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GATT dispute process; and assurances of unimpeded flows of investment.

The global trading system is a delicate arrangement, and it operates largely on the basis of mutual and voluntary cooperation. Abrupt and nationalistic actions on the part of a single country have the potential to produce chain reactions which can threaten not only the harmony of international trade relations but the underlying structure of the world economy.

In short, walking away from the trade talks would not, and should not, be taken lightly.

But I believe it fair to say that the administration would have much congressional support were it to make a carefully considered decision that the potential outcome of trade negotiations was not worth the effort and compromise that our participation may involve.

This would not be a happy event; indeed, it would be a source of great international discomfort. But a new round is not an object intrinsically to be desired; a new round must be a good round.

And so we applaud the administration for its courage in confronting the serious choices that are posed as we consider new negotiations; we urge the administration to weigh such choices carefully and solemnly, recognizing their full implications; and we join the administration in urging our trading partners to appreciate the gravity of these talks and the determination of the United States to pursue true and meaningful reform.

□ 1150

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

The Senator from South Carolina is recognized.

EXECUTIVE SESSION

Mr. THURMOND. Mr. President, I ask unanimous consent that the Senate now go into executive session in order to consider Executive Calendar No. 995, William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

The PRESIDING OFFICER. Is there objection?

Mr. KENNEDY. 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.

□ 1200

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Is there objection to the Senator's request to go into executive session?

Mr. BYRD. Mr. President, I know of no objection. I want to be sure the colleagues understand what is going on. I do not think there will be objection.

The PRESIDING OFFICER. Is there objection to the request to go into executive session to consider the Rehnquist nomination?

There being no objection, the Senate proceeded to the consideration of executive business.

The PRESIDING OFFICER. The nomination will be stated.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The assistant legislative clerk read the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise today to voice my strong support of Justice William H. Rehnquist, President Reagan's nominee to be Chief Justice of the United States.

Justice Rehnquist was born in Milwaukee, WI, and attended elementary and high schools in Shorewood, WI. He attended Kenyon College in Gambier, OH, for a short time and then enlisted in the U.S. Army in 1943. Following military service he attended Stanford University and was elected to the National Scholastic Honor Society, Phi Beta Kappa. He attended Harvard University receiving a master of arts degree in history. Justice Rehnquist then entered Stanford University Law School. He graduated first in his class and was a member of the board of editors of the Stanford Law Review. He was also elected to the order of the COIF, a national honor society. Following his graduation from law school, Justice Rehnquist served as a law clerk to U.S. Supreme Court Justice Robert H. Jackson from February 1952 until June 1953.

From 1953 to 1969 he was in the private practice of law in Phoenix, AZ. He practiced with the firm of Evans, Hull, Kitchel & Jenckes until 1955. He then became a partner in the firm of Ragan & Rehnquist. In 1957 he was a partner in the firm of Cunningham, Carson & Messenger, until joining the firm of Powers & Rehnquist as a partner in 1960. He practiced law in Phoenix until he became the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in 1969. During his years of legal practice Justice Rehnquist served at various times as the president and member of the board of directors of the Maricopa County Bar Association. He was also chairman of the Arizona State Bar continuing legal education committee and a member of the National Conference of Commissioners of Uniform State Laws. He also served on the council of the administrative law section of the American Bar Association.

In 1971 he was nominated to be an Associate Justice of the U.S. Supreme Court and was confirmed by the full Senate in December of that year. Justice Rehnquist has served with distinction as an Associate Justice since that time.

The Judiciary Committee received the President's nomination of Justice William H. Rehnquist for the position of Chief Justice of the United States on June 20, 1986. In accordance with a committee agreement, the hearings on Justice Rehnquist's nomination commenced on July 29, 1986. Also by agreement the committee vote on the nomination took place on August 14, 1986.

The Judiciary Committee carefully and thoroughly scrutinized the nominee's qualifications, credentials and 15 years' experience as an Associate Justice of the U.S. Supreme Court. The hearings on Justice Rehnquist's nomination were held on July 29, 30, 31 and August 1, 1986. The 4 days of hearings lasted approximately 40 hours and during that time, the committee heard from more than 40 witnesses. The Rehnquist nomination is distinctive when comparing the interval between Senate receipt of the nomination and the start of the committee hearings. Thirty-nine days elapsed before the Rehnquist hearing started, which was more than with any other Supreme Court nominee during the period from 1961 until 1986.

THE ABA AND OTHER SUPPORT

The American Bar Association's standing committee on Federal judiciary, found Justice Rehnquist to be well qualified and informed the Judiciary Committee:

> The ABA committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the committee's highest evaluation of the nominees to the Supreme Court—well qualified.

The extensive investigation by the American Bar Association committee provides a significant basis supporting the association's unanimous findings and its granting of the highest evaluation possible to the nominee. In their investigation, the ABA committee interviewed all of the current Associate Justices of the Supreme Court, and more than 180 Federal and State judges. As reported by the ABA, Justice Rehnquist enjoys the respect and esteem of his colleagues on the Supreme Court.

The ABA committee also interviewed approximately 65 practicing attorneys throughout the United States. These attorneys, including some who disagree with Justice Rehnquist politically and philosophically, spoke of warm admiration for him and described him as "very talented, . . . a bright and able man, . . . always well prepared, . . . one who brings out the best in people, and will facilitate the work of the court." Additionally, the ABA committee interviewed more than 50 deans and faculty members of a number of law schools across the country. The ABA stated that many of these individuals spoke highly of his writing and analytical ability and the vast majority had strong praise for his professional qualifications. Finally, the ABA committee had approximately 200 of Justice Rehnquist's opinions examined and it was concluded that his legal analysis and writing ability were of the "highest quality."

□ 1210

At the Judiciary Committee hearings a number of very prominent individuals testified on behalf of Justice Rehnquist and in addition a number of letters were received supporting Justice Rehnquist's nomination. Among the many individuals supporting Justice Rehnquist were: Judge Griffin Bell, former Attorney General during the Carter administration; Erwin N. Griswold, former Solicitor General under President Johnson; former Attorney General William French Smith; Dean Gerhard Casper of the University of Chicago Law School; and Rex Lee, former Solicitor General under President Reagan.

CONCLUSION

The Judiciary Committee has thoroughly reviewed all allegations, old and new, and has found nothing that would keep Justice Rehnquist from being elevated to the position of Chief Justice. The committee also had the responsibility to determine if Justice Rehnquist possesses the qualities required of a Supreme Court Justice; namely, unquestioned integrity, honesty, incorruptibility, fairness; courage—the strength to render decisions in accordance with the Constitution and the will of the people as expressed in the laws of Congress; compassion—which recognizes both the rights of the individual and the rights of society in the quest for equal justice under the law; proper judicial temperament—an understanding of, and appreciation for, the majesty of our system of government in its separation of powers between the Federal and State governments.

Based upon his responses to questions during the hearing, his outstanding qualifications and intellect, it was determined that Justice Rehnquist does possess these attributes and is overwhelmingly qualified to serve as Chief Justice of the United States.

I urge my colleagues to vote in favor of President Reagan's nomination of Justice Rehnquist to be Chief Justice of the United States.

Mr. President, I yield the floor.

Mr. BIDEN. Mr. President, I thank my colleague, the chairman of the Judiciary Committee, Senator THURMOND, for yielding.

Mr. President, the debate that begins today marks the 18th time—only 18 times over the 200-year history of this Nation—that the U.S. Senate has considered the nomination of an individual to be Chief Justice of the United States. Only 15 of those men—and they have all been men—were confirmed and served in the high-ranking position. Today, we began what I hope will be a fruitful, a thorough, and a scholarly debate on the role of the Chief Justice and the fitness of Justice Rehnquist to serve in that role.

This should be a time of serious reflection by the Members of the U.S. Senate about the very nature of our constitutional system and the division of power among our three coequal branches of Government. I think it should be a time to consider the liberties and freedoms which the Constitution guarantees and for us to make clear to the American people who watch this and listen to this that we are cognizant of what the Constitution is about—that we understand fully why these liberties and guarantees are so much in hands of the members of the Supreme Court.

I think it should be a time also, Mr. President, to look a little bit into the future 10 and 20 years hence to contemplate the role of the Supreme Court of the United States of America, not only as it is constituted today but during the tenure of the next Chief Justice of the United States. It is a fact that the man before us and others who might come before us are men who have a good, long time left to serve their country if they are confirmed.

So, if we fail to look down the road the next 10 to 20 years, we will, in my view, be doing a disservice to the country and a disservice to the Court.

To contemplate the role of the Supreme Court in governing this diverse and fragmented society is one of the responsibility that we have.

If my colleagues undertake such a deliberative debate—as I fully expect they will with the leadership of Senator THURMOND and Senator HATCH, very strong and eloquent proponents of the nominee—I believe that if this debate is engaged, if we are able to make the arguments which I fully expect we will be able to, to deliberate on the subject of the role of the Court and the role of this individual within the Court, I believe my colleagues will come to the same conclusion that I have reached—that the nomination of Justice William Rehnquist to be Chief Justice of the United States should not be approved.

The hearings conducted by the Judiciary Committee, to which Senator THURMOND referred, delved into a number of very important issues regarding the personal background and the judicial philosophy of the nominee as well as exploring the significant role the Chief Justice plays in the conduct of justice in America.

Quite frankly, the Chief Justice of the United States of America is a metaphor for justice in America. There are those who will say—and my colleague from South Carolina has already said it and I expect to hear it time and again in the next several days, as we debate this nomination—there are those who will say that the hearings exhausted every possible avenue of objection, but I might suggest it is also possible to assert that the hearings raised more questions than were answered.

In many instances, the record, as we will hopefully demonstrate, remains incomplete or Justice Rehnquist's answers were not sufficiently forthcoming to satisfy the burden—and I emphasize "the burden"—the burden on every nominee to justify his or her confirmation.

We should set that straight. The burden is not on the U.S. Senate to suggest that someone not be the nominee, to prove they should not be the nominee. The burden is upon the nominee and the proponents of the nominee to demonstrate that they should be confirmed. Just as the burden is not upon the people of my district and my State to prove that I should or should not be the Senator; the burden is upon me to convince the people of my State that I should be the Senator.

We are talking about the second-most important person in America, heading one of the three coequal branches of the Government. And the burden is on the nominee to prove that he should be Chief Justice.

At the beginning of the Rehnquist hearings, I commented extensively on the historic role of the U.S. Senate in evaluating Supreme Court nominees. I think it bears repeating.

I am certain it will be argued, and argued repeatedly here today and tomorrow on the floor of the U.S. Senate, that the Senate has traditionally "gone along" with Presidential choices for the Supreme Court and that our advise and consent should be abbreviated.

I have no doubt this argument will be asserted with regard to a sitting Justice being elevated to the position of Chief Justice, as is the case with Justice Rehnquist.

As Prof. Larry Tribe of Harvard University noted in his recent book "God Save This Honorable Court," and as many others have noted—nothing could be further from the truth than to say the Senate has gone along with Presidential nominees to the Court.

Let us look at the record. The Senate has rejected more Presidential nominees for the Supreme Court than nominees to any other Federal office. About one out of every five persons nominated to serve on the Supreme Court of the United States from the beginning of our history as a constitutional nation, one out of five have been rejected by the U.S. Senate, Democrat as well as Republican, federalist, all.

□ 1220

So this notion that the Senate has historically gone along merely because the President has sent up a nominee is not historically accurate. Out of the 18 nominations for Chief Justice of the United States over our 200-year history, the Senate has rejected 4 of those, 4 out of 18. John Rutledge, George Williams, Caleb Cushing, and Abe Fortas all failed to win confirmation before the U.S. Senate.

Throughout our history it has been the Senate's solemn responsibility to assure that men and belatedly women picked by the President to sit on the Supreme Court are up to the task. The duty comes directly from the Constitution. Article II, section 2 requires that the Senate give its "advice and consent" before a Presidential nominee is approved to a position on the Court.

And this Senate prerogative was no constitutional afterthought by the framers. Here again I think a little history might be worthwhile. Initially, and almost to the end of the Constitutional Convention in Philadelphia, over 200 years ago, the framers lodged the power of appointing members of the Federal judiciary, including the Supreme Court, in the Senate alone.

Again, I will ask unanimous consent that at this point in the RECORD I can insert a longer explanation than the one I am about to give about how in fact the Constitutional Convention arrived at the conclusion that the President would be able to nominate.

I ask unanimous consent that be done.

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

CHOOSING JUDGES: THE FRAMER'S INTENT

(By Prof. Walter Dellinger, Duke University School of Law)

President Reagan and Attorney General Meese, echoing a doctrine enunciated by President Nixon, have boldly suggested that the Senate is obliged to consent to the appointment of any judicial nominee who is not shown to be corrupt or professionally unqualified. They suggest that the President and the Attorney General may take a judicial prospect's philosophy into account, but that the Senate may not. Others contest this view and argue that the Senate, when it decides whether to consent to a nomination, is obligated to take into account the same range of considerations open to the President, and make its own independent determination of whether confirmation of a particular nominee is in the best interest of the country.

Hardly anyone has bothered to refer to the original understanding of the framers of the Constitution. This is a significant oversight, because the debates over the drafting of the Constitution tell us a great deal about the proper role of the Senate in the judicial selection process. Although it is difficult to discern the original understanding of a constitutional provision, the records of the Constitutional Convention speak to this particular question with unusual clarity. Both the text of the Appointments Clause of the Constitution and the debates over its adoption strongly suggest that the Senate was expected to play an active and independent role in determining who should sit on the nation's judiciary.

The Constitutional Convention met in Philadelphia from late May until mid-September of the fateful summer of 1787. Throughout its deliberations, the Convention contemplated that the national legislature, in some form or other, would play a very substantial role in the selection of federal judges. On May 29, 1787, the Convention began its work on the Constitution by taking up the Virginia Plan introduced by Governor Randolph. It provided "that a National Judiciary be established . . . to be chosen by the National Legislature." The executive was, under this plan, to have no role at all in the selection of judges.

When this provision came before the Convention on June 5, several members expressed concern that the whole legislature might be too numerous a body to select judges. James Wilson's alternative suggestion that the President be given power to choose judges found almost no support, however. Rutledge of South Carolina stated that he "was by no means disposed to grant so great a power to any single person." James Madison agreed that the legislature was too large a body, but stated that "he was not satisfied with referring the appointment to the Executive." He was "rather inclined to give it to the Senatorial branch" of the legislature, a group "sufficiently stable and independent" to provide "deliberate judgments."

One week later, on June 13, Madison rendered his inclination into a formal motion that the power of appointing judges be given exclusively to the Senate, rather than to the legislature as a whole. This motion was adopted "nem. con."—without any objection. On June 19, the Convention formally adopted, as its working draft, the Virginia Plan which thus provided that a "national Judiciary" be established, the "Judges of which to be appointed by the second Branch of the National Legislature."

July was spent reviewing every position of the draft. On the 18th, the Convention reconsidered and reaffirmed its earlier decision to grant the Senate the exclusive power of appointing Judges. James Wilson again moved "that the Judges be appointed by the Executive." His motion was defeated, six states to two, after delegates offered "solid reasons against leaving the appointment to the Executive" as Bedford of Delaware put it. Luther Martin of Maryland, stating that he "was strenuous for an appointment by the 2nd branch," argued that "being taken from all the States, [the Senate] would be best informed of character and most capable of making a fit choice." Sherman of Connecticut concurred, "adding that the Judges ought to be diffused, which would be more likely to be attended to by the 2d branch [the Senate], than by the Executive." A compromise proposal suggested by Ghorum of Massachusetts to provide for appointment by the executive "by and with the advice and consent" of the Senate failed on a tie vote, apparently without much discussion.

The issue was considered once again on July 21, and Convention once again reaffirmed exclusive Senate appointment of judges, and rejected executive appointment, this time by a vote of six states to three, after a debate in which George Mason attacked the idea of executive appointment as a "dangerous precedent. It might even give him an influence over the Judiciary department itself." As rephrased by the Committee on Detail, the provision in the draft Constitution read, "The Senate of the U.S. shall have power to . . . appoint. . . Judges of the Supreme Court." Thus the matter stood until the closing days of the Convention.

On September 4, less than two weeks before the Convention's work was done, a Committee of Five reported out several provisions on matters that had been postponed, including sections dealing with how the President should be chosen and how various officers should be appointed. The Committee's draft provided for the first time that the President should have any role at all in the selection of judges: "The President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court." Giving the President the power to nominate judges was not seen as ousting the Senate from a central role: Governeur Morris of Pennsylvania paraphrased the new provision as one giving to the Senate the power "to appoint Judges nominated to them by the President." With little discussion, and without dissent, the Convention adopted this reworked provision giving the President the power, with the advice of the Senate, to nominate judges, and the power, with the consent of the Senate, to appoint. The Convention having repeatedly and decisively rejected the idea that the President should have the exclusive power to select judges could not possibly have intended to reduce the Senate to a ministerial role.

President Nixon, in the course of his unsuccessful 1970 effort to persuade the Senate to confirm G. Harrold Carswell, asserted the doctrine that the President is "the one person entrusted by the Constitution with the power of appointment" and that his will should not be "frustrated by those who wish to substitute their own philosophy or subjective judgment. This erroneous notion has now been echoed by President Reagan's assertion that the President has the "right" to "choose Federal judges who share his judicial philosophy" and that the Senate is somehow bound to confirm these choices "so long as they are qualified by character and competence." These statements are simply inconsistent with both the text and the original intent of the Appointments Clause. The reasons given by delegates to the Constitutional Convention for making the selection of judges a joint decision of the President and the Senate are as cogent today as they were in 1787. The framers objected to giving the power of appointment to a "single individual" and un-

derstood that the goal of having a diverse judiciary would be advanced by having the Senate, which contains members from every state, play a substantial role in determining who should sit on the bench.

Mr. BIDEN. Mr. President, our Founding Fathers in the beginning said that the only way in which we are going to agree on putting someone on the Federal court or on the Supreme Court is if the Senate picks, names, nominates and votes on the process. The President was not even considered part of the process in the first several plans that were offered.

It was only during the last days of 1787 in the convention, as part of a very complex compromise, was the power to suggest, the power to appoint Supreme Court Justices divided between the President and the U.S. Senate.

Doubts about the capability or character of a nominee in the past have resulted in Senate rejections of the Court nominee sent up by the President. The nominations of Clement Haynsworth and Harold Carswell were rejected for those reasons along with many others, but historically these have not been the sole basis for the Senate's opposition to a Presidential choice. From the fight over the Rutledge nomination, which centered on his speeches against the then controversial Jay Treaty, through the more contemporary struggles over the nominations of Louis Brandeis, Judge John Parker, and Justice Abe Fortas, the Senate often considered the nominees' judicial philosophy and vision of the Constitution as part of what they had the right to consider.

I would like to put another notion to rest. That is the idea that the U.S. Senate constitutionally is precluded from considering anything other than whether the nominee is intellectually capable, competent as a jurist—by the way, you need not be a lawyer or a judge to be on the Supreme Court under the Constitution—and whether or not he or she has committed a crime of moral turpitude. All constitutional scholars agree that the Senate may go beyond this in considing the fitness of a nominee. I might note parenthetically we do not have to get to that in my view on this man to conclude that he should not be Chief Justice. But it is fully within the constitutional authority of the U.S. Senate to do so.

One need not go back to the 1930's to witness Senate leaders scrutinizing the judicial views of a Supreme Court nominee. During hearings on the last Chief Justiceship that was not confirmed—Abe Fortas' nomination—our distinguished Judiciary Committee chairman, Senator STROM THURMOND, stated, and I quote:

It is my contention that the Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of propsective Justices or Chief Justices as they relate to broad issues confronting the American people, and the role of the Court in dealing with these issues.

As the loyal opposition, the Democrats owe this country no less now than Senator THURMOND and his colleagues from the other side of the aisle offered at that time. And they were right. These hearings should meet the same standard for completeness and hard scrutiny that Senator THURMOND expressed in those words 18 years ago.

Having set forth general parameters of our inquiry, let me turn now to specific topics considered in the conclusions that I have drawn and tried to do them in summary because I will be speaking to each of these at some length before the debate is over.

From my perspective, three areas of questioning directly relate to the ability of Justice Rehnquist to serve as Chief Justice. I should say there is no doubt about the legal ability or professional competence of the nominee, and that is not what these reservations are about. Rather my concerns relate to the unique symbolic role which the Chief Justice plays in our scheme of constitutional government.

The Chief Justice not only serves longer than any President, but he and his colleagues exercise power limited only by their consciences and principles. The Chief stands as a metaphor for justice in our society more than any other individual, including the President of the United States of America, or any U.S. Senator or Congressman. The Chief symbolizes the guarantee of equal protection under law, "equal justice under the law," for all Americans. And that is not just an arcane legalism. It is the embodiment of the fundamental purpose of our entire judicial system.

My first concern is whether Justice Rehnquist can serve effectively as a leader of the Court, and to my mind, this does not mean whether or not he can be an effective administrator, or whether or not he will do that expeditiously.

Two elements comprise the quality of leadership that I think is necessary to be Chief Justice of the United States. One, a Chief Justice must exhibit the capability and willingness to work for and forge a consensus for unanimous opinions in watershed cases, cases where if there is not a unanimous decision there would be serious problems in this Nation. Brown versus The Board of Education, the desegregation case, said separate but equal is no longer equal, no longer constitutional. Had that been a split court does anyone in this chamber doubt it would have been considerably more difficult, and possibly considerable bloodshed in this land, to bring about the change? Does anyone doubt that in the Nixon tapes case had the court not been unanimous the President, Richard M. Nixon, might have considered provoking a constitutional crisis rather than step down in shame as he did?

Second, the Chief Justice must demonstrate the flexibility and openmindedness to put aside his own philosophical or legal views when consensus on the Court is required even if he disagrees with the majority's holding. It is essentially two sides of the same coin requiring sensitivity to the great legal and social issues of our day.

Two of Justice Rehnquist's predecessors exemplify this kind of leadership. In his book, "Simple Justice," Richard Kluger detailed a careful and deliberate process by which Chief Justice Earl Warren sought to forge that unanimous opinion I referred to earlier, Brown versus The Board of Education.

□ 1230

Recognizing that only a unanimous decision would insure compliance with the Court's ruling and public respect for the law, he worked relentlessly to achieve a consensus on the Court. Knowing that Justice Stanley Reed, a southerner, was the last hold-out, Warren met privately with him many times, prevailing upon him—to his great credit, I might add—to make his decision in the best interests of the country. And that is what Reed did.

Similarly, Chief Justice Burger, in the Nixon tapes case, put aside his own views in the interests of a unanimous ruling requiring the President to turn over the Watergate tapes. It was reported in "The Brethern," a widely read book about the workings of the Supreme Court, that Chief Justice Burger originally intended to write an opinion which, although mandating the release of the tapes, would have provided a national security exception which might have allowed the President to withhold significant materials. However, the Chief Justice was convinced by his colleagues that such an approach might obstruct the legal process and he joined in and authored an unqualified unanimous opinion.

Justice Rehnquist's response to questions I asked him about the consensus-building role of the Chief Justice was quite unsettling. With regard to the Brown case, I asked whether he would have done what Chief Justice Warren had done. Let me cite his answer:

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

for the country to make it unanimous. (Emphasis added)

It became clear as I continued questioning that Justice Rehnquist did not then and would not now see the case the way Chief Justice Warren did. To lead the Court in this manner requires a broad vision of the major social and legal issue of the day.

Let me go back to his statement. He points out or states, "From the point of view of hindsight, realizing the importance of Brown, the importance of unanimity."

It was important that someone have the sensitivity to understand the importance of Brown, the importance of unanimity.

It seems to me, based on other answers, Justice Rehnquist is not such a person to recognize the sensitivity of the consequences of the Court's decision. Whether a ruling will provoke resentment and resistance or respect and compliance cannot be disregarded. There is nothing in his record as a sitting Justice, nor does the hearing record, indicate to me that Justice Rehnquist would be willing or capable or exercising this kind of leadership.

Another disappointing answer from my perspective came when I asked Justice Rehnquist about his dissenting opinions. Let me quote the question and the answer:

Q. Do you believe, had you been Chief, would there have been the necessity in any of your 8-1 decisions where you were the dissent that you think you could have changed? I mean, can you imagine having changed? Do any of those decisions rise to that level?

A. I do not have those readily before me. And I am trying to think whether any one of them might. My feeling is no. (Emphasis added)

Justice Rehnquist should perhaps have heeded the advice of his mentor, the late Justice Robert Jackson. From an address written in 1955, it is clear that Justice Jackson might not have approved of his law clerk's proliferation of dissenting opinions. Said Justice Jackson:

The right of dissent is a valuable one. Wisely used on well-chosen occasions, it has been of great service to the profession and to the law. But there is nothing good, for either the court or the dissenter, in dissenting per se. Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a judge is his influence in leading, not in opposing his court.

I also explored with Justice Rehnquist his views on the 14th amendment, especially the distinction which becomes apparent from a reading of his opinions with regard to his treatment of race and gender cases. It became evident that the nominee regards the 14th amendment, the most basic affirmation of equal treatment under the law, as something different for blacks than for women and other minorities.

That is not my perception. He states it is a different test, as, I might add, others have.

This stems from his rigid view of the "original intent" of the amendment as directed toward the abolition of slavery.

He says "That is why it was written, so when you look at that amendment, you have to look at it in the context of the abolition of slavery." When they wrote it, they wrote it to stop slavery and here we are. "You are coming before the court, plaintiff, and saying women are not being treated well. Obviously, the framers were not thinking of women when they wrote that clause. Therefore, you do not treat the inequality of women in society, even when proven beyond a reasonable doubt, the same way you treat inequality to blacks because, obviously, when they wrote the 14th amendment they were only thinking of blacks in slavery."

That is what he means by original intent.

Since women and other minorities were not considered to be part of the Civil War amendments—the 14th amendment among them—they should not enjoy the same guarantees of equal protection that he would extend to blacks. Apparently, under Justice Rehnquist's view of the Constitution, women and corporations are to be treated similarly—that is, laws are to be challenged under what we call a rational basis test rather than the higher standard of "strict scrutiny," which I will talk some more about as the debate continues. Unfortunately, almost every act of the legislature which discriminates on the basis of sex, whether at the State or Federal level, which Justice Rehnquist has had an occasion to examine, meets his test of a rationality.

Almost every time there is a law on the books that discriminates against women, where clearly if that law were one on the books about blacks, it would be clearly unconstitutional because it would have to meet a test of strict scrutiny. But when the law is about women, he says, "You do not have to meet that test. You just have to find out whether there is a rational basis for it, any at all."

□ 1240

He always finds that there is, I might add, a rational basis for the discrimination. Whereas you cannot say, "By the way, is there a rational basis in the law that says blacks cannot do something that whites can do?" he says, "Oh, no," and he is right. The 14th amendment says you do not have to apply that statute. It does not matter whether it is rational or not. It matters whether it was intended to discriminate against blacks.

That is the view of the 14th amendment that some hold. But I do not. I suggest that Justice Rehnquist, when you look at his decisions—and he is not the only one who has ever ruled this way—he seems always to find that there is a rational basis for discriminating against women where it is challenged.

If the Chief Justice stands as a metaphor for justice in our society, as I suggested earlier, a nominee must, to my mind, exhibit a certain sensitivity to justice in his rulings. He may be technically correct; it may be an intellectually defensible argument; but in fact I think it sends a signal to 51 percent of our population that although, under arcane jurisprudential principles, you can make a distinction. It is very hard to make that decision when you are the person to whom 99 percent of the American people look and say, "This is my recourse to justice, the Chief Justice of the U.S. Supreme Court."

The mere fact that a Justice would be able to make an argument that was legally defensible, it seems to me there is a different standard that we should have—and have had, I might add—for a Chief Justice on account of the symbolic role of the Chief Justice.

Justice Rehnquist's dissent in the Bob Jones University case stands out as a disturbing example of his insensitivity and a startling example of his intellectual creativity. Many of you will recall that that case involved a determination of whether or not the Internal Revenue Service was empowered to promulgate regulations withholding tax exempt status from private schools that discriminated on the basis of race.

To put it in common language, can you say blacks are inferior and treat them differently and still be tax exempt? Can you do that? Well, Justice Rehnquist said you can. He said in an 8-to-1 decision, his being the only dissent—again intellectually defensible but, in fact, symbolically tragic—he said, "Yes, you can." The Court ruled 8 to 1, Justice Rehnquist filing the sole dissent, that the IRS did have the authority to issue the regulations in question. Justice Rehnquist dissented on the grounds that only Congress, not an administrative agency, was constitutionally empowered to pass legislation withholding such tax-exempt status.

Mr. President, it is not the legal grounds of Justice Rehnquist's dissent that bothers me. While I might strongly disagree, the rationale, as I said earlier, is intellectually defensible. But Justice Rehnquist was incapable of joining or in any way associating himself with the findings of Chief Justice Burger, who wrote an impassioned opinion, regarding the importance of a national policy against racial discrimination in education.

He comments that he does not disagree with the Court's finding that there is a strong national policy in this country opposed to racial discrimination, but he did not indicate that he personally agreed with that policy.

Go back to the person he always talks about, Justice Jackson. Let me reread that quote, because I think it is important here, at least to help my colleagues understand why I feel so strongly about this. Justice Jackson speaking:

The right to dissent is a valuable one. Wisely used on well-chosen occasions—

He is talking about the right to dissent of a Justice—

it has been of great service to the profession and to the law. But there is nothing good, for either the Court or the dissenter, in dissenting per se. Each dissenting opinion is a confession of the failure to convince the writer's colleagues, and the true test of the judge is his influence and leading, not in opposing, his court.

Let me ask why, on such a fundamental issue as whether or not a university can say blacks are going to be treated at this university different than whites if they are admitted, why could he not say at least, "This is a tragic commentary on American education; it should be stopped and," as they often do, "I urge Congress to remedy it forthwith? But, unfortunately, in my interpretation of the law, I cannot bring myself to join on intellectual grounds, but it grieves me to do so."

He does that in other places.

Look, Mr. President. When we talk about the Chief Justice, again, go back to my concern. The Chief Justice is a metaphor for justice. People look to him. My daughter, your daughter, your wife, your female staff person, your black friend, you, the black American. You say, "I know one thing for sure: the Supreme Court is with me." And the Supreme Court is the Chief Justice. Ninety percent of Americans cannot name one person beyond the Chief Justice. And we have a Chief Justice nominee who does not seem to understand that.

I believe that Justice Rehnquist's incapability of joining or associating himself with any of those findings of Justice Burger is a window into his soul as well as to his mind. It is just this kind of action, both during his tenure on the Court and during his confirmation hearings, that led me to the conclusion that he does not have an open mind with regard to racial and gender discrimination cases. He has an agile mind but not an open mind.

I am disturbed about how he approaches these cases as an Associate Justice, but I am deeply disturbed about how he will approach these cases as Chief Justice of the United States. For, as I indicated, the Chief Justice of the United States reflects more on the office as a symbol of justice than any other person in our society.

As the debate proceeds, I intend to discuss at length, along with many of my other colleagues, the third component of the role of the Chief Justice, that he or she be perceived by the American people as candid and forthright.

For if you cannot point to the Chief Justice, who is in office for life, who is the most important person in our judicial system, as being the epitome of candor and honesty, to whom, in God's name, do you point? What does it say if a significant portion of the American people or a significant number of our colleagues conclude that that cannot be said of a Chief Justice? What does it say for our system? What does it say for a branch of Government whose ability to function depends more upon its moral suasion than anything else, including its intellectual persuasion?

What is it that makes us all go along with a Supreme Court ruling? Is it that you, the American people, say, "Now, I have examined the rationale of that case and I have concluded, notwithstanding the fact that it does not seem right to me, that under legal precedents and English jurisprudential initiatives of the past, this is the right thing to do"?

That is not what we say.

□ 1250

We say, "They are fair women and men. I trust their instincts. They are smart. They are honorable. And although it does not feel good to me, I guess they are right."

That is what we say. We do not get a chance to go throw them out of office and they do not get a chance to send an army or the police to enforce their rulings.

That is why it is so important that when we look at a Chief Justice, we say, "I believe her," or "I believe him."

Ladies and gentlemen, my colleagues, I think our people expect this individual, the Chief Justice, above all others to exemplify the characteristics of candor and forthrightness. Unfortunately, and I will speak at length to this later, as I know my colleagues will, Justice Rehnquist's performance in the confirmation hearing did anything but enforce this perception. Whether it was his election day activities prior to assuming the bench or his clerkship for the late Justice Jackson and his views about the most significant desegregation case in the history of America, Brown versus Board of Education, or his participation in the Laird versus Tatum case—that is the case where he is alleged to have been involved as a member of the administration and then as a number of the Court ruled on a challenge to the policy he developed, whatever it is, any one of those areas, I believe and I hope to demonstrate that his record, his answers to our legitimate questions are at best incomplete, in all cases vague, in some cases misleading, and in some cases very difficult to believe.

For these reasons, I intend to vote against the nomination of William Rehnquist to be the 16th Chief Justice of the U.S. Supreme Court. I am well aware that he will remain on the Court, no matter what the outcome of this debate, but I believe the Nation will be better served and the causes of justice will be better served and the symbol of justice will be better served if he remains one among nine rather than the first among equals, which the Chief Justice of the United States is. I yield to my colleague from Utah. I thank my colleagues.

Mr. HATCH. Mr. President, at the outset of this debate I would like to note that many of Justice Rehnquist's opponents have left no stone unturned in this particular debate. During the Judiciary Committee hearings we inspected 20-year-old records from the Office of Legal Counsel; we scrutinized memos written 34 years ago by a young law clerk; we read FBI reports, some 20 years old, some 20 minutes old; we received reports from independent medical experts; we heard from over 50 witnesses and questioned them to our hearts' content. And much of that can be summarized as much ado about very little. It shows little more than honest people can disagree with Justice Rehnquist on his reading of the law. I wish that we would say it forthrightly. Instead, we hear personal attacks, misleading criticism, and I think political remonstrations. But personal attacks, threats of filibuster and prolonged debate and unseemly innuendo only demean this proceeding. They are irrelevant to our purpose and I hope we will see none of that. If we do, those who do it are going to be sorry for having done so. I certainly will be sorry that they have done so.

Later in this debate I will comment further on the proper standard for confirmations. At this point, however, I do want to ensure that no misleading impressions are left by my distinguished colleague from Delaware. And what I would like to do is talk about some of the comments he has quoted from Larry Tribe from the Harvard Law School.

The Senate has not ignored the dangers that politicization poses to the integrity of the Court and the public selection processes. Since 1894, it has failed to confirm only four nominees while considering the choices of Presidents as widely divergent in political ideology as Franklin Roosevelt, Dwight Eisenhower, Lyndon Johnson, and Gerald Ford. Although Mr. Tribe's book, "Save This Court," at-

tempts to argue that the Senate has traditionally questioned the nominees on political grounds, it offers no explanation for the modern Senate's consistent approval of 51 Justices on the basis of merit rather than on the basis of politics. Examination of that record discloses some important considerations militating against using political criteria in the confirmation process.

Mr. President, I hope that this debate will be a high-level debate and we can talk about the things that are really involved here and that we not malign a man who has served this country well for 15 years as a Justice on the Supreme Court.

Frankly, it is a great privilege to participate in the confirmation of a Chief Justice of the Supreme Court. This is an event which has occurred only 16 times in 199 years of free government under the Constitution. Moreover, to me—and I think to a majority of Senators—it is a honor to support the President's choice of Mr. William Hubbs Rehnquist, who was confirmed as the 100th Justice of the Supreme Court of the United States more than 15 years ago, to lead the judicial branch into the second century of American freedom.

As the Nation's third Chief Justice declared in Marbury versus Madison, "Ours is a government of laws, and not of men." This is the genius of the Constitution—that Americans do not owe their highest legal allegiance to any person, no matter how trusted and trustworthy, but to the concept of liberty embodied in law. Chief Justice John Marshall, in that same pivotal case, emphasized the vital mission of the Judiciary within this inspired constitutional scheme with the words: "It is emphatically the province and duty of the Judicial Department to say what the law is." For over 15 years, Justice Rehnquist has earned a reputation as a leader amongst leaders on the nine-member Court. He knows better than perhaps anyone in the Nation the responsibility of serving as a "keeper of the contract," a protector of the agreement between the Government and the governed. He, better than perhaps anyone in the Nation, can impart that vision in his fellow Federal judges throughout the Federal Judiciary.

QUALIFICATIONS

He already has the trust and respect of his peers and the rest of the bench and bar. This was the unmistakable message delivered by the American Bar Association which assesses the qualifications of candidates for judicial office. The ABA interviewed 180 Federal and State judges, including all members of the current Supreme Court, 50 law deans and professors, and 65 leading attorneys before giving Justice Rehnquist their highest possible rating. The ABA stated to Chairman THURMOND and the rest of us on the Judiciary Committee:

> The Committee on the Federal Judiciary unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States.

Thus, the Judiciary Committee's approval for this nomination, by the wide margin of 13-5 after enormous efforts to discredit his outstanding reputation, is shared by the largest organization of lawyers and judges in the Nation. The ABA approval, however, was unanimous. It is also significant that the ABA called Justice Rehnquist "among the best available."

Leaving no stone unturned, the ABA Committee also reviewed 200 of Justice Rehnquist's written opinions. This led to their conclusion that his legal analysis and writing skills are of the "highest quality." In other words, after a thorough investigation, the American Bar Association Committee unanimously voiced its high regard for Justice Rehnquist and its approval for his qualifications and ability to serve as Chief Justice.

This nomination is also supported by many important leaders in the legal community who do not always share Justice Rehnquist's conclusions on various questions of law. At the top of this list is Associate Justice William Brennan who feels that Justice Rehnquist will make a "splendid Chief Justice." This candid statement of approval for President Reagan's choice for Chief Justice came in an interview in the Legal Times. It is a high tribute to Justice Rehnquist from a highly respected fellow Justice who is known for a different judicial philosophy.

Many other eminent legal scholars also have come forward to voice their high regard for Justice Rehnquist. This includes many who would not necessarily agree with him on many legal issues. For instance, Griffin Bell, President Carter's Attorney General, testified that Justice Rehnquist "would serve our Supreme Court and our country well" as Chief Justice. Erwin Griswold, President Johnson's Solicitor General, praised Justice Rehnquist for his "important contributions to our constitutional and other law" and endorsed his nomination. These are only a couple examples among many.

Justice Rehnquist is not only remarkably prepared and qualified to assume the leadership of the Federal Judiciary today, but was remarkably prepared and qualified to serve on the Supreme Court in 1971. He had received a M.A. from Harvard, scored a 99.6 out of 100 on the law school aptitude test, and graduated first in his 1952 law school class. A classmate, Sandra Day, now Associate Justice O'Connor, recalls that William Rehnquist was "head and shoulders above all the rest of us in terms of sheer talent and ability." Moreover he won a coveted Supreme Court clerkship and served as an Assistant Attorney General before his appointment to the high Court.

Since that time, Justice Rehnquist has proven a match for the awesome trust placed in him by the Presidency, the Senate, and the people of the United States. A 1985 New York Times article states that "Rehnquist stands out" from amongst his colleagues on the Court. Esteemed University of Virginia law professor, A.E. "Dick" Howard, commented well over a year ago that "Justice Rehnquist has a claim to the leadership role on the Court." Professor Howard also notes in a recent ABA journal that "Perhaps no Justice at the Court generates more genuine warmth and regard among both his colleagues and others who work at the Court."

President Reagan is to be commended for recognizing these marvelous qualities in Justice Rehnquist and appointing him to become the 16th Chief Justice of the United States. Perhaps no other individual today would more closely approximate the character and ability of former Chief Justices like John Marshall, Salmon Chase, William H. Taft, Charles Evans Hughes, and Warren Burger.

CONCLUSION

The importance of this proceeding is illustrated by the observation of Alexis de Tocqueville that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." I would only add that in this era when many Supreme Court pronouncements are debated in Congress that scarcely any legal question arises that is not soon a political question. The legal history of this Nation, the daily lives of its citizens, and the future agenda of both Congress and the Court may well be shaped by today's events.

The Supreme Court will inevitably be ensnarled in the great questions of our generation. Indeed Justice Holmes noted that the only peace found at the Court is the uneasy stillness found at the eye of a hurricane. I am grateful that President Reagan has chosen an individual of the quality of Justice Rehnquist to guide the Court through coming storms.

(Mrs. KASSEBAUM assumed the chair.)

Madam President, I have been interested in some of the comments today—disagreements with this case or that case, or with his view on civil rights or with his view on women's rights, and so forth. We have had, right at the outset, an attempt to label Justice Rehnquist as "extreme."

The hearings showed who the extremists really are, and they certainly do not embrace Justice Rehnquist. As a matter of fact, he has written a majority of the majority opinions on the Court in the last two terms of the Court. That is anything but extreme.

The problem with his opponents is that they have controlled Congress for 51 of the last 53 years, during which time we have run into a lot of difficulties, and they see all of a sudden a man with whom they disagree. They have been used to having this power; they have been used to not sharing it; they have been used to not having people like Justice Rehnquist serve. Frankly, it is hard for them.

With regard to women's issues, let me say that they can try all they want to paint him as an extremist, but I think the tar is blown right back into their faces. They tried to paint him as not being sensitive to women's rights and that is not accurate.

Once again, I found 27 cases in which he had voted for the interests of women and minorities. I have to admit that there will be differences on how far he should have gone, how far he did not go, but there are always certain differences.

This is a particularly erroneous charge in light of the Meritor Bank case, which said that employers can be held for sexual harassment in the workplace. This was the most significant women's rights case in the last term. And who wrote that opinion? None other than Mr. Justice Rehnquist.

In the tarring, I wonder why that case has not been mentioned by the other side. It was the most significant women's rights case in the last term of the Court. Those who make these accusations seem to forget that Justice Rehnquist authored this landmark opinion. This is hardly the record of a judge who ignores the fair assertion of women's rights.

In the most important women's rights case in the 1984 term, the Jaycees case, Justice Rehnquist found that an all-male organization may be compelled to accept women.

□ 1310

That same year in the Hishon case he concluded that cries against women in admission to law firm partnerships justify a claim under title VII, a widely criticized case by certain elements of our society who themselves are sincere, educated, highly intellectual, and who disagreed with Mr. Justice Rehnquist in that landmark decision for women's rights.

In the 1979 Cannon versus University of Chicago case, Justice Rehnquist gave title IX a very broad reading to provide an implied cause of action. Justices White, Powell, and Blackmun dissented and would have denied the implied cause of action in that case.

No one is criticizing them. They were sincere. They knew that they believed in what they were doing. But he happened to be on the side of women's rights in that case, something that his opponents on the Judiciary Committee have continually ignored.

An analysis of the 20 leading civil rights cases of 1986 demonstrates that Mr. Justice Rehnquist is clearly in the mainstream of the Court when it comes to protecting minority interests. In these 20 civil rights cases, Justice Rehnquist voted with the majority 14 times for a 70-percent mainstream rating which is identical to the mainstream ratings of Justice Blackmun and Chief Justice Burger. The highest mainstream rating goes to Mr. Justice Powell who voted with the majority 90 percent of the time in civil rights cases. Several Justices, by the way, have lower mainstream ratings in regard to these issues than Mr. Justice Rehnquist.

What it comes down to is that certain members of the Senate Judiciary Committee cannot stand the fact that President Reagan has appointed Justice Rehnquist to become Chief Justice of the U.S. Supreme Court, why? Because they do differ ideologically with both President Reagan and Mr. Justice Rehnquist. Actually ideology should play a very limited role. However, a judge should be rejected if he believes in blatant segregation. But no one in his right mind, no one who understands, no one who reads these opinions, no one who looked at the 15-year history, no one who is fair will try to make that type of assertion unless they are trying to make political points.

Mr. Justice Rehnquist's nomination is not going to be destroyed by these political points. But I suspect that there is a desire on the part of some to tar his reputation so bad that no matter what opinions he writes in the opinion they will be critlcized by certain segments of our society who always criticize those who are not on the left side of the political spectrum.

Mr. President, Justice Rehnquist clearly, like President Reagan, is not on the left side of the political spectrum of our country. He is on the right side. I will say that term "right" means more than just one connotation.

You cannot write the majority of the majority opinions for the last two terms and be outside the mainstream.

I have seen major journalists in this country try to distort his record. That is shocking to me. I have not seen major Supreme Court journalists who really understand what they are doing distort his record. Maybe it can be explained away in the explanation that many of those who have distorted his record just plain do not understand the Supreme Court, do not understand the law, do not understand the widely disparate viewpoints in the law and are just advocating again their own ideological makeup.

But some of it is a little more than vicious. I suspect the purpose now is not to defeat his nomination because that is not going to occur. The purpose now is to try to smear his reputation, at least by some, not by all. There is a sincere belief on the part of a number of our Senators that they would prefer to have someone different than Mr. Justice Rehnquist. There are many who will vote for him, not many, but a number who will vote for him who would prefer probably a Justice from the left to a Justice from the right of center. There are many in this country who might feel otherwise. But there are millions who believe that this President has the right to this nomination. This man has a right to be there. He has been on the Court 15 years. He has the support of all his colleagues. He has an eminent record, is considered the leading intellectual on the U.S. Supreme Court today among a class of intellectuals who are very seldom duplicated and have been very seldom duplicated in the history of our country.

I hope that our colleagues will be fair in this debate because it is really important. It is important that we do not tar the reputation of a man who has had such a public service record. I will be doing my best to make sure that he is not tarred here. If you want to talk cases we will talk about cases. If you want to talk about ideology we will talk about ideology. If you want to talk about the merits of certain things we will talk about that.

In considering this nominee, it is very important that we accord him the respect that his present position deserves.

I have to admit one of the low points to me of the hearings was people being brought in for something that happened 24 years ago and remembering details like none of us would ever remember, and others brought in who disputed those details, and the readiness on the part of some of our Senators to immediately presume the worst rather than giving the benefit of the doubt.

I do not mean to malign any Senators or impugn their motives or find fault with anyone, but I thought there were some pretty low points in the Senate hearings.

I hope that this debate will be an elevated one that befits the U.S. Supreme Court and the nomination of the Chief Justice. I hope that we can talk about the merits and not about just red herrings as were talked about in the committee.

I hope that we will somehow look at that 15-year record of service, the esteem his fellow colleagues have for him, and if there is a question, resolve

it by giving the benefit of the doubt to this wonderful man.

We have people accuse him of shoving people in voting lines. There is no one who knows Bill Rehnquist, not anyone, who would ever believe that. He is one of the most quiet, unassuming, unobtrusive people you will ever meet. He has been that way, as far as I can ascertain, all of his life.

We have people arguing about ethics. Again, assuming all the worst and never giving the benefit of the doubt, I wonder if ideology has not played a tremendous role in all of this.

If Justice Rehnquist wrote a memorandum where he pointed out the difficulties of the equal rights amendment, he is joined by literally hundreds of intellectuals who have drafted similar memorandums. It has been one of the most hotly debated issues for the last 14 years.

The fact that we differ sometimes on legal matters is really kind of insignificant and inconsequential. We are going to have a difference. We differ in the Senate. We differ among ourselves. And to impugn a person because he differs with you ideologically is really stooping too low.

It is fair to point out you are different, fair to point out that you believe one way rather than the other, fair to point out that you wish he had a different opinion, but it is really something to make that the sole determining factor as to whether or not you vote for or against a U.S. Supreme Court Chief Justice.

Madam President, I am grateful to have this opportunity to participate in this debate. I look forward to it. It should be a stimulating one.

Thank you.

I yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

□ 1320

Mr. KENNEDY. Madam President, this vote is one of the most important that any of us will ever cast. The Chief Justice of the United States is more than just first among equals on the Supreme Court. He symbolizes the rule of law in our society. He speaks for the aspirations and beliefs of America as a nation.

The Senate is not a rubber stamp for the nomination of any Federal judge, let alone the most important judge of all, the Chief Justice of the Nation. The framers of the Constitution envisioned a major role for the Senate in the selection of judges. The Virginia plan, the original blueprint for the Constitution, gave the legislature sole authority for appointment of members of the judiciary. James Madison favored the selection of judges by the Senate. The provision ultimately adopted in the Constitution was a compromise described as giving the Senate the power "to appoint judges nominated to them by the President."

The Senate, therefore, has its own constitutional responsibility to scrutinize judicial nominees with special care, and the highest scrutiny should be reserved for the person nominated to be Chief Justice of the United States.

It is no accident that the Constitution speaks, not of the "Chief Justice of the Supreme Court," but of the "Chief Justice of the United States." In this sense, the Chief Justice is the ultimate trustee of American liberty; when Congresses and Presidents go wrong under the Constitution, it is the responsibility of the Supreme Court to set them right. Among members of the Court, the Chief Justice is chiefly responsible for ensuring that the Court faithfully meets this fundamental responsibility.

Presidents and Congresses come and go, but Chief Justices are for life. In the 200 years of our history, there have been only 15 Chief Justices. The best of them, the greatest of them, have been those who applied the fundamental values of the Constitution fairly and generously to the changing spirit of their times.

With his famous dictum, "We must never forget that it is a constitution we are expounding," John Marshall shaped the Court in the early years and laid the groundwork for America to become a nation. Roger Taney failed the test and helped put the country on the path to Civil War. Charles Evans Hughes helped guide the country safely through its severest domestic test of modern times—the upheaval of the Great Depression. In recent times, Earl Warren understood the central role of the Bill of Rights and its protections for the individual and helped guarantee that the civil rights revolution would pursue a peaceful path.

Two hundred years of history have assigned the Chief Justice a place in the affairs of our Nation not given to any other judge or justice. His commitment to equal justice under law is particularly important because the Court is the last refuge for racial minorities, those with unpopular views, and others outside the corridors of power who cannot look to the majority in society for protection of their rights.

Justice Rehnquist is not qualified to discharge this preeminent responsibility. His statements and actions throughout his career shed significant doubt on his commitment to equal justice under law, his adherence to ethical standards, and his credibility. His record on the Supreme Court places him outside the mainstream of American jurisprudence.

Near the end of the committee's examination of Mr. Rehnquist in 1971, we received allegations that Mr. Rehnquist had challenged minority voters in Phoenix in the early 1960's. We were unable to investigate those allegations completely in 1971. After the committee had reported Mr. Rehnquist's nomination in 1971, the infamous school segregation memo surfaced. Mr. Rehnquist denied in writing that the memo supporting school segregation stated his views, but was never cross examined on this issue.

We have now had the opportunity to look more thoroughly into these and other matters. Based on the current record, the Senate would probably reject Mr. Rehnquist if he were before us now as a first-time nominee to the Supreme Court. And he certainly does not deserve to be rewarded for concealing those transgressions in the past by elevating him now to be Chief Justice. I have heard the argument that refusing to approve this nomination will reflect adversely on Justice Rehnquist and therefore on the Court. Mr. Rehnquist should have been rejected in 1971. We should not compound that error by promoting him in 1986.

The choice is not whether to make Justice Rehnquist the Chief Justice or impeach him. If rejected by the Senate, Justice Rehnquist will presumably remain on the Court. We are saying simply that he lacks the special qualities we expect of our Nation's chief judicial officer. The Senate did not hesitate to make a similar judgment against Associate Justice Abe Fortas when he was nominated for Chief Justice in 1968, and we should not hesitate to apply the same test to Justice Rehnquist.

There are four basic reasons why I oppose this nomination of Mr. Rehnquist:

Consistent and appalling record of opposition to minorities; his extreme positions against the constitutional minorities; his extreme positions against the constitutional rights of individuals; his refusal to recuse himself in the case of Laird versus Tatum; and his lack of candor in testifying to the Senate Judiciary Committee.

INSENSITIVITY TO MINORITIES

Justice Rehnquist's entire legal career shows a persistent hostility to the rights of minority citizens. In his first job after law school, when Mr. Rehnquist was a law clerk to Justice Jackson, he authored his infamous memo on the school desegregation cases, in which he stated:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by my "liberal" colleagues but I think *Plessy v. Ferguson* was right and should be affirmed.

In 1971, Mr. Rehnquist stated that the views in the memo were Justice Jackson's, not his own. In the hearings in July, Justice Rehnquist reaffirmed this position. Frankly, his statements

are not credible. He has been contradicted by several people, including impartial commentators. His fellow law clerk at the time, Donald Cronson, disputes Rehnquist's explanation and says the memo was more Cronson's than Rehnquist's. Elsie Douglas, who was Justice Jackson's secretary for 9 years, said that Mr. Rehnquist's account was "incredible on its face." Richard Kluger, who wrote the definitive work on the Brown decision concluded that a preponderance of the evidence indicated that the memo was an accurate statement of Mr. Rehnquist's own views on segregation, not Justice Jackson's. We have looked at all of the memos Mr. Rehnquist prepared for Justice Jackson; several of them contain Mr. Rehnquist's personal views, and are written in a style similar to the segregation case memo.

Justice Jackson died in October 1954, a few months after he had voted for desegregation and against the position in the Rehnquist memo, so we don't know what he would say about it. But the record itself casts serious doubt on Justice Rehnquist's explanation.

Mr. Rehnquist's hostility to minorities increased when he entered private practice in Phoenix. In the 1960's he publicly opposed a Phoenix public accommodations ordinance, and he publicly challenged a plan to end school segregation in Phoenix, stating that "we are no more dedicated to an integrated society than a segregated society."

At his confirmation hearings in 1971, he stated that he has come to realize "the strong concern that minorities have for the recognition of these rights." Mr. Rehnquist did not, however, say that he had come to share this concern. In response to my question at the hearings, Justice Rehnquist could not recall a single civil rights statute which he had supported on the public record.

In the early 1960's, he led a Republican Party ballot security program designed to disenfranchise minority voters. Accounts of voter harassment by participants in the program in Phoenix in 1962 are documented by reports in the Arizona Republic of November 7, 1962, that voter-challenging by Republicans in predominately black and Hispanic precincts in South Phoenix obstructed the right to vote of citizens assigned to those precincts.

Similar difficulties characterized election day in Phoenix in 1964. On November 4, 1964, the Arizona Republic reported that:

Substantial harassment of Democratic voters in several Phoenix precincts was reported to State Democratic Party leaders.

Robert H. Allen, State Democratic chairman, said reports reaching his office indicated that the harassment consisted mainly of "indiscriminate mass challenging of voter residency." "Most of the harassment came from precincts with predominantly Negro and Mexican American voter registration," said Allen.

In 1960, Rehnquist was designated cochairman 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 lawyer's committee; he advised challengers on the law; and he supervised in assembling returns of the mailings for challenging purposes.

In 1962, Rehnquist was designated chairman of the lawyer's 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 Rehnquist became chairman of the ballot security program, with overall responsibility for mailing out envelopes, recruiting challengers and members of the lawyer's committee, and speaking, or seeing that someone spoke, at a training session of challengers.

Thus while Mr. Rehnquist has sought to disassociate himself from the tactics in 1962 and other years, he held a high and responsible position in the election day apparatus from at least 1960 to 1964, a period that saw very substantial harassment and intimidation of voters in minority group precincts.

□ 1330

The committee has received sworn testimony from numerous credible witnesses that, as part of his involvement in the ballot security program, Mr. Rehnquist personally challenged the eligibility of minority voters. Mr. Rehnquist categorically denied this. In response to repeated questioning during the recent hearings, Justice Rehnquist continued to deny that he had ever challenged voters during the 1958-68 period or intimidated voters at any time. Nevertheless, five witnesses testified that Justice Rehnquist was engaged in challenging or intimidating voters. None of these witnesses had anything to gain by misrepresenting the truth, and, in fact, may feel they are risking adverse consequences.

For example, Mr. James Brosnahan, an assistant U.S. attorney in Arizona in 1962, testified that he visited a minority polling place in South Phoenix on election day 1962, that he saw Rehnquist at the precinct and that others in the polling place pointed out Rehnquist as having engaged in challenging voters. He discussed the matter with Rehnquist, who did not deny the charge. His answers to Mr. Brosnahan's questions acknowledged that he had been engaged in challenging voters.

Dr. Sidney Smith testified that he was in a predominantly minority Phoenix polling place in 1960 or 1962. He saw Mr. Rehnquist drive up with one or two men and get out of the car. Mr. Rehnquist approached two black men in the line of voters and held up a white card for them to read. He said:

You have no business being in this line trying to vote. I would ask you to leave.

Mr. Charles Pine testified that he was working out of Democratic county headquarters and received a complaint about someone intimidating voters at the Bethune polling place in 1962. When he arrived, an attorney identified the man engaged in challenging voters as Rehnquist. Mr. Pine saw the man identified as Rehnquist approaching voters, and asking, "Pardon me, are you a qualified voter?"

These witnesses provide overwhelming evidence that Rehnquist was personally engaged in challenging and harassing voters during the early 1960's.

Minority citizens look to our Federal courts for equal justice. They have reason to be concerned that their rights will not be protected in a court led by Justice Rehnquist.

As a member of the Supreme Court, Justice Rehnquist has been quick to seize on the slightest pretext to justify the denial of claims for racial justice:

His lone dissent in the Bob Jones University case supported tax credits for segregated schools.

In Batson versus Kentucky, his dissent supported the right of a prosecutor to prevent blacks and minorities from serving on a jury.

In Keyes versus School District No. 1, Denver, Colorado, his dissent supported the view that segregation in one part of a school district does not justify a presumption of segregation throughout the district.

In 33 cases during his 15 years on the Court, Rehnquist has voted in favor of a black complainant in a race discrimination case; 31 were unanimous decisions.

In 14 race discrimination cases brought by or on behalf of blacks, Justice Rehnquist cast the deciding vote against the civil rights claimant every time.

RECORD OF EXTREMISM ON THE COURT

In his 15 years on the Supreme Court, Justice Rehnquist has compiled a record of consistent opposition to individual rights in all areas—minority rights, women's rights, religious liberty, rights of the poor, rights of aliens, and rights of children.

In 1974, Harvard Law Professor David Shapiro reviewed Justice Rehnquist's first four terms on the Court and reached the following conclusion:

A review of all the cases in which Justice Rehnquist has taken part indicates that his votes are guided by three basic propositions:

(1) Conflicts between an individual and the Government should, whenever possible, be resolved against the individual.

(2) Conflicts between State and Federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the States; and

(3) Questions of the exercise of Federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.

Justice Rehnquist's hostile record on individual rights is shocking. During Justice Rehnquist's tenure, the Court has decided 23 cases involving constitutional claims of sex discrimination. The majority of the Court voted with the claimant 14 times. Justice Rehnquist voted to uphold the challenged statute or practice in 20 of the 23 cases effectively against individuals.

In cases involving claims of discrimination against legal aliens, Justice Rehnquist has voted to uphold the discriminatory statute in everyone of the 12 cases in which he participated. The majority of justices found the challenged statute unconstitutional in eight of those cases. Justice Rehnquist would bar legal aliens from holding jobs ranging from architect to notary public.

In cases striking down statutes which provide that illegitimate children do not have the same rights as legitimate children, Justice Rehnquist has consistently voted to uphold the discriminatory statutes. Justice Rehnquist would deny disability insurance payments and worker's compensation benefits to illegitimate children.

Since Justice Rehnqulst has been on the Court, it has decided 25 cases involving separation of church and State. In 13 of those cases, a majority of Justices held the challenged statute to be a violation of the first amendment prohibition on Government sponsorship of religion. Justice Rehnquist voted to uphold the statute completely in 23 of the 25 cases, and voted to uphold part of the statute in the remaining two cases.

Of 30 cases involving claims of cruel and unusual punishment, the Court found a constitutional violation in 15. Justice Rehnquist found a constitutional violation in none of those cases.

Justice Rehnquist's pattern of denying individual rights in pervasive and flies in the face of the Court's critical role as protector of such rights. Perhaps the most telling illustration of Justice Rehnquist's unwavering commitment to uphold Government action against challenge by an individual is his record in cases where he cast the deciding vote in a matter involving the constitutionality of Government action. In 120 of 124 cases, Justice Rehnquist cast the deciding vote to reject the constitutional claim.

Imagine what America would be like if Justice Rehnquist had been Chief Justice and his cramped and narrow view of the Constitution had prevailed in the critical years since World War II.

The schools of America would still be segregated. Millions of citizens would be denied the right to vote under scandalous malapportionment laws. Women would be condemned to second-class status as second-class Americans. Courthouses would be closed to individual challenges against police brutality and executive abuse—closed even to the press. Government would embrace religion, and the wall of separation between church and State would be in ruins. State and local majorities would tell us what we can read, how to lead our private lives, whether to bear children, how to bring them up, what kinds of people we may become. Such a result would be a radical and unacceptable retreat from the protections Americans enjoy today, and our Constitution would be a lesser document in a lesser land.

TATUM VERSUS LAIRD

The Chief Justice of the United States must have the highest ethical standards. Shortly after he joined the Court, Justice Rehnquist refused to recuse himself in the important case of Tatum versus Laird, and thereby demonstrated an ethical lapse that, in my view, should by itself disqualify Justice Rehnquist from being Chief Justice.

The plaintiffs in Tatum challenged the Government's policy of surveillance of civilians by the Army. Justice Rehnquist cast the deciding vote to reject the challenge, and denied the plaintiff's request that he recuse himself. The applicable ABA Code of Judicial conduct required disqualification if a judge's impartiality might reasonably be questioned because of the judge's involvement in the matter prior to his coming to the bench.

The public record indicates that Assistant Attorney General Rehnquist was heavily involved in the development of the policy of surveillance of civilians by the Army, the same policy which was challenged by the plaintiffs in Tatum. Further, Assistant Attorney General Rehnquist had some knowledge of disputed evidentiary facts in the Tatum case, and had, while the case was pending in the Federal Court of Appeals, expressed the opinion that the plaintiffs in Tatum versus Laird had a nonjusticiable claim.

I might point out for the RECORD, Mr. President, that I find the statement by the committee members in referencing the Laird versus Tatum issue in question to be in complete in significant respects. In the committee report, the memorandum in which Justice Rehnquist indicated his reasons for not recusing himself is reprinted verbating followed by excerpts from Mr. Rehnquist responses to questions by Senator Ervin when he appeared before the Ervin Committee.

But the most significant comment that Mr. Rehnquist made is not included in the majority views in the committee report. It is included in my comments on page 79 of the committee report. In this key statement, Mr. Rehnquist indicated "My only point of disagreement with you is to say whether in the case of Laird versus Tatum that has been pending in the court appeals here in the District of Columbia that an action would lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government."

□ 1340

That is a direct statement about how he would rule if he were deciding the Laird versus Tatum case. But through oversight or whatever, that particular reference was not included in the committee's report to this body. That is one of the most significant points in the Laird case, that Mr. Rehnquist stated his conclusion about the parties rights in that particular case and then ruled on it when he got to the Supreme Court.

Finally, the record of Assistant Attorney General Rehnquist's actual role in the formulation of the policy involved in Tatum is in conflict with his sworn testimony on the subject. In his testimony last month, Justice Rehnquist stated that the only information he had about Army surveillance of civilians was obtained in connection with May Day. May Day was in 1971. In fact, Mr. Rehnquist was involved in the development of the policy of Army surveillance of civilians from the beginning—in 1969.

That was all brought out in the various documents provided by the Justice Department, many of which he authored. In the civil disturbance plan memorandum, Mr. Rehnquist provides a very detailed justification for the use of the Army to spy on American citizens, and the use of the FBI for intelligence gathering on American individuals.

In considering the Tatum versus Laird case, we should not forget the issue in that litigation and the consequences of Justice Rehnquist's vote. If Justice Rehnquist had recused himself, as he should have, the decision of the court of appeals would have been affirmed, and the case would have been sent back to the trial court. Discovery would have gone forward, and in the course of that discovery, the American people would have learned about the Huston plan, about the Army's surveillance of private citizens, and about the CIA's illegal domestic surveillance operations. But because of Justice Rehnquist's vote, that infor-

mation remained concealed from the American people for several years. His vote prevented the American people from learning about the illegal intelligence activities going on inside the Nixon administration. As an Assistant Attorney General in the Justice Department, Mr. Rehnquist was well aware of these activities and he did not want the American people to know about them.

That is why Prof. Geoffrey Hazard, one of our Nation's foremost judicial ethics experts, who played a key role in formulating the "ABA Canons On Judicial Ethics" has been so critical of Justice Rehnquist's decision to sit on that particular case. We will examine Professor Hazard's opinion in greater detail during the course of this debate.

CREDIBILITY

Throughout all of these issues which raise serious concerns about Justice Rehnquist's fairness and openmindedness and commitment to equal justice runs a thread of evasivenss that casts doubt on his credibility. From the Jackson memo to the voter harassment to the Tatum case, we see a pattern of explanations by Justice Rehnquist that are contradicted by others or are misleading or do not ring true. It is not a pattern worthy of the Chief Justice of the United States.

CONCLUSION

In the past, the Senate has not hesitated to oppose controversial Presidential nominations to the office of Chief Justice. Before Rehnquist, 20 persons have been nominated to that high office, but only 15 have been confirmed. Most recently, in 1968, with the active encouragement of the current chairman of this committee, the Senate refused to invoke cloture on President Lyndon Johnson's nomination of Associate Justice Abe Fortas to be Chief Justice, and the nomination was withdrawn.

The Senate should not hesitate to do the same today. This institution is not a rubberstamp. We have our own independent responsibility to the Constitution, the Supreme Court and the judicial appointment process.

On the merits, Justice Rehnquist is not mainstream but too extreme—he is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be Chief Justice.

Further, Justice Rehnquist did not hesitate to defy the fundamental principles of judicial ethics by participating—and casting the decisive vote—as an Associate Justice in a major Supreme Court case that challenged his own extremist actions as an Assistant Attorney General in fashioning the Nixon policy of military surveillance of civilians. And he engaged in an unusually cruel and unseemly violation of legal ethics by concealing a trust he had drafted for the benefit of the destitute and deperately ill brother of his wife.

Finally, Justice Rehnquist did not come clean with the committee in any area of major controversy; the committee record, including the testimony of numerous witnesses, is replete with serious challenges against his credibility.

In sum, Justice Rehnquist is outside the mainstream of American constitutional law and American values, and he does not deserve to be confirmed as Chief Justice of the United States.

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Madam President, I rise to oppose this nomination.

I want to put one point at rest very promptly. That is the point that was made by the majority leader this morning before we got into the Rehnquist nomination. The majority leader this morning said that this is just a question of giving the President the right to name those jurists that he believes should be on the Court, and that it was a question of liberalism versus conservatism.

Let me point out that this statement is just so contradictory to the facts that, before I get into some of the remarks I hope to make in connection with this nomination, I think we ought to look at the reality of the situation on that subject.

I will address myself later to the number of judges that we have confirmed without any question being raised concerning political philosophy. But let us take two outstanding cases.

In connection with the confirmation of Justice Sandra Day O'Connor, who is recognized, respected, and accepted as a conservative jurist, this body voted 99 to 0 for her confirmation. It is a fact that I think very few of us doubt that the vote with respect to the confirmation of Justice Scalia will probably be something in that very area. His nomination came out of the committee unanimously.

So, to suggest that the opposition to Justice Rehnquist is somehow related to his political philosophy or his conservatism just does not accord with reality. Anyone who suggests that that is the case just is not willing to look at the facts.

Madam President, I have been in this body off and on since 1974, and it is my view that there will never be a more important vote that I have cast or will cast than the one having to do with the confirmation of the Chief Justice of the United States.

Although I recognize the value of television in the Senate, I am frank to say that I am somewhat disappointed, that there are not more Members of this body on the floor prepared to debate this issue. We are considering the confirmation of a nominee for Chief Justice who would serve for 10, 15, 20 years, possibly well into the 21st century. Much is at stake for the Nation.

The Chief Justice heads the third branch of our Government. He heads the judicial conference of the United States, composed of all Federal judges. He appoints committees which make policy for our Federal courts. He chairs the board of the Federal Judicial Center, which does research, training, and education for our Federal courts. He literally manages the Supreme Court.

He presides over the Court sessions and decisionmaking meetings of the Court.

When he is in the majority he assigns opinions to the Justice who is to write them.

The Chief Justice serves as a symbolic head of the Federal court system. He holds the highest judicial office in our Nation. This is more than just another judicial appointment.

He occupies the pinnacle of judicial power in our country.

Before confirming a nominee for Chief Justice we must discuss fully the issues and the controversies presented by this nomination.

□ 1350

I accept the challenge of my colleague from Utah, who said "let us be fair." If my colleagues in the U.S. Senate will look at all the evidence concerning Justice Rehnquist and be fair about it, if they will not make a decision purely on a politically partisan basis, they will come to the conclusion that Justice Rehnquist should not be confirmed as Chief Justice. I am willing to be fair. I wonder if my colleagues are willing to be equally fair.

Some say that those of us who desire this debate are wrong to have the debate at all, that we seek a partisan fight over this nomination. Nothing could be further from the truth. I am frank to say that it should be noted that on my side of the aisle, there has been a split. Some of the Democrats have voted for confirmation and some have not. The partisanship comes from across the aisle.

Not one of those who sat on the committee could see fit to vote against the confirmation. That is indeed partisanship. One might say, well, it is not partisanship; they just understand the issues better. But I would say if you understand the issues and really thoroughly look at them, you cannot arrive at the conclusion that every Member on the other side would see fit to vote for confirmation. I hope that will not happen.

The importance of this nomination demands our integrity. It demands that we look at this man's record and put aside all political considerations and decide what is right for America.

Those of us on this side of the aisle have not delayed or thwarted confirmation of President Reagan's judicial nominees. There have been very few that have been opposed in the United States. We have confirmed over 285 Federal judges and only 5 or so of that 285 have excited any real controversy. I am frank to say that overall, there has been bipartisan cooperation.

Some would say we should not oppose or debate this confirmation because it is a reflection upon the Supreme Court of the United States itself, to raise some of the questions that my colleagues have already raised and that I shall elaborate upon in some detail today. But this is not an ordinary confirmation. To fail to raise the issues concerning Justice Rehnquist and his integrity and his candor and his truthfulness would be irresponsible on our part. We are confirming the Chief Justice of the United States, a post filled only 15 times in the history of this great Nation. The Chief Justice will serve longer than most Presidents and longer than most Senators. Therefore, I say to every Member of this body, you owe it to yourselves, but more than that, you owe it to your children and to your grandchildren to decide—do you want to make just a partisan judgment or will you make a judgment based upon all of the evidence? If it is a judgment based on all the evidence, it will be a judgment that Justice Rehnquist should not be the Chief Justice of the United States.

We are considering the confirmation of a Chief Justice who will serve all the people of the United States. Each Senator must decide on his or her own whether Justice Rehnquist is the appropriate person the appropriate choice to serve all the people of this Nation.

The Chief Justice affects future directions of constitutional interpretation. The Chief Justice is the symbol of the Supreme Court. He or she is the final guarantor of individual liberties. The Chief Justice is a symbol of the highest standards of integrity and fidelity to the law.

The most important issue for me is the last one. The Chief Justice of the United States is the embodiment of the ideal of integrity. The unfortunate truth is that the hearings cast great doubt on Justice Rehnquist's credibility. There are four major areas that trouble me in regard to his credibility. The area of voter intimidation, a memo about Brown versus Board of Education, and a restrictive covenant which applies to his property in Vermont, each of which I shall discuss in detail today. His statements regarding the case of Laird versus Tatum also raise certain credibility issues, but I will defer a discussion of those.

I want to talk about the issue of voter intimidation first. Let me make it very clear that the issue is not whether he intimidated voters. That is not the issue. The issue is whether he was truthful when he testified on this issue during his first confirmation hearing in 1971. The issue is not what he did but whether he was truthful when he testified during his confirmation hearing last month.

What did he say in 1971 when he was asked whether he had challenged voters? Justice Rehnquist stated to the Judiciary Committee in 1971 in response to written questions: "In none of these years"—meaning 1958 to 1968—"did I personally engage in challenging the qualifications of any voters." I repeat—

He stated that in none of those years did he personally engage in challenging the qualifications of any voter.

In response to evidence presented at the 1971 hearings that he engaged in harassing and intimidating voters, he submitted an affidavit after the conclusion of the hearing. In that affidavit, he stated under oath: "I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons."

That was succinct, it was clear. He had not in any election, either himself harassed or intimidated voters or encouraged or approved the harassment or intimidation of voters by any other person. But the record shows overwhelmingly that that statement is untrue.

We are talking not alone about his statements in 1971. Again, in 1986, he repeated the same position over and over again. Questioned again and again as to whether he challenged voters, each time, he said no. Senator THURMOND said to him: "How do you respond to these allegations?" Justice Rehnquist said: "I have reread very carefully the statement I made to the committee in 1971 and I have absolutely no reason to doubt its correctness now."

□ 1400

Senator KENNEDY said to him, "Do you deny categorically that you were engaged in any of the activities that are identified by any of these individuals in any of the polling places that were mentioned?" Justice Rehnquist: "Yes, I do deny that."

I asked him, "Did you ever ask a voter any questions regarding his or her qualifications to vote?" Justice Rehnquist said, "Not that I can recall."

I asked him, "Did you ever ask a prospective voter to read from any text, whether the Constitution or otherwise? Justice Rehnquist: "Not that I can recall."

I asked him, "Did you ever personally confront voters at Bethune precinct?" Justice Rehnquist: "No, No, I did not."

Each time he was asked, Justice Rehnquist denied the allegation.

Members of the Senate, the evidence is exactly to the contrary. There were five witnesses who appeared before the committee, five witnesses who were totally impartial, objective, they had nothing to gain, and some, I am frank to say, had a lot to lose by being there. Yet each came forward and testified to Mr. Rehnquist's involvement in challenging, intimidating, and harassing voters.

Mr. Brosnahan was the first witness, senior partner in a San Francisco law firm of 235 lawyers, a former U.S. attorney, was the assistant U.S. attorney at that time when he met Mr. Rehnquist—even today represents clients practicing before the Supreme Court. It took a lot of courage for Mr. Brosnahan to appear before us. There is no doubt in my mind that if you had a law firm of 235 members in San Francisco, the overwhelming majority of them are going to be members of the Republican Party. There is no doubt in my mind that they are going to be conservative, that they are going to be supportive of Justice Rehnquist's nomination. But Mr. Brosnahan felt he had to come forward and testify. He was very clear. He personally did not see Justice Rehnquist challenge voters. He did not say that he did. But when he was called to investigate claims of harassment, Justice Rehnquist was there, and he testified. "At that polling place, I saw William Rehnquist, who was known to me as an attorney in the city of Phoenix. He was serving as a challenger of voters; that is to say, the conduct and complaints had to do with his conduct. People told me he was challenging, and he did not deny he was a challenger. At that time in 1962, he did not raise any question about credentials or any of that. He did not deny that."

Now, he further went on to testify that he had talked to Justice Rehnquist about the complaints about his having challenged voters, and Justice Rehnquist's comments to him acknowledged he had been challenging voters. There was no mistake that many people in the room complained about the fact that Justice Rehnquist had been challenging voters and they complained to Mr. Brosnahan, who was the assistant U.S. attorney.

Now, Mr. Brosnahan did not make a mistake about identity. He knew Mr. Rehnquist. He had attended bar association functions with him. He had introduced his wife to him. Mr. Brosnahan said that Justice Rehnquist had been challenging voters. Justice Rehnquist said that he did not, and I quote,

"personally challenge the qualifications of any voter."

Then came another witness, a Dr. Smith, a professor of psychology, former professor at the Arizona State University. He testified that he saw Justice Rehnquist at the minority polling place in Phoenix in 1960. He saw Justice Rehnquist approach two black men in a line of voters, and he heard Mr. Rehnquist—and I use the term Mr. Rehnquist because obviously he was not "Justice" at that time—he heard Mr. Rehnquist say, "You have no business being in this line trying to vote. I would ask you to leave." As a result, Dr. Smith said, the two men left the line. There was no mistake in Dr. Smith's opinion about his identity. He knew who Justice Rehnquist was and could identify him. There was no mistake about what Mr. Rehnquist did. He challenged voters. He intimidated voters. He deprived minority members of their right to vote. Dr. Smith testified that Justice Rehnquist was harassing and intimidating voters. Dr. Smith quoting Justice Potter Steward testified, "I may not be able to define intimidation but I know it when I see it."

Dr. Smith was a very impressive witness. He had absolutely nothing to gain from testifying. And when asked as to why he had come forward, he said, "I am here to keep from being shamed in the eyes of my children." And I might say that his children sat behind him during his testimony.

Yet, in spite of that direct evidence, Justice Rehnquist said he did not personally challenge the qualifications of any voters.

(Mr. COHEN assumed the chair.)

Mr. METZENBAUM. Then there was a third witness, a Mr. Pine, a successful businessman in Phoenix. In the 1960's he was active in the Democratic Party.

On election day, he was assigned to respond to complaints from precincts where harassment of voters had occurred. He testified that he received complaints about harassing voters at the Bethune precinct, and when he arrived, the attorney who accompanied him said, "That is Bill Rehnquist." He saw Mr. Rehnquist approaching voters, challenging their qualifications to vote. Mr. Pine stated that as a result of Mr. Rehnquist's challenge, voters left the line. They were entitled to vote but they left the line because Mr. Rehnquist made them feel that they should have some document, some piece of paper to show they were qualified. It was not the law. It was wrong. It was unfair.

But having said all of that, let me make it clear if Justice Rehnquist had come before the committee and said, "Yes, indeed, I did that; I challenged voters. I may have even gone too far; I'm sorry, I should not have done it. It was a number of years ago and it was a mistake on my part"—that is not what he has done—I think all of us could understand some misconduct on the part of a human being some years past.

The question is his veracity. Did he come forward and admit the conduct? Did he tell the Senate what he had done and say, "I should not have done it?" No. Justice Rehnquist back in 1971 and again in 1986, time and time again said he never personally challenged the qualifications of any voters.

And then there was Senator Pena, a State senator from New Mexico. He testified he saw Mr. Rehnquist challenge voters at a minority precinct. Mr. Rehnquist was holding up the lines. A hundred people were waiting to get in line. Mr. Rehnquist was asking everybody who came in, "Where do you live? How long have you lived there? What is your name?" These were minority voters. They were afraid. It was a way to force people to give up and leave the line, and they did just that. That is wrong. It is unfair. It was not proper conduct on his part.

□ 1410

I repeat: The issue is not what he did. The issue is, Did he tell the U.S. Senate committee considering his nomination in 1971, and again in 1986, the truth? One can only come to the conclusion that the answer is "No."

Justice Rehnquist says that he never personally challenged the qualifications of voters. That just is not the fact.

Then there was another witness, a Mr. Mirkin. Mr. Mirkin is an attorney in Phoenix, and obviously he had nothing to gain. As a matter of fact, he said that he supported Justice Rehnquist's confirmation. But when it came to the question of what he saw Mr. Rehnquist doing, he testified that he saw Mr. Rehnquist intimidate voters; he tried to encourage them to leave the line at a minority polling place. This was a man who said, "I support his confirmation."

Mr. Mirkin testified that Mr. Rehnquist was giving instructions to challengers at the polling place. But Mr. Mirkin said they were merely props. He said that the real audience was the minority voters and the real object was to get them to leave the line, to get them to give up their right to vote.

How Justice Rehnquist could tell Senator THURMOND, could tell Senator KENNEDY, could tell me that he did not challenge or intimidate voters, or how he could have told the Senate committee that in 1971, in view of the evidence, is hard to comprehend.

Before the day is over, we will hear my colleague from Utah probably talk about the fact that there were five witnesses on one side and there were seven witnesses on the other side. So I think we ought to talk about those seven witnesses, because, so far as I am concerned, those witnesses were honorable people; they were respectable people. Some were lawyers. Five of them were Republicans, or active in the party. But I do not question the fact of their total honesty, Republicans or Democrats. I am not one who believes that some people in one party tell the truth and some people in another party do not. Those five were involved in the challenging program with Justice Rehnquist.

One witness was actually involved with the Democratic Party—he had been the county chairman—and another was a police officer. All of them said the same thing: "We were not with Mr. Rehnquist, so we cannot say what he did, but we don't think he would do such a thing." In fact, they talked about the law of probabilities being that he would not do such a thing.

I respect their opinions. But testimony based on the "law of probabilities," has little weight in the face of uncontroverted direct evidence from five people under oath, each of whom has nothing to gain by testifying against Justice Rehnquist's confirmation. The witnesses were asked about Justice Rehnquist's conduct in 1962.

Question: "Can you state categorically that Justice Rehnquist did not challenge anyone on that election day?"

One answered for the group: "How could you answer that categorically when not one of us was with him all day?"

I accept that answer. You cannot categorically say that somebody did not do something on a particular day if you were not with him all during the day. The truth is that none of these witnesses knows everything that happened on election day in 1962, and they do not know everything that happened in 1960 or in 1964. They were not with Justice Rehnquist all day in 1962, and they did not claim to have been with him all day in other years.

The proponents of his confirmation say that all this is just a case of mistaken identity, that all the testimony really refers to one incident involving another man. That, I say to my colleague from Utah, who has made that statement previously, is a smokescreen; that is a phony argument.

There was an incident involving another man in 1962 at Bethune Precinct. There was a scuffle, and a man was taken away. That man's name was Mr. Bentson. But none of the five witnesses referred to that incident at all. None of the five witnesses testified to a scuffle; none mentioned the police taking someone away. That was a totally separate and distinct action by Mr. Bentson. That incident occurred at a different time and place than the

incidents described by the five eyewitnesses.

The five witnesses who saw Mr. Rehnquist were not talking about Mr. Bentson. There is no claim that Justice Rehnquist was involved in that incident. So let us not confuse the facts on the question of Mr. Bentson and Mr. Rehnquist.

I think my distinguished colleague will also probably say that they both were tall men, and therefore there was this confusion. But none of the five saw any scuffle. None of the five confused Mr. Rehnquist with anyone. All of the five recogized Mr. Rehnquist for whom he is.

There is another phony argument that has been offered. The supporters of Justice Rehnquist say that the police officer who investigated the scuffle was at the Bethune Precinct all day, and that he came forward and testified that he never saw Justice Rehnquist.

There are two major problems with that argument. First, only one of the witnesses testified he was sure an incident occurred at Bethune Precinct, and in that case the incident occurred in 1964. The police officer was at Bethune in 1962, not 1964.

Another problem: The police officer told us that he was at the polling place only 1 hour, and the rest of the day he was "in the area." Those are his words, "in the area." So he did not know what was going on there.

There are a lot of people in the area of the U.S. Senate today, probably some as close as the House of Representatives and some on the streets. They are in the area but they probably do not know what is going on on the floor of the U.S. Senate this afternoon.

Supporters of Justice Rehnquist go on to say that one of the witnesses they called, a Mr. Maggiore, was in Democratic headquarters in 1962—he was the county chairman at that time—and he never received a complaint about Mr. Rehnquist. So what? Because nobody called him, does that prove it did not occur? They contend that Mr. Rehnquist could not have been involved in challenging voters because Mr. Maggiore got no call.

□ 1420

Would the assistant U.S. attorney call the Democratic chairman, or would the State senator feel it necessary that he call the State chairman? Would the doctor feel that it was incumbent upon him to call the county chairman? Of course not.

The failure of a call to the Democratic county chairman does not prove anything. It just proves that nobody saw fit to call him.

And, again, the incidents that occurred in 1960 and 1964 could not lead to a call in 1962.

None of the witnesses, I might also say, claimed that he had called Mr. Maggiore.

So what do we have? On one side, we have five witnesses who were there, five witnesses with nothing to gain and a lot to lose, and on the other side, seven witnesses all of whom admit they were not with Justice Rehnquist throughout all the election days in either 1960, 1962, or 1964.

It is not easy to come out here on the floor and state my conclusion that a sitting Supreme Court Justice has misstated the facts. But the Constitution demands that each of us make an independent judgment as to the fitness of the nominee for this office, the nomination of the Chief Justice, the highest symbol of integrity and fidelity to the law. Justice Rehnquist misled the committee in 1971 and in 1986. He challenged voters. He harassed voters. He deprived them of their right to vote. Then he told the Senate—and to me this is the critical question—he told the Senate in 1971 under oath and again in 1986 that he did not.

That, to me, is the key point, the question of telling the truth to the U.S. Senate.

I cannot support his nomination under these circumstances. Yet I want to be very candid about something. If this had been the only instance of his lack of candor, I might be persuaded to say, "Well, maybe he has misstated the facts but one issue does not make a total case and perhaps I should give him the benefit of the doubt."

But there is so much more having to do with the very question of his candor and his integrity and his forthrightness.

Let me go now to another subject. As I go to these subjects, I want to emphasize I do not believe that the issue is what he did or did not do. I believe the issue has to do with his candor and his integrity and his truthfulness in his representations to the U.S. Senate.

The memo in connection with the case of Brown versus Board of Education is the next matter about which I would like to speak.

Justice Rehnquist wrote a memo. The memo has, right under the substance of the text, his initials, WHR. He was younger then. He was a clerk for Justice Jackson. He had a right to his own views. I am not concerned about whether I agree or disagree with him about his thoughts concerning Brown versus Board of Education of Plessy versus Ferguson back there in 1952. I am concerned about whether he told the truth about the memo in 1971 at his first confirmation hearings. I am concerned about whether he told the truth to the Senate in 1986.

Let us take a look at the facts: The memo was typed by Justice Rehnquist. As I previously stated, it has his initials on it. It is written in the first person. The memo says, "I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by 'liberal' colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed."

But in 1971, at his confirmation hearing, Justice Rehnquist stated, "Those are not my views. They are Justice Jackson's."

He stated in his 1971 letter to the Senate: "The bald simplistic conclusion that 'Plessy versus Ferguson was right and should be affirmed' is not an accurate statement of my own views at the time."

That leads to the first question of credibility because the memo is in the first person, the memo has his initials right below that very line and it is clear that he agreed with Plessy versus Ferguson doctrine of segregated schools. But when he advised the Senate about his position, he indicated that he disagreed with Plessy and supported the view that the public schools should be integrated.

I do not care what his opinion was then. He had a right to his point of view and he has a right to his point of view as a member of the Court and whether I agree or disagree is not the issue I am concerned about here.

So at one point he said he agreed with the Plessy decision, on the other point he said he disagreed with it, and then—and then—in 1986 When Senator BIDEN asked him what his views were, he said "I do not think I reached a conclusion."

Now, you have him on one of the issues, you have him on the other side of the issue categorically, and then you have him saying "I do not think I reached a conclusion."

These statements are too totally inconsistent to reconcile. The story just will not wash. All the rest of the evidence says the memo represented Justice Rehnquist's views.

The title of the memo is "A Random Thought on the Segregation Cases." Does that sound like he was stating Justice Jackson's views? Of course not.

The memo ends by it saying he has been "excoriated" by his liberal colleagues. If these are Justice Jackson's views in that memo, then is he saying that the liberal colleagues of Justice Jackson were excoriating him? Come on now. Other members of the Court excoriating their fellow colleague? Does Justice Rehnquist want us to believe that the liberal members of the Court were excoriating Justice Jackson?

Can we believe that Justice Jackson was excoriated by liberal colleagues for having a sincere view about this case? Can we believe that Justice Jackson would announce to his fellow Justices at the conference that he had been excoriated, as the memo indi-

cates? It strains one's credulity. It is unbelievable.

Justice Rehnquist's own colleagues, his fellow clerks, indicate who those liberal colleagues are. One of those fellow colleagues recently said, "Unquestionably, in our luncheon meetings with the clerks he—meaning Justice Rehnquist—did defend the view that Plessy was right."

Another problem with his explanation is that the first half of the memo is a gratuitous discussion of the history of court decisions on property rights. Can it be reasonably claimed that Justice Jackson lectured his fellow Justices about elementary propositions, when they were intimately familiar with this history?

Justice Rehnquist says that Justice Jackson supported the doctrine of separate but equal.

He said to the Senate in 1971 and in 1986 that Justice Jackson did not want to overturn Plessy. He makes that argument to support his position that it was not his memo but that it was Justice Jackson's.

But what were Justice Jackson's views at the time? Certainly not those indicated by Justice Rehnquist. We can pretty well conclude what Justice Jackson's view were. After all, Justice Jackson joined in the unanimous decision to strike down Plessy versus Ferguson.

Justice Rehnquist says, even if those were Jackson's view when the decision was handed down they were different when the Justices first conferred about the case. But then you check some other evidence and you look at the notes of Justice Jackson's fellow Justice, Justice Burton at the conference. Justice Burton's notes show that Jackson supported overturning Plessy, and another Jackson clerk said Justice Jackson was prepared to support a Court decision ending segregation. There is no evidence supporting Justice Rehnquist's claim or contention in this respect.

No other drafts or memos indicate Justice Jackson agreed with the statement that "I think Plessy versus Ferguson was right and should be reaffirmed." Those were the views of William Rehnquist, the clerk.

□ 1430

He had a right to have those views. He did not have a right to fail to state the facts in 1971 and then to indicate his position was exactly opposite and then indicate in 1986 that he had no views at all.

The supporters of Justice Rehnquist's interpretation point to a letter from Justice Rehnquist's fellow clerk, Donald Cronson, to the Senate in 1971;

That letter claimed Jackson asked for two memos—one supporting overturning the Plessy decision and the other supporting upholding it. Cronson claimed both memos were collaborative efforts.

But the Cronson account just does not withstand scrutiny:

First, if the memos were collaborative effort, why did not Justice Rehnquist ever mention that? Why did not he respond to all the controversy by saying he coauthored the memo with someone else? He did not say that?

Second, if the memos were collaborative efforts, why is each signed by only one clerk, WHR, William H. Rehnquist? No more, no less; no other names. It is not difficult to find at least 25 other memos that are signed the same way, WHR.

Third, with respect to the Cronson memo, Cronson's claim is that Justice Jackson asked for one memo supporting Plessy and the other one opposing it. But Justice Rehnquist, you will recollect, as I just told you, claimed that Justice Jackson favored reaffirming Plessy, not that he wanted argument on both sides.

Fourth, Mr. Cronson's memo is titled "A Few Expressed Prejudices on the Segregation Cases." That is not a title for a memo stating Jackson's views of the cases.

The fact is that Mr. Cronson's claim that the memo represented Jackson's views does not hold up.

Ten years ago, in a scholarly analysis of the Brown and Plessy decisions, Richard Kluger concluded:

> One finds a preponderance of evidence to suggest that the memorandum in question . . . was an accurate statement of his own views on segregation; not those of Robert Jackson, who, by contrast, was a staunch libertarian and humanist.

And to further refute Justice Rehnquist's denial that the memo represented his own views, we now have the statement of Justice Jackson's personal secretary of 9 years, Elsie Douglas. Ms. Douglas stated in a recent letter to Senator KENNEDY:

> It surprises me every time Justice Rehnquist represents what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson's rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as Secretary for many years.
>
> Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance.

This is no ordinary memo about which we are speaking. And I must say that I somewhat apologize to my colleagues for taking so much time to talk about this, but I believe that it again bears on the question of the Justice' credibility, of his candor, of his truthfulness. We are talking about a memo in a matter that was not an ordinary case. The Brown case was the most important constitutional decision of this century.

The memo was a key issue in his 1971 confirmation. It is inconceivable, that Justice Rehnquist could have had no position in that case, at the time which is what his statement was in answer to Senator BIDEN's question. He did have a position. That position was to oppose integration of schools.

But the issue still is not whether he was right, wrong, or whether I agree or disagree. The issue is, has he deliberately misled the Senate and the American people on two separate occasions?

Enough on that issue.

Let us go to another issue having to do with integrity and credibility and candor and openness with the U.S. Senate—Justice Rehnquist's knowledge of the restrictive covenants on his property in Vermont. Again, I want to say the issue is not whether he did or did not buy a home subject to a restrictive covenant. He did. He is not the first nor the last person who did. The issue also is not whether or not he took some action in connection with the restrictive covenant, which I believe personally he should have done. But he did not do that. The issue still has to do, in my opinion, with his candor and with his frankness with the U.S. Senate.

On July 30, Senator LEAHY asked Justice Rehnquist about the restrictive covenant in his deed to his Vermont home purchased in July 1974. The covenant states:

> No feet of the herein conveyed property shall be leased or sold to any member of the Hebrew races.

Now Justice Rehnquist testified that he was not aware of the covenant "at the time" and "was advised of it a couple of days ago."

In other words he did not know of it at the time and he just learned about it, was just advised about it a couple of days ago.

But the facts indicate something totally contrary to that. The facts indicate that Justice Rehnquist was aware of the covenant "at the time."

There are two letters that show that he was made aware of the covenant "at the time" he purchased the property. One letter, from Justice Rehnquist's attorney, dated June 24, 1974, recommends that Mr. Rehnquist "examine closely the attached abstract deed of the main cottage property."

Now, that is a letter from his lawyer. He was a member of the Supreme Court at the time. He is told by his lawyer that he should examine closely the attached abstract deed of the main cottage property. That is the deed containing the restrictive covenant.

Now, a lot of people, you might say, would not pay too much attention, but we are talking about a Justice of the U.S. Supreme Court, a man who reads legal documents and legal papers

every single day of his life when he is sitting on the bench.

Can we believe that scholarly, erudite, able lawyer, William Rehnquist, Justice Rehnquist, totally disregarded his attorney's specific advice to "examine closely" the deed?

Now, as if that were not enough, there is another letter, dated about 10 days later, July 2, 1974. The second paragraph of that letter says:

The property is subject to restrictions relative to use * * * and ownership by members of the Hebrew race.

To restrictions relative to use—and ownership by members of the Hebrew race.

□ 1440

So he not only got one letter. He got two letters from his lawyer.

There is no question that Justice Rehnquist was aware of the covenant "at the time." But he told the committee that he was not aware of it and just had learned about it a few days earlier. It is hard to believe. But then there is another development.

An August 4, 1986, article in the Legal Times newspaper revealed that Justice Rehnquist had received the two letters from attorneys with information on the restrictive covenant. The headline of the article was: "Rehnquist's lawyer urged him to note deed restriction."

The article said:

Associate Justice William Rehnquist's lawyer in the 1974 purchase of a Vermont house said in an interview with Legal Times Friday that he had sent a letter to Rehnquist before the purchase advising him to read the property deed, including the condition set forth in the deed. One of those conditions was a covenant prohibiting sale or lease of the property "to any member of the Hebrew race."

At another point, the article mentions the second letter—and I have added the word "John" and I have added the phrase "lawyer for the sellers of the property" only for the purpose of this debate. And Willis, I might say, is the lawyer for Justice Rehnquist.

(John) Downs (lawyer for the sellers of the property) said that both he and Willis (lawyer for Justice Rehnquist) were aware of the restrictive covenant at the time of the sale. Downs read to Legal Times an excerpt from a letter dated July 2, 1974, from Willis in which Rehnquist's lawyer said he studied the deed.

According to Downs, the July 1974 letter states: "The property is also subject to restrictions relative to use, with rights of way, construction on the various parcels, and ownership by members of the Hebrew race."

Look what now develops. What an amazing coincidence of facts. On the very same day that the article appears, Justice Rehnquist who said he had not been notified and had not learned of the restrictive covenants until several days earlier writes a letter to Senator THURMOND, the chairman of our committee. And in that letter he said he reviewed his files and discovered that July 2, 1974 letter on restrictive covenants.

Mr. Justice, I respect you and I respect the office you hold. But, Mr. Justice, I wonder what you think about that kind of evidentiary development if the evidence only came out to contradict the witness' statement after it had been published in the newspapers, and then the witness came forward and reviewed and reversed his testimony.

Justice Rehnquist said in his letter to Senator THURMOND:

While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week.

Before this debate is concluded, I will attempt to bring to the attention of my colleagues the innumerable occasions on which Justice Rehnquist has faulty recall. It is very difficult to comprehend. I understand certainly somebody who could not recall what happened on October 7, 1968, or 1972. Nobody would expect that. We are not talking about those kinds of matters. We are talking about recall of issues far more important than that, recalls having to do with a memo concerning the most important constitutional decision perhaps in this country, recall having to do with lawyers' letters that does not become apparent until such time as a newspaper publishes the facts.

Justice Rehnquist told us the facts only after truth was published. Until then, he said he didn't know about restrictive covenants. Then when the whole world learned the truth—then and only then did he admit the truth.

Again—as in case of military surveillance of private citizens an issue which I will discuss at a later point—we find a distinguished legal scholar unable to recollect very salient, and very significant facts.

This failure of recollection is not believable. I quote from a recent newspaper editorial in the Toledo Blade:

It is one thing for an ordinary home buyer to be unaware of a restrictive covenant in a deed, * * * it is quite different for a lawyer as astute as Mr. Rehnquist to plead ignorance. Quite simply, it is not believable * * *

In today's New York Times on this same subject about valid doubts about Justice Rehnquist, it states:

Confronted with restrictive covenants on two of his homes, the nominee first said he had been unaware of them. Then he wrote to the Senate Judiciary Committee that he had found a letter in his file cautioning that his Vermont home could not be sold to "anyone of the Hebrew race." He said he "undoubtedly" read that letter when buying the property in 1974 but did not recall doing so. If the Senate believes that, what does this say of the sensitivity of a Supreme Court Justice?

Mr. President, I ask unanimous consent that the entire New York Times editorial be included in the RECORD at the conclusion of my remarks.

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

(See Exhibit No. 1.)

Mr. METZENBAUM. The fact is—he did know about the covenant; he read the letter which described it—clearly and prominently—in the second paragraph.

But what did he do about it? Nothing.

When he was up for Senate confirmation, I believe he just was frankly embarrassed. He says he searched his files "after the conclusion of his testimony" and found the letter. We now know the letter was sent only after public disclosure of it. The issue is not simply whether he had a restrictive covenant on his property. The question is what did he tell the U.S. Senate concerning his knowledge of that fact. Did he tell us the truth or did he not? In this case, we have a restrictive covenant on a property purchased by a lawyer, a very prominent lawyer, a Justice of the Supreme Court. It is not a covenant just filed away in the courthouse record. It is in his deed. And the two letters are sent to him which mention it.

It is a temptation to ignore these issues. He is the President's nominee. He is already on the Court. He has the ABA's endorsement. These are arguments in favor of quick confirmation. But issues of integrity cannot be ignored and we in the Senate must meet our responsibility. It matters whether Justice Rehnquist told the truth to the Senate Judiciary Committee. The integrity of the Court is at stake. Integrity issues are always important when Senate confirmation is involved. But they are especially important here. We are confirming the head of the Supreme Court of the United States. The Senate cannot ignore the issue of integrity.

□ 1450

I am frank to say that I wish that I did not feel compelled to stand here on the floor today to talk about these issues of integrity, candor, and truthfulness with reference to a Justice of the Supreme Court who is up for confirmation as Chief Justice of that Court. But I do not know how I could look myself in the mirror if I had not discussed with my colleagues this entire question. It is so basic, it is so fundamental, it relates so directly to the question of whether or not Justice Rehnquist should be confirmed as our Chief Justice. I believe that I would have preferred, I know I would have preferred, not to have raised the questions concerning his integrity today. I do not think I had any alternative.

I yield the floor.

EXHIBIT No. 1

VALID DOUBTS ABOUT JUSTICE REHNQUIST

President Reagan has earned the right to try to shift the philosophy of the Supreme

Court. But the Senate has an equal right to insist on high-quality appointments—particularly for Chief Justice, the noblest position in American law. The debate that begins today on the nomination of Justice William Rehnquist will properly turn on concerns beyond the mundanely partisan. The Senate's own investigation has raised valid questions about the nominee's credibility and convictions.

Justice Rehnquist has served on the high court for 15 years and there is no doubt about his legal ability or agreeable personality. But brilliance and courtesy are not enough. The Supreme Court's center seat demands a symbol of impartiality, fairness and integrity that resoundingly affirms America's commitment to equal justice. At critical junctures in his confirmation hearings, when senators sought to explore Justice Rehnquist's beliefs and past actions, he stonewalled with failures to remember and unpersuasive explanations of embarrassing facts.

As Assistant Attorney General in 1971, Mr. Rehnquist defended the Nixon Administration in Senate hearings into the military's surveillance of civilian protesters of the war in Vietnam. He testified then that plaintiffs suing the Defense Department had no case, yet still voted as a Supreme Court Justice in 1972 to throw out their lawsuit. When Senator Charles Mathias recently asked what role the nominee played in formulating the surveillance policy, he said that he couldn't remember. Does the Senate believe that?

Justice Rehnquist also testified this summer that he favored from the start the Supreme Court's 1954 school desegregation decision. A memorandum to the contrary that he wrote as a law clerk in 1952, he said, was not really his opinion but that of the late Justice Robert Jackson. Does the Senate believe that? And how does that testimony square with a memorandum that surfaced only last week in which Assistant Attorney General Rehnquist urged a constitutional amendment that would have permitted widespread evasion of this decision?

Confronted with restrictive covenants on two of his homes, the nominee first said he had been unaware of them. Then he wrote to the Senate Judiciary Committee that he had found a letter in his file cautioning that his Vermont home could not be sold to "anyone of the Hebrew race." He said he "undoubtedly" read that letter when buying the property in 1974 but did not recall doing so. If the Senate believes that, what does this say of the sensitivity of a Supreme Court Justice?

Accused of harassing black and Hispanic voters in Phoenix during turbulent elections in the 1960's, Justice Rehnquist has categorically denied over the years lodging even a legal challenge to any voter's qualifications. Yet a former Federal prosecutor has testified that he encountered Mr. Rehnquist in 1962 at a polling place where voters were registering complaints and that while denying impropriety, Mr. Rehnquist never denied having challenged persons attempting to vote. Can the Senate rest easy with this unresolved conflict?

Justice Rehnquist's unhappy record on matters of civil rights, civil liberties and judicial ethics is a legitimate concern. He has frustrated the Senate's inquiry with evasive and unconvincing replies. The Senate's pride and the serious task of passing a candidate for Chief Justice ought to make it demand more. This venerated post should not be conferred midst so much nagging doubt.

Mr. METZENBAUM. I ask unanimous consent that the following additional materials be printed in the RECORD in connection with the nomination of Justice Rehnquist.

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

ARTICLE IN NATION, SEPTEMBER 20, 1986

The almost daily revelations of examples of Justice William Rehnquist's deep hostility to civil rights would ordinarily be enough to kill a nomination for any public office. Assistant Attorney General William Bradford Reynolds was denied a short-term promotion in the Reagan Administration partly because of a civil rights record that is not much worse. Yet Rehnquist's nomination to a lifetime position as Chief Justice of the United States may sail through. Many senators think that since Rehnquist is already on the Court, his promotion will not change the vote count and, will therefore have little impact. Nothing could be more wrong or shortsighted.

First of all there is the obvious symbolism of the choice. The Court is in the forefront of the nation's quest for justice and liberty. Its mission, in Justice Lewis Powell's words, is to afford "protection [to] . . . the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action." Justice Rehnquist's record on and off the Court has been one of consistent opposition to every effort to provide such protection. To elevate to leadership someone with such a uniquely hostile record to the fundamental mission of the institution is to mock and disparage that mission. It amounts to saying to the nation, and indeed to the whole world, for whom the U.S. Supreme Court has been a model, that we don't take that mission seriously.

The symbolic effect of the appointment is increased by the fact that the Chief Justice speaks for the Federal judiciary, as well as the Court, to Congress, the legal profession and the nation and indeed the world.

There are also tangible considerations. The Chief Justice assigns the writing of opinions when he is in the majority. Like his predecessors, Rehnquist will probably write the most important opinions himself and will probably take on a large number of them. (He reportedly writes easily and quickly.) In the past, when he has spoken for the Court in a decision restricting someone's rights, he has used sweeping and often vague language, as in a recent case refusing to recognize a right to privacy against electronic tracking devices. The scope and ramifications of such opinions are broad and difficult to confine.

Conversely, on the rare occasions when Rehnquist has joined his colleagues in upholding someone's rights—and invariably these have been decisions in which the other eight are unanimous—he has defined the right narrowly, as in a recent case involving the rights of illegitimate children to child support. Rehnquist has set something of a record for lone dissents in decisions upholding civil rights. Given the opinion-assignment power wielded by the Chief Justice, Rehnquist is likely to indulge himself far less in such largely ineffectual gestures, and instead join the majority, writing the opinion himself or assigning a kindred conservative.

The role of assigning opinions gives the chief power over the other Justices, whose place in history once they ascend the Court is determined by when and what they write. Warren Burger was said to have used his power to punish Justices whose votes had displeased him.

As chief, Rehnquist's influence will be greater with new Justices than with those now on the bench. Because he may serve as Chief Justice for from ten to twenty years, at least five new Justices will join the Court during his reign, and probably more. No matter who appoints them or who they are, they will feel the power of the Chief Justice, particularly in their early years. Moreover, some Chief Justices, such as William Howard Taft, influenced appointments to both the lower Federal judiciary and the Supreme Court itself. Given Rehnquist's activist history, he may well emulate Taft in this respect.

Finally, the Chief Justice heads a vast adminsitrative apparatus: the Federal judiciary. He designates the members of special judicial bodies, including the Temporary Emergency Court of Appeals and the secret Foreign Intelligence Surveillance Act court. He also presides over the Judicial Conference, a policy-making body which proposes and evaluates rules and legislation affecting the Federal courts. He appoints the membership and staff of the conference and of its twenty judicial committees. These groups play a significant role in the administration of justice in this country, for they deal with matters such as class-action rules, discovery, probation and sentencing. The importance of this authority is magnified by the Chief Justice's role as the spokesman to Congress on these and other legislative matters affecting court administration.

The power of the Chief Justice of the United States may not be visible, but it is very real. The Rehnquist nomination should not be dismissed as a minor shift in the Court's seating arrangements. The lifetime leadership of the third branch of our government deserves the closest scrutiny.

HERMAN SCHWARTZ.

LEGAL DEFENSE FUND,
Washington, DC, August 8, 1986.

HON. HOWARD M. METZENBAUM,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR METZENBAUM: I am writing to provide the additional information requested at the August 1, 1986 hearing regarding the nomination of Justice Rehnquist to serve as Chief Justice.

(1) We have identified 33 cases in which Justice Rehnquist voted in favor of a black complainant in a race discrimination case. Of these, 31 were unanimous opinions; in the two remaining cases only a single Justice voted against the black complainant. A list of these decisions is set out in Table A.

(2) We have identified 14 race discrimination cases brought by or on behalf of blacks in which Justice Rehnquist cast the deciding vote. These include nine cases in which the rest of the Court was evenly divided, and four cases in which, because only eight Justices participated, a vote by Justice Rehnquist in support of the complainant would have had the effect of upholding by an equally divided vote a favorable decision in the Court below. In the remaining case, *Arlington Heights* v. *MCDH,* Justice Rehnquist's vote determined whether the lower court would be permitted to consider on remand the plaintiffs' racial discrimination claim. In every one of these cases Justice Rehnquist cast the deciding vote against the civil rights claimant. None of these cases involved a dispute about quotas, and none of

these cases concerned whether a particular statute or constitutional provision forbade practices with a discriminatory affect, or were limited to instances of intentional discrimination. A list of these decisions is set forth in Table B.

(3) At last week's hearing we urged the Committee to review with particular care Justice Rehnquist's record regarding the interpretation and application of twentieth century civil rights statutes. We believe that aspect of the nominee's record is important for several reasons. First, because such cases involve considerations of statutory construction, and are thus governed by well established rules of statutory construction, a nominee's constitutional philosophy should have little impact. Second, Justice Rehnquist has explained that his decisions on constitutional cases dervies in part from a reluctance to override the will of the majority as expressed in legislation; in statutory cases, however, it is the will of the majority as expressed by Congress which the Supreme Court is asked to enforce. Third, prior to becoming a member of the Court, Justice Rehnquist on several occasions voiced opposition to the adoption of certain civil rights measures. Justice Rehnquist's actual record with regard to statutory civil rights cases is the best evidence as to whether he has been influenced as a judge by his personal disagreement with this legislation.

We have identified a total of 83 cases since 1971 in which there has been some disagreement within the Court as to the interpretation or application of a twentieth century civil rights statute.[1] These cases involve more than a dozen different laws covering employment, housing, voting, and federal assistance programs, and prohibiting discrimination on a variety of grounds, including race, sex, national origin, age, and disability. Only four of these cases involved a dispute about quotas or affirmative action.[2] Only two of these cases concerned whether a particular statute forbade practices with a discriminatory effect, or was limited to instances of intentional discrimination.[3] Because these are cases in which the interpretation or application of a civil rights statute was sufficiently debatable that members of this Court reached different conclusions, it would not, of course, be reasonable to expect Justice Rehnquist to vote in every case for the result more favorable to the civil rights plaintiffs. The Court as a whole reached such a favorable result in slightly less than half of these cases.

Among the 83 cases in which members of the Court have disagreed about the interpretation or application of a twentieth century civil rights statute, Justice Rehnquist has joined on 80 occasions for the interpretation or application least favorable to minorities, women, the elderly, or the disabled. In two cases, *Albermarle Paper Company* v. *Moody* and *Dothard* v. *Rawlinson*, Justice Rehnquist's interpretation of Title VII was less favorable to minorities and women then the standard adopted by the majority in each of these cases, but more favorable than the standard and result urged by a sole dissenter in each case. In only one of the 83 disputed cases, *Cannon* v. *University of Chicago*, did Justice Rehnquist vote for the interpretation of the law that was advanced by the civil rights plaintiffs. A complete list of the 83 cases is set out in Table C.

There are a number of Supreme Court decisions which, although they originally arose out of a civil rights controversy were resolved by the Court on another basis, were disposed of in a manner not relevant to the attached tables. In categorizing cases for the tables, some judgment calls were at times required, but they did not affect the overall pattern revealed by the study.

Yours sincerely,

ELAINE R. JONES.
ERIC SCHNAPPER.

REHNQUIST DECISIONS IN FAVOR OF BLACK COMPLAINANTS

I. UNANIMOUS DECISIONS

Ham v. *South Carolina*, 409 U.S. 524 (1973) (black criminal defendant entitled to voir dire the jurors about their racial attitudes) (9-0 opinions for defendant) (Rehnquist wrote majority opinion).

Test v. *United States*, 420 U.S. 28 (1975) (9-0 decision holding criminal defendant entitled to inspect jury roles to prove discrimination) (Rehnquist joined per curiam decision).

McDonnell-Douglas v. *Green*, 411 U.S. 792 (1973) (9-0 opinion overturning dismissal of discrimination claim and setting standards for remand) (Rehnquist joined majority opinion).

Chandler v. *Roudebush*, 425 U.S. 840 (1976) (9-0 decision holding that federal employee alleging discrimination entitled to trial de novo) (Rehnquist joined majority opinion).

Teamsters v. *United States*, 431 U.S. 324 (1976) (finding of intentional discrimination) (9-0 decision finding discrimination) (Rehnquist joined majority opinion).

Carson v. *American Brands*, 450 U.S. 79 (1981) (9-0 decision holding refusal to approve Title VII consent decree is an appealable order) (Rehnquist joined majority opinion).

EEOC v. *Shell Oil Co.*, 466 U.S. 54 (1984) (9-0 decision sustaining EEOC subpoena) (Rehnquist joined concurring opinion).

Cooper v. *Federal Reserve Board*, 81 L. Ed. 2d 718 (1984) (8-0 decision holding rejection of class claim does not bar individual claim) (Rehnquist joined majority opinion).

University of Tennessee v. *Elliott*, 54 USLW 5084 (1986) (9-0 decision holding that unreviewed state administrative proceedings do not have preclusive effect on Title VII claims) (Rehnquist joined majority opinion).

Bazemore v. *Friday*, 54 USLW 4972 (1986) (9-0 decision holding that under Title VII the defendant Extension Service had a duty to eradicate salary disparities between white and black workers that originated prior to the effective date of Title VII) (Rehnquist joined with majority).

U.S. v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972) (creation of separate school district prevented desegregation) (9-0 decision finds new district unconstitutional) (Rehnquist joined concurring opinion).

Norwood v. *Harrison*, 413 U.S. 455 (1973) (9-0 decision holds states may not provide textbooks to segregated private schools) (Rehnquist joined majority opinion).

Milliken v. *Bradley*, 418 U.S. 717 (1974) (9-0 opinion upholding remedial programs for segregated school system) (Rehnquist joined majority opinion).

White v. *Regester*, 412 U.S. 755 (1973) (9-0 opinion held that at-large plan unconstitutionally diluted votes of blacks and hispanics) (Rehnquist joined majority opinion).

Connor v. *Waller*, 421 U.S. 656 (1975) (9-0 decision holding redistricting plan is subject to §5 of Voting Rights Act) (Rehnquist joined majority opinion).

Briscoe v. *Bell*, 432 U.S. 404 (1977) (9-0 holding state cannot challenge §5 coverage) (Rehnquist joined majority opinion).

Connor v. *Coleman*, 440 U.S. 612 (1979) (8-1 decision directing district court to frame redistricting plan) (dissenter would have granted stronger remedy) (Rehnquist joined majority opinion).

Blanding v. *DuBose*, 454 U.S. 393 (1982) (9-0 decision holding letter was not request for preclearance within meaning of §5) (Rehnquist's separate opinion concurred in the result but denounced §5).

McCain v. *Lybrand*, 465 U.S. 236 (1983) (9-0 decision holding mailing of statute to Attorney General did not constitute §5 submission absenting request for preclearance) (Rehnquist concurred in judgment).

NAACP v. *Hampton County*, 84 L. Ed 2d 124 (1985) (9-0 decision holding election law changes subject to §5) (Rehnquist concurred in judgment).

Hunter v. *Underwood*, 85 L. Ed. 2d 222 (1985) (8-0 decision holding state law disenfranchising misdemeanants unconstitutional due to racial purpose) (Rehnquist wrote majority opinion).

Thornburg v. *Gingles*, 54 USLW 4877 (1986) (9-0 decision upholding §2 challenge to general at-large districts) (Rehnquist joined majority opinion as to those districts but urged adoption of standard more favorable to defendants).

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) (9-0 decision holding whites may challenge exclusion of blacks under Title VIII) (Rehnquist joined majority opinion).

Hills v. *Gautreaux*, 425 U.S. 284 (1976) (8-0 decision upholding authority of district court to order multi-city housing remedy) (Rehnquist joined majority opinion).

Havens Realty v. *Coleman*, 455 U.S. 363 (1981) (9-0 decision holding "testers" can sue under Title VIII) (Rehnquist joined majority opinion).

Tillman v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973) (9-0 decision holding exclusion of blacks from swimming pool violates §1982) (Rehnquist joined majority opinion).

Gilmore v. *City of Montgomery*, 417 U.S. 556 (1974) (9-0 decision limits use of city facilities by segregated schools) (Rehnquist joins majority opinion).

Kush v. *Rutledge*, 460 U.S. 719 (1983) (9-0 decision holding §1985(2) does not require allegation of racial animus) (Rehnquist joined majority opinion).

Palmore v. *Sidoti*, 466 U.S. 429 (1984) (9-0 decision holding state cannot deny custody of child because mother married a black) (Rehnquist joined majority opinion).

Burnett v. *Grattan*, 82 L. Ed. 2d 36 (1984) (9-0 decision rejecting 6-month limitation period for filing §1983 complaint) (Rehnquist wrote concurring opinion).

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (9-0 decision holding that an employee's statutory right to trial de novo under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of claim to final arbitration under the nondiscrimination clause of a collective-bargaining

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[1] This analysis does not include cases in which Justice Rehnquist joined unanimous opinions rejecting or sustaining a claim under one of these statutes.

[2] *Firefighters* v. *Cleveland* (July 2, 1986); *Sheetmetal Workers* v. *EEOC* (July 2, 1986); *Firefighters* v. *Stotts*, 81 L. Ed. 2d, March 4, 1983 (1984); *Steelworkers* v. *Weber*, 44 U.S. 480 (1979).

[3] *Board of Education* v. *Harris*, 444 U.S. 130 (1979) (Emergency School Aid Act); *Guardian Association* v. *Civil Service Commission*, 463 U.S. 582 (1982) (Title VI).

agreement) (Rehnquist joined majority opinion).

II. NON-UNANIMOUS DECISIONS

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful, and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977) (7-1 decision upholding district lines drawn in race conscious manner to comply with §5) (Rehnquist joined majority opinion).[1]

CASES IN WHICH JUSTICE REHNQUIST CAST DECIDING VOTE

Mayor v. *Educational Equality League*, 415 U.S. 604 (1974) (5-4 decision holding plaintiffs failed to prove racial discrimination in the selection of city officials) (Rehnquist joined in majority opinion).

Delaware College v. *Ricks*, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

American Tobacco Co. v. *Patterson*, 71 L. Ed. 2d 748 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act.) (Rehnquist in majority).

Guardians Association v. *Civil Service Commission*, 463 U.S. 582 (1982) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Milliken v. *Bradley*, 418 U.S. 717 (1974) (5-4 decision rejecting interdistrict desegregation remedy) (Rehnquist joins majority opinion).

Electrical Workers v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (5-4 decision holding period of limitations for filing Title VII charge is tolled during consideration of grievance or arbitration)

Bazemore v. *Friday*, USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion)

Warth v. *Seldin*, 422 U.S. 490 (1975) (5-4 decision holding plaintiffs lack standing to challenge allegedly discriminatory zoning) (Rehnquist joined majority opinion).

California Brewers Ass'n v. *Bryant*, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Allen v. *Wright*, 82 L. Ed. 2d 556 (1984) (5-3 decision holding black parents lack standing to challenge grant of tax exempt status to segregated private schools) (Rehnquist joined majority opinion).

City of Richmond v. *United States*, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. *United States*, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) (Rehnquist joined majority opinion).

Rizzo v. *Goode*, 423 U.S. 362 (1976) (5-3 decision holding plaintiffs failed to prove sufficient incidents of police brutality towards blacks to justify injunction) (Rehnquist wrote majority opinion).

Arlington Heights v. *Metro Housing Corp.*, 429 U.S. 252 (1977) (5-3 decision holding plaintiff had not proved refusal of rezoning was racially motivated) (Rehnquist joined majority opinion).

CASES IN WHICH MEMBERS OF SUPREME COURT DISAGREED AS TO THE INTERPRETATION OR APPLICATION OF A TWENTIETH CENTURY CIVIL RIGHTS STATUTE

(1) TITLE VI

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) (5-4 decision holding medical school admission plan violated Title VI) (Rehnquist joined in concurring opinion).

Guardians Association v. *Civil Service Commission of the City of New York*, 463 U.S. 582 (1983) (5-4 decision holding only injunction but not damages can be awarded under Title VI for an employment practice with a discriminatory impact) (Rehnquist wrote concurring opinion).

Bazemore v. *Friday*, USLW 4972 (1986) (5-4 decision limiting obligation of state to desegregate de jure system) (Rehnquist joined majority opinion).

(2) TITLE VII—RACE

Johnson v. *Railway Express Agency*, 421 U.S. 454 (1975) (6-3 decision holding that filing of a Title VII charge does not toll the § 1981 limitations period) (Rehnquist joined majority opinion).

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) (7-1 decision holding employer testing unlawful and requiring back pay in most Title VII cases) (Rehnquist joined majority and filed concurring opinion).

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (5-4 decision holding that minorities denied a job are entitled to make whole seniority relief) (Rehnquist joined dissenting opinion).

Washington v. *Davis*, 426 U.S. 229 (1976) (6-2 decision rejecting Title VII claim of discrimination) (Rehnquist joined majority opinion).

National Education Association v. *South Carolina*, 434 U.S. 102 (1978) (5-2 decision holding Title VII not violated by teacher examination disqualifying 83% of all black teachers but only 17.5 percent of whites) (Rehnquist joined summary affirmance).

Brown v. *GSA*, 425 U.S. 820 (1976) (6-2 decision holding Title VII precludes all other remedies for employment discrimination against federal employees) (Rehnquist joined majority opinion).

Electrical Workers v. *Robbin & Myers, Inc.*, 429 U.S. 299 (1976) (5-4 decision holding period of limitations for filing Title VII charge is not tolled during consideration of grievance or arbitration).

Teamsters v. *United States*, 431 U.S. 324 (1976) (7-2 decision holding employers may use seniority system that perpetuates the effect of past discrimination) (Rehnquist joined majority opinion).

Hazelwood School District v. *United States*, 433 U.S. 299 (1977) (8-1 decision holding that plantiff made out a prima facie case of discrimination but defendant entitled to adduce more evidence) (Rehnquist joined majority opinion) (Court of Appeals found discrimination and was reversed)

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) (7-2 and 5-4 decision reversing Court of Appeals finding of discrimination) (Rehnquist wrote majority opinion).

New York Transit Authority v. *Beazer*, 440 U.S. 568 (1979) (6-3 and 5-4 decision reversing district court finding of Title VII violation) (Rehnquist joined majority opinion).

Steelworkers v. *Weber*, 443 U.S. 480 (1979) (5-2 decision upholding voluntary affirmative action plan) (Rehnquist wrote dissenting opinion).

California Brewers Ass'n. v. *Bryant*, 444 U.S. 598 (1980) (4-3 decision holding challenged discriminatory practice was immune from attack) (Rehnquist joined majority opinion).

Delaware College v. *Ricks*, 449 U.S. 250 (1980) (5-4 decision construing Title VII such that plaintiffs charge was untimely) (Rehnquist joined majority opinion).

Connecticut v. *Teal*, 457 U.S. 440 (1982) (5-4 decision holding Title VII applies to any subpart of a selection procedure with a disparate impact) (Rehnquist joined dissenting opinion).

Baldwin County Welcome Center v. *Brown*, 466 U.S. 147 (1984) (6-3 decision holding filing with court of EEOC right-to-sue letter does not toll period of limitations) (Rehnquist joined majority).

Firefighters v. *Stotts*, 81 L. Ed 2d 483 (1984) (6-3 decision holding district could not modify a Title VII consent decree to require racially-based layoffs) (Rehnquist concurred in majority opinion).

Sheetmetal Workers v. *EEOC*, 54 LW 4984 (1986) (5-4 decision upholding court ordered affirmative action in Title VII case) (Rehnquist wrote dissenting opinion).

Firefighters v. *Cleveland* (July 1986) (6-3 decision upholding Title VII affirmative action settlement) (Rehnquist wrote dissenting opinion).

American Tobacco Co. v. *Patterson*, 456 U.S. 63 (5-4 decision holding that § 703(h) is not limited to seniority systems adopted before the effective date of the Act) (Rehnquist joined majority opinion).

(3) TITLE VII—SEX/NATIONAL ORIGIN/RELIGION

Cecilia v. *Espinoza*, 414 U.S. 86 (1973) (8-1 decision holding Title VII does not forbid discrimination on ground of alienage) (Rehnquist joined majority opinion) (National origin).

General Electric v. *Gilbert*, 429 U.S. 125 (1976) (6-3 decision holding Title VII permits exclusion of pregnancy related disability benefits from disability plans) (Rehnquist wrote majority opinion) (sex).

United Airlines v. *Evans*, 431 U.S. 553 (1977) (7-2 decision holding Title VII does not forbid application of seniority system that perpetuates effects of past Title VII violation) (Rehnquist joined majority opinion) (sex).

Trans World Airlines v. *Hardison*, 432 U.S. 63 (1977) (7-2 decision holding that Title VII did not require employer to accommodate religious needs of employee) (Rehnquist joined majority opinion) (religion).

Occidental Life Insurance Co. v. *EEOC*, 432 U.S. 335 (1977) (7-2 decision holding Title VII establishes no limitation period for EEOC initiated enforcement action) (Rehnquist wrote dissenting opinion) (sex).

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) (8-1 decision finding Title VII violation as to non-contact positions; Rehnquist concurring opinion adopted intermediate standard) (7-2 decision holding Title VII not violated as to contact position; Rehnquist joined majority opinion) (sex).

Los Angeles Department of Water v. *Manhart*, 435 U.S. 702 (1978) (6-2 decision holding unlawful under Title VII smaller pensions for female employees) (Rehnquist joined dissenting opinion) (sex).

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[1] In *Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982), Justice Rehnquist joined 6-3 majority holding that exhaustion of administrative remedies is not required under §1983. Although this precedent is helpful to plaintiffs presenting Civil Rights claims, the plaintiff in *Patsy* was a white alleging reverse discrimination.

Board of Trustees v. *Sweeney*, 439 U.S. 24 (1978) (5-4 decision vacating district court finding of unlawful intentional discrimination) (Rehnquist joined majority opinion) (sex).

Davis v. *Passman*, 442 U.S. 228 (1979) (5-4 decision holding exclusion of Congressional employees from Title VII coverage did not bar sex discrimination claim by such employees under § 1331) (Rehnquist joined dissenting opinions) (sex).

General Telephone v. *EEOC*, 446 U.S. 318 (1980) (5-4 decision holding EEOC may seek class-wide relief under Title VII without resort to rule 23) (Rehnquist joined dissenting opinion) (sex).

Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980) (6-3 decision establishing more stringent interpretation of deadline for filing Title VII charge) (Rehnquist joins majority opinion) (religion).

Washington v. *Gunther*, 452 U.S. 161 (1981) (5-4 decision holding Title VII forbids employer to set lower salary for a job because the position is held by women) (Rehnquist wrote dissenting opinion) (sex).

Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) (5-4 decision holding adverse determination of State law discrimination claim precludes litigation of Title VII claim) (Rehnquist joined majority opinion) (National origin-Religion).

Ford Motor Company v. *EEOC*, 458 U.S. 219 (1982) (6-3 decision limiting back pay where defendant employer makes certain job offers) (Rehnquist joined majority opinion) (sex).

Arizona Governing Committee v. *Norris*, 463 U.S. 1073 (1983) (5-4 decision holding *Manhart* violated by employer offering only discriminatory third party pension plans) (Rehnquist joined dissenting opinion) (sex).

Meritor Savings Bank v. *Vinson*, 54 USLW 4703 (1986) (5-4 establishing limits on employer legal responsibility under Title VII for sexual harassment by supervisors) (Rehnquist wrote majority opinion) (sex).

(4) TITLE VIII

Gladstone Realtors v. *Bellwood*, 441 U.S. 91 (1979) (7-2 decision holding city and certain individuals can sue under § 812 of Title VIII) (Rehnquist wrote dissenting opinion, limiting § 812 to "direct victims" of discrimination).

(5) TITLE IX

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) (6-3 decision holding there is a private right of action under Title IX) (Rehnquist wrote concurring opinion).

North Haven Board of Education v. *Bell*, 456 U.S. 512 (1982) (6-3 decision holding employment discrimination is covered by Title IX) (Rehnquist joined dissenting opinion).

Grove City College v. *Bell*, 465 U.S. (6-2 decision limiting scope of Title IX coverage) (Rehnquist joined majority opinion).

(6) VOTING RIGHTS ACT

Taylor v. *McKeithen*, 407 U.S. 191 (1972) (districting allegedly gerrymandered to prevent election of blacks) (5-3 decision orders appellate court to explain why it overturned district court order for plaintiff) (Rehnquist wrote dissenting opinion).

Georgia v. *United States*, 411 U.S. 528 (1973) (6-3 decision holding Attorney General can reject § 5 submission if state fails to establish nondiscriminatory purpose and effect) (Rehnquist joined dissenting opinion).

NAACP v. *New York*, 413 U.S. 345 (1973) (7-2 decision denies NAACP right to intervene in section 5 bailout suit) (Rehnquist joined majority opinion).

City of Richmond v. *United States*, 422 U.S. 358 (5-3 decision that annexation plan did not violate § 5) (Rehnquist joined majority opinion).

Beer v. *United States*, 425 U.S. 130 (1976) (5-3 decision holding § 5 prohibits only retrogressive election law changes) (Rehnquist joined majority opinion).

Morris v. *Gressette*, 432 U.S. 491 (1977) (7-2 decision holding Attorney General's refusal to object under § 5 not subject to judicial review) (Rehnquist joined majority opinion).

United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978) (6-3 decision holding § 5 applies to political subdivisions as well as to states) (Rehnquist joined dissenting opinion).

Wise v. *Lipscomb*, 437 U.S. 535 (1978) (6-3 decision holding Dallas redistricting not subject to § 5) (Rehnquist wrote concurring opinion).

Dougherty County v. *White*, 439 U.S. 32 (1978) (5-4 decision holding board of education rule subject to § 5) (Rehnquist joined dissenting opinion).

United States v. *Mississippi*, 444 U.S. 1050 (1980) (6-3 decision rejecting challenge to redistricting plan under § 5) (Rehnquist joined majority opinion).

City of Mobile v. *Bolden*, 446 U.S. 55 (1980) (6-3 decision holding at-large elections did not violate § 2) (Rehnquist joined majority opinion).

City of Rome v. *United States*, 446 U.S. 156 (1980) (6-3 decision holding city election law change subject to § 5) (Rehnquist wrote dissenting opinion holding Voting Rights Act unconstitutional as applied).

McDaniel v. *Sanchez*, 452 U.S. 130 (1981) (7-2 decision holding reapportionment subject to § 5) (Rehnquist joined dissenting opinion urging § 5 did not apply).

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) (8-1 decision holding state courts can enforce § 5) (Rehnquist wrote dissenting opinion).

Rogers v. *Lodge*, 458 U.S. 613 (1982) (6-3 decision finding at-large election plan adopted for unconstitutional racially discriminatory purpose) (Rehnquist joined dissenting opinion).

Port Arthur v. *United States*, 459 U.S. 159 (1982) (6-3 decision holding redistricting plan violated § 5) (Rehnquist joined dissenting opinion).

Lockhart v. *United States*, 460 U.S. 175 (1983) (6-3 decision holding election plan did not violate § 5) (Rehnquist joined majority opinion).

Thornburg v. *Gingles*, 54 USLW 4877 (1986) (6-3 division as to standard for proving § 2 standard) (Rehnquist concurred in result but joined concurring opinion proposing standard more favorable to defendants).

(7) DISCRIMINATION AGAINST DISABLED

State School v. *Halderman*, 451 U.S. 1 (1981) (6-3 decision holding § 6010 of Developmentally Disabled Assistance and Bill of Rights Act creates no legally enforceable rights) (Rehnquist wrote majority opinion).

Board of Education v. *Rawley*, 458 U.S. 176 (1982) (6-3 decision holding Education for All Handicapped Children Act does not require sign language interpreter for deaf child) (Rehnquist wrote majority opinion).

Community Television v. *Gottfried*, 459 U.S. 498 (1983) (6-3 decision holding FCC is not obligated to consider station's compliance with § 504 in renewing license) (Rehnquist joined majority opinion).

Atascaden State Hospital v. *Scanlon*, 87 L. Ed. 2d 171 (1985) (5-4 decision holding a plaintiff can never obtain damages against a state for violation of § 504) (Rehnquist joined majority opinion).

U.S. Department of Transportation v. *Paralyzed Veterans*, 54 USLW 4854 (6-3 decision holding that airline using federally-assisted airports may discriminate against the handicapped despite § 504) (Rehnquist joined majority opinion).

(8) AGE DISCRIMINATION IN EMPLOYMENT ACT

United Airlines, Inc. v. *McMann*, 434 U.S. 92 (1977) (6-3 decision holding ADEA does not prohibit mandatory retirement of 60-year-old worker under bona fide pre-Act seniority plan) (Rehnquist joined majority opinion).

Oscar Meyer and Co. v. *Evans*, 441 U.S. 750 (1979) (5-4 decision holding plaintiff need not resort to state administrative procedure prior to filing suit under ADEA) (Rehnquist joined dissenting opinion).

Lehman v. *Nakshian*, 453 U.S. 156 (1981) (5-4 decision holding there is no right to jury trial in an ADEA suit against the federal government) (Rehnquist joined the majority opinion).

(9) PREGNANCY DISCRIMINATION ACT

Newport News Shipbuilding v. *EEOC*, 462 U.S. (1983), (7-2 decision holding Act forbids distinction in pregnancy benefits between male workers with spouses and female workers with spouses) (Rehnquist wrote dissenting opinion).

(10) EMERGENCY SCHOOL AID ACT

Board of Education v. *Harris*, 444 U.S. 130 (1979) (6-3 decision holding claim under Emergency School Aid Act can be based on discriminatory impact alone) (Rehnquist joined dissenting opinion).

(11) COUNSEL FEE STATUTES

Hutto v. *Finney*, 437 U.S. 678 (1978) (5-4 decision upholding the Court of Appeals award of attorney's fees under Civil Rights Attorney's Fees Awards Act of 1976) (Rehnquist wrote dissenting opinion).

Hanrahan v. *Hampton*, 446 U.S. 754 (1980) (7-1 decision denying fees under 1976 Attorney Fees Act for interim success) (Rehnquist joined concurring opinion).

New York Gaslight Club v. *Carey*, 447 U.S. 54 (1980) (7-2 decision upholding the award of attorney's fees in a Title VII action to successful complaining party for services in state administrative and judicial proceedings) (Rehnquist joined dissenting opinion).

Maine v. *Thiboutot*, 448 U.S. 1 (1980) (6-3 decision holding that 1976 Attorney's Fees Act applies to all litigation under § 1983) (Rehnquist joined dissenting opinion).

Hughes v. *Rowe*, 449 U.S. 5 (1980) (7-2 decision holding Attorney's Fees Act did not authorize award against prison inmate) (Rehnquist wrote dissenting opinion).

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) (5-4 decision establishing standards for determining the size of fee award under 1976 Attorney's Fees Act) (Rehnquist joined majority opinion).

Pulliam v. *Allen*, 466 U.S. 522 (1984) (5-4 decision holding judicial immunity not a bar to award of attorney's fees under 1976 Attorney's Fee Act) (Rehnquist joined dissenting opinion).

Webb v. *Board of Education*, 471 U.S. (1985) (6-2 decision holding that attorney's fees are not available under 1976 Attorney's Fee Act for time spent on optional administrative proceedings prior to filing civil rights action under § 1983) (Rehnquist joined majority opinion).

Evans v. *Jeff D.*, 54 U.S.L.W. 4359 (1986) (6-3 decision holding that Court may approve civil rights class action settlement

provision for plaintiffs' waiver of claim for attorney's fees under 1976 Attorney's Fees Act) (Rehnquist joined majority opinion).

Riverside v. *Rivera*, 54 U.S.L.W. 4845 (5-4 decision upholding District Court's award of attorney's fees under 1976 Attorney's Fees Act) (Rehnquist wrote dissenting opinion).

Library of Congress v. *Shaw*, 54 U.S.L.W. 4951 (1986) (6-3 opinion holding no interest is available on fee awards against Federal agencies under Title VII) (Rehnquist joined majority opinion).

Pennsylvania v. *Delaware Valley Clean Air Counsel*, 54 U.S.L.W. 5017 (1986) (6-3 opinion holding that the lower courts apply § 304(d) Clean Air Act) (Rehnquist joined majority opinion).

REPORT ON THE CIVIL LIBERTIES RECORD OF JUSTICE WILLIAM H. REHNQUIST

(Prepared by the American Civil Liberties Union)

PREFACE

It is important that the reader understand what this report is and what it is not.

Pursuant to ACLU policy, established by the National Board of Directors of the American Civil Liberties Union, the Union does not take any position on candidates for elective or appointive office at the national, state or local level. At the same time, the Board has directed the national staff to publish reports on the civil liberties records of individuals nominated for certain offices, including positions on the Supreme Court. The purpose of such reports, like the periodic publication by the ACLU of legislative voting records on civil liberties issues, is to provide relevant information to the public. The purpose is not to suggest that the civil liberties record of any candidate ought to determine anyone's position on such candidacy.

This is the report of the civil liberties record of U.S. Supreme Court Justice William Rehnquist, who has been nominated for the position of Chief Justice of the United States. The ACLU has not, and will not, take a postion on whether the Senate should consent to his appointment.

Justice Rehnquist has served on the Supreme Court for some fifteen years and has authored and joined a large number of majority, concurring and dissenting opinions. It is not possible to summarize even briefly every opinion he has written or joined, nor is it even possible to deal with most of those opinions in a report of manageable length. Therefore no effort is made to be comprehensive. Rather, the report presents a description of Justice Rehnquist's judicial philosophy and seeks to explain how it shapes his record on civil liberties questions by focusing on those opinions which Justice Rehnquist authored alone. The ACLU believes that these opinions fairly reflect Justice Rehnquist's civil liberties record.

Justice Rehnquist has a very clear and comprehensive position on the role of the Court and the nature of the American constitutional system of government. His judicial philosophy is not shared in its entirety or even in its central features by any other person who now sits on the Court or who has served with Justice Rehnquist, including Justices who often vote with him. For that reason, his position emerges most clearly in the opinions that he has written only for himself. This report quotes extensively from these opinions so as to present Justice Rehnquist's position on civil liberties in his own words. Unless otherwise noted the opinions of Justice Rehnquist quoted from and cited are dissents in which Justice Rehnquist speaks only for himself.

A reader introduced in reviewing the entire record might want to begin with the cases cited below which suggest the range of opinions that Justice Rehnquist has authored or joined. In the cases listed Justice Rehnquist authored the opinion unless otherwise noted.

Over the past fifteen years, Justice Rehnquist has authored or joined a small number of opinions of the Court which have expanded civil liberties. In almost all of these cases the issue was one of statutory, rather than constitutional, construction, and in many he issued concurring opinions joining the holding on narrower grounds. *See* e.g.:

Nashville Gas Co. v. *Satty*, 434 U.S. 136 (1977) (Discrimination under Title VII when women denied senority when returning from mandatory pregnancy leave.)

Meritor Saving Bank v. *Vinson*, 54 U.S. L.W. 4703 (June 19, 1986) (Title VII prohibits sexual harassment.)

Estelle v. *Smith*, 451 U.S. 454 (Rehnquist's concurring opinion at 474-476.) (1981) (Testimony of court-ordered, pretrial examining psychiatrist not admissible at capital sentencing proceeding.)

Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) (FOIA does not provide authority for a private business to seek court order enjoining release of information.)

Hunter v. *Underwood*, 85 L ED 2d 222 (1985) (State constitutional provision disenfranchising persons convicted of crimes unconstitutional as to misdemeanants.)

Cannon v. *University of Chicago*, 441 U.S. 677 (Rehnquist's concurring opinion at 717-718.) (1979) (Woman alleging sex discrimination has a private cause of action under Title IX.) (Justice Rehnquist joins in majority opinion.)

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (Rehnquist's concurring opinion at 441-447.) (1975) (Expanding rights under Title VII.) (Justice Rehnquist joins in majority opinion.)

Patsy v. *Florida Board of Regents*, 457 U.S. 496 (1982) (Exhaustion of Administrative Remedies not required under Sec. 1983.) (Justice Rehnquist joins in majority decision.)

U.S. v. *Ortiz*, 422 U.S. 891 (Rehnquist's concurring opinion at 898-899.) (1975) (Warrantless vehicle searches by the Border Patrol at checkpoints must be based on probable cause or consent.) (Justice Rehnquist joins in majority decision.)

Wolff v. *McDonnell*, 418 U.S. 539 (1974) (Prisoners' Rights.) Justice Rehnquist joins majority opinion.)

Procurier v. *Martinez*, 416 U.S. 396 (1974) (Prisoners' Rights.) Justice Rehnquist joins majority opinion.)

In a larger number of cases he has authored or joined majority opinions limiting civil liberties. *See*, e.g.:

Goldman v. *Weinberger*, 54 U.S. L.W. 4298 (March 25, 1986) (Army regulations prohibiting wearing of yarmulkes upheld.)

Posadas de Puerto Rico Ass'n. v. *Tourism Co. of Puerto Rico*, 54 U.S. L.W. 4956 (July 1, 1986) (Restrictions on Casino advertising upheld.)

Time, Inc. v. *Firestone*, 424 U.S. 448 (1976) (Participants in judicial proceedings are not "public figures" for purposes of libel suits.)

Michael M. v. *Superior Court of Sonama County*, 450 U.S. 464 (1981) (Sex-based distinction in a rape statute not unconstitutional.)

General Electric v. *Gilbert*, 429 U.S. 125 (1976) (Pregnancy discrimination not covered under Title VII.)

Edelman v. *Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment limits federal courts remedial power to award retroactive relief to disabled persons.)

Pennhurst v. *Halderman*, (I), 451 U.S. 1 (1981) (Congressional statute conferred no substantive rights on mentally retarded persons.)

Salyer Land Co. v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (Weighted voting based on land ownership upheld.)

Mahan v. *Howell*, 410 U.S. 315 (1973) (State and local redistricting subject to less rigorous standards than congressional districts.)

Bowers v. *Hardwick*, 54 U.S. L.W. 4919 (June 30, 1986) (Constitution does not provide a right to engage in sodomy.) (Justice Rehnquist joins majority opinion).

Bounds v. *Smith*, 430 U.S. 819, 837-841 (1977) (Limiting prisoners' rights.)

Paul v. *Davis*, 424 U.S. 693 (1976) (Rejecting right of privacy as to disclosure of unadjudicated arrest records.)

INS v. *Delgado*, 466 U.S. 210 (1984) (INS factory searches do not constitute either detention or seizure.)

Justice Rehnquist has also authored and joined a number of minority opinions which would have limited civil liberties. *See* e.g.:

County of Washington v. *Gunther*, 452 U.S. 161, 181-204 (1981) (Title VII does not apply to intentional sex-based wage discrimination.)

Michigan v. *Jackson*, 89 L. Ed. 631, 643-647 (1986) (Limiting right to counsel.)

Hill v. *Stone*, 421 U.S. 239, 302-308 (1975) (Approving restrictions on voting based on wealth.)

Roe v. *Wade*, 410 U.S. 113, 171-178 (1973) (No right of abortion in the Constitution.)

Payton v. *N.Y.*, 445 U.S. 573, 620-621 (1980) (Warrantless nonconsensual entry into a home to make a felony arrest does not violate Fourth Amendment.)

A report which included detailed consideration of these and other cases would not present a different view of Justice Rehnquist's civil liberties record.

SUMMARY

Two propositions are central to Justice Rehnquist's civil liberties record and the degree to which his views differ from those of every Justice with whom he has served on the Court. First, he believes that it is far worse to hold a statute unconstitutional than to deny an individual his/her civil rights. Second, he believes that the Bill of Rights as applied to the states prevents them from encroaching on the rights of individuals only when the state action is "irrational."

In Justice Rehnquist's opinion, the primary responsibility of the Supreme Court is to protect the freedom of action of the states against the actions of the federal government and the claims of rights by individual citizens. In interpreting federal legislation or actions of the federal courts which affect the powers of the states, he interprets the Constitution so as to preserve state autonomy. In dealing with individual liberty, on the other hand, he does not believe that the courts should go beyond the literal words of the Constitution or the original intentions of the Framers. Thus, he rejects the view that the Supreme Court has a special obligation to defend individual liberty, and rejects the position, often expressed in the opinions of the Court, that the Bill of Rights as a whole, and the First

Amendment in particular, have a favored place in the constitutional scheme.

This approach to the Constitution—viewing it as the creation of the majority whose primary objective was to preserve the power of the states—also determines Justice Rehnquist's view of the Civil War Amendments. Every other sitting Justice has come to accept the position that the Fourteenth Amendment "incorporates" the major provisions of the Bill of Rights and therefore requires the states to observe these limits on governmental action to the same degree that the federal government is limited. Justice Rehnquist, in marked contrast, views the Civil War Amendments as having only very limited applicability. Writing on a clean slate, Justice Rehnquist would reject the doctrine of incorporation entirely, and would permit the states to restrict the liberty of their citizens within limits proscribed by their own state constitutions and those few rights in the federal constitution that apply explicitly to the states. Justice Rehnquist mentions this position only in passing in his opinions, and focuses instead on the very narrow reading that he would give to the applicability of the Bill of Rights to the states.

The Supreme Court, with only Justice Rehnquist dissenting, has consistently interpreted the Equal Protection clause of the Fourteenth Amendment to prohibit discrimination on a variety of "suspect" grounds, including sex and citizenship. By contrast, Justice Rehnquist holds that the Amendment applies only to race discrimination, and even as to race only when segregation was the official policy of the state.

The Due Process clause of the Fourteenth Amendment, again with only Justice Rehnquist in dissent, has been held to require the states to observe the protections of liberty found in the Bill of Rights. In Justice Rehnquist's view the Amendment "incorporates" only the most fundamental principles of the Bill of Rights. State legislatures have wide latitude to determine what actions to take. In contrast to his Supreme Court colleagues who subject such legislation to heightened scrutiny of various kinds, Justice Rehnquist believes that the role of the Supreme Court in cases involving challenges to state action on constitutional grounds is limited to determining if the legislation is "irrational." If it is not, the Court must uphold the statute. Applying this rational basis test, Justice Rehnquist would permit the states to restrict freedom of speech or press in ways that would, in his view, violate the First Amendment if done by the federal government. This approach has led Justice Rehnquist to uphold the actions of states in the area of religion whether they expanded or limited religious liberty as long as he could articulate a rational reason for the state action.

Because of his belief that such legislation need only not be "irrational," Justice Rehnquist has routinely voted to uphold the constitutionality of state statutes not only when a majority of the court or a large minority took the same position, but also when all of his colleagues on the Supreme Court agreed the law violated the Constitution.

In addition, Justice Rehnquist holds a number of substantive views which affect his interpretation of civil liberties. He believes, for example, that the Establishment Clause of the First Amendment prohibits government aid to a particular religion, but does not prohibit legislation whose purpose is to support all religions. He also believes that commercial speech is not entitled to any special constitutional protection.

The civil liberties record of Justice Rehnquist is most succinctly summarized in his opinion of how a Justice should weigh the relative harms of denying a person rights under the Constitution and striking down a legislative act:

"An error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best."—*Furman* v. *Georgia*, 408 U.S. 238, 468 (1972) (three Justices joining in the dissenting opinion).

To the extent that the Bill of Rights and the Civil War Amendments were designed precisely to limit the popular will when it impinges on individual rights, Justice Rehnquist's view is inconsistent with the functional purpose of the Bill of Rights and the generally accepted role of the federal courts in enforcing it.

THE CIVIL LIBERTIES RECORD OF JUSTICE REHNQUIST

This is a report by the American Civil Liberties Union of the civil liberties record of Justice William H. Rehnquist. It first presents a description of the basic principles which Justice Rehnquist brings to the adjudication of claims that actions violate civil liberties or civil rights. It then deals with the role of the Fourteenth Amendment, which is central both to the protection of civil liberties and to understanding why Justice Rehnquist so often takes a position on civil liberties issues which finds no other support on the Court. Finally, the report describes his views on the First Amendment which depart from those of the rest of the court.

PROTECTING CIVIL LIBERTIES

In his Supreme Court opinions and his extra-judicial writings, Justice Rehnquist rejects the notion that the Supreme Court has a special responsibility to protect civil liberties to protect the individual against the excesses of the majority. Rather, he maintains that the Court's obligation is to protect the primary political structures of the government, which include the independence of the states and majority rule. This approach is illustrated, for example, by the narrow reading that Justice Rehnquist gives to the 5th clause of the Fourteenth Amendment. The power given to the Congress in that clause to take actions necessary to effectuate the purposes of the Amendment is viewed narrowly so as to protect the rights of the states to determine their own political structures and procedures. See *City of Rome v. U.S.* 446 U.S. 156, 168 (1980) (dissent joined by Justice Stewart). Doubts are to be resolved in favor of permitting the will of the legislature to be effectuated and the automony of the states protected. As Justice Rehnquist explains in a dissenting opinion in a death penalty case (joined by three other Justices):

"Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people coexist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

"The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed 60 (1803). An oft-told story since then, it bears summarization once more. Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people.

"The Founding Fathers thus wisely sought the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

"The courts in cases properly before them have been entrusted under the Constitution with the last word, short of constitutional amendment, as to whether a law passed by the legislature conforms to the Constitution. But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone dissenting in *United States* v. *Butler* must be constantly borne in mind:

'[W]hile unconstitutional exercises of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.' 297 US 1, 78-79, 80 L Ed 477, 495, 56 S Ct 312, 102 ALR 914 (1936).

"Rigorous attention to the limits of this Courts authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires. This is doubtless why nearly two centuries of judicial precedent from this Court counsel the sparing use of that power. The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. The Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill when he observed:

"The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power." *On Liberty* 28 (1855).

"A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of rights secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

"The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment." *Furman v. Georgia*, 408 U.S. 238, 466 (1972). *See also Fry v. U.S.* 421 U.S. 542, 549-559 (1975); *Carey v. Population Services International*, 431 U.S. 678, 717-719 (1977).

Justice Rehnquist also rejects the view that the courts should interpret the Bill of Rights in light of changing morality and circumstances. In an article challenging the notion of a "living Constitution," Justice Rehnquist sums up his view of this doctrine:

"The brief writer's version of the living Constitution, in the last analysis is a formula for an end run around popular government. To the extent that it makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution, the brief writer's version of the living Constitution is genuinely corrosive of the fundamental values of our democratic society." Rehnquist, "The Notion of a Living Constitution," 54 *Texas Law Review* 693, 706 (May 1976).

In this view, protection for new rights as reflected in new moral values should come exclusively through legislation or constitutional amendment and not by the Supreme Court interpreting a "living" Constitution. "[S]urely," Justice Rehnquist wrote in dissenting from a decision of the Court holding that it violated the Fourteenth Amendment to exclude women from juries, "constitutional adjudication is a more canalized function than enforcing as against the States this Courts perception of modern life." *Taylor v. Louisiana*, 419 U.S. 522, 542 (1975). In the article quoted just above, he puts the point more fully as follows:

"It seems to me that it is almost impossible, after reading the record of the Founding Fathers' debates in Philadelphia, to conclude that they *intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations.* The Constitution that they drafted was indeed intended to endure indefinitely, but the reason for this very well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to furnish the motive power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring. Limitations were indeed placed upon both federal and state governments in the form of both a division of powers and express protection for individual rights. These limitations, however, were not themselves designed to make certain that the constituent branches, when they attempted to solve those problems, should not transgress these fundamental limitations." *Id.* 699.

Justice Rehnquist does not believe that legistation challenged on the grounds that it violates constitutional rights should be subjected to strict scrutiny. Rather he believes that the Supreme Court should not invalidate legislation on constitutional grounds unless the Court is sure that the Constitution compels that result. Actions of legislatures should be accorded a presumption of constitutionality. Justice Rehnquist in a number of lone dissents quotes from *McGowan v. Maryland*, 366 U.S. 420 (1961) which he believes establishes this principle even when individual rights are at stake. Here is a typical statement of his position:

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 US 420, 425-426, 6 L Ed 2d 393, 398-399, 81 S Ct 1101 (1961). Under this test, so long as the 'discrimination is founded upon a reasonable distinction, or difference in state policy.' Allied Stores of Ohio, Inc. v. Bowers, 358 US 522, 528, 3 L Ed 2d 480, 485, 79 S Ct 437 (1959). The Court will not attempt to weigh its social value or determine whether the classification might have been more finely drawn. Ferguson v. Skrupa, 372 US 726 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR 2d 1347 (1963). However, this salutary principle has been departed from by the Court in recent years, as pointed out in its opinion here, where the Court has felt that the classification has affected what it conceives to be 'fundamental personal rights.'" *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 178-179 (1972). See also *Zablocki v. Redhail* 434 U.S. 374, 407-411 (1978); *Sugarman v. Dougall* 413 U.S. 634, 649-664 (1973).

Actions of administrators are assumed to be valid: "I think that the Court's approach reverses the presumption of constitutionality accorded acts of the States," Justice Rehnquist writes in a lone dissent. "The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not." *Delaware v. Prouse* 440 U.S. 648, 667 (1979). Administrators must be given very wide latitude to act. The role of the federal courts is limited to enjoining actions that are specifically prohibited by the Constitution. *Hutto v. Finney* 437 U.S. 678, 710-714 (1978). Those who wish to protect new rights, such as those of women, the right to an abortion, or the rights of aliens or prisoners should look to the legislatures or the constitutional amendment process rather than to existing constitutional principles as applied by the courts to new conditions.

Justice Rehnquist believes that in appropriate circumstances the Court should look beyond the original intent of the Framers and should not be bound by a literal reading of the Constitution. Where he differs from those who believe that a primary function of the Supreme Court is to protect civil liberties is on the question of when to rely exclusively on presumed original intent only and apply a literal reading of the Constitution. Confronted with claims of civil liberties or equal protection, Justice Rehnquist declines to go beyond the intent of the Framers as he sees it. In contrast, he goes beyond original intent to take account of changing conditions when the issue is the ability of the states to avoid federal regulation. (Compare, Roe v. Wade, 410 U.S. 113, 171-178 (1973) (abortion) *Payton v. N.Y.* 445 U.S. 573, 620-621 (1980) (privacy), *Woodson v. North Carolina* 428 U.S. 280, 308-324 (1976) (death penalty), *Carey v. Population Services International* 431 U.S. 678, 717-719 (1977) (contraceptive services), with *Nevada v. Hall* 440 U.S. 410, 432-443 (1979) (states rights) (dissent joined by Chief Justice Burger). He requires an explicit and unmisfeasable reference in the Constitution to uphold individual rights, but imposes no such requirement when the question is whether federal legislation impermissibly restricts the power of the states. *(See, Fry v. U.S.* 421 U.S. 542, 549-559 (1975)).

THE FOURTEENTH AMENDMENT

It is impossible to exaggerate either the role of the Fourteenth Amendment in protecting civil liberties in the United States, or the degree to which Justice Rehnquist's view of that Amendment explains his civil liberties records.

The Bill of Rights originally applied only to the federal government. Although there were earlier hints of this position, it was not until the 1930's that the Supreme Court began to systematically "incorporate" the Bill of Rights into the Fourteenth Amendment. Over the past 30 years the Court has held that almost all of the elements of the Bill of Rights apply to the states in the same way as they apply to the Federal government. For example, whatever restrictions the First Amendment puts on actions of the federal government it also places on actions of the states. Relying on this doctrine, the Supreme Court has struck down numerous statutes and state actions which discriminate against classes of people has held unconstitutional state and local statutes which violate rights both explicitly mentioned in the Bill of Rights, such as freedom of religion and the right to be secure in one's home, as well as rights which the court has found implicit in the Constitution, such as the right to travel and to privacy. This doctrine of "selective incorporation" was initially controversial both on and off the Supreme Court. On the Court, Justice Frankfurter and Harlen led the fight against full or selective incorporation. For most the fight is over; "incorporation" is now accepted as the settled interpretation by every sitting Supreme Court Justice but Justice Rehnquiust. See, *Wallace v. Jaffree* 86 L Ed 2d 29, 38 (1985).[1]

[1] See also Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986).

Justice Rehnquist's view is totally different. He is very skeptical of the doctrine of incorporation and continues in his optinions to dismiss it as an error. Although he does not seem to advocate the complete abandonment of the doctrine or to base his opinions on such a view, he does reach his conclusions on issues before the court based on a very narrow reading of the role of the Fourteenth Amendment and of "incorporation."

The key phrases of the Fourteenth Amendment read as follows:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court has interpreted the first clause as "incorporating" many elements of the Bill of Rights, and the second as preventing discrimination on a number of "suspect" grounds in addition to race. In assessing the constitutionality of statutes it often blends the requirements of the two sections. Justice Rehnquist insists on their strict separation and a very narrow reading of each one. In one of his many dissents in cases applying the Fourteenth Amendment to the states and limiting state action Justice Rehnquist puts his view this way:

"I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the 'rational basis test,' *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970), and that under the Due Process Clause it need only be shown that it bears a rational relation to a constitutionally permissible objective. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 733, 83 S. Ct. 1028, 1032, 10 L.Ed.2d 93 (1963) (Harlan, J., concurring). The statute so viewed as a permissible exercise of the State's power to regulate family life and to assure the support of minor children, despite its possible imprecision in the extreme cases envisioned in the concurring opinions." *Zablocki v. Redhail*, 434 U.S. at 407 (1978).

His view of the Equal Protection Clause is that it relates only to race and not to discrimination on other grounds:

"The Equal Protection Clause was adopted as a part of the Fourteenth Amendment in 1868. Five years later Mr. Justice Miller delivered this Court's initial construction of that amendment in his classic opinion in Slaughter-House Cases, 16 Wass 36, 21 L Ed 394 (1873). After setting forth an account of the adoption of that amendment, he described the account as a 'recapitulation of events, almost too recent to be called history, but which are familiar to us all.' 16 Wall, at 71, 21 L Ed at 407. Referring to the Equal Protection Clause, he said: 'We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.' 16 Wall, at 81, 21 L Ed at 410.

"In nearly 100 years of subsequent adjudication concerning this clause, the Court has adhered to the notion expressed in the Slaughter-House Cases that racial classifications are 'suspect.' *See e.g., Loving v. Virginia*, 388 US 1, 18 L Ed 2d 1010, 87 S Ct 1817 (1967). But during that same period of time, this Court has proved Mr. Justice Miller a bad prophet with respect to nonracial classifications." *Weber* 406 U.S. at 178.

Rejecting this expansion, he has dissented, often alone, in a long list of cases in which the Supreme Court has applied equal protection analysis to a variety of classifications and struck down state laws as violative of the equal protection mandate of the Fourteenth Amendment.

Even as to race, Justice Rehnquist takes a narrow view, holding that Equal Protection applies only to those evils which were, in his opinion, envisioned by the Framers of the Amendment and only to remedies aimed at those specific evils. Thus, in his view, it does not permit actions to overcome de facto segregation, or to issue orders affecting entire school systems unless there was a formal, system-wide "dual" system of white and black schools. Justice Rehnquist has, as a result, dissented in major school desegregation cases. See *Columbus Board of Education v. Penick*, 443 U.S. 449, 489-525 (1979) (Justice Powell joined in dissent) and *Keyes v. School District No. 1*, 413 U.S. 189, 254-265 (1973). Justice Rehnquist also dissents from the nearly unanimous holdings of the Court that the fifth clause of the Fourteenth Amendment giving the Congress the power to take steps necessary to effectuate the objections of the Amendment is very broad. He thus dissented from an opinion ordering the City of Rome to change its electoral system:

"Congress unquestionably has the power to prohibit and remedy state action which intentionally deprives citizens of Fourteenth and Fifteenth Amendment rights. But unless these powers are wholly uncanalized, it cannot be appropriate remedial legislation for Congress to prohibit Rome from structuring its government in the manner as its population sees fit absent a finding or unrebutted presumption that Rome has been or is, intentionally discriminating against its black citizens. Rome has simply committed no constitutional violations, as this Court has defined them.

"More is at stake then sophistry at its worst in the Court's conclusion that requiring the local government to structure its political system in a manner that most effectively enhances black political strength serves to remedy or prevent constitutional wrongs on the part of the local government. . . . The enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to 'get even' for wrongs inflicted on their forebears. What is now at stake in the city of Rome is the preference of the black community to be represented by a black. This Court has never elevated such a notion, by no means confined to blacks, to the status of a constitutional rights. *See Whitcomb v. Chavis*, 403 US 124, 29 L Ed 2d 363, 92 S Ct 1858 (1971).

* * * * *

"The Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate. Nor do I believe that Congress can do so, absent a finding that this obligation would be necessary to remedy constitutional violations on the part of the local government.

* * * * *

"To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process." *City of Rome v. U.S.*, 446 U.S. 156.

Justice Rehnquist grudgingly accepts the doctrine of specific incorporation as settled constitutional law, but interprets its consequences in a narrow way which has no other adherents on the court. In an opinion for the Court, Justice Stevens described the position to which Justice Rehnquist takes exception:

"Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

"As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, the Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again." *Wallace v. Jaffree*, 86 L. Ed.2d 29, 38-39 (1985) (footnotes omitted).

Justice Rehnquist's contrary view is that only the very general principles of each Amendment of the Bill of Rights are to be applied to the states. The states, for example, are limited by the requirement in the First Amendment that they pass no law abridging freedom of speech. However, the states are not limited by the decisions of the Supreme court elaborating that doctrine and applying it in various situations. Rather, the states are free to take actions which if undertaken by the federal government would violate the First Amendment as long as such actions do not violate the fundamental spirit of the Amendment. In this typical explanation, Justice Rehnquist notes that his position is the same as that consistently taken by Justices Harlan and Jackson:

"The limits imposed by the First and Fourteenth Amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting.

* * * * *

"For the reasons stated in the dissenting opinion of Mr. Justice Jackson in *Beauharnais v. Illinois*, 343 US 250, 288-295, 96 L Ed 919, 72 S Ct 725 (1952), and by Mr. Justice Harlan in his dissenting opinion in *Roth v. United States*, 354 US 476, 500-503, 1 L Ed 2d 1498, 77 S Ct. 1304, 14 Ohio Ops 2d 331 (1957), I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the 'general principle' of free speech, *Gitlow v. New York*, 268 US 652, 672, 69 L Ed 1138, 45 S Ct. 625 (1925) (Holmes, J., dissenting), that the latter incorporates. See *Palko v.*

Connecticut, 302 US 319, 324-325, 82 L Ed 288, 58 S Ct 149 (1937)." *Buckley v. Valeo*, 424 U.S. 1, 290-91 (1976). *See also First National Bank v. Bellotti* 435 U.S. 765, 823-828 (1978).

To take another example, the Supreme Court has held that in order to effectuate the Fifth Amendment ban on self-incrimination, a criminal defendant is entitled to have the judge instruct the jury that it cannot consider the fact that a defendant failed to testify. Justice Rehnquist believes that this rule is valid in the federal context but cannot be applied to the state courts by the Supreme Court. Only the literal rule against self-incrimination applies to the states, and the federal courts have no power to order the states or the state courts to take actions to effectuate that principle. As long as they do not literally compel someone to testify against him or herself, the states are free to determine how the purpose of the injunction is to be effectuated. Here is how Justice Rehnquist explained this position in a long dissent:

"If we begin with the relevant provisions of the Constitution, which is where an unsophisticated lawyer or layman would probably think we should begin, we find the provision in the Fifth Amendment stating that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .' Until the mysterious process of transmogrification by which this Amendment was held to be "incorporated" and made applicable to the States by the Fourteenth Amendment in *Malloy v. Hogan*, 378 US 1, 12 L Ed 2d 653, 84 S Ct. 1489 (1964), the provision itself would not have regulated the conduct "of criminal trials in Kentucky. But even if it did, no one here claims that the defendant was forced to take the stand against his will or to testify against himself inconsistently with the provisions of the Fifth Amendment. The claim is rather that in *Griffin v. California*, supra, the Court, building on the language of the Constitution itself and on *Malloy*, supra, held that a charge to the effect that any evidence or facts adduced against the defendant which he could be reasonably expected to deny or explain could be taken into consideration by the jury violated the constitutional privilege against compulsory self-incrimination. The author of the present opinion dissented from that holding, stating: 'The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a mater of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the constitution's commands.' 380 US, at 623, 14 L Ed 2d 106, 85 S Ct 1229, 5 Ohio Misc 127, 32 Ohio Ops 2d 437." *Carter v. Kentucky*, 450 U.S. 288, 308-310 (1981).

Justice Rehnquist applies this view across the board and consistently finds that there are severe limits on the authority of the federal courts to insure that state courts effectively protect civil liberties. He believes that the Supreme Court should exercise self-restraint in order to promote what he describes as a healthy pluralism:

"We have at present 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution. As said by Mr. Justice Jackson, concurring in the result in *Brown v. Allen*, 344 U.S. 433, 540, 73 S. Ct. 397, 427, 7 L.Ed. 469 (1953), "We are not final because we are infallible, but we are infallible only because we are final."

"The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens. But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in federal system but in each of the 50 states, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragement of the 220 million people who compose the population of this country. In the same concurrence just quoted, Mr. Justice Jackson accurately observed that '[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states.' *Id.* at 534, 73 S.Ct., at 423.

"However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), requires that this Court through ever-broadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 States.

"The issue here is not whether the 'right' to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's 'right' to a fair trial conferred by other Amendments to the Constitution; it is instead whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state-court system did in this case. Being unable to find any such prohibition in the First, Sixth, Ninth, or any other Amendment to the United States Constitution, or in the constitution itself, I dissent." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 605-606 (1980).

Justice Rehnquist's analysis leads him to the view, not supported by any other Justice on the Court, that the Supreme Court cannot require the states to follow specific procedures in death penalty cases. Once the Court has determined that capital punishment is not cruel and unusual punishment within the meaning of the Eighth Amendment as it applies to the States, the Court lacks authority over the procedures used by the state to determine when the penalty should be applied and with what safeguards. In his own words, put succinctly in a dissenting opinion:

"[I]f capital punishment is not cruel and unusual under the Eighth and Fourteenth Amendments, as the Court held in that case, the use of particular sentencing procedures, never previously held unfair under the Due Process Clause, in a case where the death sentence is imposed cannot convert that sentence into a cruel and unusual punishment. The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed. I would therefore affirm the judgment of the Supreme Court of Florida." *Gardner* v. *Florida*, 430 U.S. 349, 371 (1977). See also *Woodson v. North Carolina*, 428 U.S. 280,m 308-324 (1976), *Lockett v. Ohio* 438 U.S. 586, 628 (1978), and *Coleman v. Balkcom* 451 US 949 (1981).

In determining whether a state statute or action runs afoul of the Bill of Rights, Justice Rehnquist does not apply the same rules that would apply to such a challenge to a federal statute. Rather he applies the test which the Supreme Court applies to actions of the states which are challenged on grounds other than that they violate individual rights. Justice Rehnquist thus asks only whether the state action, whether by the legislature or an administrator, is rational. Unless he finds the action to be irrational, Justice Rehnquist upholds it. See, e.g. *Sugarman v. Dougall*, 413 US 634, 649-664 (1973). It is not even necessary for the state to have articulated a rational reason for its actions; rather the "Equal Protection Clause of the Fourteenth Amendment requires neither that the state enactments be 'logical' nor that they be 'just' in the common meanings of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved." *Weber v. Aetna*, 406 U.S. 164, 183 (1972). See also *Sugarman v. Dougall*, 413 U.S. 631, 658 (1973).

Justice Rehnquist's opinions in cases arising under the Establishment and Free Exercise Clauses of the First Amendment illustrate how he applies these principles and why they often lead him to positions not accepted by any other member of the Court. The starting point for Justice Rehnquist in analyzing any such case is what action the legislature has taken. State action must, in his view, be accorded a presumption of constitutionality and be over-turned only if it has no rational purpose. Thus, Justice Rehnquist is no more willing to find a constitutional violation when a state refuses to provide religious facilities for a Buddhist prisoner, *Cruz v. Beto*, 405 U.S. 319, 324-328 (1972), or to bend the unemployment laws to accommodate religious beliefs, *Thomas v. Review Board*, 450 U.S. 707, 720-727 (1981), than he is to find a violation when the state allows a religious institution to veto the granting of a liquor license, *Larkin v. Grindel's Den* 459 U.S. 116 (1982). In each of the cases Justice Rehnquist dissented alone. He did so because he applied a different test than that of all of his colleagues. They applied particularized standards that the Court has developed to address challenges under the Free Exercise and Establishment clauses. Justice Rehnquist asked only if the state action was "irrational". Finding that it was not, he held that the Supreme Court had no power to hold it unconstitutional.

Similarly, in cases involving such issues as the rights of women, of aliens, of prisoners, and in cases relating to freedom of speech, Justice Rehnquist has penned lone dissents because he asked only whether there was some conceivable rational purpose for the statute, while his colleagues were balancing the state interest against the right of the individual with some degree of special scrutiny providing a balance in favor of the right of the individual. *Taylor* v. *Louisiana*, 419 U.S. 522, 538-539 (1975) (woman), *Weber* v. *Aetna* 406 U.S. 164, 177-185 (1972) (illegitimate children), *Zablocki* v. *Redhail* 434 U.S. 374, 407-411 (1978) (marriage), *Sugarman* v. *Dougall*, 413 U.S. 634, 649-664 (1973) (aliens), *Hutto* v. *Finney*, 437 U.S. 678, 710-714 (1978) (prisoners), *Woodsom* v. *North*

Carolina, 428 U.S. 280, 308-324 (1976) (death penalty procedures), and *Carey* v. *Population Services International*, 431 U.S. 678, 717-719 (1977) (right to contraception). *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (scope of Fourth Amendment).

FIRST AMENDMENT

In two fundamental respects Justice Rehnquist's substantive view of the First Amendment differs from that of all of his colleagues on the Court and shapes his opinions on issues relating to these two aspects of the Amendment.

All of the other Justices of Supreme Court take the view that the Establishment clause of the First Amendment prohibits actions by the state of federal government which support religion. Justice Rehnquist believes that the provision only prohibits aid to a particular religion. In his famous lone dissent on this issue in *Wallace* v. *Jaffree* he explains his view as follows:

"It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establisment of a national religion, and forbade perference amont religious sects or denoninations. Indeed, the first American dictionary defind the word 'establishment' as 'the act of establishing, founding, ratifying or ordaining(g,') such as in '[t]he episcopal form of religion, so called, in England.' 1 N. Webster, American Dictionary of the English Language (1st ed 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the 'wall separation' that was constitutionalized in Everson.

"Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall ideal might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and prinicpled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since Everson our Establishment Clause cases have been neither prinicipled nor unified. Our recent opinions, many of them hopelessly divided pluralties, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.' Lemon v. Kurtzman, 403 US 602, 614, 29 L Ed 2d 745, 91 S Ct 2105 (1971); Tilton v. Richardson, 403 US 672, 677-678, 29 L Ed 2d 790, 91 S Ct 2593, 5 Ohio Ops 3d 197 (1977); Lynch v. Donnely, 465 US ——, 79 L Ed 2d 604, 104 S Ct 1355 (1984).

"Whether due to its lack of historical support or its practical unworkability, the Everson 'will' has proven all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that '[m]etaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.' Berkey v. Third Avenue R. Co. 244 NY 84, 94, 155 NE 58, 61 (1926).

"But the greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The 'crucible of litigation,' ante at 14, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The 'wall of separation between church and States' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." *Wallace* v. *Jaffree*, 53 U.S. L.W. 4665, 4683-4684 (U.S. June 4, 1985) (footnotes omitted).

Justice Rehnquist also takes the view that commercial speech is not entitled to any special constitutional protection. *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U.S. 748, 781-790 (1976). Although he has joined in and even authored opinions for the Court applying the majority view that commercial speech is entitled to some First Amendment protection, he continues to assert his view that the federal government, as well as the states, are free to put any limits that they choose on the public statements of corporations.

CONCLUSION

This report on Justice Rehnquist's civil liberties record has focused not on his opinions in particular areas of the law, but rather on the philosophical approach that he brings to the adjudication of constitutional claims and in particular to his view of the Fourteenth Amendment. It attempts by this means to illuminate the sources of Justice Rehnquist's opinions and permit an evaluation of his civil liberties record taken an a whole.

As indicated at the outset, Justice Rehnquist rejects the views that the primary function of the Supreme Court is to protect the rights of persons and that the Court should err, if err it must, on the side of protecting individual liberty. A review of Justice Rehnquist's votes during the fifteen years on which he has served on the Supreme Court leaves no doubt that he has been faithful to that premise.

Mr. HATCH addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I wish to say that all of these matters have been debated very fully, all of them have gone over time and time again in the committee. I agree they should be brought up here.

On the other hand, there is a great propensity on the part of people who are opposed to the nominee to resolve every ambiguity in favor of their position against nominee, regardless of his years of public service, regardless of how good a Justice he is, regardless of the fact that he has the complete support of the fellow Justices, regardless of the fact that he is a good man and a leading intellect on the Court. I find that inconguous.

Let me take a few minutes to discuss one of the arguments that has come up. Several myths have circulated about Justice Rehnquist's 15 years on the Court. We heard that he was the Court's foremost lone dissenter. We heard charges of impropriety in connection with the Laird versus Tatum case. These deserve clarification.

At the outset of these proceedings, we heard that Justice Rehnquist's record as the Court's leading lone dissenter makes him too extreme to serve as Chief Justice. The problem with this argument is that it is not accurate. Justice Rehnquist is simply not the Court's leading lone dissenter. In the 10 years their terms have overlapped, Justice Stevens' record of lone dissents has far outstripped that of Justice Rehnquist. Over that period, Justice Stevens dissented alone 51 times, Justice Rehnquist, 40 times. The title of greatest dissenting author on the Court also goes to Justice Stevens with 145 from 1980-84. That is the difference in the number. Justice Brennan had 106 for that period; and Justice Rehnquist, 75. In terms of dissenting votes, Justice Rehnquist's 152 losing votes from 1980-84 falls far short of Justice Brennan's 245. As I mentioned earlier, the real test of the ability to shape a consensus on the Court would be the number of majority opinions authorized by any particular Justice. In that regard, no Justice has authored more majority opinions than Justice Rehnquist over the past four terms. A careful and fair examination of the facts simply does not make Justice Rehnquist an extreme dissenter, but the leading articulator of Supreme Court policy.

Admittedly, some of those opposed do not like Supreme Court policy any more than I do on certain issues. But that is not a reason to be against him. Unfortunately, it may be, in the eyes of some.

With respect to the Laird v. Tatum issue, we gave heard that Justice Rehnquist, who gave general testimony on executive branch surveillance before Senator Ervin's subcommittee in 1971, should have recused himself when the case came before the Court. Recusal is a legal doctrine governed by a statute. A fair look at that statute offers ample reason to agree with Justice Rehnquist on his decision not to recuse himself. The governing statute in 1972, 28 U.S.C. 445, read:

> Any Justice * * * shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit * * *.

The statute requires disqualification where the Justice has a substantial interest, has been of counsel, is or has been a material witness. No one contends that Justice Rehnquist was ever "of counsel" or a "material witness" in the Laird versus Tatum case itself. Therefore, those provisions are inapplicable. It is important to note, however, that in cases where Justice Rehnquist did have a very slight advisory role at the Justice Department, for instance United States versus U.S. District Court and S&E Contractors versus United States, he recused himself.

The second part of the statute is qualified by the discretionary language "in his opinion," referring to the judge's discretion. It urges disqualification where the Justice "is so

related to or connected with any party or his attorney as to render it improper." In reviewing his relationship with this particular case while at the Justice Department, Justice Rehnquist concluded that discretionary disqualification was not warranted. This was based on his "total lack of any connection" with the case at the Department.

Critics of this judgment, which was completely within Justice Rehnquist's authority to make, contend that his testimony before the Ervin subcommittee was evidence of his extensive connection with the issues of the case while at the Justice Department. To the contrary, the extent of Justice Rehnquist's involvement with executive branch surveillance efforts was extremely minimal. He had helped prepare an initial draft of a plan to deal with civil emergencies. This included a section concerning information about potential instigators of unrest. This was simply a planning memo; the Justice did not participate in its implementation. The planning memo says nothing about surveillance underway nor about any specific event of the sixties or seventies. In fact, he explained repeatedly to the Ervin subcommittee that he was only giving his understanding of the constitutional and legal issues connected with executive branch information gathering.

He did not have personal knowledge of the actual surveillance. He did not have any personal knowledge of the facts of the Laird versus Tatum case. Most likely 28 U.S.C. 445 was discretionary in 1972 precisely because only the Justice himself can judge the degree of his involvement with a particular issue. The statute was later changed, but the Justice certainly could not be held to the subsequent changed standard at the time he made his decision to join in the Laird judgment.

Justice Rehnquist's decision was fully in line with the Supreme Court precedents and practices at that time. Justice Black had authored the Fair Labor Standards Act as the Labor Committee Chairman in the Senate, yet he helped decide its constitutionality on the Court. He even sat on one Fair Labor Standards Act case that has handled by one of his former law partners. Justice Frankfurter had written a book in the field of labor law and was acknowledged as a dominant force in the authorship of the Norris-LaGuardia Act, yet he wrote the primary case on the act.

By the way, the Norris-LaGuardia Act is one of those instances where the jurisdiction of a Federal Court of the United States was limited pursuant to article III, section 1 of the Constitution.

Justice Jackson resolved an immigration issue on the Court that he had developed as Attorney General. Chief Justice Vinson never hesitated to review legislation he had helped formulate as a Member of the House of Representatives. Chief Justice Hughes had written a book critical of one Supreme Court case and then on the Court wrote the opinion which overruled the case. This list could go on. The only purpose is to show that Justice Rehnquist's legal determination about the interpretation of the discretionary section of 28 U.S.C. 445 was completely in harmony with Supreme Court practice at that time.

Again, this is a red herring, it is offensive, frankly; it is something that should not be brought up this way. It shows a lack of knowledge about the Supreme Court.

□ 1500

He not only made a careful legal analysis, but he reported that analysis in the spirit of full disclosure and ethical treatment of the issue.

We have heard Mr. Justice Rehnquist made a statement because he was biased against the case. There are two responses. First, a Justice is not expected to join the Court with a blank mind. As Justice Rehnquist said, this would be a "lack of qualification", not lack of bias.

Second, this was a legal decision permitted by the law of that time of Justice Rehnquist. He faithfully analyzed the law and he reached a decision which others can second-guess after the fact. But that legal judgment should not be twisted into something of ethical dimensions. That is what is being attempted here today. It was attempted on the committee, because they do not have anything else.

That is the problem, Mr. President, they do not have anything against Justice Rehnquist. The allegation they have made can all be easily rebutted. We do not want to take days doing that, because most of these items were rebutted in committee.

Justice Rehnquist, on the Laird versus Tatum case, acted completely ethically and within the law.

Once again, the Laird, versus Tatum case is just another instance of some individuals holding a different legal opinion than that credibly espoused by Mr. Justice Rehnquist.

Mr. KENNEDY. Does the Senator want to yield on that particular question?

Mr. HATCH. I am glad to yield.

Mr. KENNEDY. I noticed in the report of the majority that the Senator from Utah describes a similar expression was made, that the Laird versus Tatum controversy is just a difference of opinion on the Laird versus Tatum decision.

Mr. HATCH. That is correct.

Mr. KENNEDY. Has the Senator had the opportunity to examine Professor Hazzard's memorandum?

Mr. HATCH. I did.

Mr. KENNEDY. Professor Hazzard, who was a key draftsman of the 1972 ABA Code of Judicial Ethics, indicated a complete disbelief in Justice Rehnquist's decision to participate in a case involving a policy that the Justice had been very much involved in fashioning while he was a government attorney.

I want to make the point that it is not a question of different people agreeing or differing on the outcome of the Laird versus Tatum case. That misses the point completely. The point is that Justice Rehnquist had indicated to the Senate of the United States what the outcome of the Laird versus Tatum case should be, and Mr. Rehnquist was an architect of the disputed policy that dealt with some very basic liberties of the American people.

After he participated in the case, Justice Rehnquist mislead whoever was to read his memorandum opinion by excluding from it references to key testimony that he made to the Senate, and completely distorting the ABA's canons of ethics.

I wish that, both in the presentation that is being made in favor of Justice Rehnquist as well as in the committee's majority report, the Laird versus Tatum matter issue would be examined in a more complete and accurate fashion.

Mr. HATCH. If the Senator would let me reply. That is a little sophistry. The fact of the matter is Hazzard's opinion resolved everything against Justice Rehnquist just as you are doing. Every ambiguity has to be resolved against this man who has set on the bench for 15 solid years.

Mr. KENNEDY. Is the Senator talking about Laird versus Tatum?

Mr. HATCH. I am going to talk about Laird versus Tatum. Let me say this: You are applying ethical standards enacted afterward. I am just looking at the questions raised about his participation. He was not counsel in the Laird versus Tatum case. That is what the law was at the time. He was not an adviser in the case. That is what the law was at that time. He had discretion to make this decision. That is what the law was at that time.

I cited a whole raft of other Justices who did things that were far in excess of what anybody, any reasonable mind could say Mr. Justice Rehnquist did——

Mr. KENNEDY. Would the Senator yield so I can quote the law at this time.

Mr. HATCH. I would perfer not to yield.

Mr. President, who has the floor?

The PRESIDING OFFICER (Mr. EVANS). The Senator from Utah has the time.

Mr. HATCH. I shall yield in a moment. Let me finish my comments.

He was not counsel, he was not an adviser on the case, he had only com-

mented initially on Laird versus Tatum. When he was a judge, he could comment whether he could review that in making a judicial decision and he did. He said he used that statute.

Other Justices have asserted that right and used it.

I do not hear Justice Frankfurter being excoriated because he participated and exercised discretion in decisions he later helped to write. Because opponents of Mr. Justice Rehnquist do not have anything else, they are trying to do distort Laird versus Tatum, a case where he had the right to make the decision under the then existing law. The law was changed later. I doubt that he would have exercised the discretion any more than Mr. Justice Black would have in the case I have cited that he did, or Mr. Justice Frankfurter in the case that I have cited that he did. We could go on through dozens of other cases of people who were Justices who acted as they did.

Let us be fair. Let us not distort everything.

The law was such that Justice Rehnquist had every right to do what he did at the time and most Justices probably would have done the same thing.

With regard to these other memoranda, let us be honest about that, too. He was the Assistant Attorney General at the Office of Legal Policy. He did not write every memorandum. He may have had them come through his desk as you, and I do. A month from now we will not remember which ones we signed off and which ones we did not, let alone 15, 16, 24 years or in some cases even beyond that. He was the only one who knew whether or not he had personal knowledge of the case. Why can you not accept that? Who is Mr. Hazzard that he can say that he knew when he did not know? It is typical of the type of case that the opponents have tried to build here.

Mr. KENNEDY. Will the Senator yield?

Mr. HATCH. I will be happy to yield.

Mr. KENNEDY. Professor Hazard was a key draftsman of the ABA canons of ethics, and the preeminent expert on judicial ethics.

Mr. HATCH. What has that got to do with it?

Mr. KENNEDY. The Senator questioned Professor Hazard's authority to make a judgment whether the action that was taken by Mr. Rehnquist was ethical or not. Professor Hazard is a nationally recognized expert on legal and judicial ethics.

Mr. HATCH. The first time we hear from this author——

Mr. KENNEDY. He believes that Justice Rehnquist's action in participating in the Laird case and casting the deciding vote against the plaintiffs were unethical.

Mr. HATCH. The first time we hear from this author——

Mr. KENNEDY. That is all we are trying to point out.

Mr. HATCH. The first time we hear from this author on Laird versus Tatum is right now. I do not think that author is noted for his conservative politics any more than Rehnquist is noted for liberal politics. He has a right to the opinion, but he resolved everything against Justice Rehnquist. It is typical. We can get any authority sometimes to say something on one side or the other of these issues. But the fact of the matter is Mr. Justice Rehnquist's testimony absolves him of any responsibility for that because he abided by the then-existing law.

Now, if you are talking about the subsequent law, then you might be able to criticize. And, if course, you have talked about that as though he knew what was going to be passed or brought down a little bit later. He did not know any more than you did or anybody else and you were sitting in the U.S. Senate at the time.

In summation, the Justice was neither of counsel nor was he a material witness in the Laird case while at the Department of Justice. He did not even have an advisory role in connection with the case. For this reason he was entirely within his rights to refuse to recuse himself.

I might add that you can try and build a case out of anything I suppose, but let us be fair about it. Let us look at the facts. Let us look at the law. Let us look at the laws that then existed. Let us look at the practice of the Supreme Court. Let us look at what other Justices did.

It is amazing to me how free they were to not recuse themselves in a lot of the cases that they did. It is no small thing in some of the things that I cited, such as Justice Black.

He authored the Fair Labor Standards Act. He was the Labor Committee chairman. I understand a bit about that. I am the Labor Committee chairman in the U.S. Senate. Yet he helped to decide its very constitutionality in the Court. If he could do that, certainly Mr. Justice Rehnquist, who was not a witness, was not a material witness, was not counsel, who did not really basically have anything but a passive interest in it, certainly he could have refused to recuse himself.

Justice Frankfurter was considered one of the top labor professors in the country. He was the dominant force in the enactment of the Norris-LaGuardia Act. The only reason I bring that sideline issue into it is that the Norris-LaGuardia Act is a perfect illustration of how the jurisdiction of the courts can be limited. And Felix Frankfurter had a lot to do with that.

We have had a lot of arguments here on the floor, but there is a perfect illustration of how we in Congress can limit the jurisdiction of the courts in this country under article III, section 1 of the Constitution. Yet Mr. Justice Frankfurter wrote the primary case on that particular act.

Let us be fair. I mentioned Justice Jackson's resolution of an immigration issue, that was before the Court that he actually handled as Attorney General of the United States. Chief Justice Vinson never once, to my knowledge, I hesitated to review legislation he had helped formulate as a Member of the House of Representatives. He is not being excoriated here today. These are some of the greatest men who ever served on the Court. Chief Justice Hughes wrote a critical book of one Supreme Court case and then wrote the opinion that overruled the case.

Mr. KENNEDY. Will the Senator yield on this argument?

Mr. HATCH. Those were important issues.

Mr. KENNEDY. Will the Senator yield for a question?

Mr. HATCH. Yes.

Mr. KENNEDY. The record shows without question that Justice Rehnquist expressed an opinion on a case while it was pending in the lower court and then he voted on that case, cast the crucial vote, when he was on the Supreme Court of the United States.

Can the Senator from Utah give me any instance where any of the Justices to which the Senator is now referring had ever expressed an opinion about the outcome of a case in a lower court and then voted in the Supreme Court? Can the Senator give me any case?

Mr. HATCH. First of all, he did not express an opinion regarding the outcome of the case. He generally described the case. You cannot call that an opinion. That is again a distortion.

Mr. KENNEDY. It is not a distortion. I can read the record and the Members of the Senate can make their own decision on it.

Mr. HATCH. Go ahead.

Mr. KENNEDY. Mr. Rehnquist said to Senator Ervin:

> My only point of disagreement with you is to say whether as in the case of *Laird* v. *Tatum* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

Senator Ervin said that a cause of action would lie and Mr. Rehnquist is pointing out, "My only point of disagreement with you" is whether an action will lie.

That is a major point of disagreement.

In addition, Mr. Rehnquist was an architect of the policy that was being disputed. That is very clear. That is not a question of ideology. That is a

question of fact. I am interested in whether the Senator can give me examples of other Supreme Court Justices who have expressed a view on the outcome of a case pending in the lower court and then voted in the case in Supreme Court.

Mr. HATCH. Let me go through the examples again. When Mr. Justice Black was in Congress, he was chairman of the Labor Committee. You sit on the committee with me. He helped write the Fair Labor Standards Act. He actually wrote the language. He not only gave opinions, I presume he had a lot to do with the report on the Fair Labor Standards Act. Then he decided the questions with regard to it and its constitutionality. That was the practice of the Court. Mr. Justice Vinson never recused himself on bills that he wrote, that he gave opinions on, that he wrote majority reports for. I think we could go through a lot of illustrations.

□ 1520

Mr. KENNEDY. If that is the answer——

Mr. HATCH. Mr. President, who has the floor? I will be happy to yield for a question.

The PRESIDING OFFICER (Mr. EVANS). The Senator from Utah has the floor.

Mr. KENNEDY. I thought we would have an opportunity for a debate.

Mr. HATCH. I would like to yield to you, but I would like to make my points before you interrupt.

Mr. KENNEDY. I was still waiting for additional information, because if that is your best response, it is not a satisfactory one. What you are talking about is a general question of the constitutionality of a statute. In Laird versus Tatum we have the application of the Constitution to particular facts in a particular case. That was my question.

The examples given by the Senator from Utah fail to address the issue that is raised in the Laird versus Tatum case.

Mr. HATCH. He did not give an opinion of that case. It was a passing comment in a hearing.

Mr. KENNEDY. He commented the Laird versus Tatum was nonjusticiable.

Mr. HATCH. One passing comment. He did not write a bill in this case. He did not make decisions in this case. I am telling you that the contrast with what Mr. Justice Black did and this small matter that you brought up here is stark. I do not condemn Mr. Justice Black nor Mr. Justice Frankfurter nor Mr. Justice Vinson, nor would any reasonable person. I do not think Mr. Hazard would do that. I am surprised that he is doing it to Mr. Justice Rehnquist, in light of the testimony Mr. Justice Rehnquist has given. I do not know why he did that.

The fact of the matter is that if you read the statute, as I have read it, there is no reason in the world why he had to recuse himself. He had every right to or not to. The statute itself is fairly clear. The governing statute, as I said, was a 1972 statute, 28 U.S.C. 445. It read:

Any justice . . . shall disqualify himself in any case in which he has a substantial interest.

He did not have any special interest.

has been of counsel.

He was not of counsel.

is or has been a material witness.

He was not a material witness.

is so related to or connected with any party or his attorney

He was not related to any party or his attorney.

as to render it improper, in his opinion, for him to sit, . .

He had to make that final decision. He was right. He had a right to make it that way.

I have cited at least four illustrations, stronger illustrations than the one you are trying to bring up. Let us be fair about it. Besides, Laird versus Tatum was gone into years ago.

THE PHOENIX VOTING ISSUES

Let me turn my comments from the Laird versus Tatum matter to the Phoenix voting issues.

The allegations concerning the Phoenix voting practices testify more to the frailties of human memory than to anything else. Nonetheless, this 24-year-old history must be clarified. I will first make a few general observations and then discuss a few of the witnesses who challenged Justice Rehnquist's account of these 1962 events.

In the first place, it is important to realize that these allegations were investigated carefully in 1971 when they were only 9 years old. At that time, the Senate Judiciary Committee, which was chaired by a Democrat—Senator McClellan—concluded that the

Voter harassment charges against Mr. Rehnquist are found by this committee to be wholly unsubstantiated. Viewed in its entirety, the incident suggests at the very most a case of mistaken identity.

The case of mistaken identity arises from a disturbance at Bethune precinct in 1962. This disturbance began when a Republican official challenged the credentials of several voters. Challenging voters was a legal means of ensuring that those voting were adequately qualified and registered to vote. This particular challenger, however, evidently became so aggressive that the line of people waiting to vote grew very long. This precipitated some kind of scuffle. As a result, the Republican challenger was escorted away from the polling place by a police officer. This individual was a Mr. Wayne Bentson, not a Mr. William Rehnquist, although their heights and weights appear to have been similar.

According to those who know them, they probably looked a little bit alike. Certainly, heights and weights were pretty much the same.

In his capacity as legal advisor to the Maricopa County Republican Party, Attorney Rehnquist had occasion to visit precincts to mediate voting disputes and to advise challengers. Justice Rehnquist has repeatedly testified that this was entirely within his responsibility, and it was the only thing, basically, he did. Thus, it is very probably that Attorney Rehnquist may have even appeared at Bethune in 1962, but as a legal advisor, not as a disruptive challenger. In fact, none of the contemporaneous accounts of this disturbance, including the FBI report of the matter, the detailed news accounts in the Arizona Republic, and the Phoenix City Police reports, even mention Mr. Rehnquist. Each of these accounts carefully and consistently records these events, but each identifies Bentson as the challenger, not Rehnquist. Incidentally, none of these contemporaneous sources find another disturbance worth mentioning on election day in 1962.

These contemporaneous written accounts are corroborated by then Democratic U.S. attorney—now Federal judge—Carl Muecke, who thoroughly investigated voter harassment in 1962; by Carl Sims, who scuffled with Bentson; but all other persons present who were interviewed by the FBI; by Attorney Justice Rehnquist's Democratic counterpart—now Federal judge—Hardy; and by the Judiciary Committee in 1971. Judge Hardy's statement is particularly interesting. He is a Federal judge today. Here is what he said:

Can state unequivocally that Mr. Rehnquist did not act as a challenger at the Bethune precinct * * * challenging voters was not a part of Mr. Rehnquist's role in 1962 or subsequent election years.

This was 9 years after the alleged happenings occurred. Mr. Muecke, a leading Democrat, made those comments in 1971, when his recollections were a lot better.

Before discussing each of the witnesses before the committee, I have a few other general comments about those individuals who purported to have seen Mr. Rehnquist challenge voters 24 years ago. All of these individuals failed to come forward or to make any allegations 15 years ago in 1971. Much of their testimony is consistent with Attorney Rehnquist's role as legal advisor who visited precincts to settle voting disputes. Of the seven who claim to have seen Attorney Rehnquist challenge voters, five did not know him at the time and only identified him on the basis of 1971 newspaper photographs—9 years after

the alleged incidents. All of those purporting to have seen Attorney Rehnquist challenging are committed Democratic or liberal activists, whereas six Democrats—including four State or Federal judges—refute the harassment or challenging charges.

Perhaps at this point I could proceed to examine the testimony of these witnesses. Who are these witnesses? Every specific allegation—one identifying a particular year and voting precinct—is either refuted by contemporaneous eyewitness reports or rendered highly unlikely by internal inconsistencies or contrary testimony from other reliable witnesses.

BROSNAHAN

Let us take Mr. Brosnahan.

Mr. James Brosnahan was an assistant U.S. attorney in 1962. The Arizona Republic mentions him as the investigator of the Bethune precinct incident in that year. Moreover, a 1962 letter from Wayne Bentson identifies Brosnahan as the investigating legal officer at the disturbance. Actually there should be little doubt about where Brosnahan was on November 6, 1962 or what he was doing because he stated himself on two occasions that the place where he saw Rehnquist in 1962 was Bethune precinct.

The Washington Post of July 26, 1986 states: "Brosnahan, however, said there were enough complaints about the GOP challenges at the Bethune precinct in 1962 that he went there with an FBI agent to investigate. Brosnahan said he found a small group of Republicans, including Rehnquist, there. * * *" The Nation Institute Press release, which features a running commentary by Brosnahan, includes the admission that the investigation occurred at Bethune in 1962. Moreover, Carl Muecke, Brosnahan's supervisor, only mentions dispatching Brosnahan to Bethune, not any other precinct. Nonetheless, when he appeared before the Judiciary Committee, Mr. Brosnahan, a self-described "liberal Democrat," suddenly could not remember which precinct it was and suddenly could remember that he investigated several precincts that day.

One of the great mysteries of this entire proceeding is what caused Brosnahan's memory to change in the few weeks between the newspaper interviews and the hearing. The mystery becomes larger when we realize that Brosnahan never said or did anything in 1962 which implicated Attorney Rehnquist in the slightest in any voting dispute. Moreover the FBI investigation in which Brosnahan was involved did not even mention Rehnquist. Brosnahan failed to come forward in 1971. And finally, even Brosnahan admitted in his testimony and in numerous press accounts that he never saw Rehnquist challenge even a single voter.

The gist of Brosnahan's testimony was that some of the people at Bethune or wherever his inconsistent memory finds it convenient to place the matter, said that Rehnquist was involved in challenging. This would not necessarily be one bit inconsistent with Justice Rehnquist's testimony. After all, Justice Rehnquist said he was present at voting disputes in 1962. It would not be at all unusual for some distant observers to conclude that Attorney Rehnquist was somehow involved when, in fact, he merely appeared at the polling place to settle the dispute caused by Wayne Bentson. This explanation is so logical that it may even solve the mystery of Brosnahan's changing memory.

In any event, newspaper accounts, FBI reports, and police reports all confirm that Attorney Rehnquist was not involved—other than possibly as a legal adviser—in any incident at Bethune in 1962. Even Brosnahan's slippery memory produces no credible evidence to the contrary. One further enlightening view of this incident was provided by Edward Cassidy, the Phoenix police officer who escorted Bentson from the polling place in 1962. He was present at or near Bethune that entire day in 1962. He testified under oath that only Wayne Bentson was involved in the scuffle at Bethune and that no other Republicans were involved in challenging or other unseemly conduct on that occasion.

Anyone who knows Mr. Justice Rehnquist, who knows the passive personality that he has—it is a meek and mild personality—who knows how judicial, of what tremendous judicial temperament he was, would not believe for the slightest that he was there belligerently challenging voters on that day.

Since he said he was not there challenging voters, and that was his recollection, he should be given the benefit of the doubt.

Mr. President, I ask unanimous consent that my discussion regarding the other witnesses be printed in the RECORD at this point.

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

CHARLES PINE

Charles Pine began by telling the committee that the incidents he remembered occurred at Bethune in 1962. His memory seemed to work the opposite of Brosnahan's. Instead of forgetting what he had known a few weeks earlier, Pine remembered what he had not known a few weeks earlier. He told the Nation institute and other reporters in the weeks before the hearing that he could not identify the precinct or the year.

Mr. Pine also remembered complaining to democratic headquarters about Rehnquist, but Judge Maggiore, the 1962 county democratic chairman, testified that he knew Pine well and that neither Pine nor anyone else complained to him about Attorney Rehnquist. Mr. Pine also testified that he had discussed the incident with Judge Hardy who has stated that he knew of no involvement by Rehnquist. Mr. Pine also could not recall how many voters were challenged, but he did recall the exact words Attorney Rehnquist was purported to have said to various voters. He could even remember how Attorney Rehnquist punctuated his sentences over 24 years ago. This mysterious memory principle seems to operate even though all people present, including democratic officials, at Bethune in 1962 during the incident gave testimony in contemporaneous FBI, police, and news reports that Bentson was the only GOP official involved. Moreover, the nonpartisan police officer present at Bethune, Edward Cassidy, also testified that Bentsen alone was responsible for any challenging done at Bethune in 1962.

MELVIN MIRKIN

Mr. Mirkin's testimony was completely consistent with Justice Rehnquist's. He said he saw Attorney Rehnquist, in a normal tone of voice, advise a group of Republican Challengers of the proper procedures for this legal process in 1962. This would have been within Attorney Rehnquist's duties as legal advisor. Mr. Mirkin also noted that he would vote to confirm Justice Rehnquist as Chief Justice if he had a vote.

SYDNEY SMITH

Mr. Smith could not remember the name of the precinct or the year when he purportedly saw Attorney Rehnquist challenging voters. This makes it very difficult to corroborate his story. Although he could not remember the time or place, he could recall with remarkable clarity verbatim quotes from Mr. Rehnquist 24 years after the fact. Unfortunately his memory begins to fail again when he was inconsistent as to the number and race of the people he saw Rehnquist address and as to whether or not any of them left the voting line. Mr. Smith also claimed to have personally called the democratic headquarters to complain, but Judge Maggiore, the county chairman, testifies that he did not even hear a rumor that suggested Rehnquist might have been involved in challenging.

MANUEL PENA

Mr. Manuel Pena was sure that the GOP official with whom he argued over challenging techniques in 1964 was William Rehnquist because he identified him as the man 7 years later on the basis of a newspaper photo. He did not know Attorney Rehnquist from anyone else in 1964, but 7 years later he saw a photograph in a newspaper and identified him as the man at Butler Precinct in 1964.

Besides the improbability of this identification, several other facts make this improbable. First, Judge Thomas Murphy, the Democratic county chairman in 1964, investigated personally complaints of vote harrassment. He said that Rehnquist was simply not involved. Because Attorney Rehnquist had no challenging credentials and was in charge of the massive Ballot Security Program at the GOP headquarters, it is unlikely that he spent around an hour at Butler. Moreover, Pena declared that the man he met at Butler called his headquarters to establish that his challenging procedure was correct. As the head of the Ballot Security Program in 1964, William Rehnquist would not have had to call headquar-

ters to ask about the rules. He was the one answering those calls.

QUINCY T. HOPPER

Mr. Hopper admits in his 1986 affidavit that his memory is not clear and relies instead on his 1971 affidavit. This affadavit claims that he, too, identified Rehnquist as the person he saw in 1964 from a photo shown him in 1971. He further claims that Carl Sims was with him, but Sims was the individual involved in the 1962 altercation with Bentsen at Bethune. The rest of the incident he describes, complete with details about the scuffle and the police escorting the Republican away, is remarkably similar to the 1962, Bethune incident. Judge Thomas Murphy, police records, news accounts, and Republican poll watches at the Bethune Precinct in 1964 report no disturbance whatsoever that year.

JORDAN HARRIS AND ROBERT TATE

Both of these individuals were involved in the 1962 Bethune incident and gave statements to the FBI about the event. In their 1971 affidavits, they repeat a similar story but now say that the event occurred in 1964. Tate also claims that the challenger in question did nor wear glasses. Attorney Rehnquist wore glasses at all times. Finally both of them identified Rehnquist as the challenger on the basis of a photograph shown to them in 1971. Once agaln there are no independent reports of any similar incident in 1964.

SNELSON MCGRIFF

This account follows a familiar pattern. He describes an incident remarkably similar to the 1962 Bethune problem. He says that the challenger was not wearing glasses at some time during the day. He is not sure that the incident occurred in 1964. And he indentifies Rehnquist from a 1971 photo as the 1964 culprit. And there is still no independent account of any such event in 1964.

NEW AFFIDAVITS

Since the hearing, it has been interesting to note that a few new affidavits have come forth. For instance, Ruth Finn remembers her late husband remarking at the time of the 1971 confirmation that Justice Rehnquist is the "—— (expletive deleted) who tried to close the polls on the black voters." This hearsay is not explained. If it means that Justice Rehnquist participated in the Republican Ballot Security Program to prevent tombstones and vacant lots from voting early and often, it is correct. If it means something else, that meaning passed on with Mr. Finn.

We also hear from Susan B. Perkins who was a booth worker for the Democratic Party at Jackson Precinct in 1964. She remembers a man challenging voters and later returning to the poll at closing time to tell those in line that the time had expired for voting. She did not know him at the time, but * * * you guessed it—she recognized him 7 years later when his picture appeared in the paper as a nominee to the Supreme Court.

Mr. Louis Meyer writes a letter. He says: "* * * While I did not see Mr. Rehnquist at the polling places at which I stopped on election day in 1964, I do recall during the course of the day two people mentioning to me that 'Bill Rehnquist is a part of the voter line slow-down going on' and I understand Attorney Bill Rehnquist was removed from a polling place for harrassing voters.'" Set aside for a moment the miraculous memory of this chairman of the Democratic "get-out-the-vote" drive, this tid-bit does offer some enlightenment. We have all been part of campaigns and know that each side accuses the other of hyjinks, tearing up the other's signs, and so forth. Rumors abound. In this case, the mistaken identity with the Republican challenger removed from the Bethune Precinct in 1962 seems to be part of the rumor mill. In the heat of political campaigns, these things are to be expected. It is another thing altogether, however, to magnify that innuendo through over 20 years of hazy memory and bring it forth in a proceeding of this importance.

All of these accounts are convincing evidence that memory and rumor are elusive and sometimes deceptive—even to ourselves. I have yet to mention most of the testimony of the witnesses who had not heard a single rumor about Attorney Rehnquist's involvement in any challenging or harrassing activities in either 1962 or 1964. Seven individuals, including the Democratic county chairman of 1962, testified that Rehnquist had not challenged any voters and that such activity would have been completely outside his duties as a party official. They also described the challenging procedures and noted that Attorney Rehnquist did not even have the credentials which must be presented at each challenge. Again, it seems to me that the Judiciary Committee in 1971 summarized this well when it said" viewed in its entirety, the incident suggests at the very most a case of mistaken identity."

Mr. HATCH. Mr. President, I wanted to talk about Mr. Brosnahan for a minute since he got most of the media attention in this country. I will leave, of course, the remainder of this discussion up to our distinguished chairman.

Let me just conclude that I find it pretty incredible for Mr. Brosnahan, who did not appear in 1971 although he could have to suddenly appear and tell facts that he never told to any newspaper even though he had been repeatedly interviewed by them, and to not remember he was at Bethune, even though just a week before he told newspapers he was at Bethune. The reason he did not want to remember that, in my humble opinion, is that he knew if he agreed that when he saw Bill Rehnquist at Bethune School, that there certainly was a cloud over any allegations against Bill Rehnquist at Bethune School. Why? Because there was a man taken out who looked like Rehnquist, who was the same size as Rehnquist, who was named Wayne Bentson, who was a Republican, and who did they feel was disturbing people at the time.

The FBI records and the police report indicate that Mr. Bentson was the individual causing trouble. Frankly, Mr. Brosnahan's testimony and the other witnesses' testimony were refuted by more than adequate witnesses, one of whom was the leading Democrat. He said, "Had anything like what was alleged against Mr. Justice Rehnquist happened we would have known about it," and it simply did not happen.

On that I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. EAGLETON. Mr. President, as I read the hearing record on Justice Rehnquist's nomination to be Chief Justice, I conclude that the following are the principal matters to be evaluated.

MINORITY VOTER INTIMIDATION IN PHOENIX

After the oral hearings had been concluded in 1971—this point is very relevant to the point made by Senator HATCH at the very end of his remarks—when Mr. Rehnquist's nomination as Associate Justice was under consideration by the Senate, a matter was raised on a 1-minute-to-midnight basis. Had Mr. Rehnquist harassed or intimidated minority voters in the 1964 elections in Phoenix? His flat out written answer: the hearings had been concluded and the committee had him answer in writing. No.

The same matter was raised more fully in the recent hearings and five witnesses testified under oath that Mr. Rehnquist had intimidated minority voters in the 1964 elections. Again Justice Rehnquist said: No.

Thus, there is credible evidence one way, but there is also doubt. On this matter standing alone, since Justice Rehnquist is a Supreme Court Justice of high reputation, the benefit of the doubt goes to him.

THE PLESSY VERSUS FERGUSON MEMO

In the fall of 1952, while Mr. Rehnquist was a law clerk of Supreme Court Justice Robert Jackson, he wrote a memo opposing Supreme Court intervention to end segregation in public schools by overturning Plessy versus Ferguson, the so-called separate but equal doctrine.

Justice Rehnquist takes the position that he fully supported doing away with the separate but equal doctrine and that the memo expressed not his own views but the tentative views of Justice Jackson.

Historians, legal scholars, Jackson's own secretary hotly dispute that Justice Jackson harbored any such separate but equal views. Justice Rehnquist says Jackson did.

After the most recent hearings were completed, the Washington Post, September 7, 1986, surfaced a 1970 memorandum written by Mr. Rehnquist while he was serving as Assistant Attorney General in the Nixon Justice Department. The memo advanced the idea of a consitutional amendment that would have allowed continued segregation in school districts through the use of freedom of choice plans and neighborhood schools.

The Justice Department dismisses the Rehnquist memo as just something that "addresses what someone in the White House wanted." Really?

There is doubt. In this instance, there is double-header doubt. But, on these matters, these segregation mat-

ters, standing alone, since Justice Rehnquist is a Supreme Court Justice of high reputation, the benefit of the doubt, strained as it may be, goes to him.

□ 1540

TATUM VERSUS LAIRD

During his days as Assistant Attorney General in the Nixon years, Mr. Rehnquist was deeply involved in the development of a policy of governmental surveillance of civilians by the Army. Some individuals brought a lawsuit claiming that their first amendment rights were violated by this surveillance and the case was known as Tatum versus Laird. Mr. Rehnquist personally knew of the disputed evidentiary facts in the case. In 1971, Mr. Rehnquist testified before the Senate Judiciary Committee, specifically mentioned Tatum versus Laird and specifically supported the Government's position in that specific case.

May I interject at this time. I was interested in the exchange between Senator KENNEDY and Senator HATCH on this Tatum versus Laird point. The point that Senator HATCH missed is as follows:

It is one thing for a lawyer or a trial judge to write a book on a general subject matter of the law, as Charles Evans Hughes had done, as Oliver Wendell Holmes had done, and as many later Justices of the Supreme Court had done, and then become a member of the Supreme Court and write an opinion or participate in a case that addresses the subject matter contained in that treatise or that book. Perfectly understandable.

The same is true for a Member of the U.S. Senate—and several Members of the U.S. Senate have gone up to the U.S. Supreme Court. Senator HATCH mentioned Justice Black; Mr. Truman appointed Sherman Minton; many have gone to the Court through the years.

It is one thing for a Senator of the United States to vote on a piece of legislation, a generic piece of legislation, and then to go up to the Supreme Court and there participate in the deliberation of an issue that is an outgrowth of that generic piece of legislation. It has happened before and it will happen again.

But it is a much different thing, Mr. President, it is a much different thing, for a lawyer to take a position in a specific case—Tatum versus Laird—and to stake out where that lawyer stands in that specific case while it is pending in a court of law—and that is what Mr. Rehnquist did—and then, having stated and declared a position in a specific case in controversy, a specific justiciable issue, go up to the U.S. Supreme Court and there sit in judgment on that same specific case. Indeed, he not only sat in judgment, but he cast the deciding vote, 5 to 4, in that case.

That is a far, far different thing than that which was described by Senator HATCH in terms of writing a book, writing a law review article or voting on a piece of generic legislation in the U.S. Senate, whether it be the Wage and Hour Act or the Norris-La Guardia Act or any other act. It is a far different thing to stake out a specific position in a specific case that is in litigation in court and then to rule on it "in an evenhanded and fair basis" as a member of the highest appellate court of the United States.

That just is not fair. And that is the test. One could go through the various canons of ethics or rules of conduct as set forth, for example, in section 455 of title 28 of the U.S. Code. They all provide the same standard—a judge is required to disqualify himself "in any proceeding in which his or her impartiality might reasonably be questioned."

I ask you, Mr. President, suppose you were on the losing side of Tatum versus Laird. Suppose you were either the attorney on the losing side or you were one of the parties to the proceeding, but you were on the losing side and you knew that a lawyer over there in the Justice Department named Rehnquist was dead set against your position in the case that was pending.

You would say, "Well, OK. He is an assistant attorney general over there and he testified before a committee and he is against our position in that case. It is pending in court. So be it. That is it."

Then a couple of years later or so, your case is being argued before the Supreme Court and you are sitting out there in the audience—and the litigants do come and sit there very anxiously while the Court is hearing oral arguments—and you look up and you say:

> My God. Look who is sitting there! Why, there is old Bill Rehnquist. He's the guy that already stated specifically where he stands in my case. I thought I was supposed to get impartiality. I thought I was supposed to get a situation where the judge's impartiality might not be open to reasonable question. How can a judgment be impartial if sitting up there amongst the nine is one who has already decided the specific case argued before the Court?

And then think, a few months later when hand-down day comes—and some of the litigants come back to the Court figuring that is the day their case is going to be handed down. Hand-down day comes and each of the nine Justices is permitted—and most of them avail themselves of the opportunity—to orally summarize his or her views as the opinion of the Court is announced. You sit there and you learn that the deciding vote against you was cast by the Justice that had already predetermined the case long, long ago.

Impartial justice? I wonder. Fair and evenhanded justice? I wonder.

So there is a lot of doubt, lots of doubt. Despite what Senator HATCH may have said about writing law books and law review articles and participating in statutory deliberations, there is a lot of doubt on this issue.

But one could argue, standing alone, since Justice Rehnquist is a Supreme Court Justice, and has a generally high reputation, one could argue the benefit of the doubt should go to him.

Judicial philosophy. There is not one iota of doubt that the Senate has the right under the Constitution to consider a judicial nominee's philosophical approach to important constitutional and legal questions. There is just no doubt about that. Presidents do so when they nominate a candidate. Roosevelt did it. Reagan does it. George Washington did it. Birds do it, bees do it—everybody does it.

Understandably, Presidents seek to place philosophically compatible individuals on the High Court. And the Senate, Mr. President, has no less a judgmental right when it exercises its duty to confirm. Justice Rehnquist himself, before he went on the Court, wrote an article urging the Senate to "restore its practice of thoroughly informing itself of the judicial philosophy of a Supreme Court nominee before voting to confirm him. * * *"

That is the one major writing by Justice Rehnquist with which I totally agree.

It is not difficult to formulate an amorphous, pleasant sounding "test" relating to judicial philosophy. It is very difficult, however, to apply such a "test."

I went through this "test" business when I was a new Senator, back in the days when the Haynsworth nomination was before us and in the first Rehnquist nomination.

□ 1550

During the debate on the Haynsworth nomination, I uttered these historic words:

> The Senate has the right and 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.

I thought that was pretty nice—what I wrote back 15 or more years ago.

In 1971, in the debate on Rehnquist, I liked that quote so much I stated it again and then I added this footnote. I said:

> 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?

And I liked that, too, by the way.

I found, based on such evidence then at hand, that both Haynsworth and Rehnquist passed the "test." I voted to confirm Rehnquist, but voted against Haynsworth on other grounds (which probably on reflection is one of my less spectacular votes).

We now know a great deal more about Justice Rehnquist's judicial philosophy—lots more, volumes more.

In common vernacular, Justice Rehnquist is a conservative—a very staunch conservative, indeed, the most conservative Justice on the Court.

Here's what I take to be the cutting edge of his judicial philosophy.

Whenever a challenge to Government action affecting individual rights is before him, Justice Rehnquist, as a conservative, almost always comes down on the side of Government. That is it really it in capsule form.

I find it ironic that conservatives who in their political and private lives profess the virtues of rugged individualism and who are the most outspoken opponents of an activist government role, end up being the most pro government, anti-individual in their judicial opinions. It takes more than a black robe to make this metamorphosis.

In any event, when Justice Rehnquist was distinguishing himself as a student at Stanford Law School, he took a course in Constitutional law. Undoubtedly, the first two cases considered in that course were Marbury versus Madison and McCulloch versus Maryland. These are the landmark, bedrock decisions of Chief Justice Marshall which set forth the role of the Supreme Court as the guardian of the Federal Constitution.

Marbury confirmed the power of the Court as the final arbiter of the Federal Constitution. McCulloch established that national interests must predominate, are supreme over State choices in areas of national constitutional concern.

One comes away from a reading of Justice Rehnquist's opinions with considerable doubt about his commitment to these fundamental constitutional precepts. It seems he would upset the judicial bedrock of the Nation on which rests nearly 200 years of our Nation's constitutional heritage. This is conservatism run amok.

One can steadfastly believe in States' rights without denying the precepts of Marbury and McCulloch. Rehnquist seems to believe so fervently in the authority of State action as to deny virtually any constitutionally protected individual or Federal interest that conflicts with State interests. He would, it seems, abrogate Marbury and McCulloch, he would sharply constrict the role of the Supreme Court; he would radically narrow the scope of the Constitution, converting it from a living statement of liberty to a narrow, almost sterile document.

So it may seem. Yet, perhaps there is doubt. Even on this matter, standing alone, since Justice Rehnquist is a Supreme Court Justice of high reputation and recognized intellect, the benefit of the doubt goes to him.

Thus, on each item, standing alone, Justice Rehnquist can be given the benefit of doubt and, on that basis, he probably will be confirmed by the Senate.

But these matters do not stand alone. They stand in the aggregate. They stand as a portrait of the personality and judicial philosophy of William Rehnquist. But, there is a deeply disquieting sense arising from the Rehnquist record that compels me to conclude that he is not entitled to inexhaustible benefit of all doubts.

Remember, we are not considering a Cabinet nominee where the term of office is limited and a mistake, once made, can be remedied. We are not considering a Federal District Court nominee where if we make a mistake it is but one of 575; or a Circuit Court nominee where if we make one mistake it is but one of 168.

We are considering the Chief Justice of the United States. The one—the only. We are voting on the individual who may well serve in that mighty and powerful position into the 21st century.

About a nominee for Chief Justice, we cannot harbor an array of disquieting doubts. About a nominee for Chief Justice our minds and consciences must be clear and unhesitating.

About William Rehnquist I have no such certainty. I have no such confidence. I can give Mr. Rehnquist the benefit of the doubt on each of the issues raised against him at his hearing. But I cannot erase from my mind the doubt which the totality of that record creates about his fitness for this high position.

Therefore, I will vote against the confirmation of William Rehnquist.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

□ 1600

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

The PRESIDING OFFICER [Mr. CHAFEE]. Without objection, it is so ordered.

Mr. KENNEDY. Mr. President, I think over the course of the past several hours, the areas of principal concern for those of us who must cast our vote on this nomination have been brought to the attention of the Senate. I commend my colleagues—our ranking minority member, Senator BIDEN; my good friend from Ohio, Senator METZENBAUM, and the distinguished Senator from Missouri, Senator EAGLETON, on their excellent presentations. Senator EAGLETON really captured the essence of case against elevating Mr. Rehnquist to be Chief Justice of the United States.

Over the period of the next few days, we will have a chance to further develop the case against Justice Rehnquist.

One of the areas which the Senator from Missouri analyzed with great insight and persuasion was the role of Justice Rehnquist in the Laird versus Tatum case.

At the outset of this debate, I want to point out to our colleagues the representations that were made in the committee's report really do a disservice to the Members misconstruing the heart of the issue, which was so eloquently explained by the Senator from Missouri. It is a basic and fundamental point, that Mr. Rehnquist had prejudged the case, had actually testified before a Senate committee on that particular case, indicating that the plaintiffs did not have a cause of action and then ultimately participated in the case when it reached the Supreme Court and cast the key vote to decide the case against the plaintiffs.

This is basically the heart of the issue. One could not really draw that conclusion from examining the report of the committee. I refer to page 13, which concerns the Laird versus Tatum analysis, and which is very brief because it basically just reprints the memorandum that was written by Justice Rehnquist in support of his position.

In the introductory paragraphs on page 13, the report states:

> The first issue raised is the contention that by virtue of his testimony as Assistant Attorney General during the time the case was in the lower courts, Justice Rehnquist, after having been appointed to the Supreme Court, should have recused himself from considering Laird v. Tatum when it came before the Supreme Court, because of his knowledge of the disputed evidentiary facts. Second, his detractors suggest that Justice Rehnquist was not candid with the committee in 1971, when he stated that he did not have personal knowledge of the disputed evidentiary facts in the case.

□ 1610

That is not the issue. They say the first issue raised was that contention. That is not the issue. The issue is he was asked about his view by Senator Ervin at a Senate hearing and he indicated that the plaintiffs would not have a cause of action; therefore, he had basically made his decision that there was not a cause of action. He had decided the case, so to speak.

It is well understood how he could reach that since he was the architect,

when he was in the Justice Department, of the policy that was being questioned.

The majority says the major question concerned Justice Rehnquist's knowledge of the disputed evidentiary facts. That is not so.

Second, his detractors suggest that Justice Rehnquist was not candid with the committee in 1971, when he stated that he did not have personal knowledge of the disputed evidentiary facts in the case.

Again, this is not the only issue.

Professor Hazard's letter succinctly states all the issues posed by Justice Rehnquist's participation in Laird versus Tatum, and I ask unanimous consent that the full letter by Mr. Hazard be printed in the RECORD. I want to refer to particular provisions of it at this time.

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

(See Exhibit 1)

Mr. KENNEDY. The letter outlines the particular fact situation and the actions that were taken by Mr. Rehnquist. Then it points out:

When *Laird* v. *Tatum* came before the Supreme Court, a motion to recuse Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions as insufficient to require his disqualification. In doing so he relied extensively on the analysis in Frank, *Disqualification of Judges: In Support of the Bayh bill*, 35 Law & Contemp. Prob. 43 (1970), which in my opinion correctly summarized the law of disqualification as it then stood.

In recent testimony before the Senate concerning his participation in the transaction out of which *Laird* v. *Tatum* arose, Justice Rehnquist stated, "I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities."

Mr. President, one of the key documents and memorandums that were made available to the Senate Judiciary Committee was a detailed memorandum of Mr. Justice Rehnquist on that very subject matter about the use of the Federal Bureau of Investigation as well as Army intelligence to be targeted against the individuals and groups back in the late 1960's. But evidently, that knowledge about his activities had been forgotten.

From other evidence, chiefly the testimony of Mr. Robert Jordan, General Counsel of the Army at the time that the surveillance policy was formulated, it appears that Mr. Rehnquist, as he then was, had a relationship to the surveillance program beyond that disclosed in his opinion in *Laird* v. *Tatum* or revealed in his testimony before the Senate last month.

I imagine Mr. Hazard's comments would be much more targeted if he had had the access to the memorandums that we did. He is right on point. He has reached the obvious conclusion that those of us who had the chance to examine the material reached without benefit of the memorandum.

Now, talking about the general counsel, Robert Jordan—

According to this evidence, the surveillance policy was formulated in the early months of 1969. At that time Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel. On behalf of the Justice Department that Office negotiated with the Army in formulating the surveillance policy. The negotiations were extensive. The circumstances strongly suggest that Mr. Rehnquist was personally and substantially involved in them.

That is correct, too. We can say that unequivocally.

These circumstances are that the subject was highly important, the Office is small in size, and Mr. Rehnquist himself sent a key transmittal memorandum. The negotiations resulted in a policy statement that was then adopted by President Nixon, and which in turn was the basis of the Government action complained of in the litigation in *Laird* v. *Tatum*.

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Laird* v. *Tatum*, unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

Each of them, Mr. President; each of them.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank which Justice Rehnquist cited: "Justice disqualify in government cases when they have been directly involved in some fashion in the particular matter, and not otherwise."

The letter continues to support that thesis. It goes on:

In his opinion in *Laird* v. *Tatum*, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the government's conduct of the case of *Laird* v. *Tatum*." But that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis for disqualification that was well recognized then as now.

Well recognized then as a basis of disqualification as now:

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird* v. *Tatum*.

No question that had the plaintiffs been successful in the circuit court, there would have been discovery. Justice Rehnquist's involvement in the development of that policy would have been made a part of the record. So he is a potential witness. The Hazard memorandum indicates another reason why he should have disqualified himself

He continues:

In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevant to the question is not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

Second, when the case of *Laird* v. *Tatum* was before the Supreme Court it was Justice Rehnquist's responsibility on his own initiative to address and resolve all issues concerning his disqualification.

□ 1620

We have to remember that Justice Rehnquist only responded to the question of whether he was going to participate after the plaintiff requested that he recuse himself. He did not bring this up voluntarily. It was only in response to the motion to recuse himself.

Professor Hazard makes the point that in a case such as Laird versus Tatum, it was his—

responsibility on his own initiative to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in *Laird* v. *Tatum*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensued after his involvement in the transaction, and, second, to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction.

Remember, he was architect of the military surveillance program.

It was simply his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds or recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

That is an important tenet of judicial ethics that was completely overlooked and dismissed, not even referenced by Justice Rehnquist in this case.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent.

For Justice Rehnquist to have forgotten his involvement, given the evidence that has been made available to

our committee, would be extraordinary.

If when writing his opinion in *Laird v. Tatum*, Justice Rehnquist has not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

Professor Hazard is an architect of the standards, the ethics, selected by the American Bar Association. He is one of the very outstanding, thoughtful individuals in the world of academia who is responding to a request of a Member of this body to comment on this particular issue. He has provided a very important and significant service. He has nothing obviously to gain from responding to the request of the Senator from Maryland. He concludes:

[Finally, Justice Rehnquist had a duty of candor to the Senate in answering questions concerning *Laird v. Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in government, and about which he had been asked to search his recollection on three official occasions.]

We are not talking about some incidental matter that anyone reasonably could have forgotten about. Justice Rehnquist remembers, people in this country remember the turmoil of the period the series of demonstrations against the war here in this city, hundreds of thousands of people pouring into the city, the threat to close down the city of Washington with individuals lying down at the airport and across railroad tracks and over the boulevards.

That was the atmosphere and climate. It was a crisis climate and atmosphere and Justice Rehnquist was the author of the memoranda advising what was permissible and what was not. And yet as Professor Hazard points out, on three different occasions, even though he was told he would be asked about these questions and he had an opportunity to refresh his recollection going back and examining any of this material which existed in the Justice Department, we were unable to get the Justice to comment.

Mr. President, we will have a chance to continue review of not only that matter but others, but I want to point out again to the Members we did not have the opportunity in 1971 to go over this case. I heard my friend and colleague from Utah saying earlier, when I tried to engage in an exchange with him on the Laird case, that we have gone over this a long time ago.

That is not correct, Mr. President. Laird versus Tatum was decided when the Justice was on the Supreme Court. The only time we have had an opportunity to go over it is during the course of these hearings. It related to actions of the Justice from some time ago but we only had the opportunity to examine this in light of our recent hearings. So even though these matters related to actions that were taken some time ago, they are very significant and current and important in terms of the Justice's qualifications to sit as the Chief Justice of the United States. I see my good friend and colleague from Ohio, who I believe wants to address the Senate. I yield the floor at this time.

EXHIBIT 1

YALE LAW SCHOOL,
401A YALE STATION,
New Haven, CT, September 8, 1986.

Senator CHARLES MATHIAS,
U.S. Senate, Senate Russell Office Building, Washington, DC

DEAR SENATOR MATHIAS: You have asked my opinion about the propriety of the conduct of Justice William Rehnquist in regard to *Laird v. Tatum*.

The essential facts as I have been given them are as follows: *Laird v. Tatum* was a suit to enjoin a certain Government information gathering and surveillance program that was adopted in 1969. The case was brought to the Supreme Court by the Government's appeal from a decision of the Court of Appeals, which had held that the lawsuit was maintainable. The effect of the Court of Appeals' decision was that the plaintiffs could have proceeded to the discovery stage and perhaps then on to the merits. The Supreme Court reversed, holding that the plaintiffs' lacked standing and hence that the suit should be dismissed without going into the merits. Justice Rehnquist participated in that decision and, since the decision was 5-4, cast a vote necessary to the result.

When *Laird v. Tatum* came before the Supreme Court, a motion to recuse Justice Rehnquist was filed by the plaintiffs. They argued that Justice Rehnquist was disqualified by reason of his prior relationship to the case, in that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate Committee hearing. Responding to the motion, Justice Rehnquist rejected these contentions as insufficient to require his disqualification. In doing so he relied extensively on the analysis in Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43 (1970), which in my opinion correctly summarized the law for disqualification as it then stood.

In recent testimony before the Senate concering his participation in the transaction out of which *Laird v. Tatum* arose, Justice Rehnquist stated, "I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities." From other evidence, chiefly the testimony of Mr. Robert Jordan, General Counsel of the Army at the time that the surveillance policy was formulated, it appears that Mr. Rehnquist, as he then was, had a relationship to the surveillance program beyond that disclosed in his opinion in *Laird v. Tatum* or revealed in his testimony before the Senate last month. According to this evidence, the surveillance policy was formulated in the early months of 1969. At that time Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel. On behalf of the Justice Department that Office negotiated with the Army in formulating the surveillance policy. The negotiations were extensive. The circumstances strongly suggest that Mr. Rehnquist was personally and substantially involved in them. These circumstances are that the subject was highly important, the Office is small in size, and Mr. Rehnquist himself sent a key transmittal memorandum. The negotiations resulted in a policy statement that was then adopted by President Nixon, and which in turn was the basis of the Government action complained of in the litigation in *Laird v. Tatum*.

First, in my opinion Justice Rehnquist's position as head of the Office of Legal Counsel constituted grounds of disqualification from participating in *Laird v. Tatum*, unless the significance of that relationship were overcome by additional evidence showing that he in fact was not involved in the matter while it was in the office. In a matter of such substance and complexity as the surveillance policy, it is implausible that the head of the government law office responsible for development of its legal aspects would not be personally involved in considerable detail concerning the facts and issues going into the policy and its formulation. On that basis, Mr. Rehnquist was the responsible counsel in the matter in question, and as well a potential witness concerning any factual issues regarding the policy. Each of these two relationships is independently a ground for disqualification.

A lawyer directly involved in a transaction cannot properly later sit as a judge in a case in which that transaction is in dispute. As stated in the article by Mr. Frank which Justice Rehnquist cited:

"Justice disqualify in government cases when they have been directly involved in some fashion in the particular matter, and not otherwise."

Mr. Rehnquist's relationship to the transaction was essentially the same as if he had been involved as legal counsel for the Internal Revenue Service in working up a tax investigation program and then sat as judge in a case challenging the program, or while in the Justice Department passed upon corporate merger or electoral districting policy and then sat in a case involving the policy.

In his opinion in *Laird v. Tatum*, Justice Rehnquist stated that "I never participated, either of record or in any advisory capacity . . . in the government's conduct of the case of *Laird v. Tatum.*" But that statement is irrelevant if he was counsel in the transaction out of which the case arose, a basis of disqualification that was well recognized then as now.

Justice Rehnquist appears also disqualified because he was a potential witness, at least at the discovery stage in *Laird v. Tatum*. In his testimony before the Senate, he denied having knowledge of "evidentiary facts." The standard relevant to the question is not "evidentiary facts" but facts relating to the "subject matter" of the litigation.

Second, when the case of *Laird v. Tatum*, was before the Supreme Court it was Justice

Rehnquist's responsbility on his own initiative to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts. In his opinion in *Laird v. Tatum*, Justice Rehnquist referred, first, to the fact that he had not been counsel in the "case," i.e., the litigation that ensued after his involvement in the transaction, and, second, to his statements in public and as spokesman for the Justice Department before the Senate. Thus, Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement, as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting reference to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird v. Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Supreme Court. In such a matter, a lawyer or judge is expected to give the whole truth.

Finally, Justice Rehnquist had a duty of candor to the Senate in answering questions concerning *Laird v. Tatum*. The Senate hearing was an evidentiary inquiry into his qualifications for the office of Chief Justice. In making statements before such a tribunal, whether sworn or not, a lawyer or judge has an obligation to be fully truthful. Justice Rehnquist complied with duty only if his statement is accepted that he had "no recollection of any participation in the formulation of policy on the use of the military to conduct surveillance." Whether that statement should be accepted is a matter of judgment. It was made by a lawyer of the highest intelligence concerning sensitive state policy over which his office had direct responsibility early in his service in government, and about which he had been asked to search his recollection on three official occasions.

Sincerely,

GEOFFREY C. HAZARD, Jr.

The PRESIDING OFFICER. Who seeks recognition?

Mr. KENNEDY. 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.

□ 1640

Mr. THURMOND. 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. THURMOND. Mr. President, Professor Geoffrey Hazard of the Yale Law School has raised an ethics question concerning Justice Rehnquist in connection with the Laird versus Tatum case.

I would like to make a few remarks on that facet of this hearing.

LAIRD VERSUS TATUM

Opponents of Justice Rehnquist have raised two main issues with respect to Laird versus Tatum. This case involved surveillance activities by the Department of the Army in connection with attempts to control civil disorder in the late 1960's. This was a class action suit brought against the Government on the grounds that the Army's activities had a chilling effect on the first amendment rights of the individuals being observed by the Army. During the time the case was progressing through the lower courts Justice Rehnquist was the Assistant Attorney General for the Office of Legal Counsel. In 1971 he testified before the Senate Judiciary Subcommittee on Constitutional Rights chaired by Senator Sam Ervin. He testified as an expert witness for the Department of Justice on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information on private citizens.

The first issue raised against Justice Rehnquist is the contention that by virtue of his testimony as Assistant Attorney General during the time the case was in the lower courts, Justice Rehnquist after having been appointed to the Supreme Court should have recused himself from considering Laird versus Tatum when it came before the Supreme Court, because of his knowledge of the disputed evidentiary facts. Second, his detractors suggest that Justice Rehnquist was not candid with the committee when he stated that he did not have personal knowledge of the disputed evidentiary facts in the case.

□ 1650

While the controversy arising out of Justice Rehnquist's participation in the case is couched in terms of whether he had personal knowledge of the disputed evidentiary facts, the real issue was, what constituted disputed facts. Thus, both accusations are really the same.

Some opposed to the nomination, have attached great significance to a memorandum dated March 25, 1969, from the Office of Legal Counsel, Department of Justice, dealing with intelligence-gathering assignments within the Department of Justice and the Department of the Army. This memorandum has been cited as showing personal knowledge on the part of Justice Rehnquist of the facts in Laird versus Tatum. Also, cited as supporting this view is testimony given by Justice Rehnquist to Senator Ervin's Subcommittee on Constitutional Rights in 1971. In his testimony before Senator Ervin, Justice Rehnquist referred to a computer printout of intelligence material. He stated that the information pertaining to the computer printout was provided to him or his staff by the office of the Deputy Attorney General for use in preparing his testimony before Senator Ervin.

Neither the memorandum nor the reference to the printout provides any objective basis for concluding that Justice Rehnquist had any particular knowledge of the facts in Laird versus Tatum.

Both Justice Rehnquist and his opponents agree to the facts of his testimony. What they disagree on is its legal significance—whether it constitutes having "personal knowledge of disputed evidentiary facts." What is apparent here is that his critics disagree with his legal analysis. At the time Justice Rehnquist was Assistant Attorney General, he repeatedly made it clear in testimony before Senator Ervin's Subcommittee on the Constitution that his prepared testimony did not rest on personal knowledge of any ongoing case. The following excerpts from Mr. Rehnquist's testimony before Senator Ervin's subcomittee provide examples of this fact in referring to Army intelligence-gathering activities which, as stated, was the issue in the Laird case.

Justice Rehnquist stated:

As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding * * *.

Next,

The office of the Deputy Attorney General * * * advised me or one of my staff as to the arrangement with respect to the computer printout from the Army data bank, and it was incorporated into the prepared statement that I read to the subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular printout.

Next,

While it is not altogether clear to me, certainly not from personal knowledge * * * the extent the Army guidelines were actually carried out and practiced, it should be apparent that the data base used by internal security is much more restricted * * * than were the guidelines printed in the CONGRESSIONAL RECORD.

Accordingly, it seems convincingly clear that Justice Rehnquist did not have any personal knowledge of the disputed facts in the Laird versus Tatum case.

Justice Rehnquist in responding to questions from Senator LEAHY on the subject of his analysis of the pertinent statute affecting a judge's disqualification from the Laird versus Tatum case and any second thoughts he might have today on that position stated:

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

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

This was a forthright statement by Justice Rehnquist concerning his views on the controlling statute in effect at the time as applied to the facts of the case. Additionally Justice Rehnquist acknowledges that subseqent amendments to the law could prossibly require a different conclusion.

In summary, the issue raised was one of legal analysis, upon which reasonable jurists could differ; however, in no way should Justice Rehnquist's actions be construed as being improper.

Mr. President, another incident concerning this matter is one that was alleged to have occurred at the Phoenix polling place.

The allegation that Justice Rehnquist challenged or harassed minority voters at a polling place in Phoenix during the 1960's again found itself an issue during the confirmation hearings in 1986. Similar allegations were raised in 1971 during his consideration for the position of associate justice. It should be noted at this juncture that the challenging of voters in Arizona at the time was a lawful election procedure. I repeat, the challenging of voters in Arizona at the time was a lawful election procedure. A challenger was an individual legally appointed as a representative by both Republican and Democratic Parties. The primary duty of a challenger was to observe for irregularities at the polling place. The conclusion reached by the committee in 1971 was that the allegations had been thoroughly investigated and found "to be wholly unsubstantiated" and, viewed in its entirety, the committee felt that the incident suggested at the very most a case of mistaken identity.

The allegation of voter harassment was originally made by the Southwest Conference of the NAACP in a resolution presented for the record at Justice Rehnquist's hearing in 1971. This resolution alleged that Justice Rehnquist had harassed black voters in 1968. In 1971 Justice Rehnquist categorically denied this charge and stated that he had nothing to do with polling activities in 1968.

At the same time in 1971 it was alleged by two witnesses before the committee that Justice Rehnquist had engaged in voter harassment in Phoenix, AZ in 1962. There was, in fact, an incident of voter harassment at the Bethune polling place in Phoenix, AZ during the 1962 elections, and the FBI investigated the matter. The FBI investigative report of that incident dated November 1962 was made available to the Judiciary Committee in 1971, as well as 1986. Justice Rehnquist's name was not mentioned in the 1962 FBI investigative report as either a participant in or a witness to the incidents under investigation. Mr. Carl Muecke, U.S. attorney for the district of Arizona, and A Mr. Carl Sims, who had spent a great deal of time campaigning for the Democratic Party, both, when interviewed in 1962 by the FBI, specifically identified the individual involved in voter harassment at the Bethune polling place as Mr. Wayne C. Bentson. Mr. Bentson when interviewed by the FBI—in 1962, 1971 and 1986—admitted that he was the individual involved in an incident at the Bethune polling place in the 1962 general election.

During the course of the 1962 investigation one of the individuals interviewed by the FBI was Mr. Robert Tate. Mr. Tate, when interviewed described the incident involving voter harassment which occurred at the Bethune polling place in 1962. In 1971, Mr. Tate and another individual, Mr. Jordan Harris, who was not interviewed by the FBI in 1962, sent affidavits to the Judiciary Committee, alleging that Justice Rehnquist had taken part in voter harassment at the Bethune polling place on November 3, 1964, as opposed to 1962. The incident described by Messrs. Tate and Harris in their 1971 affidavit is remarkably similar to Mr. Tate's own recollection when interviewed by the FBI in 1962 regarding the incident which took place at the Bethune polling place that same year, 1962; with the exception that Mr. Tate did not name Justice Rehnquist in his 1962 statement.

Judge Charles L. Hardy was the Democratic Party attorney in charge of the Election Advisory Committee and arbitrator with respect to voter challenges and disputes during the 1960's. Judge Hardy in 1971, after being informed that testimony before the committee that same year indicated that Justice Rehnquist was involved in voter harassment in 1964, wrote the committee:

> I am informed . . . 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 . . . 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.

In a November 1971 letter to Senators BAYH, HART, and KENNEDY, regarding his election activities during the 1960's, Justice Rehnquist wrote:

> I did speak at the school for challengers in 1962, 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 resovle them.

Justice Rehnquist's responses in 1971, are totally consistent with the information available to the committee then and now in 1986. The FBI's investigative report and eyewitness accounts are totally supportive of Justice Rehnquist's rendition of his election activities in the 1960's.

Now in 1986, individuals have come forward with essentially the same allegations against Justice Rehnquist. That is, sometime in the 1960's, and at some polling place, that Justice Rehnquist challenged, harassed or intimidated voters.

Individuals who claimed to have information concerning the allegation of voter harassment were invited to testify before the Judiciary Committee in 1986. Each of these witnesses were interviewed by the FBI prior to testimony before the committee. Thirteen individuals came before the committee in 1986 and testified on the voter intimidation matter. Five of these individuals were called by those opposed to Justice Rehnquist. All five who testified that Justice Rehnquist had in some manner harassed or challenged voters failed to make any such allegations against him during his confirmation hearing in 1971 to be Associate Justice.

Some of those who testified that Justice Rehnquist had harassed voters, as well as others interviewed by the FBI, did not know Justice Rehnquist at the time of the alleged incident and identified him based on photographs which they saw 7 to 9 years after the fact.

The following cases in point will support the conclusion that Justice Rehnquist at no time challenged or harassed voters at the polling place in the 1960's or at any other time.

James J. Brosnahan, former assistant U.S. attorney in 1962, testified before the committee in 1986 that Justice Rehnquist had challenged voters in 1962. However, prior to his testimony Mr. Brosnahan stated publicly that he never saw Justice Rehnquist actually challenge any voters at a polling place. He also stated publicly that the precinct where he saw Justice Rehnquist and where he made an appearance in his official capacity as assistant U.S. attorney to investigate complaints, was in 1962 at the Bethune polling place. However, when Mr. Brosnahan appeared before the Judiciary Committee in 1986 he was unable to recall the precinct in question. In fact, he informed Senator HATCH that "the name of the precinct is not that clear to me. The stories talk about Bethune." He now remembered investigating several disturbances at various precincts. Mr. Brosnahan also stated

that he was accompanied by an FBI agent during his election day investigations in 1962. As previously mentioned, there was an incident at the Bethune polling place in 1962 and it involved an individual by the name of Wayne C. Bentson.

A search of FBI's files fail to reveal any report filed by Mr. Brosnahan, or the FBI agent that allegedly accompanied him on election day 1962, regarding voter harassment by Justice Rehnquist. Although the FBI files do reveal that the Bureau received phone calls concerning complaints at various precincts in 1962 and 1964. There is no mention of Justice Rehnquist's name in any FBI report or complaint concerning this matter at that time.

Justice Rehnquist's role in the elections during the 1960's was that of legal advisor to the Maricopa County Republican Party. In this position he was required, on occasion, to visit precincts where disturbances occurred in order to mediate disputes and advise challengers.

Mr. Brosnahan's testimony that Justice Rehnquist was present at some precinct, in 1962, is completely consistent with Justice Rehnquist's statement in 1971 and to the Judiciary Committee in 1986.

One of the witnesses that testified before the committee on the subject of voter harassment, was Judge Vincent Maggiore, former Democratic Party chairman for Maricopa County. Judge Maggiore told the committee:

As a precinct committeeman, in the latter part of 1960, I was elected by the committee as the county chairman, the Maricopa County chairman. I was reelected in 1962, and I was the county chairman that was in office at the time all of the problems that you are facing came into being. I stayed county chairman until 1963.

At the time, I was county chairman in 1962, I was the culprit that caused all of your problems today. I have been a lifetime Democrat, and at the time of the problems as to voting with minorities, and Bethune was caused by me. I thought, as a matter of fact at that time that there was a little too much activity in the precincts, and I was the one that called the U.S. Attorney's Office . . . I am the one that caused the action that was taken by the U.S. Attorney's Office.

During this period of time, and I appreciate the seriousness of this today, at no time did anybody come to me and state that Justice Rehnquist had committed any of the acts that I have heard for 2 of 3 days. I feel that I was the party leader . . . and, for sure, all of these things should have come to me.

After the incident at Bethune, I realized that I was not going to get anything done as far as action by the U.S. Attorney's Office or action by the sheriff and the police were called also . . . I hope you realize that after 25 years it is very difficult to recollect each and every thing that occurred at that time. Too many things have passed.

But what I do recollect was that after Wayne Bentson was taken care of—and there was a little battle,—I hope the statute of limitations is broadened, because I may be the one that caused that battle to take place. I told some of my assistants to go and help out, to clear up the situation in Bethune.

I was at Bethune two or three times that day, and I was at other precincts where I thought this activity was not in accordance with the law. During all of this time, I never saw Justice Rehnquist there. I never saw him at any of the other precints either . . . A couple of days after the election and the incident in Bethune, I stopped Justice Rehnquist in the street. I told Justice Rehnquist that I was a little disturbed. Because I felt that there were some deprivation of certain people's rights.

Justice Rehnquist—and I'm paraphrasing it—stated at that time he agreed with me, that there should be something done in regards to protecting people's voting rights, that they were very important.

□ 1710

Judge Thomas Murphy was another individual knowledgeable of election activities in the 1960's. Judge Murphy, presently a judge for American Samoa, and the 1964 Democratic county chairman of Maricopa County, informed the FBI in 1986 that he personally, in 1964, investigated complaints which were made about activities at the polling places. He stated that the allegations being made about Justice Rehnquist were totally unfounded.

Finally, Mr. Ed Cassidy, former police officer with 29 years' service on the Phoenix Police Department testified in 1986 before the Judiciary Committee. Mr. Cassidy's statement to the committee, also corroborated by the FBI's 1962 investigation, utterly refutes the allegation that Justice Rehnquist was involved in voter challenging or harassment in Phoenix.

It is clear that a Republican challenger was involved in an incident at the Bethune polling place in 1962, and that this challenger was consequently escorted out of the polling place by a police officer. This person, the only person involved in the improper challenging in 1962, was Mr. Wayne C. Bentson.

In 1986 the committee expanded its investigative effort and also invited numerous witnesses to testify regarding the allegation. On completion of this investigation the committee came to essentially the same conclusion as that reached in 1971, Justice Rehnquist, although a legal advisor at the time, did not participate in any voter challenging or harassment. In fact, when all the evidence was reviewed it gave a more definitive and favorable impression of Justice Rehnquist's activities and duties as a legal advisor.

Mr. DENTON. Mr. President, I rise to urge my colleagues to give their wholehearted support to confirm William Rehnquist as Chief Justice of the United States.

Justice Rehnquist has served with distinction in the U.S. Supreme Court for the last 15 years. His keen intellect and deep understanding of law and precedent have quickly established William Rehnquist as one of the great jurists of our time.

It is significant to review some of the extraordinary information presented to this committee by the American Bar Association's standing committee on the Federal judiciary. After interviewing 50 law school professors, 70 lawyers, and 180 State and Federal judges, that committee gave William Rehnquist a well qualified rating, which is the committee's highest evaluation of a nominee for the Supreme Court. Furthermore, the committee found unanimous support on the Court for the elevation of William Rehnquist to the position of Chief Justice. Justice Rehnquist's colleagues characterized him as one who would pull the Court together. There was, in fact "a unanimous feeling of joy" expressed by Justice Rehnquist's colleagues.

With regard to his personal integrity, Justice Rehnquist has lived up to his word delivered to this committee in 1971 during his nomination hearing. There he spoke of Justice Frankfurter's famous adage that, "if putting on the robe does not change a man, there is something wrong with the man." Justice Rehnquist went on to say:

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.

I would like to note, Mr. President, that Justice Rehnquist was straightforward in answering questions put to him by the Judiciary Committee. Furthermore, he showed the utmost of integrity by raising no objection to this committee's review of the memos he authored while serving in the Justice Department's Office of Legal Counsel.

In terms of professional competence, Justice Rehnquist has demonstrated that he is second to none. Any Rehnquist opinion is a profound, clear and rightly worded text. The Wall Street Journal recently said that, "His opinions are famous for going to the heart of issues. There is rarely any doubt among lower courts about what a Rehnquist opinion means."

Mr. President, it is a special privilege and a keen honor to support a man who wholly adheres to these qualities of personal integrity, professional competence, and fidelity to the Constitution. I urge my colleagues to give him their strongest support and approve his nomination as the 16th Chief Justice of the United States.

Mr. THURMOND. Mr. President, I will now yield the floor.

Mr. GOLDWATER. Mr. President, has the Senator from South Carolina concluded?

Mr. THURMOND. Mr. President, I am very pleased that the distinguished

Senator from Arizona will now speak in behalf of this nomination.

The PRESIDING OFFICER (Mr. McCONNELL). The Senator from Arizona.

□ 1720

LIBERAL BIGOTRY AND JUSTICE REHNQUIST

Mr. GOLDWATER. Mr. President, we are about to act on the nomination of a new Chief Justice of the United States, the 16th person to sit in that position. There is no question in my mind about the qualifications of the nominee, Justice William Rehnquist, to serve as a Chief Justice.

He possesses an outstanding intellect, a solid record of experience on the bench, and the highest reputation among his colleagues on the Court and in the legal community. He is known for excellence in every category of importance to the eminent office for which he was selected.

Justice Rehnquist is recognized as being a legal scholar in and of himself, steeped in the Court's history and precedents and holding a phenomenal memory for cases. He has twice received the American Bar Association's top rating of professional competence, judicial temperament and integrity.

Yet a small minority has mounted a personal attack on the nominee's credibility and his alleged insensitivity to the rights of minorities and women. He has not decided cases the way they would have wished and it is supposedly "insensitive" for anyone to disagree with their liberal agenda. A person becomes a racist or sexist because his reasoned judgments guide him to a different outcome from the tenets of liberal philosophy.

This is not "Advice and Consent." It is what the Arizona Republic has called "Liberal Bigotry."

What we are witnessing is an attempt to turn the clock back, to reverse the general practice of recent decades when judicial nominees were confirmed on the basis of fitness for the office, not the shade of their philosophy.

In 30 years of service in this body, I have guided my decision on judicial nominations according to three general standards, regardless of whether the President who makes the nomination is a Democrat or Republican:

First, is the nominee professionally able and of sound mind and health?

Second, is the nominee free of any significant conflict of interest?

Third, is the nominee a person of high moral character and integrity?

Professional fitness for the office has been the threshold criterion of judicial appointment ever since the Magna Carta of 1215 which decreed:

> We will not make Justices . . . except from those who know the law of the land and are willing to keep it.

Under these standards, I would agree that a nominee should be rejected who holds a strong racial or religious bias against other races or creeds than his own, because such a person is lacking in integrity and character. But where I part company with the opponents of Justice Rehnquist is their reliance on judicial philosophy as a measure of an individual's devotion to values of equality and justice.

The accusers of Justice Rehnquist are themselves out of the mainstream of contemporary American values. I thought it was a principle of our basic values of fairness that a person is not to be labeled as inflexible or unfair, or hostile to other groups, solely because of his reasoned conclusions on complex and controversial issues.

The judicial philosophy test which is at the heart of the opposition to Justice Rehnquist's nomination is a faulty concept unworthy of consideration in this Chamber. In the first place many issues cannot accurately be pegged as conservative or liberal. I have voted together with some of my liberal colleagues on certain questions of social morality and I have never considered the subject to be one that falls in the liberal or conservative camp.

My primary objection to using a philosophical measure for every nominee is that this is an abuse of the power conferred upon us by the framers of the Constitution. I believe there is an attempt here to convert the confirmation power into an open license to reject nominees at will whenever some faction of the Senate disagrees with the nominee's past writings or statements.

The road we are asked to take would distort the powers the framers of the Constitution have conferred upon us in article II, section 2, by using it as a weapon for confrontation and open collision with the President's appointment power.

Instead, I believe the framers contemplated that the Chief Executive of the United States should be given broad discretion in making appointments. Alexander Hamilton stated in the Federalist Paper No. 76 that it is "not very probable" that the President's nomination would often be overruled.

Let us remember that the President is chosen in the only nationwide election held in our country. The will of all the people, expressed in their most recent choice of President, should be given due respect when acting on his nominations. This is particularly true when there is a nominee of such impeccable credentials for the office as Mr. Justice Rehnquist.

According to this morning's newspaper, the latest attack on Justice Rehnquist centers on his decision not to withdraw himself from consideration of Laird versus Tatum, involving a challenge to the role of the military to conduct surveillance during the 1971 May Day demonstrations. But Justice Rehnquist has elaborated his reasons and the correctness of his decision in a lengthy memorandum interpreting the applicable statute and precedents at the time.

He has pointed out that a Federal judge has a duty to sit where not disqualified. In his words;

> There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal that may review an equally divided decision of this Court and thereby establish the law for our jurisdiction.

The quarrel of his critics is not over the ethics of Justice Rehnquist's decision to participate in this case. They are disappointed with the way he ruled in the case. If he had decided against the Government, he would now be hailed as a hero by the same people who are making such a controversy about a matter of judgment on which informed and wise men can disagree.

Mr. President, not too many weeks ago, the Senate was told that it should insist on the standard of excellence for all members of the Federal judiciary. William Rehnquist is eminently qualified under this standard or under any other rational test.

I ask unanimous consent that the text of an editorial published in the Tucson Citizen may be printed in the RECORD. The article is written by Gary Born, associate professor of law at the University of Arizona. Professor Born served as a law clerk to Justice Rehnquist and, based on his first hand knowledge of the Justice's character and record, he strongly recommends the confirmation of William Rehnquist as Chief Justice.

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

SENATE SHOULD GIVE PROMPT APPROVAL TO REHNQUIST

(By Gary Born)

During 1982 and 1983 I served as a law clerk to U.S. Supreme Court Justice William Rehnquist. I developed a deep admiration and respect for the justice during my clerkship. As a result, I applauded President Reagan's appointment of Rehnquist as the next chief justice. I strongly believe that Rehnquist's appointment should be promptly confirmed by the Senate.

After graduating first in his class at Stanford Law School, Rehnquist clerked for Justice Jackson on the Supreme Court. He went on to become a respected and successful lawyer in Arizona and later in the U.S. Department of Justice. For the past 15 years, Rehnquist has served as an associate justice of the Supreme Court. His numerous opinions are acclaimed for their brilliant analysis and scholarship. The American Bar Association recently awarded Rehnquist the highest possible endorsement for the chief justice job.

These achievements are compelling reasons for confirming Rehnquist's appointment. An equally important—although less publicized—reason for Rehnquist's confir-

mation is the justice's personal commitment to the Supreme Court. Rehnquist has consistently, albeit quietly, devoted exceptional effort to the work of the court. He invariably carries an unusually large proportion of the court's heavy case-load. During the year that I clerked for him, he authored 20 of the clerk's 160 opinions—more than any other judge.

Rehnquist also devotes special attention to building consensus for opinions of the court and encouraging collegiality among its members. He frequently visits the chambers of other justices, either to discuss cases or simply to chat. Likewise, he maintains warm personal relations with other members of the court, and he is keenly aware of the personal interests and sensitivities of his fellow justices. These personal qualities will go far toward preventing the internal divisiveness that sometimes has beset the court.

Despite Rehnquist's obvious qualifications, a few senators have voiced opposition to his appointment. Most stridently, Sen. Edward Kennedy has charged that Rehnquist is "outside the mainstream of American constitutional law and American values."

Kennedy's charge is simply wrong. While Rehnquist is obviously a conservative jurist, his voting record and judicial philosophy place him well toward the center of contemporary American constitutional values. His opinions plainly show his commitment to contemporary American constitutional values. A large proportion of Supreme Court cases involve criminal justice issues, and many of Rehnquist's opinions deal with this subject. As most Americans would hope, Rehnquist has steadfastly refused to give criminal suspects unfair procedural advantages or to permit the release of convicted wrong-doers because of unrelated police misconduct.

Likewise, Rehnquist has been careful to ensure that law enforcement officials have adequate powers under the Constitution to protect ordinary citizens from violent crime. None of Rehnquist's critics have sought to explain how these views depart from mainstream American values.

Opposition to Rehnquist's appointment boils down to a single complaint: Rehnquist's critics wish that he would more frequently invoke the U.S. Constitution to overturn state and federal laws that they disagree with. Rehnquist's refusal to interfere with the democratic process in this way reflects his commitment to the most basic principles of the American Constitution—not his rejection of them. Rehnquist believes judges are bound by the Constitution to respect the policy choices made by the democratically-elected representatives of the people; as the Constitution's framers intended, the Justice responds with caution when litigants ask unelected, life-tenured judges to overturn democratically-enacted laws.

Charges that Rehnquist is insensitive to the interests of women and minorities are equally unfounded. During the year I clerked for him the justice unequivocally wrote that the "prohibitions against discrimination contained in the Civil Rights Act of 1984 reflected an important national policy." He has made similar statements in a number of other cases and has frequently voted to uphold claims by minorities and women. Although Rehnquist's cautious approach to the judiciary's power has often led him to reject constitutional claims by women and minorities, it is misleading and unfair to suggest that these decisions reflect insensitivity to the rights of such groups. Rather, his decisions simply reflect deeply held views about the limited powers of the federal judiciary.

Some critics have seized on accounts that Rehnquist challenged the literacy of prospective Arizona voters in the 1960s. If these accounts were true, Rehnquist could quite properly have responded that he did challenge voters—just as existing Arizona law permitted. Instead, Rehnquist forthrightly explained that he does not recall personally challenging voters on any occasion, although he candidly admits that the 30-year lapse in time may have dimmed his recollection.

One of Rehnquist's personal qualities that struck me most is his lack of guile or pretension. In his dealings with justices, law clerks, and others at the court, Rehnquist was invariably open, honest, and forthcoming. With this background, suggestions that the justice concealed—for no purpose—his involvement in long-past Arizona elections are simply implausible. The Senate plainly shares this view and almost certainly will confirm Rehnquist's appointment.

The Rehnquist critics can only be motivated by the hope of challenging the substance of Rehnquist's constitutional principles and wrongly impugning his personal integrity and authority. Questioning with this motivation amounts to a misuse of the Senate's power of confirmation and undermines the president's constitutional power to appoint federal judges.

Justice Rehnquist entered the Senate confirmation hearing with an unblemished record of service on the court. His forthright performance in the Senate hearings should only enhance his record. The Senate should promptly confirm Rehnquist's appointment and disown efforts to misuse the confirmation process.

Mr. GOLDWATER. Mr. President, a lot has been made of the activities of Justice Rehnquist in an election held in Arizona a number of years ago in which he was acting as a pollwatcher. I was acting as a pollwatcher in the same election. So were many Democrats. We did not have, at the time, adequate laws to cover the discrepancies and dishonesties which might occur in the election booths and both parties had pollwatchers for the sole purpose of determining whether a man or a woman was eligible to vote under the then existing laws of the State, which required literacy. Justice Rehnquist did nothing—I know, because I worked with him—he did nothing that was not done by many others of us acting as pollwatchers, and by many Democrats acting as pollwatchers.

I am not going to go into the rather screwy laws Arizona had at that time about elections, but I can remember the day when the Democrats, if you went up to register as a Republican, would say, "Republican? We cannot even spell it." That is what we had to put up with for many, many years.

Now people are seeking something to hold against Justice Rehnquist and they have come up with this little item that has been gone over and over by local people, Federal people, by the newspapers, by everybody concerned. There is absolutely nothing to it, as there is nothing to what the opponents of the Justice are trying to bring up on this floor.

I yield the floor, Mr. President.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, I hope that I may bring to this debate a somewhat different perspective than that of other Members who have spoken on the subject or who are likely to speak on the subject before the confirmation vote takes place.

We deal in this nomination with an issue quite different, in my opinion, from that which attends the debate over the lion's share of nominees for the Supreme Court of the United States.

Only on a handful of occasions have sitting Associate Justices been nominated by a President to sit as Chief Justice of the United States. In the case of that handful of nominations, however, we have not simply a prediction, an attempt to judge what kind of Justice the nominee will make; we have a record. In the case of Mr. Justice Rehnquist, we have a record of well over a decade, participation in literally hundreds of decisions, votes one way or another, authoring the decisions of the Court on a number of occasions.

It is for precisely that reason that I think the overwhelming direction of this debate should be based not on what Mr. Rehnquist's attitudes, whether political or legal, were before he became an Associate Justice of the Supreme Court of the United States, or, for that matter, even his personal life since that time. I believe that the consideration of the Senate should be directed primarily but not solely on whether or not the record of Justice Rehnquist as an Associate Justice of the United States is attended by a degree of personal intelligence, discipline, and commitment to the law and the the Constitution sufficient to allow him to become Chief Justice of the United States.

He is, of course, a member of the Court at the present time. A change in his title will not affect his vote on the Supreme Court in any respect whatsoever.

□ 1730

He will gain certain modest additional duties and perhaps a great more prominence with respect to his decisions. But the fact is that he is a member of the Supreme Court of the United States for life at the present time. An appropriate question may very well be whether or not Mr. Justice Rehnquist's decisions over the period of time during which he has served on the Court fall within what I consider to be the broad parameters of

acceptability with respect to an interpretation of the statutes and the Constitution of the United States. That it seems to me is a legitimate inquiry. It is not, however, an inquiry which is answered simply by a determination on the part of each individual Senator as to whether or not he or she agrees with each of those opinions or even agrees with the general philosophical bent of a Justice's actions. If a nominee falls within the parameters of a reasonable interpretation of the Constitution and the laws of the United States, it is my view that that nominee ought to be confirmed.

I stated at the beginning of these remarks that I had an insight into Mr. Justice Rehnquist which was not shared by any of my colleagues. That insight stems from the fact that for 12 years before I was sworn into this body I served as attorney general of the State of Washington. During the last 8 of those years, Mr. President, I argued 14 cases before the Supreme Court of the United States. I am certain that that is more cases than any other Members of this body has argued in that Court. It is likely that it is more than all other Members of this body combined have argued before that Court. I found during those arguments, 13 of which Mr. Justice Rehnquist attended—in one he took no part—without exception Justice Rehnquist was well prepared for argument of counsel. It was obvious that he had read and digested the serious legal or constitutional points which were at issue. That is something which a number of judges regrettably do not do at the time of argument by counsel. On the other hand, I must say that most members of the Supreme Court of the United States meet that qualification and that test. In any event, I do not know of any member of the Supreme Court during that 8-year period whom I regarded as better prepared for argument by counsel, the last action before the Court makes it decision on any case.

Second, Mr. President, Mr. Justice Rehnquist almost without exception played a major role in those oral arguments. He was and is a frequent and an aggressive questioner of counsel. His questions were without exception directly to the points at issue, were stated firmly, occasionally indicating a point of view on his part but always evidencing a desire to learn as much as he could about both the facts and the law applicable to those facts.

I had felt when I began to prepare these remarks, Mr. President, that I perhaps might have my testimony questioned on the ground that Mr. Justice Rehnquist voted for my side in those cases more than most other members of the Supreme Court. I find by a careful examination of those 13 decisions that that was not necessarily true. I won more than I lost in that Court. Justice Rehnquist voted with me more often than he voted on the other side but was not remarkably different from other Justices. In 9 of the 14 cases which I argued, Mr. Justice Rehnquist was in full and complete agreement with the majority of the opinion. In two of those cases he wrote the opinion of the Court. One of them was a win for me; one of them was a loss. The win was a rather important case having to do with whether or not Indian tribal sovereignty is sufficient so that Indian tribal courts can try and impose criminal penalties on non-Indians for offenses committed on reservations.

The second case, the loss, simply permitted the State of Idaho to sue the State of Washington in the original jurisdiction of the Supreme Court, a case in which Washington was eventually primarily triumphant.

Mr. Justice Rehnquist in three of the cases was in partial ageement with the majority but like other Justices he seemed to go through the opinion of the Court paragraph by paragraph and on occasion would dissent with only one or two paragraphs or one or two points. He took no part in the decision of the single case which I considered to be my most signal triumph. I am sorry that he did not do so, but he was absent in that connection. He was in pure dissent with the rest of the Court in only one of those 14 cases, one in which I may say he dissented on my side, on the side of the State of Washington.

The fact that Mr. Justice Rehnquist was very much a mainstream Justice in dealing with issues important enough for the Supreme Court to decide which related to the State of Washington, my impression of his service on the Court, which included times about which we have more recently learned a considerable amount in connection with his physical disabilities, was that on every single occasion on which I argued before him he was well prepared, asked intelligent questions, and reached objective and highly defensible answers. I must admit, Mr. President, that with one or two exceptions I was not arguing before the Court issues of profound constitutional implications as we seem to judge those questions here, that is to say, questions relating to civil rights and the like. When the State had constitutional questions before the Court, they were more likely to apply to the commerce clause than they were to the Bill of Rights. There was one exception, Mr. President. The second case which I argued before the Supreme Court was entitled DeFunis versus Odegaard. It was the first affirmative action/reverse discrimination case. It arose out of the law school of the University of Washington.

I was very disappointed when Mr. Justice Rehnquist joined with seven of the nine Justices, after we had, proceeded all the way to the Supreme Court, in dismissing the appeal on the grounds that it was moot because the young man who had brought the case and been admitted to a law school pending a decision was about to finish law school. When a few years later, the Bakke decision came down, I decided that I was rather fortunate that the case had been mooted, since it became quite evident that as counsel for the law school I would have lost had the case been decided on its merits.

In any event, Mr. President, I believe that with all of the rather heated oratory to which we have been subjected in connection with this nomination on both sides of the issue, it may be of some interest to Members of this body to share this experience. Mr. Justice Rehnquist in my opinion has acquitted himself well and honorably as a member of the Supreme Court of the United States. He has judged cases with which I have had firsthand experience objectively, soberly, and, when he has written the opinion of the Court or a dissenting opinion, intelligently and fashioned in a way that the lawyers and the parties could understand not only the decision but the reasons leading to that decision, I find Mr. Justice Rehnquist's philosphy of the law and of the Constitution to be one with which I differ on occasion but to be well within appropriate parameters of judicial and constitutional decisionmaking, and under those circumstances, because in my view his record has been a good one, I believe that we should confirm the nomination of the President of the United States and permit Mr. Justice Rehnquist to take the position of Chief Justice of this country.

Mr. President, I see another Senator on the floor, ready to speak, and I yield the floor.

The PRESIDENT pro tempore. The distinguished Senator from Kentucky.

□ 1730

Mr. McCONNELL. Mr. President, as a member of the Senate Judiciary Committee, I rise in enthusiastic support of Justice William Rehnquist's nomination to be Chief Justice of the United States.

As a personal observation at the outset, I might say that I first met Justice Rehnquist back in 1969. At that time I was a legislative assistance to a Senator from Kentucky who was assigned to the Judiciary Committee. As luck would have it, that particular Senator ended up being very much involved in the nomination to the U.S. Supreme Court of Judge Clement Haynsworth, of South Carolina, and

subsequently G. Harold Carswell of Florida.

The Senator for whom I worked, Marlow Cook, was very active in support of Judge Hanesworth. In my capacity as his assistant, I worked with not only the Senator but also then Asslstant Attorney General William Rehnquist, who was at that time Assistant Attorney General in the Office of Legal Counsel of the Justice Department.

So, while I did not have an opportunity to argue cases before the Supreme Court, as my distinguished collegue from Washington has just outlined, I did have an opportunity to work with Justice Rehnquist, on an almost daily basis, during those confirmation hearings, and to get a chance to observe his intellect, skill, and ability firsthand.

Ironically, I was not always on the same side as Justice Rehnquist. The Senator for whom I worked supported Haynsworth and opposed Carswell. So I had a chance during that period of controversial Supreme Court nominations to be on the same side as Justice Rehnquist and in opposition to Justice Rehnquist.

I subsequently wrote a law journal article about the issue of Supreme Court appointments by the President—what are the appropriate criteria for the Senate to apply to such nominations—and with a bit of nostalgia, I suppose, I ask unanimous consent that that law journal article be printed at this point in the RECORD.

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

HAYNSWORTH AND CARSWELL: A NEW SENATE STANDARD OF EXCELLENCE

(By A. Mitchell McConnell, Jr.*)

(All politicians have read history; but one might say that they read it only in order to learn from it how to repeat the same calamities all over again.—Paul Valery.)

With the confirmation of Judge Harry A. Blackman by the United States Senate on May 12, 1970, the American public witnessed the end of an era, possibly the most interesting period in Supreme Court history. In many respects, it was not a proud time in the life of the Senate or, for that matter, in the life of the Presidency. Mistakes having a profound effect upon the American people were made by both institutions.

The Supreme Court of the United States is the most prestigious institution in our nation and possibly the world. For many years public opinion polls have revealed that the American people consider membership on the Court the most revered position in our society. This is surely an indication of the respect our people hold for the basic fabric of our stable society—the rule of law.

To the extent that it has eroded respect for this highest of our legal institutions, the recent controversial period has been unfortunate. There could not have been a worse time for an attack upon the men who administer justice in our country than in the past year, when tensions and frustrations about our foreign and domestic policies literally threatened to tear us apart. Respect for law and the administration of justice has, at various times in our history, been the only buffer between chaos and order. And this past year this pillar of our society has been buffeted once again by the winds of both justified and unconscionable attacks. It is time the President and the Congress helped to put an end to the turmoil.

The President's nomination of Judge Harry Blackmun and the Senate's responsible act of confirmation is a first step. But before moving on into what hopefully will be a more tranquil period for the High Court, it is useful to review the events of the past year for the lessons they hold. It may be argued that the writing of recent history is an exercise in futility and that only the passage of time will allow a dispassionate appraisal of an event or events of significance. This may well be true for the author who was not present and involved in the event. However, for the writer who is a participant the lapse of time serves only to cloud the memory. Circumstances placed a few individuals in the middle of the controversies of the past year. In the case of the author the experience with the Supreme Court nominees of the past year was the direct result of Senator Marlow W. Cook's election in 1968 and subsequent appointment to the powerful Senate Judiciary Committee. This committee appointment by the Senate Republican leadership, and Supreme Court nominations by President Nixon, brought about an initial introduction to the practical application of Article II, section 2 of the Constitution which reads, in part, that the President shall "nominate and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court."

The purpose of this article is to draw upon the events of the past year in suggesting some conclusions and making some recommendations about what the proper role of the Senate should be in advising and consenting to Presidential nominations to the Supreme Court. The motivations of the Executive will be touched upon only periferally.[1]

Initiated by Senator Robert P. Griffin, Republican of Michigan, the senatorial attack upon the Johnson nomination of Justice Abe Fortas to be Chief Justice which resulted in blocking the appointment had set a recent precedent for senatorial questioning in an area which had largely become a Presidential prerogative in the twentieth century. The most recent period of senatorial assertion had begun. But there had been other such periods and a brief examination of senatorial action on prior nominations is valuable because it helps put the controversial nominations of the past two years in proper perspective.

Joseph P. Harris, in his book, the *Advice and Consent of the Senate,* sums up the history of Supreme Court nominations by pointing out that approximately one-fifth of all appointments have been rejected by the Senate. From 1894 until the Senate's rejection of Judge Haynsworth, however, there was only one rejection. In the preceding 105 years, 20 of the 81 nominees had been rejected. Four of Tyler's nominees, three of Fillmore's, and three of Grant's were disapproved during a period of bitter partisanship over Supreme Court appointments. Harris concludes of this area:

"Appointments were influenced greatly by political consideration, and the action of the Senate was fully as political as that of the President. Few of the rejections of Supreme Court nominations in this period can be ascribed to any lack of qualifications on the part of the nominees; for the most part they were due to political differences between the President and a majority of the Senate." [2]

The first nominee to be rejected was former Associate Justice John Rutledge, of South Carolina. He had been nominated for the Chief Justiceship by President George Washington. The eminent Supreme Court historian Charles Warren reports that Rutledge was rejected essentially because of a speech he had made in Charleston in opposition to the Jay Treaty. Although his opponents in the predominantly Federalist Senate also started a rumor about his mental condition, a detached appraisal reveals his rejection was based entirely upon his opposition to the Treaty. Verifying this observation, Thomas Jefferson wrote of the incident:

The rejection of Mr. Rutledge is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any department of Government.[3]

On December 28, 1835, President Andrew Jackson sent to the Senate the name of Roger B. Taney, of Maryland, to succeed John Marshall as Chief Justice. As Taney had been Jackson's Secretary of the Treasury and Attorney General, the Whigs in the Senate strongly opposed him. Daniel Webster wrote of the nomination: "Judge Story thinks the Supreme Court is gone and I think so, too." [4] Warren reports that

". . . the Bar throughout the North, being largely Whig, entirely ignored Taney's eminent legal qualifications, and his brilliant legal career, during which he had shared . . . the leadership of the Maryland Bar and had attained high rank at the Supreme Court Bar, both before and after his service as Attorney General of the United States." [5]

Taney was approved, after more than two months of spirited debate, by a vote of 29 to 15 over vehement opposition including Calhoun, Clay, Crittenden, and Webster. He had actually been rejected the year before but was re-submitted by a stubborn Jackson.[6]

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*AUTHOR'S NOTE.—This article represents the thoughts and efforts of over a year's involvement in the Senate with three Presidential nominations to the Supreme Court. The experiences were possible only because of the author's association with the Junior Senator from Kentucky, Marlow W. Cook, and the conclusions drawn and suggestions made, many of which may be found in a speech by the Senator of May 5, 1970, represent, in large part, a joint effort by the two of them to evolve a meaningful standard by which the Senate might judge future Supreme Court nominees.

Only rarely does a staff assistant to a Member of Congress receive the opportunity to express himself by publication or speech on an issue of public significance. For the freedom and encouragement to do so in this instance, the author is grateful to Senator Cook.

*Chief Legislative Assistant to Marlow W. Cook, United States Senator from Kentucky; B.A., *cum laude,* 1961, University of Louisville; J.D., 1967, University of Kentucky. While attending the College of Law he was President of the Student Bar Association, a member of the Moot Court Team, and winner of the McEwen Award as the Outstanding Oral Advocate in his class. He was admitted to the Kentucky Bar in September of 1967 at which time he became associated with the Louisville, Kentucky law firm of Segal, Isenberg, Sales and Stewart.

History has judged Chief Justice Taney as among the most outstanding of American jurists, his tribulations prior to confirmation being completely overshadowed by an exceptional career. A contrite and tearful Clay related to Taney after viewing his work on the Court for many years:

"Mr. Chief Justice, there was no man in the land who regretted your appointment to the place you now hold more than I did; there was no Member of the Senate who opposed it more than I did; but I have come to say to you, and I say it now in parting, perhaps for the last time—I have witnessed your judicial career, and it is due to myself and due to you that I should say what has been the result, that I am satisfied now that no man in the United States could have been selected more abundantly able to wear the ermine which Chief Justice Marshall honored."[7]

It is safe to conclude that purely partisan politics played the major role in Senate rejections of Supreme Court nominees during the nineteenth century. The cases of Rutledge and Taney have been related only for the purpose of highlighting a rather undistinguished aspect of the history of the Senate.

No implication should be drawn from the preceding that Supreme Court nominations in the twentieth century have been without controversy because certainly this has not been the case. However, until Haynsworth only one nominee had been rejected in this century. President Woodrow Wilson's nomination of Louis D. Brandeis and the events surrounding it certainly exhibit many of the difficulties experienced by Judges Haynsworth and Carswell as Brandeis failed to receive the support of substantial and respected segments of the legal community. William Howard Taft, Elihu Root, and three past presidents of the American Bar Association signed the following statement:

"The undersigned feel under the painful duty to say . . . that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a Member of the Supreme Court of the U.S."[8]

Hearings were conducted by a Senate Judiciary subcommittee for a period of over four months, were twice-reopened, and the record of the hearings consisted of over 1500 pages.[9]

The nomination of Brandeis, like the nomination of Haynsworth, Carswell and to some extent Fortas (to be Chief Justice) quickly became a *cause celebre* for the opposition party in the Senate. The political nature of Brandeis' opposition is indicated by the fact that the confirmation vote was 47 to 22; three Progressives and all but one Democrat voted for Brandeis and every Republican voted against him.[10]

The basic opposition to Brandeis, like the basic opposition to Haynsworth and Carswell, was born of a belief that the nominee's views were not compatible with the prevailing views of the Supreme Court at that time. However, the publicly stated reasons for opposing Brandeis, just as the publicly stated reasons for opposing Carswell and Haynsworth, were that they fell below certain standards of "fitness."

Liberals in the Senate actively opposed the nominations to the Court of Harlan Fiske Stone in 1925 and Charles Evans Hughes five years later, for various reasons best summed up as opposition to what opponents predicted would be their conservatism. However, it was generally conceded by liberals subsequently that they had misread the leanings of both nominees, who tended to side with the Progressives on the Court throughout their tenures.[11]

No review of the historic reasons for opposition to Supreme Court nominees, even as cursory as this one has been, would be complete without mention of the Parker nomination. Judge John J. Parker of North Carolina, a member of the United States Court of Appeals for the Fourth Circuit, was designated for the Supreme Court by President Hoover in 1930. Harris reports that opposition to Parker was essentially threefold. He was alleged to be anti-labor, unsympathetic to Negroes, and his nomination was thought to be politically motivated.[12]

Opposition to Haynsworth and Carswell followed an almost identical pattern except that Judges Parker and Carswell were spared the charges of ethical impropriety to which Judge Haynsworth was subjected. All three nominees, it is worthy of note for the first time at this point, were from the Deep South.

As this altogether too brief historical review has demonstrated, the Senate has in its past, virtually without exception, based its objections to nominees for the Supreme Court on party or philosophical considerations. Most of the time, however, Senators sought to hide their political objections beneath a veil of charges about fitness, ethics and other professional qualifications. In recent years, Senators have accepted, with a few exceptions, the notion that the advice and consent responsibility of the Senate should mean an inquiry into qualifications and not politics or ideology. In the Brandeis case, for example, the majority chose to characterize their opposition as objecting to his fitness not his liberalism. So there was a recognition that purely political opposition should not be openly stated because it would not be accepted as a valid reason for opposing a nominee. The proper inquiry was judged to be the matter of fitness. In very recent times it has been the liberals in the Senate who have helped to codify this standard. During the Kennedy-Johnson years it was argued to conservatives in regard to appointments the liberals liked that the ideology of the nominee was of no concern to the Senate. Most agree that this is the proper standard, but it should be applied in a nonpartisan manner to conservative southern nominees as well as northern liberal ones. Even though the Senate has at various times made purely political decisions in its consideration of Supreme Court nominees, certainly it could not be successfully argued that this is an acceptable practice. After all, if political matters were relevant to senatorial consideration it might be suggested that a constitutional amendment be introduced giving to the Senate rather than the President the right to nominate Supreme Court Justices, as many argued during the Constitutional Convention.

A pattern emerges running from Rutledge and Taney through Brandeis and Parker up to an including Haynsworth and Carswell in which the Senate has employed deception to achieve its partisan goals. This deception has been to ostensibly object to a nominee's fitness while in fact the opposition is born of political expedience.

In summary, the inconsistent and sometimes unfair behavior of the Senate in the past and in the recent examples which follow do not lead one to be overly optimistic about its prospects for rendering equitable judgments about Supreme Court nominees in the future.

CLEMENT F. HAYNSWORTH, JR.: INSENSITIVE OR VICTIMIZED

(For the great majority of mankind are satisfied with appearance, as though they were realities, and are often more influenced by the things that seem than by those that are.—Author unknown.)

The resignation of Justice Abe Fortas in May of 1969 following on the heels of the successful effort of the Senate the previous Fall in stalling his appointment to be Chief Justice, (the nomination was withdrawn after an attempt to invoke cloture on Senate debate was defeated) intensified the resolve of the Senate to reassert what it considered to be its rightful role in advising and consenting to presidential nominations to the Supreme Court.

It was in this atmosphere of senatorial questioning and public dismay over the implications of the Fortas resignation that President Nixon submitted to the Senate the name of Judge Clement F. Haynsworth, Jr., of South Carolina, to fill the Fortas vacancy. Completely aside from Judge Haynsworth's competence, which was never successfuly challenged, he had a number of problems from a political point of view, given the Democrat-controlled Congress. Since he was from South Carolina his nomination was immediately considered to be an integral part of the so-called southern strategy which was receiving considerable press comment at that time. His South Carolina residence was construed as conclusive proof that he was a close friend of the widely-criticized senior Senator from that state, Strom Thurmond, whom, in fact, he hardly knew. Discerning Senators found offensive such an attack against the nominee rather than the nominator, since the southern strategy would be only in the latter's mind, if it existed. Nevertheless, this put the nomination in jeopardy from the outset.

In addition, labor and civil rights groups mobilized to oppose Judge Haynsworth on philosophical grounds. Some of the proponents of the Judge, including their acknowledged leader Senator Cook expressed the proper role of the Senate well in a letter to one of his constituents, a black student at the University of Louisville who was disgruntled over his support for the nominee. It read in pertinent part as follows:

". . . First, as to the question of his [Haynsworth's] view on labor and civil rights matters, I find myself in essential disagreement with many of his civil rights decisions—not that they in any way indicate a pro segregationist pattern, but that they do not form the progressive pattern I would hope for. However, as Senator Edward Kennedy pointed out to the conservatives as he spoke for the confirmation of Justice Thurgood Marshall.

"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 interested really in knowing whether the nominee has the background, experience, qualifications, temperament and integrity to handle this most sensitive, important, responsible job.

"Most Senators, especially of moderate and liberal persuasion, have agreed that while the appointment of Judge Haynsworth may have been unfortunate from a civil rights point of view, the ideology of the nominee is the responsibility of the President. The Senate's judgment should be made, therefore, solely upon grounds of

qualifications. As I agree with Senator Kennedy and others that this is the only relevant inquiry, I have confined my judgment of this nominee's fitness to the issue of ethics of qualifications?" [13]

The ethical questions which were raised about Judge Haynsworth were certainly relevant to the proper inquiry of the Senate into qualifications for appointment. Also distinction and competence had a proper bearing upon the matter of qualifications, but Judge Haynsworth's ability was, almost uniformly, conceded by his opponents and thus was never a real factor in the debate. A sloppy and hastily drafted document labelled the "Bill of Particulars" against Judge Haynsworth was issued on October 8, 1969, by Senator Birch Bayh of Indiana, who had become the *de facto* leader of the anti-Haynsworth forces during the hearings on the nomination before the Judiciary Committee the previous month. This contained, in addition to several cases in which it had been alleged during the hearings that Judge Haynsworth should have refused to sit, several extraneous and a few inaccurate assertions which were swiftly rebutted two days later by Senator Cook in a statement aptly labelled the "Bill of Corrections." This preliminary sparring by the leaders of both sides raised all the issues in the case but only the relevant and significant allegations will be discussed here, those which had a real impact upon the Senate's decisions.[14]

First, it was essential to determine what, if any, impropriety Judge Haynsworth had committed. For the Senator willing to make a judgment upon the facts this required looking to those facts. The controlling statute in situations where federal judges might potentially disqualify themselves is 28 U.S.C. § 455 which reads:

"Any Justice or Judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion* for him to sit on the trial, appeal, or other proceeding therein." [Emphasis added.]

Also pertinent is Canon 29 of the American Bar Association Canons of Judicial Ethics which provides:

"A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved."

Formal Opinion 170 of the American Bar Association construing Canon 29 advises that a judge should not sit in a case in which he owns stock in a party litigant.

The first instance cited by Judge Haynsworth's opponents as an ethical violation was the much celebrated labor case, *Darlington Manufacturing Co. v. NLRB*,[15] argued before and decided by the Fourth Circuit in 1963. The Judge sat in this case contrary to what some of his Senate opponents felt to have been proper. The facts were that Judge Haynsworth had been one of the original incorporators, seven years before he was appointed to the bench, of a company named Carolina Vend-A-Matic which had a contract to supply vending machines to one of Deering Millikin's (one of the litigants) plants. In 1957, when Judge Haynsworth went on the bench, he orally resigned as Vice President of the Company but continued to serve as a director until October, 1963, at which time he resigned his directorship in compliance with a ruling of the U.S. Judicial Conference. During 1963, the year the case was decided, Judge Haynsworth owned one-seventh of the stock of Carolina Vend-A-Matic.

Suffice it to say that all case law in point, on a situation in which a judge owns stock in a company which merely does business with one of the litigants before him, dictates that the sitting judge not disqualify himself. And certainly the Canons do not address themselves to such a situation. As John P. Frank, the acknowledged leading authority on the subject of judicial disqualification testified to the Judiciary Committee:

"It follows that under the standard federal rule Judge Haynsworth had no alternative whatsoever. He was bound by the principle of the cases. It is a Judge's duty to refuse to sit when he is disqualified, but it is equally his duty to sit when there is no valid reason not to . . . I do think it is perfectly clear under the authority that there was virtually no choice whatsoever for Judge Haynsworth except to participate in that case and do his job as well as he could." [16]

This testimony by Mr. Frank was never refuted as no one recognized as an authority on the subject was discovered who held a contrary opinion.

The second situation of significance which arose during the Haynsworth debate concerned the question of whether Judge Haynsworth should have sat in three cases in which he owned stock in a parent corporation where one of the litigants before him was a wholly owned subsidiary of the parent corporation. These cases were *Farrow v. Grace Lines, Inc.*,"[17] *Donohue v. Maryland Casualty Co.*,[18] and *Maryland Casualty Co. v. Baldwin*.[19]

Consistently ignored during the outrage expressed over his having sat in these cases were the pleas of many of the Senators supporting the nomination to look to the law to find the answer to the question of whether Judge Haynsworth should have disqualified himself in these situations. Instead, the opponents decided, completely independent of the controlling statutes and canons, that the Judge had a "substantial interest" in the outcome of the litigation and should, therefore, have disqualified himself. Under the statute, 28 U.S.C. § 455, Judge Haynsworth clearly had no duty to step aside. Two controlling cases in a situation where the judged actually owns stock in one of the litigants, not as here where the stock was owned in the parent corporation, are *Kinnear Weed Corp. v. Humble Oil and Refining Co.*[20] and *Lampert v. Hollis Music, Inc.*[21] These cases interpret "substantial interest" to mean "substantial interest" in the outcome of the case, not "substantial interest" in the litigant. And here Judge Haynsworth not only did not have a "substantial interest" in the outcome of the litigation, he did not even have a "substantial interest" in the litigant, his stock being a small portion of the shares outstanding in the parent corporation of one of the litigants. There was, therefore, clearly no duty to step aside under the statute. It is interesting to note that joining in the *Kinnear Weed* decision were Chief Judge Brown and Judge Wisdom of the Fifth Circuit whom Joseph Rauh, a major critic of the Haynsworth nomination, had stated at the hearings on the nomination "would have been heroic additions to the Supreme Court." [22]

But was there a duty to step aside in these parent-subsidiary cases under Canon 29? The answer is again unequivocally No. The only case law available construing language similar to that of Canon 29 is found in the disqualification statute of a state. In *Central Pacific Railroad Co. v. Superior Court*,[23] the state court held that ownership of stock in a parent corporation did not require disqualification in litigation involving a subsidiary. Admittedly, this is only a state case, but significantly there is no federal case law suggesting any duty to step aside where a judge merely owns stock in the parent where the subsidiary is before the court. Presumably, this is because such a preposterous challenge has never occurred even to the most ingenious lawyer until the opponents of Judge Haynsworth created it. Therefore, Judge Haynsworth violated no existing standard of ethical behavior in the parent-subsidiary cases except that made up for the occasion by his opponents to stop his confirmation.

There was one other accusation of significance during the Haynsworth proceedings which should be discussed. It concerned the Judge's actions in the case of *Brunswick Corp v. Long*.[24] The facts relevant to this consideration were as follows: on November 10, 1967, a panel of the Fourth Circuit, including Judge Haynsworth, heard oral argument in the case and immediately after argument voted to affirm the decision by the District Court. Judge Haynsworth, on the advice of his broker, purchased 1,000 shares of Brunswick on December 20, 1967. Judge Winter, to whom the writing of the opinion had been assigned on November 10, the day of the decision, circulated his opinion on December 27. Judge Haynsworth noted his concurrence on January 3, 1968, and the opinion was released on February 2. Judge Haynsworth testified that he completed his participation, in terms of the decision-making process, on November 10, 1967, approximately six weeks prior to the decision to buy stock in Brunswick. Judge Winter confirmed that the decision had been substantially completed on November 10.[25] Therefore, it could be strongly argued that Judge Haynsworth's participation in *Brunswick* terminated on November 10. However, even if it were conceded that he sat while he owned Brunswick stock it is important to remember that neither the statute nor the canons require an automatic disqualification, although Opinion 170 so advises. And the facts show that his holdings were so miniscule as to amount neither to a "substantial interest" in the outcome of the litigation under 28 U.S.C. § 455 or to a "substantial interest" in the litigant itself. Clearly, once again, Judge Haynsworth was guilty of no ethical impropriety.

As mentioned earlier there were other less substantial charges by Haynsworth opponents but they were rarely used by opponents to justify opposition. These which have been mentioned were the main arguments used to deny confirmation. It is apparent to any objective student of this episode that Haynsworth violated no existing standard of ethical conduct, just those made up for the occasion by those who sought to defeat him for political gain. As his competence and ability were virtually unassailable, the opponents could not attack him for having a poor record of accomplishment or for being mediocre (an adjective soon to become famous in describing a subsequent nominee for the vacancy). The only alternative available was to first, create a new standard of conduct; second, apply this standard to the nominee retroactively making him appear to be ethically insensitive; third, convey the newly-created appearance of impropriety to the public by way of a politically hostile press (hostile due to an aversion to the so-called southern

strategy of which Haynsworth was thought to be an integral part); and fourth, prolong the decision upon confirmation for a while until the politicians in the Senate reacted to an aroused public. Judge Haynsworth was defeated on November 21, 1969, by a vote of 55-45. Appearance had prevailed over reality. Only two Democrats outside the South (and one was a conservative—Bible of Nevada) supported the nomination, an indication of the partisan issue it had become, leading the *Washington Post*, a lukewarm Haynsworth supporter, to editorially comment, the morning after the vote:

"The rejection, despite the speeches and comments on Capitol Hill to the contrary, seems to have resulted more from ideological and plainly political considerations than from ethical ones. It is impossible to believe that all Northern liberals and all Southern conservatives have such dramatically different ethical standards."

CARSWELL: WAS HE QUALIFIED?

(*Even if he was mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Cardozos and Frankfurters and stuff like that there.*—Senator Roman Hruska, March 16, 1970.)

The United States Senate began the new year in no mood to reject another nomination of the President to the Supreme Court. It would take an incredibly poor nomination, students of the Senate concluded, to deny the President his choice in two successive instances. Circumstances, however, brought forth just such a nomination.

Subsequent to the defeat of Judge Haynsworth, President Nixon sent to the Senate in January of 1970 the name of Judge G. Harrold Carswell, of Florida and the Fifth Circuit. Judge Carswell had been nominated to the Circuit Court by President Nixon the year before, after serving 12 years on the U.S. District Court for the Northern District of Florida at Tallahassee to which he had been appointed by President Eisenhower.

He, too, faced an initial disadvantage in that he came from the south and was also considered by the press to be a part of the southern strategy. This should have been, as it should have been for Haynsworth, totally irrelevant to considerations of the man and his ability, but it was a factor and it immediately mobilized the not insignificant anti-south block in the Senate.

Many were troubled at the outset of the hearings about reports of a "white supremacy" speech Carswell had made as a youthful candidate for the legislature in Georgia in 1948, and later by allegations that he had supported efforts to convert a previously all-white public golf course to an all-white private country club in 1956, thus circumventing Supreme Court rulings.[26] There were other less substantial allegations including lack of candor before the Senate Judiciary Committee (which had also been raised against Judge Haynsworth) but all of these were soon supplanted by what became the real issue—that is, did Carswell possess the requisite distinction for elevation to the High Court.

In attempting to determine by what standards Judge Carswell should be judged, some who had been very much involved in the Haynsworth debate attempted to define the standards which had been applied to the previous nominee. Kentucky's Marlow Cook called his standard the "Haynsworth test" and subsequently defined it as composed of essentially five elements, (1) competence; (2) achievement; (3) temperament; (4) judicial propriety and (5) non-judicial record.

Judge Haynsworth himself would not have passed this test had he in fact been guilty of some ethical impropriety—that is, if his judicial integrity had been compromised by violations of any existing standard of conduct. His record of achievement was only attacked by a few misinformed columnists and never really became an issue. And his competence, temperament and the record of his life off the bench was never questioned, but a breakdown in any of these areas might have been fatal also.

The judicial integrity component of the "Haynsworth test," previously described as a violation of existing standards of conduct for federal judges, was never in question in the Carswell proceedings. It was impossible for him to encounter difficulties similar to those of Judge Haynsworth because he owned no stocks and had not been involved in any business ventures through which a conflict might arise. Certainly, his non-judicial record was never questioned, nor was it a factor raised against any nominee in this century. Disqualifying non-judicial activities referred to here could best be illustrated by examples such as violations of federal or state law, or personal problems such as alcoholism or drug addiction—in other words, debilitating factors only indirectly related to effectiveness on the bench.

However, all the other criteria of the "Haynsworth test" were raised in the Carswell case and caused Senators seeking to make an objective appraisal of the nominee some difficulty. First, as to the question of competence, 1 Ripon Society Report and a study of the nominee's reversal percentages by a group of Columbia law students revealed that while a U.S. District Judge he had been reversed more than twice as often as the average federal district judge and that he ranked sixty-first in reversals among the 67 federal trial judges in the south. Numerous reversals alone might not have been a relevant factor; he could have been in the vanguard of his profession some argued. This defense, however, ignored simple facts about which even a first year law student would be aware. A federal district judge's duty in most instances is to follow the law as laid down by higher authority. Carswell appeared to have a chronic inability to do this. No comparable performance was ever imputed to Judge Haynsworth even by his severest critics.

Second, in the area of achievement, he was totally lacking. He had no publications, his opinions were rarely cited by other judges in their opinions, and no expertise in any area of the law was revealed. On the contrary, Judge Haynsworth's opinions were often cited, and he was a recognized expert in several fields including patents and trademarks, habeas corpus cases, and labor law. In addition, his opinions on judicial administration were highly valued; he had been called upon to testify before Senator Tydings' subcommittee on Improvements in Judicial Machinery on this subject in June of 1969.

In addition to his lack of professional distinction, Judge Carswell's temperament was also questionable. There was unrebutted testimony before the Judiciary Committee that he was hostile to certain classes of litigants—namely, those involved in litigation to insure the right to vote to all citizens regardless of race pursuant to the Voting Rights Act of 1965. There had been testimony that Judge Haynsworth was anti-labor and anti-civil rights, but these charges alleged not personal antipathy but rather philosophical bias in a certain direction such as Justice Goldberg might have been expected to exhibit against management in labor cases. Such philosophical or ideological considerations, as pointed out earlier, are more properly a concern of the President and not the Senate, which should sit in judgment upon qualifications only.

And finally, a telling factor possibly revealing something about both competence and temperament was Judge Carswell's inability to secure the support of his fellow judges on the Fifth Circuit. By contrast, all Fifth Circuit judges has supported Judge Homer Thornberry when he was nominated in the waning months of the Johnson presidency, even though that was not considered an outstanding appointment by many in the country. All judges of the Fourth Circuit had readily supported Judge Haynsworth's nomination. Therefore, it was highly unusual and significant that Judge Carswell could not secure the support of his fellow judges, especially when one considers that they must have assumed at that time that they would have to deal with him continually in future years should his nomination not be confirmed. His subsequent decision to leave the bench and run for political office in Florida seeking to convert a wave of sympathy over his frustrated appointment into the consolation prize of a United States Senate seat only tended to confirm the worst suspicions about his devotion to being a member of the Federal Judiciary.

Judge Carswell, then, fell short in three of the five essential criteria evolving out of the Haynsworth case. This compelled a no vote by the junior Senator from Kentucky and he was joined by several other Senators who simply could not, in good conscience, vote to confirm despite the wishes of most of their constituents. Of the southern Senators who had supported Haynsworth, Spong, of Virginia, and Fulbright, of Arkansas, switched. Gore, of Tennessee and Yarborough, of Texas, voted no again and the only Democrat outside the south of liberal credentials who had supported the Haynsworth nomination, Gravel, of Alaska, joined the opponents this time.

Judge Carswell was defeated 51-45 on April 8, 1970 by essentially the same coalition which had stopped Judge Haynsworth. The justification for opposition, however, as this article seeks to demonstrate, was much sounder. Some undoubtedly voted in favor of Carswell simply because he was a southern conservative. Others, no doubt, voted no for the same reason. The key Senators who determined his fate, however, clearly cast their votes against the Hruska maxim that mediocrity was entitled to a seat on the Supreme Court.

HARRY M. BLACKMUN: CONFIRMATION AT LAST

(*The political problem, therefore, is that so much must be explained in distinguishing between Haynsworth and Blackmun, and when the explanations are made there is still room for the political argument that Haynsworth should have been confirmed in the first place.*—Richard Wilson, *Washington, Evening Star*, April 20, 1970.)

President Nixon next sent to the Senate to fill the vacancy of almost one year created by the Fortas resignation of a childhood friend of Chief Justice Warren Burger, his first court appointment, Judge Harry A. Blackmun, of Minnesota and the Eighth Circuit. Judge Blackmun had an initial advantage which Judge Haynsworth and

Carswell had not enjoyed—he was not from the South. Once again, in judging the nominee it is appropriate to apply Senator Cook's "Haynsworth test."

Judge Blackmun's competence, temperament, and non-judicial record were quickly established by those charged with the responsibility of reviewing the nomination,[27] and were, in any event, never questioned, as no one asked the Judiciary Committee for the opportunity to be heard in opposition to the nomination.

In the area of achievement or distinction, Judge Blackmun was completely satisfactory. He had published three legal articles: "The Marital Deduction and Its Use in Minnesota";[28] "The Physician and His Estate";[29] and "Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases."[30] In addition, at the time of his selection he was chairman of the Advisory Committee on the Judge's Function of the American Bar Association Special Committee on Standards for the Administration of Criminal Justice. Moreover, he had achieved distinction in the areas of federal taxation and medico-legal problems and was considered by colleagues of the bench and bar to be an expert in these fields.

The only question raised about Judge Blackmun was in the area of judicial integrity or ethics. Judge Blackmun, since his appointment to the Eighth Circuit by President Eisenhower in 1959, had sat in three cases in which he actually owned stock in one of the litigants before him: *Hanson v. Ford Motor Co.*,[31] *Kotula v. Ford Motor Co.*,[32] and *Mahoney v. Northwestern Bell Telephone Co.*[33] In a fourth case, *Minnesota Mining and Manufacturing Co. v. Superior Insulating Co.*[34] Judge Blackmun acting similarly to Judge Haynesworth in *Brunswick*, bought shares of one of the litigants after the decision but before the denial of a petition for rehearings.

As previously mentioned, Judge Haynsworth's participation in *Brunswick* was criticized as violating the spirit of Canon 29 and the literal meaning of Formal Opinion 170 of the ABA, thus showing an insensitivity to judicial ethics, but Judge Blackmun acted similarly in the 3M case and was not so criticized. Except as it could be argued in *Brunswick*, Judge Haynsworth never sat in a case in which he owned stock in one of the litigants but, rather, three cases in which he merely owned stock in the parent corporation of the litigant-subsidiary, a situation not unethical under any existing standard, or even by the wildest stretch of any legal imaginations, except those of the anti-Haynsworth leadership.

Judge Blackmun, on the other hand, committed a much more clear-cut violation of what could be labelled the "Bayh standard." Senator Bayh, the leader of the opposition in both the Haynsworth and Carswell cases, ingored this breach of the Haynsworth test with the following interesting justification:

"He [Blackmun] discussed his stock holdings with Judge Johnson, then Chief Judge of the Circuit, who advised him that *his holdings did not constitute a "substantial interest"* under 28 USC 455, and that he was obliged to sit in the case. There is no indication that Judge Haynsworth ever disclosed his financial interest to any colleague or to any party who might have felt there was an apparent conflict, before sitting in such case."[35] [Emphasis added.]

Judge Haynsworth did not inform the lawyers because under existing Fourth Circuit practice he found no significant interest and, thus, no duty to disclose to the lawyers. In any event, Judge Blackmun did not inform any of the lawyers in any of the cases in which he sat, either. Judge Blackmun asked the chief judge his advice and relied upon it. Judge Haynsworth was the chief judge.

Chief Judge Johnson and Chief Judge Haynsworth both interpreted that standard, as it existed, not as the Senator from Indiana later fashioned it. That interpretation was, as the supporters of Judge Haynsworth said it was, and in accord with Chief Judge Johnson who described the meaning of 28 U.S.C. § 455 to be "that a judge should sit regardless of interest, so long as the decision will not have a significant effect upon the value of the judge's interest."[36]

In other words, it is not interest in the litigant but interest in the outcome of the litigation which requires stepping aside. But even if it were interest in the litigant, the interests of Blackmun were *de minimis*, and the interests of Haynsworth were not only *de minimis*, but were one step removed—that is, his interest was in the parent corporation where the subsidiary was the litigant. Furthermore, the case law, what little there is, and prevailing practice dictate that in the parent-subsidiary situation there is no duty to step aside.

As John Frank pointed out to the Judiciary Committee during the Haynsworth hearings, where there is no duty to step aside, there is a duty to sit. Judge Haynsworth and Judge Blackmun sat in these cases because under existing standards, not the convenient *ad hoc* standard of the Haynsworth opponents, they both had a duty to sit. But it is worth noting that if one were to require a strict adherence to the most rigid standard—Formal Opinion 170, which states that a judge shall not sit in a case in which he owns stock in a party litigant—Judge Haynsworth whom Senator Bayh opposed had only one arguable violation, *Brunswick*, while Judge Blackmun who Senator Bayh supported had one arguable violation, *3M*, and three clear violations, *Hanson*, *Kotula* and *Mahoney*.

The Senator from Indiana also argued that since Judge Blackmun stepped aside in *Bridgeman v. Gateway Ford Truck Sales*,[37] arising after the Haynsworth affair, a situation in which he owned stock in the parent Ford which totally owned one of the subsidiary-litigants, he "displayed a laudable recognition of the changing nature of the standards of judicial conduct."[38] Of course, Judge Blackmun stepped aside after seeing what Judge Haynsworth had been subjected to. Haynsworth did not have an opportunity to step aside in such situations since this new Bayh rule was established during the course of his demise. Certainly Judge Haynsworth would now comply with the Bayh test to avoid further attacks upon his judicial integrity just as Judge Blackmun wisely did in *Bridgeman*.

It is clear, then, to any objective reviewer, that the Haynsworth and Blackmun cases, aside from the political considerations involved, were virtually indistinguishable. If anything, Judge Blackmun had much more flagrantly violated that standard used to defeat Judge Haynsworth than had Judge Haynsworth. However, Judge Blackmun violated no existing standard worthy of denying him confirmation and he was quite properly confirmed by the Senate on May 12, 1970 by a vote of 88 to 0.

A NEW TEST: CAN ONE BE CONSIDERED?

(Bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed.—Abraham Lincoln.)

It has been demonstrated that Judge Haynsworth and Blackmun violated no existing standards worthy of denying either of them confirmation. Judge Carswell's defeat, like Judge Haynsworth's, was also due in part to the application of a new standard—it having been argued that mediocre nominees had been confirmed in the past, *a fortiori Carswell* should be also. Yet, certainly achievement was always a legitimate part of the Senate's consideration of a nominee for confirmation just as ethics had always been. The Senate simply ignored mediocrity at various times in the past and refused to do so in the case of Carswell. And in the case of Haynsworth it made up an unrealistic standard of judicial propriety to serve its political purposes and then ignored those standards later in regard to Judge Blackmun because politics dictated confirmation.

Possibly, new standards should be adopted by the Senate but, of course, adopted prospectively in the absence of a pending nomination and not in the course of confirmation proceedings. In this regard, Senator Bayh has now introduced two bills, The Judicial Disqualification Act of 1970 and the Omnibus Disclosure Act which, if enacted, would codify the standards he previously employed to defeat Judge Haynsworth. This legislative effort is an admission that the previously applied standards were nonexistent at the time. Those bills are, however, worthy of serious consideration in a continuing effort to improve judicial standards of conduct. Some standards have been suggested here and will be recounted again but first some observations about the body which must apply them.

First, it is safe to say that anti-southern prejudice is still very much alive in the land and particularly in the Senate. Although this alone did not cause the defeats of Haynsworth and Carswell, it was a major factor. The fact that so many Senators were willing to create a new ethical standard for Judge Haynsworth in November, 1969, in order to insure his defeat and then ignore even more flagrant violations of this newly established standard in May of 1970, can only be considered to demonstrate sectional prejudice.

Another ominous aspect of the past year's events has been that we have seen yet another example of the power of the press over the minds of the people. As Wendell Phillips once commented, "We live under a government of men and morning newspapers." Certainly, one should not accuse the working press of distorting the news. The reporters were simply conveying to the nation the accusations of the Senator from Indiana and others in the opposition camp. These accusations were interpreted by a misinformed public outside the south (as indicated by prominent public opinion polls) as conclusive proof of Judge Haynsworth's impropriety and Judge Carswell's racism, neither of which was ever substantiated. The press should remain unfettered, but public figures must continue to have the courage to stand up to those who would use it for their own narrow political advantage to destroy men's reputations, and more importantly, the aura of dignity which should properly surround the Supreme Court.

Some good, however, has come from this period. Senatorial assertion against an all-powerful Executive, whoever he may be, whether it is in foreign affairs or in Supreme Court appointments, is healthy for the country. Such assertions help restore

the constitutional checks and balances between our branches of government, thereby helping to preserve our institutions and maximize our freedom.

In addition, the American Bar Association has indicated a willingness to review its ethical standards and has appointed a Special Committee on Standards of Judicial Conduct, under the chairmanship of Judge Traynor, which issued a Preliminary Statement and Interim Report which would update the ABA Canons of Judicial Ethics. This report was discussed in public hearings on August 8th and 10th, 1970 at the Annual Meeting of the ABA in St. Louis and may be placed on the agenda for consideration at the February, 1971, mid-year meeting of the House of Delegates. Both supporters and opponents of Judge Haynsworth agreed that a review and overhaul of the ABA's Canons of Judicial Ethics was needed. This should be valuable and useful to the Senate as the Judiciary Committee under Senator Eastland has made a practice of requesting reports on Presidential nominees to the Supreme Court by the Standing Committee on the Federal Judiciary of the ABA. This practice probably should be continued as the Senate has not, in any way, delegated its decision upon confirmation to this outside organization. Rather, it seeks the views of the ABA before reporting nominees to the Judiciary to the floor of the Senate just as any committee would seek the views of relevant outside groups before proposing legislation.

Although not central to the considerations of this article, it should be noted what the Executive may have learned from this period. President Johnson undoubtedly discovered in the Fortas and Thornberry nominations that the Senate could be very reluctant at times to approve nominees who might be classified as personal friends or "cronies" of the Executive. It was also established that the Senate would frown upon Justices of the Supreme Court acting as advisors to the President as a violation of the concept of separation of powers. This argument was used very effectively against the elevation of Justice Fortas to the Chief Justiceship as he had been an advisor to President Johnson on a myriad of matters during his tenure on the Court. President Nixon learned during the Carswell proceedings that a high degree of competence would likely be required by the Senate before it approved future nominees. He also learned during the Haynsworth case that the Senate would likely require strict adherence to standards of judicial propriety.

Unfortunately, as a result of this episode, the administration has adopted a very questionable practice in regard to future nominations to the Supreme Court. Attorney General John N. Mitchell announced on July 28, 1970 that the Justice Department would adopt a new procedure under which the Attorney General will seek a compete investigation by the ABA's Standing Committee on the Federal Judiciary before recommending anyone to the President for nomination to the Supreme Court. This Committee has already enjoyed virtually unprecedented influence in the selection of U.S. District and Circuit Judges as this Administration has made no nominations to these Courts which have not received the prior approval of this twelve man Committee. In effect, the Administration, after delegating to this Committee veto power over lower federal court appointments, has now broadened this authority to cover its selections to the Supreme Court. Complete delegation of authority to an outside organization of so awesome a responsibility as designating men to our federal District and Circuit Courts is bad enough, but such a delegation of authority to approve, on the Supreme Court level, is most unwise. Far from representing all lawyers in the country, the ABA has historically been the repository of "big-firm," "defense-oriented," "corporate-type lawyers" who may or may not make an objective appraisal of a prospective nominee, if President Wilson had asked the ABA for prior approval of Brandeis, the Supreme Court and the nation would never have benefitted from his great legal talents. The presumption that such an outside organization as the American Bar Association is better able to pass upon the credentials of nominees for the federal courts and especially the Supreme Court than the President of the United States who is given the constitutional authority is an erroneous judgment which the passage of time will hopefully see reversed.[39] This is not to imply that ABA views would not be useful to the Executive in its considerations just as they are useful to but not determinative of the actions of the Senate (the Senate having rejected ABA approved nominees Haynsworth and Carswell).

What standard then can be drawn for the Senate from the experiences of the past year in advising and consenting to Presidential nominations to the Supreme Court? They have been set out above but should be reiterated in conclusion. At the outset, the Senate should discount the philosophy of the nominee. In our politically centrist society, it is highly unlikely that any Executive would nominate a man of such extreme views of the right or the left as to be disturbing to the Senate. However, a nomination, for example, of a Communist or a member of the American Nazi Party, would have to be considered an exception to the recommendation that the Senate leave ideological considerations to the discretion of the Executive. Political and philosophical considerations were often a factor in the nineteenth century and arguably in the Parker, Haynsworth and Carswell cases also, but this is not proper and tends to degrade the Court and dilute the constitutionally proper authority of the Executive in this area. The President is presumably elected by the people to carry out a program and altering the ideological directions of the Supreme Court would seem to be a perfectly legitimate part of a Presidential platform. To that end, the Constitution gives to him the power to nominate. As mentioned earlier, if the power to nominate had been given to the Senate, as was considered during the debates at the Constitutional Convention, then it would be proper for the Senate to consider political philosophy. The proper role of the Senate is to advise and consent to the particular nomination, and thus, as the Constitution puts it, "to appoint." This taken within the context of modern times should mean an examination only into the qualifications of the President's nominee.

In examining the qualifications of a Supreme Court nominee, use of the following criteria is recommended. First, the nominee must be judged competent. He should, of course, be a lawyer although the Constitution does not require it. Judicial experience might satisfy the Senate as to the nominee's competence, although the President should certainly not be restricted to naming sitting judges. Legal scholars as well as practicing lawyers might well be found competent.

Second, the nominee should be judged to have obtained some level of achievement or distinction. After all, it is the Supreme Court the Senate is considering not the police court in Hoboken, N.J. or even the U.S. District or Circuit Courts. This achievement could be established by writings, but the absence of publications alone would not be fatal. Reputation at the bar and bench would be significant. Quality of opinions if a sitting judge, or appellate briefs if a practicing attorney, or articles or books if a law professor might establish the requisite distinction. Certainly, the acquisition of expertise in certain areas of the law would be an important plus in determining the level of achievement of the nominee.

Third, temperament could be significant. Although difficult to establish and not as important as the other criteria, temperament might become a factor where, for example in the case of Carswell, a sitting judge was alleged to be hostile to a certain class of litigants or abusive to lawyers in the courtroom.

Fourth, the nominee, if a judge, must have violated no existing standard of ethical conduct rendering him unfit for confirmation. If the nominee is not a judge, he must not have violated the Canons of Ethics and statutes which apply to conduct required of members of the bar. If a law professor, he must be free of violations of ethical standards applicable to that profession, for example plagiarism.

Fifth and finally, the nominee must have a clean record in his life off the bench. He should be free from prior criminal conviction and not the possessor of debilitating personal problems such as alcoholism or drug abuse. However, this final criterion would rarely come into play due to the intensive personal investigations customarily employed by the Executive before nominations are sent to the Senate.

In conclusion, these criteria for Senate judgment of nominees to the Supreme Court are recommended for future considerations. It will always be difficult to obtain a fair and impartial judgment from such an inevitably political body as the United States Senate. However, it is suggested that the true measure of a statesman may well be the ability to rise above partisan political considerations to objectively pass upon another aspiring human being. While the author retains no great optimism for their future usage, these guidelines are now, nevertheless, left behind, a fitting epilog hopefully to a most unique and unforgettable era in the history of the Supreme Court.

FOOTNOTES

[1] For recent articles discussing the role of the Executive see Beckel, *The Making of Supreme Court Justices*, 53 THE NEW LEADER, May 25, 1970, at 14-18; Commager, *Choosing Supreme Court Judges*, 162 THE NEW REPUBLIC, May 2, 1970, at 13-16.

[2] J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 302-03 (1953).

[3] 1 C. WARREN, THE SUPREME COURT IN U.S. HISTORY 134-35 (rev. ed. 1935).

[4] 2 C. WARREN, THE SUPREME COURT IN U.S. HISTORY 10 (rev. ed. 1935).

[5] *Id.* at 12.

[6] *Id.* at 13-15.

[7] *Id.* at 16.

[8] J. HARRIS, *supra note* 2, at 99.

[9] *Id.*

[10] *Id.* at 113.

[11] *Id.* at 115-27.

[12] *Id.* at 127-32.

[13] Letter from Senator Marlow W. Cook to Charles Hagan, October 21, 1969.

[14] For complete discussion of all issues raised by the "Bill of Particulars" see speech of Senator Marlow W. Cook, 115 Cong. Rec. S12314-20 (daily ed. Oct. 13, 1969). *See also* REPORT OF SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF CLEMENT

F. HAYNSWORTH, JR., EXECUTIVE REPORT NO. 91-12, 91st Cong., 1st Sess. (1909).

[16] 325 F.2d 682 (4th Cir. 1963).

[16] *Hearings on Nomination of Clement F. Haynsworth, Jr. of South Carolina to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 115-16 (1969).

[17] 381 F.2d 380 (4th Cir. 1967).

[18] 363 F.2d 412 (4th Cir. 1966).

[19] 357 F.2d 228 (4th Cir. 1966).

[20] 403 F.2d 437 (5th Cir. 1968).

[21] 105 F. Supp. 3 (E.D.N.Y. 1952).

[22] *Hearings on Nomination of Clement F. Haynsworth, Jr., supra* note 15, at 469.

[23] 296 P. 883 (Cal. 1931).

[24] 392 F.2d 337 (4th Cir. 1968).

[25] *Hearings on Nomination of Clement F. Haynsworth, Jr., supra* note 15, at 238.

[26] *See Hearings on Nomination of George Harrold Carswell of Florida to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). *See also* REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF GEORGE HARROLD CARSWELL, EXECUTIVE REPORT NO. 91-14, 91st Cong. 2d Sess. (1970).

[27] *See Hearings on Nomination of Harry A. Blackmun of Minnesota to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

[28] Blackmun, *The Marital Deduction and Its Use in Minnesota*, 36 MINN. L. REV. 50 (1951).

[29] Blackmun, *The Physician and His Estate*, 36 MINN. MED. 1033 (1953).

[30] Blackmun, *Allowance of In Forma Pauperis in Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1988).

[31] 278 F.2d 586 (8th Cir. 1960).

[32] 338 F.2d 732 (8th Cir. 1964).

[33] 377 F.2d 549 (8th Cir. 1967).

[34] 284 F.2d 478 (8th Cir. 1960).

[35] REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF HARRY A. BLACKMUN, EXECUTIVE REPORT No. 91-18, 91st Cong., 2nd Sess. 9 (1970).

[36] *Id.*

[37] No. 19, 749, (February 4, 1970).

[38] REPORT OF SENATE JUDICIARY COMM. ON NOMINATION OF HARRY A. BLACKMUN, *supra* note 34, at 10.

[39] *But see Walsh, Selection of Supreme Court Justices*, 56 A.B.A.J. 550-60 (1970); REPORT OF THE STANDING COMM. ON THE FEDERAL JUDICIARY OF THE AMERICAN BAR ASSOCIATION (1970).

Mr. McCONNELL. Mr. President, I have had a chance to observe Justice Rehnquist over a period of 15 years. While I would not in any way assert that I have studied all his writings and opinions, I have a sense of his distinguished career on the Supreme Court; and I can say that there is no person—not one, anywhere in the country—the President could have selected who would have been a better choice for Chief Justice of the United States than Bill Rehnquist.

So, Mr. President, I rise today in wholehearted support of the nomination of William Rehnquist to be Chief Justice of the United States. As a member of the Judiciary Committee, it is with great pride that I join the majority of my colleagues on that committee in recommending confirmation of Justice Rehnquist without reservation.

While I respect the opinions of my colleagues who disagree with the choice of Mr. Rehnquist, and who would have made a different choice, I believe that a heavy burden must be met by those who would have this nominee rejected. Under the Constitution, our duty is to provide advice and consent to judicial nominations, not to substitute our judgment for what are reasonable views for a judicial nominee to hold. I believe that if consideration of this nomination proceeds on the merits, William Rehnquist will be quickly confirmed as our next Chief Justice of the United States.

The Members of this body have a solemn, constitutional duty to rigorously scrutinize the qualifications of judicial nominees, especially those of nominees to this high office. But, I might add, we have a corresponding obligation to do so with civility and fairness, both out of a sense of respect for the nominee and a sense of dignity for this institution. I regret to say that this obligation has been honored more in the breach in recent months.

It has been asserted, dogmatically, by Members of this body, and by certain segments of the media, that candidates such as Justice Rehnquist and Judge Scalia are too "extreme" in their judicial philosophy. Regretfully also, attempts were made to cast doubts on Mr. Rehnquist's character. Mr. President, such characterizations, to be blunt, are nonsense.

Mainstreet America has spoken clearly and unequivocally throughout the decade of the eighties in articulating a new set of priorities for this Nation. Part of the mandate that the citizens of 49 of these United States entrusted to President Ronald Reagan has been to reign in the extreme activism of our Federal judiciary.

I would respectfully submit that those who maintain that the President's nominees are outcasts from the mainstream of contemporary judicial thought, are themselves so far adrift on the fringes that they have lost contact with the prevailing currents of American society. Justice Rehnquist's credentials and qualifications place him squarely on the crest of this new wave.

Mr. President, numerous attempts were made during the hearings in the Judiciary Committee and are being made now on the Senate floor to cast doubt on Mr. Rehnquist's character. Let me make clear that the "evidence" brought forward to date has failed to raise a doubt in this Senator's mind. Sadly, these allegations speak more to the politics of the confirmation process than to the personal integrity and professional competence of the nominee. Concerns raised about Justice Rehnquist's participation in *Laird* v. *Tatum*, 408 U.S.C. 1 (1972), fall particularly in this category.

The Laird versus Tatum case involved surveillance activities by the Department of the Army in connection with attempts to control civil disorder during the late 1960's. Justice Rehnquist, then Assistant Attorney General, Office of Legal Counsel, testified before the Senate Judiciary Subcommittee on Constitutional Rights in 1971. He testified as an expert witness for the Department of Justice in regard to the statutory and constitutional authority of the executive branch to gather information on private citizens. Opponents of this nomination have questioned Justice Rehnquist's refusal to recuse himself in the Laird versus Tatum case.

The only statute directly governing the recusal of Supreme Court Justices is section 455 of the judicial code, 28 U.S.C. section 455. That statute provides that:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to, or connected with any party of his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

This statute operates on two levels, one mandatory and one discretionary. Of the mandatory grounds, Justice Rehnquist clearly had no "substantial interest," was not "of counsel," nor was a "material witness." This is not in dispute. The discretionary level of the statute presents a closer question. As an Associate Attorney General, Mr. Rehnquist was a public spokesman for the Justice Department, and appeared before a Senate Judiciary Subcommittee in that capacity. The statute premises discretionary recusal on an appearance of impropriety. Other standards of conduct, although not directly binding on Justice Rehnquist, are also couched in terms of the appearance of impropriety.

I would commend Justice Rehnquist's comprehensive memorandum detailing his reasons for declining to recuse himself to my colleagues' attention. In that memorandum, Justice Rehnquist concluded that:

> Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter.

This is the crux of the matter. As Justice Rehnquist recognized 15 years ago, this was not an easy call. Perhaps his decision not to recuse himself, viewed in the harsh glare of hindsight, was not wise. However, I would remind my colleagues that hindsight would give each and every one of us cause to rethink actions and decisions made, in good faith, in the past.

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Justice Rehnquist is not the first nor will he be the last Justice to be confronted with this discretionary decision. Indeed, one of the principle authors of the "Black-Connery Fair Labor Standards Act" later sat on the case which upheld the constitutionality of the act, United States versus Darby. Chief Justice Hughes, 2 years before he was appointed to that position, discussed at length Adkins versus Children's Hospital in a book about the court. Nine years later, he au-

thored the West Coast Hotel Co. versus Parrish decision which overruled Adkins. In each case, these respected members of the Court determined that there was a stronger public obligation to participate in the case, than to take the easy out and recuse himself.

After careful consideration of those factors I believe ought to be weighed in evaluating Presidental nominations to the Supreme Court, I have come to the conclusion that Mr. Justice Rehnquist is professionally, exceptionally well-qualified to lead our Nation's highest court. Furthermore, I am pleased to add my personal endorsement of this nominee as well, as a man of great integrity, wisdom, and foresight. I can assure my colleagues that Justice Rehnquist will not only serve the Court to the utmost of his vast abilities, but also perform those duties with distinction. Thus, Mr. President, it is without reservation that I can confidently go on record today as supporting the confirmation of Justice Rehnquist to be Chief Justice of the United States.

As I said earlier as someone who has known and worked with Justice Rehnquist in the past, I can say that I do not think the President could have picked a more outstanding nominee for Chief Justice than William Rehnquist.

Mr. President, I yield the floor.

Mrs. HAWKINS. Mr. President, I would like to ask my colleagues to join me in supporting Justice William H. Rehnquist who has been nominated by President Reagan to serve as the 16th Chief Justice of the U.S. Supreme Court. Justice Rehnquist meets every test of qualification for service as Chief Justice of the U.S. Supreme Court. He is a man of superior intelligence and proven excellence.

During his past 15 years of service as Associate Justice on the Supreme Court, Justice Rehnquist has demonstrated continued excellence in bringing balanced and scholarly opinion to Supreme Court rulings. His decisions, whether dissenting or concurring, have consistently reflected a keen perception and thorough understanding of constitutional law and issues. The American Bar Association described Chief Justice-designate Rehnquist as a "true scholar . . . unbelievably brilliant . . . a very capable individual in every respect." The ABA aiso notes that Justice Rehnquist is highly respected by fellow Associate Justices on the Court. He has twice received the American Bar Association's highest rating of professional competence, judicial temperament and integrity.

His history of dedicated service on the Court and his independent legal activities and honors prove Justice Rehnquist perfectly suited to lead the highest court in our judicial system. Before nomination to the Supreme Court, Justice Rehnquist served as Assistant Attorney General in charge of the Office of Legal Counsel at the Department of Justice. Between 1953 and 1969, while he practiced law in Phoenix, AZ, Justice Rehnquist served as president and member of the board of directors of the Maricopa County Bar Association in Phoenix. He also acted as chairman of the Arizona State Bar Continuing Legal Education Committee, and from 1963-69 was elected to the council of administrative law section of the American Bar Association. Justice Rehnquist has written articles published by U.S. News & World Report, the American Bar Association Journal, and the Harvard Law Record.

Prior to his 16-year private legal practice, Justice Rehnquist served as law clerk to Justice Robert H. Jackson on the Supreme Court. His education includes a bachelor of arts from Stanford University where he was elected to membership in Phi Beta Kappa and a master's degree from Harvard University in history. Justice Rehnquist attended Stanford University Law School where he graduated first in his class in 1952, and was a member of the Stanford Law Review.

Mr. President and fellow colleagues, we have in Justice Rehnquist a uniquely qualified candidate. I extend my wholehearted endorsement of his nomination and I urge you to join me today in my vote for confirmation.

Mr. DURENBERGER. Mr. President, I ask unanimous consent that I may proceed for 5 minutes as though in morning business.

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

VISIT BY CARDINAL KROL

Mr. DURENBERGER. Mr. President, on the coming Sunday history of sorts will be made in northeast Minneapolis. For the first time in 50 years a cardinal of the Roman Catholic Church will visit the Twin Cities when Father Frank Decowski hosts Cardinal John Krol at the Church of the Holy Cross. The last visit—in 1936—was by an Italian Cardinal named Eugenio Pacelli who later became better known as Pope Pius XII.

Having enjoyed the celebration of Mass at Holy Cross just a year ago after my return from Poland, I now take pleasure in recognizing the honor which Cardinal Krol does the largest Polish parish west of Chicago and congratulating the parishoners who make Holy Cross possible.

Mr. President, I ask unanimous consent that an article in the Minneapolis Tribune describing this occasion be printed in the RECORD in full.

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

[From the Minneapolis Star and Tribune, Sept. 6, 1986]

PASTOR, FLOCK TO OBSERVE CENTENNIAL OF POLISH PARISH CHURCH

(By Neal Gendler)

From the window of his study at Church of the Holy Cross in northeast Minneapolis, the Rev. Frank Decowski can look down the alley at the house in which he grew up.

At 53, Decowski is a little more than half the age of the church in which he grew up, and he has a lot in common with the folks in his flock.

"I've known 90 percent of these people all my life," Decowski said Thursday. "A lot of people still call me Frankie."

Decowski and most of the 1,300 households in Holy Cross share a Polish heritage, and many members have grown up near the church, 1621 University Ave. NE., in a neighborhood with about a dozen churches on as many blocks. Many families have belonged to Holy Cross since they arrived in Minneapolis sometime in the last century.

Decowski and the families that comprise the largest Polish parish between Chicago and the West Coast will celebrate the church's centennial a week from Sunday, with a mass of thanksgiving and a dinner featuring the nation's ranking Polish-American priest, Cardinal John Krol of Philadelphia.

Krol is to preside over the noon mass and speak at the dinner that afternoon at the Prom Center in St. Paul. Decowski believes that Krol's public appearance will be the first by a cardinal in the Twin Cities since the late Eugenio Pacelli, who later became Pope Pius XII, celebrated mass at the St. Paul Cathedral in 1936.

Decowski first invited the pope, although he didn't really expect John Paul to attend. The pope—who Decowski met in 1979, when both were guests of Vice President Mondale—sent a photo of himself inscribed in Polish with good wishes to Holy Cross on its centennial. Decowski wanted Krol to attend "to honor the people of our parish," a number of whom had arrived under difficult circumstances since 1945. "I wanted to honor our community."

The genial Decowski had thought of driving Krol from the church to the Prom in a horse-drown carriage, but dropped fancy ideas when he learned that the cardinal was returning from a trip to Poland and would be tired. Still, plans call for a lively day.

The mass, which Archbishop John Roach will celebrate, will be held in a church bedecked in the Polish national colors, with red-and-white banners with the white Polish eagle and white keys for the pope. Two pieces include the opening words of the Polish anthem that translate loosely as "Poland has not died."

If he can get the city to close the street, Decowski will have traditional Polish dancing in front of the church before the service.

It is such traditions, coupled with family ties, that have helped people maintain connections to Holy Cross even if they have moved to suburbs, Decowski said. His own parents met and married there, and two of his brothers still belong.

Their father died five weeks before he was born, Decowski said, and his mother supported her five children by scrubbing floors during the week and cooking for church weddings on weekends.

"I did not speak a word of English until kindergarten," he said. His Polish grew rusty over years serving other Minneapolis

I know also that I speak for all of our colleagues in saying that we shall not rest content until, like Father Jenco, all of our other fellow Americans being held prisoner by barbarians in Beirut once again stand free on the soil of the United States.

EXECUTIVE SESSION

Mr. SIMPSON. Mr. President, I ask unanimous consent that the Senate now resume executive session.

There being no objection, the Senate resumed consideration of executive business.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate continued with the consideration of the nomination of William H. Rehnquist to be Chief Justice of the United States.

Mr. SIMPSON. Mr. President, I have a few brief remarks on Justice Rehnquist. I have not spoken on the issue, and the hours have rolled by. I thought I would take a few minutes and try to summarize my own views, and then we will conclude our operations for today.

I am on the Judiciary Committee. I have seen Justice Rehnquist testify. I have come to know him in my time here.

He has an extraordinary record, academically and professionally. I will not go into that. It has already been recited very well. His fellow practicing attorneys in the American Bar Association—those with both the expertise and perspective to best judge a judiciary nominee—have given Justice Rehnquist their highest recommendations. His brethren and sister on the Supreme Court, those who have the most intimate knowledge possible of the nominee's qualifications and responsibilities of office, have strongly endorsed his nomination, including my friend William Brennan, for whom I have the greatest respect and admiration, and others—of my philosophy and not of my philosophy—as based upon a review of his decisions and background.

Those of us in this body who believe we all know better should take a more serious look at the evidence which is avallable before choosing to embark on a course of harsh and pompous criticism of this fine man. They must look at the record Justice Rehnquist has established these last 15 years as a member of the Supreme Court. To call it anything but distinguished would be a gross distortion of the truth.

So, because of the awesome strength of the nominee, the critics of the nomination had to go back 20 to 30 years to dig up the old bones and get into the old closets to find material that they believe is negative.

Who among those performing the inquisition could pass that test? That is curious to me. That is a base irony of the whole situation.

I have had a rather checkered career—it has been dazzling—and I will not go into that. But there are a lot of things in it that I wish I had not done. Some I did when I was very young and some I did when I was not so young.

But they were goofy and some of them were bizarre, and I will not go into the full line of activity.

Because of the fact that Justice Rehnquist's life was not a part of the public record at that time, the information rebutting the ancient and flimsy accusations is very difficult to reorganize.

I practiced law for 18 years; witnesses could not remember what happened 2 years after the event—now we go back 17, 20, 30 years, and the criticisms of the nominee even under those circumstances and before and after are amazingly weak.

The allegations from the Phoenix panel are based on hearsay, loose facts, and even worse. One witness bases his entire allegation of "voter harassment" on hearsay evidence that would never be admissible, never—even against the sleaziest felon—in a court of law.

Another witness claims that a man he believes to be Rehnquist ran through a voting line challenging voters and threatened this witness with his clenched fists, and this witness identified Rehnquist through a picture of William Rehnquist in a local newspaper nearly 7 years after the incident. How weak and puny that is as evidence.

It would be hard for me to believe that a 37-year-old lawyer, a Stanford graduate, first in his class, former Supreme Court law clerk and head of a lawyers committee on local election procedures, would be challenging some voter to a fist-fight. That does not really ring.

We have I think a bridge up in Brooklyn for anyone who might believe that and we could peddle it.

There has been criticism of the restrictive covenant in a deed for a house that the Justice owns. We all know that those are extremely offensive, obviously, and extremely repugnant. These covenants have no legal effect and they appear in many, many instruments—drafted, printed forms—in those years past.

Former President Kennedy, former Vice President Humbert Humphrey, former Senator McGovern have owned homes with similarly restrictive deeds that they did not attempt to remove. My own father had a similar covenant on his first home.

What is all the hurrah about that?

No one would suggest that these deeds impugned the commitment to civil rights of those men I just mentioned. Yet some imply that such a deed "says something" about Justice Rehnquist.

I think that is bosh.

Some claim that a memo written in 1952 to Justice Jackson might display Justice Rehnquist's "true feelings" about the Brown decision and the issue of racial segregation.

Justice Rehnquist has convincingly rebutted that allegation and there is no evidence at all to lead us to think otherwise. None has arisen.

Again, this is an allegation that is not only weak of its own accord, but with an additional defect of being over 34 years old with more gray hair on it than I have.

Some have questioned the "credibility" of the nominee, based on his responses to questions concerning the Phoenix panel, the restrictive covenants and the Brown decision memo.

I should point out that we challenge the integrity of a Supreme Court Justice by doing so, but what we are about is beginning to demean the Court. We are beginning to demean the U.S. Supreme Court. Others are on that Court who have served on it for 15 years or more. When do we bring them back here for some more fun and games? Maybe we just ought to sweep through there every 15 years, bring them back—they have been sitting, have a fine record, very credible—bring them back here and see what we can find on them 20, 30 years back down the road. None of us again could pass that test.

And importantly, some extremely questionable, and I use the word "extremely" because everybody else has used the word "exteme" about Justice Rehnquist on the other side of the issue—I have heard it used and used, extreme, extreme, extreme—I say there has been some extremely questionable evidence used to challenge Justice Rehnquist's answers on these subjects.

But before we challenge Justice Rehnquist's "credibility," and it comes in quotations marks, because it continues to come up from the opponents, we should determine whether the evidence on which those allegations are based is at all credible.

And based on what I have personnally seen at the hearings, read in the Judiciary Committee report on the nomination, evidence that Justice Rehnquist challenged voters, embraced restrictive convenants or endorsed the statements on the Jackson memo, is just not credible.

Since the Judiciary Committee proceedings, charges have appeared concerning Justice Rehnquist's authorship of memos while he was in the Justice Department—memos that dealt with desegregation and in opposition to the ERA.

I believe the attention being paid to those memos tells us more about the sheer pettiness and desperation of Mr. Rehnquist's opponents than about any doubt a reasonable person might have with the nominee's fine qualifications.

The desegregation memo was written at the request of the White House as were many other memos. If you were the President's lawyer, would you respond that you could not provide such a memo because you did not agree with its content? They were asked to do those things.

We lawyers, all of us, have often said, "Give me a brief on the other side; make it look as good as you can; give me the arguments." That is what he did. He produced those things. That is our business. That is our life in the law.

Then to make something sinister out of that when you find one of those things in an old file is really absurd.

The ERA memo was written in the first person because it was not intended to be an objective analysis. Justice Rehnquist was instructed to take a position of opposition to the ERA in order to balance the arguments made by another Department of Justice lawyer who was in favor of the ERA. That all gets lost in the swamps around here. It is extraordinary to watch.

If a lawyer were not a capable advocate, as Justice Rehnquist displays himself to be in that memo, he would not be qualified to be a Chief Justice. Those who accuse Justice Rehnquist of endorsing all of the arguments that he put forth in the memo are being deliberately deceptive and they know darn well it is not true. They know that in their hearts, but they have been having a good old time with it.

An interesting historical note to the ERA issue, Mr. President: The Nixon administration did come out in support of ERA. I happen to support it; I have supported that in the past.

And so, I have concluded that the allegations concerning Justice Rehnquist's unfitness to be Chief Justice are unfounded, vague, baseless, petty, and irresponsible. And really quite galling.

I have said before—and in politics, I find there is no such thing as repetition—you either pass or kill a bill in this place or confirm or not confirm a person in this place by using a deft blend of emotion, fear, guilt, or racism. Kind of a funny arena in which to work. And you have never seen it better than right here—racial imuendos, emotional innuendos, fearful innuendos, guilt. Heavens, I mean, really, it is an exhaustion of the process.

Because if you really want to be intellectually honest, just get up and say:

Mr. Rehnquist, I don't like your philosophy. I don't like it at all. I think it is bad for the country. I think you are bad for the country and I will not vote for you.

Period, with emphasis. That would do it very nicely. Then we would not have to go through all of this remarkable posturing and watch it go on for days as it did in the committee and now hours here.

That is the issue. "I don't like his philosophy. I haven't the courage to say it," and the rest of it is applesauce every foot of the way.

And they do not have the political courage to come at him like a Mack truck with six headlights bearing down on him. That would at least be honest and better than this stuff which, again, I have described as like getting pecked to death by ducks.

Also, when you turn the bugeyed zealots loose on a person like this, it has some extraordinary repercussions that will come back to, I think, a loss of credibility of those who profess it.

Well, I conclude, I strongly and deeply believe the Senate has this role, a very important role to play in providing the advice and consent to the President on his judicial nominations. I believe that the Senate has performed that task. We have done that and then some.

I am very puzzled, nay, troubled by those some who claim that now a "cloud has formed" over the nomination. That is like "Joe Btfsplk," or whatever it was, in Li'l Abner, who had the cloud in a permanent condition above his head. Should one really complain about the chance of rain when he has been up in the airplane seeding the clouds on this one?

I am also troubled by some who state they believe the Chief Justice must now be a "symbol" of something. We would think it is a symbol of equal justice. But there is a sinister connotation now in everything we see on Justice Rehnquist. An interesting spin. The "spin doctors" are at work.

Unfortunately, this has come to mean that the Chief Justice is a symbol, but it will be terribly unfortunate for the Court if he is a symbol or she is a symbol which must meet the approval of every single special-interest group that happens to have a Washington office and a hyperactive executive director. But that is how they get paid. That is how they keep their doors open. Juice up the troops and get the dues in and say they are fighting at the final bastion of whatever before we get on with something which will destroy the Republic.

So, in my mind, the Chief Justice must symbolize the wise—that is what he should symbolize—the wise, evenhanded, fair, responsible, intelligent interpretation of the U.S. Constitution and the U.S. laws.

He is a good man. I know of no person more qualified than Justice William Rehnquist to perform this task, and I strongly support his nomination. He has been pilloried in a bizarre way. And I am interested as to how it should be that there should be a higher standard for him or any Chief Justice or Justice than there should be for a U.S. Senator. That one skips my logic chain. A higher standard for a Chief Justice than for a U.S. Senator? That is absurd.

And yet, some who are lobbing in the old mortar shells, I wonder how they would be on the other end in the trench. I do not think they would pass the test.

We lose ground when we throw mud. It is an old phrase, but it is surely true. So let us get on with our work and I hope we do.

RECESS UNTIL 10 A.M. TOMORROW

Mr. SIMPSON. Mr. President, I move, in accordance with the previous order, that the Senate stand in recess until 10 a.m. on Friday, September 12, 1986.

The motion was agreed to; and, at 6:51 p.m., the Senate in executive session recessed until Friday, September 12, 1986, at 10 a.m.

NOMINATIONS

Executive nominations received by the Senate September 11, 1986:

Department of State

Elinor Greer Constable, of New York, a career member of the Senior Foreign Service, class of Minister-Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Kenya.

James Wilson Rawlings, of Connecticut, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to Zimbabwe.

The Judiciary

John L. Napier, of South Carolina, to be a judge of the U.S. Claims Court for a term of 15 years, vice Kenneth R. Harkins, term expired.

John Paul Wiese, of Virginia, to be a judge of the U.S. Claims Court for a term of 15 years, reappointment.

Patrick J. Duggan, of Michigan, to be U.S. district judge for the eastern district of Michigan vice a new position created by Public Law 98-353, approved July 10, 1984.

Thomas B. Wells, of Georgia, to be a judge of the U.S. Tax Court for a term expiring 15 years after he takes office, vice Richard C. Wilbur, retired.

Department of Justice

Donald Ray Melton, of Arkansas, to be U.S. Marshal for the eastern district of Arkansas for the term of 4 years vice Charles H. Gray, term expired.

Senior Foreign Service

The following-named career members of the Senior Foreign Service of the Department of State for promotion in the Senior Foreign Service to the classes indicated:

Career members of the Senior Foreign Service of the United States of American, class of Career Minister:

Harry E. Bergold, Jr., of Florida.

cient response to a critical national need.

As in other areas of environmental concern, there is always the possibility that in our desire to do the right thing, we might act hastily and less thoughtfully than we should. I am proud that this legislation, which was drafted with the active cooperation of the EPA, is a measured attempt to improve EPA's existing Asbestos-in-Schools Program, with three major components.

First, the bill requires that the Agency publish national standards for asbestos inspection, to help determine whether there are hazardous materials present in specific schools, and to determine whether abatement action will be required in specific schools.

Second, the bill calls for State accreditation of asbestos contractors to make certain that only competent and reliable persons undertake asbestos-related work.

Finally, the bill requires that the asbestos standards be followed. Those schools which have satisfactorily responded to asbestos problems under the pre-existing, voluntary EPA program are not covered in this legislation. But those which have not yet undertaken proper inspection, operation, and maintenance, or abatement activities will now be required to act in the interest of public health.

This legislation does not include any provision for an express or implied Federal cause of action in tort. In this environmental area, as in others, there are grave problems inherent in embarking into the uncharted waters of toxic torts before we have all the facts. After being assured that there is no express or implied Federal cause of action in tort included in this key legislation, I lent my support to its passage in committee.

Finally, I want to commend the able chairman of the Environment and Public Works Committee, BOB STAFFORD, for his fine leadership in getting this bill to the full Senate. It is my hope that the Senate, working in conference to forge a compromise with the well-considered House asbestos bill, can get a good bill to the President's desk before we recess in October.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The ACTING PRESIDENT pro tempore. The clerk will report the nomination of Justice Rehnquist.

The legislative clerk read the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

The Senate resumed consideration of the nomination.

The ACTING PRESIDENT pro tempore. Is there further debate on the nomination?

Mr. CRANSTON addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from California is recognized.

(Mr. HECHT assumed the chair.)

REHNQUIST LACKS JUDICIAL TEMPERAMENT

Mr. CRANSTON. Mr. President, I rise to speak in opposition to Senate confirmation of William Hubbs Rehnquist to be Chief Justice of the United States.

I am convinced that Mr. Rehnquist does not possess the requisite judicial temperament to serve as the Nation's Chief Justice, or for that matter as Associate Justice.

Indeed, when Justice Rehnquist first was nominated by Richard Nixon, I reached the conclusion—along with 26 of my then-Senate colleagues that he did not qualify to be Associate Justice. Three Republicans were among those opposed to the nomination.

In 1971, I made my judgment after researching carefully the Rehnquist record and concluding it lacked evidence of a balanced, dispassionate approach to legal and policy questions.

I observed then that William Rehnquist apparently was an extraordinarily committed ideologue, who first forms conclusions, then reasons backward to justify them.

I found that Mr. Rehnquist used his considerable intellect to examine microscopically arguments presented which opposed his predetermined conclusion, but questioned only superficially the merits of arguments which supported his predispositions.

When President Reagan nominated Associate Justice Rehnquist for even higher office. I undertook to review carefully not only his judicial record of the last 15 years, but additional information which has surfaced about the prior years, to determine whether there was a basis on which to change my original judgment.

It is clear to me, having completed that review, that there is not.

Indeed, my original observations, regrettably, are strengthened.

SUPPORTER OF SEGREGATION

Particularly, Mr. President, I find that Mr. Rehnquist is an unrelenting supporter of segregation—a position so far from the temper of the times and from the attitudes that the American people believe proper in a Federal judge that it has been an important factor in the Senate's rejection of three Presidential nominees for the Supreme Court since 1930.

I find that this view of women's rights would find wider acceptance in a prior century, and that he is unwilling to remedy even obvious examples of sex-based discrimination for such reasons as administrative convenience.

Moreover, I find—as I did in 1971—that Mr. Rehnquist has consistently provided the narrowest possible interpretations to opinions and concepts that protect all individual rights and liberties, and the most sweeping interpretations to those opinions and concepts that sanction government restrictions on individual rights and liberties.

Mr. President, the essential bedrock on which our unique form of government rests is the supremacy, not of government, but of law.

The supremeacy of law in turn rests on the existence of an independent judiciary, free dominance by either the executive or legislative branches.

And to head that independent judicial branch, more than in any other Federal judicial position, we need an individual prepared to match deeds to the words carved in stone on the wall of the Supreme Court, "Equal Justice Under Law." Time after time, as a private citizen, as a public official, and as a justice of the Supreme Court, William Rehnquist's actions have shown that he does not support those words.

History taught the Founding Fathers—and should teach us—that the judiciary must be coequal with the other branches, and subservient only to the Constitution.

The independent judiciary is essential to guard the human freedom and rights that our constitutional system—more effectively than any other governmental system yet devised—was designed to protect.

Careful review of Justice Rehnquist's judicial opinions conclusively demonstrates that he rigidly, consistently, and virtually without exception, rejects the view that the Supreme Court has any special obligation to defend individual liberty from legislative or executive encroachment, and rejects the position, frequently expressed in the opinions of the Court, that the Bill of Rights as a whole, and the first amendment in particular, have a favored place in the constitutional scheme.

In this respect, Mr. Rehnquist is not a "strict constructionist" or a conservative, words often used to describe several members of the present Supreme Court.

Rather, Mr. President, he is an extreme ideologue, whose judicial philosophy is far beyond the mainstream, and is not shared in its entirety, or even in its central features, by any other person who now sits or who has served with him on the Supreme Court, including justices who often vote with him.

And very frequently—more than any other member of the Court—Justice Rehnquist has voted alone.

In my judgment, Mr. Rehnquist's unremitting record of ideological extremism makes him an inappropriate choice for the Federal bench. But certainly, it makes him an even more inappropriate choice for Chief Justice.

Ideological zeal and biased prejudgment of issues are the very antithesis of acceptable qualifications for the Federal bench.

The agenda of an ideological extremist, whether of the right or the left, can create a doctrinal conflict of interest fully as inappropriate for a Supreme Court Justice as a financial conflict of interest.

QUESTIONABLE ETHICS

In one case where this doctrinal conflict of interest was manifest, *Laird* v. *Tatum*, 408 U.S. 1 and 409 U.S. 824 (1972), Mr. Rehnquist declined to recuse himself, as judicial ethics and propriety seemed to require, and cast the deciding vote in a 5-4 Supreme Court decision reversing a Federal appellate decision reviewing a case challenging government policies which he had helped formulate as both participant and advocate.

Conceding that his [unreviewable] decision to sit was "debatable", and one with which "fair-minded judges might disagree", Justice Rehnquist explained that the prospect that his recusal in that case would result in Supreme Court affirmance of the Court of Appeals decision by an equally divided court propelled him to decide the case.

The notion that recusal is appropriate judicial conduct only when it doesn't matter to the decision "seems to turn the doctrine of recusal on its head", as one witness against this nomination told the Senate Judiciary Committee.

And, it demonstrates that William Rehnquist is a zealot, more committed to the outcome in a particular case than to a desire to serve fairness and justice, or, as importantly, the appearance of fairness and justice.

The main indication of ideological zeal is the inability to separate strongly held personal or political beliefs from the responsibilities of judicial decisionmaking.

Standard judicial ethics require not only the fact of impartiality, but its appearance, in order to maintain the confidence of the people in their judicial system.

The fact and appearance of impartiality is required of all judges, but is especially important for the Chief Justice of the United States.

There is another quality that the American people have a right to expect in the person that stands at the top of their judicial system.

That is unquestioned integrity.

But there are now serious questions about the integrity of William Rehnquist.

That he is loyal to his own philosophical agenda I do not doubt, for he has demonstrated that loyalty for over 35 years.

But it is also increasingly obvious that he is willing to cut corners with the truth to protect his ability to serve that agenda.

And, Mr. President, I speak of far more than merely a case of a suspiciously selective memory or an attempt to "stonewall" questions from the Judiciary Committee, though that pattern is also abundantly clear.

Even one apparent Rehnquist supporter on the committee has expressed regret that Justice Rehnquist was not "more forthcoming" in his appearances before the committee.

But I am particularly appalled that in one of several situations in which Mr. Rehnquist's more extreme views are documented, he has denied the views are his own, although they were written in a memorandum he admittedly authored.

He would have us believe in an instance of particular concern to me that these views belong to Associate Justice Robert H. Jackson, for whom Mr. Rehnquist was a law clerk.

Mr. President, I am now going to explain why that particular incident is of grave personal concern to me. Regrettably Justice Jackson died in 1954 and cannot testify to the facts.

The memorandum, written in 1952 by Mr. Rehnquist in the context of the pending *Brown* v. *Board of Education*, 347 U.S. 483, urges that the previous decision of the Supreme Court in *Plessy* v. *Ferguson*, 163 U.S. 537, is "right" and should be reaffirmed.

The Rehnquist attribution of these views to Justice Jackson was first made during Rehnquist's 1971 confirmation hearings, and repeated in the present hearings.

One colleague with whom I discussed this situation suggests that perhaps Justice Jackson solicited memoranda on both sides of the issue. Or one can imagine Justice Jackson saying to an importuning clerk, "Get me a memo." But these scenarios are not what Mr. Rehnquist has testified to. He has attributed these views to Justice Jackson, not to himself, not to theoretical advocacy.

The Plessy case had sustained the constitutionality of a Louisiana statute requiring separate—but, theoretically, "equal"—accommodations for "white and colored persons" on railroads. The law was challenged in respect to its application to trains engaged in interstate travel. The 1986 case initiated the "separate, but equal" doctrine, and stood for the proposition, among others, that "a law which requires the separation of the races in public conveyances is a reasonable exercise of the police power of the state."

The record is abundantly clear that Justice Jackson did not even accept the memorandum's recommendation, let alone start with the view that Plessy was "right".

Justice Jackson was one of the nine Supreme Court Justices who joined in the unanimous decision in Brown versus Board of Education, expressly rejecting the doctrine of Plessy versus Ferguson in education, and forecasting its total demise.

Nor did Justice Jackson participate reluctantly. On May 17, 1954, he left a hospital bed where he was recuperating from a heart attack to stand with the united Court announcing the Brown decision.

Moreover, the Brown decision did not reflect a changed position for Jackson.

As early as 1941, his first year on the Court, Jackson had written a concurring opinion declaring that race, creed or color is a neutral fact, "constitutionally an irrelevance," which under the 14th amendment could not be used by a State to restrict constitutionally protected rights, *Edwards* v. *California*, 314 U.S. 160, at 185.

In 1949, concurring in *Railway Express* v. *New York*, 336 U.S. 106, at 111, though Jackson urged restraint in using the due process clause to strike down a State or municipal statute, he commented:

> Invocation of the equal protection clause [of the 14th Amendment], on the other hand, does not disable any government body from dealing with the subject at hand. It merely means that the regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally.

So spoke Justice Jackson.

These and other opinions written by Justice Jackson totally discredit Rehnquist's testimony that Justice Jackson believed that Plessy versus Ferguson was "right." They also state the antithesis of Rehnquist's extremist view that a State statute must be upheld against constitutional attack under the 14th amendment unless it is "irrational."

Mrs. Elsie Douglas, Justice Jackson's long time secretary, has called Rehnquist's testimony "incredible on its face" and a "smear of a great man" in a letter to Senator KENNEDY.

SOME PERSONAL HISTORY

And it is. I want to bring a bit of history—personal history—to bear on this matter.

I knew Robert H. Jackson and worked with him on matters relating to discrimination and bigotry when he was Attorney General of the United States. I know, firsthand, that he could not have held the views attributed to him by Mr. Rehnquist. Later on, in 1945, Justice Jackson went to Nuremberg, Germany, to become chief U.S. prosecutor at the war crimes trials. It is beyond belief—absolutely beyond belief—to suggest that, after prosecuting Adolf Hitler's top associates who committed some of the most cruel acts of intolerance and brutality in human history, Justice Jackson returned to the Supreme Court to represent the views on race expressed in the Rehnquist memorandum. For Mr. Rehnquist to attribute such views to Justice Jackson, who gave him the opportunity to serve him on the Supreme Court, is shocking, to put it very, very mildly. I deem the charge a slander on the record of a great justice. It reflects not on Justice Jackson but on Justice Rehnquist.

I know firsthand of Justice Jackson's commitment to equal justice under law, and that to uphold racial segregation was as foreign to his judicial philosophy as it is consistent with everything we know about William Rehnquist.

Although there is other evidence of Mr. Rehnquist's lack of credibility, his shabby attempt to rewrite history and blacken the memory of Justice Robert Jackson in order to protect himself is, alone, in my judgment, disqualifying.

Ironically, as Merlo J. Pusey has reported, "as a Supreme Court Justice, Jackson showed independence, and argued that judges should try to keep their judgment free from personal opinion," another point on which he is at odds with his former clerk.

Some have suggested that this debate on confirmation is a partisan debate between Republicans and Democrats, and that the President is entitled to confirmation of his nomination because of his reelection victory in 1984.

But big election victories give the President no right to abrogate our constitutional protections or place an ideological extremist at the head of the Supreme Court.

Some have suggested that this is an ideological struggle between conservatives and liberals, with each side trying to control the makeup of the Supreme Court.

In my judgment, both of these viewpoints are wrong.

The Founding Fathers clearly intended to give the Senate the power and obligation to make its own independent judgment of whether confirmation of a Federal judicial nomination would be in the best interests of the Nation.

Judicial nominees are not part of the President's team. They serve for life, and will serve long after a succession of Presidents with new claims to a political mandate have been elected.

His electoral mandate gives President Reagan the right and power to send us this nomination, but it does not take away our right, power, and, indeed constitutional obligation, to withhold consent if the nominee is found wanting, as, in this case, I believe he is.

From the administration of President George Washington, when his nomination of Associate Justice John Rutledge to be Chief Justice was rejected by the Senate primarily for his views on the Jay Treaty to as recently as the Lyndon Johnson administration, when a Senate filibuster, led by some of the proponents of this nomination, prevented confirmation of Associate Justice Abe Fortas to be Chief Justice, the Senate has demonstrated its right and power to reject Supreme Court nominees whose views offended the temper of the times, when Senators believed those views would disserve the interests of the Nation.

The Chief Justice should personify evenhanded justice in the United States.

The Chief Justice must be able to meet the most exacting standards: dedication to the great principles of the Constitution he will swear to uphold; dedication to dispense equal justice under law, not just for the majority, but for all in our society; impeccable ethical judgment; unquestioned integrity.

□ 1120

It ill behooves us at this time in history to put into that hallowed seat a man who is a consistent foe of civil rights; a man who is insensitive to changing roles and rights of women in our society; an ideological extremist whose very zeal prevents detached judicial consideration and affects his ethical judgments; a man whose integrity is under serious question.

William Rehnquist does not meet the qualifications for Chief Justice of the United States.

I urge that his nomination be defeated.

Mr. HATCH. Mr. President, I would like to comment on some of the statements which were made here yesterday, including the statement of the Senator from California today.

We are all aware that many questions have been raised about this nomination which date back several decades. Not only do many of these alleged concerns predate Rehnquist's 1971 confirmation, but many relate to his clerkship in 1952. These allegations come under the heading of ancient history rather than under a category of fair questions concerning Mr. Justice Rehnquist's nomination.

To put this in context, my colleagues might be shocked to learn that there was not a Kennedy in the Senate in 1952. Most shocking of all, STROM THURMOND, as I said in committee, was still a misguided Democrat and had not yet embarked on his Senate career.

Imagine the Senate without STROM THURMOND and TED KENNEDY and you can imagine the relevance of these accounts.

The first bit of ancient history which is supposed to be relevant to this nomination is a memorandum written by Justice Rehnquist in 1952. That was 34 years ago. It was written by him in 1952 when he was serving as a law clerk to then Supreme Court Justice Robert Jackson.

The Senator from California has just referred to that memorandum.

Justice Rehnquist has explained Mr. Justice Jackson asked him to prepare this memorandum to present the point of view that the doctrine of Plessy versus Ferguson was correct. That is the testimony of Mr. Justice Rehnquist.

Therefore, in the memorandum entitled "A Random Thought on the Segregation Cases," it is not surprising to read that Plessy versus Ferguson was right and should be reaffirmed, as a memorandum written to present that point of view which the Justice had asked him to do.

After all, then clerk Rehnquist's assignment was to defend that proposition. That is done today on the Supreme Court. There are Justices who ask a more conservative law clerk to write a memorandum on a conservative issue and Justices who ask more liberal law clerks to write a memorandum on more liberal issues. That is necessary to express the viewpoint of the writer of the memorandum.

I think in fairness these were not Mr. Rehnquist's personal views. He said so. My colleagues cannot seem to agree with that because they want to defeat Mr. Justice Rehnquist.

They do not care about his 15 years of great service to this country. They do not care that he is the leading intellect on the U.S. Supreme Court. They do not care that he has the respect of all his colleagues. They do not care that he has the respect of the bar and bench across this country. They differ with him ideologically. Therefore, they are going to assume the worst in everything.

It seems to me if a Supreme Court Justice says those were not his views and he says that categorically, that ought to end it right there. But we hear these diatribes here on the floor, and we hear them in the committee, as to how it could not have been the viewpoint of Mr. Justice Jackson. It

was not his viewpoint. Nobody disputes that. But it also was not then law clerk Rehnquist's at the time. He said that it was not.

Why can we not take his word for that? Why do we have to dredge up all that ancient history? Why do we have to put our own distorted approach to it? Why do we have to always resolve every ambiguity, and I do not think there is one here, against Mr. Justice Rehnquist?

There is only one answer. Ideologically, he does not fit the mold that so many of my colleagues have been used to over these last 30 or 40 years. That is what is wrong with the court system in our country. We have had basically one mold, a predominant position.

In the first place, my cursory review of his 15 years on the bench indicates that Justice Rehnquist has voted at least 34 times to sustain the most famous civil rights case of all time, Brown versus Board of Education.

When asked to decide the legal issues covered by the 1952 memo, Justice Rehnquist has consistently and without exception voted against the principles of Plessy versus Ferguson every time.

Yet we have Senators coming on the floor saying, "No, this cannot be right."

Justice Rehnquist's personal statements to the Judiciary Committee, it seems to me, have to be taken at face value. He feels Plessy is not consistent with the 14th amendment. That statement only embellishes his clear judicial record. We have a clear record here.

In addition, the only other living person, a self-admitted liberal, with the knowledge of the genesis of the 1952 segregation memo agrees that the memo was commissioned by Justice Jackson and that Justice Rehnquist believed even then that Plessy was wrongly decided.

What more do you need? We do not need a Senator, albeit a distinguished Senator from California, coming here and saying he knows Justice Jackson's views were different because he knew him personally. I know they are different. I do not need to know him personally.

On the other hand, how about giving the benefit of the doubt to knowing that Justice Rehnquist is not a liar? I think fairness, decency and dignity would lead everyone to conclude he is not a liar, that he told the truth, especially when the only other person who has any knowledge of this agrees with what he has said, and especially when his judicial record makes very clear what he believes.

Donald Cronson was Justice Rehnquist's coclerk in 1952. Mr. Cronson recalls that two memoranda were prepared for Mr. Justice Jackson, one for and one against overturning Plessy. He went on to say that he thought the "random thoughts" memo, though signed with Rehnquist's initials, was probably more his work than Clerk Rehnquist's work. Mr. Cronson, who probably knew Rehnquist's mind in 1952 on this subject better than anybody else, or at least certainly on that date, also told the New York Times in 1971 that "Both of us personally thought that Plessy was wrong."

We do not need to have somebody second-guessing this at this point when the record is so clear. It is ludicrous, like all of the charges against Mr. Justice Rehnquist.

This 34-year-old memo ought to never have become an issue in this proceeding. The facts are overwhelming that Clerk Rehnquist was preparing a paper to defend a proposition dictated by his employer and that Rehnquist did not then and does not now favor the policies of Plessy. If anything, this 34-year-old memo is indicative of Justice Jackson's struggle to ascertain the merits of the Brown case. Beyond that, it has little significance. Fifteen years on the Supreme Court has already made evident Mr. Rehnquist's abhorrence of the "separate but equal" doctrine.

Another memo was the subject of discussions in the Judiciary Committee hearings.

That memo likewise presents Justice Jackson's views and only shows the lengths some have gone to create issues about this nomination.

This memo, prepared in connection with the Terry versus Allen case, presents the views of three Justices: Justices Black and Frankfurter, and then under the heading "Your Views," the views of Justice Jackson, to whom the memo is written. Those clearly labeled views of Justice Jackson included the phrase, "It is about time the Court faced the fact that white people in the South don't like colored people."

□ 1130

Although some critics like to stop at that point, Justice Jackson's views continue to say, "The Constitution restrains them from effecting this dislike thru State action." With this additional clarification, it becomes apparent that Clerk Rehnquist understands the principle of the Brown case, that the Constitution bars discriminatory State actions. The memo continues to say that private discrimination, which Rehnquist characterizes as "ugly," is not barred by the Constitution. This last point is still the law, as is clearly established by the Court's holding in the Moose Lodge among others.

Thus, the intent of this memo is clear on its face. Clerk Rehnquist is stating Jackson's idea that the issue in this case is State action. The showing of discrimination is clear, the issue is whether the State has done the discriminating. That is the issue. If so, it is illegal. If not, the Constitution does not provide a remedy. Justice Jackson was correct on the law and his clerk was merely expressing those views to prepare his employer for a court conference. By the way, Justice Jackson's conference notes indicate that he followed this memo rather closely. It must have accurately reflected his views, regardless of what the distinguished Senator from California or any other critic of the Rehnquist nomination has to say about it.

Another piece of ancient history that is occasionally misconstrued is a 20-year-old letter written by Attorney Rehnquist in Phoenix, AZ. It was written in defense of the neighborhood school concept. It contains the phrase "we are no more dedicated to an integrated society than we are to a segregated society." Those who prefer to take things out of context stop at that point. That phrase, however, is only part of the sentence. The rest of the sentence reads:

> 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.

The full quote indicates that the Justice did not support segregation, but instead endorsed a "free society" where "each man is equal before the law." This is a ringing endorsement of the fundamental principle of equality before the law. The letter proceeds to show that this concept of equality is furthered by a race-neutral assignment of students to neighborhood schools. On this principle, the Senate agrees. This body has voted numerous times in favor of the neighborhood school concept. Once again, when these so-called items of ancient history are presented in their unabridged version, the myths are revealed as inaccurate and the facts speak for themselves.

Mr. President, the efforts that have been put forth in some of these areas to malign and, I hate to say it but to smear, this man's reputation are really incredible.

LAIRD VERSUS TATUM

I will like to return briefly to the Laird versus Tatum question. This issue, like most of those we have heard presented on the Senate floor, probably does not deserve the time devoted to it. In fact, the weakness of the argument demonstrates the lengths to which some will go to find a flaw in Justice Rehnquist's distinguished record.

Yesterday, I went through the law that governed situations when judges would be required to recuse themselves, or refuse to participate in the decision of a case. A fair reading of that law leaves little doubt that Jus-

tice Rehnquist was justified in accepting the responsibility of deciding the Laird case.

Nonetheless my colleague from Massachusetts and a few others suggest that a further ethical consideration should have caused the Justice to refrain from accepting his judicial duties. In particular, my friend from Massachusetts suggests that Justice Rehnquist should have recused himself because he had "personal knowledge of disputed evidentiary facts." My colleague suggests that he had such a "personal knowledge" because he testified on the general subject before Senator Ervin's Constitutional Rights Subcommittee, a committee that I now chair.

I am now chairman of the subcommittee chaired by Senator Ervin in 1971. Last evening I reviewed the testimony given by Justice Rehnquist in 1971 to see if it showed a "personal knowledge" on the part of the Justice. To the contrary, I found at least four instances where Justice Rehnquist directly told Senator Ervin that he lacked personal knowledge of the evidentiary facts related to Army surveillance. In fact, Justice Rehnquist used those very words "personal knowledge" to clarify what he did not know. Let me rehearse some testimony from that hearing 15 years ago. Justice Rehnquist clarified:

> While it is not altogether clear to me, certainly not from personal knowledge . . . the extent to which the Army guidelines were actually carried out and practiced, it should be apparent that the data base used by internal security is much more restricted. . . .

Justice Rehnquist stated forthrightly in the very hearing we have heard so much about that he had no "personal knowledge" of the Army activities.

In that hearing, Justice Rehnquist said:

> As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge. in every field. So I can simply give you my understanding. . . .

He did not have personal knowledge. He said he did not. This is the second time Justice Rehnquist specifically stated that he had no personal knowledge about all the aspects of the hearings, and specifically, no personal knowledge about military surveillance.

Later in the hearing, Justice Rehnquist again states:

> I am not certain—that sounds like he does not have personal knowledge—what use was made by /sic/ the information gathered by the Army. . . . So far as I know, the information gathered by the Army was not used by the Justice Department.

Justice Rehnquist, in these sentences, tells Senator Ervin once again that he is not personally aware of the circumstances of the hearing. He was only present, as he explained, to discuss the legal and constitutional implications of Government information gathering, not to verify any specific surveillance activity.

In other words, Justice Rehnquist told Senator Ervin, at least four times, that he had no personal knowledge about Army surveillance in 1972. I must admit it puzzles me that some individuals would continue to say that this hearing indicates that he had "personal knowledge of the evidentiary facts" of Laird under those circumstances.

That simply is not true; it simply is not fair; and it simply is not seemly to make these arguments on the floor of the U.S. Senate if you look at the record. What it comes down to, pure and simple, is that it is another attempt to distort this man's record because they differ with him ideologically.

Some critics contend that one paragraph in a 1969 memorandum, prepared by a staff attorney for his signature, indicates that he had personal knowledge. In the first place, I should clarify that this single mention in a lengthy memo advises caution in connection with any domestic surveillance by the military. Frankly, it is most probable that Justice Rehnquist did not even read, or at least does not remember reading, that brief paragraph prepared by a staff attorney for his signature. Is there anybody in this body who can tell me all the content of memos they were supposed to have read when they are 3 years old? The single paragraph was prepared for his signature in 1969 and it was not until 1972—3 years later—that the Laird case came up.

□ 1140

I doubt if that single cautionary paragraph would be enough to show "personal knowledge of the evidentiary facts of the case." But more important, Justice Rehnquist clearly did not even know or remember that paragraph. The most important judge of whether he had personal knowledge of the evidentiary facts was of course Justice Rehnquist. He stated in 1972 and again before the committee that he had "no personal knowledge of the arrangement."

Even giving the arguments of my colleagues a fair reading, they do not amount to a significant concern. When these arguments are placed in the context of Supreme Court practice, however, they are almost ludicrous. As I noted yesterday, Justice Black drafted the Fair Labor Standards Act. He had the most intimate knowledge imaginable about that act. As its proponent, he would have had a bias in favor of its approval. Yet he sat on the Court and voted to hold it constitutional. Justice Frankfurter participated in issues about which had formed strong prior opinions as a leading labor lawyer. Chief Justice Vinson decided cases about legislation on which he had taken public positions as a Member of the House. Chief Justice Hughes had publicly criticized the Adkins case in a book he wrote 2 years before he became a member of the Court. As Chief Justice, he authored the opinion overruling Adkins in the West Coast Hotel case, which upheld a minimum wage law. In other words, Justice Rehnquist was fully in line with Supreme Court practice.

Finally, I would note that many have suggested Justice Rehnquist refused to recuse himself because he had an axe to grind. This is not characteristic of Justice Rehnquist. Just a few months ago, he recused himself from participating in the celebrated Baby Doe case merely because it has litigated by his son-in-law's law firm. He recused himself twice early in his Court career because he had a distant advisory role in the case while he was at the Justice Department. In fact, he has recused himself nearly 100 times while on the Court. He is regarded as one of its most ethically scrupulous members. That is what makes these charges so questionable, ludicrous and downright wrong. Anybody who knows him realized that he is an ethical, outstanding good person.

To have these charges brought here with all of these ambiguities and resolve everything against him based upon suspect evidence seems highly questionable. And that is putting it mildly.

I might add that to bring up Mr. Hazard, who clearly has jumped at a number of conclusions to reach his opinion, is also shakey evidence. Yes, he did participate in writing canons for the Bar Association. That does not make him the all-seeing eye of what Mr. Justice Rehnquist did or did not do, nor should it allow him to rebut the expressed testimony of Mr. Justice Rehnquist. I suggest it borders on the unethical for him to get involved in this problem at this late date and to give an opinion that is without all the facts. Talk about ethics. He should read his own canons.

One last point I would like to make. Everyone agrees that Justice Rehnquist testified to Senator Ervin. The real question is a legal question, namely whether his testimony violated 28 U.S.C. 455 and whether his testimony amounted to "personal knowledge of disputed evidentiary facts." This calls for a legal conclusion. On the statutory law, we should all agree in fairness that he was fully within the law. On the question of "personal knowledge," he was once again well justified in finding himself on solid ground. Lawyers can disagree on these points. Justice Rehnquist himself said that some might disagree with his reading of these provisions, but I think fairness demands our recogni-

tion that his legal interpretation and conduct was ethical and undertaken in good faith. Again, I think it is fair to disagree with the Justice. We all have disagreed with him on some points. That is normal. It is another matter to attack him personally because of those legal disagreements.

Mr. President, throughout this debate we have heard it repeatedly said that Mr. Justice Rehnquist has continually sided with the Government against individual rights.

This is an extremely simplistic and misleading view of many complex constitutional issues. In particular, this view overlooks the fact that there are invariably individual rights on both sides of these very important constitutional cases. The only reason that some try to neatly divide competing interests in the Government versus individual rights is that by the time the controversy reaches the judicial stage, one branch of Government has already had to decide between the two sets of individual interests and has made that decision generally by statute.

Let me give you an example. Silent prayer cases. Some would have us believe that silent prayer cases involve the mammoth power of the State against some child who does not want to leave class or stay in class while others silently pray.

This is a pretty one-sided view of that case. On the other side, many students are seeking the religious liberty to participate in a moment of silent prayer or reflection at the outset of the school day. The State legislature has to decide between these competing rights. In 16 States silent prayer rights had been favored until the Supreme Court cast a cloud over those laws in the Jeffrey case. Regardless of the merits of this particular prayer issue, it's clear that there are individual rights on both sides of the controversy and there are differences on both sides of the controversy and those differences are sincere. And neither side needs to be maligned in the process.

It is simplistic to say that this is merely a case of the State against individuals, but we have heard that over and over again by Members of this body who are unwilling to look at both sides.

Let me give another example. The lawyer defending his client on death row would invariably like the court to believe he is advocating individual rights against the Goliath power of the State which seeks to impose upon his client the death penalty. In fact, what has occurred is that the State legislature has weighed the individual interests of murderers against the individual interests of the rest of society at large to be secure and has adopted the policy in favor of the latter.

We have tremendous discord in this body about whether that policy is right, but that is what the legislature has done. In fact, what has occurred is that the States have weighed the interests of murderers against interests of the public to be free from murder and the latter policy has been adopted.

The only reason that the law in question has taken on the character of government policy rather than protection of individual rights is because an elected body has already been required to choose between two sets of competing interests and has done so.

Regardless of the merits of these capital punishment cases, we can see that there are individual rights on both sides of these controversies. It is simply inaccurate and somewhat misleading to speak of these cases as if Justice Rehnquist is always choosing to ignore individual rights. That is ridiculous and some of the media ought to be ashamed of themselves for trying to present it that way. Certainly some of our Senators ought to be ashamed of themselves in trying to present it that way.

On the contrary, there are individual rights on both sides of almost every case that involve serious constitutional questions. The Justice is required to choose between two sets of competing rights.

Incidentally, Justice Rehnquist must do his job well because no other Justice has written more majority opinions, 73 to be exact, over the last four terms of the Court then Mr. Justice Rehnquist. What it comes down to is that some of our colleagues in their own sincere way, I am sure, differ with Mr. Justice Rehnquist's standings on individual rights. They differ with his point of view on individual rights. Some of them are totally against capital punishment. He appears to be for capital punishment, as are the vast majority of people in this country today. That does not take him out of the mainstream, nor does that make him extreme. In fact, it might be equally said on the other side.

□ 1150

Those who do not believe in capital punishment are in a distinct minority in this country. I do not think that is extreme. There are genuine arguments against capital punishment. It should be rarely used and only in the most grievous of cases. I accord them the right to believe what they want to believe, but let us accord the right to a Supreme Court Justice to believe as he wants to.

STANDARD FOR SENATE CONSIDERATIONS

If I may, Mr. President, I would like to comment just briefly on these confirmation proceedings. As we all know, the Constitution contains no explicit standard for appointment or for the advice and consent obligation of the Senate. Nonetheless, article III, which defines the role of the judiciary, and article VI, which requires judges to take an oath to uphold the Constitution, suggest a standard. These provisions note that a judge's duty is to decide cases and controversies in accord with the Constitution and laws of the United States. Because judges are obligated to find, and not make, the law, this suggests that our inquiry ought to focus on the willingness and ability of the candidate to fulfill a judicial office by interpreting the laws enacted by democratic institutions. In more than 15 years of service on the High Court, Justice Rehnquist has amply demonstrated this temperament and talent. A quick review of his ABA rating confirms this.

EXTREMISM

We have heard some critics of this nomination contend that Justice Rehnquist ought to be subjected to an ideological inquisition. According to their view of an ideal justice, Justice Rehnquist is "out of the mainstream." This assertion deserves some examination.

In the first place, it is irrelevant. In the second place, it is inaccurate. And finally, it is dangerous.

First, these charges are only marginally, if at all, relevant to our inquiry. Justice Rehnquist has been nominated to serve as Chief Justice. He is already on the Supreme Court. He will continue to serve on the Court and cast the same single vote he would have as Chief Justice. His views will continue to be represented in Court opinions and influence his colleagues to the degree of their persuasiveness. Thus, any particular Senator's personal assessment of Justice Rehnquist's voting record is only of marginal value, because Justice Rehnquist's ability to influence the directions of the Court will still depend primarily on his ability to persuade four of his colleagues of the soundness of his views.

Second, these charges are inaccurate. At best, they are simply a measure of the extremism of those making the judgment. I think a few examples will serve to establish this point. During the Judiciary Committee proceedings, we heard numerous charges that Justice Rehnquist was "extreme" or "out of the mainstream" because he dissented in the Jaffree case which struck down Alabama's silent prayer law. It is important to note that if this vote makes an individual too "extreme" to serve on the Supreme Court, then Chief Justice Burger and Justice White, a Kennedy appointment, would also be disqualified. They also voted to sustain Alabama's authority to permit silent prayer.

More important, however, is the realization that 12 members of the Senate Judiciary Committee itself have voted against that case—12 out of 18. Senate Joint Resolution 2, a proposed constitutional amendment to

overturn Jaffree and permit silent prayer, was approved by a 12 to 6 vote on October 3, 1985. It just may be the case that those who are out of the mainstream on these church/State issues are those Senators who found themselves without a prayer after losing the vote in the Judiciary Committee.

Should that constitutional amendment ever come to this floor, we will see what a majority of the U.S. Senate will have to say about it. If 56 could vote for a vocal prayer amendment last year, can you imagine how many of them are going to vote for a silent prayer or reflection amendment? I believe that such an amendment will be adopted if it is brought to the floor of the Senate.

We have also heard that Justice Rehnquist is out of the mainstream and insensitive on civil rights. We have heard remarks by the distinguished Senator from California on that issue. He is just parroting what a number of others have said who believe that civil rights controversies have to be decided the way they want them decided.

This assertion that he is insensitive to civil rights is inaccurate. More important, this masks the real reason these accusations are made—namely, that Justice Rehnquist simply does not uniformly vote in the way some civil rights activists would prefer to have him vote.

First, I would like to show why it is inaccurate to characterize Justice Rehnquist as "insensitive" to civil rights. This overlooks that in 27 cases which I was able to locate rather quickly he voted for the interests of minorities or women. For instance, in the famous 1974 bilingual education case, Lau versus Nichols, he found that discriminatory impact suffices to establish liability under title VI. He voted to overturn a much narrower circuit court opinion in this case. In the 1984 Palmore case, he found that a State may not remove a child from a mother simply because she is married to a black man. In the 1975 Albemarle case, he invalidated an employment test having a disproportionate impact on minorities. Incidentally, in this case, Justice Blackmun and Chief Justice Burger filed a much narrower dissent. In the pivotal 1973 voting rights case of White versus Regester, he voted to strike down a Texas at-large voting plan because it would have diluted minority voting strength. He reached similar conclusions in striking down voting plans in 1985, Chapman, and in 1977, Connor. This hardly sounds like the record of someone insensitive to civil rights. In doing so, he incurred the wrath of a number of conservatives in our country, particularly in the South. He is not pleasing anybody in some of these decisions. This hardly sounds to me like the record of someone who is insensitive to civil rights.

In the 1973 Tillman case, he also found that a community swimming pool could not exclude patrons on the basis of race. In the 1977 Dothard case, Justice Rehnquist held that title VII did preclude certain limitations on employment requirements, even though Justice White dissented. This list could go on further, but I think fairness would suggest that his record is not as insensitive on civil rights as some might wish us to believe.

We have also heard that he is extreme because he is not sensitive to women's rights. This is simply not accurate. Once again, I found very quickly 27 cases where he had voted for the interests of women and minorities. This is a particularly ironic charge at this time, however, because only a few months ago, the front page of the Washington Post and other papers heralded the result in the Meritor Bank case which said that employers can be held liable for sex harassment in the workplace. This was the most significant women's rights case of this last term. Yet those who make these charges seem to forget that Justice Rehnquist authored this landmark opinion. This is hardly the record of a judge who ignores the fair assertion of women's rights.

□ 1200

In the most important women's rights case of the 1984 term, the Jaycees case, Justice Rehnquist found that an all-male organization may be compelled to accept women. That same year in the Hishon case, he concluded that discrimination against women in admission to law firm partnerships justifies a claim under title VII. In the 1979 Cannon versus University of Chicago case, Justice Rehnquist gave title IX a broad reading to provide an implied cause of action. Justice White, Powell, and Blackmun dissented and would have denied an implied cause of action. Once again this is hardly the record of an individual insensitive to women's rights.

An analysis of the 20 leading civil rights cases of 1986 demonstrates that Justice Rehnquist is fully in the mainstream of the Court when it comes to protecting minority interests. In these 20 civil rights cases, Justice Rehnquist voted with the majority 14 times for a 70-percent mainstream rating, which is identical to the mainstream ratings of Justice Blackmun and Chief Justice Burger. The highest mainstream rating goes to Justice Powell, who voted with the majority 90 percent of the time in civil rights cases. Several Justices have lower mainstream ratings than Justice Rehnquist, as you can easily see.

These idle charges about Justice Rehnquist's record on civil rights simply are just a smokescreen obscuring the real reason these charges are made, which is that some people do not always agree with his independent reading of the law. It may be that Justice Rehnquist does not consistently vote in the way that some civil rights groups or some Senators would want. This, however, is an outstanding qualification for a Supreme Court Justice. A Justice should not feel obliged to reflect the viewpoint of one particular group or interest, but should independently decide each case on its own merits.

CIVIL RIGHTS CASES

Moreover all this rhetoric obscures some realities about these civil rights cases. They deserve a closer examination. To start with, I would like to refer to a few constitutional issues. In the Wygant case, Justice Rehnquist joined the plurality opinion authored by Justice Powell. In other words, the Justice joined an opinion with four of his colleagues which stood for the proposition that a school board could not give racial preferences to some teachers when deciding who to lay off. The school board was using race in its layoff decisions to retain a proportional representation on the faculty. It was that simple. As I recall that decision, the opinion joined by Justice Rehnquist agreed that strict scrutiny applies to racial classification, but concluded that there was not sufficient evidence to justify the conclusion that there had been prior discrimination. This is important because some accounts circulated about Justice Rehnquist's record suggested that he did not think racial distinctions warranted the extra protection of strict scrutiny analysis. This is clearly wrong. He applied strict scrutiny in Wygant, for just one example. In any event that case concluded that, "Societal discrimination without more is too amorphous for imposing a racially classified remedy." The dissent, as I recall, wanted to use quotas in these layoffs even if no showing of actual discrimination were made.

This is an extreme position because even a vast majority of blacks do not want to use the quotas to become the norm in our society. And the vast majority of people in our society do not want them either.

Next I would like to turn to the Fullilove case, where Justice Rehnquist joined a dissent by Justice Stewart. Once again, I note that in these vital cases, Justice Rehnquist is not alone in his views and I have never heard anyone suggest that Justice Stewart was "out of the mainstream." Justice Stewart based his dissent on Harlan's famous principle that "our Constitution is color-blind." Justice Stewart stated: "Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the Government from taking

detrimental action against innocent people on the basis of the sins of others of their own race." This sounds pretty mainstream to me. It says that when discrimination is proven, it will be remedied swiftly, but that otherwise the Government ought not to presume to use quotas or other race-conscious remedies.

Perhaps I could next look at a few statutory civil rights issues. In the Bakke case, which is seminal in this area of law, Justice Rehnquist joined Justice Stevens' opinion. Chief Justice Burger and Justice Stewart also were on that opinion as I remember. Justice Stevens is not noted as weak on civil rights issues. These four argued that the exclusion of any individual from a school on the basis of race would violate the plain language of title VI. Incidentally, Bakke was admitted to school afterward.

For an example of title VII cases, we could perhaps examine Weber, which upheld a collective bargaining agreement containing a racial hiring quota. Justice Rehnquist dissented in an opinion joined by the Chief Justice. That dissent, once again, maintained that a quota is per se violative of the notion of equality and that title VII does not permit racial preferences. This can hardly be called extreme because it prevailed in the Stotts case when the Court held that court-ordered preferences violate section 706 (G) of title VII. The majority in that case decided that court-ordered relief was to provide "make whole relief only to those who have been actual victims of discrimination."

Let me make a few more observations. In the first place, Justice Rehnquist's views in these cases are not unique, nor extreme. As you have seen in just this quick overview, his opinions are invariably joined by several of his colleagues. Another point is also evident. These are close cases. Fine distinctions of statutory language or of the facts often change the outcome from 5 to 4 in favor to 5 to 4 against a particular outcome. In such close cases, it is understandable that observers passionately desiring to win every time would be disappointed. And they are quick to fault someone who does not always vote with their preferences. Nonetheless we must respect that this is not a political, but a legal, process and that Justice Rehnquist is not a political, but a legal, officer. His job is not to balance the equities and keep the majority of his constituents happy; his job is to interpret what is written in the law. In this regard, Justice Rehnquist is respected by his colleagues and lawyers nationwide. Moreover he is not extreme. Even his opponents' statistics bear out that fact. We have heard here on the floor that Justice Rehnquist, in 14 of these close cases, cast the "deciding vote" against minorities. What this really means is that Justice Rehnquist joined the majority of the Court in 14 5-to-4 decisions. With four other Justices agreeing with Justice Rehnquist, he can hardly be called "out of the mainstream" on those 14 close cases, and they involved 14 close, hard-fought, difficult issues with good arguments on both sides or they would not have been that close.

In summary, Justice Rehnquist's record reflects intellectual honesty, not insensitivity. It shows that Justice Rehnquist interprets the civil rights acts and the Constitution to provide equal opportunities for all individuals, which I would submit, is the logical and reasonable view of those laws. Some of his opponents believe that these acts guarantee proportional representation through quotas, busing, and effects tests that invalidate legitimate State activity or require reverse discrimination.

They really argue for those positions. They are legitimate arguments but they are way out of the mainstream because the vast majority of people in this country do not want proportional representation in all instances through quotas. They do not want their kids bused across huge distances against their will. They do not want the effects test that makes every civil rights case regardless of the point of view almost a winnable case at that whether or not the cause is just. They do not want an effects test that will invalidate legitimate State activities and rights to handle matters for themselves, and they do not want an effects test that will permit reverse discrimination or in essence discrimination against a person or any person as a result of the color of their skin. The majority of people just do not want this, but there are legitimate points of view arguing for those positions.

I do not think they are very legitimate. Nevertheless, there certainly are a lot of people who are minority viewpoint people, but nevertheless people who are going to be for them.

They simply differ with Justice Rehnquist on the reading of the law. I wish that is what would be said, not that he is out of the mainstream or that he is extreme because he differs with me on the law.

Instead we hear scathing and misleading attacks on the Justice's character and record. Differences of opinion I can understand, but in my view, personal attacks demean the significance of this proceeding.

MORE ON EXTREMISM

It is also important to note that the groups charging "extremism" only focus on a few narrow areas of law. We do not hear about his record in criminal justice cases where his toughness on drugs and crime and sensitivity to the needs of victims have strengthened law enforcement against the forces of lawlessness. We do not hear about his protection of the separation of powers in cases like U.S. versus Nixon, where he concluded that the President himself is subject to the law, or in the recent Synar case, where he concluded that a provision of Gramm-Rudman infringed on vital constitutional principles. We do not hear about his preservation of rights in numerous other contexts. No Senator likes to be attacked on the basis of a single issue, yet we hear very little examination of Justice Rehnquist's entire record, which is one of leadership and distinction. For a reference on that point, I would once again refer to the ABA's exhaustive study.

I started this discussion, Mr. President, with the observation that charges about Justice Rehnquist's supposed "extremism" were irrelevant, inaccurate, and dangerous. I would like to make one final point about the inaccuracy of these charges before proceeding to discuss their danger. The most important refutation of that charge has yet to be mentioned. In the last four terms, no Justice has written more majority opinions than Justice Rehnquist. To repeat, Justice Rehnquist has authored 73 opinions in the last four terms, more than any other Justice. He simply cannot be "out of the mainstream" of the Court and also be its leading consensus-former and opinion-writer. Because Justice Rehnquist is clearly in the mainstream of the Supreme Court, either the entire Court is "out of the mainstream" or those making the charges are themselves perhaps circling in an eddy so fast that they no longer recognize the center of the current.

Finally, as I mentioned, overemphasis on ideology contains a dangerous assumption. This notion of excluding some nominees on the basis of their views on some debatable issues finds its best expression in Larry Tribe's book, "God Save This Honorable Court." Professor Tribe argues in his book, as we have heard throughout this debate, that "any judicial nominee . . . who denounced . . . the fundamental democratic principle of 'one person, one vote,'" should not be approved by the Senate. The danger in this is that such a standard would have excluded Justices Frankfurter and Harlan, who consistently rejected the doctrine. It would be hard to find two Justices in the last century who had more influence on the shape of American jurisprudence than Frankfurter and Harlan, yet they would fail one of Tribe's litmus tests. Similarly Professor Tribe would exclude nominees who would overrule Roe versus Wade, the abortion case. Of course, this view would reject President Kennedy's appointment, Justice White, and apparently, the first woman Justice, Justice Sandra Day O'Connor.

Ideological inquisition is a two-edged sword. The staunchly conservative Senate in 1910 and 1916 might have rejected Louis Brandeis or Charles Evans Hughes, who both made outstanding contributions to the law, on the basis of ideology. Thus, one danger is that rejecting nominees on the basis of a few ideological yardsticks may overlook the miles of merit a candidate offers the Nation and its courts.

Another danger of requiring an ideological orthodoxy are the consequences for the nonpolitical third branch. There is danger in reducing the selection of Justices to a political free-for-all. Frankly, the Senate would do well to realize that our Constitution commits some decisions to other branches of Government. Demanding that our political ideology be reflected in those other branches would misunderstand that the judicial branch is not a political entity. The Constitution recognizes that, in the society where taking sides is a national pastime, the judiciary is essential as the one institution capable of applying rules outside the frenzied climate of political activity. Politicizing the selection of its members can only detract from this essential judicial mission.

I have spoken long enough but I want to set the record straight on some of these issues. These are not simple issues. These are not ABC type issues. These are contested and hotly debated issues. Some of them we cannot even bring to this body because we know they are hotly contested and they will bog this body down like nothing else will. We avoid them because we have such a widely divergent set of viewpoints in the U.S. Senate and the House of Representatives. Yet he is being harangued, condemned, mistreated, and vilified because he cannot avoid making decisions, many of which have been 5-to-4 majority positions.

You know it is one thing to say that a man differs with you on civil rights and interpretation of civil rights law. It is another thing to say he is insensitive to civil rights with the record he clearly has with the Court over the past 15 years. In fact, it is an insult to this body to have those types of statements being made.

If they want to point out the cases of law where he is insensitive, we will be happy to debate them. We will be happy to take any case you want.

(Mr. COCHRAN assumed the chair.)

□ 1210

Mr. BIDEN. Will the Senator yield?

Mr. HATCH. Yes.

Mr. BIDEN. Does the Senator think that Justice Rehnquist was insensitive in the Bob Jones case?

Mr. HATCH. No, I do not.

Mr. BIDEN. Thank you.

Mr. HATCH. It would be very misleading to suggest his vote on this very difficult and complex case was insensitive. I am surprised you raised that, Senator BIDEN. I disagreed with him on some aspects of that case. He was the one dissenter. But you seem to assume, as has an awful lot of media which commented on it, that he did not want to have civil rights in universities in this country. That would be an oversimplification.

In that case, the Internal Revenue Service revoked the tax-exempt status of a religious university. This involves a university run by a particular religion with particular values and points of view, with which you and I disagree, at least on this one issue.

The first amendment talks in terms of religious freedom. It is one of the heralded freedoms. It is not just freedom of the press. We have freedom of religion, too. This played a role in that case.

Let me answer your question. The IRS denied Bob Jones University a tax exemption because racially discriminatory policies at the school were against public policy. Justice Rehnquist's vote in the case has been characterized as "support for tax credits for segregated schools."

That is really misleading and is simply inaccurate.

Justice Rehnquist specifically stated that Congress would have the power to deny tax exemptions for discriminatory institutions even if those institutions practiced discrimination by virtue of their religious beliefs. That is a pretty forthright and forceful position.

This is far from support for tax credits for discriminators and those that practice discrimination and segregation. In fact, many would feel that his opinion did not offer enough protection to bona fide religious beliefs.

There are a number of scholars who argue on the other side of this point and who would argue that he did not go far enough. The real issue in the case was not whether racial discrimination was against public policy. Everybody including Mr. Justice Rehnquist, agrees that it is and should be. The entire Court agreed on that point, including Mr. Justice Rehnquist.

The question, according to Mr. Justice Rehnquist's very trained legal eye, concerns separation of powers. Specifically, whether the IRS could, without any further congressional action, undertake to decide the content of public policy. Justice Rehnquist voted against allowing the IRS to decide unilaterally what constitutes appropriate public policy. And, you know, that is a pretty important point.

The IRS, in Justice Rehnquist's view, was exercising a legislative power which should have been given and reserved only to Congress. In other words, Justice Rehnquist clearly agreed that Congress has the power to deny tax exemptions, but the power to make this legislative change resides solely in Congress. This power should not be exercised unilaterally by some agency just because they wanted to do it. The Justice's opinion vents no absence of sensitivity to issues of discrimination, but it vents great sensitivity to the powers of Congress relative to the agencies under the separation of powers doctrine.

Admittedly, he was alone on that point, although I believe the other Justices probably recognized that point, as well. I would have ruled with the majority in that case if I had been sitting on the Supreme Court.

But, I have to tell you that he made what was a valid legal point. It was significant enough to dissent on. As somebody who has seen some of the persecutions by some of these agencies in the past, I respect his position. I have gone to court and fought for the individual rights of people who were oppressed, many times without fees as you have.

Mr. BIDEN. You are right.

Mr. HATCH. I have to admit that Justice Rehnquist has a pretty valid point. I do not want the IRS interpreting the statutes completely on their own and defining what individual rights are, especially in the area of religious freedom. It is a far more different case than what the media has described the Bob Jones University case to be.

Mr. BIDEN. Will the Senator yield?

Mr. HATCH. Of course.

Mr. BIDEN. I always admire the Senator's advocacy. The Senator started off suggesting that there were no cases where Justice Rehnquist demonstrated an insensitivity on racism.

Mr. HATCH. I do not think that one is.

Mr. BIDEN. Let me finish for a moment.

Second, he said one of the reasons why this is not a matter of real insensitivity, even though he was in the minority and has explained it, was because it was religious. Then he went on to say the decision had nothing to do with religious freedom—zero; never mentioned it; was not an issue.

Mr. HATCH. Who did? I did?

Mr. BIDEN. Yes.

Mr. HATCH. There was a legitimate religious freedom argument that could have been raised.

Mr. BIDEN. Could have been raised, but had nothing to do with Justice Rehnquist's decision.

Mr. HATCH. The final decision.

Mr. BIDEN. Not only the final decision. If the Senator will yield, the beginning, the middle, and the end of Justice Rehnquist's opinion had nothing to do with religious freedom. Zero.

Mr. HATCH. I agree.

Mr. BIDEN. Then why do we keep mentioning religious freedom?

Mr. HATCH. I want to make it clear that this is not some simple case. It was a very important constitutional issue concerning a religious school with religious tenets. The Court decided, in their zeal, to permit the IRS to revoke their tax status.

Mr. BIDEN. But it was not an issue that was adjudicated before the Court about religious freedom on the part of Justice Rehnquist. Justice Rehnquist did not reach that judgment. He did not say this had anything to do with religious freedom. He said this had to do with whether or not the IRS, notwithstanding the facts the Senator says he acknowledges that it is broad public policy, broad public policy to not allow institutions, regardless of their makeup, to discriminate. He said that is broad public policy. But, notwithstanding that, Justice——

Mr. HATCH. Could I correct the Senator on that one point? That is not the broad public policy in this country.

Mr. BIDEN. It is not?

Mr. HATCH. It is not the public policy to ignore religious rights that are acceptable in this country today. We do not need to debate the religious discrimination issue.

Mr. BIDEN. We surely do.

Mr. HATCH. It was raised in this case.

Mr, BIDEN. We surely do.

Mr. HATCH. We do not, because I agree with you. It was raised in this case and it was legitimately raised, but it was brushed aside by all nine Justices. Eight of the Justices said that Bob Jones University practiced discrimination. Therefore, the agency, according to the Court, was within its powers to do what it did. Justice Rehnquist said the agency should not have asserted this power because Congress only could have given the power. That is a far cry from saying he is in favor of discrimination and against civil rights.

Mr. BIDEN. If the Senator will let me now make a full statement. I want to be short and full on this point.

Let us make it clear. Justice Rehnquist made absolutely no judgment relative to whether or not Bob Jones should be allowed to continue the practice of discrimination because it was a religious institution. He, with the other eight Justices, said that is a specious argument. He went out and he said, notwithstanding the fact that it is broad public policy to do away with discrimination in America, we have something here that I, Justice Rehnquist, do not like and think it is, in fact, unconstitutional. He said that the IRS, which had, since the Nixon administration when Justice Rehnquist was counsel for it, been engaging in a practice which said, at the direction of the President and with clear concurrence for failure of the Congress to do anything, said, "Look, if you are going to discriminate,"—"you" meaning anyone out there—"we are not going to allow you to have a tax exemption status."

Now, he seized upon, as I told you before, an intellectually elegant and credible point. He said, technically the IRS, and all of the executive branch, is making a judgment about whether or not discrimination exists. That is not a judgment the IRS should make, he said. He said that is a judgment that only the Congress should make, or, I suspect he would have said, if the Justice Department chose to go in and sue, bring suit against an institution.

□ 1220

But he said here you have an agency that is designed to collect taxes, and to make a judgment that this outfit discriminates. Therefore, they are going to withhold an exemption under the tax code—by the way, they are the arbiters in every other case—saying we are not going to, when you file your income tax, allow you to write off in effect paying us taxes; that is, saying tax exempt because you discriminate. Granted, it is an intellectually elegant argument as all arguments are.

I stood, and the Senator from Hawaii is waiting to speak and I will not take any more time but I will come back to this. But I want to make a point. I was responding specifically to the assertion by my colleague from Utah saying that there is no record of insensitivity, and not legality—insensitivity. Was he insensitive on race? I cannot believe that if in fact he wished to make that argument, if the Senator from Utah were on the Court and I fully expect some day he will be, I suspect he would have written the decision this way: If he agreed with the legal principle stated by Justice Rehnquist he would have said although it is public policy and should be public policy that institutions not discriminate against people merely because of the color of their skin, and inasmuch as I dislike having to write the opinion this way I must conclude that the Congress should move posthaste to remedy the situation which in fact the Internal Revenue Service has arrogated unto itself.

I do not like doing this but technically they should not be allowed—"they"—the Internal Revenue Service—to do this. He did not say that. He did not express any sensitivity.

Again, legal scholars can point out—and I admit, too—he came along, and he made an intellectually defensible argument. That is clear. I am not arguing with that. I am just raising the question, Mr. President, whether or not this fellow understands how delicate the balance in this Nation is. He is to be the Chief Justice of the United States of America. He is technically right. I think he is wrong as does eight other Justices. But he can technically make the argument. But I doubt whether anybody can move from there beyond to saying it is technically right that he expressed any sensitivity.

There are those who will sit and listen to this and say, "Wait a minute, Senator BIDEN. What are you asking the Justice to have sensitivity for? All he or she has to do is have the intellectual ability to define within boundary that we can think of the arguments they hold that is fitting with the constitutional framework. That is all you have a right to do, BIDEN."

Well, if they are right, then I am wrong. But if the issue is sensitivity, which I will come back to later and I will argue the rationale for, if that is the issue, then it is a different matter.

But I do not want to hold up the Senator from Hawaii, and I am sure my colleague and I are going to get a chance to continue this discussion at some point and many others also over the range of the day and maybe into the next couple of days.

I thank the Chair.

Mr. HATCH. Mr. President, the technicality Senator BIDEN mentions was the law. And Justice Rehnquist was upholding the law as it was written, which is what Supreme Court Justices should do.

Mr. BIDEN. If the Senator will yield, it was technically the law according to one man. Seven other men and one woman disagreed.

Mr. HATCH. There is more to it than that. It is interesting to note that 18 of the 26 major law review articles on this issue—and these are the leading scholars of America—are critical of the majority opinion of the case.

All I am trying to point out is that you can take any case out of context. It is insensitivity to you because he disagrees with you. It is courageous for anyone to be a dissenter. And he has been a dissenter on a number of occasions, not as much as some of his colleagues, however. It is also interesting to note that Prof. Larry Tribe from Harvard, who is a liberal law professor, wrote in the Indiana Law Journal that the Court's use of congressional inaction in the Bob Jones University case was not—let me emphasize "was not"—a legitimate means of ascertaining congressional intent.

In addition, two of the four judges that heard this case before it arrived at the Supreme Court ruled that the university was entitled to a tax exemption.

To present it as though he is insensitive to civil rights or that he does not stand for the mainstream of civil rights is not only misleading but it is wrong.

I might add that Justice Harlan was the lone dissenter in the Plessy versus Ferguson case. He was one who coined the language "Colorblind Society." All I can say is that I differ with the Bob

Jones case, however, I can understand the very powerful constitutional argument involving separation of powers.

Let us not condemn anybody because of a series of cases. This man has been involved in thousands of cases since he has been on the Supreme Court of the United States of America and has written many opinions.

What I really resent is not my distinguished friend from Delaware. What I really resent is the way some of our esteemed correspondents and journalists have written about this Bob Jones case as though he was for segregation. He is not for segregation. His whole career says that he is not. But he does not go as far as "forced busing" and a whole raft of other issues that are highly controversial and hard-fought issues in the area of civil rights where reasonable minds can differ.

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

Mr. HATCH. Yes.

Mr. BIDEN. I was responding only to the one question of sensitivity. Let me broaden it just a moment, and then I will yield to the Senator from Hawaii.

Mr. HATCH. If I can interject, we were limiting this discussion to the Bob Jones case. We should let the distinguished Senator from Hawaii give his remarks. But, in my view, it would not be correct to cite the Bob Jones case to show that he is insensitive to civil rights.

It would be inappropriate to attack the intellectual credibility of his arguments. Some have distorted what he really wrote in that case. Some have tried to make him look like he is anti-civil rights when he merely was standing for one of the most hallowed principles of constitutional law, albeit alone, but so did Justice Harlan in the Plessy case. So did Justice Frankfurter in many cases. So did Justice Holmes and so does nearly every justice at times.

These are not simplistic issues. They are difficult issues. There are always two sides. Even though the person is a lone dissenter, it is a mark of honor. It is not a mark to be criticized for. He has had the courage to do both. He has led and has been a lone dissenter. That is the point I am making.

Sometimes we get too simplistic in our zeal to make our points in these matters. I do not think we should do that.

I will be happy to yield.

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware is recognized.

Mr. BIDEN. I will only take 3 minutes.

Let me make a couple of points with regard to the Bob Jones case. The Bob Jones case taken all by itself, even though I think it was a real stretch for Justice Rehnquist to reach the conclusion he had, all by itself I would say although insensitive is not one that would lead one to belive that this man is not in the mainstream of American civil rights. Do not forget, we are talking about a man who before he was on the Court fought open housing in his home town and wrote letters to the editor in his home town. We are talking about a man who has been, alleged to have been involved in what was then a constitutionally legitimate practice of challenging voters, Hispanics and blacks, primarily, to ask them whether or not they can read English—read before they voted. We are talking about a man who has written a memo which I will not go into now, but I will go into later, when he was at the Justice Department and allegedly by some, and I am one of those who believes it, wrote a memo for Mr. Justice Jackson saying Plessy versus Ferguson was constitutionally valid law, and it should not be overruled.

□ 1230

So we are not talking about the aberration of an otherwise committed civil libertarian and civil rights activist, you know, not that you have to be a civil rights activist to be in the courts. We should not paint this in being A, in this case, or, B, that Justice Rehnquist does not have a 30-years history of having been at best resistant to change in our civil rights laws in this country.

Let us put it in focus, to use the phrase my friend from Utah likes to use. Let us look at this.

Well, as we look at this, we have a man who in everything he has done from his most narrow interpretation—again, as I said yesterday, intellectually elegant but yet narrow interpretation—of every piece of civil rights legislation that was passed, and prior to him being a man who was to rule on that legislation, he wrote as either counsel to the President or he acted as counsel to the party of his choice in his home State, or as a private citizen, he felt the need to go forward and testify why open housing was a bad idea.

You look at things in a continuum, and the fact that he ends up somewhere 81 out of 84 times voting against civil rights characterizes the position taken by black Americans, black plaintiffs, and I will go further into it, again, in and of itself, does not mean that the man is a racist, it does not mean that the man is not intellectually sound, it does not mean that he is one who has not found arguments in the Constitution to make his argument constitutionally credible.

I will make those points later.

At a minimum, it is not someone who shows an overwhelming sensitivity or any sensitivity, I might add. That is the context in which this occurred. This is not Earl Warren, who was equally as disliked or objected to as Justice Rehnquist. Let us get in everybody's mind the man we are talking about.

We are talking about a man who has not been anywhere near the forefront, and at best he has been at the rear and not hanging on but pulling back, it seems to me, on any movement in civil rights in this country.

I yield the floor to whomever would like the floor. I will come back and discuss other matters.

Mr. HATCH. I know my distinguished colleague from Hawaii would like to speak, but I will just take a moment.

I thank my colleague for being willing to participate in this debate. Some of the criticisms which have been lodged have been general criticisms.

When you start talking about individual issues and individual cases, you find that they generally involve very hotly contested matters in our society.

The Leadership Conference for Civil Rights has been advocating timetables and quotas.

However, the majority of blacks in this country do not want to arrive at their future on the backs of other people who are discriminated against solely because of their skin. They do not believe in quotas.

Mr. BIDEN. Let me ask the Senator, who is talking about quotas?

Mr. HATCH. Let me go into this. A lot of them involve the effects test.

Mr. BIDEN. Quotas?

Mr. HATCH. I am talking about various aspects of the civil rights law in some of these cases, like the Fullilove and Weber cases which involve quotas.

Back in 1979 this body came to a standstill on the effects test issue. Those who advocated for the effects test lost, because it was an important issue. There is a good argument for the effects test, but I think there are overwhelming arguments against it.

A lot of these people are arguing for forced busing in our public schools. That is a neighborhood school concept which has been criticized here.

I know that Senator BIDEN is on the right side on forced busing, he is against it, as I am, the vast majority of people in this country are against forced busing. They are outraged. It has not been proven to be a working situation. You have to really stretch the truth to try to really show where it works at all.

A vast majority of the people are against that.

I could not let the Senator raise Bob Jones just because a lot of people have said that Mr. Justice Rehnquist was against civil rights because he was the lone dissenter in the Bob Jones University case.

He not only made legitimate arguments but they were arguments that should have been made by the other justices as well. Whether he was right

or wrong only long-term history can tell. The point is he had a legitimate point of view. He argued it well and it did not show insensitivity to argue that position.

This whole dispute is caused becaused some differ with Justice Rehnquist's ideology.

When Richard Nixon was President, when Gerald Ford was President, and when Eisenhower was President, they could not put a conservative on the Supreme Court because the U.S. Senate, except for a couple of years under Eisenhower, was controlled by the Democrats. And the Democrats are not known for conservative politics in this country except on occasional instances and they are very rare.

The fact is that a conservative President has taken the leading conservative on the U.S. Supreme Court and given him the opportunity to become Chief Justice. His opponents do not like it. There is a good reason for it. They do not agree with him on forced busing. Senator BIDEN does, but a lot of others do not. They do not agree with him on quotas. They do not agree with him on the effects test versus the intent test. These are three of the most crucial and hotly contested issues in civil rights. They involve rights of people on both sides which are extremely important.

What the opponents of Mr. Justice Rehnquist are really upset about is that they do not control this nomination and they do not control this President. They cannot attack this man's sterling 15-year record legitimately, so we get these broad-brush arguments about Bob Jones University. When you get into the issues, you find it is not the simplistic little thing that some of our journalists have written about or some of our colleagues on this floor have talked about.

I really find it reprehensible what went on in the committee hearings. In their zeal to tar this man with something that might stop him from being Chief Justice of the U.S. Supreme Court, they bring up matters that some of the media have mischaracterized. Some have tried to make Bob Jones look bad because it did in fact discriminate against blacks through its religious beliefs. If you want to get into religious beliefs, I can show my colleagues that a lot of religions have religious beliefs others object to. And if we want to portray them as bad, the Hassidic Jews are sure going to be upset, and the Catholics are going to be upset.

Mr. BIDEN. Mr. President, Catholics will not be upset.

Mr. HATCH. They will be upset if they are told they have to have abortions.

Mr. BIDEN. You said on race. Will you stick to the point, Senator?

Mr. HATCH. I am sticking to the point.

Mr. BIDEN. You are mixing bananas and apples and oranges now.

Mr. HATCH. Wait a minute.

The reason the Grove City bill is stopped in the House right now is because there is a strong coalition, including the Catholics, which objects to the Carter regulations that would provide that abortion has to be treated——

Mr. BIDEN. What does that have to do with race, Senator?

Mr. HATCH. Because they are part of the coalition that has stopped that bill in the House.

Mr. BIDEN. Is that race, Senator?

Mr. HATCH. The Grove City bill is not limited to title IX but extends to title VI as well.

Mr. BIDEN. Oh, OK, I see.

Mr. HATCH. The Grove City bill involves very serious issues. It involves the nuance of abortion that has the Catholic Church interested in it.

Mr. BIDEN. Mr. President, if the Senator will yield, I can understand when there is so much occasional confusion because I engage in it also. I thought the Grove City case relates to discrimination under title IX based on sex.

Mr. HATCH. It does relate to title IX, and also to title VI, involving race discrimination, the Age Discrimination Act and the——

Mr. BIDEN. The only point I want to make is the Catholic Church has no problem on any race issue. You can go in and tell us anything you want to tell us about not discriminating based on race and there is no problem. That is the only point I want to make.

Mr. HATCH. The entire bill is a problem in the context that a bill which will literally overrule the Grove City case on institution-wide coverage in all universities for women has been delayed because the Catholic Church and many other organizations do not like the fact that that bill will result in forced abortions at religious institutions. The entire bill relates to a variety of issues.

I am not saying they are for discrimination. There are instances where various religious institutions do hold beliefs others do not understand.

These are complex issues, Mr. President. The Supreme Court is a complex forum. There are widely divergent views on the Court right now. That is why it is such an interesting institution. To come in and make broad-brush generalities about Mr. Justice Rehnquist demeans the process. It demeans him. It demeans us.

If you want to talk about individual cases, we shall be happy to do it.

I yield the floor.

Mr. BIDEN. Mr. President, how about Batson v. Kentucky? Let us make sure we are talking—if the Senator will let me finish.

Mr. HATCH. I shall be glad to talk about Batson.

Mr. BIDEN. Give me a chance.

Mr. HATCH. I am glad to do it.

Mr. BIDEN. The Senator suggests that what we are talking about here is busing and quotas. The Senator from Delaware has not raised cases regarding busing and quotas. We are talking about much broader issues, about whether or not this man has any sensitivity on the issue of race.

There are a lot of cases, there are a lot of circumstances, there is a lot in Justice Rehnquist's background which, in this Senator's opinion, indicate that in fact he is insensitive on race questions and gender questions and age questions that do not have anything to do with quotas, that do not have anything to do with busing at all.

Maybe the Senator and I could make an agreement that we will let the Senator from Hawaii speak and then afterward, he and I could get back into the discussion about whether or not this is an area that should be pursued, because we have both been standing here saying we are going to let the Senator from Hawaii speak. That is, for the last 45 minutes we have been saying that.

I yield the floor.

Mr. HATCH. The Senator from Delaware brought up the Batson case. We will discuss that later. The Batson case is an interesting one. I shall be happy to discuss it in detail.

I yield the floor to the distinguished Senator from Hawaii.

The PRESIDING OFFICER. The Chair recognizes the patient Senator from Hawaii.

Mr. INOUYE. Mr. President, with much reluctance I intrude into this provocative and interesting debate.

Seriously, we have just seen and listened to a demonstration of what makes this body the most important deliberative body on this Earth. My only regret is that most of my colleagues are not here and were not here to listen in on this exchange. I commend my distinguished friends from Utah and Delaware for carrying on this debate.

Mr. President, I rise to join those who have expressed their opposition to the confirmation of William Rehnquist as Chief Justice of the United States.

The issue before us is not whether Justice Rehnquist should continue to serve as a member of our Supreme Court, the question is whether he should be confirmed to become the single most powerful jurist in our country—the Chief Justice of the United States. This is a distinction which is not to be taken lightly, for we are asked to confirm the leader of one of the three coequal branches of our Government.

Perhaps it is naive, but I believe that the leader of America's judiciary

should be above reproach. I believe that there should be no reasonable basis to question his commitment to racial justice; that there should be no reasonable basis to even suggest that he questions the fundamental right of women to equal protection; that there should be no reasonable basis to question his integrity and candor; and, perhaps most importantly, no reasonable basis to question his ability to lead a court which will almost certainly be called to unite a nation, and to remind our people that the promise of fairness and equality embodied in our Constitution will continue to evolve and be made real.

The administration of justice in our Nation deserves no less than a man in whom our people can place its unequivocal confidence. Because I do not believe this to be the case, I must oppose Justice Rehnquist's confirmation.

In the course of this debate, Mr. President, I believe that we must continually remind ourselves that we are selecting a man for leadership. This is not a matter of service on the Court. Nor is it a matter of providing a balancing view or alternative perspective. It is a matter of expressing our confidence that the Court and the American people will be led in a fashion that we believe represents the best of our commitment to justice.

Mr. President, the role of the Chief Justice is far more then merely ceremonial and administrative. He must lead. He must also serve as a moderator and consensus builder who will bind the Court and our Nation.

Although I cannot hold myself out as expert in these matters, I think that it is significant that the role of the Supreme Court in our Government was largely defined by a Chief Justice whose leadership and ability to find a common ground was such that he dissented only once on Constitutional issues in 34 years as chief justice. I speak of Chief Justice John Marshall. Chief Justice John Marshall serves as the paramount example of the duty and potential of the office to bring together a court, engender confidence in our form of Government and give life to the Constitution. And while it is, of course, unfair to compare any jurist to a giant such as Marshall, it is fair to ask that the qualities of leadership, moderation, and an ability to unify be demonstrated at the time of appointment. I do not find this to be the case with Justice Rehnquist.

□ 1250

He has, to my knowledge, served rather than led. He has neither a reputation nor apparent inclination toward compromise and moderation, and on the basis of the record it appears that Justice Rehnquist may be more likely to divide than unite a court or nation.

Mr. President, I believe that the Chief Justice must also symbolize and effectuate our commitment to racial and social equality.

The commitment of our Nation to genuine racial equality was manifested in Brown versus Board of Education. In that case Chief Justice Earl Warren spoke for a unanimous court declaring that "separate educational facilities are inherently unequal." This simple, now self-evident conclusion, precipitated a revolution in the history of race relations in America. The philosophical and moral leadership exhibited by Warren, together with his ability to bind a court epitomized what the American people have the right to expect of its Chief Justice.

Ironically, in 1986, we are debating whether a prospective Chief Justice supported, or currently fundamentally accepts, the premise and principles of the Brown decision.

In this age, we tend to forget that the evil of segregation was supported by benign sounding and apparently objective social and legal analysis. In Plessy versus Ferguson, the Supreme Court sanctioned segregation thusly:

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution, cannot put them upon the same plane.

But those who have historically been the victim of such language have not forgotten the vicious and degrading reality which such neutrality engendered. It is understandable that they are necessarily discomforted by the nominee's statement in 1952 that "I think Plessy versus Ferguson was right and should be affirmed." Although this was subsequently recanted and attributed to Justice Jackson, concern has been reinforced by his statement 15 years later that "we are no more dedicated to an integrated society than to a segregated society"; by his alleged participation in ballot security operations; by his allegedly innocent purchase of two homes with racial covenants; by his development of a constitutional amendment which would consciously permit intentional segregation; and by a judicial record most recently manifested by a lone dissent attempting to retain tax benefits for an educational institution which practiced racial discrimination.

It is difficult to equate this record with leadership of an Earl Warren in Brown. It is equally difficult to imagine that the confidence of the American people in our Court's commitment to racial equality will be enhanced by Justice Rehnquist's confirmation. Mr. President, I think they, and we, deserve better.

Mr. President, in 1974, our Nation was confronted with a constitutional crisis regarding the unwillingness of President Nixon to surrender certain tapes. The case was before the U.S. Supreme Court and many feared that the Court might be predisposed toward the executive since five of its members had been appointed by the President. Led by Chief Justice Burger, the Court not only put these fears to rest but substantially contributed to the resolution of the national crisis. In doing so it raised the Court's, and the Chief Justice's, reputation for integrity by issuing a unanimous consent which left no doubt as to its objectivity, honesty or allegiance.

On the basis of the record before us, I find it difficult to conclude that the Court's reputation in this regard will be enhanced by the confirmation of Justice Rehnquist. Justice Rehnquist's choice in Laird versus Tatum has been thoroughly discussed, as has his candor before the Senate Judiciary Committee. And while I cannot say that he has been proven to be less than candid under oath or violated the canons to which he is bound, I believe that there is more than sufficient doubt which has been raised to justify a rejection of his nomination. For the question before us is not whether he is a criminal who has perjured himself, or whether he must be sanctioned or impeached, but rather whether the evidence justifies elevation to a position which serves as one of the most important repositories of trust in our form of government.

Mr. President, I do not question that Justice Rehnquist is equipped with a fine legal mind. But brilliance is neither a necessary nor sufficient condition for the leadership of the U.S. Supreme Court. What is required is the flexibility to rally a court in times of national crisis; a willingness to forward and symbolize those commitments which represent the best that our system of justice has to offer; and a character and reputation which enhances the Court's reputation for unquestioned integrity.

Mr. President, in applying this standard I ask how the Nation might have evolved if Justice Rehnquist were Chief Justice when John Marshall was confronted with Marbury versus Madison and a need to cautiously and moderately unite the Court; or if he were Chief Justice when the Court was confronted with Brown versus Board of Education and the future of race relations lay at stake; or if he were Chief Justice when the Court decided United States versus Nixon when the faith of the American people in the integrity of the Court lay at issue.

Because I have substantial doubts about how a Chief Justice Rehnquist, or Rehnquist Court, would have led and comforted the Nation, I have no

choice but to oppose his confirmation and urge my colleagues to do so.

I yield the floor.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. SIMON. Mr. President, I would like to discuss for a few minutes what I think is the basic question. It is very easy, in the process of all this debate, to avoid looking at the basic question. The basic question—and I think we are all in agreement—is not the ability of the nominee. The basic question in my mind at least is not his ability to administer the Court, or to serve as the Court administrator. I have no trouble at all with the fact that he has had a great many lone dissents; that shows some courage. The question is not even how he votes on the Court, because we are not going to change one vote on the Supreme Court. What are we discussing? We are discussing the symbol of justice for this country well into the next century. If what we are debating is only the symbol of justice, is it that important? I suggest to you, Mr. President, it is that important.

Right in back of you, Mr. President, is a piece of cloth that happens to be colored red, white, and blue. It is only a symbol. Is it important? You bet it is important. It is important to every Member of this body. It is important to 220 million Americans. We just celebrated the centennial of a piece of metal, and concrete in New York Harbor. Is it simply a piece of metal and concrete? No, it is much more than that. The Statue of Liberty is a symbol. We die for symbols. Symbols are extremely important.

Can Justice Rehnquist, in the words of Senator INOUYE, bind our Nation together? Can Americans in every State in this country, in Mississippi, in New Jersey, in Delaware, in South Carolina, look to the nominee and say, "Here is a person who represents justice for me" without any hesitation? I have come to the conclusion that Justice Rehnquist is not a good symbol.

Now, can or should ideology be considered? Here I think Justice Rehnquist has provided the best answer. I think in the case of a district court nominee, unless it is a very extreme nominee, ideology should not be a major factor. The court of appeals? It is more important. Supreme Court? Yes, it is important. And important also for that symbol of justice. William Rehnquist wrote in the Harvard Law Review—this is prior to his nomination to the Court:

> Until the Senate restores its practice of thoroughly informing itself on the judicial philosphy 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.

What is true of a nominee is also true of that symbol, the Chief Justice.

A second factor has been raised, and that this is the candor of the nominee before the Senate Judiciary Committee. In the case of the memo to Justice Jackson when Rehnquist was a law clerk, it is difficult to know when memory is guilded a little bit. I was impressed by the comments of our colleague from California, Senator CRANSTON. After he made his remarks today I talked to Senator CRANSTON. I said, "Did you know Justice Jackson well enough so that there is no doubt in your mind these were not Justice Jackson's views?" And Senator CRANSTON said, "Absolutely not." Maybe memory is guilded. I will give the benefit of the doubt to Justice Rehnquist.

In the case of the Phoenix precinct, I have to say I was very impressed by a courageous attorney from California, Mr. James Brosnahan, and his testimony. I think there is at least a small cloud over the question of candor before the Senate Judiciary Committee, but I do not regard that as the main question. The main question is in the area of civil liberties, and in the area of those less fortunate in our society, for whom justice is extremely important. In the area of civil rights, will Justice Rehnquist represent the symbol of justice that we need?

□ 1300

Let me take, first, the area of civil liberties.

One matter that is not a big issue on the floor here but is an important issue, I think, for many Americans, and an important issue in the long run, is the question of wiretapping. When our Constitution was written, they said you cannot come into our home without a very specific search warrant, because we wanted to confine police activity. Also, we should not permit people to invade our conversations without great restrictions. Justice Rehnquist has not shown great sensitivity here.

In the area of church-state relations, the first amendment, the establishment clause, his record, I regret to say, is not strong. As a law clerk—again, I recognize that this is some years ago—William Rehnquist commented in a memo:

> I personally don't see why a city can't set aside a park for all games, picnics, or other group activities without having *some outlandish group like Jehovah's Witnesses* commandeer the space and force their messages on everyone. (Emphasis added.)

Again, if we were talking about some isolated statement made 30 years ago, that is not a basis for rejecting someone. But the pattern is very clear.

The Society of Professional Journalists, formerly called Sigma Delta Chi, did an analysis of 80 speech-related cases in which Justice Rehnquist has participated. They found that in 69 of the 80 speech-related cases, Justice Rehnquist cast an unfavorable vote for the first amendment.

On the church-state question: In one case, Wallace versus Jaffree, the Justice Rehnquist cited a decision by Chief Justice Story, who was Chief Justice from 1811 to 1840, which he calls the most comprehensive analysis of the Constitution until that time. In that dissent, in that decision by Chief Justice Story, he says this:

> The real object of the first amendment was not to countenance must less to advance Mohamidism or Judaism or infidelity by prostrating Christianity but to exclude all rivalry among christian sects.

I am not suggesting this is precisely Justice Rehnquist's view. But when he cites that particular decision, I feel some discomfort.

Let us quote from Justice Rehnquist, himself, in the same decision:

> The "wall of separation between church and States" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

I recognize that there is not a complete and total wall of separation. If the local Methodist Church is on fire, you call out the fire department. You do not say "a wall of separation." Yet, that separation has been important to our country, has been a protection for freedom, has been a protection for the religious bodies and the religious opinions of our country. Justice Rehnquist's record in this church-state field does not embody the symbol of justice that I would like to see as the Chief Justice.

Second, what about the less fortunate in our society? Let me just mention a couple of examples.

The Supreme Court has declared unconstitutional eight statutes that discriminated in some way against illegitimate children. Justice Rehnquist dissented in all eight cases—again, a lack of sensitivity that does not commend him to the position of Chief Justice.

In a Wisconsin case, Zablocki versus Redhail, the Wisconsin statute made it a crime for anyone to marry if you had not paid your child support payments. The Supreme Court, by an 8-to-1 ruling, said this is not fair. The Court said:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.

The Court said that if you are to deny people the right to marry because they have not paid a child support payment, you would, in effect, be denying the right to marry to very many poor people.

□ 1320

The Supreme Court Justice Rehnquist dissented from that opinion.

In a Florida case, Gardner versus Florida, a death penalty case, a jury which heard the case unanimously recommended that the death penalty be imposed. After the jury made this recommendation the trial judge, on the basis of a secret presentence report which he refused to disclose to either the defense attorney or to the defendant, ordered the death penalty. The Supreme Court by an 8-to-1 vote reversed that death penalty saying that a defendant and the defendant's attorney are entitled to see the evidence. Again, Justice Rehnquist lacks sensitivity.

Finally, in the area of civil rights, it is very clear despite the comments by my good friend from Utah, Senator HATCH, that the record is not a good one on the part of Justice Rehnquist.

When he was a law clerk—and I recognize here again views change, but the pattern is there consistently—in a memorandum concerning Terry versus Adams, he wrote:

It is about time the Court faced the fact that white people in the South don't like the colored people: the constitution restrains them from effecting this dislike through state action, but it most assure[d]ly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.

Admittedly ugly head.

Then he argued to the argument made by Thurgood Marshall, not—

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 the Court to protect minority rights of any kind—whether those of businessmen, 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.

Majority of nine men.

Is that the kind of sentiment we want as a symbol of justice.

Now, you can say well, his opinions have changed a great deal since then. It is interesting because the justice says they haven't changed; in the NAACP Legal Defense and Education Fund memo they quote a 1985 interview with the New York Times in which Justice Rehnquist observed, "I don't think that my views have changed much from the time" when he was a law clerk to Justice Robert H. Jackson.

Justice Rehnquist has a very different view of the function of the Supreme Court than I have in mind or a great many other people have in mind.

My colleague, Senator BIDEN, has already referred to the letter to the editor he wrote to the Arizona Republic of Phoenix which he recalled the passage of an ordinance prohibiting discrimination on the basis of race in places of public accommodation. Justice Rehnquist opposed that ordinance.

He testified before our committee that he was not aware of the restrictions on the sale of his home. I have no reason to doubt that. It is clear he had been told, because he later sent letters to us, but the restrictions did not seem that important to him, again a lack of sensitivity.

This morning's Washington Post has this paragraph:

But the pattern goes beyond this. The Leadership Conference on Civil Rights made a study of Justice Rehnquist's opinions over the years. It found 83 cases involving civil rights that (1) were statutory, not constitutional, involving interpretation not of the intent of the Founders but the will of Congress, and (2) were not unanimously decided; they were close calls. Mr. Rehnquist, the conference reported, voted against the civil rights complainant in 80 of these 83 cases.

In the years since Justice Rehnquist has been on the Court the Supreme court has decided 11 equal protection cases in which it resolved a dispute of fact between State officials and minorities who claimed discrimination. In 7 of these 11 cases a majority of the Court resolved the dispute in favor of the minorities. Justice Rehnquist, on the other hand, agreed with the minorities in only 1 of those 11 cases.

Fourteen race discrimination cases have been brought to the Court on behalf of blacks in which Justice Rehnquist cast the deciding vote. In every one of those 14 cases Justice Rehnquist cast the deciding vote against the black complainant.

In the case of women, we have the ERA memorandum that he wrote prior to his joining the Court.

Clearly he was wrong in his judgment as to what the effect would be, and I say that coming from the State of Illinois where we have an ERA amendment in our State constitution.

The fact that he was wrong should not be held against him. PAUL SIMON has been wrong. JOHN STENNIS has been wrong. STROM THURMOND has been wrong. DAVE DURENBERGER has been wrong. Even BILL BRADLEY has been wrong from time to time. We all make mistakes in judgment.

The question is not whether he was wrong. The question is whether he was insensitive and the answer clearly has to be that he was insensitive.

Listen to part of that memo:

"Traditionally," Rehnquist wrote, "the domicile of a married woman has been that of her husband, and if the husband decides to move . . . [for a job] the wife is legally obligated to accompany him." ERA, he wrote, "apparently would leave both parties with the power to decide this question."

Well, we have had both parties deciding this question in Illinois for some years and it has not worked out badly nor any differently than it has in any other State.

Since 1971, the Court has ruled on the constitutionality of 23 statutes or Government practices which in one way or another discriminated on the basis of sex and in 14 instances it found them unconstitutional. Justice Rehnquist voted to uphold all but 3 of these discriminatory practices.

Finally, Mr. President, what we have here is a clear pattern. A clear pattern that is going to alienate millions of American citizens if he is our symbol of justice.

Someone criticized me the other day because I had voted against the majority on this side in the case of a Federal court nominee, Judge Fitzwater of Texas. The difference is very clear. Judge Fitzwater was in error on one thing he handled. I do not defend that. But there was no pattern that was wrong.

There is a pattern in the case of William Rehnquist and it is not a good pattern. I will vote in opposition to his nomination.

□ 1320

I recognize at the same time that this body is going to approve him. A question the American public asks themselves and I ask myself is: Despite the pattern, can Justice Rehnquist grow into this new role? Time will tell. I cannot answer that. History is not very encouraging on that point, the history of Justice Rehnquist.

I would encourage Justice Rehnquist, if he is approved—and I am sure he will be within a few days—to take a weekend off by himself, walk along the beach and reflect on this role of being the symbol of justice for all the people of this country. He will no longer be a single Justice. He will be important in ways that none of us know. He will be important as the symbol of justice to everyone.

I want a Chief Justice that will bind the country together, that will give all of us a feeling that he represents justice for every man, woman, and child in this country.

On the basis of the record, I cannot vote for Justice Rehnquist. I hope he will conduct himself in such a way that my vote will turn out to be the wrong vote.

I yield the floor, Mr. President.

Mr. STENNIS. Mr. President, I appreciate very much the gesture here of my colleague from New Jersey for allowing me to proceed at this time.

Mr. President, in many ways, our function here, representing our respective States, in considering the approval or rejection of a nomination for a judge and, more particularly, a member of the Supreme Court of the United States and, even more particularly than that, for the Chief Justice

of the United States, is grave indeed and far reaching in consequence.

I want to make one point clear here, too, that this is our responsibility. The Chief Justice of the United States is not a part of the administration of whomever may be President when his name came in as a nomination. He will not be a part of the administration that follows and follows that, should he serve year after year after year as Chief Justice.

Under the Constitution, it is clear, crystal clear, that the judicial branch of the Government is separate and apart from the executive and legisative part. It is a separate function. It has a separate independence to it and, more particularly, to the Chief Justice of the United States. Even the President, even the Congress, should the vote be unanimous, cannot change the salary, for instance, for any Federal judge, even for a small amount, $100, or any change whatsoever. This illustrates how complete and how practical and how certain the framers of our Constitution were that they were to create an independent body, a body independent of every other agency in the Government, except of course in the case of the willful violation of the law of such kind that would be grounds for an impeachment.

So I speak with deference, special deference to the Presidents who send the name in because they have the responsibility of it. But they do not have any control as to how we vote.

Now I am not going to take a great deal of time. I just want to put the greatest emphasis that I know how on the importance of any judicial officer under our Constitution and, more particularly, as I say, the Chief Justice of the United States.

The President has his responsibility, as I have already covered quite briefly. But it is there and I am sure the present President felt that responsibility. I am proud to say that I believe that almost every nomination that comes in through this process does represent care and represents careful selection and represents the fundamental principle that is intended.

But I have to emphasize that the final decision is our responsibility. And it should be made clear to the people that this is a function of the Senate to pass a yes or no verdict with reference to any nominee in the judicial branch of the Government and keep on until one is selected that would go forth with the powers and the immunities that are clearly set forth in the Constitution of the United States.

But I will tell you, anyone can have defects pointed out if he served on any high court for as much as 14 years, as has this gentleman. Now I have no personal familiarity or connection with him. I have been to a reception or two at the Supreme Court quarters and have shaken hands with this gentleman. But I do not know him and he does not know me, as we ordinarily use that term.

But I do know, to some degree, about judicial experience. I was a trial judge in a court of unlimited civil and criminal jurisdiction for a good number of years. I will tell you right now, it is a hard, severe, exhausting experience that tries every fiber that a man has, every inclination that he might have. It is a test. His learning in the law is generally recognized, but the qualities, the decisions a judge has to make are far, far more important many times than is the knowledge of the law.

Now, you can have all kinds of apparent qualifications for a man you think will make a good judge. You know he is a man of honor and character and all those virtues that go with it. But the real test comes when you try him out and send him around the track, year after year, and see how he works with his fellow judges, how he reacts to certain sets of facts, how he carries on and conducts the general and special affairs of that court with impartiality. That is where you find the measure of the man.

Now, as I see things, if we had even one case of willfulness or gross carelessness, even, or gross intention to do wrong in any matter that he was deciding these 14, nearly 15 years, I would just let him go. I would not support him.

□ 1330

But as I understand the facts in the record, there is nothing that is clearcut that shows a willfulness or maliciousness or the wrong qualities of character or honor that can be laid at the foot of this man.

Now you can find matters on which you disagree. That is the easiest thing I suppose there is to do. Just go to check in the record, read the law books, the judge's opinion to see what he wrote under this circumstance, that circumstance, these facts and these alleged facts. And you can get barrels and barrels of cases where you thought, well, in that time he made a mistake. But you are not proving any defects of character, honor, capacity, and attitude against anyone that is performing that function. He has to do the best he can.

Another factor is this: how does he get along with his fellow judges? That would be a material point. It is to me, at least, looking at least, looking at these judges, their work, the complexity of it, year after year after year.

I am proud of the Members that have been holding the hearings, all of them. I am proud of the fellow Members we have here that have worked on these cases and brought them in to hear the facts.

But in all of these hearings, I have not heard anything wrong or lack of capacity, lack of intelligence or lack of a will to carry his part of the load that is attributed to this man. You may find things, as I say, that you disagree with him on. I know I could find some things by looking at the record close enough on which I disagreed with him. But when you lay that down beside the average fellow that you are trying to find to serve in this position, you are going to find about the same thing and about the same batting average so to speak with reference to those kind of mistakes, and those kind of conditions. That is true of all those that try to really turn out the work and carry on their part of the load of the Court.

When I said load, that is a deliberate choice. I do not believe anything connected with Government—the President of the United States has gotten a load that is almost impossible to carry because of the volume of it—but I do not believe even the Presidency is any harder on a man to carry the load of it and perform properly than the membership now on our Supreme Court.

In a measure, it is the most unrewarding job, as I see it, except for that satisfaction if he tries to do his best and render his duty. Then there is a certain amount of satisfaction that goes with it.

The first time I ever went into the Supreme Court Chamber was in the old Chamber here on this floor. And the Chief Justice then was a former President of the United States, former President Taft, then Chief Justice presiding over the sitting that was there, a man of great jovial disposition and nature, and in his opening remarks, he found plenty of ways to entertain us. But when he got out into the cases, it was altogether a different situation. He created an atmosphere. He was carrying on his duty. You would feel proud of him.

I think when the fundamentals are really weighed, and the general character is considered there is the capacity to turn on the work, to do the work, and the willingness to do the work. When all of those things are measured carefully and impartially, I believe that this man will be counting particularly on these years of service, and that is what I find convincing. All those things add up to the fact that it would mean that this man is capable and competent. There may be a little thing back there when he was a young man coming along. That did not weigh much with me. I believe this man will measure up in character, honor, and experience far above the average.

I believe that he will make a capable, competent, satisfactory man filling the role of leadership there even more than his brethren, according to all the proof I have heard. And that this man will turn out, round out, and be a servant of the type that we need. And if

he is finally chosen and goes on to these special duties, may I especially wish him godspeed, satisfaction, and the reward that comes to him from duty done well.

I yield the floor, Mr. President.

Mr. BRADLEY addressed the Chair.

The PRESIDING OFFICER (Mr. SIMPSON). The Senator from New Jersey.

Mr. BRADLEY. Mr. President, I thank the distinguished Senator from Delaware for making this time available and the distinguished Senator from Mississippi for his remarks, particularly demonstrating the length of his service in this body. Not all of us can remember when William Howard Taft was Supreme Court Justice, and very, very few of us ever saw him in action. So it is an honor to hear his speech.

Mr. President, the nomination of William Rehnquist to be Chief Justice of the Supreme Court is one of the most important questions to come before this Congress. The Chief Justice is not simply one of nine jurists. He is the very symbol of our Nation's dedication to fundamental fairness and equal justice for all.

The commitment of a Chief Justice in the area of civil rights must be beyond reproach, for the history of America has been shaped by racial minorities struggling to realize the promise of the Declaration of Independence "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."

America's efforts to put our most noble ideals into practice is not ancient history. Much of it happened just yesterday. Certainly it happened within our lifetime. Often within our children's lifetime. Yet we forget.

We forget that only 3 years ago, private schools that practiced racial discrimination had their bigotry subsidized by the Tax Code.

We forget the footdragging that persisted throughout the seventies in implementing the school desegregation that had been ordered 20 years before.

We forget that as recently as the sixties, blacks were still risking their necks for the right to share lunch counters, parks, hotels, and public transportation with their white compatriots.

We forget that until 1964, the right to vote was routinely denied by the imposition of poll taxes.

And, if we forget the history that happened in our own lifetime, how likely are we to remember the 400-year odyssey of black Americans' struggle for equality? Yet that history frames today's debate.

Even as the stirring words of the Declaration of Independence were being written, they were being dishonored. America was practicing slavery in a form as demeaning as any in recorded history. American slaves had no legal standing. They belonged to their white owners. They could take no action to control their sale. They could not swear a legally binding oath, nor make a binding contract, nor own any property to speak of. They had no freedom of speech or movement. They were subject to their owner's curfew. They had no privacy. Neither church nor State recognized their marriages. In sum, they were openly classified as the white man's property and required to do the white man's bidding.

□ 1340

The 13th amendment, which abolished slavery, technically changed this appalling state of affairs. Yet its promise, like the promise of the 14th and 15th amendments which followed, was systemically thwarted by the Government and the courts. The promise of equality was an illusion. Blacks were denied learning. They were denied access to political and social institutions. They were effectively disenfranchised and relentlessly ostracized. In practice, their newly won emancipation proved to be an empty husk. Except in isolated cases, the courts, instead of enforcing the Federal legislation of the Reconstruction Period, whittled away the protections it had tried to secure. By 1896, State-imposed segregation was almost the rule in the South and in some places in the North. In the two decades of the 19th century, 3,000 lynchings were recorded (and many surely went unreported). And they were carried out with impunity.

By 1900, the Supreme Court had nullified nearly every vestige of the Federal protection that had been extended to blacks to liberate them from their bondage. Once again, the black citizen had almost no rights that the white citizen was required to honor.

Jim Crow laws filled the books throughout the South. The first half of the 20th century was not much better. Nor was the Nation's Capitol immune. During William Howard Taft's presidency, the Post Office, the Census Bureau, the Treasury and the Bureau of Printing and Engraving all practiced segregation. Black men's desks were curtained off; cafeteria tables were assigned on the basis of race; toilets in Federal buildings were marked "whites only" and "colored." By the end of the Wilson administration, segregation had been extended to the galleries of the U.S. Senate and the lunchroom of the Library of Congress.

And, Mr. President, this was the law.

Blacks, though technically liberated from bondage and inferiority, were nonetheless denied education and opportunity. Black America, with the Supreme Court's acquiescence, was routinely degraded. Banished to the back of the bus. Placated with the fiction of separate but equal.

And, not until 1954, with the landmark case of Brown versus Board of Education, was the law finally changed.

In Brown, a unanimous Court found that:

> To separate negro children 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 to be undone."

Separate educational facilities are inherently unequal. Segregation deprives black people of the equal protection of the laws guaranteed by the 14th amendment.

Brown, and the cases that implemented it, reaffirmed that this Nation is dedicated to the proposition that all men are created equal, that they are entitled to equal protection of the laws, that America lives up to its ideals of fairness and justice for all.

Since Brown, it is the law that white Americans can no longer humiliate black Americans by setting them apart. They can no longer legally relegate them to the status of official outcasts.

Brown ignited a mass movement to translate the law into fact. It began in Montgomery, AL, when Rosa Parks refused to move to the back of the bus. It lasted throughout the sixties and seventies. It goes on today. It brought black Americans greater freedom and opportunity and it gave white Americans self respect.

But, unfortunately, Justice Rehnquist, the man President Reagan asks us to make Chief Justice of the Supreme Court, was not a part of that movement to enforce and advance these hard-won civil rights. As far as I can tell, he derived no self-respect from America's significant attempt to shed the legal garb of racism. He sat on the sidelines disapproving and nitpicking as the sweep of history left him behind. He belongs in a different era and has a different view of America's destiny and America's historic responsibility. His confirmation as Chief Justice will signal to the vast majority of Americans, who have fought for, or who care about these rights that a dark cloud has descended over the Court.

Just this past weekend Justice Thurgood Marshall, long a warrior on the battleground of civil rights, declared that America has a very long way to go before we become a colorblind society. And if we are ever going to get there, we had better be sure that the Chief Justice of the Supreme Court is firmly at the helm.

And what specifically has Mr. Rehnquist done to make us doubt his commitment to civil rights? Well he opposed the Supreme Court ruling that desegregated the schools. He opposed the civil rights legislation of the 1960's. He opposed efforts in his home town to outlaw racial discrimination in public facilities. He opposed requiring cities to make their electoral systems fair to blacks. He supported the right of a prosecutor to prevent blacks from serving on a jury. And he, alone, supported tax exemptions for schools that practice racial discrimination.

His positions on civil liberties and racial justice betray his pinched view of the Constitution and his disdain for minorities and individual rights. He fails to grasp that America is still an idea becoming—becoming what its people would have it be. A land where men and women are judged not by color but stand equal in the eyes and practices of the State, just as they do in the eyes of God. William Rehnquist seems not to grasp that America is incomplete until we have eliminated the injustice, festering in our national soul, of a dual society of black and white.

People praise William Rehnquist for championing the rule of law. For practicing judicial restrain. For his brilliant legal mind. But I see nothing in Mr. Rehnquist's philosophy that offers redemption from our original sin. On the contrary, I see his stewardship of the Supreme Court leading us back to darker, more divisive times.

For Mr. Rehnquist believes that even where civil rights are at issue, the Court should adhere strictly to the literal words of the Constitution and the original intent of the framers. This belief harks back to another Chief Justice, Roger Taney, whose infamous Dred Scott opinion is one of the most shamefui episodes in our history. Taney, too, sought to discover the intent of the framers—in this case the framers of the Declaration of Independence. The Declaration's ringing affirmation of life and liberty clearly did not include African slaves, Taney reasoned. For the framers of the Declaration knew that, given the mores of the day, including blacks would have subjected them to:

> Universal rebuke and reprebation. [The framers] perfectly understood the meaning of the language they used, and how it would be understood by others; and how they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery * * *. The unhappy black race were separated from the white by indelible marks and laws long before established, and were never thought or spoken of except as property.

And since no citizen could be deprived of property without due process of law, he argued, that Congress could therefore not outlaw slavery.

Shocking as Justice Taney's conclusion is, I do not criticize the opinion because it is poorly reasoned, carelessly argued, or technically unsound. I dismiss it because it is wrong. Man's inhumanity to man, the subjugation of the black race by the white, cannot be transformed and made acceptable by a well-reasoned legal opinion.

□ 1350

It is unfashionable these days to question a Supreme Court nominee's philosophy. But where civil rights are at stake, such self-restraint is out of place. Civil rights, equal protection, freedom from racial discrimination. these guarantees are the heart, the soul, of the American system. They are the source of those "just powers" from whence the consent of the governed derives. Call into question the Supreme Court's commitment to civil rights and you put the integrity of the entire Government, the character of the whole Nation, on the line. If we confirm a Chief Justice whose commitment to civil rights is in doubt we betray our past, our future and ourselves.

Let us take a look at Mr. Rehnquist's civil rights record. It is impossible to exaggerate either the role of the 14th amendment in protecting civil rights or the degree to which Mr. Rehnquist's narrow view of that amendment explains why he consistently speaks in a manner contrary to the rights of minorities and women.

The prevailing view of the 14th amendment is that almost all elements of the Bill of Rights apply to the States in the same way they apply to the Federal Government. Mr. Rehnquist is alone among sitting Supreme Court Justices in rejecting this interpretation. His view is totally different. In the world, according to Rehnquist, the 14th amendment prohibits only race discrimination and only that discrimination flowing from deliberate, official policies of segregation. Moreover, he believes that equal protection applies only to those evils envisioned by the amendment's framers. Accordingly, he rejects the view that the amendment allows actions to overcome de facto, not just de jure, segregation. He rejects the view that it permits the courts to issue orders affecting an entire school system unless there was a formal, systemwide dual system of white and black schools. That is why he has dissented in many of the major school desegregation cases of the last 15 years.

Rehnquist, like those who opposed the plaintiffs in the Dred Scott case and Brown versus Board of Education, believes that racial discrimination can be viewed strictly as a legal matter. But remember, man's inhumanity to man, the subjugation of the black race by the white race, cannot be transformed or made acceptable by well-reasoned legal argument. He seems oblivious to the swirl of moral, political, and social events that affect the issue of racial discrimination.

That obliviousness is the only charitable explanation I can think of for his extraordinary statement in 1967 when he spoke out against a desegregation program on the grounds that we are no more dedicated to an integrated society than to a segregated society.

Well, let me make one thing absolutely clear, Mr. President. That is not my view. Nor, I beleive, is it the view of a majority of the U.S. Senate. And it certainly is not the view of a majority of the American people. Most of us have unequivocally and irrevocably rejected a segregated society. And we are just as unequivocally and irrevocably committed to an integrated one.

Before I finish, I wish to turn to one of Mr. Rehnquist's more recent opinion. Bob Jones University versus United States. Frankly, I was shocked by Justice Rehnquist's position.

As you remember, Bob Jones raised the question whether there should be tax exemptions for private schools that practice racial discrimination. This was a case that I had an intense interest in because, at the time, as a supporter of tutition tax credits, it was imperative for me to be certain that no tax benefit would flow to schools that practiced racial discrimination. The Supreme Court, by an 8-to-1 majority, affirmed my view. Justice Rehnquist was the only member of the Supreme Court who voted to grant tax-exempt status to racially discriminatory schools.

This case involved more than just how you interpret a technical tax provision. All the other Justices understood that what was at stake was whether the Internal Revenue Code shouid be interpreted to allow a public subsidy of racial bigotry. They also understood that granting tax exemptions to racially discriminatory schools involved more than narrow construction of congressional intent. On the contrary, as Chief Justice Burger recognized:

> Few social * * * issues in our history have been more * * * extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine of Plessy v. Ferguson * * * it cannot be said that educational institutions that * * * practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life" * * * or should be encouraged by having all taxpayers share in their support by way of special tax status * * *. Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as con-

ferring a public benefit within the "charitable" concept * * * or within the underlying Congressional intent.

The Court found that:

There can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of Plessy v. Ferguson; racial segregation in primary and secondary education prevailed in many parts of the country * * *. The Court's decision in Brown v. Board of Education signaled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

The Court appreciated that the mere existence of tax-supported segregated private schools was likely to frustrate Brown. It would provide a Government-subsidized, all-white haven for white parents who did not want their children to attend integrated public schools. And they held accordingly.

Justice Rehnquist was the lone dissenter. He reached the wrong result. Not because he does not understand the complexities of the tax code, but because he does not understand that race discrimination is simply unacceptable in today's America.

Nor is Bob Jones an isolated example. Since 1971, there have been 14 race discrimination cases in which Mr. Rehnquist cast the deciding vote. None of these cases, I might add, involved quotas. In every instance, Justice Rehnquist cast the deciding vote against the black complainant.

As each of us thinks about our vote on this confirmation, I ask you to think how you would have felt if your vote confirmed Chief Justice Taney, who later wrote the Dred Scott decision, or if your vote placed as Chief Justice, Justice Brown, who wrote the Plessy opinion legitimizing the segregation doctrine of separate but equal. My guess is that if you took your religion seriously or if you accepted wholeheartedly our noble national ideals you would be shocked and embarrassed. I ask each of you to ask yourself how you will feel in 5, 7, or 10 years from now if the Rehnquist Court in a series of decisions declares an end to 32 years of progress in civil rights and proclaims the second coming to Jim Crow. Most in this body would say it could never happen. I hope it will not but I believe that the chances of it happening are dangerously higher with a Rehnquist as Chief Justice. And I will not take the chance.

So, Mr. President, I cannot vote to confirm William Rehnquist. I vote against the nominee not because he is unqualified, not because I disapprove of some of his decisions, not because I oppose his ideology, and not because I question some of his past activities.

I vote against him because he does not have the commitment to individual rights and liberties which a Chief Justice should have, and because his appointment will be viewed as a rejection of those in our society who most need his support. Hs confirmation will retard, not advance, our quest for a truly colorblind society.

I yield the floor.

□ 1400

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. Mr. President, I compliment the Senator from New Jersey on an obviously well prepared and well thought out statement. I would like to reiterate the point that some of us have made and made very eloquently by the Senator from New Jersey today that Justice Rehnquist has been able to engage through his intellectual dexterity in seizing upon a legal point to arrive at an unacceptable position, an unacceptable position in the eyes of the vast majority of the Senate and a vast majority of the American people. Let me give an example to reinforce that. Under the law as it has been, there used to be great questions about whether or not prosecutors could preemptively challenge jurors because of their race. As we all know, in my State and others throughout the South, the all-white jury system was a notorious vehicle by which black defendants found themselves in serious difficulty. And I do not wish to keep the Senator on the floor, but in Batson versus Kentucky, a State which engaged in similar practices historically, there was a challenge as to whether or not a prosecutor could preemptively challenge all blacks who were sought to be put on the jury because there was a black defendant. Because the person charged was black, did that mean that the prosecutor for the State of Kentucky had the right to automatically say, "We are not going to allow any blacks to sit on this jury because they will probably be prejudiced on behalf of the black defendant." A pretty racist notion but—but—it had been allowed.

Now, it came up to the Supreme Court, and the Supreme Court in Batson versus Kentucky, with Rehnquist and only one other dissenting, said, "You can do that; it's all right. It's all right to say because there is a black defendant, I, the prosecutor, am not going to allow any blacks to sit on the jury. You don't have to give any other reason other that I don't want them on the jury because they are black, not because they are smart, not because they don't pay attention, not because they're criminals, not because they're brother or sister of the defendant, not because they're related, just simply they are black, and I feel as prosecutor blacks should not be able to sit in judgment of blacks because they will not do anything other than favor the black defendant's position."

Justice Rehnquist said, "That is OK; it is all right to do that."

Now, listen to his reasoning. He said he dissented not on the grounds that no discrimination had occurred, he did not dissent saying that is not discriminatory. It is discriminatory. It is discriminatory to keep blacks off juries just because they are black, but he said he believed that such discrimination was entirely constitutional. The equal protection clause of the Constitution, the 14th amendment, he argued, simply did not prohibit a State from using its peremptory—and for those who are not lawyers it simply means an automatic challenge, the automatic right to say, "I don't want you in the jury; therefore, you can't be in the jury." That is a peremptory challenge. He says that the equal protection clause does not prohibit a State from using its automatic challenge to bar all black jurors from cases with a black defendant or from all cases with any black defendants. A prosecutor could reasonably conclude, Rehnquist argued, that all black jurors would be biased in favor of any black defendant and could in reliance on that belief strike all blacks from the jury.

Let me quote him. He says, "In my view there is simply nothing unequal about the State"—this is the equal protection clause he is interpreting. He says, "There is nothing unequal about the State using preemptory challenges to strike blacks from the jury in cases involving black defendants so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants," and so on.

That seems completely reasonable, does it not? He is saying I am allowing discrimination. You can discriminate against blacks as long as you also discriminate against whites, and also as long as you discriminate against Hispanics.

That sounds pretty fair, right? In a sense that is not discrimination. If you allow discrimination against blacks, if you exercise it against blacks on juries, it is OK as long as you exercise it against whites.

Well, that sounds reasonable. But let us look at the facts to show you how disingenuous I beleive that conclusion is. It provides I think a striking illustration of Justice Rehnquist's willing-

ness to conjure up the most implausible suppositions to excuse discriminatory practices. Although, as Justice White noted, the use of preemptory challenges to strike all blacks in juries in widespread, there is simply no similar prosecution practice purging whites.

Whoever heard of prosecutors keeping a white persom from being on a jury because there was a white defendant? Whoever heard of that? But Justice Rehnquist has given us the right to do that, and that is his justification for saying you can keep black people off juries because there is a black defendant.

Everybody knows there is a long history of trying to keep black women and men off of juries throughout this country. It is a practice that has been engaged in shamefully, but he says it is OK to do that because if you want to do it for whites you can, too.

Who wants to do it for whites? Show me any point in history where that has been done. Point out to me any time when that has been abused. It is a red herring, as we used to say in law school, but it is part of that elegant reasoning of his.

The second point I would like to make: although a small number of black jurors often make it possible for a prosecutor to use his preemptory challenges to create an all-white jury, I wonder where—do you understand what I am saying? The overwhelming portion of the population is white. So obviously all you have to do in most jurisdictions is challenge a half a dozen blacks to end up with an all-white jury.

Now, how many jurisdictions are there where you could exercise a few preemptory challenges against whites and end up with an all-black jury? Justice Rehnquist says that it is discrimination, but it is legal discrimination. It is all right.

□ 1410

Why does he say it is all right? Keep in mind that he says it is all right because you could also discriminate against whites in the same way. But whoever heard of that happening? In what jurisdictions is it likely to be able to occur? How many people within the sound of my voice have ever heard of a circumstance where a prosecutor was able to produce, and could have reasonable prospects of producing, by opposing all whites who were in the pool of jurors, an all-black jury? It obviously would be discriminatory—a discriminatory practice he says would be all right.

Justice Rehnquist trades off that nonexistent possibility against a persistent practice, the practice being that there are a lot of jurisdictions, there are a lot of circumstances, there is a long history of 150 years of prosecutors saying, "We don't want a black man on this jury. We don't want a black woman on this jury. We want an all-white jury."

The only point I want to make is that that is what I meant and I think the Senator from New Jersey meant as examples where, on the surface, his argument seems to have some merit. It is legal and elegant but substantively bankrupt. He acknowledges that it is discriminatory to automatically keep all blacks off a jury because there is a black defendant. He acknowledges that that is discriminatory on its face. He says that kind of discrimination is all right as long as you do the same to whites.

"Ain't" that something? That is setting up a straw man that in fact is easily knocked down. That is like saying—Well, I will not go on any longer, because I know that the Senator from South Carolina was considering where we were going to go next. I will talk about it some more.

If you look at Justice Rehnquist's reasoning in a number of his cases, from Bob Jones to Batson, to the cases allowing for discrimination against women, he has the same kind of elegant reasoning to arrive at a conclusion that is incompatible with how far we think we have come in this country but which cannot be readily characterized as an automatic rejection to the vast body of civil rights laws and the vast body of civil rights changes that have occurred in this country.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. HELMS). The Senator from South Carolina.

Mr. THURMOND. Mr. President, I will not go into detail in responding to the remarks just made by the able and distinguished ranking minority member of the Judiciary Committee.

I simply say that Justice Rehnquist, in all his testimony, said that he was opposed to discrimination, that he believed in equal rights for all. The record is clear in this matter, that that is his feeling, that those are his actions, and that he meets all the requirements to become Chief Justice of the Supreme Court. In the summary that is in the committee report—which I will go into on another day—it explains the situation on the part of the committee. If this committee had felt that he was in favor of discrimination in any way, shape, or form, I do not believe they would have confirmed him. I do not believe that even 1 member of the 18 members of the Judiciary Committee would favor any Justice or Chief Justice who favored discrimination or who opposed equal opportunity for all citizens.

Mr. President, if we continue this matter on Monday, I will have a few more remarks at that point.

Mr. President, Senator DOLE will be in the Chamber in a few minutes to make an announcement about the matter we are conducting now and to see if some agreement can be reached. In the meantime, 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.

□ 1420

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

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

NICHOLAS DANILOFF

Mr. DIXON. Mr. President, I have very good news for my colleagues in the U.S. Senate and people in the country generally.

The daughter of Mr. Daniloff, Miranda, lives in the city of Chicago, and had requested that our office make some inquiries about the good health of her father.

I am delighted to tell the U.S. Senate and the country at large that I just had the pleasure a moment ago, not more than 10 minutes ago, of talking on the telephone with Mr. Daniloff in the American Embassy in Moscow.

We had a very pleasant conversation. He said he is in good health, in good spirits, very safe, and happy to be in the Embassy.

He asked me to convey his best wishes to his daughter, Miranda, in Chicago.

He hold me he had served about 5 years here covering the Senate and Congress on the Hill and said to express to all in the Senate his high regard for this institution and his pleasant experiences that he had here.

He asked me to particularly remember him to his personal friends, JOE BIDEN and PAUL SARBANES, with whom he apparently had a personal relationship here on the Hill. He assures everybody that he is feeling splendidly, he is being treated very well, he is in good health, his spirits are good, and he asked me to particularly express his warm appreciation to the Congress for the resolution we passed supportive of him and to tell everyone here that that news came to him in jail and nothing did more for his spirits than to know that the Congress of the United States and those in the Senate had remembered him and were sending out a message all over the world about our support for him.

So I think that is splendid news, Mr. President. I am delighted.

I do not have the pleasure of knowing this fine gentleman. I am delighted to have the personal experience of conveying this message to friends in the Congress and Senate and able to say to his daughter, Miranda, in Chi-

cago, that he is in splendid health and good spirits and looks forward to the future with relish.

I thank the President for yielding to me. I thank my colleague from Delaware.

Mr. BIDEN. Mr. President, I hope he did not acknowledge to the Soviets that he was a personal friend of SARBANES and me. That may have been the reason they arrested him in the first place.

The ACTING PRESIDENT pro tempore. The distinguished majority leader is recognized.

Mr. DOLE. Mr. President, I thank the distinguished Senator from Illinois for that firsthand report concerning Mr. Daniloff.

Many have indicated throughout the week that he should have been released and now he has been, at least in part.

I hope the Kremlin's decision to release Mr. Daniloff into the custody of the American Embassy is the first step in granting him the total freedom he deserves.

While he no longer is a prisoner in a Soviet jail, he is still a virtual hostage.

I am glad that while he is bound to remain in the Soviet Union it is in much friendlier confines.

It was patently clear from the moment of Mr. Daniloff's arrest that he was a pawn, a victim of Moscow's retaliation for the U.S. arrest of a Soviet citizen who was caught redhanded as a spy.

Mr. Daniloff is not a spy.

It seems the Kremlin now recognizes that the U.S. Government, the American people, will not sit still while an American is arrested and charged with cooked up crimes.

The Soviets have grossly understated and underestimated the global outrage the Daniloff kidnaping has engendered.

I hope the powers that be in the Soviet Union also recognize that the United States does not trade in human lives. There will be no swap, because a swap entails an even trade.

This administration, this Congress, and the American people will continue to keep the heat on, until Mr. Daniloff is allowed to return to the United States with no constraints.

We are all pleased that Nick Daniloff will be reunited with his wife, although this reunion represents a very conditional freedom. An apartment in Moscow is a far more desirable place to sleep than the prison in which he was detained.

I know Congress will not relent. The President will not relent. The American people will not relent until Mr. Daniloff is back in this country.

Again I thank my distinguished colleague, Senator DIXON, for the firsthand report.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate resumed consideration of the nomination.

Mr. DOLE. Mr. President, it is only about 2:25 p.m. on a Friday afternoon. I had hoped by now we could have had some agreement on when we might vote on the Rehnquist nomination.

As indicated earlier this morning when the Senate convened, I hoped that we could reach some time agreement, hopefully on Tuesday, and that we could, therefore, avoid filing cloture.

If we file cloture today, the vote would come on Tuesday.

I also indicated I knew that many Members want to make statements. They want to engage in a dialog and much of that has been done. I certainly commend Members, on both sides, because up until 10 minutes ago there has been almost continuous debate or statements on the nomination.

Again, I would urge that we come to some agreement. Because if we do intend to leave here on October 3, there is a mountain of work that we have to complete. It would seem to me that Thursday, Friday, and Monday and most of Tuesday would be enough time to debate the Rehnquist nomination, unless there is some bombshell that we are not aware of.

We need to complete action on the Rehnquist and Scalia nominations by next Tuesday so we can turn to reconciliation and a lot of other painful matters, and appropriations bills, the remainder of next week. We also need to start focusing, I hope, in a bipartisan way the following week on drug legislation. We need to respond to the demand, to the concern, to the problem, to the President's initiative, to the House action, to the initiatives of my Democratic colleagues in the Senate. And we hope to address that in the next couple of weeks.

I indicated to the distinguished minority leader earlier this morning that I would be visiting with him about an agreement to vote on the Supreme Court nominations Tuesday. I hope to have an opportunity to visit with the minority leader as soon as he has time. If we can reach that agreement then there will be no necessity of filing a cloture motion.

I would rather not file cloture. I would just rather not do it in this case. Although, I think we could probably obtain cloture.

I have to be visiting with the minority leader in the next few moments and can advise my colleagues. It is quite certain there will be no more votes the remainder of today.

□ 1430

The PRESIDENT pro tempore. The Chair, in his capacity as a Senator from the State of South Carolina, suggests the absence of a quorum.

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

□ 1450

Mr. BYRD. 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 minority leader is recognized.

RELEASE OF NICHOLAS DANILOFF TO CUSTODY OF AMERICAN AMBASSADOR IN MOSCOW

Mr. BYRD. Mr. President, a major development has occurred, which has just been announced, that Nicholas Daniloff was being released to the custody of the American Ambassador in Moscow. This is encouraging news. As a matter of fact, it is wonderful news. But I would rather say it is encouraging news.

I hope that the Soviets will now promptly take the next step, which would put it into the category of being truly wonderful: To give Mr. Daniloff his freedom to leave the Soviet Union—or to continue his reporting, which may constitute a little fantasizing on my part.

This would be an important gesture on the part of the Soviet leadership and it would help to clear the sour atmosphere.

Mr. President, I understand that the Soviet citizen accused of espionage in New York is also being released to the Soviet Ambassador here. I would hope that this is not going to be followed up by the unconditional release of Sakharov without a trial, which is entirely appropriate in his case.

If that is done, the Soviets will have accomplished too much of their purpose in originally snatching Mr. Daniloff.

Mr. Daniloff himself has said he does not want to be traded one for one with an accused spy. Everybody knows Daniloff is just a good, hard-working journalist, nothing more. He is no spy and everybody knows that.

I should think that the KGB ought to know it even more than anyone else.

The United States should not encourage hostage taking. It would be a dangerous precedent in a world in which terrorist prey on the weak.

So as I applaud the release from prison of Mr. Daniloff, I would deplore the accomplishment of a trade which would hand the Soviets a victory through the extortionist technique of hostage taking.

Mr. President, I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

a major contribution to our democratic way of life.

I an confident that history will applaud our success in this effort. From its inception, the U.S. Senate was meant to be a reflective and unhurried assembly—as George Washington put it ". . . the place where legislation was sent to cool down.

But the Senate was never intended to be invisible. In this era, for many people, if something does not appear on a television screen, or come to them over their radio, it has no reality. In recent years, again and again, the American people have had opportunities to see and hear their Presidents. And the advent of broadcasts from the House of Representatives made the continued blackout and silence of the Senate even more puzzling.

Innumerable Americans have sat in the Senate gallery during Senate deliberations and have ever after counted that experience one of the highlights of their lives. Outside that on-site event, however, until now, the American people had to depend largely on secondhand reports to let them know what their Senators were doing.

Now, millions of Americans can sit at home, or in their offices, and witness for themselves by eye and by ear the proceedings of the U.S. Senate.

As of now, such Senate coverage is still somewhat of a novelty. But in time, we and you will mature in handling this new procedure. I predict that that maturing will add appreciably to our Nation's strength and to the endurance of our free democratic institutions. Our political system depends on an informed electorate. Woodrow Wilson said, ". . . the informing function of Congress should be preferred to its legislative function," In that regard, perhaps nothing that has been done in my many years as a Senator has a greater potential for helping the Senate to fulfill that function as will the electronic coverage of the Senate, and I am proud to have been, in some fashion, pivotal in bringing about such an important innovation.

Again, thank you for honoring me with your Distinguished Service Award, and thank you for helping to give the American people a clearer view of their elected representatives at work, as together we continue the paramount task of hammering out our destiny as a Nation.

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

The PRESIDING OFFICER. The clerk will call the roll.

□ 1240

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

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

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

Mr. THURMOND. Mr. President, I ask unanimous consent that the Senate now go into executive session to consider the Rehnquist nomination.

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

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The PRESIDING OFFICER. The clerk will report the nomination.

The assistant legislative clerk read the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

The Senate resumed consideration of the nomination.

Mr. LEVIN. Mr. President, there is no more important duty for the Senate than the exercise of its advice and consent power for the appointment of Federal judges, and particularly the appointment of Supreme Court Justices. It is no exaggeration to say that the judicial candidates to whom we give our consent will make decisions that directly affect the lives of millions of Americans. A judge confirmed in the last two decades of the 20th century is likely to serve well into the 21st century and shape the destiny of our children and our children's children.

Two critical points must be stressed about the Senate's role in the appointment process. First, the framers of the Constitution intended the Senate to be an equal partner to the President in the process. Second, there is nothing in the language of the Constitution or in the subsequent history of Senate consideration of judicial nominees restricting the scope of the Senate's inquiry into the nominee's qualifications.

THE SENATE'S ROLE IN THE APPOINTMENT PROCESS

The language of the Constitution leaves open the question of the extent of the Senate's role in judicial appointments. Article II, section 2 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, whose appointment are not otherwise provided for, and which shall be established by law.

However, the process by which the authors of the Constitution arrived at this construction indicates that they meant the Senate to have at least an equal role to that of the President. Walter Dellinger, professor of law at Duke University, summarized the events leading to adoption of the final language as follows:

The original Virginia Plan, introduced at the Convention on May 29, 1787, provided that all judges would be appointed by the national legislature. By June 19, the Convention had decided that the whole legislature was too numerous for the appointment of judges, and lodged that power in the Senate acting alone. Attempts to confer the power on the President to the exclusion of the Senate were solidly defeated. George Mason stated that he "considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary Department itself." Only near the end of the Convention was it agreed to give the President any role in the selection of judges; even then the President's power to nominate was carefully balanced by requiring the concurrence of the Senate. That final language was not seen to dislodge the Senate from a critical role in the process. Gouverneur Morris paraphrased the final provision as one leaving to the Senate the power "to appoint judges nominated to them by the President."

Morris' words make clear that the proponents of appointment by Congress or the Senate alone did not feel they had lost. As Prof. Charles Black of Yale writes (79 Yale Law Journal, p. 661), they:

Were satisfied that a compromise had been reached, and did not think the legislative art in the process had been reduced to the minimum. The whole process suggests the very reverse of the idea that the Senate is to have a confined role.

In Federalist Paper No. 76, Alexander Hamilton, the main proponent of giving the President the power of appointment, argued against giving the President absolute power because it would:

Enable him much more effectually to establish a dangerous empire over that body (the Senate) than a mere power of nomination subject to their control.

He confirms that dividing the appointment responsibility between the President and the Senate was deliberate and would have a positive effect on the quality of appointments:

(E)very advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination, which is proposed to be conferred on him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided.

Jefferson would have preferred to give the people the power to elect judges, and viewed "judicial independence from popular control" as incongruous with democracy. Although his viewpoint did not prevail in the end, he wrote, after the current construction was adopted, that the Senate's advice and consent power was intended "to prevent bias and favoritism in the President * * * and perhaps to keep very obnoxious people out of office of the first grade." (The Writings of Thomas Jefferson, vol. 8, p. 210.)

This brief look at what might be called the "legislative history" of the advice and consent clause makes clear that the Senate's role in judicial appointments is supposed to be an active one. The Senate is not a rubber stamp. The Senate ought not simply defer to the wishes of the President, even if the President is a popular one.

The popularity of a President does not diminish our duty under the constitution. It does not diminish the Senate's duty as a body, and it does not diminish the duty of individual Senators.

The delicate system of checks and balances upon which our democracy depends will only work if each branch of the Government is willing to assert its role by fulfilling its constitutional duties.

THE SCOPE OF THE SENATE'S INQUIRY

What factors can the Senate appropriately consider while it is carrying out its advice and consent duties?

The language of the Constitution itself provides no guidance in this area. We can get some guidance by examining the intent of the framers of the Constitution and by looking at Senate precedent. Ultimately, however, we have to determine what qualities we think a good judge should have, and what scope of inquiry is necessary to determine if the prospective judge has these qualities.

Professor Lively of the University of Toledo argued in a recent law review article that:

> Any reservations concerning the propriety of the Senate's focus upon a candidate's policy values should abate upon realization that many of the framers of the Constitution conducted precisely such as inquiry.

He we referring to the Senate's rejection, in 1795, of President Washington's nomination of John Rutledge to be Chief Justice. The rejection was based purely on Rutledge's opposition to the Jay Treaty, a treaty previously approved by the Senate. And, of course, a number of the Senators who voted to reject Rutledge had participated in writing the Constitution. (Southern California Law Review, v. 59, p. 551.)

An examination of the subsequent history of Senate advice and consent shows that the judicial nominee's policy values have consistently been considered. This has been particularly true of Supreme Court nominations. The Senate has rejected 25 out of 138 Supreme Court nominations. Out of these 25 rejections, 22 had policy reasons behind them.

To the extent that precedent is important them, there are sufficient examples in the Senate's history to justify looking beyond a nominee's general competence and integrity. But how far beyond should we go? What is it about the role of the judge—and particularly the Supreme Court Justice, and most particularly, the Chief Justice of the United States—that makes consideration of his or her policy values necessary?

A young Arizona lawyer explored these questions in an article he wrote for the Harvard Law Record in 1959. He lamented, with regard to the then recent confirmation of Charles Evans Whittaker to the Supreme Court, the "startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation." Pointing out that individual Justices of the Supreme Court "are not accountable in any formal sense to even the strongest current of public opinion," the author argued that the Senate ought to restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

By way of example, the author described in some detail the battle over the nomination of John J. Parker to the Supreme Court nearly 30 years before. He quoted approvingly from the CONGRESSIONAL RECORD several statements made by Senator William Borah of Idaho, leader of the forces opposing Parker's confirmation. "(The Supreme Court) passes upon what we do," Senator Borah said at one point. "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."

The author concluded by noting that Supreme Court justices have great latitude in interpreting vague Constitutional clauses like "due process of law" and "equal protection of the laws." Given this state of affairs, he asks rhetorically, "what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process?"

The young attorney who wrote this article was none other than William H. Rehnquist. While it was a well-reasoned argument for a broader Senate role in the appointment process, I think it actually went too far, and I think Justice Rehnquist, 30 years after writing it, would agree with me.

The young Mr. Rehnquist listed a series of cases then recently decided or before the Supreme Court—having to do with segregation and the rights of witnesses who invoke the fifth amendment—and regretted that the Senate hadn't shown any interest in Justice Whittaker's views on these cases. The implication was that it was acceptable and indeed desirable to ask a nominee's views of a particular case or opinion.

I do not agree. Justice O'Connor accurately, I think, pointed out the problem with this approach during her confirmation hearing. She said:

> I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter, or have morally committed myself to a certain position.

Indeed, I would say that if a nominee did answer questions asking about their views on specific issues likely to be central in decisions before the Court, I would be inclined to vote against them on that basis alone. A response would indicate to me that he or she did not understand that decisions should be guided by specific facts and arguments before the Court. A response would also indicate that the nominee is so driven by ideology or ambition that he or she was willing to prejudge matters to be presented to them.

However, there are two instances where I believe a nominee's policy values are relevant to his or her qualifications. The first instance is when the nominee's policy values are inconsistent with a fundamental principle on principles of American law. The second instance is when the nominee is so controlled by ideology that the ideology distorts their judgment and brings into question their fairness and openmindedness.

I am sorry to say that the nominee being considered by the Senate today, Justice William H. Rehnquist, is disqualified by both these standards.

I watched most of Justice Rehnquist's confirmation hearings on television, and reread portions of the transcript afterwards. I have read the speeches and articles he has written over the years. I have read some of his judicial decisions. And I also submitted two sets of questions directly to Justice Rehnquist, one before and one after the Judiciary Committee hearings, and received responses to these questions from him. My conclusions about this nominee are based on a careful study of the nominee's answers, the nominee's statements, and the nominee's actions.

JUSTICE REHNQUIST'S VIEWS ON INDIVIDUAL RIGHTS

In looking at Justice Rehnquist's "policy values," I am deeply troubled by his view that constitutional rights are based on support by the majority.

The Constitution, interpreted and applied by the Supreme Court, is the individual's best guarantee against the untrammelled exercise of Government power, and the minority's best protection against unjust treatment by the majority. If the rights of the minority are in principle less important, less worthy of protection than the "will of the majority" as expressed through duly enacted laws, then the Bill of Rights becomes essentially meaningless.

I was first struck by Justice Rehnquist's tendency to put the rights of the individual in the hands of the majority when I read the line in the famous "segregation memo" he wrote for Justice Robert Jackson which reads:

To the argument * * * 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.

Mr. President, I will show later why it is clear that the views in this memo were not Justice Jackson's views, as the nominee claims, but his own.

Since Justice Rehnquist was a young law clerk when he wrote these words, I would not necessarily have assumed that he still held this view. But this is a thread that runs through Justice Rehnquist's thought.

In a speech given on May 1, 1969 as part of a celebration of "Law Day," then Assistant Attorney General Rehnquist spoke about protesters whom he called over and over again the new barbarians, and expounded at some length on civil disobedience and the legitimacy of resistance to law in a democratic society. In the course of this discussion, Mr. Rehnquist made an implied threat against the protesters:

* * * Just as the minority has it within its power to frustrate the governance of the majority, so a large majority by process of constitutional amendment has it within its power to deny the right of free speech and free discussion to the minority. ("Law Day" speech, reprinted in Cong. Rec., November 18, 1971, 42133.)

In other words: "if we the majority decide we don't like your protest, we can force you to shut up." This type of argument is directly contrary to the spirit of our Constitution.

Remember that this was not a young clerk fresh out of law school speaking—this was an Assistant Attorney General of the United States, the head of the Office of Legal Counsel, who less than 3 years later was sitting on the Supreme Court.

The American Civil Liberties Union concluded in a report on Justice Rehnquist's record on the Court:

In his Supreme Court opinions and his extra-judicial writings, Justice Rehnquist rejects the notion that the Supreme Court has a special responsibility to protect civil liberties, to protect the individual against the excesses of the majority. Rather, he maintains that the Court's obligation is to protect the primary political structures of the government, which include the independence of the States and majority rule. (ACLU report, reprinted in Cong. Rec., September 11, 1986, S 12399.)

David Shapiro concluded in a Harvard Law Review article summing up Justice Rehnquist's first 4 years on the Court that his votes on cases were guided by three basic propositions, one of which was:

Conflicts between an individual and the government should, whenever possible, be resolved against the individual. (Harvard Law Review, vol. 90:293, p. 294.)

Justice Rehnquist himself provided an explanation for his strong tendency to favor "will of the majority" as expressed in duly enacted laws over the rights of the individual as protected by our Constitution. In a dissenting opinion he wrote for a 1972 death penalty case:

An error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best. (*Furman* v. *Georgia*, 408 U.S. 238, 468, 1972.)

I find Justice Rehnquist's approach to individual rights in our Constitution distressing. I see practically no recognition of the importance of the Court's role in protecting individual rights, and far too much recognition of the right or the power of the majority to impose its will on the minority or the individual.

In fact, it is more than distressing—it is flat out wrong to say, as Justice Rehnquist said and quite clearly believes, that the majority will determine what the constitutional rights of the minority are.

Justice Rehnquist has it exactly backward.

In this country, individual constitutional rights are beyond the reach of the majority. The Constitution's protections of individual rights are historic and fundamental, and the Supreme Court is their guardian. Justice Rehnquist does not accept that guardianship—and he is, thereby, an unacceptable chief trustee of individual rights.

JUDGMENT DISTORTED BY IDEOLOGY

There is another situation in which a nominee's "policy values" are grounds for rejecting that nominee. That situation arises when a nominee's personal views control their public judgments.

I believe it is inherent in the fact that judges are human that their judicial decisions will reflect their personal philosophies. But there is, I would submit, a difference between decisions which are controlled by ideology and those which are merely influenced by it.

Some individuals display an ideological fervor which distorts judicial temperament. That kind of fervor can result in actions and judgments which either violate or ignore constitutional principles. It can result in a situation in which judges are so controlled by ideology that they are unable or unwilling to look at all the facts, listen fairly to all arguments, evaluate critically all the legal precedents, and finally, decide cases judicially.

The Senate should not give its consent to nominees who come before us more as captives of ideology than creatures of reason.

LAIRD VERSUS TATUM

A good illustration of how Justice Rehnquist seems to let ideology overcome judgment is the case of Laird versus Tatum.

Justice Rehnquist's refusal to disqualify himself in the case of Laird versus Tatum was a breach of judicial ethics. His subsequent explanations of why he participated in the judgment ring hollow, and obscure more than they illuminate.

Briefly, here are the facts of the case: The Army was conducting a surveillance program aimed at Vietnam war protesters. A group of protesters brought suit in the District of Columbia to enjoin the Government from continuing the surveillance program. The plaintiffs claimed that they had standing to bring this action on the grounds of interference with their constitutional right to free speech. The Court of Appeals in the D.C. Circuit held that their lawsuit was maintainable. However, by a vote of 5 to 4, with Justice Rehnquist casting the deciding vote, the Supreme Court reversed this decision, ruling that the plaintiffs lacked standing and therefore the suit should be dismissed without going into the merits of the case.

The plaintiffs filed a motion to disqualify Justice Rehnquist. They argued that he was disqualified from hearing the case on the basis that he had expressed opinions on issues in the case and that he had presented the Justice Department's position before a Senate subcommittee hearing. In a memorandum, Justice Rehnquist responded to this motion with an explanation of the reasons for his decision not to disqualify himself.

Less than a year after Laird versus Tatum was decided, an article in the Columbia Law Review—January 1973—argued forcefully that Justice Rehnquist had erred in his decision not to disqualify himself. More recently, we have had several detailed analyses of the recusal issue by some of the foremost authorities on legal ethics in the country. I would particularly commend to my colleagues the analysis requested by Senator MATHIAS that was done by Prof. Geoffrey C. Hazard of Yale Law School. Professor Hazard was instrumental in drafting the American Bar Association's Code of Judicial Conduct. He is perhaps the Nation's preeminent expert on judicial ethics. And he has concluded, in his letter to Senator MATHIAS, that Justice Rehnquist not only should have disqualified himself from Laird versus Tatum under the statute then in force, but that he misrepresented the facts to the parties involved and to his colleagues on the Supreme Court. He also suggests that Justice Rehnquist was less than candid to the Senate in

answering questions concerning Laird versus Tatum.

I believe Justice Rehnquist prejudged the facts at issue, and should not have participated. Rather than discussing the error of his initial decision not to recuse himself—since this has already been done by the experts—I would like to focus on Justice Rehnquist's subsequent explanations of his decision. For I think that Justice Rehnquist's responses and justifications are revealing—and, in my opinion, extremely troubling.

The entire controversy over Laird versus Tatum—not only Justice Rehnquist's initial refusal to disqualify himself but his subsequent commentary on that decision—gives disturbing evidence that the nominee's ideology is so deeply imbedded that it tends to overcome good judgment and objectivity.

Let me give three examples of what I am talking about.

First, Justice Rehnquist failed to discuss a significant fact in his memorandum responding to the motion to recuse him. Referring to his appearance before a Senate subcommittee in 1971 where he testified on behalf of the Justice Department regarding the Army's military surveillance program, he stated that:

> There is one reference to the case of Tatum v. Laird in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin.

He went on to quote the first reference, which was as follows:

> However, in connection with the case of Tatum v. Laird, now pending in the U.S. Court of Appeals for the D.C. Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.

He then dismissed the second comment by simply stating that it was "a discussion of the applicable law with Senator Ervin, the chairman of the subcommittee, during my second appearance." He did not quote the second comment, and indeed there is no further reference to it in the rest of the memorandum.

His explanation of why the first comment did not constitute grounds for disqualification was that he was merely the keeper of the computer printout, that he had never "seen or been apprised of" its contents, and that the first time he learned of the existence of the case of Laird versus Tatum was while he was preparing to testify before the Ervin subcommittee. (93 SCR, 409 U.S. 827, p. 10.)

As for the second comment, the reader is left to wonder what it was. We have to look at the plaintiffs' motion or the subcommittee hearing record to find out.

In response to a question by Senator Ervin about the Government's right to put under surveillance people who are exercising their first amendment rights, Assistant Attorney General Rehnquist responded in part:

> My only point of disagreement with you is to say whether as in the case of Tatum v. Laird that has been pending in the Court of Appeals . . . that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government. (Ervin hearings, vol. 1, pp. 864-865.)

Justice Rehnquist was expressing the view here that Laird versus Tatum was not justiciable. For those who find the meaning of his statement a bit unclear, I would point to the operative words "My only point of disagreement with you." He was disagreeing with Senator Ervin's contention that there was a first amendment issue here, that these protesters' rights were being violated when the Army put them under surveillance. And this was precisely the controversy in Laird versus Tatum when it came before the Supreme Court. The conclusion is inescapable: Assistant Attorney General Rehnquist expressed the view before a Senate subcommittee that the case was nonjusticiable; Supreme Court Justice Rehnquist failed to disqualify himself from deciding whether the case was justiciable.

In light of the content of this second statement and its specific reference to Laird versus Tatum, I find Justice Rehnquist's failure to quote or explain it highly disturbing. Maybe he could have found a way to explain that he was not really saying what he appeared to be saying in this statement, that it really was simply a "discussion of applicable law." The fact that he avoided quoting or explaining it leads me to conclude that he was aware that it would severely weaken his case for not disqualifying himself.

□ 1310

I also have serious questions about the nominee's description of the extent of his involvement in formulating the Nixon administration's policy on domestic surveillance by the Army. Evidence which has come to light since 1972 indicates that he was far more involved in developing this policy than he revealed when Laird versus Tatum was decided. In particular, a draft memorandum he prepared for submission to the White House discussed the legal implications of allowing the Army to participate in surveillance activities. This memo was first made public in a little noticed appendix to the Ervin subcommittee's hearings. It resurfaced as one of the documents that the Reagan administration initially refused to provide to the Judiciary Committee but later supplied.

In this memo, Assistant Attorney General Rehnquist wrote that the U.S. Army Intelligence Command "may assist" in the collecting of raw intelligence on civilian political activity, but that "in order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters," the Army "should not ordinarily be used to collect" such data.

I assume that as the head of the Office of Legal Counsel, Assistant Attorney General Rehnquist did not write this memo off the top of his head. He must have done legal research himself, or at the very least, discussed the issue with his subordinates.

If my assumption is a fair one—which I think it is—then Justice Rehnquist's subsequent statements about his involvement in the surveillance policy have been less than candid.

The plaintiffs who filed the motion to recuse Justice Rehnquist from the case did not know about this memo. They based their objection to Rehnquist's participation in the case on his public statements made during the Ervin hearings. But as Professor Hazard points out in his analysis of the case:

> * * * it was Justice Rehnquist's responsibility to address and resolve all issues concerning his disqualification. It was not the parties' responsibility to raise such matters, although they had a right to do so if they had access to the necessary facts.

But they did not have access to these facts, and Justice Rehnquist did not volunteer them. Professor Hazard continues:

> Justice Rehnquist addressed only his publicly known involvements and omitted any reference to an involvement as counsel in the transaction, that was at least as significant but which was not publicly known. It was his duty to resolve both the publicly known possible bases of disqualification and those arising from an involvement that was confidential. Indeed, it is even more vital to fairness in adjudication that a judge resolve grounds of recusal which arise from confidential facts, for the parties ordinarily are helpless to raise such grounds.

Justice Rehnquist was not forthcoming in 1972—and in 1986, he claimed memory failure. He told Senator MATHIAS in response to a written question subsequent to the hearing:

> I have no recollection of any participation in the formulation of policy on use of the military to conduct surveillance or collect intelligence concerning domestic civilian activities.

Note that the nominee said he did not recall any participation. Considering the great significance and controversy surrounding this policy at the time and the continuing discussion in the years since, it is simply inconceivable to me that the nominee would have "no recollection." I can understand his not recalling a particular memorandum, but I again am sorry to say I have trouble accepting his statement that he draws a complete blank on his participation in formulation of the policy.

The final area of my inquiry into Justice Rehnquist's conduct in the Laird versus Tatum controversy concerned another aspect of his 1972 memorandum which denied the motion for recusal. From the outset, he limited the standards by which he would judge whether his nonrecusal had been the correct decision. He cited the statute then in effect, title 28, section 455 of the United States Code as the applicable standard:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

He went on to note that the plaintiffs had also referred in their motion to provisions of the ABA's Code of Judicial Conduct. A revised version of the code had existed in draft form at the time Laird versus Tatum was decided by the Supreme Court, having been approved by a special committee on standards of judicial conduct but not by the full ABA. However, when Justice Rehnquist wrote this memorandum of explanation, the revised code had been adopted by the ABA's House of Delegates, and had therefore become the official standards of judicial conduct for members of the ABA.

The statute was binding on Justice Rehnquist while the ABA's Code was not. But he himself did not dispute that the ABA Code provisions were relevant to his decision. Here is his explanation of those provisions:

Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.

His decision not to give the ABA Code separate consideration was based solely on his contention that they were not "materially different" from the statute.

What are these standards that, in Justice Rehnquist's view, did not "materially differ" from the statute quoted above?

The ABA Code reads in part as follows:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

The ABA also added a commentary at the end of this section dealing specifically with the standards of disqualification for former government officials. This commentary is intended as an explication of the meaning of the standards: "* * * a judge, formerly employed by a governmental agency * * * should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association."

It is evident that the ABA Code imposes a more stringent standard of disqualification than the statute as it existed in 1972, and the drafters of the revised code certainly intended it to do so. According to the Columbia Law Review in 1973:

Their recent revision of the Canons was prompted by dissatisfaction with standards such as those prescribed by section 455 and the old Canons. (Columbia Law Review, v. 73:106, p. 119.

The most obvious way in which the revised ABA Code required a more rigorous standard of disqualification lay in the phrase "a proceeding in which his impartiality might reasonably be questioned," clearly a broader standard than anything in Section 455 of the statute.

Justice Rehnquist was asked about his failure to consider the ABA standards during the 1986 Judiciary Committee hearings. He responded to a question from Senator Leahy as follows:

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

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

Justice REHNQUIST. I just can't put myself back in that position, Senator, not having the ABA standards in front of me. I really just can't answer. (transcript, July 30, 1986, p. 196.)

□ 1310

I was not satisfied with this unresponsive response. It was so clear to me that the ABA standards were "materially different" from the statute, that I submitted to Justice Rehnquist a followup to Senator LEAHY's question:

Having heard Justice Stewart's comments and having now had a chance to reread the ABA standards in effect in 1972, do you still believe that the 1972 ABA standards were not "materially different from the standards enunciated in the congressional statute" in effect at that time?

The nominee's answer provides another example of his tendency to make obfuscating distinctions when it suits his purpose. His response to my question was:

I think that the 1972 ABA standards were materially different from the provisions of 28 U.S.C. 455, as it stood in 1972, on the question of disqualification for financial interest. I believe it was this point to which Justice Stewart's comments to me were addressed. In so far as disqualification for bias is concerned, the language of the canons is phrased differently from the relevant language of section 455, and could require a result different from that required under section 455 in a particular case.

Here the nominee makes a distinction between the disqualification for financial interest and the disqualification for bias, a distinction he failed to make either in his 1972 memorandum or in his responses to Senator LEAHY. The financial interest section of the canons is, he admits "materially different" from the statute; the personal bias section, on the other hand, "is phrased differently from" the statute, "and could require a result different from" the statute "in a particular case." Presumably he is saying that the personal bias section of the ABA Code is not "materially different" from the statute. It's just "phrased differently" and "could require a different result in a particular case." Not, I assume, in the case of Laird versus Tatum.

Justice Rehnquist's supporters might point to this response as an example of his brilliant legal mind. I see it as an example of cleverness, of obfuscation, and disingenuousness. The nominee's ability to avoid the simple and straightforward, to obfuscate and play with words in order to evade their plain meanings—these are not admirable qualities. It may require a highly developed intellect to do these things as smoothly as Justice Rehnquist does them. But this is not the type of intellectual quality we should look for in a Chief Justice.

Madam President, Justice Rehnquist's use of words to distort and obfuscate and his lack of directness were analyzed in detail in an extraordinary and chilling Law Review article in the New York University Law Review, April 1982, which compared his craftiness in wordsmithing to that of Captain Vere in Melville's "Billy Budd," which was a classic American Novel. This article was written by Prof. Richard Weisberg. It is entitled "How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist."

Billy Budd who was an innocent sailor admired by all for his simple directness. He was brought to trial and executed as a result of the masterful rhetorical wiles of Captain Vere.

The New York University Law Review article compares the openness of Billy Budd with the ingratiating indirectness and covertness of Captain Vere. Vere's clever use of language overcomes the fact that the trial was illegal and improper.

The article analyzes in detail his opinion in the case of Paul versus Davis.

The author shows, at great length, how Captain Vere and Justice Rehn-

quist by dint of being "verbally and hierarchically superior adjudicators can give the force of seeming legality to drastic decisions the law does not support" and how "an adjudicator can win over an audience by considerately providing it with the story it needs to hear, thereby assuaging its doubts and dampening its spirit for further rational inquiry."

DISTORTED MEMORY, LACK OF CREDIBILITY

During the Judiciary Committee hearings, I was interested to see how Justice Rehnquist responded to questions about his past actions. Several controversial issues which had come up during his initial confirmation in 1971, but had never been satisfactorily resolved, came up again. In each case there was some new information regarding these issues that had been unavailable in 1971. Regarding the charges of voter harassment in Arizona, there were a number of new witnesses coming forward to claim that they had seen Mr. Rehnquist personally challenging voters in the late 1950's and early 1960's. On the issue of memos written while Mr. Rehnquist was a law clerk for Justice Robert Jackson, there had been only one memo publicly available at the time of the 1971 hearings; now there were a number of others.

These controversies raised questions about the nominee's sensitivity to individual rights throughout his career. The hearing gave him an opportunity to clear up doubts about his sensitivity, by clearing up the unresolved questions about these controversies.

After watching the hearings, reviewing the transcript, and closely analyzing Justice Rehnquist's answers to my additional written questions, I do not believe that either of these controversies have been satisfactorily resolved.

I was troubled by Justice Rehnquist's lack of candor in the hearings. His answers to what were, in my view, legitimate and relevant questions, have convinced me that he tends to distort memory and bend facts. His explanations were simply not credible—they did not clear up anything.

THE JACKSON MEMO

Justice Rehnquist served as a law clerk for the late Associate Justice Robert H. Jackson in 1952 and 1953. In that capacity, he did research for the Justice's opinions and wrote what are called cert memos—summaries of cases for which certiorari or Supreme Court review was being sought.

After Justice Rehnquist's 1971 confirmation hearings were over, Newsweek magazine published the text of one of the memos he had written while a law clerk. This memo, entitled "A Random Thought on the Segregation Cases," caused quite a stir, and became one of the focal points of the floor debate on the Rehnquist nomination. Opponents of Mr. Rehnquist's nomination took the memo at face value and assumed it to be a statement of Mr. Rehnquist's own views—not an unreasonable conclusion to draw considering that it was written in the first person, bore his initials at the bottom, and had a very informal and personal sounding title. They presented it in 1971 as evidence of his unsuitability to serve on the Supreme Court because in it he apparently argued that the Court should uphold segregation laws. Specifically, the memo contained the statement that Plessy versus Ferguson—the 1896 case supporting the constitutionality of "separate but equal" education laws—"was right and should be reaffirmed."

In an effort to set the record straight and head off growing opposition to his nomination, Mr. Rehnquist wrote a letter to Senator Eastland, Chairman of the Judiciary Committee, in which he explained that, to the best of his recollection:

> 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.

The nominee, in a further effort to dispel the doubts some Senators might have about his views on segregated education, added at the end of his 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.

This letter to Senator Eastland arrived in the middle of the Senate floor debate, on December 8, 1971. Mr. Rehnquist was confirmed by the Senate on December 10, 1971, by a vote of 68-26. But no one had an opportunity to ask Mr. Rehnquist questions about the memo while he was under oath, nor was anyone able to challenge this explanation of its contents in 1971.

Now, it has been said by Justice Rehnquist's supporters that we shouldn't harp on things written over 30 years ago, and that there is no reason to doubt the nominee's 1971 statement that he fully supported "the legal reasoning and rightness * * * of the Brown decision." I submit that the question is not what Justice Rehnquist believed 30 years ago and whether he still holds those beliefs today—it is how he represented to the Senate—in 1971 and in 1986—what he believed, what Justice Jackson believed, and for what this memo was intended.

We now have a better opportunity to examine the evidence relating to this memo than the Senate had in 1971. This evidence was brought together in a very comprehensive way by Richard Kluger in a section of his book "Simple Justice," an account of the school desegregation cases of the 1950's. After reading Mr. Kluger's account, it is very difficult to conclude anything other than that the memo does not contain Justice Jackson's views, and must therefore have been either an expression of law clerk Rehnquist's views or an attempt on the part of law clerk Rehnquist to provide Jackson with the pro-Plessy point of view. In either case, the evidence casts serious doubt on Justice Rehnquist's account of the nature of his memorandum.

□ 1330

Mr. LEVIN. Madam President, for now, let me add one or two of my own observations based on the evidence I have seen and some of the questions I asked Justice Rehnquist in my two letters to him.

In my first letter to Justice Rehnquist, I asked him on what basis he stated that the views expressed in the memo were those of Justice Jackson. I wondered whether he could recall anything specific Justice Jackson had told him to indicate his views on the "separate but equal" doctrine. I wondered this because I have always been a great admirer of Justice Jackson, I am familiar with his writings, and I find it difficult to believe that he would ever have expressed the view that "Plessy versus Ferguson was right and should be reaffirmed."

Justice Rehnquist reiterated what he had said in his 1971 letter to Senator Eastland: That he recalled considerable oral discussion with Justice Jackson before the Court conference on the school segregation cases; that although he did not recall the specific content of these discussions he did recall "Justice Jackson's concern that the conference 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"; and that he still adhered to the statement in his 1971 letter that the memo was intended to reflect views Justice Jackson had expressed in those discussions.

Frankly, I was not satisfied by this response. It still seemed to me, looking at the language of this memo, that it was a young law clerk talking in this memo, not a distinguished Supreme Court Justice. I centered in on one sentence in particular:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed.

What "liberal colleagues" had Justice Jackson been excoriated by and when? Why would he have been excoriated by his colleagues for views he was about to express at an upcoming Court conference?

In a followup letter, I asked Justice Rehnquist this precise question:

Did Justice Jackson tell you during these oral discussions that he had been excoriated by liberal colleagues for his views on Plessy? If he didn't tell you, then on what basis did you include this line in the momo?

Justice Rehnquist's answer was: "As I indicated in my answer to your quesiton of July 23, 1986, I have no recollection today of the specific content of my oral discussions with Justice Jackson relating to the points that he tentatively intended to make at the Court's Conference on the Brown case. I do not recall Justice Jackson telling me in those discussions that he had been excoriated by liberal colleagues for his views on the Brown case. It is my strong sense, however, that Justice Jackson acknowledged during our discussions that he fully expected to be criticized sharply by some of his colleagues if he took the position that Plessy versus Ferguson should be reaffirmed."

This last sentence is, to my knowledge, the first time that Justice Rehnquist has publicly attempted to provide an explanation for the phrase "excoriated by my 'liberal' colleagues." And if we look at it in light of what the memo actually says, we realize that it is no explanation at all. Justice Rehnquist has a "strong sense" that Justice Jackson "fully expected to be criticized sharply" by his fellow Justices "if he took the position that Plessy * * * should be reaffirmed." But the memo clearly says "I have been excoriated." It doesn't say "I will be excoriated" or even "I might be excoriated if I take this position." It says "I have been excoriated," and the question remains, "by whom?"

I should like to quote briefly from Richard Kluger's discussion of this sentence.

Is it possible that so confident and civilized a man as Robert Jackson would have told his brother Justices anything remotely approaching what Rehnquist writes at the end of his memo purportedly reflecting Jackson's views * * * The "I" in that passage, according to Rehnquist, was supposed to be Jackson, not his clerk, but when and where might Jackson have been excoriated by his "liberal" colleagues? And what colleagues might those be? Surely not his fellow Justices, who would hardly have spoken ill of him for expressing genuine convictions. A far more plausible explanation might be that the "I" of the memo is Rehnquist himself, referring to the obloquy to which he may have been subjected by his fellow clerks, who discussed the segregation question over lunch quite regularly, who were almost unanimous in their belief that Plessy ought to be reversed, and who were, for the most part, "liberal" * * * That Rehnquist was ideologically a pole apart from his fellow clerks that year is suggested by the comment of Harvard law professor Donald Trautman, who clerked for Justice Frankfurther that term. "As I knew him, he was a reactionary," Trautman told the Harvard Law Record of October 24, 1971 * * *." ("Simple Justice", p. 608.)

It should also be pointed out that the statements of the only two living people who might have some firsthand knowledge of the memo itself or Justice Jackson's expectations from his law clerks do not corroborate Justice Rehnquist's account of the memo's content and purpose.

Donald Cronson, Justice Jackson's other law clerk at the time the memo was written, cabled a message to Justice Rehnquist during the Senate debate in 1971. In this message, he recalled that after he had written one memo contending that Plessy had been wrongly decided but that the Court should leave it to Congress to change the practice of segregation, Justice Jackson requested a second memo "supporting the proposition that Plessy was correctly decided." He further told Justice Rehnquist that he remembered the second memo as a collaborative effort, in fact going so far as to say that this second memo was probably "more mine than yours."

Mr. Cronson's account raises more questions than it answers, and it certainly does not correspond to what Justice Rehnquist recalls. Justice Rehnquist has never mentioned the first memo, nor has he indicated that the memo he supposedly authored (and which bore his initials) was a collaboration between himself and Mr. Cronson. Finally, there is certainly nothing in Mr. Cronson's account to indicate that Justice Jackson wanted a second memo to "reflect his views," only that he wanted a second memo reaching the opposite conclusion about Plessy.

Another person who might have confirmed Justice Rehnquist's account is Mrs. Elsie Douglas, Justice Jackson's secretary and confidante for his last 9 years on the Court. But Mrs. Douglas, in interviews she gave in 1971 and in a recent letter to Senator KENNEDY, expressly denies that the views expressed in the memo were those of Justice Jackson rather than his clerk's. In her August 8, 1986 letter to Senator KENNEDY, she says: "Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs."

So we are left with no credible support for Justice Rehnquist's explanation of the memo. And as I have already described, the internal evidence, the wording of the memo itself, strongly indicates that these could not have been Justice Jackson's views.

One other piece of evidence has been brought into the public realm since the 1971 debate. This is the collection of memos written by law clerk Rehnquist for Justice Jackson which are among Justice Jackson's papers at the Library of Congress. A reading of these memos should enable us to test the nominee's contention in his 1971 letter to Senator Eastland that "while (Justice Jackson) 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, the nominee was suggesting that the segregation memo could not have contained his own views because it was not normal practice to put his own views into memos since Jackson frowned on that sort of thing.

□ 1340

If one looks at the "cert" memos Rehnquist wrote for Justice Jackson, however, one finds numerous instances of personal opinion and informal observation being injected into a review of the facts of the case. Let me give just a few examples.

In a memo discussing the Rosenberg case, he wrote the following:

In my opinion, if they are going to have a death sentence for any crime, the acts of these ptrs (petitioners) in giving A-bomb secrets to Russia years before it would otherwise have had them are fitting candidates for that punishment. It is too bad that drawing and quartering has been abolished.

In a memo commenting on three lawsuits by baseball players against the major leagues for alleged violations of the Sherman Act, he wrote:

Before making any recommendation, I feel it is only fair to lay bare my strong personal animus in these cases * * * I feel instinctively that baseball, like other sports, is sui generis, and not suitably regulated either by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits.

And in a case involving Jehovah's Witnessess who were convicted for insisting on making speeches in city parks in violation of local ordinances, he wrote:

I personally don't see why a city can't set aside a park for ball games, picinics or other group activities without having some outlandish group like Jehovah's Witnesses commander the space and force their message on everyone.

Clearly, whether or not Justice Jackson welcomed the personal views of his law clerks in the memos they submitted to him, law clerk Rehnquist often included his views in the memos he submitted to Justice Jackson.

Regardless of what his views on segregated education were at the time of his clerkship, Justice Rehnquist's account of the memo on the segregation cases is contradicted by external accounts and by the wording of the memo iself. His explanations of these contradictions in 1971 and again within the past month do not stand up to careful scrutiny.

It will be argued that it was a long time ago, and we shouldn't necessarily expect Justice Rehnquist to remember the details of one memo out of the dozens he must have written. However, let me point out what Justice Rehnquist did not say. He did not say:

To the best of my recollection, this was intended to the Justice Jackson's views; however, I might be wrong—it was a long time ago, my memory is fuzzy—it may have actually been my own views—even though those are no longer my views. It may have even been just an effort to provide Justice Jackson with the arguments in favor of sustaining Plessy.

But this is not what Justice Rehnquist has said. He has said repeatedly—and has stood by his statement under repeated questioning—that these were intended to be Jackson's views, and he has gone to great lengths to prove this, even attempting an explanation for the "excoriated by liberal colleagues" line in his response to my question.

I am saddened to say I do not believe Justice Rehnquist's account of the Jackson memo.

VOTER CHALLENGING IN PHOENIX

Another controversial issue that did not arise until after the 1971 Judiciary Committee hearings had ended was the charge that Mr. Rehnquist participated in challenging of voters in Phoenix area elections during the late 1950's and early 1960's. Affidavits from six individuals were submitted to the committee alleging that Mr. Rehnquist had challenged minority voters as part of a "ballot security" program organized by the Arizona Republican Party and aimed at precincts with a large percentage of Black and Hispanic voters. The committee declined to reopen the hearings. However, Senators Bayh, Hart, and KENNEDY submitted additional written questions to the nominee, and one of the things they asked him to respond to were these charges of voter challenges.

In his response to the Senators, and also in an earlier affidavit submitted to the chairman of the committee, Mr. Rehnquist flatly denied all the specific allegations of those who had come forward to charge him with voter challenging activities. These charges all involved alleged incidents in the elections of 1958, 1960, 1962, 1964, 1966, and 1968.

The nominee in his letter to the Senators also made more general statements of denial. He quoted from his affidavit to Chairman Eastland, which read in part: "I have not, either in the general election of 1964 or in any other election, at Bethune precinct or in any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment of voters by other persons." Then he added the following critical line: "In none of these years (1958-68) did I personally engage in challenging the qualifications of any voters." (CONG. RECORD, November 24, 1971, p. 43086)

In the course of the 1986 Judiciary Committee hearings, five new witnesses came forward to testify, under oath, that the nominee had engaged in voter challenging activities. After the hearings were over, three other individuals submitted affidavits swearing that the nominee had challenged voters.

Six other witnesses testified, under oath, that they had not seen Justice Rehnquist challenging voters in the years in which he was allenged to have done so. However, none of these witnesses was with Mr. Rehnquist during the entire time of any of the elections in question.

Finally, the nominee himself testified, under oath, that he had not committed any of the alleged acts. He repeatedly and specifically denied having done what the five witnesses claimed he had done.

So, we have a situation where it is one person's word against another's. Everyone cannot be telling the truth. Either the five witnesses (nd the nine who submitted affidavits after the hearings in 1971 and 1986 are wrong or the nominee is wrong.

What I focussed on relative to the issue of voter challenges, as I did with the segregatlon memo, was the way Justice Rehnquist responded to questions on the issue. And I have to say again that I was struck by his lack of candor. His painstakingly constructed, hedging responses to straightforward questions did nothing, in my opinion, to clear the air. He had the opportunity to dispel the doubts of many Senators about his credibility. He did not take this opportunity.

I would like to quote briefly from two exchanges between Justice Rehnquist and members of the Judiciary Committee on July 30, 1986, which I think are revealing:

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

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

KENNEDY. Just the ones I read about.

REHNQUIST. Would you read them to me again?

(Kennedy goes through each charge again, and Justice Rehnquist denies each one)

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

REHNQUIST. I think that is correct.

KENNEDY. Well, what is "I think" * * * If you are talking about harassing or intimidating voters is not something you are going to forget very much about.

REHNQUIST. I thought your qestion was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny that, anytime, anyplace.

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

KENNEDY. Well, did you challenge individuals then?

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

* * * * *

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

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

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

REHNQUIST. I do not think so * * * I am not entirely sure * * * I have responded in each case that you said to say that I did not agree with it, but if you are asking me whether over a period from 1953 to 1969 I ever challenged a voter at any precinct in any election, I am just not sure my memory is that good.

(Transcript, July 30, pp. 110-112)

* * * * *

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

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

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

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

METZENBAUM. Yes, yes. Did you ever personally confront. * * *?

REHNQUIST. I do not believe that I did.

METZENBAUM. Would you categorically say you did not?

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

METZENBAUM. Do you think at some time, some point, you did personally confront voters at bethune precinct?

REHNQUIST. No, no I do not.

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

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

METZENBAUM. Mr. Justice, I am not talking about your being able to remember where you were on the 3rd day of June 1952. I am talking about whether you ever confronted people and said to them: 'Can you read this Constitution?' 'What educational background do you have?' Challenge them in their right to vote. And you are saying that you do not remember. And I am saying to you, is it possible that a man as brilliant as you could not remember if you had done that?

REHNQUIST. Senator, challenging was a perfectly legitimate thing.

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

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

METZENBAUM. You said in none of these years—that being 1958 to 1968—did I personally engage in challenging the qualifica-

tions of any voters. Did you do it before that? Did you challenge voters before that?

REHNQUIST. I do not believe I did, no. Again, I point out that that is thirty years ago. (Transcript, July 30, pp. 133-134)

□ 1350

Well, Madam President, what astonishes me about these exchanges is that they could have been considerably shortened or avoided altogether if Justice Rehniquist had shown a little bit of candor. He was not forthcoming—he adopted a policy of avoiding fuller explanations. He could have said: "Senator, I don't recall any of the alleged incidents taking place. I am certain I never harassed or intimidated anyone. I might have challenged some voters at some precinct in some election—that was part of my job as a pollwatcher—but I never did anything that was illegal." He could have done that.

But, rather than offering a candid statement, he offered only qualifications, split hairs, and fine distinctions—avoiding the basic questions being raised about his sensitivity to the rights of citizens. He could have convinced me that he sincerely believed in the importance of those rights by giving straightforward, candid answers. He did not. I am afraid I do not believe his denial of voter challenging.

INSENSITIVITY TO THE RIGHTS OF CITIZENS

Because I found Justice Rehnquist's explanations of the segregation memo and the charges of voter challenging unbelievable, my doubts about his sensitivity to individual rights grew. And when I examined some of the nominee's past writings and speeches, my doubts were further confirmed.

There has been a discernible pattern to Justice Rehnquist's words and actions. It is a pattern of insensitivity to the rights of U.S. citizens. I am talking about fundamental rights, such as the right to vote, the right to peaceful and nonviolent protest and the exercise of first amendment rights, the right to own property, and the right to an equal educational opportunity. And when it comes to matters as significant as the individual's exercise of these rights, Justice Rehnquist appears to me to display a basic insensitivity.

THE RESTRICTIVE CONVENANT IN THE VERMONT DEED

A new finding at the 1986 hearings was the existence of a restrictive convenant in the deed on some Vermont property Justice Rehnquist purchased in 1974. The convenant reads: "no feet of the herein conveyed property shall be leased or sold to any member of the Hebrew Race."

During the hearing, Senator LEAHY questioned the nominee about this provision of the deed:

Senator LEAHY. Are you aware of that covenant in your deed?

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

LEAHY. Did you read the deed that you got on your property?

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

* * * * *

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

REHNQUIST. I was amazed.

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

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

(Transcript, July 30, pp. 186-187)

Several days later, Justice Rehnquist wrote to Chairman THURMOND, explaining that "review" of his file on the purchase of the Vermont property had turned up a letter from his attorney dated July 2, 1974. There is a clear reference to the restrictive convenant in the third sentence of this letter: "The property is also subject to restrictions relative to * * * ownership by members of the Hebrew Race."

Justice Rehnquist said in his letter to Senator THURMOND: "While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week." He also said that he had asked his attorney to take the legal measures necessary to remove the restrictive covenant.

The nominee "thought" he had read the deed, but he is "quite sure" he "didn't note" the restrictive covenant. He "do(es) not doubt" that he read the letter from his attorney, but he "did not recall the letter or its contents" before his recent testimony.

I wouldn't expect anyone, even a brilliant man like Justice Rehnquist, to remember everything they read 12 years ago. But I would expect someone who is sensitive to the rights of citizens, someone who recognizes that covenants restricting property ownership on the basis of religion or race are not only "obnoxious" and "unenforceable," as the nominee has said, but completely contrary to the basic values of our society—I would expect someone sensitive to individual rights to recall seeing such an obnoxious provision in a deed on his own property, if, in fact, he saw it.

So I believe that Justice Rehnquist really might not recall the obnoxious covenant, even though he was informed about it. And that is exactly what troubles me.

Justice Rehnquist's failure to remember being informed about this covenant is part of a pattern. If this were an isolated incident, if the only negative thing anyone could say about Justice Rehnquist was that he had an unenforceable discriminatory provision in a deed on some property he owned, I would not give it a great deal of attention. I would accept the nominee's explanation that he did not remember seeing it and his offer to have it removed. But Justice Rehnquist has displayed such a consistent record of insensitivity to discriminatory practices against our citizens that I cannot ignore the fact that he totally forgot being informed about this obnoxious deed provision.

What troubles me is not that it was there. What troubles me is that he forgets being informed about it being there, although he now acknowledges that he was so informed.

How many of us in this Chamber, if we were informed of a provision in our deed similar to that one, would forget about it? We might not take any action to remove it because it is unenforceable. It may not be worth 200 bucks in a lawyer's fee to remove it because it is unenforceable.

But how many of us in this Chamber, if we were told that there was a provision in our deed as obnoxious as that one, would forget that we were told? We would be troubled. Again, we might not act to remove it, but we would be troubled.

JEHOVAH'S WITNESSES

Yes, it's all part of a pattern of insensitivity, I'm afraid.

As a clerk for Justice Jackson, he wrote a memo in which he referred to the Jehovah's Witnesses as an "outlandish group." The case involved groups of Jehovah's Witnesses in New Hampshire and Rhode Island who were convicted for making speeches in city parks in violation of local ordinances.

There were probably arguments to be made in this case on the side of the locality's right to limit certain activities in city parks, just as there were arguments in favor of the Jehovah's Witnesses' first amendment right to free speech.

I am sure, in other words, there were arguments on both sides of this case, but law clerk Rehnquist chose to characterize the appellants as an "outlandish group" whom the city had every right to prevent from "commandeer(ing) the space" and "forc(ing) their message on everyone."

Mr. Rehnquist failed to recogize that his or anyone else's opinion of whether or not the Jehovah's Witnesses are in the mainstream of American religions is irrelevant to the question of whether their right to express their views in public should be protected. As Senator SIMON said to the nominee during the recent committee hearings:

Now I recognize that neither Buddhists nor Jehovah's Witnesses are particularly popular groups in our country, but I think it is important that we defend the liberties of the most isolated, unpopular groups. (Transcript, p. 239.)

At the hearing, Justice Rehnquist said he agreed with this statement. I would find his agreement more credible if the Jehovah's Witnesses memo

were an isolated incident. But again, it is part of a pattern, a common current running through his statements and writings.

Justice Rehnquist himself recognizes this common current. In an interview with the New York Times magazine which appeared on March 3, 1985, he stated:

I can remember arguments we would get in as law clerks in the early '50's. And I don't know that my views have changed much from that time.

THE "NEW BARBARIANS" SPEECH

On May 1, 1969, Mr. Rehnquist delivered a speech in honor of "Law Day" entitled "The Law: Under Attack From the New Barbarians." The "new barbarians" referred to in the title—and described that way repeatedly throughout the speech—were members of various protest movements. Mr. Rehnquist did not identify which specific protest groups he meant. Although it appears from the content of the speech that he was thinking primarily of Vietnam war protesters, he refers generically to "protest movements," so we must assume that he includes the civil rights movement, the women's movement, and any other protest movements active in 1969.

Mr. Rehnquist said at the outset that those he referred to as the "new barbarians," "represent only a small minority of the numbers participating in these movements." But he proceeded to expound on the theory of civil disobedience in general, and made a number of sweeping statements applying to all protesters or practitioners of civil disobedience. His discussion of civil disobedience was at best tendentious and incomplete. At worst, it was a gross distortion, and yet another example of his tendency to subordinate individual rights to the "rule of the majority."

To get some perspective on what we mean when we talk about "civil disobedience," let me quote briefly from the "Dictionary of the History of Ideas."

The concept of civil disobedience * * * has a long and notable history, appearing already as the Antigone theme in Greek drama and in the anti-war motif of Lysistrata, where the women, in addition to deserting their men, seize the Acropolis and the Treasury of Athens. The conflict between civil law and conscience was sharply featured when the Jews passively resisted the introduction of icons into Jerusalem by Pilate, procurator of Judea, and by Jesus in his dramatic purification of the temple, when he overturned the tables of the money changers and the seats of those who legally sold pigeons. The conflict has been highlighted in the history of English-speaking countries many times, though rarely more forcefully than when Milton refused to obey the licensing and censorship laws of seventeenth-century England and when the Abolitionists attacked the institution of slavery in nineteenth-century America. The most widely known cases of the conflict in the twentieth century are Gandhi's campaigns against colonial rule in South Africa and India, passive resistance campaigns against Nazi occupation governments during World War II, and the civil rights campaign against segregation in the United States starting in 1954. Civil disobedience attitudes and techniques also spread into attacks against the Vietnam War, draft laws, poverty, and the authoritarian structure of colleges and universities in the 1960's. (*Dictionary of the History of Ideas*, vol. 1, pp. 434-435).

Justice Rehnquist's analysis of civil disobedience in his speech completely lacked this balanced historical perspective. After identifying the danger from the "barbarians of the New Left," who "have taken full advantage of their minority right" to advocate their views, he went on to the more general question of "what obligation is owed by the minority to obey a duly enacted law which it has opposed."

This is what he wrote:

From the point of view of the majority, and of the nation as a whole, the answer is a simple one: the minority, no matter how disaffected or disenchanted, owes an unqualified obligation to obey a duly enacted law.

This was only the beginning of Mr. Rehnquist's harsh attack on civil disobedience. A sampling of some of his other comments follow:

The deliberate law breaker does not fully atone for his disobedience when he serves his sentence, for he has by example undermined respect for the legal system itself.

* * * there is a certain amount of arrogance in insisting that one's own personal predilections will not permit him to obey a law which has been duly passed by the legislative authority having jurisdiction over him * * * it is, by implication, a privilege reserved to those with articulate and hyperactive consciences. The claim for conscientious disobedience is at war with the basic premise of majority rule.

* * * disobedience cannot be tolerated, whether it be violent or nonviolent disobedience.

There are many problems with Mr. Rehnquist's analysis. First, it failed to recognize any justification for even nonviolent civil disobedience. This is incredible in light of the success of the civil rights movement's nonviolent civil disobedience tactics only a few years prior to this speech. The only historical example of "disobedience to law" he gives is the Southern States' secession in 1861 which precipitated the Civil War. It is stretching the meaning of the phrase pretty far to describe the act of secession from the Union as "civil disobedience," and it is the height of irony—and inappropriateness—that Mr. Rehnquist put into the same category the civil rights protesters of the 1960's and the slaveholding States of the 1860's.

Second, he lumped together violent and nonviolent protesters as equally reprehensible. "To deplore only violence," he said, "obscures the fact that the law must be enforced against all those who disobey it, regardless of the means by which such disobedience is accomplished." A vastly different view of nonviolent protest can be found in the writings of Dr. Martin Luther King, Jr., who wrote:

The principle of nonviolent resistance seeks to reconcile the truths of two opposites—acquiescence and violence—while avoiding the extremes and immoralities of both. The nonviolent resister agrees with the person who acquiesces that one should not be physically aggressive toward his opponent; but he balances the equation by agreeing with the person of violence that evil must be resisted. He avoids the nonresistance of the former and violent resistance of the latter. With nonviolent resistance, no individual or group need submit to any wrong, nor need anyone resort to violence in order to right a wrong.

On the other hand, Mr. Rehnquist presented the view that disobedience, whatever its nature "cannot be tolerated." It cannot be tolerated, according to him, because it violates a law duly enacted by the majority of citizens. And remember that, according to him, "the minority * * * owes an unqualified obligation to obey a duly enacted law."

Third, he fails to make any distinction between violating the law as a form of protest against some other law or policy, and violating a law to test that law. In other words, he does not make a distinction between lying down in front of buses to protect the foreign military involvement of the U.S. Government, and refusing to sit in the back of a bus to protest the law that unjustly discriminates against black people by requiring them to sit in the back of the bus. I find his failure to make this distinction extremely troubling. Because it is precisely this second kind of civil disobedience that often results in Supreme Court or Federal appeals court cases.

A black family in Topeka, KS sends their daughter to an all-white, segregated school, insisting on her right to an equal educational opportunity. The case reaches the Supreme Court and results in the landmark Brown decision that "separate but equal" education is not constitutional. The Browns violated a law in order to test that law's constitutionality. That law had been duly enacted by representatives elected by the majority of citizens. Yet by Mr. Rehnquist's standards, the Browns had "an unqualified obligation to obey" the law, no matter how unjust they might have thought it to be.

Justice Abe Fortas saw it differently. In 1968, he wrote, referring to the civil rights movement:

This is civil disobedience in a great tradition. It is peaceful, nonviolent disobedience of laws which are themselves unjust and which the protecter challenges as invalid and unconstitutional * * * the experience of these past few years shows, more vividly than any other episode in our history, how effective these alternatives are. ("Concerning Dissent and Civil Disobedience," pp. 34 and 64.)

The "Law Day" speech is disturbing in both its spirit and its content. Barely 1 year after Martin Luther King was assassinated for his nonviolent resistance to obnoxious laws, Mr. Rehnquist described those who choose civil disobedience as "arrogant" and having "hyperactive consciences." I find it hard to conceive that he would not have understood the implications of his words.

And, as I have already shown, he failed to distinguish between violent and nonviolent resistance to law or between violating a particular law to test that law and violating the law as a more general form of protest.

The content of this speech is further evidence of a thread running through the nominee's thought: That the rights of the minority are ultimately dependent on what the majority decides. The spirit of this speech is further evidence of another pattern—the pattern of insensitivity.

CONCLUSION

In conclusion, Mr. President, in a celebration of "I Am an American Day" in Central Park on May 21, 1944, Judge Learned Hand expounded on the meaning of "the spirit of liberty":

I cannot define it, I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias * * *.

The single judge in the United States with the most power over the lives of individuals is the Chief Justice of the U.S. Supreme Court. The protection of the constitutional rights and liberties of individual American citizens lies in his or her hands, more than any earthly judge.

I am sorry to say that I don't think his nominee "seeks to understand the minds of other men and women."

I have studied Justice Rehnquist's qualifications carefully. I have looked long and hard at his past statements and actions. I have found that at times his ideological fervor has distorted his judgment and objectivity.

Where I had hoped to find candor, I too often found evasion.

Where I had hoped to find wisdom, I too often found word games and hair-splitting.

Where I had hoped to find growth, I too often found unceasing rigidity.

And where I had hoped to find compassion, I too often found intolerance and insensitivity.

I will vote against his confirmation as Chief Justice, hoping, nevertheless, that if he is confirmed, history proves me wrong, and that the term of Chief Justice Rehnquist is one where the justice promised all our people in the Constitution comes ever closer to fruition.

(Mr. CHAFEE assumed the chair.)

□ 1410

Mr. President, I note the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HART. 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. HART. Mr. President, for just the 16th time in history, we will most likely confirm a nominee to serve as the Chief Justice of the United States. The leader of the Nation's highest court. The head of the third branch of Government. The symbol in principle and the guardian in practice of the American system of equal justice for all.

Our decision is much like weighing right and wrong on the scales of justice. We must ask how much deference is to be paid the President's choice, how much weight we accord Justice Rehnquist's legal acumen. But the answers must be counter-balanced against the nominee's record, his testimony, his candor and, yes, his philosophy.

By this measure, the scales of justice are tipped sharply out of balance.

The relevant record includes the Judiciary Committee record—his memoranda to Justice Jackson endorsing the Plessy decision, his writings against the public accomodations and desegregation ordinances in Phoenix; his polemic against equal rights for women, and his ceaseless search for precedent, however vague, to marshall the power of government against the rights of the individual.

This is the record, the record in its entirety, by which we must judge this nomination. We cannot, as some have suggested, cramp the position to fit the individual. We have to see whether the nominee fits the position.

And on this basis, what do we see?

We see a man who not only did not join the civil rights movement, but, further a man whose soul was immobilized when the walls of segregation were being shaken. We see a private citizen and public servant who actively and aggressively opposed progress toward civil rights and equal justice under the law.

It was not simply that he opposed the rights of black men and women to exercise their franchise, although that in itself is wrong. Associate Justice Rehnquist opposed the rights of blacks to eat a hamburger at an integrated lunch counter. He opposed the rights of black children to get a decent education in an integrated school. He opposed the rights of defendants to have their trials heard by integrated juries.

It is a continuing record that suggests an incapacity to oppose a single barrier to racial justice; to find it indecent, incompatible with our Constitution, or inconsistent with the rights of man.

It is a record that bespeaks a nostalgia for the times when defendants could be coerced into participating in their own prosecution. A nostalgia for the time women were left subservient in the home and left out at the workplace. Nostalgia for a time when black, Hispanic, and Asian Americans were expected not to assert their rights but to avert their eyes and humble themselves before the majority.

In sum, we see a picture of a man unable to accept the progressive tides in our society to break down the walls of injustice. Not only has his thinking stood still, but he seems caught up in bitter reflections—some call them brilliant—undiminished even as tolerance and justice have grown in our society.

I would like to focus on Justice Rehnquist's involvement as Mr. Rehnquist in forming the policy of military surveillance of Vietnam war protesters and civil rights activists. This was an episode that the Church committee, on which I served, examined in 1975 and 1976. I am sure that the other two remaining veterans of the committee, Senator MATHIAS and Senator GOLDWATER, remember this inquiry as well. I was saddened, I guess that is the proper word, that Justice Rehnquist stated during the recent hearings—and stated repeatedly—that he could not recall his role as a public servant at that time.

This is far too important an issue for any "I don't recall" defense. At issue is Justice Rehnquist's candor, his decision to evade in the face of real conflicts of interest, and his role in disposing of a serious constitutional question in a case where his involvement was a salient factual question. Let me detail the facts.

When the Nixon administration came to power, the Office of Legal Counsel structured a concordant between the Departments of Justice and Defense on domestic surveillance. Justice Rehnquist ran the office at the time. Representing the Army was then General Counsel Robert Jordan. His files contain strong evidence of Mr. Rehnquist's role in formulating this policy of spying on American dissenters.

There was a time when Mr. Rehnquist remembered all this as well. He testified before Senator Ervin, in 1971, that the Army had ceased its domestic intelligence program. He testified that the computerized listing of dissenters was defunct. He said that information gathered by the Army had not been transferred to the Justice Department. And he told Senator Ervin that the one printout from the Army's computers was soon to be destroyed.

But he was not only familiar with the facts. He had reached an opinion about whether this program conformed to the Constitution.

An exchange between Justice Rehnquist and Senator Ervin is particularly telling in this regard:

Senator ERVIN. Don't you think a serious constitutional question arises where any government agency undertakes to place people under surveillance for exercising their First Amendment rights?

Mr. REHNQUIST. I am inclined to think not, as I said last week. This practice is undesirable and should be condemned vigorously, but I do not believe it violated the particular constitutional rights of the individuals who are surveyed.

Senator ERVIN. 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 * * *

Senator ERVIN. Well there is also evidence here of photographers having been present at many rallies. Army intelligence agents pretending to be photographers were present at many rallies, took pictures of people, and then made inquiries to identify these people and made dossiers of them. Do you think that is an interference with constitutional rights?

Mr. Rehnquist. I do not, Senator * * * I don't think the gathering but itself, so long as it is a public activity, is one of constitutional statute.

And Justice Rehnquist conclusion:

My point of disagreement with you is to say whether in the case of Tatum vs. Laird that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

This episode might be ancient history but for a couple of relevant facts. The military surveillance program was being challenged in court. In a few short months, Mr. Rehnquist was to be nominated to the Supreme Court. He testified months before the Court of Appeals ruled the plaintiffs in the case and standing to sue. Yet, Justice Rehnquist did not recuse himself—he cast the tie-breaking vote.

One witness before the Judiciary Committee likened the Rehnquist role as follows. It was as if Billy Martin had managed the Yankees into the sixth game of the World Series and then got himself appointed umpire. In sports, that would be considered highly questionable, to say the least. In constitutional law, that's an outrage.

The Supreme Court held the claim of Tatum et al. of a subjective "chill" of their exercise of constitutionally protected rights could not "substitute for a claim of specific present objective harm or a threat of specific future harm." [408 U.S. at 13-14.]

Chief Justice Burger wrote the majority opinion. Justice Rehnquist and three other justices joined to form the majority. The case was thus decided 5 to 4. The plaintiffs asked that Rehnquist recuse himself from voting. He chose not to do so. Had Justice Rehnquist recused himself, the 2-1 decision of the U.S. Court of Appeals would have been affirmed by a 4-to-4 vote.

Justice Rehnquist wrote a memo defending his participation in the case which was subsequently published in the Supreme Court Reporter. He claimed that his Ervin testimony did not get to the merits of the particular case; that the existing canons did not require his recusal; and that he should have participated to avoid a 4-4 result.

In his book, Appearance of Justice, John MacKenzie states that Justice Rehnquist should have disqualified himself in Laird versus Tatum and commented on his characterization of his testimony before the Ervin committee as follows:

Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case.

□ 1420

Had Laird been affirmed, the case would have proceeded to discovery. Rehnquist's involvement in the Army surveillance plan would have been revealed, as it was not at that time. Mr. Rehnquist would likely have been deposed by plaintiff's counsel. Depending upon what the facts were, Rehnquist could actually have been a defendant and been sued for damages.

As NYU Law Professor Stephen Gillers wrote in a letter to Senator METZENBAUM:

By assuring with his swing vote that the case would go no further, Justice Rehnquist also assured that his participation in the creation of the challenged would go undiscovered and that he would avoid exposure to civil liability. [Gillers at p. 4.]

The Senate Judiciary members who voted against the Rehnquist nomination, and other outside experts, concluded, in the words of Senator KENNEDY's dissenting views: "In Laird versus Tatum, Rehnquist was a committed advocate, not an impartial judge." As such, Mr. Rehnquist's—Mr. Justice Rehnquist's—participation in this decision violated this ethical responsibility to recuse himself from this case.

At the time the case was decided, the canons of the American Bar Association stated:

A judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

A note in the Columbia Law Review [Volume 73:106, January 1973] concludes that Mr. Justice Rehnquist's participation in the case may have violated Canons 2 and 3 of the ABA Code. His participation was also contrary to a holding by the Supreme Court in *Commonwealth Coatings Corp.* (1968) which stated "any tribunal permitted by law to hear cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

But Mr. Rehnquist—Mr. Justice Rehnquist—failed to meet that standard. And justice faltered at a time when justice was sorely needed.

CONCLUSION

Mr. President, perhaps some of my colleagues have grown weary of the succession of nomination battles. Perhaps the passage of time and a significant measure of racial progress make the civil rights battles seem like old battles long since won. And I know that the votes are already counted, and that a number of my colleagues would be just as happy to move on to issues where the odds of prevailing are better.

But this is not a debate about calculating odds, it is a debate about simple justice.

When I came to this city fresh from law school, it was my honor to be employed at the Department of Justice. Each day on the way to work, I walked beneath a portal on which the words were etched: "The place of justice is a hallowed place." I believed that then; I believed it even more today.

As I read the Constitution, I do not believe that when the Founders penned the words "Advice and Consent," Senators were meant to foreclose dissent. As de Tocqueville wrote, "The Supreme Court is placed higher than any known tribunal." And I do not believe the nominee, Mr. Justice Rehnquist, meets the standard for leading this preeminent institution that guards the liberty of our people.

Mr. Justice Rehnquist should not be confirmed as the Chief Justice of the Supreme Court of the United States, the symbol of justice in our Nation.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

□ 1430

Mr. THURMOND. Mr. President, I suggest further proceedings under the quorum be dispensed with.

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

The Senator from South Carolina.

Mr. THURMOND. Mr. President, there has been some question raised concerning the Cornell family trust, and I thought I might go into that a little bit.

It has been said that Justice Rehnquist acted unethically in setting up a trust account in 1961 for his brother-in-law Harold Dickerson Cornell, who had been diagnosed as having multiple sclerosis. The trust account was established by Harold Cornell's father, Dr. Harold Davis Cornell, for the express purpose of providing for Harold Cornell, when his disease made it impossible for him to provide for himself. A trust fund in the amount of $25,000 was established for Harold Cornell and was to be administered by his brother, George Cornell.

It should be noted that at no time does Harold Cornell assert that Justice Rehnquist or anyone else took any money from the trust fund. Although George Cornell never disclosed the existence of the trust to his brother, Harold Cornell, he did provide money from his own personal funds for Harold's use. The trust fund was never utilized for this purpose and remained totally intact.

The FBI was requested to thoroughly investigate this matter, and submit a report to the committee. This report was available to members of the committee for review prior to the committee vote on the nomination. The claim by Mr. Harold Cornell of unethical behavior on the part of Justice Rehnquist apparently involves nothing more than a longstanding family dispute by an alienated family member.

Dr. Cornell insisted that Justice Rehnquist prepare the trust in order to save money and maintain confidentiality by keeping the matter in the family. Justice Rehnquist finally acquiesced only as a favor to Dr. Cornell. It is important to note here that it was the express wish of Dr. Cornell that the trust be kept secret from his son, Harold Cornell, in an effort to keep him from invading the trust and spending all the funds therein.

The code of professional responsibility makes clear that, where the testator or settlor initiates the request and is aware of a potential interest by an attorney, there is no ethical problem with the attorney assisting in preparation of the trust or will. Indeed, Justice Rehnquist's conduct was consistent even with the nonbinding ethical considerations in the code. Harold Cornell complains that Justice Rehnquist did not tell him of the trust. But his siblings unanimously make it clear that this is exactly the way Dr. Cornell wanted it in order to protect his son, Harold Cornell. It was Dr. Cornell's well-founded fear that if Harold Cornell knew of the trust he would spend the money before it was needed for his final medical care. Finally, it was not the responsibility of Justice Rehnquist to administer the trust and provide for its beneficiaries. In this case, Dr. Cornell's son, George, was the trustee and therefore responsible. Justice Rehnquist had nothing to do with its administration.

So I hope this clears up the matter about the Cornell trust.

Mr. President, another allegation brought up was that Justice Rehnquist is a lone dissenter.

There has been a generalized allegation that Justice Rehnquist is out of the mainstream of constitutional thought. A qualitative and analytical review of his record on the Court will demonstrate that this indeed is not the case.

Justice Stevens remains by far the greatest lone dissenter on the current Court with 27 solo dissents over the last four terms of the Court.

To claim that Justice Rehnquist is too far out of the mainstream, is a striking misperception of the thinking of the present Court. Justice Rehnquist has proven himself a leader of majorities, one who believes in equal justice for all, and there is no reason to think he will not continue to do so as Chief Justice.

Another question has been raised about restrictive covenants.

Issue has been taken with the fact that properties, formerly and currently owned by Justice Rehnquist, had covenants which prohibited the sale or transfer of these properties to individuals of certain racial, ethnic or religious origin. The pertinence of raising this issue is negligible at best; however, Justice Rehnquist's opponents were attempting to demonstrate his lack of sensitivity to these individuals. This is not a valid issue, since such covenants in the early part of this century were a common occurrence. It is also important to note that under current law there is no requirement to have these covenants removed, since they are unenforceable and meaningless on their face. The covenants on Justice Rehnquist's former property in Arizona and his current summer residence in Vermont date back to the 1920's. The restrictive covenant which appeared on Justice Rehnquist's Arizona property deed was known by the Judiciary Committee prior to the hearing in 1971 on his nomination to be Associate Justice. At that time it appropriately was not made an issue.

Another matter has come up concerning Justice Jackson's memorandum.

There has also been an allegation that Justice Rehnquist was not candid with the Judiciary Committee in 1971 concerning a memorandum he wrote as a law clerk for Justice Robert H. Jackson in 1952. The memorandum was entitled: "A Random Thought on the Segregation Cases," and was written at the time the Supreme Court was considering Brown versus Board of Education.

Mr. KENNEDY. Will the Senator from South Carolina yield for a point of information?

Mr. THURMOND. I will when I finish my statement.

Mr. KENNEDY. It was just one specific comment.

Mr. THURMOND. I will be glad to as soon as I finish this point.

His critics contend that the memorandum was actually a statement of his views and not the views of Justice Jackson. However, in a December 8, 1971, letter to Senator Eastland, Justice Rehnquist stated in part:

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 the 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 . . .

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 . . .

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 versus 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.

Those were the words of Justice Rehnquist.

There is nothing in my opinion to indicate that the views on this memorandum were Justice Rehnquist's own views. On the contrary, all available evidence, including the recollection of his coclerk Donald Cronson, indicate that Justice Rehnquist was not writing his own views. To emphasize this, the Judiciary Committee on December 9, 1971, received a telegram from Donald Cronson. This telegram was put into the CONGRESSIONAL RECORD during Senate debate on the nomination of William Rehnquist to be an As-

sociate Justice. The telegram reads in part as follows:

* * * 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 * * *

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.

Memories of events that were 19 years old in 1971, and are now 34 years old today, cannot be held to be without some divergence. However, two substantive issues concerning the memorandum are acknowledged. First, that Justice Rehnquist thought that Plessy versus Ferguson was wrong in 1952, and still does, and second, that Cronson's explanation that Justice Rehnquist was assigned to write one side of the issue makes it convincingly clear that he was not expressing his own views in this 34-year-old memorandum.

At this time, the matter appears to be irrelevant and without merit. Justice Rehnquist has served on the Supreme Court for 15 years. He has reviewed countless segregation and civil rights cases. In none of those cases has he questioned Brown versus Board of Education or suggested a return to Plessy versus Ferguson. In light of his performance as a Justice, it is hard to ascribe significance to a 34-year-old memorandum written at the request of his superior.

□ 1440

Mr. President, I ask unanimous consent to have printed in the RECORD a list of 34 cases in which Justice Rehnquist cited Brown versus Board of Education.

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

CASES WHERE JUSTICE REHNQUIST HAS CITED BROWN V. BOARD OF EDUCATION IN SUPPORT OF A PROPOSITION

1. *Thornburgh Governor of Pennsylvania, et al.* v. *American College of Obstetricians and Gynecologists, et al.*, No. 84-495, Supreme Court of the United States, 106 S. Ct. 2169, June 11, 1986.

2. *Wygant, et al.* v. *Jackson Board of Education, et al.*, No. 84-1340, Supreme Court of the United States, 90 L. Ed. 2nd 260; 106 S. Ct. 1842, May 19, 1986.

3. *Batson* v. *Kentucky*, No. 84-6263, Supreme Court of the United States, 90 L. Ed. 2d 69; 106 S. Ct. 1717, April 30, 1986.

4. *The Lorain Journal Co., et al.* v. *Michael Milkovich, Sr.*, No. 84-1731, Supreme Court of the United States, 88 L. Ed. 2d 305; 106 S. Ct. 322, November 4, 1985.

5. *Allen* v. *Wright Er Al.*, No. 84-757, Supreme Court of the United States, 468 U.S. 737; L. Ed. 2d 556; 52 U.S.L.W. 5110; 104 S. Ct. 3315; 84-2 U.S. Tax Cas. (CCH) P9611, July 3, 1984 * * Together with No. 81-970, *Regan, Secretary of the Treasury, et al.* v. *Wright, et al.*, also on certiorari to the same court.

6. *Heckler, Secretary of Health and Human Services* v. *Mathews, et al.*, No. 82-1050, Supreme Court of the United States, 465 U.S. 728; 79 L. Ed. 2d 646; 52 U.S.L.W. 4333; 104 S. Ct. 1387; 33 Empl. Prac. Dec. (CCH) P34, 190, March 5, 1984.

7. *Rogers, et al.* v. *Lodge, et al.*, No. 80-2100, Supreme Court of the United States, 458 U.S. 613; 102 S. Ct. 3272; 73 L. Ed. 2d 1012; 50 U.S.L.W. 5041, July 1, 1982.

8. *Toll, President, University of Maryland, et al.* v. *Moreno, et al.*, No. 80-2178, Supreme Court of the United States, 458 U.S. 1; 73 L. Ed. 2d 563; 50 U.S.L.W. 4880; 102 S. Ct. 2977, June 28, 1982.

9. *Board of Education, Island Trees Union Free School District No. 26, et al.* v. *Pico, by his next friend, Pico, et al.* No. 80-2043, Supreme Court of the United States, 457 U.S. 853; 73 L. Ed. 2d 435; 102 S. Ct. 2799, June 25, 1982.

10. *Lugar* v. *Edmondson Oil Co., Inc., et al.*, 80-1730, Supreme Court of the United States, 457 U.S. 922; 73 L. Ed. 2d 482; 102 S. Ct. 2744, June 25, 1982.

11. *Fullilove, et al.* v. *Klutznick, Secretary of Commerce, et. al.*, No. 78-1007, Supreme Court of the United States, 448 U.S. 23 Empl. Prac. Dec. (CCH) P31, 026, July 2, 1980.

12. *Harris, Secretary of Health and Human Services* v. *McRae, et. al.*, No. 79-1268, Supreme Court of the United States, 448 U.S. 297, June 30, 1980; Petition for Rehearing Denied September 17, 1981.

13. *Carlson, Director, Federal Bureau of Prisons, et al.* v. *Green*, Administratrix, No. 78-1261, Supreme Court of the United States, 446 U.S. 14, April 22, 1980.

14. *Estes, et al.* v. *Metropolitan Branches of the Dallas NAACP, et al.*, No. 78-253, Supreme Court of the United States, 444 U.S. 437, January 21, 1980 * * Together with No. 78-282, *Curry, et. al.* v. *Metropolitan Branches of the Dallas NAACP, et al.*; and No. 78-283, *Brinegar, et al.* v. *Metropolitan Branches of the Dallas NAACP, et al.*, also on certiorari to the same court.

15. *Gannett Co., Inc.* v. *Depasquale, County Court Judge of Senaca County, N.Y., et al.*, No. 77-1301, Supreme Court of the United States, 443 U.S. 368, July 2, 1979, Decided.

16. *Columbus Board of Education, et al.*, v. *Penick, et al.*, No. 78-610, Supreme Court of the United States, 443 U.S. 449, July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

17. *Dayton Board of Education, et al.* v. *Brinkman, et al.*, No. 78-627, Supreme Court of the United States, 443 U.S. 526; July 2, 1979, Decided; Petition for Rehearing Denied October 1, 1979.

18. *Personnel Administrator of Massachusetts, et al.*, v. *Feeney*, No. 78-233, Supreme Court of the United States, 442 U.S. 256; 19 Empl. Prac. Dec. (CCH) P9240; 19 Fair Empl. Prac. Cas. (BNA) 1377, June 5, 1979.

19. *Ambach, Commissioner of Education on the State of New York, et al.* v. *Norwick, et al.*, No. 76-808, Supreme Court of the United States, 441 U.S. 68; 19 Empl. Prac. Dec. (CCH) P9122; 19 Fair Empl. Prac. Cas (BNA) 467, April 17, 1979.

20. *Regents of the University of California* v. *Bakke*, Supreme Court of the United States, 438 U.S. 165; 17 Fair Empl. Prac. Cas. (BNA) 1000; 17 Empl. Prac. Dec. (CCH) P8402, June 28, 1978.

21. *Milliken, Governor of Michigan, et al.* v. *Bradley, et al.*, No. 76-447, Supreme Court of the United States, 433 U.S. 267, June 27, 1977; as amended.

22. *Maher, Commissioner of Social Services of Connecticut* v. *Roe, et al.*, No. 75-1440, Supreme Court of the United States, 432 U.S. 464, June 20, 1977; as amended.

23. *Ingraham, et al.* v. *Wright, et al.*, No. 75-6527, Supreme Court of the United States, 430 U.S. 561, April 19, 1977; as amended.

24. *Austin Independent School District* v. *United States*, No. 76-200, Supreme Court of the United States, 429 U.S. 990, December 6, 1976.

25. *Pasadena City Board of Education, et al.* v. *Spangler, et al.*, No. 75-164, Supreme Court of the United States, 427 U.S. 424, June 28, 1976.

26. *Rizzo, Mayor of Philadelphia, et al.* v. *Goode, et al.*, No. 74-942, Supreme Court of the United States, 423 U.S. 362, January 21, 1976.

26. *Buchanan, et al.* v. *Evans, et al.*, No. 74-1418, Supreme Court of the United States, 423 U.S. 963, November 17, 1975.

28. *Milliken, Governor of Michigan, et al.* v. *Bradley, et al.*, No. 73-434, Supreme Court of the United States, 418 U.S. 717, July 25, 1974, * Decided * Together with No. 73-435, *Allen Park Public Schools, et al.* v. *Bradley, et al.*, and No. 73-436, *Grose Pointe Public School System* v. *Bradley, et al.*, also on certiorari to the same court.

29. *Gilmore, et al.* v. *City of Montgomery, Alabama et al.*, No. 172-1517, Supreme Court of the United States, 417 U.S. 556, June 17, 1974, Decided.

30. *Norwood, et al.*, v. HARRISON, ET AL., No. 72-77, Supreme Court of the United States, 414 U.S. 455, June 25, 1973, Decided.

31. *Keyes et. al.* v. *School District No. 1, Denver, Colorado, et al.*, No. 71-507, Supreme Court of the United States, 413 U.S. 189, June 21, 1973, Decided.

32. *Lemon, et. al.* v. *Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al.*, No. 71-1470, Supreme Court of the United States, 411 U.S. 192, April 2, 1973, Decided.

33. *San Antonio Independent School District, et al.* v. *Rodriguez, et al.*, No. 71-1332, Supreme Court of the United States, 411 U.S. 1, March 21, 1973, Decided.

34. *Wright, et al.* v. *Council of the City of Emporia, et al.*, No. 70-188, Supreme Court of the United States, 407 U.S. 451; 33 L. Ed. 2d 51; 92 S Ct. 2196, June 22, 1972, Decided.

Mr. THURMOND. Mr. President, this list shows not only that he favored Brown versus Board of Education but also that he cited it in 34 different decisions he wrote.

I also ask unanimous consent to have a list of cases printed in the RECORD. A question was asked: "Have you ever voted for the interests of minorities or women?" There were 27 different cases in which Justice Rehnquist voted for minorities or women.

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

Question: Have you ever voted for the interests of minorities or women?

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) (Employee had made out prima facie case of racially motivated discrimination of employer).

International Brotherhood of Teamsters v. *United States*, 437 U.S. 324 (1977) (Team-

sters had discriminated against minorities in line driver positions).

Alexander v. *Gardner-Denver*, 415 U.S. 36 (1974) (Racial discrimination suit is not bound by prior arbitral decision).

Roberts v. *United States Jaycees*, 104 S. Ct. (1984) (State can apply Human Rights Act to compel all male organization to accept women).

Ham v. *South Carolina*, 409 U.S. 524 (1973) (Questioning of juror's racial attitudes required when racial issues inextricably bound up in the case).

Lau v. *Nichols*, 414 U.S. 56 3 (1974) (Discriminatory impact suffices to establish liability under Title VI) (*Bakke* and *Guardians* modified *Lau*).

Bazemore v. *Friday*, Nos. 85-93 and 85-428 (1986) (Extension service had a duty to eradicate salary disparities between white and black workers caused by pre-Act violations).

Palmore v. *Sidoti*, 466 U.S. 429 (1984) (State cannot remove child from mother who is married to a black man).

Hishon v. *King & Spaulding*, 467 U.S. 69 (1984) (Discrimination against women employees in admission to law firm partnerships states a claim under Title VII).

Meritor Savings Bank v. *Vinson*, No. 84-1979 (1986) (Hostile work environment can constitute sex discrimination in violation of Titie VII).

Burlington School Committee v. *Miss.*, 53 U.S.L.W. 4509 (1985) (Allowed parents to be reimbursed for private school expenses of their handicapped child).

Irving Independent School District v. *Tatro*, 468 U.S. 883 (1984) (Construed Education of Handicap Act to include certain forms of medical treatment as being covered under the Act).

White v. *Regester*, 412 U.S. 755 (1973) (Struck down Texas at-large voting plan as unconstitutional because it would have diluted minority strength).

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) (Invalidating employment test having disproportionate impact on minorities) as insufficiently job-related).

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) (Invalidating a weight and height requirement that adversely affected women) (concurrence).

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) (Plaintiffs had standing to sue owner of apartment complex, alleging that racial steering practices violated the Fair Housing Act).

United Jewish Organizations of Williamsburg v. *Carey*, 430 U.S. 144 (1977) (Constitution permits the State to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county).

Hunter v. *Underwood*, 105 S. Ct. 1916 (1985) (Held that provision in Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude violated equal protection where, even though on its face it was racially neutral, original enactment was motiviated by desire to discriminate against blacks on account of race and provision had had racially discriminatory impact since its adoption).

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) (concurrence) (Female plaintiff who was denied admission to University had private cause of action under Title IX). (J. Rehnquist concurs emphasizing that the question of the existence of a private right of action is basically one of statutory construction and Congress must make plain its intent to create such a right).

Chapman v. *Meier*, 420 U.S. 1 (1975) (Reapportionment plan for voting district was constitutionally impermissible because it diluted minority voting strength).

Gilmore v. *City of Montgomery*, 417 U.S. 556 (1974) (federal court may enjoin a municipality from permitting the use of formerly segregated public park recreational facilities by private segregated school groups and by other nonschool groups that allegedly discriminate in their membership on the basis of race).

Chandler v. *Roudebush*, 425 U.S. 840 (1976) (Federal employee had same right to a trial *de novo* on discrimination as private employee).

Sumitomo Shoji America v. *Avagliano*, 457 U.S. 176 (1982) (Female secretaries of New York corporation of Japanese subsidiary could sue under Title VII).

Hills v. *Gautreaux*, 425 U.S. 284 (1976) (The *Milliken* decision, which rejected a metropolitan area school desegregation order because there was no interdistrict violation or any significant interdistrict segregative effect, imposes no per se rule that federal courts lack authority to order corrective action beyond a district boundary where the violations occurred.

United States v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972) (The district court in this litigation instituted by the United States enjoined implementation of a statute as creating a refuge for white students and promoting school segregation in the county). (Burger along with Blackmun, Powell and Rehnquist concur in order to distinguish *Wright* v. *Council City of Emporia* from *Scotland Neck*.

Tillman v. *Wheaton*, 410 U.S. 431 (1973) (Wheaton-Haven swimming pool operates as a community pool and thus could not deny membership for racial reasons).

The PRESIDING OFFICER. The distinguished majority leader.

Mr. DOLE. Mr. President, I thank the distinguished chairman of the Judiciary Committee for his untiring efforts on this nomination.

I still hope that we can vote on this nomination and the Scalia nomination and dispose of both before 4 o'clock tomorrow.

I know that this is a matter of controversy to some, but I do believe that we should bring it to a conclusion and get on with other business before the Senate, and I hope that tomorrow we can do that.

Mr. President, I support the nomination of William Hubbs Rehnquist to be Chief Justice of the United States.

This is the third occasion in which the Senate has been asked to confirm this nominee. The first occasion was in 1969, when he was nominated and confirmed to be an Assistant Attorney General of the United States. He was also confirmed to be an Associate Justice of the Supreme Court in 1971.

The nominee has emerged from more than 4 days of thorough hearings in the Committee on the Judiciary. This involved 40 hours of testimony from 40 witnesses. By now the Senate should be well acquainted with Justice Rehnquist and his background, qualifications, and experience.

Associate Justice Rehnquist brings to the position of Chief Justice a unique set of credentials. He has unequaled experience and he has the temperament and collegiality necessary to provide effective leadership on the Court.

His academic credentials are simply the best. He was first in his class at Stanford Law School. He has a masters degree in history from Harvard and an undergraduate degree from Stanford with highest honors.

He had a distinguished private practice in Phoenix for 16 years afer being a clerk to a Supreme Court justice upon graduation from law school. He served as the top lawyer in the Government for 3 years as an Assistant Attorney General and legal counsel to the Attorney General. Then he was elevated to the Supreme Court in 1971, where he has served with distinction. It is difficult to imagine anyone with a better set of credentials to be Chief Justice.

Mr. Justice Rehnquist has been one of the most productive and prolific members of the Supreme Court. He has been assigned to write more majority opinions—over 230—than any of his colleagues during his service on the High Court. He has also been one of the most frequent dissenters—oftentimes alone—having authored more than 80 dissents. Quite frequently, he spoke for others. Some have attempted to characterize these opinions as extremism. However, I cannot find fault with one who does not hesitate to express his views, even if they might be unpopular or in the minority at the time.

AMERICAN BAR ASSOCIATION ENDORSEMENT

As might be expected when a nominee has been identified for the highest judicial position in the Nation, the American Bar Association's standing committee on the Federal judiciary conducted an exhaustive examination of Justice Rehnquist.

The committee interviewed all members of the Supreme Court and found unanimous, enthusiastic support among his colleagues. The committee interviewed judges from across the Nation, almost 200 of them. Sixty-five respected leaders of the bar were also interviewed. In addition the faculty and students of Michigan Law School conducted an indepth review of Justice Rehnquist's contributions as a Justice of the High Court. The committee also interviewed more than 50 deans and faculty members from law schools across the country.

□ 1450

The committee concluded unanimously that, based on its findings, Justice Rehnquist was "well qualified" to be Chief Justice. This is the highest rating the committee can bestow on a candidate. It speaks for itself. William

Rehnquist has been found by his peers to be uniquely qualified to assume the role of the Chief Justice.

Despite this highest rating and despite a unique set of credentials, this nomination has been controversial.

VOTER INTIMIDATION

Mr. President, one of the charges against Justice Rehnquist that received much attention alleged that he engaged in voter intimidation tactics during local Phoenix elections in the early 1960's Testimony was taken from two panels of witnesses. One panel, consisting of partisan Democrats, alleged that Mr. Rehnquist engaged in various voter intimidation tactics at certain polls with heavy minority voter registration.

A second panel, consisting of former local Republican officials as well as certain Democrats heatedly denied that Mr. Rehnquist engaged in these tactics. Rather, they stated that he was chairman of a lawyer's group that was set up to train and advise Republican watchers and challengers. In that capacity he sometimes traveled to certain polls to act as a troubleshooter.

The hearing record in 1971 and again this year reveals that events occurred, probably in 1962, although one witness suggested that the most controversial event occurred in 1964 at a Hispanic precinct. Indeed, there was an incident at a predominately black precinct, Bethune School, in 1962. Police and FBI reports as well as newspaper accounts the next morning confirmed that a Republican challenger was arrested after engaging in harassing tactics against minority voters. This individual was not Mr. Rehnquist, but a person who resembled him in height and weight.

No criminal charges were brought. Yet this event was referred to by opponents of the nomination as evidence of behavior not worthy of a Supreme Court Justice. On the other hand, supporters, including former Democratic local chairmen, vigorously contended that Mr. Rehnquist did not engage in illegal or harassing tactics.

It is undeniable that the passage of years have blurred the memories and recall of those who were involved at the time. It seems to me that it is now not humanly or objectively possible to reconstruct the events as they occurred at that time.

We have Justice Rehnquist's flat denial of improper conduct. We also have the fact, as recounted by Congressman RUDD in his testimony, that Mr. Rehnquist was selected by the Democratic House of Representatives in Arizona to defend two Democrats in an impeachment proceeding in the legislature during this period. To me, this speaks eloquently for the general high regard for and reputation of Mr. Rehnquist. It is inconceivable that Mr. Rehnquist would have been chosen by the leadership of that body if he had engaged in the conduct which was alleged in this instance.

Motives that smack of partisanship and lack of objective evidence lead me to the conclusion that the nominee did not engage in unlawful or unethical conduct in the Phoenix precincts in the early sixties.

THE RESTRICTIVE CONVENANTS

Much of the controversy relating to this nomination centers around certain racially restrictive covenants found by the FBI in the deeds of two properties acquired by Justice Rehnquist many years ago. One of these properties, which was formerly the Rehnquist family home in Phoenix, was sold in 1969. The other is currently his vacation home in Vermont.

The Supreme Court in the case of *Shelley* v. *Kramer,* 334 U.S. 1 (1948), found that these totally repugnant and obnoxious provisions were unconstitutional and utterly unenforcable in any court of law in the United States. But the matter was still bandied about in the national media as somehow evidence that Justice Rehnquist was a racist or bigot and therefore unworthy to be elevated to be Chief Justice.

Mr. President, this charge is so far fetched and irresponsible that it is a great pity that we must waste the time of the Senate in response. The Supreme Court has spoken definitively—decades ago. Any real estate lawyer knows that these convenants are not worth the paper they are written on. Yet it is undoubtedly true that millions of these relics are still buried in land records in every county courthouse in the country.

When brought to his attention, Justice Rehnquist immediately expressed his shock and dismay at their existence and pledged to the Committee on the Judiciary that they would be removed promptly. However, opponents are still trying to read some kind of bias into the character of the nominee. I simply find these charges as repugnant as the racially restrictive covenants upon which they are based. I reject them out of hand and submit that the Senate and the American people will do the same.

THE JACKSON MEMORANDUM

Another charge against Mr. Justice Rehnquist relates to a memorandum he prepared while serving as a law ckerk to Justice Jackson on the Supreme Court in 1952, about 34 years ago. At the time the Court was beginning the review of the separate but equal doctrine in Plessy versus Ferguson. This review 2 years later became the unanimous opinion of the Court in the historic case of Brown versus the Board of Education.

If I correctly heard, I heard the distinguished chairman of the Judiciary Committee refer to the Brown case in fact cited by Justice Rehnquist in as many as 30-some cases.

It is clear to this Senator that clerk Rehnquist—this was back in 1952—was playing a "devil's advocate" role on that occasion. He has stated in 1971 that that memo did not then reflect his view on the matter. He has restated that same view this time around. First, some 20 years after the fact and now almost 35 years after the fact we are engaged in an exercise trying to reconstruct the mind set of those involved at the time 1952.

The issue involved is important. It seems to me that the best evidence of the nominee's view and record in segregation in the schools can be found in the 34 opinions the Court handed down since William Rehnquist has been a member of the Supreme Court. In all these cases the Brown case was upheld. In all the cases Justice Rehnquist either wrote the majority opinion or concurred in the majority opinion. These are not clerk's memos of 34 years ago. These are 34 opinions of the High Court with Justice Rehnquist leading or joining with others on the Court to reaffirm the Brown case. Is not this the best evidence of the state of mind of Mr. Justice Rehnquist as to his views on segregation in the schools? Mr. President, I submit that it is.

THE JUSTICE DEPARTMENT MEMOS

The Judiciary hearings on the Rehnquist nomination focused substantially on several memoranda written while he served as assistant attorney general. Two of these memoranda surfaced in the past few days, one on school busing and one on the ERA amendment.

Ten pages of the Judiciary Committee report are devoted to this matter and the related issue of Justice Rehnquist's participation in the subsequent case of Laird versus Tatum. The report sets forth the issues involved adequately. It also contains a memo written by Justice Rehnquist which sets forth his reasons for not recusing himself from participation in the Court's deliberations on the case.

The majority of the committee felt that this memo was the best reply to the charges on the recusal question. The committee also concluded that "in no way should Justice Rehnquist's actions be construed as being improper." A great deal of time was spent in the hearings pursuing this question. I respect the committee's conclusion; however, it must be recognized that there is merit to the opposing view. It was a close call, as Justice Rehnquist conceded.

□ 1500

With respect to the busing and ERA memos, it seems to me that these were internal memos in which the Chief Legal Advisor was asked by senior White House staff for candid opinions which presented alternative options

on two of the most highly controversial issues of the time—busing and ERA. I note that the Nixon administration did not offer a constitutional amendment on busing, but it did support the ERA amendment. Whatever views might have been contained in the memos, the fact of the matter is that Mr. Rehnquist did testify on behalf of the administration on the ERA amendment. Again, I note that his record on the Court must be the best evidence of his position on these matters.

Upon analysis of the busing memo, it is clear that it was simply a legal analysis of the proposed constitutional amendment. The White House had sole responsibility for all policy decisions on the amendment.

Any suggestion that this memo endorsed deliberate racial segregation is a gross and irresponsible misrepresentation. The legal analysis in the memo presents the view that the Constitution prohibits intentional racial discrimination, not racial imbalance resulting from the actions of private actors. Accordingly, local jurisdictions would be free to engage in race-neutral student assignment plans even if the schools are racially identifiable due to factors beyond the school board's control. This is what the Supreme Court held in three subsequent cases: Swann, Pasadena and, most recently, Bazemore (outside the public school context).

This memo was written at a time when both the executive branches were examining alternatives to forced busing to achieve racial balance in school desegregation.

The Committee on the Judiciary examined these issues quite carefully, although not specifically the memos themselves. The majority was satisfied that Justice Rehnquist has had a satisfactory record in his Court opinions on these matters. The Justice himself cited a case decided just last June when he wrote the majority opinion for the Court on women's rights.

Although not as expansive in his views over the years as some others on the Court have been on these issues, it can hardly be said that here is a bigot or a racist or a person who is insensitive and inconsiderate. The nomination should not fall on these issues.

THE CORNELL FAMILY TRUST

In recent days attempts have been made to discredit Justice Rehnquist through the criticism of his brother-in-law, Harold D. "Dick" Cornell. The charges were first aired in an article appearing in the Los Angeles Times on August 2, 1986. Chairman Thurmond asked the FBI to investigate the matter. This report was made available to members of the committee 2 days before the vote. Subsequently four Senators, including three who are members of the committee and who voted against the nomination asked Chairman Thurmond to investigate the matter further.

My staff and I have also reviewed the matter. We have reviewed the press accounts and the FBI report. It should be said that Mr. Cornell has been alienated from the rest of his brothers and sisters for sometime. The other members of the Cornell family have unanimously repudiated Mr. Cornell's allegations.

According to members of the Cornell family, they believe that his attacks on Justice Rehnquist are motivated by his intense professional jealousy of Justice Rehnquist, and not as a result of his current physical or mental illness. Mr. Cornell previously practiced law in California and described himself as a "liberal attorney."

Mr. President, the focus on this matter has simply given a public forum to a man who seems to be personally jealous and politically motivated. Whatever are the legitimate concerns with this nomination, this is not one of them. I deeply regret that members of this body have sought to legitimize them and to build opposition based on these spurious charges.

In conclusion, Mr. President, this Senator will support the nomination of William Hubbs Rehnquist to be Chief Justice of the United States. I am confident he will be a pillar of strength in his new role. I am confident he will have the capacity and compassion to lead the Court and the Federal Judiciary in the coming years. The hearing record disclosed nothing this time or previously to bar Justice Rehnquist from assuming this position of highest trust for which the President has nominated him. The Committee on the Judiciary has found that he does possess the qualities required of a Chief Justice: Unquestioned integrity, incorruptibility, fairness and courage. I agree. I shall vote for confirmation.

It seems to me that we are reaching a point that we need to make a decision. I understand the fall session of the Court is not long off, and he will be needed to guide the Court.

In my view, I think he has the sensitivity and the compassion and certainly the integrity and the intellect to be Chief Justice of the United States. I submit there is nothing in the hearing record, and there have been no bombshells over the weekend, do not anticipate any, do not know of any, and I would urge my colleagues to let us proceed with this nomination early tomorrow afternoon.

As I have indicated this morning, we have a mountain of work—a mountain of work—and we have this week and the two following weeks if we intend to leave here on October 3. We have spent about 5 days on this nomination. For the most part, we have used the time appropriately. There has been discussion, there has been a dialog, there has been a debate. But there also has been a lot of repetition.

I know some oppose the nomination; I know some will vote no. But I just suggest I hope that vote will come tomorrow, and I am willing to predict that it will be somewhere in the neighborhood of 75 to 25, 72 to 28, or somewhere in that neighborhood. And nothing has changed in the past 4 or 5 days.

So I thank the distinguished chairman of the Judiciary Committee again for his untiring efforts on behalf of the nominee and on behalf of the President. Again, I would say the President won a fairly clear mandate in 1980, which was reaffirmed in 1984. I believe the American people would expect the President, whoever he might be—Democrat of Republican, liberal or conservative—to appoint people who might reflect his philosophy, particularly in the case of an overwhelming mandate, carrying 49 States. I must believe that the President probably had that in mind. He was not elected in 49 States to pick out the most liberal member he could find to be Chief Justice. And there are a lot of very able liberal jurists in the country. There are also very many conservative jurists. Justice Rehnquist certainly is an outstanding one and I think the President made exactly the right choice.

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER (Mr. GRAMM). The Senator from Ohio.

Mr. METZENBAUM. Mr. President, you can say something once and you can say it twice and you can say it five times and some people do not hear you.

But I want my distinguished colleague, the distinguished majority leader, to understand that we agree. The President won the election. He won the election and he has appointed 275 judges and we have only raised a question with respect to 5 of them—5 out of 275.

I want to further point out that there are other conservatives in this country besides Justice Rehnquist. When Sandra Day O'Connor came up for confirmation—a very, very conservative women, fine legal background, probably every bit as conservative as Justice Rehnquist—the Senate confirmed her 99 to 0. And when Judge Scalia was up for confirmation—and some say his conservative philosophy is even more conservative than Justice Rehnquist—I might say, parenthetically, if that is possible—but be that as it may, the Senate Judiciary Committee unanimously reported out and recommended for passage Judge Scalia to become a Justice of the Supreme Court.

I have no doubt in my mind that when Judge Scalia is brought to the

floor of the Senate after we dispose of the confirmation process concerning Justice Rehnquist, I have no doubt in my mind that Judge Scalia will become Justice Scalia with a near unanimous vote.

He is a conservative. Sandra Day O'Connor is a conservative. Most of those 275 judges are conservatives. We have made an issue with respect to five of the lower court judges and one Supreme Court Justice appointee.

Now, why? Because the issue here is an issue having to do with credibility, an issue having to do with integrity.

Mr. DOLE. Will the Senator from Ohio yield?

Mr. METZENBAUM. For a question, yes.

Mr. DOLE. I do not quarrel with the statistics, but I wanted to just make the record complete and indicate that in the 4 years President Carter was President, I think this body confirmed 264 Federal judges. It has taken Ronald Reagan 6 years to catch up with the 4-year term of President Carter. And I would guess in most of those cases those were more liberal jurists.

I did vote against one, Judge Abner Mikva.

Mr. METZENBAUM. You have made my point, and that is that the U.S. Senate, whether it is dealing with liberals or conservatives or moderates, or Democrats or Republicans, has not voted on the basis of whether the appointee was a liberal or conservative.

I do not know about President Carter's appointees, whether they were liberals. But let us accept the fact that in the main they were Democrats and let us also accept the fact that most of them were confirmed without controversy.

Let me also make the point that the distinguished chairman of the Judiciary Committee led the opposition to the confirmation of Abe Fortas on the basis of his political philosophy—led the opposition on that basis and spoke to the issue for hours on end to the point where the appointment had to be taken down. There were not enough votes in order to invoke cloture.

But none of us, there is not a single person that I know who stood on the floor of the U.S. Senate and said, "We oppose Justice Rehnquist to become Chief Justice of the Supreme Court because he is too conservative."

Judge Scalia is every bit as conservative. We had testimony saying he is far more conservative than Justice Rehnquist. That is not the issue.

□ 1510

And when you talk about five witnesses saying one thing and seven witnesses saying another thing, that is not the issue either. We are not dealing with numbers. We are dealing with what people were saying. The seven witnesses were testifying concerning the fact that they did not know whether or not Mr. Rehnquist was involved in voter challenges and intimidating of voters; they did not know. They said it was not possible for them to know with certainty; they were not with him all day. The five witnesses said they saw, they identified him.

Again, I want to report that which I said the other day: That is not the issue—whether he did or did not. The issue is what did he say to the U.S. Senate in his confirmation process. We know what he said. He denied harassing. He denied intimidating. The issue has to do with his candor, with his integrity, with his truthfulness in 1971 and again in 1986. If there had been only one question concerning his credibility or his integrity, I know I would not be on the floor speaking for the second time in connection with this appointment. But no. When you look at the facts with respect to the Justice Jackson memo, it is not what he said. He had a right to have his opinion. It is what he said to the U.S. Senate in his confirmation process.

The evidence indicates clearly that he wrote the memo. He can say anything he wants. But any single human being who understands the English language can read that memo. It is in the Record. If it is not here in the Record I will now check that fact and be certain to put it in the Record before we go to a vote.

There is no argument. It is his memo. It is signed W.H.R., William H. Rehnquist. Right above his name, right above his signature, his initials, is the indication with respect to his position concerning Plessy against Ferguson indicating that case made good law. He had a right to say that.

When he spoke to the U.S. Senate in 1971 by affidavit, he told them that was not his position. He did a 100 percent reversal. That is bad enough. But when one of the members of our Judiciary Committee asked him what his position was he said, "I did not have a position"—did not have a position. Come now, does anybody really believe that?

The distinguished floor leader spoke a few minutes ago about the restrictive covenant. The issue there again is not the matter of the restrictive convenant and whether or not he bought a piece of property with a restrictive convenant in it—as a matter of fact, two pieces of property with restrictive convenants. That is not the issue.

The issue is that he told the U.S. Senate he did not know about it. He said he just learned about it a few days earlier when he read the FBI report.

What are the facts? The facts are that he was advised by two lawyers to take a look at the restrictive convenant. He did not tell us about that at the hearing. The only time he told the Judiciary Committee about that was after the Washington Legal Times spoke with the two attorneys, and they said, "Yes, indeed, we did advise them about the restrictive convenant."

What an unbelievable coincidence. The very day that the Legal Times publishes that information as to the lawyers having advised him on the facts, what then happens? It is on that day—not a day before, not a week after—that very day that it is published here in Washington, Justice Rehnquist writes a letter to the chairman of the committee and says, "In rummaging through my papers, I found that I did have letters from my legal counsel on that subject."

Then if that were not enough, this whole question of integrity, we have the ethical question, where the chairman of the American Bar Association Committee on Legal Ethics concludes that the conduct of the Justice of the Supreme Court who is to become the Chief Justice was unethical.

Other professors, 90 of them to be exact, conclude that the conduct of his was not ethical in the Laird against Tatum case. There has been much talk about the Laird against Tatum case. That is the case you will recollect where during the Nixon administration the military was involved in surveillance of civilians in this country to find out what they were doing in connection with their protests, much of which evolved around the Vietnam war. Justice Rehnquist tells the committee, no, he did very little on that. He responds to Senator LEAHY and then on another occasion to Senator MATHIAS that he knew very little about that subject. He had written one little memo or something, he said in answer to Senator LEAHY. Then more information comes out about his actual involvement and what he really did. Senator MATHIAS asks him a series of questions. What does he say? "I can't recollect."

"I do not recollect."

We are not talking about a situation where somebody is asking what did you do on October 20, 1946, at 8 p.m. Of course that is not the kind of thing we are talking about. We are talking about one of the most important issues that has occurred in this century concerning our Government's conduct, use of the military in order to spy upon civilians conducting themselves in peaceful activities and indicating their protests. This Government was founded on the basis that people had a right to speak out, and people had a right to have different opinions, and people had a right to express those opinions. Yes, people had a right to do those things without being spied upon.

Judge William Rehnquist, as a lawyer in the Department of Justice was totally involved, tells Senator MA-

THIAS he cannot remember. "I do not recollect." "I do not recollect." "I do not recollect." "I do not recollect."

Any of us who have practiced law know that lawyers oftentimes speak with those who are about to be witnesses in cases, and make it very clear to them that when you are on the witness stand, if you are in a sticky wicket, and the problem is great, that nobody, nobody can say to you, or tell you what is in your own head, and what your memory is. And "I cannot recollect" is the standard and traditional out that is used by so many witnesses.

It is not an appropriate procedure for lawyers, and certainly not an appropriate procedure for a Supreme Court Justice about to become a Chief Justice of the United States.

What does it say to the American people if we are going to confirm a man solely on a partisan basis because the President of the United States wants it? I say to my colleagues on the other side, I am waiting for one of you who is staunch enough, strong enough, and courageous enough to say to your President, enough is enough, Mr. President. Enough is enough. We will vote for your Manions, your Fitzwaters, and your Sessions and some of the others that you have sent us. That is bad enough. And we will support you, Mr. President, when you send us decent conservatives who have impeccable records. But that does not mean, Mr. President, that we have to stand in line and salute every time you ask us to do so. We will not go along with the Rehnquist nomination.

What brave soul is going to stand up and speak out on that subject? Is it possible that the Democrats on this side of the aisle are split on the issue and some think Rehnquist should be confirmed and some think he should not? That is probably as it should be. At least it indicates an independent judgment.

It certainly does not indicate a political posture.

On that side of the aisle I have yet to hear one courageous soul say, Mr. President, I have had enough. I cannot stomach the Rehnquist nomination.

No. Instead, I am willing to appoint someone to be Chief Justice of the United States notwithstanding I know that he will only serve to polarize that Court. He will only serve to bring to it a contentiousness that has not existed under the previous Chief Justice.

We are talking about a man who has an open and understood opposition and hostility to a basic constitutional value.

I would like to talk about some of those constitutional values because to me what is this Constitution all about if we are not prepared to stand up, defend it, and defend it at times when it is not easy to do so?

I remember so well when the Kefauver committee was conducting its hearings having to do with the gangs of this country. I remember so many persons who appeared before that committee, and said "I like the fifth amendment." I remember so many in this country wanted to change the Constitution, eliminate the fifth amendment because too many were hiding behind that cloak.

□ 1520

But the strength of this Nation relates to that Constitution and the fact that it is a strong Constitution, a Constitution for all the people of this country no matter what the circumstances are, a Constitution behind which, on some occasions, people can hide, but those constitutional values are more important than invading the Constitution itself.

I am not at all certain that this new Chief Justice if and when he is confirmed will have that same approach to defending the Constitution. The fact is that of all the persons qualified for the Supreme Court, the President has chosen one of those most hostile to basic individual rights.

When Justice Rehnquist was an Assistant Attorney General in the Justice Department, he drafted a constitutional amendment which would have immunized all but the most blatant racial school segregation.

This constitutional amendment if adopted would have nullified the Supreme Court decision in Brown against Board of Education. The amendment would have overruled Supreme Court decisions which required full desegregation. These Supreme Court decisions rejected desegregation plans which were adopted to avoid desegregation, and plans which had the effect of thwarting desegregation.

But the Rehnquist amendment was written to give both the North and the South the opportunity to maintain segregated schools.

According to the Rehnquist memo, a school board could set up an attendance plan that would keep its schools segregated even if the plan had been adopted to maintain segregation. The memo states:

> If the zoning plan adopted bears a reasonable relationship to education needs—if fair-minded school board members could have selected it for nonracial reasons—it is valid regardless of the intent with which a particular school board may have chosen it.

Let me repeat that. This is from Justice Rehnquist when he was in the Department of Justice. His memo would provide:

> If fair-minded school board members could have selected it for nonracial reasons, it is valid regardless of the intent with which a particular school board may have chosen it.

The Rehnquist amendment would have permitted a school board to zone its schools with the intent to keep them segregated. As long as the court could imagine a nonracial reason for the zoning plan, there would be no constitutional violation under the Rehnquist amendment. And the amendment would have permitted school boards to let students choose their schools. Assistant Attorney General Rehnquist would have let them choose even when the freedom-of-choice plan was adopted to thwart desegregation efforts.

Assistant Attorney General Rehnquist would let them choose even when the evidence showed that blacks had no choices because of violence and threats of violence. In other words, such a plan would be great, according to Justice Rehnquist, even if it were a sham.

The 14th amendment has long been controversial, but at the time Assistant Attorney General Rehnquist wrote his memo some things were very clear. It was clear then that the 14th amendment outlawed new and more sophisticated forms of discrimination. It was clear then that school boards would not be able to evade the mandate of Brown through blatant or disingenuous subterfuge. It was clear that after a history of deliberate segregation, the mere adoption of a paper policy of equality would not satisfy the 14th amendment.

It was clear then that only meaningful desegregation would satisfy the Constitution.

Our Justice Rehnquist then was working in the Department of Justice. That William Rehnquist wanted to undo these principles. Is that the kind of man that the people of this country can have confidence in that he would be fair to all people regardless of their color, their ethnic or national origin?

William Rehnquist as a lawyer wanted to turn back the hands of time to the era of Jim Crow and he wanted to do that in 1970.

But in all candor, while I am outraged by this memorandum, I do not think anyone is surprised at all.

A few days ago a spokesperson for the Justice Department was asked about the memo. He said, "I do not see much that is new in this."

Well, I must say that I agree with the Justice Department this time. There really is not much that is new in this. After all, it was law clerk Rehnquist who supported Plessy versus Ferguson when he wrote the Brown versus Board memo for Justice Jackson. And, after all, it was Phoenix lawyer Rehnquist who opposed the desegregation of the Phoenix schools, and, after all, it is Justice Rehnquist who dissents from every major decision which would make the Brown desegregation requirement a meaningful one.

How can we possibly, I say to my colleagues who are prepared to vote for this nomination, confirm someone to this post who has so consistently opposed equality under the Constitution?

This proposed constitutional amendment is just one more reason why Justice Rehnquist should not be confirmed as Chief Justice.

Now we have also learned that Justice Rehnquist authored in 1970 a memorandum on the equal rights amendment when he was an Assistant Attorney General. He did it for the Office of Legal Counsel. He was asked to summarize the objections to the adoption of the ERA. He responded in memorandums which show he had a very firm view that women should not be accorded equality under the Constitution.

I am not talking about this memo because he opposed the ERA. The issue is not whether he favored or opposed the ERA.

The issue is his views about basic protection women should have under the Constitution.

This memo shows that the Assistant Attorney General did not think the Constitution should accord males and females equal treatment. That was his view in 1970. It has been his view on the Court ever since.

What did Mr. Rehnquist object to? I will tell you. He was concerned that the age to marry might be equalized. He was worried that the age when men and women can begin work might be equalized. He was concerned that the entitlement of male and female children to parental support might be equalized. He was concerned that husbands and wives might have equal power to decide where the family would live.

He felt certain that the 14th amendment would not require this kind of equality, but he said that ERA might be interpreted to require it.

What kind of approach is this for the Chief Justice of the Supreme Court to somehow think that women are second-class citizens, young and old?

Assistant Attorney General Rehnquist said the majority of women did not want these kinds of changes, that those supporting ERA were equality fanatics.

Let me quote Mr. Justice Rehnquist at that time:

. . . But I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional difference between men and women in the family unit, and in some cases very probably a complete rejection of the women's traditionally different role in this regard.

What bothers me, what concerns me about this man, Mr. President, for whom so many are going to vote to become Chief Justice, is his outlook that constitutional equality is fanatical, that seeking legal equality means eliminating physical distinctions. That is an absurd way to characterize women's search for equal protection under the law.

How can the women of this country feel comfortable in knowing that the Chief Justice of the Supreme Court thinks that their desire for full equality is fanatical, thinks that there is something improper, inappropriate, in their seeking that kind of full equality?

I do not care whether he is for the ERA or against the ERA. That is not the issue. The issue is his attitude toward women in this country. He looks upon them as second-class citizens.

I frankly thought we had passed that point in our history a long time ago. But putting Justice Rehnquist on the Supreme Court as Chief Justice will be a throwback, will be a turning back of the clock to a time when some in this country were more superior than others; when those of certain races were more superior than those of other races; when men were more superior than women. Justice Rehnquist was pretty sure the equal protection clause did not require changes in this traditional role for women and he did not want an equal rights amendment which would change this tradition.

I respect his right to be opposed to the equal rights amendment. Every person has that right. I do not respect his right to think that women are inferior to men and, on that basis, to become the Chief Justice of the Supreme Court of the United States.

Justice Rehnquist wanted to be sure that women kept their place. He did not believe in the equality of women under the Constitution then, and his overwhelming rejection of constitutional equality claims shows he does not believe in it now as a Justice of the Supreme Court.

The fact is, this view is totally reflected in his approach to the Constitution. Women do not get a fair shake under Justice Rehnquist.

Virtually every claim of discrimination is rejected.

Under Justice Rehnquist's view of our Constitution, women are second-class citizens and there is nothing they can do about it.

Then, when you look at Justice Rehnquist's attitude toward individual rights, you arrive at the same conclusion that leads you to say, "Why are we confirming him to become Chief Justice of the United States? Do those who intend to vote for him really understand all the facts? Have they studied the record? Have they studied his positions?"

Let us face it, Mr. President. In 1971, Justice Rehnquist was appointed. Many feared that he would be insensitive and actually hostile to individual rights claims. Those worst fears have been realized. More than insensitive, his record shows a consistent indifference to the rights of the disadvantaged minorities and women. He has just been insensitive to the problems and the cases that have been brought by the disadvantaged, by minorities, by women.

Time and time again, he is on that side and in many instances, he is on that side as the sole dissenter.

Ten years ago, a Harvard professor summed up Justice Rehnquist's individual rights record. He stated that in a case involving a claim by an individual against the Government, Justice Rehnquist almost always sided with the Government.

Is that not odd, when you stop to think about it? Is it not odd that this great conservative would always be for that big government against the individual? But that is his record on the Court.

You have to arrive at the same conclusion that that distinguished Harvard professor arrived at 10 years ago when you look at the record today. The record shows that he gives the Constitution very limited application when it comes to the individual's rights. He gives the individual very little constitutional protection. In Justice Rehnquist's view, the Constitution does not protect the individual from big government.

When you look at his record in race discrimination cases, he rejects almost all claims. I can understand somebody coming down with a conclusion that way maybe 60-40, 55-45, even 70-30. But in Justice Rehnquist's case, any member of the minority in this case who looks at that record and has a case before the Supreme Court has to be very concerned as to whether he or she is going to get equal justice, because in race discrimination cases, Justice Rehnquist rejects almost all claims.

He dissents from major school desegregation decisions. There are few decisions where he finds race discrimination and when he does, it is in cases where the Court is unanimous.

You never find him standing up for the rights of the minority, the rights of the individual, the rights of the disadvantaged in one of his well-known dissents. In the few cases where he is on the side of those against whom there has been racial discrimination, those are cases where the decision has been unanimous.

In sex discrimination cases, you find the same pattern. He rejects almost all constitutional sex discrimination

cases. As a matter of fact, talking about civil rights cases, race discrimination, the NAACP Legal Defense Fund and the American Civil Liberties Union did an analysis of his decisions. When you read that analysis, there is only one conclusion: Justice Rehnquist is not fair. His justice is unbalanced when it comes to sex and racial discrimination cases.

When it comes to sex discrimination cases, the Federation of Women Lawyers and the National Organization for Women detail that record. I believe both of those analyses of the NAACP Legal Defense Fund and the ACLU, as well as the statement of the Federation of Women Lawyers and the National Organization for Women, have already been submitted for the RECORD and I shall not do so at this time.

Justice Rehnquist rejects all constitutional claims of prisoners and parolees. Neither the context nor the claim seems to matter. The prisoner or the parolee is guilty without coming before the Court.

He rejects almost all claims that the Government has violated the separation of church and state provisions of the Constitution. He takes extreme positions, too, on issues of individual rights.

He is the only Justice to say that the Government does not have to be neutral on religious issues. That decision was decided on a 6-3 basis, but he had a separate dissent in which he pointed out his view that the Government does not have to be neutral on religious issues.

□ 1540

Let me read what he said:

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means. . . .

That is the case of *Wallace. Jaffree*, 105 S. Ct. at page 2520, decided rather recently in 1985, with Justice Rehnquist dissenting.

Justice Rehnquist is the only Justice to say that the church can be given governmental power. That had to do with the right of a church to veto the issuance of liquor licenses, the right of a church to veto the issuance of a liquor license, but Justice Rehnquist felt that the church can be given governmental power.

He is the only Justice to say States can deny nonresident indigents medical care, in the case of Maricopa Hospital versus Maricopa County.

He is the only Justice to say that the free exercise clause does not apply to prisoners, in the case of Cruz versus Beto.

He is the only Justice to say that legal aliens can be barred from all civil service positions, in the case of Sugarman versus Dougall.

He is the only Justice to say that legal aliens can be barred from the professional engineering and notary public positions, in the case of Examining Board versus Flores De Otero and Bernal versus Fainter.

He is the only Justice to say that criminal trials can be closed to the public, in the case of Carter versus Kentucky.

He is the only Justice to say that permanent civil service workers may be terminated without notice or a hearing in the case of Cleveland versus Loudermill.

He is the only Justice to say that an ACLU Lawyer could be disciplined for telling a poor person that the ACLU gives free legal services, in the case of In Re Primus.

He is the only Justice to say that the IRS could give tax-exempt status to racially discriminatory private schools, in the case of Bob Jones University versus the United States.

We are talking about the record of a man whom we are asked to confirm as Chief Justice of the United States. It is a record of indifference to important individual rights. It is a record of indifference to the role of courts in the protection of individual rights.

Confirmation power must be used to uphold and strengthen our basic constitutional values. That is our obligation. That is the reason we are given the right to confirm members of the judiciary.

We undermine the importance of the individual and our constitutional system if we now confirm Justice Rehnquist to become Chief Justice of the United States.

We must consider the effect the person who holds this office will have on fundamental values. The selection of a Chief Justice is far too important to permit us to rubberstamp the President's choice. We must make our own judgment.

Justice Rehnquist is simply not the appropriate person to lead the Court. If we care at all about the importance of individual rights in this country, it is our duty, it is our obligation, it is our responsibility to oppose this nomination.

Mr. President: I ask unanimous consent that the following materials be made part of the RECORD:

First. A memorandum from Assistant Attorney General Rehnquist regarding the equal rights amendment.

Second. A letter of September 13, 1986, from the Society of American Law Teachers opposing the nomination of Justice Rehnquist.

Third. An updated list of 165 law professors who have signed a letter dated September 5, 1986, raising concerns about the nomination of Justice Rehnquist.

Fourth. A letter dated September 11, 1963, signed by 63 law professors, raising concerns about the participation of Justice Rehnquist in Laird versus Tatum.

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

MAY 4, 1970.

MEMORANDUM FOR THE HONORABLE LEONARD GARMENT, SPECIAL CONSULTANT TO THE PRESIDENT

Re: Proposed Equal Rights Amendment to the Constitution: Brief in Opposition

Brad Patterson advises me that you have already reviewed the memorandum for the Citizens Advisory Council on the Status of Women, prepared by Miss Mary Eastwood of my office, dealing with the proposed equal rights amendment.* I consider this memorandum an excellent brief in support of the adoption of the amendment. He suggested that I summarize objections to the adoption of the amendment, in order that both sides might be available to you. This I now do.

Summary

Under existing constitutional restrictions contained in the Fourteenth Amendment, women are presently in a position to successfully challenge any distinction in treatment between themselves and men which has no rational basis. Recent decisions of lower federal courts have included exclusion of women from juries and exclusion of them from public institutions of higher learning as falling within this catgegory. The proposed "equal rights amendment" is intended to virtually abolish all legal distinctions between men and women, leaving intact only laws punishing rape, laws providing maternity benefits, and separate rest rooms in public facilities.

I believe the basic policy objection that may be urged against the amendment is that its designed effect will not be to confer any benefits or privileges upon women, but instead to invalidate existing laws enacted on the theory that in some areas women were entitled to privileged and favorable treatment. It is highly dubious, in my mind, whether a great majority of American women, to say nothing of American men, if they knew that this were the main thrust of the "equal rights amendment", would support it. The consequences of a doctrinaire insistence upon rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it.

A second argument which may be urged against the amendment is that its language is so vague as to make it impossible to predict how the courts will apply it. Since its supporters rely for its content not upon the language itself, but upon a Senate report filed at one of the times it earlier passed the

*I have relied on Miss Eastwood's memorandum as a source of decided cases on the subject.

Senate, the question arises as to whether it might not be wiser to employ greater detail in drafting the amendment itself.

Existing state of law

Women received the right to vote on the same terms as men do by virtue of the Nineteenth Amendment to the Constitution. The equal protection clause of the Fourteenth Amendment has also led some courts recently to invalidate, las violative of that provision of the Fourteenth Amendment, laws which either permitted or required women to be treated differently than men. For example, a three-judge federal court in Alabama held that that state's law excluding women for jury service violated the Fourteenth Amendment. *Whits* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). A similar result, where a state trial court had excluded women jurors from the panel because testimony relating to cancer of male genital organs would be involved, was reached by the Court of Appeals for the Sixth Circuit in *Abbot* v. *Mines*. 411 F. 2d 353. Whereas only ten years ago the Supreme Court declined to hear a case in which a Texas state court had upheld the exclusion of women for Texas A & M, *Allred* v. *Heaton*, 364 U.S. 517 (1960), more recently lower federal courts in Connecticut and Virginia have indicated that female applicants to state institutions of higher learning must be treated on the same basis as male applicants are treated. A like result has been reached by the Supreme Court of Pennsylvania in *Commonwealth* v. *Daniel*, 430 Pennsylvania 642 (643 Atlantic 2d 400 (1968).

On the other hand, recent decisions of the federal courts indicate that *favorable* treatment for women, as opposed to men, in areas such as social security regulations relating to benefits, ineligibility for the draft, and restrictions on the hours of work for women, do not violate any constitutional provision. *Gruenwald* v. *Gardner*, 2d Cir., 591 (1968) (social security benefits); *United States* v. *St. Clair*, S.D. N.Y., 291 F. Supp. (1968) (draft eligibility; *Mengelkoch* v. *Industrial Welfare Commission*, C.D. Calif., 284 F. Supp. 950 (1968) (special restrictions on hours at work).

In other areas where differences of treatment accorded to women than to men are traditional, it seems doubtful whether under existing interpretation of the Constitution that these differences would be invalid. In many states, women may marry without parental consent at an earlier age than men; men may commence working at an earlier age than women without violation of the child labor statute; the parental obligation of support may be cut off with respect to daughters at an earlier age than it is to sons; the maximum age for juvenile court jurisdiction, as opposed to adult court jurisdiction, is frequently higher in the case of girls than of boys. The basis for sustaining such legal differentiation under the equal protection clause, of course, is that there is thought to be a rational basis in each case for treating women or girls differently than men or boys are treated.

The proposed equal rights amendment

The amendment contains the following language:

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.",

and would contain further language authorizing Congress and the states to enforce the amendment by appropriate legislation.

Substantive effect of proposed amendment

The intended effect of the amendment, as gleaned from Miss Eastwood's memorandum, would be to prohibit virtually all distinctions between men and women presently embodied in the law. It is undoubtedly intended to have a broader sweep than the provisions of the Nineteenth Amendment and the Fourteenth Amendment as presently interpreted, and is apparently intended to wipe out virtually all distinctions which have previously been thought to accord women a preferred status under the law. The only two distinctions recognized in the Senate report, to which the women's rights advocates turn to explain the meaning of the generalized language of the amendment itself, would be laws which by their terms could only apply to one sex (maternity benefits, prohibition of rape), and regulations based on the right of privacy "in our present culture" (separate rest room facilities in public buildings).

Assuming that the intent of the amendment were clear, and that it accomplished pretty much what the Senate report said it would accomplish, there is in my mind a rather serious policy question as to whether most people, or indeed most women, would desire to have these results accomplished. Do a majority of women wish to be deprived of special protection in hazardous occupations? Do a majority of women wish to see their preferential treatment under the Social Security Act taken away? Do a majority of women wish to be eligible for the military draft? Put in broader terms, do a majority of women really wish to have the only distinction between themselves and men be the preservation of separate rest rooms in public buildings?

Undoubtedly many of the supporters of the equal rights for women amendment have rationally and carefully considered these questions, and have answered them in the affirmative. But I cannot help thinking that there is also present somewhere within this movement a virtually fanatical desire to obscure not only legal differentiation between men and women, but insofar as possible, physical distinctions between the sexes. I think there are overtones of dislike and distaste for the traditional differences between men and women in the family unit, and in some cases very probably a complete rejection of the woman's traditionally different role in this regard.

One practical effect of the amendment deserves attention, as an example of the sort of unsettling effect that the rigid doctrine of equality might have in many fields. [Traditionally, the domicile of a married woman has been that of her husband, and if the husband decides to move from Boston to Chicago in order to take a different job, the wife is legally obligated to accompany him (as well as being obligated by virtue of traditionaly marriage vows and most religious teaching).] The law makes an exception in the case where at the time the husband moves, the wife has grounds for separation or divorce. [The reason for the rule which the courts have traditionally given is that someone in the family must be vested with the power of decision as to where the family will locate, and that by custom and tradition the husband is invested with this authority.] While it is quite true that any family reduced to putting things in terms of the legal rights of its members may be in bad shape, a change in the law will undoubtedly have an effect on custom and practice. If there is to be change, a rule which would at least be workable would be one which placed the power of decision in the wife, rather than the husband. [But the equal rights amendment apparently would leave both parties with the power to decide this question—with a result which could indeed, to paraphrase a famous English author, turn "holy wedlock" into "holy deadlock".]

While each individual is (or she) certainly free to choose whichever view of this subject he prefers, there is to me a rather serious question as to whether the administration ought to support a constitutional change which appears to be aimed primarily not at granting to women any tangible improvement in their situation—indeed, its result might be quite the opposite—but instead to the granting to women of a rigid, doctrinaire equality in all respects with men.

Legal effect of proposed amendment

Just what the amendment would accomplish is not at all clear. This is not necessarily a criticism of it, for the Constitution has previously been amended in language of broad generality, the precise meaning of which was probably known to few of those who drafted it or concurred in its adoption. Obvious examples are the various general clauses of the Fourteenth Amendment. However, conceding that a certain amount of vagueness may be required in enunciating broad constitutional principles, the language of the equal rights amendment, taken in the context in which it is presented, is cause for concern.

The language itself admits of any number of interpretations. A court would not be irrational, taking only the operative language, in saying that it was intended to do no more than restate the requirement of the equal protection clause of the Fourteenth Amendment in the special context of women's rights. This construction would mean that no distinction between men and women is lawful unless it has a rational basis in fact. While such language would result in invalidating some existing legal distinctions between men and women (primarily those referred to in the earlier part of this memorandum) as having already been struck down by lower federal courts, such a constuction would have the serious drawback of accomplishing nothing that the existing Fourteenth Amendment did not already accomplish. In addition, the Senate report suggests that a much broader sweep is intended. These two arguments make it reasonably certain that the courts would reject such a construction as being too narrow.

At the other extreme, it is possible that a court could conclude as a result of the enactment of this amendment that no legal distinction between men and women was permissible, regardless of circumstances. Such a construction would, of course, run squarely into the rather obvious fact that women *are* physically different from men; that women bear children, and men do not; and also into the language of the proposed Senate report which itself concedes that at least separate rest rooms would remain constitutionally valid. For these reasons, I think the courts would reject so sweeping a construction of the proposed amendment as this.

The virtue of both of the foregoing constructions of the amendment—the one narrow, requiring only a rational basis in fact to sustain a classification, and the other broad, permitting no classification whatsoever, is that either of them would be relatively easy to apply. Rejection of both of them for the reasons above stated leaves

one in a kind of murky middle ground, perhaps more sensible in many respects but nonetheless bringing with it great difficulties in knowing with any certainty what the amendment means.

One possible guide through the murk is the Senate report, containing the interpretation apparently desired by the proponents of the amendment. Summarizing the Senate report, difference in treatment between men's and women's property rights (dower, separate property in community property states, and the like), non-mandatory jury service, military service for women distinctions between the sexes as to domicile, alimony, child custody, and laws limiting employment of women in unusually strenuous or extra hazardous occupations would be unconstitutional. Absolute equality of access to educational facilities—presumably including West Point and Annapolis—would be required. Statutes punishing rape and prostitution would remain valid, and separate rest rooms in public facilities of course would be constitutionally permissible.

While it is not unusual to resort to legislative history in interpreting ambiguities of meaning in a statute, such resort is far less common in the case of constitutional amendments. The question that first arises is whether or not the courts would in fact do as the proponents seem to intend—treat the Senate report as a catalog of the changes which the amendment was designed to produce. The second question which arises is why, if this is the case, should not the amendment be revised to be made a good deal more specific, along the lines of the Senate report, in order to say that its supporters stated it is intended to say.

Federalism

Since the proposal is a constitutional amendment, there is no doubt that it may, consistent with the Constitution, accomplish the purpose for which it is designed, assuming that such purpose is clear from the language chosen. But I think that considerations of federalism to which the President and the Republican Party have been traditionally devoted may call for a somewhat less superficial inquiry than that. Since the states would play a part in the adoption of the proposed amendment, it would not be a case of the national government imposing its will on the state government. But the adoption of the amendment would nonetheless sharply restrict the power of the states, as well as of the national government, to engage in legislative adjustment and accommodation in what must surely be described as an area which does not lend itself to doctrinaire prescription. I believe one could feel that changes are desirable in the legal relationships between men and women and nonetheless feel that a rigid constitutional amendment such as this is not the way to seek those changes. If one were to feel that way, he would obviously also feel that the administration should not propose the amendment.

Conclusion

Justice Holmes once made the comment that it would take more than the Nineteenth Amendment to convince him that there was no difference between men and women. [I have the impression that a large number of the country's women, as well as almost all of the country's men, would like to see some of the laws based on physical differences constitutionally permissible, even though they share the desire of many women to do away with laws which irrationally differentiate in their treatment of men and women.] All of this can be accomplished under the existing language of the Fourteenth Amendment. The effort to go further and strike down all legal differentiation, rational or irrational, as a matter of constitutional law is one which should give serious pause. [The overall implication of the equal rights amendment is nothing less than the sharp reduction in importance of the family unit, which the eventual elimination of that unit by no means improbable.] It may be that the country is heading in this direction anyway, and that there is very little that the administration can do to stop it. But this surely does not mean that the administration ought to support a change which will in fact hasten the dissolution of the family.

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

SOCIETY OF AMERICAN LAW TEACHERS, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW,
Davis, CA, September 13, 1986.

MEMBERS OF THE U.S. SENATE,
Washington, DC.

I write on behalf of the Society of American Law Teachers (SALT) to oppose the nomination of William H. Rehnquist to become Chief Justice of the United States. The Society of American Law Teachers is a membership organization of individual law professors. We are unique among organizations in legal education because we represent the views of individual teachers, rather than those of our affiliated institutions. Our opposition reflects the unanimous opinion of the members of the Board of Governors at the end of an extensive internal debate.

We fully recognize the President's power to select a Chief Justice who shares his own political views. Our objection to this nomination does not stem from political opposition. Our views rest instead on two grounds. First, we have concluded that the serious questions of ethical impropriety arising from Justice Rehnquist's participation in *Laird* v. *Tatum* simply cannot be resolved in his favor. Secondly, we have grave reservations about his record of demonstrated hostility to the constitutional ideals of equality and individual rights.

We turn first to the question of integrity and ethics. We have found it difficult, to overlook the serious questions of credibility arising from the nominee's disturbing memory lapses concerning controverted matters of the gravest national importance. Our concern here rests not on a single occurrence, but rather on a cumulation. We find it difficult to avoid the conclusion that Justice Rehnquist has failed to meet the test of Canon 2 of the Code of Judicial Conduct which requires that he conduct "himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We have read the opinion letter of September 8, 1986 from Professor Geoffrey Hazard to Senator Charles Mathias, and the comprehensive analysis of Professor Floyd Feeney and Mr. Barry Mahoney. Professor Hazard notes that Justice Rehnquist "had a duty of order to the Senate in answering questions concerning *Laird* v. *Tatum* . . . (he) complied with (that) duty only if his statement is accepted that he had 'no recollection of any participation in the formulation of policy on the use of military to conduct surveillance.'" Professor Hazard observed that "whether that statement should be accepted is a matter of judgment." It is the judgment of the Society of American Law Teachers that this lapse cannot be accepted.

We are guided by our roles as teachers of the future lawyers who will serve the citizens of this country. We are concerned that the message we will send to the next generation of lawyers is one of cynicism for law. Our concern in this regard extends as well to members of the general public. Today the honesty and integrity of every lawyer is subject to doubt in the minds of many members of the public. We fear irreversible damage to public confidence in the integrity of the judicial branch if Justice Rehnquist is confirmed. The office of Chief Justice is unique in our constitutional government. Only 15 citizens have served this country in that capacity. The Chief Justice must embody the spirit of our highest aspirations for honest, impartial judicial conduct. Both our students and the general public will find much to confirm the cynicism about which we are concerned. We have come slowly, and painfully to the conclusion that the honesty and integrity of this high office will be seriously degraded if this nominee, is confirmed.

A second, and equally critical factor in our decision to recommend that you withhold your consent from this nomination, is our concern that the candidate has a consistent, demonstrated hostility to the constitutional values of equality. We base our view in this regard upon our assessment of his non-judicial conduct. The confirmation hearings revealed many things about the Justice's conduct before he joined the Court. We are disturbed by the contradictions of eyewitnesses concerning Justice Rehnquist's involvement in partisan challenges to minority voters. We are disturbed by the reports of memoranda prepared by the Justice while he was a law clerk and in a second instance, while he was an Assistant Attorney General in the Justice Department. In the first instance, he is reported to have stated the view that *Brown* v. *Board of Education* was wrongly decided. In the second instance, he is reported to have expressed views concerning the role of women in the family that are so extreme as to under cut our confidence in his fidelity to the constitutional ideal of equality.

For all of the reasons stated above, we urge you to withhold your consent, or in the alternative to return this nomination to the Judiciary Committee.

Sincerely,

ERMA COLEMAN JORDAN,
President.

TO THE SENATE OF THE UNITED STATES,
SEPTEMBER 5, 1986

We the undersigned members of the law teaching profession ask that the Senate of the United States weigh with especially solemn deliberation the nomination of Justice William Rehnquist as Chief Justice. We ask this for two reasons.

First, it will take a conscious effort to resist the tendency to accept as determinative the 13-5 vote of the Judiciary Committee. The unanimous vote of the same Committee in favor of Judge Scalia proves that the opposition to Justice Rehnquist was not, as has been asserted, based solely on politically or ideologically motivated grounds. Five votes against a sitting Justice is really reason for pause. The conscience-searching questions that Senator Leahy wrestled with are matters that every Senator must, in fidelity, decide upon alone in a quiet place

and time, away from the political arena. We ask therefore that each of you resist the political push and decide this most important appointment of all as a matter of individual conscience.

The second reason that we ask for this extraordinary personal effort from every single Senator, even those who voted favorably in Committee, is related to the first. As teachers we are troubled by a growing cynicism among our students, particularly with respect to ethics in government. Paradoxically, in the post-Watergate period, proof of statutory crime is becoming the standard by which we measure the highest officials of the land. This perception must be changed. If history and tradition are guides, the Senate and the Judiciary are the institutions that can best signal that change. In many respects then this very significant confirmation hearing has become a testing ground for the ethical standards of this nation.

The questions that have been raised about Chief Justice designate William Rehnquist are varied. Nevertheless there is a common and disturbing thread that runs through all of the matters that have been raised at the hearings. That common thread pertains to the integrity and ethical standards of the nominee. And taking the character measure of judicial candidates is the primary duty of the Senate under the Advice and Consent clause.

The doubts that have been expressed about Justice Rehnquist's fitness arise not only from the particular charges of improper behavior but also from the responses in each instance the nominee has made to the charges. These charges and the responses are summarized below.

(1) First there is the response to the charges of voter harassment in the Arizona elections. In his testimony at the recent hearings and after the first confirmation hearing Mr. Rehnquist claimed that he had not personally challenged a voter on literacy grounds and that in any event literacy challenges were then legal under Arizona law. But the testimony against him and his own admissions establish that he at least knew what was going on and participated in some manner in the strategy of challenging voters at the polling places. Such strategy was bound to and indeed did involve intimidation and delay, as witnesses testified. Nevertheless, to this day Justice Rehnquist sees little wrong with what took place there because no technical violation of the law had been proven. There is a question of moral obtuseness in this response that we ask our Senators to reflect upon as they consider the other charges that have been raised.

(2) With respect to the restrictive convenants it is not a matter of what he did or failed to do, but likewise a question of his response to the existence of such obnoxious clauses. One response he made was that the clauses were unenforcible, again revealing a lack of appreciation for the ethical and symbolic dimensions of law. But he also said that he did not know of the existence of these clauses, an explanation that was only plausible if he had left the reading of his deeds to his lawyers. After the hearings however, he turned over a letter from one of his lawyers in which the restrictive covenant language was explicitly drawn to Justice Rehnquist's attention. This seemed to refute the Justice's testimony that he had no prior knowledge of the offensive language, or worse, it suggested that he felt compelled to correct his testimony because one of his lawyers was unwilling to accept the implied blame for failing to address the question of the restrictive convenants. We ask our Senators to consider what this initial willingness to implicitly shift blame to his lawyers for failing to do anything about such covenants in the deeds says about the integrity of the nominee.

(3) This same willingness to shift blame for an embarassment or a misdeed is also possibly revealed in the manner in which Justice Rehnquist responded to the questions about the memorandum opinion he drafted while clerking for Justice Robert Jackson. Notwithstanding the fact that there is no historic evidence that Justice Jackson ever supported the separate but equal doctrine, Mr. Rehnquist intimated that Jackson was considering a dissent in the *Brown* case. Holding the views expressed in that memorandum opinion in the fifties is not nearly as bad as disowning them and implied assigning them to someone of whose reputation the nominee, as a former clerk, should be solicitous. We ask once more that our Senators consult their collective experience about human behavior and apply this to the pattern of responses the candidate has made to the various charges brought against him.

(4) There have been charges by Justice Rehnquist's brother-in-law of a breach of ethics in connection with a trust fund. Such charges would be the basis of a bar committee investigation if lodged against an ordinary attorney. So far there has been no response from Justice Rehnquist and to the best of our knowledge no investigation by an official body.

(5) Lastly, in the light of the foregoing, we ask our Senators to review in close detail the explicit charge of the failure of judicial ethics arising from the refusal of Justice Rehnquist to disqualify himself in the case of *Laird* v. *Tatum*. Perhaps this is the most significant matter because in this instance the response to an ethical demand is largely set forth in the words of Justice Rehnquist for all to read and fairly judge.

In a memorandum submitted to the Judiciary Committee Professor Askin of Rutgers Law School has emphasized one basis for questioning the judicial ethics of the nominee. That basis was that testimony before the Ervin Committee by then Assistant Attorney General Rehnquist revealed that he had knowledge of *or had formed an opinton about facts* that were in dispute in *Laird v. Tatum* and were depositive of one of the questions before the Court. This point is clearly made by Professor Askin and we simply ask every Senator to study Professor Askin's submission with care. But there are two other points that require less careful study and these points raise serious questions of intellectual honesty.

When the subject of the Army surveillance of civilians came up at Mr. Rehnquist's first confirmation hearings he said that it would be improper for him to comment on issues involving the surveillance investigation because of his "lawyer-client relationship" with the President and Attorney General. *Laird v. Tatum* dealt specifically with the subject of the Army surveillance of civilians yet Justice Rehnquist stated his relationship to the subject under review very differently in his recusal opinion. There he said "that my total lack of connection with . . . the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department." Although Mr. Rehnquist declined to testify before the Senate Committee, once on the Court he had no difficulty deciding a case that dealt with the very subject for which he had claimed an attorney-client privilege.

The same issue of intellectual honesty appeared even more plainly perhaps in another portion of his recusal opinion. Justice Rehnquist dismissed the applicablity of the Canons for "Standards of Judicial Conduct" by describing them as "not materially different from the standards enunciated in the [federal disqualification] statute." The statute, in pertinent part, required disqualification in any case where a justice "has a substantial interest, [or] has been of counsel or has been a material witness." The Canons, which were not set forth in the opinion, in pertinent part state:" A judge should disqualify himself in a proceeding in which *his impartiality might reasonably be questioned* including but not limited to instances where: (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy . . . ." We ask the Senators whether under any interpretation of language these two standards honestly can be described as "not materially different."

The matters that appear on the face of the *Laird v. Tatum* disqualification case as well as the responses to all the other matters previously summarized are not political attacks nor are they trivial. Each of them relate directly to the central issues of integrity, honesty and character. Whatever the outcome of the confirmation vote, Mr. Justice Rehnquist will sit on the Supreme Court. The ultimate question that each Senator must answer is whether Justice William Rehnquist, in the words of Canon 2 of the Code of Judicial Conduct of the American Bar Association, has conducted *"himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."* If a Senator entertains the slightest doubt on that question with respect to the nominee for the highest judicial post in the land we humbly ask that consent be withheld and the President be advised to submit the name of a candidate who unequivocally meets the demanding standards the people have the right to expect.

Arthur Berney, Boston College.

David Chambers, University of Michigan.

David Cobin, Marie Falinger, Howard Vogel, Mary Jane Morrison, Hamline University.

Michael Kindred, Ohio State University.

Grayford B. Gray, University of Tennessee.

Patrick Charles McGinley, West Virginia University.

William L. Andreen, Timothy Hoff, Jerome Hoffman, Wythe Holt, Gene Marsh, Norman Stein, Manning Warren, University of Alabama.

Mark Brodin, Kenneth Ernstoff, Zygmund Plater, Alexis Anderson, Paul Tremblay, Peter Donovan Mark Spiegel, Robert Cottrol, Robert Berry, Ruth Arlene Howe, Robert Smith, Boston College.

Rhonda Rivera, Ohio State University.

Mark Tushnet, Georgetown University.

Kurt Strasser, University of Connecticut.

Otis Cochran, University of Tennessee.

Peter Shane, University of Iowa.

Jerry Phillips, University of Tennessee.

Carrie Menkel-Meadow, Leon Letwin, University of California at Los Angeles.

Robert Steinfeld, Isabel Marcus, Errol Meidinger, State University of New York at Buffalo.

Debra Evenson, DePaul University.

Paul Chevigny, Chester L. Mirsky, Stephen Gillers, Sylvia Law, Peggy Davis, New York University.
Peter Bayer, University of Baltimore.
Elizabeth M. Schneider, Brooklyn Law School.
Paul Brietzke, Valparaiso University.
Charles E. Wilson, Ohio State University.
Richard Ottinger, Pace University.
Arthur Pinto, Mary Jo Exster, Neil Cohen, Brooklyn Law School.
Herman Schwartz, American University.
Peter Aron, George Washington University.
Alan Freeman, State University of New York at Buffalo.
Burt Wechsler, American University.
Nadine Taub, Barbara Stark, Robert Westreich, Edward Lloyd, Carlos Garcia, Jack Feinstein, Rutgers University.
William J. Quirk, University of South Carolina.
Stephen Dycus, Vermont Law School.
Bernadette Hartfield, Paul Milch, Nicholas Richter, Jodi English, Norman Townsend, Charles Marvin, Roy Sobelson, Kathryn Urbonya, Georgia State University.
Laura Macklin, Georgetown Law School.
Egon Guttman, American University.
Bailey Kuklin, Brooklyn Law School.
Ndiva Kofele-Kale, Tennessee.
Neil Gotanda, Western State University.
Liz Ryan Cole, Pamela Ryan, Ben Aliza, Vermont Law School.
David Hill, University of Chicago.
Harvey M. Johnson, Prakash Sinha, James J. Fishman, Gayle Westerman, Ralph Stein, Frank Bress, Stuart Madden, Merrill Sobie, Donald Dorenberg, Norman B. Lichtenstein, Pace Law School.
Susan Kovac, University of Tennessee.
Richard L. Abel, University of California at Los Angeles.
Phoebe Haddon, Temple Law School.
Vivian Wilson, Hastings Law School.
Stuart Filler, Bridgeport Law School.
Michael B. Mushlin, Seymour A. Casper, Pace Law School.
Erwin Chemerinsky, University of Southern California.
Dennis Lynch, Terrence J. Anderson, Kenneth M. Casebeer, Jeremy R. Paul, Joel Rogers, Irwin P. Stotzky, Mary I. Coombs, Richard Hyland, Richard M. Fischl, Robert E. Rosen, University of Miami.
Mark Lowenstein, University of Colorado.
Judith Kasper, Vermont Law School.
Eric Blumenson, Suffolk University.
Eva Nilsen, Boston University.
Arpiar G. Saunders, Jr., Franklin-Pierce Law Center.
Marc D. Greenbaum, Judith Keys, Gerard J. Clark, Robert P. Wasson, Jr., Stephen C. Hicks, Suffolk Law School.
Lawrence Schlam, Joel H. Swift, Northern Illinois University.
Jules Lobel, University of Pittsburgh.
Stefan Krieger, University of Chicago.
Nancy Rogan, Vermont Law School.
Barlow Burke, Edwin Hazen, Elliott Milstein, Ann Shattuck, American University.
Naira Soifer, University of Maine.
Ronald Collins, University of Puget Sound, in Tacoma, WA.
John Strait, University of Puget Sound.
Barbara Salken, Barbara Atwell, Carol Olson, Pace Law School.
Charles Carr, University of Buffalo.
Irene Scharf, Pierre Schlag, University of Puget Sound.
Ken Krelling, Vermont Law School.
Leonard Sharon, University of Maine.
Jennifer Schramm, University of Puget Sound.
Charles Shaffer, Eric Schneider, University of Baltimore.
Alan Zarky, University of Puget Sound.
Judith Resnik, University of Southern California.
Bernard V. Keenan, Victoria J. Dodd, Dwight Golann, Nancy E. Dowd, Joseph W. Glannon, Bernard Ortwein, Suffolk Law School.
Elizabeth Mensch, New York University at Buffalo.
John Brittain, University of Connecticut.
Roy Mersky, New York University.
Gary Palm, Dean, Chicago Law School.
Jonathan Case, Dean, Vermont Law School.
Robert Cole, University of California, Berkeley.
Michael Altman, Arizona State University.
Linda Lacecy, Taunya Banks, University of Tulsa.
Susan N. Herman, Marsha Garrison, Brooklyn Law School.
Andrew Silverman, University of Arizona.
John P. Morris, David Kader, Jane Aken, Arizona State University.

SEPTEMBER 11, 1986.

Hon. STROM THURMOND,
Chairman, Judiciary Committee, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: This letter concerns the memorandum entitled "An Analysis of the Public Records Concerning Justice Rehnquist's participation in *Laird v. Tatum,*" which was submitted to the Senate Judiciary Committee on September 5, 1986.

The memorandum is now being circulated among law teachers. The professors whose names appear on the attached sheets have indicated their belief that the issues raised by Justice Rehnquist's participation in *Laird v. Tatum* are of serious concern and should be investigated further by the Senate.

Yours respectfully,

FLOYD FEENEY,
Professor of Law, University of California, Davis.

BARRY MAHONEY,
Attorney, Denver, CO.

SEPTEMBER 11, 1986.

[List of law professors who have read the memorandum entitled "an analysis of the public records concerning Justice Rehnquist's participation in *Laird v. Tatum,*" and who believe it raises issues of very serious concern which should be fully investigated by the Senate.]

Edward J. Barrett, Jr., Florian Bartosic, University of California, Davis.
John Batt, University of Kentucky.
William C. Beaney, University of Denver.
Antonia Bernhard, University of California, Davis.
Donald Brodie, University of Oregon.
Carol Bruch, University of California, Davis.
Claudia Burton, Willamette Law School.
John Burkoff, University of Pittsburgh.
Joel Dobris, Harrison Dunning, Daniel Dykstra, University of California, Davis.
Howard Erlanger, University of Wisconsin.
Mary Louise Fellows, University of Iowa.
Ted Finman, University of Wisconsin.
John J. Flynn, Jefferson Fordham, University of Utah.
Daniel J. Freed, Yale Law School.
Marc Galanter, University of Wisconsin.
Alvin Goldman, University of Kentucky.
Joseph Goldstein, Yale University.
Gary Goodpaster, University of Wisconsin.
Kathy Graham, Willamette Law School.
Jack Greenberg, Columbia University.
Mary Jane Hamilton, University of California, Davis.
Frederick Hart, University of New Mexico.
Hendrik Hartog, University of Wisconsin.
William Hellerstein, Brooklyn Law School.
Stephen Herzberg, University of Wisconsin.
James Hogan, University of California, Davis.
James E. Jones, University of Wisconsin.
Emma Jordan, Friedrich Junger, University of California, Davis.
Leonard Kaplan, Peter Karten, University of Wisconsin.
Lewis Katz, Case-Western Reserve Law School.
Neil Komesar, University of Wisconsin.
Pierre Loiseaux, University of California, Davis.
Tracey MaCIin, University of Kentucky.
Scott Matheson, Jr., University of Utah.
Robert B. McKay, New York University.
Marygold Melli, University of Wisconsin.
Howard Messing, Nova Law School.
John Morris, University of Utah.
Ray Mirsky, University of Texas.
Rex Perschbacher, University of California, Davis.
Jane M. Picker, Cleveland State University.
John Poulos, University of California, Davis.
Walter Raushenbush, University of Wisconsin.
Frank Remington, University of Wisconsin.
Pamela Samuelson, University of Pittsburgh.
Harry I. Subin, New York University.
Jeffrey Stempel, Brooklyn Law School.
Lee Teitelbaum, University of Utah.
Joan Vogel, Rhonda Wasserman, University of Pittsburgh.
Joseph Thome, June Weiseberger, University of Wisconsin.
Martha West, University of California, Davis.
Alan F. Westin, Columbia University-Political Science.
William Whitford, University of Wisconsin.
Donald Winslow, University of Kentucky.
Richard Wydick, University of California, Davis.

□ 1540

Mr. MITCHELL. Mr. President, today we debate, tomorrow we vote on a nominee to the position of Chief Justice of the United States. The words in the title fairly describe the position: Chief Justice of the United States.

With the single exception of the Presidency, no public office in our Nation possesses greater honor and responsibility.

The Chief Justice of the United States is the symbol of the central fact of our system of government: That every American is bound by the rule of law, that every American should stand equal before the law.

That is an ideal frequently expressed but rarely attained in the history of human societies.

It is a measure of the boundless confidence and optimism of Americans that we have set for ourselves so high

a standard and that we struggle so resolutely to attain it, rising from each failure to an even greater effort.

In that effort our Supreme Court is central. Again and again in our history, the Court has reaffirmed and preserved the rule of law. In 1974, within the memory of every sitting Senator, the Court compelled the most powerful person on Earth, the President of the United States, to act against his will and against his interest. To the amazement of the world and the delight of Americans, we were again reassured that it is not empty rhetoric to say that, in America, everyone, even the President, must obey the law.

The immense power of American courts is not based upon force. Our courts have no independent means of enforcing their judgments. Their power rests ultimately upon public respect for their rulings.

Nowhere is that moral authority greater or more important than in the Supreme Court of the United States.

The Supreme Court is the final arbiter because it is the final forum.

It is also the forum to which the lower courts, the State courts and our citizens look for the judgments that inform and define our society.

When the Court construes the law, it not only chooses among competing rights and values. It helps shape those rights and the society which lives by those values.

On average, 4,000 cases are appealed to the Supreme Court each year. Of those 4,000 cases, the Court will hear and issue written decisions in roughly 150. The decisions it chooses not to make are often as significant as those it makes.

The choice of the Chief Justice is, therefore, a decision of immense significance.

The President has chosen to nominate Associate Justice William Rehnquist to this position.

Justice Rehnquist has served on the Supreme Court for 15 years. His opinions have been praised by some and criticized by others. His fluency has served to clarify some issues and it has served to obfuscate others, as fluency can do.

It is primarily on the basis of those opinions that the Senate should consider his elevation to Chief Justice of the United States.

Unfortunately, because of controversies involving the nominee's personal behavior, the hearings before the Judiciary Committee did not adequately focus on the most important part of his record.

Some of the controversies aired at the hearings are troubling.

But how many of us who have been long active in government could stand to have our every activity investigated, researched, and picked over, in some instances decades after the fact?

I doubt that a hearing process designed to elicit perfection can ever do more than demonstrate what all of us already know: Perfection does not exist in the human condition.

Therefore, while I am concerned about, ever troubled by some aspects of Justice Rehnquist's personal behavior, I do not find them individually, or in the aggregate, a sufficient basis to vote against him.

I refer specifically to the questions raised about Justice Rehnquist's candor, or lack of it, at the hearings on his original appointment to the Court and on his recent nomination to be Chief Justice; his purchase of homes through deeds which contained restrictive convenants; his refusal to withdraw from deciding a case in which he had previously been involved; and his participation in a voter challenge program in Phoenix in the early 1960's.

I will comment briefly on each of these aspects of his record.

It is clear from the record of both hearings that Justice Rehnquist was often vague and nonresponsive in his answers to questions. He also revealed a disturbing pattern of an occasionally clear ability to remember some events alongside a frequent inability to recall others. But there is no substantial evidence of false testimony.

That may be a sadly low standard, but the modern hearing process on Presidential nominations virtually invites such a course of action by witnesses. When a single contradiction or conflict in testimony may be pounced upon as evidence of disqualification, nominees are understandably reluctant to test their memories.

They do and will increasingly seek refuge in the safety of "I don't recall." That neither confirms nor denies the fact in question, leaving the witness flexibility if later evidence is convincing one way or the other.

Given the open hostility of some of his questioners and their previously stated determination to prevent his confirmation, it is not surprising that Justice Rehnquist was as wary and noncommittal as he could be.

I regret that. But it is a fact. Each of us must therefore decide whether his answers to questions were false, or otherwise of a nature to disqualify him from serving as Chief Justice. I conclude they were not.

The second aspect of Justice Rehnquist's behavior to be questioned was his purchase of two homes through deeds with racially restrictive covenants. Such covenants are unfortunately an all-to-common relic of past racism in our society. Justice Rehnquist first said he was unaware of the covenants, then said he did know of one of them when it was disclosed that his attorney had written him a letter calling the covenant too his attention. In any event, the circumstances are too common and the matter to insubstantial to disqualify Justice Rehnquist from serving as Chief Justice.

The refusal of Justice Rehnquist to recuse himself in the case of Laird versus Tatum, by contrast, seems to me to carry with it an implication of insensitivity to what is an important concern for a judge—the appearance of prejudgment, bias or unfairness.

In Laird versus Tatum, Justice Rehnquist in 1972 made the decision that, despite his earlier advocacy of the Nixon administration's position, which the plaintiffs in the case challenged, he was not precluded from sitting in judgment on the outcome of the case.

His response to a request for his abstention took the form of a memorandum in which he set forth his view of the law, and the duty he said it imposed on him to participate in deciding the case.

That memorandum attempted to draw parallels between the case at hand and the experience of other Justices who had been involved in legislative work upon whose constitutionality they later ruled. But it markedly did not contrast the distinction between generalized advocacy of a policy position and his substantial role in the military surveillance issue, where he had actively participated in developing the policy and had previously testified before Senator Ervin's Subcommittee on Constitutional Rights that the judgment in Laird versus Tatum should lie against the plaintiffs.

The law at the time required recusal in conflicts of interest or instances where a judge had been "of counsel" or so closely connected to a party in the proceedings that his participation in the decision might be affected.

Laird versus Tatum raises the question of when a judge should recuse himself in the absence of a personal financial interest but where there is a personal belief so strongly held that it may tend to override the constraints of the law.

Our laws are written and intended to safeguard against "well meaning men of zeal" as well as against potential tyrants. They are intended to withstand passions, and to hold fast to certain central values against the tides of political, ideological, and circumstantial demand.

When a judge is particularly enamored of his point of view and persuaded that it must prevail, self-restraint is particularly important. When a man's career has involved the spirited defense of a policy, as in this case, it is particularly important that the risk of prejudgment be weighed and the appearance of bias fully evaluated.

Justice Rehnquist clearly gave considerable thought to the case, as his lengthy memorandum of explanation demonstrates. I am not persuaded,

however, that he gave as much thought to the risk of bias as to the justification of his decision.

The law at the time left the determination to a justice's own opinion of his rightness to sit, although the American Bar Association's Code of Judicial Ethics also indicated that even an appearance of bias ought to argue for recusal. The ABA Code was virtually enacted as statutory law in 1973, in part because of Justice Rehnquist's refusal to abstain in Laird versus Tatum, and in the hearings, he indicated that if the same situation were covered by the current language of the law, he might not reach the same conclusion.

I find this episode troubling, because a judge, above others, ought to be impressed with the importance of abiding by the spirit as well as the literal letter of the law.

I conclude that Justice Rehnquist made a mistake, a serious error in judgment, and that he would act differently if he had to do it over again. But I do not believe that this one mistake is sufficient in itself, nor does it fit into a pattern of such errors, to disqualify him from serving as Chief Justice.

□ 1600

(Mr. STAFFORD assumed the chair.)

Mr. MITCHELL. Mr. President, the fourth and final area of alleged questionable behavior is Justice Rehnquist's participation in a voter challenge program in Phoenix in the 1960's. Phoenix at the time was a racially divided and politically conscious city in which both parties competed zealously.

The voter challenge project was clearly an effort by Republicans to reduce voting by blacks and Hispanics because of their presumed inclination to vote Democratic. It rested upon intimidation and represented a conscious effort to deny some citizens the right to vote.

Although not illegal at the time, it was deplorable. But there were parallel activities by Democrats in the city, whose busing of black and Hispanic voters to the polls late on election day was intended to keep the polls open, probably encouraged some illegal voting, and no doubt fed the fears of Republicans about illegal voting.

Much testimony was presented on the question of whether or not Mr. Rehnquist actually challenged voters. Even assuming he did, I would not find this a sufficient basis to disqualify him from serving as Chief Justice, if it were an isolated instance, or even one of a few instances, of hostility toward minorities and their rights, or if there were any evidence that his views on this issue had moderated over time.

But this was not an isolated instance. And there is no evidence that Justice Rehnquist's views have moderated at all.

Indeed, his participation in the voter challenge program, while not sufficient by itself to deny him confirmation, is one link in an unbroken chain of deeds and words demonstrating insensitively, even hostility, to the rights of women and minorities, especially black Americans.

Race has been the most deeply divisive issue in American history. For nearly the first century of our national existence, slavery and questions over its extension into an expanding America divided our people and wracked our society with violence. The Supreme Court's decision in the Dred Scott case was one of the most significant in our history. It led directly to the supreme American tragedy of the Civil War.

The result of that war and the passage in its aftermath of the 13th, 14th, and 15th amendments did not, as most Americans hoped and believed, resolve the race issue. Not until 1965, 100 years later, did Congress finally secure the right of black Americans to exercise the most fundamental right in a free society—the right to vote. To this very day, over a century later, race remains a thorn deep in the American side.

But whatever else the American people believe, it is clear that the overwhelming majority of them are convinced that ours should never again be a segregated society. There can be no turning back.

If nothing else, the welling up of emotion in this country against the continuance of apartheid in South Africa is a measure of that attitude.

Unfortunately, tragically, on that most fundamental question, it is clear that Justice Rehnquist does not share the sentiments of most of his fellow citizens.

From 1952 to 1986, by his words and his deeds, Justice Rehnquist has displayed total and unremitting hostility toward the rights of women and minorities, especially black Americans, and a deeply troubling willingness to condone, if not support, a segregated society.

Let me touch on some of the facts which have led me to this sad conclusion.

In 1896, in the case of Plessy versus Ferguson, the Supreme Court upheld racial segregation in public services—in this instance, railroad carriages—by establishing the principle of "separate but equal."

That principle prevailed until 1954 when, in its historic decision in Brown versus Board of Education, the Court reversed Plessy and prohibited segregation in the public schools. Other than the Civil War itself, the Brown decision is perhaps the most significant event in America's long and painful march toward social justice.

Robert Jackson was an Associate Justice of the Supreme Court at the time and William Rehnquist was his law clerk. During the Court's consideration of the Brown case, Rehnquist wrote a memorandum urging Justice Jackson to reaffirm Plessy and sustain the principle of segregated schools.

Rehnquist's later explanation, made after Jackson's death, that he was reflecting Justice Jackson's views, not his own, is wholly unconvincing. For one thing, Jackson voted to reverse Plessy. For another, there is nothing in Jackson's record to suggest that he supported segregated schools, while there is a great deal in Rehnquist's record to suggest that he did. And finally, others with intimate knowledge of Jackson have sharply disputed Rehnquist's explanation.

In a 1976 book entitled "Simple Justice," the author, Richard Kluger, makes it clear that Mr. Rehnquist's explanation is highly improbable. And Justice Jackson's long-time secretary said that Mr. Rehnquist's explanation was "incredible on its face" and "smeared the reputation of a great Justice."

The weight of evidence strongly supports the conclusion that in 1952, William Rehnquist believed in segregation in American public schools. His later actions confirm that conclusion.

In 1954, after the second Brown decision, Mr. Rehnquist wrote another memorandum urging that Justice Jackson upheld a Texas law which permitted only whites to vote in primary elections. He wrote:

> It is about time the Court faced the fact that white people in the south don't like the colored people; the constitution did not appoint the Court as a social watchdog to rear up every time private discrimination raises its admittedly ugly head.

In 1957, the citizens of Phoenix debated a plan to end racial segregation in their public schools. Mr. Rehnquist publicly opposed the plan.

In 1964, the Phoenix City Council adopted an ordinance prohibiting segregation in public accommodations. Mr. Rehnquist testified against the ordinance before its adoption, and later criticized it as a mistake.

During his service in the Justice Department in 1970, Mr. Rehnquist recommended a constitutional amendment as a response to court challenges to segregated school systems.

He wrote in one memo, "the arguments in favor of doing it by a constitutional amendment heavily predominate" over the enactment of a statute, because "what is validated by statute may likewise be invalidated by repeal. * * *"

In a second memo written 2 days later, he elaborated that the language of such an amendment ought to substitute the "classical due process 'rational connection' test for a test of

actual intent," reasoning that "it is simply not feasible to try, as an issue of fact in a law suit, the intent of a multi-member school board."

Mr. Rehnquist's subsequent career on the bench has not deviated one iota from that 1970 reasoning. Despite the finding by the Court that a discriminatory outcome is a sufficient basis to alter public policies, Justice Rehnquist has pursued the reasoning of Deputy Attorney General Rehnquist in a series of dissents demanding proof of intent to discriminate.

In a 1973 dissent in the Keyes case, which challenged de facto segregation in Denver, CO, schools, he wrote that the Constitution does not "require school boards to affirmatively undertake to achieve racial mixing in the schools." He has continued to insist that specific intent to discriminate be proved in virtually any vindication of 14th amendment rights, no matter how much the result may discriminate. Adoption of his view would hinder a constitutional right meaningless. Because a right which cannot be enforced is a right which does not exist.

□ 1610

Many Americans, including high public officials, held views similar to Mr. Rehnquist's in the 1950's and 1960's. As our society has changed, most of them have also changed. But not William Rehnquist. What is most striking and disturbing about him is the rigid consistency of his views on minorities, especially racial minorities, long after times have passed him and his views by.

One searches in vain for some evolution, some moderation of his views, some balancing action to his earlier embrace of segregation. Sadly, as Mr. Rehnquist himself confirmed, one finds nothing. In response to a question during the hearings, he said he could not recall a single civil rights statute that he had publicly supported.

Since joining the Supreme Court in 1971, Justice Rehnquist's opinions and other writings have confirmed his hard, unyielding hostile attitude toward minorities.

According to the Leadership Conference on Civil Rights, a detailed analysis of his record on the Court reveals that:

In the 83 cases in which Justice Rehnquist has participated in which there has been disagreement within the Court as to the interpretation or application of a 20th Century Civil Rights statute (more than a dozen laws covering employment, housing, voting, and federal assistance programs, and prohibiting discrimination on a variety of grounds), Justice Rehnquist has joined on 80 occasions the interpretation or application least favorable to minorities, women, the elderly or the disabled; in two more, his interpretation was less favorable than that adopted by the majority and in only one did he vote for the interpretation advanced by the civil rights plaintiffs.

These statutory cases are . . . particularly important to an understanding of Justice Rehnquist's approach to civil rights cases, for a number of reasons:

(a) because these cases involve the interpretation of statutes, a justice's constitutional philosophy should have little impact on his/her decision.

(b) Justice Rehnquist's asserted concern, in constitutional cases, to avoid if possible overriding the will of the majority as expressed in the challenged legislation should have no bearing in these cases where the Court is asked to enforce the majority will as expressed by Congress.

(c) before he became a justice, Mr. Rehnquist on several occasions expressed opposition to adopting civil rights measures.

One of these cases, Bob Jones University versus United States is especially troubling, both because it is so recent and because Justice Rehnquist's lone dissent seems so wrong, so strained, so demonstrative of his inability to give expression to any civil right.

In that dissent, Justice Rehnquist not only chose to ignore the very clear choices the Congress had made not to overturn the IRS efforts—and even he was forced to admit that congressional action on this score did not comport with this preferred point of view—he reached out to suggest that if Congress wanted to do so, it could and perhaps even ought to enact legislative language enshrining racist schools as a common law charity.

Speaking for the Court in Bob Jones, Chief Justice Warren Burger wrote:

There can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. Prior to 1954, public education in many places still was conducted under the pall of *Plessy* v. *Ferguson;* racial segregation in primary and secondary education prevailed in many parts of the country . . . The Court's decision in *Brown* v. *Board of Education* signaled an end to that era. Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following *Brown* v. *Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

That is the end of the quotation by Chief Justice Burger who, when he wrote those words, wrote for every other Justice of the Supreme Court, except one, except for Justice Rehnquist.

And Chief Justice Burger wrote for more than just the Supreme Court. The overwhelming majority of the American people, the overwhelming majority of the Congress, including members of both parties, all agree that racial discrimination in education violates a most fundamental national policy.

Justice Rehnquist alone does not join this view, nor share the view of Justice Burger and the other members of the Court. Rather than moderating over time, his judgment has, if anything, hardened.

To those who say that Justice Rehnquist's support for segregation in the 1950's and the 1960's is a thing of the past, the Bob Jones case stands as an effective response. That decision came in the 1980's, a dozen years after he joined the Supreme Court.

The Judiciary Committee hearings focused heavily on Mr. Rehnquist's role in the voter challenge program in Phoenix in the 1960's, to which I have already referred. To me, the significance of these events lies primarily in their confirmation of his attitude toward black and other minority Americans.

Standing alone, his participation in this effort is insufficient to deny him the position of Chief Justice, even if one accepts the version of events most adverse to him. But as another link in an unbroken chain of hostility toward minorities, his participation is compelling evidence, especially when what was at stake was the fundamental right in a free society—the right to vote.

On September 8, 1986, the American Civil Liberties Union, which takes no position respecting the confirmation process, released a detailed report on the civil liberties record of Justice William Rehnquist.

I would like now to quote from the summary contained in that report:

Two propositions are central to Justice Rehnquist's civil liberties record and the degree to which his views differ from those of every Justice with whom he has served on the Court.

First, he believes that it is far worse to hold a statute unconstitutional than to deny an individual his/her civil rights. Second, he believes that the Bill of Rights as applied to the states prevents them from encroaching on the rights of individuals only when the state action is "irrational."

In Justice Rehnquist's opinion, the primary responsibility of the Supreme Court is to protect the freedom of action of the states against the action of the federal government and the claims of rights by individual citizens. In interpreting federal legislation or actions of the federal courts which affect the powers of the states, he interprets the constitution so as to preserve state autonomy. In dealing with individual liberty, on the other hand, he does not believe that the courts should go beyond the literal words of the Constitution or the original intentions of the Framers.

Thus, he rejects the view that the Supreme Court has a special obligation to defend individual liberty and rejects the position, often expressed in the opinions of the Court, that the Bill of the Rights as a whole, and the First Amendment in particular, have a favored place in the Constitutional scheme.

This approach to the Constitution—viewing it as the creation of the majority whose primary objective was to preserve the power of the States—also determines Justice Rehnquist's view of the Civil War Amendments. Every other sitting Justice has come to accept the position that the Fourteenth Amendment "incorporates" the major provisions of the Bill of Rights and therefore requires the states to observe these limits on governmental action to the same degree that the federal government is limited. Justice Rehnquist, in marked contrast, views the civil War Amendments as having only very limited Applicability. Writing on a clean slate, Justice Rehnquist would reject the doctrine of incorporation entirely and would permit the states to restrict the liberty of their citizens within limits prescribed by their state constitutions and those few rights in the federal constitution that apply explicitly to the states. Justice Rehnquist mentions this position only in passing in his opinions, and focuses instead on the very narrow reading that he would give to the applicability of the Bill of Rights to the states.

The civil liberties record of Justice Rehnquist is most succinctly summarized in his opinion of how a justice should weigh the relative harms of denying a person rights under the Constitution and striking down a legislative act in Furman versus Georgia:

An error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chose legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

That is the end of the quotation of Justice Rehnquist. I now return to the Civil Liberties Union summary.

To the extent that the Bill of Rights and the Civil War Amendments were designed precisely to limit the popular will when it impinges on individual rights, Justice Rehnquist's view is inconsistent with the functional purpose of the Bill of Rights and the generally accepted role of the federal courts in enforcing it.

Some in this debate have urged that Senators not weight ideology or philosophy when considering judicial nominations. But nowhere in the Constitution or in our laws or in our tradition are either the President or the Senate prohibited from considering philosophy or ideology. The President plainly and openly does so. Any Senator may, if he or she chooses, do so as well.

The question itself involves a kind of situational ethics which brings out the worst in both sides. When a liberal like Abe Fortas was nominated for Chief Justice, conservatives argued that ideology must be considered while liberals said it should not be. Now that the conservative Justice Rehnquist is nominated, their positions on the question have been reversed, thus undermining the credibility of both sides.

For me the decisive standards for us to consider was set by Justice Rehnquist himself, when in response to a question by Senator SIMON at the recent hearings he said:

• • • Have I fairly construed the constitution in my 15 years as Associate Justice?

To answer that question one must necessarily examine the Justice's view of the Constitution, the Court, and their roles in our society.

We must inquire into his philosophy, study his judicial decisions, and search the underlying premises he brings to the Court.

Nobody denies, least of all Justice Rehnquist himself, that he is a man of strongly held opinions about the proper role of Government and about the undesirability of nonelected judges arrogating to themselves powers which are properly within the province of the popularly elected branches of Government.

Such opinions represent no bar to confirmation. No sensible person would claim that a nominee to any court ought to be so free of opinions as to present a blank slate.

All the judges on the Court have ideas, opinions, philosophies and predispositions, just like everyone else. Nor is the document they are sworn to uphold a mathematically precise blueprint which need only be read for the meaning to become clear.

Constitutional phrases such as "due process of law" and "equal treatment under law" have no innate content. Content derives from existing circumstances, judicial precedent, traditional practice, and the philosophy of the individuals construing the words. Constitutional precision is reserved for relatively trivial matters—like the minimum age of the President.

Judges can no more avoid importing their beliefs and priorities into the Constitution's general commands than they can avoid thinking. So the argument that we cannot examine or take into account a nominee's philosphy seems to be a way of saying we cannot take anything at all into account.

As a former Federal judge, I am acutely conscious of the importance of preserving both the reality and the appearance of independence on the part of the judiciary. Judges ought not be required to advise in advance what judgments they may reach; nor should they be held to account for opinions they have delivered.

Under our system, the independence is secured by lifetime tenure and constitutional proscriptions against reducing judges' salaries. Judges are immunized against retribution for their actions on the bench.

But neither Justice Rehnquist's independence nor his future integrity are compromised by a debate over his work on the Court. Indeed, it is hard to see what could be more proper than to judge his fitness for the prospective post by the qualities he has exhibited in his current post.

On the Court, Justice Rehnquist has consistently pursued the primary goal he sees for the Constitution: The goal of preserving the political institutions which serve to define and establish majority rule.

In describing his view of the relative role of the judiciary and the legislatures, Justice Rehnquist has rejected the idea of a living Constitution—which is to say a constitutional interpretation that changes as times and circumstances change.

In contesting that notion as an "end run around popular government," Justice Rehnquist concludes that the Framers of the Constitution did not intend the Constitution itself to suggest answers to the problems their descendents would face. He contends that the limited view of the Founders was that the legislature and executive were intended to fulfill that role, not the language of the Constitution.

Last month, Justice Powell, a Republican, a conservative appointed by President Nixon, told the American Bar Association that the Supreme Court "has well discharged its responsibilities to safeguard the liberties of the people."

The view of the Court's role and responsibility is shared by all but one of the other Justices of the Court, and by most Americans. It is one of the bases of the extraordinary regard in which the Supreme Court is held by our people.

The only Justice who does not share that view is William Rehnquist.

He views the Court's role as being one of preserving the framework within which the articles of the Constitution can be used to sustain majority rule, but in which the amendments to the Constitution—most notably the first 10 which make up what we know as the Bill of Rights—do not figure prominently.

In other words, he seems to believe that it is the Court's role to see to it that the mechanical functions of the governmental branches perform as they are supposed to—hence the enormous deference to legislatures, especially State legislatures—but that the purpose for which this machinery has been erected is beyond the scope of the Court's authority.

To quote him directly:

The role of the judiciary is to police the structure of government set out in the Constitution to ensure that no branch or level of government exceeds its authority. The judiciary should not interfere with the majoritarian process of decision-making on substantive issues. • • • It is only success within the majoritarian process that can give substantive values legitimacy. ["The

Notion of a Living Constitution", 54 Texas Law Review (May, 1976)]

□ 1630

One problem with this formulation is that it presupposes that the structures through which the majority speaks give each individual an equal voice. But we know for a fact that this was not historically true for blacks and remains only formalistically true today for the poorly educated and economicaliy disadvantaged. And, of course, Justice Rehnquist's view ignores the fact that the Bill of Rights specifically withdraws certain areas from the majoritarian process, and that it has been the historic role of the Federal courts, particularly the Supreme Court, to protect those minority rights, however strong or passionate the attitudes of the majority of the time.

There are some rights that every American holds that are not subject to majority will. There are some rights that every American holds that will be held inallenable, cannot be challenged, cannot be overridden, no matter how many votes are cast the opposite way. It is a truth that Justice Rehnquist's entire record overlooks and ignores.

Justice Rehnquist's formulation seems to set up a social ideal based on competition for influence and success in propounding a point of view. If no moral values can be ascertained except those that a legislature enacts, then the ultimate value must be numerical.

Fifty-one percent of anything is good and less than 50 percent of anything else is bad.

I do not regard this as an acceptable point of view for the Chief Justice of the United States, and in any event, it is not what the Constitution says.

Justice Rehnquist regards the Bill of Rights as a series of limitations placed on the branches of Government, but which—

Were not themselves designed to solve the problems of the future, but were instead designed to make certain that the constituent branches, when they attempted to solve those [future] problems, should not transgress those fundamental limitations. [Ibid. P. 26].

No more effective way to drain meaning from the Constitution has been devised. For if the Bill of Rights, the first 10 amendments, the heart of the liberty of Americans, must be read only as an eighteenth-century political compromise designed to allay fears that the new central Government would intervene in the States' existing rights, then virtually our entire judicial history must be disregarded as a mammoth misunderstanding.

Justice Rehnquist's record mirrors that belief. In Buckley versus Valeo (1976), Justice Rehnquist wrote:

The limits imposed by the First and Fourteenth amendments on governmental action may vary in their stringency depending on the capacity in which the government is acting. * * * I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the states by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech * * * that the latter incorporates.

In a 1980 speech, noting that according to an opinion poll, 70 percent of the public supported repealing the Bill of Rights, he contended that while that might be "unwise," he say nothing to "make this an illegal, an immoral, or an improper act."

I disagree. Repealing the Bill of Rights would not only be unwise. It would be immoral and improper for our society.

But even when the question of Justice Rehnquist's view of the Bill of Rights is set aside, his claimed deference to majority opinion as expressed in statutory law does not lead him to defer to that majority, acting through their elected representatives in Congress, when the subject is civil rights.

As I earlier stated, since 1971 the Supreme Court has disagreed, to some extent, on the application of Federal civil rights statutes in 83 specific cases. According to Justice Rehnquist's own frequently expressed standards, such statutes—the civil rights statutes—embody the majority will of the people through their legislature, and should only be set aside under constitutional compulsion.

Yet in spite of his repeated verbal deference to the judgments of the majority as expressed in statutory law, in 80 of those 83 civil rights cases, Justice Rehnquist joined in or wrote the dissenting opinion which most severely curtailed the exercise of the legislative majority's powers.

In other words, his view is that we must defer to the will of the majority as expressed by legislative action—except when civil rights are involved.

This unwillingness, indeed this virtual inability to ever support the existence of civil rights, even when it causes him to contradict his most cherished principle of the proper role of the Court, is the most distressing and least defensible aspect of Justice Rehnquist's record.

It is beyond dispute that Justice Rehnquist has a brilliant mind. It is equally beyond dispute that, as to civil rights, it is a closed mind.

A century after the enactment of the Twenty-fourth amendment, which reads: "* * * nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person * * * the equal protection of the laws.", Justice Rehnquist limits the reach of the amendment to instances of racial discrimination alone, and even then, only when such discrimination is the official policy of a State.

In all other instances, whether they involved women, the disabled, the elderly or any other group disadvantaged in our society, Justice Rehnquist believes, as he wrote in Weber versus Aetna Casualty & Surety Co. (1972), that—

The Equal Protection Clause of the Fourteenth Amendment requires neither that the state enactment be "logical" nor that they be "just" in the common meanings of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved.

To support that conclusion, Justice Rehnquist has reached back to an 1872 opinion which said:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.

But while he acknowledged that this prediction had been disproved by over 100 years of judgments, he rejected that century of jurisprudence in favor of his own preference for the 1872 prediction.

Such a preference is not illegitimate in itself. But unless we turn the history of the country on its head, we cannot conclude that all prior decisions are equally relevant. Neither Dred Scott nor Plessy versus Ferguson today commands either adherence or defense.

The 1872 cases to which Justice Rehnquist referred were the first in which the Court considered the claim that the 14th amendment imposes any but the most minimal constraints on the States.

It is not surprising that that Court responded to those claims in a narrow way. The full extent of the First Amendment was not determined in its first test before the Court.

But that does not discredit the concept of a living Constitution, the concept of an evolving standard of judicial interpretation. Indeed, American history is to the contrary. The framers did not envisage the inclusion of women or slaves in the ranks of those with suffrage. The barons who forced Magna Carta upon King John seven centuries ago never thought it would or should protect ordinary peasants. Yet who today in 20th century America would suggest that peasants are without rights, who would defend slavery, who would exclude women from the vote?

The attempt to place the dead hand of the past on our efforts to cope with comtemporary problems finds little serious support now, or even in that same past.

□ 1640

Justice Marshall's claim that a constitution must be "designed to approach immortality as nearly as human institutions can approach it" seems to me a closer and more accurate reflection of the views of the Founders, with whom he was contemperaneous, than the narrow view of

Justice Rehnquist, that justice and liberty can only reach "constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . ." [Paul versus Davis (1976)].

A persistent effort to import other values—numerical majorities, popular opinion, traditional preference—over those embodied in the Constitution remains a hallmark of Justice Rehnquist's jurisprudence.

Whether his conclusions spring from his historical understanding or his belief that no value exists except as it gains some kind of "generalized moral righteous or goodness . . . because [it has] been enacted into positive law" [ibid. p. 26], I believe his view does not represent either contemporary understanding or the original intent of the Founders of our Constitution.

The Constitution displays no overt preference for one form of economic arrangement over another. It does not explicitly say that the due process of law must require proof of guilt beyond a reasonable doubt. The Constitution contains no ban on child labor nor a preferred role for the single-earner family.

But to infer from its broad commandments that it is a value-free document void of any prescriptive intent is a leap of faith, not logic.

The Constitution is not limited to establishing procedures by which we may reach consensual agreements about economic arrangements, social policy, and labor law. It embodies profoundly value-laden preferences for certain kinds of human liberties and is silent about others.

The Constitution prefers democracy to autocracy and theocracy. It withdraws from the majority the power to alter the conditions under which the minority may preserve itself. It balances every grant of authority with a countervailing power lodged elsewhere. It exists against an explicitly acknowledged context, set forth in the Ninth Amendment, of inherent human rights held by every American.

And by its demanding terms for amendment, the Constitution at least implicitly lays a claim for its system of values on the future.

That set of values has been accepted by two centuries of American generations and continues as a living reality today.

When Justice Rehnquist asks:

> How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from the popular will, to declare invalid laws duly enacted by the popular branches of government?" [*Furman* v. *Georgia* (1972)]

He is framing one of the enduring questions posed by our system.

But when he answers that "human error on the part of the judiciary * * * wrongfully depriving the individual of rights secured him by the Constitution" [ibid.] is worse than an error which mistakenly sustains the individual's claim, he parts company with me and with the historic and the contemporary understanding of the function and purpose of the constitutional system.

I conclude that Justice Rehnquist is so totally hostile to the rights of women and minorities, that his mind is so closed on the issues of race, that he does not sufficiently share the common recognition of the Supreme Court and the Constitution and their roles in our system to serve as Chief Justice of the United States. I will, accordingly, vote against his confirmation.

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

Mr. MITCHELL. I yield the floor.

Mr. KENNEDY. I was wondering if the Senator would yield for a question?

Mr. MITCHELL. Yes, I will, Mr. President.

Mr. KENNEDY. Mr. President, during the excellent statement of the Senator from Maine, he referred to the issues raised in the Laird versus Tatum case, in which Justice Rehnquist, who was, in 1969 serving in the Office of Legal Counsel, drafted a memorandum dealing with the army surveillance of civilians. That memorandum has been examined by the members of the Committee on the Judiciary as a result of an agreement that was worked out with Senator LAXALT and the Justice Department. We later learned that it appeared in the public record in 1974. In 1974, Mr. Rehnquist appeared before Senator Ervin's subcommittee Senator Ervin asked then-Assistant Attorney General Rehnquist about his views about the Government surveillance policy for military surveillance of civilians. In the first round of questions, Mr. Rehnquist commented on his own basic view about first amendment rights and was quite circumspect about whether the activity was constitutional or not constitutional. He certainly gave the impression that he believed that the actions of the military and the FBI during the antiwar demonstrations did not violate the first amendment rights or chill first amendment rights by demonstrators.

Then, in the second round of questions, Senator Ervin asked him specifically about the Laird versus Tatum case and Mr. Rehnquist indicated that he did not believe that Mr. Tatum had a justiciable right to raise this matter in the courts. Tatum motion to dismiss prevailed in the lower Federal courts against the Government's and then the matter came before the Supreme Court.

Justice Rehnquist and the Laird versus Tatum case got to the Supreme Court together. Justice Rehnquist ruled in favor of Mr. Laird and cast a deciding vote which dismissed the case.

I know the Senator is familiar with the fact that it was after the decision was issued that the question of recusal was raised by the respondent.

In response to the motion for recusal Justice Rehnquist issued a memorandum in which he said he thought he was under a duty to sit.

I know the Senator from Maine is familiar with the letter from Professor Hazard commenting on the judicial ethics involved in that situation. He found it incomprehensible that Justice Rehnquist could possibly have found a rationale for his sitting on that case. I have in my hand a letter from the Society of American Law Teachers, a distinguished organization, that reached the same conclusion.

I ask unanimous consent that this letter to the Members of the U.S. Senate be printed in the appropriate place not to interfere with this discussion.

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

SOCIETY OF AMERICAN LAW TEACHERS,
Davis, CA, September 13, 1986.

Members of the U.S. Senate,
Washington, DC.

I write on behalf of the Society of American Law Teachers (SALT) to oppose the nomination of William H. Rehnquist to become Chief Justice of the United States. The Society of American Law Teachers is a membership organization of individual law professors. We are unique among organizations in legal education because we represent the views of individual teachers, rather than those of our affiliated institutions. Our opposition reflects the unanimous opinion of the members of the Board of Governors at the end of an extensive internal debate.

We fully recognize the President's power to select a Chief Justice who shares his own political views. Our objection to this nomination does not stem from political opposition. Our views rest instead on two grounds. First, we have concluded that the serious questions of ethical impropriety arising from Justice Rehnquist's participation in *Laird* v. *Tatum* simply cannot be resolved in his favor. Secondly, we have grave reservations about his record of demonstrated hostility to the constitutional ideals of equality and individual rights.

We turn first to the question of integrity and ethics. We have found it difficult, to overlook the serious questions of credibility arising from the nominee's disturbing memory lapses concerning controverted matters of the gravest national importance. Our concern here rests not on a single occurrence, but rather on a cumulation. We find it difficult to avoid the conclusion that Justice Rehnquist has failed to meet the test of Canon 2 of the Code of Judicial Conduct which requires that he conduct "himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." We have read the opinion letter of September 8, 1986 from Professor Geoffrey Hazard to Senator Charles Mathias, and the comprehensive analysis of Professor Floyd Feeney and Mr. Barry Mahoney. Professor Hazard notes that Justice Rehnquist "had a duty of

candor to the Senate in answering questions concerning *Laird* v. *Tatum* * * * (he) complied with (that) duty only if his statement is accepted that he had 'no recollection of any participation in the formulation of policy on the use of military to conduct surveillance.'" Professor Hazard observed that "whether that statement should be accepted is a matter of judgment." It is the judgment of the Society of American Law Teachers that this lapse *cannot be accepted.*

We are guided by our roles as teachers of the future lawyers who will serve the citizens of this country. We are concerned that the message we will send to the next generation of lawyers is one of cynicism for law. Our concern in this regard extends as well to members of the general public. Today the honesty and integrity of every lawyer is subject to doubt in the minds of many members of the public. We fear irreversible damage to public confidence in the integrity of the judicial branch if Justice Rehnquist is confirmed. The office of Chief Justice is unique in our constitutional government. Only 15 citizens have served this country in that capacity. The Chief Justice must embody the spirit of our highest aspirations for honest, impartial judicial conduct. Both our students and the general public will find much to confirm the cynicism about which we are concerned. We have come slowly, and painfully to the conclusion that the honesty and integrity of this high office will be seriously degraded if this nominee is confirmed.

A second, and equally critical factor in our decision to recommend that you withhold your consent from this nomination, is our concern that the candidate has a consistent, demonstrated hostility to the constitutional values of equality. We base our view in this regard upon our assessment of his non-judicial conduct. The confirmation hearings revealed many things about the Justice's conduct before he joined the Court. We are disturbed by the contradictions of eyewitnesses concerning Justice Rehnquist's involvement in partisan challenges to minority voters. We are disturbed by the reports of memoranda prepared by the Justice while he was a law clerk and in a second instance, while he was an Assistant Attorney General in the Justice Department. In the first instance, he is reported to have stated the view that *Brown* v. *Board of Education* was wrongly decided. In the second instance, he is reported to have expressed views concerning the role of women in the family that are so extreme as to undercut our confidence in his fidelity to the constitutional ideal of equality.

For all of the reasons stated above, we urge you to withhold your consent, or in the alternative to return this nomination to the Judiciary Committee.

Sincerely,

EMMA COLEMAN JORDAN,
President.

Mr. KENNEDY. The Senator from Maine is a former judge—and I think perhaps no one else in this body would bring to this particular issue the kind of background and experience that the Senator from Maine can bring. I am wondering whether he feels that the decision by Mr. Rehnquist to sit in this case, after he expressed an opinion that the case was without merit, was a proper decision. I wonder if the Senator from Maine were a plaintiff in that particular case and he was sitting in court and saw that one of the judges before him had made a statement at a congressional hearing saying he did not have a case, whether he would feel he was going to get fair and equal justice in that particular court.

Mr. MITCHELL. Mr. President, I think it goes without saying that the plaintiff in that case must have felt that he would not receive fair and equal justice. If I may, with the Senator's permission, read a couple of sentences which I read during my remarks and this will amplify them. After recounting at some length the Laird versus Tatum circumstances, I said:

I find this episode troubling, because a judge, above others, ought to be impressed with the importance of abiding by the spirit as well as the literal letter of the law.

I conclude that Justice Rehnquist made a mistake, a serious error in judgment, and that he would act differently if he had to do it over again. But I do not believe that this one mistake is sufficient in itself, nor does it fit into a pattern of such errors, to disqualify him from serving as Chief Justice.

□ 1650

All members of the Judiciary have a special responsibility to not only act impartially and dispassionately but to give the appearance of acting impartially and dispassionately. It is a primary obligation; when any human being is given the enormous power that Federal judges have in our society, to sustain public support for our judicial system we simply must insist that judges act fairly, appear to act fairly, act impartially and appear to act impartially, and that it is a serious mistake for any judge to sit on a case in which he or she has previously been involved and on which the judge has a strong view. I believe, as I said in my remarks, this was a serious error in judgment by Mr. Rehnquist.

Mr. KENNEDY. I thank the Senator. Just to continue on the Laird case, Professor Hazard mentions this in his excellent letter when he is talking about the matters which were being considered in the case. He says in his letter on page 3 in the bottom paragraph:

Justice Rehnquist's addressing the publicly known grounds of recusal, but omitting references to the confidential ones, would have been proper only if he had forgotten that his office in the Justice Department had handled the surveillance policy negotiations and that he himself was involved to a substantial extent. If when writing his opinion in *Laird* v. *Tatum*, Justice Rehnquist had not forgotten his involvement in the surveillance policy negotiations, then his opinion constituted a misrepresentation to the parties and to his colleagues on the Court. In such a matter, a lawyer or judge is expected to give the whole truth.

And then he continues:

Finally, Justice Rehnquist had a duty of candor to the Senate in answering the questions concerning *Laird* v. *Tatum.*

Mr. MITCHELL. I think Professor Hazard was making two points with which I agree. The first is that in this particular case Justice Rehnquist made two errors in judgment. The first was to fail to abstain from participating in deciding the case in which he had been involved prior to entering the court and on which he had already expressed an opinion as to what the outcome should be.

The second was in writing his memorandum explaining his decision, justifying his decision, he did not set forth all of the facts, particularly those which were peculiarly known to him and might not have been known to either of the parties. That is a special burden on a judge under these circumstances. By virtue of his or her unique position, a judge may be in possession of facts affecting his or her impartiality, either the fact of impartiality or the appearance of impartiality or both, of which the parties may not be aware. And a judge then has a special responsibility under such circumstances to disclose to the parties those facts as not only explaining his decision but providing the parties with full information as to the basis for a decision. I believe Professor Hazard is correct and I share that conclusion, that there was not only the initial error in the failure to abstain from the case but the second error of a memorandum of explanation which did not fully disclose facts known to the judge at the time and possibly not known by the parties.

Mr. KENNEDY. I thank the Senator for his elaboration on this point because I think his explanation and illumination on this issue is particularly helpful to our Senate colleagues. I am also reminded that Senator Ervin, who took great interest in this issue, at the time when Justice Rehnquist refused to recuse himself, including filing an amicus curiae brief in the Supreme Court, expressed his strongest disappointment in Justice Rehnquist's action. Senator Ervin noted that, if he had known in advance that Justice Rehnquist would participate in the Laird versus Tatum case, he would not have supported his nomination for Supreme Court Justice. This statement by Senator Ervin gives an indication of the importance and significance of this kind of activity by Justice Rehnquist.

I welcome the Senator's comments. I think in his memorandum of explanation for not recusing himself, Justice Rehnquist, in his references to his exchanges with Senator Ervin, did not include the specific language on the Laird versus Tatum case. As to the Canons of Ethics, which had just been issued, there was a complete misinterpretation of those, to permit him to reach his conclusion on the duty to sit. I welcome the comments of the Senator from Maine and also the letters from Professor Hazard and the Socie-

ty of American Law Teachers on this issue. They should be carefully reviewed by all Senators before making their judgment on this nomination. I thank the Senator for an excellent statement.

Mr. President, next year, America will commemorate the 200th anniversary of the Constitution. In that document and the bill of rights, the Founders established a society based on individual liberty, equality, and the rule of law. In the two centuries since then, the American people have worked hard to advance the noble values embodied in the Constitution and make them a reality for all Americans. We have weathered many storms, including a civil war that nearly destroyed the Nation, but in these 200 years, we can be proud of the strides we have made toward realizing the goals of the Constitution.

Nearly from the beginning, the Supreme Court established itself as the ultimate Guardian and interpreter of the Constitution. In the final analysis, it is the Justices of the Court who give meaning and life to our liberties. The Chief Justice, as the leader of the Court, sets the standard for defining the Constitution and interpreting laws. The office itself is a constant symbol of the fundamental values upon which America is built, and the protections which we rely on for our freedom and justice.

The Supreme Court building itself restates this important truth. At the entrance to the building, inscribed in the pediment above the majestic pillars, are four simple eloquent words—"Equal Justice Under Law."

Now, however, the Senate is being pressed to confirm a Chief Justice whose entire career has been an impediment to those noble words.

The nomination of William H. Rehnquist to be Chief Justice of the United States places us at a crossroads in our history. We must give the mantle of leadership only to someone who has embraced our historical commitment to religious liberty and freedom of expression and our historical progress toward the elimination of discrimination based on race, sex, nationality, and economic status. Justice Rehnquist falls far short of this critical standard. If we confirm Justice Rehnquist to be Chief Justice, we will elevate to the pinnacle of our American Judicial system a man who by word and deed throughout his career has shown disdain for the fundamental values embodied in our Constitution. If we consent to the nomination of Justice Rehnquist to be Chief Justice, we will be choosing as the symbol of American Justice someone who would roll back the 'hard won progress of women and minorities to achieve full equality and would strip away essential protection from Government interference in highly personal decisions about religion, marriage, and family.

The struggle of racial minorities to achieve their rightful place in our society has been long and often bitter. For racial minorities, particularly blacks, equal protection of the laws was, until very recently, a hollow slogan. As recently as 1959, a negro was hauled from a jail in Mississippi and lynched, one of 3,441 negroes to fall victim to this form of mob violence, unhindered by law enforcement officials. During the 1960's, peaceful civil rights demonstrations were subject to excessive force by police, and were often assaulted by private citizens as law enforcement officials looked on. In St. Augustine, FL, for example, a negro girl was stabbed with the end of a stick, and when she and another marcher fell on the ground, they were arrested immediately for disorderly conduct. It was common for the victims of violence, not the perpetrators, to be taken to jail.

Negroes accused of crimes could not expect a fair trial. For example, in 1965, it was common practice in Talladega County, AL, for the prosecution and defense in a case to get together and decide whether they wanted any negroes on the jury—if not, they would just agree to strike them. No negro had ever served on a jury in the county. The use of preemptory challenges to exclude blacks from juries is widespread. The Supreme Court at last put an end to this practice last term. Justice Rehnquist, dissenting in that case, would perpetuate race discrimination in our justice system by allowing prosecutors to strike blacks from a jury because of their race.

In education, minorities suffered the discrimination of government sanctioned segregated schools until the middle of this century. Inferior education is the essence of the iron ring of discrimination against minorities. By limiting their opportunities for self-improvement it makes and keeps them inferior. Inferior status provides the justification for laws and customs which penalize minorities.

In the wake of the Brown decision, desegregation of schools was met with massive resistance in the South. A key element of Southern resistance was the creation in the 1960's of private white schools to circumvent desegregation orders. In 1970, the IRS began to withhold tax exemptions from these private segregated schools. In 1983, in the Bob Jones University case, the Supreme Court upheld the Government's refusal to subsidize segregated schools. Justice Rehnquist alone dissented.

Women in America are fighting a difficult battle in eradicate sex discrimination in our society. Although sex discrimination is often more subtle than other forms of discrimination, it is no less destructive. Innumerable legal obstacles still exist to full equality of men and women in America. Justice Rehnquist is committed to perpetuating much of this discrimination. He is the only member of the Supreme Court who believes that the Government can discriminate against women in selecting juries, deny unemployment benefits to an unemployed woman who is seeking work if she is pregnant or has recently given birth, or give smaller housing allowances to married women in the Armed Forces than to married men.

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

The PRESIDING OFFICER (Mr. COCHRAN). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

□ 1700

Mr. KENNEDY. Mr. President, the most important measure of good government is how well it protects the weakest and most powerless. Most important among these are our Nation's children. In recent years, the Court has endeavored to blunt the social stigma of illegitimate children by prohibiting laws which single out these innocent children to disadvantage them. These children truly are victims of their parent's behavior, and there is no justification for laws which further punish them. Justice Rehnquist has voted consistently to uphold statutes which deny illegitimate children the right to inherit from their fathers by intestate succession, the right to child support from their fathers, the right to receive disability or worker's compensation benefits, or the right to benefit from supplemental income programs for indigent families.

The poor are also in need of government protection. Justice Rehnquist's response is to vote, along, to uphold a State statute which Justice Stewart characterized as prohibiting the poor from marrying.

Justice Rehnquist also has voted consistently to uphold statutory schemes that discriminate against resident aliens. Beginning in the late 19th century, States and localities enacted various laws that disadvantaged newly arrived, and often unpopular, immigrants. Many of these laws struck at the core privilege of freedom—the right to seek and obtain employment. Because legal aliens generally are not qualified to vote, they are uniquely vulnerable to discrimination by the majority.

The Supreme Court has repeatedly held these discriminatory statutes unconstitutional. Justice Rehnquist has voted to prohibit aliens who are in this country legally and are eligible to

work from engaging in the profession of engineer or architect, from becoming a notary public, or from holding any State job whatsoever.

For the Founders, religious freedom was the crux of the struggle for freedom in general. James Madison authored the first legislative pronouncement that freedom of conscience and religion are inherent rights of the individual in Virginia's great Declaration of Rights in 1776. Madison opposed every form and degree of official relation between religion and civil authority. For him, religion was a wholly private matter beyond the scope of the civil government either to restrain or to support.

The Founders wisely recognized the historical divisiveness of government entanglement with religion, and the fundamental importance of freedom from such entanglement to the realization of individual liberty. The separation of church and state has been respected by the Court throughout our history.

Justice Rehnquist would tear down the wall of church/state separation. In his extreme dissent in Wallace versus Jaffree, with which no other member of the Court agreed, Justice Rehnquist stated:

> The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing nondiscriminatory aid to religion.

This startling statement flies in the face of our historical commitment to government noninterference in religion.

Due process is the cornerstone of the criminal justice system of a civilized society. It is the basis for preventing intolerable abuses in law enforcement. Justice Rehnquist has voted to strip away some of our most important due process protections. For example, he alone voted a defendant to be sentenced to death on the basis of a secret report which neither the defendant nor his attorney was permitted to see.

I urge every Member of the Senate to reflect on what would become of our precious freedoms if the positions that Justice Rehnquist has taken on these fundamental issues prevailed. He would create a society that none of us would recognize. Living in Justice Rehnquist's America would be a vastly different experience from living in America today. Civil rights and civil liberties would mean little in his society. Our Nation's commitment to bedrock principles of individual liberty and equality for all Americans is not shared by Justice Rehnquist. His vision of America is not shared by most Americans. He does not deserve the privilege and solemn responsibility of being the Chief Justice of the United States.

Mr. HATCH. Let us review the issue we are debating.

If it were a question of qualifications, the debate would be over. It would have been over as soon as the ABA reviewed 200 of Justice Rehnquist's opinions and found that he "meets the highest standards of professional competence." It would have been over when President Carter's Attorney General and President Johnson's Solicitor General endorsed Justice Rehnquist. The fact is Justice Rehnquist has been an outstanding Justice for 15 years. Questioning his qualifications now, is like asking 15 years into his career whether Babe Ruth could hit home runs. This debate has nothing to do with qualifications.

If this debate were about judicial temperament or integrity, it would already be over. It would have been over when the ABA interviewed 180 judges, 50 law deans and professors, and 65 attorneys before stating that his temperament and integrity make him "among the best available" for the office. It would have been over when the Judiciary Committee voted 13 to 5 in favor of appointment. It would have been over when his colleague, Justice Brennan, declared that he would be a "splendid Chief Justice."

This is not a debate about qualifications or integrity. This is not a debate about judicial temperament.

The debate continues only because some Senators and special interests disagree with Justice Rehnquist's legal views. These Senators say their case is not a question of mere disagreement, yet they proceed to call him insensitive on civil rights solely because he differs with their views. They say disagreement is not the issue, yet they say Justice Rehnquist considers women "second class citizens" only because he differs with their extreme and narrow view of equal rights.

CIVIL RIGHTS REBUTTAL

We continue to hear charges of insensitivity to civil rights. It is accurate to say that Justice Rehnquist disagrees with some of my colleagues about the outcome of many civil rights disputes. It is not accurate to describe his record as "insensitive." Let me briefly recount his record on civil rights:

First, over 34 times he has upheld and reaffirmed the landmark Brown versus Board case which held that racial classifications are stigmatizing and that "separate but equal" is unconstitutional.

Second, over 27 times he has voted to sustain minority and women's rights.

Third, he wrote the landmark womens rights case, Meritor Bank, which held that an employer may be held liable for sex harassment in the workplace.

Fourth, he has consistently defended the principle that the Constitution is colorblind. This defense for a race-neutral Constitution and society is what causes much of the concern amongst those who disagree with him. They would prefer to have the Constitution justify preferential treatment for some citizens through quotas, busing, and effects tests that invalidate legitimate State actions or require reverse discrimination. They want preferential treatment and quotas: Justice Rehnquist has carefully read the law to require color blindness—a total absence of race as relevant criterion for any government purpose.

Fifth, a study of the 1986 term showed Justice Rehnquist was clearly in the mainstream of the Supreme Court on civil rights issues. On the 20 civil rights cases studied, he voted with the majority 70 percent of the time.

BATSON

We began last week to discuss one civil rights case, Batson versus Kentucky, the 1986 jury selection case. Justice Rehnquist's position in this case has been characterized as "preventing blacks and minorities from serving on a jury." This is inaccurate. In fact, in a related 1986 case, Turner versus Murray, Justice Rehnquist prohibits attorneys from inquiring into racial attitudes when screening jurors. In this instance, Justice Rehnquist was simply defending the longstanding principle that an attorney may legitimately make peremptory challenges to jurors, even if the juror was eliminated on the basis of race or ethnicity. This was a policy first articulated by the supposedly liberal Warren Court. Moreover the dissenting opinion which he joined was actually authored by the Chief Justice. The Chief Justice, joined by Justice Rehnquist, recognized that race or ethnicity could affect a juror's decisionmaking in a particular case. Peremptory challenges are undoubtedly applied across the board to jurors of all races and nationalities and accordingly do not evince a deprivation of equal protection to any particular group. Justice Rehnquist is simply stating that the color of a juror's skin should be irrelevant. Jurors are fungible, meaning that they can be interchanged in any combination and the decisionmaking process should still produce the truth. Therefore, these two Justices oppose making race a factor in jury trials. This is the basis for their decision. This is a distant departure from the way this case has been characterized by some of the Justice's critics.

BATSON VERSUS KENTUCKY

One further thought on Batson versus Kentucky. It is both irrational and stereotypical to believe that the defendant has been denied a fair trial

or suffered other prejudice because of the underrepresentation of one group of potential jurors. People do not perceive truth differently because of race or sex or any other arbitrary and irrelevant classification. All persons of all races and both sexes are essentially fungible as jurors. They can be interchanged without any prejudice to the defendant.

If all persons are fungible as jurors, it follows that raclal or gender composition of the jury cannot possibly affect the defendant's rights or the outcome of the trial.

Because race is irrelevant to the composition of the jury, it makes no difference legally whether a preemptory challenge is based on race or gender or any other "gut instinct" of the prosecutor. Thus, the ruling in Batson, according to the Chief Justice's opinion, does no harm to the defendant but it does damage the basic notion of preemptory challenges which have been part of the common law for centuries. Preemptory challenges are meant to be preemptory. If a court begins to inquire into the basis for the challenge, to question its racial or gender motives, it no longer is a preemptory challenge, but a challenge for cause.

This is also what concerned the Warren court in the Swain case. No one suggested that this 6-to-3 vote of the Warren court made those Justices "insensitive to civil rights." This is another instance of selective name calling. When the Warren court does it it is warranted; when Justice Rehnquist does it it is objectionable.

RECENT MEMORANDA

In the past few days, we have seen the emergence of a few additional memoranda from the time that Justice Rehnquist served in the Office of Legal Counsel. One of these memos dealt with the equal rights amendment. This memo was prepared in response to a request from the White House for a paper setting forth the arguments against the ERA. Attorney Rehnquist was simply complying with his client's request by setting forth only one side of the debate. Moreover, on another occasion, his office prepared a memorandum supporting the ERA. At one time or another, he took both sides.

The most recent ERA memo, however, took the reasonable position that the proposed amendment would invalidate many laws designed to provide special assistance or treatment to women and many other laws which simply recognize that men and women are not identically situated for all purposes. There are many examples in both areas. For example, draft laws, child custody laws, labor laws, and others fall into these categories. This memo further notes that the proposed amendment is ambiguous and could prohibit legal and social practices accepted by many who support the ERA because of its simple equality slogan. As we know, these are precisely the legal arguments against the ERA. The most we can conclude from this memo is that legal counsel Rehnquist did his job well years before these precise issues arose to defeat the ratification of the proposed amendment.

Another recent memo from Justice Rehnquist's days at the Office of Legal Counsel discusses the possibility of legislation or a constitutional amendment to make clear that a nondiscriminatory, race-neutral system of school assignment need not be subjected to forced school busing simply to achieve racial balance. The legal analysis of the memo is simply that the Constitution prohibits intentional racial discrimination, not racial imbalance that naturally results from the free choices of private citizens. This is the classic distinction between de jure and de facto discrimination. The Supreme Court has upheld the same distinction found in the Rehnquist memorandum in the subsequent cases of Swann, Pasadena, and most recently Bazemore. The Post article on this memo makes it apparent that the memo advises a race-conscious "freedom of choice" plan, as was rejected in the Goss versus Knoxville case, would remain unconstitutional. If anything this memo must be praised as a testament to Justice Rehnquist's legal foresight.

The amendment considered in the memo would not have foreclosed any alternative to forced busing, it instead added the alternatives of neighborhood school plans. Congress apparently went further in 1974 when the Equal Educational Opportunities Act, 20 U.S.C. 1701, et. seq., declared that "the neighborhood is the appropriate basis for determining public school assignments" and prohibited busing merely to achieve racial balance. Indeed the Senate has gone even further by passing the amendment of Senator JOHNSTON of Louisiana which would have removed busing from the Federal courts.

As might be expected, this memo, too, was prepared for legal counsel Rehnquist's client, the White House. He provided legal advice which discussed the murky caselaw of the time and suggested the sound and moderate alternative of preserving the emerging distinction between de facto and de jure discrimination. The memo apparently noted that a broader amendment could be fashioned "to go all the way with freedom of choice." But this broader course was discouraged by the memo. In short, this memo demonstrates once again Justice Rehnquist's ability to quickly grasp and sort out legal concepts. ,Moreover his advice was very moderate in the climate of the times and has been vindicated by subsequent policy clarifications.

LUDICROUS

Finally, we have heard about a few issues that are almost ludicrous. One issue of this nature dealt with the Vermont restrictive covenant.

First, unenforceable due to Shelly versus Kramer.

Second, Justice Renquist immediately agrees to correct deeds.

Third, JFK was not considered "insensitive" even though he had such covenants; it would be irresponsible to make this accusation.

CORNELL TRUST

Another issue in this category deals with the Cornell Family Trust. The facts are that Justice Rehnquist set up a trust account in 1961—10 years before he took a seat on the Supreme Court—for the benefit of his brother-in-law, Harold Cornell. The trust was established by H.D. Cornell, Harold's father, for the express purpose of paying medical expenses when Harold's multiple sclerosis made it impossible for him to care for himself. The trust was administered by George Cornell, Harold's brother. H.D. Cornell, the father, specifically instructed his attorney, Mr. Rehnquist, and the trust administrator, George, not to disclose the existence of the trust to his son because he feared that Harold might not preserve the money for its intended purpose. Attorney Rehnquist obeyed his client's instructions impeccably.

Nonetheless, this has formed the basis for allegations that Justice Rehnquist acted improperly in participating in establishment of a trust when he might have some interest (as son-in-law) in the estate. This overlooks that the code of professional responsibility does not bar family cooperation in legal matters, but only requires that the testator initiate the request for legal help and that the testator be aware of the attorney's potential interest as an inheritor. Attorney Rehnquist was in full compliance with these standards. Frankly, the family was grateful that Mr. Rehnquist handled the matter because of its sensitivity and the need for care and confidentiality.

We also hear that Mr. Rehnquist was somehow wrong for not disclosing the trust to Harold. In the first place, Mr. Rehnquist was not the administrator. George was. If anyone had the responsiblility to decide when the trust was to be disclosed, it was George. Moreover, Mr. Rehnquist was obeying his client's orders. It would have been more severe for him to have presumed to break his client's trust. It he had disclosed the trust over his client's objections, I have no doubt that Justice Rehnquist's critics would have been even more vociferous in their attacks on his violation of legal responsibilities. For those seeking some flaw in Justice Rehnquist, he would have been

wrong either way. The facts show that he performed admirably by remaining within his duties as a lawyer.

This is, in reality, a sensitive family dispute. The FBI did a thorough check of the facts and every member of the Cornell family agrees that the purpose for confidentiality was to prevent Harold from invading the trust and spending the assets before they were needed for his medical care. To suggest that Justice Rehnquist kept his client's trust because his wife might benefit from the estate is ludicrous. This issue simply demands no further explanation.

These arguments demonstrate that this debate is about ideology, not integrity. They should be laid to rest for once and for all.

Mr. BINGAMAN. Mr. President, this week we are being asked to confirm the President's nomination of William Rehnquist for Chief Justice of the Supreme Court and the President's nomination of Judge Scalia as an Associate Justice of the Supreme Court. My vote will be to deny the President's request for confirmation of Mr. Rehnquist and to grant the Prsident's request for confirmation of Mr. Scalia.

In Mr. Rehnquist's confirmation hearings some questioned the significance of the position of Chief Justice. They argued that the factual scope of the office, the duties of the Chief Justice compared to those of the Associate Justices, render the office only nominally different from the position Mr. Rehnquist currently holds.

In my view they are wrong. The Chief Justice's power and prestige extends beyond the responsibility of assigning opinion authorship and beyond his role of determining what cases the courts will hear. Rather, the power of the office is closely related to the fact that the Chief Justice presides over our entire judicial system and that he is the most honored figure in our legal system.

Mr. Rehnquist clearly has the intellectural capability to function as the Chief Justice; nobody questions that. Similarly, he has the ability to administer the Court as its Chief Justice. However, I do not believe that Mr. Rehnquist is qualified to carry out the role as the symbol of justice for all our Nation's people. The hearing record shows that his record on civil rights—on equal justice for all Americans—is questionable. Whether the question concerns his authorship and views in the now famous memorandum on Brown versus Board of Education, or his lone dissent in the Bob Jones University case, his positions indicate an unwillingness to apply the 14th amendment in race and gender cases. Moreover, his involvement in Laird versus Tatum raises serious and unanswered questions of judicial ethics—whether Mr. Rehnquist should have disqualified himself from this case. Further, the record remains unclear on charges of voter harrassment by Mr. Rehnquist in the "ballot security" programs in Phoenix in the fifties and sixties.

In short, Mr. Rehnquist's record alienates large numbers of Americans. And in my view the Chief Justice must meet a higher and more complete standard of excellence to maintain the high esteem that the position requires.

As my colleague, Senator EAGLETON, states:

> About a nominee for Chief Justice, we cannot harbor an array of disquieting doubts. About a nominee for Chief Justice, our minds and consciences must be clear and unhesitating.

I agree that this is the test we must apply to the nominee for Chief Justice, and in my view Mr. Rehnquist does not meet that test.

Mr. President, the Senate Judiciary Committee has unanimously recommended the nomination of Judge Scalia as Associate Justice. Nothing in the record before the committee raised questions about his fitness for that position. Based on that record, I will vote to confirm Mr. Scalia.

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. ROCKEFELLER. 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. ROCKEFELLER. Mr. President, our colleagues on the Judiciary Committee have presented the issues concerning the nomination of William Rehnquist in great depth. Some of our other colleagues—Senators LEVIN, EAGLETON, BRADLEY, and MITCHELL—have, and added to our understanding with notable statements.

I do not intend to repeat the arguments that have been made in detail by others. Instead, I would like to summarize the conclusions that I have reached based on the case that has been presented so forcefully—pro and con—by others.

Mr. President, I intend to vote against the nomination of William Rehnquist to be Chief Justice of the United States.

I base my opposition to Justice Rehnquist on his complete hostility to civil rights and individual rights—and his lack of sensitivity to the special role that the Supreme Court, and its Chief Justice, play in protecting those rights.

I base my opposition on an overall sense, obviously subjective, that Mr. Rehnquist, despite his brilliant intellect, lacks the breadth of vision and potential for growth that our country has a right to expect in the Chief Justice.

In our system, Mr. President the legislative branch makes the laws and represents majority opinion. The President gets his mandate from the electoral process, and the majority of the country. But the Constitution protects the rights of minorities and individuals, often against hostile majorities, and it is the special responsibility of the courts to protect those rights which the Constitution provides.

Of course, it is inevitable that reasonable people will disagree, and fairminded judges will disagree, about what the Constitution requires in particular cases. But Justice Rehnquist's record goes beyond the normal range of disagreement that fairminded people and Justices could have. He is uniformly, predictably and inevitably opposed to civil rights, whatever the claim, and always on the side of the state when Government authority collides with the constitutional rights of individuals.

Despite the special, historic role which the Federal courts have in protecting civil rights, it is of course possible to believe in civil rights and equal justice for all, while opposing on philosophical grounds the idea of an activist Federal judiciary.

But that is not Justice Rehnquist's approach. He has not confined his opposition to Federal court action on civil rights. He opposed the historic Civil Rights Act of 1964, and every other Federal civil rights statute; so he does not believe that Congress has a role to play in protecting civil rights. He opposed the efforts in Arizona when the city of Phoenix wanted to pass an ordinance protecting the right of minorities to go into restaurants and other public accommodations; so he does not believe that local government has a role to play in protecting civil rights. Thirteen years after the Supreme Court decided in Brown versus Board of Education that segregated schools were unconstitutional, Mr. Rehnquist offered the opinion that "we are no more dedicated to an integrated society than a segregated society"—an opinion that was legally incorrect and morally wrong.

There is no chink in the armor of his hostility toward civil rights. But the struggle for civil rights has been the central, morai issue of our time. As a country, we have worked so hard and we have worked for so long to translate our concept of equal justice into a reality for all Americans. Having a Chief Justice of Mr. Rehnquist's proven insensitivity would be a serious step backward and not one that I would support.

Mr. President, as I have studied this nomination, I have slowly become convinced that for all his intellectual ability, Mr. Rehnquist is not the kind of

person who should be the Chief Justice of the United States. His dismaying judicial record is troubling enough, but really it is only part of the picture. Mr. Rehnquist seems to be the kind of person who decided very early on exactly what he felt about the world and how he felt about all issues and has never wavered or grown. Most people change their views over time; sometimes they become more liberal; other times more conservative; hopefully, in most cases, more aware of nuance, and complexity. Frankly, I do not see that growth in Mr. Rehnquist; his strongly held, provocative views today are no different than they were in 1952 when he clerked on the Supreme Court: both unshaken and unrefined by anything that has happened in three tumultuous decades.

That lack of growth seems to me to be compounded by the coldness of his ideology and the lack of a generous spirit. He seems intolerant of the kind of diversity than makes this country unique; he seems incapable of trying to strike the genuinely difficult balance that our country relies on the Supreme Court to find between government authority and individual rights. And there is no doubt that my view of Mr. Rehnquist's character and rigidity of ideology is influenced by what I believe to be his lack of candor to the Judciary Committee and his totally improper refusal to recuse himself in the Laird versus Tatum case.

Supporters of this nomination have argued that the Senate should give great deference to the President's choice, particularly because the American people have twice elected President Reagan with great majorities. This is the first time that I have had the privilege of voting on a Supreme Court nomination, and I have become firmly convinced that every Senator has a special responsibility to reach an individual decision on whether Mr. Rehnquist should be elevated to be Chief Justice. That decision should be based on each Senator's individual assessment of Mr. Rehnquist's qualifications to hold this position of extraordinary responsibility and not the popularity of the President who appointed him.

There have only been 15 Chief Justices in the nearly two centuries since the Constitution was written. Chief Justices stay on while Presidents change, their decisions touching the lives of Americans in very crucial ways, for 15 or 20 or 25 years. Throughout history, the Senate has recognized its special responsibility to consider this nomination; 5 of the 20 men nominated for the position have actually been rejected by the Senate.

The President has won from the American people the awesome right and privilege of selecting, from among 230 million Americans, his choice to nominate for Chief Justice of the United States. And that is all. The Senate has, and each individual Senator has, an absolute right and responsibility to decide whether to "advise and consent" to the President's nomination. That is what the Constitution envisions; That is what our separation of powers is all about.

The Senator from Illinois, Mr. SIMON, made in interesting observation on this nomination last week. Recognizing that Mr. Rehnquist was likely to be confirmed, Senator SIMON expressed the hope that Mr. Rehnquist would take some time on the beach, as he expressed it, to reflect seriously on the criticisms and concerns that have been raised—hopefully, to open his mind and change his views on certain matters.

I wish I believed that were possible. But it does not seem realistic to me any more than it probably did to Senator SIMON.

John Mitchell and Richard Kleindienst gave Mr. Rehnquist a key position in the Justice Department—because of his views.

Richard Nixon appointed Mr. Rehnquist to the Supreme Court—because of his views.

And now Ronald Reagan has nominated him to be Chief Justice of the United States—because of his views.

So there is little chance that, having attained the pinnacle of our system of justice, because of his views, Mr. Rehnquist will change his views now.

And yet despite his ascent, I don't believe that Mr. Rehnquist's view of constitutional rights is shared by most Americans. And frankly, I do not think that it is shared by most Senators.

Mr. Rehnquist is not a fair-minded conservative. He is a closed-minded ideologue. He bears no serious resemblance to the distinguished, conservative Justices appointed by conservative Presidents: John Harlan or Potter Stewart, appointed by President Eisenhower; Lewis Powell or Harry Blackmun, appointed by President Nixon; and, based on the record so far, Sandra O'Connor, appointed by President Reagan.

It appears that opponents of this nomination will total perhaps 25 or 30. but if we were voting on Mr. Rehnquist's view of the Constitution, I would say to my colleagues that Mr. Rehnquist would be lucky to get 25 or 30 votes.

And we should be voting on Mr. Rehnquist's view of the Constitution. That's what this process is all about; not the popularity of the President, and not Republican versus Democratic politics. There are times for Senators to defer to the President. This is not one of those times. Sometimes loyalty demands to much.

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.

□ 1730

Mr. DOLE. 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. DOLE. Mr. President, it is now 5:30 on Monday, and I would like to hope we could reach some agreement on voting on the Rehnquist nomination tomorrow. Either that or we ought to stay here tonight and debate it because October 3d is not as far away as some might think. If we are going to be denied the right to vote tomorrow, then I think in fairness we should be told we are not voting tomorrow so we can decide what other efforts we might wish to pursue. I get rumors that the press has been told there will be no votes tomorrow. I am not certain that is true. We might have a vote on both Rehnquist and Scalia prior to 4 o'clock. We have now been about 5 days on the nomination of Rehnquist. We find some Senators making additional speeches on the same subject. We will have a full RECORD of that. I guess some made two or three.

I really believe we have reached the point now where we are holding up the entire Senate program. No one has complained about the debate. We have not filed cloture on this side. And we may have to yet this evening, but I hope we could have some indication that we will be permitted to vote tomorrow.

It was my understanding on Friday from a number of Members on the other side—Senator BIDEN, Senator METZENBAUM—that they saw no reason why there could not be a vote on Tuesday. I hope that is the case because we do have as I have indicated a mountain of work to do. We would hope tomorrow then, if we can, to have a vote on Rehnquist, and Scalia following. We will take up appropriations bills until well into the evening tomorrow night.

If there is not to be a vote on those nominees, then we I think are entitled to have that information so that we can plan on what we wish to do to try to expedite the business of the Senate.

I hope there would be more debate, that people are willing to speak on Rehnquist for or against nomination, and now would be an appropriate time to do that. It is only 25 until 6. We did not come in until 11 today, and were not on the nomination until about 12:30. We have had several quorum calls.

I understand we now have a speaker on the nomination. I thank the distinguished Senator from Rhode Island.

Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Rhode Island.

THE REHNQUIST NOMINATION: A LEGAL EXTREMIST SHOULD NOT LEAD THE SUPREME COURT

Mr. PELL. Mr. President, I appreciate the opportunity to speak on the nomination of Justice Rehnquist.

I must say that after careful consideration I have decided to oppose the nomination of William Rehnquist to serve as Chief Justice of the United States.

I oppose the nomination of Mr. Rehnquist with some reluctance, because I have always believed that a Presidential nominee should be confirmed, barring serious flaws of character or integrity or evidence of gross incompetence which would prevent the nominee from performing the duties of the office for which he or she has been nominated. In the case of Mr. Rehnquist, clearly none of these impairments apply. He is a man of great intellect and good moral character and clearly his record over the past 15 years on the Supreme Court demonstrates his technical competence for the position of Chief Justice.

But when a nominee is being considered for a term that will extend many years after the life of the administration that appointed him, as is uniquely the case with Federal court nominees, then I believe the Senate has a greater burden to discharge in the confirmation process. The question becomes not merely one of whether the justice-designate is a man or woman of intelligence and integrity, but whether the nominee is a person who is appropriate to make legal and social policy for the society that will be inhabitated by our children and our children's children.

The Supreme Court occupies a very singular position in our society. Nine unelected men and women, with lifetime tenure, are vested with the power to act, in effect, as a "superlegislature" in making legal and social policy that touches virtually every aspect of our lives. One need only look at Supreme Court decisions over the past 40 years in the areas of civil rights, voting rights, labor relations, sex discriminaton, and a host of other questions along the cutting edge of social change to realize the virtually infinite power of the Supreme Court to alter the fabric of our society.

The leadership and judicial philosophy of the next Chief Justice will long outlast the viewpoint of the current administration, which of course will expire on January 20, 1989. Chief Justice John Marshall was nominated by the lame duck administration of John Adams in 1801 and, over the next 34 years, left a lasting judicial legacy even though President Adams' political party, the Federalists, has long since ceased to exist. His successor, Roger B. Taney was appointed in the last year of the Jackson administration and served for 28 years. The combined tenure of these two men spanned the period from the infacy of the Republic until the closing days of the Civil War, a reach of well over three generations. In more modern times, the legacy of Chief Justice Earl Warren outlived the Eisenhower administration. From 1789 until the present, a period of roughly 200 years, only 15 persons have served as Chief Justice.

When a nominee is being considered for a term that will extend many years the life of the administration that appointed him, the confirmation process is far more important than in the case of a routine appointment. And when that nominee is also of an extreme viewpoint, whether liberal or conservative, then I believe the Senate should hesitate in confirming that appointment.

The record of Justice Rehnquist, both in the period before he joined the Supreme Court and more importantly over the past 15 years, demonstrates conclusively that his extreme legal philosophy is incompatible with the mainstream of our society today.

□ 1740

I have reviewed his record, and particularly in the areas of civil rights, women's rights and the relationship of government and the individual in modern society, Justice Rehnquist has demonstrated that his extremely narrow judicial philosophy is at odds with the view of society held by the board spectrum of American citizens. His interpretation of the Constitution is a narrow one, perhaps better suited to the more uncomplicated world of 1886 than the turbulent sometimes chaotic American society of 1986.

I would emphasize here that the current confirmation process is not a referendum on whether William Rehnquist should continue as a member of the Supreme Court. I fully expect Mr. Rehnquist to serve as an able member of the Court for many years to come, indeed into the next century, long after most Senators here have left this body. Moreover, I would point out that 15 years ago, I supported Mr. Rehnquist's confirmation when he was nominated to serve as an Associate Justice of the Supreme Court. My concerns about Mr. Rehnquist's extreme legal and constitutional views were not as great when he was selected to serve as an Associate Justice.

The issue before us, today, however, is whether Mr. Rehnquist should be promoted to the high position of Chief Justice. Other than the presidency, no public office in the American system of government is entrusted with greater responsibility than the Chief Justice. He is both the symbolic head of our judicial system and the top policymaker and administrator for the Federal courts. The responsibilities of the Chief Justice make him more than merely "first among equals" in his relationships to his colleagues on the Nation's highest court. This is especially so as we stand at the eve of the bicentennial of our Constitution. The task of the next Chief Justice is to adapt that great document to the society that will usher us into the 21st century, and who does not go beyond the bounds of mainstream constitutional philosophy. That man or woman must have a vision of an evolving society, an evolving Constitution, and I do not believe Justice Rehnquist possesses that.

Here I am reminded of Thomas Jefferson's admonition that institutions of government must evolve with the times:

> I am not an advocate for frequent changes in laws and Constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.

In conclusion, I would emphasize this point: when it comes to the Chief Justice, he, above all the Justices, must be within the limits of conventional political philosophy and not be on the extreme left or the extreme right. In this case, this would not be the case. If an individual Justice is outside the extremes, then it is no excuse for the Chief Justice.

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that I might be allowed to proceed as in morning business for 10 minutes.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

NICHOLAS DANILOFF

Mr. MOYNIHAN. Mr. President, in the week since the Senate unanimously deplored the outrageous arrest of Nicholas Daniloff in Moscow, a correspondent for U.S. News & World Report, that situation has worsened and it would not, I think, be wrong to describe it as having escalated at the desire of the Soviet Union; escalated between our assertion of the fact and their denial; their acts of provocation that can only be seen as deliberate; and their decision to act in a manner without precedent in the history of the relations between the United States and the Soviet Union.

I think, Mr. President, that this is something to be emphasized.

In the past, when Soviet spies have been arrested in the United States, it

Shultz, "do not shrink from including themselves in this farcical course."

"It is evident that the zealous supporters of the failed agent urgently need to distract the attention of the world public from the Soviet peace initiatives," Pravda said.

NOMINATION OF WILLIAM H. REHNQUIST, TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate continued with the consideration of the nomination.

The PRESIDING OFFICER. The distinguished majority leader.

Mr. DOLE. Mr. President, what is the pending business?

The PRESIDING OFFICER. The pending business is the Rehnquist nomination.

CLOTURE MOTION

Mr. DOLE. Mr. President, it had been my fervent hope, based on conversations I had last Friday with a number of my colleagues on both sides, we would be able to vote on the Rehnquist nomination on Tuesday. I have now been advised by the distinguished Senator from Massachusetts [Mr. KENNEDY] that he does not want to vote on Tuesday. I think that is unfortunate. But it leaves, as far as I can tell, very little recourse than to file a cloture motion because the clock is ticking and another day means it will probably make it that much more difficult to meet the October 3 adjournment date. I have had a discussion with the Senator from Massachusetts. I have asked him if cloture were filed, if we could move on, if we had the consent of the distinguished minority leader and other Members on both sides, to other business and time would not be wasted, because I do not believe there is that much more debate on the Rehnquist nomination. He did indicate he would be willing to permit us to move into appropriation bills and do other things, but he did not want to vote tomorrow and that is his right. I do not agree with him but that is his right. I mean I do not agree that we should not vote tomorrow. It seems to me this would hopefully bring this matter to a conclusion on Wednesday, although I am sure there could be a great deal of debate on Wednesday. So I am going to send a cloture motion to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislation 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 debate on the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

Bob Dole, Strom Thurmond, Thad Cochran, Chic Hecht, Dan Quayle, James A. McClure, William L. Armstrong, Jesse Helms, Phil Gramm, Mack Mattingly, Jeramiah Denton, Orrin G. Hatch, James Abdnor, Paul Trible, Malcolm Wallop, and Al Simpson.

□ 1810

Mr. DOLE. Mr. President, a parliamentary inquiry: When would the vote occur on this cloture motion? When would the cloture motion mature?

The PRESIDING OFFICER. On Wednesday.

Mr. DOLE. One hour after we convene?

The PRESIDING OFFICER. One hour after we convene.

Mr. DOLE. I will consult with the distinguished minority leader and see if we can work out a time to accommodate all our colleagues. This is a very important vote, and I think they want to be here.

Again, if we can do additional work tomorrow on a couple of appropriation bills, that will be helpful. I regret that some of our colleagues have made plans on the fervent hope that we would vote tomorrow. They may have to modify those plans. But this is it. There is no way we can force a vote tomorrow. We had hoped that by accommodating our colleagues, we would be permitted to vote tomorrow. That is not going to happen. I hope we can invoke cloture and that shortly after cloture is invoked, we can proceed to vote on the Rehnquist nomination.

I am advised that on the Scalia nomination, there probably will be a little debate, and we could dispose of that nomination in a matter of hours or less.

So I alert my colleagues that on tomorrow we hope to fill in the blanks, the time we have, with the Interior appropriation and the D.C. appropriation. As I understand it, there is one other, Transportation.

So, with some luck, we might be able to conclude action on those three appropriation bills tomorrow and still permit Senators who wish to speak on the Rehniquist nomination to do so.

LEGISLATIVE SESSION

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate resume the consideration of legislative business.

There being no objection, the Senate resumed the consideration of legislative business.

MESSAGES FROM THE PRESIDENT RECEIVED DURING ADJOURNMENT

Under the authority of the order of the Senate of January 3, 1985, the Secretary of the Senate on September 12, 1986, during the adjournment of the Senate, received messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received on September 12, 1986 are printed at the end of the Senate proceedings.)

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mrs. Emery, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session, the Presiding Officer 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.)

DRUG-FREE AMERICA ACT OF 1986—MESSAGE FROM THE PRESIDENT—PM 172

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with accompanying documents; which was referred to the Committee on the Judiciary:

To the Congress of the United States:

I am pleased to transmit today for your immediate consideration and enactment the "Drug-Free America Act of 1986." This proposal is one of the most important, and one of the most critically needed, pieces of legislation that my Administration has proposed. I strongly encourage the Congress to act upon this proposal before its adjournment.

Drugs are menacing our Nation. When Nancy and I spoke to the Nation last evening about what we Americans can do to win the fight against illegal drugs, we said that it is time to pull together. All Americans—in our schools, our jobs, our neighborhoods—must work together. No one level of government, no single institution, no lone group of citizens can eliminate the horror of drug abuse. In this national crusade, each of us is a critical soldier.

From the beginning of my Administration, I pledged to make the fight against drug abuse one of my highest priorities. We have taken strong steps to turn the tide against illegal drugs. To reduce the supply of drugs available in our country, we moved aggressively against the growers, producers, transporters, smugglers, and traffickers. Our spending for drug law enforcement has nearly tripled since 1981. To reduce demand, we plotted a course to encourage those who use drugs to stop and those who do not, never to begin. I am especially pleased

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

EXECUTIVE SESSION

Mr. WEICKER. Mr. President, I ask unanimous consent that the Senate return to executive session.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

(Mr. GRASSLEY assumed the chair.)

□ 1400

Mr. WEICKER. Mr. President, in my opinion there is no more important word in America's governmental lexicon than the word "justice." It is the priority and reverence accorded justice that has taken a piece of geography and made it a great nation. America, the New World, call it what you will, did not come with justice—we have had to work at it. Justice was not native to New England with its religious persecution or the South with its slavery. It was not native to suburbia with its prejudices, nor to the retarded in the United States who are now our special olympians. Whether today's bag lady huddled on a grate in the big city, or yesterday's Japanese American interred in a California concentration camp. Whether today's victim of AIDS or yesterday's congressionally hounded writer or actor.

Whether Irishmen in 1900 or Hispanic in 1986. For all these and more, life in freedom with opportunity and dignity has come to pass by a nation striving to live up to the ideals of justice as expressed in the Declaration and the Constitution of the United States.

Mr. President, I ask that the Senate be in order.

The PRESIDING OFFICER. The Senator from Connecticut has made a request that the Senate come to order. The Chair would respond to that request and ask any Senators disrupting to halt.

The Senator from Connecticut.

Mr. WEICKER. Thank you very much, Mr. President.

Justice in America needs no prefix such as first or chief or paramount or ultimate to give it place. Its history and promise accord it preeminence.

Twenty-six years—I first was elected in 1962 to the State legislature in Connecticut—in elected office, executive and legislative, has made me proud of the creativity, integrity, and vision exhibited by colleagues of all philosophies at all levels of government. But the legacy of courage to achieving justice in the face of political neglect or persecution—that uniquely belongs to the American judiciary.

Surely all of us are more or less of some political bent—judges included. And most assuredly the President of the United States, in this instance, Ronald Reagan, has every right to nominate persons to the judiciary of his general philosophy. So on the matter of the numbers or philosophies of President Reagan's nominees to the Federal bench I have no quarrel. If America wants to change Reagan's appointees, that is more properly done in the voting booth than ex post facto with confirmation votes in the U.S. Senate.

In light of what admittedly is an idealistic view of the role of justice in our society, my worry as it related to the nomination of William H. Rehnquist to be Chief Justice of the United States is his unrelieved predisposition toward achieving a specific philosophical end while leaving reality unexplained or misspoken.

Even thought I am one, fortunately all the world is not a lawyer. When the Chief Justice speaks Americans should not have to rush to Shepard's Citator or acquire the United States Code Annotated to understand what has been said. The perception should be that justice has been done to the facts.

That is not the perception that we get in the various discrimination decision or memoranda of Justice Rehnquist. Whether in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), or a myriad of other cases, the perception is neither one of justice or reality. It is a perception that separate is equal.

Again, with religious discrimination cases *Wallace* v. *Jaffree*, 86 L. ED 2d 29 (1985) or *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982). Chief Justice nominee Rehnquist leaves the reader with the clear-cut perception that getting government in the business of religion can be an OK thing. Such a perception has potentially explosive ramifications for religious freedom in this Nation.

Mr. Rehnquist's views relating to women as they translate into defining sexual discrimination defy constitutional promise and fact. The bottom line perception of *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) or *Craig* v. *Boren*, 429 U.S.C. 190 (1976), and *Duren* v. *Missouri*, 439 U.S.C. 357, 370–78 (1979), is one of inferior individuals and inferior opportunity. That is not fact. It will never be justice.

Were Justice Rehnquist to be a candidate for Press Secretary to the President of the United States these words would be gratuitous and my vote of little consequence.

The job is Chief Justice of the United States. Not only is the operative word justice the end must be justice.

Despite the brilliance of Justice Rehnquist's mind, his abilities have been used to weave plausible logic suited to a philosophical end rather than a beginning of justice.

Such exercises in sophistry abound these days both in Congress and at the White House. They are not needed from a Chief Justice.

Therefore, my vote is no to this nomination.

NOMINATION OF JUSTICE WILLIAM REHNQUIST

Mr. ROTH. Mr. President, today, as we consider the nomination of Justice William Rehnquist, I believe it is most important to reconsider the proper role of the courts in our representative form of government. I believe it is important to keep in mind that our duty is not to select and advance those individuals who will carry our political ideologies to the hallowed chambers of the Supreme Court, but to approve those who are dedicated and faithful to the Constitutional plan. I firmly believe Justice Rehnquist has a proven record in this area, both as a brilliant scholar of our Constitution and as one who exercises judicial restraint.

His opinons in cases like Roberts versus Louisiana, National League of Cities versus Usery, Trimble versus Gordon, and Railroad Retirment Board versus Fritz are examples of such restraint.

What a tremendous responsibility we have—to approve our justices and see that they are of this caliber. As Members of this distinguished legislative body, it is important that we understand the genius behind our Constitution—that through distinct levels of government and the separation of powers the American people possess optimum control over their government. Whereas certain later amendments to the Constitution are well-known to embody substantive values, the original Constitution is basically a procedural document. This is how it was conceived; this is how it should be.

Within this framework, the substantive value judgements concerning the Government of America—or the making of laws—were assigned to those officials politically accountable to the people. These laws were to represent the will of the people, provided that they fit within the division, separation, and limitation of powers set forth in our Constitution. And it was the responsibility of the courts to apply the law to cases, to ensure its enforcement except where it conflicts with the higher law of the Constitution. It should be remembered that the Constitution is itself and expression of the will of the people. Its original articles and subsequent amendements were all proposed by representatives of the people and ratified by representatives of the people.

When proposed and ratified, the provisions of the Constitution had spe-

cific meaning. That meaning should be given effect. Therefore, there is no place in the constitutional plan for the courts to impose their own notions of what is right or just or popular. As elected officials, this is our responsibility, and if we fail to carry it out to the desire of our constituencies we can be voted out from office.

Chief Justice Marshall simplified what I am saying when he said that if the popular branches of government—State legislatures, the Congress, and the Presidency—are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must prevail. Implicit in our form of government is the fact that the popular will embodied in the legislative acts be given effect except where it is clear that the people speaking throughout the Constitution have said otherwise.

Unfortunately, history holds examples where these principles have gone astray—where the theory of judicial restraint has given way to judicial activism. At times our Supreme Court has violated the constitutional plan by holding legislative acts as unconstitutional for reasons other than the popular will speaking through the Constitution. To find these instances, one need only look at the Supreme Court decisions that struck down legislative attempts to curb the spread of slavery before the Civil War, legislative decisions to protect our labor force from the excesses of the industrial revolution, and legislative efforts to overcome the devastation of the Great Depression. These, of course, are examples of judicial activism by conservatives who thought that social policy was being set too swiftly by the legislatures.

In contrast, judicial activism on the left is characterized by impatience with the evolution of social policy. This form of judicial activism does not have legislative acts before it to strike down, primarily because the liberals believe the legislatures often are not acting quickly enough to do what they perceive is in the peoples' best interest. In this vein the courts have usurped State responsibility over schools, in cases of busing; and over welfare, where courts are determining the responsibilities of States to illegal aliens.

Of course there are times when liberal judicial activists strike down legislative acts because, in their view, they are insufficiently progressive. An example here is capital punishment where these activists believe State and Federal laws, over time, have come to violate the eighth amendment. Changing attitudes toward the death penalty should not be taken as authorization by the judiciary to strike down capital punishment as cruel and usual. If these changing attitudes truly reflect the popular will, then Congress and the State legislatures are perfectly capable of declining to impose the death penalty. The decision for change in this area belongs to the legislatures since the framers of the eighth amendment never intended that the ban on cruel and unusual punishments apply to the death penalty.

One might note that in this regard flogging has passed from the American scene, not because the Supreme Court has declared it "cruel and unusual," but because legislatures, reflecting contemporary standards, have declined to impose it. This is how it should be.

It is because the Court has been used to advance political agendas that some liberals are very concerned about the political ideology of Justice Rehnquist—just as some conservatives might have been concerned with the appointments of Justices Frankfurter and Holmes. These two Justices were faithful adherents to the doctrine of judicial restraint. Such restraint is never appreciated by those with a political agenda, left or right.

In my opinion Justice William Rehnquist is of equal stature. He, too, is a champion of Judicial restraint—restraint that is not affiliated with party politics or ideology, but rather with the values of liberty, democracy, and stability. He is well-liked by his peers and highly recommended by the American Bar Association. His opinions since 1971 have been sound and steeped in constitutional theory. He is well recognized for his legal ability, leadership qualities, and integrity. And I believe there is little doubt that he will serve in the capacity as Chief Justice not as a moral or social reformer but as an objective expounder of the law, a strong defender of our constitutional form of government of distinct levels of government and the separation of powers.

LIBERAL MCCARTHYISM

● Mr. GOLDWATER. Mr. President, the debate on Justice Rehnquist has now stretched on for 4 days of hearing and 4 days in the Senate. I hope we are ready to vote.

My remarks will be brief. I merely want to look at the new criteria being raised by the critics of the nominee and show why they are so badly wrong.

The case against elevating Justice Rehnquist to the office of Chief Justice of the United States seems to boil down to an attack on his personal integrity. He is charged with holding opinions he disavows, and he is even condemned for groups he did not join.

Under the new standard raised by liberals, a man is guilty of insensitivity to individual liberties if he did not play an activist part in the civil rights movement of the 1960's and 1970's. This is guilt by "disassociation."

But even worse, Justice Rehnquist is accused of having beliefs which he has emphatically rejected. Time after time he has been falsely charged with opposing the Supreme Court ruling that desegregated public schools. This charge is made even though the record shows that Mr. Rehnquist testified eloquently on the fundamental correctness of this case, Brown versus Board of Education.

Speaking expressly of the ruling in Brown, Mr. Rehnquist said in 1971:

> I have, long before my nomination to the Supreme Court was made, felt strongly that the law of the land should be carried out in every part of the country and that resistance to it, whether in the name of interposition or something else in the South * * * couldn't be tolerated.

Yet he is charged with endorsing a school segregation memo he prepared alone or jointly with a fellow law clerk to Justice Robert Jackson back in 1952. Mr. Rehnquist explained that the position taken in this memo, which rejected judicial action to end classroom segregation, did not reflect his views. He was directed to take this line by Justice Jackson himself.

The opponents of Justice Rehnquist now make a serious accusation. They impugn the integrity of the nominee by proclaiming that his explanation "is not true."

Mr. President, it is not only the truthfulness of Justice Rehnquist they are doubting, it is that of Justice William O. Douglas, too.

Unlike the doubters, Justice Douglas was actually present in the conferences of the Supreme Court when the desegregation case was discussed. According to Bob Woodward and Scott Armstrong, authors of the Brethren, Justice Douglas:

> The only remaining member of the Court that had decided the Brown cases, examined a copy of Rehnquist's testimony. Rehnquist was correct, he told clerks. The views were, in fact, Jackson's.

Thus, not only do the accusers of Justice Rehnquist unfairly dishonor him, they also diminish the memory of the Justice who was widely recognized as the Court's "great libertarian."

Mr. President, in my statement on last Thursday, I called this frame of mind "liberal bigotry." Today, I have another name for it. More accurately, it might be termed "liberal McCarthyism."

If someone has not been an outspoken worker for liberal causes, he is un-American—unfit for high office. That is what the detractors of Justice Rehnquist seem to be saying.

His record is picked at selectively and distorted. The many cases in which Justice Rehnquist has decided for a civil rights plaintiff are ignored or dismissed out of hand. The cases in which he ruled against a civil liberties claim on the ground of statutory interpretation or federalism are portrayed as deliberate hostility to minorities or gender.

Heads you win. Tails I lose. The opposition to Justice Rehnquist is that simplistic.

However much his critics may alter the facts, the truth is that Justice Rehnquist often joins with a liberal outcome when respect for the legislative branch or the tradition of federalism points toward such a result.

In Shopping Center versus Robins, 1980, Justice Rehnquist sustained the California Supreme Court in expanding the scope of free speech to a broader public forum.

In Moore versus Sims, 1979, Justice Rehnquist's opinion for the Court sided with a Texas statute granting greater protection to children, who it was feared, were the victims of child abuse.

In Ray versus Atlantic Richfield Co., 1978, Justice Rehnquist adopted a position, in dissent, that would have increased the environmental safety of the State of Washington's sounds and coasts.

In Kassel versus Consolidated Freightways, 1981, a Rehnquist dissent would have allowed Iowa to protect its motorists from the danger and annoyance the State government believed was posed by double trailer trucks.

And, in Meritor Savings Bank, decided June 19 of this year, Justice Rehnquist wrote the opinion of the Court upholding the right of a female employee to bring claims of sexual harassment against a bank vice president and the bank itself.

This case may be the leading women's rights case of the year. Justice Rehnquist's opinion hardly sounds like the grunts of a male chauvinist, as his critics have made out.

In fact, the minority views of the report on his nomination by the Judiciary Committee does not even mention this case. It does not fit their predetermined image.

Yet in this decision, only 3 months ago, Justice Rehnquist supported the individual rights of a midlevel female bank employee against the power and wealth of a big financial institution.

Contrary to his detractors, who argue that Justice Rehnquist stands for backsliding in civil rights, he broke new ground by deciding that title VII of the Civil Rights Act of 1964 is not limited to "economic" or "tangible" discrimination, but covers the entire spectrum of disparate treatment of men and women, including sexual harassment.

Not only did Justice Rehnquist uphold women's protections under title VII beyond the economic aspects, he held that the bank as well as its officers may be liable for sexual discrimination of this form.

Mr. President, his opponents are absolutely wrong when they bandy about charges of disdain for individual rights concerning Justice Rehnquist. They have not done their homework and are unfairly smearing a dedicated jurist who has a real human warmth and sensitivity to the interests of other individuals and their needs.

Justice Rehnquist possesses an abiding fidelity to the Constitution and his oath to uphold this sacred charter. He will make an excellent Chief Justice and I urge that we end the debate and confirm him posthaste.●

LEGISLATIVE SESSION

Mr. WEICKER. Mr. President, I ask unanimous consent that the Senate return to legislative session.

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

Mr. WEICKER. 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.

□ 1410

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

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

DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS, FISCAL YEAR 1987

The Senate continued with consideration of the bill (H.R. 5234).

Mr. SYMMS addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. SYMMS. Mr. President, I rise in strong opposition to the Proxmire amendment. It seeks to delete $90 million from the Forest Service budget for road construction. The roads in question are needed to provide access to national forest timber. The national forests supply about 23 percent of the softwood lumber products produced in the United States. Rough calculations indicate that the Forest Service timber sale program will be cut by about 25 percent if this amendment passes. To put it another way, according to Forest Service estimates, 24,000 people now working in the lumber industry will, in all probability, be out of work in the next few years. Mr. President, a few years ago we talked a lot about the misery index. I submit that this amendment will raise the misery index substantially, especially in the small Western communities where the sawmill that generates most of the towns payroll is heavily dependent on Forest Service timber.

If the Forest Service Timber Harvest Program was the scam and the pork barrel that proponents of this amendment seem to think it, is I would have to vote with them. Given the size of the deficit, it would be very hard to support a timber sale program that added to that deficit. However, I am convinced that the Forest Service Timber Program returns money to the Treasury. It is difficult to get a precise figure for several reasons. Probably the major problem is assigning values and costs to the nonmarket outputs that are associated with timber harvesting. A very significant share of the cost of the Forest Service Timber Sale Program is associated with providing for other resource and values. How much of this is charged, or should be charged, to the Timber Program?

Similarly, the cost of building Forest Service roads and harvesting Forest Service timber is often dramatically increased by provisions for protecting and enhancing other resources. How much of this should be charged directly to the timber sales? There are basic questions that involve subjective judgment. There will probably never be totally correct, precise answers. However, Forest Service calculations show net receipts of $107 million in 1985. I do not think that anyone else has a more accurate estimate. Remember, 1985 was a year of high demand but very low lumber prices because of the deluge of imported lumber from Canada.

Some of the rhetoric used in pushing this amendment is not very convincing. We are, for instance, told that the Forest Service just likes to build roads, and that they, therefore, build too many roads and build roads that are too big. I just do not believe this. The road builders—the engineers—do not dominate the wildlife managers, the landscape architects; the recreation specialists and the forest planners. By law and by practice the national forests are managed under the strategy of multiple use. No single use dominates although 95 percent of national forest receipts come from the sale of timber products. All major decisions are subject to public scrutiny and public input. The roads that are built are needed and they have to be justified. The Forest Service does practice multiple use.

We are also given the fascinating but irrelevant information that the mileage of roads on national forest land is equal to 14 times the diameter of the Earth. The additional calculation showing 1 mile of road per square mile of national forest land might be a little more meaningful. Incidently, this is much less than the road density usually required for efficient timber harvesting.

The real question is whether the road system is adequate to meet the objective of national forest management. On balance, I think it is. It bothers me that this debate has centered almost exclusively on the timber resource. It is true that most of the Forest Service roads are built—and fi-

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is making interest on money that would otherwise be in the hands of the prevailing plaintiff.

According to calculations derived from a 1977 survey conducted by the Insurance Services Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs, while for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents. While I do not advocate wage and price controls, those who advocate reform of the system should be focusing on the higher defense costs. An imbalance would be created if the fees of lawyers for injured consumers were controlled, while not limiting the defense lawyers' costs. In that case, the only effect would be to undermine our legal system's guaranteed right of access to justice.

OVERVIEW OF THE CURRENT SYSTEM

What little information we do have about the current product liability system provides an interesting perspective: the system is generally fair and workable. According to one study, approximately 73 percent of the bodily injury claims and 83 percent of the property damage claims are settled without the filing of a lawsuit. Only 3.5 percent of claims go all the way to a court verdict, and in those cases, fewer than 25 percent of defendants are found liable. Thus, 96.5 percent of product liability claims are resolved before the verdict and more than 75 percent of plaintiffs lose in cases in which a verdict is reached. The American bar Foundation, in a study of seven counties from across the country, found that the percentage of cases in which the plaintiff was successful ranged from 28 percent to 56.3 percent. So, we know that it is difficult to win a product liability lawsuit when the case goes to trial and verdict.

The studies to date show that punitive damage awards remain infrequent, particularly for product liability, and that damages decided upon by the jury are often substantially reduced. The truth of the matter is that if actual damages are not sustained by the evidence, they are lowered at the insistence of the judges themselves who would otherwise order a new trial. And what about those million dollar awards by juries? In more than two-thirds of the cases with million dollar awards over the past 14 years, the plaintiffs have suffered gross and serious injuries or death.

We also have been told that many of the individual jurisdictions are experimenting with programs such as arbitration programs and are successfully speeding up the consideration of cases. Ninety-eight percent of civil cases pending in my own State of South Carolina, for example, have been pending for less than 1 year.

Certainly, juries sometimes—and it seems increasing—award damages against institutional wrongdoing. For example, in the University of Georgia case, the plaintiff was awarded $2.5 million against the university, although the amount was later reduced by over half of the original award. The plaintiff alleged that she was fired in retaliation for speaking out against preferential treatment of athletes on scholarship. The jury decided that the institution was liable for wrongdoing and felt that a large damage award was necessary to prevent this situation from occurring there or at any other institution in the future. Some researchers have hypothesized that plaintiffs receive large jury awards because jurors view certain defendants as having "deep pockets." However, interviews with jurors in Federal and State courts in southeast Pennsylvania revealed no significant finding that awards were based on the ability of the defendant to pay. The jurors' decisions rested primarily on their consideration of whether the plaintiff deserved to win based on the facts of the case and the applicable law, as well as the necessity to deter misconduct.

When a product liability case goes to trial, the jury is not impaneled for the purpose of giving away someone else's money. Rather, it is charged with the administration of justice. These juries are composed of our friends and neighbors, who conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

There are countless examples illustrating how our product liability system, has provided incentives for the development of a safer society. Product liability lawsuits can be credited with, among many other examples, the elimination of cancer-causing asbestos as a common building material. The trial process also has prompted State and Federal agencies to promulgate and enforce more vigorous safety standards for many products. With the opportunity to compete on the free market goes the duty to produce products that are not unreasonably dangerous as well as the responsibility to make reparation for any harm caused when that duty is neglected. Because we have a system which enforces this ideal, we can proudly state that ours is the safest nation on the planet.

CONCLUSION

The U.S. Senate should not pass legislation to codify product liability tort law without any comprehensive data to demonstrate, first, that such legislation is necessary, and second, that such legislation will work.

Do we know what we are getting into? Based on the scant statistical evidence provided by proponents of this legislation, the answer to that question is: "obviously not." We don't know whether the enactment of this legislation would affect insurance premiums, or whether there is any connection at all between insurance premiums and tort law. We don't know the burden we would create for the State courts to administer such legislation. We don't know how it would affect the development of safe and reliable products. In other words, the committee has chosen to close its eyes, say a few prayers, and go for broke. While I agree that successful government depends on the willingness of its leaders to engage in bold experimentation, the Product Liability Reform Act represents a recklessness this Nation cannot afford. If we must attempt to tinker with the product liability system, then let us do so armed with the facts and with an eye toward the protection of our society from unsafe and dangerous products.

If any problems exist with the product liability tort system, we are not going to solve them with legislation of this type. The bill should be rejected.

I yield the floor.

EXECUTIVE SESSION

The PRESIDING OFFICER. The hour of 1:30 p.m. having arrived, the Senate will now resume executive session to consider the nomination of William H. Rehnquist to be Chief Justice of the United States.

Under the previous order the time between 1:30 p.m. and 3 o'clock p.m. shall be equally divided between the chairman and ranking minority member of the Judiciary Committee or their designees.

The Senate resumed consideration of executive business.

Mr. KASTEN. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time be equally divided.

The PRESIDING OFFICER. Without objection is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

□ 1340

Mr. DOLE. Mr. President, I ask unanimous consent that further proceedings under the quorum call be rescinded.

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

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. RIEGLE. Mr. President, I rise to express my view on the Rehnquist

nomination which we will be voting on later in the afternoon today.

I have not spoken before on this issue, but I have been studying it and following it with great care going back to the hearings this year, the prior hearings when Justice Rehnquist initially went on the Court, and with a careful examination of his record both on the Supreme Court and prior to that time through his professional career.

Having done so and having had the opportunity now to listen to a number of my colleagues who serve on the Judiciary Committee and who went through the hearing process, I rise today to express my own judgment and conclusion on this nomination.

I have been in the Congress 20 years, and this marks 10 years, the end of this year, in the U.S. Senate. I have tried to recall a nominee we have had before the Senate for confirmation that has been more troubling in my mind than this one. There have been some others that have been troubling that I have voted against, some in my own party, some in the other party. I do not cast those votes on the basis of party as I think that recitation itself indicates. But as I reflect on all the judges who we have had to confirm, I do not recall a choice that I think is more disappointing or falls shorter of what is needed in an extraordinary position of responsibility in our Government than Justice Rehnquist.

Along with the President and Vice President, the Chief Justice of the United States, which is a lifetime appointment, is one of a tiny handful of Federal officials who serve at the highest level of trust and importance in our democracy. In a nation of over 240 million people, when we have an opportunity to select a Chief Justice—we have only had 15 in our entire national history—the obligation is to look across the length and breadth of our country to find someone of such extraordinary stature and respect and all the other qualities that you would want to see in a top government official that when that person is named and confirmed and goes to serve in that capacity there is an outpouring of support and good feeling and good will across the country. It should never be less than that, in my view, for a position as important as this one.

But I do not see that kind of feeling in the country, and I understand why. I am not able to feel it within myself because, as I say, I find this to be a sad and disappointing choice. It is a flawed choice, flawed in several ways, and one that I think will damage our country in a number of ways over a period of many years in the future.

Probably the cornerstones of our democracy when all is said and done is the idea that as citizens we make the laws. We are a self-government, a citizen government, and once we have made the laws which govern us, we will have equal justice when anything arises that applies those laws to us; that if a matter arises which takes us into court or in some way involves us with the law, our standing under the the law will be complete in terms of what the Constitution provides and it will be equal to that of any other person in our society. So that on the one hand, we have the ability as participating citizens to build the law and, on the other hand, we have the certain guarantee that we will be measured equally by those laws.

One of the defects in the way our system actually works is that very often under our legal process you get the justice you can pay for. By that I mean if you are well situated financially so that you can hire the best lawyers and have them go to work for you and they are competent and they go in and they work for you, you can get a measure of justice that is not available in the same degree to someone else who may not have the knowledge of the law or would not have the money to be able to hire the top legal talent in the country to defend them in a legal proceeding.

So the effect of the working of the law in this country is very uneven and unequal because of the nature of how the system works, in how you get and pay for legal counsel. That is why at the Federal level we have set up the Office of Legal Services to try to make sure that people who do not have the money receive some measure of representation so they get equal access to the law and get a fair judgment. That does not work very well. It works very imperfectly, and many people do not get competent and adequate representation in a legal sense.

□ 1350

I am deeply troubled about that. I think that in a society where you have large numbers of people who are economically disenfranchised, many times because of poor education or circumstances of poverty or circumstances of discrimination or other factors that may attach to them, they are in a circumstance where they cannot hope to get adequate representation under our system of law in this country.

So, yes, we can engrave across the front of the Supreme Court "Equal justice under law," but we are not able as a society to really produce that on a broad scale across the country.

For example, with people of very modest financial circumstances and maybe limited education, who do not understand the law and cannot afford to hire expensive legal talent, when a legal issue arises in their lives, I wonder how they feel about the degree to which they are actually able to have equal justice under law. I think they feel that it is not available to them, because, as a practical matter, most often it is not. So I think they have a different view of how they fit into our society. Unless we make a concerted effort to bring them in, in a full way, to put them on an equal standing with everyone else, there is a faultline which runs through our system of equal treatment under the law. That is what we find today.

For those people who feel that they are on the outside looking in and for whom the legal system does not really work in a meaningful or effective way, I am not sure how much stake they feel in our society. I do not know how much stake they feel in our system of laws, in our system of justice.

I can see how a feeling could arise in a person that if the system were stacked in such a way that it did not work for them, they would not feel a sense of commitment and investment to that system. I think it might lead to a state of mind where people would figure that the cards are stacked the other way, that maybe the law does not matter, because it does not work for them when it should in a proper sense, that it is something so distant and almost alien that it really is separate and apart from what their life is about.

I think that is a dangerous condition to have with any number of citizens, let alone the large number of citizens in our country. We have that in our society today, if we want to be honest about it.

How does this relate to Justice Rehnquist? I think that if you look at the pattern of incidents that have been cited and developed in the Judiciary Committee hearings, his pattern of decisions over the years as a sitting Justice, and his personal conduct prior to becoming a Justice of the Supreme Court, you see a person who consistently, time after time, almost without exception, has gone to great effort to make it hard for people to get equal treatment under the law.

When somebody engages, for example, in a voter intimidation program—in fact, is the mastermind of a voter intimidation program—to try to discourage people from voting, I do not know what more fundamental act there is in our democracy, if it is a working democracy, than the right to vote and the fact that people develop an opinion to go to the polling place on election day and vote for the people who will be in governing positions——

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

Mr. RIEGLE. Not at this time.

Mr. HATCH. Just on one point. The Senator is misstating the testimony.

Mr. RIEGLE. I do not want to be discourteous to my friend, but I do want to make my statement, and then I will be happy to yield for any

number of points the Senator wishes to make at the end.

The PRESIDING OFFICER. The Senator from Michigan has the floor.

Mr. THURMOND addressed the Chair.

Mr. RIEGLE. Mr. President, I do not want to be disrespectful, but I do not want to yield the floor.

Mr. THURMOND. I just want Senator HATCH to take my place.

The PRESIDING OFFICER (Mr. DURENBERGER). The Senator from Michigan.

Mr. RIEGLE. To engage in a voter intimidation program, to try to interject yourself between a person who is going to vote and their ability to vote, to operate in that fashion is about the most undemocratic act I can imagine—especially when it is carried out against people who are most often found in minority circumstances in our society, whether they be Hispanic people, black people, or other people who might otherwise have some large measure of difficulty with the voting process, or particularly with language problems or may be feeling uncomfortable about being able to go in and be understood and get their ballot and vote.

For anybody to inject themselves in the middle and try to discourage somebody from voting, to try to frighten somebody away from the voting place—what an act of arrogance that is. What an act of personal arrogance that is. Not only to mastermind a plan like that, but then to go out to the voting places, as a number of eyewitnesses have reported, and to personally inject yourself in that process, with the purpose in mind of frightening somebody away from the voting place, so that they are unable to vote and to cast the judgment they have reached—what level of arrogance does that require, for someone to feel that their notion of what the outcome of the election to be is so certain and so pure that they feel empowered to come to the voting place and try to discourage and stop the voting participation of another citizen? I have a very hard time even understanding how that kind of mind works.

Justice Rehnquist was involved actively in that kind of voter intimidation. He helped design the plan. He went to the voting place. He gives evasive and unclear answers as to his direct personal involvement in confronting voters, but we have a number of witnesses of stature who have come before us to testify that in fact he not only served as a mastermind, which he acknowledges, in terms of putting together a voter intimidation program, but also was directly involved, himself, in confronting voters in an effort to frighten them away from the voting place.

That is not an isolated incident. That is just one area of conduct and behavior in a larger pattern that is consistent over a long professional career.

Here is a man who, in other activities, has behaved in a fashion to try to prevent people from being able to have any full measure of justice under the law in this country. There is the case of the Justice Jackson memo, and it has been cited several times. I will not read it again into the RECORD. The language of that memo, prepared for Justice Jackson, which Justice Jackson's long-time personal secretary says did not reflect the views of Justice Jackson, which Justice Rehnquist said was the case, but was in fact Rehnquist's own views—that memo says in effect that it is all right to stay with school segregation; it is all right to basically separate our educational facilities on the basis of race.

I am deeply troubled that, first of all, he could have that view, could generate that view. I am troubled about his explanation about it after the fact. I do not find his explanation believable.

And that is just one of many instances where I think his testimony just is not believable. It just is not believable. It is inconceivable to me that he could recall with precise knowledge in an area where he wants to shed responsibility, an event that goes back to the early fifties and he has in a sense a perfect recall in that situation, but then we come several years ahead in the future to a more recent time where he was directly involved in the Laird versus Tatum issues in terms of domestic surveillance and he cannot remember anything. His mind and his memory is virtually completely erased in that area. So that back a long time before on what would seem to be a relatively minor matter he has a perfect recollection and you come forward much later in time on an area where he was in charge of the effort and was in charge of the Department, and very serious policy and practice decisions were being made and carried out, and he has no recollection.

I just find that very hard to believe and I do not believe it, I am frank to say.

You know one thing you have a chance to see over a period of time in Congress—for me it has been 20 years—are lots of witnesses. I dare say like my colleagues who served that length of time, I probably have spent thousands of hours of committee sessions listening and conducting the cross examination of witnesses of all sorts and types. After a while you develop an ability, I think, to judge quite well whether witnesses are telling the truth, whether they are withholding information, whether they are being deliberately vague, whether they fall back on the Watergate language of "I have no recollection," which is the way if you want to withhold something, with conscious knowledge to avoid a perjury charge, those are the words you have to use. Those are the words you use. You do not say "No, I didn't do it," if you knew you did it. You say, "I have no recollection," and then you are off the hook. Those are the legal words, words of art that allow you the chance to evade the situation without putting yourself into a situation of perjury.

So that does not make any sense.

But in the role that he necessarily had to have as the Director of that division within the Justice Department on Laird versus Tatum, we still do not have the answers on that and we ought to have the answers on that.

I am deeply troubled about the fact that he was involved in that activity.

There again there were people during that period of time who had serious reasons for opposition to the war in Vietnam. In fact, that became ultimately the majority view of this country and we got out of Vietnam because the people finally figured out it did not make sense and we had been lied to by our own Government, and the people who got out front early and took those views, and were subject to Government direct intimidation and harassment should never have had to be faced with those circumstances. This man was one of the architects of that activity. That much we know, but we cannot get the facts because this administration will not release the information that I am sure exists, that could throw light on this, and he has no recollection because his mind somehow got erased in that area. I do not believe that. I just do not believe that. I just do not believe that is the case.

There are a number of other specific situations that I think are equally troubling if you look at the pattern of decisions on the bench over a period of time.

It is almost impossible to find a situation where a citizen of low standing or inconsequential standing in terms of his or here personal circumstances where they have come in seeking justice and some redress of a grievance in terms of the effect of the law in their life and circumstances, that this Justice can find the way to give a measure of justice to that person. Other Justices equally conservative have found a way to do that in any number of cases, but almost never does this Justice find a way to do that.

So, one is left, I think, by looking at this record over the long period of time of saying that you cannot convince yourself—I am not able to convince myself—that he believes in one standard of justice equally applied for all citizens in this country. And if he becomes the Chief Justice and takes on that enormously elevated position of power, influence, responsibility, and symbolism, and the symbolic message

to the whole country is this is the best we have, this is the person who is going to epitomize equal justice under the law in the United States. I can see why a large number of people in this country who are knowledgeable about the background and the facts that relate to this candidate would walk by the Supreme Court and have a very bad feeling about it, that it was a contradiction, it was a contradiction about the way our system is supposed to work, it is a contradiction about the way we say our system will work, and in fact we have put someone there whose entire history is contrary to the notion of equal justice under the law.

Frankly, I think the latest examination of this man's record is compelling enough that he ought not to be on the Supreme Court at all, but he is and that cannot be changed, but I find nothing in his record, absolutely nothing in his record, that suggests that he meets a higher standard that one would hold for the office of Chief Justice. I find no distinguishing characteristic that would say across the broad sweep of our society, this is the one individual or this is 1 of 20, or 1 of 50, or 1 of 100, the finest ones that we can find to come in and be the Chief Justice of the Supreme Court and administer the Court and in a sense become the most powerful symbol of what justice in this country means to rank and file citizens.

He is not even close in terms of that kind of standard of measurement. In fact, I think what we have here is a choice that as I say is sad and discouraging, but I think more than that it is designed to create a lot of the polarizing feeling that in fact has been created and will continue to be created because I think large numbers of people in this country, with justification, will feel they cannot get a fair shake out of this man in this Court if he is running it. And that is what I think based on the record. In fact, the way I see the Constitution and I think the bulk of the people of this country see the Constitution, I do not think he is fairminded with respect to equal standing under the law, and I worry about a young person, let us say a young black person living in this town, standing out in front of the Supreme Court chamber and looking up at that magnificent building and wondering if he or she is going to get the same measure of justice from that Supreme Court that everybody else in th society is going to get.

I do not have that sense of confidence about this Justice because his entire pattern of professional conduct, history, and decisionmaking is to the contrary, that there will not be one nice even level standard out there but in fact we will have something far different than that. We will have two standards of justice. Those who are in circumstances where they have the ability to go out and hire the top lawyers, and so forth, will get one kind of treatment, and the other people can essentially fend for themselves.

I do not believe in that. I do not believe that is what our Supreme Court is all about. I do not believe that is what our system is about.

So in a sense, this choice, made as it was late in the year, I think was deliberate to rush the proceedings, to squeeze us up against the closing of the session of Congress, to not run the risk of the Democrats taking control of the Senate and running the Judiciary Committee so that if this appointment were to come next year we would have a far more searching inquiry, and a feeling that it ought to be avoided at all costs. So we get the timing of this situation coming now where we have been forced, I think, to move much faster than prudence would dictate we ought to move on an appointment of this importance and a record that I think is as questionable and I think is sad in so many respects as this is.

I will just say one or two other things and then I will yield the floor.

Some make the point that the President of the United States ought to be able to name anyone he wants to any job that is within his power of appointment. Under the strictures of the law, I suppose that is right. He can send up any nomination that he wishes.

But the reason we go through this process is because our ability to advise and consent requires us to make an affirming judgment. He does not make that decision by himself. He has to make that decision in concert with the United States Senate.

The Senate can, if it chooses, decide that it is a bad choice and turn it down.

I think you will see today when the final votes are cast there is a very substantial number of people in this body who are disturbed enough by this nomination that they intend to vote against it and will vote against it. I think when you are talking about a third branch of Government, the judicial system, the highest ranking position, the independent branch of Government, the President is not automatically entitled to his appointments necessarily, and even brings into question the independence of that third branch of Government. He has the right to appoint but we have the equally proper right to assess that nominee and to make the judgment as to whether that nominee measures up or not.

This nominee does not measure up. This nominee does not inspire the kind of feeling across this country about our system of justice and how it works that we ought to have coming from the person who is the Chief Justice. This nomination falls far short of that. It is, as I say, a disappointing one.

I guess my final thought is this to the people of the country. Assuming that this nomination is confirmed today, and it looks as if the votes are there, I am sorry to say, we may go through a period of great difficulty in terms of the pattern of decisions that we see coming from the Supreme Court because the Chief Justice does have an extra measure of power by virtue of the uniqueness of that position. We may see a period where unfortunate decisions are forthcoming, that injure people in this country and injure our ability to provide equal justice under the law.

If so, we are going to have to get through that period. We are going to have to get through it as best we can, and I think we can. But it is wrong to have this imposed upon the country. The President has made a serious error of judgment here and we ought not to compound it by confirming this nominee.

Mr. President, I yield the floor.

Mr. HATCH. Mr. President, I have heard a lot of remarks about Mr. Justice Rehnquist from the beginning of his announced nomination by the President to this very instant. Most of the criticisms of Justice Rehnquist have been effectively rebutted before.

I have, however, been curiously intrigued by much of what the distinguished Senator from Michigan has said, from calling him a mastermind in the voter challenging approach to saying that had the Democrats been in control of the Senate this inquiry would have been much more searching and much more in detail, and all the other comments in between.

You know, sometimes I do not think this is a nomination proceeding. I would call it a "Rehnquisition," because of the, I think, intemperate remarks which have been made, some of the inaccurate remarks that have been made, the distortions that have been made, the misrepresentations that have been made, the, I think, distortion of his written opinions and of his actual approaches that he has taken since he has been on the bench. And they have all effectively been rebutted.

How much more searching could this "Rehnquisition" have been? I cannot imagine. I said the last time I was on the floor, some of these people have left no stone unthrown. They have done everything they can to destroy this man's reputation. And I think they have done it in some of the most heinous of ways.

Let me just move to one aspect of it. Critics of Justice Rehnquist—and the prior speakers have been no exception to this—have relied heavily on a letter from Prof. Geoffrey Hazard to maintain that the Justice should have re-

cused himself in the Laird versus Tatum case. The entire theory stated in Professor Hazard's letter has no basis in the law or the ethics standards as they existed in 1972.

In earlier remarks, I have examined 28 H.S.C. 455 which would have required Justice Rehnquist to recuse himself if he had been "of counsel * * * a material witness * * * or had a substantial interest." He had no financial interest, was not involved even in an advisory role in the preparation of the Laird case while at the Department of Justice, and, of course, was not a material witness in the case. He did not commit any legal violation, nor did he participate directly.

Professor Hazard, however, sugests that the ethical standards of 1972 should have caused him to recuse himself. This opinion has little, if any, foundation in the ABA standards of that time. Rather than repeat the entire text of the ethical standard on disqualification, I will read its primary requirements:

A judge should disqualify himself in a proceeding which his impartiality might reasonably be questioned, including but not limited to instances where: (A) he has a personal bias or prejudice . . .

No evidence of that.

Or a personal knowledge of disputed evidentiary facts . . .

No evidence of that here.

(B) He served as a lawyer in the matter in controversy . . .

No evidence of that here.

Or has been material witness concerning it.

No evidence of that.

Now, Justice Rehnquist, as has been discussed many times, had no personal knowledge of the disputed facts, namely the Army's actual information-gathering activities. Moreover, as I have stated, he told Senator Ervin that he had no personal knowledge of those facts in 1971 four times.

Why can he not be believed by our colleagues? Why can they not respect this man? Why can they not treat him as an ordinary human being? Why can they not treat as an exceptional human being, which he is?

That hearing by Senator Ervin is the same hearing that critics rely on as evidence of his personal knowledge. When are people going to start being fair? When they are going to stop distorting this record?

Justice Rehnquist was not a lawyer at any stage of the Laird proceedings. In fact, he recused himself in numerous other cases when he had had merely an advisory role while at the department of Justice. He was not even an advisor, let alone the attorney, in the Laird case. When he was adviser, he recused himself. Hazard says that the Justice should have recused himself "unless he was not in fact involved in the matter when it was in the Office of Legal Counsel." He quickly concludes, without further investigation, that this would be "implausible" and declares that "the circumstances suggest that Mr. Rehnquist was personally and substantially involved" in formulating policy. The record, however, indicates otherwise.

I do not know where Mr. Hazard got these types of feelings but he does not have, it seems to me, much knowledge about what went on nor has he given the Justice even the bare courtesies of looking at what he has had to say in the past.

The "key" 1-page transmittal memorandum for the 1969 policy indicates that it was prepared by staff for Justice Rehnquist's signature. Moreover, the entire 12-page draft memo only includes one paragraph on Army surveillance—the entire 12-page draft. Where, then, does Mr. Hazard find his "personal and substantial involvement"? Justice Rehnquist's explanation seems much more logical and he should be believed over some law professor who injects himself into this at the last minute after 15 years.

The Office of Legal Counsel develops hundreds of policy memos every year—some might say thousands of them—most of which are highly important. If anything is implausible, it is the assumption that Mr. Rehnquist simply must have "personal and substantial involvement" in all of these memoranda.

I challenge any Senator here to remember all the memoranda that comes through his office in a week, let alone over a period of time like this.

I might add, otherwise, Mr. Hazard has no independent basis for concluding that the Justice devoted himself to this particular policy enterprise.

Finally, the Justice was not a material witness in the case. Moreover, he did not have sufficient knowledge of the disputed evidentiary facts to serve as a witness. The facts are simply not what Professor Hazard assumes. Let us look now at the ethical standard itself.

Professor Hazard stretches to find within this ethical code some falling on Justice Rehnquist's part. He bases his opinion on the notion that if Justice Rehnquist was involved in the "transaction out of which the case arose" he was somehow the equivalent of the attorney in the case. If this were the case, no attorney at the Department of Justice could ever be placed on the bench because they would have to recuse themselves in hundreds of cases. The ethical standard says nothing about relationship to a policymaking process as being the equivalent of relationship to the case itself. It is not in the ethics standard that involvement with policymaking or, to use the overly broad and vague terms of Professor Hazard, with "the transaction" requires disqualification. The ethics code speaks of the "proceeding," meaning in this context the judicial proceeding or the case, it does not speak of a broader notion of "transactions."

In fact, Mr. Hazard's statement of the law in his letter is clearly incomplete in this exact question. The professor quotes the following passage from a law review article written in 1970:

Justices disqualify in Government cases which they have been directly involved in some fashion in the particular matter, and not otherwise.

Professor Hazard omits, however, a later sentence from the same paragraph of that article. Let me read that,

More important, Justices who have come from the Government do not disqualify merely because the particular matter involves a policy which, when in the Government, they may have helped to form.

This omission is particularly puzzling when Professor Hazard himself states that this article "correctly summarizes the law of disqualification as it then stood." In fact, I think this omission has the appearance of an ethical violation on the part of Professor Hazard. It may be an ethical violation itself to distort what really happened and what the law really was. This professor has left out the part of the law that completely justifies the Justice's conduct.

In short, Professor Hazard jumps to the conclusion that Justice Rehnquist was "personally and substantially involved" in the policymaking at the Justice Department related to Laird. Now, the facts not only appear to be contrary, they are contrary. And any fair and reasonable review of them would have to be concluded in the Justice's favor. Specifically, what little work was done on the issue at the Department seems to have been done by a staff attorney, not Justice Rehnquist. Moreover, even if he were involved in the policymaking process, the ethical code of 1972 simply did not require disqualification for policymaking activity.

Now, this is just typical of what we have been going through for weeks here since the nomination of Mr. Justice Rehnquist to this elevated position. It is very disturbing to me, because I believe that even though we may be partisans on this floor from time to time there is a limit beyond which partisanship should not go.

I do not think that this should be an imposition. I do think it is legitimate to raise legitimate arguments. But I think every one of those has been more than refuted. I think those that some might feel are not fully rebutted, if they give this Justice the benefit of the doubt in the slightest sense, will have to go with Justice Rehnquist on every one of them.

You could spend hours on this discussing the distortions, the misrepresentations, and the cloudings that have really occurred, not only throughout the hearings but also throughout the floor debate on this matter. I suspect if we had the time, and we have I think covered most of them and I have no doubt in my mind we have covered all of the arguments that really need to be covered with regard to the remarks of the distinguished Senator from Michigan.

You know, the word "Rehnquisition" is not too far out of place here as I stop and think about it because that is what it should be. I think it is time to bring it to an end. I hope all of our colleagues will vote for cloture today, at least the vast majority of them, and then fight for this man who has spent 15 years of his life serving the public, and who has the confidence of the American Bar Association and so many people who really do not agree with him philosophically but at least admit he is a great Supreme Court Justice. And he has done a great job since he has been on the Court.

Mr. President, how much time do we have left on this, our side?

The PRESIDING OFFICER. The Senator has 24 minutes and 10 seconds.

Mr. HATCH. I yield the floor and reserve the balance of my time.

The PRESIDING OFFICER. Who yield time?

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. Mr. President, the managers on the matter of nomination on our side of the aisle are not present, and might I inquire on their behalf whether time will run against this side—their side—in the absence of someone speaking, or can we suggest the absence of a quorum and put that matter at a close to conserve the time remaining which can only be approximately 11 minutes?

The PRESIDING OFFICER. The Senator does not control the time. So he has no right to suggest the absence of a quorum.

Mr. MOYNIHAN. Mr. President, I believe a Senator has a right to suggest the absence of a quorum regardless of the position with respect to——

The PRESIDING OFFICER. Not when time is under control of specified Senators. And the Senator from New York is not one of those who controls the time.

Mr. MOYNIHAN. Mr. President, out of curiosity, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator does not have that right. That request would take a unanimous consent to do so.

Mr. MOYNIHAN. Mr. President, I ask unanimous consent that I may suggest the absence of a quorum.

Mr. HATCH. Mr. President, reserving the right to object, if that will be charged to the other side, we would have no objection. However, we are prepared to debate.

Mr. DODD. Mr. President, will the Senator use the microphone? I cannot hear.

Mr. HATCH. Excuse me.

We are prepared to debate. We are prepared to answer any questions. If that time will be charged to the other side, we have no objection. I really do not have any objection anyway.

Mr. MOYNIHAN. I am next in line. I have an address that will take exactly the time remaining. I do not want to do that.

Mr. HATCH. Mr. President, I will be happy to lend some of our time to the Senator from New York.

Mr. MOYNIHAN. Will the Senator yield 10 minutes to the Senator from New York?

Mr. HATCH. I will be delighted to yield 10 minutes to the distinguished Senator from New York. Will that solve the problem?

Mr. MOYNIHAN addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. MOYNIHAN. I thank always the accommodating and distinguished friend who so graces this Chamber by his personal manner as well as by his substantive positions.

Of the many memorials received by the Senate with respect to the nomination of Mr. Justice Rehnquist as Chief Justice of the Supreme Court, I found especially compelling one that came from a group of law professors which asserted that the "conscience-searching questions" raised by the nomination

are matters that every Senator must, in fidelity, decide upon alone in a quite place and time, away from the political arena.

This appeared to me to be counsel. I understook to follow it, have done, and have now reached a judgment.

May I first state my understanding of the duty of the Senate in the matter before us. Along with any number of Senators I have more than once stated that in exercising its power of confirmation the Senate should show a certain deference to the wishes of the President in constituting his Cabinet, and generally speaking choosing his advisers. Whatever their disposition in policy matters, once in office their actions can only be the actions of the President, and within the bounds of law, the President is entitled, indeed is expected, to act as he thinks best. Congress has the same right and responsibility.

This practice, generally followed, is no more, and no less, than a commensensical accommodation to the system of checks and balances built into our constitutional arrangements which keep us ever aware of the peril of stalemate.

With respect to Supreme Court nominations, however, wholly different standards apply. Here the President and the Senate are jointly constituting the third branch of the National Government, which is to say the Court. Here again a measure of accommodation is prudent. I would like to think I am mindful of the President's preferences. I would like to think he is mindful of mine. But that is a consideration that precedes more than follows an actual nomination. Once before us the Senate must act entirely as it thinks best.

This elemental duty was, if anything, painfully clear to the fourth Congress which rejected George Washington's second nominee for Chief Justice. (This position which is mentioned in article 1, section 3 of the Constitution, but was not actually created until the Judiciary Act of 1789.)

In the 19th century more than one Supreme Court nomination in four was rejected by the Senate. This ratio has been much lower in this century, but even so it is not uncommon for nominations to fail, and widely agreed that this is to be expected from time to time as Presidential views come into conflict with those of Senate majorities. In an article in the Harvard Law Record of October 8, 1959, Mr. Justice Rehnquist, then of course in private practice, concluded:

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 law", 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."

What then are my views in this matter. They are not complicated. Nor do they rest on exclusively legal considerations. Rather they go to the matter of "sympathies"—Mr. Justice Rehnquist's term, and a perfectly sensible one.

His critics, and I now join them, have drawn attention to an extended series of cases decided during his now extended service as an Associate Justice in which he has taken the most restrictive view of claims for equality of treatment advanced by individuals or groups claiming to have been discriminated against or other forms of unequal treatment. Mr. Justice Rehnquist has notably associated himself with resistance to the principle of incorporation under which the Civil War amendments, as they are known, are

judged to have extended the guarantees of the Bill of Rights to State governments, restraining them in the same manner the Federal Government is restrained.

I would offer the thought that over the now near two-century experience of constitutional government in the United States we have seen a persistent tension, at times almost a competition between the ideals of liberty on the one hand and equality on the other. In this competition liberty began with a distinct advantage. The word is enshrined in the very preamble to the Constitution which undertakes to

secure the blessing of liberty to ourselves and our posterity. . . .

By contrast, the word equality is nowhere to be found in the Constitution: not in the original text, not in the amendments.

We need not apologize for this. In the history of political ideas, liberty appears well before equality, and it is not difficult to show that it was in the setting of political liberty that the claims for equality gained attention and adherence. This was elementally the case as we moved toward manhood suffrage. How could the claims of liberty be met if some men could vote and others could not? The principle of manhood suffrage was secured by the Jacksonians in the 1830's, and just as promptly advanced on behalf of women by the Ladies of Seneca Falls in the decade that followed. A great civil war was required to secure a claim for black Americans, but that too was done.

Matters hardly ended there. Great struggles ensued as the idea of citizenship expanded beyond elemental freedoms to positive entitlements. The United States is not alone in this regard. Other democracies have followed much the same pattern. And other democracies have also experienced the tension between the claims of liberty and the claims of equality that abound in our polity.

There is a tension between these two ideals, but no contradiction. We are not required to choose one or the other. Americans are accustomed to speaking of competition as healthy, and surely this is such a case. And it will remain healthy so long as both claims are seen as legitimate and ensured a hearing.

More than any one thing, this is what the Supreme Court does. Brown versus Board of Education (1954), far the most important and celebrated of its decisions in this century, had to do with the fundamentally necessary decision that separate education facilities could never be equal. But throughout the century the Court has been dealing with issues of legislation and mass organization that arise from demands for equality of treatment. Sometimes reluctantly, sometimes enthusiastically, but always, in time, near to unanimously the Court has come through. Liberty has been secured but equality has advanced.

I cannot say and do not say that this advance would be put in jeopardy by Mr. Justice Rehnquist's appointment as Chief Justice.

The PRESIDING OFFICER. The Senator has used the 10 minutes of time allotted to him.

Mr. MOYNIHAN. Mr. President, I ask for 30 seconds.

The PRESIDING OFFICER. Who yields time?

Mr. THURMOND. Mr. President, we do not have the time to spare. We will try to give the Senator 30 seconds. I yield 30 seconds.

Mr. MOYNIHAN. I thank the distinguished chairman.

Speaking of Mr. Justice Rehnquist, his willingness to accept the position indicates a willingness to seek out consensus in the manner a Chief Justice must do. Even so it may not be gainsaid that significant groups within our society see the matter otherwise. They see principles put in jeopardy, matters involving liberty no less than equality, which were thought to be settled. This is necessarily and unavoidably unsettling to them. And in my view they are right. This was not necessary. Any number of sitting Justices might have been chosen whose nomination would have been unanimously acclaimed. Other sympathies were deferred to by the choice of Mr. Justice Rehnquist. These are not my sympathies. I will accordingly vote against the nomination.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. BIDEN. Mr. President, how much time does the minority have, the opponents?

The PRESIDING OFFICER. The minority has 8 minutes, 55 seconds.

Mr. BIDEN. I yield 3 minutes to my colleague from—and he is going to be exasperated by my only yielding him 3 minutes, unless he wants to have a fight in the Cloakroom with the Senator from Kentucky and the Senator from Massachusetts. I yield him 3 minutes.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, the nomination of an individual to be Chief Justice of the United States is probably the most important nomination a Senator could consider. It is a duty we should carry out with the same solemnity that we give to our oath of office. I have given the nomination to Justice William Rehnquist my closest scrutiny and my most careful consideration. I have cast my vote in the Judiciary Committee against him. I did so with some personal regret because I know Justice Rehnquist and I have high regard for him. I could spell out a number of the reasons for it but I would like to go to one. In my views, submitted as part of the minority report to Justice Rehnquist's nomination, I set out the facts in the Laird versus Tatum case and I explained the facts and the basis for my opposition to——

Mr. BIDEN. Will the Senator yield for a moment? I ask unanimous consent that we extend the time of the cloture vote for 15 minutes to be equally divided.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, I reserve the right to object. I would not give an answer until the majority leader has come to the floor and approved it.

Mr. BIDEN. I apologize for the interruption. I thought I could get more time. I beg the Senator's pardon.

Mr. LEAHY. Do I have any time remaining, Mr. President?

The PRESIDING OFFICER. One minute and ten seconds.

Mr. LEAHY. Mr. President, I yield back the time to the distinguished ranking member. To go through and make any kind of sense out of Laird versus Tatum in a minute and a quarter would be a charade and a mockery. I will not do it.

The PRESIDING OFFICER. Who yields time?

Mr. BIDEN. Mr. President, I yield 3 minutes to the Seantor from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I ask unanimous consent that I be permitted to make an inquiry which will not come out of our time.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, each side has so many minutes; they can use theirs, we can use ours.

Mr. KERRY. Mr. President, I would like to make an inquiry about time.

Mr. THURMOND. The Senator can make it on their time, if he wishes.

The PRESIDING OFFICER. An objection is heard. The Senator from Massachusetts is recognized.

Mr. KERRY. Mr. President, it is my understanding we are still having the cloture vote at 3 o'clock; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. BIDEN. The Senator is correct.

Mr. KERRY. Mr. President, I will yield my time back to the distinguished ranking member of the committee and reserve my opportunity to speak after the cloture vote, whatever the outcome.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. EXON addressed the Chair.

Mr. BIDEN. Mr. President, I told the Senator from Connecticut I would yield him 3 minutes.

Mr. DODD. I thank the Senator for yielding.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I would hope that there may be an extension of the time for the cloture vote so we may have more than 3 minutes to address this particular issue.

Mr. President, along with my other colleagues, I have given this matter a great deal of thought over the last several weeks; I have read intently the transcript of the hearings of the Judiciary Committee; and I have listened with a great deal of interest to the debate on this floor. As you can see, I have waited until the latter part of last week and this week to make a formal statement with regard to this nomination. It is often said here that votes are historic. I think we probably use those words describing matters that come before this body with too much frequency because, in fact, there are not that many historic votes in the course of a given legislative year. And yet, certainly I do not think anyone would disagree, given the few and rare occasions on which we as a body have already provided our advice and consent with regard to Supreme Court nominations, and even fewer when we have dealt with the nomination of someone to be the Chief Justice of the United States, that this is one of those rare historic occasions that occur in the history of this country. I, therefore, approach this occasion, as all of my colleagues do, with a great deal of seriousness and solemnity.

Mr. President, I feel that there are some basic tests we all ought to apply regarding judicial nominations—first, regarding the technical and legal skills, as well as the character of the individual. If a nominee cannot pass muster on those two tests, then we need not get to the question of whether or not the nominee embraces and endorses the constitutional principle of equal justice and liberty for all or, in the case of a nomination for Chief Justice, whether or not the nominee has the ability to lead the Court effectively and with the great degree of compassion and understanding that every Chief Justice must possess.

Mr. President, I ask unanimous consent that the vote on the cloture motion be extended until 3:15 with the time equally divided between the minority and the majority.

The PRESIDING OFFICER. Is there objection?

Mr. EXON. Reserving the right to object, Mr. President.

Mr. THURMOND. I reserve the right to object. I will have to object.

The PRESIDING OFFICER. Objection is heard.

Mr. DODD. Mr. President, if I may——

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, with regard to Justice Rehnquist, I feel clearly on the issue of technical skills, as has been said over and over again, he passes muster on that point. Mr. President, I see that my time has expired. I will finish my remarks on this nomination after the vote on the cloture petition is taken.

The PRESIDING OFFICER. The Senator's time has expired. Who yields time?

Mr. EXON. Mr. President, a point of inquiry?

The PRESIDING OFFICER. Who yields for the purpose of an inquiry by the Senator from Nebraska?

Mr. BIDEN. If it is less than 30 seconds, I yield.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. I yield for the purpose of an inquiry for 30 seconds.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, one of the problems with the Senate is that when we have blacks and whites we cannot get time for those of us who have not made up our minds. You cannot get any time unless you are for or against. I think that is unfortunate. I would like to ask unanimous consent that I be allowed to proceed for 3 minutes and no more without the time being charged to either side.

The PRESIDING OFFICER. Is there objection to the request?

Mr. THURMOND. Mr. President, personally, I would like to accommodate all Senators. We are under restrictive circumstances. I have conferred with the leader. I will have to object.

The PRESIDING OFFICER. An objection is heard.

Mr. THURMOND. They knew how much time they had, we knew how much time we had, and we will have to restrict ours and they will have to restrict theirs.

Mr. EXON. I would like to ask the distinguished chairman of the committee——

The PRESIDING OFFICER. Who yields time to the Senator from Nebraska? Who yields time?

Mr. BIDEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. BIDEN. How much time remains under the control of the Senator from Delaware?

The PRESIDING OFFICER. One minute, forty seconds.

Mr. BIDEN. Mr. President, in a moment of magnanimity, I will yield to the man who is probably going to vote the other way, but I yield to my colleague from Nebraska since I have no time to say anything intelligent anyway.

Mr. EXON. I thank my friend for the consideration. I wish it was shared by the other side, which this Senator was probably going to vote for until today. I am going to vote in support of this side of the aisle on this matter. I have been inclined to vote for this man all the way along but I have been listening to the debate. I do not like the ramrodding. I do not like the fact that those of us who have not thoroughly made up our minds cannot have a say. The reason I sought time, Mr. President, to explain my position a little further was that I do not believe we have fully explored the matter of credibility and reliability of the nominee.

I do not know how I am going to vote, up or down, when this comes up. But I have some concerns and considerations that I would like to bring to the Senate when I have time and when we can get off of this kick that right or wrong, black or white, you do not get any time. It is wrong. And I am somewhat taken aback by the distinguished chairman of the Judiciary Committee, the main ramrodder, who would not even allow me the courtesy of 3 minutes. I thank my friend from Delaware.

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. THURMOND. Mr. President, in response to the distinguished Senator from Nebraska, my good friend, I want to say we have already given you all 10 minutes, 10½ minutes of our time.

Mr. EXON. You have not given me any of your time and I want the record to so recognize. When you say we, because I am a Democrat you assume I am "we." I am a Member of the U.S. Senate, and I respectfully remind the President pro tempore of that fact.

Mr. THURMOND. Mr. President, I just want to say that the agreement was entered into; the time would be equally divided, and that is the way it has been handled. The leader of the Democrats, my good friend, the ranking member here, was handling their time. If the Senator from Nebraska wanted time, he could have gotten it from him, I presume.

Mr. President, I want to say in the beginning there has been more distortion, and more assertions made about this nomination without foundation than any nomination I have handled in the time I have been in the Senate. Who is this man we are talking about? He is a man who served in private practice, he is a man who served as a clerk to a Supreme Court Justice, he is a man who was first undergraduate in law school, he is a man who has been on the Supreme Court now for how long? Fifteen years. Fifteen years on the Supreme Court.

□ 1450

Mr. President, what do some of the people say who have investigated this man carefully?

The American Bar Association's Standing Committee on the Federal Judiciary found Justice Rehnquist to be well qualified and so informed the Judiciary Committee. That is the highest rating the American Bar can give. They rarely give the highest rating. They generally give a middle rating. They gave this man the highest rating they could, and it was unanimous. It was not a divided opinion. It was a unanimous finding in granting the highest evaluation possible.

The ABA committee interviewed all the current Associate Justices of the Supreme Court. How did they feel, his associates? They are not all Republicans. Some are liberal, way out in left field. They all said that they thought this man would be fair and would make a good Chief Justice. That is what the members of the Supreme Court said, the people he has sat with for 15 years.

What about Federal and State judges? They interviewed a lot of Federal and State judges. They interviewed 180 Federal and State judges. What did they say? They said he is well qualified, and they endorsed him. They should know. They describe him as a true scholar, unbelievably brilliant, a very capable individual in every respect. He enjoys the respect and esteem of his colleagues on the Court.

What about some practicing attorneys, those who have tried cases before the Supreme Court, those who are actively practicing? The ABA committee interviewed approximately 65 practicing attorneys throughout the United States—not in one area, but all over. These attorneys, including some who disagree with him politically and philosophically, spoke of warm admiration for him and described him as a very talented man, a very bright and able man, always well prepared, one who brings out the best in people and will facilitate the work of the Court. That is what the practicing attorneys said about him.

Some say we ought to listen to the deans and the teachers and the professors. So they went to them and interviewed 50 deans and law school faculty members. What did they say about him? They said that his legal analysis and writing ability were of the highest quality. They approved him; they recommended him.

So, Mr. President, here you have the American Bar, which did a very careful investigation. You have the Supreme Court Justices, his colleagues on the Court. One hundred eighty Federal and State judges were interviewed. Very capable lawyers all over the country and deans and faculty members were interviewed.

They went further and examined 200 opinions Justice Rehnquist had written, and from those they said that his writings are of the highest quality.

Are you going to rely on some group here that is against him because they do not agree with his philosophy, or are you going to rely on some group which claims he is discriminatory, when the preponderance of the evidence shows to the contrary? On whom are you going to rely here?

Let us go back a little. What about a former Attorney General under President Carter, Judge Griffin Bell? What does he say about Justice Rehnquist? He said:

I think he has to be tested to see if he possesses integrity, ability, leadership capacity, intellectual attainment, and good health and on top of that, I would want to be certain that he had a modicum of common sense. It seems to me that he meets all of these standards and the President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I think his record supports that same conclusion. Were I a Senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with a decided view that he would serve our Supreme Court and our country well.

Mr. President, that is not a Republican. That is a Democratic Attorney General.

What about Mr. Erwin Griswold, who is respected by everyone who knows lawyers? He was Solicitor General under President Johnson. He said:

. . . because of my 33 years of academic career, I have been quite a student of the Supreme Court over the past good many years, including the current Court. I have read the opinions. I think Justice Rehnquists' opinions are able, lawyer-like, important contributions to our constitutional and other law. In my opinion, he is extremely well qualified to be Chief Justice . . .

That was stated by Mr. Erwin Griswold, a former Solicitor General under President Johnson.

What about another former Attorney General, William French Smith? Mr. Smith gave a glowing opinion which is in the record. He said:

He has made an impressive and important contribution to the Court and will certainly continue to do so.

What about Dean Gerhard Casper, of the University of Chicago Law School? He gives Justice Rehnquist a glowing recommendation. He said:

Justice Rehnquist, in terms of abilities, temperament, and administrative experience, is well qualified to take on these tasks. I have known Justice Rehnquist personally for about 7 years and I have been greatly impressed by his capacity to deal with people and problems in a low-keyed, friendly, and effective manner. Justice Rehnquist is well versed in the institutional history of the Supreme Court and cares about the Court's role in American life. While the Justice and I disagree on a fair number of substantive issues, these disagreements have never prevented me from appreciating Justice Rehnquist's great abilities as a lawyer. I would expect him to go about the tasks of the Chief Justice with true concern for the demands of the position.

Mr. President, all these are very prominent people.

The PRESIDING OFFICER. The Senator has 4 minutes remaining.

Mr. THURMOND. Mr. President, in closing, I want to say this, and I will give the rest of the time to the distinguished majority leader.

I urge my colleagues to vote for cloture on the nomination of Justice William Rehnquist to be Chief Justice of the United States. Justice Rehnquist is entitled to a vote on the constitutionally mandated responsibility of advice and consent of the Senate.

Mr. President, the outcome of the issue of confirmation should not be decided by a vote on cloture requiring 60 votes, almost two-thirds of the Senate. Those who oppose cloture will, in effect, be holding the nominee to a higher standard than that normally required. A majority vote is all that is needed to approve or disapprove any nominee, and Justice Rehnquist or any other nominee is entitled to that vote.

I urge my colleagues, in a sense of fairness, to vote for cloture, and thus allow the Senate to work its will.

Mr. President, I ask unanimous consent to have printed in the RECORD a letter to me from Thomas E. Adams, Jr., which is self-explanatory. He refutes the charges with respect to civil rights and so forth.

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

SEPTEMBER 12, 1986.

HON. STROM THURMOND,
Chairman, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: News articles appearing in The Wall Street Journal on September 10 headlined "New Questions Raised About Rehnquist's Role in Army Surveillance of Protestors" and The Washington Post of September 11 headlined "Rehnquist Role in Army Spy Case Called Unethical" greatly preturb me. These newspaper articles wrongly charge Justice Rehnquist with developing an Army domestic surveillance program of antiwar protestors while working for the Justice Department during the Nixon Administration.

As the Chief of Plans and Operations for the Military District of Washington during the period February 1964 to August 1966 and the Chief of Plans and Operations, Office Chief of Military History, Department of the Army (1966–May 1968), I have personal knowledge that Army surveillance activities were not only planned but were operational, i.e., in use, against so called war protestors and additionally, so called "civil rights activists" prior to the Nixon Administration. Such surveillance was conducted specifically during the period 1964–1968 by a Counter-Intelligence-Corps (C. I. C.) Battalion assigned to the Washington area. Specific surveillance of so called "civil rights activists" by the C. I. C. unit was being conducted prior to my assignment to the Military District of Washington and apparently (from reports submitted to me) was initiated

during Martin Luther King's "March on Washington" in the fall of 1963. At any rate the Army C. I. C. unit was actively conducting widespread surveillance of "civil rights activists" in the Washington area during the 1964-66 period and when the so called war protestors commenced their activities those activities were also put under surveillance by the Army C. I. C. unit in the Washington area. The Federal Bureau of Investigation supplied the Military District of Washington and the so called "War Room" of the Pentagon with similar surveillance information during this period. During a meeting I attended in 1966 in the Office of the Attorney General of the United States conducted by the then Deputy Attorney General, Ramsey Clark, regarding the possibilities of rioting in the District of Columbia, the Attorney General directed all surveillance activities to be increased. Also in attendance at this meeting were Assistant Attorney General Barefoot Sanders, the U.S. Attorney for the District of Columbia, the Chief of Police for the District of Columbia, and a General Officer in charge of the "Army War Room" at the Pentagon. Following my transfer to the Office of the Chief of Military History in the fall of 1966 until I retired from the Army in May of 1968, I maintained close contact with my Army friends at the Military District of Washington; my observation was that the surveillance mission continued at least until my retirement. My statement in this matter can easily be documented from Army records.

I trust this information might be useful in bringing out the real truth in Justice Rehnquist's confirmation proceedings.

Respectfully,

THOMAS E. ADAMS, Jr.,
LTC U.S. Army Ret.

Mr. THURMOND. Mr. President, since my name has been brought into this matter previously with respect to Justice Fortas, I ask unanimous consent to have printed in the RECORD my additional views on Justice Fortas when I opposed his nomination several years ago.

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

INDIVIDUAL VIEWS OF MR. THURMOND ON JUSTICE FORTAS

Refusal to advise and consent to the appointment of a Chief Justice of the Supreme Court is a most serious action. It cannot be undertaken lightly, and reasons for such an action must be set out clearly and forthrightly.

The hearings conducted by this committee have been extensive. There has been considerable discussion by witnesses and by Senators of the propriety of the circumstances of this appointment, of the proper role of the Supreme Court in the governing of this Republic, and inevitably, of the activities of the nominee himself, Justice Abe Fortas. This discussion has produced three sound and highly persuasive reasons why this nomination should not be confirmed: First, the positions taken by Justice Fortas since he went on the Supreme Court as Associate Justice have reflected a view to the Constitution insufficiently rooted to the Constitution as it is written; second, the conditional wording of Chief Justice Warren's resignation, in which the Senate is told, in effect, confirm this nominee, or the Chief Justice remains at his post, is indicative of a desire by the Chief Justice to influence the choice of his successor in an extraconstitutional manner; and third, Justice Fortas himself has involved himself in extrajudicial activities which raise doubts as to his desire to maintain that degree of isolation and impartiality required of a Chief Justice.

With regard to the decisions in which Justice Fortas has participated, four categories of cases are of particular concern: Criminal procedure, pornography, State-Federal relations, and subversive activities.

CRIMINAL PROCEDURE

Crime and lawlessness have become of utmost concern to the vast majority of Americans, and understandably so. The maintenance of public order and the security of person and property which accompany this order is necessarily the first requirement of government. The Supreme Court's decsion in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which freed a confessed rapist and completed the destruction of the voluntary confession in criminal cases, unfortunately typifies the Court's approach to criminal procedure. Justice Fortas sided with the majority in this 5-to-4 decision. Justice White, in his strong dissent to the *Miranda* ruling, stated:

In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.

PORNOGRAPHY

A society which refuses to defend its standards cannot preserve them. *Redrup* v. *New York*, 386 U.S. 767 (1967), in which Justice Fortas concurred, set the stage for massive reversals of obscenity convictions. Justice Fortas has voted to reverse obscenity convictions in 35 of 38 cases since he became an Associate Justice. Testimony before the Judiciary Committee made clear that these decisions have opened the floodgates for pornographic material of all kinds and created chaos in the efforts to enforce laws against such material.

STATE-FEDERAL RELATIONS

With regard to State-Federal relations, Justice Fortas has shown a strong distrust of the States. In his dissent in *Cardona* v. *Power*, 384 U.S. 672 (1966), he concluded that the 14th amendment left New York powerless to require literacy in English as a prerequisite to voting. In *Katzenbach* v. *Morgan*, 348 U.S. 641 (1966), he agreed with a majority that Congress could prohibit New York from enacting such a voting requirement. In *Brown* v. *Louisiana*, 383 U.S. 131 (1966) he wrote the prevailing opinion holding Louisiana powerless to punish demonstrators who refused to leave a public library.

In *Harper* v. *Board of Elections*, 383 U.S. 663 (1966), Justice Fortas agreed with the majority that Virginia was powerless to enact a poll tax as a voting requirement. Regardless of one's view of the poll tax, and as Governor of South Carolina, I sponsored legislation to repeal it in our State, Justice Black's dissent in this case should be noted:

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 through the amendment process which the framers wisely provided.

SUBVERSIVE ACTIVITIES

Another category of cases in which Justice Fortas' record should be noted concerns the internal security of this Nation. In *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), Justice Fortas voted with the majority to overthrow a Federal requirement that Communist Party members register with the Subversive Activities Control Board. In *Keyishian* v. *New York Board of Regents*, 385 U.S. 589 (1967), Justice Fortas concurred in a 5-to-4 decision which struck down the New York loyalty oath prohibiting Communists from teaching in the public schools. Justice Fortas also sided with the majority in *United States* v. *Robel*, 389 U.S. 258 (1967), to overthrow a law of Congress prohibiting Communists from working in defense plants. Justice Fortas voted with the majority again in *De-Gregory* v. *New Hampshire*, 383 U.S. 824 (1967), to deny the State of New Hampshire the power to investigate Communist activities in that State. Considering the wealth of knowledge Congress has accumulated on the Communist apparatus, distinguishing it from a mere political association, I find these decisions indefensible.

Some have objected that prior Supreme Court decisions and the role of Justice Fortas in these decisions have no proper part in these deliberations. Let us recall these words attributed to Abraham Lincoln:

The candid citizen must confess that if the policy of government upon vital questions is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own selves, having to that extent practically resigned their government into the hands of that eminent tribunal.

A second question to be considered is the curious matter in which Chief Justice Warren tendered his resignation to the President. In our system of checks and balances, the Supreme Court is appointed by the President with the advice and consent of the Senate. There is no provision for the members of the Court to participate in this process. Chief Justice Warren, by resigning effective upon the qualification of his successor, has created a situation in which we are not called upon to fill an existing vacancy: If we refuse to confirm this appointment, Chief Justice Warren will continue to serve. It is unclear just how long he intends to serve or whether a new President in January may simply submit another name in the absence of any further action from the Chief Justice. If Justice Fortas is confirmed, the Senate will have also acquiesced in setting a precedent by which sitting Justices attempt to perpetuate their philosophies by influencing the choice of their successors. Such a precedent would be unwise and could accelerate the growing influence of the Supreme Court in American government.

Finally, we must consider certain nonjudicial activities of Justice Fortas which are relevant to this nomination. It is well known that Justice Fortas, prior to his elevation to the Supreme Court in 1965, was a man of great influence in the councils of Government here in Washington. His friendships were numerous, uncommonly influential, and well placed both in and out of Government. It is only natural that he acquired a reputation for an ability to influence the course of events in Government. There is, of course, nothing necessarily wrong in such an arrangement. His counsel was apparently sought, and freely given. Involvement in all branches of Government became a habit with Mr. Fortas. When he became a Supreme Court Justice, he did not break the habit.

Persuasive evidence was introduced in the hearings that Justice Fortas transgressed the separation-of-powers doctrine in both the executive and legislative branches. The evidence, which came from credible sources and was not refuted, indicates that Justice Fortas participated in the drafting of President Johnson's state of the Union message and in the drafting of legislation to provide Secret Service protection for presidential candidates. Such activity on the part of a member of the Supreme Court is improper. The prospect of a Justice ruling on a matter before the Supreme Court in which he had been personally involved violates both standards of judicial ethics and the concept of separation of powers.

The testimony of Dean B. J. Tennery, of the law school of American University, must also be given the most serious consideration. Justice Fortas was paid $15,000 by American University to conduct a seminar for the law school. The seminar consisted of nine lectures during the summer of 1968. The highest sum previously paid by the law school for similar services was $2,500. Justice Fortas was paid from a fund of $30,000 raised for this seminar by Mr. Paul Porter from five prominent individuals. Mr. Porter is a former law partner of Justice Fortas; and Mrs. Fortas is still associated with the firm. As far as can be determined, none of the five individuals had any prior association with American University. Apparently the five are friends of Mr. Porter and/or Justice Fortas. All of the contributions have extensive business interests and are directors of large corporations, any of which could have cases before the Supreme Court. One is chairman of the New York Stock Exchange. According to press reports, one of the contributor's son has a conviction for mail fraud on appeal before the U.S. court of appeals.

The role of a Supreme Court Justice is unique in government. A Member of Congress for example, is an advocate for the people and cannot remain indifferent to the outcome of causes which he believes are in the best interest of the Nation. A Supreme Court Justice cannot allow himself to appear to be active in public affairs. He cannot involve himself in situations which could compromise or constrict his work on the Court. The price of judicial detachment is high in human terms; but the dignity and authority and reserve of the Court come from the stature of those who are willing to pay the price.

For all of the reasons outlined above, I believe the Judiciary Committee should not have reported this nomination to the Senate floor. The U.S. Senate should refuse to concur in this appointment.

Mr. THURMOND. Mr. President, I yield the remainder of our time to the able majority leader, Senator DOLE.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. DOLE. Mr. President, we are about to have a vote on cloture, to end the debate on the nomination, and I hope it is overwhelming.

I know there are some who have very strong differences; and I indicate, and I think the Record will reflect, that there has been an effort by the distinguished chairman of the committee, Senator THURMOND, and by the leader to keep this as free from partisanship as possible.

In my view, we have extended every courtesy to the opponents. We thought we might vote yesterday. We thought there might not be a need to file the cloture motion. I will not say that we have gone the extra mile. This is a very important nomination. I believed, and I still believe, that there was every right to discuss it to the fullest. I think, for the most part, the debate has been on a very high level, and we have not wasted a great deal of time. But I do believe that now we have heard everything at least once or twice or three times. There are no bombshells lying around.

It seems to me that it is in the interests of the U.S. Senate and certainly in the interests of the nominee that we proceed to vote on the nomination. I know this is important. I know that we should not let other important work interfere with this nomination. We do have a lot of work to do, but we have tried to temper any effort to rush to judgment, with parts of at least 4 or 5 days on the Rehnquist nomination.

□ 1500

I believe for the many, many, many reasons stated by the chairman of the committee, Senator THURMOND, who had done outstanding work on this nomination, that there ought to be an overwhelming vote on this cloture motion and following that if cloture is invoked we ought to dispose of the nomination.

Once cloture is invoked I really do not see any reason to debate it further.

I urge my colleagues—those who are opposed, all right—I urge all who can to vote for the cloture motion. Let us get on with this nomination and get on with the rest of our work so we can leave here on October 3.

CLOTURE MOTION

The PRESIDING OFFICER. The hour of 3 p.m. having arrived, under the previous order, the clerk will state the motion to invoke cloture.

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 debate on the nomination of William H. Rehnquist, of Virginia, to be Chief Justice of the United States.

Bob Dole, Strom Thurmond, Thad Cochran, Chic Hecht, Dan Quayle, James A. McClure, William L. Armstrong, Jesse Helms, Phil Gramm, Mack Mattingly, Jeramiah Denton, Orrin G. Hatch, James Abdnor, Paul Trible, Malcolm Wallop, and Al Simpson.

VOTE

The PRESIDING OFFICER. The question is, Is it the sense of the Senate that debate on the nomination of William H. Rehnquist to be Chief Justice of the United States shall be brought to a close? The yeas and nays are automatic under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] is necessarily absent.

The PRESIDING OFFICER (Mr. NICKLES). Are there any other Senators in the Chamber who desire to vote?

The yeas and nays resulted—yeas 68, nays 31, as follows:

[Rollcall Vote No. 265 Ex.]

YEAS—68

Abdnor	Gorton	Nickles
Andrews	Gramm	Nunn
Armstrong	Grassley	Packwood
Bentsen	Hatch	Pell
Bingaman	Hatfield	Pressler
Boren	Hawkins	Proxmire
Boschwitz	Hecht	Quayle
Broyhill	Heflin	Roth
Bumpers	Heinz	Rudman
Chafee	Helms	Simpson
Chiles	Hollings	Specter
Cochran	Humphrey	Stafford
Cohen	Kassebaum	Stennis
D'Amato	Kasten	Stevens
Danforth	Laxalt	Symms
DeConcini	Leahy	Thurmond
Denton	Long	Trible
Dole	Lugar	Wallop
Domenici	Mathias	Warner
Durenberger	Mattingly	Weicker
Evans	McClure	Wilson
Ford	McConnell	Zorinsky
Goldwater	Murkowski	

NAYS—31

Baucus	Gore	Metzenbaum
Biden	Harkin	Mitchell
Bradley	Hart	Moynihan
Burdick	Inouye	Pryor
Byrd	Johnston	Riegle
Cranston	Kennedy	Rockefeller
Dixon	Kerry	Sarbanes
Dodd	Lautenberg	Sasser
Eagleton	Levin	Simon
Exon	Matsunaga	
Glenn	Melcher	

NOT VOTING—1

Garn

□ 1520

The PRESIDING OFFICER. On this vote, there are 68 yeas and 31 nays. Three-fifths of the Senators duly chosen and sworn having voted in the affirmative, the motion is agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote.

Mr. HATCH. I move to lay that motion on the table.

The PRESIDING OFFICER. A motion to reconsider a successful cloture vote is not in order.

Mr. LEAHY addressed the Chair.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, a parliamentary inquiry: What is the situation now?

The PRESIDING OFFICER. Will the Senate be in order now, please?

There is a total of 30 hours for consideration of the nomination. Senators may speak for up to 1 hour each.

Mr. LEAHY. Thank you, Mr. President.

Mr. President, before the—was the majority leader seeking recognition? If he was, I would certainly yield to him.

Mr. DOLE. I am just standing around.

Mr. LEAHY. Mr. President, if we could have order.

The PRESIDING OFFICER. The Senate will be in order.

The Senator from Vermont.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

Mr. LEAHY. Mr. President, prior to the cloture vote, I had attempted to spell out my feelings about the Laird versus Tatum case, and others. I did not feel it would be fair, either to the Senate or to myself, to go into such complex a matter in a minute or so that might be available. I would like to go into that now.

Justice Rehnquist has many qualities that I consider important for a Chief Justice. Among these are his keen intellect and legal skills, and his considerable experience as an Associate Justice, which gives him a great understanding of the workings of the Court and an appreciation for the responsibilities of the Chief Justice.

But there are other equally important qualities requisite to being Chief Justice. And they are in these areas: in credibility, in judgment, in sensitivity——

The PRESIDING OFFICER. Will the Senator please withhold? The Senate will be in order. The Senator has a right to be heard.

Senators please take their conversations to the rear of the Chamber. Will the Senate please be in order? Senators please take their conversations to the rear of the Chamber.

Mr. RIEGLE. Mr. President, the Senate is still not in order. I wonder if the Chair would restore order so we can hear the Senator.

The PRESIDING OFFICER. The Presiding Officer is aware of that. The Senate will be in order. The Sergeant at Arms, too, will try to accommodate the galleries in trying to maintain order.

The Senator from Vermont.

Mr. LEAHY. I thank the Chair for restoring order. I realize that, on what has been really one of the more momentous votes of this year, there is, understandably enough, a fair amount of confusion both in the galleries and on the floor. I do appreciate the Chair restoring order.

Earlier this afternoon, I said that in the Judiciary Committee I had cast my own vote against Justice Rehnquist as a member of that committee. I did so with some personal regret, because I know him and I have a high regard for him.

I have, however, voted for cloture here this afternoon, and I did that because I felt that this is an issue that should come to a conclusion and that the Senate should vote on it. I feel that President Reagan is entitled to have a vote up or down in this body and that we should carry out our constitutional duty to advise and consent on this nomination.

And so, in that regard, Mr. President, I would like to discuss the main reason I voted against Justice Rehnquist in the Judiciary Committee.

Justice Rehnquist has many qualities that I consider important for Chief Justice. Among these are his keen intellect and legal skills, and his considerable experience as an Associate Justice which gives him a great understanding of the working of the Court and an appreciation for the responsibilites of the Chief Justice.

However, there are other, equally important qualities requisite to be Chief Justice, and it is in these areas—credibility, judgment, and sensitivity—that I believe Justice Rehnquist falls short of the standard we should employ.

At the outset, let me say that I do not believe that a nominee's philosophy should be the ultimate factor in carrying out our responsibility to advise and consent. As long as a nominee is otherwise qualified, philosophy should not be a consideration unless that philosophy undermines fundamental principles of constitutional law, or his or her adherence to ideological principles is so fervent that the nominee cannot judge impartially.

President Reagan, like any President, is entitled to appoint judges who share his philosophy. Indeed, Justice Rehnquist himself acknowledges that he very well may be the most conservative member of the Court. Yet the fact that Justice Rehnquist's ideology or judicial philosophy differs from my own played no part in my decision to vote against him.

Justice Rehnquist's ownership of property in Vermont was also explored in the hearings. The warranty deed on that property includes a restrictive covenant barring the sale of the property to any member of the Hebrew race.

While I am disturbed that as a sitting Supreme Court Justice, Justice Rehnquist did not question the existence of this clause in the deed at the time he bought the property, I find no evidence in Justice Rehnquist's background that he is either racist or anti-Semitic. I accept Justice Rehnquist's assurances that he finds the covenant repugnant, and that he will move expeditiously to have it removed from his deed.

I raised this issue during the hearings because the Chief Justice of the United States is the person who, perhaps more than any other, embodies our principles of justice. Because of that important role, I believe—and Justice Rehnquist agreed with me during his testimony—that it is vital that he avoid even the appearance of racial or religious hostility.

Another important issue raised during the Judiciary Committee hearings on the Rehnquist nomination was whether he participated in efforts to challenge minority voters in the early 1960's. Based on my observation of the witnesses and my review of the testimony, I believe that the memories of both Justice Rehnquist and of many of those who testified against him are faulty.

I can understand the position of those of my colleagues who are convinced of Justice Rehnquist's participation in voter challenges and based their decisions on this point. I can appreciate the opinions of my colleagues who are equally convinced that Justice Rehnquist was not involved in this reprehensible activity. Without clear and convincing evidence, I feit that this issue could not form the basis for my decision on Justice Rehnquist's nomination.

The axis upon which my decision to vote against Justice Rehnquist's confirmation ultimately turned was his decision not to recuse himself in the Supreme Court's 1972 decision in Laird versus Tatum. That case involved a first amendment challenge to the Army's program of conducting domestic surveillance of persons engaged in lawful antiwar demonstrations. The Supreme Court ruled in a 5-to-4 decision that the facts underlying the case presented a nonjusticiable controversy.

During my review of the testimony and the materials which have been submitted concerning this nomination, I kept coming back to Justice Rehnquist's participation in the Laird case. I was not only troubled by Justice Rehnquist's decision to sit on that case, but also by the testimony he gave in answer to my questions concerning Laird versus Tatum.

In order to understand Justice Rehnquist's conduct and his testimony before the committee, it is important to review the history of the Army's Domestic Surveillance Program—the program which led to the Laird versus Tatum case.

The Army's Domestic Surveillance Program began during the Johnson administration. It grew more as a result of the FBI's failure to provide accurate intelligence concerning the potential for riots in urban ghettos than from a lack of intelligence concerning antiwar protests.

In 1967, Army personnel were called in to quell the Detroit riot. This was the first time in 25 years that Army troops were used to handle a civil disturbance.

Following that incident, Attorney General Clark created a working group in the Department of Justice under the direction of Deputy Attorney General Christopher to collect intelligence and plan for civil disturbances. Meetings were held to plan for potential incidents, to coordinate the Federal response, and to establish rules for engagement for the use of Army personnel. Personnel of the Department of the Army participated in this working group.

It was in this context that the Army began its Domestic Surveillance Program which was first authorized by a Defense Department directive in May, 1968. Later, the emphasis of the program shifted from urban violence to concern about potential antiwar demonstrations.

In 1969, when President Nixon's team came to Justice, Deputy Attorney General Kleindienst took over command of the working group.

At that time, the Department of the Army sought specific civilian authorization for its role in civil disturbance planning and it sought to limit its role in domestic intelligence gathering. After consultations between Defense and Justice, it was decided that a memorandum to the President from Attorney General Mitchell and Secretary Laird would be prepared. That memorandum would set out the parameters of the various agencies' roles with regard to civil disturbances.

The responsibility for preparing the memorandum was given jointly to the Office of General Counsel of the Department of the Army and the Office of Legal Counsel of the Department of Justice. The Office of Legal Counsel was then headed by William Rehnquist. On March 25, 1969, Mr. Rehnquist prepared the first formal Justice draft memorandum of a civil disturbance plan. A quote from the memo states:

> In order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters, the U.S. Army Intelligence Command should not ordinarily be used to collect intelligence activities of this sort.

The general counsel of the Army at that time, Robert E. Jordan, III, later testified before the Senate Subcommittee on Constitutional Rights that the Army had problems with the Rehnquist draft. In a memorandum accompanying his 1974 testimony to Senator Ervin, Mr. Jordan wrote the Army had suggested that the term "should" should be changed to "will" so that the memorandum would state forcefully that the Intelligence Command "will not ordinarily be used to collect intelligence of this sort."

In spite of the Army's arguments, the final draft of the memorandum eliminates any restrictions on the Army's collection of raw intelligence.

In his 1974 testimony, Jordan stressed that those changes were made at the request of Deputy Attorney General Kleindienst. In a recent letter to my chief counsel, Mr. Jordan clarified how the change in the final memorandum came about and Mr. Rehnquist's role in the development of the final product. Quoting from the letter:

> Some of the inquiries I have received from other sources suggested that Mr. Rehnquist might have been an advocate for increased military intelligence activities relating to civilians. That is certainly not my recollection. To the extent this issue is important, you should know that my recollection is that Mr. Rehnquist agreed in general with the Pentagon view that every effort should be made to reduce or eliminate the military intelligence role. Within the Department of Justice, the opponents of reducing the military intelligence role were, as I understand it, the representatives of the FBI, and Mr. Hoover in particular.

The point is not whether Justice Rehnquist argued in favor of more or less domestic surveillance by the Army as a policy matter.

The point is that Justice Rehnquist, while Assistant Attorney General for the Office of Legal Counsel, was deeply involved in the development of the policy which was ultimately at issue in the Laird versus Tatum case.

These facts were not known to the plaintiffs in Laird at the time they asked Justice Rehnquist to recuse himself from the case. Their basis for seeking recusal was testimony which he gave before Senator Ervin's Subcommittee on Constitutional Rights in 1971. Again, it is important to understand the context of those hearings to fully appreciate the refusal of Justice Rehnquist to recuse himself in the Laird care.

Some information about the Army's Domestic Surveillance Program had come out as a result of press articles and congressional inquiries in 1970. Included in that information was the fact that the Army had developed a data bank of potential subversives which was stored in a computer at Fort Holabird, MD, headquarters for the Army Intelligence Command.

Public exposure of the program and the Fort Holabird blacklist resulted in the filing of Tatum versus Laird in 1970 in the U.S. District Court for the District of Columbia. That case was pending at the time of the Ervin hearings. The topic of those hearings was Government collection and computer storage of information about individual Americans. The focus of those hearings was the Army's Domestic Surveillance Program.

Senator Ervin requested witnesses from both the Department of Defense and the Department of Justice. One of the Justice Department witnesses was Mr. Rehnquist. He testified on the constitutional limits of the Government's collection of sensitive personal information about American citizens, especially with regard to the exercise of their first amendment rights. During the course of that testimony, Mr. Rehnquist stated:

> The function of gathering intelligence relating to civil disturbances, which was previously performed by the Army as well as the Department of Justice, has since been transferred to the Internal Security Division of the Justice Department. No information contained in the data base of the Department of the Army's now defunct computer system has been transferred to the Internal Security Division's data base. However, in connection with the case of *Tatum* v. *Laird*, now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one printout from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.

In the same hearings, Justice Rehnquist went on to testify about a central legal question presented in the Laird case. The following exchange occurred between Senator Ervin and Mr. Rehnquist:

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

These two statements formed the basis for the plaintiffs' motion seeking recusal of Justice Rehnquist in Laird versus Tatum. As I stated earlier, at the time the recusal motion was made, the plaintiffs were not aware of Justice Rehnquist's important role in developing the policy which underlay the Army's Surveillance Program.

Furthermore, they were not aware of Mr. Rehnquist's role in advising the Defense Department on what information could or could not be provided to the Ervin committee concerning the Army's Domestic Surveillance Program.

Recently we have received a memorandum for the RECORD, written by Robert Jordan on February 23, 1971. This memorandum describes the Defense Department strategy for dealing with the then upcoming Ervin hearings, and the role of then Assistant Attorney General Rehnquist in advising

the Defense Department on its witnesses' participation in those hearings. Quoting from part of that memorandum:

> The objective of Fred's [J. Fred Buzhardt, General Counsel, Department of Defense] negotiations has been to avoid the presence of any military personnel as witnesses at the hearings. Apparently, OSD with the approval of Justice plans to take a pretty hard line in refusing the committee information on internal discussions and the like. Fred made reference to an opinion from Bill Rehnquist, Assistant Attorney General, Office of Legal Counsel, on what can be released. There will be problems with the committee asking questions which cannot be answered without violating Mr. Rehnquist's guidelines. I will be the biggest problem here, because I have been around for a long time, and have participated in a large number of internal discussions.

In addition to the testimony at the hearing and advice to the Departments of Justice and Defense, Mr. Rehnquist played one other role during the course of the Ervin hearings. He sent a letter authorizing one of Senator's Ervin's staff members to review the printout of the information which had been stored in the Fort Holabird computer.

This printout included codes about the alleged subversive activities of the people who were under Army surveillance—a list, it should be noted, which included many distinguished military personnel. It seems highly unlikely that Mr. Rehnquist would have authorized congressional review without knowing what information was contained in the printout.

Mr. President, I've just recounted a lot of facts that may be difficult to follow. Let me summarize.

Mr. Rehnquist participated in forming the policy which for the first time gave civilian authorization to the Army's Domestic Surveillance Program.

He testified concerning important and disputed facts about the scope and continued existence of the Domestic Surveillance Program. These facts were that the Army had terminated its Surveillance Program, that it had destroyed the data stored in the computer at Fort Holabird, that only copy of the computer printout was retained and that no information had been transferred to the Department of Justice Internal Security Division's data base.

He advised the Department of Defense about the scope of its testimony concerning the Domestic Surveillance Program.

He authorized congressional access to a key document which established the scope and contours of the Domestic Surveillance Program.

He gave testimony concerning his legal opinion as to whether the specific case of Laird versus Tatum raised a justiciable controversy.

Then, little more than 1 year after the most of these events occurred, Justice Rehnquist was faced with a decision to sit on the Laird case.

And what did he do? He cast the deciding vote in favor of the position he had previously testified to before the Ervin committee.

He cast the deciding vote for an opinion which adopted the version of the facts he had previously testified to, but which were hotly contested by the plaintiffs in Laird.

He cast the deciding vote in favor of a position which denied plaintiffs the opportunity to take discovery on the factual questions he had previously testified to.

He cast the deciding vote in favor of a position which resulted in keeping the internal discussions of the Army Surveillance Program which went on in the Department of Defense from coming to public light—a position he previously counseled the Defense Department to take.

Why did Justice Rehnquist decide to sit on the Laird case, a matter which most legal authorities now say was a very, very bad mistake? He wrote a lengthy memo explaining his reasons. His opinion boils down to the fact that since he did not serve as counsel to the Government in the actual case of Laird versus Tatum in the lower courts, he could therefore sit on the case as a member of the Supreme Court.

It is interesting and instructive to read his memorandum opinion in light of the facts that we now know and which had to be known to Justice Rehnquist at the time. I urge every Member of the Senate to do so.

It might be easy for some of my colleagues to write off this breach of judicial ethics as merely a mistake made long ago. But today, Justice Rehnquist says it was no mistake.

His answers to questions about Laird and his role and knowledge of the Army surveillance program were vague, and at times misleading.

I asked him whether he would have done things differently in retrospect. He said, "I never thought of it again until these hearings, to tell the truth."

Senator MATHIAS asked him in a written question what his personal role was in the development of the memo regarding the Nixon administration's civil disturbance plan. His answer was "I have no recollection of my personal role in the preparation of this document."

I asked him did he have any knowledge of the Army's domestic surveillance policy. His answer was, "I had—if you would consider information obtained in the course of preparing for the May Day demonstrations, which did involve some military activity, I suppose you would say yes."

Finally, I asked him did he have any knowledge of the evidentiary facts at issue in the Laird case. His answer was simple. It was "no."

But the facts presented to the Senate suggest an equally simple answer. It is yes, he did know—not the denial he made to the committee.

All of this information, taken together, raises so many substantial questions about his ethical judgment, his sensitivity to the appearance of impropriety, and his credibility during his confirmation hearings, that I cannot cast my vote in favor of Justice Rehnquist.

CONCLUSION

Each Member of the Senate now will have to examine the hearing record and the evidence which has come to light since the hearings.

There are two decisions possible—to vote for Justice Rehnquist's confirmation or against it. Yet, as the statements of the Senators during Judiciary Committee consideration of the confirmation demonstrate, even among those who come to the same conclusion on how they should vote, there is no one compelling reason that unites, no agreement as to what tips the scale.

There is no one that holds Senators together. When we stop to think about it, that is really the way it should be. We are 100 different Senators, and 100 different men and women. We are united in one thing. We have each taken a very solemn oath to uphold the Constitution. And we each have an individual duty to sift through the facts, and make our very best judgments.

So what is clear is that we are not a rubber stamp for a Presidential nomination just as we are not a vigilante force against a nomination. I sat through all of those hearings. I asked a lot of questions. I read practically every case I could get hold of. I read all of the material for Justice Rehnquist, and I read all of the material against Justice Rehnquist. I met privately with him at some considerable length. I listened to his answers during the confirmation hearings. I took most of this material back to my home in Vermont, and I reviewed it again. I walked around the fields of my farm and thought about it there.

At the conclusion of the confirmation hearings I wrote two memos to myself, one saying why I could vote for him and should vote for him, and one saying why I would not vote for him. When I read those, the one that said I should and could vote for him did not ring true. It did not in my mind reflect my commitment to this great body, the U.S. Senate, nor would it be fulfilling my own conscience as a Vermonter and as an individual.

I have set forth the reasons for my vote against Justice Rehnquist's confirmation. And those reasons are compelling to me. The others will perhaps find it equally compelling, or not significant, or maybe will find something

else that makes the picture clearer for them.

Mr. President, I vote only as one Senator but Justice Rehnquist will not be confirmed with my vote.

Mr. President, I reserve the balance of my time.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

□ 1540

Mr. KERRY. Mr. President, I ask unanimous consent that further proceedings under the quorum call be rescinded.

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

Mr. KERRY. Mr. President, there is no doubt that the President of the United States has what I think all of my colleagues would agree is an undisputed right to appoint nominees who are of a similar philosophical view, and I certainly do not oppose the appointment of any individual to the Supreme Court or any other court on the basis that some of their views may disagree with mine. In fact, I think that has been true of most of my colleagues who are opposed to this nomination. I have voted for almost all of the President's nominees to Federal judgeships during his second term. Out of 118 judicial nominations by President Reagan in his second term, I voted for 115. I have voted against only three.

But it seems to me, as colleague after colleague has asserted in the course of this debate, when we are considering the nomination of a Chief Justice of the United States, it is incumbent on us to apply a higher standard even than we do for other Justices of the Supreme Court, that we ought to stop and ask the tougher questions, and that we should expect the application of the very highest standards.

Why? Senator after Senator on both sides of the aisle has eloquently underscored the nature of the U.S. Supreme Court and what it means to use as Americans and as a society. It is no accident that we refer to the Chief Justice as the Chief Justice of the United States, not merely the Chief Justice of the Supreme Court. The Chief Justice represents more than just one of nine men and women on that Court. The Chief Justice is the leader, not only of the Supreme Court but of our entire system of justice.

The Chief Justice is the symbol of our constitutional system of government and of the traditional American values of equallty and justice which go with that.

As Prof. Laurence Tribe of Harvard Law School has written, "The Chief Justices—only 15 have served in our entire history—present the most obvious examples of the one Justice who can make a difference. And although often in dissent and sometimes lagging behind instead of leading the Court, one Chief may make all the difference in the constitutional world."

Historically, the role of the Chief Justice has been critical in shaping the course of American jurisprudence and American history. Chief Justice John Marshall, for instance, with his famous decision in Marbury versus Madison, shaped our view of the U.S. Constitution itself and as Justice Benjamin Cardozo wrote, "Marshall gave to the Constitution of the United States the impress of his own mind and the form of our constitutional law is what it is because he molded it while it was still plastic and malleable, in the fire of his own intense convictions."

Chief Justice Marshall personally wrote the opinion of the Court in 519 of 1,215 cases decided during his tenure on the Court, and as Professor Tribe has written, "his intellectual grip on his fellow Justices was so firm that Marshall dissented from a constitutional ruling only once. In every other major case decided in his 34 years at the helm of the Supreme Court, Marshall got his way." And in the 20th century the role of the Chief Justice has been equally important.

Under Chief Justice Earl Warren, the U.S. Supreme Court led the way in moving this country toward racial justice. Chief Justice Warren not only wrote the Court's opinion in Brown versus Board of Education, mandating an end to segregated public schools in this country, but he acted as a genuine leader in the process of bringing about a unanimous decision of the Court. In Professor Tribe's words, "That the Court spoke with a single authoritative voice in Brown added immeasurably to the ruling's credibility in the face of widespread and bitter resistance."

And under Chief Justice Warren Burger, the Court's unanimous 8-to-0 decision in the Nixon tapes case was instrumental in forcing President Nixon to release those tapes and in bringing about an end to that constitutional crisis.

So clearly, Mr. President, the role of the Chief Justice is crucial to building consensus on the Court, to leading the Court, and to helping to lead the country in our system of justice and also in reasserting and impressing on Americans and the world our value system. The man or woman who fills that position has to be a person with demonstrated ability to lead in that way and with a demonstrated capacity and willingness to show the moral vision, of which true leadership is a part.

In the case of Justice Rehnquist, measured against this standard, or measured against what I hope would be the highest standards that body would apply, I feel there are compelling reasons for opposing his nomination. First, Justice Rehnquist has consistently—consistently—demonstrated an insensitivity to the rights of minorities, women, children, and the poor in our society. He has shown himself to be literally hostile to the principle of racial desegregation and to fundamental constitutional principles such as the separation of church and state.

Now, as we all know, Mr. President, there is nothing wrong in a justice of any court having views which place he or she in solitary opposition to colleagues on the bench. No, we applaud I think in this country and certainly in our judicial system we encourage independent thinking, and it is obviously vital to the development of our judicial system.

□ 1550

I believe that Justice Rehnquist's views are so far outside the mainstream of legal thought that he is irredeemably handicapped in his ability to effectively fulfill the essential role of a Chief Justice as a builder of consensus on the Court. That is the most important reason for opposition. But, in addition, I believe Justice Rehnquist has demonstrated a disturbing lack of sensitivity to certain principles of legal ethics, as well as some lack of credibility in his testimony before the Senate Judiciary Committee, enough so that it actually does injury to the standards of our judicial system to reward him with the role of Chief Justice of the United States, considering all that means.

Mr. President, the record shows that Justice Rehnquist, throughout his career, has consistently shown an insensitivity to the rights of minorities. We have heard much of the memo as a law clerk for Justice Robert H. Jackson in 1952, which he authored, defending the infamous Plessy versus Ferguson decision, upholding racial segregation in "separate but equal facilities." Mr. Rehnquist wrote:

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed.

In another memo, he wrote that:

It is about time the Court faced the fact that white people in the South don't like the colored people; the Constitution did not appoint the Court as a social watchdog to rear up every time private discrimination raises its admittedly ugly head.

Subsequently, Justice Rehnquist claimed at his first confirmation hearing in 1971, and again this year, that these statements merely reflected the views of Justice Jackson, and not his own views.

I think that any reading by anybody—not even a lawyer—any reading of the way in which those words have been phrased and that memo was writ-

ten makes it clear whose views were being expressed.

The weight of the evidence clearly shows that assertion by Justice Rehnquist is of dubious credibility. It has been contradicted by the statements of Mr. Rehnquist's coclerk at the time, Donald Cronson, and by Justice Jackson's longtime secretary, Elsie Douglas, who said that it "smeared the reputation of a great Justice." And this explanation is simply not consistent with the facts regarding Justice Jackson's views. As others have stated, it would have been more appropriate—perhaps even honest—for Justice Rehnquist to simply have admitted that the memos represented his views at that point in time, but that today he no longer holds those views, if in fact that were true. That he did not do so simply raises an additional issue regarding credibility.

I believe Justice Rehnquist has consistently in his 15 years on the Supreme Court shown himself to be outside further examples of the mainstream of legal thought. More than 50 times, Justice Rehnquist has been a lone dissenter on the Court, with all of his colleagues on the other side of an issue. He has been opposed not only by liberals and moderates, but even by such conservatives as Justice O'Connor and Chief Justice Burger. In his lone dissent in the Bob Jones University case, Justice Rehnquist was the only Justice to support tax credits for segregated schools. In Batson versus Kentucky, his lone dissent supported the right of a prosecutor to prevent blacks and minorities from serving on a jury. In Keyes versus School District No. 1, Denver, CO, his lone dissent supported the view that segregation in one part of a school district does not justify a presumption of segregation throughout the district. In Wallace versus Jaffree, the Court's most recent school prayer case, Justice Rehnquist was the only Justice to assert that the establishment clause did not require Government neutrality on religious issues. In Cruz versus Beto, he was the only Justice to reject the application of the free exercise clause to imprisoned convicts. He was the only Justice to dissent from a decision in Cleveland versus Loudermill requiring notice and opportunity to be heard before permanent civil service workers can be terminated. He was the only Justice to say that churches can be given discretionary governmental power, in Larkin versus Grendel's Den. He was the only Justice to say that the State can deny medical care to nonresident indigents, in Maricopa Hospital versus Maricopa. He was the only Justice to say that criminal trials can be closed to the public, in Carter versus Kentucky. And he was the only Justice to say, in In Re Primus, that an ACLU lawyer could be disciplined for telling a poor person that the ACLU provides free legal services.

In 80 out of 83 cases in which members of the Court have disagreed about the interpretation or application of a modern civil rights statute, Justice Rehnquist has joined the interpretation or application of the law which is least favorable to minorities, women, the elderly, or the disabled. In the 23 cases involving constitutional claims of sex discrimination which were decided during Justice Rehnquist's tenure, he voted to uphold the challenged statute or practice in 20 out of the 23 cases. In 25 cases involving separation of church and state, Justice Rehnquist voted to uphold the challenged statute completely in 23 cases, and voted to uphold part of the statute in the other 2 cases. In 30 cases involving claims of cruel and unusual punishment, Justice Rehnquist found a violation in none of the cases. The full Court found a constitutional violation in 15 of the 30 cases. And in cases involving challenges by individuals to government action, Justice Rehnquist cast the deciding vote in 120 out of 124 cases to reject the constitutional claim of individual rights. This is not the record of a man who will build consensus and lead the Court.

There are other reasons for concern—though none as critical as the record of decisions on the Court itself. I am also deeply concerned by Justice Rehnquist's interpretation of basic canons of legal ethics. In particular, I believe Justice Rehnquist committed a serious violation of legal ethics by refusing to recuse himself in the case of Laird versus Tatum, in which he cast the deciding vote. There is no question—many of my colleagues have pointed out, and as the distinguished Senator from Vermont most recently among them pointed out—that Justice Rehnquist had been deeply involved in this case while he was in the Justice Department, and that his participation in the case as a Justice violated both 28 U.S.C. 455, and the ABA code of judicial ethics. This ethical violation has been discussed at length elsewhere, and I will not repeat all of those arguments.

But I think it is fair to say that the fact that this violation of legal ethics by Justice Rehnquist took place while he was a sitting Justice of the Supreme Court makes his conduct even more questionable. I cannot but conclude that he exercised bad judgment or let his personal bias in this case interfere with the fair and impartial administration of justice.

□ 1600

(Mr. BROYHILL assumed the chair.)

Mr. KERRY. Mr. President, the release within the past few days of two additional memos written by Justice Rehnquist, which were not provided to the Senate Judiciary Committee, provide additional insight, I believe, as to why Justice Rehnquist is not a suitable candidate for the position of Chief Justice. These memos were written by Mr. Rehnquist when he served in the Nixon administration as an Assistant Attorney General. One of the memos, written in March 1970, contains a proposal for a constitutional amendment to overturn Supreme Court rulings which brought about desegregation in the South. Its purpose was plainly and simply to halt the desegregation of America's public schools.

The other memo, also written while Mr. Rehnquist served as Assistant Attorney General, expressed his arguments in opposition to the equal rights amendment. No one faults anyone for being opposed to the equal rights amendment for one reason or another, but the memo expresses views which I believe can only be deemed to be reactionary about the role of women in American society. In Mr. Rehnquist's view, women should be second-class citizens in American society—subservient to their husbands, and passive onlookers in the decisionmaking processes of family and society. In his memo, Mr. Rehnquist candidly expresses the view that women should not have equal rights with men in American society. At one point in his memo, he states that—

> The consequences of a doctrinaire insistence on rigid equality between men and women cannot be determined with certainty, but the results appear almost certain to have an adverse effect on the family unit as we have known it.

I believe that in 1986, these views are simply beyond the pale of what is acceptable in a Chief Justice or for that matter in any Federal officer.

I am also concerned by the evidence which has emerged about Justice Rehnquist's conduct and his answers during the hearings of the Senate Judiciary Committee and subsequent to the hearings. It is the opinion of this Senator from the testimony of many credible witnesses that Mr. Rehnquist did participate in instances of harassment and intimidation of minority voters at the polls in Arizona in the early 1960's. His attempts to evade responsibility for these actions, or to disguise their true character, are simply not credible in the eyes of this Senator. It is striking that a man who has been universally acclaimed as having a brilliant mind would claim to have such a hazy recollection of these important events in his life.

I found much more credible the testimony of James Brosnahan, then an assistant U.S. attorney and now a distinguished trial lawyer, who testified that he had personally seen Mr. Rehnquist at the polls and had confronted him regarding his challenges to voters. Several other credible witnesses also

testified that they had personally seen Mr. Rehnquist challenging minority voters at the polls. There is no small irony that, at a time when the Warren Court was breaking new ground in upholding the rights of minorities, and President Kennedy and Attorney General Robert Kennedy were bringing the power of the Federal Government to bear in enforcing these rights, that Mr. Rehnquist was at that same time challenging the rights of minority voters.

Mr. President, had this issue arisen now in 1986, since it occurred in the sixties, that were to have been framed in a way that somehow acknowledged it or said in fact that it was part of the role that he was performing but that that view has changed and we have moved on, I think that would probably have seen that issue disappear. But it is the fact that we are confirming conceivably a man for the role of Chief Justice who has put before us just totally conflicting testimony and one has to measure the motives of those who said otherwise.

What is the motive of a trial attorney, distinguished as he is, from that region and other witnesses in coming forward now to challenge a potential nominee for Chief Justice unless, Mr. President, they were speaking their mind and the truth.

I am disturbed by the revelation that Justice Rehnquist breached his ethical duty as a lawyer by failing to notify his brother-in-law, Harold Dickerson Cornell, of a trust which Mr. Rehnquist had drafted, of which Mr. Cornell was the beneficiary. The fact that that trust was kept secret from his own brother-in-law for over 20 years during which time Mr. Cornell became destitute makes me question, if not the question of a breach of a legal obligation, the question of the breach of a human obligation. The fact that Justice Rehnquist, through his wife, stood to personally benefit from this trust makes the violation even more questionable. And the fact that this deception continued for 10 years after Justice Rehnquist became a sitting Justice on the Supreme Court raises an even larger question.

I am also concerned by the revelations that Justice Rehnquist had restrictive convenants, not so much by the fact that if he had genuinely not known and they had passed on as they have in other people's deeds—we know others have had those restricted convenants and they were commonplace at one time—but Justice Rehnquist originally claimed at a Senate hearing that he was unaware of these covenants. Subsequently, within days it came to light in the press that he had received a letter from his attorney in 1974 containing explicit references to the Vermont convenant. Justice Rehnquist then admitted at the moment that the letter was about to become public in the press, that indeed he had received it but claimed that he did not recall the letter or its contents when he testified before the committee. Again, this whole episode raises further questions both about Justice Rehnquist's lack of sensitivity on racial matters and about his credibility.

Mr. President, any one of these matters considered alone might be considered a minor blemish, might be considered unimportant, might be considered too distant a part of history and not relevant at this point in time. But taken together, Mr. President, taken together, with the history of the record of the decisions themselves, they paint the picture, I believe, of a man who is at least insensitive to the rights of women, blacks, Jews, the handicapped, and other minority groups. They convey the picture of a man whose mind is not open and whose biases lead him to twist legal precedents and constitutional principles in order to reach a preordained result. And they paint the portrait of a man who has not paid enough attention to some of the standards which he will be called on to apply to others in the judicial system. And they paint the picture of a man whose own credibility as he were to perhaps assume the responsibility of the most important position for reenforcing credibility in our system is in doubt.

These, Mr. President, are not the qualities that this Senator wants to confirm in a Chief Justice of the United States.

I believe that the U.S. Senate should be more than a rubberstamp for the nominations of any President. We obviously have an obligation to the American people, to ourselves, to our system of justice to search our consciences and to determine whether a nominee for this office meets the high standards of ethics, integrity, judgment, and commitment to the constitutional principles which a Chief Justice should embody.

Above the portals to the Supreme Court, Mr. President, are written the words "Equal Justice Under Law," equal justice under the law.

It was only 10 years ago or so that this Senator began to practice law as an attorney and I had the privilege of serving for 5 years as a prosecutor and for 3 years as a private attorney. I know the feelings that I had as a law student as well as a fledgling attorney as I looked at the Supreme Court of the United States before which I am privileged to say I am permitted to appear, and I believe, Mr. President, that as I think about walking under those portals and about the meaning of those words "Equal Justice Under Law" the record of the cases decided, the record regarding the lack of ability to be able to bring about the consensus of a court to make those words real, force this Senator to conclude that I must vote against this nomination, and I do so, I must say, most reluctantly because it is not pleasant, I think, to oppose the nomination of a President of the United States to the Supreme Court.

But it seems to me that when you have a vote of some 31 U.S. Senators who say continue to debate this issue, and when clearly there may be more votes than that in opposition to this nomination, that in and of itself makes an important statement about qualifications.

The Chief Justice of the United States of America should be I think confirmed by acclamation or unanimously. At least the Chief Justice of the United States should be confirmed by a vote of 90 to 10 or so.

I think it is very sad that if this Chief Justice is in fact confirmed it will be by a vote that shows how clearly this is a nomination that raises serious questions, that leaves in doubt the ability of that Court to render justice which is equal under the law and which probably I think diminishes the standards which law students, prosecutors, and others within the judicial system will view that Court.

I reserve whatever remainder of time may be mine.

□ 1610

The PRESIDING OFFICER. The Senator from Montana.

Mr. BAUCUS. Mr. President, I first want to commend the Senator from Massachusetts, Mr. KERRY. I think he has given a very important statement, one that I might presumptuously say he will be very proud of in the years to come. He has shown himself to be a very strong leader in the U.S. Senate and I think he does the people of the Commonwealth of Massachusetts credit. I thank the Senator.

Mr. President, when we take our oath of office in the Senate, we swear before God to support and defend the Constitution of the United States.

Our Constitution provides that the Senate must vote to confirm or vote not to confirm the President's nominations to the Federal judiciary.

This provision is part of the brilliant constitutional compromise. It's part of the system of checks and balances our Founding Fathers set up when they created three separate, coequal branches of Government.

It is this system that protects individual citizens against the risks of uncontrolled power and tyranny.

Therefore, it is vitally important that we exercise our duty to advise and consent with utmost care and responsibility.

POSITION ON REHNQUIST

I am deeply troubled over the nomination of Justice William H. Rehnquist to be Chief Justice of the United

States. I have grave concerns about his personal integrity, about his regard for individual rights, and particularly about his vision and leadership.

It is critical and Americans have full confidence in the integrity, independence, and competence of the Chief Justice of the U.S. Supreme Court. The American people must have no question about his commitment to individual rights and personal freedoms. He must be above reproach.

Because I do not have that confidence in Justice Rehnquist, I must oppose his confirmation.

EXECUTIVE BRANCH NOMINEES

It has been suggested that the President should have his own person confirmed, so long as that nominee is honest and competent. That may be true with executive branch nominees.

Executive branch officers, after all, are part of the President's team. They implement the President's policies.

Executive branch officers are appointed only for the term of the President. The American people have the ability to elect a new President every 4 years.

I think that as a general rule the President should be allowed his choices for executive branch positions unless they lack integrity or competence. The President should have his own team in the executive branch.

JUDICIAL OFFICERS

But with our system of Government, a higher standard must be applied to officers of the Federal judiciary. Federal judges are part of the third, coequal branch of the U.S. Government—the judicial branch.

Federal judges are appointed for life. They are not elected every 2, 4, or 6 years. They are appointed for life to protect them from improper pressures and influence.

Federal Judges have the solemn responsibility to decide the fates of people who could not come to a resolution of their disputes either with other people or with the Government. Federal judges must resolve these disputes dispassionately, coolly, accurately, fairly, and in accordance with the law.

The men and women who wield this great power must be chosen with great care. That power must be entrusted only to the wisest, most responsible people.

OFFICE OF THE CHIEF JUSTICE

The confirmation of a Chief Justice is the most important nomination any Senator will ever consider. Indeed, the vote here today is probably the most important vote that a Senator is going to cast in this decade.

The Supreme Court is the ultimate protector of our hard-won individual rights and personal freedoms.

The office of Chief Justice is the second most important in our Nation, second only to the Presidency.

The Chief Justice is the highest symbol of America's commitment to a government of laws; to its Constitution and the Bill of Rights.

The integrity and commitment of the Chief Justice must be entirely above question to maintain public confidence in our judicial system.

In sum, a nominee for Chief Justice must embody the highest standard of integrity, ethical responsbility, and fidelity to law. That person must have demonstrated exceptional legal ability and sound judgment. And finally, the Senate must consider how the nominee would lead the Court, and how such leadership might affect the fundamental constitutional principles upon which our Government is based.

INTEGRITY OF THE NOMINEE

In my judgment, Justice Rehnquist fails to meet this exacting standard.

Many of the questions that were raised during the hearings of the Senate Judiciary Committee have not, in my judgment, been adequately answered.

As a member of the Judiciary Committee from 1978 to 1984, I participated in numerous hearings on nominees to the Federal judiciary.

I am well aware of the sensitivity of these proceedings and the delicate position that nominees occupy when they are asked to give their views and justify their records in the face of probing investigations. But I do not believe Justice Rehnquist has given adequate testimony.

□ 1620

I do not know whether he has perjured himself, but I do believe that he has not responded with full candor to all the issues raised.

NOMINEE'S COMMITMENT TO INDIVIDUAL RIGHTS

I am also deeply concerned about the extent of Justice Rehnquist's commitment to constitutional guarantees of individual rights and personal freedoms. Repeated episodes of Justice Rehnquist's record raise troubling questions about his commitment to fundamental fairness and upholding the Constitution in the areas of race discrimination, equal rights for women and men, and the separation of church and state. In his judicial opinions, Justice Rehnquist has repeatedly advocated positions that will deny constitutional protections to minorities to women, to children, and to the poor.

When these writings are combined with the unanswered questions raised during his confirmation hearings, I for one cannot in good conscience say that I have full confidence in the nominee's commitment to justice.

LEADERSHIP AND VISION

When difficult issues arise, we look to the Supreme Court to unite our Nation. The Court has played a vital role in many times of national crisis, ranging from striking down racial segregation in Brown versus Board of Education to ordering President Nixon to turn over the Watergate tapes.

Based on his record as an Associate Justice, I fear that Justice Rehnquist will be more likely to divide the Court than to unite the Nation.

Justice Rehnquist has dissented frequently during his tenure on the Court. Every Justice has the right and, indeed, many argue the responsibility, to dissent when the Court adopts a position with which that Justice disagrees.

However, Justice Rehnquist has repeatedly stood alone in 8-1 decisions on cases involving vital issues affecting constitutional rights and personal freedoms.

His record raises deep doubts about his ability to rally the Court and unify the Nation in times of crisis and uncertainty.

CONCLUSION

The framers of the Constitution created the Federal judiciary to protect the integrity of the Constitution, and to ensure that individual freedoms will be protected. That is after all what the Constitution is all about under our constitutional form of government—to assure that individual freedoms are protected. For as Alexander Hamilton said in Federalist Paper 78, without such a judiciary, "all reservations of particular rights or privileges would amount to nothing."

The Senate was not meant to be a rubberstamp. The advice and consent clause gives the Senate great power. Senators must ensure that members of the judiciary are worthy of the people's trust and confidence.

In fact, I believe that Senators should look more deeply into the history of the writing of the Constitution because when they do they will see that the U.S. Senate was meant to be an equal partner with the President in the selection of nominees to the Supreme Court. The Senate was not meant to be a rubberstamp of the President's nominees. The Senate was not meant to give undue deference to the President's choice. In fact, in earlier drafts of the Constitution, it was the Senate that was going to decide who the members of the Court would be—not the President, but the Senate. In later drafts it was determined that the President should appoint with the advice and consent of the Senate.

It does not make sense for one branch of the Government to pay virtually no attention to the second when deciding who is to serve in the third. That does not make sense. If we have three coequal branches of Government, the U.S. Congress must have an equal role along with the President in determining who should be on the U.S. Supreme Court.

I submit very strongly that the U.S. Senate has as great an obligation as

the President to make sure that the right person is on that Court. This is particularly true for the Chief Justice, who like the rest of the Court is appointed for life: not elected, but appointed for life.

I suggest, Mr. President, when Senators look deeply into the history of this nominee, and look into their own consciences and ask themselves whether they in good conscience feel this man should be appointed for life to be Chief Justice of the United States, in the privacy of their own conscience, they have to answer that question regrettably and sadly and profoundly.

I also submit that if he is confirmed, that this vote will haunt this body because this vote will be one of the most important votes that Senators will cast during this decade. When this Court decides constitutional issues, civil rights, civil liberties, search and seizure, and other constitutional provisions which are so near and dear to America's freedoms; when that Court decides against Americans' personal freedoms; Senators are going to go back and wonder why they voted to confirm this man.

In conclusion, Mr. President, I ask all of us, all of us in this body, who took this oath of office that we swear to as profoundly as we humanly can; to ask ourselves what is right here and cast the appropriate vote. Mindful of my constitutional duty and my oath of office, I cannot in good conscience support the confirmation of the nominee.

Mr. President, I yield the floor.

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. DODD. 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 Connecticut is recognized.

Mr. DODD. Mr. President, prior to the vote on cloture, I did not get a full opportunity to express my views on this nomination. I would like to take these few minutes this afternoon to share with my colleagues and others the rationale underlying the position I take on the nomination of Mr. Justice Rehnquist to be Chief Justice of the U.S. Supreme Court.

Like all of my colleagues, Mr. President, I approach this question on the confirmation of Justice Rehnquist with enormous seriousness and solemnity. I recognize, as my colleagues do, the tremendous duty that we all must bear to fulfill our constitutional responsibilities in providing advice and consent to the President of the United States—and to the American people—on nominations that are sent before us. And I will do all in my power to see to it that constitutional responsibility is fulfilled as to every nomination which is presented to us.

There is no more significant vote, short of an actual vote on a constitutional amendment, than on nominations to the Federal judiciary. Within that context, the most important nominations that we give our advice and consent on are, of course, appointments to the Supreme Court of the United States. And further, within that context, the most important votes we cast are those involving the Chief Justices of the United States.

We often talk about historic votes. I am as guilty, I suppose, as my other colleagues from time to time of referring to particular measures that come before us as "historic" votes, and certainly there have been some along the way. But far too often, I think, we describe a particular measure as a historic measure or historic opportunity and, in the process, we cheapen the word "historic." Certainly, considering the fact that there have been only a handful of occasions in the 200-year history of this country when this Senate has cast its judgment as to individuals nominated to be Chief Justice, the nomination of Justice Rehnquist to be Chief Justice of the United States must qualify legitimately as a historic vote.

Given the age of Mr. Rehnquist and the present age of those who occupy seats on the U.S. Supreme Court, it would not be an exaggeration to suggest that Mr. Justice Rehnquist could serve as the Chief Justice of the United States for the next 2 decades or more. The votes we cast this afternoon, therefore, will have historic, profound significance, and effect on the future of this country as we close out the 20th century and begin the next.

Over the past several months since President Reagan announced the nomination of Mr. Justice Rehnquist to be Chief Justice, I have monitored, as I know my colleagues have, with keen interest the very lengthy and thorough confirmation hearings; I have listened intently to the debate here on the floor over the last several days and to the various points that my colleagues have made—both pro and against—this nomination; and I have sought out and read with eagerness numerous press and constituent accounts of the nominee and his record. I began that process, Mr. President, with an open mind, one harboring neither a hidden proclivity to oppose the nominee simply because he is a conservative jurist, nor a presumption that he should be rubberstamped by me or the Senate simply because he is the President's choice or a sitting member of the U.S. Supreme Court.

□ 1630

Article II of the Constitution vests in the Senate the privilege—and the solemn duty—to assess the qualifications of each judicial nominee. While the framers unquestionably intended that the Senate take an active role in the confirmation process, the Constitution nowhere delineates those factors against which each Senator should judge the fitness of a judicial nominee to serve his or her lifetime on the Federal bench. As with other crucial decisions we are called upon to make in this arena, each Senator must, in my view, begin and end his or her examination of the nominee with one overriding question: Is confirmation of this nominee in the best interests of the United States as a whole?

Answering this question in the affirmative first requires that each Senator satisfy himself or herself that the nominee possesses the excellent technical and legal skills which we must demand of all Federal judges. If the nominee lacks those skills, our examination need proceed no further, and we are duty bound to reject the nominee.

Our next mission is to ensure that the nominee is of the highest character and free from any conflicts of interest. The nominee's testimony before the Judiciary Committee—what he or she said or failed to say—becomes critical in this regard.

Finally, we must vigorously examine the nominee to see whether he or she is capable of and committed to upholding the Constitution of the United States. Under this final test, we must focus on two critical elements, both of which require that we examine, to a certain extent, the nominee's personal ideological views on a range of substantive issues.

First, we examine the nominee's judicial temperament. As to this element, we look to see whether the nominee is so wedded to his or her views on controversial issues—be they termed "prolife," "anticapital punishment," "progun control," or the like—that he or she is simply not capable of deciding cases fairly on the basis of the facts as presented and the law as previously decided.

Second, not only must we examine the nominee's temperament, but we must take a reading of the nominee's temperature as well. It is under this crucial test that we look to see how committed the nominee is to carrying out the fundamental constitutional principle upon which our Nation has been built, namely, the guarantee of liberty and equal justice for all. In other words, as to civil rights, is the nominee on fire, icy cold, or merely lukewarm?

It is up to each Senator to decide for himself or herself at what point the nominee's views become so contrary to

what the Senator believes is in the best interests of the Nation to warrant opposition to the nominee. I will not oppose, and have not in the past opposed, a judicial nominee solely because he or she holds concededly conservative views regarding the Constitution and the Court's role in interpreting and applying it. In fact, I intend to vote for the nomination of Judge Scalia to be an Associate Justice of the Supreme Court. I voted for Justice Sandra Day O'Connor. In fact, I have voted for about 96 percent, or more, of the judicial nominations that have been sent to this body by President Reagan during the last 5½ years. So it is not a nominee's views on any particular ideological issue on which I think any Member of this body, including myself, wants to base their decision on the nomination.

Rather, I base my decision on this nomination on three factors under the framework laid out above. These are three reasons why I do not feel that confirmation of Mr. Justice Rehnquist is in the best interests of my State or my country.

First, I am troubled by several areas of the nominee's testimony before the Senate Judiciary Committee which, in my view, reflect a lack of full candor on his part. Exemplary of these is the nominee's testimony regarding two restrictive covenants found to be contained on his property. When confronted with this issue, Mr. Justice Rehnquist denied any and all knowledge of these covenants and expressed surprise in learning about them from the FBI report which uncovered their existence. Several days later, however, the nominee sent to the committee a letter which he received in 1974 explicitly referring to the covenant on his Vermont property. I would not reject Mr. Justice Rehnquist solely on this basis, but certainly his testimony raises questions about whether or not he should have been aware of those restrictive covenants and whether the nominee was as candid as he should have been before the Judiciary Committee.

Second, and more importantly, the nominee's temperament and temperature are, in my view, called into serious question by his well-developed record on civil rights and liberties. An objective analysis of that record reveals that the nominee has, with few exceptions, decided against civil rights plaintiffs and in favor of allowing the State or Federal Government to act discriminatorily or in ways which restrict individual liberties. That same record does not reflect merely a lukewarm commitment to equal rights for our citizens. Rather, it mirrors an icy cold indifference to the equal protection guarantee embodied in our Constitution.

Mr. President, other Members have adequately delineated the specific number of cases and the votes that the nominee has cast during the 15 years he has served on the Supreme Court as an Associate Justice. I would merely point out that it appears to this Senator that Justice Rehnquist does not see the Constitution as a living document. Rather he seems to view it rigidly—frozen in time, as it were—in the latter part of the 18th century or the early part of the 19th century.

The Constitution, as we have seen, evolves. Not that the fundamental meaning ought to change, but certainly the world in which we live changes and has changed dramatically. Mr. Rehnquist appears to have made the intellectual decision that we ought to interpret the Constitution very rigidly, as it was written, as it applied during the days in which it was drafted.

That may seem to be an overbearing interpretation of his decisions but, frankly, I am left with no other conclusion when I look at the decisions in which Justice Rehnquist has been involved.

Consider the some 83 nonunanimous cases where civil rights statutes were interpreted. Justice Rehnquist voted against the civil rights plaintiff in 80 out of those 83 cases, that, in my view, reflects a rigidity. It reflects, as well, an unwillingness to recognize that the times in fact have changed, that evalution has occurred over the last 200 years and most importantly in the last 40 years, and that the Constitution must be read in light of those changes.

Let us remember what we are doing today. We are attempting to fill the position of Chief Justice of the United States—without question the highest, most revered judicial office in our Nation. The man or woman who occupies that seat must, as the title of the position reflects, above all else actively work for and embody justice. Not justice for some. Not justice only for whites. Not justice for men exclusively. But Chief Justice for all. Whatever other qualifications Mr. Justice Rehnquist possesses, I do not believe he stands as a symbol and reality of equal justice for all.

Finally, while Mr. Justice Rehnquist undoubtedly possesses a sharp legal mind, he lacks one particular ability which he must possess in order to be an effective leader on the Court: the ability and the desire, and I emphasize desire, to activate and effectuate consensus among the Court's nine individual members.

The nominee has not only concededly been in dissent more frequently than most but, more importantly, it seems to me, he simply does not reach out. In fact, in testimony before the Judiciary Committee, the American Bar Association, through its investigation and discussion with others, indicates that Justice Rehnquist rarely, if ever, has sought out, as one might in a collegial fashion, the views of those other members of the Court.

Certainly, all of us in this body, while we are not a judicial body, even though we know we may disagree with one another, we respect the intelligence, we respect the compassion, we respect the integrity of each other enough to seek each other out on policy matters and the like.

In fact, it is not an uncommon occurrence for a very conservative Member of the other side of the aisle to approach a very liberal Member on this side of the aisle and to ask, "Why are you voting that way? What is your rationale, your thinking? Likewise, it is not uncommon to see Members here approach that side of the aisle and raise the same kind of question. They may not end up voting alike, but there is enough respect for each other's integrity that we seek out the motivation of our colleagues.

□ 1640

You would think that on the Supreme Court, that same kind of collegial environment might exist. And yet, Justice Rehnquist has demonstrated little or no inclination to reach out and discuss with his colleagues on the Bench why they reach their decisions as they do.

That worries me deeply because the Chief Justice must perform, as head of the Court, the role of consensus builder.

At critical junctures in our Nation's history, the Chief Justice has recognized the need to forge a consensus to achieve a greater social good. Chief Justice Earl Warren cajolled recalcitrant Justices in order to persuade them to concur in the Court's opinion in Brown versus Board of Education. Chief Justice Warren foresaw the firestorm that the decision would create, and convinced his brethren that unanimity was required to weather the storm ahead. Similarly, Chief Justice Warren Burger recognized the importance of consensus when the Court was making preparations to order President Nixon to surrender the Watergate tapes.

I fear that Mr. Justice Rehnquist, put in similar situations which will undoubtedly arise during his tenure on the Court, would be unable to develop that same type of consensus among his colleagues on the Bench. This would be harmful not only to the Court, but to our country as well.

Finally, Mr. President, there has been extensive debate over the memorandum that the nominee wrote to Justice Jackson regarding the 1896, Plessy versus Ferguson decision which upheld segregation. Let me briefly remark on that discussion.

Almost a week from today, we will commemorate the 40th anniversary of the termination of the Nuremberg

trials. Justice Jackson, of course, was the chief prosecutor for the United States at those trials. I have more than just a passing interest in all of that since the executive trial counsel for Justice Jackson at those trials was my father, who happened to be a Member of this body. I went back over the correspondence between my father and Justice Jackson, who maintained a friendship long after those days in Nuremberg. While I could find no particular piece of correspondence that referenced Justice Jackson's views toward segregation in this country, I knew my father well enough and heard him talk over the years enough to know about his deep affection for this man and Mr. Jackson's deep commitment to human rights.

In fact, that trial almost did not occur had it not been for the United States and Justice Jackson insisting that there ought to be a framework in which the crimes of the Nazis could be examined and laid before the entire world.

I think it is helpful to make note of Justice Jackson's remarks as he opened the tribunal debates in Nuremberg in 1945. He said there, "We will show them to be living symbols of racial hatred, of terrorism, of violence and of the arrogance of power. They took all the dignities and freedoms that we hold as natural and inalienable rights in every human being." He went on at length, but that particular paragraph, it seems to me, demonstrates Justice Jackson's views about racial hatred and the inalienable rights of every human being. Statements such as these cast doubt upon Justice Rehnquist's testimony that he was writing a memorandum for Justice Jackson only to comply with Justice Jackson's views of civil rights. Justice Jackson was as determined as any human being in public life to uphold the inalienable rights of every human being, and to suggest otherwise does a great disservice to a man whose memory we ought to be remembering in these days 40 years after the conclusion of the Nuremberg trials.

In conclusion, Mr. President, I have no choice but to oppose the confirmation of Mr. Justice Rehnquist to be Chief Justice of the United States for a number of reasons. More than anything else, however, this office demands from its occupant more than mere mental acuity: it demands someone who is red hot to ensure that the guarantees of our national charter apply with equal justice for all. It is precisely this burning desire to protect the civil liberties of all citizens which, I am saddened to say, is most lacking in this nominee.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. EXON. Mr. President, I will not unnecessarily delay the vote up or down to confirm Mr. Rehnquist as Chief Justice. It seems to me that basically it is a foregone conclusion that the 50-plus votes are here and ready to be cast in support of the nomination.

First, I would like to comment on a happening which took place just before—I emphasize just before—the cloture vote earlier today. The Senator sought recognition from the Chair to ask unanimous consent that I be allowed to speak for 3 minutes without such time being charged to either side of the issue, being fully aware of the parliamentary agreement then in effect, under the dwindling time that was assigned to both managers of the bill. Since this Senator had not at that time made up his mind what his vote would be on the cloture motion, I sought to make a statement and then ask a question. I did not think it was proper for me to declare at that time to either manager of the bill the pro side or the con side on what I was going to do because I had not come down to that final determination.

The minority Member was kind enough, however, to give me the last few moments of his time to make a brief statement. The majority manager of the bill objected to the additional 3 minutes. Frankly, at that time, Mr. President, this Senator intended to vote "present" on the cloture vote, willing to move ahead if it was the will of 60 of my colleagues to get on with the up or down vote. I would like to have had the opportunity to ask questions then. But some of the questions and some of the statements I intended to make in those brief 3 minutes will be included in the remarks I am about to give.

When we get down to one of these time agreements, Mr. President, where the time is allotted to either those for or against, it leaves no time whatsoever for the views of those yet undecided or to ask questions to help us make up our mind.

Mr. President, we have before us an extremely—an extremely important matter—probably one of the most important votes that any of us will cast in the Senate. But now we are down to the final vote up or down and it is time to make the call.

□ 1650

Mr. President, from the very beginning, I had indicated my likely approval of the Presidential nomination of Justice Rehnquist to be Chief Justice. While I had some misgivings, my record shows that I generally support Presidential appointees. Last night and this morning, I intended to vote for Justice Rehnquist. But after listening further, and after further reviewing the record again and again, and having had some second thoughts, I felt that I should press myself into making a final look at the record. I have come to the conclusion that the proper vote is "no." I wish to take a few moments to explain my reason for opposition.

It is not based on the technical qualifications or his high intellect. They are strong and, in my view, beyond any reasonable doubt. While I do not agree completely with his position on a whole series of issues, I recognize the right he has to those, and I think he has been honest and straightforward in his decisions while on the Court. Nor is it his personal or judicial philosophy that this Senator takes issue with, and it has nothing to do with the vote I will be casting in opposition.

His judicial philosophy and his political affiliation, I think, have nothing whatsoever to do with the basic qualifications. I believe that has been well established by many discussions and many decisions he has been a part of on the Court, that he has a right to those positions, and I thought he stated them quite eloquently. For the most part I agreed with him; and I will say again that there is nothing wrong with a conservative—even a dedicated conservative—on the Supreme Court of the United States.

I will further say that I generally agree with his prolife decisions and statements that have been part of the character of Justice Rehnquist over the years, both as a person and as a Justice of the Supreme Court.

What, then, one might ask, would be the reason for opposing moving a Justice to Chief Justice, if he is technically qualified, has a high rating from the bar association, and has other characteristics that would otherwise qualify him?

Why, then, would one quarrel with his elevation to the position of Chief Justice? I think it is for a very good reason, Mr. President, which has received little consideration when reviewing the elevation of a Justice to Chief Justice, where he will serve for years and years to come, as the top jurist of all the courts and the court systems of the United States of America.

My concern is his lack of full credibility, sometimes reliability, and, most of all, his seeming inability to be an effective consensus developer, which I believe is an important requirement for the Chief Justice.

The Chief Jutice of the United States is a person who should be chosen nearly by acclamation, and I think the vote will indicate very clearly that he is not being chosen by acclamation, that there are those who, for their own reasons and very sincere reasons, have serious objections. I think what they are basically saying is that there is nothing wrong with Justice Rehnquist remaining on the Court, but the question is as to whether or not he is the best individual in

the whole United States of America to be moved up to this important position.

Having said all that, Mr. President, I realize that his nomination will very likely be confirmed by the U.S. Senate. Nonetheless, notwithstanding any of the statements I have made, I have no personal feelings against Justice Rehnquist whatsoever. I hope and pray that after his nomination is confirmed, which it very likely will be, he will be an outstanding Chief Justice of the United States.

The good news is that people have a way of growing in that position, and I certainly believe that Justice Rehnquist has the ability to grow. Therefore, in conclusion, let me say that I hope history will show that he will eventually be recognized through accomplishments as a great Chief Justice. I think he has the potential. I hope he has the will and the foresight, and I hope that he will develop the ability to become an effective consensus-maker, which I think, above all other qualifications, is the supreme test of the Chief Justice of the United States.

Mr. President, I yield the floor, and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

□ 1700

Mr. BYRD. 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 minority leader is recognized.

Mr. BYRD. Mr. President, I thank the Chair.

Mr. President, if the Chair will indulge me I am awaiting the promulgating of a unanimous-consent request before I begin.

Mr. KASTEN addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. KASTEN. Mr. President, is a quorum call in progress?

The PRESIDING OFFICER. No, it is not. The minority leader has been recognized.

Has he yielded?

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

Mr. BYRD. I yield to the distinguished acting Republican leader for the purpose of his making a unanimous-consent request.

Mr. KASTEN. I thank the distinguished minority leader.

IMPEACHMENT TRIAL OF JUDGE HARRY E. CLAIBORNE

Mr. KASTEN. As in legislative session, Mr. President, I ask unanimous consent that, notwithstanding the provisions of rule XIX of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials, the chairman—or, in his absence, the vice chairman—of the Special Committee on the Impeachment Trial of Judge Harry E. Claiborne is authorized to permit members of said committee to pose questions orally to the impeached person, witnesses, House managers, and counsels appearing before the committee, on such terms and with such restrictions as the chairman shall prescribe for the expeditious completion of the committee's business.

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

Mr. KASTEN. I thank the Chair, and I thank the distinguished minority leader.

NOMINATION OF WILLIAM H. REHNQUIST TO BE CHIEF JUSTICE OF THE UNITED STATES

The Senate continued with considerations of the nomination.

The PRESIDING OFFICER (Mr. DANFORTH). The minority leader is recognized.

Mr. BYRD. Mr. President, I thank the Chair.

Mr. President, this afternoon we are debating the nomination of William H. Rehnquist, of the State of Virginia, to be Chief Justice of the United States.

This is a vote that will be cast soon. This is a vote that has troubled me considerably.

I voted to report the nomination from the Judiciary Committee. I voted to report it with the understanding that I would reserve my final judgment on it, that I would give the Senate a chance to debate the matter. And the Senate has debated this matter. Senators have, I think, done themselves proud.

I have listened to the debates carefully.

One might say "Well, I have not seen you on the floor, Senator." That is true.

I cannot sit on the floor and listen to each debate as I would like, because of the many other matters that come up and things that interrupt me. Other Senators have the same demands on their time.

But I have watched this debate. I asked my daughter last week to tape the debate on the Rehnquist nomination, and last Sunday I spent all afternoon and until 1 o'clock in the morning on Monday watching Senators and listening to them as they presented their views on this nomination. And on Monday evening I continued until after 1 o'clock in the morning. Last evening, until after 2 o'clock this morning, I was still considering the views of those who spoke pro and con.

I arrived at my decision last night as to how I would cast my vote on this nomination.

Watching the debate on TV, may I say, incidentally, one can concentrate without interruption, without being called to the office to talk on the phone, without being called to the office to meet someone, without having to bend one's ear to a colleague. One can concentrate wholly and totally on what a Senator is saying.

May I say I have been very impressed by the logic, by the content, by the probity and substance of the debate on both sides of the aisle and on both sides of the question.

So I finally have arrived at my decision. As I have listened to this debate I find that it in the main has revolved around about five or six contentions.

One, give the President his choice.

Two, conservative ideology is so extreme in this individual as to make him insensitive to the rights of minorities. He favors government over individuals.

Three, those who oppose the nomination of Mr. Rehnquist do so on the basis of his judicial philosophy, on the basis of his ideology, and ideology has no place in decisions with respect to the confirmation of nominees to sit on the courts.

Four, candor or lack thereof.

Five, give the nominee the benefit of the doubt.

I think that this is a pretty fair summation of the points that have been debated back and forth, and to which I shall briefly address my own remarks.

First, give the President his choice. Well, we have heard this argument time and time again, Mr. President. I do not subscribe to it. It is a fallacious argument. It is a spurious one.

Let us see what the Constitution says. The Constitution says "He," meaning the President, "he shall nominate, and by and with the advice and consent of the senate, shall appoint * * * judges of the supreme court." The President only can nominate. But he shall appoint "by and with the advice and consent of the senate." Those words are not meaningless. They mean something.

They mean that the Senate has an equal part in the appointment of judges to the Supreme Court of the United States, and we should not take that constitutional responsibility that is placed upon us lightly.

This decision can be made but once. There is no opportunity for a second time. Once the Senate has made its decision, once the President has been notified, once he has tendered the commission to Mr. Rehnquist, once Mr. Rehnquist takes the oath as Chief Justice of the United States, then the Senate has no opportunity to reconsider its decision.

Only in the case of impeachment trials does the Senate take a second

look. And we all know that only for the first time in the last 50 years is the Senate engaged—at the moment, as a matter of fact—in sitting as a court in the trial of a judge who has been impeached by the House of Representatives.

□ 1710

So the Senate has a responsibility in the appointment process. It is a heavy one.

Mr. President, normally I would say, all things being equal, let us give the President his choice. And in the case of Cabinet officers, the responsibility upon us is heavy, but not as heavy as it is with respect to nominees to the courts of this land, and particularly to the Supreme Court of this land, and more specifically to the office of Chief Justice of the United States.

This is a heavy, it is an awesome, it is a sobering responsibility, and no Senator should take it lightly. No Senator should act in this instance on the basis that we should just give the President his choice. I do not care what President it is, whether it is a Democratic President or a Republican President. Our duty goes beyond that.

The next point: The conservative ideology of Mr. Rehnquist is so extreme that he has an insensitivity to the rights of minorities, and he favors government over individuals.

Mr. President, I happen to believe that there is something in the mind and heart of most men and women which, when inspired and challenged, will cause them to rise to the challenge and to the needs of the office, the moment, and the occasion. I do not subscribe to the idea that Mr. Rehnquist is so insensitive of the rights of minorities that he cannot rise to the occasion and meet that test.

Time and time again we have all seen men become Presidents, or become U.S. Senators, or who have held other high offices, either appointive or elective, when who would have believed that they would have later proved to be equal to the task, or even have proved outstanding. But we have seen it happen time and time again.

I do not think we should pin a label on a Justice just by counting how many cases decided by that individual reflected liberal decisions—whatever that means—or how many reflected conservative decisions—whatever that means. It takes a close look at the substance, at the content of the reasoning and rationale behind the decisions.

Mr. Rehnquist's decisions on sexual harassment of women in the workplace is a perfect example. Did Justice Rehnquist take that position because it is his traditional views of women and the family, or did he write the opinion because he clearly understood the need to ensure that women are protected from that kind of pressure in the workplace and can advance on the merits of their work performance and receive equal treatment?

So it is not the volume of cases, it is not the number of cases, it is the substance. What were the issues? Perhaps a loose way of saying it would be that it is the "quality," the quality of his judgment, the rightness of his judgment, the substance of the case. What did this involve and how did he reach his decision?

I do not believe that Mr. Rehnquist is so straitjacketed in his conservative beliefs that he is insensitive. Perhaps his experience thus far would lead some people to believe that he would have a difficult time being more sensitive. But I still believe that men can improve themselves, can rise to meet the occasion, the challenge, the requirements of the office, the moment, the circumstances, the needs of the people.

Well, let me go on from there.

The third point of contention here seems to be that "ideololgy" has no place in this decision. I have heard that said here.

> All those who are opposed to the nomination are opposing it on the basis of ideology. It should not be done. Experience, ability, integrity, these are the qualifications. The President may decide on the basis of ideology. Let him choose whomever he wishes and let him make a judgment as to that particular individual's judicial philosophy. But not the Senate.

I maintain, Mr. President, that, any President of the United States has a right to do so—and not only has a right, I think he has a duty to do so. I would think him lacking in something if he did not consider the ideology or the judicial philosophy of the nominee whose name he submits to the U.S. Senate to sit on a district court, an appellate court, the Supreme Court of the United States, yes, even that highest of all judicial positions, Chief Justice of the United States. I would think he was lacking in judgment.

And I think the same thing about Senators. Why should Senators not have the same right and duty?

Well, let us have Mr. Rehnquist answer the question. For those who propose that Senators should not judge this nominee on the basis of his ideology, let us hear what he has to say.

In "The Making of a Supreme Court Justice," by William H. Rehnquist, from the Harvard Law Record, October 8, 1959, here is what he says on that question:

> 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.

And again he says—Mr. Rehnquist himself, the nominee, is speaking here—on the question as to whether or not ideology should be a factor in the determination by Senators who sit in judgment on his nomination:

> 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."

Now, Mr. Rehnquist is "on his way", we might say, to the office of Chief Justice of the United States and, therefore, the only way for Senators to learn of his sympathies, whatever his ideology may be on this or that question, is to inquire of him, "on his way", what his views are on this question. So Mr. Rehnquist answers the question himself.

Now, Mr. President, this is not the first time I have had something to say about the ideology of individuals named to sit on the Supreme Court. And it is not the first time I have considered ideology.

When Mr. Justice Thurgood Marshall was appointed to the Supreme Court in 1967, by a Democratic President—at a time when I held a Democratic office in the leadership of the U.S. Senate, secretary to the Democratic conference—I voted against Mr. Marshall because of his judicial philosophy.

□ 1720

I intended at first to vote for him. I said to my staff before I went home on that particular day, "Prepare me a speech in support of Mr. Marshall. I want to vote for him." I had filibustered against the 1964 Civil Rights Act, which I voted against—one of the two votes that I have cast in this Senate for which I have been sorry, and have regretted. Incidentally, the other vote, as I have indicated many times, was to deregulate the airlines. But, I had spoken 16 hours on this Senate floor in opposition to the Civil Rights Act of 1964.

I was just out of law school, I had gone to law school 10 years, I had been on the Armed Services Committee and the Appropriations Committee, and I decided I wanted to go on the Judiciary Committee now that I had earned a law degree. I sat on the Judiciary Committee. And here I sat in the shadow of constitutional giants in this Chamber—Senator Ervin, Senator Russell. And you can name others one by one. I was impressed with their constitutional arguments against the 1964 Civil Rights Act. And I in my own conscience spoke against that act, and I in my own good conscience voted against it. Later, I have come to be sorry for that vote.

But here came the nomination to the Senate of Thurgood Marshall. I thought to myself, I had spoken

against the 1964 Act. Politically, I think it would be a good thing for me to vote for Thurgood Marshall to sit on the Supreme Court. And then aside from politics, I thought it would be good for me to vote for Thurgood Marshall as the first black man to serve on the Supreme Court of the United States. "This is a historic vote. I am going to vote for him. So prepare me a speech for him. But first give me some of his opinions that he has rendered on the appellate court in New York." So I took those opinions home with me, and as I read them I began to see that more and more they were opinions with which, from the standpoint of ideology, I personally did not agree.

So lying in bed that night, it suddenly dawned on me, well, here I cannot vote for this nominee. If he were white, I definitely would not vote for him because I do not subscribe to his judicial philosophy. I do not subscribe to his ideology. Then why should I vote for him just because he is black, if I do not subscribe to his judicial philosophy? So I cast my vote against Mr. Justice Marshall. That is nothing to his discredit. I am simply saying that ideology was the controlling factor in my decision.

Then there came Abe Fortas. I had voted for Abe Fortas, whose name had been sent to the Senate by a Democratic President to be an Associate Justice. But when it came to elevating him to Chief Justice, I looked at his philosophy. Here is what I said: "I have no objections to Mr. Fortas personally, or to his qualifications as an able lawyer. I have heard nothing which would reflect against his good character and conduct as a citizen. My objections go solely to his judicial philosophy as manifested by his words and actions while serving on the Court."

So there you are. That was in September 1968. Again a nomination by a Democratic President, again a decision by an officeholder within the Democratic party structure in the Senate, a decision to vote against a Presidential nomination, and why? Because of the nominee's ideology. So much for ideology.

I say that ideology has its place, and as far as I am concerned, speaking of ideology itself, I subscribe to the judicial philosophy of Mr. Rehnquist in many areas—not in all, but in many—school prayer, forced busing, search and seizure, Miranda warnings, the death penalty. So if it were simply on the basis of his ideology, I would support Mr. Rehnquist.

Again I say I have cast my vote in the past against nominees to the Bench submitted by Presidents of my own party, and on the basis of ideology alone.

No. 4: That Mr. Rehnquist lacked candor. Mr. President, the several instances in which Mr. Rehnquist in appearing before the Judiciary Committee professed not to have good recollection, not to be able to recall, those instances have been debated and discussed in the Senate perhaps ad nauseum. But very briefly, let me, too, look at them. On the matter of challenging voters, Mr. President, whether or not Mr. Rehnquist thought he was "intimidating" voters or "harassing" them, I do not know. But Mr. Kennedy asked the following questions:

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

Justice REHNQUIST. I think that is correct

Going on, Senator Kennedy said:

Well, what is "I think". I mean, you would remember whether you did or not. I mean, it is not an event. If you are talking about harassing or intimidating voters, it is not something you are going to forget very much about.

Justice REHNQUIST. Senator, let me beg to differ with you on that point, if I may. I thought your question was challenging. Now you say harassing or intimidating. As to harassing or intimidating, I certainly do categorically deny anytime any place. If you are talking about challenging, I have reviewed my testimony, and I think I said I did not challenge during particular years. I think it is conceivable that [in] 1954 I might at least have been a poll watcher at a west-side precinct.

Senator KENNEDY. Well, did you challenge individuals then?

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

Senator KENNEDY. Then you did not challenge them?

Justice REHNQUIST. I do not think so.

Mr. President, I am in no position to charge Mr. Rehnquist with intimidating or harassing anybody. Perhaps he did. He may not have. If he did, it is conceivable that he did not feel that he was intimidating them. He might not have felt so, even while the individual on the receiving end might very well have felt intimidated. Mr. Rehnquist might, indeed, not have felt he was intimidating or harassing.

But it seems to me it would be very difficult not to at least remember challenging voters. And in challenging voters, Democrats have done that. Republicans have done that. That has been done over the years, way back, it was a pretty normal thing for voters sometimes to be challenged as they approached the voting booths. But why would one not remember? I should think it would have been better if one had indeed challenged voters, simply to have said so. Mr. Rehnquist was not a judge then. He did not sit on the Supreme Court at the time.

He was not in the Justice Department. I would simply think that the committee would have felt that it was an acceptable response if he would have said, "Yes, I did challenge some voters. That was what we did in those days. My Democratic counterparts did it. I did it. As a Republican, a very partisan, loyal, dedicated Republican, I did it.

□ 1730

"But I was not sitting on the Court." So much for that.

Now, we go to the next question, that of restricted covenants.

Mr. President, we have all, I guess, or most of us have, bought property in which there were restrictive covenants. That was common back a few decades ago. It is not beyond my recollection at all.

Of course, it is now unconstitutional.

But in this situation, Mr. LEAHY referred to the summer home Mr. Rehnquist had purchased.

Senator LEAHY. When did you purchase that?

Justice REHNQUIST. In 1974, I believe.

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

Are you aware of that covenant in your deed?

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

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

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

It is not inconceivable, that it could have been that way.

But on August 4, 1986, Mr. Rehnquist wrote a letter to the chairman of the Judiciary Committee, indicating that following his testimony before the Senate Judiciary Committee, he had reviewed his files and he had found a letter from the attorney for the seller of the property, who described the conditions of title, including a reference to the restrictive covenant:

While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week.

So we look at the letter of July 2, 1974, a letter written with a copy to Mr. Rehnquist, which contains the following statement:

The property is also subject to restrictions relative to use, width of rights-of-way, construction on the various parcehe property, who described the conditions of title, including a reference to the restrictive covenant:

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So we look at the letter of July 2, 1974, a letter written with a copy to Mr. Rehnquist, which contains the following statement:

The property is also subject to restrictions relative to use, width of rights-of-way, construction on the various parcels, and ownership by members of the Hebrew race.

There was an earlier letter dated June 24, 1974, addressed to him by David L. Willis, of the firm Witters, Zuccaro, Willis & Lium. It says:

I would recommend that you examine closely the attached abstract copy of the deed of the main cottage property.

We go to that abstract of title and we see these words to which Mr. Rehnquist's attention had been specifically drawn by the letter:

No feet of the herein conveyed property shall be leased or sold to any member of the Hebrew race.

Mr. President, as I say, those restrictive covenants were included from time to time in those days, but the question here is, were you aware of this? Were you aware of that covenant?

Then all of a sudden it appears in a published article that he had been notified of this fact by the attorney, and on that same day Mr. Rehnquist wrote the letter to Mr. THURMOND, the chairman of the Judiciary Committee.

Again, here is the problem of inability to recall, failure to recollect. It woud seem most likely that a man in Mr. Rehnquist's position, a man of his legal ability, a man of his perspicacity, his insight, his sensitivity to these things, would certainly have taken notice of that convenant the astract of title. When his attention was specifically called to it in the letter, one would have thought that he would have read this, 12 years ago when the property was purchased.

All of these matters trouble me.

In the case of Laird versus Tatum, I will not go into that as others have already gone into it, but there is a question there as to whether Mr. Rehnquist participated in the development of a policy dealing with Army surveillance of activities of Americans engaged in nonviolent, legal public demonstrations. He said he did not. There is evidence to the contrary.

Let me go on quickly now to the last of these specific items, the Rehnquist memo to the late Mr. Justice Jackson.

Mr. President, in this situation, a memo entitled "A Random Thought on the Segregation Cases," came to light after the Judiciary Committee had closed its hearings in 1971 on the nomination of Mr. Rehnquist to the office of Associate Justice of the Supreme Court of the United States.

This memo, titled as I have indicated, expounded on whether or not the Court in considering the facts in Brown versus Board of Education should adhere to the constitutional pillar of Plessy versus Ferguson, decided in 1896, the "separate-but-equal" doctrine.

The memorandum was supportive of the Plessy versus Ferguson "separate but-equal" doctrine. I quote from that memorandum:

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."

At the time this memorandum was written, Mr. Rehnquist was law clerk for the late Mr. Justice Jackson. When this memorandum came to light, Mr. Rehnquist wrote to Senator Eastland. The committee had closed its hearings and the matter was before the Senate.

In the New York Times of December 9, 1971, we find the following, with explanatory material:

WASHINGTON, December 8.—Following is the text of a letter from William H. Rehnquist, Supreme Court nominee, to Senator James O. Eastland about a memorandum that has become involved in the Senate debate over his confirmation, and the text of the memorandum:

The following is an excerpt from the letter by Mr. Rehnquist to Mr. Eastland.

As best I can reconstruct the circumstances after some 19 years, this 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.

Going on to another excerpt:

He very definitely did not—

"He" meaning Mr. Justice Jackson—

either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided.

And then further:

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.

And further:

I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use at conference.

Mr. President, the memorandum itself, titled "A Random Thought on the Segregation Cases," is written by the writer in the first person, not in the third person. The memorandum states, "I believe * * *."

Now, who is "I" in this case? Who is the first person? The initials on the memorandum are W.H.R. It would be difficult, then, to believe that this memorandum was written by anyone other than Mr. Rehnquist and that the "I," the personal pronoun in the memorandum, is not Mr. Rehnquist.

The memorandum states: "I realize that it is an unpopular and an unhumanitarian position, for which I have been excoriated by my 'liberal' colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed * * *."

Mr. President, why would Mr. Rehnquist deny that it was his memorandum? Why did he not say, "Yes, it was my memo. Those were my thoughts. I was a clerk to the late Mr. Justice Jackson. Those are my thoughts. That was the constitutional doctrine of the day, Plessy versus Ferguson—separate but equal. I subscribed to it. But that has been overturned. Now it is Brown versus Board of Education. So the separate but equal doctrine has been turned on its head."

I think that would have been understood by the committee. I certainly would have accepted that explanation. One could have understood how a law clerk, who had perhaps been asked to do so, or even if not asked to do so, might have submitted such a memorandum. Oftentimes I ask my staff, "You give me a memo that states the positive. You give me a memo that states the negative. Let me have both sides of the argument." And that could very well have been the case with Mr. Rehnquist. But to say that this memorandum did not represent his own views but that he was stating rather the views of the late Mr. Justice Jackson, Mr. President, is just a little too difficult to swallow.

And then there is the letter from Mrs. Elsie L. Douglas, who was the secretary to the late Mr. Justice Jackson, in which she wrote:

DEAR SENATOR KENNEDY: I have been following the proceedings on the confirmation of Justice William Rehnquist for Chief Justice.

It surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case than before the Court were those of Justice Jackson rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That's what happened in this instance.

So, Mr. President, it is not sinful to admit that one in that day and time supported the view of what was then the law of the land. Whether it was the right law or whether it was the wrong law, that was to be decided by the legislative branch or by the Court and in this instance it was the Court, and in my judgment, the Court made the right decision in Brown versus Board of Education. But to say, "Those were not my views," I cannot understand that. It would not have been amiss, as I said, if Mr. Rehnquist had simply said, "Yes; those were my views and in that day and time that was the law of the land. It was what the Constitution said, according to the Court in Plessy versus Ferguson."

But that was not what Mr. Rehnquist said, and so, Mr. President, that leaves a very serious cloud on his perceived candor, may I say.

So without going further into these instances which have been, I think, admirably presented to the Senate on

both sides of the aisle by those who contend one way and those who contend the other, let me simply say that for that, in my judgment, the nominee's responses were not entirely forthcoming. To that extent, he left a cloud of doubt in my mind. There are those who say, "Give Mr. Rehnquist the benefit of the doubt." Mr. President, it is not a question of giving Mr. Rehnquist the benefit of the doubt. That is the same thing that was said, although in a different form, when the Manion nomination was before the Senate, when it was argued, "Well, here is a young man whose future depends upon this decision." The young man's future was one tiny thing. What counted most was the future of the people of the seventh judicial circuit. Now we hear it said, "Give Mr. Rehnquist the benefit of the doubt." It is not Mr. Rehnquist I am so concerned about. He would still be on the Court as an Associate Justice if not confirmed to be Chief Justice. The benefit of any doubt should be resolved in favor of the people of the United States. Let us think of the people of the United States. There can always be some other Chief Justice, one equally as conservative, one of the same judicial philosophy. But let us give the benefit of the doubt to the people of the United States.

□ 1750

Mr. President, I have reached my conclusion. We are today considering the position of Chief Justice of the United States, and this decision affects every man, woman, boy and girl in these United States.

Chief Justice Marshall said: "The Judicial Department comes home, in its effects, to every man's fireside; it passes on his property, his reputation, his life, his all."

The Court, Mr. President, has no patronage, no control of purse, no bayonets, no battalions. Its power and its influence rest upon the confidence reposed in it by the American people and by the public acceptance of the fact that there should be a tribunal to which all may appeal. The public trust. That is the basis for the power and the influence of the Court, and the symbol of that Court must be the Chief Justice of the United States.

Justice Holmes said:

If American law were to be represented by a single figure, skeptic and worshiper alike would agree without dispute that the figure could be one alone, and that one, John Marshall.

John Marshall was the Chief Justice of the United States.

Mr. President, it is imperative that the people of the United States, all the people—rich and poor, men and women, black and white, Catholic, Gentile, Jew, Protestant—have confidence in the Supreme Court of the United States and the judiciary, as a Court and as a system that will render justice and fairness, and judgment with impartiality toward all.

The Chief Justice of the United States must be perceived as the very symbol of justice and the purest symbol of all, a symbol without flaw. This man's experience cannot be challenged. His ability is universally recognized. Some say he is brilliant. His philosophy, overall, I find no quarrel with. His integrity—there is the question.

Will the American people view this Chief Justice as one who became Chief Justice and on the way cut a corner here, cut a corner there, was unable to remember here, was unable to recall there, when it should have been most likely to the contrary? I am concerned about his ability to develop consensus on the court at times when consensus and balance may be best for the country.

Mr. President, I close with a quotation from Horace Greeley:

Fame is a vapor; popularity an accident; riches take wings; those who cheer today will curse tomorrow. Only one thing endures—character.

Just as it is character that endures in the case of the individual, it is character in the case of the highest Court of these United States that must endure if our constitutional system shall ensure liberty and justice for all.

Mr. President, I regret to say that we are about to confirm a man as Chief Justice of the United States with a quarter or a third, or whatever, of the U.S. Senate showing its lack of complete confidence in this Justice for that exalted office. He would still be an Associate Justice of the Supreme Court. I would have wished that the President would have withdrawn the nomination and submitted in lieu thereof the nomination of Mr. Scalia, but that is perhaps too late. We know what the outcome will be.

Mr. President, for the reasons I have already stated, I cannot vote for the confirmation of Mr. William Rehnquist to be the Chief Justice of the United States.

I yield the floor.

Mr. BIDEN. Mr. President, I say to my friend from Arizona that I will not make my entire statement at this point. I will just take about 5 minutes, and I will cease and desist until later this evening.

First of all, I compliment my colleagues, the Democratic leader, the Senator from West Virginia, on his statement.

Second, I suggest that he pointed out one of the three serious flaws in this nomination.

Let me just illustrate, because I often hear from my colleagues who have not followed this enough, and from my constituents, "Why are you all spending so much time talking about something that happened 8, 10, 15, 18, 20, 25 years ago? Why is that relevant? What difference does that make?"

Let me suggest that if you look at the facts and the time back in 1970 when Justice Rehnquist first came to the Court, 90 percent of these documents and these points were not able to be made because they were not available to us. That is No. 1.

No. 2, Justice Rehnquist has come before the U.S. Senate Judiciary Committee and the American people and repeated some statements which, on their face, seem to be ridiculous. Let me just take one series of points that relate to Justice Rehnquist's testimony.

Justice Rehnquist claimed in 1971 that the memorandum we keep talking about—the memorandum we are talking about now is the memorandum that he, as a clerk for Mr. Justice Jackson, wrote. Senator BYRD referred to it; others referred to it. In that memorandum, it is a clear statement that he thinks, that someone thinks, Plessy versus Ferguson—separate but equal—is a good idea.

In fairness, I might add that Mr. Justice Rehnquist at the time had been the No. 2 man. Here he had been the No. 1 man at the Justice Department in terms of legal counsel for the President and part of his responsibility was to honcho through the nominations of two men who had just gone down to defeat and literally, as the biographers tell us and stories go, he was sitting in the office with then Attorney General Mitchell. The President called Attorney General Mitchell and said, "Within an hour I am going to name someone if you don't find me someone."

And he, Mitchell, allegedly turned then to Rehnquist and to everyone's great surprise said, "It is you."

Justice Rehnquist did not anticipate that occurring but Justice Rehnquist figured out one thing. He observed that in 1970 anyone who expressed support for at any time in their life Plessy versus Ferguson they would not be confirmed. That was the attitude at the time. He was smart enough to know in this Senator's view had he gone up there and said, "Yes, I once or still believe Plessy versus Ferguson is a good idea," he would have been in deep, deep trouble. He just saw two nominees go down to defeat.

So what does he do? He has an opportunity of a lifetime. He never expected in his whole life to ever be on the bench and he concludes, in my view, that he has to come up with some mildly credible rationale that he never held those views.

So he turns and he says, "This memorandum,"—the only thing that was talked about being surfaced,—"was something that Justice Jackson," and keep in mind Justice Jackson was

dead now, that "Justice Jackson was the guy who in fact really had me write this for him, they were not my views."

He goes on to say as was pointed out: Justice Jackson "did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided."

The fact of the matter is, though, that Justice Rehnquist and his colleague, Donald Cronson, wrote numerous memoranda for Mr. Justice Jackson in which they articulated their personal philosophic view which is, by the way, what Justice Jackson's secretary said all his clerks did. They were asked to give their view, not Jackson's view.

Let me point out why I believe he was disingenuous at best, when he said, "Justice Jackson didn't expect or welcome the incorporation of our views."

If that were true you would assume that the memorandum that he wrote on other matters would not express his, Mr. Rehnquist's view. Right? Let us just go through a few of them.

For instance, in the memorandum in the case of Terry versus Adams, which involved the challenge to the State elections, Justice Rehnquist wrote, and this is a memorandum to Justice Jackson: Just like the Plessy versus Ferguson memorandas to Justice Jackson he wrote:

I have a hard time being detached about this case, because several of the Rodell school of thought among the clerks began screaming as soon as they saw this that "Now we can show those damn southerners', etc. I take a dim view of this pathological search for discrimination."

In a memorandum in the case involving the right to speak in a public park, Justice Rehnquist wrote to Justice Jackson:

I personally don't see why a city can't set aside a park for ball games, picnics, or other group activities without having some outlandish group like Jehovah's witnesses commandeer the space and force their message on everyone.

Again, I do not care about his view. Here are two instances in a row where he said after having said Justice Jackson did not want clerk views, he is giving his view.

Third, in a memorandum on three lawsuits by baseball players against the major leagues for violation of the antitrust laws, Rehnquist wrote:

I feel it is only fair to lay bare my strong personal animus in these cases . . . I feel instinctively that baseball, like other sports, is sui generis, and not suitably regulated by a bunch of lawyers in the Justice Department or by a bunch of shyster lawyers stirring up triple damage suits.

This is a memorandum to Justice Jackson.

I see the majority leader standing. I want to make a few more points, if he would like to make a comment.

Mr. DOLE. Mr. President, what I want to do while the minority leader is available is to indicate and I am sorry to interrupt the distinguished Senator from Delaware.

Mr. BIDEN. It is perfectly all right.

Mr. DOLE. We might be able to either fix a time or determine a time when we might vote on this nomination. A lot of our Members understand that there is going to be a window between roughly 6 and 8. But it would be my hope that those who want to speak on this nomination would avail themselves of this time and if we could reach the end of the discussion on the Rehnquist nomination and then perhaps we could set aside that particular nomination and start discussing Scalia. I do not know how much more time the Senator from Delaware has that he is allotted or committed.

Mr. BIDEN. If the Senator will yield, I will say there are probably about another hour-and-a-half worth of total time, my guess.

The Senator from Arizona has about 20 minutes to a half-hour and the Senator from Delaware has total another 15 or 20 minutes; the Senator from Massachusetts has 20 minutes, and the Senator from Ohio may or may not have 15 minutes.

So to the best of my knowledge they are the only people who wish to speak on the nomination.

So I would guess maximum we are talking about anywhere from an hour and 20 minutes to a maximum of an hour and 50 minutes is my guess remaining to be spoken on this nomination.

Mr. DOLE. Could we do that during the so-called window to see if we could not come and start the debate?

Mr. BIDEN. The Senator from Delaware would be prepared to do that. The Senator from Arizona acknowledged he would be prepared to do that. Senator KENNEDY, I believe, indicated he had to leave during that window. He was here prepared to speak. So he ought to be back. We can check with the Senator.

The answer is I think we can get 90 percent of it finished during the window.

Mr. DOLE. If we could conclude the debate on Rehnquist probably—not going to happen—but if we could conclude it before 8 o'clock, would the distinguished minority leader have any objection if we would set the nomination aside temporarily to call up the Scalia nomination and start the debate on that one?

Mr. BYRD. Not at all. I have no objection.

Mr. BIDEN. If the majority leader will yield, I would have no objection. I would like to have 2 minutes immediately prior to the vote on Rehnquist with all my colleagues on the floor. It would be safe to say 5 minutes before the actual vote. So I do not mind leaving it, going to Scalia, but prior to the vote being called, I would like 5 minutes set aside for the opposition.

Mr. DOLE. All right. I understand.

I know the distinguished minority leader has a commitment. If he has no objection, then if it should happen—it may not happen—we could proceed in that fashion.

Mr. BYRD. Mr. President, will the distinguished Senator yield?

Mr. BIDEN. I yield.

I say to both leaders I think that is reasonable. I would suggest quite frankly—I do not speak out of school with my colleagues—maybe we could run a hot line on that, I know of no one who would have reason to object to that. I would suggest we proceed on that basis unless in the next 10 minutes or so we find an objection. That is what I would say.

Mr. DOLE. If the Senator will yield, we will do the same. Again I ask the distinguished minority leader if we can reach that agreement if it is all right to do it in his absence.

Mr. BYRD. It is. I authorize the distinguished manager here or authorize the distinguished majority leader to speak on my behalf. If it is clear on this side, our staff will know it. They can inform the majority leader and it is perfectly all right with me to enter into this agreement.

Mr. DOLE. Thank you.

Mr. BYRD. I thank the majority leader, and I thank the distinguished Senator from Delaware.

Mr. BIDEN. I thank my colleagues.

Mr. BYRD. Mr. President, I am one of those who in this instance has to go to a function, and I am one of those who asked that there be a window. It would seem to me we could proceed with debate on this nomination and if Senators are not here at this particular point and we have not reached 8 o'clock and they are not here, we still wish to speak on Mr. Rehnquist, if the managers of the nomination on Mr. Scalia were here and care to proceed with their statements, and other Senators could—we will be back then shortly after 8—perhaps if we could agree to a vote on both nominations, let us say, no later or let us say at 9 o'clock, Mr. Rehnquist's vote and back to back Mr. Scalia, that would give us virtually 3 hours in which to complete the debate on Mr. Rehnquist, do the debate on Mr. Scalia, which is not going to be very lengthy I should think, and then we all know when the vote is going to occur.

(Mr. HUMPHREY assumed the chair.)

Mr. BIDEN. Mr. President, to continue again now, remember what we are talking about here. We are talking about a fellow who said that, "It is obvious they were not my views. I was not saying these things."

Justice Rehnquist argued in 1971 that "tone of the memorandum is not that of a subordinate submitting his own recommendations to his superior * * * but is instead quite imperious—the tone of one equal exhorting other equals."

Again, that is his argument as to why he said, "I could not have written this." Do not forget in the first place he said, "I couldn't have written it, they were not my views. The reason they were not my views," he said, "is because clerks don't give their own views."

□ 1810

Well, I hope I have just pointed out that he consistently gave his own views in every other memorandum and Justice Jackson's clerk said that is what all the clerks did. So I would like to make that point.

The second point is he now says, as a second defense, that it was not he who wrote that memorandum or they were not his words. He comes back and says, not only did clerks not do that, he said, in addition to that, it was too imperious, the tone; it sounded like a Justice, and "We clerks didn't use those kinds of terms like the ones used in the memorandum."

Well, let us examine that point for a minute. In one memorandum, for example, the man who say clerks do not use those phrases, he, Justice Rehnquist, then clerk Rehnquist, refers to his coclerk, this Mr. Cronson, as "Mr. Justice Cronson," He says, "As Mr. Justice Cronson said in his memo," blah, blah, blah, and he went on from there.

At another time, he titles the memorandum he wrote to the Justice—again, now, he said "We don't use high-sounding terms. Any time it is formal or any time it is flippant, it must have been a judge, not a clerk."

This is another title of one of his memorandums. It is quite good, actually. The title is: "Habeas Corpus Then and Now—Or, If I can Just Find the Right Judge, Over These Prison Walls I Shall Fly."

That is how he titles his memo to Justice Jackson.

A third example: In Justice Rehnquist's memo on Terry versus Adams, when he was a clerk, he talked about—this is his, Rehnquist's verbiage—he talked about a "pathological search for discrimination," that, he said, could be attributed to Justices Douglas and Black, as well as several other prominent legal scholars.

Now, Let us go back over this a minute. Why are we concerned about this? Because, A, it does not appear he is telling the truth; B, we did not have a chance to examine it in 1971; and, C, his arguments do not hold water.

His arguments that "I wasn't for Plessy versus Ferguson," are as follows: A—this is the first part now, this is really important in my view—he says, "A, when we talked and when we wrote in those memos, we were writing for Justices. We weren't expected to give our own views."

Yet, consistently, when he was a clerk for Justice Jackson, he gave his own views and stated them that way. And I have submitted those for the RECORD.

Mr. SARBANES. Will the Senator yield on that point?

Mr. BIDEN. Yes; sure.

Mr. SARBANES. Did the Senator put in the RECORD the letter from Justice Jackson's secretary of many years taking very sharp issue with that?

Mr. BIDEN. Yes. She made it very clear, as the Senator from Maryland knows, that, in fact, clerks were expected to give their views, not the Justices' views. And she pointed that out. And Senator BYRD put that in the RECORD.

But, not only on that score is it clear he is not telling the truth, it is clear on the score that when he tried, in a fallback position, to defend his argument to say he is not lying to us or not misrepresenting, he said, "Well, only Justices use imperious language." And yet in every memo he writes—because that is what he is known for. He is quick witted. He is sarcastic. He is sometimes sardonic. He does it all the time, and I just cited three of those examples.

Now, there is a fourth thing. Rehnquist asserted in 1971 that the statement in the memo that "Plessy was right and should be reaffirmed was not an accurate statement of my views at the time."

However, everything in Justice Rehnquist's background at that time points overwhelmingly to the fact that that is what he believed.

Let me give you some examples. This is Rehnquist's coclerk, again, Mr. Donald Cronson. He stated that Rehnquist regularly defended Plessy versus Ferguson in the luncheon meetings with the other clerks. And this is consistent with the statement and the memo which he wrote to Justice Jackson where he, Rehnquist, says, "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by my 'liberal' colleagues."

He means the people at lunch time who used to excoriate him, his fellow clerks who used to say things like, "You can't mean that. You don't really believe separate but equal is equal." And he would come back and say, "I do believe that."

So he says to Jackson, he acknowledges that. He says, "I am recommending to you to uphold Plessy v. Ferguson. I realize that is an unpopular and unhumanitarian position for which I"—Justice Rehnquist—"have been excoriated by my colleagues," the clerks.

Continuing the quote: "But I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

And, by the way, throughout his memorandum, which I will submit for the RECORD, he consistently refers to his fellow clerks as "the liberals." He was not talking about the other judges. He is talking about his fellow clerks.

In an 1983 interview by a reporter from the New York Times, Justice Rehnquist was asked whether his views on Plessy had changed since his days as a clerk. This is before he knew he was going to be nominated to be Chief Justice of the United States. He replied: "I think they probably have."

Now, why would he say in 1983 that his views on Plessy had changed from when he was a clerk and yet he swore in 1971 his views as a clerk were in support of Brown versus the Board of Education? What are we, fools? I mean, it is crazy. Obviously, he believed that. And there is nothing wrong with him believing that. As the Senator from West Virginia stated, almost half of the United States believed Plessy versus Ferguson was right. Over half of them stood here on the floor and said "Separate but equal is equal." And obviously, he did, too.

So why is he not telling us the truth under oath? Why, in 1983, would he say: "My views have changed since that of when I was a clerk"?

If you take his statements in 1971 and 1986 as being accurate, where he swore under oath that he was for Brown, then I am really worried. That means he is now for Plessy. That means he has changed his mind. That means he is going to rule, if another case like it comes up that says separate but equal is equal.

Now, nobody believes that; do they? God willing, he does not mean that.

So, obviously, as my mom might say, he might have tole us a little white lie about who wrote the memorandum.

Another point in his testimony before the Judiciary Committee this year: He testified that he never reached a personal conclusion—I asked him, I said, "By the way, did you have an opinion? Did you have an opinion back when you were a clerk?" And he said, "Clerks don't have opinions."

Well, here is one of the most opinionated men that has probably ever served as a clerk, one of the most opinionated Justice—and that is not bad—and he says he had no opinion. He had no opinion at all back at that time on whether or not Brown should be reaffirmed.

Given that the Brown decision was the most controversial constitutional decision of the century, it is absolutely inconceivable to me that a person with such strong views as Justice Rehnquist held would not have a view regarding the correctness of the decision.

Similarly, Justice Rehnquist's corollary assertion that the memo represented the views of Justice Jackson is wholly contradictory to the evidence. It is disputed by Phillip Kurland, one of the most conservative constitutional scholars in America, from the University of Chicago. Phil Kurland, Justice Jackson's biographer, disputes that Jackson ever held those views. Richard Kluger, the author of the seminal work on the history of the Brown decision, disputes that Jackson ever held those views; cannot find any evidence Jackson ever held those views.

□ 1820

Ms. Douglas, who we referred to earlier, Jackson's personal secretary, refutes the assertion that Jackson ever had any of those views.

Mr. SARBANES. Will the Senator yield on that point?

Mr. BIDEN. Justice Jackson's own writings in the Brown case refutes that he ever had those views. I will yield on that point, and I will make a concluding point to let my colleague from Arizona speak if he has not already left.

Mr. SARBANES. I simply want to quote the letter that Ms. Douglas, Justice Jackson's long time secretary, sent because obviously she worked very closely with the Justice, and law clerks came and went. She stayed on forever, as it were. In her letter she says:

It surprises me every time Justice Rehnquist repeats what he said in 1971 that the views expressed in his 1952 memorandum concerning the segregation case then before the Court were those of Justice Jackson's rather than his own views. As I said in 1971 when this question first came up, that is a smear of a great man for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own, and they expressed theirs. That is what happended in this instance.

Mr. BIDEN. I thank my colleague from Maryland. Look, let's be honest about this. Here is a guy who had himself in a crack. If it had not been for the fact that he was nominated, he could have said what a lot of other Members of the Senate said here. Like Senator BYRD said, hey, I held that view. I was wrong. I regret having held that view. It was my view at the time but I do not hold it any more. But I concluded he could not say that because he was afraid, in this Senator's judgment, that had he said that in 1970 that the array of Senators in this Chamber in 1970, the mood of the country in 1970, the civil rights atmosphere in 1970, they would have said notwithstanding you have recanted, we still do not want you on the Court because you held those views. That was the mood of the country.

So in fairness to Justice Rehnquist he sat there and he had himself in a bind. He had a chance to do something he never thought he would ever be able to do in his life—be a Supreme Court Justice. And he allowed himself in my view to succumb because obviously every single thing points to the fact that they were his views. Let me make a concluding point on this area.

Justice Rehnquist stated in 1971, and he expressed again, "Since I fully support the legal review and the rightness from the standpoint of fundamental fairness of the Brown decision."

Clearly, this statement was intended to deflect criticism by indicating that he consistently agreed with Brown. But Justice Rehnquist's unequivocal endorsement of Brown in 1971, is clearly questionable in light of the statements he made about integration in 1964 and 1967, and in 1970. You heard my colleague, the distinguished Senator from Utah. He said, look—and you will hear from my friend from Arizona. He was required to write a position. My boss asked me to write a position. Put away the issue of Justice Jackson, which I cannot believe a reasonable person can conclude that they were not his, Rehnquist's, views. Put that all aside. Let us look at a few facts.

In 1964, Justice Rehnquist while a private lawyer in Phoenix, AZ, testified against the passage of the Phoenix City Ordinance which would prohibit racial discrimination in places of public accommodation. He also wrote a letter, then wrote a letter to the newspaper. Now this is a private citizen. He had a right to do that. He wrote a letter to the newspaper in which he equated the indignity suffered by victims of discrimination barred from a lunch counter with "the indignity suffered by the segregationist forced to serve the meal." I ask unanimous consent that an excerpt relating to that matter be printed in the statement.

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

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, 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 is 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—particulary when other actions by the nominee after 1964 are taken into account.

Mr. BIDEN. I thank the President.

He concluded that letter by saying the following. He said, "It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedoms for a purpose such as this."

A purpose such as this was forcing a white person to serve a black person in a restaurant; forcing a white person to have to rent a room in a public accommodation house to a black person.

Again, a lot of reasonable women and men held that view in 1964. But this was not as a clerk to the Court. This was a full-blown respected lawyer, a prominent citizen in Phoenix, all on his own, as a concerned citizen writing a letter to the editor of the Phoenix newspaper.

In 1967, Justice Rehnquist publicly challenged the plan to end de facto segregation in public schools in Phoenix. And again, as a good-spirited public citizen, he wrote a letter to the editor. In the letter to the editor, he said, "We are no more dedicated to an integrated society than we are dedicated to a segregated society." Again, a view that is not unreasonable. Some will argue that we are required under the Constitution to eliminate discrimination but we are not required to promote integration. That is an intellectually defensible argument. That is the one he made. This is the guy now who is saying in 1971, "I fully support Brown, and I always have." Does that sound like a guy who fully supports Brown, and always had?

In 1970, it now appears that Justice Rehnquist drafted a proposed constitutional amendment while he was working for the Government, an amendment that had it passed would have halted the desegregation of the Nation's public high schools. In a memo accompanying this proposal, then attorney Rehnquist said, "This amendment would stop Federal courts from interfering even if local officials set up school attendance zones 'with a motive of segregating the races in the schools.'"

He drafted an amendment, and he attached a memo to the amendment sending it on to the President, a defensible position in which he said that it is all right to "set up school attendance boundaries under this proposed amendment even where there is a motive of separating the races in the schools."

Again, I would be delighted to debate any of my colleagues on whether or not the substance of what he is suggesting in all these things is reasonable. I think they are not reasonable.

But the reason I raise these things, I say to my colleagues, is not to demonstrate that he was right or wrong in holding these views, but to demonstrate that he was not telling us the truth when he said, "I supported the Brown decision, and I always supported the Brown decision," that "I did not write the Jackson memo, they were Jackson's views, not my views."

Now, look, there is nothing wrong again as I say to my colleagues with him having held those views. A lot of people in America held those views.

But I say to my colleagues after I have read what I read to you, does anyone reasonably believe that William Rehnquist, clerk William Rehnquist, lawyer William Rehnquist, private citizen William Rehnquist, was a man who from 1954 on strongly supported Brown versus The Board of Education? Is that a reasonable conclusion anyone can reach?

So why did he not just say to us, yes, in 1954, like almost the majority of the American people, I thought Plessy versus Ferguson was still good law. But, he came up under oath, raised his right hand, and he said, "No, they weren't my views. I am for Brown," or, "I had no opinion at all."

□ 1830

Let me speak to another point, and I had no intention of speaking to this but I am going to speak to it now because it was referred to by the Senator from West Virginia, restrictive covenants.

I have never once raised during the hearings the issue of restrictive covenants with regard to blacks or "members of the Hebrew race."

In all honesty, whoever wrote that covenant not only indicates how prejudiced they were but how stupid they were. There is no Hebrew race. I find this offensive all by itself to my friends.

Having said that, it has been pointed out by supporters of Justice Rehnquist, the way I have read some of the accounts, "Even Senator BIDEN had a restrictive covenant in his deed."

I have read that now so many times in the press I think it warrants commenting.

A lot of us in America have restrictive covenants in deeds. I might point out I never had any restrictive covenant in any deed in which I was a property owner.

It turns out my father's home in which I lived, like some of us do—we lived in our father's home as children—there was a restrictive covenant in my father's deed.

Let me show you how it is different than Justice Rehnquist's and how most Americans' are different than Rehnquist's.

In my father's deed, about the second line from the bottom line, it says, "There are restrictions and covenants to be found in volume 479, pages 376 and 377 at the recorder of deeds office in the county of New castle, Delaware."

Any reasonable person reading that, I am sure if my father read it which I am sure he did not, could assume that it is anything from allowing the electric power company to put the lines straight through to where they could put a road through in the neighborhood.

My father did not look it up and say, "I better go down to the county recorder's office and, assuming I can find it, turn to volume 471, turn to page 4,372, and read the covenant."

No lawyer ever wrote my father a letter. It never appeared on the face of the deed or any other document my father read, just like 99 percent of the other Americans in this country who have "restrictive covenants."

How is that distinguishable? It is distinguishable in a very definite way. I am not here to defend my father, but to point out the difference.

In Justice Rehnquist's case, it said it on the face of the deed, right there in big, bold print: "No Hebrew."

In addition to that, there was a lawyer who sent him a letter, a one-page letter. It said, "By the way, Mr. Justice Rehnquist, you should look at this because your deed says, 'No Hebrew race' can be sold this property."

Here is a Justice of the Supreme Court who everybody over here says, and some of my colleagues over here say, is this brilliant, legal tactician, and scholar.

He gets a letter from a lawyer which is one-page long. He does not read it?

In addition to that, do you know what happened? Do you know what happened when some Republican Party worker went down and checked out every deed I have? The only restrictive covenant that restricts in a property I own is because one was owned by a DuPont family, and it says in fact that if there is an explosion at the DuPont property the owner of my property will not be liable. And it says I cannot sell drinks on the property of my home.

I assure my colleagues, I sell no drinks.

Let me tell you what the difference is between what I think 90 percent of Americans would do.

The day my father was made aware because some Republican worker went

down to the recorder of deeds and said, "Let's check BIDEN out and his family," the day that became known, do you know what my father did? He went to a lawyer and said, "I want that taken out of my deed."

The lawyer told my father, "You can't have it taken out of your deed because the court will not hear the case because it is moot anyway."

My dad said, "What can I do?"

He said, "You can attach an amendment to the deed and say you do not consider it legal and you find it repugnant."

That is what my father did.

What did Justice Rehnquist do when he found this out? To the best of my knowledge, nothing.

Let us assume he did not know anything about it. Let us assume he did not have any notion of it. Let us assume it never crossed his mind. Let us assume he never read the letter. Let us assume he did not see the deed.

When he found it out, what did he say? Did he say at the hearing "I want to get that taken out of my deed"?

Did he say this was horrible?

It goes to the question of a little bit of sensitivity.

I do not see any of my colleagues wishing to speak and since we are going to try to finish, let me keep going. Let me shift to another subject, if I may.

By the way, if it has not already been put into the RECORD, I ask unanimous consent that the New York University Law Review article written in April 1982, entitled "How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist," be printed in the RECORD.

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

HOW JUDGES SPEAK: SOME LESSONS ON ADJUDICATION IN BILLY BUDD, SAILOR* WITH AN APPLICATION TO JUSTICE REHNQUIST

(Richard Weisberg)**

(Professor Weisberg, recognizing the relationship of literature to the law, closely examines Melville's Billy Budd, Sailor as a vehicle for exploring the importance of language in adjudication. His approach to Melville's story emphasizes the concept of considerate communication. The concept is then developed through a detailed analysis of Justice Rehnquist's opinion in Paul v. Davis. This analysis of the concept provides a useful demonstration of how language can affect adjudication.)

INTRODUCTION: FICTION, LAW AND BILLY BUDD, SAILOR

Can there really be something over and above these clear ascertainable facts, some extra element, which guides the judge and justifies or gives him a reason for punishing? . . . We are here in the realm of fiction, with which it is said the law has always been connected.[1]

The normal subject matter of the law review writer is, of course, statutory or adjudicatory prose. Through compilation, comparison, and interpretation of this matter, the legal analyst attempts to predict, criticize, and suggest. The writer may thereby enrich a particular area of law and provide ideas to which judges, lawyers, and others may refer when analogous issues arise. Why, then, should we break the pattern and devote law review space to a work of pure fiction? How can we justify substituting imaginative for legal prose? Do we not intrude sufficiently into the abstract in jurisprudential pieces without adding literary art to the legal cannon?

There are good reasons for insisting on the importance of some fictional works to legal scholarship. First, legal analysts, in fact, have long employed fiction to illuminate law.[2] Second, despite the present tendency of some legal writers to ignore fiction in favor of more fashionable "extrinsic" methodologies,[3] other distinguished scholars continue to find its influence irresistibly beneficial.[4] Third, some literary texts so richly contribute to our understanding of the law that it would be a mistake to ignore their implications for legal analysis. Certain fictive situations command the attention of lawyers in each generation,[5] some for generations at a time.[6] These situations occasionally surpass in their legal significance the utterances, on similar subjects, of judges, legislators, administrators, or law professors.

Billy Budd, Sailor is such a text. Since its publication[7] several decades after Melville died,[8] this novella has captivated literary scholars.[9] Lawyers have written about the text at least since the mid-sixties,[10] and as recently as the summer of 1980, it became the centerpiece of an interdisciplinary conference at Princeton University.[11] The dilemma of the story's central adjudicator, Captain Edwin Fairfax Vere, in bringing the morally innocent Billy to trial and execution for striking and killing the evil John Claggart, has entered into the spirits of legal and literary scholars alike, provoking debate and even passion.

Thus, for example, contemporary legal analysts such as Robert Cover[12] and David Richards[13] have integrated the pivotal trial scene, and the text as a whole, into an understanding of legal history on the one hand and moral judicial behavior on the other. In a fine earlier work by a nonlawyer, Vere's legal argument to the court-martial was preliminarily analyzed and employed to further an understanding of what Melville is saying about law in his story.[14] Teachers of jurisprudence and of law and literature have carefully examined the long passage in which Vere defends his view that, on occasion, moral innocence must bow to legal culpability,[15] recognizing in it a paradigm for theories of adjudication.

A complete analysis of the law of this "case," however, has not yet been presented. Therefore, after summarizing the "plot" of Billy Budd, Sailor and introducing a narrative theme that will echo throughout the piece, this Article will examine the law that a court-martial should have applied in Billy's case. The analysis demonstrates that Captain Vere's articulation and application of the law in many respects were erroneous, and that Melville intended his reader both to realize this fact and to consider its broader implications. Our reading thus challenges the prevaling interpretation[16] that Vere was confronted with a situation in which positive law dictated legal action wholly opposed to his natural sense of justice.

Since Vere successfully posits a dilemma he did not really face, the moral and legal significance of the story turns not on conflicts arising from the correct application of externally imposed forms, but on the articulate adjudicator's ability to impose a subjectively attractive result that the law does not require. So understood, the novella indicates Melville's view that language frequently controls the outcome of adjudication. The Article develops this insight by extracting the notion of "considerate communication" from an early passage in the story. It further explores some of the narrative techniques that mark this mode of communication through an analysis of Justice Rehnquist's opinion in *Paul* v. *Davis*[17] as viewed through the lens of Vere's argument in Billy's case. Following Melville's lead, the Article then relates "considerate communication" to the moral nature of the adjudicator by examining Vere's motives for having Billy hanged. This analysis, finally, leads to an examination of the story's broader cultural themes. For the lawyer, this centers on Melville's concern that the values and normative structures likely to inhere in many judges today may pose barriers to objective judicial behavior.

Thus, this Article seeks both to enrich our understanding of Melville's remarkable tale and to demonstrate how some literary works pose profound questions so artfully that they deserve a place in the growth and development of legal culture.

I. PLOTS AND DIGRESSIONS: OVERTNESS AND COVERTNESS IN BILLY BUDD, SAILOR

No schematic attempt to describe *Billy Budd, Sailor's* "plot" would sit easily with anyone who has entered into the majestic complexity of Melville's final work. Such attempts, made by filmmakers,[18] opera writers,[19] and some literary critics,[20] impoverish the narrative subtlety that is the story's essence. But a kind of recasting of the tale, loyal to its digressions, is possible and serves to introduce the central theme underlying Melville's view of adjudication.

The story, subtitled *An Inside Narrative,* is brief—approximately ninety pages long. It begins with the description of a certain maritime type, the "Handsome Sailor":

It was strength and beauty. Tales of his prowess were recited. Ashore he was the champion; afloat the spokesman; on every suitable occasion always foremost. Close-reefing topsails in a gale, there he was, astride the weather yardarm-end, foot in the Flemish horse as stirrup, both hands tugging at the earing as at a bridle, in very much the attitude of young Alexander curbing the fiery Bucephalus. A superb figure, tossed up as by the horns of Taurus against the thunderous sky, cheerily hallooing to the strenuous file along the spar.

The moral nature was seldom out of keeping with the physical make.[21]

The story's title hero is a fine (albeit flawed) example of the type:

Such a cynosure, at least in aspect, and something such too in nature, though with important variations made apparent as the story proceeds, was welkin-eyed Billy Budd—or Baby Budd, as more familiarly, under circumstances hereafter to be given, he at last came to be called—aged twenty-one, a foretopman of the British fleet toward the close of the last decade of the eighteenth century.[22]

Billy brings the overt values of his sailor-like type to the specific historical environment of this novella. Melville's tale unravels not in an allegorical locus of anytime and

Footnotes at end of article.

anywhere, but rather in the era of the French and American Revolutions, when the great mutinies threatened the stability of the British navy. "It was the summer of 1797,"[23] we are told, shortly after "The Great Mutiny" at the Nore.[24] Billy is impressed from a merchant ship, the *Rights of Man*, onto the action-bound *Bellipotent*, cheerfully accepting his fate.[25] Resentment and "double meanings and insinuations of any sort [being] quite foreign to his nature,"[26] he departs from the homeward-bound ship, leaving with the *Rights* only the memory of "the jewel"[27] of that crew, and bringing to the *Bellipotent* his popularity and natural esteem among fellow sailors.

The narrator continues to ground the tale in a specific historical context by now moving from Billy to the general subject of the mutinies, providing needed background for the introduction to the story of Admiral Nelson. A very real contemporary and colleague of the *Bellipotent's* fictional captain, Vere (who has not yet been mentioned), Nelson, " 'the greatest sailor since our world began,' "[28] is the subject of two full chapters; he will be mentioned twice again as the text proceeds.[29] Nelson here appears as a kind of Handsome Sailor himself. Evocative of Billy on the *Rights*,[30] but on a far higher level of significance, Nelson is presented as a natural leader. Called to a troubled ship, the *Theseus*, he dampened a mutiny virtually on his arrival, choosing "not indeed to terrorize the crew into base subjection, but to win them, by force of his mere presence and heroic personality, back to an allegiance if not as enthusiastic as his own yet as true."[31] (Vere's subsequent tactics at Billy's trial will have to be tested against this narrative model.)

As the story winds through self-admitted "bypaths"[32] to the exposition of its central actions, Captain Vere is finally introduced. A good, if somewhat pedantic,[33] perhaps overly prudent[34] and bookish officer,[35] he bears the nickname "Starry Vere" partly because he would occasionally gaze dreamily at the blank sea,[36] but more so because Andrew Marvell had written a poem about his ancestor, "starry Vere," who was noted for his discipline severe."[37]

From Vere, Melville moves to the *Bellipotent's* master-at-arms, John Claggart. "His portrait I essay," admits the always equivocal narrator, "but shall never hit it."[38] Like Vere[39] (and unlike Billy), Claggart is twice described as "exceptional."[40] Both Vere and Claggart are unusual on a ship because their verbal gifts and complex intelligence oppose them to the usual sailor-like type. Melville, in a later "digression," describes this opposition as follows:

And what could Billy know of man except of man as a mere sailor? And the old-fashioned sailor, the veritable man before the mast, the sailor from boyhood up, he, though indeed of the same species as a landsman, is in some respects singularly distinct from him. The sailor is frankness, the landsman is finesse. Life is not a game with the sailor, demanding the long head—no intricate game of chess where few moves are made in straight-forwardness and ends are attained by indirection, an oblique, tedious, barren game hardly worth that poor candle burnt out in playing it.

Yes, as a class, sailors are in character a juvenile race.[41]

Claggart, like Vere, "is finesse," particularly finesse with language, with verbal obfuscation, and with achieving ends through "indirection."[42]

Claggart, however, suffers from an animus not shared by his captain: he is obsessed with Billy Budd. Such a hidden passion, "never declared" and directed against "some special object," is described in a vitally important passage:

But the thing which in eminent instances signalizes so exceptional a nature is this: Though the man's even temper and discreet bearing would seem to imitate a mind peculiarly subject to the law of reason, not the less in heart he would seem to riot in complete exemption from that law, having apparently little to do with reason further than to employ it as an ambidexter implement for affecting the irrational. That is to say: Toward the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane, he will direct a cool judgment sagacious and sound. These are madmen, and of the most dangerous sort, for their lunacy is not continuous, but occasional, evoked by some special object; it is protectively secretive, which is much as to say it is self-contained, so that when, moreover, most active it is to the average mind not distinguishable from sanity, and for the reason above suggested: that whatever its aims may be—and the aim is never declared—the method and the outward proceeding are always perfectly rational.[43]

Why does Claggart have it in for Billy? As the narrative proceeds, it affords us some oblique hints. Billy and Claggart are *types in opposition*. It has become a critical commonplace to think of this as an opposition between good and evil, or "heart and head," but these are reductive analyses, unworthy of the text in its fullness.[44] The real opposition here, as indicated in the last few quoted passages, is between the Handsome Sailor's innate openness and the intelligent master-at-arm's "ingratiating"[45] indirectness, or, as we shall call these qualities here, *overtness* and *covertness*.[46]

Claggart proves himself a master at covertness, as well as arms, during the tale's famous "soup spilling" episode.[47] When Billy accidentally spills "the greasy liquid"[48] in Claggart's path, the master-at-arms, about to chastise the perpetrator, "checked himself."[49] Claggart's physiognomy, locked into sternness, immediately alters; a smile adorns his not-unpleasant features, and he says merely, "Handsomely done, my lad! And handsome is as handsome did it, too!"[50] Not a sailor in the mess hall now believes that Claggart has it in for Billy. As he extracts himself from the view of his fellow crewmen, however, Claggart vents his deliberately repressed rage on a passing drummer boy, who perhaps evokes Billy's own youth and spontaneity. Melville thus establishes a model for covert communication which we will have occasion to recall when discussing the adjudicatory process.[51]

Meanwhile, Claggart's antipathy to Billy evolves into a strategy. He dispatches a deputy to tempt the youthful foretopman to mutiny, but Billy, always the loyal counterpart of Nelson, throws him out.[52] Finally, Claggart takes a fateful step. Before Captain Vere, he accuses Billy of conspiracy to mutiny.[53] Using his customary indirectness[54] and deftness of covert expression, he forces the reluctant and angrily unbelieving Vere to call Billy to defend himself against the charges.

Billy, a stutterer, cannot frame a coherent answer to Claggart's incredible charge. "Speak, man!" implores his captain.[55] But the Handsome Sailor is a doer, not a say-er; his essential harmony—the perfect matching of outward form and inner essence—compels him to express his aversion to the unjust attack. Thus, Billy strikes, and Claggart falls to the cabin floor.[56] Propelled by these events to a wholly uncharacteristic show of emotion, Vere intones, "Struck dead by an angel of God! Yet the angel must hang!"[57] The ship's surgeon, amazed to see the usually calm captain so passionate, confirms Claggart's death. Vere immediately summons a drumhead court, although the surgeon and other officers privately deem it proper to refer the matter "to the admiral."[58]

Chapter 21, the longest in the text, describes the trial of Billy Budd for striking a senior officer in time of war. The hand-picked members of the court, listening to Captain Vere's arguments as sole non-party witness, prosecutor, and fellow adjudicator,[59] overcome their innate sympathies and legal misgivings, and sentence Billy to hang.

Early the very next day, before an awe-struck crew, Billy is executed.[60] Mustering the men quickly back to work, Vere appeases his fellow officer's ironic[61] fear that the men might mutiny in seeing their favorite hanged by counselling the dampening influence of "forms, measured forms"[62] upon the crew. The sailors docilely return to their duties (for, indeed, as we learned of the *Bellipotent* earlier in the tale, "very little in the manner of men . . . would have suggested to an ordinary observer that the Great Mutiny was a recent event"[63]); they are perhaps partially satisfied by the always-loyal and finally articulate Billy's last words, "God bless Captain Vere!"[64]

The event stands thus, unremarked until Melville's narrative by any but the men who were present and, curiously, by the readers of an official naval chronicle of the time called *News from the Mediterranean*. This "long ago superannuated and forgotten"[65] account, recited towards the end of the novella, reports it incorrectly: Claggart is described as an upstanding model of loyalty and Billy as a depraved foreigner who stabbed him vindictively to the heart.[66]

As for Captain Vere, profoundly affected by the choice he says the law compelled him to make, he never really recovers. Wounded in an insignificant batt[illegible] prior to the magnificent episodes at the Nile and Trafalgar, Vere, "[t]he spirit that 'spite its philosophic austerity may yet have indulged in the most secret of all passions, ambition, never attained to the fulness of fame."[67] He dies mumbling, "Billy Budd, Billy Budd," a phrase well understood by at least one who hears it.[68]

The tale ends on its least ambiguous and most lyrical note. The crew—straightforward, overt, and uncomplex sailors—has composed a ballad called "Billy in the Darbies." Its strikingly simply verses speak of the heroic Billy at death, the jewel of the crew who can only observe, without bitterness, "—O, 'tis me, not the sentence they'll suspend."[69]

II. Melville's Use of the Law in Billy Budd, Sailor

For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience, the rules that are supposed to control their decisions.[70]

A. The Trial Scene: Earlier Critical Views

The centerpiece of this amazing short story is its trial scene. Chapter 21 stands as its microcosm of meaning, just as trial scenes in other literary masterpieces so frequently carry forth the fullest sense of the larger text.[71] The chapter's focus, not sur-

prisingly, is on Captain Vere and his explanation to a restive court-martial that duty to law overrides the apparent claims of natural justice. Critics have been particularly attentive to the following speech:

"But your scruples: do they move as in a dusk? Challenge them. Make them advance and declare themselves. Come now; do they import something like this: If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a capital crime whereof the penalty is a mortal one. But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so?—Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. Though the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King's officers lies our duty in a sphere correspondingly natural? So little is that true, that in receiving our commissions we in the most important regards ceased to be natural free agents. When war is declared are we the commissioned fighters previously consulted? We fight at command. If our judgments approve the war, that is but coincidence. So in other particulars. So now. For suppose condemnation to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is that: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.

"But the exceptional in the matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool." [72]

As we demonstrate shortly,[73] Melville intends such jurisprudential statements [74] as these to shed "light" [75] on Vere's "exceptional . . . moral quality." [76] Perhaps the novella's most puzzling character, Vere has won the admiration of the vast majority of critics, who seem to accept without question his remarks during the trial scene.[77] In the late 1940's and 1950's in this country, negative perceptions of Vere were virtually nonexistent; when expressed, they were greeted with serious professional antipathy.[78] As recently as 1967, *legal* analysts of Vere's position were likely to have full faith in his veracity and thus to show respect for his dilemma. Charles Reich therefore could say:

The chief agent of the law is Captain Vere. . . . Melville allows Vere no choice within the terms of the law itself; if the law is obeyed, Billy must hang. . . . We may perhaps criticize the law, but not the officer whose "vowed responsibility" is to "adhere to it and administer it." . . . As Melville presents the case, there is no escape for Vere. It is in this light that we must appreciate Vere's reactions.[79]

In the 1970's, Robert Cover spoke admiringly of Vere's "righteousness," [80] under the circumstances. Comparing Vere to Melville's father-in-law, Lemuel Shaw,[81] Cover sensitively asks: "What deep urge leads a man to . . . embrace, personally, the opportunity to do an impersonal, distasteful task?" [82] Cover's historical approach to Shaw understandably forestalled a more intensive analysis of Vere; as a result, his view of the fictional adjudicator essentially agrees with Reich's.[83]

A small minority of literary critics, however, began the slow process of attacking the foundation upon which Vere's "righteousness" must lie: his assertion that the positive law *compelled* the court to sentence and execute Billy. In an article provocatively entitled *The Case Against Captain Vere*,[84] Leonard Casper cited an allusion to the *Somers* mutiny of 1842 [85] in Melville's decades-earlier tale *White-Jacket* [86]—"Three men, in a time of peace, were then hung at the yard-arm, merely because, in the captain's judgment, it became necessary to hang them" [87]—and asked the question, in Vere's case, "how necessary is necessity?" [88]

Casper's approach opens the entire story to the legal analyst. "Vere's behavior," he noted, "demands explanation because of its unnaturalness." [89] For Casper, the text as a whole, Melville's biography, and even the trial scene itself indicated that "[t]he trial is a pretense at deliberative justice, and is made to appear so by Melville." [90] Where Reich saw Vere as nobly applying the dictates of an unnatural law, Casper suggested the converse: "By refusing all natural considerations, Vere makes his verdict unnatural, a perversion as serious as Claggart's. By shifting responsibility for his decision to the King, Vere denies that he is a free agent with an individual sense of discrimination and judgment." [91] Although Casper's article forms a meritorious basis for inquiring into the legal meaning of the story, it uses no legal materials. Nor did Casper elaborate his hint that Vere and Claggart participate in a similar spiritual disease.

Merlin Bowen, however, a lifelong Melville specialist, went further in comparing Captain Vere (thought to be a "good" character) to John Claggart (the novella's clear villain):

The pages of *Billy Budd* themselves contain sufficient evidence upon which to base a quite different estimate of Captain Vere. According to this view, he appears as a uniformed and conscientious servant of "Cain's city," an overcivilized man who has stifled the sound of his own heart and learned to live by the head alone as his calling requires, who has abdicated his full humanity in the interests of a utilitarian social ethic and postponed the realization of truth and justice to some other and more convenient world. Neither the Christian gospel nor the modern doctrine of the rights of man has, in his opinion, any place in the government of this man-of-war world. And when the simple and loyal-hearted sailor, Billy Budd, left speechless by Claggart's accusation of treason, impulsively knocks the liar down and so kills him, the practical Vere knows his duty at once and resolutely proceeds to hang, for the greatest good of the greatest number, a man innocent in all but the most technical use of the word. . . .

. . . *Billy Budd* will appear as a much more coherent, though still puzzling, work of art if regarded as a study in the possible consequences of a commitment to a fixed and theoretic pattern rather than to patternless life itself with all its contradictions, crosscurrents and inescapable risks.

In the book's central opposition of civilization and nature, head and heart, there can be no real question where Captain the Honorable Edward Fairfax Vere stands: quite clearly, and despite his own instinctive feelings in the matter, he stands with Claggart and against Billy. By both temperament and training, he is much closer to the petty officer he despises than to the young foretopman he admires.[92]

Writing in 1962,[93] C.B. Ives employed technical legal material to further his perception that an understanding of the story's allegorical or metaphysical levels of meaning can be reached only after the reader has explored the *tangible* data that Melville himself knew so well.[94] Accordingly, Ives decided not to accept Vere's position at "face value"; [95] instead, he carefully examined the provisions of the actual British statutes Vere invoked. Ives noted some of the procedural defects in Vere's approach, [96] some of the substantive oddities,[97] and some of the legal history and custom that cast into doubt the harshness of the drumhead court's decision to hang Billy.[98] But Ives' efforts take us only part of the way: his legal analysis is sketchy, and his ultimate conclusions unsupported. He labelled Vere's rush to hang Billy as *idiosyncratic*, "a sacrifical gesture, born to a kind of self-punishment that had become habitual in Vere's life." [99] Ives thus failed to appreciate the broader implications of Melville's perceptions about law and moral choice. But, along with Casper and Bowen, he alterted us to the need to scrutinize the idea that Vere's action is best understood as a response to the imperatives of the positive law.

B. VERE'S CHOICES: LAW AND MORALITY IN THE TRIAL SCENE

1. THE FRAMEWORK FOR ADJUDICATION; VERE'S POSSIBLE "INSANITY"

Not to endorse Vere's dichotomy of moral innocence and legal guilt might appear to lessen the force of the story's posed moral problem.[100] But a textual demonstration that Vere's behavior is marked by adjudicatory "insanity" [101] would not dilute the story's complex moral or legal interest; it would, rather, reinvigorate it.

Accordingly, we should recall that the trial scene begins in a strange way. Vere's state of mind, and not the law of Billy's case, is discussed first, during a seeming digression on the difficulties of distinguishing sane from insane behavior.[102] The narrator quickly indicates that the adjudicator, as much as the accused, is to be judged. He advises each reader to decide about Vere based on "such light as this narrative may afford," [103] and returns to the scene of the drumhead court. But we should not minimize the aesthetic importance of this insanity allusion beginning the chapter; it affords narrative legitimacy to the surgeon's fear that Billy's care has caused his captain to become "unhinged." [104] The question of Vere's sanity is reiterated at the end of the chapter, during a passage too frequently misread as an endorsement of Vere's behavior:[105]

Not unlikely [the court was] brought to something more or less akin to that harassed frame of mind which in the year 1842 actuated the commander of the U.S. brig-of-war Somers to resolve, under the so-called Articles of War, Articles modeled upon the English Mutiny Act, to resolve upon the execution at sea of a midshipman and two sailors as mutineers designing the seizure of the brig. Which resolution was carried out though in a time of peace and within not many days's sail of home. An act vindicated by a naval court of inquiry subsequently convened ashore. History, and here cited without comment. True, the circumstances on board the Somers were different from those on board the Bellipotent. But the urgency felt, well-warranted or otherwise, was much the same.[106]

The insanity passage and the Somers reference frame the trial itself. Both emphasize that it is the adjudicator's "harassed frame of mind," and not necessarily legal compulsion, that led to the capital sentence. Futhermore, the comparison with the Somers case casts doubt on the "urgency felt" by Vere. After all, Vere knows well that Billy Budd is no mutineer. Whether or not Mackenzie actually believed his three crewmen were guilty, his dilemma at least appeared to derive from a genuine crisis of command. No one on the Bellipotent, Vere excepted, perceives any general threat of mutiny on the quiet ship. Billy's crime is not conspiracy, but striking one of the most hated figures on board. Was the capital sentence truly necessary? Only Vere seems to think so. On the Somers, several officers joined the captain in endorsing the hangings; we know that Vere's sense of imminent danger reverberates in no other officer privy to the incident.[107]

Thus, Vere's courtroom pronouncements are meant to be analyzed, not simply accepted as true. They are the "light" that the narrator hints will be shed on the careful regarding the adjudicator's state of mind during the trial. The legal argument must be rigorously dissected to discover both the essential Vere and Melville's view of the adjudicatory act itself.[108]

2. VERE'S PROCEDURAL ERRORS

As with the insantiy motif, Melville clearly employs his legal theme to indicate profound, if hidden, textual meanings. Chapter 20, a short but significant bridge between Billy's fateful act and Vere's lengthy legal argument, explicitly serves to raise doubts about the captain's procedural handling of the case. The surgeon, that careful officer whom Vere summons to confirm Claggart's death, simply cannot fathom his captain's behavior:

As to the drumhead court, it struck the surgeon as impolitic, if nothing more. The thing to do, he thought, was to place Billy Budd in confinement, and in a way dictated by usage, and postpone further action in so extraordinary a case to such time as they should rejoin the squadron, and then refer it to the admiral. . . .

In obedience to Captain Vere, he communicated what had happened to the lieutenants and captain of the marines, saying nothing as to the captain's state. They fully shared his own surprise and concern. Like him too, they seemed to think that such a matter should be referred to the admiral.[109]

The junior officer's skepticism suggests that Melville, who knew naval law well,[110] intended the legal aspects of Billy's case to be examined. The officers' fear that Vere's procedures were not "dictated by usage" [111] further suggests their suspicion—soon confirmed by Vere at the trial—that the *substantive* law of the case would derive from the Articles of War of 1749.[112] Melville's own experience on a naval vessel taught him that these Articles were publicly recited, with amazing frequency, on warships.[113] Thus, the officers certainly knew that the twenty-second paragraph of the Articles' second section contained the following language:

If any officer, mariner, soldier, or other person in the fleet, shall strike any of his superior officers, or draw, or offer to draw, or lift up any weapon against him, being in the execution of his office, on any pretence whatsoever, every such person being convicted of any such offence, by the sentence of a court-martial, shall suffer death. . . .[114]

In the midst of the confusing admixture of substantive law theories that he offers to the court,[115] Vere indeed does identify this provision as the operative element in the case: "To steady us a bit, let us recur to the facts. In wartime at sea a man-of-war's man strikes his superior in grade, and the blow kills. Apart from its effect the blow itself is, according to the Articles of War, a capital crime." [116] But, as Vere's junior officers recognize, this substantive law (itself questionably interpreted by Vere [117]) carries with it a *procedural* scheme.

The Articles of War of 1749 afford a series of procedural safeguards. Although these protections might appear surprising in a military setting, they were in line with at least a century of precedent [118] in British naval law. As they stand, the Articles, though offering Vere his best arguments in favor of summarily convicting and executing Billy, also indicate that the captain committed no fewer than *eight* procedural errors.

A. NECESSITY TO REJOIN THE FLEET FOR TRIAL

The surgeon and his discomfitted fellow officers have two main concerns about Vere's decision to assemble a drumhead court. First, they feel he should "postpone further action in so extraordinary a case to such time as they should rejoin the squadron." [119] On this point, their apprehension is grounded in the Articles, which specifically grant court-martial commissions exclusively to fleet or squadron commanders, *not* to individual commanders.[120] Captains could be so commissioned only when their ships were docked in Great Britain or Ireland, and then only if expediency dictated that the usual procedures not be followed.[121]

B. RECOURSE TO THE ADMIRAL OR FLEET COMMANDER

The narrator's second indication of surprise derives from Vere's choice not to "refer [the case] to the admiral." [122] Every educated man on the Bellipotent (and probably a good number of ordinary sailors) would have known that, under the Articles, capital crimes must be brought to the attention of either the lord high admiral or the commander of the fleet.[123] According to the Articles, the high officers' jurisdictional interest in such matters commenced at the earliest stages of the proceedings [124] and continued to the stage beyond conviction, in which the admiral or fleet commander was to have full review powers.[125]

By its terms and by tradition, the Articles indicate that only for trials concerning mutiny might sentencing and execution occur without admiralty of fleet command review.[126] Billy, it must be recalled, was neither a deserter nor, despite Vere's extremely clever use of the idea of mutiny during the trial,[127] a mutineer; the jurisdictional power of the admiralty, or the commander of the Mediterranean fleet, clearly extended to his case.

C. REQUISITE NUMBER OF JUDGES

Vere's assembling of the court raises other procedural questions. The Articles require at least five (and no more than thirteen) members on any general court-martial.[128] Since the trial was to take place only when the fleet or squadron had been rejoined, these judges were normally all at or above the rank of post captain.[129] Although he places Billy's substantive crime under the sign of the Articles of War,[130] Vere decides that "summary" court procedures should determine the number of judges.[131] He hand-picks three [132] officers, one of whom, the captain of marines, is not even a naval officer.[133]

D. NONAVAILABILITY OF "SUMMARY" MEASURES

In justifying the use of three rather than five judges, and in failing to return to the squadron to seek out the admiral's or fleet commander's jurisdiction, has Vere correctly employed his so-called "summary" powers? After all, the Articles of War themselves, from which Vere culls his substantive approach to the case, do not grant such powers.

A review of the British authorities (and Americans commenting on customs largely derived from the British) indicates that, even had there been a crisis, "summary" proceedings were inappropriate in Billy's case; summary procedure was geared to trivial offenses, not major crimes.[134] The American navy, for example, allowed for summary courts-martial consisting of three officers,[135] but such jurisdiction covered only those offenses "not sufficient to require trial by general courts-martial." [136] Hence, Vere should have followed the procedures outlined by the Articles of War; his handpicked, three-man court and failure to return to the squadron cannot be justified by a simple reference to "summary" courts.

E. CONCEALED NATURE OF PROCEEDINGS

Vere's proclivity to summary proceedings apparently motivates him to conduct Billy's trial with the utmost secrecy. Yet, Ives quotes authoritative texts to the effect that "Courts Martial shall always be held in the Forenoon, and in the most public Place of the Ship, where all, who will, may be present." [137] An American naval handbook states, "The sessions of courts-martial shall be public."[138] In disregard of this long custom, Vere proceeds covertly; bis procedure arouses controversy and criticism among some of his officers.[139] We will return to this breach later,[140] for it evokes the larger meaning both of Vere's personality and Melville's feelings about the law.

F. VERE'S MULTIPLE ROLE PLAYING

Vere's own behavior during Billy's trial flies in the face of naval procedure. The captain, perhaps sensing that even his docile court might question his active role in the proceedings, takes pains to dampen their perceived apprehensions.

"What he said was to this effect: 'Hitherto I have been but the witness, little more; and I should hardly think now to take another tone, that of your coadjutor for the time, did I not perceive in you—at the crisis too—a troubled hesitancy, proceeding, I doubt not, from the clash of military duty with moral scruple—scruple vitalized by companies. For the compassion, how can I otherwise than share it? But mindful of paramount obligations, I strive against scruples that may tend to enervate decision. . . .'" [141]

Vere clearly doubted the propriety of assuming the role of sole witness, implicit accuser, and presiding adjudicator. And with good reason. One of the specific novelties in the Articles of 1749 was their sense that commanders-in-chief should not preside at courts-martial.[142] (Indeed, the ongoing tradition of Anglo-American military law is of strict antipathy to multiple role playing.[143]) Vere's personality again produces his procedural breach. As we shall examine shortly,[144] his desire totally to control the case and his surroundings predominates over his conscious awareness of proper procedure.

G. TRADITIONAL LENIENCY IN SUCH CASES

Cowed by the articulate captain who hand-picked them, Billy's judges still manage, however hesitatingly, to suggest leniency. "'Can we not convict,'" one of them "falteringly" inquires of Vere, "'and yet mitigate the penalty?'"[145] Vere promptly quashes the court's final attempt at independence by implying that leniency might not be "clearly lawful for us under the circumstances."[146]

In this one instance Vere has a point. On its terms, section 2, paragraph 22 of the Articles, which speaks to Billy's offense, does not allow for any penalty except death.[147] (Some other capital crimes under the Articles, such as concealment of "traitorous or mutinous practice or design,"[148] a crime not wholly irrelevant to Billy's case,[149] are punishable by "death, or such other punishment as a court-martial shall think fit."[150] There was extensive debate on this point,[151] which apparently raged until 1757 (forty years before Billy's trial) when a certain Admiral Byng was actually executed under this provision.[152] Sometime after that controversial trial, according to naval historian John Snedeker, death under section 2, paragraph 22 "was again made discretionary."[153]

Melville knew this history,[154] and Vere's equivocation on the legality of his court's request may be meant to indicate the fictional captain's awareness of the leniency debate. And more. Whatever the wording of British naval statutes, there was a strong tradition of leniency in enforcement. Discussing the "Cromwellian" naval Articles,[155] Snedeker observes: "While severe in their terms, these articles were enforced with discretion. There is no known instance of the death penalty being executed during the period of the Commonwealth."[156] As we noted earlier, only in cases of convicted mutineers was execution permissible prior to reporting the proceedings to the admiral or fleet commander.[157] Snedeker's research indicates that even for this extreme offense, few if any commanders found it necessary to rush through to a hanging.[158]

In sum, the proper stance of a captain toward enforcement of punishments at sea was that "[h]e alone is to order punishment to be inflicted, which he is never to do without sufficient cause, nor ever with greater severity than the offence shall really deserve."[159] It is the traditional stance, but Vere categorically violates it.

H. EXECUTION IMPERMISSIBLE WITHOUT REVIEW

Perhaps no procedure was better settled than the court-martial convenor's duty to seek review on the highest level before executing a capital sentence.[160] The admiralty or the crown in Britain,[161] sometimes the President himself in the United States,[162] were to be the reviewing authorities for all death sentences.[163] So strict was this view that, in the *Somers* case,[164] several American naval officers (including Melville's first cousin[165] were court-martialled for having hanged three sailors who may well have been engaged in a *mutiny*.[166] But Billy, we must always recall, was not even accused of mutiny, and "on board the [*Bellipotent*] . . . very little in the manner of the men and nothing obvious in the demeanor of the officers would have suggested to an ordinary observer that the Great Mutiny was a recent event."[167]

Vere must have known that in the British navy a mere ship's captain could not lawfully execute a summary sentence exceeding *twelve lashes* (mutiny cases arguably aside[168]). Thus, even if Vere deemed his hand-picked court to satisfy all the procedural exigencies of the Articles of War, he had no legal right to bring to fruition its severe sentence.[169]

3. VERE'S SUBSTANTIVE ARGUMENTS

Vere's numerous procedural errors, jarring in a man who so consistently appeals to legal formality, merge subtly into substantive mistakes as the trail scene progresses. Vere seems to proceed under the Articles of War; as we have seen, however, he superimposes on this statute the inapposite procedures of a summary court. Moreover, he manages to confuse the issue by articulating three other substantive bodies of law during his argument to the court.

A. "MARTIAL LAW"

Vere deploys the first of these, "martial law," in several conflicting ways. Vere's initial reference attempts to distinguish his military tribunal's mode of judgment from that of other possible approaches: "But for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with."[170] Using the phrase a few minutes later, Vere answers the officer of the marines' emotional defense of Billy's motives by saying, "And before a court less arbitary and more merciful than a martial one, that plea would largely extenuate. At the Last . . ., it shall acquit. But how here? We proceed under the law of the Mutiny Act."[171] In these two parallel arguments, Vere appears to remind the court of its legal, as opposed to moral, jurisdiction over the case.[172] General usage confirms Vere's rhetorical invocation of the phrase, since the court obviously finds its jurisdiction under the applicable military law, and not under any ethical or philosophical code. But a keen irony pervades Vere's dialectic once his own gross violations of this law are discovered. If Vere invokes "martial law" to stress the strictly legal aspects of the court's authenticity, then his own covert illegality attains a reprehensible level.

So, in Vere's behalf, it must be observed that there is a second meaning of "martial law," which provides the best (though still flawed) argument for the summary procedure. Contrary to the first sense of the phrase, this alternative meaning calls for the abrogation of formally established law in favor of what one commentator calls "the will of a military commander operating without any restraint, save his judgment, upon the lives, upon the property, upon the entire social and individual condition of all over whom this law extends."[173] The essential feature of this use of the term is its invocation of necessity.[174]

Covered by "the haze of uncertainty which envelops it,"[175] this meaning of "martial law" would appear to appy only at a time of great urgency. Furthermore, it usually applies to civilian populations placed under military rule due to some crisis necessitating extraordinary measures. In Britain, the executive agency declaring martial law during the period of the story would probably have been the crown, parliament, a governor, or perhaps the admiral of the fleet, but rarely, if ever, a single ship's captain.[176] If, extraordinarily, a captain did declare it on his own, "his judgment would be subject to review by his military superiors,"[177] a form of review not imposed upon higher ranking executive authorities.

At best, therefore, Vere could properly invoke martial law only if the situation fully warranted a fear of insurrection on the ship. As Ives observes:

"[A] captain might hang the mutineers as a matter of necessity, in disregard of the Articles of War. In such cases it was normal to secure the advice and judgment of his officers in a summary court.

"But Billy Budd was not a mutineer. . . . Vere's stated reasons for the hanging were that Billy had struck his superior and that there was *danger* of mutiny by some other members of the crew."[178]

As we have seen, none of the other officers privy to the incident feared an impending crisis.[179] Moreover, recourse to martial law was not frequent in the England of the story's historical period.[180] It was a period of war, yes; of a "crisis for Christendom,"[181] yes; but far more inflammatory shipboard situations that year had been dampened without violence.[182] Above all, on the *Bellipotent*, as the narrative explicitly states,[183] mutiny was not in the air; indeed, Vere's control over the court itself proves the docility of his men (even the surgeon never dares to voice his procedural concerns to the captain).

Vere's best argument—that "martial law" calls for an abridgment of proper procedures—thus appears unjustified.[184] As Frederick Wiener, an expert on military law, has observed, "[w]hat constitutes necessity is a question of fact in each case."[185] In Billy's case, all evidence suggests it is only Vere's power and masterful use of language that convince crew and reader alike of the necessity for a hanging.[186]

B. THE MUTING ACT

As Ives[187] and Hayford and Sealts[188] have pointed out, the Mutiny Act applied only to *land forces*.[189] Vere's invocation of the statute as a reason for ignoring Billy's intent[190] appears inapposite, indeed quite surprising. After all, the use of the phrase "martial law" serves his rhetorical purposes sufficiently, albeit unorthodoxically. The mistake may, of course, be Melville's, but the extreme accuracy of so much of the legal detail in chapters 20 and 21, coupled with the body of naval law experienced by Melville biographically,[191] places the burden on those who so argue.[192]

C. "PLAIN HOMICIDE"

As noted earlier, Vere answers the sailing master's plea for penalty mitigation by conjuring a threat of mutiny and arguing that the hanging is necessary to quell it.[193] In elaborating this point, Vere invokes yet another body of laws: "No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny."[194]

Implausible as well as inaccurate, the theory of "plain homicide" fails because there is simply nothing "plain" (or mutinous) about Billy's act if analyzed as a "homicide." Questions about Billy's intent, the degree of premeditation, the defenses of provocation or of temporary insanity, and the like would necessarily be raised under any criminal code (including the Articles[195]) if the charge were homicide instead of striking a superior officer.[196] Since any impartial judge would see that these facts complicate the question of Billy's guilt, Vere's casual assumption that men already favorably disposed to Billy would attribute homicidal and mutinous motives to him is clearly suspect.

So, in disregard of the procedural requirements of the Articles of War, the only statute correctly applicable to the case,[197] and in violation of each of the other laws he distractingly cites to his impressionable court, Vere contrives to have Billy hanged. The

skepticism of both surgeon and narrator as to Vere's formal objectivity, and that of the court itself as to the punishment, is fully sustained by a legal analysis of the case. Vere's behavior is dictated not by law, but by his own intuitive predilection, clearly articulated in the captain's outburst seconds after Billy's fatal blow—"Strck dead by an angel of God! Yet the angel must hang!"[198] The trial's arguments form the necessary mediation between this preordained subjective desire—Vere's not so peculiar "insanity," the source of which we will discuss presently[199]—and the court's need for reasoned analysis. Thus, it is important to set forth, as perhaps the prevailing theme and system of *Billy Budd, Sailor* itself, the clever *mode* of communication that permits Vere to assuage his fellow officers' doubts about the propriety of summarily executing the Handsome Sailor.

III. BILLY BUDD, SAILOR AND A THEORY OF ADJUDICATORY COMMUNICATION

A. JUDICIAL CLEVERNESS: THE "CONSIDERATE" WAY

Captain Vere recognizes the primal value of language and form to a communicator seeking authoritative force, particularly when the analytical logic behind the communication is fatally flawed. Although he does not wear the impressive robe or wig of a land-based judge, he stands on the "weather side"[200] of the ship, elevating his physical self to the appropriate judicial grandeur and leaving his hand-picked court no doubt about who directs the proceedings. Then, as we have seen, he intercedes verbally, using rhetorical devices, repetition, arousal of fear, and other techniques to urge his audience to the acceptance of a desired conclusion. Billy must hang.

Verbally gifted judges generally do not hesitate to bring style and structure to the service of legal logic and factual analysis.[201] In close cases especially, language serves function[202] as the judge influences his audience to accept his reasoning and actual decision.[203] Few would argue against the propriety of rhetoric and form in the service of a substantive position. But Melville, in a seminal passage quite early in Billy Budd, implies that the form of a communication is actually likely to control understanding and prevail over substance when decision-makers or authoritative individuals issue verbal declarations. This passage, leading into the "digressions" on the great mutinies and Admiral Nelson, explicitly deals with the way the British historians described the Nore mutiny to the interested audience back home, but the paragraph's message is meant to apply to Vere's adjudicatory communication in chapter 21.

Such an episode in the Island's grand naval story her naval historians naturally abridge, one of them (William James) candidly acknowledging that fain would he pass it over did not "impartiality forbid fastidiousness." And yet his mention is less a narration than a reference, having to do hardly at all with details. Nor are these readily to be found in the libraries. Like some other events in every age befalling states everywhere, including America, the Great Mutiny was of such character that national pride along with views of policy would fain shade it off into the historical background. Such events cannot be ignored, but there is a considerate way of historically treating them. If a well-constituted individual refrains from blazoning aught amiss or calamitous in his family, a nation in the like circumstance may without reproach be equally discreet.[204]

Melville makes "considerate communication" a generative theme in his story. Closing out lifetime almost totally devoted to verbal craftsmanship, he not surprisingly emphasizes the relationship of speaker (or author) and audience in his final tale. "Considerate communication" seems to require three elements: (1) that the communicator's perception of the audience's well-being stand uppermost in his mind, whatever the ancillary motivations for the speech; (2) that whatever factual distortions occur because of that perception involve predominantly omissions, or, at the worst, trivial misstatements of fact; and (3) that the communicator faithfully convey the essence of the underlying reality he is discussing (either through overt language, or tonal or structural elements), despite the omissions or mild misrepresentations of detail.

Melville seems more to be describing the way things are, in the seminal passage, than to be criticizing either authoritative statements or the audiences to which those statements are directed. He is simply announcing a theory of communication, much in the manner of Leo Strauss, in his brilliant and highly relevant Persecution and the Art of Writing,[205] when he refers to the general public's tendency to believe "a statement made by a responsible and respected man."[206] So, if the Nore historians, reluctantly deciding that the public deserves some news of the mutiny, go on substantially to omit almost all the relevant details, they nevertheless "considerately" serve the needs of that public. Why "blazon aught amiss" when a small number of carefully selected facts, woven into the fabric of a subtly organized communication, will suffice to give people a sense of well-being predicated on their appreciation of participating in the authoritative truth?

The actions of the Nore historians embody all three prerequisites of considerate communication. They have at heart the well-being of the audience, not their own self-interest. If they distort reality, they do so only by omission, not commission. Finally, they convey the news about the mutiny, however troubling, albeit in the form of a carefully selective abridgment. Thus, although a bit of the Grand Inquisitor[207] inheres in the authoritative communicator's power to control the flow of information, this represents a fact of social life, not a negative element. If the communicator preserves the three requirements, he may proceed "without reproach."[208] So, as *Billy Budd, Sailor* progresses, Melville presents us with several other nonpejorative examples of considerate communication. The Dansker repetitively intones a selective truth to Billy about Claggart: "Jemmy Legs is down on you."[209] Recognizing both the needs and the limitations of his audience, the Dansker restricts his speech to this oracular declaration. When Billy chooses to disbelieve this statement, we again learn that authority and verbal complexity must combine (as they do not in the poetic Dansker)[210] to steer an audience towards a desired viewpoint.

Far more "considerate" than the Dansker's speech act is the *News from the Mediterranean*, the journalistic account of the events on the *Bellipotent* which "is all that hitherto has stood in human record to attest what manner of men respectively were John Claggart and Billy Budd."[211] Reporters, like judges and historians, can exercise verbal control over their audiences and establish authoritative versions of the truth. To allow their naval audience a sense of continuity and comfort, the gazette's editors paint Vere's decision to execute Billy in the most radiant colors of legality and necessity. As always, most of the actual reality is omitted. Although Billy becomes a villian who "vindictively stabbed" the upstanding Claggart,[212] the overriding goal of preserving the audience's well-being[213] may have required such nontrivial distortions. The event cannot be undone. Why "blazon aught amiss"? Better to report the actual homicide and its legal aftermath in the discreet shades of the audience's established beliefs.

Considerate communication, or Strauss' "responsible and respected" speech, then, soothes the average citizen by providing him with a canon of truth against which the heterodox views of others can be tested and, usually, rejected. "With mankind," as Captain Vere tells us, "forms, measured forms, are everything,[214] and these have fewer "ragged edges" than the pure truth itself.[215]

But, as we have seen, the verbally and hierarchically superior adjudicator can give the force of seeming legality to drastic decisions the law does not support. The propriety of Vere's own "considerate" use of form and style during Billy's trial, therefore, is cast into doubt. Vere at trial in fact does not follow the example of the Nore historians or even the *Mediterranean* newsmen. He does not communicate a selective view of reality primarily to establish comforting authoritarian interpretations of otherwise troubling realities. Rather, he uses legal argument to distort the law and to further purely *subjective* ends. In Straussian terms he "persecutes" his audience directly[216] through his adjudicatory arguments, utterly falsifying the reality that he purports to convey. Vere desperately seeks, and masterfully finds, the key to controlling his handpicked audience. He moves from four separate substantive law theories of guilt to an overriding (and thoroughly fanciful) vision of a ship in chaos if Billy is not hanged, whatever the theory of culpability. So effective is his pattern of argumentation that the critics, as well as the drumhead court, have largely granted it credence.

The narrative makes it quite clear that Vere's articulated reasons for hanging Billy do not withstand the analysis of even his junior officers.[217] Since the men's well-being does not require Billy's death, it must be Vere's subjective desires that motivate his actions.[218] This is narratively indicated by the captain's uncharacteristic show of extreme emotion during Billy's violent act and its immediate aftermath—the "excited manner" that the surgeon "had never before observed"[219]—and by the irrational, visceral (*i.e.*, inconsiderate) declarations that were its result: "It is the divine judgment of Ananias! Look!"[220] and "Struck dead by an angel of God! Yet tbe angel must hang!"[221]

Given this intense personal reaction, and since Vere apparently saw the result of the trial to be morally, even divinely, preordained, Melville's allusion to Vere's "insanity" at the trial[222] comes into focus. Furthermore, Vere's repetitive direction to the court to ignore both their own subjective sympathies and the moral issues raised by the case moves beyond irony to outright calumny.

Vere's legal errors, therefore, were consciously placed in his mouth by the knowledgeable Melville,[223] leaving to us the twin tasks of overcoming our own inclinations to believe such a thoughtful, verbally gifted character,[224] and of finding the narrative "light" on the *causes* of Vere's behavior.[225]

This latter task we defer to a later section of the Article,[226] but it would be well as to the former task to recall here that Vere's form of considerateness has been implicitly criticized throughout the narrative. For one thing, it stands at odds with the "frankness" of the average sailor;[227] it is the medium of a land-oriented being, quite "exceptional" [228] on a ship; that of a "martinet," [229] whose "queer streak of the pedantic," [230] "discreet envoy" [231] appearance, humorlessness,[232] and "bookish" predilections [233] create and odd impression in which "scarce anyone would have taken him for a sailor" [234] at all.

That Vere's speech smacks of the landsman's covertness is also indicated by three of his more peculiar actions during the trial. Vere displays an attraction to land-oriented law when he oddly appoints a marine to the court, [235] then goes on twice to tell the court to apply the Mutiny Act (a statute applicable only to land forces [236]) and finally conjures for them the model of a judge, "ashore in a criminal case." [237] It is almost as though the prudent, well-ordered Vere yearns to be on land where, as the narrator strongly tells us, "considerate" communication is the normative mode of behavior, men never communicate simply and directly with each other, and life is an "intricate game of chess." [238]

But Vere wound up on the water, with which he feels discordant, but in which formless element he must somehow operate. He does so by using language and intelligence so effectively that, given his position of authority, he overcomes the natural inclinations of his more "juvenile" [239] shipmates. He learns, to recall the narrative language first used about Claggart's insanity (but clearly meant to foreshadow Vere's),[240] to display an "even temper and discreet bearing," a "mind peculiarly subject to the law of reason" [241] and "a cool judgment sagacious and sound." [242] This outward form masks the "irrational," [243] the "protectively secret" [244] and even "the accomplishment of an aim which in wantonness of atrocity would seem to partake of the insane," [245] so that "whatever its aims may be—and the aim is never declared—the method and outward proceeding are always perfectly rational." [246]

Thus, the argument at trial comes from the mouth of a character whose methods have already been associated with duplicitous landsmen and, specifically, with Claggart himself. When these types have their passions aroused, they do everything possible to hide from any significant audience the true source of their emotion.[247] And so, Vere conceals (or fails to recognize) his desire, instead showing to the court the face of a man who would rather save Billy but who is forced to execute him by "duty and the law."

Gentlemen, were that clearly lawful for us under the circumstances, consider the consequences of such clemency. The people (meaning the ship's company) have native sense; most of them are familiar with our naval usage and tradition; and how would they take it? Even could you explain to them—which our official position forbids—they, long molded by arbitrary discipline, have not that kind of intelligent responsiveness that might qualify them to comprehend and discriminate. No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide committed in a flagrant act of mutiny. What penalty for that should follow, they know. But it does not follow. *Why?* They will ruminate. You know what sailors are. Will they not revert to the recent outbreak at the Nore? Ay. They know the well-founded alarm—the panic it struck throughout England. Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it would provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and law, I steadfastly drive. But I beseech you, my friends, do not take me amiss. I feel as you do for this unfortunate boy. But did he know our hearts, I take him to be of that generous nature that he would feel even for us on whom in this military necessity so heavy a compulsion is laid.[248]

In this, his final argument, Vere sucessfully exercises over the members of the court the precise form of deception that he counsels them to use on "the people." Advising them, through the clever medium of a subordinate clause, that the crew will react mutinously to news of Billy's unpunished deed "however it be worded in the announcement," Vere effectively dissembles. He means, of course, "as I intend to word it in the announcement," for the full power of communication (as this speech itself proves) lies in his authoritative hands. It would not have been difficult to tell the crew the story in a manner that would have appeased their sense of order and saved the life of their favorite. Instead, in the service of his own unstated desires. Vere, through his landsman's mode of communication, succeeds in sentencing a moral innocent to a needless death.

Adjudicatory communication, as its highest level of articulateness and sophistication, is therefore cast into doubt by Melville in this tale. The questions he poses should not be lost on us, his legal audience, and they bear repetition by application to a fascinating actual subject, Justice Rehnquist.

B. CONSIDERATE COMMUNICATION AND JUSTICE REHNQUIST

Whatever we may think of his substantive positions, Justice Rehnquist has come to be seen as perhaps the least doctrinally disinterested judge currently on the Supreme Court.[249] He also stands as the contemporary master of judicial language.[250] Thus, any random sampling of Justice Rehnquist's opinions would readily illustrate how language can control adjudication. And few opinions better demonstrate Rehnquist's awareness of the tactics of "considerate communication" than Paul v. David.[251] Widely criticized for its legal reasoning and use of precedent,[252] Justice Rehnquist's opinion is thereby an all the more brilliant contemporary example of narrative prose in the service of the adjudicator's unspoken desires.[253] Moreover, Paul merits particularly intensive analysis here as a remarkable analogue to Melville's novella.

Let us take up this judicial text, not to criticize anew its legal analysis, but rather to appreciate the clevely persuasive manner in which Justice Rehnquist, ever considerate of his audience's needs, uses language to dispel critical probing into his logic and use of precedent.

I. FACT DENEUTRALIZATION

Paul v. Davis' story (and is that not the proper term for an actual event once it has been syphoned through the appellate process?) has by now become a kind of "inside narrative" too, renowned not necessarily as it occurred, but at least as it is reported by the authorities.

Yet, each new factual rendition of the case is its own new story, inevitably emphasizing some facts, minimizing or deleting others, using descriptive terms that quietly affect the listener or reader. To demonstrate this again (for we have just been analyzing the way various "reporters" manipulated facts in Billy Budd's case), we need only compare Justice Rehnquist's own restatement of the facts [254] with that of a law review Note about the case. First, the Note:

> Who steals my purse steals trash; tis something, nothing;
> Twas mine, 'tis his and has been slave to thousands.
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.—Othello, Act III, Scene iii

In June of 1971, plaintiff Edward Charles Davis, a photographer for the Louisville Courier-Journal and Times, was arrested in Louisville, Kentucky on a charge of shoplifting. He pleaded not guilty. In September, the charge was "filed away with leave [to reinstate]." but he was never called upon to face that charge in court. With the onset of the Christmas season in 1972, defendants McDaniel and Paul, the chiefs of police for Jefferson County and Louisville, jointly prepared a five-page flyer containing the names and mug-shots of "Active Shoplifters." Copies of this bulletin were distributed to local merchants in the Louisville area, warning them of possible shoplifters. In fact, the flyer was composed not only of persons actually convicted of shoplifting, but included persons who had merely been arrested for shoplifting either in 1971 or 1972. Plaintiff's name and mug-shot were included in the flyer, even though the charge against him was dropped six days after the flyer was distributed. After discovering the affront, Davis commenced a civil rights action in the District Court for the Western District of Kentucky. . . .[255]

Although it is of course impossible to restate any fact situation without adding subjective color to the pristine original reality, Justice Rehnquist's approach now attracts our careful attention; not the defamed Davis of the law review Note but rather the police chiefs Paul and McDaniel become the sympathetic protagonists of his tale.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agree to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer,"\ . . [of active shoplifters].

The flyer consisted of five pages of "mug shot" photos, arranged alphabetically. . . . In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.[256]

Just as Vere must await his entrance until Admiral Nelson is fully discussed (thus lending narrative emphasis to Nelson's person), so Davis and his grievance must tarry a score of lines before surfacing.[257] By then, the render has assimilated a pleasant picture of two dutiful officers (the event's protagonists) who "agreed to combine their efforts" to prevent crime, all of this "during the Christmas season," no less.

As to the intrusive David, Justice Rehnquist's narrative emphasizes the aura of suspicion surrounding Davis' arrest for shoplifting, which apparently justifies the police flyer's publicizing this arrest prior to trial.[258] Instead of saying that the state never overcame its burden of proof, Rehnquist declares that his guilt or innocence of that offense had never been resolved,"[259] although later the shoplifting charge was "finally dismissed."[260] This last adverb speaks volumes, for like Vere's "pitilessly" in his remarks to the court,[261] it sticks in the audience's mind, cleverly attaching a new sense to the verb it modifies. Just as Vere's hard view of Billy's case is justified because the law operates pitilessly, so David is made to seem culpable because the dismissal of his case was so long in coming. Even the Christmas season had to suffer suspicions of this alleged shoplifter; perhaps we, like Davis' supervisor,[262] should blame him for finding himself in such a situation in the first place.

2. Law Deneutralization

While Justice Rehnquist's narration of the factual events leaves Davis looking a bit sheepish, and Paul and McDaniel looking cooperative and dutiful, his rendition of the plaintiff's legal strategy[263] utterly reduces Davis (and his lawyers) to calumny. Starting out much like his imaginative progenitor, Captain Vere, Justice Rehnquist stresses the litigant's chances of success in some other court;[264] it would be well to recall the fictional figure's relevant language:

Not, gentlemen, that I hide from myself that the case is an exceptional one. Speculatively regarded, it well might be referred to a jury of casuists. But for us here, acting not as casuists or moralists, it is a case practical, and under martial law practically to be dealt with. . . .

"Ay, sir," emotionally broke in the officer of marines. . . . "But surely Budd purposed neither mutiny nor homicide."

"Surely not, my good man. And before a court less arbitrary and more merciful than a martial one, that plea would largely extenuate. At the Last Assizes it shall acquit. But how here? We proceed under the law of the Mutiny Act."[265]

Justice Rehnquist, no more than Vere, needed (analytically) to discuss other "courts." His offhand talk of defamation per se as the basis for Davis' claim in the Kentucky courts[266] is as technically irrelevant and questionable as Vere's allusion to casuists and the Last Assizes.[267] The action has been brought in federal court on nondefamation grounds.

To understand this verbiage, we must recognize that Justice Rehnquist's strategy duplicates Vere's in its motivation, but to the converse logical effect. Vere sought to prepare his summary court for the view that it *did* have jurisiction to dispose, definitively, of Billy's case; Justice Rehnquist posits the state courts' jurisdiction to impel his audience to see that the federal courts *did not* have jurisdiction over Davis and his claim. Through structure and language, both adjudicators create a distraction designed to evoke the sense that the unfortunate litigant before them has wound up in the wrong arena. This strategy, placed at the outset of their legal arguments, deflects attention from the only true jurisdictional issue at hand: does the *instant* court have the authority to determine the case? This deflective technique usually contrives to conceal more germane information which, if known to the audience, would be detrimental to the communicator's well-being.[268]

Justice Rehnquist lingers on the jurisdictional point, ensuring its effectiveness by choosing an adverb and a verb geared to emphasize Davis' unfortunate choice of forums: Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby *transmuted* into one for deprivation by the State of rights secured under the Fourteenth Amendment.[269]

Justice Rehnquist's ability to use the parts of speech syntactically available to a communicator is impressive. Here, the adverb "concededly"[270] passes over the inattentive reader and further colors his impression of Davis; it implicitly links the respondent to the earlier view that a state court action is mandated. But has Davis made such a concession? Perhaps he might have if his case had anything to do with "private" behavior; it is, however, so imbued with police activity that Davis surely never considered, much less conceded, the authenticity of such a statement. Yet, "he" contends that the police action here has "transmuted" the defamation claim into one under the Constitution.

Justice Rehnquist's depiction of the respondent's "strange" choice of forums thus makes Davis out to be almost a buffoon, or worse, an alien to our system of law. Like Billy's striking of Claggart, Davis' act of raising federal law claims is—through the use of one verb—exacerbated into a threat to normative law; like a visitor from outer space (or a Handsome Sailor), he takes civilized processes and *transmutes* them into something threatening.

These two words unclench Justice Rehnquist's "parade of horribles."[271] But this is no parade trotted out by a judge of modest narrative talent. Could it be that Justice Rehnquist, who sometimes alludes to fiction in his opinions,[272] might have recently read *Billy Budd, Sailor* or, at least, that section of it in which Vere speaks to the potential snowball effect on the sailors' sense of loyalty if the court treats Billy leniently?[273]

Your clement sentence they would account pusillanimous. They would think that we flinch, that we are afraid of them—afraid of practicing a lawful rigor singularly demanded at this juncture, lest it should provoke new troubles. What shame to us such a conjecture on their part, and how deadly to discipline. You see then, whither, prompted by duty and the law, I steadfastly drive.[274]

Justice Rehnquist starts his "slippery slope" in similar fashion: "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983."[275] Hypotheticals, the stuff of opinion writers as well as professors, come creatively and imaginatively to the fore in these two texts. Both arguments conjure the worst possible disruption of order if these litigants are permitted to prevail. If Billy is to be adjudged innocent, says Vere, discipline will disintegrate; if our Court hears Davis, argues Justice Rehnquist, the populace will be aroused. Finally, to clamp the lid on respondent's plea, Justice Rehnquist recalls the "trouble-making" Davis of his factual presentation[276] by suggesting that this litigation even threatens the repose of certain patriots long departed: "We think it would come as a great surprise to those who *drafted* and *shepherded* the adoption of that Amendment to learn that it worked such a result. . . ."[277] Two verbs, artfully inserted, conjure the ultimate effect of Davis' otherwise straightforward and innocuous claim. History itself, the constitutional tradition of the fourteenth amendment, cannot be cast into disarray.

If Vere's underlying message to his court evokes Billy as a threat to the stability of the Empire, Justice Rehnquist's to his sees Davis as a force of lawlessness challenging the basis of fundamental legal order. Most considerately, each adjudicator provides his court with a litigant who must not be allowed to succeed.

3. Rhetorical Devices

One of Justice Rehnquist's precursors in the craft of judicial considerateness, Benjamin N. Cardozo, had this to say about the effective appellate utterance: "The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb, and the maxim. Neglect the help of these allies, and it may never win its way."[278] Justice Cardozo stressed that rhetoric, as much as logic, dictated the acceptance and ultimate authority of an opinion.[279] Justice Rehnquist's talented use of these rhetorical devices suggests his awareness of a symmetry in law between "form" and "substance." Phrases are woven so cleverly that we come to doubt mere stylistic fortuitousness or the authorship of fledgling law clerks.

In some of the passages of *Paul* already analyzed, Justice Rehnquist has established a rhetorical pattern that runs through the first part of the opinion. This pattern provocatively combines at least five technical devices: anacoenosis, aporia, epitrope, prosopopoeia, and sarcasm. At the beginning of what we have called the "law deneutralization" process, Rehnquist throws a few bones to Davis: "Accepting that such [defamatory] consequences may flow from the flyer in question";[280] "Imputing criminal behavior to an individual is generally considered defamatory *per se*."[281] Here, and in only one later section,[282] Justice Rehnquist employs anacoenosis—the opponent is seemingly allowed full sway in forcefully furthering his argument. Together with epitrope—ironically permitting an opponent to do what he proposes to do—this device deliberately misleads the audience as to the substance and effect of the opponent's (here Davis') argument. All of this leads to the general casting of doubt (aporia) upon Davis' now thoroughly distorted position: "It is hard to perceive any logical stopping place to such a line of reasoning."[283] These doubts are heightened by the device of prosopopoeia: representing imaginary or absent figures, here the drafters of the fourteenth amendment,[284] as though present or alive. And the sarcastic tone of the first part of the opinion reverberates in such phrases as "nothing more than," "'strained interpretation,'" "surely far more clear," and "difficult to see why."[285]

Indeed, in part II, section B of the opinion, as we shall stress further on, the Sixth Circuit receives treatment similar to Davis': the lower court is several times allowed full sway when Justice Rehnquist seems to let it speak in its own voice,[286] but his call to absent authority (particularly the ironic and inapposite dependence on Justice Douglas' language[287]) undermines the lower

court's premises and interpretations. There are also the mildly sarcastic locutions, "could be taken to mean," [i]f read that way," "[w]e should not read this language,"[288] and the omnipresent quotation marks around the word "stigma,"[289] implying that both Davis and the court of appeals might be on doubtful ground even in asserting that those 800 flyers injured respondent's reputation.

There is no need to repeat the commentators' critiques of Justice Rehnquist's use of precedent in part II, section B.[290] The point here is to recognize that Justice Rehnquist's rhetorical facility goes as far to explain his success in cases such as *Paul* as Justice Cardozo's did in more agreeable decisions—and as Vere's did in *Billy Budd, Sailor.*

4. Structure and Organization

As has been established, Justice Rehnquist's manner of depicting fact and law subtly deneutralizes the Court's ostensibly objective reasoning process. Rather than offering his audience the passion and fire of, say, Justice Brennan's dissent, Justice Rehnquist seeks to convince coolly. But this should not be taken for disinterest. The considerate communicator knows that structure (Cardozo's "architectonics")[291] is as forceful as logic when a given situation might take an audience either way.

To appreciate the structure of *Paul v. Davis,* we need only start with Justice Rehnquist's overt compartmentalization. Prior to part I, he sets forth the "facts."[292] These fifty-nine lines thus are made to seem almost by-the-way; yet, as we have indicated, they serve a vital coloring function.[293] It is only in the sixty-four lines that constitute part I,[294] however, that Justice Rehnquist educes his basic structuring thesis: Davis, through the temerity of his claim, challenges an ordered system of law. Masterful in its progression, this part builds on the reader's skepticism, imbued earlier, about a respondent who, after all, *had been arrested.*[295] Justice Rehnquist continues to depict Davis as opposing, in turn, the basic premises of the federal system,[296] the police who are trying "to claim the fears of an aroused populace,"[297] the natural limits of legal liability,[298] and the studious reflectiveness of the Court itself.[299]

Like Vere, who used clever words and phrases to aid structural suggestiveness,[300] Justice Rehnquist cogently chooses words to set Davis up against one or more of his audience's basic values. We noted the centrality to substance of the embellishing words "concededly," "transmuted," "drafted," and "shepherded."[301] The concluding phrase, "a study of our decisions convinces us they do not support the construction urged by respondent,"[302] climaxes the mounting sense of uneasiness about Davis. Davis has challenged the police, and, according to Justice Rehnquist, the legislative drafters of a noble amendment; but his gravest offense, it seems, is attempting to distort the studious processes of the Supreme Court itself.

The concluding lines of part I also provide an enjambement[303] to part II; they connect the idea of there being no "stopping place" to Davis' line of reasoning or to the circuit court's analysis. Indeed, the structure of sections A and B of the second part largely duplicates that of the first, but with one essential difference: the overt butt of Justice Rehnquist's now gentler rhetoric is the Court of Appeals for the Sixth Circuit. To convince his audience that the court below should have been more reflective. Justice Rehnquist immediately introduces the primary formal device of the rest of the opinion: the positing of "premises" from which his logic seems inevitably to flow. But these premises, usually expressed in what Cardozo called the "type magesterial."[304] are often drafted out of Justice Rehnquist's whole cloth. Like Vere, who disequilibrates his audience by telling them that they would be weak and feminine to acquit or mitigate in Billy's case,[305] Justice Rehnquist disorients his reader by asserting two premises upon which the result below "must be bottomed."[306] Neither premise though, truly express the grounds upon which the court of appeals rendered its finding for Davis.[307] Vere's awareness of the substantive and procedural weakness of his legal argument leads him to shift the focus of the court's perception.[308] Similarly, Justice Rehnquist proceeds by ignoring significant language from two Supreme Court precedents. From *Wisconsin v. Constantineau:*[309] "The only issue present here is whether the label or characterization given a person by 'posing' . . . is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[310] And, most tellingly, from *Board of Regents v. Roth:*[311]

> The State . . . did not make any charge against [respondent] that might seriously damage his standing and associations in his community. . . . Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[312]

Justice Rehnquist's structure—the repetitive undermining of the premises upon which Davis and the court of appeals ostensibly thought they could rely—serves to displace the audience's attention from his own monumental task, which is nothing less than to reconstrue a whole line of precedents without overruling them.[313] And indeed, when Justice Rehnquist finally, turns to precedents like *Constantineau* and *Roth,* his tendency to follow a given structure begins to lose its charm.[314] This is particularly true in these lines about *Roth.*

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment.[315]

In light of the language from *Roth* just cited, this statement, however glib, appears difficult to support. With his characteristically considerate understanding of what, at a minimum, his audience requires, Justice Rehnquist nonetheless perseveres, quoting elliptically from *Roth*:

> "The State, *in declining to rehire the respondent,* did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> "Similarly, there is no suggestion that the State, *in declining to re-employ the respondent,* imposed on him a stigma or another disability that foreclosed his freedom to take advantage of other employment opportunities."[316]
>
> "Thus," somewhat fantastically but still forcefully continues Justice Rehnquist, "it was not thought sufficient to establish a claim under § 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment."[317]

Surely no opinion less well crafted to this point could have survived this logical distortion and brought four other Justices along with it to a majority. Justice Rehnquist deftly avoids the *Roth* Court's explicit disjunction: if state action imposed *either* defamation *or* employment deprivation on Roth, "this, again, would be a different case,"[318] entitling him to notice and a hearing. Justice Rehnquist instead formalistically constructs the distorted premise that *both* are necessary by avoiding language to the contrary and emphasizing words that might lead the unwary audience to agreement.

In addition to H.L.A. Hart's observation about the power every judge possesses because of his creative capacity to interpret precedents,[319] at least three literary quotations come to mind when considering Justice Rehnquist's summary of the law available to the lower court. The first, from *Billy Budd* itself, is quite striking; Vere, who artfully conceals much during the trial, so detests his ally in covertness, John Claggart, that he finds himself urging the master-at-arms to "Be direct, man."[320] In another novel, Dickens' *Great Expectations,* the protagonist, Pip, implores the always secretive solicitor, Jaggers, "to be more frank"[321] in conveying information that Pip needs. The third quotation, from John Barth's *The Floating Opera,* probably explains better the *success* of a judicial writer like Justice Rehnquist in an opinion such as *Paul:* "How could mere justice cope with poetry? Men, I think, are ever attracted to the *bon mot* rather than the *mot juste,* and judges, no less than other men, are often moved by considerations more aesthetic than judicial"[322]

Having posited major premises based on such creative misreadings of the precedents, Justice Rehnquist now glides into part III, in which new law, under the guise of old, is freely propounded:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.[323]

The opinion's critics have observed the retreat to a kind of outmoded "entitlement" theory articulated in these lines.[324] Structurally, the passage also retreats to an earlier theme in the opinion: Davis should look to state tort law.[325] Circularity, always an esthetically pleasing structural device, conjoins here with what might be called "single-phrase evocation" to link the two ends of Justice Rehnquist's opinion.[326] Recall how effectively Melville uses the phrase "sanity and insanity" with reference to Vere in the opening paragraph of the trial scene;[327] it evokes in the reader a connection with the first use of those words in the text,[328] ostensibly regarding John Clag-

gart.[329] Just as Claggart and Vere are thus artfully connected in the domain of irrationality, so the Court's use of entitlement is carefully linked, through the key phrase "by virtue of its tort law,"[330] to its earlier pejorative view of Davis' claim: "But [Davis'] reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[331]

The good narrative writer weaves into his structure certain code words to which he can return, knowing that his reader will follow the associative pattern connected with those words. Thus, Justice Rehnquist buttresses the substantive legal concept of entitlement by joining it with the already established image of the state's protective tort law. The "virtue" of the states, in whose bosom a grievant can find relief through tort-based actions, is not lightly to be "superimposed" upon the unwilling federal courts. No "font" to which a plaintiff may crawl for spiritual and legal solace, the federal laws apply themselves sparingly. Davis, as we have been taught, is not one of the chosen; he is not entitled to the Court's protection.

Words like "font" and "superimposed," and evocative structuring devices like enjambement and circularity, are impressive tools of appellate opinion writing; they contribute to the art of adjudication, and we should appreciate them for what they are. But when claims are denied, perhaps wrongly, with the help of the crafty use of language and form, commentators must move beyond logical criticism alone[332] and into an understanding of appellate communication. Literary techniques can help pry open the source of an adjudicator's capacity to persuade when logic and tradition seem to support a contrary result. Thus, examining *Paul v. Davis*[333] in the light of *Billy Budd, Sailor* illustrates how, to achieve a subjective goal,[334] an adjudicator can win over an audience by considerately providing it with a story it needs to hear, thereby assuaging its doubts and dampening its spirit for further rational inquiry.

IV. Melville's Thoughts on Adjudicatory Communication: Outer Form and Inner Essence Disjoined

> The moral nature was seldom out of keeping with the physical make.[335]

A. Vere's Hidden Motive

Examples, real and fictional, illustrate the important adjudicatory role played by rhetorical skill in the dual service of the communicator's unspoken desires and the audience's minimal demands. As we have seen, however, Melville questions this mode of communication when employed by Vere: the captain's considerate way with words distracts the drumhead court sufficiently to permit him to win his way despite his legal improprieties. Vere's adjudicatory "insanity," however, consists not only in cleverly using language to reach a result that lacks sense; his communication is result-oriented, and his reason for contriving to have Billy hanged must be sought if the legal significance of the tale is fully to be grasped.

Melville does not readily reveal Vere's motives; his, too, is a nonovert narrative. Carefully exposed, the captain's impression of the defendant prior to the central incident seems unironically clear: Vere likes Billy. To the extent that it has been noticed at all, Billy's presence on the Bellipotent strikes Vere as a "'King's bargain.'"[336] Vere even deems him an intelligent enough sailor to be considered for a promotion to the "captaincy of the mizzentop."[337] Unlike Claggart, Vere seems indifferently admiring of the foretopman's easy popularity and pleasing outer form.

Why, then, does Vere single-mindedly and illegally press for Billy's execution? A possible answer links the captain's "insanity" at the trial with Claggart's behavior toward Billy, but reveals the object of Vere's rage to be a far more considerable one.

Vere joins Claggart in being marked by a prudent dissembling of underlying obsessions, and a burning envy directed at a sublime embodiment of the heroic, sailor-like-mode. But Vere's animus, like Vere himself, exists at a far higher level of significance than does Claggart. For if, in the service of his covert methodology and his deeper, unstated desires, Vere sacrifices the favorite of the crew, he does so to destroy a symobl. Billy, the embodiment of the mode opposite to Vere's own, the ultimate model of sailor-like "frankness,"[338] dies not for any of the legal or political reasons articulated by a man of Vere's landsman-like "finesse,"[339] but because he unwittingly stands in the place of the envied, magnificently overt Admiral Nelson. The far-reaching narrative opposition of overtness and covertness finally underlies Vere's substantive decision to have Billy hanged.[340] Unable to wreak his vengeance on Nelson directly, Vere finds a surrogate in the heroic Billy, who is emblematic of Nelson in his overt popularity and ability to use that popularity for good. So, when Vere speaks of the threat of mutiny requiring a violent sacrifice, we are meant to recognize the active irony of the statement; we must recall the factual example of Nelson in a similar circumstance, related much earlier in the tale:

> In the same year with the story, Nelson, then Rear Admiral Sir Horatio, being with the fleet off the Spanish coast, was directed by the admiral in command to shift his pennant from the Captain to the Theseus; and for this reason: that the latter ship having newly arrived on the station from home, where it had taken part in the Great Mutiny, danger was apprehended from the temper of the men; and it was thought that an officer like Nelson was the one, not indeed to terrorize the crew into base subjection, but to win them, by force of his mere presence and heroic personality, back to an allegiance if not as enthusiastic as his own yet as true.[341]

Nelson's mere presence quashed the very real threat of a mutiny on the *Theseus*.[342] Vere, on the other hand, creates an artificial crisis on his ship from the stuff of Billy's deed, and proceeds to destroy the jewel of the crew, effecting both a resentful inversion of Nelson's bloodless procedures and the symbolic annihilation of Nelson himself.

Claggart's complex envy of Billy achieves, then, a form of *projection upward* in Vere's covert approach to his heroic colleague. Because Vere is effectively juxtaposed to Claggart in so many narrative ways, it is important to emphasize certain "exceptional" traits in both which reach their apotheosis in Vere's actions at the trial; as with Claggart's rage against Billy, Vere's against Nelson can be understood as the complex man's strange attraction-hatred for the straightforward, essentially non-verbal hero.[343] Like Claggart's, Vere's aims are "never declared."[344] If the master-at-arms' personality is "hidden,"[345] Vere's is "undemonstrative," "not conspicuous," and "discreet."[346] If Claggart has "shown considerable tact in his function,"[347] so Vere tends to "guard as much as possible against publicity."[348]

A consummate dissimulator, Claggart fools everyone in the "soup spilling" scene,[349] one that we may now understand as deliberately foreshadowing Vere's covert methodology during the trial. Claggart's remark—"Handsomely done, my lad! And handsome is as handsome did it, too!"[350]—well exemplifies the clever communicator's tendency to distract his audience at any crucial point in which the communicator's true desires might otherwise be revealed. His wisecrack succeeds in hiding his villainous motives both from the "tickled" foretopman, and such onlookers as Billy's friend, Donald, all of whom thereafter disbelieve the Dansker's warnings to Billy about Claggart.[351] Perhaps still more important to the developing narrative conjunction of Vere and Claggart, the master-at-arms' subsequent attack on the unfortunate drummer boy asserts the covert individual's tendency to lash out at surrogate bystanders (the resentful man's "innocent victims").[352] Unwilling as yet to chastise publicly the real object of his bitterness, the master-at-arms instead attacks another youthful sailor during the "less guarded"[353] moment leaving the mess hall.

Only someone who had both seen Claggart depart and grasped the interpretative principle which we here call parallelism would have correctly ascertained the implied object of Claggart's rattan-lashing of the drummer boy. For the clever communicator never shows his true colors, or perhaps may just hint at them through the use of a "parallel" object, and then only when his audience is sufficiently distracted not to notice them. Like Claggart, Vere finds a substitute for the true source of his resentment; Billy is his drummer boy.

But then whom does Billy represent for Captain Vere? The carefully concealed inspiration for Vere's animus appears to be none other than Nelson; the convenient "parallel" object of his violence is Billy, a suitably emblematic, overt figure, a kind of mini-Nelson.[354] Both Billy and Nelson are presented early in the tale as variations of the Handsome Sailor type in which "the moral nature was seldom out of keeping with the physical make."[355] There natures are stamped by a consistent harmonic integration of inner and outer man and an almost organic rejection of hypocrisy and covertness. Most critics would associate Billy's overtness with his overall simplicity, and this is true. But, by juxtaposing Billy and Nelson early in the tale, Melville may mean to emphasize that Nelson too represents a kind of simplicity, sailor-like honesty on the highest level. Just as the foretopman is "a superior figure of . . . [his] own class,"[356] so Nelson has been called by the narratively invoked Tennyson, "'the greatest sailor since our world began.'"[357]

When Vere sees Billy strike Claggart, he experiences a violent, cathartic emotion. He intuits instantly the opportunity this event affords his imaginatively complex nature. Merely a competent pragmatist in battle, Vere will seek a form of immortality by creating a scenario out of the stuff of Billy's deed, one that will satisfy his own most basic subjective goals. In this light, Vere's complexity joins Claggart's, no longer as a positive attribute, but as negatively antithetical to the sailor-like condition. When Vere gazes at Billy, he does not feel any of Claggart's venom; but, when Billy strikes the captain's covert ally, all of Vere's subtle

envy for Nelson emerges in a violent urge to indirect vengeance.

To fathom Vere's unarticulated resentment toward Nelson, one need only consider the dilemma of a man whose very considerable talents might have garnered him a glorious reputation in any other historical period, but whose career must constantly lie in the shadow of the unmatchable figure of the Nile, the *Theseus*, and Trafalgar. Indeed, Vere may realize (as the narrative takes pains to disclose) that some of his fellow captains in fact do compare the two, and to his own detriment. These peers would remark that perhaps only "'the queer streak of the pedantic running through'" Vere has kept him from the deserved fame bestowed by "'the gazettes'" upon Sir Horatio Nelson.[358]

Vere is a superb pragmatist, yes; but, as the narrator tells us of Nelson (with Vere in mind), "[p]ersonal prudence, even when dictated by quite other than selfish considerations, surely is no special virtue in a military man."[359] Unable to respond to his men with a Nelson-like (or Billy-like) naturalness, Vere implicitly adopts the precedent of his "starry" ancestor;[360] imaginatively formalized discipline.[361] As the central events unfold, he attempts, at the trial and thereafter, to create a narrative form that will enable him to destroy the representation of overt naval heroism, the Nelson-in-Billy. But like the unsymmetrical European ironclads compared with the "grand lines" of Nelson's *Victory*,[362] Vere's aberrational aesthetic also degrades the artistic mode, one better exemplified by Nelson's literary gestures at Trafalgar.[363]

Consistently false in his verbal approach to the legal reality, Vere proceeds after the trial to communicate the sentence both to Billy[364] and the crew.[365] The atmosphere still hangs heavy with deception. The narrative casts a pejorative pall of secrecy over Vere's communications to the doomed sailor.[366] And, though an abstract compassion or even religious paternalism toward Billy often has been imputed to Vere during this part of the story, the narrative tone and, most importantly, the "closeted" location suggest otherwise; after all, Billy's open nature has at least twice before been impelled by "closed interviews."[367]

Vere's death shortly after these events forces the character to be judged by his actions at the trial, his only real attempt to fulfill "the most secret of all passions, ambition."[368] Even in death, however, Vere remains true to his primary characteristic, *covertness*. For, in uttering Billy Budd's name,[369] the dying man fittingly invokes the heroic mode most perfectly embodied in the rival whom he could neither destroy nor emulate, the envied Nelson.

Vere's "insanity," then, lies in translating his covert resentment into the considerate argument that the law requires Billy's death. The best that can be said for him (but is this "righteousness"?[370]) is that he sought a legitimate, external compulsion for what was, in fact, a subconscious and all-consuming subjective desire. Unlike the Nore historians, who were genuinely considerate in order to permit the British public to assimilate a painful topic, Vere is covertly considerate in order to forestall inquiry into the true reasons for the hanging. The covert nature hides from its own involvement under a protectively considerate use of language. Vere joins Claggart in a mutual intolerance for the overt, sailor-like mode. Each uses the outward show of an "uncommon prudence"[371] "as an ambidexter implement for effecting the irrational."[372] In Vere's hands, authoritative communication, once "considerate," becomes, finally, covert.

B. RAMIFICATIONS FOR ADJUDICATION

[I]n this world of lies, Truth is forced to fly like a scared white doe in the woodlands; and only by cunning glimpses will she reveal herself as in Shakespeare and other masters of the great Art of telling the Truth—even though it be covertly and by snatches.[373]

When a judge claims that positive law prohibits him from acting according to the dictates of his own moral nature, we should be on guard. The sanctuary of formal, positive law too often subtly conceals the naturalistic impulses that bring the adjudicator to a decision. This insight is the most basic contribution of *Billy Budd, Sailor* to a theory of adjudication.[374] Melville indicates that the judge's imagination (*i.e.*, subjective creativity) must inevitably be brought to bear on the facts and law before him.[375] In particular, the judge's need and *power* to use language afford him an engaging opportunity to act out his subjective motives within the acceptable form of legal discourse and reasoning. Melville reminds us that judges who claim to be disinterestedly applying the law may well be implementing their consciences, particularly when the law could take them either way.[376] The formalistic strictures of the law simply aid them to appear more "professional."[377]

Thus, as David Richards notes in his perceptive treatment of *Billy Budd, Sailor*, "*noting* dictates th[e] grotesque result but Vere himself,"[378] who "*chooses* to read the statute in a certain way."[379] Formalism often masks the exercise of judicial will. Melville here anticipates and endorses certain critiques of legal positivism and formalism, particularly those involving the place of language in adjudication,[380] and the role of ethics in legal reasoning.[381]

But Melville also delivers a more disturbing message that can be brought out by pursuing Professor Richards' intelligent analysis of *Billy Budd* a bit further. In Richards' reading, Vere's conscience remains at odds with his legal decision; Vere betrays his conscience in favor of the "consequentialist reasoning" of general deterrence.[382] Richards, thus, is properly skeptical of Vere's legal argument and perceives that the captain wrongfully denies responsibility for the hanging by attributing it to the law.[383] But Richards accepts Vere's articulated reason for handing Billy—a fear of mutiny—at face value. The analysis offered here suggests that this reason, too, is suspect; it is Vere's covert way of persuading his impressionable drumhead court. Far from betraying his conscience in hanging Billy, Vere acts out his innermost desire—his resentful antipathy to the sailor-like directness and unpragmatic heroism of Admiral Nelson. The difference is analyses is profound, asserting a limitation on the ability of the unexamined judicial conscience to reach objectively disinterested and morally correct results.

Professor Richards agrees that Vere's behavior is a species of adjudicatory insanity: Vere indulges "crude reasons of policy that, without the sham defense of principle, . . . [his] own considerable conscience would reject,"[384] The source of Vere's "corruption of moral conscience," of his tragedy, "is not egoism nor a failure of courage, but a defect in self-conception, a belief that professional identity requires . . . the separation of moral passion and professional role."[385] *Billy Budd, Sailor*, in this view, is a dramatic illustration of how law divorced from ethics is repressive—and irrational. An adjudicator can reach a just conclusion through rational inquiry, but only by taking account of the claims of conscience and acknowledging personal responsibility.[386] To deny the role of ethics in legal reasoning, in the name of legal formalism, is a fatal failure of rational understanding.

The reading of *Billy Budd, Sailor* offered here located Vere's adjudicatory insanity in a very different source and thereby poses a yet more troubling question. Is ethical adjudication available to the average judge through purely rational processes? Melville's answer, linked to the even wider critique of modern culture found in this tale, is decidedly negative.

Vere, let us recall, is not an evil character; in most circumstances, he is indifferently honest.[387] Yet, we learn that neither his conscience nor his mode of communicating is to be trusted. Resentment, envy, and other prevalent negative forces throw the capacity for both reasoned judgment and rational discourse into doubt. Judges are mortal being, prone to contemporary crises in values. Through Vere, Melville suggests that the barriers to the rational discovery of a just result are deeper than Professor Richards imagines; they are rooted in the normative structure of the culture in which adjudicators act.[388]

For Melville, Vere's "insanity" was emblematic of an entire culture in distress. The headnote of an earlier version of the story spoke of a "crisis in Christendom."[389] The extreme care bestowed on the tale by its author (extending over the last five years of his life)[390] indicates that its significance goes beyond even what we have said. As to this fuller cultural perspective, only part of which we have discussed here,[391] it may suffice to add (in the spirit of this article's predominant outlook) that Melville found it necessary in the final story to join forces with his covert communicators, Claggart and Vere. The novella's deepest meanings are sheltered beneath a cloak of narrative equivocation, irony, and selective omission. In Leo Strauss' eminently applicable terms,[392] Melville was writing as a "persecuted" author, required by the iconoclasm of his message to enunciate it "between the lines."[393]

Thus, Vere's methods and motives define those of society (at least literate society) as a whole. The narrative's own considerateness hints that Vere's approach is normative; no significant moral act, and certainly no important act of authoritative communication, is to be taken at face value in the modern world. News from the Mediterranean has hitherto made John Claggart the hero and Billy Budd the villain, and those "superannuated" gospels[394] are to be recognized as the paradigm for all modern acts of narrative communication.

The nineteenth century literary artists is no more likely than the modern-day adjudicator to place all his cards on the table, even when he is playing with a full deck. Melville's wider cultural message requires each reader's willingness to make himself one with the allegorical and symbolic suggestiveness of the full narration. But this one reader will suppress the urge (at least until later)[395] to enter into the more baffling mysteries of Melville's portentous tale.

CONCLUSION: ON THE USES OF LITERATURE FOR LAW

This Article has had several interconnected aims. First, our approach has attempted to illuminate certain puzzling aspects of a superb work of literary art, one that has

always had special meaning for lawyers. In so doing, the Article sought to exemplify the rich manner in which fiction—more than any other "extrinsic" data—can add to our understanding of basic legal issues. Second, at some length (but less than it deserves), the notion of "considerate communication" has been gleaned from Billy Budd, Sailor, furthered, and applied to a recent piece of actual Supreme Court craftsmanship. More work is needed on this aspect of legal meaning, which Llewellyn once called the "range of creative effort which no individual rule can offer." [396] Finally, in a far more schematic and tentative way, the Article has suggested that the study of literature itself, the reabsorption of the legal community in its cultural roots, may be a modern-day necessity. Western culture, as Melville predicted in the late nineteenth century, was preparing itself for some shocks. Vere's covert rage and effective formalism were to become, only a generation or two later, the model of European behavior; millions of actual innocents would take the place of the one fictional foretopman. Law has its place in that scheme. Literary culture has its place in the development of contemporary legal theories that may realistically aspire to the renaissance of a just society.

FOOTNOTES

*H. Melville, Billy Budd, Sailor (H. Hayford & M. Sealts eds. 1962) [hereinafter cited by page number only].

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Although I think of this paper as a tentative first step into the mysteries of a complex masterpiece, I have ventured this far only through the steadying guidance of many mentors. Foremost among these have been the student and professional audiences whose acceptance of at least some of these ideas has encouraged me to proceed. Among the individuals whose willingness to discuss the paper at length allowed me to refine the inquiry over the years are Merlin Bowen, Michael Braff, Robert Cover, David Haber, Arthur Jacobson, Robert Lawry, David Richards, Benno Schmidt, Paul Shupack, Cheryl Weisberg, and Edward Yorio.

[1] H.L.A. Hart, The Concept of Law 11 (1961).

[2] For a survey of this scholarship, see Suretsky, Search for a Theory: An annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities, 32 Rutgers L. Rev. 727 (1979).

[3] The currently popular "extrinsic" methodologies are the various social sciences. See, e.g., D. Baldus & J. Cole, Statistical Proof of Discrimination (1980); Forst, Rhodes & Wellford, Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines, 7 Hofstra L. Rev. 355 (1979); Symposium: The Courts, Social Science, and School Desegregation (pts. 1 & 2), 39 Law & Contemp. Probs. 1, 217 (1975); Wolfgang, The Death Penalty: Social Philosophy and Social Science Research, 14 Crim. L. Bull. 18 (1978). For perspectives critical of excessive judicial reliance on statistical and social scientific analyses, see, e.g., O'Brien, Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law, 64 Judicature 285 (1981); O'Brien, The Seduction of the Judiciary: Social Science and the Courts, 64 Judicature 8 (1980); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971).

[4] See, for example, the central use of *Billy Budd, Sailor* and Sophocles, Antigone (Athens 440 B.C.) in the prelude to R. Cover, Justice Accused 1–7 (1975). Four recent full-issue symposia on law and literature demonstrate a contemporary interest in the application of literary structures to legal issues. See Law and Literature, 32 Rutgers L. Rev. 603 (1979); Law and Literature, 9 U. Hartford Stud. Literature 83 (1977); Law and the Humanities, 29 Rutgers L. Rev. 223 (1976); Law and the Humanities, 7 U. Md. L.F. 84 (1977); see also Weisberg, Law, Literature and Cardozo's Judicial Poetics, 1 Cardozo L. Rev. 283 (1979) [hereinafter Weisberg, Literature and Cardozo]. See generally M. Ball, The Promise of American Law (1981), for an excellent and creative approach to the importance of the humanities for law; J.B. White, The Legal Imagination (1973), for a rich approach to the use of literature in the law school curriculum.

[5] For one distinguished figure's presentation of fictional works considered, in its time, to be each lawyer's "professional duty" to read, see Wigmore, A List of One Hundred Legal Novels, 17 Ill. L. Rev. 26 (1922), reprinted with corrections from Wigmore, A List of Legal Novels, 2 Ill. L. Rev. 574 (1908). Wigmore's list has recently been expanded and the theoretical introduction modified. See Weisberg & Kretschman, Wigmore's "Legal Novels" Expanded: A Collaborative Effort, 7 U. Md. L.F. 94 (1977), revised from Weisberg, Wigmore's "Legal Novels" Revisted: New Resources for the Expansive Lawyer, 71 Nw. U.L. Rev. 17 (1976) [hereinafter Weisberg, Wigmore's Novels].

[6] For a seminal anthology in this field, including selections from great literary works and legal writings, see The World of Law (E. London ed. 1960). Among those authors frequently discussed by lawyers are Shakespeare, see, e.g., W.N. Knight, Shakespeare's Hidden Life (1973); O. Phillips, Shakespeare and the Lawyers (1972); Dickens, see, e.g., W. Holdsworth, Charles Dickens as a Legal Historian (1928); E.T. Jaques, Charles Dickens in Chancery (1914); Dostoevski, see, e.g., Rabinowitz, The Click of the Spring: The Detective Story as Parallel Structure in Dostoyevsky and Faulkner, 76 Mod. Philology 355 (1979); Weisberg, Comparative Law in Comparative Literature: The Figure of the "Examining Magistrate" in Dostoevski and Camus, 29 Rutgers L. Rev. 237 (1976) [hereinafter Weisberg, Comparative Law]. Among recent studies by nonlawyers, see Sussman, The Court as Text: Inversion, Supplanting, and Derangement in Kafka's *Der Prozeß*, 92 PMLA 41 (1977).

[7] *"Billy Budd* remained unpublished until 1924, when it was edited by Raymond Weaver in Volume XIII of the Standard Edition of Melville's *Complete Works* (London: Constable and Company)," Hayford & Sealts, Editors' Introduction to H. Melville, Billy Budd, Sailor 12 (H. Hayford & M. Sealts eds. 1962). Our text is the definitive Hayford & Sealts edition.

More recently, an edition by Milton Stern has challenged some of Hayford and Sealts' positions. See H. Melville, Billy Budd, Sailor (M. Stern ed. 1975).

[8] Melville labored over the manuscript from late 1885 or early 1886 until his death in 1891. See Hayford & Sealts, supra note 7, at 1.

[9] Space does not permit a listing of every piece of scholarship on or criticism of *Billy Budd, Sailor.* From those representative of the various schools, see, e.g., R. Chase, Herman Melville 258–77, 298 (1949); L. Fiedler, Love and Death in the American Novel 359, 362, 434–35 (1960); L. Thompson, Melville's Quarrel with God (1952); Braswell, Melville's *Billy Budd* as "An Inside Narrative," 29 Am. Literature 133 (1957); Watson, Melville's Testament of Acceptance, 6 New Eng. Q. 321 (1933); Withim, *Billy Budd*: Testament of Resistance, 20 Mod. Language Q. 115 (1959). Representative of more recent approaches, increasingly sensitive to the importance of communication and language use in the story is Johnson, Melville's Fist: The Execution of *Billy Budd*, 18 Stud. Romanticism 567 (1979). For scholarship on the legal aspects of the story, see text accompanying notes 10–14 infra. For a bibliography of published criticism and scholarship on *Billy Budd* and other works by Melville, see Hayford & Sealts, Bibliography to H. Melville, Billy Budd, Sailor 203–12 (H. Hayford & M. Sealts ed. 1926).

[10] E.g., R. Cover, supra note 4, at 1–7; Reich, The Tragedy of Justice in *Billy Budd*, 56 Yale Rev. 368 (1967).

[11] Conference on "A Moral Critique of Law: The Example of Melville," held at the Woodrow Wilson School of Public and International Affairs, Princeton University, June 20–21, 1980. Among those papers presented were D. Richards, Ethical Autonomy and the Legal Mind; R. Weisberg, The Lawyer's Way: "Considerate Communication" in *Billy Budd, Sailor* (unpublished papers on file at New York University Law Review).

[12] R. Cover, supra note 4, at 1–7, 250–51. Cover analogizes the dilemma of antislavery judges confronted with the Fugitive Slave Act to Vere's dilemma in *Billy Budd.*

[13] D. Richards, supra note 11, at 11–15. For further discussion of Richards' piece, which is in partial accord with the view taken here, see text accompanying notes 377–89 infra.

[14] Ives, *Billy Budd* and the Articles of War, 34 Am. Literature 31 (1962).

[15] See text accompanying note 72 infra.

[16] See, e.g., R. Cover, supra note 4, at 250–51; Reich, supra note 10, at 378–79. But see D. Richards, supra note 11, at 12–14.

[17] 424 U.S. 693 (1976).

[18] The best known film re-creation of the story is the Peter Ustinov version with Ustinov as Vere and Terrence Stamp as Billy.

[19] In the libretto for Benjamin Britten's striking opera, the "plot" is virtually reduced to Claggart's unambiguous evil and Billy's lyrical innocence, producing Vere's tragic dilemma. See E.M. Forster & E. Crozier, Libretto for *Billy Budd* (rev. 1961). Melville's narrative, as we shall see, supplies infinitely more meaning than does the libretto.

[20] Whatever we may think of Vere, he is not the "tragic" hero of this tale. Critics who reduce the "plot" to the three most obvious characters tend to miss the central narrative (not tragic) quality of the tale. As we shall see, the story is at least as much about Nelson, the "Handsome Sailor" type, "a certain X," or the narrator himself, as it is about Vere.

[21] P. 44.

[22] Id.

[23] P. 54.

[24] Id.

[25] Pp. 44–45.

[26] P. 49.

[27] P. 47.

[28] P. 58.

[29] Pp. 63, 69. There is also a strong allusion to Nelson during the depiction of Vere's death, see p. 129.

[30] Billy pacified the upstart "Red Whiskers," in an incident foreshadowing the Claggart situation. See p. 47.

[31] P. 59; see text accompanying note 342 infra.

[32] P. 56.

[33] P. 63.

[34] See p. 60.

[35] Pp. 82–63.

[36] P. 61.

[37] Id.

[38] P. 64.

[39] Pp. 62, 96. Like Claggart, Vere's "exceptional" quality lies specifically in his keen intelligence and complex "moral" nature. Id. The narrative implies that these two are the only figures on the ship "intellectually capable of adequately appreciating the moral phenomenon presented in Billy Budd." P. 78.

[40] Pp. 74, 76.

[41] Pp. 86–87.

[42] See, e.g., text accompanying notes 47–54 infra.

[43] P. 76.

[44] Melville specifically mitigates the "goodness" of Billy and the "evil" of Claggart through his use of narrative epithet and detail. Billy, for example, is organically violent (albeit justifiably at times), e.g., p. 47, and, when on shore leave, as prone to sailor-like "fun" as the next man, see p. 49. He is far more the "barbarian" or the classical pagan than a Christian innocent. As for Claggart, he is a man of advanced intelligence, education, reasonable good looks, and pragmatic hard work. See pp. 64–65. This is hardly a straightforward allegory.

[45] P. 67

[46] For a further discussion of this central opposition, see text accompanying notes 337–41 infra.

[47] Pp. 72–73.

[48] P. 72. This incident is understandably beloved of Freudian analysts of the novella. See, e.g., R. Chase, supra note 9, at 269–77, one of the finest analyses of the story.

[49] P. 72

[50] Id.

[51] See text accompanying 349–53 infra. As we will see, Melville's full view of adjudication encompasses both the particular manner in which the adjudicator uses language, see sectoin III, A infra, and the adjudicator's inner nature, see section IV, A infra.

[52] Pp. 80–85.
[53] P. 96.
[54] See p. 92.
[55] P. 98.
[56] P. 99.
[57] P. 101.
[58] Pp. 101–02. As we shall discuss, the whole of chapter 20 concerns Vere's fellow officers' skepticism about his procedureal approach to the case. See section II, B, 2 infra.
[59] Vere admits the inappropriateness of these combined roles in his famous speech to the court, Pp. 109–10. This is analyzed more fully at text accompanying notes 141–44 infra.
[60] Pp. 122–24.
[61] After all, Vere's main justification for the hasty trial and execution is that, absent these, the crew might consider him weak and proceed to mutiny. See pp. 112–13.
[62] P. 128.
[63] Pp. 59–60.
[64] P. 123.
[65] P. 131.
[66] P. 130–31.
[67] P. 129.
[68] The officer of marines, the member of Billy's court-martial who was "the most reluctant to condemn," id., comprehends the centrality of Billy's trial and execution to Vere's whole existence. See id. True to the theory of "considerate communication," however, see section III, A infra, this officer "kept the knowledge to himself."
[69] P. 132.
[70] L. Fuller, The Morality of Law 40 (1964).
[71] See Weisberg, Wigmore's Novels, supra note 5, at 19–20, for a discusson of such famous trial scenes, especially those in W. Shakespeare, The Merchant of Venice (1st Quarto London 1600), and P. Dostoevski, The Brothers Karamazov (C. Garnett trans. 1937).
[72] PP. 110–11.
[73] See text accompanying notes 102–06 infra.
[74] Vere, in this speech, states his judicial dilemma in a classically jurisprudential way: * * * The judge claims that the law must predominate over morality when the two conflict but the law is "clear"; he conjures the possibility of a precise notion of the law of a given case and then sees a direct path to professionalism and judicial duty. There is even some pride in the idea of being forced to choose objective duty over personal inclination: "hard cases" give the judge a chance to prove he is a professional. For an alternative view of what Vere really may be doing during the trial scene, see notes 218, 253 infra.
[75] P. 102.
[76] P. 96.
[77] For an influential model for such approaches, see Watson, supra note 9.
[78] A distinguished Melville scholar tells of his early days in the field during the mid-1950's when he took the then "radical" stand that Captain Vere was not unambiguously righteous and indeed shared some of Claggart's circumspect evil. The professional audience for this scholar's remarks would grow restive; some faces turned beet red. A very private chord had been struck.
[79] Reich, supra note 10, at 377–79.
[80] R. Cover, supra note 4, at 4. Robert Cover's analytical use of the story in his exceptional study of the judicial response to the ante-bellum slavery laws, see id. at 2–6, has yet to be fully understood.
[81] Id. at 4–6. Shaw, the Chief Judge of the Massachusetts Supreme Court (famous for such seminal torts opinions as Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850)), felt he had to apply the Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1865), against the dictates of his private conscience, as he did in Thomas Sims' Case, 61 Mass. (7 Cush.) 285 (1851). See R. Cover, supra note 4, at 4–6, 249–52. Melville was no doubt influenced by having so distinguished a jurist in his family. Indeed, Shaw may, in part, have been a model for Captain Vere. See id. at 5–6.
[82] R. Cover, supra note 4, at 4.
[83] See id. at 4–5. In discussions I have had subsequently with Professor Cover, I have been struck by his generous appreciation of the substantially different approach to Vere taken here.
[84] Casper, The Case Against Captain Vere, 5 Persp. 146 (1952). Casper's challenge to orthodoxy appeared in the midst of this country's most recent authoritarian period.
[85] The mutiny on the *Somers* in 1842, in which Melville's first cousin, Guert Gansevoort, was a principal, clearly was on Melville's mind throughout his life. See The Somers Mutiny Affair 198 (H. Hayford ed. 1959). It is arguable that the case, which generated "great public excitement" when its facts became known J. Snedeker, A Brief History of Courts-Martial 55 (1954), lay at the heart of the novelist's motivation in examining the vital legal issues raised in *Billy Budd, Sailor*; it merits a significant paragraph within the novella's pages, pp. 113–14. The relationship of Vere-Billy-Claggart was paralleled on the *Somers* by Mackenzie-Spencer-Wales: Wales succeeded in ingratiating himself with Captain Mackenzie (who had an active antipathy for Spencer) by reporting Spencer's mutiny plot. See Proceedings of the Naval Court Martial in the Case of Alexander Slidell Mackenzie 202–06 (New York 1844) [hereinafter Mackenzie Court-Martial]. Mackenzie and Vere both craved secrecy. See text accompanying notes 137–40 infra. James Fenimore Cooper, another novelist fascinated by the case, said of Mackenzie what Melville seems to say of Vere: "The mental obliquity, so very obvious throughout the whole of the affair, renders any ordinary analysis of human motives exceedingly precarious. The act was, unquestionably, one of high moral courage, one of the basest cowardice, one of deep guilt, or one of lamentable deficiency of judgment." Cooper, Review of the Proceedings of the Naval Court Martial, in Mackenzie Court-Martial, supra, at 263, 344. Both Mackenzie and Vere were questioned on board about the justification for their summary action in hanging defendants without right of appeal, Mackenzie Court-Martial, supra, at 205; both received the blessing of a man they had condemned (three men were hanged on the *Somers*), id. at 206; newspaper accounts distorted both situations by falsifying facts and praising the executioners, id. at 264–65.

Some have argued that the *Somers* affair may not have been sufficiently alive in Melville's memory to be the precise inspiration for his final story. See Hayford & Sealts, supra note 7, at 29–31. But see Rogin, The Somers Mutiny and *Billy Budd*: Melville in the Penal Colony, 1 Crim. Just. Hist. 187, 196 (1980) (*Billy Budd* reimagined family-based conflicts which the *Somers* mutiny had first brought to Melville's fiction in *White-Jacket*). As Rogin notes, however, the press had revived the *Somers* affair during the period when Melville was writing *Billy Budd, Sailor*; Id; e.g., Hanged from the Yard-Arm, Albany Times, Aug. 2, 1890, at 1, col. 3; Argus, May 17, 1886, at 1, col. 1. In any case, Hayford and Sealts acknowledge that the *Somers* incident was related to the emergence of Captain Vere and the trial scene. See Hayford & Sealts, supra note 7, at 29–30.
[86] H. Melville, White-Jacket (London 1850), 5 Writings of Herman Melville (H. Hayford, H. Porter & G. Tanselle eds. 1970).
[87] Id. at 303.
[88] Casper, supra note 84, at 149.
[89] Id. at 150.
[90] Id.
[91] Id. at 151.
[92] M. Bowen, The Long Encounter 217–18 (1960).
[93] Ives, supra note 14.
[94] Ives therefore ask: "Did Melville make his captain's case so strong that the problem disappeared?—so strong that every reasonable captain would have acted as he did? If so, the story has lost some of its realistic appeal. Vere's position was exactly that; he said that he had no choice and that, in fact, he was faced with no problem at all. I believe that the reader is mistaken if he accepts Vere's position at face value." Id. at 32.
[95] Id.
[96] See id. at 35–36; text accompanying notes 137–39 infra.
[97] See Ives, supra note 14, at 32–34; text accompanying notes 187–89 infra.
[98] See, e.g., Ives, supra note 14, at 34 n.14, on the custom of "leniency in cases involving the death penalty . . . in the early days of the Articles."
[99] Id. at 38.
[100] Thus, critics normally avoid the specific issue of Vere's (questionable) application of the law and proceed to discuss the novella in vaguer terms not so tangibly suggested by the text. For example, the story is analyzed as a contrast between absolutism and relativism, e.g., Glick, Expediency and Absolute Morality in *Billy Budd*, 68 PMLA 103 (1953), individual and communal needs, e.g., Watson, supra note 9; Withim, supra note 9, or innocence and maturity, e.g., R. Mason, The Spirit Above the Dust 245–60 (1951).
[101] Ives suggests this is the case: "The customs of the sea did not require [Billy's hanging]; and the Articles of War provided only a deceptive excuse for the exercise of Vere's extraordinary 'priestly motive,' which, as Melville suggests at the beginning of Chapter XXII [*sic: XXI*], may well have contained the elements of true insanity," Ives, supra note 14, at 39; see id. at 35.
[102] Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blendingly enter into the other? So with sanity and insanity. In pronounced cases there is no question about them. But in some supposed cases, in various degrees supposedly less pronounced, to draw the exact line of demarcation few will undertake. . . . P. 102. This passage echoes Melville's comments about "a certain X" earlier in the tale. See pp. 74–76; text accompanying note 43 supra.
[103] P. 102.
[104] Id. The surgeon expresses his concern just before we enter chapter 21, the trial scene.
[105] See, e.g., Reich, supra note 10, at 378.
[106] Pp. 113–14.
[107] See Ives, supra note 14, at 35–36.
[108] Melville, explicitly as well as tonally, invites informed inquiries into his complex tale's meaning. It seems to our reading to be insufficient, given the narrator's equivocal tone and overt advice that each reader "must determine for bimself" an explanation of Vere's behavior, p. 102, merely to accept Vere's statements at face value; since Melville's narrator, and his biography, ground the trial scene in a material setting of legal custom, history, and precedent, it would be foolish to ignore the lessons of considerate communication and to rest easy with superficial explanations. There is too much internal evidence tending to demonstrate Melville's intention that every word used by Vere—and particularly every allusion to law or to theories of communication—be thoroughly explored.

Without this painstaking process we will never arrive at the story's "higher" (symbolic, allegorical) meanings. These latter meanings must be approached with the care mandated by the text's subtlety. As C.B. Ives put it 20 years ago: "Allegory is often so patent in *Billy Budd* that many critics have found in the novel not a story but Melville's philosophical generalizations about man's fate and others have read the book as a statement regarding the nature of the struggle between good and evil. It seems to me, however, that the novel contains realistic elements worth examining and that one of these is Captain Vere's appeal to the Articles of War to justify his hanging Billy." Ives, supra note 14, at 31. Melville refrains here, in his final painstaking creative deed, from offering his reader simple and self-satisfying resolutions to enormously complicated cultural problems. We must, in the first instance, come to grips with the text.
[109] Pp. 101–02.
[110] Melville knew British and American naval statutes well not only because of his lifelong fascination with sailors, but also as a result of having served in 1843 and 1844 on a naval vessel upon which the applicable American statute was read in full at frequent intervals. See N. Arvin, Herman Melville 72 (1950): "Then, on the first Sunday of every month he would take part with the rest of the crew in the "muster round the capstan"; passing in review before the officers, being inspected by them, and listening—Melville, with angry rebellion in his heart—to a reading of the grim Articles of War."

Thus, in an earlier work, Melville carefully recited, and criticized, specific provisions of the statute governing the American navy. See H. Melville, White-Jacket, supra note 86, . . .–304. In a historical note to this portion of his story, Melville observed that these Articles "may be found in the second volume of the 'United States Statutes at Large,' under chapter xxxiii." Id. at 298 n. *; see note 128 infra. He referred also to the British Articles, those enacted "in the twenty-second year of the reign of George the Second." H. Melville, supra, at 298 n. *; see note 112 infra. Although less overt, the older Melville was no less knowledgeable. For a fine, detailed analysis of Melville's lifelong inquiry into the use and abuse of the American Articles (including a source-guide to Melville's wide reading on the subject), see H. Vincent, The Tailoring of Melville's *White-Jacket* 90, 103–06 (1970). But see E. Rosenberry, Melville 112 (1979). Rosenberry agrees that "neither Mackenzie's action nor Vere's . . . was required or even sanctioned by law," id., but (oddly, considering the novelist's biography) concludes that "Melville tampered with history, or simply

worked from inadequate research . . . in establishing the legal framework of his plot," id.

In addition, as noted previously, Melville's interest in legal matters was also informed by the *Somers* mutiny, see note 85 supra, and by his father-in-law Lemuel Shaw's experience with the Fugitive Slave Act, see note 81 supra. Further, Melville maintained an active interest in current legal matters. The infamous Haymarket trials, held toward the end of Melville's life, may well have reinspired him to treat the essential moral issues so frequently encapsulated in courtroom dramas. See Wallace, *Billy Budd* and the Haymarket Hangings, 47 Am. Literature 108, 109-13 (1975).

[111] P. 101.

[112] 22 Geo. 2, ch. 33 (repealed 1860).

[113] See note 110 supra. An American historian of the British Articles reports: "It was ordered that the articles be read openly twice each week." J. Snedeker, supra note 85, at 44. A typical contemporary American naval statute was "to be hung up in some public places of the ship, and read to the ship's company once a month." Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 328, 329 (1775) (W. Ford ed. 1905). The comparable American military statute was "to be read and published once in every two months, at the head of every regiment, troop or company, mustered. or to be mustered in the service of the United States." Articles of War, § 18, art. 1, 5 J. Continental Cong. 788, 806 (1776) (W. Ford ed. 1906).

[114] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 22 (repealed 1860).

[115] See text accompanying notes 169-99 infra.

[116] P. 111.

[117] See note 197 infra.

[118] See J. Snedeker, supra note 85, at 45.

[119] P. 101.

[120] Articles of War of 1749, 22 Geo. 2, ch. 33, §§ 6-10 (repealed 1860).

[121] Id. § 11.

[122] P. 101.

[123] Section 19 provides in relevant part:

(A)nd if the said court shall have been held beyond the narrow seas, then such sentence of death shall not be carried into execution but by order of the commander of the fleet or squadron wherein sentence was passed; and in cases where sentence of death shall be passed in any squadron, detached from any other fleet or squadron upon a separate service, then such sentence of death (except in cases of mutiny) shall not be put in execution, but by order of the commander of the fleet or squadron from which such detachment shall have been made, or of the lord high admiral, or commissioners for executing the office of lord high admiral. . . .

Articles of War of 1749, 22 Geo. 2, ch. 33, § 19 (repealed 1860).

Billy was impressed onto the *Bellipotent* as it was heading out to sea, pp. 44-45, to join the Mediterranean fleet, p. 54. The ship was on "detached service" from that fleet, beyond the Narrow Seas, the channels separating Great Britain from the Continent and from Ireland, when the events in the story occurred. Pp. 54, 90, 129. Captain Vere was therefore obliged to refer the case to either the admiral or the commander of the Mediterranean fleet.

[124] Provided always, and be it further enacted, That no person or persons not flying from justice, shall be tried or punished by any court-martial for any offence to be committed against this act, unless the complaint of such offence be made in writing to the lord high admiral, or to the commissioners for executing the office of lord high admiral for the time being, or any commander in chief of his Majesty's squadrons or ships impowered to hold courts-martial, or unless a court-martial to try such offender shall be ordered by the said lord high admiral, or the said commissioners, or the said commander in chief. . . .

Articles of War of 1749, 22 Geo. 2, ch. 33, § 12 (repealed 1860).

[125] See note 123 supra; see also I J. McArthur, Principles and Practices of Naval and Military Courts Martial 67-68 (4th ed. London 1813) (1st ed. London 1792).

[126] See note 123 supra; I J. McArthur, supra note 125, at 67-68. For a typical contemporary American equivalent of this provision, see Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 378, 378 (1775) (W. Ford ed. 1905).

[127] P. 112.

[128] Articles of War of 1749, 22 Geo. 2, ch. 33, §§ 12-14 (repealed 1860). The Articles retained the customary minimum of five, but apparently altered the maximum from the traditional nine to 13, occasioning some debate. See 14 Parl. Hist. Eng. 416-17 (1749). The higher number seemed easier to achieve than it might appear, for naval custom "obliges every captain who comes in sight of the [court-martial] flag to go on board and take his place in the court." Id. at 416. In America, the numbers five and 13 were the clear tradition; any captain operating under naval law would have known them. See, e.g., Act for the Better Government of the Navy, ch. 33, art. 35, 2 Stat. 45, 50 (1800) (repealed 1950). For the equivalent army provisions, see, e.g., Act of May 31, 1786, art 1, 30 J. Continental Cong. 316, 316 (J. Fitzpatrick ed. 1934) (repealed 1874).

[129] Articles of War of 1749, 22 Geo. 2, ch. 33, § 14 (repealed 1860).

[130] P. 111.

[131] P. 104.

[132] Id. Melville, again, may be adverting to the *Somers* matter, in view of the three defendants there. See note 85 supra.

[133] P. 104. The disjunction of sailors and marines apparently was a tradition on naval courts-martial. See, e.g., U.S. Dep't of the Navy, Naval Courts and Boards § 405 (1917) [hereinafter Naval Courts and Boards]: "When a marine is to be tried by summary court-martial, one or more marine officers shall, if practicable, be detailed as members of the court." Melville may stress this detail because Vere's land-oriented personality again is coming to the fore. Although Billy is a sailor, Vere feels more comfortable with a marine officer on the court. It is this officer, we should recall, who is at Vere's deathbed later when he mumbles "Billy Budd, Billy Budd." P. 129. He may be one of several "Melville figures" in the text.

[134] Writing about English naval law of the period, McArthur observes: [A] captain or commander of any of his majesty's ships or vessels, has the power of inflicting punishment upon a seaman in a summary manner for any faults or offences committed, contrary to the rules of discipline and obedience established in the navy; this power the framers of our naval articles and orders wisely considered preferable to establishing inferior courts martial for trying trivial offences, as calculated less to obstruct his majesty's service at sea, and as carrying more promptly into execution the rules and articles laid down for its regulation.

Moreover, the prompt punishment of trivial offences is attended with salutary effects in the discipline of a ship, and from the public example makes a great impression on seamen's minds, thereby deterring them from committing greater crimes.

By the 4th article of the Old Printed Instructions, a captain was not authorized to punish a seaman beyond 12 lashes upon his bare back, with a cat-of-nine-tails; but, if the fault should deserve a greater punishment, he was directed to apply for a court martial.

J. McArthur, supra note 125, at 162-63.

[135] See Articles for the Government of the Navy, Rev. Stat. § 1624, art. 26, 27, reprinted in 18 Stat. 274, 281 (1874) (repealed 1950); see also Naval Courts and Boards, supra note 133, §§ 407, 412, 417.

[136] Article for the Government of the Navy, Rev. Stat. § 1624, art. 26, reprinted in 18 Stat. 274, 281 (1874) (repealed 1950); Naval Courts and Boards, supra note 133, § 412.

[137] Ives, supra note 14, at 36 n.22 (quoting Regulations and Instructions Relating to His Majesty's Service at Sea art. 3 (11th ed. 1772)).

[138] Naval Courts and Boards, supra note 133, § 217. The Rules for the Regulation of the Navy of the United Colonies, 3 J. Continental Cong. 328 (1775) (W. Ford ed. 1905), was the first American statute for the governance of the navy. The next comprehensive revision was the Act for the Better Government of the Navy, ch. 204, 12 Stat. 600 (1862) (repealed 1950). This statute remained essentially unchanged until the major overhaul of military and naval law in 1950, Uniform Code of Military Justice, ch. 169, 64 Stat. 107 (1950) (current version at 10 U.S.C. §§ 801-940 (1976 & Supp. IV 1980)). See 96 Cong. Rec. 1353 (1950) (remarks of Sen. Kefauver); see also E. Byrne, Military Law 1-16 (3d ed. 1981). Thus, the 1917 handbook is a compilation of the naval law with which Melville was familiar.

[139] P. 103.

[140] See text accompanying notes 366-67 infra.

[141] Pp. 109-10.

[142] Articles of War of 1749, 22 Geo. 2, ch. 33, § 7 (repealed 1860); see 14 Parl. Hist. Eng. 411 (1749). Apparently, opponents of the Articles felt that "[t]o pretend that the chief commander, by being president, may influence the court to do as he pleases, is contrary to experience." Id. As, presumably, did the proponents of the statute, Melville strongly disagreed; Vere's control—even when he is not speaking—is felt throughout the trial. As sole witness, and as the unmatched authority figure on the ship, he should surely have withdrawn after offering his testimony, as the law required.

[143] A 1917 naval handbook, for example, gives the accused in general and summary courts-martial the right to challenge any member of the Board. Naval Courts and Boards, supra note 133, §§ 277, 427. The handbook states that "care be exercised in selecting the personnel of a court," id. § 406, and provides that: "A challenge upon the ground, admitted or proven, that a member preferred the charges or is a material witness in support thereof. . . should be sustained by the court." Id. § 278.

Similarly, the American Articles of War of 1874 (governing armies) prescribes that any commanding officer of any army may appoint a court-martial. It adds: "But when any such commander is the accuser or prosecutor. . . the court shall be appointed by the President. . . ." Articles of War, Rev. Stat. § 1342, art. 72, reprinted in 18 Stat. 228, 236 (1874) (repealed 1920). More recently, an army officers' handbook specifically states that "an officer is legally incompetent if he is the accuser or witness for the prosecution. . . . Should the accuser sit on the court the trial is a nullity." F. Munson & W. Jaeger, Military Law and Court-Martial Procedure: "Army Officers' Blue Book" 13 (1941). Again, the accused may challenge (and upon proof, automatically procure the removal of) a court member who is either the accuser or a witness for the defense or procesution, id. at 49; the defendant is in fact usually powerless even to waive objections based on such dual role playing, id. at 50.

[144] See section III, A infra.

[145] P. 112.

[146] Id.

[147] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 22 (repealed 1860).

[148] Id. ¶ 20.

[149] Billy has failed to inform on "the stranger" who tempts him with lucre if he will join other "impressed ones" to do some unnamed mischief. P. 82. The stranger probably has been dispatched by Claggart, but the naive Billy does not suspect this. Since the stranger, whom Billy forthwith rebuffs, does not specifically mention mutiny, the foretopman's failure to inform might not have been actionable even if it had come to light, although Melville apparently thought it would be. See pp. 106-07. In any event, the incident serves to demonstrate again Billy's essential loyalty as well as his inclination to handle troublemakers himself instead of becoming an informer.

[150] Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 20 (repealed 1860).

[151] John McArthur, in his classic text, recapitulated the opponents' basic position:

But when we consider the infirmities inseparable from human nature, which abound even in the most upright hearts—the unguarded moments of passion, which at times no prudence or circumspection can govern, and the numberless unforeseen causes which may suddenly arise amidst the fluctuating humours and caprices of mankind, it is devoutly to be wished, that, on a legislative revision of this article, a discretionary power may be vested in a court martial to inflict death, *or such other punishment as the crime, from the palliating circumstances attending it, shall merit.*

Indeed this is so essentially requisite towards the administration of justice, that the omission of this discretionary power must have proceeded from oversight and not from intention; for, it is to be observed, that the original article on this subject introduced by the statute 13 Charles II. c. 9. contains the discretionary alternative alluded to, and is distinguished by its conciseness and simplicity. The words are, "none shall presume to quarrel with any superior officer upon pain of severe punishment, nor to strike any such person upon pain of death, or *otherwise as a court martial shall find the matter to deserve.*"

1 J. McArthur, supra note 125, at 70-71 (emphasis added).

[152] See J. Snedeker, supra note 85, at 47.

[153] Id.

[154] Beginning at least in *White-Jacket* (London 1850), Melville drew on actual historical sources to make the point in his fiction that the practice or custom of punishment on board naval vessels often

differed from the letter of the law. See H. Vincent, supra note 110, at 99-102.

[156] These rules, the first regular "Articles of War" for the British Navy, were adopted in 1649 and recast and applied to all British naval forces in 1652. Essentially, the rules codified traditional naval practice. See J. Snedeker, supra note 85, at 46. The code is "the formal ancestor of all British and American naval articles." Id.

[157] Id.

[158] See text accompanying notes 122-27 supra.

[159] J. Snedeker, supra note 85, at 46.

[160] 1 J. McArthur, supra note 125, at 164 (quoting the New Regulations and Instructions for the Navy (1806)).

[161] See text accompanying notes 122-27 supra.

[162] See 1 J. McArthur, supra note 125, at 67-68.

[163] D. Walker, Military Law 108 (1954): "Cases resulting [under the earliest American Articles for the Government of the Navy] in dismissal of an officer or in the death penalty required Presidential confirmation prior to execution." See generally W. Winthrop, Military Law and Precedents 48-56 (2d rev. ed. 1920) (army courts-martial).

[164] The policy behind these high-level reviews of severe sentences in courts-martial is adequately expressed in the following passage from a handbook prepared for United States Army officers:

Until the sentence of a court-martial has been approved by the proper commanding officer, it is not effective. This follows logically from the fact that these tribunals are adjuncts to the executive power, rather than part of the judicial function. . . . Nevertheless, courts-martial must carry out their duties in a judicial manner—fundamental principles of justice and rules of law and of evidence must be adhered to even as in courts of civil law.

F. Munson & W. Jaeger, supra note 143, at 16.

[165] See note 85 supra.

[166] For more on Gansevoort, see, e.g., Anderson, The Genesis of *Billy Budd*, 12 Am. Literature 329 (1940); Rogin, supra note 85, at 197-98. Gansevoort, a lieutenant on the *Somers*, jointed with Mackenzie in recommending execution for the three sailors.

[167] See Rogin, supra note 85, at 197.

[168] Pp. 59-60.

[169] See 1 J. McArthur, supra note 125, at 163.

[170] Interestingly, in American army law, there was some movement toward allowing the *convening* officer to execute even a serious sentence in time of war. See Articles of War, ch. 20, art. 65, 2 Stat. 359, 367 (1806) (repealed 1830). Article 89 of the same statute, however, gave that same convening officer "power to pardon or mitigate . . . [or, in capital cases] he may suspend, until the pleasure of the President of the United States can be known." Id. art. 89, 2 Stat. at 369-70. Vital here is the discretion allowed the convenor. And, in any case, the convening officer's power was short-lived. This portion of article 65 was repealed by Act of May 29, 1830, ch. 179, 4 Stat. 417, 417, and the statute again came to insist on presidential review of death sentences, with the usual exception for wartime mutineers. See Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598, as amended by Act of Mar. 31, 1863, ch. 75, § 21, 12 Stat. 731, 735 (repealed 1950).

[171] P. 110.

[172] P. 111.

[173] In rhetorical terms, such a statement duplicates the device used by Vere in the famous passage from the same lengthy speech: "Well, the heart here, sometimes the feminine in man, is as that piteous woman, and hard though it be, she must here be ruled out." Id.

[174] W. Birkhimer, Military Government and Martial Law 375 (3d ed. 1914).

[175] As one military law expert puts it: "It is because an appreciation of the importance of necessity as the underlying justification is so essential to understanding of the principles of martial law that the point is so strongly emphasized here." F. Weiner, A Practical Manual of Martial Law 16 (1940).

[176] C. Fairman, The Law of Martial Rule 19 (2d ed. 1943).

[177] See W. Birkhimer, supra note 173, at 404.

[178] Id. at 416.

[179] Ives, supra note 14, at 33.

[180] See text accompanying notes 106-07 supra.

[181] See C. Fairman, supra note 176, at 50-63 (no mention of the late eighteenth century as among those periods in English history compelling frequent use of martial law). Ireland, which experienced British martial rule in 1798-1799, was an exception. See id.

[182] The phrase is from a purported "Preface" to the story to be found in many earlier versions of Billy Budd, Sailor. Hayford's and Sealts' research indicated that the "Preface" did not belong in Melville's final version at all. See Hayford & Sealts, supra note at 18-19. Yet, the phrase lends insight into the larger meanings of the story, meanings that must build on the kind of analysis presented in this paper, but that we cannot explore fully at his time. See text accompanying notes 389-95 infra.

[183] See p. 59.

[184] Pp. 59-60.

[185] We shall later recall Melville's suspicion of adjudicators who counsel breach of legal form in the name of "necessity." See text accompanying notes 214-49 infra.

[186] F. Weiner, supra note 174, at 16. Weiner continues:

As a distinguished soldier-jurist [Holmes] has said, "We need education in the obvious more than investigation of the obscure." Now, viewed in the light of the principle of necessity, martial law is nothing more and nothing less than an application of the common law doctrine that force, to whatever degree necessary, may be used to repress illegal force.

Id. at 16-17. Did Billy in any way still threaten illegal force?

[187] As Leonard Casper has noted, Melville's interest in the *Somers* case, see note 85 supra, indicates a concern with the question "just how necessary is necessity?" See Casper, supra note 84, at 149. As applied to Billy's case, Holmes' "education in the obvious," see note 185 supra, would have led to no more than imprisonment until the fleet was rejoined.

[188] Ives, supra note 14, at 32.

[189] Hayford & Sealts, Notes & Commentary to H. Melville, Billy Budd, Sailor 181 (H. Hayford & M. Sealts eds. 1962).

[190] The statute controls "every person being in Their Majestye's Service in the Army . . . who shall . . . excite, cause, or joyne in any mutiny or sedition in the Army." Mutiny Act, 1 W. & M., ch. 5, § 1 (1689). Except for a few brief intervals, the Mutiny Act was reenacted annually until 1879, when it was merged with the Articles of War of 1749 to form the Army Discipline Act, 42 & 43 Vict., ch. 33 (1879) (repealed 1881). See W. Winthrop, supra note 162, at 20.

As to the possibility that this is Melville's unintended error, perhaps based on the 1879 merging of the two statutes, see pp. 113-14. But even Hayford and Sealts speculate that Melville may have deliberately had Vere apply military rather than naval law. See Hayford & Sealts, supra note 188, at 181. And evocative in the use of the term "Mutiny Act," whether the error be (atypically) Melville's or Vere's, is both the continuing indication of Vere's attraction to the *land* and his use of the phrase to imply, covertly, that "mutiny" is actually a part of the instant litigation. See notes 192, 223 infra.

[191] "War looks but to the frontage, the appearance. And the Mutiny Act, War's child, takes after the father. Budd's intent or non-intent is nothing to the purpose." P. 112. Vere earlier (erroneously) noted: "We proceed under the law of the Mutiny Act." P. 111.

[192] See note 110 supra.

[193] The strong inference from all the evidence is that Melville was conscious of every single legal detail (including Vere's mistakes and omissions) in this story. See, e.g., note 110 supra; see also note 223 infra. For a view contra, see Hayford & Sealts, supra note 188, at 176. I can only assume that the editors, despite some of their own research indicating the biographical and literary logic of assuming Melville's expertise in naval law and history, were not prepared to deal with the ramifications of that logic, particularly since the thrust of their compendious notes is pro-Vere, see, e.g., id. at 175-77 (Hayford's and Sealts' comments to their notes 223, 241-42).

[194] See text accompanying notes 145-46 supra.

[195] P. 112.

[196] See Articles of War of 1749, 22 Geo. 2, ch. 33, § 2, ¶ 28 (repealed 1860) ("All murders committed by any person in the fleet, shall be punished with death by the sentence of a courtmartial.").

[197] Of course, Vere is not here actually charging Billy with homicide. Nevertheless, he deploys this substantive law to explain the risks of leniency and to assuage doubts about the necessity for the hanging.

[198] Even Vere's interpretation of the Articles of War is open to question. The applicable section speaks of striking a superior officer "being in the execution of his office." Articles of War of 1749, 22 Geo. 2, ch 33, § 2, ¶ 22 (repealed 1860). This phrase leaves room for interpretation. Claggart, arguably, was not "executing his office" when, out of personal animus unrelated to official duty, he lied to his captain about a crewman's loyalty. Although Vere was unaware of all the facts, he decided not to pursue his suspicions about Claggart. See pp. 94-96. Had Vere inquired into the full circumstances of the case, he might have discovered the incident in which Claggart's henchman vainly tempts Billy to mutiny, pp. 80-83, a violation of § 2, ¶ 19 of the Articles (endeavor to make mutinous assembly), as well as Claggart's bad faith in informing on Billy.

The significance of Vere's refusal to contemplate Claggart's role in the matter is heightened by his apparent earlier omission to *swear in* the members of the court. Section 16 of the Articles, which supplies the statutory text for the oath, expressly charges members of a court-martial to "duly administer justice according to [their] conscience[s]" in "any case [that] shall arise, which is not particularly mentioned in the said articles and orders." Articles of War of 1749, 22 Geo. 2, ch. 33, § 16 (repealed 1860). See generally 1 J. McArthur, supra note 125, at 368, 374 (necessity for oath since time of King William; relationship of oath-taking to secrecy); D. Walker, supra note 162, at 108 (American procedures "copied almost verbatim from the contemporary English laws"). Had Vere pursued Claggart's role in the matter, Billy's case might have been thrown into the domain of conscience: it would not fall under § 2, ¶ 22, because no officer was struck "in the execution of his office"; it would not be murder under § 2, ¶ 28, because of the defense of provocation and other matters, see text accompanying notes 194-97 supra.

These arguments, of course, are not unassailable. But the court was seeking an escape from the death sentence apparently mandated by the statute; Vere had the power to provide one. As befits a "considerate" communicator, see section III, A infra, he chose to conceal, or at least not to pursue, all the facts.

[199] P. 101.

[200] See section IV, A infra.

[201] P.105.

[202] See generally Weisberg, Literature and Cardozo, supra note 4.

[203] See Llewellyn, On the Good, the True, the Beautiful, in Law 9 U. Chi. L. Rev. 224, 249 (1942).

[204] When a 16 year-old boy, arguably, a trespasser, dies upon impact with the defendant railroad's negligently maintained electrical wiring, it helps to build a bare majority of an appellate court in favor of his heirs by referring to him at the outset as "a lad of 16," Hynes v. New York Cent. R.R., 231 N.Y. 229, 230, 131 N.E. 898, 898 (1921) (Cardozo, J.), instead of the legalistic "plaintiff's decedent." Similarly, when the defendant railroad's negligently dislodged scales hit an innocent woman travelling to the beach with her children, the same majority may be swayed for the railroad if the judge refers to the injured party throughout as merely "respondent" or "plaintiff." Palsgraf v. Long Island R.R. 248 N.Y. 339, 162 N.E. 99 (1928((Cardozo, J.).

[205] P. 55.

[206] L. Strauss, Persecution and the Art of Writing (1952).

[207] Id. at 23. According to Strauss, authoritative communication, particularly if repeated often, ultimately establishes what most people think of as "truth"; such statements, like those of Melville's Nore historians, become "morally certain." Id. The authorities abide dissenting points of view because they thereby allow the apperance of freedom of thought in the audience by creating a perceived choice between several conflicting positions. See id. The general audience, however, is likely to accept the authoritative position and view the heterodox communication as false. The latter then ceases to be repeated, and the accepted view increases in credibility. See id. To avoid ridicule, therefore, the "persecuted" dissenter must hide his basic views by "writing between the lines." Id. at 24. A recent example of this phenomenon would be the various accounts of the assassination of John F. Kennedy. Vere's junior officers are in this "persecuted" category. See next accompanying notes 261-17 infra.

By "writing between the lines," disbelieving, "persecuted" individuals lodge their dissent to the ensconced position, hoping and expecting that only a small number of like-minded readers will appreciate what they are saying. See L. Strauss, supra note 205, at 25, 34-35. Considerate communications, on the other hand, *establish* doctrinal truths by conveying and repeating a selective version of reality, one that they fully expect the vast majority of

their audience to accept. We shall late recall Strauss' notion of "writing between the lines" when reflecting on Melville's own mode of communication in *Billy Budd*. See text accompanying notes 389-94 infra.

[207] P. Dostoevski, The Brothers Karamazov 227-44 (C. Garnett trans. 1937). Dostoevski was Melville's virtual contemporary; The Brothers Karamazov originally was published in 1880.

[208] P. 55. Why does Melville state that such a nonforthright approach can be taken "without reproach"? (There may be irony here, of course, but Melville tells us throughout the tale that truth emerges more from the "ragged edges," see, e.g., p. 128, of these digressions than from the characters and descriptions of the basic story line itself. In a passage on communication, in particular, we may divine an unmediated message meant to be taken at face value.) We must recall that "considerate communication" is *essentially truthful* and primarily designed to *serve* the audience. Although the full story is truncated by the authoritative communicator, his account adequately fulfills the needs of his readers or auditors without really deceiving them. Indeed, the average English person probably would not take the time even to delve into a more detailed and accurate report about the mutiny.

To be distinguished from "considerate communication" is *propaganda* itself, which is essentially false and which aids only the communicator while victimizing and persecuting the audience. We might contrast the authoritative accounts of the John P. Kennedy assassination (probably "considerate") to the collected speeches of Goebbels (propaganda).

Finally, we must distinguish from both of these that which the *audience itself* chooses to do with individuals who attempt to contradict or elaborate upon the official account. Theirs may be a sentence of ostracism or worse, but this is not the fault of the original authoritative communicator. Consider the fate of those who have tried, over the past twenty years, to differ from the Warren Commission report of the Kennedy assassination. Ridicule from the *New York Times* was the kindest of their destinies. See notes 206 supra, 392-93 infra for a discussion of the theories of Leo Strauss.

[209] Pp. 71, 85.

[210] Melville seems to convey the belief that the lyrical poem as a genre (and lyrical speech generally) is more direct, more sailor-like, and less "considerate" than authoritative, narrative discourse. The beautifully simple ballad that closes the story, "Billy in the Darbies," p. 132, contrasts keenly with all the convoluted prose that has preceded it about the events on the *Bellipotent*.

[211] P. 131. The narrator specifically labels this account "authoritative" and adds that it was "written in good faith" despite the distortions. P. 130; see text accompanying note 65 supra.

[212] Pp. 130-31.

[213] The audience for the *Mediterranean News* symbolically includes everyone. See note 394 and accompanying test infra.

[214] P. 128.

[215] Id.

[216] See L. Strauss, supra note 205, at 32. This form of persecution goes beyond the milder "social ostracism," id., or even "persecution of free inquiry," id. at 33, to Strauss' "most cruel" type, id. at 32, in which the audience is directly coerced and robbed of its ability to reason freely altogether.

[217] P. 102; see text accompanying note 58 supra. Melville's narrative approach to this potential dissent is again parallel to Leo Strauss' theory: the junior officers choose to remain silent, and the surgeon decides not even to tell them of "the captain's state." To articulate a position different from the authoritative captain's would be to risk "persecution"—punishment for "mutiny," p. 102—with no real likelihood of gaining credibility anyway. See L. Strauss, supra note 205, at 24-26. For another example of Vere's officers' keeping knowledge to themselves, see note 68 supra.

[218] The paradigmatic structure of adjudication outlined in note 74 supra is thus modified as follows: * * * In this modification, neither objective duty nor subjective moral inclination is immediately achieved. We have, for example, neither Justice Harlan's complex professionalism nor Justice Douglas' result-oriented (but not always carefully reasoned) directness. Instead, a kind of triangle, arguably more typical yet of judges, is formed, only two sides of which are part of the finished process. The judge applies the law as "an ambidexter implement," p. 76, to various subjective goals. The first of these goals may be "policy" (Vere's conjuring mutiny if the court does not sentence Billy to hang), which is usually freely articulated since it *seems* a legitimate judicial concern. (Note, though, that "policy" contains strongly subjective elements, may be questionably proffered, and is rarely required by "the law" of the case.) But, other subjective goals may not be stated at all. They are not necessarily "moral." Indeed, in this structure, the moral side of the triangle is totally skirted. Such covert goals emerge from the judge's whole personality and may be as disparately and even subconsciously motivated as "what the judge ate for breakfast" (the "legal realist" model) or how the judge reflects the values of the surrounding culture in everything he does (Cardozo's model). See Weisberg, Literature and Cardozo, supra note 4, at 306, for an analysis of the vital similarities and differences in the realist and Cardozo approaches; see also note 374 infra. For Vere, these unarticulated goals include avenging himself against the absent Nelson, fulfilling his nature as an authoritarian pragmatist, creating a dramatic scenario, giving voice to generalized cultural resentment, etc. See also note 253 infra.

[219] P. 100.

[220] Id.

[221] P. 101.

[222] See text accompanying notes 100-09 supra.

[223] See notes 110, 192 supra. As to the possibility that Melville accidentally made some of these errors despite his generally thorough knowledge of naval law, we should now add the words of Strauss (writing about the way in which authors communicate about delicate themes): "If a master of the art of writing commits such blunders as would shame an intelligent high school boy, it is reasonable to assume that they are intentional, especially if the author discusses, however incidentally, the possibility of intentional blunders in writing." L. Strauss, supra note 205, at 30.

[224] I have suggested in other context that highly verbal and literate characters usually gain the sympathetic praise of most readers unless they are overtly presented as evil. See Weisberg, Hamlet and Ressentiment, 29 Am. Imago 318, 333-37 (1972). This occurs simply because most readers of complex fiction share the verbal acumen of these characters. It is harder to like, or accept as "real," those figures who do not do well with words. This observation has particular importance for works of fiction in which lawyers play central roles. See note 343 and accompanying text infra.

[225] P. 102. We must compile the evidence ourselves; the narrator, true to his own equivocal mode of communication, see text accompanying notes 218-17 infra, will not tell us directly.

[226] See text accompanying notes 336-69 infra.

[227] P. 86.

[228] Pp. 62, 96.

[229] P. 128.

[230] P. 63.

[231] P. 60.

[232] Id.

[233] P. 63

[234] P. 60.

[235] P. 104; see notes 133, 191 supra. Vere, true to his internal scenario, found in the marine an intelligent enough fellow but one who, like the other members of the court, was more a warrior than an analytical thinker. See p. 105.

[236] See note 189 infra.

[237] P. 111.

[238] P. 86; see also text accompanying note 41 supra.

[239] P. 87.

[240] P. 76. As we point out a bit later, see note 392 infra, Melville's own communication is of the Staussian "persecuted" variety throughout the tale; much of what the reader must ferret out to understand one character may in fact be placed in a part of the story seemingly relating to another. This is especially true of the passages originally descriptive of Claggart, a figure representative of Vere, but on a lower level of importance. See note 102 supra. Billy stands in the same relation to Nelson. See text accompanying notes 30-31 supra.

[241] P. 76.

[242] Id.

[243] Id.

[244] Id.

[245] Id.

[246] Id.

[247] The clearest narrative example is the "soup spilling" episode. See text accompanying notes 48-50 supra.

[248] Pp. 112-113. Although everything he says to the court in chapter 21 brilliantly distorts the operative legal and political reality to suit his own purposes, this speech is especially clever. Taken as a whole, its structure and tone convey the pathos of a court necessarily torn between two unhappy choices: hang the morally innocent Billy or provoke the crew to mutiny. "You know what sailors are," Vere remarks, suddenly confiding in these junior officers. But his communication hides the truth about these particular sailors; that they are not prone to mutiny and that the news of their favorite colleague having killed the despised shipboard policeman (if, indeed, such news had to be published at all until the ship regained the fleet) would less likely produce mutinous rumblings than the sight of Billy hanging by the yard-arm itself as punishment for that homicide. For, without the worst possible construction being imposed on Billy's act, "the people" would rather see their Handsome Sailor alive and well. Indeed, Vere's construction does become the authoritative naval version of the incident, in which Billy becomes the villainous alien-upstart and Claggart the patriotic hero. See pp. 130-31.

[249] See, e.g., Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 326 (1976): "I fear that in too many instances Justice Rehnquist's efforts have been impeded by his ideological commitment to a particular result."

[250] In his facility with language, Justice Rehnquist is in the tradition of Justice Cardozo, although perhaps without the latter's innate sense of cultural balance. See Weisberg, Literature and Cardozo, supra note 4, at 308-42.

[251] 424 U.S. 693 (1976). References to "line" numbers in the text are to this report of the decision. For other Rehnquist opinions notable in this light, see, e.g., note 270 infra.

[252] See, e.g., Shapiro, supra, note 249, at 324-28; Note, Paul v. Davis: The Taming of 1983, 43 Brooklyn L. Rev. 147 (1976) [hereinafter Brooklyn Note]; Note, Paul v. Davis: Reputation Succumbs to Judicial Self-Restraint, 38 Pitt. L. Rev. 417 (1976); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 87-102; Hofstra L. Rev. 199 (1976); 60 Marq. L. Rev. 162 (1976); 22 N.Y.L. Sch. L. Rev. 340 (1976); 17 Santa Clara L. Rev. 959 (1977).

[253] Recalling our structure at note 218 supra, we might say that Justice Rehnquist uses the law to implement the articulated goal of supporting the state through its police and the unarticulated desire further to support the states through limiting the jurisdiction of the federal courts whenever possible. Other unstated subjective motivations may be present, but can probably be detected only through a rigorous reading of all of Justice Rehnquist's opinions (a methodology advisable vis-a-vis any influential judge).

I have argued that to some degree, all appellate opinions use language and form to conceal both analytical imprecisions and subjective motive. See R. Weisberg, Narrative Aspects of Appellate Opinions (Jan. 3, 1980) (principal paper delivered before the Law and Humanities Section of the Conference of the Association of American Law Schools) (available on tape).

[254] 424 U.S. at 694-96.

[255] Brooklyn Note, supra note 252, at 147-48 (footnotes omitted).

[256] 424 U.S. at 694-95.

[257] Contrast the dissenting opinion's approach to the *Paul* facts. See id. at 718-20 (Brennan, J., dissenting).

[258] Id. at 695-96.

[259] Id. at 696.

[260] Id.

[261] "That however pitilessly [martial] law may operate in any instances, we nevertheless adhere to it and administer it." P. 111.

[262] Although Davis was not fired, his supervisor told him "he had best not find himself in a similar situation in the future." 424 U.S. at 696.

[263] Id. at 697-99.

[264] "[R]espondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State." Id. at 697.

[265] Pp. 110-11.

[266] "Inputing criminal behavior to an individual is generally considered defamatory *per se* . . . ." 424 U.S. at 697 (emphasis by the Court).

[267] On the irrelevance of the availability of a state court action to Davis' § 1983 claim, see, e.g., 5 Hofstra L. Rev. 199, 201-04 (1976).

[268] We shall shortly examine several other passages involving the use of audience deflection, which was first exemplified in *Billy Budd* by Claggart's masterful remark to the crew during the

"soup spilling" incident. See text accompanying notes 47-51 supra.

[269] 424 U.S. at 698 (emphasis added).

[270] For a similar use by Justice Rehnquist of the word "concededly," see Rummel v. Estelle, 445 U.S. 263 (1980), an opinion well worth analyzing in terms of considerate communication.

Justice Rehnquist's use of the word in *Paul* deserves more intensive study here. The word is used oddly; precisely which other word or words in the remainder of the sentence does "concededly" modify? And who, exactly, is making the implied concession? Would anyone except the Court itself necessarily go along with the statement that follows the adverb? Yet, the strong impression on the reader is that the point is too clear to abide further analysis and that even the losing litigant would agree with it.

Such a word, with its potential for effective and clever manipulation of the casual reader of the opinion, is likely to be a favorite of writers like Justice Rehnquist, and research reveals this to be true. Over the past 60 years or so (as far back as *Lexis* can search), Supreme Court Justices have used the word in 686 cases. Of these, 189 arose during Justice Rehnquist's tenure on the bench. Out of these 189 cases, Justice Rehnquist authored the majority opinion in 26 and either a concurring or dissenting opinion in 60 others. In the 26 cases for which he authored the majority view, there are 41 actual usages of the word "concededly"; 28 are by Justice Rehnquist and 13 by either concurring or dissenting opinions. In *Rummel*, and of course, *Paul*, he uses the word thrice and twice, respectively; in United States v. Santana, 427 U.S. 38 (1976), and Gooding v. United States, 416 U.S. 430 (1974), he uses it thrice, and in Moose Lodge No. 107 v. Irvis, 407 U.S. 1963 (1972), twice again. In the 60 cases about which he wrote dissents or concurrences, the word is used 82 times, 29 times by Justice Rehnquist and 53 times by other Justices. There are five separate instances in this category of multiple use of the word by Justice Rehnquist in the same opinion.

Thus, of the 244 uses of the word "concededly" by the Supreme Court since Justice Rehnquist has been a member, he has used the word 57 times and others have used it on a mere 187 occasions. Perhaps indicative of the Paul and Rummel variety of usage is the following phrase from his dissent in Duren v. Missouri, 439 U.S. 357, 371 n. (1979): "The reversal of concededly fair convictions returned by concededly impartial juries is, to say the least, an irrational means of vindicating the equal protection rights of those unconstitutionally excluded from jury service." Again, who would make such concessions? Can "fair" and "impartial" rationally be modified by the word "concededly" when the litigants' very claim is based on the view that certain categories of jurors had been unconstitutionally excluded from jury service, thus affecting the makeup of actually constituted juries? Justice Rehnquist's use of the adjective "irrational" here artfully conceals the rhetorically based irrationality of his own argument.

[271] If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under § 1963.

It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and study of our decisions convinces us they do not support the construction urged by respondent. 424 U.S. at 698-99.

[272] See Brooklyn Note, supra note 252, at 147. For a recent use of Shakespeare by Justice Rehnquist, which perhaps indicates his growing sensitivity to the literary aspects of the subjects he adjudicates, see Dames & Moore v. Regan, 101 S. Ct. 2972, 2984 n.7 (1981).

[273] For discussion of this passage, see text accompanying notes 246-49 supra.

[274] P. 113.

[275] 424 U.S. at 698; see note 271 supra.

[276] See notes 258-62 and accompanying text supra.

[277] 424 U.S. at 699 (emphasis added).

[278] B. Cardozo, Law and Literature, in Selected Writings of Benjamin Nathan Cardozo 342 (M. Hall ed. 1947).

[279] See, for example, Cardozo's remarks on Chief Justice Marshall. Id. at 355.

[280] 424 U.S. at 697.

[281] Id.

[282] Id. at 707 ("There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals . . . .").

[283] Id. at 698-99.

[284] See id. at 699; text accompanying note 277 supra.

[285] Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law . . . .

In *Greenwood v. Peacock*, 384 U.S. 808 (1966) . . . , the Court said that "[i]t is worth contemplating what the result would be if the strained interpretation of § 1443 (1) urged by the individual petitioners were to prevail." *Id.*, at 832. We, too, pause to consider the result should respondent's interpretation of § 1983 and of the Fourteenth Amendment be accepted. . . .

. . . And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983. 424 U.S. at 698.

[286] The second premise upon which the result reached by the Court of Appeals could be rested—that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law—is equally untenable. Id. at 701. "There is undoubtedly language in *Constantineau*, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals . . . ." Id. at 707.

[287] Justice Rehnquist quotes Justice Douglas' opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 175 (1951) (Douglas, J., concurring), a case involving the validity of the Attorney General's designating certain organizations as "Communist" on a list he gave to the Civil Service Commission: "Mr. Justice Douglas, who likewise concluded that petitioners had stated a claim, observed in his separate opinion: 'This is not an instance of name calling by public officials. This is a determination of status—a proceeding to ascertain whether the organization is or is not "subversive."' " 424 U.S. at 703. This is one of a long series of references to precedents designed to show that, contrary to the Sixth Circuit's opinion, mere defamation by a state official as opposed, *e.g.*, to defamation that affects legal status) does not violate the fourteenth amendment. See id. at 701-10; note 288 infra.

[288] The last paragraph of the quotation could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [precedent cases]. . . . We should not read this language as significantly broadening those holdings without in any way adverting to the fact if there is any other possible interpretation of Constantineau's language. We believe there is. 424 U.S. at 708.

[289] Id. at 701, 705, 709.

[290] See, e.g., Shapiro, supra note 249; Brooklyn Note, supra note 252; The Supreme Court, 1975 Term, supra note 252, all of which are critical of at least one of the readings of the precedents offered by Justice Rehnquist.

[291] B. Cardozo, Law and Literature, supra note 278, at 352, Cardozo continues: "The groupings of fact and argument and illustration so as to produce a cumulative and mass effect; these are the things, after all, that count above all others." Id.; see Weisberg, Literature and Cardozo, supra note 4, at 312-15.

[292] 424 U.S. at 694-97.

[293] See text accompanying notes 254-62 supra.

[294] 424 U.S. at 697-99.

[295] See id. at 695-96.

[296] Id. (Davis should have sued for defamation in Kentucky state court); see text accompanying notes 264-70 supra.

[297] 424 U.S. at 698 (Justice Rehnquist's "parade of horribles"), see text accompanying notes 271-77 supra.

[298] "It is hard to perceive any logical stopping place to [Davis'] line of reasoning." 424 U.S. at 698-99.

[299] Id. at 699; see text accompanying note 302 infra.

[300] Thus, for example, in presenting the "plain homicide" theory to the drumhead court, see text accompanying notes 193-99 supra, Vere says, "No, to the people the foretopman's deed, however it be worded in the announcement, will be plain homicide. . . ." P. 112. In the tradition of manipulative communicators, Vere state precisely the opposite of what he means. See note 248 supra.

[301] See text accompanying notes 269, 277 supra.

[302] 424 U.S. at 699. This phrase is rendered particularly effective by its juxtaposition with the preceding infinitive "to learn": "We think it would come as a great surprise to those who drafted and shepherded the adoption of . . . [the fourteenth] Amendment to learn that . . . ["every legally cognizable injury which may have been inflicted by a state official acting 'under color of law' "]" violates that Amendment. Id.

[303] Enjambement, a poetic term, means the running over of a syntactical sentence from one verse to another so that closely related words fall on different lines. Justice Rehnquist merges here the related idea of "no stopping place" to the court of appeals' reasoning, and runs the relation from part I to part II.

[304] B. Cardozo, Law and Literature, supra note 278, at 342. Cardozo wrote: "It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative groping towards the inductive apprehension of a truth imperfectly discerned." Id.

[305] P. 111.

[306] The first is that the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims. The second premise is that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from the infliction by the same official of harm or injury to other interests protected by state law, so that an injury to reputation is actionable under § 1983 and the Fourteenth Amendment even if other such harms are not. 424 U.S. at 699.

[307] See Davis v. Paul, 505 F.2d 1180, 1182-84 (6th Cir. 1974), rev'd 424 U.S. 693 (1976).

[308] See section II, B, 3 supra; text accompanying notes 247-49 supra.

[309] 400 U.S. 433 (1971).

[310] Id. at 436.

[311] 408 U.S. 564 (1972).

[312] Id. at 573 (citing *Constantineau*, 400 U.S. at 437).

[313] See note 252 supra.

[314] Karl Llewellyn once asserted that "a graceful structure of doctrine can intoxicate. . . . But if it does not serve sense, it remains bad legal esthetics." Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224, 249 (1942).

[315] 424 U.S. at 709.

[316] Id. at 709-10 (quoting Roth, 408 U.S. at 573 (emphasis and ellipsis by Paul Court)).

[317] Id. at 710.

[318] 408 U.S. at 573.

[319] See H.L.A. Hart, The Concept of Law 200 (1961).

[320] P. 92. The context of this remark, from chapter 18 of the story, has Claggart unctuously and eleverly unfolding his lie about Billy's alleged disloyalty. See text accompanying notes 53-54 supra. During the same conversation, Vere prevents Claggart from mentioning the Nore mutiny, shouting "Never mind that!" P. 93. The scene stands as a fine example of the tension arising when two considerate communicators confront each other.

[321] C. Dickens, Great Expectations 442 (Signet ed. 1963) (London 1861). The reference here is to the

brilliant chapter 51 conversation between Pip, Jaggers, and Wemmick about Estella's parentage.

[323] J. Barth, The Floating Opera 92 (Bantam ed. 1967). The protagonist of the story, which was written in 1956, is an estates lawyer. The reference here is to a verbally gifted lawyer's argument before a probate judge.

[324] 424 U.S. at 711-12.

[325] See, e.g., The Supreme Court, 1975 Term, supra note 252, at 90-102. The author wrote: Justice Rehnquist's opinion in Paul v. Davis raises serious questions as to the continued protection of . . . "core" interests [like "liberty" and "property"]. In determining that due process offers no procedural safeguards against injury to a person's reputation, the Court departed from a growing line of its own decisions that appeared to find reputation to be a protect interest independent of state authorization. Id. at 92-93.

[326] See 424 U.S. at 699-701 (part II, section A of the opinion).

[327] The off-handed treatment of the privacy aspect of Davis' claim in part IV of the opinion, id. at 712-13, is beyond the scope of our treatment here.

[328] See p. 102; text accompanying notes 102-04 supra.

[329] P. 76.

[330] See text accompanying notes 240-46 supra.

[331] 424 U.S. at 712.

[332] Id. at 701.

[333] See, e.g., Shapiro, supra note 249; Brooklyn Note, supra note 252. The Supreme Court, 1975 Term, supra note 252. Perhaps the best of these in dealing with the line of precedent cases interpreted by Justice Rehnquist is the Brooklyn Note, supra, at 152-60.

[334] *Paul v. Davis* has not been, in the words of the hopeful dissenting opinion, a "short-lived aberration," 424 U.S. at 735 (Brennan, J., dissenting); it has been followed, see, e.g., Bishop v. Wood, 426 U.S. 341, 348-50 (1975).

[335] The next section explores Vere's motives for hanging Billy. We cannot now analyze the goals for which Justice Rehnquist deploys his narrative gifts. Other commentators have noted that he seems to bring a particular personal goal (or "judicial philosophy") to all cases: the reduction of the authority of the federal courts. See, e.g., Shapiro, supra note 249, at 293-99.

[336] P. 44.

[337] P. 95.

[338] Id. Critics who stretch Billy's "simplicity" into outright stupidity appear to disregard such elements as this—Vere's evident respect for Billy's responsible seamanship.

[339] P. 86; see text accompanying notes 234-35 supra.

[340] P. 86.

[341] See text accompanying notes 44-46 supra.

[342] P. 59.

[343] As is each of Melville's invocations of Nelson's name, this one is historically accurate. See 1 A. Mahan, The Life of Nelson: The Embodiment of the Sea Power of Great Britain 289-91 (1897).

[344] This theme, of course, is no stranger to modern literature. It goes far toward explaining the attraction of novelists to the law as a theme. Writers like Melville see in lawyers and legal aniaysis a reflection of their own proclivity toward complexity, sometimes at the expense of simpler people or ideas. See, e.g., Weisberg, Comparative Law, supra, note 6, for further remarks about this aspect of the law-literature relationship; see also note 224 supra.

[345] P. 76; see pp. 96, 112.

[346] P. 76.

[347] P. 60.

[348] P. 93.

[349] P. 103. On Vere's predilection for secrecy, see text accompanying notes 137-40 supra. Vere breaches naval procedures by holding Billy's trial in secret.

[350] See text accompanying notes 47-51 supra.

[351] P. 72.

[352] See pp. 71, 85.

[353] For a fascinating and highly relevant study of clinical resentment (of the type peculiarly experienced by Claggart and, in our view, Vere), see M. Scheler, Ressentiment (W. Holdheim trans, 1961). Max Scheler, a student of Nietzsche's at the end of the nineteenth century, agreed with his teacher that "ressentiment" was the dominant spiritual and sociological malaise of modern western cultures. Some of his best examples are taken from literary art, though he did not know Melville or (of course) Billy Budd. Sea text accompanying note 374 infra.

[353] P. 73.

[354] See note 240 supra.

[355] P. 44.

[356] P. 43.

[357] P. 58.

[358] P. 63.

[359] P. 58.

[360] See text accompanying note 37 supra.

[361] The mode of the literary artist himself, Vere's "forms, measured forms" during and after the trial make of him a clear "author-figure." Whatever criticism narratively flows to Vere thus implicitly seeks its true destination in Melville and all similarly situated, highly complex narrative artists. "Parallelism" works to effects, therefore, on the highest literary meaning of the tale: just as the descriptions of Claggart find their significance in Vere, so those of Vere achieve true meaning when applied to Melville himself.

[362] P. 57.

[363] The description of Nelson's ship here, together with the elaborate allusion to Nelson's act of writing and self-adornment at Trafalgar, p. 58, clearly set him in opposition, aesthetically, to Vere and, implicitly, to Melville. See note 361 supra. Not all art, Melville courageously admits, must be of the Vere-Melville (ironic, deceptive, formalistic, covert, anti-heroic) variety; the merging of art and life (or "action") in a figure like Nelson (or, say, Homer) points up the possibility of a renewal of a more overt, life-affirming aesthetic. Melville's self-indictment implicates most modern literary art as of the Vere variety: repressed, overly verbal, and essentially life-denying.

[364] See pp. 114-15.

[365] See pp. 116-17.

[366] The words "closeted" (thrice), "concealed," "seldom . . . revealed," "privacy," "covers," "absence," "blotted," "shadows," "refrained," and "tacit" help cast this spell. See pp. 114-17.

[367] See Billy's "screened," "refined," and "obscured" interview in the ship's "shrouds" with the stranger who tempts him with the mutiny plot, pp. 81-82; see text accompanying note 52 supra; and his "closeted" meeting in the "decks below" with Claggart which, of course, leads to the fatal blow, see pp. 97-98.

In addition, the narrator uses no fewer than 15 negative words or phrases in the brief text discussing Vere's final interview with Billy, and his explanation to the crew. See pp. 116-17.

To speculate a bit in this vein, might not Vere, that master communicator, have used his interview with Billy to advise the always-obedient lad to intone "God bless Captain Vere!," p. 123, at the moment of his death? What better way to complete the brilliantly scripted scenario?

[368] P. 129.

[369] Id.6

[370] See note 80 supra.

[371] P. 80.

[372] P. 76.

[373] H. Melville, Mobby Dick 542 (H. Hayford & H. Parker eds. 1967) (New York 1851).

[374] This insight differs from that of the so-called "realists," e.g., J. Frank, Law and the Modern Mind (1930); Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930), not only in its concomitant stress on the importance of language in law, but also in its recognition that the entirety of a judge's innate value system comes to the fore (and not what he happened to eat for breakfast) when he makes a decision. See note 218 supra. Melville's story leads us less to a nihilistic sense of total arbitrariness in the law than to an ordered inquiry into the predominant values of our own culture, because these, more than pure logic or any ephemeral emotion, are likely to motivate adjudicatory acts.

[375] Cardozo makes a similar point. See B. Cardozo, The Nature of the Judicial Process 35-36 (1921).

[376] Cardozo proceeds to observe that more cases than we usually think can be decided either way. See id. at 40.

[377] Sometimes a judge may imply that acting his conscience is mandated not so much by the law as by a professional sense of what it means to be a judge. A more benign view of Vere might place him in this category. See note 74 supra; see also D. Richards, supra note 11 at 14-15; text accompanying notes 384-86 supra. But is it really the essential function of a judge to strive to divorce his actions from his conscience?

[378] D. Richards, supra note 11, at 13.

[379] Id. at 12.

[380] The literary and legal bibliography on this point would form the basis of an entirely separate, book length-work. It must suffice here to call attention again to James B. White's *The Legal Imagination*, supra note 4, particularly the section on "The Lawyer as Writer," id. at 3-80, and the sections contrasting the formalism of "rules" with the artistic flexibility of legal language artistry, id. at 232-37, 623-85. As one who reviewed White's book eight years ago, see Weisberg, Book Review, 74 Colum. L. Rev. 327 (1974), I can attest to a personal reaction of still greater appreciation each time I reopen its pages. For other favorable reactions to White in the context of recent books furthering the discourse on language and its relationship to legal formalism, see M. Ball, supra note 4, at 128-36; J. Cueto-Rua, Judicial Methods of Interpretation of the Law 31 n.10, 276-77 (1981).

[381] For the sophisticated positivist position, see H.L.A. Hart, The Concept of Law 181-207 (1961). Prominent critics include R. Dworkin, Taking Rights Seriously 22-45, 81-130 (1977); L. Fuller, The Morality of Law 106-18, 145-57 (1964); D. Richards, The Moral Criticism of Law 31-36 (1977).

[382] See D. Richards, supra note 11, at 13.

[383] See id. at 13-14.

[384] Id. at 14.

[385] Id. at 14-15.

[386] See id. at 2-5, 14-18; see also D. Richards, The Moral Criticism of Law 31-36 (1977).

[387] Although Vere's "honesty," p. 63, is almost excessive when it comes to certain subjects, he is resolutely close-mouthed as to others. One of these subjects is, precisely, the threat of mutiny. When the plotting Claggart, whose insinuating verbosity first annoys Vere ("Be direct, man!" he orders the master-at-arms), begins to speak of mutiny, the following fascinating situation occurs:

"Never mind that!" here peremptorily broke in the superior, his face altering with anger, instinctively divining the ship that the other was about to name, one in which the Nore Mutiny has assumed a singularly tragical character that for a time jeopardized the life of its commander. Under the circumstances he was indignant at the purposed allusion. When the commissioned officers themselves were on all occasions very heedful how they referred to the recent events in the fleet, for a petty officer unnecessarily to allude to them in the presence of his captain, this struck him as a most immodest presumption. Besides, to his quick sense of self-respect it even looked under the circumstances something like an attempt to alarm him. Nor at first was he without some surprise that one who so far as he had hitherto come under his notice had shown considerable tact in his function should in this particular evince such lack of it.

P. 93. Mutiny is a sensitive subject to Vere; when it suits his purpose, "considerateness" rather than "honesty" becomes the operative mode of communication. So it goes during the trial scene itself.

[388] Melville's tale, thus, suggests that the neo-Kantian approach to problems of justice, articulated most comprehensively in J. Rawls, A Theory of Justice 251-57 (1971), and relied on by, among others, Professors Richards, see D. Richards, The Moral Criticism of Law 44-49 (1977); D. Richards, supra note 11, at 2-5, and Dworkin, see R. Dworkin, Taking Rights Seriously (1977), carves out only a small section of the complex fullness of adjudicatory behavior. "There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy." W. Shakespeare, Hamlet, Act I, Scene v (G. Kittredge ed. 1939) (1st Quarto London 1603). Let us move to appreciate those "things," for, like it or not, they are ours.

[389] We need to recall that the text of the story is still somewhat in doubt, but there is considerable support for Hayford and Sealts' conclusion that Melville did not intend the "crisis in Christendom" preface to be in the final version of the tale. For our purposes, it suffices that Melville's words (superannuated or not) and the text as it was ultimately organized are in essential harmony that Christian and other institutional values of the nineteenth century were in a state of transition and even crisis. See Hayford & Sealts, supra note 7, at 18-20, for the textual analysis that led them to delete this and other passages; see also note 181 supra.

[390] See Hayford & Sealts, supra note 7, at 2-3.

[391] For sections of the present analysis touching on the implications of the story for institutions besides law, see notes 9, 48, 205, 224, 343, 352, 361, 369 and accompanying text supra.

[392] See L. Strauss, supra note 205, at 25-37.

[893] Id. at 24. "Persecution, then, gives rise to a peculiar technique of writing, and therewith to a peculiar type of literature, in which the truth about all crucial things is presented exclusively between the lines. That literature is addressed, not to all readers, but to trustworthy and intelligent readers only." Id. at 25. Strauss feels that such writers as Plato, Aristotle, Maimonides, Descartes, Hobbes, Locke, Rousseau, and Kant, among others that he deals with, "witnessed or suffered . . . a kind of persecution which was more tangible than social ostracism." Id. at 33. They wrote what Strauss goes on to call "exoteric" books, namely, books that contain "two teachings: a popular teaching of an edifying character, which is in the foreground; and a philosophic teaching concerning the most important subject, which is indicated only between the lines." Id. at 36.

[894] I do not use the word "gospels" casually. (Neither would Melville, who deleted it from his final version in at least one key place, see Hayford & Sealts, supra note 7, at 5.) The *News from the Mediterranean* is nothing other than the Gospels, and its way of handling reality is meant to reflect the mode of the Gospel writers. That a character with the initials J.C. becomes the hero of both is not coincidental.

[895] The present writer is concluding a book-length manuscript called "Justice's End: Legal Themes in the Modern Novel," in which *Billy Budd, Sailor,* of course, plays a major role. Other texts analyzed in that forum are J. Barth, The Floating Opera (1956); A. Camus, The Fall (J. O'Brien trans. 1957); C. Dickens, Great Expectations (London 1861); A. Camus, The Fall (J. O'Brien trans. 1957); C. Dickens, Great Expectations (London 1861); F. Dostoevski, The Brothers Karamazov (C. Garnett trans. 1937); F. Dostoevski, Crime and Punishment (J. Coulson trans. 1967) (St. Petersburg 1866); W. Faulkner, Intruder in the Dust (1948); B. Malamud, The Fixer (1966); M. Twain, Pudd'nhead Wilson (1894).

[896] Llewellyn, On the Good, the True, the Beautiful, in Law, 9 U. Chi. L. Rev. 224, 249 (1942).

Mr. BIDEN. This author goes through Melville's article on Billy Budd.

Billy Budd was basically framed. Billy Budd was caught up and, in effect, hung on legal technicalities. So what this author does, the author of this article, what Richard Weisberg does, is to go through and show how just as Melville shows how language can be abused so as to ruin individuals and bring about injustice. He, long before Justice Rehnquist now—and no one ever thought he would be named as Chief Justice—takes Rehnquist's decisions to show how Rehnquist does the same thing.

I spoke earlier about this elegant use of language to reach what I believe to be ridiculous conclusions, how he uses language to arrive at a position that otherwise would not be justifiable.

He said, and I think it is a perfect description of how Justice Rehnquist works:

> Justice Rehnquist's opinion is a brilliant contemporary example of narrative prose in the service of the adjudicator's unspoken desires.
>
> The adjudicator's unspoken desires.

I believe if you have gone through Justice Rehnquist's cases, it becomes abundantly clear that here is a man who clearly knows the decision he wishes to reach based upon his desires and then searches the law, and his elegant use of language justify those decisions, as opposed to what I believe Justice Scalia will be, a man with conservative views, comes to the law, comes to the case, not seeking to impose his views but to adjudicate the law with an open mind.

Let us talk discrimination for a minute.

I mentioned before that the way in which the 14th amendment is interpreted and applied varies based upon whether or not it is being applied to race discrimination or whether it is being applied to sex discrimination.

In order to find discrimination under the 14th amendment, it is much easier to find it in the case of race discrimination and the way the Court interprets it, than it is to find it in cases of sex descrimination.

And there is a distinction, I think an unwarranted distinction but a distinction made. And where it relates to discrimination based on race, the Court has ruled that the equal protection clause of the 14th amendment requires that if the State is going to pass a law discriminating, that racially discriminatory action is subject to a strict and rigorous scrutiny by the Court to determine whether or not the discriminatory practices serve a compelling governmental interest. If it does not pass a strict scrutiny demonstrating that there is some compelling Government interest in descriminating, then it is discriminatory and unconstitutional.

□ 1840

Now, in the cases relating to women, it is a different test, particularly articulated by Justice Rehnquist in Frontiero and Craig versus Boran cases where he says that the issue before the Court in those cases in 1970 was whether sexually discriminatory actions are also subject to this rigorous and strict scrutiny, this high standard. But in the two cases, the Court held that sexual discriminatory practices to be lawful must have only an important governmental interest and be substantially related to the obtainment of that interest.

In other words, it does not have to be a compelling reason to have a law, just it be important. One of those cases involved allowing men to drink at one age and women to drink at another age, and another one of those cases related to whether or not a serviceman could claim a wife automatically as a dependent for purposes of benefits but a servicewoman could not claim a husband automatically.

Justice Rehnquist, it seems to me, through reading his opinions, based on his interpretation of the constitutional protections accorded blacks under the 14th amendment, says that any law or regulation that had a purpose of discrimining on the basis of race would be subject to the strict scrutiny, the most rigorous test for judging constitutionality of such measures. However, it is also clear, if you read him, that the 14th amendment was only intended to correct the injustices of slavery and consequently the protection, equal protection clause of the 14th amendment by his interpretation would not be applicable to other kinds of discrimination, such as those based on race, alienage, or handicap. If you look at his rationale, Justice Brennan in the Frontiero case, writing for an 8-1 majority, him being the only one in the minority, held that classification based upon sex like classification based on race, alienage and national origin, are inherently suspect and therefore must be subject to close scrutiny.

Rehnquist, however, in his sole dissent sided with the district court and said all you have to find is a rational basis for the discrimination, for the regulation in this case which automatically allowed servicemen to claim wives as dependents but allowed servicewomen to claim husbands as dependents only if she provided half the support.

There was no test for support for whether or not a man could claim the woman but he allowed there to be a test whether or not the colonel, the woman who is the colonel in the Air Force could claim her husband—the only one who reasoned that. He goes out and he picks the lowest standard. He said if there is any rational basis for the Government arriving at this position, it is constitutional.

Well, I see my friend from Massachusetts is here, and I will conclude for the moment by saying that Justice Rehnquist in fact uses, as was stated in the law review article, narrative prose in the service of his unspoken desires time and time and time again. That is not an open mind. That is not what Justices should do. I will come back to try to further make that case. In the meantime I yield to my colleague from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, we have had the opportunity to debate this nomination for several days. I have been impressed by the nature of the debate and the discusion. I regret very much that it has been the decision of the Senate to terminate the debate.

I understand full well that within a very short period of time the Senate will cast a final vote on the nomination of Justice Rehnquist to be Chief Justice. I intend to vote in opposition.

In the final moments before the vote I would like to summarize my own reasons for that and also to respond to at least some of the arguments in support of the nominee that have been advanced in the recent debate.

The Chief Justice of the United States is the highest symbol of America's commitment to the Constitution and the Bill of Rights. He is the ulti-

mate protector of our freedoms and our system of equal justice under law.

The record on Mr. Rehnquist compiled in the hearings before the Judiciary Committee contains overwhelming and shocking evidence of his intense lifelong hostility as lawyer, public official, and member of the Supreme Court to claims for racial justice. His record is equally unsatisfactory on other great issues that are fundamental to our system of justice.

Mr. Rehnquist is wrong on race, wrong on equal rights for women, wrong on the Bill or Rights, wrong on separation of church and state, wrong on the most basic individual freedoms protected by the Constitution. And he is not just wrong on this issues; he is an extremist. His views place him far outside the mainstream of debate about the Constitution. He is too extreme to be Chief Justice.

From his memo supporting Plessy versus Ferguson at the beginning of his career, to his leadership in disenfranchising minority voters under the Republican ballot security program, to his proposal of a constitutional amendment to legalize segregated schools, to his appalling record on civil rights cases on the Court, Mr. Rehnquist has consistently opposed civil rights.

This morning, I received a letter from Prof. Walter Dellinger of Duke University, a highly respected constitutional scholar. Commenting on Rehnquist's proposal in 1970 of a constitutional amendment to legalize segregated schools, Professor Dellinger states that the amendment endorsed "a radical and sweeping rollback of desegregation" and "an acceptance of racial segregation going far beyond that which should be acceptable for one holding a position that symbolizes justice in America."

Defenders of Justice Rehnquist have argued that his support for the Brown versus Board of Education decision is illustrated by the fact that Justice Rehnquist has relied on the Brown decision in 34 cases since he has been on the Surpreme Court. A review of those cases indicates that Justice Rehnquist has never relied on Brown to uphold the claims of a civil rights plaintiff.

Of the 34 cases, 4 actually contain no reference to Brown. Twenty-two were opinions written by other members of the Court and tell us little or nothing of Mr. Rehnquist's views about the Brown decision. Indeed, some of these opinions also cite decisions which Justice Rehnquist believes were wrongly decided, including cases upholding affirmative action and the right to abortion, and denying the constitutionality of capital punishment.

These citations obviously do not mean that Justice Rehnquist now favors affirmative action, abortion rights, and the abolition of capital punishment—and it is equally clear that the references to Brown do not signal any support for civil rights.

Also, among the propositions that Brown is cited for in these decisions are the facts that public education is an important local government function, that Government funding for public education began about a century ago, and that compulsory public education became universal in 1918.

The eight remaining decisions citing Brown were written by Justice Rehnquist, but only three cite the central holding of Brown—and they do so only to distinguish Brown and rule against the plaintiffs.

□ 1850

In sum, the number of instances in which Justice Rehnquist relied on Brown to sustain a claim of racial discrimination is zero. Justice Rehnquist's appalling record on race and his relentless hostility to civil rights remain unrefuted.

In addition, it is obvious to all of us that Mr. Rehnquist was not candid with the committee on the numerous controversial incidents that have marred his confirmation proceeding. For example, he denied that he harassed and intimidated voters in Arizona, but the evidence is overwhelming that he did.

Finally, Justice Rehnquist's conduct on the Court indicates a serious ethical lapse. He was so intent on sustaining his totalitarian views about the right of the Government to spy on its own citizens that he violated the basic rules of judicial ethics that no person should be a judge in his own cause. He sat as a member of the Supreme Court and cast the deciding vote in the very case that upheld the shocking policy he had helped to make—and then wrote a deceptive memorandum that covered up his breach of ethics.

These issues of truthfulness and ethics aside, Justice Rehnquist might have made a brilliant 19th century Chief Justice. But brilliance of judicial intellect in the service of racism and injustice is no virtue in our times—and no qualification for the high office of Chief Justice of the United States.

I regret that the Senate has chosen to end debate on this nomination. But I hope that a majority of the Senate will now see fit to vote against Mr. Rehnquist's confirmation as Chief Justice of the United States—and that we will have the courage to display a sufficient respect for the Constitution to ask President Reagan, with all respect, to try again.

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.

□ 1900

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

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

□ 1910

ORDER OF PROCEDURE

Mr. DOLE. Mr. President, let me indicate that both sides have been trying to see if we can agree that we will have two votes at 9 o'clock, one on Justice Rehnquist to become Chief Justice and one on Judge Scalia to become an Associate Justice of the Supreme Court.

A question has been raised—and we are checking it now—whether or not it would be appropriate to vote on Judge Scalia tonight because there would not be an Associate Justice vacancy until Justice Rehnquist has been sworn in as Chief Justice. So we are checking that with some of our legal scholars, if we can find them. We should have that information in the next 30 minutes.

RECESS UNTIL 7:45 P.M.

Mr. DOLE. Mr. President, since there does not seem to be too many people clamoring to speak, ask unanimous consent that we stand in recess until 7:45 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered

Thereupon, at 7:12 p.m., the Senate recessed until 7:45 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer (Mr. GRAMM).

□ 1945

The PRESIDING OFFICER. The Senate will come to order.

The Chair in his capacity as a Senator from Texas suggests the absence of a quorum. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

□ 1950

Mr. DOLE. Mr. President, I as unanimous consent for the order for the quorum call be rescinded.

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

Mr. DOLE. Mr. President, the pending business is the Rehnquist nomination?

The PRESIDING OFFICER. It is.

Mr. LAXALT. Mr. President, I rise in strong support of the nomination of William Rehnquist to be Chief Justice of the United States. William Rehnquist is superbly qualified for this most important position by virtue of his character, his temperament, his intelligence and competence, and his sound legal judgment.

As we are all acutely aware, the decision to confirm a Chief Justice is one to be taken with the greatest care and

with reference to as much information and knowledge about the nominee as possible. In the case of Justice Rehnquist, this task has been relatively simple. The President, the Senate, and the American people have at hand 15 years of judicial opinions by Justice Rehnquist and a large amount of additional evidence relating to his years of public service and private law practice before he joined the Court.

Whether or not one agrees with his legal judgments throughout the years, it is difficult to disagree with the unanimous opinion of the American Bar Association committee that his legal analysis and writing ability are of the "highest quality" and that he meets, in general, "the highest standards of professional competence, judicial temperament, and integrity."

In short, I believe that President Reagan made a truly outstanding selection.

Still, as one would expect on a question of this magnitude, there is opposition to the nomination. The opposition, as I see it, rests on allegations that attack both Justice Rehnquist's integrity and his fitness to render decisions in civil rights cases.

Justice Rehnquist's integrity is called into question on two counts. The first relates to his work for the Republican Party during the 1960's in Phoenix. The second challenges his decision not to recuse himself in 1972 from participating in the case of Laird versus Tatum. Let me comment briefly on each of these.

THE VOTER HARASSMENT CHARGES

The committee, in 1971 and again this year, heard from individuals who were active in party politics and in election day activities in Phoenix during the elections of 1960, 1962, and 1964. Five witnesses testified under oath either that they personally saw Bill Rehnquist bully and intimidate voters, or that they were morally certain that he did so. While the testimony of the five evidently did not refer to the same single incident, the witnesses did agree that the events in question took place at polling places in predominantly minority sections of Phoenix on the election days of 1960, 1962, and 1964.

For his part, Justice Rehnquist, in 1971 and again this year, denied ever harassing or intimidating voters, either as an official challenge or in any other capacity, at any time. His denial is firm and without qualification. Justice Rehnquist did testify that during the elections of 1960, 1962, and 1964 he participated in Republican Party politics as a legal adviser to the party and to the official Republican challengers in the Phoenix area. In this capacity, he did, in 1960 and 1962, have occasion to visit several Phoenix polling places to resolve disputes and other problems involving the official Republican challengers assigned to those locations.

The question, then, is who do you believe? Or, rather, whose memories of 22, 24, or 26 years ago do you believe: the five witnesses—four of whom were active Democrats—who accuse the Justice of intimidation? Or the six witnesses—four of whom were active Republicans and one an active Democrat—who defend him?

In my opinion, all of the witnesses—partisan and not partisan—told the committee the truth to the best of their recollection. But I believe that Senator LEAHY is correct when he says that the evidence here is not "clear and convincing." And Senator MATHIAS, one of the sages of the Senate, also wisely remarked that the testimony "probably tells us more about the uncertainties of human memory than about the nominee's veracity and fitness for office."

For my part, after observing Justice Rehnquist over the years and during the 2 days of cross-examination by the Judiciary Committee, I must admit that I have a difficult time accepting the image of "Rambo Rehnquist" that the accusing witnesses portray. The conduct described by these witnesses is totally inconsistent with the scholarly, soft-spoken, gentle character that we all witnessed during the hearing and that is so well known to Justice Rehnquist's colleagues on the Court. I simply cannot believe that he bullied any voters at any time anywhere and, in particular, not in Phoenix at the times in question.

LAIRD VERSUS TATUM

The issue in the Laird versus Tatum case is the extent of the Justice's personal knowledge of the facts in dispute in that case. The statute at that time had as its principal purpose, I believe, the requirement that judges who have personal knowledge of the disputed facts or who are otherwise too involved in the actions giving rise to the case to be able to render a fair judgment must disqualify themselves from sitting in the case.

Recusation problems, in close cases, have always been among the most difficult to resolve. Of necessity the judge in question must decide whether his participation will appear so inappropriate that the legitimacy of the decision will be called into question. When the judge in question is a Supreme Court Justice, the problem is intensified because the Court, as the tribunal of last resort, is obligated to render judgments in the cases of national importance that it accepts for decision.

Laird versus Tatum was such a case. And Justice Rehnquist's particular situation called for one of those close, difficult personal and legal decisions that inevitably do not satisfy everyone with an interest in the case.

I believe that Justice Rehnquist's decision to participate in Laird versus Tatum was entirely appropriate. His sensitivity to the issues confronting him was reflected in his long, carefully reasoned memorandum. In it, he demonstrated that the terms of the applicable statute did not expressly require him to sit out the case. The question that ultimately confronted him, then, was whether or not his participation violated the purpose of the statute—namely, to disqualify himself if he had been too involved in the actions giving rise to the legal action.

The Justice's critics argue on this point that, as an Assistant Attorney General in charge of the Office in the Department of Justice working on domestic surveillance policy at that time, William Rehnquist must have had personal, actual knowledge sufficient to require his disqualification. But in light of all of the facts that were known at the time and that have been discovered since 1972, that conclusion simply cannot be maintained.

As head of the Office of Legal Counsel, Justice Rehnquist in one sense was, of course, responsible for what went on in the that Office and for what was in the documents he signed and the testimony he gave. This is the very nature of "official responsibility." All of us here know, however, that those "officially responsible" seldom do the actual research and writing of the documents and testimony attributed to them. I would venture to say that some of us who are taking part in this debate on the nomination may not have even written their own speeches.

Very often, public officials do not do the actual negotiating and even the policy and decisionmaking for which their offices are responsible. In short, it is difficult for observers of public officials to determine just what the officials personally know about a given subject, and it is even more difficult sometimes for the official himself to sort it out.

In my opinion, Justice Rehnquist, in his lengthy memorandum, dealt with the recusation question honestly and appropriately. His statement reflects the same careful and conscientious deliberation that we have come to expect from this man. In other cases during his tenure, he has recused himself from cases when the situation called for it. I cannot believe that he was so bent on deciding the Laird case that he intentionally violated the legal and ethical standards in question. That type of conduct just does not fit the character of this man as I know him.

The Phoenix election activities and the Laird case, and also to a lesser extent the Rehnquist memo to Justice Jackson in the Brown case, serve as the grounds for the principal attacks on Justice Rehnquist's integrity. From

the opponents' point of view, they are safe arguments: by their very nature they cannot be absolutely refuted. There are no daylong videotapes of Bill Rehnquist capturing his every action on the election days of 1960, 1962, and 1964. And there is no absolute way of determining the extent of his actual knowledge of the disputed facts in the Laird versus Tatum case in the early 1970's. We must simply consider what we know and then decide for ourselves—by no means an easy determination—what is probably the truth.

In both cases, I have no doubts that the Justice is telling the truth and that his recollection of the events in question is accurate.

THE JACKSON MEMO

The nominee's opponents call into question his ability to render fair and just decisions in "civil rights" cases for two reasons. The first is the views expressed in his memo to Justice Jackson on the school desegregation case in 1952. The second is his allegedly extreme and doctrinaire position on civil rights issues before and after he became a Supreme Court Justice. I believe that I can respond to each of these charges more briefly than I did to the first two issues.

The "Jackson memo" is also used by the critics to attack Justice Rehnquist's integrity. His opponents argue that he has not responded candidly to questions raised in 1971 and again this year about the purpose of the memo. The critics say that, first, the memo was clearly intended to persuade Justice Jackson to adopt the author's prosegregationist point of view. Second, the opponents say that Justice Rehnquist says that the memo represented Justice Jackson's final, considered position on the subject.

I do not believe that either of these statements is correct.

Let us be clear about the intended purpose of the memo as explained by Justice Rehnquist and his fellow clerk, Donald Cronson. From my reading of the testimony, the Rehnquist memo and the Cronson memo were intended by their authors to serve as alternative "talking points," representing the position yet to be selected by Justice Jackson on the Brown case and to be presented by Jackson to the members of the Supreme Court when the Court discussed the case.

The memos were not intended to represent the actual views of Justice Jackson at the time that they were written: that does not make sense in light of the contrary positions taken in the two memos. Nor, I believe, were the memos primarily intended to persuade Justice Jackson to adopt one or the other position.

Rather, the memos were intended to present coherent, logically sound and defensible rationales for either of the two principal legal positions being considered at that time by Justice Jackson in the Brown case. The Justice could use either one, depending on the position he finally chose.

I believe that a close reading of the two memos bears this out. Neither memo contains any explicit statements indicating that the clerks who authored them were addressing Justice Jackson. The general tone of the memos also does not lead the reader to infer that the clerks are writing to their boss. Such an inference is possible, but more plausible is the inference that the memo is to be used by the Justice as a statement to others—a statement that Justice Jackson would doubtless wish to edit and polish, but a statement that did not appear to be exclusively for the eyes of Justice Jackson himself.

Then, too, both memos have similar titles: "A Random Thought on Segregation Cases" and "A Few Express Prejudices on the Segregation Cases." It is not likely that clerks would entitle routine memos in this way.

We can go through each memo with a fine-tooth comb and find phrases and sentences that are consistent with other interpretations of the real purpose of the memos, but I believe that we must also admit that on balance the memos themselves strongly support Justice Rehnquist's account of them.

For those who find the content of the Rehnquist memo appalling, I should note that both memos—the Cronson memo is also quite reserved in its recommendation—reflected the positions taken by many responsible, unprejudiced individuals on one of the most difficult legal questions of that time. We may regret our history, but we cannot alter it.

I believe the Justice when he says that he does not now and did not in 1952 hold segregationist, racist views. I certainly believe that the 1952 memo and Justice Rehnquist's subsequent explanation cast doubt upon neither his fairmindedness nor his integrity.

THE OPINIONS IN "CIVIL RIGHTS CASES"

Finally, I want to address the criticism that is based on Justice Rehnquist's opinions in civil rights decisions over the years. The claim is that William Rehnquist is at the wrong "extreme" in these cases, and it is implied that the right position—the "mainstream" position—is almost always to favor the individual plaintiffs in civil rights cases.

We have already heard references during this debate to the excellent study by the Washington Legal Foundation showing that the Justice is certainly in the "mainstream" of Court opinion in these cases. What I would like to remark upon briefly is the assumption that the side of the plaintiff alleging a violation of his civil rights is presumptively the right side in "civil rights cases."

The term "civil rights cases" conjures up the image of intentional, malicious discrimination against an individual solely because of that individual's race, sex, creed, or national origin. I unconditionally agree—I am sure that all of us unconditionally agree—that such discrimination is bad and illegal and that it should always be opposed by good men and women everywhere.

But "civil rights cases" seldom center on so simple an issue. Civil rights litigation and civil rights jurisprudence over the past few decades have focused instead upon efforts to use civil right statutes and constitutional doctrines in new ways, ways that arguably were never intended by the authors of the statutes and the Framers of the Constitution. Many of these cases trivialize the sound meaning of "civil rights," "equal protection," and "due process." Many other cases present unprecedented legal questions upon which reasonable men of good faith may, and often must, differ. Often the question presented for decision in these cases is implicitly that of whether the courts should correct an alleged wrong by twisting and contorting the legal interpretations of existing statutes or whether the task of justice must be left to Congress and the political process. In short, the plaintiff is not always right: justice is not always on his side.

It is on these types of civil rights questions that Justice Rehnquist has often differed from his colleagues in the past. I should note, however, that his dissents of the past are increasingly becoming the basis of the sound majority decisions of the present, and I see no cause for alarm to anyone in this development.

I have no difficulty whatever in saying that it is just as wrong to call William Rehnquist "weak" on civil rights as it is to call him a bigot. Both suggestions are dead wrong and do injustice to a good man who will become a great Chief Justice.

I have taken some time here to respond to the major charges against the nominee. In conclusion, let me say that our Nation is fortunate indeed to have a nominee of William Rehnquist's caliber. I urge my colleagues to approve the nomination and to allow Justice Rehnquist to take his proper place as "first among equals" on the Court.

Mr. DOLE. Mr. President, we are prepared to complete debate on the Rehnquist nomination. Once that is done, if we can, we will either vote or take up the Scalia nomination and have two votes back to back.

Some question has been raised about whether the Scalia nomination could be voted upon prior to a vacancy occurring of an Associate Justice of the Supreme Court. I am advised that it is not a problem. We now have the

rather lengthy memorandum, which I will not include in the RECORD, but I will deliver it to the distinguished Senator from Delaware for his perusal. We have other material.

Mr. BIDEN. Mr. President, I say to the majority leader, in terms of time, that, to the best of my knowledge, there are only three more Senators who wish to say anything in addition on this nomination. The distinguished Senator from Ohio will shortly be prepared to do so. I have a few more things to say, which will not take long. The Senator from Arizona [Mr. DECONCINI] wishes to speak in support of Justice Rehnquist, and I believe he indicated that he would be prepared to do that somewhere from about 8:20 to 8:30.

I will ask the Senator from Ohio whether he wishes to speak now, and if so, I will withhold my further comments until the Senator from Ohio has finished.

I yield the floor.

Mr. METZENBAUM. Mr. President, we are now coming to that point where the die will be cast and the votes will be counted; and, in all probability, Justice Rehnquist will become Chief Justice of the United States.

To me, it is a very solemn occasion. As a matter of fact, it is a very sad occasion, because I feel very strongly that the responsibility that rests upon our shoulders has not been taken as seriously as it should.

Chief Justice of the United States: A position as powerful as almost any other position in the United States; in some respects coequal with the President of the United States; in some respects even more powerful than the President of the United States.

We are about to confirm a man who some would like to argue should be confirmed because the President has chosen him, and the President won by an overwhelming margin, and therefore, he ought to be confirmed; that it is his political philosophy that is at issue—notwithstanding the fact that some of us have stood on this floor and in the committee and said that is not the issue. If it were, Justice Sandra Day O'Connor would not have been confirmed by a vote of 99 to 0. If it were, Judge Scalia would not be confirmed, as he undoubtedly will be this evening, by a vote equal to that of Justice O'Connor or even by a vote very close to it.

The issue is not that. The issue is, can this man be the leader of this Court? Can he provide that sense of harmonizing and bringing the Court together so that it continues to command the respect it does at this time; or will his confirmation and his sitting as Chief Justice merely change the Court into a political machine where one man will attempt to use his powers in order to further his own politicai philosophy? Is he the kind of man who can take those who are on the Court who disagree with him and try to bring them together, as Chief Justice Burger did in connection with the Brown versus Board of Education decision?

The Chief Justice of the United State ought to be a special person. He ought to be a person whose integrity is beyond question, to whom every person in the United States can look and feel confident that justice will be done by this Chief Justice. But the fact is that there is not a member of a minority in this country, whether that minority be black or Hispanic, who can look to this Chief Justice—if and when he is confirmed—and feel that equal justice under the law will be done.

Look at the record in case after case after case after case. He always winds up in opposition to the rights of the minority.

Look at his actions in connection with the whole issue of Brown versus Board of Education and the Plessy versus Ferguson memo, and, with no exception, Justice Rehnquist is always on the side that is against the minority.

Can the women of this country feel any sense of comfort, when he becomes Chief Justice of the United States? I think not. They have indicated by their public statements heretofore made and by their letters that they are concerned; and they have a right to be concerned, when you read some of the language that he ennunciated when he was discussing the ERA.

There is no problem about whether he is for the ERA or against the ERA. That is not the issue. But when you look at the language he used in connection with that issue, you recognize that there is something about this Justice who thinks that somehow, some way, women in this country are second-class citizens.

The Chief Justice of the United States must have unquestioned integrity, but no person can read the record of this man in his dealings with the U.S. Senate in 1971 and 1976 and come away feeling that he has unquestioned integrity, a Justice who replies to an inquiry from the Senator from Maryland, "I can't recollect, I don't recollect, I can't remember." We were not talking about some specific night, some specific say, some specific hours. We were talking about his own involvement in the preparation of a memo and preparation of a whole position paper, having to do with the question of military surveillance of civilians. He cannot remember whether he was or was not involved and what he said and what he did.

Come now. Come now, Mr. Justice. Do you really want the American people to accept that?

This is the same man about whom so many testified that he was involved in challenging and harassing and intimidating voters, and he makes a total denial. Five people come forward under oath and say they saw him, and he says, "I didn't do it. I wasn't there. It wasn't I."

Come, now, Mr. Justice. Are the American people really expected to believe that?

The evidence is irrefutable. He was there, he did it, and he had a right possibly to do it and in some instances it might have been legal. Certainly it was legal to challenge. It was not legal to intimidate and harass. But he says he does not remember anything at all about what occurred at that time.

The Jackson memo—it has been discussed time and time again, but again we find an instance in which you say what kind of man is this? What kind of a man is it who says in one instance that he agrees with a particular position that the Supreme Court had reached at an earlier time and then some years later he says that was not his position; his position was directly opposite that.

That is what he said in 1971, and then in 1986 he comes before the committee for confirmation and one of the Senators asks him what was his position in 1952, and he says he did not have a position.

Come now, Mr. Justice. Are the American people really expected to believe that?

Then the whole issue with respect to the restrictive covenant, the restrictive covenant. Bad enough to be involved, bad enough not to have raised the issue, bad enough not to have not challenged the situation. Bad enough not to have done something about it. But far worse not to have leveled, not to have stated the facts to the Judiciary Committee when we inquired of him about it. He told us he only learned about the restrictive covenants 3 or 4 days before the hearing when he saw the FBI report. And then lo and behold, the Washington Legal Times writes a story about having talked with his lawyers and having talked with his lawyers they report that the lawyers had advised him in writing about the restrictive covenants concerning restrictions against the Hebrew race.

There is no such thing as the Hebrew race, I might point out, but everybody understands what was intended.

And then what does Justice Rehnquist do? On the very day that the Washington Legal Times reports the story about the two lawyers having said that they had sent him letters in connection with these restrictive covenants in the deed, then and only then does he sit down and write a letter to the chairman of the Judiciary Com-

mittee and say "In rummaging through my papers I find that I was so advised by two attorneys."

He does not say "When I saw that the whole world learned about it in the Washington Legal Times, then and only then did I decide to report the facts to you accurately."

This is a Justice who lost his credibility. This is a Justice who was not candid. This is a Justice who did not tell the facts when he appeared before the committee in 1971 and again in 1986.

And now my colleagues across the aisle are all going to vote for him because President Reagan wants him. I say to you, President Reagan may want him, but I wonder whether your children want him, I wonder whether your grandchildren will want him, I wonder whether or not he will not turn the clock back on all those things that the Constitution has stood for over a period of many years.

The price that will be paid for the political decision that will be made tonight is an insufferable one. The price that will be paid is the highest price that could be possibly paid and yet my colleagues across the aisle have been unwilling to look at the facts, to search the record, to seek out in their own conscience whether this man should or should not be confirmed.

I have talked with some of you and you have indicated, "Well, I may as well go along, there is no smoking gun."

There may be no smoking gun, but the fact is there is a lot of smoke and a lot of fire. There is a lot of problem.

And you are going to pay an awful price. You are going to pay an awful price, either yourselves or your children or your grandchildren.

They are going to have less respect for the Supreme Court of the United States by reason of your action tonight than the people of this country have ever had for the Supreme Court.

The people of this country have respect for the Supreme Court of the United States. I have respect for that Court.

But we are not adding to its luster. We are not adding to its credibility. We are not adding to his stature in this country when we elevate Justice Rehnquist to be Chief Justice.

Nobody questions his intellect. Everyone agrees Justice Rehnquist is smart. There is no argument about that.

Everybody agrees that he has legal training, not enough legal training to remember some of the facts about things that occurred in his lifetime, but he certainly has legal training with respect to the books and the law.

I say to my colleagues that the decision that you are going to arrive at tonight may prove to be the worst vote that you have ever cast since you have been in the U.S. Senate. You may have cast votes having to do with SDI, having to do with defense spending, having to do with human rights, having to do with South Africa, having to do with aid to the Contras and everything else. But there is no more important decision, no more single vote that has greater impact upon the American people and the future of our country than the action which is about to be taken in confirming Justice Rehnquist to be Chief Justice.

I think it is a sad night. I think it is a very sad night. And somehow, some way, I wish that I could get through to those across the aisle and try to shake them up a little bit and say you have a right to vote any way you want. Your vote is your decision. But if you just look at the facts, if you would just search the record, if you would just let your conscience be your guide, instead of your politics, Justice Rehnquist would not be confirmed as Chief Justice of the United States.

I yield the floor.

The PRESIDING OFFICER (Mr. TRIBLE). The Senator from Delaware is recognized.

Mr. BIDEN. Mr. President, you know we are about to vote, and it has been said a number of times to the point I think that maybe people believe it; but it is not true.

And the thing that has been said many times is that, A, the President, under the Constitution, is automatically entitled or near automatically entitled to his or her nominee for the Court. And I find it interesting that everybody who has written about Justice Rehnquist's nomination to the Court by the President has said something to the following effect. All the supporters of the nomination have said: "The President chose Justice Rehnquist because he was a brilliant conservative who shared Ronald Reagan's philosophic point of view on the issues." And everyone automatically says, "Well a President can go and decide that he wants someone and pick them solely on ideology."

□ 2010

President Reagan had a choice of a number of conservatives he could have appointed to the Chief Justice slot, but they made it clear they wanted the most conservative jurist they could find for that slot. And in his choice of all of his other judicial nominees, he said the same thing. And that is his right.

But when any of us raise the issue of whether or not Justice Rehnquist's stretched interpretation of the law, the Constitution as it related to women and blacks and, by the way, individuals against the state, we are told, "Well, we should not look at the ideology of that person." As if to say, the way that is interpreted, the Constitution says that it is all right for the President to be purely ideological in picking his nominee for the Court, but it is not all right for the U.S. Senate to consider the confirmation of a nominee based on how he or she thinks about the issue. Clearly that is not what the Constitution meant.

And the other sort of accepted colloquial wisdom which is not true that is often used around here is that, "Well, not only should the President be able to choose, based on ideological grounds, who should be on the Court and we should just rubber-stamp them, but that the burden is upon those who question whether or not the nominee should sit on the Court to prove beyond a reasonable doubt that the nominee is not qualified."

Well, that is also not true from a legal standpoint. The fact of the matter is that we are voting on someone to be the leader of the third coequal branch of the Government. And to suggest that the Senate has to prove that that person is not qualified—that the burden is on us to prove he is not qualified, rather than the burden being upon the nominee and the proponent of the nominee to prove that they should be on the Court—is like saying that the burden is upon the people of Delaware to prove that I should not be a Senator, rather than the burden being on me to go to my constituency and say: "This is why I think I would be a good representative of this State in the Senate." The burden is on me to do that. The burden is upon the candidate for the President of the United States of America to say, "Let me prove that I should be President."

And yet we act around here like the burden is not upon the nominee for the Court—an equally powerful body. The Court is as powerful and as important as the Congress or as the President. And the burden is on Justice Rehnquist, through his testimony and his record, to prove that he should be named to be the Chief Justice of the United States.

The other notion is we hardly ever reject nominees for the Supreme Court. The first Chief Justice nominee to the Supreme Court of George Washington's was rejected. More people have been rejected by the U.S. Senate who have been nominated to serve on the Supreme Court than for any other—for any other—Presidential appointments. More people have been rejected than for any other nomination over the past 200.

Until today, the highest negative votes for a Supreme Court Justice who was confirmed was in 1971, Justice Rehnquist had 26 people vote against him. In 1930, Charles Evans Hughes had 26 people vote against him. In 1912, Mr. Pitney had 26 people vote against him. And in 1888, Mr. Fuller had 20 people vote against him.

One of the reasons for that is, when it has been clear that such a large number of Senators believe that the nominee was not fit for the post for which he or she was nominated, the nominee had been withdrawn. Because, in fact, it is very, very important that the American people believe that the nominee is all that is required. And when over a third of the U.S. Senate says the person is not qualified, it, at a minimum, casts a shadow upon the ability of the Justice, particularly as Chief Justice, to fulfill the function required.

Mr. President, the time is now at hand for the U.S. Senate to exercise one of its most important constitutional functions and decide whether the President's nominee, William Rehnquist, will be confirmed as the next Chief Justice of the United States. The Senate has considered a nominee for this highest judicial office only 18 times in the history of our Nation; on 4 of those occasions the Senate has rejected the President's nominee. I believe that the facts compel this body to again accept its ultimate responsibility and to reject a fifth Presidential nominee to this highest office.

Before briefly summarizing the facts that, I believe, compel the conclusion that Justice William Rehnquist should not be the next Chief Justice of the United States, I would like to commend my colleagues, on both sides of this issue, for the manner in which this debate has been conducted. During this past week we have had an opportunity to consider some of the most important and sensitive issues to arise under our constitutional form of government. What could be more important than determining the proper roles of the legislature and the executive in shaping the membership of the third branch of government? What could have more significance for our future as a nation than debate over the scope and intent of the equal protection clause of the Constitution? What could be more important than defining the character as characteristics that the next Chief Justice—the very symbol of justice—ought to possess. My colleagues have approached these issues with intelligence, with insight, and with courage. Their performance reflects well on this body as well as upon those who have entrusted us with the task of governing.

During this debate various reasons why William Rehnquist should not be the next Chief Justice of the United States have been advanced. In fact, at times it seems as if there are as many reasons as there are Senators who oppose this nomination. Many Senators have based their decision to oppose this nomination on the poor judgment shown by Justice Rehnquist in his refusal to recuse himself in the case of Laird versus Tatum. Others reach their decision because they question whether Justice Rehnquist was sufficiently forthcoming and candid in his testimony on a number of subjects before the Judiciary Committee. Others have eloquently stated the case that Justice Rehnquist should not be confirmed because of his—to quote the distinguished Senator from Maine, Senator MITCHELL—"total and unremitting hostility toward the rights of women and minorities, especially black Americans, and a deeply troubling willingness to condone, if not support, a segregated society." And others rely on some combination of these and other grounds to reach their conclusion.

All the reasons that compel this Senator to oppose this nomination are contained in the answer to one simple question: Does William Rehnquist have the necessary qualifications and attributes to fulfill the unique symbolic role of Chief Justice of the United States? For me the answer to that question is a clear and unqualified "No." Anyone who reviews the record with an open mind will be compelled to reach the same answer.

During this debate and the proceedings in the Judiciary Committee I have commented extensively on my view of the importance of the symbolic role of the Chief Justice. Let me summarize my position: A Chief Justice not only serves longer than any President, but he or she, along with the other members of the Court, exercise a power limited only by their conscience and principles. The integrity and honesty of the Chief must be beyond doubt if America is to believe in the integrity of the Judiciary. And, the Chief must stand as a metaphor for justice in our society; more than any other individual, The Chief symbolizes the guarantee of "equal justice under law" for all Americans.

The record demonstrates that Justice Rehnquist does not meet the high standards this role requires:

A man whose judgment is so poor and sensitivity to ethical concerns so lacking that he would choose to sit and cast the deciding vote in a case where he had previously offered an opinion as to its proper resolution—a case challenging the validity of a policy he helped to establish does not pass the test.

A man whose testimony at his confirmation hearings led Senators and the public to question his candor and forthrightness does not pass the test.

And a man who has consistently and unremittingly displayed a "hostility toward the rights of women and minorities", a man whose actions have led Members of this body to question his commitment to individual rights and liberties, a man whose confirmation will, as one of my colleagues has stated, "retard, not advance our quest for a truly colorblind society" clearly does not pass the test.

Because William Rehnquist does not pass the test, does not possess the qualities that would allow him to fulfill the important symbolic role of the Chief Justice of the United States, I cannot in good conscience vote to confirm him as the next Chief Justice of the United States. I urge all of my colleagues to consider the record, consider the past week's debate, and consider their own consciences. I trust that if they do so with an open mind, they will join with me in opposing this nomination.

Mr. President, let me summarize, if I may, why I am against Justice Rehnquist.

First of all, Mr. Justice Rehnquist does not, in my opinion, fulfill the necessary requirements to be the Chief Justice of the United States. To be the Chief Justice of the United States of America, one, in my view, has to be able to have demonstrated in a career that they are openminded, that they are not rigid, that they are capable of building a consensus and, even more importantly, capable of recognizing that there are periods in the tenure of every Chief Justice where it is vitally important for the Court and well-being of the United States of America that the Supreme Court speak with one voice. And a rigid woman or man is not capable, in my view, of subsuming his or her particular point of view on a critical matter to the whole Court.

□ 2020

Had there not been a unanimous decision in Brown versus the Board of Education, we could have had considerably more civil unrest in this country than we in fact had. Had Justice Reed not succumbed to the persuasive arguments of Justice Earl Warren, it would not have been a united Court. Had Justice Burger failed to understand the significance of the requirement for a totally unanimous Court in the Nixon tapes case, we would have precipitated, in my view, a constitutional crisis. Justice Rehnquist—nothing in his background demonstrates that he has a sense of that, that he has a sense of history, that he has a sense of requirements that are needed to be the Chief Justice. The Chief Justice is a metaphor for justice in America.

Second, everything in Justice Rehnquist's background suggests at a minimum a hostility toward advancing the causes of minorities in this country, and a generous disposition to engage in narrative prose in the service of his unspoken desires. He has been very, very, very adept at setting up strawmen. In the famous case involving Kentucky where he ruled that notwithstanding the fact that it is discriminatory to insist upon all blacks being kept off a jury when there is a

black defendant—he acknowledged that is discriminatory but when he engages in narrative prose in the service of his own desires.

He goes on to say that kind of discrimination is all right as long as you discriminate against whites the same way, and discriminate against blacks the same way, totally lacking any knowledge or apparent understanding of American history where black juries, white juries—where we kept blacks off those juries—have been historically used to deny justice to blacks, he says it is all right to do that as long as you can say you can keep all whites off a jury. Show me jurisdiction where there are enough blacks to guarantee that there will be an all-black jury. When has a prosecutor in our history ever used preemptory challenges to keep all whites off a jury because he was fearful that they would not judge properly a white defendant? I do not know of any case. But I can name hundreds of cases where prosecutors have attempted to keep black women and men off juries where there is a black defendant. But he said, oh, it is all right to discriminate against blacks as long as you discriminate against whites, as if there was any circumstance where that would occur.

That is what I mean by narrative prose in the service of his unspoken desire.

Third, he has at best exercised very, very poor judgment in allowing himself to be the deciding vote in Laird versus Tatum. At best, it is poor judgment. And also, I cannot fathom how anyone could conclude that he was candid with us regard to how he felt about desegregation, and segregation in America in the 1940's, 1950's, and the 1960's.

I believe that Justice Rehnquist has not proven that he should be Chief Justice.

The PRESIDING OFFICER. The Senator's 1 hour has expired.

Mr. BIDEN. I thank the Chair.

I yield the floor. My colleague from Arizona is here.

Mr. DECONCINI addressed the Chair.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. DECONCINI. Mr. President, I intend to make a few comments on the Rehnquist nomination but I do know the Senator from Iowa has been waiting here for some time and does not intend to talk near the time I will. I will be glad to yield, and I ask unanimous consent that I can yield to the Senator from Iowa for 5 minutes and then be the next pending speaker.

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

The Senator from Iowa.

Mr. HARKIN. Mr. President, I want to thank my distinguished friend from Arizona for yielding me a small amount of time to give my thoughts on the nomination of Mr. Rehnquist to be the Chief Justice of the United States.

Mr. President, initially this summer I had planned to vote affirmatively for Mr. Rehnquist to be the Chief Justice of the United States. I made that decision because quite frankly I served on the Judiciary Committee. I had not looked at the record. But I had only assumed that he had gone through a hearing process many years ago when he was put on the Supreme Court, and that if in fact he was qualified to be a Justice of the Supreme Court then I saw no reason why he was not also then qualified to be Chief Justice.

So based upon just that kind of a cursory, preliminary thinking, I had decided that I would support Mr. Rehnquist to be Chief Justice of the United States.

However, a lot has occurred since that time. I have listened to the debate. I have read some of the opinions that Mr. Justice Rehnquist has written. I have followed the questioning that happened on the committee. And quite frankly, Mr. President, I have changed my mind.

I have no doubt that Mr. Rehnquist is a scholar, that he is quite intelligent, but I think he lacks two things that are so necessary to be the Chief Justice of the United States.

I think he lacks sensitivity, and he lacks what I call wisdom. He may be intelligent. He may be smart. But I do not think that he is a wise individual. In fact, if his nomination were to come up to be even on the Bench itself, knowing what I now know, I could not vote even to put him on the Supreme Court, let alone to vote affirmatively for him to be Chief Justice.

Mr. President, the office of Chief Justice is a symbol of high integrity and ethical propriety. The principles and commitments upon which our legal foundation is based are embodied in this very position, fairness, openness, and truthfulness. These are the qualities that the Chief Justice could personify in setting the tone for the whole judicial system. The office is more than just a symbol. It is also a position of great power.

Appointed for life to the highest court in the land, the Chief Justice can steer the Court toward consensus or toward conflict on the most important constitutional issues of our time. I believe that as Chief Justice, Mr. Rehnquist would steer the Court more toward conflict and away from consensus because that indeed has been his position on the Court over the last several years, one of conflict and not of consensus.

Also, the office of Chief Justice serves as the guardian of American traditions built on equal justice for all. Applying these guarantees of due process and equal protection, the Chief Justice has an obligation to go beyond personal biases and assure these rights are accorded to all Americans. Thus, Mr. President, the standards of Chief Justice must be dominated by impartiality, fairness, honesty, and all undergirded by wisdom and sensitivity. The leadership of the Chief Justice must be sensitive to the ability of the Constitution to address the complexities of today's changing society. The Constitution is a living document, not a dead document. As a living document, it must adapt itself to the changing norms of society.

So the convictions of the Chief Justice must be governed by his sincere respect for Americans as individuals, individuals blessed with the right to enjoy personal freedom and liberty. And that Chief Justice must be wise enough to see that the Constitution is indeed a living document and not a dead document.

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So, Mr. President, unfortunately, I do not think that William Rehnquist measures up to these criteria. That is, I say that after, again, having read the record, listened to the debate, and read some of the opinions that Mr. Rehnquist has written.

His conflicting testimony before the committee casts great doubt on his candor and honesty. His record on school desegregation, voting rights, and other cases displays a hostility that I believe abandons the fundamental principles of equal justice under law.

Mr. President, I have four editorials: one from the Quad City Times, Davenport, IA; two from the Des Moines Register; and one from the Ottumwa Courier, all leading newspapers in the State of Iowa, editorials asking us to vote no on the nomination of Mr. Rehnquist to be Chief Justice. I ask unanimous consent that these editorials be printed in their entirely.

There being no objection, the editorials were ordered to be printed in the RECORD, as follows:

REHNQUIST, A CHIEF JUSTICE OF YESTERDAY

It is disheartening that President Reagan has chosen to appoint William Rehnquist—a man with 19th century legal views—to lead the Supreme Court into the 21st century.

Reagan could have chosen a more moderate justice for the nation's top judicial post. We wish he had.

Senators soon will be considering the Rehnquist nomination, and we hope all Senators—and especially our own, Charles Grassley and Tom Harkin—thoroughly review the Rehnquist record. The chief justice's post is one of immense influence. The chief justice is not the president's right-hand man, no matter how consumed a president is with turning the court to the philosophical right or left.

This much we admit: Since his appointment to the bench as an associate justice in 1971 by Richard Nixon, Rehnquist has been consistent in his decisions.

He has consistently voted for the death penalty; anti-abortion laws; public financing

of private and parochial schools; government control of free expression; the limitation of privacy rights; narrowing of the Miranda rule; limiting what can be reported in the press; freeing police from strict obedience to court-imposed restrictions; and government control of pornography.

In Rehnquist's case, consistency is no asset.

The most cursory of reviews shows the Rehnquist past littered with opinions bordering on the archaic. A more examined study reveals the man to be an arch conservative who favors the majority in individual rights cases.

In the landmark abortion ruling of 1972 (*Roe vs. Wade*), the court stated the government has no right to interfere with a woman's privacy in making such a personal decision. Rehnquist voted in the minority, calling the decision ". . . an improvident and extravagant exercise of the power of judicial review."

The nominee, obviously, is opposed to judicial activism. He suggests issues such as abortion should be decided by elected representatives, allowing individual states to prohibit abortions if they so desire. That position is a step back to the Old World church-state tyranny that the framers of our Constitution sought to escape.

In individual rights cases, Rehnquist's reading of the Constitution takes little note of individual liberties. In fact, he has compiled a near perfect record in voting for the government and against the individual. We believe interpretations should favor broad liberties for people and ironclad protections against government interference in their private lives.

It comes as no surprise, then, that Rehnquist is opposed to the Incorporation Doctrine of 1925, which permits the Supreme Court to extend Bill of Rights provisions to the states. The doctrine prohibits states from encroaching on human rights and extends the Fourteenth Amendment's guarantee of due process to the states.

On the relationship between religion and government, Rehnquist wrote in the 1985 *Wallace* vs. *Jaffree* decision that he believes "the 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proven useless as a guide to judging. It should be frankly and explicitly abandoned."

Should the Rehnquist interpretation of the establishment clause ever command a court majority—and as the court's chief justice, he certainly would have the influence of leadership—the ramification would be enormous and harmful to the tranquil church-state relations enjoyed in our country.

Rehnquist also has consistently ruled in favor of the states in conflicts between state and federal authority. He seemingly favors Bible reading, state-sanctioned prayers and other religious exercises in public schools, should a state adopt laws allowing such activities. Such a viewpoint would ensure that any religious group commanding a majority on a school board could institute whatever sectarian practices and programs it wants in the public schools.

And then there are those disturbing Rehnquist memos.

In the early '50s, during debate of the *Brown* vs. *Board of Education* case, Rehnquist authored a memo stating that "separate but equal" public education for blacks was "right and should be reaffirmed."

In 1970, as an assistant attorney general in the Nixon administration, Rehnquist wrote a memo that the Equal Rights Amendment could "turn holy wedlock into holy deadlock." The overall implication of the Equal Rights Amendment, he continued, "is nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable."

The positions are ones that are dated and espoused now by only the most radically reactionary. They are not the moderate views we want to see embodied in a chief justice.

We need a justice who understands the purpose of the Constitution in this day and age—and beyond. Rehnquist clearly does not. Though it seems unlikely to happen, we urge the Senate to deny his nomination.

Cause To Reject Rehnquist

The Senate should take a fresh look at William H. Rehnquist's nomination to be chief justice in light of new evidence turned up since the Judiciary Committee recommended confirmation.

That new evidence is Rehnquist's proposal in 1970, when he was an assistant attorney general, that the Constitution be amended to nullify Supreme Court school-desegregation decisions.

The amendment, according to the Los Angeles Times, would have permitted district boundaries to be drawn so as to separate students by race and would have allowed parents to send children to the schools of their choice.

We urge senators to think about the meaning of such a proposal. It is 1970—16 years after the Supreme Court in Brown vs. Board of Education unanimously struck down school segregation, a time when great strides have been taken to topple the institutional barriers of racism. Yet, here is a man who proposes wiping all of that out by rewriting the Constitution to permit segregated schools.

It is probably of no great consequence that this damning evidence should turn up after the Judiciary Committee hearings ended. Rehnquist would likely have suffered another "amnesia attack" before the committee. And who could blame him for wanting to forget?

This piece of evidence by itself is unlikely to derail Rehnquist's confirmation. What is unfortunate, though, is that a "smoking gun" is necessary to get the Senate to see what has been so clear in Rehnquist's career: that he does not believe the government should be in the business of assuring racial equality because he does not find any root principles of individual liberty in the Constitution.

The 100 senators must ask themselves: Is this the man they wish to elevate to lead the third branch of government? Their answer should be no.

Just Say No on Rehnquist

Regardless of one's views on Supreme Court Justice William Rehnquist, the letter signed by more than 100-law school professors raising doubts about his fitness is far from courageous. Pusillanimous is the word it brings to mind.

While the Senate considers Rehnquist's confirmation as chief justice, the professors have taken it upon themselves to counsel the senators in an open letter raising "serious questions of [Rehnquist's] intellectual honesty, . . , integrity and ethical standards."

For specifics, the letter lists various accusations made in confirmation hearings: that Rehnquist harassed voters, approved racist clauses in real-estate contracts, argued for separate-but-equal schools for blacks, sought to cheat a relative out of an inheritance and failed to disqualify himself from a case in which he had a conflict.

The academics' advice? Oppose Rehnquist if the senator "entertains the slightest doubt" about the justice's conduct.

The senators can be forgiven for reacting to this letter with a "Thank you very much, but we can read the papers, too."

The great irony is that the professors had the temerity to accuse Rehnquist of intellectual dishonesty in a letter containing a powerful bill of indictment yet stopping short of urging his rejection. What more do senators need to entertain the "slightest doubt" of Rehnquist's fitness?

This effort to undermine the nominee while carefully avoiding personal risk reminds us of a line that a writer attributed to Dante: "The hottest places in hell are reserved for those who in a moment of moral crisis seek to maintain their neutrality."

If the senators need more evidence of Rehnquist's all-male WASPish perspective, consider the just-uncovered memo from 1970 in which, as assistant attorney general, he said the Equal Rights Amendment could "turn holy wedlock into holy deadlock" and would end any distinction between the sexes outside of separate restrooms.

No need to belabor the implications of this memo, for it merely confirms what opponents of Rehnquist have been saying all along: that his mind seems stuck in 1950.

With each new disclosure, it becomes increasingly clear that Rehnquist is not only sadly out of touch with contemporary American values but with the values embodied in the Constitution.

Unfortunately, the Republican-controlled Senate is on a course to confirm Rehnquist and dismiss all questions about him as political. That may be good politics but it is not statesmanship because it will result in a chief justice whose veracity, integrity, ethical standards and, hence, judgment will always be open to question.

Reject Rehnquist

The U.S. Senate is scheduled to begin debate this week on the nomination of William Rehnquist to be chief justice.

Senate watchers are saying he's a shoo-in.

Rehnquist should be rejected for a very compelling reason—one that overrides whatever qualifications he might bring to the position.

He's insensitive on matters of race.

Over a period of several decades—in his personal conduct, in his legal advice and in his judicial opinions—he has demonstrated that he is on the wrong side of one of the great legal and moral questions of our time.

The evidence has emerged in tiny bits and pieces—some of it known for years and some of it uncovered as a result of the investigation into his nomination.

Consider:

As a law clerk for Justice Robert Jackson in the 1950s, Rehnquist wrote a memo defending an 1896 Supreme Court ruling upholding racial segregation.

As a political operative in Phoenix in the 1960s, he tried to prevent minorities fom voting using tactics witnesses described as intimidating.

While a top attorney in the Nixon administration in the 1970s, he drafted a proposed constituional amendment that would have halted, desegregation of the nation's public schools.

As a private citizen, he bought a home in Phoenix by signing a deed barring its resale to anyone but whites. He bought a vacation place in Vermont with a deed prohibiting resale to Jews.

Rehnquist was questioned on those activities during his nomination hearings and his responses were, to put it charitably, less than candid. Does anyone really believe that lawyer Rehnquist signed those deeds without knowing the provisions in the documents?

Rehnquist's voting record on the Supreme Court is consistent with his actions as a private citizen and his advance as a law clerk and government attorney. He's insensitive on matters of individual rights generally and of minority rights specifically.

It is not the record of a man who should be the top judge in the country.

Senate should vote "no."

Mr. HARKIN. Mr. President, I again thank my distinguished friend from Arizona for yielding this time.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. DECONCINI. Mr. President, there is no one I have more respect for then my friend from Iowa, Senator HARKIN. He is a real tribute to that State and is a thoughtful Senator who carefully looks at these things. We just happen to be in disagreement here.

Mr. President, I am privileged today to be able to participate in the Senate's consideration of the nomination of a Chief Justice of the United States. I was not in the Senate when Chief Justice Burger was confirmed by this body. It is probable that neither I nor most of my colleagues will be here when this responsibility next comes to the Senate. We must approach our constitutional responsibility for advise and consent with our most careful and thorough attention.

I consider the confirmation of Justices of the Supreme Court to be one of the most important responsibilities entrusted to us by the Constitution. The responsibility to advise and consent on the nomination of the Chief Justice is all the more important because of the leadership role of the Chief Justice. I have spent many hours considering the nomination of William Rehnquist to be Chief Justice. I have attended hours of hearings. I have listened carefully to the testimony of many witnesses both pro and con. I have met with and heard the testimony of the Justice himself, and of people who are in diametric opposition to what he says and to what other witnesses say.

I have read hundreds of pages of documents pertaining to Justice Rehnquist's qualifications, temperament, and integrity. I have read dozens of decisions and articles by the Justice. And finally, I have talked to my constituents to get the benefit of their views on the nomination.

Even in the State of Arizona, where the Justice lived a long time, it is not unanimous.

As a result of all of the study and deliberation, I have concluded that Justice Rehnquist should indeed be elevated to be Chief Justice of the United States.

Mr. President, there can be no question at this time about Justice Rehnquist's intellectual abilities. He has proven himself over his 15 years on the court as a brilliant legal thinker and writer. He is both a scholar of the law and a most articulate and sometimes humorous writer of opinions. I do not always agree with the analyses and decisions of Justice Rehnquist, but I have never found his opinions to be anything but well reasoned and lucidly explained. I have no doubts in my mind that Justice Rehnquist easily exceeds any requirement for intellectual capability that any of my colleagues may impose on any nominee.

I also believe that Justice Rehnquist possesses the requisite temperament to be Chief Justice. I know of no allegations that, in the last 15 years, Justice Rehnquist has acted in any way inconsistent with the Office of Justice of the Supreme Court of the United States.

He has brought dignity to the office and has earned the respect of his colleagues and those who do business with the Court.

I ask my colleagues here, if you know a judge on the Supreme Court—or if you do not, call one, even after the vote call one—you will be satisfied with the response you get, I can assure you, regardless of the political spectrum that that judge might follow or philosophy that that judge might follow.

I am sure that as Chief Justice, Justice Rehnquist will continue to serve with dignity and honor.

The last criterion that I examine in determining whether to vote in favor of a judicial nomination is whether the nominee has the integrity and reputation for truthfulness and honesty required of the Federal judiciary.

In determining whether Justice Rehnquist meets the test of this standard, I have relied heavily on those who have worked closely with Justice Rehnquist and those who know him best.

The American Bar Association rated Justice Rehnquist as well qualified, their highest rating for Supreme Court nominees.

Mr. Gene Lafitte and Mr. John Lane, members of the ABA Standing Committee of Federal Judiciary testified before the Judiciary Committee that the standing committee had reached this recommendation unanimously after extensive investigation—my recollection is some 300 or more contacts: lawyers, judges, clients, and many individuals.

In addition to the ABA witnesses, Justice Rehnquist had a most impressive roster of witnesses testify as to his character and qualifications.

These witnesses included Griffin Bell, former Attorney General of the United States under Jimmy Carter; Irwin Griswold, former Solicitor General of the United States and former long-term dean of the Harvard Law School; and Rex Lee, also a former Solicitor General.

We also heard from several distinguished attorneys, who have worked with Justice Rehnquist, as to his abilities and integrity.

I believe it is a high compliment to Justice Rehnquist that such a group of distinguished Americans enthusiastically testified in his favor.

There have been allegations that Justice Rehnquist engaged in improper activities in Phoenix in the early 1960's and subsequently failed to testify truthfully about these activities to the Judiciary Committee.

I am concerned about the activities of the Republican Party in Phoenix at that time.

I was involved in efforts by the Democratic Party in southern Arizona to protect individuals, mostly minority individuals, who were attempting to exercise their constitutional right to vote.

There is no question in my mind that the Republican Party in Arizona, for political purposes, was engaged in an all-out campaign to prevent minority voters from voting for Democratic candidates.

However, I believe that the proper forum for examination of the activities that took place in Arizona during these years is in Arizona.

The allegations made against Justice Rehnquist should have been examined by the Arizona attorney general, the Arizona Bar Association or the Arizona Supreme Court.

The fact is that the allegations against Justice Rehnquist were not made to the proper authorities at the time.

No one thought they were important enough or credible enough to bring them up then.

We, in Arizona, do not need the Federal Government in Washington or Members of this body to tell us what the standards are. If there are complaints, we are very able to handle them. There were none.

I believe that Justice Rehnquist was involved in the planning and supervising of this political strategy. While I do not believe that these incidents were either Justice Rehnquist's nor Arizona's finest hour, I do not find that Justice Rehnquist was either directly involved in challenging voters or subsequently was untruthful about his activities.

The Judiciary Committee received a full 12-hour day of testimony concerning the election day activities of the

Republican Party and Justice Rehnquist in Arizona in the early 1960's.

I believe the fairest summary of the testimony and other evidence we received is that it is inconclusive and contradictory.

There were witnesses who alleged that Justice Rehnquist was directly involved in the voter challenges, and there were witnesses who testified that Justice Rehnquist could not possibly have been involved in such activities.

I do not doubt the sincerity and honesty of any of the witnesses who made allegations against Justice Rehnquist.

But I believe that, after looking at the record as a whole, the preponderance of the evidence indicates that Justice Rehnquist was not personally involved in challenging or attempting to intimidate any voters.

Let's look at the testimony offered to the Judiciary Committee by those witnesses.

Six witnesses who were with Justice Rehnquist or were in a position to have known of his activities testified before the Committee that Justice Rehnquist was not involved in any voter challenges himself.

In addition, a Phoenix police officer who was at or near the Bethune school precinct all day testified that he did not see Justice Rehnquist there.

Finally, the Democratic county chairman, former Federal Bankruptcy Judge Vincent Maggiore, who would have been aware of any complaints by Democrats of illegal voter challenges, testified under oath that he received no such complaint about William Rehnquist.

Melvin Mirking, a very respected lawyer in Phoenix, was a volunteer Democratic party worker in the early 1960's

He testified that he heard Justice Rehnquist giving instructions to Republican challengers in South Phoenix in such a way as to intimidate voters.

Mr. Mirkin did not see Justice Rehnquist challenge voters or even talk to any voters.

His analysis was purely subjective based on the tone of voice used by then Mr. Rehnquist.

Mr. Mirkin also testified that he believed that Justice Rehnquist should be confirmed by this body.

Charles Pine was Democratic State Party Chairman in the early 1970's. In the early 1960's he was a Democratic party worker.

Charles Pine is an old, dear friend of mine, as is his wife.

Mr. Pine testified that he saw Justice Rehnquist challenge two black voters in a voting line in 1962, or was it 1964, and that the two men left the line as a result.

I believe that Mr. Pine is sincere in his allegations against Justice Rehnquist; I find his testimony troubling for several reasons, however.

First, he was unable to provide any details concerning the allegations, such as what was said.

Second, there was no complaint or report filed on this or any other incident involving Justice Rehnquist.

I believe that in the atmosphere which existed at the time in Phoenix, the Democratic Party or its campaign workers would have been quick to report that the man they thought to be in charge of the Republican Ballot Security Program was personally harassing and challenging voters.

I was involved as a volunteer poll watcher in Tucson during the same years that the Republican Ballot Security Program was taking place.

I remember making a record of the names, places and times that I observed Republicans engaging in challenges to voters and turning this record over to the appropriate officials.

If Justice Rehnquist had been personally challenging voters in these years, I believe that such records would have come to light, and they did not.

And last, I find that Mr. Pine's allegations are overboard.

He makes several blanket allegations against the Republican "flying squads" which went into Democratic precincts in Phoenix in the early 1960's.

After describing these activities, he makes his allegations against Justice Rehnquist without connecting Justice Rehnquist to the activities.

Dr. Sydney Smith was a third witness to the activities that took place at the polling place in South Phoenix.

He served as a Democratic poll watcher in 1960 or 1962.

Dr. Smith offered what I thought was the most credible testimony making allegations against Justice Rehnquist.

I am pleased that Dr. Smith came forward with his story and would not dispute his story as he saw it.

I would question why, if the incident was reported to the Democratic County Headquarters, there is no record of it and why Mr. Vincent Maggiore, the Democratic County Chairman at the time, has no recollection of Justice Rehnquist involvement in voters challenges.

The fourth witness was State Senator Manuel Pena, another very dear friend of mine.

Senator Pena's integrity and honesty are, in my opinion, beyond reproach and question.

He tells a very troubling story about an individual's reprehensible activities at the Bulter school in 1962.

If there was proof that the individual at the school was Justice Rehnquist, I would be very disturbed and could not stand here before my colleagues tonight.

However, Senator Pena did not know Justice Rehnquist at the time and he so testified.

He did not recognize him until he saw his picture in the newspaper 9 years later.

I am afraid that Senator Pena's allegation against Justice Rehnquist, without corroboration, is insufficient for me to conclude that Justice Rehnquist was there and did the things that supposedly happened.

The witness who drew the most public interest and who drew the committee's greatest attention was former Assistant U.S. Attorney James Brosnahan.

Mr. Brosnahan is an impressive witness indeed.

He was a patient and collected witness who showed just the right amount of spunk, but of interest to be sure the committee members got all the answers they needed.

He told an interesting and credible story, but he did not see Justice Rehnquist do one thing, and that was his testimony.

He was not concerned enough about what he saw or heard to do anything about it at the time.

He did not file a complaint with the election commission. That question was asked.

And he did not file a complaint with the Arizona Bar Association—that question was not asked, but I later confirmed that—about what would have been unethical activities if they had been performed by a lawyer such as William Rehnquist.

Mr. Brosnahan also did not come forward when Justice Rehnquist was nominated for either Assistant Attorney General Associate Justice of the Supreme Court.

As credible as the opponents of Justice Rehnquist believe Mr. Brosnahan to have been, in my opinion, he merely put on a show without contributing any substantive or prohibitive evidence.

He admitted that his allegations would not be admissible in any court.

I am, of course, concerned about having to weigh and compare the testimony of several of my old friends and colleagues.

I believe that a nominee has the burden of proof to show that he or she is worthy of confirmation.

However, in cases where specific allegations of unethical or illegal conduct are made, the burden of proving those allegations must be on those making the allegations. That is how our court system works and it ought to be the same here.

In this case, after carefully reviewing the record as a whole, I have concluded that there is not sufficient evidence to believe that Justice Rehn-

quist was directly involved in challenging voters.

Parenthetically, the State law requires that party workers who were to engage in challenging voters had to be registered with the Election Commission and nominated by the chairman of their party:

There is no record that Justice Rehnquist was ever so registered or nominated or appointed.

I believe that Justice Rehnquist was too good a lawyer and was too smart to either challenge voters without being registered under State law or to challenge voters in an illegal manner.

He is not dumb.

□ 2050

I will comment briefly on other issues that have arisen in connection with the nomination of Justice Rehnquist to be Chief Justice. First, I find that the criticism of Justice Rehnquist based on the restrictions in the deeds to his homes in Arizona and Vermont to be totally without merit and beneath the dignity of the Senate. I believe that Senator LEAHY brought up the Vermont deed restriction in a responsible manner, and I compliment him for doing it early and casting no aspersions when he did so.

When Justice Rehnquist explained what had happened and what he planned to do to remedy the problem, that should have been the end of the discussion. Indeed, at that point, Senator LEAHY responsibly dropped the matter entirely. Some critics of Justice Rehnquist have, however, sought to blow the existence of the restrictions out of proportion. I do not doubt for a minute that property I now own or have owned in Arizona contains deed restrictions similar to those in Justice Rehnquist's deeds. I dare say that most of my colleagues have owned property with these kind of restrictions.

Even the distinguished Senator from Delaware—unfortunately for him, but no fault of his—was involved in such a situation. His father had such a deed. Look at what the press and the critics did to Senator BIDEN—unfair as could be, condemning that he, as a child, lived in such a home that had such a restriction, that there was something bad about it. Nonsense.

We all know that they are unenforceable and meaningless.

The U.S. court found such restrictions to be unconstitutional and therefore totally unenforceable in *Shelley* v. *Kramer*, 334 U.S. 1 (1948).

Most people have more important things to do with their time and money than worrying about contractual provisions that are void and have no effect on the transaction.

I suggest that we also find better ways to spend our time and effort.

Concerns have also arisen about two memoranda Justice Rehnquist wrote as Assistant Attorney General and when he was clerk for Justice Jackson.

One of these memos concerned school integration and the other concerned the equal rights amendment and its effect on families. I disagree with the arguments presented in each of these memos. Some of the stuff I read by Justice Rehnquist is repugnant to me. I oppose busing as a remedy for school segregation, but I certainly do not believe that freedom of choice plans should be used as a means to avoid integration. I would have earnestly opposed legislation such as that proposed in the school integration memo written by then Attorney Rehnquist.

Similarly, I am a cosponsor of the equal rights amendment.

I voted for expanding and extending the time for confirmation of the equal rights amendment, and I am proud of it. It was right. It has not passed, but it will. Those of us who are supporting Rehnquist, and are for the equal rights amendment are still going to be for it, because we believe in it. It is a principle. Some of the statements made by Justice Rehnquist in these two briefs I am not proud of, but I do not have to be proud of them. I have to decide whether or not he is qualified to be Chief Justice of the United States.

In my opinion, his arguments are unsound and irrelevant. But, I have heard them all before. During the 98th Congress, the Subcommittee on the Constitution, of which I am the ranking member, held a series of hearings on the equal rights amendment. The opponents of the ERA dragged out the same red herrings that Justice Rehnquist had enumerated in his memo 15 years ago.

I am sure that if today's debate were on the ERA, my good friend Senator HATCH as well as other opponents of the amendment, would be making these antiquated—as I see them—arguments right now. I would be opposing my good friend from Utah, and I have the greatest respect for his legal capacity and his senatorial capacity.

The point is that in both these memos, the President or his staff requested that memos be prepared expressing certain viewpoints. Assistant Attorney General Rehnquist, the good lawyer that he is, prepared the memos using the best arguments that were available to argue the point of view that he had been instructed to take. As to what his personal views are, they may have been exactly like that. But there is only one person who can say unequivocally that that is what was in his mind, and that person was Justice Rehnquist, who explained that under oath in detail and has constantly done so.

It is not Justice Rehnquist's fault that he was given the least defensible side of each of these issues to try to defend.

As a lawyer, Assistant Attorney General Rehnquist carried out the assignment given to him by his client. Although these may very well be Justice Rehnquist's views, we should not hold him responsible for views he expressed in a legal memorandum he wrote under the direction of, and serving as the lawyer to, the President of the United States or the Attorney General of the United States.

I do not agree with the views expressed in these memos, but in my opinion, Justice Rehnquist was doing his job as a lawyer is supposed to do.

Mr. President, before I conclude, I would like to discuss briefly my analysis of our responsibility to advise and consent to the President's nominees to the Supreme Court. There is a difference in what I consider to be the appropriate manner in which this responsbility should be carried out, and that conduct that I consider to be improper and unwise, but not culpable.

In the case of a nominee to the Supreme Court, I do not consider it to be unacceptable for an individual Senator to take the nominee's political views, as they relate to enforcement of the Constitution and our laws, into consideration when determining whether to vote for him or against him. That is part of our individual rights and responsibilities. Except for the most extreme views, however, I do not think it is appropriate. But I honor and respect my colleagues who believe that. Let us not kid ourselves. This is not an issue about a restriction in a deed or about supposedly challenging voters. This is an issue of whether or not a very conservative sitting Justice should be moved to the position of Chief Justice. That is what it is all about. We can talk about it, but I think we all know here that this Justice is very conservative and that many Members of this body who are not very conservative do not want to see this type of Justice sit there because of his conservative views. They have a right to do that, and I respect it.

My philosophy is that the Senate should base its confirmation decisions on the three criteria that I discussed above—intellectual excellence, appropriate judicial temperament, and integrity and honesty. While I acknowledge that for much of this Nation's history, the Senate performed an almost purely political function in advising and consenting to the President's nominees, I submit to my colleagues that the American people were not well served by this system.

Whether we like it or not, President Reagan won the election. Under our Constitution, he has the right to make these appointments. If they meet those three criteria, so far as this Sen-

ator is concerned, they should be confirmed, even though I disagree with many of their decisions.

A vacant seat on the Court occurred when Chief Justice Salmon P. Chase died on December 6, 1864. Because President Andrew Johnson was opposed by a solid Republican majority in the Senate, he was unable to fill the vacancy and the seat on the Court went vacant for more than 5 years. At one point, the Congress actually abolished the seat rather than have President Johnson fill the vacancy. The stalemate was only resolved when President Grant was elected.

□ 2100

For 3 years in the 1840's, the Supreme Court lacked its full compliment of Justices while the Senate and President Tyler wrangled with President Tyler's nominees. President Tyler, in fact, was able to get confirmation of only one of his six nominees to the Court.

There have been many other examples of politics undermining the proper functioning of the Court. These political games have been played both by the Senate and by the President. President Franklin Roosevelt attempted to pack the Court with liberal justices who would uphold the New Deal legislation. President Taft contrived to have himself appointed Chief Justice after he left the President's office. I believe that these attempts at politicizing the advice and consent process is improper no matter which party makes the attempt.

Mr. President, I urge my colleagues to put politics aside and vote to confirm Justice Rehnquist as Chief Justice based on his qualifications, his temperament, and his integrity. During the Carter administration, I served on the Judiciary Committee when it considered many judicial nominees who I thought to be quite liberal. I voted on each of these nominees based on the criteria that I have discussed and not based on their political views. I voted to confirm such Judges as Patricia Wald, for the D.C. circuit; William Canby and Mary Schroeder, for the ninth circuit; and Steven Breyer, for the first circuit.

The record before us amply shows that Justice Rehnquist has met and exceeded each of these standards. While there are political questions that remain, I believe that they have no place in this discussion. I will cast my vote to confirm.

Mr. President, I thank a couple people. Ed Baxter, of my office, Brad Kirby, and Bill Wood, and many who helped in this process.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I compliment my distinguished colleague and dear friend from Arizona for, I think, one of the better sets of remarks made on this nomination throughout this whole process.

I personally mention my respect for him because I know that it has been very difficult for him to stand up on his side of the floor throughout these proceedings and do the excellent job that he has done in being fair to Mr. Justice Rehnquist.

It is typical of Senator DECONCINI. It is typical of the way he handled himself in the Senate. He is a fair man. He is honest and does a very good job, and I consider him one of my best friends in this body. I have gained even more respect—I did not think it possible—but I gained even more respect because of his leadership for Justice Rehnquist throughout this battle.

THE REHNQUISITION IS NEARLY OVER

The Rehnquisition is nearly over. The Nation has watched in horror as the grand inquisitors have turned the Senate Chamber into a star chamber. The inquisitors have dragged out their racks and stretched the truth. Let me give an example of how the truth has been twisted, beaten, and gouged in this arduous debate:

JACKSON MEMO

The inquisitors have used a 34-year-old memo written by a young law clerk to say that Justice Rehnquist questioned appropriate civil rights policies. In fact, both the Justice and his co-clerk, Don Cronson, the only other living person knowledgable about the genesis of that memo, state that the memo was written at the request of Justice Rehnquist's employer. The inquisitors complain that it is shameful to attribute those beliefs to Justice Jackson. This is another stretching of the truth. Neither Justice Rehnquist nor Cronson contend that Justice Jackson held these views, but only that he asked his clerks to present him with arguments on both sides of a difficult case.

In other words, Justice Rehnquist was asked to play devil's advocate. But 34 years later, the inquisitors want to label Justice Rehnquist as the devil. Where is the fairness?

LAIRD VERSUS TATUM

Another stretching of the truth on the rack of these inquisitors concerns Justice Rehnquist's decision to hear the Laird versus Tatum case. Even the inquisitors agree now that Justice Rehnquist violated no law in his decision, but they contend it was unethical to hear a case when he had a "personal knowledge of the evidentiary facts" before he went on the Court. The inquisitors base this claim on his testimony to Senator Ervin's subcommittee in 1971. As current chairman of that subcommittee, I have reviewed the record and learned that Justice Rehnquist told Senator Ervin four times during that hearing that he lacked any "personal knowledge" about Army information gathering—the subject of the later Laird case.

The inquisitors have not only stretched the truth, they have also hauled out their thumbscrews and twisted the facts.

EXTREMISM

The charge that Justice Rehnquist is extreme is just such an instance of fact twisting. In fact, Justice Rehnquist has written more majority opinions over the last four terms—73 to be exact—than any other Justice. It is simply impossible for the Court's leading opinion-writer and consensus-shaper to be "extreme." A study of the Court's 20 top civil rights cases of 1986 shows that Justice Rehnquist voted in the mainstream 70 percent of the time. Only three other Justices had better mainstream ratings.

Just like the real inquisition, these inquisitors were not interested in Justice Rehnquist's faithfulness to the Constitution; they were interested in whether he agreed with their narrow dogmas. They ignore that he wrote the leading women's rights case of last term and that he consistently votes to end proven discrimination. At least 27 times he has voted for women and minorities. This is not enough for them. Faithfulness to desegregation is not enough for them, they must have total obedience to the dogma of racial balance even if it means using quotas, busing, and judgment by statistics and effects tests. Even if it means ignoring the principle of the "color-blind constitution" and striking down laws passed by the States with no discriminatory purpose at all, they must have racial balance.

Justice Rehnquist is no heretic on civil rights. He simply reads the Constitution and laws as most Americans would read them. He believes in a colorblind constitution and fights genuine discrimination wherever it arises. He just happens to disagree with the real extremists and for that they call him "insensitive" and twist the facts.

The real test of extremism came when the inquisitors accused the Justice of extremism because he would have allowed Alabama's silent prayer to stand in the Jaffree case. The inquisitors failed to remember that the Senate Judiciary Committee had voted on that same issue 12 to 6 in favor of Justice Rehnquist's position, namely in favor of allowing States to have silent moments of prayer or reflection. This showed that the inquisitors were in fact the minority extremists.

At least the inquisitors have proved one thing. With enough time in blur memories, the past can be molded to mean anything. The best example of that was the testimony from Phoenix about vote challenging. This testified more in the frailities of human memory than to anything else. Nothing the committee found in 1986 sig-

nificantly altered the opinion of the same committee in 1971 that "Viewed in its entirety, the incident at the very most in a case of mistaken identity." Of the seven who claimed to have seen Justice Rehnquist engage in the completely legal activity of verifying voter credentials, five did not know him at the time and only identified him from newspaper photos in 1971—7 to 9 years after the fact. I have heard of hindsight being 20-20, but this is ridiculous. Eight witnesses testified that they had never even heard a rumor of Justice Rehnquist's involvement in any voter improprieties. Inquisitors can make any kind of case out of hazy memories.

These inquisitors make us all wish that their mouths would be more like their minds—closed.

I mention the primary characteristic of the inquisitor, a closed mind, for a reason. These inquisitors have overlooked the most relevant facts. They have ignored Justice Rehnquist's 15 years of leadership on the Supreme Court. They have ignored the fact that the ABA gave Justice Rehnquist their highest possible rating for "competence, judicial temperament, and integrity." They ignore that his colleagues and the 180 other judges interviewed by the ABA gave him their highest marks for integrity and judicial ability.

Instead they distort the truth, twist the facts, emphasize rumor, legitimize innuendo, and ignore the relevant. Moreover they attempt to prolong the torture for hours—repeating time and again the same unfounded charges in the hope that repetition will make them sound legitimate.

Throughout this painful proceeding, the inquisitors have searched in vain for any inconsistency, crack, or break that they might use to justify their foreordained verdict—guilty, guilty, guilty. I would ask guilty of what? The record shows Justice Rehnquist is guilty of elevating the rights of victims alongside those of criminals; guilty of advocating equal treatment of all—not special treatment for some; guilty of defending the Constitution as it was written. If there is any guilt in this proceeding, it is not fairly attributed to Justice Rehnquist.

This body has one question remaining: will it let justice be done or permit a Justice to be done in.

It is the time for the Senate to end the Rehnquisition and proceed to a fair vote on the merits of this issue. Today, September 17, 1986, is the 199th anniversary of the day that 39 men at the Convention in Philadelphia signed the Constitution. It is fitting that we choose this day to approve the 16th Chief Justice of the United States. It was on this day in 1787 that George Washington dellvered his first official oration to the Convention to voice his approval of the amended Virginia plan, whose sponsor, Edmund Randolph, would refuse to sign along with the celebrated George Mason. That split would help produce the bill of rights. This is an important day in American history. It is appropriate to celebrate it with this historic constitutional action. I urge my colleagues to approve Justice Rehnquist as Chief Justice.

I yield the floor.

Mr. THURMOND. Mr. President, I did not intend to speak further but after the opponents have gone so far in some of these matters, I feel it necessary to keep the record straight to make a brief reply to a few of those allegations that have been made.

Mr. President, the allegation about the polling place incident. The allegation is that Justice Rehnquist challenged or harassed minority voters at a polling place in Phoenix, AZ during the 1960's.

RESPONSE

Similar allegations were raised in 1971. The committee concluded at that time that the allegations were wholly unsubstantiated, and probably a case of mistaken identity.

Justice Rehnquist acknowledged that he was a legal advisor to the Republican Party and did visit some precincts in 1962.

In 1986, the committee expanded its investigative effort and invited numerous witnesses to testify regarding the allegation.

Only three of the five witnesses testifying against Justice Rehnquist said they saw him challenging minority voters. Some recognized him as the individual involved several years after the incident when they saw his picture in the paper. All eight witnesses testifying in support of Justice Rehnquist said that he did not harass, intimidate, or challenge minority voters.

Judge Vincent Maggiore, the 1962 Democratic Party chairman for Maricopa County, testified that Justice Rehnquist was not involved in voter harassament.

Judge Thomas Murphy, the 1964 Democratic Party chairman told the committee that he personally investigated the allegations about Justice Rehnquist and that they were totally unfounded.

A Republican challenger by the name of Wayne C. Bentson was involved in a disturbance at the Bethune Polling Place in 1962.

Mr. Bentson admitted to the FBI in 1962, 1971 and again in 1986 that he was the individual involved at the Bethune Polling Place in 1962.

A 1962 FBI Report concerning voter harassment at the Bethune Polling Place refers to Mr. Bentson. Justice Rehnquist's name is not even mentioned.

A 1962 Phoenix police report concerning an instance at Bethune Polling Place refers to Mr. Bentson. Again this report does not mention Justice Rehnquist's name.

A 1962 FBI report, the 1962 Phoenix, AR Police report, and Mr. Bentson all acknowledge that Wayne C. Bentson was the individual involved in the disturbance at the Bethune Polling Place in 1962.

Although Justice Rehnquist was a legal advisor and did visit some precincts, there is no truth to the allegation that Justice Rehnquist participated in any voter challenging, harassment or intimidation of minority voters.

LAIRD V. TATUM

ALLEGATION

Justice Rehnquist was not candid with the Judiciary Committee in 1971 regarding the Laird versus Tatum case involving surveillance activities by the Department of the Army.

RESPONSE

Justice Rehnquist issued a comprehensive memorandum on October 10, 1972, detailing his reasons for declining to recuse himself in the Laird versus Tatum case. In that memorandum Justice Rehnquist reviewed his involvement in the case, analyzed the disqualification statute and reviewed the precedents of the Supreme Court on the disqualification of Justices. He concluded on this basis that recusal was not warranted.

Justice Rehnquist did not have personal knowledge of the Laird versus Tatum case in 1971 when he testified before Senator Ervin's Judiciary Subcommittee. The following will indicate that fact. Justice Rehnquist stated:

As you might imagine the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding. . . .

Next:

The Office of the Deputy Attorney General . . . advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army data bank, and it was incorporated into the prepared statement that I read to the subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out.

Next:

While it is not altogether clear to me, certainly not from personal knowledge . . . the extent the army guidelines were actually carried out and practiced, it should be apparent that the data base used by internal security is much more restricted . . . than were the guidelines printed in the Congressional Record.

It seems clear that Justice Rehnquist did not have any personal knowledge of the disputed facts in the Laird versus Tatum case when he testified before Senator Ervin in 1971 and consistently acknowledged that fact.

In 1986, Justice Rehnquist responded to a question from Senator LEAHY

on the subject of his analysis of the pertinent statute affecting his disqualification from this case and any second thoughts he might have on that position by stating:

I realize people might disagree with me but that was the position I took in that case . . . I never thought of it again until these hearings, to tell the truth. I have gone back and read the opinion, and I think under the statute as it was changed after *Laird V. Tatum;* I think there would be probably a very strong ground for disqualification. But I didn't feel dissatisfied with the way I behaved under the statute as it then stood.

It is obvious that the issue raised was one of legal analysis, upon which reasonable jurists could differ and Justice Rehnquist, himself agreed with this fact. However, in no way should Justice Rehnquist's actions be construed as being improper. He was prudent, honest and forthright in his statements and that is all we can ever ask for.

CORNELL TRUST

ALLEGATION

Justice Rehnquist acted unethically in setting up a trust account in 1961 for his brother-in-law, Harold Dickerson Cornell, who had been diagnosed as having multiple sclerosis.

RESPONSE

The trust fund was established by Dr. Cornell, Harold's father, with the express purpose of providing appropriate care for Harold Cornell upon his inability to provide for himself.

It was Dr. Cornell's express wish that the trust fund be kept secret from Harold Cornell. But Dr. Cornell made all of his other children aware of the secret trust.

Justice Rehnquist had no responsibilities to administer the trust or provide for its beneficiaries. This was up to Harold Cornell's brother, George, the trustee.

George Cornell in accordance with his father's wish never disclosed the existence of the trust to Harold Cornell. However, he did provide money from his own personal funds for Harold's use. The trust fund was never violated and was given to Harold intact.

At no time does Harold Cornell assert that Justice Rehnquist or anyone else took any money from the trust fund.

The claim by Harold Cornell of unethical behavior on the part of Justice Rehnquist apparently involves nothing more than a longstanding family dispute by an alienated family member.

The allegation totally lacks merit.

RESTRICTIVE COVENANTS

ALLEGATION

Properties formerly and currently owned by Justice Rehnquist, contained restrictive covenants which prohibited the sale or transfer of these properties to certain individuals.

RESPONSE

Such restrictive covenants in the early part of this century were a common occurrence.

Under current law there is no requirement to have covenants removed.

The covenants are unenforceable and meaningless on their face.

The Judiciary Committee in 1971 was aware of the restrictive covenant on his former Arizona property. However, it was appropriately not an issue in 1971 during consideration of his nomination to be Associate Justice.

Raising this issue now is nothing more than an attempt to portray Justice Rehnquist as insensitive to certain individuals. Nothing could be further from the truth.

Justice Rehnquist has taken steps to have the restrictive covenant on the Vermont property removed even though there is no requirement for this action.

LONE DISSENTER-OUT OF THE MAINSTREAM

ALLEGATION

Justice Rehnquist is out of the mainstream of constitutional thought and by far the greatest lone dissenter.

RESPONSE

This is an undeserved reputation.

Over the last four terms of the Supreme Court no Justice has written more opinions than Justice Rehnquist.

The principles of many of Justice Rehnquist's earlier lone dissents are gaining acceptance with the other Justices in recent terms.

Justice Stevens remains by far the greatest lone dissenter on the current Court with 27 solo dissents over the last four terms of the Court.

Justice Rehnquist has proven himself a leader of majorities, one who believes in equal justice for all Americans and there is no reason to think that he will not continue to do so as Chief Justice.

JUSTICE JACKSON MEMORANDUM

ALLEGATION

Justice Rehnquist expressed his own views in a memorandum concerning segregation that he wrote as a law clerk for Justice Robert H. Jackson in 1952.

RESPONSE

The memorandum was written in 1952 at the time the Supreme Court was considering Brown versus Board of Education.

Justice Rehnquist informed Senator Eastland in 1971:

The memo was prepared by me at Justice Jackson's request: it was intended as a rough draft of a statement of his views . . . rather than a statement of my views . . . the tone of the memo is not that of a subordinate submitting his own recommendation to his superior . . . but is the tone of one equal exhorting other equals.

Donald Cronson, Justice Rehnquist's coclerk, stated in 1971:

It is my recollection that the memo 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, who requested that a memo be prepared supporting the proposition that *Plessy v. Ferguson* was correctly decided. The memo supporting *Plessy* was typed by you, but a great deal of its content was the result of my suggestions.

Justice Rehnquist told Senator Eastland that he unequivocally and fully supported the legal reasoning and the rightness from the standpoint of fundamental fairness of the Brown decision and for anyone to say that he thought Plessy versus Ferguson was right, was not accurate and was not his personal views.

The matter appears to be totally irrelevant and without merit. Justice Jackson asked for a memo from his clerks and received what he requested. During his 15 years on the Court Justice Rehnquist has reviewed countless segregation and civil rights cases and has never questioned Brown versus Board of Education or suggested a return to Plessy versus Ferguson.

Mr. President, as I previously stated, the Judiciary Committee has thoroughly reviewed all allegations old and new and has found nothing that would keep Justice Rehnquist from being elevated to the position of Chief Justice.

The committee also has the responsibility to determine if Justice Rehnquist possesses qualities required of a Supreme Court Justice; namely, unquestioned integrity—honesty, incorruptibility, fairness, courage—the strength to render decisions in accordance with the Constitution and the will of the people expressed in the laws of Congress; compassion—which recognizes both the rights of individuals and the rights of society in the quest for equal justice under the law; proper judicial temperament—an understanding of, and appreciation for, our system of government, its separation of powers between the Federal and State governments.

□ 2110

Based upon his responses to questions during the hearings, his outstanding qualifications and intellect, it was determined that Justice Rehnquist does possess these attributes and is overwhelmingly qualified to serve as Chief Justice of the United States.

Mr. President, President Reagan has submitted Mr. Rehnquist's name to be Chief Justice of the United States. The FBI investigated him after he was selected for that position. They found nothing wrong. They made a thorough investigation.

It came to the Judiciary Committee. We made a thorough investigation. We spent weeks on it and then we dragged out the hearings for week after week after week to accommodate the opponents. And yet there was no merit in the allegations that were made.

The Judiciary Committee has recommended overwhelmingly that this man be confirmed. It is just not right to condemn him in the terms that have been used here and to use such phraseology as has been used. I say it is disgraceful.

I urge my colleagues to vote in favor of President Reagan's nomination of Justice Rehnquist to be Chief Justice of the United States.

Mr. President, questions have been raised about vacancies and the prospective vacancies on the Supreme Court and so forth.

I ask unanimous consent that a letter to me, signed by John R. Bolton, Assistant Attorney General, with attachments, be printed in the RECORD.

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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND
INTERGOVERNMENTAL AFFAIRS,
Washington, DC. 20530.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: This letter is written to you as Chairman of the Committee on the Judiciary to discuss the respective powers of the President to nominate, and the Senate to confirm, an individual for a prospective vacancy on the Supreme Court. The Department of Justice has consistently maintained that the President has the power to nominate, and the Senate has the power to confirm, in anticipation of a vacancy which shall occur during the President's term of office. See, e.g., Department of Justice Memorandum re: Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice and Judge Thornberry to be Associate Justice of the Supreme Court, July 11, 1968, printed in, Hearings before the Committee on the Judiciary, United States Senate, 90th Cong. 2d Sess., on Nominations of Abe Fortas and Homer Thornberry, Appendix, Exhibit 1 (1968) (copy attached).

A prospective vacancy on the Supreme Court arises when a Justice announces his or her intention to retire on a specific date, or upon the qualification of a successor.[1] A prospective vacancy also arises when an incumbent Justice is nominated for elevation to the Chief Justiceship. In any of these instances, the President has the power to nominate, and the Senate the power to confirm, in anticipation of the vacancy. This practice is entirely compatible with the constitutional plan and has been followed on numerous occasions.

As explained in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 153-157 (1803), the constitutional appointment process consists of three major steps: (1) the nomination by the President; (2) the Senatorial advice and consent; and (3) the appointment by the President, of which the Commission is merely the evidence. Each step is essential to assumption of authority by the officer or Justice, as the case may be. *Id.*[2] Thus, the Constitution clearly permits the President to nominate, and the Senate to confirm, a successor while the incumbent still holds office. Confirmation does not confer any rights of the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission. If the President nominates a person to be an Associate Justice of the Supreme Court in anticipation that an incumbent Justice will be elevated to the Chief Justiceship, and the Senate then fails to confirm the latter, thereby preventing the creation of a vacancy, the appointment, of course, cannot go forward.[3]

On several previous occasions, the President has simultaneously elevated a sitting judge and nominated his replacement. For example, Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. 34 Journal of the Executive Proceedings of the Senate, 202, 215 (hereinafter "Journal"). More recently, on December 11, 1974, President Ford nominated Judge William J. Bauer of the Northern District of Illinois to replace Judge Otto Kerner on the Seventh Circuit. On the same day, the President also nominated Alfred Kirkland to the seat vacated by Judge Bauer's elevation. 116 Journal at 805.[4]

In our view, the President's constitutional power to nominate Justices for anticipated vacancies is limited only by his term of office. A President should not be permitted, as a constitutional matter, to make a prospective nomination for a vacancy that shall occur after his term of office expires because such a power would encroach upon the appointment power of his successor. However, no such limitation exists, in the absence of a specific statutory prohibition, where the President nominates an individual for a vacancy which shall occur during his term of office.

For the above reasons, the Department of Justice believes that the President may nominate, and the Senate may confirm, individuals for anticipated vacancies on the Supreme Court which shall occur during the President's term of office. We hope this letter alleviates any remaining concerns on the part of members of your Committee.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

Attachment.

DEPARTMENT OF JUSTICE

Memorandum re Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court

On June 13, 1968, Chief Justice Warren advised President Johnson of his "intention to retire as Chief Justice of the United States effective at your pleasure." In his reply, dated June 26, the President stated, "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified." On the same day Chief Justice Warren sent to the President a telegram in which the Chief Justice referred to the President's "letter of acceptance of my retirement," and expressed his deep appreciation of the President's warm words.[1]

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief Justice of the United States vice Chief Justice Warren, and of Judge Thornberry, of the United States Court of Appeals for the Fifth Circuit, to be Associate Justice of the Supreme Court vice Justice Fortas. 114 Cong. Rec. (Daily Ed. June 26, 1968) S7834.

Questions have been raised as to the power of the President to make and of the Senate to confirm these nominations. The primary objection is based upon the assertion that there is at present no vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. Secondarily, there seems to be an objection that nomination and confirmation of Judge Thornberry cannot be accomplished in these circumstances because the office to which he has been named is not yet vacant.

Neither objection appears to be well taken. The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the qualification of his successor.[2] Judge Thornberry has been nominated in anticipation of the elevation of Mr. Justice Fortas. As this nomination will show, it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy. This power exists where it has been agreed that retirement of an incumbent Justice or judge will be effective upon the qualification of his successor. Such power also exists where an incumbent Justice or judge is simultaneously nominated for elevation to a higher position.

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[1] 28 U.S.C. 371(b) provides in relevant part: "The President shall appoint, and by and with the consent of the Senate, a successor to a justice or judge who retires." This section does not prescribe the procedures or timetable for such appointments.

[2] See also 4 Op. A.G. 217, 219-220 (1843); 12 Op. A.G. 32, 41-42 (1866); 36 Op A.G. 382, 384-385 (1931).

[3] For example, when Justice Fortas' nomination to the Chief Justiceship was withdrawn in October 1978, after the Senate failed to end a filibuster preventing a vote on his elevation the prospective vacancy for which President Johnson had nominated Judge Thornberry was eliminated.

[4] Moreover, successors to district court judges who have been elevated to the court of appeals have frequently been nominated while the Senate is still considering the nomination of the incumbent. On December 15, 1970, while the Senate Judiciary Committee was considering the nomination of Judge Wallace Kent to the Sixth Circuit, President Nixon nominated Albert Engel to fill Judge Kent's seat on the district court for the Western District of Michigan. Judge Kent's elevation was approved a few days later. 112 Journal at 680, 682.

[1] See Appendix I, Nos. 1-3 for the texts of the letters and telegram exchanged between Chief Justice Warren and the President. The letters appear in 4 Weekly Compilation of Presidential Documents 1013-14.

[2] The term "qualification" or "qualifies" refers in this context to the taking of the two oaths prerequisite to holding federal judicial office, (1) the oath to support the Constitution required by Article VI, clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office.

I.

It is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to the President to propose a timing best suited to prevent an extended vacancy and the resulting disruption of the operation of the court on which he sits. Nomination of a successor in such circumstances is but one example of the power to fill anticipated vacancies.

The more general power will be analyzed below, but it is instructive first to consider two directly pertinent instances for which documentation is available.

Mr. Justice Gray of the Supreme Court advised President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the privilege to resign at full pay, and added:

"* * * I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you."

President Roosevelt's acceptance, two days later, contained the following passage:

"It is with deep regret that I receive your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of you successor.[3]

Mr. Justice Gray died in September, before his successor, Mr. Justice Holmes, took office (187 U.S. iii).[4] The Memorial Proceedings in honor of Mr. Justice Gray pointed out that "he submitted his resignation to take effect upon the appointment and qualification of his successor. So he died in office." See also Lewis, "Great American Lawyers." Vol. 8, p. 163.

More recently, Circuit Judge Prettyman advised President Kennedy on December 14, 1961, that he intended to take advantage of the statutory retirement provisions of section 371(b), Title 28, United States Code, and continued:

"The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

"The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note."

President Kennedy replied on December 19:

"It was with regret that I received the notification that you were retiring from 'regular active service.' The way in which you phrased your letter left me with no alternative but to accept your decision."

A few days later, however, President Kennedy sent the following additional note to Judge Prettyman:

"As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

"I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist."

Judge Prettyman replied to the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite." [5]

Judge J. Skelly Wright was nominated on Februray 2, 1962, confirmed on February 28, and appointed March 30. He qualified on April 16, and Judge Prettyman retired as of April 15.

The exchange of communications between Chief Justice Warren and the President must be understood in the light of these precedents. The Chief Justice advised the President of his intention to retire, leaving it to the President to suggest terms of retirement which would be suitable in allowing sufficient time for nomination and confirmation of a successor without the disruption and over-burdening of the remaining Justices which might result from an extended vacancy, in particular such a vacancy in the Office of the Chief Justice. The President suggested that the Chief Justice's retirement should take effect upon the appointment and qualification of his successor. The Chief Justice agreed to this condition.

It is a condition of retirement that was used with respect to the Supreme Court in the case of Mr. Justice Gray. It has been frequently resorted to in the case of other judicial retirements. (For a partial list of retirements by federal judges effective upon the appointment and qualification of their successors, see Appendix II.)

The effect of this form of retirement is that the Chief Justice remains in office until the condition occurs; i.e., until his successor qualifies by taking the oaths of office.

II.

The power of the President to appoint Justices of the Supreme Court, by and with the advice and consent of the Senate, is specified in Article II, section 2, clause 2 of the Constitution. It provides that the President shall

"nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * *."

Article II, section 3 provides additionally that the President shall "Commission all the Officers of the United States."

As explained in *Marbury* v. *Madison*, 1 Cranch 137, 153–157 (1803), the Constitutional appointment process consists of three major steps: The nomination by the President; the Senatorial advice and consent (confirmation); and the appointment by the President, of which the Commission is merely the evidence. See also 4 Op. A.G. 218, 219-220.

There is no indication in this early analysis of the constitutional appointment process that a matured vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history.

It should be noted that anticipated vacancies may be grouped into two categories: First, those that will take effect on a day certain; e.g., when a resignation is submitted as of a specific date, or a statutory term is about to expire. Second, those that will take effect upon fulfillment of a condition; e.g., when the removal or elevation of the incumbent takes effect, or the appointment and qualification of his successor. Nothing in the Constitution prevents advance nomination and confirmation to fill either category of anticipated vacancies. Logic and experience, running from the earliest years of the Republic to the present, support this conclusion.

If the Senate's power to confirm were conditioned on the present effectiveness of the vacancy, there would continually be gaps in the holding of important offices. In all cases, nomination, confirmation and appointment would have to wait until the incumbent leaves office. Interruptions in the discharge of public business would necessarily result. The needs of prudent administration suggest the unsoundness of a coustitutional interpretation that would force this result upon every resignation or retirement of Presidential appointees.

As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect, by action of the incumbent or of the President, as the case may be. The first volume of the Executive Journal of the Senate, covering the years from 1789 to 1805, gives instances in which the Senate confirmed nominees in the following situations: To fill a vacancy to be created by the promotion of the incumbent; to replace an official who desired to be recalled; to rename an officer whose term was about to expire; to replace an official who had resigned as of a day certain; and to replace an official about to be superseded. (For details as to these nominations, see Appendix III.)

This practical interpretation of the Constitution by the early Presidents and the Senate has been judicially supported in a number of Supreme Court decisions holding that an officer who serves at the pleasure of the President is ousted from his office when the President appoints a successor by and with the advice and consent of the Senate. *McElrath* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 103 U.S. 227, 237; *Mullan* v. *United States*, 140 U.S. 240, 245. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office.

The history of the Supreme Court contains several examples of actions, by Presidents and the Senate, to fill positions of Justices and the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

1. Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1. However, due to his death on December 24, Stanton never ascended to the Bench. See Warren, "The Supreme Court—United States History" (1937 Edition) Vol. 2, pp. 504, 506.

2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (see supra, pp. 4–5). On August 11, the newspapers announced that Oliver Wendell Holmes had been "appointed" to suc-

[3] See Appendix I, Nos. 4–5 for the pertinent passages of the Gray-Roosevelt correspondence.

[4] The circumstances surrounding the Holmes appointment will be discussed infra.

[5] See Appendix I, Nos. 6–9 for the pertinent passages of the Kennedy-Prettyman correspondence.

ceed Mr. Justice Gray. Bowen, "Yankee from Olympus," 346. President Roosevelt had in fact on that day given Holmes a recess commission, which subsequently was canceled. Holmes, who then was Chief Judge of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. "Holmes-Pollock Letters," Vol. I, p. 103.[6]

As shown above, Mr. Justice Gray died on September 15. The President nominated Holmes on December 2, the day after the Senate reconvened. The nomination was confirmed two days later. "Journal of the Executive Proceedings of the Senate," Vol. XXXIV, pp. 5, 21. There can be no question but that President Roosevelt would have submitted the Holmes nomination to the Senate prior to Justice Gray's death, had the Senate then been in session.

3. Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. "Journal of the Executive Proceedings of the Senate," Vol. XXXIV, pp. 202, 215.

4. On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. 260 U.S. iii. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, "commencing September 18, 1922."

5. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. iii. On June 12, President Franklin D. Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 Cong. Rec. 5097. The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7. 314 U.S. iv.[7]

These precedents relating to Supreme Court appointments thus show instances in which the Senate confirmed judicial nominations which were made in anticipation of a vacancy, either where a resignation or retirement was to take effect on a day certain (Stanton; Day; Sutherland; Stone), or where the nomination was vice an Associate Justice nominated to be Chief Justice (Jackson) or vice a judge nominated to be a Justice (Richards).[8]

As noted earlier, in recent years a very sizable number of federal judges have retired subject to the appointment and qualification of their successors. The Senate has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy. (See examples in Appendix II.) The same is true of the situations, very frequent in the lower Federal courts, in which nominations have been made and confirmed to replace incumbent judges being elevated to higher posts at the same time. Thus, acceptance of the assertion that the Senate lacks the power to confirm Mr. Justice Fortas on account of the condition affecting the timing of Chief Justice Warren's retirement, or that it lacks the power to confirm Judge Thornberry at this time to replace Justice Fortas, would create serious doubt about the validity of the appointments of a sizable portion of the Federal judiciary.

There is nothing inconsistent with the Constitution in the practice of anticipatory and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the "Court may not be handicapped for any time during which a vacancy might otherwise exist."

APPENDIX I

1. Letters from Chief Justice Warren to President Johnson, dated June 13, 1968:

a. MY DEAR MR. PRESIDENT: Pursuant to the provisions of 28 U.S.C., Section 371(B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,

EARL WARREN.

b. MY DEAR MR. PRESIDENT: In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem of age, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court.

I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my very best wishes for your continued good health and happiness.

Sincerely,

EARL WARREN.

2. Letter from President Johnson to Chief Justice Warren dated June 26, 1968:

MY DEAR MR. CHIEF JUSTICE: It is with the deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have so well advanced.

Sincerely,

LYNDON B. JOHNSON.

3. Telegram from Chief Justice Warren to President Johnson, dated June 26, 1968:

The President,
The White House,

DEAR MR. PRESIDENT: My secretary has read to me over the phone your letter of acceptance of my retirement. I am deeply appreciative of your warm words, and I send my congratulations to you on the nominations of Mr. Justice Fortas as my successor and of Judge Homer Thornberry to succeed him. Both are men of whom you can well be proud, and I feel sure they will add to the stature of the Court.

EARL WARREN.

4. Letter from Mr. Justice Gray to President Theodore Roosevelt, dated July 9, 1902:

DEAR MR. PRESIDENT: Being advised by my physicians that to hold the office of Justice of the Supreme Court for another term may seriously endanger my health, I have decided to avail myself of the privilege allowed by Congress to judges of seventy years of age and who have held office more than ten years. I should resign to take effect immediately, but for a doubt whether a resignation

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[6] See also a letter of August 21, 1902 from President Roosevelt to Holmes: "After consulting one or two people, I feel that there is no necessity why you should be nominated in the recess. Accordingly I withdraw the recess appointment which I sent you, and I shall not send you another appointment until you have been confirmed by the Senate, which I think will be two or three days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts."

[7] Chief Justice Stone took his oath on July 3 (314 U.S. iv), but the delay in Justice Jackson's confirmation until July 7 had no relation to that fact. The Jackson hearings, which commenced on the same day as the Stone hearings, took place over several days, June 21-30, and the Judiciary Committee reported on the nomination June 30. On the same day the Jackson confirmation by arrangement was put over until the next session for conducting substantial business of the Senate, which was July 7. 87 Cong. Rec. 5,701, 5756, 5759 (1941).

[8] Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith, Jr., Chief Judge of the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice the elevation of Judge Smith. 112 Cong. Rec. 25524. The confirmation of Judge Greene occurred on October 18, 1966, and that of Judge Smith on October 20. 112 Cong. Rec. 27397, 28086.

to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.

Wishing that the first notice of my intention should go to yourself, I have not as yet mentioned it to any one else.

Very respectfully and truly yours

HORACE GRAY.

5. Letter from President Roosevelt to Mr. Justice Gray, dated July 11, 1902:

MY DEAR JUDGE GRAY: It is with deep regret that I received your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.

It seems to me that the valiant captain who takes off his harness at the close of a long career of high service faithfully rendered, holds a position more enviable than that of almost any other man; and this postion is yours. It has been your good fortune to render striking and distinguished service to the whole country in certain crises while you have been on the court—and this in addition of course to uniformly helping shape its action so as to keep it up on the highest standard set by the great constitutional jurists of the past. I am very sorry that you have to leave, but you go with your honors thick upon you, and with behind you a career such as few Americans have had the chance to leave.

With warm regards to Mrs. Gray, believe me,

Faithfully yours,

THEODORE ROOSEVELT.

6. Letter from Judge Prettyman to President Kennedy, dated December 14, 1961:

DEAR MR. PRESIDENT: On October 17th last, I had been on the court sixteen years. In August I was seventy years old. Being thus qualified I wish to take advantage of the statute (Sec. 371(b) of Title 28, U.S. Code) which says a judge with such qualifications "may retain his office but retire from regular active service". The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

The statute provides that you shall appoint a successor to a judge who retirees. Hence I am sending you this note.

With great respect I have the honor to be

Yours sincerely,

E. BARRETT PRETTYMAN.

7. Letter from President Kennedy to Judge Prettyman, dated December 19, 1961:

DEAR JUDGE PRETTYMAN: It was with regret that I received the notification that you were retiring from "regular active service." The way in which you phrased your letter left me with no alternative but to accept your decision.

I was pleased, however, that you were retaining your office and would be available to continue your distinguished service on the Bench. Your record for justice and humanity, your efforts in behalf of more efficient administration of the law, and your legacy of sound precedent entitle you to some relaxation from the demands of regular active service.

I am happy that you have elected to continue in the capacity of chairman of the Administrative Conference. I am looking forward to receiving the recommendations and suggestions which flow from the meetings of the Conference. It seems to me that this offers an opportunity to make a major contribution toward the improvement of the regulatory agency procedures. Under your leadership I am sure that the Conference will take advantage of that opportunity.

With every good wish, I am

Sincerely yours,

JOHN F. KENNEDY.

8. Letter from President Kennedy to Judge Prettyman, dated December 26, 1961:

DEAR JUDGE PRETTYMAN: As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Sincerely,

JOHN F. KENNEDY.

9. Letter from Judge Prettyman to President Kennedy, dated January 2, 1962:

MY DEAR MR. PRESIDENT: I have your note of December 26th. I am glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite. I shall advise the keepers of the records to enter my retirement upon the date when my successor qualifies.

May I take advantage of this opportunity to express to you my deep appreciation of your generous remarks regarding my service.

With great respect.

Yours sincerely,

E. BARRETT PRETTYMAN.

APPENDIX II

By letter dated February 24, 1968, Judge Wilson Warlick, North Carolina, Western, retired effective upon the appointment and qualification of his successor. James McMillan was nominated on April 25, appointed June 7, and entered on duty June 24. Judge Warlick retired June 23.

By letter dated March 30, 1967, Judge Frank M. Scarlett, Georgia, Southern, retired effective upon the appointment and qualification of his successor. To date no one has been appointed and he is still on the bench in regular service.

By letter dated November 28, 1966, Judge Frank A. Hooper, Georgia, Northern, retired effective upon the appointment and qualification of his successor. Newell Edenfield was nominated May 24, 1967, appointed June 12, and entered on duty June 30. Judge Hooper retired June 29.

By letter dated September 21, 1965, Judge William G. East, Oregon, retired effective upon the appointment and qualification of his successor. Robert Belloni was nominated February 21, 1967, appointed April 4, and entered on duty April 10. Judge East retired April 9.

By letter dated March 12, 1965, Judge William C. Mathes, California, Southern, retired effective upon the appointment and qualification of his successor, or not later than June 30, 1965. Irving Hill was nominated May 18, appointed June 10, and entered on duty June 25, Judge Mathes retired June 9.

By letter dated February 19, 1964, Judge Walter M. Bastian, D. C. Circuit, retired effective upon the appointment and qualification of his successor. Edward A. Tamm was nominated March 1, 1965, appointed March 11, and entered on duty March 17. Judge Bastian retired March 16.

By letter dated March 26, 1963, Judge David W. Ling, Arizona, retired effective upon the appointment and qualification of his successor. C. A. Muecke was nominated August 17, 1964, appointed October 1, and entered on duty October 12. Judge Ling retired October 11.

A number of other instances early in this century of retirements to be effective upon the appointment and qualification of the successor have been assembled from incomplete records of the Department of Justice. It is believed that in these cases the successor was appointed between the date of the announcement of retirement as shown in the second column and the effective date of retirement as shown in the third column.

Name and Court	Announcement of retirement	Effective date of retirement
Benedict, Charles, New York, E	5/26/97	7/20/97
Brown, Addison, New York, S	7/1/01	9/3/01
Baker, John, Indiana	11/8/02	12/18/02
Hallett, Moses, Colorado	4/7/06	5/1/06
Lochren, Wm., Minnesota	4/3/08	7/11/08
Saunders, Eugene, Louisiana, E	1/8/09	2/8/09
Dallas, George, Third Circuit	3/15/09	5/24/09
Reid, Silas, Alaska	6/14/09	7/1/09
Cooley, Alford, New Mexico	6/6/10	7/10/10
Brawley, Wm., S. Carolina	4/18/11	6/14/11
Dorworth, George, Washington	1/24/12	7/8/12
Locke, James, Florida, So	7/9/12	9/2/12
Peele, Stanton, Court of Claims	1/2/13	2/11/13
Stuart, Thomas, Hawaii	8/8/16	11/23/16
Whitney, Wm., Hawaii	1/25/17	3/19/17
Shepherd, Seth, D.C. Ct. Appeals	5/1/17	9/30/17
Dyer, David, Missouri, E	5/15/19	11/3/19
Baits, Robert, Fifth Circuit	8/22/19	4/9/20
Davis, John, New Jersey	6/5/20	6/12/20
Riner, John, Wyoming	10/13/21	10/31/21
Ruckin, Frank, Washington	1/17/23	1/18/23
Anderson, Albert, Seventh Circuit	10/31/29	11/6/29

APPENDIX III

Examples in Vol. I of the Journal of the Executive Proceedings of the Senate, of Senatorial Confirmations in Anticipation of a Vacancy.

I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1976, p. 216.[1]

I nominate the following persons to fill the offices annexed to their names, respectively, which became vacant during the recess of the Senate:

* * * * * *

Jonathan Jackson, of Massachusetts, to be Supervisor for the district of Massachusetts, vice Nathaniel Gorham, deceased.

John Brooks, of Massachusetts, to be Inspector of Survey No. 2, in the district of Massachusetts, vice Jonathan Jackson, appointed Supervisor.

Samuel Bradford, of Massachusetts, to be Marshal for the district of Massachusetts, vice John Brooks, appointed Inspector of Survey No. 2, in that district.

* * * * *

Confirmed December 22, 1796, p. 217. A number of similar nominations and confirmations took place in February, 1801, in connection with the staffing of the circuit courts. pp. 381-385.

II. Nominations vice incumbents who desire to be relieved of their duties.

May 19, 1796, p. 209

[1] The page numbers refer to the pages of Volume I of the Journal of the Executive Proceedings of the Senate.

I nominate Rufus King, of New York, to be Minister Plenipotentiary of the United States at the Court of Great Britain, in the room of Thomas Pinckney, who desires to be recalled.

David Humphreys, of Connecticut, to be the Minister Plenipotentiary of the United States at the Court of Spain; William Short, the resident Minister to that Court having desired to be recalled.

Confirmed, May 20, 1796, p. 209.

III. Nominations to fill terms about to expire.

1. January 10, 1798, p. 258

I nominate the following persons to be Marshals of the United States;

John Hobby, for the District of Maine; Philip B. Bradley, for the district of Connecticut; Thomas Lowry, for the district of New Jersey; Samuel McDowell, Jr., for the district of Kentucky: each for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 325

I nominate * * * David Mead Randolph the present Marshal of the District of Virginia, for the term of four years, to commence on the 15th instant when his existing commission will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1803, p. 441

I nominate * * * William Henry Harrison, to be Governor of the Indiana Territory from the 13th day of May next, when his present commission as Governor will expire.

Confirmed February 8, 1803, p. 442.

IV. Nominations to fill vacancy which will be caused by a resignation on a future day certain.

May 7, 1800, p. 352

I nominate the Honorable John Marshall, Esq. of Virginia, to be Secretary of the Department of War, in the place of the Honorable James McHenry, Esq., who has requested that he may be permitted to resign, and that his resignation be accepted to take place on the first day of June next.

May 12, 1800, p. 353

I nominate the Honorable John Marshall, Esq., of Virginia, to be Secretary of State, in place of the Honorable Timothy Pickering, Esq. removed.

The Honorable Samuel Dexter, Esq. of Massachusetts, to be Secretary of the Department of War, in the place of the Honorable John Marshall, nominated for promotion to the Office of State.

Confirmed, May 13, 1800, p. 354

V. Nomination to fill office, the incumbent of which is to be superseded.

December 23, 1799, p. 329

I nominate Ambrose Gordon, of Georgia, to be Marshal of the district of Georgia, in the place of Oliver Bowen, to be superseded.

Confirmed, December 24, 1799, pp. 329-330.

NOMINATIONS OF SUPREME COURT JUSTICES IN ELECTION YEARS [1]

	Total nominations	Confirmed	Rejected	Withdrawn, postponed, or not acted upon
Before election in election year (see table I)	15	11	1	3
Between election and inauguration of different President (see table II)	15	[2] 9	1	5
Nominations other than above categories	96	[3] 85	7	4
Total	126	105	9	12

[1] Includes the period between Jan. 1 of an election year and the inauguration date of the following year.

[2] Includes Stanley Matthews, the relevant dates of whose nomination and confirmation are as follows: Nominated—Jan. 26, 1881; not acted upon when Senate adjourned Mar. 3, 1881; resubmitted—Mar. 14, 1881; confirmed—Dec. 20, 1881.

[3] Includes these special cases: William Paterson: Nominated—Feb. 27, 1793; nomination recalled by President—Feb. 28, 1793; resubmitted—Mar. 4, 1793; confirmed—Mar. 4, 1793.

I. NOMINATIONS IN ELECTION YEAR: BEFORE ELECTION

Name of nominee	Date of nomination	Disposition of nomination	Nominating President and party	Succeeding President and party
William Cushing	Jan. 26, 1796 [1]	Confirmed Jan. 27, 1796; declined Feb. 2, 1796	Washington, Federalist	Adams, Federalist.
Samuel Chase	Jan. 26, 1796	Confirmed Jan. 27, 1796	....do	Do.
Oliver Ellsworth	Mar. 3, 1796	Confirmed Mar. 4, 1796	....do	Do.
William Johnson	Mar. 22, 1804	Confirmed Mar. 24, 1804	Jefferson, Democrat-Republican.	Jefferson, Democrat-Republic.
John Spencer	Jan. 8, 1844	Rejected Jan. 31, 1844	Tyler, Democrat	Polk, Democrat.
Reuben Walworth	Mar. 13, 1844	Postponed Jan. 15, 1844; withdrawn June 17, 1844	....do	Do.
Edward King	June 5, 1844	Postponed June 15, 1844	....do	Do.
Edward A. Bradford	Aug. 16, 1852	Not acted upon	Fillmore, Whig	Pierce, Democrat.
Melville Fuller	Apr. 30, 1888	Confirmed July 20, 1888	Cleveland, Democrat	Harrison, Republican.
George Shiras	July 19, 1892	Confirmed July 26, 1892	B. Harrison, Republican	Cleveland, Democrat.
Mahlon Pitney	Feb. 19, 1912	Confirmed Mar. 13, 1912	Taft, Republican	Wilson, Democrat.
Louis D. Brandeis	Jan. 28, 1916	Confirmed June 1, 1916	Wilson, Democrat	Do.
John H. Clarke	July 14, 1916	Confirmed July 24, 1916	....do Do.	
Benjamin N. Cardozo	Feb. 15, 1932	Confirmed Feb. 24, 1932	Hoover, Republican	Roosevelt, Democrat.
William Brennan	Oct. 15, 1956 recess appt. Jan. 14, 1957 (after election)	Confirmed Mar. 19, 1957	Eisenhower, Republican	Eisenhower, Republican.

[1] Nominated as Chief Justice; had been Associate Justice since 1789.

II. NOMINATIONS BETWEEN ELECTION AND INAUGURATION OF DIFFERENT PRESIDENT

Name of nominee	Date of nomination	Disposition of nomination	Nominating President and party	Succeeding President and party
John Jay	Dec. 18, 1800	Confirmed Dec. 19, 1800, declined Jan. 2, 1801	Adams, Federalist	Jefferson, Democrat-Republican.
John Marshall	Jan. 20, 1801	Confirmed Jan. 27, 1801	.....do	Do
John J. Crittenden	Dec. 17, 1828	Postponed Feb. 12, 1829	J.Q. Adams, Nat.-Republican	Jackson, Democrat.
William Smith	Mar. 3, 1837	Confirmed Mar. 8, 1837; declined later in same month	Jackson, Democrat	Van Buren, Democrat.
John Catron	Mar. 3, 1837	Confirmed Mar. 8, 1837	.....do	Do
Peter V. Daniel	Feb. 26, 1841	Confirmed Mar. 2, 1841	Van Buren, Democrat	Harrison, Whig.
Edward King	Dec. 4, 1844	Postponed Jan. 23, 1845; withdrawn Feb. 7, 1845	Tyler, Democrat	Polk, Democrat.
Samuel Nelson	Feb. 4, 1845	Confirmed Feb. 14, 1845	.....do	Do
John Read	Feb. 7, 1845	Not acted upon	.....do	Do
George Badger	Jan. 10, 1856	Postponed Feb. 11, 1853	Fillmore, Whig	Pierce Democrat.
William Micou	Feb. 24, 1853	Not acted upon	.....do	Do
Jeremiah Black	Feb. 5, 1861	Rejected Feb. 21, 1861	Buchanan, Democrat	Lincoln, Republican.
William B. Woods	Dec. 15, 1880	Confirmed Dec. 21, 1880	Hayes, Republican	Garfield, Republican.
Stanley Matthews	Jan. 26, 1881	Not acted upon	.....do	Do
	Resubmitted Mar. 14, 1881	Confirmed Dec. 20, 1881	Garfield, Republican	Arthur, Republican (Sept. 20, 1881).
Howell E. Jackson	Feb. 2, 1893	Confirmed Feb. 18, 1893	B. Harrison, Republican	Cleveland, Democrat.

Note: Includes these special cases: (2) Roger B. Taney: Nominated as Associate Judge—Jan. 15, 1835; postponed—Mar. 3, 1835; nominated as Chief Justice—Dec. 28, 1835; confirmed—Mar. 15, 1836. (3) Edwin M. Stanton: Nominated—Dec. 20, 1869; confirmed—same day; died—Dec. 24, 1896—without ever taking seat on Court.

Mr. THURMOND. Mr. President, in closing, I wish to take this opportunity to express my appreciation to the Republican Senators who supported this nomination and voted for cloture today. I would also like to thank Senator ORRIN HATCH for his splendid work on this nomination. Every Republican Senator on this floor voted for him. Not a single one voted against him.

I wish to commend the able majority leader for what he has done to get this nomination up and for speaking on it forcefully. We are very indebted to him.

I wish to commend Senator STENNIS, who has been a judge himself from Mississippi. No one in the Senate is respected more than Judge STENNIS, who not only voted here for cloture and who is going to support the nomination, but who spoke out for him and I commend him. He is acting in a non-

partisan way, as we Senators should act on nominations, regardless of who is the President.

I wish to commend Senator HEFLIN, Senator LONG, and the other Democratic Senators who supported this nomination, at least in voting for cloture today.

I wish to especially commend Senator DECONCINI who did a great deal of work on this nomination. He is in the Democratic Party. His address here on this subject is one of the finest I have heard on nominations since I have been in the Senate.

I would also like to take this opportunity to commend Duke Short, the chief investigator of the Judiciary Committee, and his investigator, Frank Klonoski, for the fine job they did investigating this nominee and for all that they have done to assist in this matter.

I wish to commend Jack Mitchell, Mark Goodin, and Melissa Nolan; Paul Morgan, of the Library of Congress; and Randy Rader, from Senator HATCH'S staff; and others whose names I will not mention at this time. We appreciate their fine cooperation.

This is a nomination, Mr. President, that, when it was sent to the Senate and on to the committee, should have sailed right through. Instead of that, it has taken weeks and weeks and weeks. We just wasted a lot of time here. When it came to the Senate, it should have sailed through.

It is just amazing to me the allegations they brought up here, especially after we answered them and explained them and after witnesses appearing before the committee did that. Yet, they go on and on and on.

Mr. President, I hope the time has now come when we can get to a vote and get the matter settled once and for all.

I wish to thank the distinguished ranking member, the distinguished Senator from Delaware, for the courtesies that he has extended to the majority in this matter. I thank him for that.

Mr. BIDEN. I thank my colleague, especially in light of his concluding remarks.

Mr. THURMOND. Mr. President, I think we are about ready to vote. I hope all Senators are here and they will cast their vote in favor of Mr. Rehnquist. The fight is over now. There is no use to continue it.

Someone said of the opposition that some of them were going on and on because they wanted to intimidate him and try to get him, if he is confirmed, to be more liberal. That is ridiculous allegation.

Mr. Rehnquist is what he is. He always has been. I think he is going to hand down decisions and call them just as he sees them—and that is what he should do—regardless of what people think. That is the reason we have an independent court. They do not have to come up for renomination and reappointment. They are appointed for life. They are independent.

I commend Justice Rehnquist for the great job he has done for 15 years and hope he will have 15 more years, or double that, on the Supreme Court after he has been confirmed.

The PRESIDING OFFICER. Is there further debate?

Mr. MELCHER. Mr. President, I have been concerned that Justice Rehnquist's previous action in political campaigns in Arizona aided and abetted tactics to challenge unlawfully black voters. Rehnquist's direct involvement is unclear, and he now testifies to deplore those tactics.

I do not pass judgment on his nomination on that basis.

Nor do I pass judgment on his nomination on the basis of his evident, consistent conservative philosophy. That conservative philosophy and Justice Rehnquist's legal expertise and experience on the Supreme Court gives President Reagan the confidence to nominate him for Chief Justice.

My vote on the Rehnquist nomination turns on a fundamental issue that involves him personally where I find his determinations to be seriously inadequate.

News accounts published in mid-August brought to public attention charges made by Harold Cornell of San Diego.

Cornell charged Rehnquist with improperly withholding from him the existence of a trust fund established by Cornell's father to benefit Howard Cornell. Rehnquist is his brother-in-law, married to Cornell's sister.

I have previously noted Chairman THURMOND'S explanation of the circumstances of the Cornell trust.

I have talked to Harold Cornell questioning him on the matters of the trust and the facts surrounding it.

The facts are not disputed.

In 1961, the father, Dr. Cornell, asked Rehnquist to draw up a trust fund for his son Harold; that his other son, George, be trustee; and, that the family not inform Harold of its existence. Further, that the trust was to benefit Harold if he was in serious need; that the funds ($25,000) be invested for his benefit; that in the event of Harold's death the surviving family members would be the beneficiaries; and, that in the event of George Cornell's death, named as trustee, the succeeding trustee would be a bank in San Diego.

George Cornell did die in 1981. A few months later in 1982 the San Diego bank refused to accept trustee status; a motion filed in court brought to Harold Cornell's attention that the trust fund existed.

Harold Cornell promptly took action to claim the entire trust fund. He succeeded in his claim.

The trust fund after 21 years amounted to $35,000.

Harold Cornell has multiple sclerosis and receives veterans' benefits. Prior to being determined to be eligible for veterans' benefits, Cornell beginning in 1962, 1 year after the establishment of the trust, his earnings from his law practice declined rapidly as he became afflicted increasingly with multiple sclerosis. His needs for financial assistance within a few years became apparent and for a time prior to gaining veterans' benefits his needs were great.

He was not aware of the existence of the trust.

I have reached several conclusions:

The trust funds terms should have benefited Harold Cornell when his apparent and serious needs started.

Although the family was instructed by Dr. Cornell, the father, not to inform Harold of the trust fund, it did instruct assistance to him if and when he needed it. That assistance was not provided.

In fact, the purpose of the trust fund, the very purpose, and the requirement of the trust fund was that financial assistance be provided if the needs were there.

Although he was not the trustee, Rehnquist having drawn up the trust knew its terms. That established a special responsibility on Rehnquist to advice the trustee, George Cornell to follow the terms of the trust and to provide benefits of the trust to Harold Cornell in his time of need.

Further, Harold Cornell, as a victim of multiple sclerosis attained a permanently debilitated condition. Measured by the trust's terms required continuous financial benefits for Harold.

I find it extraordinary that Harold Cornell only learned of the existence of the trust, 21 years old, when the San Diego bank refused to become the trustee following the death of George Cornell. Had the bank not refused which necessitated a motion to be filed in court to appoint a new trustee and that was published as required, Harold Cornell, then about 70 years old, might never have learned of the trust set up by his father for his benefit if he became in need of help.

The basic fundamental responsibility of Rehnquist to help his brother-in-law cannot, he excused because the trustee, George Cornell, did not act.

Rehnquist had a special binding obligation to assure that Harold Cornell benefited from the trust, in his days and years of need.

As he became incapacitated his income dwindled, multiple sclerosis gradually ended any earnings. That should have dictated that he be helped from the trust.

When Dr. Cornell set up the trust just before his death he could not have anticipated any more serious

needs than did in fact become the fate of his son.

Legal scholars may argue or quibble over the legal obligations of Rehnquist versus the primary duty of the trustee George Cornell.

But I shall not argue or quibble legal nuances.

This is a question of basic right or wrong.

I believe Rehnquist was wrong in not assuring the benefits flowed to Howard Cornell in his time of need, and not advising the trustees of his primary duty to make sure that the trust benefits were given to Howard Cornell, and I find it wrong that did not happen in not informing Howard Cornell of the existence of the trust.

I believe it is a moral family obligation required of Rehnquist to have taken those actions. I believe he failed in a basic responsibility. And I regret that I believe it demonstrates a flaw in his judgment, and in his compassion.

Our duty here in the Senate of the confirmation of the Chief Justice is clear. It is an obligation and a responsibility that we have to use every facet of a person's character, his knowledge, his wisdom in determining whether or not he should indeed be confirmed for the highest position in the highest court of our country.

I find with regret that I do not believe that Chief Justice Rehnquist should receive confirmation. I regret that I find that to be the case. But for those reasons, I shall vote against the nomination.

Mr. PELL. Mr. President, I wish to emphasize that while I have voted in favor of invoking cloture on the nomination of William Rehnquist, I intend to oppose the nomination when the time arrives for a final vote on confirmation. During 25 years in the Senate I have never voted in support of a filibuster. I believe that a majority of this body should work its will, regardless of the outcome, and that filibusters are not in the public interest. Having said that, I would reiterate my intention to oppose Mr. Rehnquist's nomination. The arguments, pro and con, are before the Senate and I believe it is time for the Senate to move toward a final vote on this nomination.

Mr. COHEN. Mr. President, the Senate's role in judicial appointments, and particularly the appointment of members of the Supreme Court, is one of its most important functions. In fulfilling its constitutional duty of advice and consent, the Senate shares with the President the critical responsibility of shaping the quality of the Federal judiciary and, therefore, the quality of justice in our Nation.

I do not take this responsibility lightly, nor do I believe that the Senate should act as a rubber stamp, simply deferring to the President's wishes. Although there may appropriately be a strong presumption in favor of a Presidential nominee, the Senate and each individual Senator have an obligation to take an active role in evaluating the qualifications and competence of those individuals nominated by the President in order to meet the responsibility imposed by the Constitution.

During the Senate Judiciary Committee's hearings and the Senate's debate on the nomination of Associate Justice William Rehnquist to be Chief Justice of the U.S. Supreme Court, several issues touching on his fitness for this position have been raised. However, in regard to his intelligence, his temperament, and his academic and professional qualifications, I believe there is virtually unanimous agreement that Justice Rehnquist is well qualified to serve as Chief Justice.

The Standing Committee on Federal Judiciary of the American Bar Association concluded, after an extensive investigation, that Justice Rehnquist "meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the Committee's highest evaluation of the nominees to the Supreme Court." Justice Rehnquist is described by fellow members of the judiciary as a "true scholar," "unbelievably brilliant," and "a very capable individual in every respect." Moreover, he has the respect and esteem of his fellow Associate Justices and the current Chief Justice, all of whom have strongly endorsed his nomination.

The question before the Senate is not whether Justice Rehnquist should remain or be allowed to serve on the Supreme Court, but whether he should be elevated to the position of Chief Justice, the head and administrator of the Federal judiciary. Regardless of the outcome of the Senate's debate on this nomination, Justice Rehnquist will remain on the Supreme Court and will continue to express his opinions, in the majority or in the dissent, as a member of the Court.

I fully expect that among these future opinions, there will be some, and perhaps many, with which I will disagree. I make this prediction based on the record of the past, for I do not share a number of the views which have been expressed by Justice Rehnquist and, in fact, find myself in strong disagreement with many of his past judicial opinions.

I must also say that I am troubled by the performance of Justice Rehnquist during the Judiciary Committee's confirmation hearings. His failure to be more candid and forthright with the committee has raised serious questions regarding his credibility. In addition, I am dismayed by some of the statements and writings made by Justice Rehnquist during his tenure in the Justice Department's Office of Legal Counsel and as a private citizen prior to his joining the Court in 1971 regarding civil rights issues and the equal rights amendment. These statements have understandably raised concerns regarding Justice Rehnquist's sensitivity to our Nation's commitment to equal rights for minorities and women.

While these statements should not be ignored by the Senate in its consideration of the nomination, I believe the more important and relevant indicator of Justice Rehnquist's fitness is his established record over the past 15 years as Associate Justice. An examination of this record reveals that Justice Rehnquist is, without question, a conservative jurist, an assessment with which few, if any, would disagree. However, the fact that his conservative judicial philosophy has led him to judgments on complex and controversial issues with which I and many others differ, neither makes him unfit nor does it necessarily indicate a hostility or insensitivity to the values of equality and justice.

Despite my differences with Justice Rehnquist's conclusions on various constitutional and legal issues, I do not question his integrity, or his respect for the rule of law and the Constitution. And, it is by these standards, together with professional competence, that Justice Rehnquist and other nominees to the Federal judiciary should, in my opinion, be judged.

Those who would have the Senate reject this nomination bear the burden of demonstrating why an individual who has served honorably and with distinction on the Supreme Court for over a decade should not be elevated to the position of Chief Justice. While there is much in Justice Rehnquist's record that precludes me from giving my enthusiastic support for his nomination, I do not believe that this burden has been met. I will, therefore, vote to confirm William Rehnquist as the next Chief Justice.

FAILING THE NATION'S IDEALS

Mr. LAUTENBERG. Mr. President, I rise to oppose the nomination. Justice Rehnquist should not become Chief Justice Rehnquist.

Mr. President, I do not reach this conclusion lightly. But, I do not come to it with any doubts or hesitation. I have thought a lot about the nominee. And I have thought a lot about my role and the Senate's role, in this process.

It is my role to apply, as best I can, certain high standards that a Chief Justice must meet. Standards of intelligence and integrity. But also standards of loyalty and service to ideals we hold so dear. Ideals of freedom and equality. Ideals embedded in the Con-

stitution, in our laws, and in our vision of a more perfect society.

Mr. President, Justice Rehnquist fails to meet those standards.

THE ROLE OF THE SENATE

The Senate has no role more important than its role of advice and consent to judicial nominations. And no judicial nomination is more important than one to the Supreme Court, one to the post of Chief Justice.

We have a great responsibility. Just as the President is empowered to make nominations, we are entrusted with the power to reject them. We are coequal with the President. Let me say that, at the outset, because I believe some of my colleagues would disagree.

Some would say the President—a popular President—has the right to whom he chooses, unless we prove the nominee to be a liar or a cheat or an incompetent. Some would say that we ought not to inquire into the nominee's views. It is fine for the President to do that. And, we can be sure, those views were a factor in this nomination. But, it is not our job to inquire as well.

Mr. President, that is what some may say. But, I disagree. The Senate's job is not so confined. It is not so mechanical. And it is not so easy.

We sit in judgment of someone who would lead one separate branch of Government. This is not some post within the executive branch, some post in the President's own administration. For that, perhaps more latitude is justified. A President is elected to lead that branch, and to assemble a government. But, we are elected to the Congress. And both the President and the Senate must join as partners in the selection of the members of the third branch—the judiciary.

We sit in judgment not of some nominee to a district or circuit court. For that, questions about a person's views perhaps should be balanced against a person's obedience to precedent.

But, we sit in judgment of a nominee to the highest court. The Court does not merely find the law, it shapes it. The Court can feed the growth of our liberties and the moral height of our Nation, or it can stunt them, starve them, and deny them their flowering.

We sit in judgment of a nominee who, while he serves today, would acquire greater power and greater stature, if confirmed as Chief Justice. He would have greater power to shape consensus and to cast the direction that lower courts must follow. He would serve as a symbol of American justice—a symbol of its achievements and a symbol of its failures.

We have a duty to exercise judgment. We have a duty to decide for ourselves. Is this the person the Nation needs?

Mr. President, I am not a lawyer. But, that's my view of our role. It conforms with the intent of the framers of the Constitution. It is upheld by history.

QUESTIONS OF INTEGRITY

This Senate must hold this nominee up to the highest standards of integrity. There must be no doubts. There must be no questions.

But, Mr. President, questions abound. Doubts are raised. There are questions of credibility and doubts about ethical responsibility.

Mr. President, people change. They grow. I can accept that. Our law has grown over the last 30 years. I can accept the fact that a person may have grown with it. That, in the past, he held views that would have been respectable in many quarters then, but would be untenable in most quarters today.

But Justice Rehnquist does not present such a picture of growth. Rather, he denies that he held now-rejected views. His denials are unbelievable. They're are unbelievable in the light of evidence. They're unbelievable in the light of the views that Justice Rehnquist has expressed over the years. And they raise profound questions about his credibility, his integrity, and his suitability to become Chief Justice.

As a young man, serving as a clerk to Justice Jackson, Justice Rehnquist argued for keeping the rule of separate but equal. Justice Rehnquist claims that he did so not as a statement of his own views. He did so at the request of Justice Jackson, who was seeking both sides of the argument.

The issue is not opposition, well over 30 years ago, to what would be the result in Brown versus Board of Education. While I would reject such opposition, I could accept that someone might have opposed the decision then, if that person accepts the decision now.

But, Justice Rehnquist denies that his memo reflected his views. That's hard to believe. His memo reads, "I have been excoriated by liberal colleagues, but I think Plessy versus Ferguson was right and should be reaffirmed." He says "I think". "I have been excoriated." This doesn't sound like the memo prepared to reflect another view.

Justice Jackson's secretary today refutes Justice Rehnquist. So does Justice Rehnquist's co-clerk at the time.

Indeed, it is Justce Rehnquist's own opinions, his own views, as expressed over the years following his clerkship, that make it much more believable that the memo expressed Justice Rehnquist's views. The memo expressed the views of a man who would later propose a constitutional amendment to strip the court of power to enforce Brown versus Board of Education. A man who would give Brown a narrow and cramped reading.

Mr. President, I could accept someone who said I thought separate but equal was right, but in retrospect, I was wrong. But, Justice Rehnquist does not show us to be a man of growth. He instead raises doubts about his integrity and credibility.

Similar doubts about the Justice's credibility are raised by his explanation of the terms of deeds on his homes. These were terms that restricted the sale of his homes on racial and religious grounds.

The deed on his Vermont home read that it could not be "leased or sold to any member of the Hebrew race."

The Justice claims that he was not aware that his deed so stated. But, can we believe that a skilled lawyer would not notice such a provision? We are talking about a purchase of a home not in 1950, but 1974.

By letter, Justice Rehnquist was specifically advised by his attorney that the deed was restrictive. Justice Rehnquist replied that he did not recall being advised. How could he forget? And even if he did, how could he accept that deed back then?

Justice Rehnquist is said to have personally challenged, accosted, and questioned would-be black voters in Phoenix, AZ. This was part of a Republican ballot-security program. A program said to be designed to intimidate black voters from the exercise of their rights. Justice Rehnquist denies that he had such a role. But, several witnesses dispute the Justice's account. Questions remain about the Justice's actions then, and what they say about his respect for voter's rights. Questions remain about his honesty today.

THE DUTY TO RECUSE ONESELF

The Chief Justice must uphold the highest standards of legal ethics. He must uphold the standard for the system and the legal profession.

One basic rule of judicial ethics, is that a judge should not sit in a case in which he has been involved; whose facts and subject matter has personal knowledge of; a case about which he has already formed an opinion.

The evidence shows that Justice Rehnquist violated that rule. He sat on the Supreme Court and cast the deciding vote, in the case of Laird versus Tatum. That case challenged the military's program of surveillance of citizens. The Court said that the plaintiffs had no right to bring the case.

Mr. President, when he served in the Justice Department, then attorney Rehnquist was head of the office that reviewed legal aspects of the surveillance policy. The office negotiated with the Army about the details of the policy. Negotiations were extensive. The office Mr. Rehnquist headed was small. Mr. Rehnquist himself sent a key transmittal memorandum. It is hard to believe that government attor-

ney Rehnquist did not have knowledge of facts and circumstances that should have disqualified Justice Rehnquist.

Compounding this breach of ethics, attorney Rehnquist testified about the Laird versus Tatum case before the U.S. Senate. He testified about important facts involving the case. He also expressed doubts about whether the case should be heard by the courts. That was the same issue that eventually came to the Supreme Court.

A leading expert on legal ethics, Professor Geoffrey Hazard, Jr. of Yale Law School, has written a letter on this matter. He has concluded that the Justice violated rules of legal ethics.

But, Mr. President, one does not have to be an expert on legal ethics, to see that it was wrong for the Justice to sit. He knew facts that the parties did not know and that they could not address. He had formed an opinion about the case before the parties had a chance to make their arguments. That's unfair. It's wrong. And it reflects negatively on the suitability of Justice Rehnquist to be elevated to the position of Chief Justice.

Mr. President, significant questions have been raised about the integrity of Justice Rehnquist. About his candor. About his legal responsibility. It is enough, alone, to deny him elevation to the highest judicial post in the land? Perhaps. But, we need not decide that question.

HOSTILITY TO THE IDEALS WE CHERISH

Mr. President, more troubling than the question about integrity, credibility, and ethical responsibility, is the nominee's consistent hostility to the rights and ideals we cherish. Justice Rehnquist has tried to impose a cramped and arthritic view of rights . . . rights that should flex and bend and reach out to embrace those left out. For this reason, he should be denied the post of Chief Justice.

Equal protection of the law is not just a guarantee of the Constitution. It is an ideal. It is a goal of our Nation. To promote equality. To raise up those kept down: racial minorities, women, the handicapped. To give them an equal chance to live a good life.

Justice Rehnquist would deny these people all but the stingiest protection. But, thankfully, he has often been alone. He has stood on the fringes of the Court. He has been pushed into dissent from rulings to expand civil rights, to bar bias as minorities, to uphold the rights of individuals.

Mr. President, that is where Mr. Rehnquist should stay. He should not rise to the top and center of the Court. No one so extreme, so out of touch with the mainstream of thought, should become the symbol of Justice in our Nation.

Rather than unite the Court and unite the Nation, he would divide it. Rather than build a consensus for expanding rights and liberty, he would fracture it.

This nominee would close the door to justice. The Courts of our Nation stand as a check against the tyranny of the majority. It stands as a defender of the individual. As the protector of the rights established in the Constitution and our laws.

Justice Rehnquist would close the door to the courthouse. He would deny access to the courts. In decision after decision, he has tried to deny standing, the right to go to court, to resolve disputes.

Mr. President, there is no right more basic to this Nation's history, its reason for being, than the right of free exercise of religion, and the proviso that the State shall not establish religion. This Nation was founded by people seeking to escape religious intolerance.

The separation of church and State is basic to the fabric of this Nation. Guarding against Government sponsorship of religion is as important as guarding the right of free exercise.

But, Justice Rehnquist would disagree. Time after time, he has departed from the court majority, to uphold laws said to sponsor religion.

Had Justice Rehnquist spoken for the Court, for the Nation, each time has spoken in dissent, our laws would be different laws; our rights would be lesser rights; and our Nation would be a poorer nation.

Racial segregation would prevail. Women would suffer second class citizenship. The wall between church and State would have crumbled. The rights of the individual would suffer at the hands of the State. The door to the courthouse would be closed.

This is what Justice Rehnquist has stood for. This is what he would stand for, as the chief of the courts, the guardians of the Constitution and the laws of the Nation.

He would stand as a symbol not of our aspirations, but of our failures. He would stand for rigid, unyielding view of rights, when the hallmark of our Constitution and our system of laws has been its flexibility, its vitality, its ability to adapt to changing times and expanding conceptions of liberty.

I cannot support this nominee for Chief Justice. He fails to meet the highest standards of integrity. But more important, in fact decisive, he fails to meet the highest standards of fidelity to the ideas of freedom and equality that we hold so dear.

Mr. HECHT. Mr. President, I rise today to speak in support of the nomination of William Rehnquist to be Chief Justice of the U.S. Supreme Court.

Justice Rehnquist is a man blessed as both a learned scholar and an accomplished attorney. More importantly, however, Mr. President, the Justice has a long and distinguished career of government service. As former President Richard Nixon so aptly noted in his speech nominating Mr. Rehnquist to the Supreme Court; Mr. Rehnquist was "awarded one of the highest honors a law graduate can achieve," when, shortly after completion of law school, he was given the position of clerk to Supreme Court Justice Robert H. Jackson.

Subsequent to this clerkship, Mr. Rehnquist was appointed during the Nixon administration to head the Justice Department's office of legal counsel as an Assistant Attorney General—an important public policy position. In this capacity Mr. Rehnquist reviewed the legality of all presidential executive orders and other constitutional law questions of the executive branch. He also frequently testified before congressional committees in support of that administration's policies. In fact, so well reasoned and articulate were his congressional presentations that even many liberal Members of Congress applauded his abilities.

Mr. Rehnquist was next nominated as a Justice on the Supreme Court where his tenure has been equally impressive. After 15 years and hundreds of cases on the Court, the Justice has clearly established his stance as to the Court's role—one of judicial restraint. Justice Rehnquist believes that the Court should exercise its powers with deference to its partners in the Federal system—Congress, the President, and the States—a philosophy with which I concur.

Mr. President, the present controversy over the nomination of Justice Rehnquist seems not to concern his immaculate record, but rather the fact that he is a conservative and a strong supporter of Reagan administration policies. The campaign in opposition to this nomination is being conducted primarily by those who, quite simply, do not agree with Justice Rehnquist's political disposition. And this effort will be, I am confident, an unsuccessful attempt to derail the nomination of someone who has faithfully served the Court for the past 15 years.

In closing, Mr. President, I would like to remind my colleagues that the American Bar Association gave Justice Rehnquist its highest rating when evaluating his qualifications for the position Chief Justice. I am of the opinion that Associate Justice Rehnquist will make an excellent Chief Justice. Accordingly, I wholeheartedly support his nomination and urge my colleagues to do the same.

Mr. DIXON. Mr. President, shortly, we will be asked to advise and consent to the nomination of Mr. Justice Rehnquist to be Chief Justice of the Supreme Court of the United States.

This is a particularly challenging obligation of each Senator, because once confirmed, the Chief Justice serves for

life, pending good behavior, and closely touches all aspects of our national experience.

I want to say, Mr. President, that I take this solemn duty most seriously, and regard it as a sacred trust.

In a moment, I will review the pros and cons of Mr. Justice Rehnquist, as I view him, but first I would like to set forth my own interpretation of the correct and proper discharge of my responsibility as a Senator regarding this appointment.

I believe that a Senator should require the following attributes in a nominee to a high Federal post, and particularly the Supreme Bench:

First. Great intellectual capacity.

Second. The kind of background and training that appropriately prepares the nominee for the post to which he or she is recommended.

Third. Personal integrity and a good reputation.

I will return to these criteria after I have briefly examined some of Justice Rehnquist's qualifications. I will also deal with a series of charges leveled against Mr. Rehnquist during his confirmation hearing in the Senate Jusiciary Committee.

Mr. President, the American Bar Association has examined these qualifications. If I may quote briefly from the Bar Association's report. It reads:

> The committee unanimously has found that Justice Rehnquist meets the highest standards of professional competence, judicial temperament and integrity, is among the best available for appointment as Chief Justice of the United States, and is entitled to the committee's highest evaluation * * * well qualified.

The Bar Association continues:

> Members of the Judiciary who know him describe Justice Rehnquist as a true scholar, collegial, genial and low key * * * unbelievably brilliant * * * a very capable individual in every respect.

Finally, the American Bar Association examined approximately 200 of Justice Rehnquist opinions, and concluded that his legal abilities are of the "highest quality."

Mr. President, in addition to weighing the recommendations of the American Bar Association, the Judiciary Committee examined some charges against Justice Rehnquist.

A major matter in the committee was the alleged involvement of the nominee in aggressive vote challenges in Arizona 20 years ago. Mr. Rehnquist admits election involvement, but essentially denies partisan excessiveness. As a participant in the elective process for a good many years, I must first observe that there is nothing at all unusual in election challenges. This is a customary and longstanding practice in Illinois politics, and has been employed by many members of both political parties in my State. It is nothing new, Mr. President. I would also suggest that the facts of the Arizona case are in serious dispute. The Democratic chairman in Maricopa County, AZ, at the time of the alleged election challenges was Judge Vincent Maggiore. The judge informed the Senate Judiciary Committee, and I quote:

> At no time did anybody come to me and state that Justice Rehnquist had committed any of the acts that I have heard for the last 2 or 3 days. * * * I was the party leader, and, for sure, all of these things should have come to me.

Page 12 of the Judiciary Committee's report states plainly:

> Justice Rehnquist * * * did not participate in any vote challenging or harassment.

Mr. President, some contend that Mr. Rehnquist has peculiar "memory failure" in this phase of his life, but is that peculiar?

Twenty years ago, I was a party leader in the Illinois State Senate. I remember that phase of my life with great joy and satisfaction and I can recall all of the good fights, and the major issues of that time. But I cannot recall every detail of that period with great exactness, and I would not expect another busy individual like Mr. Rehnquist to have perfect recall either.

Frankly, I would not refuse this high office to Mr. Rehnquist on the basis of a 25-year-old historical experience in substantial dispute.

Mr. President, the matter of the restrictive covenants in the deeds has been troublesome to many of us, but, clearly, it is a situation that is common to a good many substantial people in public service. I do not find it particularly difficult to believe that Justice Rehnquist was unable to immediately recall a letter from his attorney describing the title on a Vermont property. That letter included a reference to the restrictive covenant. Mr. Rehnquist immediately took steps to remove the covenant, and informed the committee of his actions. Mr. President, certainly this issue ought not to disqualify the nominee.

On the matter of the Cornell Family Trust, I believe allegations that Justice Rehnquist somehow acted improperly are without substance. I am a lawyer, Mr. President. Lawyers draw up trusts all the time. Mr. Rehnquist drew one up for the benefit of his brother-in-law, at the request of his father-in-law, who also asked that the existence of the trust be kept secret. On the basis of the information I have, Mr. President, I do not believe I can withhold my vote on this account.

Also at issue before this body today is the propriety of Justice Rehnquist's decision against recusing himself from Supreme Court consideration of the case, Laird versus Tatum. In considering this matter, I examined the statute which must govern a decision of this type. I also read Mr. Geoffrey Hazard, Jr.'s letter to the Judiciary Committee, and examined the great variety of testimony available.

Mr. President, I find this case against Justice Rehnquist to be circumstantial. By this I mean that I have not seen substantial, direct evidence which involves William Rehnquist specifically in the formulation of the Office of Legal Counsel's surveillance policy.

Lacking definitive evidence, I believe the Senate must take Justice Rehnquist at his word. As he testified before the Senate Judiciary Committee:

> I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair-minded judges might disagree about the matter.

Mr. President, the most serious deficiency in this nominee, so far as this Senator is concerned, is his fallure to be more forthcoming and helpful in advancing the cause of civil rights in this country, both in his private life, and in his service of 15 years on the Supreme Court.

In this connection, he falls far short of the minimum standard I would demand in a nominee. I would demand a greater commitment to individual quality and opportunity for minorities in our country. I would demand a greater sensitivity to civil liberties. My candidate for this post would advocate a judicial and political philosophy far different than that of Justice Rehnquist. But, here, I should observe—he is the President's nominee, not mine.

The President has made it clear that he wants a strict constructionist, and a certified conservative, as Chief Justice of the U.S. Supreme Court. President Reagan carried 49 of the 50 States in this country and enjoys a staggeringly high approval rating nationally.

The President is entitled to a Chief Justice of his choice. It comes as no surprise to this Senator that President Reagan has chosen for the post of Chief Justice one who shares his philosophical attitudes. Opposing the political or judicial philosophy of a President's nominee is not, in my view, generally a basis for a vote against that nominee.

I do not agree with, nor do I condone, Mr. Rehnquist's views. I do, however, suggest the following:

First, the President is entitled to a Chief Justice who shares his views; and

Second, if we rejected Mr. Rehnquist on philosophical grounds, the President would send us another nominee of exactly the same persuasion who would probably not be as well qualified as Mr. Rehnquist.

Why do I say that?

Because I set forth three criteria in my opening remarks, and, in my mind, Mr. Rehnquist more than meets them.

First, he is exceedingly bright—he meets the test on intellectual capacity;

Second, he is a respected member of the Supreme Court—he meets the requirements regarding background and training; and

Third, despite an extensive and thorough hearing, no substantial evidence has developed destroying his reputation, or disqualifying his character.

Mr. President, I voted against Dan Manion because he lacked intellectual capacity, and is an inferior writer. He was not fit for the Seventh Circuit Court of Appeals in Chicago. I also disagreed significantly with his political philosophy.

Mr. President, I likewise disagree with Mr. Rehnquist's philosophy, but I will vote for him because he is qualified for the post. When the question is put: "Will the Senate advise and consent to the nomination of William Rehnquist to be Chief Justice of the U.S. Supreme Court?"—this Senator will vote "aye."

Mr. DOLE. Mr. President, the Senate now begins its final debate on the nomination of William H. Rehnquist to be Chief Justice. Since I have already spoken at length previously, I will not take more time now except to highlight briefly the reasons why I shall vote to confirm Justice Rehnquist; and will do so with a firm conviction that the President has acted wisely in submitting this nominee to us for our advice and consent.

I shall be brief also, because the Senate has already spent the better part of a week on this nomination, often going over the same few arguments endlessly. I remind the Senate that this is the third time we have been asked to confirm Justice Rehnquist. He was approved as an Assistant Attorney General in 1969. He was confirmed as an Associate Justice of the Supreme Court in 1971. The Committee on the Judiciary held 4 days of hearings, receiving testimony from more than 40 witnesses over 40 hours. Even the most die hard opponent must concede that the Senate has given the most careful attention to this nominee. Chairman THURMOND certainly accommodated opponents during the committee process; this Senator also has made every attempt to accommodate opponents. Only with great reluctance was a petition for cloture filed last Monday evening. Even then, up until the last moment, I felt we would be able to avoid cloture—at least that was my impression. But it did not happen.

Mr. President, it is unquestioned that Justice Rehnquist brings a unique set of credentials to the Senate for review. His 15 years of service on the High Court has simply been a model for justices and judges everywhere to follow. He has been prolific and productive. He has authored more than 230 majority opinions—more than any of his colleagues during that period. He has also been a frequent dissenter—more than 80. This is the third highest number among those currently on the Court.

He has unequalled experience, and has the temperament and collegiality necessary to provide effective leadership on the Court. His academic credentials are the best: He was first in his class at Stanford law school; he has a master's degree in history from Harvard; he had highest honors at Stanford in his undergraduate studies.

He was found to be well qualified by the American Bar Association—the highest rating to be given. And this rating was bestowed after in-depth interviews with all other members of the Supreme Court, and literally hundreds of judges, scholars and lawyers throughout the country.

What more can we ask?

Mr. President, the critics of this nominee have raised a number of objections to confirmation. In my view, they do not present a strong enough case to warrant a negative vote. Since I have already set forth my analysis of these objections, I will not again belabor these points, except for a few brief observations.

First, it is said that he is an extremist—often dissenting from his colleagues. Yet he seems to reflect the views of a majority of his court colleagues more often than any other Justice. He certainly has the confidence of the President, who in turn, received an overwhelming mandate from the electorate in 1980, and again in 1984. If that is extremism, then the majority of the American people fit into that same mold.

It is said that his views on school desegregation are exteme—a throwback to Plessey versus Fergusen and its abhorrent separate but equal doctrine. But as evidence of this argument, a 34-year old law clerk's memo is cited. At the same time, 34 opinions of the Supreme Court in the past 15 years, in which Justice Rehnquist either authored or joined with the majority, to uphold the landmark Brown versus the Board, are ignored. To me, that is the best evidence upon which to weigh this argument.

Charges have been made that Mr. Rehnquist engaged in partisan voter intimidation tactics in his time as a practicing lawyer in Phoenix in the early 1960's. Yet these charges were made by a group of avowed Democratic partisans, and denied by a group of partisan Republicans—and including some former local Democratic Party officials. And we have the repeated flat denials of intimidation by the nominee himself. To me, after all this passage of time, and the belated nature of much of the accusatory material, again the argument must favor the nominee.

Attempts have also been made to discredit the nominee because of the racial restrictive covenants contained in the deeds of two of the properties which the Justice acquired. To me, this is by far the weakest opposition argument. These repugnant provisions are littered across the land in record books of every courthouse in the country. Since 1948, they are utterly uninforcible, in the wake of the Supreme Court decision in Shelley versus Kraemer. But the opponents somehow try to translate these relics into the present state of mind of the nominee. This is simply sophistry and nothing more.

The opposition argument that has the most merit, and indeed was a close question, as the nominee himself conceded, was the decision of Justice Rehnquist to participate in the case of Laird versus Tatum. This case involved the 1970 May-day demonstrations and disturbances. While serving as Assistant Attorney General at the time, he prepared memoranda and was otherwise involved in the Nixon administration response to the situation. I am satisfied that the code of judicial ethics that applied at the time did not preclude his participation in the subsequent high court proceedings. Again, I say it was a close call, but not of a sufficient stature to persuade me that this was a fatal error.

Attempts have been made to allege a serious breach of legal ethics by Attorney Rehnquist in the handling of a family trust for the brother of his wife. To me, this is the sorriest aspect of this whole proceeding. It was an internal family matter. All other members of the family have specifically denied the brother's charges. An investigation by the FBI affirmed their denials. Yet critics persist—as if Mr. Rehnquist actively participated in some scheme to deceive a helpless invalid. Nothing could be further from the truth. Frankly, Mr. President, these charges have not added to the dignity of this institution. It is most regrettable they have seen the light of day.

In conclusion, Mr. President, I shall vote to confirm Justice Rehnquist as the 16th Chief Justice of the United States. And I shall do so with a firm conviction that the Nation, and the American people, will be well served. He will be a creative and congenial leader. He will build a Federal judiciary that will be equipped to deal with the immense and complex legal business that will arise in the coming years. I have every confidence that he will be fair and just. He will get my vote.

The PRESIDING OFFICER. Is there further debate?

Mr. DOLE. Mr. President, there is no further debate, but I hope we are now in the position to vote.

Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. DOLE. Let me announce that I think we want to give a little warning to Members who may be scattered about. We are about to vote on the Rehnquist nomination.

Following the vote on the Rehnquist nomination, we will take up the Scalia nomination. I do not believe that will take any great deal of time. There will be a rollcall vote on that yet this evening. Then we will either go back to product liability, or to reconciliation. It is a 20-hour time agreement on reconciliation. That should be of some encouragement. But we will not try to finish it this evening.

So let me just suggest the absence of a quorum for a minute or two.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

There being no further debate, the question is, Will the Senate advise and consent to the nomination of William Rehnquist, of Virginia, to be Chief Justice of the United States of America?

On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. SIMPSON. I announce that the Senator from Utah [Mr. GARN] and the Senator from Arizona [Mr. GOLDWATER] are necessarily absent.

I further announce that, if present and voting, the Senator from Utah [Mr. GARN] would vote "yea."

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 65, nays 33, as follows:

[Rollcall Vote No. 266 Ex.]

YEAS—65

Abdnor	Domenici	Kasten
Andrews	Durenberger	Laxalt
Armstrong	Evans	Long
Bentsen	Ford	Lugar
Boren	Gorton	Mattingly
Boschwitz	Gramm	McClure
Broyhill	Grassley	McConnell
Bumpers	Hatch	Murkowski
Chafee	Hatfield	Nickles
Chiles	Hawkins	Nunn
Cochran	Hecht	Packwood
Cohen	Heflin	Pressler
D'Amato	Heinz	Proxmire
Danforth	Helms	Pryor
DeConcini	Hollings	Quayle
Denton	Humphrey	Roth
Dixon	Johnston	Rudman
Dole	Kassebaum	Simpson
Specter	Symms	Warner
Stafford	Thurmond	Wilson
Stennis	Trible	Zorinsky
Stevens	Wallop	

NAYS—33

Baucus	Gore	Melcher
Biden	Harkin	Metzenbaum
Bingaman	Hart	Mitchell
Bradley	Inouye	Moynihan
Burdick	Kennedy	Pell
Byrd	Kerry	Riegle
Cranston	Lautenberg	Rockefeller
Dodd	Leahy	Sarbanes
Eagleton	Levin	Sasser
Exon	Mathias	Simon
Glenn	Matsunaga	Weicker

NOT VOTING—2

Garn	Goldwater

So the nomination was confirmed.

□ 2150

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the nomination was confirmed.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BIDEN. Mr. President, I congratulate the Senator from South Carolina and the supporters of Justice Rehnquist. I hope that all that some of us fear of him does not come to fruition. I wish him well on the Court.

I am anxious to get to our next Supreme Court nominee.

The PRESIDING OFFICER. The Senate will come to order. Senators are asked to take their seats, and Senators engaged in conversations are asked to retire to the cloakroom.

THE JUDICIARY

Mr. DOLE. Mr. President, I ask unanimous consent that the Senate proceed to the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. The nomination will be stated.

The assistant legislative clerk read the nomination of Antonin Scalia, of Virginia, to be an Associate Justice of the Supreme Court of the United States.

The PRESIDING OFFICER. Is there objection to the present consideration of the nomination?

There being no objection, the Senate proceeded to consider the nomination.

Mr. STENNIS. Mr. President, may we have order?

The PRESIDING OFFICER. That is an appropriate request. The Senate is not in order. The Senate will be in order. The hour is late, and the matter before us is important. Senators are asked to be in order. Those Senators who wish to confer are asked to retire to the Cloakroom. Those Senators ambling about the Chamber are asked to take their seats or retire to the cloakroom. Staff members on the Republican side and the Democratic side are asked to be silent.

Mr. THURMOND. Mr. President, I rise today to voice my strong support for President Reagan's nomination of Judge Antonin Scalia to be Associate Justice of the U.S. Supreme Court. Judge Scalia is eminently qualified. In 1957, Judge Scalia graduated summa cum laude and No. 1 in his class from Georgetown University. In 1960, he graduated magna cum laude from Harvard law School. While at Harvard he was the note editor of the Harvard Law Review and a Sheldon fellow.

Judge Scalia practiced law with the prestigious firm of Jones, Day, Cockley, & Reavis in Cleveland, OH, from 1961 to 1967. He then embarked on a career as a law professor at the University of Virginia Law School. In 1971, he was appointed general counsel of the Office of Telecommunication Policy, Executive Office of the President. He was appointed Chairman of the Administrative Conference of the United States in 1972. During the period 1974-77, he served as the Assistant Attorney General, Office of legal Counsel, U.S. Department of Justice.

Following his Government service, Judge Scalia again returned to the academic arena. In 1977, he was a professor of law at the University of Chicago Law School. He was also a visiting professor of law at Georgetown Law School, and scholar in residence with the American Enterprise Institute. In 1980 and 1981, he was a visiting professor of law at Stanford University Law School.

Among his many other achievements, Judge Scalia has served as the editor of Regulation magazine. He was chairman of the American Bar Association's Section of Administrative Law, as well as chairman of the ABA's Conference of Section Chairman. He also served on the board of visitors of the J. Reuben Clark Law School of Brigham Young University.

In August 1982, Judge Scalia was confirmed by the Senate for the position of circuit judge for the U.S. Court of Appeals for the District of Columbia Circuit. He has served with distinction in that capacity since that time.

Judge Scalia's nomination to be an Associate Justice of the Supreme Court was received by the Senate on June 24, 1986, and was reported out of committee favorably on August 14, 1986, by a unanimous vote of 18 yeas. The Committee on the Judiciary held 2 days of hearings on the nomination. The nominee was questioned by members of the committee and testimony was heard from 25 witnesses.

A number of very prominent individuals testified in support of Judge Scalia, including Carla Hills, the former Secretary of Housing and Urban Develoment; Erwin Griswold, former Solicitor General of the United States and former dean of Harvard