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In the *Wright* case, a bill that had originated in the Senate was vetoed by President Roosevelt and returned with his objections to the Senate during a three-day adjournment of that body. The House of Representatives was in session. The bill with the President's message was received by the Secretary of the Senate and submitted by him to the Senate when it reconvened two days later. The issue was whether the veto was effective since the President's objections had not been received within the ten-day period by the originating house while in session. In a majority opinion written by Chief Justice Hughes, the Court held that as the Senate alone had adjourned, the constitutional provision did not apply, and the veto was effective.

Wright considerably limited the opinion and dictum of the *Pocket Veto Case*. In the latter case the Court said (in a statement that does not appear to have been necessary to its holding) that even though one or both houses of Congress were to authorize an agent to receive messages from the President, "the delivery of the bill to such officer or agent . . . would not comply with the constitutional mandate".

The Court in the *Pocket Veto Case* was concerned with the impropriety of delivering a bill during a period of adjournment to "some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months . . . In short, it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself . . but should enable Congress to proceed immediately with its reconsideration."

The Court in *Wright* responded to these concerns. Chief Justice Hughes wrote: "However real these dangers may be when Congress has adjourned and the members of its Houses have dispersed at the end of a session—the situation with which the Court was dealing [in *Pocket Veto*]—they appear to be illusory when there is a mere temporary recess."

While it is true that the recess taken in the *Wright* case was for only three days, it is hard to imagine the Court ruling differently for temporary or interim adjournments when only a few more days are involved. Indeed, in his letter to Senator Kennedy, even Mr. Rehnquist recognized this when he wrote: "There is undoubtedly a legal 'gray area' with respect to the question reserved in the *Wright* case—whether a pocket veto is appropriate during an adjournment for more than three days by one house of Congress. Advice from this office in the past has been to the effect that in this situation, without controlling judicial decision to guide him, the President ought to disapprove a bill by the *normal veto message and return*, rather than by the pocket veto" (emphasis added).

WHY WAS THE POCKET VETO USED FOR THESE BILLS?

Returning, then, to the two bills which were the subject of President Nixon's pocket veto, there is a real question why the President apparently ignored advice to disapprove the bills by the normal veto message. Fred B. Rooney, Democrat of Pennsylvania, the principal House sponsor of the Family Practice of Medicine Act, believes that the President, faced with a 346–2 vote in the House and a 64–1 vote in the Senate, took advantage of the pocket veto "because he knew if he did send a veto message back to the Congress, the Congress would override his veto unanimously".

During a roundtable discussion at a meeting of the Subcommittee on Separation of Powers of the Senate Judiciary Committee, Senator Kennedy asked Mr. Rehnquist why the President took the "rather extraordinary procedure of the pocket veto" instead of returning the bill with a veto message. Mr. Rehnquist responded that by the time the President determined to veto the measures, Congress had adjourned: "I felt at this point he had no choice after Congress had adjourned. If it is an adjournment which under the constitutional language prevents the return of the bill, if he wishes to veto it, he must pocket-veto it."

No matter what the legal merits of the qustion are, the fact remains that President Nixon's pocket veto thus far has been effective. But Congressman Rooney, Senator Kennedy and Senator Sam Ervin, Democrat of North Carolina, have indicated their intention to test the constitutionality and legality of the vetoes, and recently there have been a number of developments.

HOW CAN THE POCKET VETO BE TESTED?

One method of bringing the issue to court is for Congress to treat the Family Practice of Medicine Act as a valid public law and appropriate funds for its implementation. If the Nixon Administration were unwilling to spend the appropriated monies, then a legal action could be brought to test the validity of the purported pocket veto.

Following this approach, on May 11 Congressman Rooney introduced an amendment to an appropriation bill that would have appropriated $25 million to implement the provisions of the act. Responding to a point of order that there can be no appropriation for something that is not authorized, Speaker of the House Carl Albert ruled the amendment invalid, stating:

"The Chair is not oblivious to the fact that certain questions have been raised about the legal propriety of this veto. However, the Chair cannot rule on this constitutional question. The Chair may only refer to the statutes at large or the United States Code to find the authorization required to support this appropriation. Since no such statute can be cited, the Chair must sustain the point of order."

And the Senate similarly refused to make the appropriation.

Another method of testing the pocket vetoes might be to proceed on the private claim. One of the vetoed bills would have conferred jurisdiction on the Foreign Claims Settlement Commission to pass upon a $215,200 claim of the estate of Miloye Sokitch, a refugee from Yugoslavia. After the Germans had occupied Yugoslavia in World War II, they handed over a manganese mine owned by the Sokitch family to the Italians, and the family's loss of ore from the mine is the basis of their claim.

In April of this year the Sokitch family filed their claim with the commission, alleging jurisdiction on the basis that the private bill is now law. If the commission rejects that view and holds the pocket veto authority validly used, this may open the door for an ultimate Supreme Court ruling. Although commission rulings on claims usually are final and not subject to court review (22 U.S.C. § 1623(h)), because of the constitutional issue involved, a federal district court might be willing to accept the case for review.

CONGRESS MOVES TO DEFINE "ADJOURNMENT"

Only time and a possible judicial decision will determine the ultimate legality of the Family Practice of Medicine Act and the private claim statute. Many members of Congress believe, however, that Congress should act to prevent what they regard as the possibility of future abuse of the pocket veto power by defining what "adjournment" means. For example, Congress probably will have recessed at least seven times during 1971, and presumably the President would be able to exercise the pocket veto during at least some of those recesses.

Senator Ervin, along with Representatives Emanuel Celler, Democrat of New York, and William M. McCulloch, Republican of Ohio, have introduced bills that would define the scope of the pocket veto (S. 1642 and H.R. 6225). Specifically, the word "adjournment" in the Constitution would be defined as an adjournment *sine die* by either the Senate or the House of Representatives. The bills also would make it clear that if the respective house were not in session when a President wants to return a bill, then presentation to an officer designated and authorized by that house to receive bills under those circumstances would constitute a valid return of the bill. Both bills have been referred to the respective committees on the judiciary, where they are under active consideration.

In June of 1833, James Madison wrote Henry Clay on the President's duty to return bills to Congress, stating:

It is obvious that the Constitution meant to allow the President an adequate time to consider the bills . . . presented to him, and to make his objections to them; and on the other hand that Congress should have time to consider and overrule the objections. A disregard on either side of what it owes to the other, must be an abuse, for which it would be responsible under the forms of the Constitution.

The legislative bone of contention has been hauled out again. Perhaps this time, Congress—and the courts—will have an opportunity to bury it completely.—BENNY L. KASS

(Now a lawyer in Washington, D.C., Benny L. Kass formerly served on the legal staffs of two Congressional committees. He was educated at Northwestern University (B.S. 1957), the University of Michigan (LL.B. 1960) and George Washington University (LL.M. 1967).

NOMINATION OF WILLIAM REHNQUIST TO THE SUPREME COURT

Mr. GOLDWATER. Mr. President, needless to say, we have heard many thousands of words of arguments for and against President Nixon's latest nominations for seats on the Supreme Court to fill existing vacancies. And I am sure that I do not have to point out that the weight of opposition to the President's selections has fallen on Mr. William Rehnquist, a highly qualified constitutional lawyer from the State of Arizona.

Mr. President, I have no complaint about arguments being raised against Mr. Rehnquist so long as they have a direct bearing on an implication which might reflect upon his qualifications to serve on the highest court of the land.

We have already heard about Mr. Rehnquist's exceptional performance during many hours of close questioning by members of the Senate Judiciary Committee.

What the situation boils down to at the present time is strictly a question of Mr. Rehnquist's political views and whether they are in accord with those of some of our liberal Members of this body. Nothing that I have heard so far has in any way qualified or diminished my belief that Mr. Rehnquist would make one of the finest members ever to serve on that distinguished body, so it is with disgust and even a little sadness that I denote a deliberate effort to smear an honorable and highly qualified attorney in order to prevent the confirmation of a man who might add to the conservative forces on the High Court.

On November 2, it will be recalled, I denounced on the Senate floor a rumor campaign which was then underway to

cast an unfavorable reflection on Mr. Rehnquist. As I mentioned at that time, the tactics being employed were beginning to look exactly like the one that Mr. Rehnquist's critics used to call "McCarthyism."

The unfair and reprehensible attempt at character assassination in this case began on a talk show the night of November 8, when a guest accused Mr. Rehnquist of being a member of the John Birch Society. And almost before Mr. Rehnquist could reply to the charge his friends and associates were being plagued with questions from newsmen on whether the charge was correct. I have personal knowledge of this because the very next day, when I held a news conference in Atlanta, Ga., the first question put to me was what I thought of charges that Mr. Rehnquist had been a member of the John Birch Society. I labeled the allegation a deliberate lie; but I must say, Mr. President, that any neutral observer listening to that recorded question and answer would be justified in believing that it was merely my word against that of a newspaperman who presumably had some inside information.

For all this, I think the campaign against William Rehnquist reached its alltime low before the Judiciary Committee, where Clarence Mitchell and Joseph Rauh, representing the Leadership Council on Civil Rights, were testifying and where Mr. Rehnquist had presented a sworn statement to the fact that he was not and had never been a member of the Birch Society. When the statement was presented to the Judiciary Committee, both Mr. Mitchell and Mr. Rauh made it plain that they did not believe the statement. Mr. Rauh stated for the record that Mr. Rehnquist's statement "was the weakest denial I have ever heard." He went on to add: "What of all the possible relations short of membership? I am flabbergasted."

This deliberate, underhanded smear was too much even for committee members who have the strongest reservations about the Rehnquist nomination; and in this connection, I want to warmly commend the senior Senator from Massachusetts (Mr. KENNEDY) for his quick and forthright action to put an end to innuendo rather than fact in the case of Mr. Rehnquist. Senator KENNEDY told Rauh his suggestion was completely unwarranted and uncalled for. He added that while he had reservations about the nominee, he was completely satisfied that the John Birch charge was false. The Senator from Indiana (Mr. BAYH), another committee member having reservations, said his investigation provided no evidence that the charge was correct. To cap it all, Senator KENNEDY admonished the witnesses not to spread charges without evidence, adding:

You have left an atmosphere that I think is rather poisonous.

Mr. President, the smear tactics resorted to in this case come with particular ill grace from Mr. Rauh, who was one of the loudest voices in the country complaining about "guilt by association" when questions of Communist associations by persons holding sensitive Government jobs came into question back in the early 1950's.

With some of the opponents of Mr. Rehnquist, the familiar double standard is beginning to emerge. Those who were so sensitive about any hint that some liberal might actually hold membership in the Communist party now take the position that since Mr. Rehnquist was accused of belonging to a rightwing organization he must prove himself innocent beyond any conceivable objection.

It is most unfortunate that the smear tactics have reached such a low point on such an important matter. They not only distort the record and unfairly persecute the nominee, but they reflect most unfairly upon the Senate.

This situation was set forth very effectively in an editorial published in the Wall Street Journal of Friday, November 12, 1971. It commended Senator KENNEDY for cutting off a leftwing smear directed against Supreme Court nominee William Rehnquist. I ask unanimous consent that the editorial be printed in the RECORD at the conclusion of my remarks.

Mr. President, I should like to say, further, that I believe it is time to bring the President's nominations for the Supreme Court to a vote in the Judiciary Committee and in the Senate. The record is about as complete as it can get. Further delay will merely encourage the smear artists to extend their propagation of the big-lie technique.

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

AN EXAMPLE OF DECENCY

Senator Edward Kennedy provided a fine example of fundamental decency the other day in cutting off a left-wing smear directed against Supreme Court nominee William H. Rehnquist.

Clarence Mitchell and Joseph L. Rauh Jr. were representing the Leadership Conference on civil rights before the Senate Judiciary Committee. The purpose of the exercise was to say that they disagreed with some positions Mr. Rehnquist had taken in the past, and to incant the litany about this meaning the nomination was an "insult" and "the foot of racism is placed in the door of the temple of justice," etc.

It happened that the night before, a talk-show guest some place had accused Mr. Rehnquist of being a member of the John Birch Society. The nominee promptly submitted a sworn statement that he is not now and never has been a member of that group. This did not satisfy Mr. Mitchell and especially Mr. Rauh. "The weakest denial I've ever heard," said the latter. "What of all the possible relations short of membership?" Mr. Rauh complained, "I'm flabbergasted."

"Your suggestion is completely unwarranted and uncalled for," Senator Kennedy interrupted. He said that while he had reservations about the nominee, conversations left him "completely satisfied" that the John Birch charge was false. Senator Birch Bayh, another committee member who also has reservations provided no evidence of the charge. Senator Kennedy told the witnesses they should not spread such charges without evidence, and that "you have left an atmosphere that I think is rather poisonous."

Senator Kennedy clearly recognizes that smear tactics can be used on both sides of the ideological fence. Such tactics, in fact, come with particular ill grace from those who see themselves as special guardians of civil liberties, from those who would be most outraged if the tables were turned. If, say, someone objected that a nominee's affidavit denying Communist Party membership did not cover all the possibilities no doubt Mr. Rauh would be not merely flabbergasted but apoplectic.

By now we are becoming accustomed to this particular double standard; in fact, Mr. Rauh's charge that the nominee is a "laundered McCarthyite" was a fair warning of what was to come. Today the invocation of that word is almost always a signal that the speaker is about to use precisely the tactics he is ostensibly deploring, only for opposite ideological purposes. So you have Mr. Rauh taking the position that since Mr. Rehnquist was accused he must prove himself innocent beyond any conceivable objection.

In blowing the whistle on such tactics by his natural allies, Senator Kenendy has acted in a responsible political manner. That we frequently disagree with him is no secret, but we must say he clearly recognized what political leaders more often should; that excessive charges are good neither for the case they are intended to serve nor for the political health of the nation.

CHINA IN THE U.N.

Mr. FULBRIGHT. Mr. President, in these days of agitation and heated issues, it is most refreshing and encouraging to receive the views of those whose interest in such issues is based on thoughtful and objective deliberation.

Prof. Maurice Waters of Wayne State University in Detroit, Mich., forwarded to me a copy of his letter to the President of the United States with regard to the recent United Nations vote admitting the People's Republic of China to its international body.

I ask unanimous consent that Professor Waters' letter be printed in the RECORD.

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

WAYNE STATE UNIVERSITY,
Detroit, Mich., October 29, 1971.

PRESIDENT OF THE UNITED STATES,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: I am writing to express a deep concern regarding the reaction in this country to the United Nations vote on the representatition of China. As a person who has spent some time working at tbe U.N., and studying and writing about it, I have been acutely aware of the great emotional feelings that prevail in many circles in this country. I am also aware that much of the public discussion on radio, television and in the newspapers, and the debates on the floor of Congress reveal either an ignorance of some of the issues, both legal and political, or an unwillingness to face up to them honestly and forthrightly. That such a condition should be reflected in the news media and in Congress is extremely distressing, primarily because both should be sources of information and should provide bases for rational thinking and judgment. When men in high office state, as Ambassador Bush did immediately after the U.N. Assembly vote, that the U.N. has reached a turning point having for the first time voted to expel a member state or, as Senator Dominick said when interviewed on NBC TV, that it was outrageous to permit those forces interested in destroying capitalism and the Free World to gain the upper hand in the U.N., and that the Chinese Peoples Republic had killed nearly 34 million Chinese, statements that are either misleading or false, or based upon totally inadequate evidence, then the nation suffers badly because the public does not have the mature and responsible leadership it so desperately needs in these serious times.

It seems that one must acknowledge, as

Rattle # 522, Happy Mates Happy Toys Electro Plastics, Inc., Newark, New Jersey, May 20, 1971; sharp pieces.

Rattle # 540: Happy Mates Action Rattle, Electro Plastics, Inc., Newark New Jersey, May 19, 1971; small pieces and sharp edges.

Rattle # 530: Happy Mates Rattle Balls, Electro Plastics, Inc., Newark New Jersey, May 19, 1971; small pieces and sharp edges.

Toy Green Cat, Squeze Toy # 679, Happy Toy 661: Electro Plastics, Inc. (dist.) Newark, New Jersey, June 7, 1971; squeaker removes.

Stuffed Dolls # 131 c/1: Collette Toy and Novelty Co., Long Island City, New York, May 26, 1971; sharp wires.

Squeeze Toys # 314: Stahlwood Toy Mfg. Co., New York, New York, June 8, 1971; squeaker removes.

Dolly Rattle # 632: Stahlwood Toy Mfg. Co., New York, New York, June 9, 1971; small objects.

Whirle Suction Toy # 660: Stahlwood Toy Mfg. Co., New York, New York, June 8, 1971; sharp edges and small objects.

Toddler Set Containing Suction Cup, Flipn'Roll # 822: Stahlwood Toy Mfg. Co., New York, New York, June 9, 1971; small objects.

Horseshoe Rattle # 200: Stahlwood Toy Mfg. Co., New York, New York, June 8, 1971; sharp edges and small objects.

Pretzel, Rocking Horse & Wishbone Toy #924: Stahlwood Toy Mfg. Co., New York, New York, June 8, 1971; squeaker removes.

Squeaker Toy #63542 with Special Squeaker: Tidy Ties Corporation, Monroe, Louisiana, May 12, 1971; squeaker removes.

Debbie Teen #1360 1/10, Thor Import, Inc., Dallas, Texas, May 27, 1971; sharp wires.

Musical Bells #105: Binky Baby Products Co., New York, New York, June 22, 1971; small objects.

Stuffed Myrtle Turtle: Len Art Mfg. Company, Petaluma, California, June 14, 1971; sharp wire & "I Love You"; sharp pin.

Toddly Toy (cat) #3/186: Star Mfg. Company, Leominster, Massachusetts, June 14, 1971; small objects.

Shake Me Rattle #818: Reliance Products Corp., Woonsocket, Rhode Island, June 14, 1971; sharp edges & small objects.

Klatter Balls #2915052: Sears, Roebuck & Company, Chicago, Illinois, Binky Baby Products (importer), New York, New York, June 22, 1971; small objects.

Baby Toys #6257 & 6258: Baby World Company, Inc., Great Neck, New York, June 14, 1971; sharp wire.

Reggie Rabbit (packaged with *Whitman's* Sampler): Imported by R. Dakin & Co., Inc., Brisbane, California, May 14, 1971; sharp wires.

"Poly-Fluff Animals": Consolidated Productions, Ft. Lauderdale, Florida, June 21, 1971; sharp nose.

Baby Rattler #831, #832, #833, and #834: Childhood Interests, Inc., Roselle Park, New Jersey, June 22, 1971; small objects.

Hour Glass: Mego Corporation, New York, New York, July 7, 1971; small objects & sharp edges.

Stuffed Yellow Teddy Bear: Fun World, Inc., New York, New York, July 13, 1971; sharp wires in ear.

Musical Chime Rattle #587: Binky Baby Products, Inc., New York, New York, around July 13, 1971; small objecte.

Toy Rattle #289: Binky Baby Products Co., Inc., New York, New York, July 13, 1971; small objects.

Rolling Fun Ball #377: Binky Baby Products Co., Inc., New York, New York, July 13, 1971; small objects.

Teething Rattle #39/70: Binky Baby Products Co., Inc., New York, New York, July 13, 1971; small objects.

Happy Hassock: Kasta Corporation, Bellevue, Iowa, July 13, 1971; squeaker removes.

Toy Clown #26345: W. T. Grant Company, New York, New York, July 13, 1971; small objects.

Stuffed Bunny: Dollcraft Novelty Co., Inc., New York, New York; July 14, 1971; laceration/puncture hazard.

Squeeze Toys #690: J. L. Prescott Co., Arrow Molded Products Division, Passaic, New Jersey, July 13, 1971; squeaker removes.

Squeeze Toys, boy & girl likeness, Dreamland Creations, Bronx, New York, July 12, 1971; squeaker removes.

Rooster Pull Toy with Rattle Eggs #205, Mego Corporation, New York, New York, July 12, 1971; small objects.

Miss Fashion Doll, Blatt Distributing Company, La Mirada, California, July 14, 1971; sharp wire.

Musical Nursery Bells #640: Stahlwood Toy Mfg. Co., Inc., New York, New York, July 13, 1971; small objects.

Squeeze Toys #131: Binky Baby Products, Inc., New York, New York, July 12, 1971; squeaker removes.

Klatter Balls #793: Binky Baby Products, Inc., New York, New York, July 12, 1971; small objects.

Jingle Bells #764: Sanitoy, Inc., Palisades Park, New Jersey, July 13, 1971; small objects.

Happy-Mates Rattle #52: (improved design), Electro Plastics, Inc., Newark, New Jersey, July 12, 1971; small pieces.

"Squeeze N' Hammer Rattle" #538: (improved design), Electro Plastics, Inc., Newark, New Jersey, July 12, 1971; small pieces.

Dog Squeeze Toy #780/1: Louis A. Boettinger Co., Inc., Hewlitt, New York, July 28, 1971; squeaker removes.

Bear with Dark Glasses Squeeze Toy BV-5: Louis A. Boettinger Co., Inc., Hewlitt, New York, July 28, 1971; squeaker removes.

Cat and Duck Shape Squeeze Toy BV-8; Louis A. Boettinger Co., Inc., Hewlitt, New York, July 28, 1971; squeaker removes.

Colorscope Rattle No. 561: Louis A. Boettinger Co., Hewlitt, New York, July 27, 1971; small objects.

Assorted Rattles No. 5619P: Baby World Co., Inc., Grafton, W. Virginia or Great Neck, New York, July 23, 1971; small objects.

Telephone Shaped Rattle No. 6623: Baby World Co., Inc., Grafton, W. Virginia or Great Neck, New York, July 23, 1971; small objects and sharp edges.

Assorted Squeeze Toys No. 6500: Baby World Co., Inc., Grafton, W. Virginia or Great Neck, New York, July 22, 1971; squeaker removes.

Klatter Balls No. 238: Baby World Company, Grafton, West Va. or Great Neck, New York, July 23, 1971; small objects.

Klatter Ring No. 5868: Baby World Company, Inc., Grafton, West Virginia or Great Neck, New York, July 23, 1971; small objects.

Plastic Doll Squeeze Toy No. 297: Binky Baby Products Co., Inc., New York, New York, July 22, 1971; squeaker removes.

Duck Squeaker Toy No. 3-680: Star Mfg. Company, Inc., Leominster, Massachusetts, July 23, 1971; squeaker removes.

Monkey Squeaker Toy No. 3-160: Star Manufacturing Company, Leominster, Massachusetts, July 23, 1971; squeaker removes.

Tutti Fruitee Squeeze Toys No. 140: Stahlwood Toy Mfg. Company, Inc., New York, New York, July 21, 1971; squeaker removes.

Indian Drums No. 3715: Sally Distributors, 119 North Fourth Street, Minneapolis, Minnesota, July 26, 1971; sharp nail & small objects.

Toy Stuffed Porpoise: S. Dakin & Company, San Francisco, California, July 28, 1971; sharp wires in flippers.

Rattle Balls No. 907: Stahlwood Toy Mfg. Co., Inc., New York, New York, July 26, 1971; small objects.

Cuddle Rabbit #9406: Knickerbocker Toy Company, Middlesex, New Jersey, August 18, 1971; sharp wire in ear.

Animal Squeeze Toys #275: Stahlwood Toy Mfg. Company, New York, New York; August 18, 1971; squeaker removes.

Pata Cake Baby Rattler (new design): F. W. Woolworth & Company, New York, New York, August 18, 1971; sharp wire & small object.

Party Favors: Carousel Party Favors, Inc., Los Angeles, Calif., August 19, 1971; noisemaker removes.

Klatter Balls #4530: Formulette Company, Inc., Long Island City, N.Y., August 18, 1971; small object.

Jumbo Fun Ball #440: Formulette Company, Inc., Long Island City, N.Y., August 18, 1971; small objects.

Whiskers Toy Squeeze Lion: Ashland Rubber Products Corp., Ashland, Ohio, August 23, 1971; squeaker removes.

Shake N' Rattle #921: Stahlwood Toy Mfg. Co., New York, New York, August 23, 1971; small objects.

Whistle Packaged in "Cracker Jacks": Cracker Jacks Company, Chicago, Illinois, August 23, 1971; small object.

Squeeze Lion #3/187: Star Mfg. Company, Leominster Massachusetts, July 23, 1971; squeaker removes.

Xylophone Player #9151: Larami Corporation, August 25, 1971; sharp edges.

Suction Toy Rattle #674: Electro Plastics, Inc., Newark, New Jersey, August 31, 1971; small objects.

Toy Truck Kit. #5044: Nodel & Sons Toy Corporation, New York, New York, September 2, 1971; small objects.

Baby Toy Kit #5088: Nodel & Sons Toy Corporation, New York, New York, September 2, 1971; small objects.

"I Squeak for a Squeeze" Stuffed Mouse: Rushton Company, Atlanta, Georgia, September 8, 1971; sharp wires in ears & eyes.

Musical Ball: The Playhouse Company, Minneapolis, Minnesota, September 8, 1971; sharp prongs.

Patty Happy Landings Doll: Lovee Doll & Toy Company, Ino., New York, New York, September 15, 1971; straight pin in tam.

Squeeze Toys #2521 and 2548: West Bros. of DeRidder, DeRidder, Louisiana, September 15, 1971; squeaker removes.

Toy Whistle #662: Ralph Pressner, Metairie, Louisiana, September 15, 1971; small object.

Vinyl Bendy Dogs: Paul E. Sernau, Inc., New York, N.Y., August 18, 1971; sharp wires [exemption granted. Item used only as a part of an adult novelty ash tray.]

NOMINATION OF WILLIAM REHNQUIST TO THE SUPREME COURT

Mr. FANNIN. Mr. President, the vicious smear campaign that is being waged against William Rehnquist is appalling. It is incredible that such wild and groundless accusations should be made against this fine, extremely well qualified nominee for the highest court in our land.

It is significant that the attempt at character assassination is being led by people who have little or no personal knowledge of William Rehnquist.

People who know William Rehnquist, who have worked with him or against him, and who are familiar with his work, respect him as a man of high character who is devoted to law and to the Constitution of the United States.

The most meaningful assessments of William Rehnquist might well be those made by persons who have opposed him politically within Arizona.

On November 5, 1971, the Arizona Republic published a letter to the editor from Mr. Herbert Ely, the chairman of the Democratic Party in Arizona.

Emphasizing that he was commenting on the Rehnquist nomination as an individual and not as party chairman, Mr. Ely wrote:

Although I would not have nominated William Rehnquist as justice of the Supreme Court, nevertheless, as a Senator I would vote to confirm the appointment.

The President is entitled to someone of his own philosophical bent, providing the nominee is competent to serve and is not so extreme or radical that his biases would preclude judicial objectivity and thus make him dangerous to the republic as a Supreme Court justice.

From a decade of personal experience with William Rehnquist, I found him to be qualified to serve on the U.S. Supreme Court both in intellect and legal scholarship. He is a man who happens not to share my political philosophy. But in my opinion he is neither an extremist or a bigot.

Mr. President, here we have a political opponent who has known William Rehnquist personally for 10 years, who has done battle with him in several election campaigns, declaring that: ". . . in my opinion, he is neither an extremist or a bigot."

It seems to me that Mr. Ely's assessment is infinitely more valuable than the innuendo from those who, for one reason or another, now seek to block the Rehnquist nomination.

Mr. President, I ask unanimous consent to have printed in the RECORD the complete text of Mr. Ely's letter.

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

REHNQUIST WELL SUITED FOR SUPREME COURT

EDITOR, THE ARIZONA REPUBLIC: I write in response to your Oct. 31 editorial, "Vicious anti-Rehnquist tactics," and the accompanying cartoon.

I wish to make clear my position on the nomination of William Rehnquist to the Supreme Court, and to respond to your editorial handling of Mr. Rehnquist's nomination (as an individual, not as chairman of the Democratic Party).

I have stated before, and restate here, that although I would not have nominated William Rehnquist as justice of the Supreme Court, nevertheless, as a Senator I would vote to confirm the appointment.

The President is entitled to someone of his own philosophical bent, providing the nominee is competent to serve and is not so extreme or radical that his biases would preclude judicial objectivity and thus make him dangerous to the republic as a Supreme Court justice.

From a decade of personal experience with William Rehnquist, I found him to be qualified to serve on the U.S. Supreme Court both in intellect and legal scholarship. He is a man who happens not to share my political philosophy. But in my opinion he is neither an extremist or a bigot.

We debated in Phoenix on various occasions on a variety of topics. There has been a charge made that he has been aligned with the John Birch Society. My experience is the contrary.

In one particular debate (approximately a four-hour ordeal on open-end television) on the subject of dissent in a free society, a John Birch member was the third panelist. Bill Rehnquist's views were essentially opposed to the views expressed by the member of the John Birch Society.

When Rehnquist testified against the public accommodations bill for the City of Phoenix, I was there and testified for it. His position, in my opinion clearly wrong, was based not on a racist basis but on a philosophical belief that problems of racial injustice can be solved best by voluntary action.

Your editorial, however, went beyond support for Mr. Rehnquist. Its attack on liberals and others who would oppose Rehnquist was unwarranted, and will tend to polarize in an unfortunate way various groups in the community.

Detailed scrutiny of nominees for the highest court in the land is salutary. The Supreme Court, after all, makes decisions which affect the very fabric of our society. There are some who apparently have a different opinion of Rehnquist based upon facts not personally known to me. They should be heard and, indeed, if they feel he would make a poor justice, they have an obligation to expound their views.

There are many of us who believe that, particularly since 1954 (when the landmark desegregation case was decided), the Supreme Court has opened vistas of freedom through the protection of individual rights and liberties and has been a bulwark for a broad and healthy interpretation of the Bill of Rights. Many Americans rightfully do not wish the Court to back away from these interpretations. I understand and share their concern.

Your editorial further suggested that social, remedial legislation is inappropriate. But it is a little late in the game to be arguing such an anachronistic position. In public accommodations, to which you specifically referred, the facts are in. Those who oppose such legislation have been proved wrong.

In Phoenix, restaurants and motels which were closed to minorities before such legislation are now open to blacks and browns. The fears of businessmen have proved ill-founded and, if anything, their business has prospered because of these laws.

A final word for people who are opposing William Rehnquist: The remedy for keeping "strict constructionist," conservative judges off the bench is a political remedy and a very specific one—namely, to defeat President Nixon in 1972.

HERBERT L. ELY.

PHOENIX.

Mr. FANNIN. Mr. President, the Arizona Republic on October 27, 1971, published an editorial which refuted vague allegations that William Rehnquist is a "sophisticated racist." I ask unanimous consent that this editorial and another Republic editorial, published on November 11, 1971, be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

NO RACISM FOR REHNQUIST

The Southwest chapter of the NAACP is exposing itself to embarrassment by branding former Phoenix attorney William Rehnquist, one of President Nixon's two nominees to the Supreme Court, as a "sophisticated racist." It cannot make the charge stand.

The Rev. George Brooks, former leader of the Maricopa County NAACP chapter, declared soon after the President's announcement that Rehnquist had shown his opposition to civil rights bill by opposing a "1968" civil rights bill in the State Legislature. He soon modified that and began to speak more vaguely about Rehnquist's behavior in the "mid-60s."

The State Legislature did pass a Civil Rights Act in 1965. But leading Arizona Democrat Harold Giss of Yuma, then Senate Majority Leader as well as chairman of the Senate Judiciary Committee, said Rehnquist could not be cited as having taken a racist position.

Senator Giss added that he considered Rehnquist an outstanding nominee. Such is also the opinion of former State Supreme Court Chief Justice Charles Bernstein, also a Democrat, who described Rehnquist as a lawyer of exceptional ability.

In addition, yesterday morning the moderate-liberal Christian Science Monitor editorialized: "This newspaper reacts positively to the two newest Supreme Court nominations of President Nixon . . . the President is to be commended for seeking men of quality . . ."

And Herb Ely, liberal chairman of the Arizona Democratic Party, has said that he has "immense respect" for Rehnquist, even though the two of them may disagree on most political issues. Ely said he believes the Nixon nominee would be a first-rate justice.

We believe that neither slyness nor racism has any part in Rehnquist's personality. The NAACP has gone far astray by equating the Supreme Court nominee's conservative views with racial bigotry.

Prominent Arizonans of many diverse views utterly fail to agree with the group. The NAACP had better climb down from its shaky limb.

LOOK WHO'S TALKING

The ugly campaign to discredit Supreme Court nominee William Rehnquist has been marked by calumny and rumor. But it has not been without its humorous aspects, even though the humor is unintended.

We think specifically of the opposition to Rehnquist by Joseph L. Rauh Jr., of the Americans for Democratic Action, and the Leadership Conference on Civil Rights. Even Sen. Edward Kennedy rebuked Rauh for his "uncalled for and unwarranted" personal attacks on Rehnquist.

If there is one thing Rauh is big on, it is civil liberties. No person in Washington has ever been more vocal in support of those rights. And few people have never spoken so passionately one way and acted directly opposite.

Writing in The Progessive, May 1950, Rauh said: "Let us do away with confidential informants, dossiers, political spies . . . No one can guess where this process of informing will end." Just four years later Rauh, at that time chairman of the ADA, paid $8,500 to a self-confessed liar and confidence man—a confidential informant and political spy who was supposedly compiling dossiers on government officials.

The whole incident is part of federal grand jury records, and is amusingly detailed in William Buckley's "Up From Liberalism." Briefly, the story is this:

One Paul Hughes, 35, tried to sell the McCarthy staff and the FBI a lurid tale of high treason at a U.S. Air Force base. Both agencies sent him packing. Whereupon Hughes approached Rauh, Clayton Fritchey (then editor of the Democratic Digest), and the Washington Post with a grotesque and bizarre story, supposedly based on his knowledge as a McCarthy staff member, of intrigue between McCarthy and the White House . . . of McCarthy informers in the CIA and the State Department . . . of an arsenal of pistols, Lugers, and submachine guns that McCarthy and his staff had amassed in the basement of the Senate Office Building.

When Hughes told Rauh that McCarthy's spy on the ultraliberal New York Post was that newspaper's cooking editor, Rauh quickly informed Post editor James Wechsler—and later told the jury that McCarthy shouldn't have anybody on the newspaper, a vivid contrast to his view that loyalty risks should be allowed to hold government jobs.

Rauh and Fritchey agreed with a Hughes memorandum of December 1953 that phone taps could be used against McCarthy, that ethics should be relaxed to prove and document McCarthy's guilt, that "being nice, too ethical or squeamish, will accomplish less than nothing, where McCarthy is concerned."

The Washington Post prepared 12 articles on Senator McCarthy, based on the Hughes revelations. But when it began to check them out, the tissue of lies was revealed.

". . . Rauh and company had for years moralized about the venality of the secret informer—even when used under sanction of

custom, law, and relevant administrative rulings, subject, in the end, to all judicial safeguards," wrote Buckley.

"Now it developed that even while they were loudly condemning the use of 'political spies' and 'secret informers,' they were themselves making deliberate, extended, and blanket use of a man whom they believed to be a political spy and secret informer—one who, moreover, had told them explicitly and in writing that he was not merely being personally disloyal to his employer, but was prepared to use illegal methods to get his alleged information."

That is the sort of man who now charges that William Rehnquist does not have the proper respect for civil liberties!

SENATOR SPESSARD L. HOLLAND, LATE A SENATOR FROM FLORIDA

Mr. ALLEN. Mr. President with the retirement and subsequent death of the Honorable Spessard L. Holland, the Nation, as well as his native State of Florida, lost a great patriot and one of her most distinguished sons. The United States Senate, where Senator Holland made an outstanding record during an illustrious career of almost 25 years, lost some of its greatness and some of its luster on his retirement from the Senate; for, surely, it was Senator Holland and Senators of his type who earned for the U.S. Senate the accolade of "greatest deliberative body in the world."

In the Senate Reception Room, just off the Senate Chamber, are portraits of five former U.S. Senators. The room contains no other portraits. These Senators were chosen as the five greatest U.S. Senators of all time by a Senate committee, headed by then Senator John F. Kennedy, that had been appointed to name the five greatest U.S. Senators. Predictably, Webster, Calhoun, and Clay were named, as were Robert A. Taft and Robert LaFollette. Outstanding as were all five of these famous Senators, without question, in the judgment of the junior Senator from Alabama, Senator Spessard Lindsey Holland was the peer of the greatest of these great Senators.

Senator Holland's superior intellect and silver-tongued eloquence; his integrity and statesmanship; his fairmindedness and courtesy; his logic, leadership, and dedication all contributed to his greatness.

Mr. President, a man is judged by the company he keeps, by his deeds, by his thoughts and motives, by his dedication, sincerity and integrity—yes, and by the books he reads and the music to which he listens. But, Mr. President, I suggest that a man can also be judged by the men he most admires—by who his heroes are. To the junior Senator from Alabama, Senator Holland was one of his heroes, one of the public figures that he most admired. I welcome judgment by this standard.

I had the privilege of serving with Senator Holland only in the 91st Congress, but I did have the good fortune of enjoying a close association with him, on and off the Senate floor.

Many times—actually dozens of times—I had the privilege of sitting at the same table with him at lunch in the Senators private dining room at the table reserved for Democratic Senators. While I figuratively sat at his feet on those occasions, I actually sat beside him and listened intently and with great interest as Senator Holland told of the history and traditions of the Senate, and of the many great issues that had been debated in the Senate, and of the renowned statesmen who had served in the Senate. What greater authority could have been found than Senator Holland?

Mr. President, Mrs. Allen and I were always deeply touched by the love that Senator and Mrs. Holland had for each other. She was seldom absent from his thoughts or his conversation. We had the pleasure of attending their 50th wedding anniversary and, with hundreds of their friends, shared with them the happiness of the occasion. We pray that the Lord will comfort and sustain Mrs. Holland in her loss.

Senator Holland has been gathered unto his fathers and will never again be physically present in this Chamber, but the memory of his greatness and of his illustrious record will live on as long as our Republic stands.

QUORUM CALL

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

The PRESIDING OFFICER (Mr. STEVENSON). The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

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

CONCLUSION OF MORNING BUSINESS

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

REVENUE ACT OF 1971

The PRESIDING OFFICER. Under the previous order, the Chair now lays before the Senate the unfinished business, H.R. 10947, which the clerk will report.

The legislative clerk read the bill by title, as follows:

A bill (H.R. 10947) to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes.

The Senate proceeded to consider the bill.

Mr. MANSFIELD. Mr. President, what is the pending question?

The PRESIDING OFFICER. The pending question is on the amendment of the Senator from California (Mr. TUNNEY), which will be read:

The amendment was read, as follows:

On page 71, line 2, strike out "$12,000" and insert in lieu thereof "$18,000".

The PRESIDING OFFICER. The time is under control.

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that the time be taken out of both sides equally.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

Mr. TUNNEY. 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. TUNNEY. Mr. President, the amendment which I am offering this morning would have the effect of amending the committee bill in that it would increase from $12,000 to $18,000 the point at which the deduction for expenses of child care and domestic help would begin to phase out. Other provisions of this deduction would remain unchanged from the bill proposed by the Committee on Finance, as amended. For example, the maximum deduction of $4,800 would be available for child care and domestic help expenses if incurred to allow the taxpayer to get a paying job.

There are four main arguments for the amendment which I would like to bring to the attention of the Senate.

First, child care and domestic help expenses are work-related and ought to be business expenses at this level, just as they are for lower income families.

One news commentator on television several days ago commented that if John D. Rockefeller needed to hire a new secretary in order to be able to utilize his time more effectively in his work, he would be able to obtain a business expense under present Federal tax laws. If, on the other hand, a mother wants to go out and earn some money, perhaps so that her family can live better or so that her children can have more opportunities, and she wants to hire somebody to help care for her home and help look after her children, she is not able to claim such a salary cost as a business expense. It really is not fair to grant relief to the businessman to hire a secretary and at the same time not grant that same relief to the mother who wants to work.

Second, I think that the committee and its very distinguished chairman, the Senator from Louisiana (Mr. LONG), have made a very wise decision in including in this legislation a deduction for the working mother. I think it demonstrates an awareness of the realities of life. However, I believe that the $12,000 limit is unrealistically low. I realize that the $12,000 limit was put on because it was assumed $12,000 would be the median income for families in the coming year. However, it seems to me that families should be able to take such a deduction beyond the median when we are talking about work-related activities.

Third, the Bureau of the Census has studies which show that families in the middle-income range face large tax burdens from all sources. I was able to develop some information on that point. Families with an income of between $8,000 and $10,000 have total State, local, and Federal taxes which represent 16.7 percent of their income. In the $10,000 to $15,000 range, it is 19.1 percent. In the $15,000 to $25,000 range it climbs to 21.1 percent.

As Senators know, the Senate has already accepted an amendment of mine which would make this deduction avail-

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plex problem which deals with Agriculture, the environment and ecology, as well as other aspects. I am hopeful that with the testimony which we shall develop we will be in a position to face up to and resolve the problems in this most troublesome area.

As I indicated previously, these will be public hearings. Anyone wishing to testify is welcome to do so and I would invite any interested individuals to contact Dudley Miles, clerk to the subcommittee, in room 1324 of the New Senate Office Building. The telephone number of the subcommittee office is 225–7272 area code 202.

NOTICE OF HEARINGS BY SELECT COMMITTEE ON SMALL BUSINESS

Mr. NELSON. Mr. President, I announce that the Subcommittee on Monopoly of the Select Committee on Small Business, on November 23 and December 1, 1971, will continue its hearings on the role of giant corporations in the American and world economies. The hearings will be in room 318 of the Old Senate Office Building and will begin at 10 a.m. each day. These sessions will receive testimony on the subject of corporate secrecy in the field of agriculture and agribusiness.

On Tuesday, November 23, the witnesses will be Mr. Harrison Wellford, of the Center for the Study of Responsive Law; Mr. Jim Hightower and Mr. Philip Sorensen of the agribusiness accountability project; and Mr. Roger Blobaum, a consultant on agricultural economics from Creston, Iowa.

On Wednesday, December 1, the witnesses will be Mr. Tony T. Dechant, president, and Mr. Victor K. Ray, director of public relations of the National Farmers Union; Mr. Gilbert C. Rohde, president of the Wisconsin Farmers Union; Mr. Oren Lee Staley and Mr. Charles L. Frazier, of the National Farmers Organization; and Mr. John W. Scott, national master, and Mr. Robert M. Frederick, legislative director, of the National Grange.

NOTICE OF HEARING ON NOMINATIONS

Mr. EASTLAND. Mr. President, on behalf of the Committee on the Judiciary, I desire to give notice that a public hearing has been scheduled for Tuesday, November 23, 1971, at 10:30 a.m., in room 2228, New Senate Office Building, on the following nominations:

James S. Holden, of Vermont, to be U.S. district judge, District of Vermont, vice James L. Oakes, elevated.

Ralph F. Scalera, of Pennsylvania, to be U.S. district judge, Western District of Pennsylvania, vice John L. Miller, retired.

At the indicated time and place persons interested in the hearing may make such representations as may be pertinent.

The subcommittee consists of the Senator from Arkansas (Mr. McCLELLAN); the Senator from Nebraska (Mr. HRUSKA) and myself as chairman.

ADDITIONAL STATEMENTS

THE FUTURE OF THE SMALL BUSINESSMAN

Mr. SPARKMAN. Mr. President, one night last week, I was driving home after work and I happened to hear a commentary of Joseph McCaffrey on WMAL radio. I have voiced my concern regarding the future of small businessmen in our country on many occasions and I am more conscious of their problem in recent weeks due to the economic plan now in effect and the results of the many new policies to be enacted in the months to come.

I would like to share Joseph McCaffrey's comments with my colleagues, and I call your attention to a copy of his commentary and ask unanimous consent that it be printed in the RECORD.

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

COMMENTARY OF JOSEPH MCCAFFREY

Recently a small businessman told me that he thought within another twenty years his specie would be extinct.

"We'll have gone the way of the dinosaurs," he told me, "we just can't survive in the present climate."

Since that time I have made it a point to talk to a cross section of small merchants, both in and around Washington and down in the country section of Virginia. Surprisingly, whether they run restaurants, hardware stores, gas stations, clothing stores or what have you—they all tell the same story: they are being snowed to death under paper work.

The owner of a gas station told me that he spends almost as much time in the little cubby hole he has for an office, as he does out in front servicing customers. A restaurant owner, here in the District, says sometimes he has more District inspectors, taxmen, snoopers and what have you in his restaurant than customers.

Another D.C. restaurant owner said he thinks there is a deliberate campaign to strangle all small businessmen to death here in Washington, using red tape. Tax forms, insurance forms, work hour sheets, the list grows every year. Add to this, most of them told me, the problem of finding help.

One store owner summed it up by saying, "Even those with a 7th grade education and unemployed for years seem to think the only job they can take with dignity is manager."

The small businessman may not be extinct by 1990, but his numbers will have been greatly reduced. This is a pity when it is considered that the small businessman, whether he is a shop keeper, or a manufacturer, is really the backbone of our system.

NEW YORK TIMES EDITORIAL ON NOMINATIONS TO THE SUPREME COURT

Mr. HRUSKA. Mr. President, yesterday the New York Times decided to express its opinion on the pending confirmation of the nominations of Lewis F. Powell and William H. Rehnquist to be Associate Justices of the Supreme Court. In its lead editorial, the Times concluded that Mr. Powell was unobjectionable as a nominee, but determined that Mr. Rehnquist was not qualified philosophically to sit on the Court.

In summarizing its opposition to Mr. Rehnquist, the Times employed journalistic shorthand in characterizing him as a "radical rightist." This label evidently results from the conclusion that Mr. Rehnquist "neither reveres nor understands the Bill of Rights."

Mr. President, in the belief that such a bald and unsupported assertion should not go without response, I have today dispatched a letter to the editor of the New York Times. I am most hopeful that the Times will find the space to print my letter, as I believe this response will help to set the record straight in the minds of the many readers of this widely circulated newspaper. In the meantime, so that Senators will have the benefit of my views, I ask unanimous consent that my letter and the Times editorial be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

UNITED STATES SENATE,
November 16, 1971.

Mr. JOHN B. OAKES,
Editorial Page Editor, The New York Times, New York, N.Y.

TO THE EDITOR: In yesterday's lead editorial, you chose to label William H. Rehnquist a "radical rightist" and opposed his Supreme Court nomination on that basis, although you recognize he is "a capable lawyer of impressive academic and intellectual attainment".

If the Times had a factual case against Mr. Rehnquist, it should have been stated. Instead you relied upon journalistic shorthand to characterize a number of issues on which Mr. Rehnquist, as Assistant Attorney General, made public statements in support of the Administration's position. For example, you refer to "no-knock" entry and "preventive detention".

What you describe as "no-knock" is a procedure whereby a police officer, in obtaining a search warrant, can secure further permission from the Court to enter a dwelling without announcing himself, but only under certain limited circumstances: (1) if the Court has found, on the evidence, that the officer's life is likely to be endangered if he identifies himself before entering; or (2) if the Court has found that the purpose of the warrant is likely to be frustrated by the destruction of evidence (such as flushing drugs down a toilet) while the officer stands outside.

Mr. Rehnquist was hardly alone in believing that this procedure is reasonable. This doctrine and procedure has long been practiced and declared constitutional in many states—32 at last count. A majority of both Houses of Congress voted it into law in both the District of Columbia Court Reform and Criminal Procedure Act of 1970 and the Comprehensive Drug Abuse Prevention and Control Act of 1970. Please advise whether your editorial classifies all of the following as "radical rightists": the legislatures and courts of some 32 states, and the majority of the House and Senate in Congress which enacted the District of Columbia and Drug Control Acts—as well as the Federal and District of Columbia judges who apply this law.

What you describe as "preventive detention" is a procedure designed to protect the public in situations where the evidence convinces a judge that one or more serious crimes will be committed by the arrestee if he is released on bail.

One example would be a hold-up in which the victim was shot and the arrestee was apprehended on the premises with a smoking gun in one hand and the stolen money in the

other, and the arrestee, moreover, was a known heroin addict whose record indicated that if released he would be likely to support his habit by criminal acts against innocent persons, probably crimes of violence. In all cases, a decision to detain the arrestee can be made only by a judge after an evidentiary hearing at which the arrestee has the right to appear and be represented by counsel; and in no event can he be held longer than 60 days.

Mr. Rehnquist's views on the reasonableness of "preventive detention" were also shared by the majority of both Houses of Congress.

It is an interesting footnote that on the same editorial page on which you condemn Mr. Rehnquist for supporting this procedure, you printed a letter from a New York physician who had been robbed by an admitted heroin addict who had a previous arrest record and who was apprehended with the stolen article in his possession. As the physician pointed out, the arrestee was turned loose on bail and, having failed to appear in court for his hearing, will never be held accountable unless he is arrested for another crime.

You also refer to wiretapping, but fail to point out that in 1968 Congress expressly recognized the propriety and necessity for wiretaps and authorized their use in connection with certain specified types of crime. The enactment by Congress is in full compliance with the 1967 landmark Supreme Court decision on electronic surveillance. (*Berger* v. *New York*, 388 U.S. 41). Are the majorities of the House, Senate and Supreme Court adjudged by you to be "radical rightists" therefore?

As to the limited use of wiretapping for the purpose of gathering intelligence relating to the national security, this is a practice which has been used and defended by every President and Attorney General since the Administration of Franklin D. Roosevelt.

May I suggest that the Times might well re-read the articles written by your Associate Editor, Tom Wicker, and by Mr. Anthony Lewis, who spent so many years covering the Supreme Court. Both of these gentlemen recognize the propriety of confirmation for Mr. Rehnquist, and I don't think the Times overcomes their reasoned arguments simply by coining the label "radical rightist."

In the course of full hearings before the Senate Judiciary Committee, we have seen or heard nothing which would indicate that Mr. Rehnquist's devotion to the Bill of Rights is anything less than total. We believe he is eminently qualified for the Supreme Court, and the Times editorial has pointed to nothing which is inconsistent with that conclusion.

Sincerely,

ROMAN L. HRUSKA,
United States Senator, Nebraska.

[From the New York Times, Nov. 15, 1971]

THE COURT APPOINTMENTS

In recent years, the Senate has been loath to argue about the judicial philosophy of Supreme Court nominees. It has generally assumed in the absence of damaging evidence to the contrary that any nominee who is intellectually qualified, honest and experienced in some branch of the legal profession will cultivate the detachment and perspective which the task of judging requires. But inasmuch as President Nixon has to a far greater degree than normal politicized the process of selection and has so insistently proclaimed his determination to remake the Court in his own image, the Senate needs to recall that its traditional deference to Presidential nominations is an institutional courtesy rather than a constitutional command.

Assistant Attorney General William H. Rehnquist's published belief that the Senate has an obligation to inquire into the basic philosophy of a Supreme Court nominee is applicable to his own position today. The question is whether the nominee should be evaluated by the Senate in terms of his specific political, social and economic views—quite apart from the obvious requirements of integrity, ability, temperament and training. Does not the President have the privilege of nominating to the Supreme Court a man or woman of any political orientation that pleases him, without interference by the Senate; or does the Constitution, through its "advise and consent" clause give the Senate the right to reject a candidate because it disagrees with his politics or his philosophy?

The Supreme Court should be above politics; yet, it is obvious that the Supreme Court deals with the stuff of politics. We have repeatedly argued that while the President owes it to the Court and the American people to keep partisan politics out of his judicial appointments, he ought to have the broadest latitude in his selections so long as they are made within the context of the American democratic system. What this means is that the candidate, whether liberal or conservative, of the right or of the left, must not be hostile to the broadly accepted principles of American constitutional democracy. This test the Senate has the right and duty to make.

The choice of Lewis F. Powell presents in this context relatively little difficulty. A leading lawyer of Richmond, a highly regarded member of the profession, a thorough-going conservative in political philosophy, Mr. Powell has demonstrated during a long record of service to the community as well as to the bar that he has the requisite personal, intellectual and basic philosophic qualities.

The same cannot be said for Mr. Rehnquist. Though he is undoubtedly a capable lawyer of impressive academic and intellectual attainments, his entire record casts serious doubt on his philosophic approach to that pillar of the American constitutional system, the Bill of Rights. On every civil liberties issue—wiretapping, electronic surveillance, "no knock" entry, preventive detention, rights of witnesses before Congressional committees and state legislatures, the rights of the accused—Mr. Rhenquist's record is appalling. He seems to have scant respect for the individual citizen's rights to privacy, relying on "self-discipline on the part of the executive branch" to provide the protection needed. But if "Self-discipline" by Government officials were sufficient in such circumstances, why would this nation need the carefully defined safeguards of the Bill of Rights?

What alarms us about Mr. Rhenquist is not the conservatism of his views—Mr. Powell certainly shares that characteristic—but our conviction on the basis of his record that he neither reveres nor understands the Bill of Rights. If this is so, then he certainly does not meet the basic requirement that a justice of the Supreme Court be philosophically attuned to the irrevocable premise on which the American political structure rests; the protection of individual liberty under law, particularly against the repressive powers of government.

The Constitution leaves room for a wide diversity of political and social interpretations and even of judicial philosophy; but through the issues of human freedom as set forth in the first ten amendments there runs a basic imperative that cannot be dismissed and must not be trifled with. A deep-seated respect for these liberties, a belief that they cannot be arbitrarily abridged or diminished by any power, even that of the President, is indispensable for service on the Supreme Court.

Mr. Rehnquist's elevation to the Supreme Court could have a critically regressive effect on constitutional protection of individual liberties for a long time to come. On Mr. Nixon's own premises, the Senate would be within its rights in insisting that while it may be content to accept a distinguished conservative like Mr. Powell, it is not obligated to accept a radical rightist like Mr. Rhenquist.

SOUTH ASIA: THE ROOTS OF THE CRISIS

Mr. KENNEDY. Mr. President, South Asia today stands on the brink of war. Armies have been mobilized. Guerrilla forces are active. And with the escalating tension between India and Pakistan—and the exchange of accusations and threats—it seems to many that the situation in South Asia today merely reflects the chronic problems in Indo-Pakistan relations.

But a review of events since March 25—a quick jostling of our memory—reminds us that the problem in South Asia is overwhelmingly a problem between the ruling military elite in Islamabad, and the Bengali leadership elected in Dacca and now exiled in prison or the refugee camps of India.

Events have moved so swiftly in East Bengal—tragedy has so quickly piled upon tragedy—many Americans have forgotten how and why the tragedy of East Bengal happened. Fewer still understand the ramifications of what the massive flow of refugees into India means, not only to India, but to the stability of the entire region.

An excellent report on the roots of the crisis in South Asia—and its impact upon India—has been prepared by Prof. John P. Lewis, dean of the Woodrow Wilson School at Princeton University. Professor Lewis submitted this report as a special consultant to the Judiciary Subcommittee on Refugees, which I serve as chairman, and is based upon our field trip to India last August.

Mr. President, I invite the attention of Senators to Professor Lewis' provocative report and ask unanimous consent that it be printed in the RECORD.

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

INDIA AND BANGLA DESH, A REPORT BY PROF. JOHN P. LEWIS

It would be hard to find a nastier set of problems than those triggered on March 25 by the decision of the Pakistan Government to put down East Bengal separatism by the systematic use of terror. The deaths, injuries, repression, and dislocations inflicted on the 75 million East Bengalis add up to one of the worst man-made disasters of modern history, and they are continuing. Already the Pakistani civil war has spilled into India by far the largest quick, one-way migration of refugees on record—at this writing some eight million. In early August the number still was rising about 40,000 a day.

For India the direct burden of coping with the influx is horrendous. The indirect cost is worst. The problem arose at just that historical moment when the 550 million beleaguered Indians had achieved much their best chance for accelerated economic and social progress since the sub-continent was partitioned and they won independence 24 years ago. Now that opportunity is fast aborting.

FINDINGS AND CONCLUSIONS: ENFORCEMENT OF SANITATION STANDARDS STILL WEAK

Following GAO's earlier reviews, the agency took some actions to improve the enforcement of sanitation standards, including:

Sending letters to its inspection program employees, including plant and supervisory inspectors, clearly outlining inspection objectives and sanitation procedures and assuring each employee full support for his efforts in enforcing sanitation standards.

Issuing revised procedures, forms, and instructions, including criteria for withholding or suspending inspection to assist inspectors in carrying out the agency's policies.

The actions taken by the agency have not been successful in achieving adequate enforcement at the plants GAO visited. For each of the 68 plants, supervisory inspectors, who accompanied GAO and evaluated each plant for compliance with the agency's standards, reported some deficiencies. The types and extent of the deficiencies, classified as either minor variations or unacceptable conditions, varied from plant to plant.

The evaluations showed that unacceptable conditions:

Continued to exist at most of the 17 plants covered in GAO's prior review. In many cases the conditions were similar to those previously noted.

Existed at most of the 51 randomly selected plants. At many of these plants, the conditions appeared to be of a long-standing nature and were similar to conditions noted at most of the 17 plants.

Four case studies illustrating the types of sanitation problems at the plants GAO visited are included on pages 19 through 39.

After most of GAO's fieldwork had been completed, the agency implemented a revised regulation providing criteria on the amount of moisture which may be absorbed and retained in poultry during processing. When the amount of moisture absorbed is determined to be above the specified limits, the inspector is to require that all poultry processed be held and drained to acceptable levels. Because of the timing of the regulation's implementation, GAO did not determine how well it was being implemented.

CONCLUSIONS

Many of the sanitation deficiencies appeared to have existed over a long period. In GAO's opinion, this situation is indicative of a lack of strong, day-to-day enforcement by the agency's plant inspectors and a lack of effective supervisory review. Weaknesses in the agency's enforcement of sanitation standards may be widespread.

Adequate criteria and policies now exist for enforcing sanitation standards. Such criteria and policies, however, provide only a basis for improving enforcement. In the final analysis the effectiveness with which sanitation standards are enforced depends on the resolve of the agency's employees at every level—from plant inspectors to Washington officials.

Ways must be found to demonstrate convincingly to the agency's inspection employees that consumer protection is the main objective of enforcing sanitation standards and that strict enforcement of such standards is essential.

RECOMMENDATIONS OR SUGGESTIONS

In August 1970 two consultants hired by the Department of Agriculture completed a study of the agency's consumer protection programs. The consultants recommended a number of changes for reorganizing the programs. Most of the recommendations were adopted; however, one recommendation—that a separate agency be established within the Department for consumer protection programs—was not. The consultants stated that the recommendation was predicated on their belief that:

There is an inherent difference between the nature of the agency's marketing activities and that of its consumer protection activities which creates an internal conflict.

Consumer protection is so large an area and has such complex problems that it needs a full-time administrator.

GAO recommends that the Secretary of Agriculture reevaluate the consultants' recommendation because GAO believes that implementation of the recommendation would demonstrate convincingly that the Department was placing emphasis on consumer protection.

GAO recognizes that, should the Department adopt the consultants' recommendation, its full implementation would take some time. Also, if a separate agency were established within the Department, many of the employees now responsible for enforcing sanitation standards would continue to be responsible.

For these reasons GAO recommends also that the Secretary explore other and more immediate avenues to improve and emphasize the enforcement of sanitation standards. Such avenues might include an intensification of efforts already under way to strengthen supervision and to improve the training of inspection employees as well as increased use of disciplinary action when inspection employees do not meet their responsibilities.

AGENCY ACTIONS AND UNRESOLVED ISSUES

The Department (see app. I) said:

That it initially decided not to adopt the consultants' recommendation to establish a separate agency because the consultants had stated that the meat and poultry inspection program also could function within the existing agency and because one advantage of keeping it there would be that separate administrative support functions would not have to be developed.

That the agency was attempting to respond in specific ways to deficiencies in its supervisory structure which had been totally inadequate and was taking or planning other actions to improve the enforcement of sanitation standards.

That the merits of establishing a separate agency should be considered but that, in its judgment, it would be a grave error to consider the creation of a new agency until the actions already under way and others being planned had been given a reasonable time test.

MATTERS FOR CONSIDERATION BY THE CONGRESS

The Congress may wish to consider the matters discussed in this and earlier reports in connection with a number of measures now before the Congress. These measures include bills to establish a separate Department of Consumer Affairs and the President's Reorganization Plan which would transfer the agency's poultry and meat inspection activities to a proposed Department of Human Resources.

NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT

Mr. TAFT. Mr. President, I take this opportunity to address the Senate on the pending nomination of William H. Rehnquist to the Supreme Court. The Judiciary Committee has now completed hearings and I have followed the reports from these hearings closely, and I have met and examined Mr. Rehnquist personally. I am convinced that his credentials are superior. I hope we will soon have before us the confirmation of this receptive, brilliant, and dedicated man whose academic and legal background reflect his outstanding qualifications and competency.

Some witnesses before the Judiciary Committee opposed Mr. Rehnquist's nomination and urged that he not be confirmed by the Senate because of his alleged philosophical beliefs. They speak as advocates of special interests and concerns and that is their privilege and duty. They should understand that Mr. Rehnquist was the Assistant Attorney General in charge of the Office of Legal Counsel. In that position he was the advocate for the Department. He spoke frequently before committees of Congress and in other public forums in defense of and in support of President Nixon's policies, actions, and programs. His job was to convince his audience and listeners that what he urged was indeed legal and proper.

Some suggest that some of these positions demonstrate that Mr. Rehnquist is not sensitive to the civil liberties and individual rights of our citizens. I do not believe this to be true. Mr. Rehnquist has stated publicly that he will render judgments on the law and will not interject any personal feelings or previously adopted legal positions into his decisions. This is as it should be with any Justice on the Court.

I urge speedy action on this nomination.

AMERICAN PRISONERS OF WAR

Mr. KENNEDY. Mr. President, we have heard so many optimistic reports recently about the situation in Indochina—about the number of American troops that have been withdrawn, and how "only" six or eight or 10 GI's now die each week—there is a growing temptation to forget our other troops in Indochina who are not being withdrawn: the American prisoners of war.

All of us in Congress have, of course, shared the frustration of the families of American prisoners of war and those missing in action. We know their frustration over the lack of progress that has been made in obtaining the prisoners' release from the many letters we receive each day from relatives across the Nation.

I felt this today from a most eloquent letter I received from the parents of an American prisoner of war from New Jersey—Mr. and Mrs. Edward Miller, whose son has been held prisoner for 3½ years. They write that they "Would be less than frank if we did not admit that at times we are disheartened at no visible sign of a plausible administration effort aimed at prisoner release."

Mr. President, I invite the attention of Senators to the letter Mrs. Miller has addressed to the President and the Congress and I ask unanimous consent that it be printed in the RECORD.

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

FRANKLIN LAKES, N.J.,
November 15, 1971.

DEAR MR. PRESIDENT AND MR. CONGRESSMAN: My son has been a prisoner of war in North Vietnam for 3½ years. Today he is spending his fourth birthday as a prisoner of war. Many of his friends have seen their 5th, 6th, and 7th birthdays as prisoners.

if they have a discriminatory effect and can't be justified on the basis of business necessity.

Less controversial, although also hotly debated, are the provisions that would center in the EEOC virtually all federal job anti-bias efforts. Scattered among a multiplicity of agencies, such programs often have worked at cross-purposes. Most civil rights advocates agree with Clarence Mitchell, director of the Washington bureau of the NAACP, who snaps, "You don't want a lot of different pots when you're just trying to cook one stew."

EFFECTIVENESS QUESTIONED

Yet how effective an anti-bias superagency would be is questioned by at least some. Pennsylvania's Mr. Anderson believes that "competition between federal agencies has contributed to a more rapid expansion of equal opportunities," since agencies have been under at least some pressure to outperform each other. Then, too, some observers suggest that labor is backing the transfer of the Office of Federal Contract Compliance to the EEOC in hopes of weakening it.

They say the OFCC, which has imposed goals and timetables on government contractors for hiring minorities, could lose this authority if it were transferred. This could happen, they say, because the Civil Rights Act of 1964, which established the EEOC, specifically disallows racial-hiring quotas.

According to the conspiratorial theory, labor favors the OFCC's transfer on the expectation that its "goals and timetables" would conflict with the EEOC's ban on quotas, thus depriving the OFCC of its key sanction and, at the same time, "removing a thorn from labor's side," as one exponent put it.

It's by no means clear, however, that this would be the effect of such a move. Some courts, for example, have ruled that "goals" aren't necessarily the same thing as "quotas." And it's hard to imagine that the OFCC would be less effective at another agency. "How could the OFCC be weaker than it is now?" asks the NAACP's Mr. Mitchell.

No doubt, the new powers Congress confers upon the EEOC will profoundly affect the future course of the civil-rights movement. While most civil-rights advocates prefer cease and desist, it's by no means clear that this approach would ultimately prove more effective than merely authorizing the EEOC to ask courts to enforce its anti-discrimination rulings. As Mr. Blumrosen writes: "One court decision is worth 10 written conciliation agreements and one hundred annual reports of administrative agencies."

GENOCIDE AND EXTRADITION

Mr. PROXMIRE. Mr. President, article VII of the Genocide Convention says in part:

> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

The fear has been expressed that if the United States ratifies this convention we will be compelled to extradite our citizens to foreign courts where they will be tried without any of the benefits of the Bill of Rights. Such a fear is unwarranted because it overlooks two facts.

First, the convention is quite clear in stating that extradition will only be granted according to laws and treaties in force. At the present time the United States is not a party to a single extradition treaty that defines genocide as one of the crimes for which extradition is to be granted. Our adherence to the Genocide Convention would in no way change this. No one can be extradited for genocide until the United States enters into additional extradition treaties. And even then, extradition would be possible only to those specific countries with whom we had those new treaties.

Second, it is a common policy of the United States not to grant extradition unless the Federal Government is assured that the accused will receive a fair trial with all the guarantees of our constitution. Our Government has always acted to protect the rights of Americans. Nothing in this convention will change that policy.

Mr. President, I urge the Senate to ratify the Genocide Convention as soon as possible.

WILLIAM H. REHNQUIST: A MAN OF PROVEN CAPABILITY

Mr. PEARSON. Mr. President, each Senator fully realizes the solemn responsibility associated with the confirmation of a Supreme Court nominee. For hanging in the balance are decisions which affect all Americans in a most profound way. In this regard, both the President and the Senate should seek to nominate and confirm only those individuals who, through their performance as interpreters of the law, have indicated an extraordinary competence and potential to judge in America's highest tribunal.

Mr. President, William H. Rehnquist is a man of proven capabilities, and his record indicates a capacity for growth which has yet to be fully realized. In a few short years, he has risen from private attorney to a position of great responsibility in the Department of Justice. His concern for and work in efforts to help halt the rising rate of crime throughout the Nation has earned him much respect.

Now, at a comparatively young age, he is on the verge of appointment to the Supreme Court, a pinnacle of success achieved by only 98 men throughout our history.

Mr. President, some have argued that Mr. Rehnquist's basically conservative philosophy could be a detriment to the Court. They would have us believe that his conservative political philosophy could carry over to the decisions he makes as a Supreme Court Justice. I would suggest, Mr. President, that although political considerations cannot be totally dismissed in appointments of this nature, it does any man of Mr. Rehnquist's stature a disservice to intimate that personal political beliefs will affect the manner in which he conducts himself while sitting on the Bench.

We who have followed the progress of these nominations in the Senate to date know that Mr. Rehnquist has acknowledged his conservative leanings, both in a political and judicial sense. Yet we also know that he has confirmed, and that his associates have reaffirmed, his strict adherence to the Constitution, to the law, and to his belief that the merits of any individual case will be his only consideration as a Supreme Court Justice. Based on these assertions, I would ask those who oppose Mr. Rehnquist's nomination whether it is fair to judge a man based on what he might think as compared to what he himself has said he will think.

Mr. President, the Senate has a clear responsibility to explore Mr. Rehnquist's record thoroughly in making its decision on whether it should accept his nomination. Yet it is my judgment that a complete analysis will show that this man is eminently qualified to perform the duties which the President has determined he should have. I therefore intend to support the nomination of William H. Rehnquist to the Supreme Court of the United States.

SCHOLARS SUPPORT UNITED NATIONS

Mr. BROOKE. Mr. President, this past weekend, national newspapers published reports that a distinguished group of scholars in the field of international relations had warned against reducing America's support for the United Nations.

I share their alarm over recent suggestions that the United States should reconsider its support for the U.N. as a result of the admission of Mainland China. We have nothing to lose and much to gain by including China, which comprises one-quarter of the world's population, in the deliberations of the world body. China's admission is in our national interest. And while I regret the simultaneous expulsion of Taiwan, I believe we must abide by the democratically made decision of the other members.

Our support for the U.N. must not be diminished. On the contrary, with more inclusive representation of nations in the world body, the U.N.'s potential for resolving international disputes and for providing constructive solutions to problems of hunger, disease, and pollution is greater than ever.

I welcome the statement of the 16 leading scholars of international relations, who met in Boston, Mass., last weekend to draft this joint statement of concern. The views of these men inject a note of reason and scholarly assessment into an ongoing national policy debate. I ask unanimous consent that their statement be printed in the RECORD.

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

STATEMENT OF 16 LEADING SCHOLARS, BOSTON, MASS.

A group of leading US scholars in the field of international organization, meeting in Boston, urged today that the United States not jeopardize its national self-interest by shortsighted actions crippling the United Nations and other international bodies.

Specifically, the group warned against overreacting to the consequences of the seating of the Peoples Republic of China in the UN and other international agencies. On the contrary, the group argued, this action would give the UN new relevance, even though the Republic of China on Taiwan had been excluded. Pointing out that one reason the United States could not use the UN for assistance in negotiating an end to the Vietnam War was the lack of UN membership of three of the major parties to the conflict, the scholars emphasized the value to the United States and to future world peace of a world organization containing friends and adversaries alike.

As to UN finances, the group pointed out that other nations provide up to approxi-

November 11, 1971, be printed in the RECORD at the conclusion of my remarks.

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

FOES STALL OTEPKA CONFIRMATION

(By Willard Edwards)

WASHINGTON, November 10.—Some quality in Otto F. Otepka—perhaps it is his invincible calm under fire—has always provoked his opponents to extremes.

The former security chief of the State Department was the victim of isolation, surveillance, phone-tapping and perjured evidence during his successful, six-year fight (1963–1969) against dismissal on trumped up charges.

He seemed to have won vindication in 1969 when President Nixon nominated him to a short term on the Subversive Activities Control Board and the Senate confirmed the appointment, 61 to 28, in June.

But when that term ended Aug. 9, 1970, and Nixon reappointed Otepka to a full five-year term, his foes began engaging in obstructive tactics which have prevented the Senate, ever since, from recording its will.

Nearly six months ago, the Senate Judiciary Committee, after hearings, recommended Otepka's confirmation. Customarily, such committee indorsements are submitted to the Senate for a vote within a few days.

This one has remained on the Senate calendar and will remain there, according to reliable report, perhaps not to be acted upon before the November, 1972, elections when, Otepka's antagonists hope, a successor to Nixon will be elected.

Dilatory maneuvers are not new to the Senate and sometimes command approval, but this one, under scrutiny, lacks a practical purpose since it does not prevent Otepka from continuing to serve. The law insures his tenure until a successor is provided.

The delay, thus, is regarded by many in the Senate as a petty and spiteful exercise. It merely serves to keep in a kind of legalized limbo an official who made powerful enemies during the Kennedy and Johnson administrations who are still in the State Department under the Nixon administration.

Sen. Mike Mansfield (D., Mont.), the majority leader and technically responsible for entombment of the Otepka nomination, is evasive when asked for the identity of senators responsible for denying the Senate a vote on it. One of those under suspicion is Sen. Edward M. Kennedy (D., Mass.). His brother, Robert, the late attorney general, was one of the first to tangle with Otepka over security procedures eight years ago.

Altho the anti-Otepka campaign began more than a year ago, his opponents are now privately advancing a new excuse for delaying a Senate vote. They compare the Otepka case to that of Daniel Ellsberg who announced that he gave classied documents (the Pentagon Papers) to newspapers and who is now under indictment for this act.

Unless and until Ellsberg is cleared, a small group of senators is reported arguing, no Senate vote on Otepka should be permitted.

What are the facts in this Ellsberg-Otepka analogy?

Ellsberg, by his own account, leaked to the press an estimated 7,000 pages of classified information. It was published without government knowledge or approval. A grand jury labeled this act "conversion to private use of government documents."

Otepka, called upon the Senate Internal Security Subcommittee to provide evidence in answer to sworn testimony disparaging his character, supplied two confidential papers, eight pages in length, to prove the testimony was false. These papers, entrusted to recipients officially qualified to receive them, were examined in closed session. They were not published.

Otepka, by the State Department's own testimony, never violated security. The courts will eventually determine if Ellsberg did.

Meanwhile, on the basis of claimed similarities between the two cases, the Senate is being deprived of the right to vote its judgment on a Presidential nominee recommended for approval by one of its own committees.

NOMINATION OF WILLIAM REHNQUIST TO THE SUPREME COURT

Mr. FANNIN. Mr. President, William Rehnquist has been and is, above all, a man who believes deeply in the Constitution and the rule of law. I do not believe, and everyone who knows him cannot believe, that he would have participated in any activities that would discourage legally registered and qualified voters from participating in elections.

I understand that two affidavits have been signed by persons in Phoenix alleging that they believe William Rehnquist was involved in the harassment or intimidation of black voters in an election in the 1960's.

Mr. President, these affidavits are mighty flimsy and strangely vague. It now is unclear whether the alleged harassment occurred in 1968 as first contended, in 1962 as later stated, or in 1964 as in the current version.

It also is apparent that the persons who say they were harassed are no more certain about who it was that harassed them than they are of the date when it occurred.

We do have the word of a highly respected Arizona Superior Court judge, Hon. Charles L. Hardy, who has told the Judiciary Committee by letter that in 1962 Rehnquist had voiced disapproval of a Republican challenger who was using disruptive practices at a polling place. Judge Hardy is a Democrat who worked for his party in the 1962 election.

Mr. President, to shed further light on this matter, I ask unanimous consent to have printed in the RECORD an article from today's Arizona Republic concerning the intimidation charge:

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

DOUBT CAST ON VOTER INTIMIDATION CHARGE

(By Clarence W. Balley)

One of the two Phoenix Negroes who charged that Supreme Court nominee William Rehnquist had harassed Phoenix voters in 1964 asserted last night he "didn't know" who had asked him to submit an affidavit making the accusation.

After repeated quizzing, Jordan Harris, of 1845 W. Apache St., finally said he was asked to do it by "some of the politicians" he knew, but he insisted he didn't know the name of the person who made the request.

At the same time, Judge Charles Hardy of the Maricopa County Superior Court threw doubt on the validity of the harassment charge in an interview reported by the Associated Press.

Harris' affidavit asserted Rehnquist was attempting to make three voters at Bethune Precinct recite portions of the Constitution before voting. He said he argued with Rehnquist and "We then engaged in a struggle and the police were called in."

Harris said Robert Tate, of 947 W. Watkins, came to help him when the struggle began. Efforts by The Republic to reach Tate last night were unsuccessful.

Phoenix Police Capt. Charles M. Marks, of the special operations bureau, last night checked department records and said he could find no report on the alleged polling place fracas.

"I can't find anything that would substantiate that," Marks said. "I'm not saying it didn't happen, but if it did it wasn't reported to us . . . we have no record of it."

The AP reported Judge Hardy said in an interview that he advised Democratic Party challengers and poll watchers in the same years that Rehnquist advised Republicans.

Hardy said there was an incident at Bethune Precinct in which a Republican challenger got into a scuffle and was escorted from the polling place by two sheriff's deputies. But the judge said it was in 1962, not in 1964, and the challenger was not Rehnquist.

"I have nothing to hide," Harris told The Arizona Republic, although he declined to tell his age or to answer a number of other routine questions about himself.

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

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

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

At the time of his plea Harris acknowledged a prior conviction for a similar offense, in 1950.

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

Another story in The Republic shed more light on Harris' past. It was a Sept. 15, 1961 news account of his being severely wounded in the abdomen by a bullet fired by an irate, 31-year-old woman whose $107 welfare check Harris cashed, withholding $31 he said the woman owed on her grocery bill.

CHINESE ACTIONS IN THE UNITED NATIONS

Mr. THURMOND. Mr. President, much has been said on the floor of the Senate already about the diplomatic defeat which was inflicted on the United States by the United Nations in the vote expelling the Republic of China and installing the Peking regime in its place. At that time I pointed out how the United Nations would become even more of a base for subversion in which the Communist groups of nations would have the power to cause the United Nations to act against the interests of the United States whenever they so desired.

Less than a month has gone by, and already we are witnessing the practical fruit of that tremendous defeat. The Chinese delegation has been seated, and their first speech has consisted of a harangue against the United States and its allies despite the fact that preparations are going forward for the President of the United States to visit Peking.

Mr. President, full accounts of that Chinese speech were published in the New York Times and the Washington Post of November 16, 1971. I ask unanimous consent that these accounts be

mounting the most vigorous water pollution abatement program we can, and I believe the Water Quality Standards Act, recently passed by the Senate, represents just such an effort.

The report also supports a point I have made repeatedly. We need more knowledge of the specific effects of varying levels of pollutants on the marine environment and on human life.

Mr. Farrington's study disclosed the presence of petroleum hydrocarbons in shellfish in Narragansett Bay. But we do not really know what this means in terms of the shellfish population or human health, because we have no standards of permissible levels of hydrocarbons in shellfish.

It is ironic that a few miles from Narragansett Bay is the National Marine Water Quality Laboratory, charged with the responsibility for developing marine water quality criteria. That laboratory is laboring in grossly inadequate, temporary quarters, even though Congress appropriated money 9 years ago for modern facilties.

The Senate adopted my amendment to the Water Quality Standards Act, requiring that this laboratory be built. I hope the administration now will not wait for final passage of that bill, but will proceed as quickly as possible with the construction of this vital research facility.

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

HYDROCARBONS FOUND IN NEW BAY AREAS

Hydrocarbons, possibly derived from petroleum products, have been found in sediments and clams in parts of Narragansett Bay considered unpolluted up to now.

John W. Farrington, who has completed requirements for a doctoral degree in oceanography at the University of Rhode Island, said in a recent paper that some areas of Narragansett Bay, including areas in the West Passage where the waters are designated as unpolluted and shellfishing is not restricted, may be chronically polluted with oil. Mr. Farrington delivered his paper at the University of Delaware.

Sources of the oil include sewage treatment plants, storm sewers, repeated small spills from tankers and Naval vessels, and motor oil from small craft, he said.

"The presence of this oil raises the question of the potential danger to shellfish consumers," Mr. Farrington said.

He emphasized, however, that there are no standards of permissible levels of hydrocarbons in shellfish. Nor is it known that the hydrocarbons found in the shellfish in the bay could have any adverse effects on humans.

Toxicological studies are now being initiated by the Food and Drug Administration (FDA) to determine the potential danger of hydrocarbons to humans, according to Darrell Schwalm, a shellfish consultant to the FDA in Boston.

He was among the URI, federal and state officials who attended a meeting at which Mr. Farrington discussed his findings at URI's Narragansett Bay Campus last Friday (Nov. 5).

Other participants of the meeting included Dr. Clarence M. Tarzwell, director of the National Marine Water Quality Laboratory in West Kingston; Carleton A. Maine, chief of the division of water supply and pollution control in the state Department of Health; John N. Cronan, deputy chief of fish and wildlife in the state Department of Natural Resources; Capt. James Verber of the Public Health Service at Quonset; Dr. John A. Knauss, provost for marine affairs at URI; Stuart O. Hale, assistant to the provost; and Dr. James G. Quinn, assistant professor of oceanography under whom Mr. Farrington did his graduate work at URI. Dr. Quinn is the co-author of Mr. Farrington's paper.

Mr. Farrington estimated that about 75 million gallons of hydrocarbons are discharged into the country's coastal waters every day through sewage effluents.

His research points up the fact that it is becoming more critical to "watch what we allow to be discharged from our sewage outfalls," Dr. Quinn said.

Hydrocarbons are an important group of organic compounds containing only hydrogen and carbon in varied structural combinations.

Hydrocarbons were found in shellfish taken in three locations and sediments from eight locations covering an area starting at the Fields Point and East Providence sewage treatment plants on the Providence River, continuing through the upper bay and the West Passage, and ending off Beavertail at the southern tip of Conanicut Island.

As a comparison, samples of hard shell clams found in Charlestown Pond, a coastal salt marsh and lagoon area on the south shore of the state cut off from most sources of oil pollution, were analyzed and found to contain no detectable levels of petroleum hydrocarbons.

The area around the sewage treatment plants is designated as polluted and is closed by the state department of health to shellfishing. Due to sewage overflows, the upper part of the bay is also closed to shellfishing following heavy rains, based on fecal coliform counts. Most of the West Passage has been considered unpolluted, however.

Although there are several possible explanations for the presence of hydrocarbons in the sediments and shellffish from "unpolluted" areas of the bay, Mr. Farrington said that the most likely sources are in the petroleum products, such as used oil, in the sewage effluents of the Fields Point and East Providence plants, and in small oil spills.

Based on analyses of the effluents, Mr. Farrington estimates that 350,000 liters, or about 79,450 gallons, of hydrocarbons a year are discharged by the sewage treatment plants into the river. The exact nature of the hydrocarbons is not known, but the analyses point to a petroleum source.

The explanation that "best explains the observed data" is as follows:

Oil in the sewage effluents, coupled with that in small oil spills, is adsorbed by—that is, it adheres to the surface of—particles of matter in the water. Under certain conditions, some oil can even form its own particulate matter. Most of this matter is then deposited on the bottom.

While the oil is being deposited, it begins to break down and some constituents dissolve in the water. Some of the particles with oil on them are filtered by the hard shell clam and become incorporated in the clam's tissue. The breakdown of the oil slows down in the clam, while continuing at the same rate in the sediment. This results in the difference in the amount and types of hydrocarbons found in hard shell clams and sediments from the same location.

The concentration of hydrocarbons in the shellfish varies from 94 parts per million of dry weight near the sewage outfalls to 11 parts per million near the mouth of the bay.

Dr. Quinn said that hydrocarbons in shellfish tend to build up in the lipids or fatty tissue. "The next question is what do the hydrocarbons do to the shellfish biochemically? We can't just trust that the animal will purify itself over a period of time," he said.

Research on the effects of hydrocarbons on lipid metabolism of shellfish is continuing at URI's Graduate School of Oceanography, Dr. Quinn said.

Mr. Farrington is presently conducting research with Dr. Max Blumer, who is continuing his study of the effects of the 1969 West Falmouth oil spill, as a post-doctoral investigator at the Woods Hole Oceanographic Institution.

Mr. Farrington's paper is based on research he did at URI for his doctoral thesis over the past three years. Funding for the project came from the Environmental Protection Agency and the Sea Grant Program of the Commerce Department's National Oceanic and Atmospheric Administration.

NOMINATION OF WILLIAM REHNQUIST

Mr. FANNIN. Mr. President, for the past several weeks, the entire life of William Rhenquist has been subjected to a microscopic examination. Absolutely nothing has been discovered that should detract from his magnificent qualifications to be an Associate Justice of the Supreme Court.

We who have known William Rehnquist for a number of years knew exactly what all of the investigations would reveal. We knew that William Rehnquist is a man of the highest character as well as a man with a brilliant legal mind.

Mr. President, my colleague from Arizona (Mr. GOLDWATER) summed it up well in today's New York Times. I ask unanimous consent that an article written by Senator GOLDWATER be printed in the RECORD.

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

"A MAN OF THE HIGHEST PERSONAL INTEGRITY"

(By BARRY M. GOLDWATER)

WASHINGTON.—Liberal opponents of Supreme Court nominee William H. Rehnquist will never find a more difficult target.

Almost a week of hearings before the Senate Judiciary Committee plus thousands of hours spent searching out a lifetime of records and comments by the Phoenix attorney have left nothing to object to except Mr. Rehnquist's political views.

It is estimated that never before have so many journalists, academicians, legal experts and others spent so much time on the qualifications of one nominee.

And what emerges from the thousands of words, voiced and written, about Mr. Rehnquist are these salient facts:

Mr. Rehnquist is a man of the highest personal integrity and professional competence.

Mr. Rehnquist is a man who takes the trouble to see both sides of all issues to which he addresses himself.

Mr. Rehnquist is a man who has demonstrated himself to be thoughtful and moderate; a man whose beliefs and convictions are well within the mainstream of this country's thinking.

Perhaps one of the greatest pluses for Mr. Rehnquist which emerged from a nonstop inquestion by liberal politicians, commentators and journalists was his ability to maintain his poise and temper under the most extreme and trying circumstances.

He has proven to friends and critics alike that he wears pressure well, and is a man of such breadth and balance that his severest critics were had put to find even short

passages of his past statements to quote out of context.

It would be unfair to say that the Phoenix attorney is a man devoid of political and social convictions. As an acquaintance of many years, I know him to be a man who believes that the protection of individual rights should extend not only to the accused but also to society as a whole. He perhaps could fairly be described as a man who believes in a system based on ordered justice, who is deeply concerned about threats to our democratic processes.

Some, but by no means all, of Mr. Rehnquist's opponents have lately begun to use smear tactics in an effort to prevent his confirmation. The tactics by now have included exaggerations of his views, outright distortions of his public statements, plus a considerable variety of vicious labels and characterizations. It may be a measure of desperation, but the fact remains that now that the committee questioning has failed to destroy Mr. Rehnquist's chances, he is being called a "right-wing zealot," a "radical of the right," a "laundered McCarthyite" and an "extremist in favor of executive supremacy and diminution of personal freedom."

In my opinion, the opponents of Mr. Rehnquist overstepped themselves and defeated their own purpose when they seized on a casual talk-show claim that the President's nominee was a member of the John Birch Society. Almost as soon as the charge hit the airways, the nominee filed a sworn statement with the Judiciary Committee denying that he was now or had ever been a member of the Birch Society. Unfair as the charge was, the effort of the A.D.A. leader, Joseph Rauh, to use it for smear purposes may have tipped the Senatorial scales in Mr. Rehnquist's behalf.

Rauh's attempt to cast doubt on Mr. Rehnquist's denial of membership and his obvious attempt to smear the nominee through a process of guilt by association blew up right in his face. It brought from Senator Edward Kennedy of Massachusetts, a committee member with admitted reservations about the nominee, a warning not to spread charges without evidence. Kennedy further told Rauh: "You have left an atmosphere that I think is rather poisonous."

Mr. FANNIN. Mr. President, I also invite the attention of Senators to four other columns which have been published recently in the press. These articles discuss the Rehnquist nomination and the role of the Supreme Court in general. I ask unanimous consent to have printed in the RECORD columns by William F. Buckley, Jr., James J. Kilpatrick, and Richard Wilson, and an article by Anthony Lewis which appeared under a London dateline in the New York Times.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

WOULD SENATE LIBERALS CONFIRM JUSTICE CARDOZO?

(By William F. Buckley Jr.)

If one were to ask the question about former justices of the Supreme Court, "Who is the fairest of them all?", there would be many answers: But no list of the great Supreme Court justices of this century would exclude the name of Benjamin Cardozo. A learned friend now calls to my attention that notwithstanding that Cardozo was worshipped in his day, which is not that remote (he died in 1938), one wonders whether the liberals in the Senate would nowadays vote to confirm a man with such a record.

In brooding over appointments to the vacancies in the Supreme Court, Fred Graham, who covers the court for the New York Times, wrote recently, "The suspicion is that what Mr. Nixon really has in mind is a Supreme Court that will quietly attend to its own judicial backyard, and will not interfere with what the other two branches and the states want to do." That of course is not only what President Nixon has in mind, but substantially what the framers of the Constitution had in mind. Certainly that is substantially what Cardozo had in mind. And yet, in recent days, in the New York Times Prof. Alan M. Dershowitz named Cardozo as the judicial exemplar, whom Nixon's choices should seek to emulate.

Judge Cardozo always distinguished between the function of the legislature and the function of the court. Soon after being named to the Court of Appeals, he concurred in a decision of that court affirming the conviction of Dr. Margaret Sanger for the offense, under the law as it stood, of disseminating birth control information. The court's objection, in which he joined, noted breath-takingly that it was not the business of the courts to consider arguments "touching social conditions and sociological questions." These, the court held, were "matters for the legislature and not the courts."

On this point, Cardozo more or less held firm throughout his life, the most conspicuous exception being his vote to condemn the National Recovery Act as unconstitutional. It was the keel of his judicial philosophy, singled out by his eulogist, Atty. Gen. Homer Cummings, at his memorial service. For Cardozo, Cummings said, that doctrine was not an "aphorism but a burning truth."

Cardozo seldom interfered with state legislation. Although he did on one occasion invalidate the sentencing of a Communist under an anti-anarchy law, he took pains to point out that he was observing merely that a Communist is not an anarchist, that he was not disputing the constitutional authority of the state to "protect itself by prohibiting the teaching of revolutionary doctrine."

And, in the field of criminal prosecutions, Cardozo came face to face with many problems still being actively debated. For instance: Do you or don't you admit evidence even if it was procured by trespass or other unlawful means? Cardozo believed that the purpose of a trial was to ascertain whether accused was guilty.

He never held the 5th Amendment as binding in the state courts, and indeed he did not consider either it, or even a jury trial, as generically indispensable to freedom: "Few would be so narrow and provincial as to maintain that fair and enlightened system of justice was impossible without them (trial by jury and the privilege against self-incrimination) . . . justice . . . would not perish if the acoused were subject to a duty to respond to orderly inquiry." For the record, Justices Hughes, Brandeis, and Stone concurred.

I am indebted to James Jackson Kilpatrick for a little arithmetic on the Supreme Court's 1970–71 term. The court handed down 121 written opinions. Twenty-eight of these were 5-to-4 decisions. Of the 28, eight dealt with statutory questions. The rest were cases arising under the Constitution. The court conservatives won thirteen, lost six, and tied one (U.S. versus Arizona). Burger and Blackmun voted as one in all 20 cases. On the liberal side, Douglas, Brennan, and Marshall never broke ranks. White joined the two conservatives in 16 out of 20 cases, Harlan and Stewart in 15 of them, Black in only 9. The exemplary Cardozo, whom Messrs. Powell and Rehnquist should indeed seek to emulate, would have joined the conservative bloc.

REHNQUIST'S RECORD IS RESULT OF ADVOCATE ROLE

(By James J. Kilpatrick)

Nine of the last 12 nominees to the U.S. Supreme Court were sitting judges when their names went to the Senate. It was not much of a problem to read their reported opinions and to get a line on their cast of judicial thought.

A more difficult task is presented in getting a line on Lewis F. Powell, Jr. and William H. Rehnquist, the President's nominees for the vacant Black and Harlan seats. They are active lawyers, one in private practice, the other as government counsel; they think, speak and act as advocates, not as judges. Their high calling has made them players, not umpires, and this role needs to be kept in mind.

It needs especially to be kept in mind in the matter of Rehnquist. He is coming under heavy fire just now from a number of civil libertarians who are offended by things he has done or said as assistant attorney general. He has, for example, been "tough on demonstrators." He has "supported preventive detention." He has "defended a President's unrestrained power to eavesdrop on private citizens." The impression is being cultivated that Rehnquist is somewhat to the right of Torquemada and just to the left of Genghis Khan.

A very different impression may be formed from a careful reading of Rehnquist's speeches and prepared statements over the past three years. These make a stack of papers 4 inches high. To study them is to gain a picture of advocacy at its best—of argument compelling in its force, but founded in reason. One also sees Rehnquist, as the quintessential lawyer, living by the commandment of Canon 6 that his obligation is to represent one's clients "with undivided fidelity." His clients, of course, have been the attorney general and the President.

Yes, he is tough. He speaks to the Newark Kiwanis Club on Law Day of "the new barbarians" and he is cool to cold: "I do offer the suggestion in the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. I offer the further suggestion that if force or the threat of force is required in order to enforce the law, we must not shirk from its employment."

He is wholly a man of the law: "The minority, no matter how disaffected or disenchanted, owes an unqualified obligation to obey a duly enacted law. Government as we know it could not survive for a day if it permitted any group to choose the laws which it would obey, and those which it would not obey."

In another Law Day address, this one in Houston, he defends the government's position in the matter of violent demonstrators. He has no apologies for sweeping them up: "I suggest to you that, quite contrary to the views expressed by the defenders of the radicals, these actions of state and federal governments are only the most minimal sort of responses to very intense and serious provocation, and that these actions on the part of the government are not only thoroughly defensible but absolutely necessary. They are absolutely necessary not only for the preservation of order, but for the preservation of liberty itself. . . . We must not equate dissent with disloyalty. . . . But I would like to pose the corollary that neither should we equate destruction with dissent."

Time after time, one finds Rehnquist defending "the balancing approach," and "the reasonable approach." In a speech at Tempe, Ariz., in December 1970, he provided a superb defense—agree or disagree—of the case for "preventive detention." He is constantly remarking that "all or nothing" solutions cannot be accepted. He is contemptuous of the excesses in federal surveillance activities. These at one point "rather clearly got out of hand."

Rehnquist is not the most felicitous writer one might encounter. He splits infinitives. He mangles verbs. He falls into the "may or may not" constructions that smack of redundancy. He has not mastered the distinction between "less than" and "fewer than."

The syntax is not so important. Rehnquist, on his advocate's record, offers a brilliant intellect and a scholar's patience. On the court he may disappoint Nixon and he will disappoint me, but he promises to make a tremendous judge.

REHNQUIST UNDERSCORES IDEOLOGICAL ISSUE

(By Richard Wilson)

The nomination of William Rehnquist as a justice of the United States Supreme Court presents the issue between President Nixon and the Democratic Senate majority in a unique and direct way.

No fringe questions cloud the issue. Rehnquist's record as a lawyer is without blemish. No reproach arises from his personal life, his financial affairs, or his intellectual qualifications.

Rehnquist is an activist conservative. It does not wash that in the Justice Department he merely did a lawyer's duty as an advocate of his client's cause. The record shows that he did so with the force of conviction. His record as a private lawyer equally supports the conclusion that he has articulated the rational conservative position as a believer, and by no means in the sense that a lawyer might defend an accused murderer whom he suspected, in his heart, to be guilty.

A vote against Rehnquist in the Senate, therefore, must be based largely upon opposition to his politico-legal philosophy as revealed in his record as a lawyer. Is this a group basis upon which to oppose a President's nomination of a Supreme Court justice?

There is no use saying that lawyer-trained senators are above basing their votes on such differences. If William Kunstler were to be nominated to the Supreme Court he would be opposed as a dangerous radical who could not be trusted as a judge. It is precisely the difference between a Rehnquist and a Kunstler which makes the point. Rehnquist respects the processes of law and Kunstler does not.

If innocence of all politico-legal doctrine or ideology were to be made the definitive qualification of a Supreme Court justice, the court would not have seated Charles Evans Hughes, Earl Warren, Hugo Black, Felix Frankfurter and others. Hughes was governor of New York and a candidate for President. Warren was governor of California and a candidate for vice president. Both were Republicans and adhered to a certain political philosophy.

Black and Frankfurter were liberals in their time and very active as such. That was a major reason why they were appointed to the court. Others were appointed for the same controlling reason. One law school dean came to prominence as a supporter of Franklin D. Roosevelt's court reorganization plan and he was subsequently appointed to the court.

A senator must judge whether or not a nominee's past record of advocacy and his political orientation is such as to disqualify him from being a fair and able judge weighing all sides of an issue. Fair-minded and able men often come to different conclusions, as the Supreme Court illustrates very often. Justices supposed to be "liberal" or "conservative" often end up the opposite or somewhere in between.

President Nixon has placed on the scales by which a senator weighs a nominee's qualifications the idea of "strict construction" of the Constitution. Just what this phrase means is beyond clear definition. It might be said that under strict construction of the Constitution the President of the United States could not conduct the Vietnam war without direct congressional authorization and declaration. Would Nixon agree to that? Even the strict constructionists on the Burger court evidently do not.

Strict constructionism has become a codephrase for inflexible adherence to the past which Nixon himself negates nearly every day in his executive policies. It was a mistake to introduce the idea, for the court is compelled to move with the times as it did so dramatically in the school desegregation cases. In these cases the strict construction of the Constitution changed the centuries-old pattern of American life.

The current need is not for those trapped by the past, but for men with minds of penetrating depth unswayed by shibboleth and fixed concepts. Rehnquist brought that kind of a mind to the problem of legally rationalizing opposition to long prevailing concepts which were supposed to be "liberal" and therefore sanctified, as was the separation of the races so long sanctified.

So, a senator who votes against Rehnquist must say to himself: "This man is qualified, evidently brilliant, capable of growth, and with an enviable grasp of the law. But I cannot support him because he doesn't fit my definition of a liberal." Experience shows this is a poor way to measure judicial qualification.

[From New York Times, Nov. 11, 1971]

AFTER REHNQUIST

(By Anthony Lewis)

LONDON.—The problem now troubling American liberals in the nomination of William H. Rehnquist to the Supreme Court was foreseen years ago by Judge Learned Hand. In his Holmes Lectures at Harvard he said:

"In so far as it is made part of the duties of judges to take sides in political controversies, their known or expected convictions or predilections will, and indeed should, be at least one determinant in their appointment."

Judge Hand was not using the word "political" in its narrow partisan sense. If our judges are to decide controversial national issues in the guise of lawsuits, he was saying, then they will be chosen in part for their ideology.

It is difficult for liberals to deny the premise. They know that for years they cheered the Supreme Court on as it advanced values of which they approved. Now a conservative President wants judges with different values. Is it logical to deny him that power, or even democratic? After all, the Presidential appointing power is the only means of seeing that the Court even distantly reflects the changing outlook of the country—as it must.

From this it follows that a President, should be allowed ample ideological scope in choosing a Supreme Court justice. There are limits—a racist would be disqualified—but they are broad. And so, many Senators who entirly disagree with Mr. Rehnquist's right-wing ideas will nevertheless properly vote for his confirmation.

But a more basic issue will remain—the one that really interested Judge Hand. That is the issue of the appropriate limits on the judicial function. Should judges be dealing with heated social and economic controversies? Or should they limit themselves to tamer matters of more traditional law?

In recent years it has gone out of fashion to ask such questions. Mr. Justice Frankfurter's plea for judicial self-restraint seems long ago and far away. Few seem to remember the terrible lesson of the 1920's and 1930's, when self-willed judges almost destroyed the Supreme Court.

Instead we have what could be called the neo-realist view. It was put with candor in 1958, the same year as Judge Hand's lectures, by Prof. Charles L. Black of Yale:

"We are told that we must be very careful not to favor judicial vigor in supporting civil liberties, because if we do we'll be setting a bad precedent. Later on, we may get a bench of [conservative] judges . . . [but] suppose the present Court were to shrink from vigorous judicial action to protect civil liberties. Would that prevent a Court composed of latter-day McReynoldses and Butlers from following their own views?"

Professor Black's rhetorical question expects a negative answer, but it is not so clear that restraint on the part of a liberal Court would have no effect when the pendulum swings. Certainly Brandeis, the greatest intellect who ever sat on the Supreme Court, thought otherwise. Again and again he held back from results that he personally desired because he thought he would encourage other judges to push their views in other cases.

Of course there is no convenient formula to set the limits on the judicial function. Every judge will have his own deep instincts about the values essential to the American system. Brandeis deferred to most legislative judgments, however foolish they appeared, but not when it came to freedom of speech or privacy: He thought they were too fundamental to the whole constitutional scheme.

The justices of the Warren Court did not decide the great cases as they did out of sheer perversity, as some of the sillier critics seem to think; they were carrying out what they perceived to be their duty. If they had changed their minds because they anticipated adverse reaction, they might have been said to lack courage.

The Warren Court is to be criticized not for its motives but, occasionally, for its judgment. It overreached from time to time. For me the outstanding example was the *Miranda* case: A narrow majority, without convincing basis in history of expert consensus, read a particular code of police procedure into the general language of the Constitution.

Judicial intervention on fundamental issues is most clearly justified when there is no other remedy for a situation that threatens the national fabric—when the path of political change is blocked. That was the case with racial segregation and legislative districting; it was not the case with *Miranda*.

Judge Hand would have excluded all such matters from the courts, but that remedy would be too drastic. We have long since come to rely on the Supreme Court as an essential medium of change in our rigid constitutional structure. What we can ask of the judges is modesty, a quality required not only by man's imperfection but by the fragile nature of the judicial institution.

FORCED BUSING AND THREAT TO NEIGHBORHOOD SCHOOLS

Mr. SPARKMAN. Mr. President, in this day, when so many of us throughout the whole Nation are concerned with the threat against our neighborhood schools and with the problem of forced busing, it is good to read such an editorial as published in the Mobile, Ala., Press Register of Sunday, November 14, 1971. I think it is a fine analysis and cross-section of views throughout the country.

I ask unanimous consent that it be printed in the RECORD.

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

BUSING BY FORCE LOSES GROUND FAST

If the trend of attitude on the issue continues, it soon may be difficult to find a voice anywhere in the nation that will speak out unreservedly in favor of the political atrocity of busing school children by federal force for racial purposes.

The Gallup Poll and other recent surveys have shown the great strength of public opinion against that atrocity.

SENATE—*Thursday, November 18, 1971*

The Senate met at 8:30 a.m. and was called to order by the Acting President pro tempore (Mr. METCALF).

PRAYER

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

For Thy mercies which are new every morning, we give Thee thanks, O Lord.

For Thy grace which restores both body and soul, we give Thee thanks, O Lord.

Teach us the ancient truth that they that wait upon the Lord shall renew their strength. Make us to know when to wait, how to wait, and for what to wait. Teach us when to speak, when to pray, when to remain silent, and in all we do to glorify Thee.

O Lord, be with our Nation. Save us from all that defiles or corrupts or anything which tarnishes the national character. Restore morality and virtue. Send a revival of religion cleansing and redeeming that this "one nation under God" may be revealed in every thought, word, and deed.

In Thy holy name we pray. Amen.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Wednesday, November 17, 1971, be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

VIETNAM

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD the lead editorial published in the Billings, Mont., Gazette of November 11, 1971, and also a column in the Hungry Horse News of November 12, 1971, which was taken from the Montana Kaimin, student newspaper at the University of Montana.

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

GET OUT OF VIET, GET COMPLETELY OUT

President Nixon is expected to announce the withdrawal of the last combat division from Vietnam soon. At the peak of U.S. involvement in 1968, there were nine full divisions plus two brigades equal to two other divisions in that torn Asian nation.

After the pullout, expected to be early 1972, there will remain 40,000 U.S. support troops, including fighter-bomber squadrons, helicopter, artillery, logistics and support units.

The withdrawal is welcome. The war remains unpopular, and a deepset infection in the flesh of the Republic. The question is whether Mr. Nixon will dare to take the final step: total withdrawal of the remaining units.

We hope he will. The Gazette favors an unqualified withdrawal from a war we should never have plunged into in the first place. The South Vietnamese seem to have their nation stabilized, and the Viet Cong have been reduced to guerrilla warfare. Thus the time is propitious for concluding the war.

The danger in leaving even support troops in Vietnam is that they will pose a continuing temptation to escalate the struggle once again. If the struggle goes badly for the South Vietnamese army, or if the remaining American units are suddenly beseiged by a revived North Vietnamese force, it could be the Gulf of Tonkin all over again, with the deployment of massive military force to go to the relief of the remaining Americans.

The Gazette feels that a clean break is necessary: If, as administration officials keep insisting, the South Vietnamese are strong and viable, then our presence will not be necessary.

PUBLIC OPINION LETTER

(By Thomas Binsted)

Two years and four days ago, Mike Gilbertson died in a rice paddy, twenty miles south of the DMZ, Republic of Vietnam. On that day, I stood and I watched the blood and the screams and the life pour from his body.

Mike died in the manner of a scared nineteen-year-old boy. He screamed and cried and he called for his mother. Not at all like on television. Not at all like the characters between the covers of a Sgt. Rock comic book. Mike died a very real death.

To a good many people in the United States, Mike did not die. Neither did the 13 others who were killed that day. They were killed that day. They were merely statistics stuck on the back pages of the newspaper near the comic strips.

It's ironic that Mike's death came so close to Veterans Day—a day on which we celebrate our young men for their service to their country. The irony is two-fold. First, Mike was a draftee and one that didn't want to serve his country in that particular manner. Second, he did not serve his country by dying in Vietnam. Mike died without reason or cause.

It's important that I remember Mike; he was my friend. It's important that you remember him, too; he was a person.

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. Does the Senator from Pennsylvania seek recognition?

Mr. SCOTT. Mr. President, I have nothing worthwhile to say at this moment. I hope that my example of restraint may be followed.

Mr. BYRD of West Virginia. Mr. President, will the Senator yield?

Mr. SCOTT. I am glad to yield.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that all committees be permitted to meet during the session of the Senate today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Florida (Mr. CHILES) is recognized for not to exceed 15 minutes.

(The remarks of Mr. CHILES when he introduced S. 2872 are printed in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

The ACTING PRESIDENT pro tempore. Under the previous order, the Senator from Arizona is recognized.

THE JUDICIAL PHILOSOPHY TEST AND WILLIAM REHNQUIST

Mr. GOLDWATER. Mr. President, in a very few days the Senate will mark a historic occasion by undertaking to offer its advice and consent on the nominations of the 99th and 100th Justices ever to sit on the Supreme Court of the United States. As we are about to embark upon this momentous event, we can witness once again, as has occurred often in our Nation's past, the efforts by a few Members of this body to scrutinize and judge a nominee solely on the basis of his political philosophy.

Mr. President, the advocates of the use of this criteria make no bones about it; they are concerned with knowing whether or not a nominee's judicial and political philosophy fits the same mold as their own views on social issues of the day. This position became evident, at the recent nomination hearings held by the Judiciary Committee, in the ground rules laid down by four liberal members of that committee.

Mr. President, as I sat at the witness table, accompanying William Rehnquist and hearing his critics, I thought about a recent poll of scholars undertaken by Life magazine which rated 96 prior Supreme Court Justices.[1] I wondered how the 12 selected as "great" would have fared under the liberal-oriented criteria of those Members now challenging the philosophy of the man who is to be seated as the 100th Justice on the High Bench.

It would be interesting, I thought, to take a look at the words and deeds of these 12 great Justices and see how they might stack up against the test used by the current liberal wing of the Senate.

I might say, Mr. President, that my legal assistant, Mr. Terry Emerson, a brilliant law scholar, compiled this paper for me.

For example, we might inspect the record of an early Justice who is hailed today for his stands in solitary disagreement with his colleagues against segregation, a man who is well known today for his assertion that "Our Constitution is colorblind."[2]

And yet, prior to serving on the Court, this Justice had been a member of a slaveowning family in Kentucky, a bitter foe of the Civil War amendments, and a critic of Federal civil rights legislation.[3] In 1854 he began his political activities by joining the Know-Nothing Society, a secret organization having for its purpose the restriction and destruction of the influence of foreigners and Catholic priests in our political affairs.[4]

In 1859, upon being nominated for a congressional seat, he set out to prove himself the more devoted defender of property rights in slaves. He not only endorsed the holding of the Dred Scott

Footnotes at end of article.

decision that Congress lacked power to exclude slavery from the territories, but he claimed that the case meant that Congress was dutybound to pass laws for the full protection of the rights of slaveowners.[6]

Later, running for election as attorney general of Kentucky, he denounced President Lincoln's promulgation of the Emancipation Proclamation and came out strongly against the 13th amendment to the Constitution abolishing slavery.[6]

Once he became attorney general, this Justice argued several cases involving slave issues and civil rights. In *Commonwealth* v. *Palmer*,[7] he prosecuted a Union general for being guilty of the crime of aiding slaves to escape. In *Bowlen* v. *Commonwealth*,[8] he asked the Kentucky Court of Appeals to overturn a lower court decision which had permitted the introduction of Negro testimony against a white defendant indicted for larcency.

We might also observe that in the 1865 elections for State legislature this individual took the stump in support of "a thorough union of all citizens who are opposed to the admission of the Negro to the ballot box or to the enjoyment of other political advantages."[9]

He is, I should mention, none other than John Marshall Harlan, author of the famous dissent in the Supreme Court decision of *Plessy* v. *Ferguson*.

Turning to another early Justice, whose background may cause some raised eyebrows, I might discuss a gentleman of whom it is said:

> Judged by the standards of the present day, or even by those of 18th century colonial America, he was given a paltry foundation in the law.

In fact, an authoritative, new biography of all Justices of the Supreme Court up to 1969, states that the extent of his formal education included 6 weeks of attendance at George Wythe's law lectures at William and Mary and some reading from Bacon's Abridgement, and that was all.[10] This future great was both a slaveholder himself and an official of the American Colonization Society, which was dedicated to the transportation of free Negroes back to Africa.

It is particularly striking to notice that 7 years before the famed decision of *Marbury* v. *Madison*,[11] this Justice had argued before his future tribunal that "the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution," a conferral which he knew was not expressly granted.[12] Yet, in 1803, it was he who ruled in *Marbury* v. *Madison* that an act of Congress was unconstitutional, a move that is considered perhaps the most important decision in Supreme Court history. Of course, I am referring to the unanimously recognized great, John Marshall.

Here we have a man who in his pre-Court days argued vehemently that the Court could not review and veto acts of a legislature and then, who turned around 7 years later, and wrote the most famous decision of his career by holding that the Court could do this very thing. We might remember this incident when we hear criticisms made of the positions taken by Mr. Rehnquist as an advocate for the U.S. Government or as a private practitioner on behalf of his private clients.

Next we might review the history of another Chief Justice. Like Marshall, this one, too, was a member of the Colonization Society and was born into a slave-owning family. A descendant of a prominent Maryland Tidewater family, he sided with rural area representatives as a member of the Maryland Legislature and remained a State's-rights man in that body.[13]

Once, as attorney in a case, the future Chief Justice argued:

> The African race in the United States, even when free, are everywhere a degraded class. The privileges they are allowed to enjoy are accorded to them as a matter of kindness and benevolence rather than of right.[14]

Later, as Attorney General under President Andrew Jackson, he rendered opinions which repeated his view that slavery was basically a problem for the States alone; except that he allowed that the Government might pass fugitive slave laws upholding the property rights of Southerners.[15]

During this same period he gave some suggestion that a Court headed by him might abdicate its right of judicial review. He said:

> The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges and on that point the President is independent of both.[16]

In these days of marked contest by Congress to reassert its role in relation to that of the President, imagine how these words would go over with our liberal friends. In similar manner, the spokesmen for civil liberty would undoubtedly be horrified at the following words written by this future Justice upon the occasion of hearing about a riot caused by workingmen whose savings had been wiped out a year before by the collapse of a Maryland bank. He wrote his son-in-law:

> There ought not to have been a moment's hesitation about the use of fire arms, and the firm and free use of them the moment that force was attempted by the mob. The first stone thrown . . . should have been the signal to fire.

So said Roger Brooke Taney in 1835.[17]

Shades of Kent State and Washington's May-Day disturbances, can you picture how this inflammatory message would be received by Joseph Rauh and other radical spokesmen were they to be expressed today?

Mr. President, the last Justice selected from the 1800's leaves little to grasp in examining his pre-Court history. As the youngest person ever to sit on the Supreme Court, his prior record did not offer much opportunity for making distinct marks of his philosophy.

The one and only case which brought this attorney to national attention was one in which he was retained to uphold the money interests of Massachusetts speculators in lands which they had snapped up from a corrupted Georgia Legislature.[18] According to the authoritative four volume biography on Justices of the Supreme Court by Friedman and Israel, the young attorney thus began "the work he was to complete as a judge—a transformation of the contract clause of the Constitution into a bastion for the rights of property."[19]

In view of the sparseness of material on this individual in his pre-Court life, I am taking the liberty of mentioning his view on an important political question which he expressed 9 years after taking his seat on the bench. I use this reference only because it was made in the constitutional convention of Massachusetts relative to the composition of the State legislature in which he had earlier been a member and because his remarks seem to reflect a long-held position.

When the convention reached the issue of determining the basis of representation in the State senate, he rose to attack the idea that population should serve as the basis of seats in the senate rather than the amount of taxation derived by each county. He said:

> Cases may be easily supposed, in which, from the peculiar state of society, such a basis would be universally deemed unsafe and injurious. Take a State, . . . where there are five or ten thousand wealthy persons, and 90 or 100 thousand artisans, reduced to a state of vice, and poverty, and wretchedness, which leave them exposed to the most dangerous political excitement. . . . Who would found a representation on such a population, unless he intended that all property should be a booty to be divided among plunderers?[20]

Elsewhere in the same speech the Justice, whom I shall reveal as Joseph Story, said:

> The more numerous the body the greater the danger from its movements . . .[21]

Now where, I must ask, in these views is the spirit of human compassion that liberal critics deem necessary in candidates for the High Bench?

Let us turn now to 20th century men who have been chosen as outstanding Justices. First, we might study the background of a personality who is known today as the peoples attorney. By 1895 the peoples attorney "was rapidly becoming a millionaire. He was esteemed in the Nation's highest financial and business circles. Big businessmen and heads of great corporations were among his clients and friends." When he was appointed to the Court in 1916, he had become a milllionaire twice over.[22]

In 1902 the peoples attorney incurred the wrath of Samuel Gompers by proposing to take away from unions their immunity from suit by incorporating them. He said:

> If Unions are lawless, restrain and punish their lawlessness; if they are arbitrary, repress their arbitrariness . . .

The unions, he said, "need something to protect them from their own arbitrariness."[23] Two years later he found something. When acting as counsel for an employers' organization, he obtained an injunction ending a union strike.[24]

As further indication of his concept of industrial relations, I might quote from his address before the Central Labor Union in 1905, when he advised labor it

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Footnotes at end of article.

"should strive to make the earnings of any business as large as possible," "should be so faithful and diligent that espionage will not be needed," and "should not limit the production of individuals." [25]

In 1899 the peoples attorney was, all at the same time, an investor, a director, and a lawyer in the shoe industry monopoly held by the United Shoe Machinery Co. In this capacity he publicly opposed legislation which would break up the monopoly by overriding a provision of United's contract which forced a shoe manufacturer to use United's entire line if he wanted to use any at all.

In his brief on behalf of United he argued:

We have found in Massachusetts that in certain things we have got to have a monopoly.[26]

On the occasion of the Supreme Court ruling of 1913, holding that manufacturers of patented articles could not fix the price at which retailers sell their product to the consumer, the peoples attorney angrily wrote:

The Supreme Court is all wrong . . . When a Court decides a case upon grounds of public policy, the Judges become, in effect, legislators.[27]

Do these revelations reflect a sensitivity to the protection of the poor and the weak? Did a statement signed by seven past presidents of the American Bar Association declaring "he is not a fit person to be a member of the Supreme Court of the United States" [28] indicate that degree of recognition by his brethren at the bar that would meet the approval of our liberal colleagues in the Senate today? Yet, if the Senate had conformed to the test now suggested by them, the Nation would never have had the services of Justice Louis Brandeis.

Moving to another Justice, now celebrated for his zeal for social justice, we encounter an individual who, as dean of Columbia Law School, was sorely troubled with the view that judges "should consciously endeavor to mold the rules of laws to conform to their own personal notion of what is the correct theory of social organization and development." [29]

When public discussion centered on a decision which invalidated the Workingmen's Compensation Act of 1910, the future Justice rallied to the defense of the decision on the theory that the mere fact the goal was economically desirable did not justify the taking of property from the employer. He stated:

The proper method of securing the economic benefits of workmen's compensation . . . is "by the orderly process of constitutional amendment . . ." [30]

During controversy over another human rights law, the Tenement House Act of 1901, he endorsed a court ruling exempting an apartment house owner from the law. He admonished:

The view that it is possible to base judicial decisions upon some vague notion of social justice finds frequent expression in these days of hasty and ill-considered criticism. Social justice may mean anything, and therefore, as a basis of judicial decision means nothing.[31]

But there is more in the man's record to suspect that his appointment to the Court would never have been cleared by today's liberal standards. Sitting on a Presidential board of inquiry reviewing conscientious objector cases in World War I, he "entertained a profound repugnance" toward the political, or nonreligious objector.[32] A year after Armistice Day, he observed:

One can but wonder what forces are at work in our social and educational life to produce the ill-balanced and distorted intellectual processes by which these young men, in many respects intelligent, had worked out their social philosophy.[33]

Even as to religious objectors he felt, "many were plainly fanatics, with abnormal mental experiences." [34]

As dean of Columbia Law School he expressed much the same thoughts about youth at large. In 1917, he stated:

I observe generally that the average college student of today has a radical tendency.[35]

Finally, I should mention his role in supporting the efforts of the J. P. Morgan estate against Colonel Ownbey. In this unusual case, the future Justice argued before the Supreme Court that Ownbey had not been denied any fundamental right simply because neither he nor his attorney had been allowed to testify or offer proof denying the allegations in the case against him. It mattered not that the Morgans were thereby enabled to seize everything the old Indian scout owned. Speaking in defense of the ancient Delaware practice which effectively prevented Ownbey from being represented in the court below, the Morgans' attorney proclaimed that the correction of old methods ought to be left to the legislators, not the courts.[36]

Now if this view of the Constitution indicates a deep-seated commitment to individual liberties of the kind required by my liberal friends, I would be very much surpised. Had this nominee been disapproved on the ground of his approach to questions of human liberty, however, the Court would have lost its future Chief Justice, Harlan Fiske Stone.

Next we might examine the past record of a Chief Justice who began his career convicting criminals, first as deputy city attorney, then in the county district attorney's office, and later in the State attorney generalship.[37] As attorney general he denounced Communist radicals, attacked his election opponent for opposing a bill to make schoolchildren salute the flag, and blocked the nomination of a liberal-minded law professor to the State supreme court.[38]

As a Governor, he was a leading proponent of the wartime order removing all persons of Japanese ancestry from the west coast and putting them in concentration camps. Opposing the return of the evacuees in 1943, he told a Conference of Governors:

If the Japs are released, no one will be able to tell a saboteur from any other Jap.[39]

Through most of his career in State politics he was regarded as a favorite of what his biographer calls rightwing politicians. William Randolph Hearst promoted him for the Republican presidential nomination in 1944. The Saturday Evening Post described him admiringly as an ardent believer in States rights.[40] His name, if you have not guessed it by now, is Earl Warren.

Another man, revered as a defender of personal liberties, got his start as a police court judge after which he became prosecuting attorney for his county. In the course of this experience he is said to have tried more murder cases than he could ever remember.[41]

Backed by the Ku Klux Klan, he was sent to the U.S. Senate. From the time he came into this Chamber, he was a leader against all efforts to pass an antilynching law. On the Senate floor he sarcastically charged that the attempt to pass such a law "could well be designated a bill to increase lynching." [42]

As an ironical twist on fate this individual, later to be known for his dedication to freedom of speech, was chairman of a special Senate committee which demanded, under blanket subpena, the delivery to it of all telegraph messages transmitted by a daily newspaper and magazine publisher covering a 7-month period of 1935. The newspaper firm was forced to go to the U.S. court to get an order enjoining the committee from copying and using these telegraph messages.[43]

Perhaps the most interesting characteristic of the nominee, at the time his name was before the Senate, is found in his total silence during vigorous argument over whether or not he had ever been a member of the Klan. Holding his silence throughout the entire confirmation proceedings, it was later proved that he had taken the oath of a Klansman early in his political career.[44] Yet, I suppose, most observers would believe that subsequent events have definitely vindicated the appointment of Justice Hugo Black to the Bench.

Another of the Supreme Courts' dozen greats had, during his 18 years on the New York Court of Appeals, established a reputation of adherence to the theme that solutions to the great problems of the 20th century are for the legislature.[45] For example, in the 1920's he wrote an opinion upholding a statute of the State of New York which gave preference to its citizens over aliens in the construction of public works.[46]

Was such discrimination in opposition to human rights? He said:

It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making, great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature.[47]

In 1927 he handed down a decision in favor of a husband who had, in a moment of fury, caused the arrest of his innocent wife. The judge held that neither statutes nor the Constitution granted women legal rights in cases such as this. Their remedy must lie in legislative action, not judicial interpretation.[48]

An examination of his cases on criminal law in the New York Court of Appeals indicates that he carried over the same strict view of interpretation into this field. In general, he gave great weight to the interests of society in effective law enforcement.[49] Consider, if you will, the 1927 case in which he held there

Footnotes at end of article.

was no violation of personal liberty in a State statute which automatically provided for life imprisonment once a criminal was convicted for a fourth time. Admitting that this would result in too cruel a punishment in some instances, he nevertheless did not consider the statute to be in conflict with the Constitution.[50]

A year earlier, in People against Defore[51] he had held that evidence obtained through an illegal search and seizure was admissible in a criminal proceeding. Though the defendant had been unlawfully arrested and the evidence against him obtained by lawless force, the future Justice ruled the evidence could still be used against him.

In so ruling, the judge had expressly rejected a growing line of Federal decisions that were at variance with his opinion. His attitude toward the issue is reflected in his reasoning that the pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for the most wicked crimes. He wrote:

A room is searched against the law, and the body of a murdered man is found. The privacy of the home has been infringed, and the murderer goes free . . . We may not subject society to these dangers . . .[52]

Again, I must ask, what evidence of a "breadth for vision" is demonstrated on this record? Would our liberal colleagues find that these decisions cast a cloud over the judge's commitment to justice so that they could not have supported his nomination? I wonder if Benjamin N. Cardozo would be confirmed today under the doctrine of the new left?

Our next candidate of greatness was a Boston Brahman, an irreverent agnostic, and economically upper class. In his personal politics he was rated a conservative. It is said that almost by instinct he tended to mistrust Democrats.[53]

Judged by some today as "the greatest judicial liberal the Court had known," it may be interesting to consider some of his personal pronouncements on the nature of human beings. He has written:

I only mean that when one thinks coldly I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand.[54]

He also held:

That man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.[55]

The theme running through his letters and papers is that "might makes right." One commentator describes his philosophy as meaning that since—

The binding force in law is nothing but physical force applied through decisions of courts to the bad man, namely the man who runs counter to the dominant groups' completely changeable tastes, the only important thing in law is to try to predict how public policy, i.e. dominant tastes will change, and in changing change decisions. The smart judge should keep his eye on fast developing tastes and write a minority opinion based on the same, betting that some day that minority taste will be the dominant taste in public policy. And so he called himself a bettabilitarian.[56]

Footnotes at end of article.

According to this view, if the dominant taste in the community was changing from one of great emphasis on the rights of the accused to a call for law and order, judges should change their decisions in line with the latest trend. If society should be changing its taste from a regard for the advancement of minorities to a protection of the interests of the majority, this judicial philosophy would mean that a smart judge had better begin to change his decisions accordingly.

For one who held no personal standard for testing the goodness or badness of public policy, "except what the crowd wants,"[57] this drastic turnabout in his position on the great issues of the day would have seemed the practical thing to do. But whether this eccentric approach to questions of human liberty would have enabled Oliver Wendell Holmes to be confirmed by present-day liberals raises a serious question.

When the name of the next of 12 great Justices was before the Senate as a nominee, Senator George Norris charged:

Perhaps it is not far amiss to say that no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does he.[58]

As a Wall Street lawyer, he had been an attorney for the American Petroleum Institute, arguing before the Federal Governments that it had no power and no means by which to restrain, control, or direct the great oil companies in the production of oil.[59]

Early in his career he represented other vast commercial ventures. In the late 1880's, when heavy electric light cables on poles were falling to the ground constantly killing people, this great man represented the electric light companies in pleading that city orders to get the wires underground were "an invasion of the rights of property." In deciding in favor of New York City, the Court rebuked this position. "The companies," the Court said, "are without excuse, and when they claim that the destruction of these instruments of death is an invasion of the rights of property, such claim seems to proceed upon the assumption that nothing has a right to exist except themselves."[60]

Later, as Secretary of State in Harding's administration, this man became known for his "narrow and uncomprehending insistance at all cost on the most extreme interpretation of American property rights, notably in our oil diplomacy."[61] Also, as Secretary of State, he violently fought recognition of Soviet Russia until there should exist "convincing evidence" of a restoration of "private property, the sanctity of contract and the rights of free labor."[62]

Finally, to give away the game, I will mention that this great figure was attacked during debate over his nomination for having already resigned a seat on the Supreme Court in order to run as a candidate for President of the United States.[63] It was charged that his example would establish a precedent tending to lower the standard of the Supreme Court down to the level of the political machine. How this matter and the overall record of Charles Evans Hughes would look to the judicial philosophy theorists today is an intriguing question.

Mr. President, the remaining Justice among the 12 greats is the only one who appears to have an impeccable past record as a liberal. Strangely enough, he is also the only one whom Life magazine appraises as fitting "President Nixon's definition of a 'strict constructionist.'"

His pre-Court background reads like a "Who's Who" of liberalism. He was one of the founders of the Civil Liberties Union, a legal adviser to the NAACP, and counsel to the National Consumers League. He participated in a number of important human rights cases, such as support of the Oregon maximum hour labor law and the District of Columbia minimum wage law.[64]

He wrote editorials in the New Republic arguing that labor injunctions must go, an article for the Atlantic Monthly denouncing the terrorist methods used against Sacco and Vanzetti, and worshiping essays about Justices who cherished civil liberties.[65]

Life magazine says:

Once on the Court, however, he adhered to strict judicial restraint.

This philosophy is well illustrated in an opinion he wrote upholding State "right-to-work" laws, which make it unlawful to forbid employment to a person simply because he does not belong to a union.[66] He wrote:

But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat.

He added:

The Court is not saved from being oligarchic because it professes to act in the service of human ends.

Applying this philosophy to other issues before the Court, the Justice upheld the practice of States to allow their police, without a warrant, to search and seize a person's papers and effects, rejected the view that speech and press were absolutes, and refused to embrace the general approach that speech and press are preferred freedoms. In other significant opinions he held that a State may try a man after he had been acquitted of a Federal crime based on the same facts, voted to uphold criminal prosecution of Communist Party leaders under the Smith Act, and concluded that a State could require Jehovah's Witness children to salute the flag on pain of expulsion from public school.[67]

From these cases alone, it is evident that Justice Felix Frankfurter could not be counted upon to deliver his judgment routinely in support of the latest accepted tenet of the liberal program. More than any other illustration, the judicial record of Justice Frankfurter should prove that it is impossible to predict with certainty how a Justice will vote once he joins the Nation's highest court.

In truth, Mr. President, those who would use the judicial philosophy test are engaged in an utterly falacious practice. I believe it is safe to say that, if the criteria suggested by the liberal element

of the Senate had been applied to the 12 Justices selected as great, only one of them would have been assured of his seat on the Court. In fact, I think that if we had had that element in the Senate over the nearly 200 years of our history, we never would have had a Supreme Court.

There was something tangible and significant in the background of each of the other nominees which could have disqualified them from acceptance by the judicial philosophy advocates.

But let me respectfully suggest that a person who becomes a member of this legislative body does not thereby become endowed with the all-seeing powers of Providence. We, like other mere humans, are incapable of judging what a man's course will be after he is seated on the most eminent court of our land.

As this brief review has shown, there is some real spark of independence that ignites men once they become immune from all political pressures. As Justices, they sit as neither conservative nor liberal, but as intelligent human beings doing their utmost within their God-given capacities to search for and uphold the truth.

What the liberal opponents of William Rehnquist are doing is to decree that because he may not openly espouse the identical political and sociological doctrines to which they hold dear, he is incapable of supporting human liberty and freedom. A man is deemed guilty in their minds of an unwillingness to enforce the guarantees of the Constitution until he proves otherwise. Lacking even the faintest evidence of any deed or activity which might, even when taken out of context, be used against him, Mr. Rehnquist's opponents have fallen back on a blatant political criteria.

Mr. President, not only is this method repudiated by the clear facts of history and by the nominee's personal record of integrity, but it is a patently unfair and presumptious device. Those who hold to the judicial philosophy criteria act as if there had been no change in the man who sits in the White House. They assume that their own liberal views have carried on in the mainstream of majority opinion, forgetting that such a doctrine was soundly rejected by the American people in 1968.

Mr. President, it is my opinion that the President of the United States should be given broad leeway in choosing judicial nominees who might reflect the same broad philosophy as his own on major matters of the day. Thereby the will of the people, as most recently announced in our only election for a nationwide office, can be given some possibility of expression. So long as a nominee is a man of high integrity, scholarship, ability, and diligence, and does not have a serious conflict of interest in his past record, he should be confirmed by the Senate. On these grounds the current nominee, William Rehnquist, is eminently qualified.

Furthermore, Mr. President, contrary to the cruel innuendos raised by his detractors, William Rehnquist is a man with a proven deep regard and respect for individuals and their problems. On all issues, he shows a human vein and a respectful understanding of the other man's viewpoint. He is a man who will make a great and honorable Justice.

FOOTNOTES

[1] Life Magazine, at 52–59 (Oct. 15, 1971).
[2] See his dissent in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).
[3] See Leon Friedman and Fred Israel, the Justices of the United States Supreme Court 1789–1969 (1969), vol. I, at 1282. Also see generally, Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," 66 Yale L. J. 637 (1957).
[4] Westin, *supra* note 3, at 640.
[5] *Id.* at 643.
[6] *Id.* at 649.
[7] 65 Ky. (2 Bush) 570 (1866).
[8] 65 Ky. (2 Bush) 5 (1867).
[9] Westin, *supra* note 3, at 653.
[10] See Friedman and Israel, *supra* note 3, vol. I at 288–289.
[11] 1 Cr. 137 (1803).
[12] Fred Rodell, Nine Men (1955), at 88.
[13] See generally Friedman and Israel, *supra* note 3, vol. I, at 635–641.
[14] Rodell, *supra* note 12, at 120.
[15] Friedman and Israel, *supra* note 3, at 638–639.
[16] Rodell, *supra* note 12, at 112–113.
[17] Friedman and Israel, *supra* note 3, at 641.
[18] The so-called "Yazoo" lands case, 6 Cranch 87 (1810).
[19] See Friedman and Israel, *supra* note 3, vol. I, at 437.
[20] See the Miscellaneous Writings of Joseph Story, Cambridge Press (1835), at 516–517.
[21] *Id.* at 522.
[22] See Alpheus Thomas Mason, Brandeis, A Free Man's Life (1946), at 103.
[23] *Id.* at 142.
[24] *Id.* at 149.
[25] *Id.* at 151.
[26] *Id.* at 215–217.
[27] *Id.* at 424.
[28] *Id.* at 489.
[29] See Alpheus Thomas Mason, Harlan Fiske Tone: Pillar of Law (1968 ed.), at 115.
[30] *Id.* at 115–116.
[31] Id. at 116.
[32] *Id.* at 102.
[33] *Id.* at 108–109.
[34] *Id.* at 108.
[35] *Id.* at 109.
[36] A lengthy criticism of this case is set forth in the remarks of Senator Heflin, at 66 Cong. Rec. 3042–3050 (Feb. 5, 1925).
[37] In general, see Friedman and Israel, *supra* note 3, Vol. Iv, at 2727.
[38] *Id.* at 2728.
[39] *Id.*
[40] *Id.*
[41] *Id.*, vol. III, at 2324.
[42] See 81 Cong. Rec. 9069 (Aug. 17, 1937).
[43] *Id.* at 9072.
[44] Friedman and Israel, *supra* note 3, Vol. III, at 2326.
[45] *Id.*, Vol. III, at 2290.
[46] George S. Hellman, Benjamin N. Cardozo (1969), at 73.
[47] *Id.*
[48] *Id.* at 147.
[49] Friedman and Israel, *supra* note 3, Vol. III, at 2302.
[50] Hellman, *supra* note 46, at 148.
[51] 150 N. E. 585 (1926).
[52] *Id.* at 588.
[53] Rodell, *supra* note 12, at 180–181.
[54] See Frances Lucey, "Natural Law and American Legal Realism," 30 Georgetown L. J. 493 (1942), at note 9, pp. 498–499.
[55] *Id.*
[56] *Id.* at 503.
[57] *Id.* at note 22, p. 503.
[58] 72 Cong. Rec. 3373 (Feb. 10, 1930).
[59] 72 Cong. Rec. 3450 (Feb. 11, 1930).
[60] 72 Cong. Rec. 3555 (Feb. 13, 1930).
[61] Alpheus Thomas Mason, The Supreme Court from Taft to Warren (1968 rev. ed.), at 84.
[62] Friedman and Israel, *supra* note 3, vol. III, at 1902.
[63] 72 Cong. Rec. 3372–3373 (Feb. 10, 1930).
[64] Friedman and Israel, *supra* note 3, vol. III, at 2404.
[65] Felix Frankfurter, Law and Politics, Occasional Papers 1913–1938 (1971), at 61–126, 140, and 218.
[66] *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).
[67] See generally Friedman and Israel, *supra* note 3, vol. III, at 2411–2416, for a discussion of these cases.

REVENUE ACT OF 1971

The ACTING PRESIDENT pro tempore. Under the previous order, the Chair now lays before the Senate the unfinished business, H.R. 10947, which the clerk will state.

The second assistant legislative clerk read as follows:

A bill (H.R. 10947) to provide a job development investment credit, to reduce individual income taxes, to reduce certain excise taxes, and for other purposes.

The Senate resumed the consideration of the bill.

The ACTING PRESIDENT pro tempore. The question is on agreeing to the Mathias amendment (No. 699). The time between now and the vote at 10 a.m. today is equally divided between the Senator from Maryland (Mr. MATHIAS) and the Senator from Rhode Island (Mr. PASTORE).

Who yields time?

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

Mr. MATHIAS. I am happy to yield 5 minutes to the Senator from Kentucky.

The ACTING PRESIDENT pro tempore. The Senator from Kentucky is recognized for 5 minutes.

Mr. COOK. Mr. President, in going over this matter last night—and I wish the majority leader would stay in the Chamber for a moment——

Mr. MANSFIELD. I will.

Mr. COOK (continuing). To listen to this, one of the things we failed to discuss last evening, over and above the political ramifications—which, I am afraid, got a little bit too heavy last night—was the fact that we were talking in terms, in the bill, that someday there may be a deficiency in the fund and, therefore, it would be reduced proportionately in relation to the expense.

In all fairness to the majority leader, who is a cosponsor of the amendment, and contends that this is not a tax that can be checked off by the taxpayer every 4 years, let me say that this is a tax that the taxpayer can check off every year, if he so desires. In other words, this is a fund that can build for 4 years. If it is conceivable that every taxpayer will designate that $1 may be deducted from his taxes, that would amount to $113 million a year, and it could be four times that $113 million, because on page 29, the Pastore amendment (No. 692), beginning on line 6, states:

Every individual (other than a nonresident alien) whose income tax liability for any taxable year is $1 or more may designate that $1 shall be paid over to the Presidential Election Campaign Fund in accordance with the provisions of section 1006(a)(1) of the

bodia's national assembly on Oct. 20, and now the military takeover in Thailand.

In each case, there has been embarrassment for the United States, which is the major military and economic supporter of all three nations. But in the case of Thailand yesterday, as in the previous instances, American officials indicated that no variation in U.S. policy is expected or likely.

Present U.S. strategy in the Indochina war, these sources point out, virtually locks in American policy to support the existing, pro-American, military power structures in all three countries while American troop withdrawals from South Vietnam continue.

President Nixon, in effect, pronounced the grin-and-bear-it attitude of his administration over the disappointments for democracy in Southeast Asia when he commented defensively about the South Vietnamese election outcome.

"We would have preferred . . . a contested election somewhat along the lines that would meet our standard," the President said on Oct. 12. However, he added, if the United States refused to send representatives to the inaugurations of winners of uncontested elections around the world," we would have only one-third as many delegations to send . . ."

American officials, trying to put the best face on their latest disappointments in Thailand, noted yesterday that the main power figures they have been doing business with over the years are generally still the men in control in Bangkok. At the same time, this also illustrates the shallowness of the roots of democracy in Thailand—which the United States prided itself on nurturing with every possible form of military and economic aid.

Now ousted from office, with all civilian officials, is one who holds a service record as foreign minister (since 1959), Western-trained Thanat Khoman, whose education includes attendance at Harvard University's graduate schools. Thanat provided his own epitaph yesterday for the Western concept of democracy in Thailand: "Somehow or other we have not mastered the political forms of Europe and America."

However, although Westernized democracy has a highly hazardous and erratic short history in Thailand, that nation, more than any other in the region, has been a centerpiece of U.S. policy.

Thailand, an original member of the U.S.-built Southeast Asia Treaty Organization, has provided the United States with major air bases for support of anti-Communist warfare throughout Indochina. It has also supplied 11,000 troops to fight in South Vietnam.

The Thai troops were supplied at considerable U.S. cost, estimated by a Senate Foreign Relations subcommittee last year as adding up to more than $200 million. Thailand also has supplied, clandestinely and later, semi-openly as "volunteers," thousands of its troops for service in Laos.

These Thai forces have been the principal target of recurring "anti-mercenary" legislation initiated in the Senate.

Sens. Stuart Symington (D-Mo.), Clifford P. Case (R-N.J.), J. W. Fulbright (D-Ark.) and other critics have repeatedly charged that the Nixon administration "circumvented" attempts to shut off U.S. payments to these Thai "mercenaries."

Current attempts to close this outlet have been accompanied by the Senate Foreign Relations Committee's protest that: "with continuing reports about U.S. financing of Thais and Cambodian mercenaries in Laos and even Thai mercenaries in Cambodia, it is virtually impossible for the Congress to judge the accuracy of these reports or know how much of the taxpayers' money is being used to support these activities . . ."

The administration is counting on greater sympathy for its strategy among members of the House in Senate-House conference to blunt, if not to remove, Senate limitations on these Thai forces.

[From the Evening Star, Nov. 17, 1971]

THAI TAKEOVER IS BLOW TO ADMINISTRATION FIGHT FOR AID TO ASIA

(By George Sherman)

The military takeover in Thailand today is seen here as another blow to the Nixon administration in its battle with the Senate over American aid to Southeast Asia.

U.S. officials were taken by surprise. They maintained that the decision of Premier Thanom Kittikachorn and his generals to remove the "inefficient" Parliament came from domestic factors—not Thai foreign policy.

But they said they feared repercussions in the U.S. Congress, where the foreign aid program already is under attack.

Both U.S. officials and congressional sources said they saw this latest move against democracy as reinforcing Senate opposition to continuing U.S. involvement in Southeast Asia.

At stake is the Nixon doctrine of using military and economic aid to help Asian countries defend themselves. Regarding Thailand the immediate issue is U.S. financing of Thai irregulars fighting in neighboring Laos.

The Senate has passed an amendment by Sen. Clifford Case, R-N.J., to the revised foreign aid bill forbidding all U.S. funds for such operations.

Sen. Stuart Symington, D-Mo., who has access to classified material, already has informed the Senate that 12,000 Thai forces are being groomed to operate in Laos during the coming dry season.

No exact figures are available on the cost of these operations. Symington said in October that the U.S. budget for these mercenaries—under a Thai general—is 25 percent higher than the whole military aid budget for the Royal Laotian army. That figure was set at $80 million for this fiscal year.

That would put the figure set aside by Washington for the Thais in Laos at about $100 million. The funds are included in budget for the CIA and Defense Department. But the Case amendment would prohibit spending these funds.

The administration says it is not prepared to accept the prohibition. It is resting its hopes on the House, traditionally more sympathetic to American military aid programs.

According to U.S. officials, the strategy has been to have the House pass a version of the new aid bill omitting the language of the Case amendment. Then, in a conference committee session on the over-all measure, administration supporters could fight to remove the Senate structures.

Officials admitted it is an uphill battle. Last year Congress put language into the aid bill forbidding U.S. support to any "foreign forces" in Laos. But the administration has claimed that the Thais are individual "volunteers" not covered by that earlier prohibition.

Case and other Senate critics on the Foreign Relations Committee now have moved to close that loophole. The dismissal of the Thai Parliament and the blatant assertion of military rule in Thailand is bound to strengthen congressional arguments against deeper involvement with still another dictatorship in Southeast Asia.

Experts in the U.S. government claim this argument is exaggerated. Thailand has had a series of military governments since 1932. Parliament was reinstituted in 1969, after 10 years of military government begun under Thanom's predecessor.

During the past two years Thanom has run a predominantly military government which has been at odds with the civilian Parliament. Reports from Bangkok indicate that the final blow came when Parliament recently voted to reduce the military budget.

The Thai military also is reported to be upset about the continuing inability to end the guerrilla insurgency supported by China in Northeast Thailand. A substantial portion of the military budget goes toward that operation.

U.S. officials said Thai-American relations have remained stable despite Senate criticism and Thai moves to open their own dialogue with Peking. U.S. forces there have been reduced from 48,000 to 32,000 under the Nixon doctrine. But that stability is now bound to come under new strain.

THE GENOCIDE CONVENTION AND THE CONSTITUTION

Mr. PROXMIRE. Mr. President, many people who oppose the Genocide Convention do so because they believe that ratification of the convention will deny American citizens their protections under the Bill of Rights. But this is not the case. The Genocide Convention would not infringe on the Constitutional guarantees of the American people.

Article VI of the Constitution says,

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

The Supreme Court in *Reid* v. *Covert* 354 U.S. 1 has made very clear the relationship among the Constitution, acts of Congress, and treaties. All acts of Congress and treaties must conform to the Constitution. Where they do not, they are null and void. Furthermore, the Supreme Court held in the same decision that whenever a treaty and an act of Congress are in conflict the last enacted is controlling. Thus Congress always has the opportunity to reconsider enabling legislation on the Genocide Convention any time it wishes.

Mr. President, the Genocide Convention will not endanger our legal system. I urge the Senate to ratify it as soon as possible.

NOMINATION OF WILLIAM REHNQUIST TO THE SUPREME COURT

Mr. FANNIN. Mr. President, we already have had ample evidence that William Rehnquist was not involved in any attempts to harass voters in Phoenix elections. Allegations made concerning an incident in 1964 have been proven false.

The smear tactics being used in an effort to keep Mr. Rehnquist off the Supreme Court have failed, as smear tactics most often do.

The Phoenix Gazette yesterday published an interview with Vincent Maggiore, who was Maricopa County, Phoenix Democratic committee chairman for the Democrats in 1962.

Maggiore says he is angered that attempts have been made to label Mr. Rehnquist as someone who would abuse anyone's right to vote.

And Mr. Maggiore said: "I would be glad to have him judge me."

Mr. President, I ask unanimous consent to have printed in the RECORD the Phoenix Gazette article which should be of interest to every Senator.

There being no objection, the article

was ordered to be printed in the RECORD, as follows:

REHNQUIST CALLED VOTE-ABUSE FOE

(By Lois Boyles)

The man who was chairman of the Maricopa County Democratic Committee in 1962 today labeled William Rehnquist as one he believes "would be totally opposed" to abusing anyone's right to vote.

The belief was cited by Vincent Maggiore, federal bankruptcy referee. "I would say Bill Rehnquist is a very democratic type when it comes to people's rights," Maggiore said. "I am a little angered that people in my own party are bringing this up (charges of harassing voters) and using it as a guise to hurt a very fine man."

Rehnquist—whose nomination to the U.S. Supreme Court is being considered today in Washington by the Senate Judiciary Committee—has been accused by two Phoenix Negroes of approaching several black voters at Bethune Precinct during the 1964 general election and demanding they recite passages from the U.S. Constitution.

Those signing the affidavits—Jordan Harris, 1825 W. Apache, and Robert Tate, 947 W. Watkins—contend they subsequently struggled with the man they said was Rehnquist.

The Justice Department has labeled the charges "false."

Rehnquist supporters have said opponents to the appointment have tacked a 1964 time tag on an incident that actually occurred in 1962 and which did not involve the high court nominee.

Maggiore said, "I definitely know Rehnquist was not involved" in any polling place squabbles in 1962. He discounted the idea the former Phoenix lawyer might have been so involved in 1964.

After the 1962 election Maggiore said he had occasion to talk to Rehnquist and to mention a proposal a bipartisan group get together in the future to check the challenges.

"He was in full agreement that people's rights should be protected," Maggiore said. "He indicated he didn't want any part in anything that would abuse the people's right to vote and that anyone doing so should be prosecuted to the extent of the law."

Maggiore called Rehnquist a "nice man" and said "I would be glad to have him judge me."

As for the 1964 general elections, attorney Tom Murphy, then chairman of the county Democrats, and attorney Wayne Legg, in an identical post with the Republicans, said they had no knowledge of any incidents of any nature involving Rehnquist.

Murphy said, "The only recollection I have is that 1964 was a lot less of a problem year than 1960."

As for a specific recollection of Rehnquist in relation to 1964 voting, Murphy said he had none "other than being aware Bill was working for the Republicans."

He contended, however, "it is traditional, as you know, for the GOP to try to slow down voting lines in heavy Democratic precincts."

AS JAMES J. KILPATRICK SAYS, THE PASTORE AMENDMENT "OUGHT TO BE PASSED. IT MERITS A FAIR TRIAL." LET'S GET ON WITH THE PEOPLE'S BUSINESS

Mr. McINTYRE. Mr. President, the distinguished conservative commentator, James J. Kilpatrick, expressed his views on WTOP television in Washington this morning. He was commenting on the campaign spending amendment offered by the distinguished Senator from Rhode Island (Mr. PASTORE), an amendment now before the Senate.

Although I often find myself in disagreement with views expressed by Mr. Kilpatrick, I nevertheless believe him to be one of the most forceful, responsible, and able exponents of the conservative viewpoint in the Nation.

I happen to think his expressions on campaign spending this morning are worthy of our consideration. I personally might not have quoted George Bernard Shaw as an expert on our democratic process, as Mr. Kilpatrick did, but the Kilpatrick conclusion that we need ways to bring about greater participation by all the people in our campaign process makes such sense to me.

That is why I think Senator PASTORE's amendment makes sense. That is why, as Kilpatrick says, "it merits a fair trial. It ought to be passed." Let us get on with the people's business.

I ask unanimous consent that Mr. Kilpatrick's remarks be printed in the RECORD.

There being no objection, the remarks were ordered to be printed in the RECORD, as follows:

REMARKS OF JAMES J. KILPATRICK

"George Bernard Shaw once remarked he never looked upon an election 'without being ashamed of the whole sham democratic routine.' He thought such exhibitions 'were entirely intolerable and disgraceful to human nature and civic decency.' He happened to be speaking at the time in New York—this was in 1933—and he was speaking largely from experience with the electoral process in England. But Shaw's bitter description applies to our own elections today, and especially to our own presidential elections. They are indeed, in many respects, both intolerable and disgraceful.

"This is particularly true in the matter of campaign financing. It is absurd, dangerous, and potentially scandalous that candidates seeking our highest office be dependent upon the kind of massive private contributions that have been required in recent years. It is idle to contend that large gifts create no obligation. Of course they create obligations—and these are equally suspect whether they are obligations to big labor or to big business. A president—any president—enters upon his office a compromised man.

"The proposal suddenly revived in the Senate by which taxpayers could contribute a dollar each to a federal campaign fund, has great merit. The fund would be distributed according to a formula that fairly takes into account minority parties. Fully implemented, the proposal would bar private contributions altogether in presidential campaigns. The approach has its drawbacks—we would abridge one more freedom, the freedom to give—but it has great advantages also. At the very least, the system merits a fair trial. The bill ought to be passed."

FEDERAL CIVIL RIGHTS EFFORT—1 YEAR LATER

Mr. HUMPHREY. Mr. President, this week the U.S. Commission on Civil Rights issued an important progress report, entitled "The Federal Civil Rights Enforcement Effort: 1 Year Later."

In this highly effective followup action on its major analysis of executive branch activities directed at securing compliance with the Nation's civil rights laws, the Commission concluded that the present administration, despite operational improvements, must continue "to get low marks."

I hope this administration will give close attention to the Commission's central argument:

Actual performance in the resolution of problems, not progress in the development of mechanisms alone, is the real yardstick by which the Government's civil rights effort should be measured.

It is no consolation to the black farmer who continues to receive assistance from the Extension Service on a racially separate and unequal basis that the Department of Agriculture is making progress. It is no source of satisfaction to the Mexican American or Puerto Rican job seeker turned down by a Government contractor that the OFCC is gradually improving.

Yes, there has been improvement in the Federal Government in terms of compiling statistics, preparing reporting forms, and planning interdepartmental agreements; but all of this remains preliminary to actually enforcing civil rights policies.

The Commission's report notes the disparities among Federal agencies in the performance of civil rights responsibilities, with the Federal Home Loan Bank Board establishing a program that can be highly effective in preventing discrimination in mortgage lending, while sister financial institution regulatory agencies have declined to undertake similar action, to cite only one example. It is sharply critical of the Law Enforcement Assistance Administration, charging the LEAA with having "barely begun to implement compliance programs."

But I find most disturbing the Commission's conclusion that, too, often, Federal agencies seem determined to avoid upsetting the status quo for the sake of equal rights, or they have undertaken changes in form, but not of substance, to avoid unfavorable publicity. Where can we find any sense of leadership and initiative in all of this, on behalf of firmly establishing equal justice and opportunity for all Americans?

How can we have confidence in an administration where promises to enforce civil rights policies are only rarely being kept? As an example, the Commission cites the agreement, announced last June, between the General Services Administration and the Department of Housing and Urban Development, to assure living accommodations for poor people near new Federal installations. Yet 5 months passed before even regulations were issued, and no installation site housing investigations have been made.

The Commission and, I sincerely believe, the American people, ask nothing more than that Federal officials faithfully execute the law. Only by vigorous and sustained enforcement, can the Federal Government redeem the pledge of equal treatment made in the historic civil rights laws enacted over the past decade.

Mr. President, I ask unanimous consent that the introductory statement by the U.S. Commission on Civil Rights to its latest report on the Federal civil rights enforcement effort, be printed in the RECORD.

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

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the great combines. We could start by insisting that the $4 billion annually which the government spends to buy food be spent with the independent farmer. We could fund small farmers in co-operatives; we could insist that the $234 million annually which we spend on land-grant colleges be used to pioneer and produce cheap farm equipment instead of being used to research for the benefit of agribusiness.

It would require a major turnaround, and it probably won't take place. Those who yearn may ease their consciences by voting against Mr. Butz. Doing more than that would require battle with large interests who will argue, "You can't fight progress."

But it is well to pause and look around. Is rural America to be a factory or a place to live? That is the real question behind the question of Earl Butz.

NOMINATION OF EARL L. BUTZ TO BE SECRETARY OF AGRICULTURE

Mr. CRANSTON. Mr. President, the nomination of Dr. Earl L. Butz as Secretary of Agriculture not only raises disturbing questions about this administration's game plan for rural America—it suggests that the die has already been cast. Small farmers can expect little help from the Department that is supposed to be their spokesman in Government if Dr. Butz is confirmed.

Three days of hearings before the Senate Agriculture Committee did little to quiet my doubts about Dr. Butz. It is clear that his basic philosophy has not changed since he helped to design and implement the disastrous farm policies of Ezra Taft Benson, the controversial Secretary of Agriculture during the Eisenhower years. His long-standing ties with industro-agriculture, his tendency to equate bigness with efficiency, and his philosophy on price supports, supply management, farmer bargaining, and cooperatives indicates that the rural America favored by Dr. Butz will amount to little more than a giant food factory.

In addition, there is increasing evidence that Dr. Butz has little understanding of the environmental crisis which threatens every citizen in every city and town in America. In an April 26, 1971 speech released by Senator PROXMIRE, Dr. Butz said:

I'm going to talk about something this morning that I think is a real threat to American agriculture . . . And that's the threat that comes from the environmentalists, or from the do-gooders, or from consumerism, or from whatever you want to call it.

He goes on to suggest that growing national concern about the continued abuse of our environment is mere "faddism"—that 1971 can be termed the "year of the environment" and that 3 or 4 years ago:

What were we marching for then? Then the big clamour was hunger and malnutrition . . . And what came out of that? Out of that came a food stamp plan—so generous, so extensive—that it's just short of ridiculous in some parts of this country. Out of it came a welfare program that President Nixon is recommending to the Congress that is so far out that even the Democrats in Congress won't buy it.

I find these statements appallingly insensitive. They show little concern about the urgency of the environmental crisis and the need for Federal food assistance programs. This is certainly an inappropriate stance from the man who will head the U.S. Forest Service which administers 187 million acres of public forest lands in 42 States, the food stamp program which now feeds more than 10.5 million needly people, and the school lunch program which assures a balanced meal to every needy school child.

In California alone, the State has identified 1 million needy pupils, or about 25 percent of the school population.

In fiscal 1972, nearly 40 percent of the total budget for the Department of Agriculture is allocated to Federal food programs.

Mr. President, the nomination of Dr. Butz indicates that President Nixon has made his choice for rural America. He has chosen to allow the continued migration from farm to city of millions of small farmers, small businessmen, and farm workers. He has chosen the further demise of the family farm—both as an economic unit and as a way of life.

He has chosen to allow giant corporations to continue their invasion of the production phases of agriculture, a trend which is most directly responsible for the precarious position in which the small farmer finds himself in 1971.

An economic and technological revolution is sweeping agriculture, and the small farmer is its chief victim. As large diversified corporations enter the production phases of farming, more and more small farms are forced to close. More than a million farms will close up in the next 10 years. As the small farmer leaves, the small businesses lose their customers. The huge investment required to get started in farming today is beyond the reach of the young, and they leave the farm as soon as they are able. Behind them remain the old and the young—the very groups that need the community services which the dwindling rural tax base can no longer support. Churches, schools, hospitals, and community centers are boarding up their doors. Whole towns stand silent and deserted as ghostly reminders of a better day in rural America.

Mr. President, these trends are not inevitable.

The myth that the small farmer is leaving because he is "inefficient" is false. The small farmer is not inefficient, but he cannot compete with giant conglomerates with multibusiness revenues, who can afford to operate with small margins of profit. The farmer has only one source of income—his crop. If he is undersold by industro-agriculture, his very livelihood is threatened.

I believe that the Senate's vote on this nomination will indicate our choice for rural America. It will indicate that we have either decided in favor of an agriculture that is little more than a giant food factory or an agriculture that allows people to live and work in dignity. I believe it is essential that we choose the latter. Therefore, I urge the Senate to reject this unwise nomination.

THE NOMINATION OF WILLIAM REHNQUIST

Mr. BAYH. One of the most important constitutional powers of the Senate is its power—and its concomitant responsibility—to play a meaningful role in the process of selecting Justices of the Supreme Court. In the classic and particularly fitting words of Senator George Norris of Nebraska during the debate over President Hoover's ill-fated nomination of Judge John Parker to the Court more than 40 years ago:

When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches the great questions of human liberty.

I have reluctantly concluded that William Rehnquist approaches the great questions of human liberty in a way which reveals a dangerous hostility to the great principles of equal justice for all people and individual freedom under the Bill of Rights. For this reason I must vote against advising and consenting to his nomination.

On three separate occasions in the past 7 years, Mr. Rehnquist plainly demonstrated a persistent unwillingness to allow law to be used to promote racial equallty in America. In 1964 in Phoenix he spoke out vehemently against a local ordinace designed to assure equal access to public accommodations regardless of race. He argued after the ordinance had been approved by a unanimous city council that—

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as the ordinance.

Upon being nominated to the High Court, Mr. Rehnquist told the Senate that he has changed his mind and would no longer oppose a public accommodations ordinance. But it is hardly comforting that during the mid-1960's, when the entire country was demanding equal rights for all Americans and significant laws were being passed by Congress and state legislatures, Mr. Rehnquist did not feel black people should be accorded equal access to drug stores in Phoenix. In addition, other actions after 1964 make it unwise to rely on the nominee's change of heart, first announced at the confirmation hearings.

In 1966, Mr. Rehnquist opposed two key provisions of a Model State Antidiscrimination Act. The first of these would simply have permitted an employer, subject to the approval of State agency, to hire new employees and fill vacancies in such a way as to reduce or eliminate imbalances with respect to race, religion or sex, if he wished to do so.

The second would have banned "blockbusting" by realtors for their own profit—practices which Robert Braucher, then chairman of the committee and a professor at Harvard Law School and now a Justice of the Supreme Judicial Court of Massachusetts, called "vicious, evil, nasty, and bad" and without any "merit whatever." Yet Mr. Rehnquist saw both "unconstitutional and a serious policy question" about this provision. Both of these provisions were included in the Model Act notwithstanding Mr. Rehnquist's opposition to them.

Moreover, Mr. Rehnquist wrote a public letter in 1967 in opposition to efforts to promote integration in the Phoenix

public school system in which he stated that—

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

He has never disassociated himself from that statement despite many chances to do so during the hearings. And if Mr. Rehnquist himself is no more dedicated to integration than to segregation, he is outside the mainstream of modern American thought.

Mr. Rehnquist's unwillingness to allow law to be used to promote equality has two significant implications which argue strongly against his confirmation. First, his views are such that one must fear the interpretation he may give to the grand promise of the 14th amendment: equal protection of the laws. Indeed, one must fear the limits he would impose on a legislature's power to redress 200 years of racial injustice. Second, there is the question of the appearance of fairness and impartiality. At a time when many Americans, young and old alike, doubt the responsiveness of our system of Government, we cannot afford to put on the Supreme Court a man whose public words and deeds show that he is insensitive to the role that law must play in achieving a fair and just society.

The second set of reasons which underlie my decision to vote against William Rehnquist have to do with his lack of dedication to the fundamental individual freedoms of the Bill of Rights. Mr. Rehnquist has consistently interpreted constitutional clauses which confer power on the executive, or protect property rights, to their utmost breadth, while narrowly construing those which confer rights on the individual. One need only compare, to take a single example, his sweeping reliance on the Republican Form of Government Clause to justify Government surveillance with his stringent and narrow interpretation of the first amendment arguments against such conduct.

Indeed, it was in the context of testifying about surveillance that Mr. Rehnquist made his astounding comment that—

> I think it quite likely that self-discipline on the part of the Executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering.

This widely condemned statement reveals Mr. Rehnquist's views concerning the balance of power. He is a person who consistently favors executive over legislative or judicial power—a view of our system of government particularly dangerous for a man who seeks confirmation as a Justice of the Supreme Court. For example, Mr. Rehnquist has vigorously defended the Nixon administration's position on so-called national security wiretapping, under which the Attorney General claims the right to listen to private conversations whenever he believes a domestic threat to the national security is involved, without prior judicial authorization. When these views are combined with Mr. Rehnquist's public statements on the Subversive Activities Control Board, the executive privilege, the right to bail, and the rights of public employees to free speech, among others, a clear pattern of insensitivity to the fundamental individual freedoms of the Bill of Rights emerges.

These are the major reasons which have led me to decide to vote against Mr. Rehnquist. I will analyze his record and present my position in greater detail in the individual views I plan to file to the Judiciary Committee's report.

Since President Nixon has called both Mr. Rehnquist and Mr. Powell conservatives, the question arises why I have decided to vote for one and not for the other. The answer is that they are very different sorts of men, and the label "judicial conservative" serves to confuse analysis rather than aid it. Based upon a thorough investigation of Lewis Powell's record and his testimony to the Senate Judiciary Committee, I am convinced that he is within a great American tradition of legal philosophy—the tradition of Holmes and Frankfurter and Harlan. This tradition has often been called conservative. But whatever it is called, it has played a vital role in preserving and protecting the fundamental liberties of the Bill of Rights and according equal justice to all Americans.

I believe Lewis Powell is dedicated to equal justice under law. My belief is confirmed by the fact that Mr. Powell's nomination is supported by several leaders of the black community in his hometown of Richmond, including the first black member of the Richmond School Board, who served with Mr. Powell from 1953 to 1961. It is confirmed by the fact that the Leadership Conference on Civil Rights, which has vigorously opposed the nomination of Mr. Rehnquist, has not opposed the nomination of Mr. Powell. And it is confirmed by the testimony of Mrs. Jean Camper Cahn, an outstanding black lawyer who played a leading role in creating the OEO legal services program, who has written eloquently of the humanity, empathy, sense of decency, fair play and commonsense of Mr. Powell. It is this distinction, this recognized open-mindedness that distinguishes Mr. Powell from Mr. Rehnquist.

I am willing to accept a nominee who may be described by the President as a judicial conservative, but I am unwilling to accept a nominee of any philosophy who exhibits an insensitivity to those basic human rights that distinguish our society from others. We in the Senate have a responsibility to look beyond the pressures of the moment to the interest of the thousands of litigants and millions of Americans whose very lives may be affected by Mr. Rehnquist's decisions, not just for the duration of this administration, but perhaps for the remainder of this century. Every Senator has a responsibility to study Mr. Rehnquist's philosophy in this light. Having made that study, I must oppose him.

Mr. President, I ask unanimous consent that a copy of Mr. Rehnquist's 1964 letter and public testimony opposing a local public accommodations ordinance, the 1967 letter concerning our Nation's commitment to an integrated society, a statement I made concerning Mr. Rehnquist's position with respect to a Model State Antidiscrimination bill, my statement in support of Lewis Powell, and a memorandum which has been prepared for me concerning Mr. Rehnquist be printed in the RECORD.

There being no objection, the items were ordered to be printed in the RECORD, as follows:

PUBLIC ACCOMMODATIONS LAW PASSAGE IS CALLED "MISTAKE"

Editor, The Arizona Republic: I believe that the passage by the Phoenix City Council of the so-called public accommodations ordinance is a mistake.

The ordinance is called a civil rights law, and yet it is quite different from other laws and court decisions which go under the same name. Few would disagree with the principle that federal, state, or local governments should treat all of its citizens equally without regard to race or creed. All of us alike pay taxes to support the operation of government, and all should be treated alike by it, whether in the area of voting rights, use of government-owned facilities, or other activities.

The public accommodations ordinance, however, is directed not at the conduct of government, but at the conduct of the proprietors of privately owned businesses. The ordinance summarily does away with the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers. By a wave of the legislative wand, hitherto-private businesses are made public facilities, which are open to all persons regardless of the owner's wishes. Such a drastic restriction on the property owner is quite a different matter from orthodox zoning, health, and safety regulations which are also limitations on property rights.

If in fact discrimination against minorities in Phoenix eating-places were well nigh universal, the question would be posed as to whether the freedom of the property owner ought to be sacrificed in order to give these minorities a chance to have access to integrated eating places at all. The arguments of the proponents of such a sacrifice are well known; those of the opponents are less well known.

The founders of this nation thougbt of it as the "land of the free" just as surely as they thought of it as the "land of the equal." Freedom means the right to manage one's own affairs, not only in a manner that is pleasing to all, but in a manner which may displease the majority. To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom.

Such would be the issues in a city where discrimination was well nigh universal. But statements to the council during its hearings indicated that only a small minority of public facilities in the city did discriminate. The purpose of the ordinance, then, is not to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants. The ordinance, of course, does not and cannot remove the basic indignity to the Negro which results from refusing to serve him; that indignity stems from the state of mind of the proprietor who refuses to treat each potential customer on his own merits.

Abraham Lincoln, speaking of his plan for compensated emancipation, said:

"In giving freedom to the slave, we assure freedom to the free—honorable alike in what we give and in what we preserve."

Precisely the reverse may be said of the public accommodations ordinance: Unable to correct the source of the indignity to the Negro, it redresses the situation by placing a separate indignity on the proprietor, it is as barren of accomplishment in what it gives to the Negro as in what it takes from the proprietor. The unwanted customer and the dis-

liked proprietor are left glowering at one another across the lunch counter.

It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this.—William H. Rehnquist [June 1964].

COMMENTS OF WILLIAM REHNQUIST, ON THE PUBLIC ACCOMMODATIONS ORDINANCE PROPOSED FOR THE CITY OF PHOENIX (JUNE 1964)

Mr. Mayor, members of the City Council, my name is William Rehnquist. I reside at 1817 Palmcroft Drive, N.W., here in Phoenix. 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. I take it that we are no less the land of the free than we are land of the equal and so far as the equality of all races concerned insofar as public governmental bodies, treatment by the Federal, State or the Local government is concerned, I think there is no question. But it is the right of anyone, whatever his race, creed or color to have that sort of treatment and I don't think there is any serious complaint that here in Phoenix today such a person doesn't receive that sort of treatment from the governmental bodies. When it comes to the use of private property, that is the corner drugstore or the boarding house or what have you. There, I think we—and I think this ordinance departs from the area where you are talking about governmental action which is contributed to by every taxpayer, regardless of race, creed or color. Here you are talking about a man's private property and you are saying, in effect, that people shall have access to that man's property whether he wants it or not. Now there have been other restrictions on private property. There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. 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.

What has brought people to Phoenix and to Arizona? My guess is no better than anyone else's but I would say it's the idea of the lost frontier here in America. Free enterprise and by that I mean not just free enterprise in the sense of the right to make a buck but the right to manage your own affairs as free as possible from the interference of government. And I think, perhaps, the City of Phoenix is not the common denominator in that respect but that it is over on one side, stressing free enterprise. I have in mind, the state of the Housing Ordinance, last year, which a great number of people—you know, the opinion makers, leaders of opinions, community leaders were entirely for it. I happen to favor it myself and yet it was rejected by the people because they said, in effect, "we don't want another government agency looking over our shoulder while we are running our business". Now, I think what you are contemplating here is much more formidable interference with property rights than the Housing Ordinance would have been and I think it's a case where the thousands of small business proprietors have a right to have their own rights preserved since after all, it is their business.

Now, I would like to make a second point very briefly, if I might, and that is on the mandate existing to this Council and this again, of course, is a matter of one man's opinion against another. As I recall, the position taken by the preceding Council, of which I know you, Dr. Pisano, Mr. Hyde, Mr. Lindner were all on, was that there would be no compulsory public accommodations ordinance and as I recall, when this Council ran against the Act Ticket, which I would have thought would be the logical ticket, if elected, to bring in an ordinance like this, nothing was said about any sort of change that the voters might guide themselves by in voting in this particular matter. I don't think this Council has any mandate at all for the passing of such a far reaching ordinance and I would submit that if the Council, in its wisdom, does determine that it should be passed, it has a moral obligation to refer it for the vote of the people because something as far reaching as this without any mandate or even discussion on the thing at the time the election for City Council was held is certainly something that should be decided by the people as a whole rather than by their agents, honorable as you ladies and gentlemen are. I have heard the criticism made by the groups which have favored this type of ordinance in other cities that we don't want our rights voted on but of course, it is they who are bringing forward this bill. The question isn't whether or not their rights will be voted upon but instead, it's a question of whether their rights will be voted upon by you ladies and gentlemen who are the agents of the people or the people as a whole. Thank you very much for your time. (Transcribed from tape on record at Phoenix city clerk's office.)

[From the editor, the Arizona Republic]

"DE FACTO" SCHOOLS SEEN SERVING WELL

The combined effect of Harold Cousland's series of articles decrying "de facto segregation" in Phoenix schools, and The Republic's account of Superintent Seymour's "integration program" for Phoenix high schools, is distressing to me.

As Mr. Cousland states in his concluding article, "whether school board members take these steps is up to them, and the people who elect them." My own guess is that the great majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the federal Civil Rights Commission.

My further guess is that a similar majority would prefer to see Superintendent Seymour confine his activities to the carrying out of policy made by the Phoenix Union High School board, rather than taking the bit in his own teeth.

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policy-making bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small minority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

The schools' job is to educate children. They should not be saddled with a task of fostering social change which may well lessen their ability to perform their primary job. The voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour.

STATEMENT OF SENATOR BIRCH BAYH, ON MR. REHNQUIST'S ACTIONS CONCERNING UNIFORM STATE ANTIDISCRIMINATION ACT, NOVEMBER 22, 1971

In the past few days I have come upon additional information which casts some light on Mr. William Rehnquist's attitude toward the great quest for equality in America. The attitude indicated by this new information—especially when taken together with other information already before the Senate—is disturbing indeed.

At its 1966 annual meeting the National Conference of Commissioners on Uniform State Laws took up a proposed State Model Anti-Discrimination Act, which had been three years in the preparation. The Act created State Commissions on Human Rights to deal with discrimination in employment, public accommodations, educational institutions, and real property transactions. Mr. Rehnquist represented Arizona at the proceedings. The transcripts of the deliberations of the Committee of the Whole reveal that Mr. Rehnquist opposed two important provisions of the Model Act.

The first was a proposal which was, in the words of the Commissioners Comments, "designed to permit the adoption [by an employer] of voluntary plans to reduce or eliminate" racial, religious, or sex imbalance in its workforce. These plans were to be subject to the approval of the Commission on Human Rights, and they could apply only to the hiring of new employees or the filling of vacancies. According to the debates, four states already had enacted similar laws: Indiana, Massachusetts, Illinois, and California. Mr. Rehnquist opposed this provision, and, in effect, moved to delete it. Another Commissioner called this "a direct attack upon the power granted in the statute to eliminate racial imbalance." The issue then came to a vote and Mr. Rehnquist's motion was defeated. The provision now appears as Section 310 of the Model Act.

The second proposal that Mr. Rehnquist opposed was one designed to prohibit vicious "blockbusting" tactics by which realtors sometimes play on racial fears for their own profit. As the Reporter-Draftsman of the Act, Professor Norman Dorsen of New York University, said during the deliberations, a number of cities and at least one state (Ohio) had antiblockbusting provisions by 1966. Mr. Rehnquist moved to delete this section. He said:

"It seems to me we have a constitutional question and a serious policy question, and in view of the combination of these two factors, plus the fact that it doesn't strike me this is a vital part of your bill at all, I think this would be a good thing to leave out."

Mr. Robert Braucher, then Chairman of the Special Committee on the Model Anti-Discrimination Act and a Professor at Harvard Law School, and now a Justice on the Supreme Judicial Court of Massachusetts, then made an eloquent defense of the anti-blockbusting provision:

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

"And the notion that that type of conduct should be entitled to some kind of pro-

tection under the bans of free speech is a thing which doesn't appeal to me a tiny bit."

A vote was then taken on Mr. Rehnquist's motion to delete the section, and the motion failed. The section now appears as Section 606 of the Model Act.

While Mr. Rehnquist subsequently authored the Justice Department's opinion upholding the "Philadelphia Plan"—requiring that substantial numbers of minority employees be hired to redress the effects of earlier discrimination—his arguments at the Conference suggest that his personal philosophy and policy preference is to the contrary. And when his statements are combined with other views he has expressed within the last seven years—his vehement opposition to a 1964 Phoenix public accommodations ordinance, and his public letter in 1967 stating that "we are no more dedicated to an integrated society than we are to a segregated society"—a persistent unwillingness on Mr. Rehnquist's part to permit law to be used to promote racial equality in America is revealed.

STATEMENT OF SENATOR BIRCH BAYH ON THE SUPREME COURT NOMINATION OF LEWIS POWELL, NOV. 11, 1971

The President has said that few decisions are as important as the nomination of a Justice for the Supreme Court of the United States. I agree. And no less important is a Senator's decision whether to advise and consent to such a nomination. With this in mind, and in light of the difficult struggles we have had in recent years over nominations to the high court, I have devoted my most careful attention to the two nominees presently before the Senate. I have today concluded that I will support the nomination of Lewis Powell.

I have stated what I felt were the three qualities the nation demands of a nominee to the Supreme Court: outstanding legal ability, unimpeachable integrity, and a demonstrated commitment to fundamental human rights. In the course of the Senate hearings on the Powell nomination no question was raised concerning his competence as a lawyer or his personal integrity. Few men or women in America could earn the active support of as many leading lawyers and legal echolars, many of whom have testified or written about their personal knowledge of the nominee's qualifications and their enthusiastic support for him. The American Bar Association not only found that Mr. Powell "meets high standards of professional competence, judicial temperament and integrity," the highest rating given to Supreme Court nominees by the ABA Committee on the Federal Judiciary, but voted unanimously that Mr. Powell meets this standard "in an exceptional degree."

The focus of the Senate hearings on Mr. Powell's nomination has been a discussion of the third criterion I mentioned earlier, demonstrated commitment to fundamental human rights. In exploring the nominee's commitment, the Committee has properly inquired into his judcial philosophy. I believe that the power and the responsibility of the Senate to make such inquiry is now generally accepted—and the President himself encouraged an investigation of judicial philosophy by announcing that these nominees had been selected because of their philosophy. Mr. Powell cooperated fully with the Judiciary Committee in this inquiry, and is to be commended for his conduct.

Lewis Powell and I disagree on some matters of judicial philosophy. Were the power of nomination mine, I might well have nominated someone whose views coincided more nearly with my own. But that is not the issue here. Based upon my investigation of Lewis Powell's record and his testimony to the Senate Judiciary Committee, I am convinced that he is within a great American tradition of legal philosophy—the tradition of Holmes and Frankfurter and Harlan. This tradition has often been called conservative. But whatever it is called, it has played a vital role in preserving and protecting the fundamental liberties of the Bill of Rights and according equal justice to all Americans. For these reasons, I will vote for the confirmation of Lewis Powell.

I have not come to this decision without careful thought and some hesitation. Because of specific questions that have been raised, I have undertaken a careful review of the record before us, especially in the areas of civil liberties and civil rights.

For me the most serious question about Mr. Powell's civil liberties views was raised by an article he wrote originally for the Richmond, Virginia *Times-Dispatch*, which has been reprinted in other publications, including the *New York Times*. In that article Mr. Powell appeared to defend certain positions of the Nixon administration which I consider dangerous, including wire-tapping without a prior court order. But I have found upon consideration of the entire record that this question is less serious than had originally been thought. First, Mr. Powell testified that the article was written not as a careful analysis of the legal problems involved, but rather as an effort to counteract what he believes are unwarranted charges among the young of systematic and widespread repression in the United States. Thus the article cannot be taken as expressing Mr. Powell's considered legal views. Moreover, Mr. Powell clarified in his testimony before the Committee several aspects of the article. For example, he acknowledged that, not withstanding a contrary implication in the article, "in most cases it would not be difficult to draw" the line between foreign threats and alleged domestic threats to the national security. Finally, Mr. Powell both on other occasions and in his testimony has expressed strong dedication to civil liberties. In 1967, for example, he said "We rightly cherish the privacy of citizens in their conversations. Indeed, unless substantial privacy exists the very fundamentals of free speech are threatened. . . . Certainly, no serious thought should be given to granting an unlimited right to eavesdrop." And while testifying on Monday Mr. Powell said that "I would not trust any government to self discipline, Senator Bayh. I think the purpose of the Bill of Rights was to assure there are limitations on what the government can do."

I have also been troubled by questions concerning Lewis Powell's record in the area of civil rights. In particular, I was disturbed by the eloquent testimony presented to the Committee by Representative John Conyers and by Attorney Henry Marsh of Richmond. There are certainly decisions which Lewis Powell made over the course of his career on the Richmond and Virginia school boards with which I disagree; there may be some which, in the bright light of hindsight, seem unjustifiable. Perhaps Lewis Powell did not do everything humanly possible to end segregation in Virginia during the troubled decade following *Brown* v. *Board of Education*. But if that were the test for appointment to the Supreme Court, few in public life, north or south, could pass it. Unfortunately, we must all share that indictment.

I wonder how many of us can recall the climate of that period in the South, how many of us are aware of the tremendous pressures on those who sought in good faith to abide by the decision in *Brown* v. *Board of Education*. Perhaps Armistead L. Boothe put it best in his testimony in support of Mr. Powell when he said, "From July 1954 onward the issue in the State was just as sharp as a new knife blade between an assignment (or freedom of choice) plan, to keep the schools open, or massive resistance, to cripple them.

Lewis Powell, like my friend and colleague Bill Spong, was one of the courageous men in Virginia who was determined to obey the law of the land, and not to engage in massive resistance to the School Desegregation Cases. As he told the Committee this week "the task of my Board, and my task as I conceived it, was to keep the schools open, and that we did, and finally they were integrated." There may be some who think that his opposition to massive resistance was simply a subterfuge designed to perpetuate segregation. But as one who knows Lewis Powell, who listened to him testify, and who remembers the difficult times during which he sat on the school boards, I believe he is dedicated to equal justice under law.

My belief is confirmed by the statements of other concerned persons. Mr. Powell's nomination is supported by several leaders of the black community in Richmond, including the first black member of the Richmond School Board, who served in that capacity with Mr. Powell from 1953 to 1961. The Leadership Conference on Civil Rights, which has opposed William Rehnquist, has taken no position with respect to the Powell nomination. Mrs. Jean Camper Cahn, an outstanding black lawyer who played a leading role in creating the OEO Legal Services Program, has written concerning the crucial role of Lewis Powell in implementing that program. In addition, Mrs. Cahn said: "My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane, that he has a capacity to emphathize, to respond to the plight of a single human being to a degree that transcends ideologies of fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense."

But perhaps no one has said it more plainly than Lewis Powell himself, who said on Monday:

"I had a mother and father who had a deep conviction that all human beings were equal and that no one was better than anyone else; and I inherited that and have never departed from it."

That inheritance will serve Lewis Powell well on the Supreme Court.

MEMORANDUM FOR SENATOR BIRCH BAYH ON THE NOMINATION OF WILLIAM REHNQUIST TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

1. It now seems to be generally accepted that the Senate, in the exercise of its constitutional obligation of "Advice and Consent" to the President's nomination of a Supreme Court Justice, is properly concerned with the nominee's views and values which may affect his approach to the important issues that come before the Court. The propriety of the Senate's consideration of a nominee's ideology (in this sense) is documented by the *Memorandum on the Role of the Senate in Considering the President's Nominees for Appointment to the Supreme Court of the United States*, addressed to Senator Bayh and to Senator Tunney by Professors Paul Brest, Thomas C. Grey and Arnold M. Paul. Mr. Rehnquist's article, *The Making of a Supreme Court Justice*, Harvard Law Record, October 8, 1959, p. 7, also urges that the Senate has the obligation "of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." (*Id.*, at 7.)

2. There are two basic conclusions to be drawn from what Mr. Rehnquist has publicly written and said. The first is that he places a very low value upon concerns of equality and individual liberties—that he consistently gives these concerns far less weight than that to which they are entitled by

their high place in the Constitution of the United States and their vital role in the fabric of contemporary American society. The second is that Mr. Rehnquist is essentially closed-minded; that he is rather a legal apologist than a legal reasoner; that he reasons backward from his desired conclusions to their justifications, instead of suspending judgment until the reasons which should inform judgment have been impartially considered.

3. The first conclusion is exemplified by a number of specific points:

a. *Racial Equality.* In his testimony and writing concerning the Phoenix public accommodations ordinance, Mr. Rehnquist expressly says that he values a business proprietor's interest in choosing his customers above a Negro's interest in having equal, non-discriminatory access to business premises. The proprietor's interest in the use of his property may properly be subordinated to the values reflected in zoning, health and safety regulations, but not to the value of racial equality. Mr. Rehnquist's suggested distinction between telling a business man "what you can build on your property" and "who can come on your property" is obviously unsubstantial. It is a verbalism which only partly conceals a preference for the interests protected by zoning over the interest of equality. (See his 1964 testimony and letter.)

b. *Speech and Political Association.* It is instructive to compare Mr. Rehnquist's treatment of the values which conflict in the area of government surveillance. On the one hand, he rejects the notion of judicial control over surveillance on the ground that the very process of litigation will impede the investigative activities of the Executive and will—in Learned Hand's borrowed phrase—"dampen the ardor of all but the most resolute" public officials. He does not explore the extent of the impediment, or consider available devices (such as *ex parte* or *in camera* judicial proceedings) which would minimize it. On the other hand, he denies that surveillance raises First Amendment questions, resolutely rejecting the argument that it may "dampen the ardor" of political dissenters. The acknowledged possibility of abuse of surveillance does not call for judicial controls; but the possibility of abuse of judicial process calls for executive immunity from judicial controls. The government's investigative interests must be protected from the "chilling effect" of litigation; but the First Amendment interests of political dissenters need no protection from the "chilling effect" of the investigation. *See generally,* "Privacy, Surveillance, and the Law" (March 19, 1971); testimony on "Investigative Authority of the Executive" (March 9, 17, 1971); "Law Enforcement and Privacy" (July 15, 1971).

Obviously, such conceptions as "possibility of abuse" and "chilling effect" have differing application to the facts and values on the two sides of the surveillance controversy; and, carefully analyzed, they may cut more heavily on one side than the other. But anyone who seeks fairly to resolve the controversy must fairly examine the applicability of these conceptions to the contentions on both sides, not just one. To be concerned with degrees of impairment of investigation that result incidentally from judicial supervision, but unconcerned with degrees of impairment of political expression that result incidentally from surveillance, bespeaks sensitivity to law enforcement values but none to the values of free speech. That sums up Mr. Rehnquist's approach. He uncritically accepts—and expands—such notions as "dampening the ardor" of investigators; but, when it comes to the First Amendment, he is content to stand equally uncritically upon the proposition that: "No decided case of the Supreme Court of the United States has ever held or said that the 'chilling effect' of a governmental activity by itself, unaccompanied by either an attempt to impose governmental sanctions to compel the involuntary divulgence of information or to impose criminal or other sanctions on the basis of the information obtained amounted to a violation of the First Amendment."

This last proposition appears to be wrong. See *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). But even were it correct, Mr. Rehnquist's refusal to "extrapolate from decided Supreme Court cases" in the First Amendment area starkly contrasts with his far-reaching extrapolations in other areas; for example, (i) his extrapolation of a broad power of federal Executive surveillance from the "faithfully executed" Clause as construed by *In re Neagle,* 135 U.S. 1 (1890), and the "Republican Form" Clause *see* Testimony on Investigative Authority of the Executive (March 9, 17, 1971); (ii) his extrapolation of a broad Presidential war-making power from the "Commander in Chief" Clause *see* Expansion of the War into Cambodia: The Legal Issues, 45 N.Y.U.L. Rev. 628 (1970); and (iii) his extrapolation of a concept of "qualified martial law," apparently authorizing the Executive arrest and detention of thousands of citizens, from decided cases which scarcely go so far. One who makes *these* extrapolations, but limits *N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958), and *Bates* v. *Little Rock,* 361 U.S. 516 (1960), to the adventitious circumstances that both involved a "governmental legal sanction" is treating the First Amendment as a constitutional stepchild. So is one who asserts that a doctrine of "purely commercial advertising" permits the government to prohibit the advertising of literature whose *sale* the First Amendment concededly protects *see* Testimony on H.R. 11031 (Sept. 25, 1969).

The same scant regard for the First Amendment appears in Mr. Rehnquist's analysis of the free-speech rights of public employees. *See* Public Dissent and the Public Employee, 11 Civ. Serv. J. 7 (1971). Although it purports to employ a "balancing" approach, this article casts the balance very heavily against freedom of expression. This is hardly surprising once the "interest on the other side of the scale [is] . . . described as the interest of the government in governing effectively." Closely examined, the various "factors [used] . . . to meet the balancing test" plainly appear designed to paint *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), into the narrowest possible corner. But more significant than Mr. Rehnquist's conclusions is his analytic method of "balancing." When he discusses the weights on the government employer's side, he examines in lavish and loving detail all of the justifications for stifling speech—" 'loyalty,' 'harmony,' . . . avoidance of 'dissention,' " the chief Executive's "popular mandate," and the intolerability of "insubordination." On the other side, he aligns a "claim for freedom of speech" to which he devotes no such detailed analysis. Surely this "claim" also has its several components, including not only the public employee's interest in speaking (which Mr. Rehnquist appears to see as the only First Amendment interest involved) but the public's interest in hearing—and, in particular, a self-governing people's interest in hearing about governmental policies from those most knowledgeable concerning them. About these concerns Mr. Rehnquist says nothing, because he reserves his "critical analysis" for the weights in the other pan. Indeed, he not only slights but also distorts the First Amendment interests involved: for example, he treats the expression of individual views by public employees as some sort of plebiscite which would "control" their employer. This sort of "critical analysis" and "balancing" manifests either a calculated stacking of the weights against the First Amendment or, at the least, a callous insensitivity to what the First Amendment is all about.

c. *Rights of Arrested Persons.* Mr. Rehnquist shows the same insensitivity to Bill of Rights guarantees in the criminal process, and particularly to the rights of arrested persons. Discussing the May Day arrests, he treats the problem of delayed preliminary hearings as though the function of a preliminary hearing were principally to prevent protracted investigative detentions *see* "Which Ones Have the White Hats?" (May 5, 1971). In fact, another major function of the preliminary hearing is to enforce the Fourth Amendment's prohibition of arrests without probable cause, by requiring the arresting officer to justify his arrest before a judicial examiner. Mr. Rehnquist stresses the point that preliminary hearings are more difficult to hold—but he ignores the point that they are also particularly important to hold—in a time of indiscriminate mass arrests.

This treatment of the Eighth Amendment is astounding. On the one hand, he reads it (together with the Fourth and Fifth Amendments) as broadly expressive of a "right to be let alone," which he then broadens into "the right to be free from robberies, rapes, and other assaults on the person by those not occupying an official position"—a concept which warrants governmental use of preventive detention as a device to prevent criminal depradations. Here, certainly, is an extrapolation which dwarfs even Mr. Rehnquist's extrapolations from the "Republican Form" and "Commander in Chief" Clauses of the Constitution. *supra.* But when the detained man points to the Eighth Amendment, Mr. Rehnquist replies that "the framers of this Amendment deliberately chose language confined to a relatively narrow set of circumstances" *see* "Official Detention, Bail, and the Constitution" (Dec. 4, 1970); and that, read with proper narrowness, the Amendment "does not establish a right to bail; it forbids judges from requiring excessive bond in cases where the defendant has a statutory right to bail" (p. 82). The latter grudging construction ignores much history and logic (see Foote, *The Coming Constitutional Crisis in Bail,* 113 U. PA. L. REV. 959, 1125 (1965)); but, if it were correct, it would surely render the Eighth Amendment unavailable as a source of Mr. Rehnquist's "right to be let alone." It appears that this Amendment means whatever Mr. Rehnquist wants it to mean: *viz.,* preventive detention.

Mr. Rehnquist also takes his own liberties with the Supreme Court's criminal procedure decisions. Whatever view one entertains upon the difficult question of the constitutionality of "no-knock" statutes, it is plainly misleading to assert that they are "actually nothing more than a codification of constitutional law, and of practices which were held not to violate the Constitution in a case decided a few years ago by the Supreme Court of the United States" *see* "The Administration of Criminal Justice" (Dec. 2, 1970). Presumably, Mr. Rehnquist refers to *Ker* v. *California,* 374 U.S. 23 (1963), in which the Supreme Court split 4–4 on the relevant issue. (Mr. Justice Harlan's decisive vote was based upon another ground, which Justice Harlan had abandoned in deference to precedent several years before Mr. Rehnquist's speech.)

It should be made plain that, in the foregoing pages, the quarrel is not principally with Mr. Rehnquist's results in particular cases. Fair-minded men will often disagree on constitutional questions, as on others. What leads to the conclusion that Mr. Rhenquist is heedless of the basic constitutional guarantees of civil rights and liberties is his reasoning process, not his results. Consistently, he overlooks or understates the nature and significance of whatever civil-liberties claim he

purports to be assessing. Consequently he consistently dismisses such claims without having given them a fair and adequate hearing. He invariably reads constitutional clauses and judicial decisions which promote civil-liberties interests narrowly, without explaining why; and equally invariably he reads constitutional clauses and judicial decisions which militate against civil-liberties interests broadly, without explaining why. He accords the most painstaking and sympathetic analysis to all of those considerations which—he ultimately concludes—require the subordination of civil-liberties values; but the competing civil liberties values themselves receive no such analysis. Confronted with a civil-liberties claim, he does not pause to consider it dispassionately; instead his critical faculties are bent immediately toward the fashioning of reasons for its rejection.

A final example of this penchant is his treatment of the rule excluding unconstitutionally obtained evidence in criminal trials. The exclusionary rule is a controversial subject, to be sure. But controversial questions are not responsibly resolved by begging them, as Mr. Rehnquist does with this one. His discussion begins and ends with the unexamined premise that the exclusionary rule can be defended only as a means of forbidding unfair prosecutive practices—rather than as a means of deterring illegal searches and seizures. Once he adds to this assumption the further assumption that there is nothing inherently unfair about convicting a man upon the basis of illegally seized evidence, he unsurprisingly comes out where he started: with a strong distaste for the exclusionary rule. *See* "Which Ones Have the White Hats?" (May 5, 1971). Surely, however, there is something missing in a consideration of the exclusionary rule which does not face up to the rule's basic purpose of enforcing the Fourth Amendment.

4. Much of what has just been said also undergirds the second conclusion: that Mr. Rehnquist does not display the balance in reasoning which should characterize a Supreme Court Justice. Specifically:

(a) He habitually manufactures unsubstantial and merely verbal distinction whose only purpose is to justify whatever conclusions he wishes to reach. Examples are his distinction between limiting a businessman's choice of what is built on his property and who comes on it, drawn for the purpose of opposing a public-accommodations ordinance *see* part 3(a), *supra,* and his distinction between intimidation of political dissenters by "compulsory process" or other "legal sanction" and intimidation of political dissenters by other means *see* part 3(b), *supra.* He reads cases which can be made to support his desired results with unexampled breadth (e.g., *Neagle; Valentine* v. *Chrestensen; Ker,* but denies the plainest logical implications of cases which stand in his way (e.g., *N.A.A.C.P.* v. *Alabama; Pickering, see* parts 3 (b) and (c), *supra.*

(b) He construes constitutional clauses which confer Executive power with the utmost breadth (e.g., the "Republican Form" Clause; the "Commander in Chief" Clause), while construing guarantees of individual liberty with persistent stinginess (e.g., the First Amendment; the Eighth Amendment *see* part 2(b), *supra.* His approaches to interpretation of these two sorts of constitutional provisions differ as do day and night. No explanation is ever offered why Mr. Rehnquist chooses one or the other approach; and the obvious explanation is—to borrow Mr. Rehnquist's words in criticism of the Warren Court—"ideological sympathy at the expense of generally applicable rules of law".

(c) When he purports to "balance" interests, he does so unfairly. He subjects a governmental interest to "critical analysis" or not, depending upon whether it gains or loses force from critical analysis. (Compare his treatment of the government's interest in restricting its employees' freedom of speech *see* part 2(b), *supra,* with his treatment of its interest in preventive detention *see* part 2(c), *supra.*) The governmental interest is given the benefit of such concerns as "chilling effect" (under other names) while the competing interest of individual liberty is not. The governmental interest is minutely inspected and dissected for the purpose of increasing its bulk, while the competing interest is left unexamined or dissected for the purpose of throwing half of it away. Mr. Rehnquist's treatment of civil disobedience *see* "The Law: Under Attack From the New Barbarians" (May 1, 1969) is exemplary. It recognizes—for the purpose of urging the immorality of even symbolic disobedience—that coercive law enforcement is no substitute for self-governance. But it ignores or denies the same perception when it takes University administrators to task for failing to use coercive measures on the campus. It develops in fine detail every aspect of the corrosive effects of symbolic disobedience, while saying nothing at all about the plight of the minority which is so deprived of access to the forums of public opinion that it must carry its case to the public conscience by suffering the consequences of an unjust law. Much is said about the irrelevance of Gandhi, but nothing about the relevance of Martin Luther King, Jr.

Other aspects of Mr. Rehnquist's writings demonstrate the same sort of intellectual double-standard:

(d) His decisive argument against symbolic civil disobedience emphasizes, first, the value of majority rule in a democracy and, second, the historical fact that majorities are capable of responding to minority interests. A classic instance of this latter fact, he asserts, is Congressional passage of the 18-year-old voting act. Mr. Rehnquist does not mention that he opposed that act, and urged submission of the 18-year-old voting issue to the constitutional amendatory process, upon the precise ground that social change of this nature should await the action of "extraordinary majorities both in Congress and among adopting States" *see* Testimony on Lowering the Voting Age to 18 (March 10, 1970). Plainly, Mr. Rehnquist shifts back and forth between majoritarianism and his notion of "consensus" as may suit his purposes: to discourage both social change and the effective advocacy of social change.

(e) The same double standard is shown in his analysis of *Valentine v. Chrestensen,* 316 U.S. 52 (1942). Mr. Rehnquist cited this case as posing a constitutional problem for an anti-blockbusting provision of a Model State Anti-Discrimination Act while he was a Commissioner on Uniform State Laws. This is apparently the only time that Mr. Rehnquist has given the First Amendment wide scope—and, significantly, it is a time when his argument cut against the interests of racial equality. Contrast that narrow reading of *Valentine* with the incredibly broad reading he gave the same case when arguing that it was constitutional for the government to prohibit the advertising of allegedly obscene materials which concededly could not be banned themselves. *See* Testimony on H.R. 11031 (Sept. 25, 1969).

(f) Mr. Rehnquist purports to advocate both stern law enforcement measures and prison reform *see* "The Administration of Criminal Justice" (Dec. 2, 1970). His zeal for prison reform is limited, however, by the realistic assessment that "the case for prison reform must be sold in competition with the case for any number of other worthwhile expenditures of public money." This appears to be the only reference in his writings to the economic costs of a program which he professes to approve. He never considers, for example, the costs of government surveillance, preventive detention, federal administration of an anti-bombing statute, etc. Economic concerns, like analytic ones, emerge in his thinking only to support the results he wants to reach.

(g) Mr. Rehnquist aligns himself with those who decry the lack of "judicial self-restraint" of the Warren Court. See Rehnquist, *The Making of a Supreme Court Justice,* Harvard Law Record, October 8, 1959, pp. 7, 9. On the other hand, he defends the Justice Department's use of wiretapping despite doubts concerning its constitutionality, on the ground that "[i]f the Department of Justice were to refuse to enforce the legislation of Congress because of doubts as to its constitutionality, the matter would never get to court for decision," and it is "to the courts, that any final decision as to the constitutionality of legislation passed by Congress is confided." Indeed, he goes further, and suggests that the Executive would be derelict in its role and duty if it "refused to push for legislation" authorizing preventive detention, despite the admitted possibility that such legislation might be unconstitutional. In other words, the Executive and Congress are to push ahead with legislation that may be unconstitutional, on the theory that constitutionality is the Supreme Court's business; but Court decisions of unconstitutionality are to be criticized for overriding the will of the Executive and Congress, The Executive and Congress are to watch out for law enforcement; the Supreme Court is to watch out for the Executive and Congress; and no one is to watch out for the Constitution.

(h) If there is a constant characteristic in Mr. Rehnquist's legal writings, it is the employment of this sort of double standard. Ideas and arguments that are ideologically uncongenial to him are subjected to a critical analysis which his own ideas and arguments need not undergo. Always demanding strict proof of an unwelcome view but never of a welcome one, Mr. Rehnquist largely uses legal analysis as a means of liberating himself from claims that he does not wish to recognize, so that he can do as he pleases

5. It may be objected, certainly, that Mr. Rehnquist has heretofore spoken as an advocate, and that he may speak. But this is hardly persuasive. First, Mr. Rehnquist has said quite explicitly that his selection for his present position reflects his intellectual compatability with the views that he advocates in that position. Rehnquist, *The Old Order Changeth: The Department of Justice under John Mitchell,* 12 ARIZ. L. REV. 251; 252–253 (1970). Second, the most troubling features of his writings and speeches relate not to the ultimate positions which he advocates but to the reasoning process by which he advocates them. These reasoning processes, surely, are his own, whatever may be the advocate's use to which he puts them. If he *is* capable of balanced reasoning—of subjecting his own viewpoints to the criticism which he wields against others—he has never given any affirmative indication of it. and finally, nothing in the testimony he gave at the hearing gives one cause to believe that his advocate's views were different from his own.

6. This memorandum does not deal with his testimony in the confirmation hearing. But it is worth noting that his testimony tends to confirm the conclusions drawn from his previous writings. Where he withdrew from previously held positions—for example, with regard to the public accommodations ordinance and some aspects of government surveillance—he did so in a way, and for stated reasons, which reflect no different basic views, values, or reasoning processes than the ones which led him to his original positions. Once again it must be emphasized that it is those views, values and reasoning processes—not Mr. Rehn-

quist's positions on specific issues—that appear to be dangerous. In addition, Mr. Rehnquist's testimony at the confirmation hearings was less than wholly forthright. His claim of "privilege" was, of course, in a technical sense, entirely unfounded; what it amounted to—if something more than an evasion—was a preference for the public image of the Justice Department over the constitutional role of the Senate in the confirmation process.

SALUTE TO VETERANS' PROGRAM AT WOODBRIDGE, N.J.

Mr. CASE. Mr. President, last month the Allied Council of New Jersey Veterans' Organizations held a most successful salute to veterans' program at the Woodbridge Veterans' Memorial Park in Woodbridge, N.J.

I am pleased to pay tribute to the Allied Council of New Jersey Veterans Organizations for the fine work it is doing in behalf of the Vietnam veterans in New Jersey.

I ask unanimous consent that the letter I have received from Martin Kaufman, commander of Elin-Unger Post No. 273, Jewish War Veterans, and chairman of the salute to veterans' program, be printed in the RECORD.

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

HILLSIDE, N.J.,
October 28, 1971.

Senator CLIFFORD P. CASE,
Senate Office Building,
Washington, D.C.

DEAR SENATOR CASE: This is the first opportunity in which I have been able to sit down and write to you about the just concluded Salute To Veterans Program held at Woodbridge Center, Woodbridge, New Jersey, Oct. 25–27, 1971.

If any program was to receive an Americanism Award this program should be at the top of the ladder. Opening day we attracted over 100,000 people. The highlight was Governor Cahill and may I add that your kind message was read before those in attendance and was warmly received. The highlight of the second day was the Stage Door Canteen. We entertained forty patients from East Orange Veterans Hospital and forty patients from Lyons Veterans Hospital.

The highlight for the third day was to us the most important part of the three day program. The Job Seek Program which was run in the Community Hall between the hours of four and nine. Some fifty industrial and government agencies participated and we had 125 Veteran applicants seeking out these organizations for employment.

As for the Salute To Veterans Program we had participating over forty (40) veteran, civic and government groups and we attracted over 250,000 people.

Sincerely yours,
MARTIN KAUFMAN, *Chairman.*

CHEYENNE HELICOPTER DEVELOPMENT

Mr. THURMOND. Mr. President, in view of some remarks placed in the RECORD last night with reference to future weapon systems for close air and close fire support, I feel the Senate would benefit from some points in favor of the Cheyenne helicopter gunship program.

The Cheyenne is the Army's most urgent requirement. The helicopter gunship saved countless lives in Vietnam. It is the only airborne machine which can provide suppressive and sustained fire in support of transport helicopters which deliver our fighting men to hot spots on the battlefield.

Development of the Cheyenne is practically complete. It would be foolish to develop an advanced gunship and then cut off the money needed to fully test and evaluate it.

The utility of the helicopter gunship is a matter of record:

First. The Air Force owns helicopter gunships and uses them to extract downed pilots and protect airbases in Vietnam.

Second. The Navy uses helicopter gunships for the same purposes plus river patrols and along shorelines.

Third. The Marines have helicopter gunships—Cobras—integrated into each of its ground divisions just as the Army wants to do with the Cheyenne.

Fourth. Israel and other nations are using helicopter gunships. Israel used them successfully in raids on Egyptian territory. As evidenced at the recent Paris Air Show, the U.S. is behind in various aircraft development, but it is ahead in helicopters.

Justification for the Cheyenne can be fully met on one point—its ability to operate in bad weather and at night when fixed wing planes are grounded. During Tet in Vietnam the weather was so bad that at one location during February fixed wing planes were grounded for 24 of the 28 days, and helicopter gunships provided all close air support. The weather in Europe is bad more often than it is good.

While the Cobra is a good gunship, the Cheyenne carries three times as much ordnance and possesses armor plating for protection. The Cheyenne also fires the TOW anti-tank missile, an essential weapon in destroying enemy armor.

The army of the future is to be smaller and based on mobility. Presently over 90 percent of the Soviet divisions are mobile—mainly moving in personnel carriers. The U.S. Army is developing the Tri-Cap Division, one-third helicopter borne, one-third tank, and one-third air cavalry with helicopter gunship units. This concept will have to be abandoned if the Cheyenne program dies.

Approval by the Senate last night of the $9.3 million for the Cheyenne will assure continued development, testing, and evaluation. We need the information which would be obtained from such testing to make a decision in 1973.

Mr. President, the Senate should realize that the Army has given up a sizable amount of equipment to absorb the cost of the Cheyenne. The Marines gave up F–4 squadrons to allow for the cost of the Harrier. The Army wants the Cheyenne badly enough to sacrifice for it as the Marines did to get the Harrier.

Thus, the cost of the Cheyenne has to some degree already been absorbed in the budget. If the Cheyenne program is not completed, then the military planners will have to go with the Air Force AX close support plane which is still in the early stages of development. The Air Force wants seven wings of the AX over and above the present 21-wing tactical air wing structure while the Army would be using the Cheyenne in lesser numbers as an integrated part of the ground fightng forces.

The man on the ground, the man with the "mud on his boots" who takes the brunt of any war, deserves the added protection and support which can only be provided by an-advanced helicopter gunship. No one can deny that the gunship has unique capabilities which will save lives among our foot soldiers.

I am pleased that the Senate has approved the Appropriations Committee request that $9.3 million be allowed in the Defense bill for continued development of the Cheyenne helicopter gunship.

THE SUPREME COURT NOMINATIONS

Mr. HANSEN. Mr. President, over the past several weeks, statements have appeared, both in the RECORD and in the media, on the qualifications of Lewis F. Powell and William H. Rehnquist to serve as Justices of the U.S. Supreme Court.

The Senate Committee on the Judiciary has held hearings on the President's nomination of these two gentlemen and I congratulate the committee on its fine work in developing a clear record on which every Senator can base his vote on confirmation.

I have had some opportunity to study the record of Mr. Powell and Mr. Rehnquist.

They are individuals of great academic and professional accomplishment.

It is my intention to vote in favor of the confirmation of both these able men.

Lewis F. Powell, Jr., is, without question, one of the outstanding lawyers in the South and, indeed, in the entire Nation. He exercised leadership in his early years when he served as president of the student body of his university. He was elected to Phi Beta Kappa and holds both a bachelor's and a master's degree in law.

Mr. Powell's professional reputation is founded on his many years of activity as a member of Hunton, Williams, Guy, Powell and Gibson, one of Virginia's oldest and most respected law firms. His career is a testimony to public service. He has acted as a leader and stabilizing force within his community, and his contributions are many and most significant.

In 1964–65, Lewis Powell served in the prestigious postion of president of the American Bar Association, an organization representing 117,000 attorneys, judges, and teachers of law. The record of Lewis F. Powell superbly qualifies him for service on the U.S. Supreme Court.

While the nomination of William H. Rehnquist has generated some controversy, there is no question in my mind that this man embodies those qualifications and attributes required for service as a member of our Nation's highest Court.

William Rehnquist's academic credentials are of the highest order. He was elected to both Phi Beta Kappa and the Order of the Coif. His accomplishments led to his selection as law clerk to the late U.S. Supreme Court Justice Robert

H. Jackson, an honor reserved only for the few.

Mr. Rehnquist turned to private practice in Phoenix, Ariz., where he established himself as a prominent and capable member of the legal community. His interest and participation in public affairs led to his appointment as Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, a position which President Nixon has described as the President's attorney's attorney. Indeed, William Rehnquist's capable execution of his duties in this post may in large measure be responsible for the criticism he has endured in recent weeks. He has proved to be a strong and persuasive advocate for the administration positions which he has had the duty of representing. This is not to say that he has not agreed with these positions. But all of us can appreciate the position of an advocate and William Rehnquist himself has stated that he would not hesitate to adopt a position as a justice different from one he had advocated as an attorney or as counsel for the Justice Department.

It is impossible to find a man with whom a person can agree on every point. In fact, if an individual does agree with another all of the time, there is a good chance that the individual is willing to compromise his own principles in order to satisfy the demands of the other person. But total agreement on philosophy is not a prerequisite for Senate confirmation of a nomination to the Supreme Court.

Mr. Herbert Ely, chairman of the Democratic Party in Arizona, a man who has known Mr. Rehnquist for over 10 years and who has often engaged in philosophical and political combat with the Supreme Court nominee, said:

Although I would not have nominated William Rehnquist as Justice of the Supreme Court, nevertheless, as a Senator I would vote to confirm the appointment. From a decade of personal experience with William Rehnquist, I found him to be qualified to serve on the U.S. Supreme Court both in intellect and legal scholarship. He is a man who happens not to share my political philosophy. But in my opinion he is neither an extremist or a bigot.

Mr. President, on November 21, an editorial entitled, "Proper Yardstick for a Justice", appeared in the Denver Post and reminds us that William Rehnquist himself in a 1959 article, defended the right of the Senate to inqulre into the nominee's views on issues that might come before the Supreme Court. That same editorial referred to a New York Times article by Senator John McClellan.

Our distinguished colleague set forth three issues which face the Senate in determining a nominee's qualifications for the Supreme Court and stated:

After personal integrity and professional competency, what is crucial, in my judgment, is the nominee's fidelity to the Constitution.

I agree with the senior Senator from Arkansas, in finding that both William H. Rehnquist and Lewis F. Powell, Jr., meet this high standard and are most competent individuals.

I heartily support the confirmation of their nominations by the Senate.

Mr. President, I ask unanimous consent that the editorial to which I referred earlier be printed in the RECORD at this point.

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

PROPER YARDSTICK FOR A JUSTICE

It is almost as if the liberal members of the Senate Judiciary Committee this month had been following the advice of William Rehnquist himself—contained in the 12-year-old article reprinted on this page from the Harvard Law Record—in their determined inquiry into the conservative lawyer's views on issues that might come before him as a Supreme Court justice.

In the article Rehnquist approved this procedure as necessary to enable the Senate to influence the tone, and indeed the decisions, of a court whose latitude for interpretation is intentionally very broad. Now that he has actually gone through such an inquiry, he may look at the matter differently however.

After parrying a question from Sen. Hiram Fong, R-Hawaii, with the statement that it would be "inappropriate" for him as a Supreme Court nominee to answer, Rehnquist was asked by Sen. Ted Kennedy, D-Mass.:

"What kind of questions should we be asking you?"

To which Rehnquist replied: "I simply am not able to answer that, Senator."

He did tell Sen. Philip Hart, D-Mich., that "I would disassociate my personal philosophy to the greatest extent possible from my role as a judge."

And when Sen. John McClellan, D-Ark., asked him if he would "hesitate to adopt a position as a justice different from one you had advocated as an attorney or as counsel for the Justice Department," Rehnquist replied: "I would not."

So in effect, Rehnquist wound up saying much the same thing that Felix Frankfurter said in 1939 when he, as one of Franklin Roosevelt's liberal appointees (who later became an outstanding court conservative), appeared before the first senate inquiry of this sort: "I would think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations."

We are impressed with what Senator McClellan said about qualifications in an article in the New York Times earlier this month:

"There is room on the United States Supreme Court for liberals and conservatives, Democrats and Republicans, Northerners and Southerners, Westerners and Easterners, blacks and whites, men and women—these and other similar factors neither qualify nor disqualify a nominee. After personal integrity and professional competency, what is crucial, in my judgment, is the nominee's fidelity to the Constitution."

By that threefold test, both Rehnquist and his fellow nominee, Lewis F. Powell Jr., appear to qualify for the Senate approval they seem at this point certain to receive.

THE BIGGEST CITY—AND THE LOWEST CRIME RATE

Mr. SCOTT. Mr. President, I was extremely interested to read on the editorial page of the Washington Post for Tuesday, November 23, an article which begins as follows:

Tokyo today boasts the largest population of any city in the world, if that's anything to boast about—11,513,669, give or take a few births and deaths since the most recent reading; and it also boasts the lowest rate of crime among all the world's great metropolises.

This opening sentence on the editorial page of one of our prestigious newspapers caught my eye and I read to the end of the article. It is written by Alan Barth, one of the Washington Post's top writers, who is currently visiting in Japan with his wife. Among the statistics he cites with some astonishment is that in 1970 there were only 213 murders in Tokyo compared with 1,117 murders in New York City. There were only 474 robberies compared with 74,000 in New York, and 500 rapes compared with over 2,000. There were only six bank robberies in Tokyo during 1970.

The traditional reporter, the man with an inquiring mind, would obviously question how this situation came about. He would seek for reasons, and would hope therefrom to draw some ideas for improvement of our disgraceful record. Some of the reasons found by Alan Barth are described in the article which I read. They make good reading, if not happy reading, but the conclusion Mr. Barth reaches is pretty hard to contradict.

He says:

It would be worth a considerable price if citizens in the Capital of the United States were able to walk around the streets at night in comfort and security, without fear of footpads, as citizens do commonly and unconsciously every night of the week in the Capital of Japan.

Mr. President, the article in question made a great impression upon me, and it should likewise make a great impression upon every thinking citizen. The situation on our streets today screams for correction. Even here, in the city which is the Capital of the United States, in the complex of buildings which constitute our national legislature, where the representatives of all the people meet daily in the Congress of the United States, and are served in their offices by thousands of dedicated, toiling workers, it is a disgraceful condition that the secretaries working for us fear to walk the sidewalks outside their buildings after dark.

It is absolutely unacceptable that a young woman leaving her office to walk a block or two to her car or to a bus stop must be escorted there by a policeman, or run the risk of being robbed, raped or otherwise molested. The situation that exists upon the very doorstep of the Congress of the United States should bring the blush of shame to every Member of the Congress.

Mr. President, we cannot allow this to continue. Tokyo, a city many of ours would do well to emulate, has found an answer. Mr. Barth has suggested some of the methods the Japanese have used. I do not suggest that all these means will serve us equally as well, but I do suggest that the striking difference between the statistics of crime in Japan and in the United States indicates that we, here, have not done our duty.

Mr. President, I ask unanimous consent that the entire text of this outstandingly thoughtful article by Mr. Alan Barth be printed in the RECORD.

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

the confidence of most youngsters, but Sullivan was not typical of "most youngsters."

Coach Jordan had decided to have a man-to-man talk with his young quarterback before practice Monday, just in case Sullivan needed to have someone restore his confidence. Before Jordan could speak to him, Pat walked up and said, "Don't worry about me, Coach. I'm okay," and trotted on to practice.

Auburn defeated Kentucky 44–3 and Clemson 54–0 the next two outings, and finished with an 8–2 season. In a nose-to-nose confrontation with John Reaves, Florida's sensational sophomore quarterback, Sullivan came out on top 38–12. A Bluebonnet bowl trip followed the 49–26 win over Alabama.

1970 brought another 8–2 record and another bowl bid, but Auburn fans will best remember this particular year for what happened in the waning shadows of November 28 at Legion Field. Auburn, with an injury-mauled defense, was playing Alabama and Bear Bryant's Crimson Tide jumped to an embarrassing 17–0 lead in the first quarter. Beasley was hurt and out of action. Surely a comeback was too much to expect from anyone, even Sullivan. Auburn fans reached for their bag of excuses, but Sullivan wouldn't let them have it. He had reserved it for Alabama again. Sullivan's confidence was a key factor and it was evident on the sidelines. As Beasley sat on the bench, trying to regain his bearings, Sullivan walked up to him, flicked his red hair, and said, "Hurry up and get ready Beas, we're going to beat them just like we did when we were freshmen."

It was 17–7 when Beasley returned, and when the scoreboard beeped the game's conclusion, Auburn had beaten Alabama 33–28, in what must surely be one of the greatest, if not the greatest game in Auburn football lore.

Pat called most of the plays in the victory over Alabama as he does in most Auburn games. "We just decide on the game plan and present it to him," says chief offensive coach Gene Lorendo. "Pat is always prepared for any eventuality. He spends a lot of extra time watching films, studying the defense and asking questions."

While Beasley is his favorite receiver—he caught 52 for 1051 yards and 11 touchdowns in 1970—Pat has confidence in his other receivers and does not hesitate to call on them. "I knew he'd throw to me if I was open," says Alvin Bresler, a 1970 receiver, "and so does everyone else. This helps morale."

The running backs know too that Sullivan will give each man ample opportunity to run the ball and taste a share of the glory during the season.

As Schmalz puts it: "Whatever Pat does, you know it's for the good of the team. He's the most selfless person I've ever known."

Schmalz has touched another aspect of Sullivan's greatness: a hat size that refuses to increase no matter how profuse or great the accolades. No matter what honor he accepts, Sullivan accepts it "not for myself, but for the Auburn football team."

When he went to Nashville to accept the 1970 SEC Player of the Year Award, Sullivan had to miss a day of Gator Bowl preparations. On returning, with Coach Jordan's permission, he called the team together, and said, "I want to apologize for missing practice yesterday. You all read the papers and you know where I was. I'm sorry I had to go during practice, but I want you to know that I didn't accept that award for me. I accepted it for you. Any praise or credit I get, doesn't belong to me. It belongs to you, and I thank you for letting me be your representative."

The Auburn Tigers responded with a rousing cheer, and in the spring elected him captain for the coming year, an honor which Sullivan treasures more than all the others that have come his way. This, he says, "shows that the team has put their utmost confidence in me. I have to maintain their confidence and trust."

Their trust in him and his confidence in them is one reason Sullivan was dropped behind the line of scrimmage only three times last year.

The Sullivan mystique is not reserved only for the football field. He has been tapped for many campus leadership honoraries, and scholastically, Pat, a business major who hopes to run his own firm someday, made a 2.8 out of a possible 3.0 spring quarter.

Rod Carlson, who had Pat in his economics class, has his own idea on what makes Sullivan great not only in the classroom, but also on the field.

"He has a tremendous belief in himself and a respect for other people. Not too many people of his ability maintain this sense of respect for others, but I've never heard Pat say a derogatory word about anyone. He's almost 'boyish' about it," says Carlson.

Confidence, ability, humility, respect. Those according to those who know him best, are what makes Pat Sullivan a great quarterback. But how did he develop those qualities? How did he happen to choose the Blue of Auburn rather than Alabama's Red or Notre Dame's Gold? And what about the coming season? And the Heisman? Does Pat think he will win it?

The Pat Sullivan football story began many years ago, when Pat was in the sixth grade, and it began very inauspiciously—he quit.

His first coach, Brother Christopher ST., had put him at center, and Pat just didn't like playing center. Also, he happened to be younger than all the other boys out for the team.

A year later, and a year older, Pat came back. This time, Bro. Christopher, having noticed Pat's speed and ability to throw a ball during baseball season, decided to try Mr. and Mrs. Jerry Sullivan's son at quarterback. He's been there ever since.

"It was obvious from the start," recalls Bro. Christopher, director of the Magic City's Toy Bowl Program, "that Pat was an athlete of college calibre. He had the right mental attitude and success never went to his head. It was somewhat embarrassing at times. I'd be on the sidelines trying to figure out what should be done, but Pat had already figured it out himself. He was real smart."

Mr. and Mrs. Sullivan never forced their son to participate in sports. They only "encouraged him when he wanted to go out for the teams," and, in Pat's case, that meant a lot of encouragement. He loved almost every sport, football and baseball taking the upper hand, and he wanted to excel in whatever he did.

"We always congratulated him on his success," recalls his father, "but we always cautioned him that he, like everyone, was subject to a bad game. We just took him as he was and were thankful for all of the good things that came his way.

"It's still that way."

At age 12, Pat Sullivan, who "always liked Auburn," saw his first Tiger football game. The young athlete sold Cokes to get in the 1962 Auburn-Georgia Tech game, which Auburn won 17–14.

"That was a great game," Sullivan smiles. "I'll never forget Jimmy Burson (Auburn fullback) scoring on the first play from scrimmage. I almost stopped selling Cokes right then."

It was early in his senior year that Auburn and Sullivan had their first important contact. "Coach Lorendo had come to see John Carroll play," says Pat, smiling, "and I was walking off the field when this big man came up and said he was Coach Lorendo from Auburn and congratulated me on what he said was a fine game. I was flattered. That was the first time I knew Auburn knew who I was and was really interested in me."

Pat met his wife Jean shortly after graduation when John Carroll and Auburn teammate David Shelby got the two together on a blind date.

"I didn't really know who Pat was," laughs Jean. "I'd read a little about him in the paper. I knew he played football, but I didn't know how good he was. It wouldn't have made any difference anyway."

Pat and Jean were married in the summer of 1969 and Jean soon found that being married to a hero has its drawbacks as well as benefits. There's a tremendous demand for a hero's time, and Jean readily admits, "I don't always look forward to it, but when I go with him, I have a great time. I enjoy meeting different people like Pat does."

The shapely brunette especially enjoys one part of being a hero's wife. "Every boy should have a someone to look up to, and when that someone is your husband, you get a great thrill down deep inside just seeing those big admiring eyes gazing up at your husband."

"Those admiring eyes," as Jean calls them, place an added responsibility on Pat. "You have to think about those people looking up to you," observes Pat. "What's right for most people my age, may not be right for an athlete, especially when there are youngsters looking to you to set an example."

And so it is with Pat Sullivan, Auburn's quarterback par excellence. Because he doesn't wear a white hat, you wouldn't know he's a hero. To his classmates, Sullivan is just another student. To his neighbors, he is the fellow down the street who loves to grille hamburgers. To his brothers, Joe, 11, and Bill, 6, he's a big brother, not a hero, even though they both wear No. 7 Auburn jerseys. To baby daughter Kim, he's a father.

Sullivan is very much the unheroic type at home and in classroom, but on the football field it's a different story.

And it's not a bad story for a lad who once quit football, but came back out and may carry a Heisman Trophy home.

And what about the Heisman. Will you win it, Pat?

"I'm very honored to be considered for such an award, but winning the Southeastern Conference Championship is more important to me. That's our team's ultimate goal. If our team wins, everything else will take care of itself."

THE SUPREME COURT NOMINATIONS

Mr. TOWER. Mr. President, very soon, perhaps later this week, the Senate will proceed to consider the nominations of Mr. William Rehnquist and Mr. Lewis Powell to be Associate Justices of the Supreme Court. The Senate Judiciary Committee overwhelmingly approved Mr. Rehnquist by a vote of 12 to 4 at the same time as they approved the nomination of Mr. Powell. When the debate of these two nominations begins, I will make a detailed statement on the qualifications of both men, who I believe deserve the unqualified support of this body.

There have been raised, however, some questions about Mr. Rehnquist's capabilities and sensitivities, I might add almost entirely by innuendo, that I believe should not be allowed to go unrefuted. The Senator from Indiana (Mr. BAYH) has charged that William Rehnquist "approaches the great questions of human liberty in a way which reveals a dangerous hostility to the great principles of equal justice for all people and individual freedom under the Bill of Rights." In order to support this allegation, he cites three instances in which "Mr. Rehnquist plainly demonstrated a persistent unwillingness to allow law to be used to promote racial equality in America."

It has in no way been substantiated that Mr. Rehnquist shows hostility to the principles of equal justice. In order to demonstrate this, let me point out some of the facts connected with the three instances cited by Senator BAYH which the Senator failed to point out.

First, there was Mr. Rehnquist's opposition to the Phoenix, Ariz., public accommodations ordinance. There were many people in the Congress in 1964, and a presidential candidate who felt that such legislation was unworkable and unwise, that it would create more problems than it would solve. Mr. Rehnquist's position was shared by many throughout the Nation. The fact that he can support such a law after the legislative battle is over shows his devotion to the principle of the rule of law. He has stated that he now believes in this law and has no reservations about it.

The second incident Mr. BAYH cites is Mr. Rehnquist's opposition to two sections of the Model State Antidiscrimination Act in 1966 at the meeting of the Commissioners on Uniform State Laws. Mr. BAYH fails to mention, however, that the Arizona delegation voted to support the adoption of the final Model Act in spite of the fact that it still contained the provisions he had opposed. He also fails to mention that one of the provisions in the Model Act which Mr. Rehnquist did not oppose was a public accommodations provision, which demonstrates that Mr. Rehnquist had changed his mind about such legislation long before the recent confirmation hearings.

The third incident cited by Mr. BAYH is the letter to the editor concerning the Phoenix school system from which Mr. BAYH quotes a sentence stating that "we are no more dedicated to an 'integrated' society than to a 'segregated' society."

I wish Mr. BAYH had seen fit to quote the rest of the sentence which I believe is far more indicative of Bill Rehnquist's philosophy than is the first part of the sentence pulled out of context. The rest of the sentence reads:

> That we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

I must say that does not sound to me like the words of a man with a "dangerous hostility to the great principles of equal justice." I note that the letter was written in 1967 in opposition to a plan which Mr. Rehnquist felt would endanger the neighborhood school concept, an issue which is being hotly debated today, 4 years after Mr. Rehnquist's letter was written.

I believe that this examination of the incidents cited by Mr. BAYH calls for a conclusion exactly opposite of Mr. BAYH's. Here is a man who has learned the value of law in protecting our rights. He is concerned that we continue to make orderly progress in these areas. Nothing has been introduced into the record, or could it be, to show that Mr. Rehnquist is not deeply concerned about the problems today.

I heartily endorse the nomination of Bill Rehnquist and urge my colleagues to vote to confirm him.

SUMNER, MO., WINS TOP COMMUNITY BETTERMENT HONOR

Mr. FULBRIGHT. Mr. President, the St. Louis Post Dispatch on November 12, 1971, carried an article entitled "Town Once Called Sleepy Was Aroused To Win Top Community Betterment Honor."

It is an interesting and encouraging account of what public-spirited citizens can accomplish by working together for their own improvement.

Sumner, Mo., the town in question, I am proud to say is my birthplace. Under the leadership of a dynamic and imaginative woman, Mrs. Roland Epperson, the people of Sumner have demonstrated once again that the strength of our Nation lies primarily in the spirit and energy of self-reliant people motivated by a desire to improve themselves and their community.

In spite of the many troubles which now afflict our Nation, with people like those in Sumner I am confident we will find solutions to our problems.

I ask unanimous consent to insert the article in the RECORD.

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

TOWN ONCE CALLED SLEEPY WAS AROUSED TO WIN TOP COMMUNITY BETTERMENT HONOR

SUMNER, Mo., November 11.—Several years ago, a newspaper in Jefferson City referred to "the sleepy little town of Sumner."

"That got us a little mad," said Mrs. Roland Epperson in giving her explanation on how the community of 178 persons got into total involvement to capture five Missouri Community Betterment (MCB) awards since 1964.

This year, Sumner hit the top. Of nearly 300 communities in the state active in the program administered by the Missouri Division of Commerce and Industrial Development, Sumner was the grand-prize winner.

Three times Sumner was cited in the National Cleanup Contest among cities of fewer than 25,000 residents. Mrs. Epperson, Sumner MCB chairman for four years, has received the governor's leadership award three times.

When Sumner first became involved in the state program in 1964, the town "had no place to go but up," said Walter DeWeese, a pensioner who was the first MCB chairman.

A year earlier the school was closed down and the children were bused to a consolidated district at Menden, about 10 miles to the southeast.

Sumner has no industry. Most of the men work in Brookfield, 18 miles northward, if they don't farm. The nearest major artery, U.S. Highway 36, bypasses the town about 15 miles to the north.

The only real attractions that have drawn travelers are the Swan Lake National Wildlife Refuge and the state-administered Fountain Grove Wildlife Area.

The waterfowl hunting season, preceded by Sumner's Wild Goose Fall Festival, is the busiest time of the year.

DeWeese said the town was faced with extinction when the school was closed and the old Methodist church was in advanced disrepair.

"Any community centers around its church and school," he said. "A good many country people come into town for church. Lose the country people, and we'd begin to fall apart."

Sumner's first MCB project was to build the $40,000 Methodist Church, which was paid off in less than two years.

Mrs. Epperson recalled that "we were surprised at the number of people who wanted a new church." The effort was a catalyst, and once the church was completed, she said, "we had to have a town clean enough to go with it."

The next phase of MCB involved trash and brush cleanup and the demolition of old buildings.

The demolition project continued each Sunday, "young and old alike pitched in and we used to make it a day with picnic lunches and everything" while the old buildings burned, she said.

"There wasn't much left to Sumner when we got finished," she said, " but we got most of the old buildings down."

An MCB project is always under way in Sumner. The board meets on the last Monday of every month, when new ideas are introduced.

One year the wintertime project was building elaborate bird houses for martins. Seventy were constructed, enough for virtually every residence in the area.

This year wooden silhouettes of the Canadian Goose are being cut. More than 175 have been ordered from throughout the county and the entranceway to almost every home in the town displays the residents' name on the black silhouette—a token of gratitude, in a way, to the bird that brings hundreds of hunters to the area each autumn.

Sumner is, by its own labeling, "The Wild Goose Capital of the World." This year, for example, 125,000 Canadian geese settled on the federal reserve, along with thousands of other geese and ducks.

"In Missouri Betterment we've been working on the tourist angle," said Mrs. Epperson. "Each year it was a case of looking only to the next fall. So in 1968, to try to change that, our MCB project was the Fulbright Museum."

Sumner's most illustrious native son, Senator J. W. Fulbright (Dem.), Arkansas, attended the dedication of the museum in 1968. Memorabilia from Sumner's past includes a dress his grandmother wore.

Tourists who happen onto Sumner on Sundays during the fall are treated to the delicious homemade products of The Pioneer Kitchen, another MCB project.

While women volunteers cook and serve a smorgasbord, including homemade breads and jellies, the men distribute tickets for seating, serve as ushers and even wash the dishes.

Both the museum and The Pioneer Kitchen were among the factors considered when state judges made their on-site inspection of Sumner. The museum figured prominently in the town's Missouri Sesquicentennial festivities last April.

The state citation applauded the town for "presenting the picture of total civic involvement, long-range plans and successful observance of Missouri's Sesquicentennial."

Proceeds from such MCB projects as the museum and kitchen go into community betterment—like the Sumner Community Park, on the western edge of town. Until two years ago, it was a corn field.

The grassy stretch now is broken by a concrete basketball court and a community center, which from the outside could be mistaken for a modern ranch-style house.

Inside the center, which includes tables and a huge brick fireplace for anyone's use, retired farmer Frank Kanamaker was repairing a broken window. "When something's gotta be done, everyone's gotta pitch in," he said.

Russell Smart, a retired grocer, rides around town in late afternoon hauling a wagon with his tractor and picking up trash and brush.

Mayor Ernest Bloss, 76, does not want to run for the office again in April "because my duties as street commissioner are getting to be too much."

When DeWeese was selected as chairman of MCB six years ago, he had retired as man-

ing revised by committees of nearly 100 persons, most of them child care professionals.

The proposal they are working from is far more explicit than current regulations, particularly in its stress on ideal goals." Namely that day care should he educational.

Licensing in the past, says the proposal, has often led to minimal programs. From now on, the training and temperament of supervisors must be looked at as closely as the safety and hygiene of the building. Licensing staff must make efforts to help the applicant make his program he what it should, and the program must be reexamined yearly.

The proposal would require day-care operators to plan activities with the children, "encouraging them to share their experiences, by stimulatng conversation, for example, during snacks and meals, and by expecting each child to take certain responsibilities . . .

"An opportunity should be given to participate in small and large groups as well as individual activities . . . The content of the program must be rich and varied," and include opportunities for parents to watch and participate and for staff to continue their own training.

Licensing itself is under debate. Some charge it takes too long (usually at least six months) to get a daycare license. Some challenge the need for regulations at all. Many feel regulations are necessary but should not be under the jurisdiction of the welfare department, which they say makes day care seem "a welfare thing."

The education department, which many would like to see take over the responsibility, is in turn viewed by others as representative of the same rigid approach to learning they have struggled to oppose.

Regulations governing programs that get federal aid are also under revision, and there is talk of states, whose licensing requirements vary considerably, meeting to arrive at some kind of uniformity.

Who should run preschools? Private entrepreneurs claim they can do the best job, saying competition will pressure them to provide quality. Others argue that it's impossible to create a quality program for profit at fees the average family can afford.

Some groups believe programs should be run by parents, with the idea that only they have the right to choose and direct teachers who will meet their children's needs.

Again, many nursery schools and day care centers operate under a variety of sponsors, public, private and consumer. Continuing variation and coordination is encouraged under the Mondale bill.

Final conclusions will not emerge from next week's conference of preschool educators in Minneapolis. For every answer suggested at the 250 sessions there will no doubt be dozens of new questions. Preschools, like their pupils, are in the crucial exploratory stage of growth.

THE NOMINATIONS OF LEWIS F. POWELL AND WILLIAM REHNQUIST TO THE SUPREME COURT OF THE UNITED STATES

Mr. McCLELLAN. Mr. President, it is my judgment that the Senate should consent to the nominations of Mr. Lewis F. Powell, of Virginia, and Mr. William H. Rehnquist, of Arizona, to be Associate Justices of the Supreme Court of the United States, and I take this opportunity to share with my colleagues the reasons behind this judgment.

A special genius of the American people has been a commitment to the rule of law, not of men, and a special focus of that commitment has always been on the Supreme Court of the United States. The Senate, therefore, fulfills a sacred duty in advising and consenting to the nominations submitted by the President for the Nation's highest court.

In considering these pending nominations, three issues face us:

Do these nominees have personal integrity?

Do they possess professional competency?

Do they have an abiding fidelity to the Constitution?

In my opinion, no Senator has a duty to vote to confirm any nomination forwarded by the President that cannot pass muster under this threefold test.

I settled upon these criteria only after reaching certain basic conclusions on the proper role of the Senate in the process of selecting Supreme Court Justices.

Article II, section 2, clause 2 of the Constitution states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint—Judges of the Supreme Court." The question thus arises as to what extent the framers intended the Senate to play a part in the appointment process in cooperation with the Executive?

Turning to Madison's notes on the proceedings of the Constitutional Convention, it seems abundantly clear that the Senate was intended to serve an active role in the process. Indeed, during the entire period of controversy over the method of appointment for the Supreme Court Justices, the dominant view seemed to support an alternative proposal that would have placed authority exclusively in the Senate. The final language agreed upon was the result of a compromise, which was clearly not intended to reduce the legislative part in the process to a minimum. See generally, Farrand, the Records of the Federal Convention of 1787 (1937). The Federalist papers confirm that an active and independent role for the Senate was envisioned. The Federalist, Nos. 76 and 77—Encyclopaedia Britannica, edition 1952, at 225, 226.

In Hamilton's words, the Senate was to have the duty to reject nominations, where there were "special and strong reasons for the refusal," and this power of rejection was meant "to restrain" the President from making nominations founded in "favoritism," "family connection" or "popularity," or of "unfit characters" generally. Id. at 226.

Hamilton's views were shared, too, by our earliest and most respected commentators on the Constitution. See, for example, Stony's "Commentaries on the Constitution," sections 1527-31—fifth edition 1891.

In light of the foregoing, I believe that the tripartite inquiry which I suggest is in keeping with the Senate's mandate under the Constitution.

After deep consideration, I have resolved each of the three questions in the affirmative with regard to both nominees and will now consider each in turn.

With respect to the personal integrity and professional competency of Mr. Powell, the record before us speaks eloquently of him. First in his law class, one of the leading lawyers of the State of Virginia, former president of the American Bar Association, the American Bar Foundation, and the American College of Trial Lawyers, Mr. Powell is truly one of the finest lawyers of our contemporary legal community.

The hundreds of attorneys contacted by the Standing Committee on the Federal Judiciary of the American Bar Association had the highest possible praise for Mr. Powell's integrity and abilities. A significant number of lawyers and judges stated that Mr. Powell would be their first choice for appointment. I quote the conclusion of the Standing Committee:

It is the unanimous view of our Committee that Mr. Powell meets, in an exceptional degree, high standards of professional competence, judicial temperament and integrity and that he is one of the best qualified lawyers available for appointment to tbe Supreme Court.

As to the personal integrity and professional competency of Mr. Rehnquist, it seems equally clear that this man, although relatively young in years, is also above suspicion and of exceptional intellectual and legal ability. Throughout his career, excellence, and nothing short of it, has been the mark of his achievements.

Elected to Phi Beta Kappa, graduated first in his law school class, selected as a clerk to former Supreme Court Justice Robert Jackson, Mr. Rehnquist early approached the law in a decidedly grand manner.

As a private practitioner, he was a person of recognized honesty and professional quality, highly regarded by members of the bench and bar.

Since 1969, the nominee has served as Assistant Attorney General for the Office of Legal Counsel. The basic assignment of the Office of Legal Counsel is to assist the Attorney General in discharging his function as the legal advisor to the President and his Cabinet. Thus, it can be said of the nominee that in point of fact he is, in the President's words, "a lawyer's lawyer."

In his capacity as an Assistant Attorney General, the nominee has appeared before Congressional committees on numerous occasions to present the Administration's position on various topics of legislative concern. A review of the records of these proceedings reveals that at all times he has conducted himself forthrightly and in an informed manner, in the loftiest traditions of advocacy.[1]

[1] Hearings before Subcommittee No. 3, Committee on the Judiciary. House of Representatives, on H.R. 11031 and H.R. 11032, Sept. 25, 1969, 91st Cong., 1st Sess.; Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, on S. 1508, Mar. 3, 1970, 91st Cong., 2d Sess.; Hearings before Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, on Proposed Statute to Lower Voting Age, Mar. 10, 1970, 91st Cong., 2d Sess.; Hearings before Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, on S. 1506, Apr. 9, 1970, 91st Cong., 2d Sess.; Hearings before Committee on House Administration, House of Representatives, on

Footnote continues on next page.

I quote the conclusion of the standing committee of the bar association:

The . . . conclusion of the Committee . . . is that Mr. Rehnquist meets high standards of professional competence, judicial temperament, and integrity. To the Committee, . . . Mr. Rehnquist is one of the best persons available for appointment to the Supreme Court.

In sum, reasonable men cannot disagree that both nominees are of unquestionable integrity and supremely competent men.

The final area of my concern relative to the suitability of a nominee—his fidelity to the Constitution—is the most crucial of the required qualities.

Mr. President, I think it can be said that there is room on the U.S. Supreme Court for liberals and conservatives, Democrats and Republicans, Northerners, and Southerners, Westerners and Easterners, blacks and whites, men and women—these and other similar factors neither qualify nor disqualify a nominee.

In my judgment, after personal integrity and professional competency, what is then crucial is the nominee's fidelity to the Constitution—its text, its intention and understanding by its framers, and its development through precedent over the history of our Nation.

There have been a few unfortunate periods in our history when justices on the Supreme Court have taken too literally Chief Justice Hughes' aphorism that the Constitution is what the judges say it is and have attempted to rewrite our Nation's basic charter according to their own personal philosophies, either conservative or liberal. This has always been a mistake.

The Constitution, too, has integrity. One part of it must not be emphasized to the exclusion of another. The Constitution mandates both federalism and separation of powers as well as due process of law.

I recognize, of course, that there are those who no longer feel that the doctrines of federalism or separation of powers should be accorded equal respect with other aspects of the Constitution.

Mr. Justice Black in his Carpentier lectures at Columbia in March of 1968 aptly observed:

[T]here is a tendency now among some to look to the judiciary to make all the major policy decisions of our society under the guise of determining constitutionality. The belief is that the Supreme Court will reach a faster and more desirable resolution of our problems than the Legislative or Executive branches of the government.

Mr. Justice Black then set over against this contemporary tendency what he understood to be required by fidelity to the Constitution. He said:

Our written constitution means to me that where a power is not in terms granted or not necessary and proper to exercise a power that is granted, no such power exists in any branch of the government—executive, legislative or judicial. Thus, it is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by Justices of the Supreme Court.

* * * * *

The courts are given power to interpret the Constitution and laws, which means to explain and expound, not to alter, amend or remake. Judges take an oath to support the Constitution as it is, not as they think it should be. I cannot subscribe to the doctrine that consistent with that oath a judge can arrogate to himself a power to "adapt the Constitution to new times."

I, for one, suggest that we establish no test oath to contemporary liberalism or traditional conservation. Test the nominee by the Constitution, nothing else.

One of the nominees—Mr. Rehnquist—put the issue well when he observed:

It is so difficult to pin down the terms "liberal" and "conservative," and I suspect that they may mean something different when one is talking about a political alinement as opposed to a judicial philosophy on the Supreme Court.

I think it would be presumptuous of me to suggest to the Senators of this committee, or to the Senate as a whole, what standards they ought to look for, but I cannot think of a better one than fidelity to the Constitution and let the chips fall where they may, so to speak, whether the particular decision pleases one group or pleases another.

I think to an extent in discussion about the Court there has been a tendency to equate conservatism of judicial philosophy not with a conservative political bias, but with a tendency to want to assure one's self that the Constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that at least on the part of the person making the observation that the person tends to read his own views into the Constitution.

I think the difference is well illustrated by Justice Frankfurter's career, who came on the Court at a time when I think it was clear to most observers that the old Court of the nine old men of the twenties and thirties was indeed, on any objective analysis, reading its own views into the constitution, and Justice Frankfurter, of course, prior to his ascent to the bench, had been critical of this, and as a Justice he helped demolish the notion that there was some sort of freedom of contract written into the Constitution which protected businessmen from economic regulation.

And yet, when other doctrines were tested later in the Court, it proved that he was not simply an exponent of the current politically liberal ideology and reading that into the Constitution.

He was careful to try to read neither the doctrine of the preceding Court nor perhaps his own personal views at a later time to the Constitution, but to simply read as he saw it.

Mr. President, I closely questioned each of the nominees in the hearings to determine their judicial philosophy. From their answers, I am satisfied that they will honor their oath to uphold the Constitution as written. I find them faithful to the Constitution as written and not as some would like to see it written.

At one point in the hearings Mr. Powell and I had this exchange:

Senator McCLELLAN. I feel where the Congress enacts a statute that is constitutional, is binding on the Supreme Court. I don't think it has the right to, by edict or some process, to legislate or attempt to legislate that act away or to hold it to be invalid because of personal views on what policy should be. That is what strict constructionism is to me. I don't know what it means to others, but I believe if the act is constitutional, it is the Congress' prerogative to set national policy in those areas within the framework of the Constitution and that that policy should stand and not be overruled by a court because the court's philosophy is that it was bad policy.

Mr. POWELL. I certainly subscribe to those views, Senators.

At another point, we had this exchange in reference to the wiretap statute:

Senator McCLELLAN. In my judgment, when the Congress has spoken, that is the law of the land; it is the national policy; and it seems to me that those who disagree with that policy should find their remedy in the halls of Congress.

It is no question of whether you favor the act, as I see it, or whether you like all of its provisions or don't. The only thing that would be before you would be did the accused receive a fair trial under due process; and is the statute constitutional?

Let me ask the question another way. If you found it constitutional, would you, and I am sure you would, but I ask this for the record, would you enforce it as a member of of the highest court of the land?

Mr. POWELL. The answer to that is clearly an affirmative.

Finally, Mr. Powell summed up his judicial philosophy, simply and beautifully, in these words:

My thoughts about the role of the Court, expressed as simply as I can, may be summarized as follows:

(1) I believe in the doctrine of separation of powers. The courts must ever be mindful not to encroach upon the areas of the responsibilities of the legislative and executive branches.

(2) I believe in the federal system, and that both State and Federal courts must respect and preserve it according to the Constitution.

H.R. 12773, May 6, 1970, 91st Cong., 2d Sess.; Hearings before Subcommittee on Separation of Powers, Committee on the Judiciary, Senate, May 7, 1970, 91st Cong., 2d Sess.; Hearings before Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, on Congressional Representation for the District of Columbia, June 1, 1970, 91st Cong., 2d Sess.; Hearings before Subcommittee on National Security Policy and Scientific Development, Committee on Foreign Affairs, House of Representatives, on The President, The Congress and The War Power, July 1, 1970, 91st Cong., 2d Sess.; Hearings before Subcommitttee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Mar. 9, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, on Constitutional and Statutory Sources of Investigative Authority in the Executive Branch of Government, Mar. 9, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee No. 4, Committee on the Judiciary, House of Representatives, Apr. 1, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, on H.R. 6225, Apr. 7, 1971, 92d Cong., 1st Sess.; Hearings before Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, on Executive Privilege, June 29, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, on Executive Privilege and S. 1125, Aug. 4, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee on Separation of Powers, Committee on the Judiciary, Senate, on Executive Order 11605 and S. 2466 and S. Res. 163, Oct. 5, 1971, 92d Cong., 1st Sess.; Hearings before Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, on Speedy Trial Act of 1971, S. 895, Sept. 14, 1971, 92d Cong., 2d Sess.

(3) Having studies under then Professor Frankfurter, I believe in the importance of judicial restraint, especially at the Supreme Court level. This means as a general rule, but certainly not in all cases, avoiding a decision on constitutional grounds where other grounds are available.

(4) As a lawyer I have a deep respect for precedent. I know the importance of continuity and reasonable predictability of the law. This is not to say that every decision is immutable but there is normally a strong presumption in favor of established precedent.

(5) Cases should be decided on the basis of the law and facts before the Court. In deciding each case, the judge must make a conscious and determined effort to put aside his own political and economic views and his own predilections and to the extent possible to put aside whatever subtle influences may exist from his own background and experience.

And finally, although all the three branches of Government are duty bound to protect our liberties, the Court, as the final authority, has the greatest responsibility to uphold the rule of law and to protect and safeguard the liberties guaranteed all of our people by the Bill of Rights and the 14th amendment.

In questioning Mr. Rehnquist during the hearings, at one point we had this exchange:

Mr. MCCLELLAN. Would you feel free, as a justice, to take the text of the Constitution particularly in its broad phrases—"due process" . . . "unreasonable search and seizure"—and to read into it your personal philosophy, be it liberal or conservative?

Mr. REHNQUIST. I would not, Senator McClellan.

Senator MCCLELLAN. If you felt honestly and deeply, in light of your own personal philosophy, that the intention of the framers of the Constitution was no longer being achieved through the specific legal devices they deliberately chose in drafting specific clauses, would you feel free, as a justice, to ignore these specific legal devises and give old clauses new readings to achieve a new, and in your judgment, beneficial, result?

Mr. REHNQUIST. I do not believe I would, Senator.

Senator MCCLELLAN. Well, this goes to the heart of the matter. Would you be willing, as a judge, with the power you would have on the Court, to discard the intent of the framers of the Constitution to change it to achieve a result that you thought might be desirable for society?

Mr. REHNQUIST. No; I would not.

At another point, we had this exchange:

Senator MCCLELLAN. What I am trying to ascertain, simply, is this: There is one school of thought today that believes that the Supreme Court—whenever it feels that the Constitution as written and as it has been interpreted is not adequate to deal with the conditions that prevail in society today—ought to give it a different interpretation to get it in to the mainstream, as some call it, of modern society. Do you believe that the Court or a Justice, under the Constitution, has the power to do that or the duty to do it, under his oath?

Mr. REHNQUIST. Under my oath I believe it would have neither the power nor the duty.

Mr. President, these are the words of the nominees themselves. In my judgment, they establish the requisite fidelity of both to the Constitution.

They indicate a deeply held reverence for the law of the land and a willingness to abide by its dictates.

Of course, adverse testimony does appear in the record relative to each nominee. Opposition both to Mr. Powell and to Mr. Rehnquist centered on their alleged lack of sensitivity to civil liberties or civil rights. Mr. Rehnquist, in particular, was the subject of highly emotional testimony, which attempted to characterize him as a so-called radical, right-wing reactionary. Once the smoke cleared, however, it was apparent that there was no substantial fire.

Mr. Rehnquist was also accused, irresponsibly and falsely, of interference with voters and of membership in the John Birch Society. The less said about these two allegations the better. They reflect on the people who made them, not the nominee.

It is unfortunate, too, that our friends in the press saw fit to print most of what was adverse and little of what was favorable.

I quote, therefore, from the record typical items to give my colleagues and the readers of the RECORD an opportunity to reach a balanced judgment.

Of Mr. Powell—Robert Huntley, the president of Washington and Lee University, observed:

For the past ten years, Mr. Powell has been a member of the University's Board of Trustees, a group of 18 men which works actively to provide intelligent and responsive governance for the institution. In large part because of Mr. Powell's influence, our Board is in my opinion a model exemplifying the ways in which such organizations of lay trustees can function usefully.

In routine matters and in matters of critical dimension for Washington and Lee no one could have performed more effectively. His characteristic posture of firm fairness facilitated the University's decision to seek enrollment of qualified black students. In the Board's deliberations about planning for this institution's next decade, he has repeatedly made the kinds of suggestions and raised the kinds of questions which serve to focus attention on the significant matters of policy, thus helping to guide the Board to a sharpened appreciation of its proper role. He was one of several trustees who provided leadership in a decision to reorganize the Board to provide for term membership in place of the more traditional life appointment.

Armistead L. Boothe, a leader of the Virginia Bar, observed:

From the date of the *Brown* decision in 1954 . . . [Mr. Powell] was a stalwart member of an elite group of Virginians who saw that the Commonwealth's schools must not be closed. From July 1954 onward, the issue in the State was just as sharp as a new knife blade between an assignment (or freedom of choice) plan, to keep the schools open, or massive resistance, to cripple them. During the next five crucial years Lewis Powell, then Chairman of the Richmond School Board, placed himself effectively with the minority who felt obligated to uphold the law and the Virginia public school system.

* * * * *

Perhaps today there are some younger people who do not remember the 1950's or the humanity, the regard for law, and the far-sightedness of a few people like Lewis Powell who helped Virginia, in a Virginia way, to survive the Commonwealth's severest test in this century. Many accolades could be given to Powell's judgment, fairness, intelligence, and other judicial attributes. Men and women who can vouch for his virtues are legion. This statement is simply intended to be a brief word picture of a courageous American legal soldier under fire.

I note from the news that the congressional black caucus is opposing Powell. If the distinguished members of that group could remember the 1950's and could get all the available facts, they would not oppose him. They would approve of his selection and thank the good Lord they would have him on the Supreme Court.

Jean Camper Cahn, of the Urban Law Institute, observed:

By way of a final observation I would note that while I support Lewis Powell's nomination—and have limited the scope of my remarks to those facts which I know at first hand—I do not base that support on the fact that Mr. Powell is a supporter of the Legal Services Program. My support is more fundamental because I would expect that while we agree on some things, we would disagree on others. I would not want to rest my support solely on agreement or disagreement on some particular subject.

My support is based upon the fact that I am drawn inescapably to the sense that Lewis Powell is, above all, humane; that he has a capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies of fixed positions. And it is that ultimate capacity to respond with humanity to individualized instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

Of Mr. Rehnquist—Congressman PETE MCCLOSKEY had this moving personal endorsement:

Mr. Chairman, I have known Bill Rehnquist for over 20 years, since we attended Stanford Law School together in 1950.

I believe him to be a man of the highest character, integrity and professional ability. Both his personal and professional reputation in the Stanford legal community, among fellow students, professors, and lawyers, reflects my own belief and the personal respect I have expressed.

Mr. Rehnquist's stated political philosophy is probably diametrically opposed to my own. We disagree on the most basic and deeply held views in the field of civil rights, on the powers of the President, the relationship between the executive and the Congress with respect to the war in Indochina, and on the balance between the Government police powers and individual rights.

In the single instance in which Mr. Rehnquist has appeared before my own Subcommittee on Governmental Information in the House of Representatives, we have sharply disagreed and debated the executive's historic claim of executive privilege with respect to information necessary to congressional deliberations.

Nevertheless, it is my opinion that the greatest base for our national strength and security remains the absolute separation between political beliefs and law. We are a government of law, not of men. Perhaps the highest judicial obligation of a Supreme Court Justice is to insure that their judicial opinions respect this separation between politics and law. I consider it the most basic element in maintaining public respect for the law that it be absolutely divorced from political influence and opinion.

In my judgment, Mr. Rehnquist has a respect, a reverence, for the law in our constitutional history which will cause him to bend over backward to prevent an intrusion of his political beliefs into his judicial decisions.

He meets the three exacting tests that I would impose on a nominee to the High Court. His legal intellect and integrity are of the highest excellence. He has demonstrated the kind of judgment and tempered

advocacy which indicates a good judicial temperament. Finally, I believe him open-minded in his search for solutions to the constitutional and legal interpretations which this Nation will face in the years ahead.

It seems imperative to me that, as a Nation, we once again achieve a common respect for the law and respect for the Supreme Court as the ultimate decision-maker in our system of justice, and that respect requires the recognition of politically liberal and politically conservative justices that they properly contribute to the national welfare so long as they respect the Constitution and interpretations as being more important than their individual political viewpoints. I am confident Mr. Rehnquist will honor that separation.

Congressman SAM STEIGER has this to say:

This is more than the normal, ritual endorsement of an executive appointment by a Member of Congress who resides in the appointee's State.

Bill Rehnquist, by temperament, training and character, will be a magnificent member of the Supreme Court. His intellectual ability, his honor and integrity, and his legal achievements have been attested to by his shrillest critics.

It is incredible to me that this man, whose intellectual stature absolutely precludes bigotry, would be called racist, even by the most partisan practitioner. That Bill Rehnquist would be indifferent, or worse, to civil liberties would be laughable if these charges were not being mouthed by people who should know better. . . .

I have known Bill Rehnquist for a decade—both professionally and socially. In most of my dealings with public figures I have found my respect mitigated by tolerance after similar exposure. Not so in the case of Bill Rehnquist. I can say without hesitation that the more I know of him, the greater is my undiluted respect for him.

Mr. Jarrel F. Kaplan, a civil rights leader in Phoenix, had this to say:

I have known Mr. Rehnquist well as a professional colleague for many years. He is an outstanding lawyer, completely thorough, scholarly, perceptive, articulate and possessed of the utmost integrity as well as a keen wit. He enjoys the highest respect of his fellow lawyers for his legal talent. There is, in my mind, no question about Mr. Rehnquist's legal qualifications to serve upon the Supreme Court.

* * * * *

For many years I have worked to build bridges of communication and understanding among our many groups of people in Phoenix. I have been, and am, most concerned with prejudice and discrimination against minority groups. In 1963, I was appointed by the Mayor to the City of Phoenix Human Relations Commission, which is dedicated to the elimination of this monstrous social disease. For several years I served as Chairman of the Commission. I have also served as President or Chairman of other organizations whose functions are to promote better human relations among all people. In all my years of intergroup relations in this community, I have never once heard reference to Mr. Rehnquist as bearing hostility toward minority persons.

He did, as I recall, disagree with the content of certain proposed civil rights legislation at both the City and State levels. But unlike others, whose opposition was clearly suspect, Mr. Rehnquist's objections were based on legal grounds which he presented in a sincere fashion.

Phil C. Neal, the dean of the University of Chicago Law School, had this to say in a letter:

I should like to express my warm support for the confirmation of William H. Rehnquist as Associate Justice of the Supreme Court.

Rehnquist was a student of mine at Stanford Law School. He was not only the top student in his class but one of the best students in the School over a number of years. He has remained in my mind as one of the most impressive students I have had in some twenty-two years of teaching.

I am confident that he is a fair-minded and objective man. Any suggestions of racism or prejudice are completely inconsistent with my recollections of him. Although I have had little contact with him in the intervening years, I have confirmed my impressions about both his intellectual quality and his objectivity with members of the Arizona bar whose judgment I respect.

I believe he would be an independent judge and that he would bring to the Court an unusual capacity for understanding and responding to all dimensions of the difficult problems the Supreme Court must confront. In my judgment his appointment would add great strength to the Court.

Prof. Thomas Kauper, of the University of Michigan Law School, wrote in his letter:

It was my privilege to serve as Deputy Assistant Attorney General for the Office of Legal Counsel, United States Department of Justice, during the period from May, 1969 through July, 1970. In that capacity, I worked very closely with William H. Rehnquist. . . . I urge you to support his nomination.

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

Based upon my close working relationship with Mr. Rehnquist, I believe he is exceptionally well qualified for the position to which he has been nominated. I might also add that I have been somewhat dismayed by charges made during the past that he is a "racist." That is a term used rather loosely these days, but I surely hope that we have not reached the point where all political conservatives must bear the racist label. Mr. Rehnquist is of course on the conservative side of the political spectrum. But I neither saw nor heard anything during my two years with the Department which would in any way suggest that Mr. Rehnquist had any tendency toward racism. Charges to the contrary seem wholly unwarranted.

Finally, I quote from a letter of Mr. Edward L. Wright of Little Rock, Ark., a former president of the American Bar Association and a man whom I have known and trusted for a long, long time:

I have known Lewis F. Powell, Jr., intimately for many years and have worked extremely closely with him in many American Bar Association matters. He is a truly great man, whether measured by his impeccable character, his outstanding intellect, or his unselfish activities in the genuine public interest. In my opinion he will become one of the outstanding and recognized jurists of all times to sit on the Supreme Court of the United States.

I am not well acquainted personally with Mr. William H. Rehnquist, but I feel that he has all of the proper credentials to make an excellent member of the Supreme Court. For these reasons I trust that the Senate will promptly confirm both of them.

Mr. President, I have now quoted extensively from the record the views of the nominees and I have alluded in detail to the testimony of men who have known each nominee over a period of time. I have not attempted to twist anyone's words or to take an isolated statement out of time or context. The result ought to be plain for anyone with a sense of basic fairness. On this record, if the Senate rejects these nominations, or either one of them, history will not record that there were any legitimate "special and strong reasons for the refusal." History will not kindly remember those who would deny these two men an opportunity to sit on the Supreme Court.

Mr. President, I began these remarks with the observation that there have been periods in our Nation's history when Justices of the Supreme Court have attempted to write their personal philosophy into the Constitution. I concluded that such an effort was always a mistake. In my opinion, our Nation has just passed and is still passing through one such period in one area of the law and it has been a mistake.

In recent years a majority of the Supreme Court—no doubt in good faith, but nonetheless with erroneous judgment—began to impose new standards on the administration of criminal justice in the United States on both the Federal and State levels. These decisions have not enforced, as some have suggested, the simple rule that law enforcement agents must "live up to the Constitution" in the administration of justice, a Constitution that establishes known and basic standards. If this was all that was involved, no one could legitimately complain. My voice, for one, would not have been raised. Instead, these cases have, to a significant degree, created and imposed on a helpless society new rights for the criminal defendant. The pursuit by some jurists of abstract individual rights defined by ideology, not law, has threatened to alter the nature of the criminal trial from a test of the defendant's guilt or innocence into an inquiry into the propriety of the policeman's conduct. And many of these new rights have been carved out of society's due measure of personal safety and protection from crime. Indeed, since 1960, in the criminal justice area alone, the Supreme Court has specifically overruled or explicitly rejected the reasoning of no less than 29 of its own precedents, often by the narrowest of 5-to-4 margins. The high watermark of this tendency to set aside precedent was in 1967, when the Court overturned no less than 11 period decisions. Twenty-one of the 29 decisions the Court overruled involved a change in constitutional doctrine—accomplished without invoking the prescribed processes for the adoption of a constitutional amendment. It is significant that 26 of these 29 decisions were handed down in favor of a criminal defendant, usually one conceded to be guilty on the facts.

In my judgment, these decisions, however well intentioned, have come at a most critical juncture of our Nation's

history and have had an adverse impact on the administration of justice. Our system of criminal justice, State and Federal, is increasingly being rendered more impotent in the face of an ever rising tide of crime and disorder.

President Johnson's prestigious Crime Commission in 1967 began its monumental study of crime in the United States with these tragic words:

There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the Nation. Every American knows that. Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone. Some people have been impelled to uproot themselves to find new homes. Some have been made afraid to use public streets and parks. Some have come to doubt the worth of a society in which so many people behave so badly. Some have become distrustful of the Government's ability, or even desire, to protect them. Some have lapsed into the attitude that criminal behavior is normal human behavior and consequently have become indifferent to it, or have adopted it as a good way to get ahead in life. Some have become suspicious of those they conceive to be responsible for crime: adolescents or Negroes or drug addicts or college students or demonstrators; policemen who fail to solve crimes; judges who pass lenient sentences or write decisions restricting the activities of the police; parole boards that release prisoners who resume their criminal activities.

It is in this context that I, for one, especially welcome these two distinguished nominations. I see and support them not as an attempt to put a "liberal" or a "conservative" on the Court, but rather to appoint to the Court men of the highest integrity and outstanding competency, men characterized by a deeply held fidelity not to an abstract ideology of the left or the right, but to the Constitution itself, and I believe that if we can return to fidelity to the Constitution our society will be both free and safe.

Mr. President, I, therefore, support the nominations of Lewis F. Powell, of Virginia, and William H. Rehnquist, of Arizona, to the Supreme Court.

INDIAN EDUCATION

Mr. MONDALE. Mr. President. In his message on Indian policy issued in July 1970, President Nixon said:

One of the saddest aspects of Indian life in the United States is the low quality of Indian Education.

The President's statement echoed the findings of the Senate Special Subcommittee on Indian Education. The subcommittee report, "Indian Education: A National Tragedy—A National Challenge," issued in November 1969, documents the truly disastrous condition of Indian education:

The average educational level of Indians under Federal supervision is 5 school years;

Only 18 percent of all students in Federal Indian schools go on to college, while the national average is 50 percent;

In 1969, the BIA spent only $18 per year per child on textbooks and supplies compared to a national average of $40.

The President also supported the subcommittee's key recommendation—that Indian citizens, like other Americans, should govern their childrens' schools. The President said:

We believe each Indian community wishing to do so should be able to control their own Indian schools.

And yet now more than a year after the President's statement, the BIA has contracted with only one additional Indian community.

S. 1401, the Comprehensive Indian Education Act of 1971, of which I am a cosponsor, would reform the BIA school system by placing control at the Federal level in the hands of a new National Board of Regents of Indian Education, which in turn would support establishment of local school boards to operate BIA schools.

But the administration already has power to extend control of Indian schools to Indian parents. If the President's policy were followed, that would happen.

Mr. President, an article entitled "Indian Run-Around," from the Washington Post of November 7, describes the frustrating experiences of local Indian communities which have tried to take advantage of the President's policy. Strangled in redtape, these local groups are only the latest victims of the BIA's stubborn refusal to permit Indian citizens to lead their own lives. I ask unanimous consent that this article may appear in the RECORD.

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

INDIAN RUNAROUND—HOW THE BUREAUCRACY VETOES A NIXON VOW ON SCHOOLS

(By William Greider)

On the Wind River reservation in Wyoming, which the Shoshone share with the Arapahoe, about 40 or 50 Indian children did not go back to boarding school this fall.

Most of them were under the impression that a new high school would be operating on their reservation, controlled by an Indian school board, supported by the federal government. They were misled by what they heard from Washington. Some of them are still waiting.

The children at Wind River, when they reach high school age, are scattered across the map. About 300 or so go to two public high schools off the reservation in the towns of Lander and Riverton. An additional 150 or so are sent to government boarding schools in six states. Still others, perhaps a couple of hundred, don't go to school any more.

"What we're trying to do," says Allison Sage, an Arapahoe who is president of the Wind River Education Association, "is bring our kids back home and attack the drop-out problem or, rather, the push-out problem."

He and the other parents at Wind River have been trying to get their own community high school, which, after all, is not exactly a radical proposal. They are encouraged by words from the President himself and by a letter from the commissioner of Indian affairs. But so far they have encountered mostly frustration and postponement.

The educational problems at Wind River are a small matter compared to the tens of thousands of Indian young people already lost, but the situation is noteworthy because the parents there have tried—and so far failed—to do something dramatic to "bring back" their kids.

In the process, they have discovered what any seasoned Washington lobbyist could have told them—that the President makes the grand declarations of government policy, but that he is not there when bureaucrats draft the regulations or negotiate the contracts or keep the project proposals shuffling back and forth from one office to another. The people from Wind River have become convinced that this process, in the end, can twist the President's words or perhaps even veto his ideas.

COALITION FORMED

Among Indian leaders, there was general applause and even some cheering when President Nixon first announced his new goals for Indians: The Indians themselves would begin to run things. The paternalism of non-Indian bureaucrats would be replaced with self-determination contracts through which tribal leaders could take over the operation of government programs.

As the President envisioned it, these contracts might cover any of the variety of federal programs on the more than 300 Indian reservations, from real-estate management to police protection. The heart of it, however, was to be education—where people shape their own image of themselves and determine whether their culture will survive in their children.

Mr. Nixon declared: "Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools."

That was July 8, 1970. Since then, only one tribe—the small band of Miccosukee in South Florida—has managed to wrestle out of the Bureau of Indian Affairs the kind of contract which gives the Indians control over their school. They accomplished that in part because their tribal chairman, Buffalo Tiger, waded through repeated tangles of red tape and in part because the tribe had a Washington lawyer lending his time and expertise to the struggle.

Three other tribal groups—the one at Wind River, an Oglala Sioux community at Pine Ridge, S.D., and the Crow reservation at Bushy, Mont.—have also waded into the thicket with firm proposals, but so far they have not come out with contracts. Instead, the process has created a lot of legal back-and-forth between them and the bureau. They have felt the need to form a "coalition" of some 10 fledgling Indian-controlled school boards, united to prod the BIA into doing what the President said to do.

32 YEARS LATER

The coalition was in Washington last week, lobbying at the bureau, the Interior Department and Congress. Its "position paper" expressed considerable skepticism about the future of self-determination contracts:

"Each day's procrastination endangers at least four Indian community school projects and retards the education of our children. Our belief in the good faith of this administration as regards self-determination for Indians in education is fast dwindling and only immediate fulfillment of prior commitments can restore our support."

The commissioner of Indian affairs, Louis R. Bruce, an Indian himself, and Secretary of Interior Rogers C. B. Morton periodically reaffirm their devotion to the idea. But the Indian skepticism is based solidly on the history of reform—initial enthusiasm buried by bureaucratic delays and diversions. The official policy of the BIA, for instance, is to phase out government boarding schools. That has been the official policy for more than 35 years, yet the percentage of Indian children who must leave home for their schooling has dropped only modestly since 1930.

The current few who are trying to get self-determination contracts fear that their experience will be a negative object lesson for other tribes who will see the frustration and won't bother to try.

of diplomacy make their slow revolutions, the pace of war quickens. It is reported that Indian Army troops are now making deeper and deeper incursions into East Pakistan at the request of the Bangla Desh, or Bengal Nation, as the secessionists call themselves, and for the more military purpose of silencing the Pakistani guns that the Indians claim are shelling villages on the Indian side of the Bengali border.

The U.S. Senate is not the place nor is the information available sufficient for me to castigate or sympathize with one side or the other in this most recent flare-up of old enmities, but it seems to me important that we bear in mind the admonition the past is prolog.

When Great Britain withdrew from India in 1947 and the partition of the subcontinent created India, and Pakistan, there were many people wise in the ways of Hindus and Muslims, who expressed grave apprehension that India would ever accept the permanence of the eastern wing of Pakistan. East Bengal, as a part of Pakistan, was once described by the late Prime Minister Nehru as "politically nonsensical and geographically ludicrous." I am inclined to believe that Mr. Nehru's view is still widely held in the councils of state in New Delhi. Not that India has a corner on covetousness. Almost a quarter of a century after the Hindu Maharaja of Kashmir ceded his state to India against the wishes of his large Muslim population majority, Pakistan still casts envious looks at Kashmir and has never really accepted the state as a part of India. The simple truth is, Mr. President, that the troubles which are tearing East Bengal apart today are a part of the harvest so indiscriminately sown in August 1947. I would have hoped that almost 25 years of independence and political, diplomatic, commercial, and social intercourse with other nations of the world would have tempered to some degree the centuries-old jealousies and distrust that have characterized the subcontinent, but recent events in East Bengal make it abundantly clear that the old order changeth little.

It is relevant to ask what, if anything, the United States can do to persuade the antagonists to cease and desist and go about the humanitarian business of alleviating the unspeakable misery of millions of human beings engulfed in the conflict. We have already given much, both unilaterally and through the United Nations, in the way of food, clothing, and medical supplies for refugees on both sides of the East Bengal border. We have tried and even now are trying, through our diplomatic missions in New Delhi and Islamabad, to persuade India and Pakistan to stop shooting and start talking, but this can be achieved only if there are goodwill and a genuine desire to do so on both sides.

I am very much afraid that these two elements are missing. They are missing on the Pakistan side because, rightly or wrongly, the Pakistanis believe that the cornerstone of India's foreign policy was and is the elimination of Pakistan as a viable entity and the reversion of the subcontinent to one country under Hindu domination. They are missing on the India side because India has never become reconciled to a divided Bengal and desperately wants the bountifully fertile area of the Punjab that went to West Pakistan at partition. With the addition of the Punjab granary, India could come close to feeding her population without having to depend on imports. With the addition of East Bengal, India's economy would benefit immensely from the rich jute and rice crops of the delta and the bonus of a fine deep-sea port at Chittagong. And these, Mr. President, are the stakes that are being played for. Since the tragically sudden death of Mohammed Ali Jinnah, Pakistan's architect and first President, and the assassination of his successor Liaquat Ali Khan, the intensity of feeling and determination of the people of Pakistan to maintain their country has reached a fanatical level. There is not the slightest doubt in my mind that if India, or indeed any other aggressor, seeks to subjugate Pakistan, the Pakistanis will fight, and a full-scale war, even if it were confined to the subcontinent, would result in a slaughter too horrible to contemplate. It is sometimes forgotten that India, next to Indonesia and Pakistan, has the third largest Muslim population in the world. Approximately 60 million Muslims live in India. Approximately 11 million non-Muslims, the majority of whom are Hindus, live in Pakistan. One has only to cast one's mind back to the horrors of the months immediately following partition when the great Hindu-Muslim migrations took place, in order to foresee the inevitable. If reports of certain actions in East Bengal in the past few weeks are true, they are the harbinger.

As I mentioned earlier in this statement, accurate information is scanty and conclusions are therefore imprudent, but my guess would be that if India is not actively assisting the East Pakistan guerrillas, against the Pakistan Government forces in East Bengal neither is she hindering them. Pakistan is reported to have 80,000 men in East Bengal. This is a significant number to be detached from the main forces of the Pakistan Army on the India-West Pakistan border. As long as they are occupied by present or increased guerrilla activity in East Bengal, the less chance there is for Pakistan retaliation in the West, which might well be a part of Indian strategy. At the same time, the bogging-down of these experienced troops elsewhere might just encourage India to try a little adventure along the Punjab and Sind frontiers. As we all know, the easiest thing in the world to manufacture is an excuse. India's reluctance, up to this point, to allow full and free media coverage of events and incidents on her side of the border makes such an excuse easier to contrive and fuller coverage is much to be desired.

India and Pakistan have had their skirmishes before and in all probability will continue to have them. Skirmishes we can live with. All-out war we must do our best to prevent at all costs. But the United States cannot do this alone. We need the good offices of countries which have as big a stake in peace on the Indian subcontinent as we have. It is coincidental—perhaps providential—that Communist China has just become a member of the United Nations. She has common borders with India and with Pakistan in northern Kashmir. This might be an excellent opportunity for the United Nation's newest member to show her good faith to the principles of the U.N. Charter by interceding actively with both sides in the dispute for the cause of peace. Communist China has already appealed to both sides to stop shooting. It is to be hoped that she will continue her efforts which would be an auspicious entry into the family of nations.

But if Communist China and the Soviet Union do not see fit to participate in the efforts to avoid a major confrontation between India and Pakistan, that does not absolve the United States from doing all in our power, through the Security Council or in concert with other world powers—but not involving U.S. military forces—to prevent what would be a holocaust of horrifying proportions. The killing on the battlefield would be bad enough. The killing in the cities and in the countryside would be even more appalling.

Mr. President, have I any time remaining?

The PRESIDENT pro tempore. The Senator has 5 minutes remaining.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum, without prejudice to the Senator who will follow.

The PRESIDENT pro tempore. The clerk will call the roll.

The second assistant legislative clerk proceeded to call the roll.

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

The PRESIDENT pro tempore. Without objection, it is so ordered.

Under the previous order, the Senator from New York (Mr. BUCKLEY) is recognized for 15 minutes.

SUPREME COURT NOMINATIONS

Mr. BUCKLEY. Mr. President, the Senate will be called upon shortly to give its advice and consent to the nominations of Lewis Powell and William Rehnquist to the Supreme Court. These nominations come forward at a moment of critical importance in the history of the Court and of the Nation, and have therefore aroused exceptional public interest. This interest is, I believe, equally the product of reverence and of concern:

Of reverence, because the Court has always occupied a special place in the hearts of the American people as that institution which uniquely marks the Government of the United States as a government of laws and not of men.

But of concern also, Mr. President, because so many Americans, rightly or wrongly, have come to believe that in recent years the High Court has too often abandoned that judicial impartiality which is essential to the rule of law; and this at a time when the public is so deeply distressed by the spirit of lawlessness which seems to have insinuated itself into so many areas of our daily lives.

We are confronted, Mr. President, by a crisis in our legal order, a crisis which manifests itself not only in widespread disobedience but also in the seeming in-

ability or unwillingness of our courts to do much about it. This, in turn, has occasioned a rather marked and dangerous decline in public esteem for the judicial process. Nor is the public likely to be dissuaded of this view as long as it continues to be confronted by judicial opinions which appear to be ideologically motivated or capriciously reasoned; or as long as it continues to be confronted by that seeming abandonment of "judicial restraint" on the part of the Supreme Court which in 1958 drew so sharp a rebuke from the chief justices of 36 States.

The oldest political wisdom teaches us, Mr. President, that a widely held public opinion, especially in a democracy, cannot safely be disregarded. When, therefore, public opinion reveals a loss of confidence in the judicial process, it behooves us to exercise with special care our constitutional authority to advise and consent to nominations to the highest court in the land.

Much debate has been heard in recent weeks on the nature and extent of the Senate's prerogatives in passing upon the qualifications of judicial nominees. Some hold that it is improper for the Senate to inquire into the personal views of nominees; others hold that it is not only proper but necessary to undertake such an inquiry in detail. My own view, Mr. President, is that it is as unwise to err on one side as on the other. Those who would foreclose such an inquiry altogether grant too much to the President's prerogatives and too little to those of the Senate. On the other hand, those who would subject a nominee to an ordeal by ideological combat endanger the integrity and independence of the judiciary and open themselves to the charge of personal or political motivation. A recent column by Mr. Tom Wicker put the matter well:

> On the one hand, the writers of the Constitution, in giving the Senate the power to confirm or reject Presidential nominees to the judiciary, clearly meant the legislative branch to play a substantive role with the executive branch in this process. The Senate has the right, therefore, to judge for itself the qualifications of a man to sit on the Supreme Court.
>
> On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business . . . It would tend to politicize the courts according to the temporary political coloration of Congress; it could punish some individuals for their ideas and frighten others out of having any.

The Senate clearly has the constitutional authority to require what it will of judicial nominees. But having said that, we have only stated a problem, not solved it. For the question is not one of power or prerogative, but of prudence and propriety. Certainly, the Senate cannot blind itself to the ways in which the general character of a man's thought will bear upon his future role as a judge. A limited inquiry would be justified, therefore, into such aspects of a man's political philosophy as may be relevant to his service upon the Court. After such an inquiry, the Senate would be right to reject a man who was so ideologically or politically committed as to be incapable of exercising the judicial function, which, if nothing else, requires both the ability and the willingness to subordinate personal preference to the mandates of the law. Such an inquiry, however, also entails certain dangers, and the greatness of these is that the question of confirmation will be made to hang by approval or disapproval of a nominee's viewpoint on specific issues.

Mr. President, I believe that it would be as wrong to support or oppose a nominee because of his views on specific constitutional issues as it would be foolish to expect that a nominee will behave like an automaton once he dons the robe. The history of the Court is replete with examples of men who underwent profound changes of opinion during the course of their judicial service. The most conspicuous example in our own time, perhaps, was provided by the late Mr. Justice Black, who shed not only the petty prejudices of his Ku Klux Klan associations but also some of his passionately held New Deal convictions. Indeed, during the Teapot Dome investigations, the then Senator Black expressed views on the rights of witnesses before congressional committees that Mr. Justice Black would have found inimical to the letter and spirit of the first amendment. Similarly, few who knew of Professor Frankfurter's scholarly and polemical writings or of his extensive political involvements would have predicted at the time of his confirmation that he would emerge, as Mr. Justice Frankfurter, as the most eloquent, informed exponent of judicial restraint in our time. Mr. Rehnquist in his confirmation hearing, I thought, put the matter rather well:

> I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it. But I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with the man. I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.

That remark, Mr. President, says as much about the character of William Rehnquist as it does about the risk the Senate runs in conducting an inquiry into a nominee's political opinions. And, in a sense, it says as much as the Senate really needs to know in order to exercise its constitutional responsibility with regard to Mr. Rehnquist. Mr. Rehnquist's statement, it seems to me, sounds just the right note. It reveals the depth of his fidelity to the principles and procedures of constitutional discourse, and as well that eloquence and capacity for intellectual growth that we have come to associate with our greatest Justices. It also serves to remind those who would interject ideological considerations into the confirmation process that they are in effect asking a nominee to violate his oath of office before he takes it.

Mr. President, it is the duty of the Senate to pay special scrutiny to those who are nominated to sit upon the High Court. And in the present instance, I believe that special scrutiny has been paid to the men whose names will shortly be presented to us for consideration. Their lives, characters, talents, and personal opinions have been combed and culled with meticulous care. On the basis of the record before us at the present time, Lewis Powell and William Rehnquist would appear to be exceptionally well qualified to sit upon the Supreme Court. Both are men of great learning and legal sophistication. Both are men of unimpeachable character. Both have revealed by word and deed their understanding of and their fidelity to the Constitution. Both have evidenced their acute awareness of the special burdens and grave responsibilities entailed by service on the Court. Both have expressed their great sensitivity to the difference between advocacy on behalf of a client and the assumption of a sacred trust on behalf of a whole nation. Both have made a special effort to demonstrate their understanding of the difference between partisan ideology and constitutional principle.

This last is no small matter. For the Court has suffered in recent years from an excess of zeal on behalf of doctrines that derives from ideological conviction rather than from constitutional principle; a zeal which has moved dissenting Justices in countless opinions to criticize the Court in language as harsh as any which has been directed against it from the outside. To cite a few examples:

Mr. Justice Black in Harper against Virginia Board of Elections:

> The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil . . . It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written Constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided.

Mr. Justice Frankfurter in Baker against Carr:

> Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our Constitutional scheme.

Mr. Justice Stewart in Escobedo against the State of Illinois:

> Supported by no stronger authority than its own rhetoric, the Court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial . . . I think the Court perverts those precious Constitutional guarantees and frustrates the vital interest of Society in preserving the legitimate and proper functions of honest and purposeful police investigation.

Mr. Justice Harlan in Reynolds against Sims:

> The Court's elaboration of its new "constitutional" doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority . . . It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the states . . . When, in the name of Constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its views of what should be so for the amending process.

However well intentioned, this activist zeal has not only served to undermine the judicial process, it has undermined public confidence in the stability of the law and of the Court itself. There are already encouraging signs, however, that the Court is beginning to curb its past excesses; and we have every reason to expect that the addition of Mr. Powell and Mr. Rehnquist will contribute to the restoration of constitutional common sense.

While men of moderate disposition will, I believe, support both Mr. Powell and Mr. Rehnquist for precisely this reason, there are others who seek to brand Mr. Rehnquist as an "extremist." During the past few weeks, Mr. Rehnquist has had his reputation slandered by an avalanche of rumor, half-truth, slur, and innuendo. Some of his opponents seek to defend themselves, in turn, against the charge of partisan or political motivation by indicating their approval of Mr. Powell—even though, they feel it necessary to add, he is a "conservative." This tactic, Mr. President, is bound to fail, for the most sensitive jurisprudential seismograph in the country will not be able to record any substantial difference between the considered views of Mr. Powell and those of Mr. Rehnquist. And the considered views of both are well within the mainstream of respectable constitutional discourse.

This fact Mr. Rehnquist's opponents are, of course, at great pains to deny. The New York Times, for example, tried very hard 2 weeks ago in an editorial which castigated Mr. Rehnquist as a "radical rightist." Precisely what is meant by this venomous sobriquet remains a matter of some mystery. A resort to name-calling, of course, is the ultimate tactic of those who have abandoned resort to reason. It is fully the right of the Times to oppose Mr. Rehnquist; but it is equally the right of fair-minded men, even those who may otherwise oppose Mr. Rhenquist, to take the strongest possible exception to the rhetorical excesses of the Times.

The editorial in question is conveniently vague as to the reasons why the Times considers Mr. Rehnquist to be beyond the pale of acceptable constitutional thinking. Such specificity as the Times managed to convey was admirably refuted in a letter to the Times from the distinguished ranking minority member of the Judiciary Committee, Senator HRUSKA. For the sake of the record, Mr. President, I ask unanimous consent that the Times editorial, along with Senator HRUSKA's response, be printed at the end of my remarks.

The PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. BUCKLEY. Mr. President, I also ask unanimous consent to have printed at the conclusion of my remarks a recent letter addressed to the distinguished chairman of the Judiciary Committee (Mr. EASTLAND), a copy of which was sent to me. It is a letter from a constituent, Prof. Benno C. Schmidt, Jr., of the Columbia University School of Law.

The PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 2.)

Mr. BUCKLEY. Mr. President, Professor Schmidt, as it happens, is well acquainted with Mr. Rehnquist, having worked closely with him for nearly 5 months in the Office of Legal Counsel. It also happens that Professor Schmidt greatly admires former Chief Justice Warren and disagrees with Mr. Rehnquist on a number of constitutional questions. He was, nevertheless, moved to write because of what he describes as the "extravagant denunciation" of Mr. Rehnquist "by groups and persons with whom I am usually in accord." Professor Schmidt points out most eloquently, I think, those qualities of mind and character that caused Mr. Rehnquist to be nominated in the first place. He states:

> I believe no fairminded person could doubt Mr. Rehnquist's exceptional intellectual qualifications to sit at the highest level of our judicial system.
>
> In my work with Mr. Rehnquist he seemed to me unusually open-minded and free of reliance upon dogma in dealing with constitutional questions. His approach to legal problems is highly discriminating; few persons in my experience have exhibited more alert skepticism as to the utility of sweeping generalizations and ideological positions. Always I had the impression that careful analysis governed his response to legal questions.
>
> Mr. Rehnquist approaches legal issues with the utmost forcefulness and honesty. In our work together, he was open to reasoned persuasion, tolerant and respectful of my quite different constitutional and political outlook, and ever willing to examine his position in the light of the fullest possible analysis of facts and legal principles.
>
> Candor, openness to argument, and forcefulness of logic and expression are critically important to the performance of the Supreme Court, with its unique and delicate power of constitutional review. I believe Mr. Rehnquist's appointment will help restore these necessities of judicial process, sadly diminished by recent events and losses from the Court.

This is high praise, indeed, Mr. President, coming as it does from one who believes that Mr. Rehnquist's positions on matters before the Court may often be opposed to his own. It is as much a tribute to the man who wrote it as it is to the man about whom it was written. I congratulate Professor Schmidt for his scrupulous fairmindedness, and in doing so cannot help thinking that if constitutional discourse were to be marked by the same civility, disinterestedness, and reverence for this law that mark his letter, we would all be much less concerned about the political views of nominees.

The spirit which animates Professor Schmidt, unfortunately, does not animate the writers of New York Times editorials. The general thrust of their indictment is that Mr. Rehnquist's views—views, incidentally, that were for the most part expressed in his adversary capacity as legal counsel to the President—bespeak a callous disregard for the Bill of Rights. While the editorial nowhere specifies what Mr. Rehnquist's views are, it does allude to a number of issues—for example, wiretapping, surveillance, "no knock" entry, preventive detention—on which Mr. Rehnquist's views are alleged to be contrary to what the Times calls "broadly accepted principles of American constitutional democracy." The merits of Mr. Rehnquist's views aside for the moment, what the Times has, in effect, done is to assert that, on certain specified issues, respectable opinion is so virtually unanimous that to dissent from that opinion is to place oneself outside the mainstream of "broadly accepted" constitutional principles and to betray a mentality that, as the Times puts it, "neither reveres nor understands the Bill of Rights."

With all due respect for my brethren on the Times, I must wholeheartedly dissent.

In the first place, I feel constrained to point out that, notwithstanding my own deep and abiding affection for the Bill of Rights—and, if the Times will forgive me, I believe I have some understanding of it as well—the Constitution is not coextensive with the Bill of Rights; nor is the meaning of the Bill of Rights coextensive with the Times' understanding of it. The Bill of Rights is an integral and indispensable part of the Constitution; but, like all parts of the Constitution, it must be read in the light of the Great Charter as a whole. The Constitution as a whole is dedicated not only to the securing of the blessing of liberty but also—and no less so—to those equally noble and important purposes enumerated in the Preamble:

> To form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general welfare . . .

It is no easy matter, Mr. President, to delineate with precision the meaning of these grand phrases, or of those equally grand phrases contained in the Bill of Rights—phrases such as "due process of law," or "abridging the freedom of speech, or of the press," or "the right to a speedy and public trial," or "the right to be secure against unreasonable searches and seizures," or the prohibition against "excessive bail." These phrases do not come equipped with some sort of jurisprudential litmus paper that can be dipped into the circumstantial vat to produce a constitutional result.

The meaning of the Constitution in any given circumstance can be problematic—problematic enough, in fact, to give rise to countless 5-to-4 decisions on constitutional questions. Yet the Times not only implies that the Bill of Rights is all that is finally important in the Constitution, but that its reading of the Bill of Rights—an exclusively libertarian reading—defines the limits of constitutional discourse on the subject. One, therefore, suspects that what the Times chiefly dislikes in Mr. Rehnquist—aside from the fact that he has been an advocate on behalf of an administration for which the Times has little use—is his refusal to acknowledge that certain fashionably prevalent views on civil liberty, views espoused most ardently by the Times, ought to be taken as settled constitutional writ. On every specific issue alluded to by the Times as marking Mr. Rehnquist's apostasy from constitutional fidelity, Mr. Rehnquist's views, upon examination, turn out to be infinitely less alarming than the Times' self-righteous certitude.

On wiretapping, for example. The opposition of the Times to Mr. Rehnquist on this point is unrelated, presumably,

to his position on wiretaps under title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, since even Senator BAYH voted in favor of the measure. And presumably, it is also unrelated to his position on wiretapping in national security cases involving foreign espionage agents, since that position has been defended by every Attorney General and President since the days of Franklin Roosevelt. Rather, the Times' opposition relates exclusively to his position on wiretapping in what is loosely called "internal security cases." But even there, the authority for warrantless wiretaps claimed by Mr. Rehnquist is scarcely different from the authority claimed by every administration since that of President Truman, including the Kennedy administration. Mr. Rehnquist has advocated only that the logic which would authorize warrantless wiretaps in national security cases applies also to "internal security" cases involving domestic subversives. It is an argument which, whatever one may feel about it on the merits, is not unreasonable. It may be unwise or unnecessary for the Government to have such power, but that is an argument, surely, on which reasonable men—men equally devoted to the preservation of liberty—can agree.

On domestic surveillance, for example, Mr. Rehnquist's position is simply that Government surveillance is subject to the restrictions of the first, fourth, fifth, and 14th amendments. With that argument, presumably, even the Times would not disagree. What the Times seems unwilling to abide, however, is Mr. Rehnquist's argument that surveillance does not constitute a per se violation of any provision of the Bill of Rights. Again, such an argument is not unreasonable upon its face. Mr. Rehnquist is here taking a stand as a strict constructionist by saying that not every dangerous or unwise governmental undertaking is necessarily a violation of the Constitution. In the present instance, that argument may prove to be imprudent; but I for one am not prepared to say that the man who makes it is an enemy of liberty.

On preventive detention, for example. Here, Mr. Rehnquist's position is simply that the preventive detention of persons charged with felonies of a dangerous or violent nature does not conflict with either the eighth amendment's prohibition against excessive bail or the fifth amendment's due process clause. Now preventive detention may prove to be unworkable or undesirable for other reasons, but Mr. Rehnquist's argument, again, is hardly unreasonable on its face. It is hardly the mark of an authoritarian zealot.

On no knock, for example. The Times' opposition seems to derive from Mr. Rehnquist's defense of the no knock provisions of the D.C. Court Reform and Criminal Procedure Act of 1970. While there are those who disagree with the constitutionality and wisdom of this provision—the most prominent among these being the distinguished Senator from North Carolina (Mr. ERVIN)—Mr. Rehnquist—and, presumably, the majority in Congress which voted its enactment—has taken the position that it is nothing more than a codification of constitutional law, and of practices condoned by the Court itself in Ker against California. Whether Senator ERVIN or Mr. Rehnquist is correct is less important for the moment than the recognition of the fact that their disagreement is a reasonable one, one in which the partisans of liberty may be found on either side. And I think it worthy of at least a passing reference that Senator ERVIN—who yields to no one in his love of liberty—has indicated that he will support the nomination of Mr. Rehnquist.

I do not here pass on the merits of Mr. Rehnquist's views on any of these issues. For one thing, they are views expressed in his capacity as an advocate for the administration; and Mr. Rehnquist has made it abundantly clear that his views as a member of the Court will not be unduly influenced by his views expressed in an adversary capacity. But, more importantly, Mr. Rehnquist's views, whether or not they eventually prevail upon the whole Court, are in no wise so shocking to constitutional sensibilities that they are, as the Times would have it, beyond the pale. On every controversial issue alluded to by the Times as demonstrating Mr. Rehnquist's animosity toward the Bill of Rights, there are many—many, indeed, in this very body—who share, and many more who are certainly not offended by, Mr. Rehnquist's views. It should be unnecessary to have to say it, but good and decent men can and do differ on a wide variety of constitutional issues, and they ought to be able to do so without having their views castigated as noxious to the Constitution. The civil libertarian view of the Constitution and of the Bill of Rights so predominant at the Times is not without its merits; indeed, it has an important, even essential part to play in the conduct of American constitutional discourse. But neither nature nor experience—nor the Constitution—has bestowed upon the Times any special stock of constitutional wisdom that all good men are bound to follow lest they risk being adjudged enemies of liberty.

The Times lays it down that the overriding test for a nominee is that he "not be hostile to the broadly accepted principles of American constitutional democracy." With such a requirement, no reasonable man can disagree. The Times neglects to point out, however, that one of the chief faults of the Court's work in recent years has to do precisely with its failure to articulate clearly and consistently the nature of the constitutional principles before it. The Court has upset so many precedents and undertaken to write new law in so many areas that it is something of a problem anymore to say what is or is not broadly accepted. As I have already suggested, the problem of determing the meaning of the Constitution in any given case is no easy matter in any event: There are simply too many issues on which thoughtful differences of opinion can be entertained. But the difficulty of this task has been considerably complicated by the instability of the Court itself, both as to the substance of its decisions and as to the mode of their presentation.

I was greatly impressed in this regard by the recent remarks of the distinguished senior Senator from Arkansas (Mr. MCCLELLAN) who stated that since 1960, in the area of criminal justice alone—

> The Supreme Court has specifically overruled or explicitly rejected the reasoning of no less than 29 of its own precedents, often by the narrowest of five-to-four margins. In 1967, the high watermark of this tendency to set aside precedent, the Court overturned no less than eleven prior decisions. Twenty-one of the twenty-nine decisions the Court overruled involved a change in constitutional doctrine—accomplished without invoking the prescribed procedures for the adoption of a constitutional amendment. Seven of these represented a new reading of old statutory language—accomplished without the intervening of Congressional action and Presidential approval. And this is the significant point: 26 of those 29 decisions were handed down in favor of a criminal defendant, usually one conceded to be guilty on the facts.

These are disturbing figures, Mr. President. They reveal with a simplicity and clarity that no merely ideological argument can match just why it is that thoughtful friends of the Court, liberal and conservative alike, have been deeply troubled. They reveal just why it is that esteem for the judicial process in general and for the Supreme Court in particular has fallen to an unacceptably low level. I stand with the Times in requiring of nominees strict adherence to "broadly accepted" constitutional principles. But I question just how "broadly accepted" any constitutional principle can be in the face of assaults by the Court itself on its own precedents. If the maintenance of boadly accepted principle is the chief goal of the Times, then one is bound to wonder why the Times is so passionate in its opposition to Mr. Rehnquist, who has in a number of areas undertaken to suggest that the Court itself has strayed from what was only a few years ago widely understood as "broadly accepted" constitutional principle.

Mr. President, I believe the record will bear out the fact that Mr. Rehnquist's views on the role of a Supreme Court Justice reveal neither a radical departure from precedent nor an intolerable divergence from respectable present-day opinion. At this point, I think it would be well to permit Mr. Rehnquist to speak for himself. I quote from the mimeographed transcript of testimony before the Judiciary Committee, at page 43:

> Senator HART. Well, this business of balancing the competing interest of the Government against the individual defendant is admittedly enormously difficult, and indeed I suppose it is one of the most difficult aspects of interpreting the Constitution, one of the toughest jobs that the Court has.
>
> And would you agree with me that the assignment has to be approached with as strong a concern for the Bill of Rights as for either the Preamble or the Second Article which creates the Executive Branch?
>
> Mr. REHNQUIST. Unequivocally.
>
> Senator HART. And would you, without hesitancy, protect the constitutional rights of any individual or any group as your sights best enable you to interpret those rights, without any regard to your personal feelings about the particular view or position of the individuals who were asserting such rights?
>
> Mr. REHNQUIST. Without hesitation.

From the transcript, at page 108:

Senator KENNEDY. Do you think you are a judicial conservative?

Mr. REHNQUIST. Well, let me tell you what I think I am, and then let you decide whether I am a judicial conservative or not.

My notion would be that one attempts to ascertain a constitutional meaning . . . by the use of the language used by the framers, the historical materials available, and the precedents which other Justices of the Supreme Court have decided in cases involving a particular provision.

From the transcript at page 170:

Senator HRUSKA. My question is this: Do you know of any reason why you could not be successful in shedding and in thrusting to one side any loyalties you may have had in the past, in the interest of extending to the advocates before you, as a member of the Supreme Court, that fairness of decision, and that consideration of the facts and the law which will enable you to make a fair decision, regardless of the color of the skin of the advocate, regardless of their economic position, regardless of any other personality or attributes which they may possess?

Mr. REHNQUIST. I will bend every effort to do so, Senator, and I would regard myself as a failure as a Justice if I were unable to do so.

From the transcript, at page 220, in response to a question touching on his ability to lay aside his personal preferences:

Mr. REHNQUIST. My hope would be if I were confirmed to divorce as much as possible whatever my own preferences, perhaps as a legislator or as a private citizen would be as to how a particular question should be resolved and address myself simply to what I understand the Constitution and the laws enacted by Congress to require.

And, finally, from the transcript at page 230, that eloquent statement that I had occasion to quote earlier in my remarks:

Mr. REHNQUIST. I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with the man. I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.

Mr. President, I put it to the Senate: Are these the views of a so-called radical rightist?

Are these the views of a man who "neither reveres nor understands" the Bill of Rights?

Are these the views of a man who is hostile to "broadly accepted principles of American constitutional democracy?"

The record, Mr. President, speaks for itself.

I wish it were possible to let the matter rest here. Unfortunately, that cannot be the case. For the Times' attack, though unfounded, has contributed to an atmosphere which threatens to obscure from the Senate and the American people those considerations which ought to be of final importance in the confirmation process. What should be important to us is not whether a nominee meets some sort of idological purity test, but whether he possesses such habits of mind and such character as will be conducive to a restoration of public confidence in the judicial process. The judicial process, correctly applied, may from time to time produce results in specific cases that displease many of us; but it would be irresponsible of us to place our own biases above the assurance of that constitutional stability which is so essential to the Nation as a whole. Personal biases, to be sure, can never be wholly excluded from the confirmation process; but the Senate no less than the nominees themselves, ought to keep such biases at as far a remove as possible, since it is only by so doing that we can come to deliberate about the role of the Supreme Court within the American constitutional system. And it is that which I should now like to touch upon.

A curious, but significant fact of Senatorial and public discussion thus far in the confirmation proceedings, is the extent to which both the proponents and the opponents of the nominees tend to assume that they possess the true understanding of genuine constitutional principle. Such debate reveals the unique importance that our people and their representatives continue to attach to considerations of fundamental law. Indeed, it may be said to reveal a reverence for fundamental law that can be found only among a free people. It bespeaks a profound awareness that it is the Constitution which first, last, and always binds us together when we might otherwise fly apart.

It is in this sense that the current debate partakes of the grand tradition of American political discourse, a tradition which began in the debates in Philadelphia in 1787 and which continues, in a more or less unbroken line, right down to our day. It is a tradition quite unlike anything else the world has ever seen or may ever see again. It is peopled with figures who seem to loom larger than life—Madison, Hamilton, Washington, Adams, James Wilson; Jefferson, Webster, Marshall, Story, Lincoln. These are the names of men whose deliberations on the meaning of the Constitution affect our own thoughts and action in profound, if subtle ways. And precisely because these men dedicated their lives to the perpetuation of American political institutions, we have inherited a form of government that permits us to treat their deliberations as part of the living present.

It is this tradition which is, soon or late, recalled when the Senate undertakes to give its advice and consent to nominations to the Supreme Court. For it is the Supreme Court, more than any other American institution, that must forge a bond capable of uniting the past with the present and the present with the future. It is the Court which must articulate the meaning of the grand tradition for ourselves and for our posterity. The tradition recognizes that intelligent differences of opinion can be entertained regarding this or that decision. But the commonly observed disagreement on particular cases, which often derive from a different reading of special facts or circumstances, sometimes disguises a higher fundamental agreement. That agreement, which is or ought to be at the very center of the thinking of those who are elevated to the Court, consists in the understanding that ours is uniquely a government of laws and not of men. It is men, of course, who must interpret the law. But it is the law, and the law alone, which rightly commands the allegiance of free men. It is for this reason that we can in justice demand that those who sit upon the Court demonstrate soundness of character, sobriety of temperament, a willingness to subordinate personal bias, and, above all, a fervent dedication to the intent of the framers as the guiding star of constitutional interpretation.

In the light of the foregoing, Mr. President, I think it would be unwise for the Senate to become preoccupied with contentious disputes on the nominees' views on this or that issue of apparent immediate concern. The interjection of yet further ideological pressure will serve only to advance an opinion already too far advanced that the Court is, or should be, animated by the same passions which animate day-to-day political debate. Issues change; men change. The passionate range of 1 hour may become the moot question of the next. A danger to liberty perceived from one quarter today may give way, unpredictably, to a yet more sinister danger from another quarter tomorrow. The Supreme Court, least of all American institutions, can ill-afford to be swayed by the ideological conflicts of the moment. To be sure, the Court would be foolish to ignore such conflicts altogether; but it would be equally as foolish for the Court to attempt to set its compass by the shifting poles of senatorial or public opinion. Indeed, it is the highest function of the Court precisely to transcend the hotly contested issues of the hour, by viewing them in the light of enduring considerations which are often ignored in the everyday clash of political opinions.

The performance of this task demands great skill on the part of those to whom it is entrusted. And not only skill of a technical or legal sort, but as well an ability to interpret the Constitution in a manner at once flexible and firm; an ability to interpret the Constitution in the light of new problems without making of it a thing of infinite plasticity; an ability to distinguish between slavish devotion to the past and prudential respect for precedent; and, perhaps above all, an ability to deduce from the Constitution those unchanging principles which ought to guide free men confronted by ever-changing circumstance.

Mr. President, I believe that the record leaves no doubt whatever but that Lewis Powell and William Rehnquist possess these skills in the highest degree. And at a time when the Court is suffering from a crisis in public confidence, it is of particular importance that the Court be reinforced by men of their qualifications, by men who understand the requirements of the judicial process.

The viability and authority of the Court depend in the last analysis on its continuing ability to sustain a high degree of public confidence. President Jackson reminded the Court on one occasion that it was without the power to enforce its decrees. We need to remind ourselves again that such power as the Court possesses depends most decisively on one thing above all; namely, its ability to persuade men of widely divergent passions, opinions and interests that its decrees are reasonable, that they are based on an objective application of the law, that they are, therefore, entitled to be obeyed.

This dependence of the Court on the continuing good will of the public was described by that great student of American politics, Alexis de Tocqueville, in the following words:

The power of the Supreme Court Justices is immense, but it is a power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is dangerous to lag behind as to outstrip it.

The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.

These remarks of Tocqueville, penned nearly 150 years ago, seem to me especially pertinent to our own time. Those who truly love the Court are bound to pay them particular heed, for they contain such wisdom as is necessary for the restoration of public confidence in the judicial process. Such a restoration, I believe, will be admirably advanced by the addition of Lewis Powell and William Rehnquist to the Supreme Court.

EXHIBIT 1

[From the New York Times, Nov. 15, 1971]

THE COURT APPOINTMENTS

In recent years, the Senate has been loath to argue about the judicial philosophy of Supreme Court nominees. It has generally assumed in the absence of damaging evidence to the contrary that any nominee who is intellectually qualified, honest and experienced in some branch of the legal profession will cultivate the detachment and perspective which the task of judging requires. But inasmuch as President Nixon has to a far greater degree than normal politicized the process of selection and has so insistently proclaimed his determination to remake the Court in his own image, the Senate needs to recall that its traditional deference to Presidential nominations is an institutional courtesy rather than a constitutional command.

Assistant Attorney General William H. Rehnquist's published belief that the Senate has an obligation to inquire into the basic philosophy of a Supreme Court nominee is applicable to his own position today. The question is whether the nominee should be evaluated by the Senate in terms of his specific political, social and economic views—quite apart from the obvious requirements of integrity, ability, temperament and training. Does not the President have the privilege of nominating to the Supreme Court a man or woman of any political orientation that pleases him, without interference by the Senate; or does the Constitution through its "advise and consent" clause give the Senate the right to reject a candidate because it disagrees with his politics or his philosophy?

* * * * *

The Supreme Court should be above politics; yet it is obvious that the Supreme Court deals with the stuff of politics. We have repeatedly argued that while the President owes it to the Court and the American people to keep partisan politics out of his judicial appointments, he ought to have the broadest latitude in his selections so long as they are made within the context of the American democratic system. What this means is that the candidate, whether liberal or conservative, of the right or of the left, must not be hostile to the broadly accepted principles of American constitutional democracy. This test the Senate has the right and duty to make.

The choice of Lewis F. Powell presents in this context relatively little difficulty. A leading lawyer of Richmond, a highly regarded member of the profession, a thorough-going conservative in political philosophy. Mr. Powell has demonstrated during a long record of service to the community as well as to the bar that he has the requisite personal, intellectual and basic philosophic qualities.

The same cannot be said for Mr. Rehnquist. Though he is undoubtedly a capable lawyer of impressive academic and intellectual attainments, his entire record casts serious doubt on his philosophic approach to that pillar of the American constitutional system, the Bill of Rights. On every civil liberties issue—wiretapping, electronic surveillance, "no knock" entry, preventive detention, rights of witnesses before Congressional committees and state legislatures, the rights of the accused—Mr. Rehnquist's record is appalling. He seems to have scant respect for the individual citizen's right to privacy, relying on "self-discipline on the part of the executive branch" to provide the protection needed. But if "self-discipline" by Government officials were sufficient in such circumstances, why would this nation need the carefully defined safeguards of the Bill of Rights?

What alarms us about Mr. Rehnquist is not the conservatism of his views—Mr. Powell certainly shares that characteristic—but our conviction on the basis of his record that he neither reveres not understands the Bill of Rights. If this is so, then he certainly does not meet the basic requirement that a justice of the Supreme Court be philosophically attuned to the irrevocable premise on which the American political structure rests: the protection of individual liberty under law, particularly against the repressive powers of government.

The Constitution leaves room for a wide diversity of political and social interpretation and even of judicial philosophy; but through the issues of human freedom as set forth in the first ten amendments there runs a basic imperative that cannot be dismissed and must not be trified wtih. A deep-seated respect for these liberties, a belief that they cannot be arbitrarily abridged or diminished by any power, even that of the President, is indispensable for service on the Supreme Court.

Mr. Rehnquist's elevation to the Supreme Court could have a critically regressive effect on constitutional protection of individual liberties for a long time to come. On Mr. Nixon's own premises, the Senate would be within its rights in insisting that while it may be content to accept a distinguished conservative like Mr. Powell, it is not obliged to accept a radical rightist like Mr. Rehnquist.

[From the New York Times] Nov. 19, 1971]

WILLIAM H. REHNQUIST'S RECORD

In your Nov. 15 editorial, you chose to label William H. Rehnquist a "radical rightist" and opposed his Supreme Court nomination on that basis, although you recognize he is "a capable lawyer of impressive academic and intellectual attainment."

If The Times had a factual case against Mr. Rehnquist, it should have been stated, Instead you relied upon journalistic shorthand to characterize a number of issues on which Mr. Rehnquist, as Assistant Attorney General, made public statements in support of the Administration's position. For example, you refer to "no-knock" entry and "preventive detention."

What you describe as "no-knock" is a procedure whereby a police officer, in obtaining a search warrant, can secure further permission from the court to enter a dwelling without announcing himself, but only under certain limited circumstances.

Mr. Rehnquist was hardly alone in believing that this procedure is reasonable. This doctrine and procedure has long been practiced and declared constitutional in many states—32 at last count. A majority of both houses of Congress voted it into law twice last year.

What you describe as "preventive detention" is a procedure designed to protect the public in situations where the evidence convinces a judge that one or more serious crimes will be committed by the arrestee if he is released on ball.

Mr. Rehnquist's views on the reasonableness of "preventive detention" were also shared by the majority of both houses of Congress.

You also refer to wiretapping, but fail to point out that in 1968 Congress expressly recognized the propriety and necessity for wiretaps and authorized their use in connection with certain specified types of crime. The enactment by Congress is in full compliance with the 1967 landmark Supreme Court decision on electronic surveillance. (Berger v. N.Y., 388 US 41)

As to the limited use of wiretapping for the purpose of gathering intelligence relating to the national security, this is a practice which has been used and defended by every President and Attorney General since Franklin Roosevelt's Administration.

May I suggest that The Times might well re-read the articles written by your associate editor, Tom Wicker, and by Anthony Lewis, who spent so many years covering the Supreme Court. Both recognize the propriety of confirmation for Mr. Rehnquist, and I don't think The Times overcomes their reasoned arguments simply by coining the label "radical rightist."

In the course of full hearings before the Senate Judiciary Committee, we have seen or heard nothing which would indicate that Mr. Rehnquist's devotion to the Bill of Rights is anything less than total. We believe he is eminently qualified for the Supreme Court, and The Times editorial has pointed to nothing which is inconsistent with that conclusion.

United States Senator from Nebraska

ROMAN L. HRUSKA.

WASHINGTON, *November 17, 1971.*

EXHIBIT 2

COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,
New York, N.Y., November 18, 1971.

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

DEAR SENATOR EASTLAND: I am writing to you as Chairman of the Senate Judiciary Committee to state my hope that the Committee will recommend and the Senate will confirm the appointment of William H. Rehnquist to the Supreme Court of the United States. Ordinarily, I would not think my impressions of a nominee to the Supreme Court were worthy of any special interest by the Committee. However, Mr. Rehnquist has been subjected to such extravagant denunciation

by groups and persons with whom I am usually in accord that I feel justified in making my views a matter of record.

In assessing what weight to give my views, it may be helpful for you to know that I am Associate Professor of Law at Columbia University School of Law. My primary teaching interest and responsibility is Constitutional Law. After graduating from Yale Law School in 1966, I served for one year as law clerk to Chief Justice Earl Warren, and then for the next two years I served as Special Assistant to the Assistant Attorney General in charge of the Office of Legal Counsel.

In that latter capacity, I had the bulk of my working relationship with Mr. Frank M. Wozencraft, Mr. Rehnquist's gifted predecessor as Assistant Attorney General. When Mr. Rehnquist became Assistant Attorney General, I remained in the Office of Legal Counsel at his request for about five months while he became acquainted with the operations and responsibilities of the Office. During that time I worked closely with him on a daily basis on a variety of constitutional and other legal problems, I should make clear that my impressions of Mr. Rehnquist were formed solely on the basis of this close association over a relatively short period of time.

In working with Mr. Rehnquist, I developed clear impressions of his attributes of character and intellect which seem to me most relevant in assessing his qualifications to be a Justice of the Supreme Court. First, and most important, Mr. Rehnquist is a person of great intelligence. He is a painstaking legal craftsman with a lively and subtle interest in the interplay of constitutional law and social policy. I will not elaborate this point, since I believe no fairminded person could doubt Mr. Rehnquist's exceptional intellectual qualifications to sit at the highest level of our judicial system. Instead, I want to address myself to Mr. Rehnquist's fairness and objectivity.

In my work with Mr. Rehnquist he seemed to me unusually openminded and free of reliance upon dogma in dealing with constitutional questions. His approach to legal problems is highly discriminating; few persons in my experience have exhibited more alert skepticism as to the utility of sweeping generalizations and ideological positions. Always I had the impression that careful analysis governed his response to legal questions.

Mr. Rehnquist approaches legal issues with the utmost forcefulness and honesty. In our work together, he was open to reasoned persuasion, tolerant and respectful of my quite different constitutional and political outlook, and ever willing to examine his position in the light of the fullest possible analysis of facts and legal principle. He is an independent, even iconoclastic, thinker.

Candor, openness to argument, and forcefulness of logic and expression are critically important to the performance of the Supreme Court, with its unique and delicate power of constitutional review. I believe Mr. Rehnquist's appointment will help restore these necessities of judicial process, sadly diminished by recent events and losses from the Court.

I do not doubt that Mr. Rehnquist's positions on matters before the Supreme Court will be opposed, often diametrically, to my understanding of the mandates of our Constitution. One who reveres the person and performance of Chief Justice Warren, as I do, cannot but look forward to Mr. Rehnquist's likely decisions with some misgivings. But protecting the independence of the Supreme Court by subjecting nominees to an outcome-determinative test is self-defeating. Ultimately, those who believe in the essential role of the Supreme Court as an active and principled protector of individual liberties must rest their faith on process, not on outcome. Candor, force of logic, attention to pertinent detail, openmindedness in approaching the discrete and varied problems which come before the Court—these are the conditions of independence and purpose in our judicial institutions. They are attributes which I believe Mr. Rehnquist possesses in abundance.

I respectfully urge the Judiciary Committee to recommend confirmation of William H. Rehnquist to the Supreme Court.

Respectfully,

BENNO C. SCHMIDT, JR.

Mr. GRIFFIN. Mr. President, will the Senator from New York yield?

Mr. BUCKLEY. I am glad to yield to the Senator from Michigan.

Mr. GRIFFIN. I wish to commend the distinguished junior Senator from New York. He has made an excellent statement, and I wish to associate myself with his line of reasoning. The distinguished Senator makes interesting points—points that in past years have been made over and over again on the floor of the Senate by some of our colleagues who regard themselves as liberals.

I refer to discussions that took place concerning the nomination of Arthur Goldberg, for example.

At that time, conservatives in this body were admonished to look at Mr. Goldberg's qualifications—not his philosophy or practical persuasion.

It is a fact that a good many in this body at the time who were regarded as conservatives joined their liberal colleagues in voting to confirm Mr. Justice Goldberg. Of course, a similar story could be told with respect to the debate and confirmation of Mr. Justice Thurgood Marshall.

I wonder if those liberal Senators who intend now to vote against Mr. Rehnquist, solely because of his philosophy, would take the position that conservative Senators voted wrong when they voted earlier to confirm Messrs. Goldberg and Marshall.

NOMINATIONS OF LEWIS F. POWELL AND WILLIAM H. REHNQUIST

Mr. PERCY. Mr. President, I wish to inform my colleagues in the Senate that I intend to vote for the confirmation of the nominations of Lewis F. Powell and William H. Rehnquist, and urge as well their support of these candidates.

I have known Lewis Powell for many years. I have had the privilege of observing his manner, of knowing his thoughts, and of sharing the esteem for him held by all who know him. He is eminently well qualified and his appointment to the Supreme Court promises to bring distinction not only to his own career but to that institution. The enthusiastic acclaim of the public and the press which has greeted Lewis Powell's nomination and the unanimity with which it was received and passed by the Senate Judiciary Committee suggests the broad support for his candidacy. I am pleased and honored to indicate officially at this time my own support for Mr. Powell's confirmation.

The nomination of William H. Rehnquist, however, has not enjoyed this degree of support, a fact which we cannot permit automatically to portend doom. Few men in public and private life enjoy the luxury of unanimous support, even among their friends. At most the controversy signifies the need for careful scrutiny of the nominee's record, with an open mind to all the evidence presented. I have sought to so scrutinize Mr. Rehnquist's record. I have talked with him in private, putting to him the hard questions which his critics have raised, and I have received frank and thoughtful replies. I have listened carefully to him in public, and have found him similarly frank and thoughtful. I am persuaded that Mr. Rehnquist will bring to the Court distinction, and I trust will earn by his performance there the same acclaim which now characterizes the nomination of Mr. Powell. I will vote for confirmation of both men.

SCOPE OF SENATORIAL SCRUTINY OF NOMINEES

Much has been made in the course of considering the present nominees over whether the Senate may legitimately inquire into the judicial philosophy, background and views of a nominee or whether the consideration is more properly limited to his competence, integrity, and general fitness.

It has been my policy to consider every relevant factor: Experience, legal ability, personal integrity, political and constitutional philosophy, judicial temperament, and a sensitive regard for ethical requirements of the bench.

Without rehashing all the arguments in support of this approach, suffice it to say that I am persuaded that the history surrounding adoption of article II, section 2, clause 2 of the Constitution would support an active and independent role for the Senate in the appointment of Supreme Court Justices.

The judicial process is far from mechanical; it draws upon the sum total of all that a judge brings to it in terms of his background, experience, values, judgment, and so forth. Since a judge's policy positions and judicial philosophy figure largely in the outcome of cases, it follows that they should figure as well in the appointment process.

ANALYSIS OF SPECIFIC ALLEGATIONS

Since William Rehnquist has not served in a judicial capacity, rather having served almost exclusively as an advocate, we are left to try to peek behind the veil to determine what Rehnquist's philosophy and positions really are as opposed to what he has been required to assert in representing his clients' interests. It is no small task, particularly when specific inquiries required that the nominee invoke the attorney-client privilege, thereby ruling out any meaningful examination. This is not to say that the invocation was improper, merely that it complicated the investigation to determine his suitability for the high court.

In any case, it seemed essential to review carefully those speeches wherein Rehnquist was alleged to have said and implied certain things which bear materially on his fitness for the Court. These are dealt with below:

First. Rehnquist, in a 1957 article for U.S. News & World Report, is alleged to have levied a strongly-worded criticism of Supreme Court clerks for slanting research material and improperly influencing court decisions, due at least in part

to his characterization of the clerks as "left wing."

The article is, in fact, more informative in tone than critical. It is carefully worded, distinguishing between the work and relative influence of the clerks in dealing with certiorari petitions and the preparations of actual decisions. In the latter case, Rehnquist pointed out that the clerks had virtually no influence. Then conceding that there was a wide diversity of opinion among the clerks, he concluded that the "political cast of the clerks was to the left of either the Nation or the Court." As a general proposition, it is difficult to argue with that or be surprised by it.

Concerning the decisions on certiorari petitions the clerks were more influential and Rehnquist included himself as among those whose unconscious bias crept into their work. Again, it is hard to argue with that possibility occurring in almost any job. I am not sure how you could rule it out.

I found nothing in the article suggesting that Rehnquist had taken off on an attack against the Court, the clerks, or the "left-wing."

Second. Rehnquist, in 1969, is alleged to have lambasted student demonstrators as the "New Barbarians."

Rehnquist did use this phrase, but he limited its applicability to those "who care nothing for our system of government and law, believing that the relatively civilized society in which they live is so totally rotten that no remedy short of the destruction of that society will suffice." In limiting his definition, he also limited the numbers of people to whom it was directed—the relatively few militants who seek to overthrow the government. I did find Rehnquist's use of the term "barbarians" inflammatory and perhaps imprudent, but he was careful not to include—in fact he specifically exempted—the majority of peaceful demonstrators.

Third. Rehnquist has been charged with a willingness to leave to the discretion of law enforcement agencies and the Executive the imposition of controls on Government surveillance activities against private citizens. March 5, 1971; speech before the Maricopa County Bar Association.

This is partly true. Rehnquist has urged that even though agencies may abuse their authority, it would be a serious mistake to shackle their investigative powers by legislation. Law enforcement agencies must have some latitude in order to provide a reasonably effective system of law enforcement.

The errors of zeal by law enforcement officers in this area do not constitute in his judgment a violation of civil liberties, thus making attempts to amend the Constitution to provide for such ill-advised. If legislatve guidelines are deemed necessary—and Rehnquist left room for this possibility—they should be framed in such a way as to provide the greatest latitude for investigations, lest law enforcement be improperly hamstrung.

Rehnquist specifically stated that peaceful gatherings and political activity should be "out of bounds" to investigative agencies, but the isolated cases which have come to view where surveillance activities have been inordinately abusive should not be regarded as the rule.

Though I would opt more readily for some legislative controls on surveillance, I think Rehnquist's representation of his view was reasonable and carefully expressed.

Fourth. Rehnquist has been portrayed as the primary spokesman for the administration last May when mass arrests were made by the Washington police in the May day demonstrations, and his espousal of the doctrine of "qualified martial law" was particularly repugnant.

It is significant that Rehnquist again relies on narrow definitions to justify his position, an intellectually respectable if not politically desirable approach. The demonstrations which need to be quashed by the Government, Rehnquist asserted, are those which threaten to immobilize—and, therefore, move toward the destruction of—that Government. Rehnquist has no legal opposition to peaceful demonstrations.

From there, Rehnquist moves to justify the activities of Washington police on the basis that the "extreme situation" which prevailed brought about the exercise of the legitimate power of police and troops in such emergencies to detain individuals without bringing them before a committing magistrate and filing charges of criminal conduct against them. In this situation the doctrine customarily referred to as "qualified martial law" obtains.

The application of this doctrine, according to Rehnquist, is strictly limited:

> In that situation, to protect itself and its citizens against actual violence or a real threat of violence is held to outweigh the normal right of any individual detained by governmental authority to insist on specific charges of criminal conduct being promptly made against him, with the concomitant right to bail or release pending judicial determination of those charges. The courts limited the duration of the power to the duration of the emergency, however, and have also insisted that the claim of violence be not a mere sham.

I, quite frankly, had strong reservations about the tactics resorted to during the May day melee, reservations which I think have been partially vindicated by the subsequent court of appeals decision invalidating most of the arrests made under those procedures.

But it is important, in my opinion, that Rehnquist did not develop the concept of qualified martial law, as certain of his detractors claimed; rather he applied an established principle which he considered an appropriate precedent. In doing so, he did not move in a manner inconsistent with strict legal process.

Fifth. Rehnquist is being held responsible for his defense of wiretapping, with some loss of an individual's privacy, as not too high a price if it helps stop major crime.

Rehnquist is, in my opinion, being stuck with the policy adopted by Congress and by the role of the Justice Department.

In 1968, Congress authorized wiretapping with certain safeguards in the Omnibus Crime Act. The Justice Department is committed to its adoption and its defense because of this direction from Congress, if the law is not clearly unconstitutional on its face.

I think Rehnquist has been wrongly attributed with the views and demands of his client. Understanding, of course, his reluctance to comment in violation of the attorney-client privilege, I nevertheless wish somehow that the Senate could be apprised of the true feelings of Mr. Rehnquist in this area.

Sixth. In 1964, Rehnquist wrote a letter to the editor of the Arizona Republic, opposing the passage by the Phoenix City Council of a public accommodations ordinance.

Rehnquist opposed the ordinance because discrimination of this sort was the exception rather than the rule in Phoenix, thus making the purpose of the ordinance not an attempt "to make available a broad range of integrated facilities, but to whip into line the relatively few recalcitrants." Furthermore, "unable to correct the source of the indignity to the Negro, the ordinance redresses the situation by placing a separate indignity on the proprietor."

This letter does suggest a certain rigidity to the cause of civil rights. It is callous to the inequities blacks have had to suffer and insensitive to the course of events in this country at that time which seemed to indicate a willingness to rectify some of these inequities. The letter is cause for concern, in my mind.

However, Rehnquist did say that, on this matter, he has changed his mind. He has said this publicly and privately. We can and should inquire as to the slowness of his change of mind, but in the final analysis we must leave room for such changes. I think Rehnquist's change of mind is a good thing substantively and in terms of analyzing his capability to serve on the Court. Without being overly optimistic, I think his change of mind at least signals growth.

Seventh. In 1967, in another letter to the editor, Rehnquist outlined his views on busing and de facto segregation. The most widely quoted excerpt from the letter is as follows:

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

He then goes on to enunciate a policy in favor of neighborhood schools.

Again, these statements raise some red flags in terms of our passing on the credentials and suitability of Mr. Rehnquist for the Supreme Court. But it is important to note that immediately following the excerpted line—quoted above—Rehnquist went on to say:

> That we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

I think that rounds out what Rehnquist really had to say on the matter. We are dedicated to a free society, but at this time integration seems to be the only viable means to freedom for many, many minority citizens, and so integration becomes the short-range goal. I wish that

Mr. Rehnquist had included this idea as well.

Eighth. There have been a variety of charges that Rehnquist supports the aggrandizement of the executive branch of Government in terms of its relative power vis-a-vis the other branches. It has usually been characterized in terms of the executive's "inherent powers." These allegations have grown out of Rehnquist's statements on the war powers, law enforcement, the "committee veto" proposal, Government surveillance, and so forth.

In almost every instance, Rehnquist was speaking at the behest of the administration, whose business he was about. It is logical to assume that he would press for enlarged executive powers, as some of us in Congress have sought to assert broader congressional responsibilities. I am convinced—indeed we have virtually no information on which to conclude anything other than that he was speaking for the administration on these points. I have seen nothing from his earlier statements that would suggest a preoccupation with executive power.

Ninth. Rehnquist is alleged to have played an important role in the Pentagon papers case, pleading for prior restraint of publication.

Rehnquist, however, explains that he took only one action in connection with proposed litigation by the Government against the Washington Post in this connection. At the request of the Attorney General he telephoned Ben Bradlee, executive editor of the Post to request on behalf of the Justice Department that the Post refrain from further publication of these papers. Mr. Bradlee informed Rehnquist that the Post would not accede to this request.

Tenth. It has been charged that Rehnquist harassed and intimidated voters while he was an elections official for the Republican Party in Maricopa County, Ariz.

These are serious charges, deserving the most careful examination possible. Rehnquist has gone to great lengths to provide a full explanation of his role, his observations at each election in which he was involved, and his understanding of other related events at the time. It is important to note that Rehnquist states unequivocally that "in none of these years did I—Rehnquist—engage in challenging the qualifications of any voters." Though his full response has already been reprinted in the RECORD, I ask unanimous consent that it be printed at the conclusion of my remarks so that persons who read my statement will have the benefit of this explanation. The charges, as I have said, are serious enough to justify reprinting the full response of the nominee. I am persuaded that he has answered satisfactorily every allegation and is guilty of no wrongdoing in connection with the performance of his election responsibilities.

The PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

SUMMARY

Mr. PERCY. The Rehnquist nomination is unlike any other recent nomination to the Supreme Court on which the Senate has had to pass. It raises no clear-cut issues to which it is easy to respond in a "yea or nay" fashion. This dilemma has been apparent throughout the hearings and investigations and should be reflected in my statement as well. While there seems to be a "gut" reaction against Rehnquist's record and philosophy by some, there has been precious little in terms of pragmatic, specific evidence to support that reaction.

What opponents seem to be saying is that in confirming Rehnquist's nomination, individual liberties are subjected to considerable risk. I do not think the risk is considerable.

First. Rehnquist has a distinguished intellect giving him the capacity and inclination to consider every option, carefully and thoroughly with a full understanding of the implications they pose. The importance of intelligence, of course, especially on the Supreme Court is not that it promises in every case that the right result will prevail, but that irrelevancies will be exposed and discarded—emotion, prejudice, unexamined tenets of historical falth—that get in the way of decision making. Finally, of course, intellectual excellence suggests a longing for the truth and the capability to recognize it and pursue it in those occasional instances when we are granted the blessing of seeing it.

Second. Rehnquist seems to be a fair man who has demonstrated a sensitivity for the balancing act which is the essence of judicial decisionmaking. He rarely sees questions in terms of absolutes, perceiving instead the fact that in most instances the issues which come to the Court require determinations as to what is more right or more wrong in light of constitutional mandates.

Third. His speeches and public statements suggest that he possesses the requisite fidelity to the Constitution, of which others have spoken so well and so persuasively of late. Indeed, it has been Rehnquist's almost stubborn adherence to what he perceives to be the letter and spirit of the Constitution that has elicited some of the most bitter attacks against his judgment. He is a firm believer that this Government, weak and struggling though it may be at times, is better than no government—anarchy.

Fourth. Rehnquist's disposition and intellect have imbued him with a resulting capacity for change. While he could not be portrayed as leading the cause for change, neither has he revealed himself as incapable of adapting to changes in social values and legal imperatives.

Fifth. Rehnquist is a gifted advocate, a position which has on occasion saddled him with responsibility for some views which might more properly be attributed to his client but which has at the same time provided him the forum wherein by proving himself he has proven his worthiness to serve on this Court. He has been widely regarded as the Justice Department's best spokesman, certainly its most articulate and penetrating one.

Given the fact that passing on a particular nominee to the Supreme Court is always risky business, in that it is impossible to determine in advance how a man will respond to the demands of the High Court, it seems to me that it is especially risky to base one's judgment on political grounds. I personally have some strong political differences with some views held by Mr. Rehnquist. But relying on politics as a basis for supporting or rejecting a nomination presumes some kind of rightful political orthodoxy. Men and politics change; to oppose a nominee on political grounds alone is to ignore both the angers and the facts.

CONCLUSION

I support the confirmation of the nomination of Rehnquist, not entirely without reservations, but on balance. He is a young, articulate, gifted lawyer; he is, it seems to me, as well, a good and decent man. The doubts his nomination prompts in terms of his sensitivity to the singular importance of civil liberties and equal protection of the laws will be assuaged by the recognition that he is open-minded, uncommonly bright, and genuinely committed to the rule of law and hopefully will be overcome entirely by the record he establishes once he assumes his responsibilities on the Bench.

EXHIBIT 1

QUESTIONS TO WILLIAM REHNQUIST

QUESTION

Please describe in as much detail as possible your position (including title and the manner in which you were selected), responsibility, and activities in connection with Republican Party efforts to challenge Democratic voters in Arizona for each of the following elections, separately: 1958, 1960, 1962, 1964, 1966, 1968.

In addition, please answer the following questions concerning your position, responsibility or activities in each of the above-mentioned years:

(a) Did you personally engage in challenging the qualifications of any voters? If so, please describe the nature and extent of the challenging you did and the bases on which the challenges were made.

(b) Did you train or counsel persons selected to be pollwatchers or challengers about the procedures to be used in challenging? If so, please elaborate concerning how the persons were selected, and the training that you gave. Did you in any of the above-mentioned years train or counsel persons selected to be pollwatchers on the bases on which challenges could be made? If so, please elaborate concerning what you advised these persons were proper bases under law for challenges in each of the relevant years.

(c) Did you prepare, select or advise on the use of printed passages from the Constitution designed to be employed by challengers to determine the literacy of a potential voter? Did any such practice come to your attention? Did you think it proper and lawful? If not, did you take steps to curb such procedures?

ANSWER

During the course of the Committee's deliberations, I submitted the following affidavit to the Chairman of the Committee.

"I have read the affidavits of Jordan Harris and Robert Tate, both notarized in Maricopa County, Arizona. Insofar as these affidavits pertain to me, they are false. I have not, either in the general election of 1964 or in any 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."

In order to fully respond to question 10, an understanding of the background of Republican challenging procedures in Maricopa

County is necessary. I have therefore tried as best I can to recall and set forth that background.

A combination of the peculiarities of Arizona election law, the customary practices of the Board of Supervisors in appointing precinct election officials, and the numerical weakness of registered Republicans in part of the County resulted in the fact that the only method by which a Republican observer or poll watcher could be stationed inside a particular polling place in many precincts in order to watch for voting irregularities was to be there as a "challenger." While he was authorized by law to challenge voters, the prospects of his being successful were not great, since the challenges he made were ruled upon by a three-man election board (two judges and an inspector) and in the precincts with extraordinarily heavy Democratic registration at least two and often three members of this board would be Democrats.

The challenger's real usefulness to the Party, therefore, was not that he was going to be able to prevail upon the election board to disqualify any large number of voters, but that his mere presence as a party representative would have a tendency to discourage any large-scale irregularities in voting procedures at that precinct. My recollection is that the most frequent cause of dispute which arose on Election Day during the late 50s and early 60s was the nature of the credentials required for a challenger to be allowed to enter and remain in a polling place, since in many of these precincts there had never been a Republican representative on the scene during Election Day.

With respect to the specific questions posed, I have attempted to refresh by recollection by speaking with several persons in Arizona who acted in Republican Party affairs during the years covered in this question and to Judge Hardy, who was active for the Democratic Party at the same time. I have also had occasion to see two local newspaper articles which appeared in the Fall of 1964, describing my position during the elections of 1960, 1962, and 1964. I recall that at the time there were written schedules, instructions, and the like prepared at least for the elections of 1960, 1962, and 1964, but I have not found anyone who was able to locate any of this written material, and it may no longer be in existence.

In 1958, I became involved in the Election Day program on quite short notice, and spent all of the day at Republican County Headquarters in Phoenix answering questions as to the election laws on the telephone. So far as I remember, I was the only person having this responsibility at County Headquarters. I don't believe I had a title, and I cannot remember by whom I was selected. As I recall, Don Reese, then of Phoenix but presently of Houston, Texas, was County Chairman in 1958.

My attention has been called to a clipping from the *Arizona Republic* in October 1964, which states that in 1960 I was co-chairman of the "Ballot Security Program." I do not have any independent recollection of this fact, but I have no reason to dispute the account in the newspaper. As I recall, however, the program in 1960 was not called the "Ballot Security Program," since I don't remember hearing that term used before 1964.

In 1960, I supervised and assisted in the preparation of envelopes to be mailed out in advance of the election for the purpose of challenging voters on the basis of their having moved from the residence address shown on the poll list; I also recruited about a half a dozen lawyers to work on a "Lawyers Committee" on Election Day. I did not myself recruit challengers, but I did speak to a "school" held for challengers shortly before election, in order to advise them on the law. I believe I also supervised and assisted in the assembling of returns of our mailings which were returned "addressee unknown", so that they could be made available to the particular challenger who was stationed in the precinct in which the address was located. On Election Day, I believe that I spent most of the day in County Headquarters. In that year, however, we had enough other lawyers available in County Headquarters so that I probably spent some of the day going to precincts where a dispute had arisen, and attempting to resolve it.

I cannot remember whether Don Reese or Ralph Staggs was County Chairman in 1960; I believe I was designated by whoever was County Chairman that year.

With respect to 1962, I have been shown an article in the October 1964, *Arizona Republic* which states that I was Chairman of a Lawyers Committee which operated on Election Day. This is consistent with my own recollection. I do not believe that in this year I participated in the mailing out of envelopes prior to election, though I may have. I did speak at a school for challengers, I believe, in much the same manner as in 1960. On Election Day, my recollection is that I spent most of the day in Republican County Headquarters; however, I think that on several occasions in 1962, just as in 1960, I went to precincts where disputes had arisen in an effort to resolve them.

With respect to 1964, I have seen an article in the *Arizona Republic* dated October 1964, stating that I was Chairman of the "Ballot Security Program." This is consistent with my recollection. I presume that I had overall responsibility for the mailing out of envelopes, the recruiting of challengers, and the recruiting of members of the Lawyers Committee to work in County Headquarters; however, I believe that there were individuals other than me who were directly responsible for each of these aspects of the program. At this time, Wayne Legg was Chairman of the Republican County Committee, and I presume it was he who designated me as chairman. My recollection is that on Election Day during this particular election I spent all of my time in County Headquarters.

I also think, though I am not certain, that I spoke at the school for challengers held just before the election; if I did not speak to the school, I believe I was present when someone else spoke on the law. Challengers were advised in this year, pursuant to an opinion issued by the State Attorney General, that challenging at the polls on the basis of literacy or interpretation of the Constitution was unlawful by virtue of the Federal Civil Rights Act of 1964.

In 1966, my best recollection is that I played no part at all in the election activities, though I am not absolutely certain. If I played any part, it was simply to serve as a lawyer on duty at County Headquarters for a period of several hours in order to handle questions that might come in over the phone.

In 1968, I played no part at all in the election activities.

(a) In none of these years did I personally engage in challenging the qualifications of any voters.

(b) The recruitment of challengers in each of these years was under the direct supervision of someone other than me. However, in at least two of these elections—1960 and 1962—and perhaps in 1964, I spoke at a challengers' school conducted shortly before the election. The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to the various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the basis for challenge, the method of making the challenge, and the manner in which the challenge was to be decided by the Election Board of the precinct in question.

(c) I did not. No such practice came to my attention until sometime on Election Day, 1962. The manner in which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics. Since no question was raised at that time as to the propriety or lawfulness of the use of printed passages from the Constitution by challengers in conjunction with the election board in an otherwise courteous and lawful manner, I did not consider it. Shortly after the election, I discussed this type of challenge with Charles Hardy, now Judge of the Superior Court of Maricopa County, and expressed my vigorous disapproval of any scattergun use of literacy challenges. By the time of the next biennial election, in 1964, such challenges were no longer permitted under federal law.

QUESTION

To what extent are you able to confirm Mr. Richard G. Kleindienst's statement found in the *Arizona Republic* of November 7, 1962 that the Republican challengers who worked in 1962 "are the same persons, under the same instructions, who have been doing this in Maricopa and Pima counties since 1956?"

ANSWER

I cannot speak at all for Pima County, and I cannot speak at all for 1956. I did not myself directly supervise the recruiting of challengers in Maricopa County in any of these years. If challengers were instructed in any formal way in 1958, I do not remember it. Substantially the same legal advice as to challenging, more fully described in the answer to 10(b) above, was given by me in both 1960 and 1962. I do not presently remember whether the same challengers operated in 1958, 1960, and 1962, but I believe there was some turnover each time, and a rather substantial turnover between 1960 and 1962.

QUESTION

You testified that one of the roles you played in the Republican efforts to challenge Democratic voters was "to arbitrate disputes that arose" along with a Democratic counterpart (p. 149). Did any of the disputes as to the roles of the Republican challengers which you sought to mediate involve opposition to the type of challenging procedure being employed or the basis of the challenge, as distinct from the right of the Republican challenger to function at all in such a capacity in the precinct in question? If so, please explain the challenging procedures which came under attack.

ANSWER

As described in my answer to 10(c), I recall one instance in which a Republican challenger was himself going down the line and requiring prospective voters to read some passage of the Constitution, rather than presenting his challenge to the Election Board in an orderly way. I advised him to stop this practice, and to make any challenges in the manner provided by the law.

QUESTION

Judge Charles L. Hardy in a letter to Senator Eastland describes the tactics of the Republican Party in Phoenix in 1962 as follows:

"In 1962, for the first time, the Republicans had challengers in all of the precincts in this county which had overwhelming Democratic registrations. At that time among the statutory grounds for challenging a person offering to vote were that he had not resided within the precinct for thirty days next preceding the election and that he was unable to read the Constitution of the United States in the English language. In each precinct *every* black or Mexican person was being

challenged on this latter ground and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking for their names. There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections."

(a) Please describe the relationship between your role in planning and implementing Republican election day challenging efforts that year and the tactics described by Judge Hardy.

(b) Did any of the practices described by Judge Hardy come to your attention before or during election day in 1962? If so, did you seek to curb such procedures or were they in your view proper?

ANSWER

(a) My role in 1962 was, to the best of my recollection, that described above. I neither advised nor suggested that scattergun challenges be made on the basis of literacy. I neither advised nor suggested the handing out of handbills, nor the photopraphing of voters at the election places. My talk to the challenging "school" in 1962 as to the law governing elections was, I believe, substantially the same as that which I gave in 1960. In 1958 and in 1960 virtually the entire thrust of the Republican challenging effort was devoted to preventing unregistered persons, or persons who had moved from the address from which they were registered, from voting, and as I recall the main disputes which arose in those years with respect to the right of the Republican challengers to enter the polling place to which he was assigned. I did not realize the change in emphasis during Election Day of that year. I therefore feel that there was no connection between my role and the circumstances related by Judge Hardy.

(b) The practices described by Judge Hardy, to the extent that they did in fact obtain, did not come to my attention until quite late in the day of the election in 1962. At that time I believe that the County Chairman decided to remove the Republican challenger from Bethune Precinct because of the serious trouble his actions were causing. The challenging procedures relating to residence described by Judge Hardy were, in my opinion, generally proper; those relating to indiscriminate use of literacy challenges were entirely improper.

QUESTION

Were you present at the Bethune precinct at any time on election day, November 3, 1964? If so, while you were there, did you speak to any persons waiting to vote regarding their qualifications to vote under the state literacy laws or other laws, or regarding their ability to read the Constitution? Did you ask anyone waiting to vote at the Bethune precinct in 1964 to read from any printed material which you or anyone else presented to the potential voter? Were you engaged in any dispute at the Bethune precinct in 1964 with Democratic workers regarding efforts by yourself or other Republican representatives to challenge voters? If so, please describe the incident in detail.

ANSWER

I was not present at Bethune Precinct at any time on Election Day in 1964.

ECONOMIC STABILIZATION ACT OF 1971

The PRESIDENT pro tempore. Under the previous order the Chair lays before the Senate the unfinished business, which the clerk will read by title.

The legislative clerk read as follows:

A bill (S. 2891) to extend and amend the Economic Stabilization Act of 1970.

The PRESIDENT pro tempore. Under the previous order the clerk will state amendment No. 771, proposed by the Seantor from Wisconsin (Mr. PROXMIRE).

The LEGISLATIVE CLERK. The Senator from Wisconsin (Mr. PROXMIRE) proposes amendment No. 771.

The PRESIDENT pro tempore. Time on the amendment is limited to 1 hour. Who yields time?

Mr. TOWER. Mr. President, I ask unanimous consent that I may suggest the absence of a quorum without the time being charged to either side.

The PRESIDENT pro tempore. Is there objection? Without objection, it is so ordered.

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

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

The PRESIDENT pro tempore. Without objection, it is so ordered.

AMENDMENT NO. 771

Mr. PROXMIRE. Mr. President, I yield myself such time as I may require. I expect to speak for about 8 or 9 minutes, or less.

The PRESIDENT pro tempore. The Senator from Wisconsin is recognized.

Mr. PROXMIRE. Mr. President, I do hope that the managers of the bill will accept this amendment. I think if they read the amendment carefully and think about what it provides they may be disposed to do so, because it is an amendment which does provide for open hearings, but it provides complete and full safeguards for any kind of confidential executive session the Pay Board and Price Commission would like to have.

Let me read the amendment:

Any hearing or other proceeding conducted by the President or his delegate for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers shall be open to the public except that a private hearing or other proceeding may be conducted to receive information considered confidential under section 205 of this title.

As all of us who have served in the Senate know that this is exactly how the Senate conducts its operations. We normally have open hearings, but when information should be received privately or when there is a markup of a bill we have an executive session. This amendment would provide the same rule for the Pay Board and the Price Commission, and require that hearings conducted by the Pay Board and Price Commission be open to the public. This amendment is prompted by the testimony of Judge Boldt before the Joint Economic Committee last Saturday. Judge Boldt indicated that hearings before the Pay Board were secret, that the public and the press were excluded, and that not even a transcript was available. This type of secrecy has no place in a democratic society.

My amendment would not require the disclosure of information considered to be confidential under section 205 of the legislation.

I asked Judge Boldt if a reporter who might come to the hearings would be admitted, and he said "No." I asked him if a transcript was kept of these very important hearings. It would have a profound effect on what consumers have to pay throughout the country, and what millions of wage earners are going to get.

He said no transcript is kept. He did say that minutes were kept and that, at our request, the minutes would be made available to our committee. On something that is this far reaching, that has this kind of effect on many, many people, there is just no place for this type of secrecy. If confidential information were involved in the course of a public hearing, the Pay Board or Price Commission would be permitted to consider the information in executive session. Thus my amendment would in no way require the disclosure of trade secrets or other confidential information.

As a matter of fact, what is confidential is entirely at the discretion of the board. They can decide, on the basis of the firms coming to them, that that information shall not be revealed publicly. The chairman of either board could say the session would be executive. I do think there would be a wholesome public pressure not to abuse that. Obviously pressure would be on the Board to make these hearings open, and they should be open, but there are confidential matters which should be protected. In those circumstances, this amendment would not interfere with that.

I would expect that much of the information bearing on a proposed wage or price increase would not be considered confidential under section 205. There is no reason why this type of information cannot be discussed in a public hearing. If the Pay Board or Price Commission holds a hearing on a proposed wage or price increase, why should not the public be invited to sit in as long as confidential information is not discussed? No one has a greater stake in the program than the general public. Why exclude them from the hearings?

Mr. President, the basic reason for supporting my amendment is that the public has a right to know what is going on. But there is a second important reason for adopting my amendment. If public hearings are required, it will serve to moderate some of the excessive demands for wage and price increases on the part of powerful labor unions and corporations. It is one thing to argue for an exorbitant price increase behind closed doors. It is an entirely different matter when these arguments must be made in public. Pub-

too deep, and the concerns that press in upon us are too urgent. But the voices of moral acquiescence to oppression are sometimes heard above the voices calling for a renewed commitment to freedom. At this time the protest of Soviet Jews is a compelling reminder of where our national commitment lies. We must support their protest for no other reason than because it is the right thing to do. In acting with justice and compassion towards them, we will enrich our own lives and strengthen the spirit of our nation.

FEDERAL EMPLOYEE WAGE POLICY

Mr. PELL. Mr. President, I think it appropriate, while we are considering the economic stabilization program, to point out the basic inconsistencies and self-contradictions involved in the administration's Federal employee wage policy.

I think these inconsistencies are particularly notable in the case of the blue-collar workers. They are for the most part skilled industrial craftsmen who work for the Defense Department. The wages of these workers are determined by surveying the wages paid for similar jobs in private industry.

Historically, under this system, the pay of our Federal blue-collar workers has moved upward only after private industry wages have risen. There is a lag, and that lag is particularly large during inflationary times.

So I submit it is absurd and inconsistent to decide, as the administration has decided, that these workers must be used to set an example by freezing their wages. These workers are the victims of inflation, not the cause. To fight inflation by denying them justified wage increases is much like fighting crime by putting the victims of crime in jail.

In my State we have many hard-working blue-collar Federal workers. I am consequently particularly happy that the amendment offered by the senior Senator from Wyoming (Mr. McGEE), the chairman of the Committee on Post Office and Civil Service, was adopted by the Senate, with the assurance of the chairman that it was the intention of the committee that the amendment also would permit adjustments in blue collar wages.

I hope very much that the other body will approve this provision and that the President will then abide by the wishes of Congress and allow a wage adjustment for our Federal blue-collar workers.

THE NATION'S ECONOMY

Mr. FULBRIGHT. Mr. President, Representative HENRY REUSS, of Wisconsin, has made an excellent analysis of the Nation's economic predicament in an article printed in the New York Times of December 1.

Congressman REUSS points out the serious problems which have resulted from the Nixon administration's policies. He also offers some suggestions about what can be done to improve the situation, including removal of the protectionist import surtax.

Mr. President, this article deserves widespread attention and I ask unanimous consent that it be printed in the RECORD.

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

[From the New York Times, Dec. 1, 1971]

ABOUT THE ADMINISTRATION'S "PROTECTIONIST SWAGGER"

(By Henry S. Reuss)

WASHINGTON.—Prior to Aug. 15, 1971, the Administration's economic policy was one of benign neglect. At home, unemployment was allowed to increase and growth to stagnate in the misguided belief that this would cure inflation. Instead, it produced both 6 per cent unemployment and 6 per cent inflation.

Abroad, the policy was to consider the dollar invincible. Foreign central banks would continue to accept endless dollar deficits, no matter how badly over-valued the dollar was. No fundamental realignment of currencies nor reform of the international monetary system, was necessary.

But then came Aug. 15 and the New Economic Policy which the President has encumbered with obeisances to the false gods of trickle-down at home and protectionism abroad.

At home, the price-wage freeze was accompanied by a tax-reduction program which has now been substantially enacted by the Congress. In essence, the tax program gives corporations and their stockholders an $8-million a year annual tax reduction, mainly through the 7 per cent investment tax credit and rapid depreciation. After the first year, the tax program gives the above-poverty-level wage earner no tax reduction whatever.

The mischief caused by the Nixon tax program is three-fold:

(1) By obviously discriminating against the wage earner, it destroys the social contract upon which effective wage-price controls must be founded. Labor's increasing unwillingness to go along with meaningful wage restraints is due in large measure to the inequality of sacrifice brought about by the tax bill.

(2) The nation's "fiscal dividend," out of which was to be paid the cost of health and education and environmental control and revenue-sharing in the decade of the seventies, has been effectively wiped out by the permanent fracturing of the revenues implicit in the tax-reduction bill.

(3) The corporate tax reductions will do very little to combat our close to 6 per cent unemployment. The five million unemployed include vast numbers of unskilled and semi-skilled people, mostly young and disproportionately black, who could be helped by a vigorous program of providing 500,000 public service jobs immediately. The $3 to $5 billion to fund such a program simply is not available if we are to dissipate the revenues by unwarranted tax reductions.

So, on the domestic side, the Administration is forgoing most of the benefits of the freeze by favoring corporations. In fact, the tax bonanza to corporations is not even in their real interest. Though it will reduce taxes on corporate profits by as much as 20 per cent, corporations and their stockholders would have been much better off under a program to increase consumer spending by immediately reducing unemployment.

Having subverted the domestic program by undue obeisance to the corporate interest, the New Economic Policy then proceeded to subvert the international program by undue obeisance to the protectionist interests.

The Administration's protectionist measures have prevented the needed prompt realignment of currencies—both by masking the proper amount of such realignment and by causing the Treasury to delay an agreement lest the resulting repeal of the 10 per cent import surtax offend the protectionists.

Indeed, the Treasury appears quite happy to live for a while with protectionism. It has to date turned down a reasonable offer of the Group of Ten, made in September, to effect an over-all realignment, provided only that the United States played its part by something like a 5 per cent devaluation of the dollar.

Since such a partial devaluation would involve only a technical, bookkeeping increase in the price of gold (because further gold purchases outside the system would be banned and the U.S. gold window would remain closed), it would in no real sense contribute to a rebirth of gold as a reserve medium.

The tax bill, unfortunately, will go through. And this means the United States will be doing very little about decreasing the rate of unemployment—both because the loss of tax revenues will foreclose an adequate emergency re-employment program, and because consumer nervousness at the unemployment rate will continue to inhibit adequate consumer spending and the resulting capital investment. Wall Street is likely to continue to reflect this basic confusion and lack of confidence.

I envisage that the Administration will soon have to drop its protectionist swagger. If the U.S. is so foolish as to dilly-dally indefinitely, it will run into recessions in one or more European countries which will make a currency realignment impossible.

A realignment deal, accompanied by a broadened 3 per cent band in the International Monetary Fund and the removal of our protectionist import surtax and buy-American measures, must come first.

CURRENT U.S. POPULATION

Mr. PACKWOOD. Mr. President, I would like to report that according to current Census Bureau approximations, the total population of the United States as of today is 208,407,309. This represents an increase of 147,674 since November 1, or roughly the size of Youngstown, Ohio. It also represents an addition of 2,102,127 since December 1 last year, an increase which is about four times the size of Seattle.

THE NOMINATION OF WILLIAM REHNQUIST

Mr. HUMPHREY. Mr. President, I shall vote against the confirmation of William Rehnquist to the Supreme Court. I believe that the political and judicial philosophies that he has espoused if applied to the Court's role of judicial decisionmaking would weaken the legal protections which are the constitutional right of every American. His judicial philosophy is clearly out of step with a nation undergoing dramatic economic, political, and social change.

I believe Members of the Senate would be abdicating their constitutional responsibilities if they failed to examine and evaluate the judicial philosophy of a President's nominee to the Supreme Court. I have carefully reviewed the record of William Rehnquist as a citizen, a lawyer, a member of the administration and as a nominee before the Senate Judiciary Committee.

I have no argument with his integrity, character, or professional competence.

But William Rehnquist himself argued 12 years ago in the Harvard Law Review that the Senate has every right—and indeed has a responsibility—to inquire

into the judicial philosophy of nominees to the Supreme Court. In good conscience I cannot support the appointment to the Supreme Court of a man with Mr. Rehnquist's views of the Constitution and the Bill of Rights.

The Supreme Court, the Congress, and many State legislatures had firmly committed themselves to equal rights for all Americans when William Rehnquist in 1964 publicly opposed the passage of a Phoenix public accommodations law that would have allowed black people to eat at the city's drugstores and restaurants. Despite Mr. Rehnquist's change of mind, I find it alarming that it took him so many years to realize what he viewed as a businessman's "right" to refuse service to a customer on the basis of race was the denial to an American citizen of his basic constitutional rights.

Every American has the right to change his mind. But even in 1967 Mr. Rehnquist boldly wrote that:

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

This excerpt from a letter to the editor of a Phoenix newspaper was part of Mr. Rehnquist's efforts to oppose integration of the Phoenix public schools.

I believe that a man who sits on the Supreme Court cannot view integration and segregation as dispassionately meriting equal consideration. As late as 3 weeks ago, Mr. Rehnquist was given several opportunities by Senator BAYH to disassociate himself from this philosophy during the Judiciary Committee's hearings. He did not do so.

The law can achieve what violence and force can never accomplish. It is the only effective weapon that can secure equal rights for all Americans. I find in Mr. Rehnquist's interpretation of the law an unwillingness to use it for these ends.

At a time when so many Americans feel powerless in the face of an all-powerful government and corporate world, William Rehnquist has chosen to interpret basic constitutional questions construing the rights of the individual citizen in a very narrow fashion.

Mr. Rehnquist has strongly defended the broad powers of the executive branch to violate the principles of privacy and equal protection under the law. Mr. Rehnquist has continually supported the executive branch's drive for a dominant position among the branches of Government. His position violates the constitutional principle of checks and balances. At a time when Executive power is magnified, judicial emphasis will serve only to weaken the role of the Congress.

Our judicial institutions do not exist in a vacuum apart from political and legal currents of American society. If they did, they would soon become antiquated bodies removed from their role of insuring that we live in a just and free society. The Constitution is a living document. It must be applied and interpreted in light of the times and conditions in which we live.

As the Supreme Court deliberates in the years to come the basic principles of the separation of powers, the integrity of the federal system and constitutional rights of all Americans will be at stake. Not to be forgotten as crucial judicial issues are the rights of the accused in criminal proceedings, the development and nature of our economic institutions, the role of Government in the continued social and economic development of this Nation, and the important right of peaceful dissent in opposition to governmental policies. Yes, a great deal will be at stake.

As a Senator, I have the right and the duty to oppose a man's confirmation to the Supreme Court if I believe that he would impede the efforts of our Nation to come to grips with important social, economic, and political dilemmas which we face today. The judicial philosophy of William Rehnquist clearly endangers the principles of freedom and human dignity which are the cornerstones of our constitutional protections. I am opposing William Rehnquist's confirmation on these grounds.

THE WAYWARD PRESS

Mr. GOLDWATER. Mr. President, in recent years some elements of the liberal press have gone to great extremes to make sure that no segment of the defense industry in this country is ever pictured in a favorable light. Occasionally an example so extreme and far fetched comes along that it is recorded in industry magazines.

One such case turned up in the November 1971 issue of Air Force magazine under the heading "The Wayward Press." It claims that the Washington Post resorted to a phony, composite picture to cast aspersions on the motivations of Fairchild Industries of Germantown, Md. In the process, the Post managed to lend a sinister aspect to one of the finest efforts ever attempted to mobilize America's youth in a program aimed at using technology to solve many of our Nation's more prominent problems. I ask unanimous consent to have this article printed in the RECORD.

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

THE WAYWARD PRESS

The defense industry, and particularly the aerospace industry, has long been accused of lacking a sense of social responsibility. There is a growing group of technological know-nothings that can hear noise and see dirt at the airport, but is blind to the fabulous capabilities of this industry to contribute to social and economic progress.

In early September, Fairchild Industries of Germantown, Md., inaugurated a program designed to define the potential, with the focus on youth. Called "It's Your Turn," the effort seeks to challenge today's young people to think about their future careers in terms of using technology to solve pollution, communications, medical, safety, and other social problems.

The company has produced a moving picture, radio spot announcements, and a brochure on the subject. All cite the importance of technology in the improvement of the world around us. The brochure discusses such matters as pollution and violent deaths caused by the automobile, and points out that technology can clean up power sources and build safety into the vehicles. It admits we have a major ecological problem, as young people keep reminding us, and says the solution will be found by chemists, metallurgists, physicists, or agronomists. There are many examples cited, each climaxed by the call, *it's your turn.* "And the message is challenge," says the brochure to the young. "You are being dared to take on the problems of the world; to take over the controls of an imperfect society."

There is no evidence, in the material this reporter has seen, that the purpose of the Fairchild Industries effort goes beyond portraying the benefits of technology in a broad sense. Yet, in the Washington *Post* of Sunday, September 12, a staff writer named Robert J. Samuelson declares the company has "formally and unabashedly entered the propaganda business."

By itself, that is an accurate statement, but the Samuelson-*Post* approach, that of advocacy journalism, is to portray "It's Your Turn" as a sinister campaign—by a "maker of jet fighter planes, communications satellites, and electronic instrumentations"—to feather its own technological nest. The headline in the *Post* specifies the interpretation:

"The Message: Technology Is Good
Or, the Selling
of Fairchild
To the Young"

The crowning insult, and example of bad journalism, is in the accompanying illustration. Operating with the clip-and-paste technique sometimes used by television producers when they want to distort a message, the *Post* had an artist take the front cover of the brochure and doctor it up to bolster the newspaper's editorial prejudices. The cover was a simple photo of two young people with "It's your turn" over the picture. The only mention of Fairchild in the actual brochure was a company logotype, discreetly printed on the inside of the back cover. The *Post* wizards clipped it out and pasted it on the front cover picture. That helped support their thesis, but did nothing for the accuracy of their report. It is a type of journalism last commonly practiced, in our experience, by the New York *Evening Graphic.* That was a paper renowned for a number of things, not including a high standard of professional ethics.

THE WORK OF THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

Mr. McCLELLAN. Mr. President, Army Times Publishing Co., which publishes the Army, Navy, and Air Force Times as well as other periodicals specializing in military affairs, recently praised the work of the Senate Permanent Subcommittee on Investigations in its inquiry into clubs, messes, and post exchanges.

An editorial of November 24, 1971, points out the subcommittee's investigation has already achieved important reforms, and that more can be expected.

The editorial in the much respected Army Times reflects a widespread feeling among knowledgeable observers of the military nonappropriated fund industry that reform within the system is called for and that the subcommittee's inquiry and its subsequent recommendations for improvement have been responsible, constructive, and realistic.

I ask unanimous consent to have printed at this point in the RECORD the November 24, 1971, Army Times editorial.

I also ask unanimous consent to have printed at this point in the RECORD a November 24, 1971, column written by the Army Times congressional correspondent, Robert S. Horowitz, on the subcommittee's investigation.

"You know, cancer is still described in the dictionary as something evil, and many people avoid it like a dirty word. They delay treatment until their bodies are just eaten with cancer and they can't stand the pain."

The American Cancer Society notes that this year about 106,000 cancer patients will probably die who might otherwise have been saved by earlier and better treatment. "We are currently curing a third of all cancers," says a spokesman for the Society. "We could save one-half."

Lyn has no desire, before she dies, to circle the globe or climb a mountain. Rather, she seeks normal, happy, family living: "I don't wake up every morning and say I have to do this, you know, before I die. But I do wake up and realize there are things that I want to do that I should try to accomplish. But that I shouldn't put them above loving my family.

"The main thing is to finish the book. And small things, like sewing a quilt, learning to play the piano. Nothing big."

How much longer has Lyn to love and give? "That's a question they ask on *Marcus Welby* or *Medical Center*," says Dr. Holton. "In real life there is no way we can predict these things. Lyn's resistance is down and she could succumb to a pneumonia and not her tumor. I would be surprised if she lived several months.

"But then, I've been surprised in the past. That's why I don't like to talk in terms of time."

Since Lyn's illness, mundane, everyday things have come into sharp focus and taken on a new depth of meaning and appreciation. A ride in the car, a sunny morning, cooking for her family—even doing the dishes—have become treasured events for Lyn.

"It's so important," she says, "to live your life for what it is and to the fullest—which nobody will do until they are in the same situation I am. They don't seem to understand the beauty of life until they are told it is going to be taken away. If you know how good it feels to take a deep breath, you really are superlucky."

(EDITOR'S NOTE.—Nearing press time, we have learned with deep regret that Lyn Holton died at one a.m. Sunday, November 7th, 1971. We offer our sympathies to Lyn's loved ones. Her courage and compassion will be missed and remembered.)

NOMINATION OF WILLIAM REHNQUIST TO THE SUPREME COURT

Mr. BAKER. Mr. President, it is elementary politics that the architects of our Government set up a system of checks and balances vesting in three separate branches of Government complementary functions, so that the power of Government could not be usurped by a single dictatorial authority and so that our democratic Government would, indeed, remain responsive to the people and to their basic and inalienable rights. The Supreme Court's function as interpreter of the Nation's Constitution and laws must be viewed carefully in that context.

In recent decades the function of the Supreme Court has, because of several of its decisions, become a matter of some controversy. It is no longer, if it ever was, a simple task to define in the context of specific issues the proper function of the Court. Those who would oversimplify the issues by dividing them into categories have not enhanced understanding of the problem.

Mr. William Rehnquist has been classified a conservative—a strict constructionist, and some opposition to him has been generated by those who have philosophical differences with him.

It is sometimes stated that it is not or should not be the function of the Senate to test the philosophical mettle of the nominees to the Court, and regardless of the merits of that contention, it is equally fair to say that philosophical considerations are probably taken into account to one extent or the other in the confirmation proceedings for every nominee to the Supreme Court; however, it is clear to me that there is no requirement that the President submit philosophically sterile nominees. The Court, fortunately, has always been made up of strong personalities with visible and discernible philosophical convictions. I for one would have it no other way.

I believe William Rehnquist qualifies technically and philosophically and I have no doubt that he would render fair and impartial justice.

Mr. William Rehnquist has demonstrated his understanding of the Constitution and the statutes and case law of the United States. He has demonstrated his dedication to the law and to the Government of the United States. I am pleased that the Judiciary Committee has acted favorably on his nomination and hope that the Senate will move forward with the approval of his appointment to the Supreme Court of the United States.

WINNING MONEY FOR SOLAR ENERGY

Mr. GRAVEL. Mr. President, it is budget time again. Even now, the President's Office of Management and Budget is preparing the administration's fiscal 1973 budget for presentation to Congress early next year.

Will solar electricity receive more than lipservice this year from President Nixon and his Budget Director, George P. Shultz?

Our future will be molded by their money decisions.

Budgets determine whether we will have a sunshine economy in the future, or a radioactive one.

TAKING THE SUN SERIOUSLY

It is clear that the scientific and engineering communities are impressed with the attractiveness of solar energy. One need only look at the September 1971 issue of the Scientific American, the October 1971 issue of Mechanical Engineering, the October 1971 issue of the Bulletin of Atomic Scientists, the November 1971 issue of the Smithsonian magazine, and others to confirm this.

Even Chauncey Starr, nuclear superenthusiast and presently dean of engineering at UCLA, is now calling solar energy promising and the only significant long-range alternative to nuclear power.

In his article in the September issue of the Scientific American, Chauncey Starr says:

The enormous magnitude of the solar radiation that reaches the land surfaces of the earth is so much greater than any of the foreseeable needs that it represents an inviting technical target. Unfortunately there appears to be no economically feasible concept yet available for substantially tapping that continuous supply of energy. This somewhat pessimistic estimate of today's ability to use solar radiation should not discourage a technological effort to harness it more effectively. If only a few percent of the land area of the U.S. could be used to absorb solar radiation effectively (at, say, a little better than 10 percent efficiency), we would meet most of our energy needs in the year 2000. Even a partial achievement of this goal could make a tremendous contribution.

MONEY MAKES THE DIFFERENCE

The relationship between this goal and money was pointed out by Dr. Farrington Daniels in a letter to me December 10, 1970:

Surely, solar energy will be important within 20 years, and if enough financial support should become available, the time could be considerably less . . . Atomic power has been supported by billions of dollars; solar energy research for use on earth has received almost no government support, except in solar distillation and solar batteries. Certainly solar energy is amply adequate for all the conceivable energy needs of the world. It is harmless and it is certain to work.

Dr. Daniels is professor emeritus at the University of Wisconsin College of Engineering.

AN OPINION TO RECKON WITH

The highest respect for solar energy has also been expressed by the 1970 Nobel Laureate for Physics, Dr. Hannes Olof Alfven of the University of California at La Jolla:

In the long run, fossil fuel can not satisfy the rising energy demand in the world. There are only three sources of energy known which are sufficiently powerful: (a) Solar Energy (b) Fusion Energy, and (c) Fission Energy. The first one is completely pollution-free, the second one almost pollution-free. The third one is necessarily combined with production of large quantities of radioactive poisonous elements . . . In a full-scale fission program, the radioactive waste will soon become so enormous that a total poisoning of our planet is possible . . . If solar energy or fusion energy were available now at comparable cost, no one would use fission energy (for peaceful purposes) . . . Solar energy is available, but at prohibitive cost. However, there are new interesting solar energy projects which should be examined carefully . . .

That statement is part of a memo which Dr. Alfven wrote to me in April, published in full in the September 1971 Bulletin of Atomic Scientists.

THE VOICE OF ATLANTIC-RICHFIELD

The Atlantic-Richfield Co. is now referring to solar energy as "the ideal." An ARCO energy ad placed in the November 1971 issue of the Smithsonian magazine says:

The ideal: a practical way to harness the pure, clean force of the sun.

The potential for solar electricity is not limited to hot, sunny places with lots of empty land. Solar energy is available not only in direct sunlight, but also in the ocean temperature differences found off all the continents, in the products of photosynthesis like algae and animal wastes which can be converted into man-made oil and gas, and in the great winds which can power propeller-driven turbines whose electricity could turn water into the clean, storable fuel, hydrogen. Even some of the energy of ocean waves and currents may be tapped.

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sional mandate for assistant directors for both these program areas.

It remains, then, for this Congress to establish the priorities and enact the programs to enable older Americans to make their own decisions about their lives, to continue to be involved in the mainstream of life, and to be treated with dignity.

We must establish federally assisted programs across the nation to provide older workers with opportunities for job retraining and employment in new careers. And we must provide for multi-purpose centers in our communities with extensive professional social services for and by our older citizens, in addition to greatly expanding existing programs to involve these people in vitally needed community service.

There must also be a major national effort to help older people to escape from the isolation in which they live. Too often, we are in effect locking up older people at night and over the weekends. This is inhumane. And the problem is compounded for the elderly in rural America. I believe this isolation has a lot to do with the overcrowding of our hospitals, nursing homes, and mental health care facilities.

We need imagination and creativity in designing transportation services and adaptations specifically for the elderly and handicapped. No longer dare we deny them the right to obtain essential services, to reach jobs, or to pursue community-service or personal interests.

Nor should they be prohibited from travelling by the cost of airline or interstate transportation fares, and I have introduced legislation to meet this need by authorizing reductions in these fares.

Finally, in recognition of the high proportion of the income of older Americans that is paid for housing that is often substandard and in unsafe neighborhoods, there must be a total redirection in national housing programs to end discrimination based on age and to assure that a fair share of Federal housing assistance is at last allocated to rural America.

It is inexcusable that while an estimated 24 percent of the Nation's population lives in non-metropolitan counties without a town exceeding 25,000 in population, less than 11 percent of the housing units financed or insured by the Department of Housing and Urban Development in the last three years were located in those same counties.

But the inadequacy of housing that includes the opportunity for enriching community life for older Americans is a fact of life across America. To meet this critical need, we should at least undertake the immediate construction of a minimum of 125,000 units of low-cost housing for the elderly each year.

And we must provide effective and reasonable assistance to older people who want to remain in the homes for which they have worked and cared over the years.

At the same time, we dare not continue to condone the inadequate and sometimes inhumane treatment of our elderly that has been reported at a number of nursing homes across America. This must be ended by the enforcement of quality health care standards and by the imaginative employment of incentives and new resources, both to improve institutional care and to broaden the spectrum of health care from preventive medicine to rehabilitation programs.

It remains for us all to address the fundamental need to revitalize rural America. We have yet to establish the programs to carry out a comprehensive national growth policy of balanced rural and urban development. We have yet to recognize the direct connection between advancing rural poverty and the congestion and fiscal crisis confronting our cities.

The development of rural America, as many of you know, has been a top-priority concern in my legislative work agenda over the past months.

I firmly believe we have the resources and the tools to do this job. What we need is the *will*, carried through by strong national leadership. I have introduced a comprehensive legislative program to strengthen our agricultural economy and to promote public and economic development in our rural areas—a legislative program that has strong bipartisan backing; and a legislative program that must be enacted.

With your support, this *can* be accomplished. And with your involvement, it *will* be done. There is a tremendous resource among rural older Americans of talent and ability and commitment to carry through extensive programs of rural improvement and development.

I have seen in Minnesota how older people can get into the efforts to improve our rural communities. In Otter Tail, Wadena, and Todd Counties, the Green Thumb and Green Light workers have literally been the manpower force that has enabled many of our rural development plans to come into being. It is the kind of dedication and hard work that must be duplicated throughout the rural counties of America.

I want to conclude now by expressing a deep, personal concern that this Conference shall produce results. I am looking to you in this session and in this Conference to help us in Congress to decide the priorities—which programs should be moved onto a full-scale basis; and what new directions must be taken.

Let us resolve to get on with the job of creating a new era for and by older people which will bring their talents and abilities to bear, and which will assure them a lifetime of dignity, security, and opportunity.

NOMINATIONS TO THE SUPREME COURT

Mr. ALLOTT. Mr. President, I intend to vote to confirm the nominations of Lewis Powell and William Rehnquist for the positions of Justices of the U.S. Supreme Court. My votes will represent my conviction that both men will serve with distinction.

There is no reason why this matter should detain us any longer than it takes for each of us to express our confidence in these two outstanding men. The Judiciary Committee has done its job. It has examined the records compiled by these men in their many years of public service. It is a measure of our happy position here today that not a shred of damaging evidence was produced concerning either of these men.

This is not to say that there has not been criticism. Indeed there has. Mr. Rehnquist particularly has been subjected to a most obnoxious and unconvincing attack. But, Mr. President, his enemies, in their frenzy, have tarred themselves with their own brushes. They have revealed themselves as unlaundered McCarthyites. Suffice it to say that my admiration for Mr. Rehnquist is only heightened when I see the enemies he has made.

Reduced to simplest terms—and it has never risen far above the simplest terms—the opposition to Mr. Rehnquist boils down to this assertion: Conservatism is unconstitutional. This is not just twaddle, it is pernicious twaddle. I do not intend to dignify that assertion or demean the Senate by discussing that assertion.

I would only point out that Mr. Rehnquist has already served us well by provoking a revealing display from those elements who seek to impose their orthodoxy upon all America. As a result of their tiresome performance, these elements, whose impudence is exceeded only by their imprudence, will not again enjoy a serious audience on Capitol Hill for a long, long time.

There can be no doubt that both Mr. Powell and Mr. Rehnquist have developed judicial philosophies. In fact it is perfectly obvious that we would all be alarmed and perplexed if these intelligent, learned and public-spirited men had never bothered to reflect in a systematic way about the profound philosophic foundations of our Constitution and of ordered liberty in general.

In addition, Mr. President, there can be no doubt that the only issue involved in the minor oppositions to both of these men is their judicial philosophies.

What, then, is the criticism of them all about?

In my judgment, Mr. President, those who oppose one or both of these nominations are saying that the Founding Fathers were mistaken; and that the mainstream of American judicial thinking over the years has been mistaken.

That is, they are saying that the most extreme actions of the Supreme Court in recent years—actions which no one seriously argues reflects the intentions of the framers—represent the only permissible judicial philosophy.

Do any of the critics of Mr. Powell and Mr. Rehnquist seriously maintain that, say, John Marshall would have voted with the majority on the so-called Warren Court? Do any of these critics really believe that, say, Mr. Justice Taft or Mr. Justice Cardozo or Chief Justice Hughes would have participated in the torturing of the 14th amendment which recently became the iron orthodoxy of one militant school of constitutional jurisprudence?

I think it is fair to say that both of these men incline toward the view that in recent years the Supreme Court has been excessively assertive in attempting to take the lead in tackling social problems. It seems likely that both of these men, like many reflective Americans, are inclined to believe the Court has taken on a role it cannot fulfill; it has attempted to push law beyond the prudent limits set by society's slowly evolving consensus.

Mr. President, I say that these men are "inclined" to believe this, and I select that word with care. These are not blind dogmatists. If they were, they would not enjoy the widespread approbation which they have earned from their colleagues in America's temperate legal profession. But the inclination is real enough and, in my judgment, it is sound.

I do not find it at all puzzling that reflective men should feel this way. But I do find it very puzzling indeed that Senators should find this view repugnant. After all, this inclination to curtail the Court's assertiveness is, by another name, an inclination to acknowledge the legislative as the first branch of Government. I believe that the primacy of the legislature is, in theory and in historical

experience, the foundation of free government.

I note with interest the fact that many Senators are greatly exercised about what they consider an excessive assertiveness on the part of the executive branch in the shaping and administering of foreign policy. I think these Senators are mistaken on two counts. They say that this assertiveness is relatively recent, and it is not: its first practitioner was George Washington, and it has been the practice of every President since the United States became a world power under Theodore Roosevelt. And these Senators are mistaken in saying that the Executive predominance in the field of foreign policy is without constitutional warrant: in fact, every precedent speaks the primacy of the Executive in that field.

What interests me about these Senators is that their passion for legislative primacy is so selective, and is so finely focused on an area of thorny constitutional questions.

I suggest, Mr. President, that these Senators are half right. They are right that there has been an erosion of the legislatures standing in this Government. But they are wrong in thinking that this erosion has been in the area of foreign policy. In fact, the real erosion has come in the field of domestic policy.

It is well to remember that the two most significant decisions affecting domestic policy in the United States in the more than a quarter century since the end of the Second World War were made by the Supreme Court. The first was the desegregation decision, the ramifications of which are still being worked out—and worked out by the courts. The second crucial decision concerned reapportionment.

Senators who are really concerned about the stature of the legislative branch, and who want to do something about it, might well cease their attempts to usurp the President's constitutionally well-founded powers in foreign policy, and might concentrate instead on making the legislative branch the decisive force it once was in determining domestic policy.

It is ironic that the President himself is taking steps which are necessary, if not sufficient, for a restoration of legislative primacy in domestic policy. The President is appointing to the Supreme Court men steeped in a prudent philosophic tradition. This tradition will lead the Court back to its proper and traditional balance in the constitutional system without in any way diminishing the Court's "great and stately jurisdiction."

That is the real significance and drama of the nominations of these two fine men, Mr. Powell and Mr. Rehnquist. And that is why it ill behooves Senators to oppose these men in the name of Senate prerogatives.

Just as it is ironic that Senators should clamor for a larger role for the Senate in foreign policy just as they are clamoring for a smaller role for the United States in the world, so too, is it ironic that Senators should urge the Senate to flex its muscles by opposing the confirmation of men whose judicial philosophy will encourage a wide range of responsibile Senate exertions in setting policy for this Nation.

Mr. President, we are in a very happy position. When we confirm the nominations of these two gentlemen we shall be strengthening the Supreme Court and, simultaneously, enhancing the role of the Senate.

In short, there is not the slightest particle of a reason for voting against either of these nominations, and there are abundant reasons for all of us to be grateful for the opportunity to vote for them. The President is to be applauded for his wisdom in making these selections which we are privileged to support.

ARTHUR B. SPINGARN

Mr. HUMPHREY. Mr. President, the Nation suffered a deep loss yesterday with the death of Arthur B. Spingarn, president of the National Association for the Advancement of Colored People from 1940 until his retirement in 1966.

Mr. Spingarn brought to this vital organization, from the outset of its legal defense efforts in the early 1900's, an outstanding example of constructive militancy on behalf of equal rights and justice for the black people of America.

He knew the lonely, hard struggle to overcome racial discrimination long before the cause of civil rights became popular, winning court cases against enforced segregation when the Ku Klux Klan could still march in a grand parade down Pennsylvania Avenue in Washington.

Dedicated to the objectives of the NAACP to achieve solid accomplishment and provide concrete help in establishing equality in education and voting rights and ending officially sanctioned segregation, he was also at the forefront of its determined efforts to end discrimination in housing and employment.

The black people and all Americans owe Arthur Spingarn a profound debt of gratitude, for he embodied the spirit of human dignity and brotherhood and he ennobled the law in its quest for justice.

Mr. President, I ask unanimous consent that an article about Arthur B. Spingarn, published in the New York Times of December 2, 1971, be printed in the RECORD.

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

ARTHUR SPINGARN OF NAACP IS DEAD

(By Farnsworth Fowle)

Arthur B. Spingarn, a Manhattan lawyer who was a leader in the struggle for equal rights for American Negroes from the foundation of the National Association for the Advancement of Colored People in 1909 to his retirement as its president in 1966, died yesterday at the age of 93 in his home, 60 Gramercy Park.

Mr. Spingarn became head of the organization's national legal committee and a vice president in 1911, and president succeeding his brother, Joel E. Spingarn, a poet and professor of comparative literature, in 1940.

In that year the organization split off the legal functions into a separately-financed Legal Defense and Educational Fund. The team of black lawyers who grew up in the N.A.A.C.P., led by Thurgood Marshall, now an Associate Justice of the United States Supreme Court, won the landmark unanimous Supreme Court decision in 1954 outlawing segregated public education.

The immediate reaction of Mr. Spingarn and his associates was to announce new goals—eliminating residential and job discrimination throughout the nation.

In recent years, for many black militants the goal of integration has become less attractive than the assertion of a separate black identity, and the N.A.A.C.P., with its partially white leadership, has been looked upon as old-fashioned as its name. Long forgotten was the almost scandalous militancy of the N.A.A.C.P.'s origins.

Mr. Spingarn, a white man, was attracted to the cause by his experience in trying a civil rights case in the Manhattan courts, from which he concluded that a concerted effort would be needed to secure equal justice.

ALUMNUS OF COLUMBIA

He had been admitted to the bar in 1900, after receiving a bachelor's degree from Columbia in 1897 and his law degree two years later.

His parents, Elias Spingarn and the former Sarah Barnett, were respected members of the New York Jewish community; his father, born in Austria, was a well-to-do tobacco merchant.

The N.A.A.C.P.'s initial impulse came from two white New York social workers, Mary White Ovington and Dr. Henry Moskowitz, who reacted to an article by a wealthy Southerner, William English Walling, denouncing a race riot he saw in Springfield, Ill., in 1908 and calling for a revival of the abolitionist spirit.

The three met with Oswald Garrison Villard, publisher of The New York Evening Post, and decided to support the militant wing of what was then called the "colored" leadership (the word "Negro" was deemed offensive), represented by Dr. W. E. B. DuBois. Dr. DuBois contended that the Negro must win his fundamental human rights before self-improvement, a policy advocated by Booker T. Washington, founder of the Tuskeegee Institute.

The two Spingarns became involved. Those who knew Arthur in later years as a smiling grandfatherly figure in gold-rimmed spectacles when they were out of fashion might have been surprised to see him in action six decades ago.

One practice in New York in those days was to discourage Negro patronage at bars by charging them outrageous prices. Mr. Spingarn recalled that when he and black friends went to such bars, they would smash the glasses on the floor in an effort to discourage this practice.

But the main fights were in the courts, and one of his first significant victories for the N.A.A.C.P. was when the Supreme Court in 1927 upheld its challenge to an explicitly all-white Democratic primary election in Texas. This was in line with the organization's major goals, which included abolition of forced segregation, equality in education and voting rights.

The membership of the N.A.A.C.P. was 85,000 when Mr. Spingarn became president in 1940. In the 1950's it quadrupled, much of its growth being in the South.

In the 1960's, with newer civil rights organizations capturing the imagination of black communities, there was criticism of the N.A.A.C.P. for having a white president and other whites on the board. In 1963 Representative Adam Clayton Powell, Jr., a Negro of Harlem, raised this objection and called its approach through the courts "nit-picking."

Roy Wilkens, then and now the executive director of the N.A.A.C.P. dinner here on Jan. views "vicious" and praised Mr. Spingarn for more than half a century of service to

ants to an F.B.I. agent—rather than the other way around—but as a practical matter their work as regular paid informants meant that the F.B.I. had infiltrated the press.

It seems logical that the same considerations that prompted Mr. Hoover to forbid his agents to pose as journalists should preclude the F.B.I. agents from accepting journalists as paid informants. Obviously, if journalists or any other citizens volunteer information as acts of citizenship, any law enforcement agency should gratefully accept it. But an infallible test exists for determining whether information is actually being "volunteered" as an act of citizenship, or whether the informant has become an undercover arm of the Government—that is whether he gets paid for his information. Thus it seems that when the F.B.I. pays journalists for their "services" as informants, then the journalists' profession has been infiltrated by the F.B.I. The Task Force concluded that the present F.B.I. policy is wrong, and that journalists should not be employed as paid informants.

The Task Force also felt, Mr. Chairman, that the practice of news reporters accepting employment as informers is unethical and contrary to the trust required of professional journalists. The members expressed the hope in their report that the profession would condemn and discourage this practice.

THE UNDERGROUND PRESS

Mr. Chairman, I understand that you have heard the testimony from a person who has made an extensive study of the underground press, so I will refer to it briefly, from the standpoint of the Task Force's examination of the matter.

If there is an inherent tension between the press and the government, the friction is multiplied with regard to the underground press. It seems to have a special genius for antagonizing officialdom, yet it has little or none of the establishment press' protective political power. As the frictions between militants of the political left and the Government have increased in the past few years, so have the occasions upon which local law enforcement officials have become aggrieved by statements in the underground press:

The Los Angeles Free Press was fined $10,000 for having published a purloined list of state narcotics agents.

Dallas police raided an underground newspaper and hauled away two tons of material from an underground newspaper in an "obscenity" raid—yet failed to obtain an obscenity conviction that would stand up in Federal Court.

The Police Department of Buffalo, New York, drove the Black Panther newspaper from the streets by announcing its intention to arrest any vendors selling the publication.

Officials in Los Angeles, Philadelphia, Providence and Richmond denied press credentials to the reporters of the local underground newspapers.

The San Diego *Street Journal's* office was searched by police without a warrant and its street vendors handcuffed, searched and jailed for loitering and obstructing the sidewalk.

There have been numerous other allegations by the underground press of heavy-handed treatment by law enforcement officials. In *Orpheus*, a bimonthly publication of articles drawn from various underground newspapers, the underground press has described its situation as follows:

"Although these papers have been evicted from their offices and homes, harassed by the police, had their street sellers arrested en masse, had their benefit parties raided, been bombed, burned, beaten, gypped, framed and lost printer after printer, the underground press continues to increase in size and number."

The list above included only those incidents that have been verified in sworn court testimony or reported in the "straight" press, but that is evidence enough that some law enforcement officials have used their official authority against the underground press in a way in which it would never have been invoked against the establishment press.

These actions seem to have been based upon an erroneous assumption that underground publications forfeit some degree of their protection under the First Amendment when they violate standards of taste, preach a tolerance of drugs and fornication and criticize the police. The result has been a double standard of treatment between the underground and the establishment press—a double standard that is inconsistent with the First Amendment's guarantee of freedom of the press.

A notable lack of attention has been given to this by the "straight" press. Of the numeroue instances that were brought to the Task Force's attention in which elements of the underground press protested that they had been abused by the police, a majority were not mentioned in either the news or editorial columns of the establishment press.

In those incidents that have developed into court cases, the underground press has been left largely to its own fragile devices by the more affluent elements of the news media. Others in the journalistic profession stood by and gave no aid in three legal actions involving the underground press that produced legal precedents damaging to all newsmen—the prosecution of the *Los Angeles Free Press* for theft, the subpoenaing of the editor of the *Madison Kaleidoscope* after the bombing at the University of Wisconsin in 1970, and the denial of press credentials to the *Los Angeles Free Press'* reporters.

It might be asked, Mr. Chairman, why this has been brought to the attention of a Congressional subcommittee, since the underground press' difficulties have usually been with local officials. The reason, of course, is that it is the First Amendment to the United States Constitution that is being violated. It is intolerable that any element of the press should be denied its protection—but if that is not enough reason to oppose this double standard, another reason is that legal precedents are being set that can come back to haunt the entire Fourth Estate.

Last spring, the Supreme Court refused, with three Justices dissenting, to review a California decision upholding the denial of press cards to underground press personnel. The lower Court's decision rejected out of hand the idea that the First Amendment gives newsmen a right of access to the scene of public disorders and upheavals.

As Justice William O. Douglas noted when the Court refused to intervene in the Dallas case mentioned above: "If this search and destroy technique (by the police) can be done against this Dallas newspaper, then it can be done to the New York Times (or) the Washington Post."

TASK FORCE ON GOVERNMENTAL POWER AND PRESS FREEDOM

Robert Williamson (Chairman), Former Chief Justice of Maine.

Tom Forcade, Coordinator, Underground Press Syndicate.

Jack Bass, Charlotte Observer.

L. F. Palmer, Jr., Columnist, Chicago Daily News.

George E. Reedy, Writer.

Roger Rook, Dist. Attorney, Clackamas County Courthouse.

Bert H. Early, Exec. Dir., American Bar Association.

Mike Wallace, CBS News.

Howard B. Woods, St. Louis Sentinel.

Ralph de Toledano, Columnist.

Norman Isaacs, Editor in Residence, (Vice Chairman), Graduate School of Journalism, Columbia University.

Fred P. Graham, Supreme Court Correspondent, New York Times (rapporteur).

TO ASSURE THAT RIGHTS AND LIBERTIES ARE MEANINGFUL

Mr. HANSEN. Mr. President, I have spoken on previous occasions in support of the nominations of both William Rehnquist and Lewis Powell to the Supreme Court.

Both men have outstanding credentials, both within the legal profession and as U.S. citizens, and each is eminently qualified for the confirmation of his nomination to the Court.

This morning, the Washington Post published an excellent letter from the distinguished Senator from Arizona (Mr. FANNIN), who took issue with the allegation in a previous Post editorial that Mr. Rehnquist "subordinates individual rights to governmental powers."

The Senator from Arizona most persuasively substantiates his contention, and mine, that Mr. Rehnquist "both understands and believes in the rights and liberties guaranteed to individuals by our Constitution, and that he will devote his very considerable talents to assuring that those rights and liberties are meaningful."

Mr. President, I ask unanimous consent that the entire letter from Senator FANNIN be printed in the RECORD.

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

SENATOR FANNIN REBUTS AN EDITORIAL ON MR. REHNQUIST'S NOMINATION

I find myself in disagreement with the conclusion of The Washington Post's thoughtful editorial on the President's Supreme Court nominees in that Mr. Rehnquist is committed to a philosophy that consistently subordinates individual rights to governmental powers. My own review of Mr. Rehnquist's record convinces me that he both understands and believes in the rights and liberties guaranteed to individuals by our Constitution, and that he will devote his very considerable talents to assuring that those rights and liberties are meaningful—that the Constitution continues to be, as he said at the hearings, a living document.

The best way to support my conclusions is to let the nominee speak for himself. I have assembled some of the passages from Mr. Rehnquist's testimony and earlier statements that make me confident of his devotion to civil liberties as embodied in our Constitution.

It has been said that Mr. Rehnquist does not understand the Bill of Rights and would like to do away with it. At the hearings, Mr. Rehnquist said it was certainly the purpose of the Bill of Rights to put restraints on government:

"I think specifically the Bill of Rights was designed to prevent . . . a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities."

In a speech given in December of 1970 entitled "Official Detention, Bail, and the Constitution," Mr. Rehnquist said:

"Our most basic freedoms, those found in the Bill of Rights, are determined from events and conflicts arising out of the familiar contacts between individuals and the public authorities.

"We assume that under our philosophy of government the individual is guaranteed the freedom or sanctity of his person—in short, the 'right to be let alone . . .'

"Freedom of the person does not appear as a single constitutional right, hut is embodied in the ideas of the Fourth, Fifth, and Eighth Amendments . . .

"These provisions, taken together, clearly express a constitutional right to be let alone, and as we all know this right has been vigorously protected by the Supreme Court."

On the subject of freedom of the press, Mr. Rehnquist stated at the hearings:

"Well, I think it would be inconceivable for a democracy to function effectively without a free press, because I think that the democracy depends in an extraordinarily large degree on an informed public opinion. And that the only chance that the 'outs,' or those who do not presently control the government, have to prevail at the next election is to make their views known and that the press is one of the principal, probably the principal, media in the country through which that can be accomplished.

"I believe it is a fundamental underpinning of a democratic society."

It has been suggested that Mr. Rehnquist has taken the position that the only restraint on executive branch wiretapping and surveillance should be self restraint. A brief review of his testimony and earlier statements show this to be utterly unfounded. Speaking of the executive power to maintain surveillance, Mr. Rehnquist testified:

"Well, I certainly perceive limits in the First Amendment, in the Fourth Amendment, and without reading a catalog, I suspect there are other limits."

And further:

"the only legitimate use of surveillance is either in the effort to apprehend or solve a crime or prevent the commission of a crime . . . surveillance has no proper role whatsoever in the area where it is simply dissent rather than an effort to apprehend a criminal."

Although he stated that under present law observation of persons in public places is not per se unconstitutional, he indicated that any element of harassment or chilling effect on free expression presents a question of fact to be considered in the context of individual cases.

At hearings before Senator Ervin's Subcommittee on Surveillance, Mr. Rehnquist said:

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

When asked how he would balance the interest of the individual in privacy against society's interest in law enforcement in the area of wiretapping, Mr. Rehnquist replied:

"I think a good example of a line that has been drawn by Congress is the Act of 1968 which outlawed all private wiretapping and which required, except in a national security situation, prior authorization from a court before wires could be tapped."

And later in the hearings, he said:

"I doubt that you can find any statemnet, Senator, in which I have suggested that the government should be given carte blanche authority to bug or wiretap. I recently made a statement at a forum in the New York School for Social Research in New York, attended by Mr. Meier of the Civil Liberties Union and Mr. Katzenbach, that I thought the government had every reason to be satisfied with the limitations in the Omnibus Crime Act of 1968."

And further:

"certainly, the government cannot simply go out on a fishing expedition, promiscuously bugging people's phones."

Later he noted that:

"Congress has it within its powers anytime it chooses to regulate the use of investigatory personnel on the part of the Executive Branch. It has the power as it did in the Omnibus Crime Act of 1968 of saying that federal personnel shall wiretap only under certain rather strictly defined standards."

Finally, Mr. Renquist has been said to be insensitive to the rights of the accused. Yet a reading of the many statements he has made on this subject shows that he has been consistently aware of the considerations on both sides of these very difficult issues.

It is significant that Mr. Rehnquist was instrumental in formulating the department's position favoring the Speedy Trial Act of 1971. "The goal of the system," said Mr. Rehnquist, "should be the administration of criminal justice in such a manner that the defendant is afforded a fair and prompt trial, that the innocent are acquitted, that the guilty are convicted, and that the process for making this determination is one which begins and ends within reasonable time limits."

In a May 1971 speech entitled "Conflicting Values in the Administration of Justice," Mr. Rehnquist concluded a long exposition of the law in the area of the Fourth Amendment as follows:

"Finally, I hope you can see from some of this discussion that no reasoned opinion can invariably insist that courts resolve all of these (Fourth Amendment) issues in favor of the criminal defendant. The issues are so complex and so important to all of us that it is wrong to think that either side invariably has white hats. Ultimately, decision is made by the balancing of the need of society for protection against crime against the need of the accused defendant for a fair trial and just results. Both of these values stand so high in the scale of most of us that none would want to say that one should automatically prevail at the expense of the other."

PAUL FANNIN,
United States Senator.

RESOLUTIONS ADOPTED BY NRECA'S REGION VI AT ANNUAL MEETING

Mr. HUMPHREY. Mr. President, the rural electric systems of NRECA's Region VI held their annual meeting at Rapid City, S. Dak., on October 20, 21, and 22, 1971, and during the course of the meeting passed several resolutions which I know will be of interest to all Members of the Senate.

There were 661 farm and rural leaders at this year's regional meeting. They represented 116 cooperatives which serve some 419,093 consumers in the States of Minnesota, North Dakota, and South Dakota.

I urge all Members of the Senate to give careful consideration to these resolutions. They reflect the considered judgment of rural electric consumer-owners and are an earnest expression by them on issues which are important to rural electrification and to the people of rural America.

An excerpt from Mr. Jacob Nordberg's letter to me, transmitting these resolutions, sums up the significance and importance of rural electrification and development:

You understand, I know, that rural electrification is a nation-wide task. What affects one rural electric, or one State, or a region, affects all of us. We recognize this as we seek to understand each other's problems and try to work together to make our program as effective country-wide as we can.

Mr. President, I ask unanimous consent that the resolutions passed at Rapid City Region VI annual meeting be printed in the RECORD.

There being no objection, the resolutions were ordered to be printed in the RECORD, as follows:

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

6–1. REAFFIRMING PAST ACTIONS

Resolved, we reaffirm our support of the Continuing Resolutions adopted at the NRECA Annual Meeting at Dallas, Texas, February 18, 1971, subject to the following amendments:

Be it resolved that Continuing Resolution No. 32 be amended by deleting the final sentence.

Be it further resolved that Continuing Resolution No. 38 be deleted, and in lieu thereof, the following Resolution be substituted:

38. Rural housing.—We recommend that the level of the Farmers Home Administration insured housing program be set at 300,000 units a year beginning with the current fiscal year so as to make possible the achievement of the rural part of the national housing goal set by Congress in 1968. We urge NRECA, statewide associations, power supply and distribution systems to continue their vigorous support of the National Rural Housing Campaign which in large measure has been responsible for the tremendous momentum gained by the FmHA rural housing program during the past year.

Be it further resolved that Continuing Resolution No. 48 be amended by omitting the period after the word program and adding the following phrase: and as a step towards compliance with the Federal Occupational Safety and Health Act of 1970.

Be it further resolved that Continuing Resolution No. 52 be amended by striking the words Women's Participation from its title and by striking the first two sentences and by striking the word also from the next sentence.

Be it further resolved that the following resolutions be added to the list of Continuing Resolutions:

63. Reorganizing USDA.—We recommend that as an alternative to the Administration's proposal for reorganizing the Department of Agriculture out of existence that the USDA be given the official overall responsibility for the mission of *rural development* which it is obviously better suited to perform than any other existing or proposed department by virtue of its rural people, and its extensive local field operations. Further, we recommend that Congress devise a comprehensive, nationwide rural development program to be undertaken by the Department of Agriculture with provisions for additional components that the USDA will require along with provisions for expanding existing components and for changes or innovations in existing USDA structure that will be necessary to insure success.

64. Community facilities.—We recommend that the Farmere Home Administration insured water and sewer loan program beginning in fiscal 1972 be set at a level of $750 million and that the accompanying grant program be set at $250 million. Water and waste disposal systems for rural America are especially essential for the sound orderly growth and ecology of the country. We urge rural electric systems to help develop support and organize such services as necessary to provide necessary management, maintenance and other technical assistance to them as appropriate to maintain their feasibility.

65. Streamline FmHA.—We urge Farmers Home Administration to streamline its administrative procedures in order to increase the productivity of its local county offices involving such things as standardization of regulations, enlisting the assistance of third parties in preparing loan documents, and contracting for as much of the detail work

(2) Population growth rate of approximately ¼% per year. The columns on per capita energy are not affected by this assumption.

(3) Development of solar energy heat pumps for partial household and commercial applications. It is assumed that this will take effect starting 1980 and that the construction of households will incorporate the use of sound insulation techniques.

(4) Technological innovations other than the use of solar energy and heat pumps have not been incorporated. A major omission is the application of the "total energy" principle (See above). This has been omitted in the interest of accuracy as the application of this principle must be considered separately for each industry and the net savings (or lack thereof) will vary largely with the type of industry and size of the plant.

V. Conclusions

Table VII demonstrates that substantial decreases in fuel consumption and mineral ores can be effected whilst maintaining the availability of the goods to which this society has become accustomed and improving the availability of housing, mass transportation, street lighting and public services. Consequent to this is the reduction in the amounts of pollutants that are caused by fuel consumption. The recycling of metals substantially mitigates the problems of solid waste disposal and decreases the vast amount of metals discharged into the water systems of the earth by man.

Serious efforts need to be made in the implementation of programs that reduce pollution before it is made, since these efforts will yield a more livable environment and a conservation of our non-renewable resources and at the same time provide us with the paraphernalia of the modern civilized existence.

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NOMINATION OF WILLIAM REHNQUIST TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. BAYH. Mr. President, so that the information may be widely disseminated, I ask unanimous consent that the individual views of the Senator from Michigan (Mr. HART), the Senator from Massachusetts (Mr. KENNEDY), the Senator from California (Mr. TUNNEY), and myself, on the nomination of William Rehnquist together with the memorandum which accompanies those views, be printed in today's RECORD. I realize that the memorandum is lengthy, but I urge every Senator to read it carefully, for it summarizes the bases of the opposition to this nomination.

Mr. President, I also ask unanimous consent that a statement signed by 20 Harvard Law School professors urging the rejection of Mr. Rehnquist's nomination be printed in today's RECORD. These distinguished lawyers concluded that Mr. Rehnquist's narrow views of human rights and broad views of executive power are outside the mainstream of modern American thought. They are joined in this conclusion by a majority of the faculty of the Wisconsin Law School who also oppose Mr. Rehnquist's confirmation. I ask that their statement be printed in today's RECORD also.

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

INDIVIDUAL VIEWS OF MESSRS. BAYH, HART, KENNEDY, AND TUNNEY

It is no longer necessary to belabor the Senate's coequal role in appointments to the Supreme Court. The President has said that, with the possible exception of promoting world peace, few of his acts are likely to have as lasting an impact upon the American people as his choice of nominees. The same can be said of their confirmation by the Senate. This thought merits reflection as we pause in the rush of legislation to perform that task again.

Recent nominations have also underlined that our duty is truly to "advise" before we "consent"; we are bound to do more than cull nominees obviously flawed by impropriety or incompetence. Beyond evident excellence and integrity, there is a further dimension for the Senate to explore—although to recognize its significance is easier than to define its exact scope.

Under any theory of the Senate's task, our role inescapably includes weighing the nominee's attitude toward the fundamental values of our constitutional system: limits on government power, individual liberty, human equality. A man takes what he is, and believes, to the bench. Ultimately, it may be less important to debate the meaning of "judicial philosophy" than simply to acknowledge the inherent strand of discretion in judicial decision—especially Constitutional interpretation. The best intentions of restraint cannot erase the elements of value and judgment involved when the Court applies the majestic generalities of the Fourteenth Amendment and the Bill of Rights.

In the past, some of us have noted our reluctance to oppose a nominee merely because we disagree with the results he might reach in particular cases. And we have voted to confirm men of views markedly different from our own. But we have also made clear our reluctance to approve anyone whose overall record suggests a persistent insensitivity to the protection of individual liberties and equal rights.

William Rehnquist's record presents no threshold problem of integrity or excellence. But it does raise serious doubts about his sensitivity and commitments to these fundamental values. His numerous public positions on issues involving the Bill of Rights display a consistent discounting of those rights—an inadequate appreciation of the underlying interests at stake and of the danger of their erosion. His reluctance to disavow these views, with few exceptions, leaves us little alternative but to take the record as we find it; for we do not share his view that protecting the pride of the Justice Department takes precedence over the constitutional obligation of the Senate. And that record—on surveillance, wiretapping, inherent executive power, criminal procedural safeguards, dissent by public employees, and more—is a profoundly disturbing one.

That the nominee gives short shrift to individual liberty when it hinders the pursuit of order and authority cannot be explained as merely the result of "strict construction." On the contrary, his approach to Constitutional interpretation seems strangely elastic. The Bill of Rights, and decisions upholding them against competing interests, are read as narrowly as possible, with little heed to their underlying concerns. But provisions and precedents conferring Executive power and declaring the general purposes of government are read loosely and expansively, to justify the most intrusive kinds of official interference with those rights.

In the case of civil rights, Mr. Rehnquist viewed Judge Carswell's continued refusal to enforce the Constitution, even in the face of clear mandates from higher courts, as no more than the reflection of a "consistently applied judicial conservatism." Mr. Rehnquist's own attitudes in this area appear largely from his private actions taken prior to assuming his present position. His volunteered opposition to modest civil rights efforts in Phoenix, viewed in the context of its time, reflects either hostility to their purpose or a startling indifference to the injustice of discrimination. In 1964, as three-quarters of the Senate were agreeing to a nationwide public accommodations law, a man of his intellect and experience should have realized the concern of black Americans and other minorities for equal treatment.

Only five years ago, in 1966, he fought to delete two key sections from a Model State Anti-Discrimination Act under consideration by the Commissioners on Uniform State Laws. One would merely have permitted—not required—employers to reduce the effects of past discrimination by considering this factor in hiring new employees. The second provision would have outlawed racial "blockbusting." And only four years ago, in 1967, he personally opposed modest efforts at voluntary school integration, stating his view that "we are no more dedicated to an 'integrated' society than to a "segregated' society."

Unrelieved by actions showing an affirmative commitment to racial justice, Mr. Rehnquist's record is one of persistent indifference to the evils of discrimination and an almost hostile unwillingness to accept the use of law to overcome racial injustice in America. President Nixon himself has called for judges to interpret our laws who are men "dedicated to the great principles of civil rights." The nominee's subsequent record, both in Arizona and Washington, is devoid of any significant reflection of such dedication.

No one can doubt the difficulty of predicting a nominee's future performance on the

Court. If Mr. Rehnquist is confirmed, we wholeheartedly hope our misgivings prove unfounded. But we must do our best on the basis of all the evidence available to us. On that basis, we cannot consent.

While each of us would put different emphasis on the various points developed in the investigation, we believe it would be helpful to the Senate to bring together in one place the specifics which underlie the conclusions stated in these views. For that reason, the following memorandum has been prepared. We urge the Senate to give it careful consideration.

BIRCH BAYH.
PHILIP A. HART.
EDWARD M. KENNEDY.
JOHN V. TUNNEY.

MEMORANDUM ON THE QUALIFICATIONS OF WILLIAM H. REHNQUIST TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

I. THE ROLE OF THE SENATE

A. Preliminary remarks

One of the questions which has been raised by the nomination of William H. Rehnquist concerns the proper role of the Senate in the confirmation process—particularly whether it is proper for the Senate to consider the philosophy of the nominee in reaching its decision whether to advise and consent. There is great deal of confusion about what is meant by a nominee's philosophy. A number of disparate notions are subsumed within this term. The phrase "judicial philosophy" traditionally refers to a Justice's view of his role in constitutional adjudication—judicial self-restraint in deferring to the judgment of the legislature, for example, or so-called "strict construction" of constitutional provisions. Apart from judicial philosophy in this sense, there is the separate question of a nominee's personal philosophy—although there is hardly a clean and clear line between these two aspects of a nominee's "philosophy."

For the reasons given below, it seems clear that philosophy in either sense is a fit inquiry for the Senate. But it is not necessary to agree on the precise role the Senate ought to play in the confirmation process, nor to agree on a precise definition of "philosophy" in this context, to deal with the nomination of Mr. Rehnquist. The opposition is not based on simple disagreement with the merits of Mr. Rehnquist's views on any particular issue of the day. The opposition is far more fundamental. Mr. Rehnquist has failed to show a demonstrated commitment to the fundamental human rights of the Bill of Rights, and to the guarantees of equality under law. No person of whatever philosophy—or what ever legal ability or personal integrity—ought to be confirmed who cannot pass this vital test.

B. The scope of the inquiry

Senator William E. Borah of Idaho, during the debate on the nomination of Judge John J. Parker—who was, in the end, defeated on philosophical grounds—described the unique nature of a Supreme Court Justice's role as follows:

"Upon some judicial tribunals it is enough perhaps, that there be men of integrity and of great learning in the law, but upon this trihunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental policies are involved."

Precisely because the Supreme Court must decide some of the most fundamental questions of government, the philosophy of the nominee must be of concern to the Senate. This situation is wholly different from the nomination of a Cabinet Secretary or other executive official who serves at the President's pleasure. They are the President's men; Supreme Court Justices are the country's.

Senators cannot ignore the fact that if the nominee is confirmed, he will be called upon to breathe life into the grand promises of the Constitution: the separation and distribution of power among three equal branches of government, and the limitations on executive power this demands; the prohibitions against unreasonable searches and seizures, against arrests without probable cause, against compelled self-incrimination, and against cruel and unusual punishment; the guarantees of free speech and assembly and press; and the great promises of fundamental fairness and equality, the due process and equal protection clauses. The answers to the difficult constitutional questions the nominee will face cannot be found only in the intent of the framers or the Court's own precedent, important as those are. Try as he might to avoid it, the justice's own view of the world—his heart and soul—must become involved in this decision. This is why, in the words of Senator George Norris of Nebraska during debate over Judge Parker's nomination—

"When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches the great question of human liberty."

There is more than ample historical support for the Senate's inquiry into a nominee's philosophy, both in the annals of the Constitutional Convention and in the Senate's own practice. These matters are discussed in great detail in a number of recent studies that have made available to the Senate. Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657 (1970) (reproduced in 117 Cong. Rec. S 19014 (daily ed. Nov. 18, 1971)); Brest, Grey & Paul, "Memorandum To Senator Birch Bayh and Senator John Tunney on the Role of the Senate in Considering the President's Nominees For Appointment to the Supreme Court of the United States" (reproduced in 117 Cong. Rec. S 17788 (daily ed. Nov. 8, 1971)). Accordingly, this Memorandum touches only on the highlights of that history.

The proceedings of the Constitutional Convention reveal that the Senate's role in advising and consenting was to be an active one. Indeed, for much of the Convention, it appeared that Congress or the Senate alone would have the power to appoint Supreme Court Justices. It was not until a compromise was approved unanimously near the end of the proceedings that the existing practice was agreed to, whereby the President is given the power to "nominate, and by and with the Advice and Consent of the Senate . . . appoint" the members of the Court, Article II, section 2. As Professor Black has written, *supra*, 79 Yale L.J. at 661, the vote on this compromise "must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role."

Nothing in the records of the Convention indicates that there is any limitation of the factors the Senate may consider in advising and consenting to Supreme Court justices. In fact, Alexander Hamilton spent much of *Federalist Papers 76* and 77 explaining that the Senate was to play a major, unconstrained role in weighing Presidential nominations. Hamilton wrote that confirmation should be denied in the presence of "special and strong reasons for the refusal" without placing any limitation on the type of reason which would be the basis for refusal.

The Senate has regularly used its broad power to advise and consent to reject a nominee on philosophical grounds. In 1795, it refused to confirm President Washington's nomination of John Rutledge to be Chief Justice, primarily because of Rutledge's outspoken opposition to the Jay Treaty. To take but one more example, the Senate refused to confirm President Hoover's nomination of Judge John Parker in 1930. No one disputed Judge Parker's legal ability, but he was rejected because "(1) . . . he favored 'yellow-dog' contracts and was unfriendly to labor; (2) . . . he was opposed to Negro suffrage and participation in politics; and (3) . . . the appointment was dictated by political considerations." J. Harris, The Advice and Consent of the Senate 128 (1953). See also Abraham & Goldberg, *A Note on the Appointment of Justices of the Supreme Court of the United States*, 46 A.B.A.J. 147 (1960).

Thus if the Senate were to refuse to consider the philosophy of a Supreme Court nominee, it would abdicate its historic role in the selection process. The Constitution establishes a partnership of the Senate and the President to choose the men and women who will sit on the Supreme Court for life. To play its full role in this partnership, the Senate must, in Mr. Rehnquist's own words, "thoroughly infor[m] itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." Rehnquist, *The Making of a Supreme Court Justice*, Harvard Law Record, October 8, 1959, p. 7.

An inquiry into philosophy is particularly appropriate in the case of the nomination of Mr. Rehnquist. First, the nomination comes from a minority President whose party controls neither House of Congress, so it cannot successfully be argued that he reflects the will of the people more accurately than does the Senate. Second, Mr. Nixon has now presented the Senate a nominee for the fourth vacancy during his first term of office. Only two other Presidents since Civil War have had the opportunity to influence the Court so much in a three-year period. We face the prospect that this President's particular philosophy may come to be reflected in not just one or two but in a substantial number of the Court's members. Third, the President has made it perfectly clear that he chose these nominees *because* of their philosophy. Thus on the President's own terms, philosophy is a fit inquiry.

II. LACK OF COOPERATION WITH THE COMMITTEE

The Majority Report states that "to draw sweeping generalizations from the positions an advocate has taken as a means of determining his fitness to be a judge is, in the view of the Committee, mistaken." To the extent that this statement implies that it is improper to base a decision about Mr. Rehnquist's judicial philosophy on the writing and speaking he has done as an Assistant Attorney General, it is mistaken.

Preliminarily, it should be noted that a good portion of the objections to Mr. Rehnquist are based on his views on equal rights for all, and conclusions about those views rest on writing and speaking he did before assuming government office. The views he expressed then, of course, must he taken as his own.

It is only in the area of civil liberties that one must rely primarily on statements Mr. Rehnquist has made while holding office to discern his philosophy. There are at least two reasons why this is legitimate and proper. In the first place, the objections to Mr. Rehnquist's positions on civil liberties relate as much to the mode of reasoning and the openmindedness of the nominee as to the position he finally espoused. These reasoning processes, surely, are his own, whatever may be the advocate's use to which he puts them. Second, Mr. Rehnquist has said both at the hearings and before, *see* Rehnquist, *The Old Order Changeth: The Department of Justice under John Mitchell*, 12 Ariz. L. Rev. 251, 252–253 (1970), that his selection for his present position reflects his intellec-

tual compatibility with the views that he advocates in that position.

Moreover, both the Majority Report and Mr. Rehnquist himself rely on his statement as an advocate when they feel it will help their cause. For example, the majority quotes from a speech Mr. Rehnquist gave on behalf of the Department entitled "Official Detention, Bail, and the Constitution" which is said to show his "sensitivity to the considerations on both sides of Bill of Rights questions." In that speech, discussed below, he defended the Administration's position on preventive detention. Interestingly enough, when Mr. Rehnquist was asked by Senator Fong whether he supported that position, his only reply was that he had supported it in public speeches. He did not give his personal views. Another example of the same phenomenon is Mr. Rehnquist's citation of his part in drafting the Opinion of the Attorney General upholding the Philadelphia Plan, 42 Op. Atty. Gen. No. 37 (Sept. 22, 1969), as demonstrating his commitment to civil rights—a citation which, as discussed below, is undermined by the views Mr. Rehnquist expressed in 1966 during the deliberations on the Model State Anti-Discrimination Act.

In short, the decision whether to confirm or reject Mr. Rehnquist's nomination must be made on the record before the Senate, and a portion of that record consists of statements the nominee made while an advocate—and architect—of controversial positions. Those on both sides of the dispute, including the nominee himself, have cited his statements as an advocate to show his philosophy. So long as the nominee declines to express his own philosophy on important matters, the record remains in its present state, and no Senator has an alternative if he wishes to make a rational decision.

One reason that the Senate is forced to rely on the nominee's statements as an advocate, of course, is that Mr. Rehnquist refused to give the Senate his personal views on those issues on which he had defended the Administration's position. These include some of the most important and controversial issues of the day: national security wiretapping; preventive detention; no-knock; the legality of the Subversive Activities Control Board Executive Order; the scope and extent of executive privilege; the scope and extent of government surveillance power; the desirability of the Equal Rights Amendment; the need for cease and desist power in the EEOC; and others. Mr. Rehnquist invoked the attorney-client privilege to refuse to answer questions on such topics. By his own admission, this privilege had never before been invoked by a Supreme Court nominee.

Indeed, Justice Thurgood Marshall at his confirmation hearing had the following exchange with Senator McClellan concerning *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which was decided while Justice Marshall was Solicitor General:

Senator MCCLELLAN. . . .

I have a responsibility here, and I want to perform it conscientiously. . . . But I think it has become so critical that we who have this responsibility here of upholding confirmations need to have some idea, at least glimpse, some impression of the trend of the thinking and the philosophy of the one who is to receive confirmation.

Judge MARSHALL. . . .

Well, in this case you have the best evidence you could get, which would be the brief that I filed in the *Westover* case [a companion to *Miranda*], which not only gave the views of the U.S. Government. *It gave my personal views.* [emphasis added]

The purpose of the attorney-client privilege is to encourage the frankest and freest exchange of advice and information between lawyer and client. *See e.g.* McCormick on Evidence 181 (1954); 8 Wigmore, Evidence 628–29 (McNaughton rev. 1961). That purpose would not have been undermined at all had Mr. Rehnquist given the Committee his own personal views on the vital issues of the day. This is especially true since he did not invoke the privilege in other situations which are closer to traditional notions of its scope. For example, Mr. Rehnquist revealed to the Committee that he had advised the Justice Department to abandon its public position on national security wiretapping in favor of another position which, while substantively the same did not require advancing an argument based on inherent executive power. Yet advice to a client is something arguably covered by the privilege. *See* sources cited *supra*. And while revealing this piece of legal advice, he repeatedly declined to state his personal views on the same subject.

In any event, the matter could have been handled had the nominee's clients—the President and the Attorney General, by Mr. Rehnquist's own statement—waived the privilege. There can he no doubt as to their power to do so. *See e.g.* Cannon 4, A.B.A. Code of Professional Responsibility (1969); E. Conrad, Modern Trial Evidence § 1097 (1956). And there can be no doubt as to the importance of their doing so. As Mr. Rehnquist himself recognized in an article he wrote in 1959, *see* Rehnquist, *The Making of a Supreme Court Justice*. The Harvard Law Record, Oct. 8, 1959, p. 7, a Supreme Court nominee's philosophy ought to be of utmost importance to the Senate. On any rational scale of values, it surely should be more important that the Senate be fully informed before it votes on a Supreme Court nominee than that an Administration be shielded from the embarrassment, if any, which might result from an announcement that one of its members disagreed with its substantive position on a certain matter.

Nevertheless, the President and Attorney General refused to waive the privilege, and this has made the Senate's job even more difficult than it usually is. As Dean E. Clinton Bamberger, Jr., 18 of the 26 other members of the laws faculty of Catholic University said in a letter to the Committee:

No nominee may justify withholding from the Committee which must initially pass upon his qualifications and dispositions for handling this political power "in legal form" a frank expression of his political and legal philosophy. . . .

There is no such privilege which any nominee was so bold as to claim before against the Senate's right to know in fulfilling its responsibility to the . . . people.

Beyond the difficulties created by the fact that Mr. Rehnquist is a government official, and that he invoked the attorney-client privilege, was the excessive reluctance to the nominee at the hearings themselves. There were numerous examples of this. On national security wiretapping, to take one, the nominee spoke of his role in the formation of the government's position in the Supreme Court several times in general terms. Only at the end of the hearings, upon being asked again about his position, did he reveal that he had advised the Department to change its argument from reliance on inherent power to one phrased in terms of reasonableness. To take another example, Mr. Rehnquist was asked and described his role in the Pentagon Papers litigation, but neglected to mention until specific supplemental written questions were addressed that he had been the person who called the *Washington Post* asking them not to publish the documents. Such instances as these, combined with the invocation of the attorney-client privilege—combined too with the very proper refusal of the nominee in other situations to comment on specific fact situations or issues which may come before the Supreme Court—made it unnecessarily difficult to build a complete record of his views other than as contained in his writings and statements.

The proper perspective for this problem has been supplied by Mr. Rehnquist himself. He has stated his view that judicial philosophy is a proper inquiry for the Senate to make. When that inquiry is partially frustrated, the question arises, who must bear the burden? Mr. Rehnquist answered a similar question when testifying before Senator Ervin on executive privilege and the role of the Senate in ratifying treaties. Senator Ervin asked whether under some circumstances information accumulated during the negotiation of a treaty would have to be made available to the Senate at least on a confidential basis before the Senate voted on ratification. Mr. Rehnquist's policy was that "the Executive would fail to furnish that [information] at its peril, since . . . the Executive has the burden of proof of persuading the Committee and the Senate as a whole." Hearings Before the Senate Subcommittee on Separation of Powers, "Executive Privilege: The Withholding of Information By the Executive," 92d Cong., 1st Sess., July 27, 28, 29, Aug. 4, 5, 1971 (unprinted). The Executive has the same burden of proof when it comes forward with a Supreme Court nominee. Since the Executive is so largely responsible for the inability of the Senate to get the information it needs, it must run the risk that the Senate will act on the basis of the only substantive record available, and, on this "best evidence," reject the President's choice.

III. CIVIL RIGHTS

The Supreme Court has played a crucial and proper role in the last 20 years in securing the rights guaranteed in the Constitution for all citizens, particularly our racial minorities. For many of those to whom America has made unfulfilled promises, the Supreme Court has often been the one responsive institution which can be counted on to dispense equal justice under law. President Nixon himself, in accepting his party's nomination in 1968 recognized this when he said:

Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the general principles of civil rights.

Mr. Rehnquist's record, far from demonstrating such a commitment to civil rights, displays a consistent hostility toward efforts to secure rights for the victims of discrimination.

There are three specific episodes in the last seven years which show that Mr. Rehnquist is unwilling to allow law to be used to promote racial equality in America. These are his volunteered opposition in 1964 to a Phoenix public accommodations ordinance; his opposition in 1966 to two key provisions of a Model State Anti-Discrimination Act; and his public statement in 1967, offered in opposition to modest proposals toward integration, that "we are no more dedicated to an integrated society than to a segregated society." And these incidents are not offset in any way by an affirmative demonstration of commitment to equal rights.

A. The 1964 public accommodations ordinance

In June of 1964 the Phoenix City Council was considering a public accommodations ordinance which declared that—

It is . . . contrary to the policy of the City and unlawful to discriminate in places of public accommodation against any person because of race, color, creed, national origin, or ancestry.

The ordinance applied only to "public places" offering entertainment, food or lodging, and specifically excluded "any place which is in its nature distinctly private." In testimony before the City Council, Mr. Rehnquist called this ordinance so "far reaching" that it should be submitted to the people for a vote rather than being passed by the Council. He also said:

I am a lawyer without a client tonight. I am speaking only for myself. I would like to speak in opposition to the proposed ordinance

because I believe that the values that it sacrifices are greater than the values which it gives. . . . There have been zoning ordinances and that sort of thing but I venture to say that there has never been this sort of an assault on the institution where you are told, not what you can build on your property, but who can come on your property. This, to me, is a matter for the most serious consideration and, to me, would lead to the conclusion that the ordinance ought to be rejected.

The ordinance was passed unanimously by the City Council the next day. Mr. Rehnquist, still without a client save himself, then wrote a letter to the editor of the Arizona Republic calling passage of the ordinance "a mistake." Incredibly, the letter first equated the indignity suffered by a victim of discrimination barred from a lunch counter with the "indignity" suffered by the segregationist forced to serve a meal, and then concluded:

"It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

The freedom to which he referred was the freedom of the property owner to do with his property as he wished. As Mr. Rehnquist recognized in the letter, this freedom has been impinged upon by a great many laws, such as zoning laws, and health and safety regulations. While Mr. Rehnquist thought that imposition on property rights was acceptable for purposes of zoning, he thought an impingement on property rights designed to assure equal access regardless of race to places which hold themselves out to the public was unjustified. In other words, in 1964 the nominee, as he agreed at the hearings, "felt that personal property rights were more important than individual freedoms, the individual freedom of the black to go up to a lunch counter."

It is important to understand the time at which this ordinance was being considered. The fight to end discrimination in public accommodations was in full swing across the nation. The encounters at Selma and Birmingham were recent history. The Congress was in the midst of considering the broadest and most significant piece of civil rights legislation it had ever passed, and that legislation included a meaningful public accommodations section. By the time Mr. Rehnquist spoke in Phoenix, the House had passed the bill, and the Senate had invoked cloture on it. Even more important, the most substantial objections to the federal act came from those who doubted the federal government's constitutional power to enact public accommodations legislation. This was not an argument the nominee used. He fought the measure solely on its merits.

When questioned at the hearings about his opposition to the ordinance, Mr. Rehnquist said he has changed his mind. Asked why, he replied:

I think the ordinance really worked very well in Phoenix. It was readily accepted and I think I have come to realize since it, more than I did at the time, the strong concern that minorities have for the recognition of these rights.

Subsequently, Mr. Rehnquist, perhaps recognizing that a pragmatic argument is weak where principle 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—particularly when other actions by the nominee after 1964 are taken into account.

B. The 1966 Model State Anti-Discrimination Act

The second example of Mr. Rehnquist's opposition to the use of law in the promotion of racial equality came in 1966, when as an Arizona representative to the National Conference of Commissioners on Uniform State Laws he participated in deliberations on a proposed Model State Anti-Discrimination Act. The Act forbade discrimination in certain aspects of employment, public accommodations, education, and real property transactions, and it created a State Commission on Human Rights to enforce its provisions. The Act was finally approved by the States 37–2 (Alabama and Mississippi dissenting), with Arizona and Mr. Rehnquist voting in favor of it. But this came only after the Act was relegated to the status of a "Model" instead of a "Uniform" act, thereby relieving the Commissioners of the personal duty to seek passage of the Act in their home states. See Handbook of the National Conference of Commissioners on Uniform State Laws 406 (1966). And it came after Mr. Rehnquist attempted unsuccessfully to delete two key provisions of the Act.

The first was a proposal which was, in the words of the Commissioners' Comments, "designed to permit the adoption [by an employer] of voluntary plans to reduce or eliminate" racial, religious, or sex imbalance in its workforce. No compulsory hiring to achieve racial balance was involved; the Act merely permitted voluntary efforts. These plans were to be subject to the approval of the Commission on Human Rights, and they could apply only to the hiring of new employees or the filling of vacancies. According to the debates, four states already had enacted similar laws: Indiana, Massachusetts, Illinois, and California. Mr. Rehnquist opposed this provision, and, in effect, moved to delete it. Another Commissioner called this motion "a direct attack upon the power granted in the statute to eliminate racial imbalance." The issue then came to a vote and Mr. Rehnquist's motion was defeated. The provision now appears as Section 310 of the Model Act, which reads as follows:

SECTION 310. [Imbalance Plans.] It is not a discriminatory practice for a person subject to this chapter to adopt and carry out a plan to fill vacancies or hire new employees so as to eliminate or reduce imbalance with respect to race, color, religion, sex, or national origin if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan.

This opposition in 1966 reveals Mr. Rehnquist's unwillingness to allow law to be used in constructive ways to undo 200 years of discrimination in America. And it also reveals that the nominee's much heralded responsibility for the Opinion of the Attorney General upholding the lawfulness of the Philadelphia Plan—which required that specified numbers of minority employees be hired to redress the effects of earlier discrimination—cannot be given much weight, for the nominee's personal philosophy and policy preference are to the contrary. Indeed, the inconsistency is shown even more clearly by the fact that the Philadelphia Plan is mandatory on all those covered, while the provisions Mr. Rehnquist sought to delete from the Model Act were merely permissive.

The second proposal that Mr. Rehnquist opposed was one designed to prohibit vicious "blockbusting" tactics by which realtors sometimes play on racial fears for their own profit. As the Reporter-Draftsman of the Act, Professor Norman Dorsen of New York University, said during the deliberations, a number of cities and at least one state (Ohio) had anti-blockbusting provisions by 1966. Mr. Rehnquist moved to delete this section. He said:

"It seems to me we have a constitutional question and a serious policy question, and in view of the combination of these two factors, plus the fact that it doesn't strike me this is a vital part of your bill at all, I think this would be a good thing to leave out."

Mr. Robert Braucher, then Chairman of the Special Committee on the Model Anti-Discrimination Act and a Professor at Harvard Law School, and now a Justice on the Supreme Judicial Court of Massachusetts, replied with an eloquent defense of the anti-blockbusting provision:

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

"And the notion that type of conduct should be entitled to some kind of protection under the bans of free speech is a thing which doesn't appeal to me a tiny bit."

A vote was then taken on Mr. Rehnquist's motion to delete the section, and the motion failed. The section now appears as Section 606 of the Model Act, which reads as follows:

SECTION 606. [Blockbusting.] It is a discriminatory practice for a person, for the purpose of inducing a real estate transaction from which he may benefit financially

(1) to represent that a change has occurred or will or may occur in the composition with respect to race, color, religion, or national origin of the owners or occupants in the block, neighborhood, or area in which the real property is located, or

(2) to represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

Some have argued that Mr. Rehnquist's vote in favor of the final Model Act which contained public accommodations provisions shows the nominee's change of heart from his 1946 position opposing a Phoenix public accommodations ordinance. But that is a vastly oversimplified view. In the first place, the Commissioners were dealing with model legislation, not a law about to be put into effect, so the situations are not comparable. And even more important, the nominee himself was twice asked to explain his change of heart, which was first announced at the confirmation hearings. Neither time did he mention his vote as a Commissioner in 1966. This means either that in the nominee's mind the vote approving the final draft was not significant in showing a change of heart or that he chose not to bring it up because of his opposition to the imbalance and anti-blockbusting provisions. Giving the nominee

the benefit of the doubt, one concludes that in his own mind the 1966 vote was not important. There is then no reason it should be important to the Senate. In any event, the final vote is far less significant than Mr. Rehnquist's earlier opposition to the two sections of the act discussed above.

C. The 1967 letter

The third incident was a letter to the editor Mr. Rehnquist wrote in September 1967 in response to a series of articles and a school official's proposals to deal with de facto segregation in Phoenix. The letter can be understood only in the context in which it was written.

Mr. Harold R. Cousland wrote a series of six articles for the *Arizona Republic* in late August 1967 concerning de facto segregation in Phoenix and what might be done to combat it. Mr. Cousland discussed the problem of racial segregation in the Phoenix schools, the reasons that segregation is self-perpetuating, the contention that minority group children are better off in integrated schools, compensatory education plans, and alternative proposals for integration: open enrollment, voluntary busing, school pairing, educational parks. Forced busing of students was not one of the proposals.

Just as Mr. Cousland's series was completed, the Superintendent of the Phoenix Union High School District, Dr. Howard Seymour, proposed a number of steps designed to combat de facto segregation in Phoenix. As reported in the Arizona Republic of September 1, 1967, at p. 19, these steps were:

Appointment of a policy adviser skilled in interpersonal relations and urban problems;

Organization of a citywide advisory committee representing minority groups;

Formation of a Human Relations Council at each high school;

Promotion of voluntary exchanges of pupils among racially imbalanced schools in various ways, including the location of special enrichment programs and extra-curricular activities;

In the long run, a series of seminars on the nature of prejudice;

Curriculum changes designed to accent the contributions of various ethnic groups and individuals;

Without setting a ratio of minority teachers at each school, the assignment of staff in a way which redressed the existing imbalance.

Mr. Rehnquist found the combination of Mr. Cousland's articles and Dr. Seymour's program "distressing" enough to write the following letter to the Arizona Republic:

"De Facto" Schools Seen Serving Well

[Editor, The Arizona Republic:] The combined effect of Harold Cousland's series of articles decrying "de facto segregation" in Phoenix schools, and the Republic's account of Superintendent Seymour's "integration program" for Phoenix high schools, is distressing to me.

As Mr. Cousland states in his concluding article, "whether school board members take these steps is up to them, and the people who elect them." My own guess is that the great majority of our citizens are well satisfied with the traditional neighborhood school system, and would not care to see it tinkered with at the behest of the authors of a report made to the federal Civil Rights Commission.

My further guess is that a similar majority would prefer to see Superintendent Seymour confine his activities to the carrying out of policy made by the Phoenix Union High School board, rather than taking the hit in his own teeth.

Mr. Seymour declares that we "are and must be concerned with achieving an integrated society." Once more, it would seem more appropriate for any such broad declarations to come from policymaking bodies who are directly responsible to the electorate, rather than from an appointed administrator. But I think many would take issue with his statement on the merits, and would feel that we are no more dedicated to an "integrated" society than we are to a "segregated" society; that we are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities.

The neighborhood school concept, which has served us well for countless years, is quite consistent with this principle. Those who would abandon it concern themselves not with the great majority, for whom it has worked very well, but with a small minority for whom they claim it has not worked well. They assert a claim for special privileges for this minority, the members of which in many cases may not even want the privileges which the social theorists urge be extended to them.

The schools' job is to educate children. They should not be saddled with a task of fostering social change which may well lessen their ability to perform their primary job. The voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour.

Mr. Rehnquist was given several opportunities at the hearings to explain this letter. His reply always took the same line:

"I would still have the same reservations I expressed in 1967 to the accomplishment of this same result by transporting people long distances, from points where they live, in order to achieve this sort of racial balance, and what I would regard as rather an artificial way.

And later in the hearings:

With respect to the 1967 letter which I wrote in the context of the Phoenix School system as it then existed, I think I still am of the view that busing or transportation over long distances of students for the purpose of achieving a racial balance where you do not have a dual school system is not desirable.

And again in answers to supplemental questions, Mr. Rehnquist explained that a statement by Dr. Seymour that he would "not dismiss busing of students as a partial solution" lay at the heart of this letter.

Thus, Mr. Rehnquist has tried to cloak his 1967 letter in the current controversy over mandatory busing of students. But a fair reading of the letter itself and the articles on which it is based demonstrates that Mr. Rehnquist was opposed to much more. The letter itself does not even mention busing, or indeed, transportation of students in any form. And it is apparent from the cursory glance at the proposals Dr. Seymour made that—as Mr. Rehnquist admitted in answers to supplemental questions—virtually all of the proposals are "entirely consistent" with the neighborhood school concept Mr. Rehnquist wrote about. Yet the letter specifically suggested that "the voters of Phoenix will do well to take a long second look at the sort of proposals urged by Messrs. Cousland and Seymour." (emphasis added)

Moreover, the newspaper story from the Arizona Republic of September 1, 1967, out of which Mr. Rehnquist takes Dr. Seymour's statement that he would "not dismiss busing of students" when read in full shows that Dr. Seymour had an extremely moderate view of the problem:

He [Dr. Seymour] said he would not dismiss busing of students as a partial solution, but he discounted busing or the altering of district lines as complete approaches to the problem.

"It is much more preferable for us to demonstrate a willingness to broaden the spectrum of school populations through such actions as voluntary transfers, a local peace corps of students and teachers, . . . and other devices intended to lift the aspirations of those who live and learn without them.

"The research evidence tentatively supports the premise that minority pupils achieve more in an atmosphere of high motivation," he said.

And the *Phoenix Gazette* of August 31, 1967, reporting the same speech by Dr. Seymour makes the Superintendent's position equally clear:

But he [Dr. Seymour] said he opposes gerrymandering district boundaries or "busing" pupils from one part of town to another as means toward "true integration."

"There is nothing more artificial in my judgment than to load a group of pupils from one district and disgorge them at another without making it possible for full, active participation in learning, socializing, sports and activities, and without integrating the adults along with busing pupils," he continued.

Thus, far from being an advocate of forced busing, Dr. Seymour favored other ways of integrating the schools, such as encouraging voluntary transfers under a program already in effect. Viewed in this light, one sees rather clearly that just four years ago Mr. Rehnquist found "distressing" some rather minimal efforts of school officials to promote equality of educational opportunity. One also sees that his answers to the Committee's questions on this matter were more glib than candid.

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

The statement is especially disturbing when put into context. The newspaper story which contains the quote by Dr. Seymour with which Mr. Rehnquist took issue reads:

Commenting on teaching minority members, [Dr. Seymour] said the district should make no attempt to establish ratios of one type of teacher to the pupils they serve.

"Since we are and must be concerned with achieving an integrated society," he said, "the Phoenix Union High School system recognizes an obligation to staff schools with personnel to help relieve cultural imbalance within the community. Pupils need to be exposed to the fine talents representative of all races."

Thus there is yet another part of a consistent pattern, complementing Mr. Rehnquist's opposition to the employment "imbalance" section of the Model State Anti-Discrimination Act, and to the public accommodations ordinance, of the nominee's hostility to programs which recognize 200 years of discrimination in America and take steps to rectify the tremendous burdens which that discrimination has imposed.

D. The absence of affirmative commitment to equal rights

Significantly, the disturbing inferences which flow from the incidents just described are not rebutted in any way by other, affirmative actions Mr. Rehnquist has taken to promote racial justice. Indeed, the absence of a demonstrated commitment to equal rights in the nominee's record is alone strong grounds for questioning his nomination.

Mr. Rehnquist was twice asked at the hearings to describe what in his record demonstrated a commitment to equal rights for all. His entire answer was as follows:

"It is difficult to answer that question, Senator. I have participated in the political process in Arizona. I have represented indigent defendants in the Federal and State courts in Arizona. I have been a member of the County Legal Aid Society Board at a time when it was very difficult to get this sort of funding that they are getting today. I have represented indigents in civil rights actions. I realize that that is not, perhaps, a very impressive list. It is all that comes to mind now.

* * * * *

"I think that there are some paragraphs in my Houston Law Day speech which recognize the great importance of recognition of minority rights, that the progress is not as fast as we would like and that more remains to be done. I am trying to think of some other public statement that may contain similar—well, you know, I am just coming back, not back to isolated passages in public statements."

This was subsequently expanded and clarified by Mr. Rehnquist in response to additional questions by certain members of the Committee. Mr. Rehnquist added that he had been an Associate Member of the American Bar Association Special Committee on the Defense of Indigent Persons Accused of Crime in 1963; that he had testified on behalf of the Administration in favor of ratification of the Genocide Treaty and in support of the Equal Rights Amendment; and that he had participated in the preparation of the Opinion of the Attorney General upholding the legality of the "Philadelphia Plan." Mr. Rehnquist also explained in somewhat greater detail the sorts of civil rights actions in which he represented indigents.

This record, compiled over the course of an 18 year career, reveals little more than the routine activities which may be expected of any private lawyer who becomes a high-ranking government official. It cannot be called a demonstrated commitment to fundamental human rights.

Representation of indigents, for example, is considered one of the duties of every member of the bar, and in criminal cases is usually done at the request of the court. The civil rights actions Mr. Rehnquist described in his response to written questions could more accurately be called civil cases than civil rights cases in the usual meaning of that term. And in response to additional questions, Mr. Rehnquist admitted that his membership on the Maricopa County Legal Aid Society Board had been *ex officio*, by virtue of his position as an officer of the County Bar Association.

Nor is any particular commitment shown by his record in the Department of Justice since 1969. His testimony in support of the Equal Rights Amendment was less than wholehearted. And any reliance which might otherwise be placed on his authorship of the Opinion of the Attorney General upholding the lawfulness of the Philadelphia Plan is undermined by his opposition to a far less reaching proposal in the Model State Anti-Discrimination Act in 1966, discussed above. Further, once put in chronological sequence, the significance of that Opinion is somewhat suspect. In June of 1969 the Labor Department, with Administration approval, promulgated the orders for minority hiring commonly referred to as the Philadelphia Plan. In August the Comptroller General held the Plan illegal. In September, Mr. Rehnquist's office prepared the Opinion of the Attorney General which, unsurprisingly, upheld the Labor Department's—and the Administration's—well publicized proposal.

In sum, Mr. Rehnquist's record falls to demonstrate any strong affirmative commitment to civil rights, to equal justice for all citizens, let alone a level of commitment which would rebut the strong evidence of insensitivity to such rights.

E. Alleged harassment of voters

There have been a number of charges and denials concerning Mr. Rehnquist's role in voter challenges by Republicans during various elections in the early 1960's in Phoenix. One serious charge was that made in sworn affidavits by Mr. Jordan Harris and Mr. Robert Tate alleging that Mr. Rehnquist harassed and intimidated a voter and engaged in a scuffle with Mr. Harris at the Bethune precinct in 1964. Messrs. Tate and Harris charge that Mr. Rehnquist made an improper attempt to administer personally a literacy test to a would-be-voter. Mr. Harris says he approched Mr. Rehnquist, to whom he had been introduced, and "argued with him about the harassment of voters." A struggle ensued, in which Mr. Tate came to Mr. Harris' aid. A policeman, it is said, entered and took Mr. Rehnquist into an office, from which he soon left. Mr. Tate identified Mr. Rehnquist "from pictures I have seen lately in the papers . . . he did not, at that time, however, wear glasses."

These affidavits are corroborated by two additional ones sworn within the past few days. These came from the Rev. and Mrs. Snelson McGriff, who say that Mr. Rehnquist—or "his twin brother"—was at Bethune precinct in 1964. Rev. McGriff says that the challenger, Mr. Rehnquist, wore glasses while inside the voting place, but took them off when he came outside, before the scuffle took place. *See The National Observer*, Nov. 28, 1971, p. 4, col. 1.

Mr. Rehnquist has submitted a sworn affidavit which says that the affidavits of Messrs. Tate and Harris "insofar as they pertain to me . . . false." He has denied having been at the Bethune precinct in 1964, and he denied that he ever personally "harassed or intimidated voters."

The conflict in the evidence before the Committee is not resolved simply by reference to Judge Charles Hardy's letter, as the Majority would have us believe. Judge Hardy only confirms what was already documented by contemporaneous news accounts and by an FBI report: that there was voter harassment and a fight at Bethune in 1962, and that Mr. Rehnquist was not involved in it. But Judge Hardy's letter does not by any stretch of the imagination stand for the proposition that no scuffle occurred at Bethune in 1964. Thus Mr. Rehnquist's statements and Judge Hardy's letter do not "completely refute the charges" made by Messrs. Tate and Harris. Indeed, Judge Hardy's letter which states that the "events in question" occurred in 1962, could not have been intended as a refutation of their charges since it is dated before their affidavits were made and released.

Nor does the fact that the Federal Civil Rights Act of 1964, in effect at the time, prohibited oral literacy challenges "undercut the credibility of these allegations" as the Majority Report claims. That fact means only that the challenges, if there were any, violated federal law. And at least in some parts of Arizona, a Justice Department investigation has revealed that "challenges . . . based on . . . ability to read the Constitution in English" were made in 1964. *See Apache County* v. *United States*, 256 F. Supp. 903, 909 (D.D.C. 1966) (3-judge court).

Instead, it appears that the Committee lacks either the motivation or machinery to conduct the type of fact-finding which is needed to uncover which side of this dispute is mistaken. Therefore, each Senator will have to decide for himself what weight—if any—to give either the charges or the blanket denial.

Whatever the actual facts are about the 1964 incident at Bethune, that dispute should not be permitted to obscure the larger question of the extent of Mr. Rehnquist's responsibility for the Republican efforts to intimidate and harass minority voters in Maricopa County from 1958 to 1964, Judge Hardy, whose letter is so heavily relied upon by the Majority, described those tactics as follows:

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

In response to a written question from several members of the Committee, Mr. Rehnquist stated that he felt "that there was no connection between my role [in 1962] and the circumstances related by Judge Hardy." He also stated that the practices Judge Hardy described "did not come to my attention until quite late in the day of the election in 1962" and that is why he took no steps to curb practices such as indiscriminate use of literacy challenges, which he believes improper. But this disavowal of involvement in the 1962 practices must be placed alongside the facts, established by Mr. Rehnquist's own answers, that in 1960, 1962 and 1964 the nominee played an important role for the Republican Party in Phoenix in voter challenges.

In 1960, Mr. Rehnquist was designated by the County Republican Chairman as co-chairman of the Ballot Security Program; he supervised and assisted in the preparation of envelopes mailed to Democrats—largely in black and Mexican-American districts—which were the foundation of residency challenges; he recruited lawyers to serve on a Lawyers' Committee; he advised challengers on the law; and he supervised in assembling returns of the mailings for challenging purposes.

In 1962, Mr. Rehnquist was designated Chairman of the Lawyers' Committee of the County Republican Party, and he again taught challengers the procedures they were to use. And, as in 1960, he served as a troubleshooter—going to precincts at which disputes had arisen, in order to help resolve them.

Finally, in 1964 Mr. Rehnquist was Chairman of the Ballot security Program, selected by the County Republican Chairman. As such, he had overall responsibility for mailing out envelopes, recruiting challengers and recruiting members of the Lawyers' Committee, and for speaking, or seeing that someone spoke, at a training session of challengers. In 1964, as well, Mr. Rehnquist was general counsel to the County Republican Committee.

Thus while Mr. Rehnquist has sought to disassociate himself from the tactics em-

ployed by the Republicans in 1962 and other years, it cannot be overlooked that he held a high and responsible position in the Republican party's election day apparatus from at least 1960 to 1964, a period that saw very substantial harassment and intimidation of voters in minority group precincts.

F. Conclusion

A review of the nominee's entire record on civil rights reveals a persistent unwillingness on his part to allow law to be used to overcome racial injustice. There are two significant implications of this which argue strongly against confirmation. First, Mr. Rehnquist's views are such that one must fear the interpretation he may give to the great promise of the Fourteenth Amendment: equal protection of the laws. Indeed, one must also fear the limits he would impose on a legislature's efforts to redress 200 years of racial injustice. Second, there is the question of the very appearance of fairness and impartiality. At a time when many Americans, young and old alike, doubt the responsiveness of our system of government, we cannot afford to put on the Supreme Court a man consistently insensitive to the role that law must play in achieving a fair and just society.

IV. BILL OF RIGHTS

Speaking of Mr. Rehnquist's approach to questions of civil liberties and the Bill of Rights, the Majority Report says that Mr. Rehnquist—sees both sides of the difficult questions in this area, which requires working out the delicate balance established by the Constitution between the rights of individuals and the duty of government to enforce the laws.

The record demonstrates that just the opposite is true. When it comes to dealing with civil liberties, Mr. Rehnquist uniformly takes a position which reflects the low value he places upon concerns of equality and individual freedom. He consistently gives these concerns far less weight than that to which they are entitled by their high place in the Constitution of the United States and their vital role in the fabric of contemporary American society. The nominee does not see "both sides of the difficult questions in this area." Rather, he reads provisions of the Constitution dealing with individual liberties, and decisions upholding them, as narrowly as possible, while giving the most expansive reading and generous extrapolation to those provisions and precedents granting the Executive power to impinge on these freedoms.

A. The early record

Mr. Rehnquist's public record on civil liberties before coming to his present post is sparse—save for some intemperate articles impugning the motives and Constitutional fidelity of the Supreme Court in precisely this area.

In 1957, Mr. Rehnquist wrote an article on the role law clerks play in Supreme Court decisions, and said:

Some of tenets of the "liberal" point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren. Rehnquist, *Who Writes Decisions of the Supreme Court?* U.S. News and World Report, December 13, 1957, p. 57.

The following year Mr. Rehnquist attacked the Court for its decisions in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg* v. *California*, 353 U.S. 252 (1957), where the Court held that applicants for state bar examinations had been deprived of their constitutional rights when they were prevented from taking the examinations because of previous political beliefs. The cases may have been difficult and controversial, but surely the decisions, written by Mr. Justice Black, did not justify Mr. Rehnquist's accusatory closing remark. Referring to the defendants in the cases, one an admitted former Communist and the other an alleged Communist, he said:

A decision of any court based on a combination of charity and *ideological sympathy* at the expense of generally applicable rules of law is regrettable no matter from whence it comes. But what could be tolerated as a *warm-hearted aberration* in the local trial judge becomes nothing less than a *constitutional transgression* when enunciated by the highest Court of the land. (Emphasis added) Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration*, 44 A.B.A.J. 229 (1958).

At the hearing Mr. Rehnquist said he meant only to suggest that the Justices had great sympathy for "the plight of unpopular groups." But a person of Mr. Rehnquist's intelligence and careful expression does not refer to "ideological sympathy" when he means concern for the unpopular. The innuendo is clear.

Taken together, these articles reveal an antagonism toward opposing points of view on civil liberties which is in stark contrast to the "balanced" approach the Majority claims for the nominee.

B. Wiretapping

With respect to wiretapping, Mr. Rehnquist has been a stern defender of the Administration position, and he has refused to disassociate himself from it or to give the Committee any different personal views on the issue. This position is that the Attorney General may wiretap without prior judicial authorization whenever he concludes there is a threat to the national security, whether the threat comes from foreign agents or so-called domestic subversives. The courts, of course, have permitted executive wiretaps in the former but not in the latter situation. *Compare United States* v. *Keith*, 444 F.2d 651 (6th Cir.), *cert. granted*, 91 S. Ct. 2255 (1971), *with United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970), *reversed on other grounds*, 403 U.S. 698 (1971).

The answer to the argument that the Executive can engage in wiretapping whenever it believes there is a domestic threat to the national security was eloquently given by the Sixth Circuit Court of Appeals in *Keith, supra*, 444 F.2d at 665:

[T]he Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.

The Sixth Circuit concluded (*id.*):

The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand.

The flaws in the wiretapping position Mr. Rehnquist has taken are so manifest that they suggest an insensitivity to Fourth Amendment principles. The purpose of that Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camera* v. *Municipal Court*, 387 U.S. 523, 528 (1967). That purpose is secured by requiring the Executive to obtain a court order *before* it can invade a citizen's privacy. As the Supreme Court put it in *Chapman* v. *United States*, 365 U.S. 610, 614–15 (1961), quoting from *Johnson* v. *United States*, 333 U.S. 10, 13–14 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. *Chapman* v. *United States*, 365 U.S. 610, 614–615 (1961), quoting from *Johnson* v. *United States*, 333 U.S. 10, 13–14 (1948).

If Attorneys General could decide on their own who is a domestic threat to the national security, and then tap without prior court order, the protection of the Fourth Amendment will have been badly eroded. For since *Katz* v. *United States*, 389 U.S. 347 (1967), held that wiretapping falls within the Fourth Amendment, there is no apparent reason why an Attorney General could not claim the power to make *other* intrusions of privacy without a warrant when he deemed the national security to be envolved.

In this connection, it is worth noting that the practice of previous Attorneys General with respect to wiretapping, on which Mr. Rehnquist places so much reliance, came before *Katz* made it clear that wiretapping was a search or seizure within the Fourth Amendment. So prior practice offers scant precedent for his position. Indeed, the memorandum from President Roosevelt to Attorney General Jackson dated May 21, 1940, reproduced in *United States* v. *Keith, supra*, at 669–70, which forms the basis for much of the argument, was written not only well before *Katz*, but also appears to be aimed at threats to the national security from foreign countries.

Mr. Rehnquist for his part seems to be willing to go even further than merely supporting wire taps without prior court order in this easily abused area. He took the position at Brown University, as reported in the Providence Journal of March 11, 1971, that the Justice Department "must protect against . . . subversive domestic elements, yet often does not have the evidence of imminent criminal activity necessary for wire tap authorization." In other words, Mr. Rehnquist argued that *because* the Executive does not have enough evidence to get a warrant against "elements" it deems in its sole discretion "subversive," it should not have to get one. This "analysis" turns the Fourth Amendment precisely on its head. If it were ever accepted, it would reverse the whole course of Fourth Amendment law in this country.

And this view raises questions about Mr. Rehnquist's statement that surveillance other than wiretapping, discussed below, is proper only when directed at the apprehension of a criminal or when the activity under surveillance has a "law violation potential." If Mr. Rehnquist has a loose view of the standard of probability the Executive must meet in the wiretap area, one would conclude that he has a similarly loose view of the standards applicable in the surveillance area. Thus, the limits he purports to place on government surveillance appear to be far more rhetorical than effective.

Much is made by the Majority of the fact that Mr. Rehnquist revealed that he had advised the Attorney General to abandon the Department's previous public position on wiretapping—that the Executive has the inherent power to tap—and take a new one—that such a tap is "reasonable" under the

Fourth Amendment. The change is more cosmetic than real, and even Mr. Rehnquist admitted it was made at least in part for tactical reasons.

Asked about this in supplemental written questions, Mr. Rehnquist replied that the change was significant because it amounted to a recognition "that the Executive is subject to the restraints of the Fourth Amendment in this area as elsewhere." But the restraints of the Fourth Amendment are, in Mr. Rehnquist's view, hardly any restraints at all, for he argues that a wiretap is "reasonable" when the Attorney General decides in his mind that it is necessary to protect the country from domestic opposition. Mr. Rehnquist's argument that the Attorney General, often a close political advisor of the President, is the kind of neutral, objective buffer between the police and the citizen that the framers of the Fourth Amendment envisaged reflects the low value he puts on individual freedom and privacy.

Mr. Rehnquist also said that the "practical result" of the change "was to recognize that the courts would decide whether or not this practice amounted to an unreasonable search which would violate the Fourth Amendment." Of course, that is precisely what the Sixth Circuit in Keith did: it decided that the "practice" was unconstitutional. Moreover, to the extent that Mr. Rehnquist's response implied that the courts will determine the "reasonableness" of each tap after the fact, it overlooks the crucial point that many "national security" wiretaps will never come to the attention of a court and thus occasional and random after-the-fact review does not provide an adequate restraining effect on the executive branch, an adequate deterrent to protect the right of privacy.

C. Government surveillance

Mr. Rehnquist has also taken an active role in presenting the Administration's views on the propriety of government surveillance of individual citizens. It was in this context, indeed, that Mr. Rehnquist made his now-famous statement that:

I think it quite likely that self-restraint on the part of the Executive Branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering.

But, as Mr. Rehnquist himself recognized at the hearings, the constitutional guarantees of the Bill of Rights were enacted precisely because our Nation was not prepared to trust our future to the "self-discipline" of those who happen to be in power at any given time. If a Supreme Court Justice were to believe that "self-restraint" on the part of the Executive could be relied on to prevent abuse—as Mr. Rehnquist plainly said—then that measure of our freedom which comes from judicial control of the Executive would be sorely threatened.

The Majority Report relies on Mr. Rehnquist's later explanation of his "self-restraint" statement as follows:

My remarks before Senator Ervin's Committe were in a context of the existence of the Bill of Rights, the existence of the statutory restrictions such as were contained in the 1968 Act. And the question, as I understand it, was what additional statutory restrictions should be placed on investigative processes.

But this is hardly an answer at all. In the first place, the statutory restrictions he refers to are applicable only to wiretapping in the detection of specifically enumerated crimes, not to government surveillance or other intelligence gathering. We are unaware—as is Mr. Rehnquist, apparently—of any statutory restrictions on government surveillance activities. In the second place, Mr. Rehnquist opposes any enforceable statutory controls, as he said in a speech entitled "Privacy, Surveillance and the Law" delivered on March 19, 1971:

I do not believe, therefore, that there should be any judicially enforceable limitations on the gathering of this kind of public information by the Executive Branch of the government.

Third, Mr. Rehnquist's reliance on the Bill of Rights as providing enforceable limitations on government surveillance activities is unconvincing, since he is of the opinion that the Constitution imposes virtually no such limits. This is shown by the colloquy he had with Senator Ervin on the question. Hearings Before the Senate Subcommittee on Constitutional Rights, "Constitutional and Statutory Sources of Investigative Authority in the Executive Branch of Government," 92d Cong., 1st Sess., March 9, 1971 (unprinted). Only a small portion of his statement is quoted in the Majority Report. The full colloquy is much more enlightening:

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. Senator, we discussed that briefly last week, I think and, as I say, I do not conceive it to be any part of the function of the Department of Justice or of any other governmental agencies to surveil or otherwise observe people who are simply exercising their First Amendment rights.

When you go further and say isn't a serious constitutional question involved, I am inclined to think not, as I said last week. Undesirable as this practice is and vigorously as it should be condemned. I do not believe it violates the particular constitutional rights of the individuals who are surveilled.

Senator ERVIN. I would agree with you to the extent that it would not constitute a violation of the Fourth Amendment where surveillance is had of people in public places because there is no search and there is no seizure, no search of a home or building and no search of papers and no seizure, but do you not concede that government could very effectively stifle the exercise of First Amendment freedoms by placing people who exercise those freedoms under surveillance?

Mr. REHNQUIST. No, I don't think so, Senator. It may have a collateral effect such as that, but certainly during the time when the Army was doing things of this nature, and apparently it was fairly generally known that it was doing things of this nature, those activities didn't prevent, you know, two hundred, two hundred fifty thousand people from coming to Washington on at least one or two occasions to, you know, exercise their First Amendment rights, to protest the war policies of the President.

Indicative of Mr. Rehnquist's insensitivity to constitutionally protected interests threatened by government surveillance is his reluctance to recognize the chilling effect such surveillance has on the exercise of First Amendment freedoms. One example of this is the following colloquy the nominee had with Senator Ervin at the surveillance hearings cited above:

Senator ERVIN. Well, is it your position that the government could take and put somebody, I believe it is called, a tail on me, and this man could walk around and follow me everywhere I went, and because he didn't compel me to go to those places, and just observed me, that it would have no legal remedy?

Mr. REHNQUIST. Well, to say you would have no legal remedy, I think, is more than I would care to say. As I have said before, I think that is a waste of taxpayer's money, it is an inappropriate function of the executive branch. I don't think it raises to a First Amendment violation.

At the confirmation hearings, with the benefit of pointed questioning, Mr. Rehnquist conceded that even where some persons exercise their rights, others may be deterred from doing so. But his testimony as presented to Senator Ervin's subcommittee plainly discounted this critical interest near the core of the First Amendment. The Majority Report's own summary of the nominee's later concessions only underlines his attitude:

In summary, his testimony before Senator Ervin's subcommittee and before this committee establishes that Mr. Rehnquist is acutely aware that certain governmental information-gathering activity may raise First Amendment questions if it is proven that citizens are *actually* deterred from speaking out. [Emphasis in original.]

The difficulty of proving a specific chilling effect is obvious, and the notion that a First Amendment question isn't even *raised* until it is "proven that citizens are *actually* deterred from speaking out" (emphasis in original) is alarming. One can have little hope on this record that as a Justice the nominee would be vigorous in his protection of those First Amendment freedoms so vital to the functioning of the American democracy.

But it is not just Mr. Rehnquist's substantive positions which are distressing. Even more fundamental and more distressing is the way he approaches and analyzes civil liberties problems. In the area of government surveillance, Mr. Rehnquist rejects on the one hand the notion of judicial control over surveillance on the ground that the very process of litigation will impede the investigative activities of the Executive and will—in Learned Hand's borrowed phrase—"dampen the ardor of all but the most resolute" public officials. He does not explore the extent of the impediment, or consider available devices (such as *ex parte* or *in camera* judicial proceedings) which would minimize it. On the other hand, until pressed at his own confirmation hearings for a more reassuring answer, he denied that surveillance raises First Amendment questions, resolutely rejecting the argument that it may "dampen the ardor of all but the most resolute" of political dissenters. The acknowledged possibility of abuse of surveillance does not call for judicial controls; but the possibility of abuse of judicial process calls for executive immunity from judicial controls. The government's investigative interests must be protected from the "chilling effect" of litigation; but the First Amendment interests of political dissenters need no protection from the "chilling effect" of the investigation. *See generally* speech, "Privacy, Surveillance, and the Law" (March 19, 1971); Testimony on "Investigative Authority of the Executive," *supra;* speech, "Law Enforcement and Privacy" (July 15, 1971).

Obviously, such conceptions as "possibility of abuse" and "chilling effect" have differing application to the facts and values on the two sides of the surveillance controversy. Carefully analzyed, they may cut more heavily on one side than the other. But anyone who seeks fairly to resolve the controversy must fairly examine the applicability of these conceptions to the contentions on both sides, not just one. To be concerned with degrees of impairment of investigation that result incidentally from judicial supervision, but unconcerned with degrees of impairment of political expression that result incidentally from surveillance, bespeaks sensitivity to law enforcement values but none to the values of free speech.

That sums up Mr. Rehnquist's approach. He uncritically accepts—and expands—such notions as "dampening the ardor" of investigators; but, when it comes to the First Amendment, he is content to stand equally uncritically upon the proposition that: "No decided case of the Supreme Court of the United States has ever held or said that the 'chilling effect' of a governmental activity

by itself, unaccompanied by either an attempt to impose governmental sanctions to compel the involuntary divulgence of information or to impose criminal or other sanctions on the basis of the information obtained amounted to a violation of the First Amendment." Speech, "Privacy, Surveillance and The Law" (March 19, 1971).

This last proposition appears to be wrong. See *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). But even were it correct, Mr. Rehnquist's refusal to "extrapolate from decided Supreme Court cases" in the First Amendment area starkly contrasts with his far reaching extrapolation of a broad power of federal executive surveillance from the "faithfully executed" Clause as construed in *In re Neagle*, 135 U.S. 1 (1890) and the "Republican Form" Clause, see Testimony on "Investigative Authority of the Executive," *supra*. One who makes these extrapolations but limits *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Bates* v. *Little Rock*, 361 U.S. 516 (1960) to the adventitious circumstances that both involved a "government legal sanction" is treating the First Amendment as a constitutional stepchild.

D. Rights of public employees

The same scant regard for the First Amendment appears in Mr. Rehnquist's analysis of the free-speech rights of public employees. See *Public Dissent and the Public Employee*, 11 Civ. Serv. J. 7 (1971). Although it purports to employ a "balancing" approach, this article casts the balance very heavily against freedom of expression by describing the interest to be balanced against free speech as "the interest of the government in governing effectively." Closely examined, the various "factors [used] . . . to meet the balancing test" plainly appear designed to paint *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), into the narrowest possible corner.

But once again the conclusions reached are less significant than Mr. Rehnquist's analytic method of "balancing." When he discusses the weights on the government employer's side, he examines in lavish and loving detail all of the justifications for stifling speech—" 'loyalty,' 'harmony,' . . . avoidance of 'dissention,' " the chief Executive "popular mandate," and the intolerability of "insubordination." On the other side, he aligns a "claim for freedom of speech" to which he devotes no such detailed analysis.

Surely this "claim" also has its several components, including not only the public employee's interest in speaking (which Mr. Rehnquist appears to see as the only First Amendment interest involved) but the public's interest in hearing—and, in particular, a self-governing people's interest in hearing about governmental policies from those most knowledgeable concerning them. About these concerns Mr. Rehnquist says nothing, because he reserves his "critical analysis" for the weights in the other plan. Indeed, he not only slights but also distorts the First Amendment interests involved: for example, he treats the expression of individual views by public employees as some sort of plebiscite which would "control" their employer. This sort of "critical analysis" and "balancing" manifests either a calculated stacking of the weights against the First Amendment or, at the least, a callous insensitivity to what the First Amendment is all about.

E. Right of accused persons

The Majority Report states that Mr. Rehnquist's statements on the rights of criminal defendants "show that he has been consistently aware of and sensitive to the competing considerations on both sides of these very difficult questions." Rather than balance and understanding, the record shows that Mr. Rehnquist has the same insensitivity to Bill of Rights guarantees in the criminal process as he does to rights of expression and association.

Discussing the May Day arrests, Mr. Rehnquist treats the problem of delayed preliminary hearings as though the function of a preliminary hearing were principally to prevent protracted investigative detentions. *See* speech, "Which Ones Have the White Hats? Conflicting Values In The Administration of Criminal Justice" (May 5, 1971). In fact, another major function of the preliminary hearing is to enforce the Fourth Amendment's prohibition of arrests without probable cause, by requiring the arresting officer to justify his arrest before a judicial examiner. Mr. Rehnquist stresses the point that preliminary hearings are more difficult to hold—but he ignores the point that they are also particularly important to hold—in a time of indiscriminate mass arrests.

His treatment of the Eighth Amendment—"[e]xcessive bail shall not be required"—is astounding. On the one hand, he reads it (together with the Fourth and Fifth Amendments) as broadly expressive of a "right to be let alone," which he then broadens into "the right to be free from robberies, rapes, and other assaults on the person by those not occupying an official position"—a concept which warrants governmental use of preventive detention as a device to prevent criminal depradations. Here, certainly, is an extrapolation which dwarfs even Mr. Rehnquist's extrapolation from the "Republican Form" Clause. But when the detained man points to the Eighth Amendment, Mr. Rehnquist replies that "the framers of this Amendment deliberately chose language confined to a relatively narrow set of circumstances", *see* speech, "Official Detention, Bail, and the Constitution" (Dec. 4, 1970); and that, read with proper narrowness, the Amendment "does not establish a right to bail; it forbids judges from requiring excessive bond in cases where the defendant has a statutory right to bail." The latter grudging construction ignores much history and logic (*see* Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 1125 (1965)). But if it were correct, it would surely render the Eighth Amendment unavailable as a source of Mr. Rehnquist's "right to be let alone." It appears that this amendment means whatever Mr. Rehnquist wants it to mean: viz., preventive detention.

Mr. Rehnquist also takes his own liberties with the Supreme Court's criminal procedure decisions. Whatever view one entertains upon the difficult question of the constitutionality of "no-knock" statutes, it is plainly misleading to assert that they are "actually nothing more than a codification of constitutional law, and of practices which were held not to violate the Constitution in a case decided a few years ago by the Supreme Court of the United States", *see* speech, "The Administration of Criminal Justice" (Dec. 2, 1970). Presumably, Mr. Rehnquist refers to *Ker* v. *California*, 374 U.S. 23 (1963), in which the Supreme Court split 4–4 on the relevant issue. (Mr. Justice Harlan's decisive vote was based upon another ground, which Justice Harlan had abandoned in deference to precedent several years before Mr. Rehnquist's speech.)

Another example of this proclivity is his treatment of the rule excluding unconstitutionally obtained evidence in criminal trials. The exclusionary rule is a controversial subject, to be sure. But controversial questions are not responsibly resolved by unbalanced analysis of the kind Mr. Rehnquist offers here. He concluded after attacking the exclusionary rule:

"Ultimately, decision is made by the balancing of the need of society for protection against crime against the need of the accused defendant for a fair trial and a just result." (Speech, "Which Ones Have the White Hats? Conflicting Values in the Administration of Criminal Justice," May 5, 1971.)

Mr. Rehnquist does not face up to the fact that the fundamental purpose of the exclusionary rule is to *deter unlawful police action*. Thus the balance is not between the need to protect against crime on the one hand and the need for a just result on the other—for as Mr. Rehnquist argued in the speech, illegally obtained evidence can be highly relevant and could, in one sense, lead to a just result. The true balance to be struck is between the need to protect society from crime and the need to provide a meaningful way to enforce the Fourth Amendment's prohibition against unreasonable searches and seizures, of the Fifth Amendment's prohibition against compelled self-incrimination, or other constitutional guarantees. Stated accurately, the final balance one chooses could be far different from the one Mr. Rehnquist, having loaded the scales, picked.

F. Conclusion—Abuse of legal analysis

As this analysis shows, a great deal of Mr. Rehnquist's legal writing reveals not the "balanced approach" the Majority hails but instead the use of an intellectual "double standard." This use of a double standard is apparent in a number of instances in addition to those mentioned above.

One example is Mr. Rehnquist's use of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). The Supreme Court there held constitutional a New York City ordinance which prohibited distribution of commercial advertising handbills on the streets. As described in Part III above, Mr. Rehnquist cited this case as posing a constitutional problem for an anti-blockbusting provision of a Model State Anti-Discrimination Act while he was a representative to the National Conference of Commissioners on Uniform State Laws. This is apparently the only time that Mr. Rehnquist has given the First Amendment wide scope—and, significantly, it is a time when his argument cuts against the interests of racial equality. On the other hand, he gave the First Amendment a very narrow scope—and *Valentine* v. *Chrestensen* a comparably broad sweep—when the interest on the other side was not racial equality but regulation of advertising of supposed salacious literature. Notwithstanding a concession that the literature was constitutionally protected—that is, that it was not obscene—Mr. Rehnquist argued that Congress could regulate its advertising. He said that commercial "advertising ranks low on the scale of values underlying the First Amendment. It may be suppressed when necessary to promote other legitimate interests." Statement at Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11032 [relating to mailing of purient materials], 91st Cong., 1st Sess., September 25, 1969 (unprinted).

Consider also the following exchange which Mr. Rehnquist, said by the President to be a strict constructionist, had with Congressman Paul McCloskey, concerning 5 U.S.C. 2954 (1971). That statute reads as follows:

An Executive agency, on request of the Committee on Government Operations . . . shall submit any information requested of it relating to any matter within the jurisdiction of the Committee.

The exchange was as follows:

Mr. McCLOSKEY. Mr. Rehnquist, the rule that permits you to look at the legislative history applies only when the wording of the statute is ambiguous, is that correct?

Mr. REHNQUIST. It's a rule, but has its exceptions.

Mr. McCLOSKEY. Do you know of any legal exception in your experience which justifies looking behind the clear language of Section 2954, by the executive branch?

Mr. REHNQUIST. Yes sir. Well, the executive branch is simply trying to forecast what a court would say in interpreting it.

Mr. McCLOSKEY. Is there any ambiguity in that statute? This is exceptionally clear language. Can you point to me any ambiguity

in that statutory section which would justify seeking explanation of that ambiguity?

Mr. REHNQUIST. I don't think it's that clear.

Mr. MCCLOSKEY. Is there any ambiguity in the section that you could find? Can you read the law specifically so the subcommittee at this point can be aware of the ambiguity, which, in your judgment, would require going to the legislative history of the statute?

Mr. REHNQUIST. * * * (Reads statute)

Mr. MCCLOSKEY. Is there any ambiguity there, Mr. Rehnquist?

Mr. REHNQUIST. I don't think the words "any information" are necessarily that sweeping. Hearings before the House Subcommittee on Foreign Operations and Government Information, "U.S. Government Information Policies and Practices—the Pentagon Papers (Part III)," pp. 785–86, 92d Cong. 1st Sess. (June 30, 1971).

In sum, Mr. Rehnquist consistently overlooks or understates the nature and significance of whatever claim based on the Bill of Rights he purports to be assessing. Consequently, he consistently dismisses such claims without having given them a fair and adequate hearing. He regularly reads constitutional clauses which promote civil liberties interests narrowly; and he invariably reads constitutional clauses and judicial decisions which militate against civil liberties interests or in favor of executive power broadly. He accords the most painstaking and sympathetic analysis to all of those considerations which—he ultimately concludes—require the subordination of civil liberties values; but the competing civil liberties values themselves receive no such analysis. Confronted with a civil liberties claim, Mr. Rehnquist does not pause to consider it dispassionately. Instead his ample critical facilities are bent immediately toward the fashioning of reasons for its rejection.

V. CONCLUSION

Mr. Rehnquist's record reveals a dangerous hostility to the great principles of individual freedom under the Bill of Rights and equal justice for all people. He has persistently opposed the use of law to eliminate racial injustice in America, and he has just as persistently analysed legal problems in a way which minimizes the importance of civil liberties values and maximizes the importance of executive power.

Mr. Rehnquist said several times at the confirmation hearings that he will attempt to disassociate himself "to the greatest extent possible" from his personal views if he is confirmed. But such a promise, made no doubt in good faith, is simply inadequate, given the actual nature of the judicial process. For once confirmed the nominee will face questions arising out of the grand but vague promises of the Constitution, like "equal protection of the laws" and "due process of law." In reaching a decision in such cases, the nominee's own views must necessarily, if subtely, intervene. Mr. Rehnquist was honest enough to recognize this at the hearings when he said:

"And there is also no doubt in my mind that each of us, the Justices who have been confirmed in the past and I, if I were confirmed, would take to the Court what I am at the present time. There is no escaping it. I have lived for 47 years, and that goes with me."

Or as Mr. Rehnquist said in a different context in 1959:

"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 on the high court. *The Making Of a Supreme Court Justice, Harvard Law Record,* Oct. 8, 1959, at 10."

The evidence before the Senate suggests that Mr. Rehnquist is not "sympathetic" to the "desires" for racial justice and the fundamental protections of the Bill of Rights. His nomination ought therefore be rejected.

A number of recognized national organizations dedicated to civil rights and to civil liberties have reached the same conclusion. The National Association for the Advancement of Colored People, the Leadership Conference on Civil Rights, the AFL–CIO and the UAW have all opposed Mr. Rehnquist's—but not Mr. Powell's—nomination. The Congressional Black Caucus has also opposed the nomination, as has the National Bar Association, an organization of Negro lawyers; the National Legal Aid and Defender Association; the Washington Council of Lawyers; the National Catholic Conference for Interracial Justice; and a number of law professors. Opposition is uniformly based on Mr. Rehnquist's views on civil rights and civil liberties.

Professor Charles Black of Yale Law School has decribed the role of the Senate in the confirmation process this way:

"[A] Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful for him to sit and vote on the Court. . . . Black, *A Note on Senatorial Consideration Of Supreme Court Nominees,* 79 Yale L.J. 657 (1970)."

Because Mr. Rehnquist's "views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court", his appointment should be rejected.

STATEMENT IN OPINION TO THE NOMINATION OF WILLIAM H. REHNQUIST BY 20 MEMBERS OF THE HARVARD LAW SCHOOL FACULTY

It is doubtless appropriate for the President to exercise his power of nomination to shift the Supreme Court in the direction of his constitutional philosophy. But history, from 1795 to the present, demonstrates that it is no less appropriate for the Senate to deny confirmation to a Presidential nominee, despite his personal integrity and professional competence, because the Senate believes that the addition of a man of the nominee's philosophy is, under the existing circumstances, against the best interests of the country and the effective functioning of the Court.

In deciding whether to confirm the Hon. William H. Rehnquist in this period of deep change and conflict, the Senate has a special obligation to preserve the position of the Supreme Court as an effective organ in our system of government. Recent changes have already shifted the consensus or balance of opinion in the Court. Within the central stream of contemporary constitutional thought exemplified by all present members of the Court and their predecessors for the past thirty years, there is a wide range for differences of constitutional view—and thus for Presidential and Senatorial choice. Our opposition to Mr. Rehnquist is based on our perception that his views on the relation between government and the individual in the area of security, and on the relation between established power and the disadvantaged in this area of human rights, are so exceedingly deferential to the former and so undervalue the latter as to place him outside that central stream. Twentieth century problems require Justices with a clearer sense of the ingredients of constitutional decision.

Accordingly, we urge that confirmation of William H. Rehnquist be denied.

Victor Brudney, Derrick A. Bell, Jr., Vern Countryman, Abram Chayes, Alan M. Dershowitz, Ruth B. Ginsbury, William B. Gould, Philip B. Heymann, Louis L. Jaffe, Andrew L. Kaufman.

Frank I. Michelman, Arthur R. Miller, Karen S. Metzger, David Rosenberg, Henry J. Steiner, Stanley S. Surrey, Laurence H. Tribe, James Vorenberg, Robert B. Washington, Jr., Lloyd L. Weinreb.

UNIVERSITY OF WISCONSIN LAW SCHOOL

We are a majority of the law professors at the University of Wisconsin Law School. We oppose the confirmation of William H. Rehnquist for a seat on the Supreme Court. His long held views on civil rights and civil liberties are in basic respects contrary to the Supreme Court's. He would have the Court go back to discredited ideas. In our opinion his views warrant rejecting him as a member of the Court which is the ultimate protector of constitutional rights. He is not a judicial conservative. Rather he is a political conservative, who was named for that reason.

Abner Brodie, Willard Hurst, George Bunn, Ted Finman, Samuel Mermin, Arlen C. Christenson, August Eckhardt, Allen Redlich, Thomas C. Heller, James E. Jones, Jr., Jean Love, Robert B. Seidman.

Neil K. Komesar, William H. Clune, Herman Goldstein, William C. Whitford, Carlisle P. Runge, Joel F. Handler, Shirley S. Abrahamson, Richard B. Bilder, John Stedman, Robert Shapiro, Marygold S. Melli.

Mr. MUSKIE. Mr. President, one of the Senate's most important constitutional obligations is to approve or reject nominations to the Supreme Court. The Supreme Court protects our liberties and the principles of due process of law. It has the ultimate responsibility for preserving and defending the Constitution. Our entire constitutional form of government depends upon a sensitive and wise Supreme Court. And the Court can only be as sensitive and wise as the Justices who are appointed to it.

Like the President, the Senate, as part of its assigned role in the selection process of Justices, must act to insure that each appointment to the Court will not weaken our constitutional system. Careful scrutiny of each nominee is vitally important, for a Justice may serve for decades and exercise a cumulative influence over the course of public affairs comparable to that of a President.

In considering nominations to the Court, it is proper for a Senator—and indeed absolutely necessary—to evaluate the judicial philosophy of the nominee. There is no other way to assess whether the proposed Justice will be equal to the task of preserving our constitutional system. A Law Review article by Prof. Charles Black of the Yale Law School—79 Yale Law Journal 657 (1970)—and a lengthier study done by professors at Stanford and Michigan Universities—CONGRESSIONAL RECORD, November 5, page 39591—both indicate that the Senate evaluation of a Supreme Court nominee's judicial philosophy was intended by the Founding Fathers and has been practiced by the Senate for nearly 200 years.

I now reaffirm what I said during the debates on the President's nomination of Judge Haynsworth:

It is the prerogative of the President, of course, to try to shift the direction and the thrust of the Court's opinions in this field by appointments to the Supreme Court. It is my prerogative and my responsibility to disagree with him when I believe . . . that such a change would not be in the best interests of the country. 115 Cong. Rec. 35368

This standard was also urged upon the Senate by one of the nominees now before the Senate. In an article in the October 8, 1959, Harvard Law Record, William Rehnquist called upon the Senate to restore "its practice of thoroughly in-

forming itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

We must remember that when we decide, we are determining the shape of the Court and the direction of the country for years beyond our own terms in office or perhaps even our own lifetime. One Justice still sits on the Supreme Court who was confirmed by a Senate, only one of whose members still serves in this Chamber. So let no one tell us that we cannot examine a nominee's judicial philosophy. Once we confirm a nominee, history will praise or blame us no less than the President for the resulting impact on the future of our law and our national life. With this in mind, I have examined the record of Mr. Rehnquist.

When President Nixon nominated William H. Rehnquist to the Supreme Court, the President said that Mr. Rehnquist is a judicial conservative who would restore balance to the Supreme Court. There is an old and honored tradition of judicial conservatism in American law and on the Supreme Court, a tradition which can be traced back to the time of John Adams. Many distinguished judicial conservatives have served on our highest court. Although I personally disagree with many of their conclusions, I believe that their tradition should continue to be represented. It was represented at its best for many years by Justice John Marshall Harlan, whom Mr. Rehnquist has been nominated to succeed.

My examination of Mr. Rehnquist's record convinces me that Mr. Rehnquist is not a judicial conservative at all, in the time-honored meaning of the term. Rather than being the views of a judicial conservative, they are those of a statist and authoritarian. Mr. Rehnquist exalts the powers of government over the rights and liberties of the individual. He exalts the executive branch over the coordinate branches of the Federal Government. He rejects some of the basic values that have characterized the conservative legal tradition in America. Far from bringing "balance" to the Supreme Court, Mr. Rehnquist would threaten to unbalance the Court.

Examine Mr. Rehnquist's views in detail and compare them to the authentic tradition of judicial conservatism in this country. His views drastically depart in major areas of constitutional law from that tradition.

First, true judicial conservatives in the United States have always given the highest value to the right of privacy—to what Mr. Justice Brandeis called "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (*Olmstead* v. *United States*, 277 U.S. 438, 485 (1928)).

It was Mr. Justice Butler—one of the most conservative men who sat on the Supreme Court in this century—who summed up the traditional conservative attitude toward privacy in these strong words:

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy . . . its protection extends to offenders as well as to the law abiding . . . the Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. (*United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932)); *Go-Bart Importing Co.*, v. *United States*, 282 U.S. 344, 357 (1931)).

It was this belief in the value of privacy that led a genuine conservative like Justice Butler to give a resounding "No" to the Federal Government's claim to the right to wiretap without constitutional limitations in the famous Olmstead decision. Likewise, privacy received the greatest priority and protection from Mr. Justice Harlan, who, as he wrote in one of his last opinions before his retirement, was deeply concerned to preserve "that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society." (United States against White, decided Apr. 5, 1971.)

Yet I find only the most perfunctory recognition of this essential constitutional value in Mr. Rehnquist's public record. Far from valuing the right of privacy as authentic conservatives have, he has subordinated it to the powers of Government.

For example, Mr. Rehnquist believes that traditional judicial control over Government wiretapping is unnecessary whenever the executive chooses to label it a matter of national security. Wiretapping has been held by the Supreme Court to be subject to the fourth amendment's provisions requiring judicial supervision of searches and seizures. This requirement of a warrant for a wiretap, like a search warrant for a home, is designed to insure that invasions of privacy are limited by an independent tribunal to cases of demonstrated need. Yet during this administration, the Justice Department has claimed that the fourth amendment requirement of a judicially approved warrant does not apply to domestic cases involving alleged domestic subversion. In these instances, the Department claims the executive can wiretap without court authorization.

In a speech in London last July, Mr. Rehnquist supported this Justice Department attempt to downgrade the protections of the fourth amendment. Mr. Rehnquist said that judicial review could only serve to delay and to hamper criminal investigations. He did not even mention the purpose of the warrant procedure—to protect citizens from unreasonable search and seizure by interposing an impartial magistrate between them and Government. This fall, Mr. Rehnquist refused to retreat from his opposition to judicial review of domestic national security wiretaps during his testimony before the Senate Judiciary Committee. He admitted that the fourth amendment did apply—but he contends that its test of reasonableness should be applied by the Attorney General alone.

A second area in which Mr. Rehnquist rejects traditional judicial control over Government activities is surveillance. In a speech, "Privacy, Surveillance and the Law," given on March 19 of this year, and in testimony before the Senate Subcommittee on Constitutional Rights, Mr. Rehnquist stated that he believed that there were no constitutional limits upon Government surveillance in public places as long as it did not involve the threat of criminal sanctions. He argued that nothing in the Constitution would prohibit an agent of the Justice Department or a soldier of the Army from following an ordinary citizen, recording everything he did in public, and compiling dossiers from that information—even though the individual had no connection with any criminal activity.

In justifying such surveillance, Mr. Rehnquist draws a very fine distinction between surveillance with the threat of criminal sanction—which he concedes raises constitutional questions—and surveillance without that threat—which he feels is constitutional. This distinction ignores the constitutional right of privacy and the first amendment right to free speech, free association, and free petition for redress of grievances without the fear of surveillance or possible future sanction. And it denies the heart of key Supreme Court decisions, such as *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Bates* v. *Little Rock*, 361 U.S. 616 (1960); and *NAACP* v. *Alabama ex. rel. Patterson*, 354 U.S. 449 (1958).

The most disturbing part of Mr. Rehnquist's disregard for first amendment rights in this area is his rejection of their relevance. When asked at Senator ERVIN'S hearings if Government surveillance and the fear caused by that surveillance raised any serious threat of a chilling effect on constitutionally protected activities and rights, the nominee answered with an unqualified "No." Later Mr. Rehnquist testified that first amendment questions were not raised until citizens were actually deterred from speaking out—an alarming threshold for the protection of precious rights.

And Mr. Rehnquist not only downgrades constitutional protections, he also sees little reason for the independent judicial supervision mandated by the fourth amendment to enforce these protections. He argued that "no legitimate interest" is served by such judicial supervision. And he is unwilling even to test available procedures to minimize the difficulties of judicial safeguards while preserving their vitality. He asserts that the "self-restraint" of government officials is sufficient protection—and that assertion is nothing less than an outright rejection of our historic commitment to a governmental system of checks and balances.

Second, a vital part of the conservative legal tradition in this country is an insistence on governmental adherence to established procedure, especially in the enforcement of criminal law. Recall Justice Frankfurter's famous statement:

> The history of American freedom is, in no small measure, the history of procedure. (*Malinski* v. *New York*, 324 U.S. 401, 414 (1945)).

Justice Frankfurter amplified this view in these words:

> (We) must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people. Id.

Mr. Rehnquist's record shows no similar faith in the procedural safeguards of our law. In the last 3 years, the Nixon administration has tried to revise traditional constitutional procedures in the field of criminal law. The administration has virtually done battle with the Bill of Rights, claiming that constitutionally dubious measures were essential to the fight against crime. In recommending preventive detention and no-knock searches, the administration has made unwise and unnecessary infringements upon fundamental ideals of justice in order to fashion law enforcement tools that are ineffective and unreasonable. As I said in the Senate over a year ago, preventive detention and no-knock searches are "instruments of fear" and "tools of repression."

During the protracted controversy about these new procedures, Mr. Rehnquist indicated that he felt no constitutional qualms about the denigration of traditional rights. In a December 4, 1970, speech, he called the administration's preventive detention proposals "entirely consistent with the spirit and the letter of the U.S. Constitution."

And in September of this year, testifying before the Senate Subcommittee on Constitutional Rights on Senator ERVIN'S speedy trial bill, Mr. Rehnquist urged the committee to consider new limits on other traditional procedural safeguards such as the right of habeas corpus and the fourth amendment's exclusionary rule. With respect to habeas corpus, Mr. Rehnquist suggested the most far-reaching revision in over 100 years of the availability of that writ in the Federal courts. Habeas corpus—often called the "great writ"—is at the center of our system of criminal procedure. Indeed, Winston Churchill, a great conservative in the Anglo-American tradition, once said that the difference between civilization and tyranny may be summed up in two words—habeas corpus.

Mr. Rehnquist has acknowledged that over a century ago, in the Habeas Corpus Act of 1867, Congress decided that "any constitutional violation could be the basis for the exercise by the Federal courts of habeas corpus jurisdiction." The Federal courts have increasingly exercised this jurisdiction in behalf of personal liberty. To Mr. Rehnquist, that constitutes "the present expansive use" of habeas corpus, and he has urged basic restrictions on the availability of the writ.

Thus, in criminal law, the most dramatic changes in constitutional protections are easily embraced by Mr. Rehnquist. He is willing to accept extreme and unprecedented constitutional interpretations without protest. It is clear that individual rights and the Bill of Rights would be weakened by Mr. Rehnquist's judicial philosophy. Instead of being a conservative committed to conserving the most vital procedures of our legal system, Mr. Rehnquist would modify them to reduce the basic rights of our citizens.

Third, the authentic conservative tradition in this country has always stood for the liberties of the individual as against the overreaching claims of Government. America had its origins in a revolution against government abuse of power, and it is fair to state that every major conservative figure in the history of the Court has spoken up on one occasion or another in behalf of private rights and against excessive public authority. This conservative judicial philosophy was eloquently expressed by Mr. Justice Sutherland—for many years the intellectual leader of the conservatives on the Supreme Court—in the following words about the Bill of Rights:

> No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight . . . A little water, trickling here and there through a dam is a small matter in itself, but it may be a sinister menace to the security of the dam, which those living in the valley below will do well to heed. (*Associated Press* v. *NLRB*, 301 U.S. 58, 135–136 (1937)).

It was this spirit which led a conservative like Justice Sutherland to uphold the rights of the press against prior restraint in *Grosjean* v. *American Press Co.* (397 U.S. 233, 250 (1936), and to uphold and extend the right to counsel for all criminal defendants in *Powell* v. *Alabama* (287 U.S. 45 (1932)). These are among the great libertarian decisions in the history of the Court, and libertarianism has been a powerful component in the conservative legal tradition.

I find in the record of Mr. Rehnquist none of this spirit, none of this conservative reverence for the Bill of Rights, none of this willingness to draw the line and say to government: "Thus far and no farther." He interprets the Constitution as giving the executive wide powers to tap telephones and to conduct surveillance. He argues that the decision to invade Cambodia was merely a tactical decision clearly within the constitutional powers of the Commander-in-Chief. In testimony before the House of Representatives, he has defended a sweeping interpretation of executive privilege, granting the President broad powers of secrecy. And he has included in the "inherent powers" of the Presidency the authority to grant to the Subversive Activities Control Board responsibilities that Congress did not grant by statute.

The one notable exception to this in his record—and it points up the spurious nature of his "judicial conservatism"—is his reliance on the claim of individual freedom in opposing the open accommodations law of Phoenix, Ariz. It is revealing and disquieting that this purported exponent of "judicial conservatism" should have given lip service to the principle of individual rights only in an effort to deny non-white citizens the free right of access to public places.

Fourth, another essential element of the conservative tradition in American law has been a commitment to the separation of powers in the Federal Government and a particular distrust for the assertion of unchecked executive power.

It was Mr. Justice McReynolds—perhaps the single most conservative justice since 1900—who wrote:

> If the phrase "executive power" enfolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity; and no human intelligence can define the field of the President's permissible activities. "A masked battery of constructive powers would complete the destruction of liberty." (*Myers* v. *United States*, 272 U.S. 160, 183 (1925)).

I find none of this adherence to separation-of-powers principle in the record of Mr. Rehnquist.

Mr. Rehnquist elevates executive power not only above the liberties of the individual but above the powers of the judiciary and the Congress. For example, he has said:

> As to the merits of proposed legislative or judicial curtailment of the investigative authority of law enforcement agencies, I simply do not believe that a limitation on these investigative activities of law enforcement officials engaged in seeking the solution to crime would be either desirable or workable. ("Law Enforcement and Privacy," July 15, 1971).

Mr. Rehnquist's conception of executive power is so broad that he rejects the traditional checks and balances provided by the three branches of government. For him, executive "self-restraint" plus the popular election of the President adds up to a sufficient safeguard against government overreaching.

This reflects a fundamental misunderstanding of our constitutional system. The check of the judiciary upon executive actions is crucial to the preservation of our liberties. Nor are general elections a sufficient safeguard against unconstitutional abuses of power. Our constitutional system rests upon fundamental rules that are unwaveringly enforced by the judiciary.

For Mr. Rehnquist, the efficiency of the executive branch is a transcendent value. He has opposed "any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities—executive investigative authority—or otherwise, would effectively impair this extraordinarily important function of the Federal Government." (Quoted in CONGRESSIONAL RECORD 42139.)

In his zeal for enhancing executive power, Mr. Rehnquist seems unmindful of the basic purpose of the separation of powers, as it has been understood by judicial conservatives and liberals alike:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. (*Myers* v. *United States*, *supra*, 272 U.S. at 293) (Opinion of Justice Brandeis).

Some have argued that Mr. Rehnquist's views on many questions involving the Bill of Rights were presented when he was the advocate of the administration and that they do not represent his own judicial philosophy. Mr. Rehnquist was repeatedly given a chance to differentiate his own views from those of the administration, but he declined in all but one instance, invoking the attorney-client privilege in an unprecedented manner. Both at the hearings and in

previous writings, he stressed the compatibility of his personal views with those he has advocated in office. And Mr. Rehnquist at times relied upon his official statements as accurate reflections of his own beliefs.

What emerges from this analysis of Mr. Rehnquist's legal views is the picture of a nominee to the Supreme Court with a wholly unacceptable approach to interpreting the Constitution. In broad areas of the law, Mr. Rehnquist has repeatedly argued that constitutional protections for individual rights and liberties must be subordinated or limited. In some areas of surveillance and wiretapping, he has concluded that constitutional protections do not apply at all. Whenever executive power is balanced by Mr. Rehnquist against individual liberties, those liberties are found to be less important, and the reasons given to support those liberties are often abruptly dismissed.

To me, these are not the hallmarks of a judicial conservative who would bring balance to the Supreme Court. This is the record of a man who would reshape the American constitutional system in the name of Government efficiency, despite the cost in personal freedom to his fellow citizens.

In addition to Mr. Rehnquist's failure to respect and support basic constitutional protections—even when interpreted in the Supreme Court's most conservative tradition—he has also failed to demonstrate a commitment to fundamental principles of equal protection. During the past 2 decades, one of the most far-reaching changes in this Nation has been the movement toward racial equality. Equality in social justice and the constitutional law have expanded in ways that must never be undone. As all Americans know, the Supreme Court has played a central role in that effort. But Mr. Rehnquist, judged by his statements as a private citizen, did not believe that the law should have been used to secure racial justice.

In 1964, on his own initiative, he testified before the Phoenix City Council and wrote a letter to the Arizona Republic protesting a proposed public accommodations bill, a local version of the public accommodations section of the historic Civil Rights Act of 1964. He argued that the property right of a store owner to serve customers of his own choice was more important than the right of an individual regardless of race to patronize any store open to the public. Although the subordination of a store-owner's property rights for the purposes of health and safety regulations or even zoning was quite understandable to Mr. Rehnquist, it was for him "impossible to justify the sacrifice of even a portion of our historic freedom for a purpose such as this."

In testimony before the Judiciary Committee, Mr. Rehnquist said that he would no longer oppose an open accommodation ordinance. He attributed his change of heart to a realization of "the strong concern that minorities have for the recognition of these rights". In other words, his appreciation of the constitutional rights of individuals depends upon his perception of the strength of their feelings.

In 1966, Mr. Rehnquist represented Arizona at a National Conference of Commissioners on Uniform State Laws which considered a proposed model State Anti-Discrimination Act. At the conference, Mr. Rehnquist made a motion which, in effect, removed the section of the proposed act that would have permitted employers to adopt voluntary plans to reduce racial, religious or sex imbalances in their work forces. He also opposed a section of the model law which would have prohibited "block-busting"—the vicious use of racial fears to destroy neighborhoods and reap enormous profits.

And in 1967, only 4 years ago, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic opposing modest steps toward voluntary school integration. In that letter he took issue with those who wanted to achieve an integrated society and concluded.

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

That is a stunning and categorical rejection of the whole thrust of the civil rights movement.

The record before us contains no pattern of action or statement that refutes the evidence before us or validates Mr. Rehnquist's claim to a strong commitment to racial justice.

These clear indications of Mr. Rehnquist's rejection of the use of law to guarantee racial equality are from a period of years during his mature life. They are not the rhetoric of a campaigner or the opinions of a young man. Even worse, they demonstrate that each time Mr. Rehnquist weighed the social and constitutional values of a proposal for racial justice, he decided against the proposal. As America moved to change its laws and its national life to end racial discrimination, Mr. Rehnquist's constellation of values put equality below superficial property rights and included no commitment to publicly enforced integration. I find this lack of adherence to one of our Constitution's most vital concepts—equal protection—unacceptable in a Justice of the Supreme Court.

For me, the ultimate standard for judging a nominee to the Court is whether he will fulfill the responsibility outlined by James Madison, the Father of our Constitution:

> If they (the Bills of Rights) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against any assumption of powers in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. (1 Annals of Congress 439).

A careful consideration of Mr. Rehnquist's judicial philosophy reveals a consistent lack of regard for individual liberties, an enthusiasm for unrestrained executive power, and a willingness to embrace drastic changes in our Constitution. This is the consistent record of many years, and it remains uncontradicted by evidence from the nominee or from others.

I am not satisfied that as a Supreme Court Justice, William Rehnquist would consider himself a guardian of the Bill of Rights, that he would be a bulwark against abuse or overreaching by the executive and legislative branches or that he would resist encroachments on the liberties guaranteed to all of us by the Constitution. Therefore, I shall vote against the confirmation of his nomination as an Associate Justice of the Supreme Court.

PROGRAM

Mr. BYRD of West Virginia. Mr. President, the program for tomorrow is as follows:

The Senate will meet at 10 a.m.

Immediately following the recognition of the two leaders under the standing order, the distinguished Senator from Maryland (Mr. BEALL) will be recognized for not to exceed 15 minutes, following which there will be a period for the transaction of routine morning business of not to exceed 30 minutes, with statements therein limited to 3 minutes.

At the conclusion of routine morning business, the Senate will go into executive session to resume the consideration of the nomination of Mr. Lewis Powell for the office of Associate Justice of the Supreme Court of the United States.

There will be no rollcall votes tomorrow. In the event any rollcall votes should be ordered on conference reports, et cetera, such rollcall votes will be put over until Monday next.

Under the order agreed to, the vote on the nomination of Mr. Powell will occur at 4 p.m. on Monday next. That will be a rollcall vote.

ADJOURNMENT UNTIL 10 A.M.

Mr. BYRD of West Virginia. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment until 10 o'clock tomorrow morning.

The motion was agreed to; and (at 7 o'clock and 46 minutes p.m.) the Senate adjourned until tomorrow, Saturday, December 4, 1971, at 10 a.m.

CONFIRMATIONS

Executive nominations confirmed by the Senate December 3 (legislative day of November 29), 1971:

OFFICE OF ECONOMIC OPPORTUNITY

Roy E. Batchelor, of Tennessee, to be an Assistant Director of the Office of Economic Opportunity.

NATIONAL ENDOWMENT FOR THE HUMANITIES

Ronald S. Berman, of California, to be Chairman of the National Endowment for the Humanities for a term of 4 years.

NATIONAL SCIENCE FOUNDATION

H. Guyford Stever, of Pennsylvania, to be Director of the National Science Foundation for a term of 6 years.