NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETIETH CONGRESS

SECOND SESSION

ON

NOMINATION OF ABE FORTAS, OF TENNESSEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

AND

NOMINATION OF HOMER THORNBERRY, OF TEXAS, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

JULY 11, 12, 16, 17, 18, 19, 20, 22, AND 23, 1968

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THURSDAY, JULY 11, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:45 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), McClellan, Bayh, Ervin, Dodd, Hart, Burdick, Smathers, Hruska, Fong, Scott, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. The hearing this morning has been scheduled for the purpose of considering the nomination of Associate Justice Abe Fortas to be Chief Justice of the United States.

Notice of the hearing was published in the Congressional Record July 1, 1968.

By letter of July 8, 1968, the Standing Committee on Federal Judiciary of the American Bar Association states that "The committee is of the view that Associate Justice Fortas is highly acceptable from the viewpoint of professional qualifications."

I place in the record a letter from the American Bar Association, dated July 8, 1968; a personal letter from Mr. William P. Gossett, president-elect of the American Bar Association, dated July 2, 1968, endorsing the nominee; and a telegram from various law professors endorsing the nominee.

(The letters and telegram referred to for incorporation in the record at this point follows:)

AMERICAN BAR ASSOCIATION,
Chicago, Ill., July 8, 1968.

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

DEAR SENATOR EASTLAND: Thank you for your telegram affording this Committee an opportunity to express an opinion or recommendation on the nomination of Honorable Abe Fortas to be Chief Justice of the Supreme Court of the United States.

Our Committee is of the view that Associatie Justice Fortas is "highly acceptable from the viewpoint of professional qualifications".

As the past distinguished chairman of our Committee, Robert W. Meserve, Esquire, of Boston, Massachusetts, wrote you under date of September 7, 1962 in respect of the report of the Committee concerning the qualifications of Honorable Arthur J. Goldberg to be an Associate Justice of the Supreme Court of the United States, we conceive it to be, in respect of the qualifications of a nominee to serve

as a Justice or Chief Justice of the United States Supreme Court, our responsibility to express our opinion only on the question of professional qualification, which includes, of course, consideration of age and health, and of such matters as temperament, integrity, trial and other experience, education and demonstrated legal ability. It is our practice to express no opinion at any time with regard to any other consideration not related to such professional qualification which may properly be considered by the appointing or confirming authority. This position is, of course, not in any way confined to Associate Justice Fortas' case, nor is it in any respect stimulated by or related to his nomination.

We are gratified that you and your distinguished Committee continue to ask for our opinion respecting the qualifications of nominees for appointment to lifetime federal judgeships and otherwise to permit us to assist your Committee in the discharge of its important constitutional function.

With best wishes.

Sincerely yours,

ALBERT E. JENNER, Jr.,
Chairman.

AMERICAN BAR ASSOCIATION,
Detroit, Mich., July 2, 1968.

HON. JAMES O. EASTLAND, *Chairman,*
HON. EVERETT M. DIRKSEN, *Ranking Minority Member,*
Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATORS EASTLAND AND DIRKSEN: I am writing to express to you my personal opinion that Mr. Justice Abe Fortas is eminently qualified to be Chief Justice of the United States.

That he has singular intellectual equipment has been amply demonstrated by scholarly achievements both in his academic life and in the legal profession. For several years he was a well regarded professor of law at Yale University Law School, of which he is a graduate with honors.

His experience as lawyer has been as varied and extensive as it has been distinguished. Before his appointment as a Justice of the Court in 1965, he enjoyed a large independent law practice, being widely respected as a practicing lawyer; and he represented corporations and impoverished individuals with equal skill and devotion. Earlier he had acquired broad professional expertise as counsel for various government agencies, all of which he served with great distinction.

Mr. Justice Fortas has had intensive experience in the work of the Supreme Court, both as judge and as an advocate, wholly sufficient, I think, to qualify him as Chief Justice. But I would remind you of a comment made by Mr. Justice Frankfurter in 1953:

"I think that when the President of the United States comes to select someone to fill a vacancy on the Supreme Court, no single factor should be the starting point in his deliberation. He should not say, 'I want a man who has had experience as a judge,' or, 'I want a man who hasn't had experience as a judge.' I shall say more about this in a moment, but to me it is important that if you blot out the names of those who came to the Supreme Court without any prior judicial experience, you blot out, in my judgment, barring only two, the greatest names on its roster."

This is, as you know, a time of great turbulence in our society. We are faced with a movement of social protest that questions the efficacy of the law as an instrument of social justice; indeed, it asserts that the law is being used as a device to frustrate the legitimate aspirations of those seeking to participate in the benefits of American society. At such a time we need a strong, enlightened Chief Justice, one of large vision and deep insight, whose conception of the role of the judicial process in our society would command the support of the country and especially of minority groups in the Supreme Court as an institution, one who could inspire their confidence in the law and our system of jurisprudence as a positive force in our society.

Mr. Justice Fortas would, I think, be such a Chief Justice. He would, moreover, preside over the Court with great dignity and precision and would, I am sure, be a skillful moderator inside the conference room. As Chief Justice, he would have the confidence and support of the Bar as well as the Court.

It is hardly necessary to remind you that Mr. Justice Fortas is a man of principle and of sterling character who is a well balanced, disciplined and responsible

person in every respect. Indeed, his attributes as a man, quite aside from his credentials as a resourceful, tough minded legal craftsman, are likely, I think, to add stature and strength to the Court by his appointment as Chief Justice.

If I were a member of the Judiciary Committee of the Senate, I would vote without reservation to recommend the confirmation of Mr. Justice Fortas as Chief Justice. The mobilization of his formidable resources as a man and a lawyer in the conduct of the business of the Court would, I am confident, serve the best interests of the people of the United States.

Sincerely yours,

WILLIAM T. GOSSETT.

IOWA CITY, IOWA, *July 10, 1968.*

SENATOR JAMES O. EASTLAND,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: As professors of law, we wish to express our grave concern over the opinion expressed in some quarters that, in view of the fact that President Johnson is not a candidate for reelection, his recent nominations of Justice Abe Fortas as Chief Justice of the United States and Judge Homer Thornberry as Associate Justice of the Supreme Court should not be entertained by the Senate.

We find no warrant in constitutional law for the proposition that the concurrent authority and obligation of the President and Senate with respect to the appointment of high Federal officials are in any degree attenuated by a presidential decision not to seek a further term. Indeed, in our judgment the proposition contended for would subvert the basic constitutional plan, for it would substantially erode authority explicitly vested by the Constitution in the President and in the Senate. The Constitution contemplates, and the people in electing a President and Senators expect, that the highest executive and legislative officials of the land will exercise their full authority to govern throughout their terms of office.

Acquiescence in the view that a President whose term is expiring should under no circumstances exercise his power to nominate would have deprived our Nation of the incomparable judicial service of John Marshall. And this example precisely demonstrates that impairment of the appointive power would be most fraught with hazard when the post is a judicial one. To lay it down as a general rule that in his last year in office a President should leave judicial posts vacant so that they may be filled by the next administration would frequently disrupt the orderly conduct of judicial business. In addition, such a general rule would have even more serious repercussions. It would imply acceptance of the premise that judges are accountable to the President who nominates and the Senators who advise and consent. Our entire constitutional structure is reared upon exactly the opposite premise. A judicial nominee is to be judged by the Senate on his merits. If confirmed and commissioned, he sits as a judge during good behavior, and he owes official allegiance not to other Government officers but to the Constitution and laws of the United States.

Moreover, we submit that any use of the technique of filibuster to frustrate the appointive power would be a further, and equally unworthy, assault upon the integrity of the Presidency, the judiciary, and the Senate. We hope and trust that the Senate, prompted by the Judiciary Committee, will forthwith address itself to the only issues properly before it—the fitness of these nominees for the posts in question.

We respectfully request that this telegram be made a part of the Judiciary Committee's record with respect to the nominations of Justice Fortas and Judge Thornberry.

Joint copies mailed to all members of the Judiciary Committee.

Respectfully,

Albany Law School: Samuel M. Hesson, dean, William Samore.

University of Arizona: Charles E. Ares, dean; Robert Emmet Clark, John J. Irvin, Jr., Winton D. Woods, Jr.

University of Arkansas: Ralph C. Barnhart, dean; Albert M. Witte, Robert Ross Wright III.

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University of Oregon School of Law: Eugene F. Scoles.

University of Pennsylvania Law School: Jefferson B. Fordham, dean.

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Case Western Reserve University, Franklin T. Backus Law School: Ronald J. Coffey, Maurice S. Culp, Lewis R. Katz, Earl M. Leiken, Richard Lewis Robbins, Hugh A. Ross, Oliver Schroeder, Jr.

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Yale Law School: Joseph W. Bishop, Jr., Boris I. Bittker, Ralph S .Brown, Jr., Guido Calaresi, Elias Clark, Thomas I. Emerson, Abraham S. Goldstein, Joseph Goldstein, Myres Smith McDougal, Loius H. Pollak, dean, Henry V. Poor, Leon Lipson.

Senator ERVIN. Mr. Chairman, before we proceed with the hearing I would like to make a unanimous-consent request, and also make a parliamentary inquiry in connection with it.

Senator FONG. Cannot hear.

Senator ERVIN. I said I would like to make a parliamentary inquiry and a unanimous-consent request. I think there are two things before this committee, two questions. The first question is whether the President and the Senate have the power at this time to appoint a Chief Justice of the Supreme Court of the United States. As far as I am concerned, I am prepared to go into that question at the present moment.

The second question, which I consider one of overriding importance to all the people of the United States, is whether Mr. Fortas has the ability and the willingness to subject himself as Chief Justice to judicial self-restraint. In saying this, I do not call into question Mr. Fortas' intellectual attainments. I have been studying his record, and such expression of his philosophy in respect to the Constitution as I can find. These have caused me some misgivings.

Now, as I understand it, the ability and capacity to exercise judicial self-restraint is a quality which enables the occupant of a judicial office to lay aside his personal notions of what he wishes the Constitution or statute to say, and to be guided solely by what the Constitution or statute does say.

To my mind, the office of Chief Justice of the United States is probably of greater importance than that of President of the United States. If you get a President, and you do not like his official acts, you have a way to rid yourself of him in 4 years. If you get a Justice of the Supreme Court and find that he does not manifest as much devotion to the Constitution as he does to his personal notions, the country has to put up with him for his lifetime. For this reason, I think this is a most serious question.

At this time, I have not been able to complete my study of the opinions which Mr. Fortas has joined in, and which he has written.

I would be prepared by Tuesday to interrogate him in respect to his philosophy and concerning the Constitution, and in request to his past opinions. I am not prepared at this time to do so, further, in fairness to him, and in fairness to the country, and in the proper discharge of what I conceive my duties as a Senator. I think the most solemn duty that devolves upon a Senator is that of passing upon nomination of a person to be a Justice of the Supreme Court. I say this for the very simple reason that it is manifest that constitutional government cannot endure in this country unless Supreme Court Justices are able—both able and willing to interpret the Constitution according to its true intent. I do not believe that either our country or any human being within its borders has any security against tyranny on the one hand or anarchy on the other unless Presidents and Congresses and Supreme Court Justices are faithful to the precepts of the Constitution. So I am going to ask unanimous-consent that in case we reach the interrogation of Mr. Fortas this week, that he be requested to return next Tuesday and I hope at that time I can complete my study and be in a position to question him in respect to his philosophy of the Constitution, and also in respect to some of the judicial opinions he has participated in.

Senator HART. Mr. Chairman——

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Chairman, I wonder if the unanimous-consent request is even necessary.

The CHAIRMAN. It is a matter that the Chair thinks should be discussed in executive session. Now, the committee voted to call the Attorney General today on the question of whether or not a vacancy exists. The Attorney General is here at the request of the Judiciary Committee. I will call an executive session when we are through with the testimony, and we will make a decision on Senator Ervin's request.

Senator SCOTT. Mr. Chairman, we could discuss this further in executive session. But I would hope that if there is any question of delay, it could be decided on Monday rather than Tuesday, for reasons which are known to the chairman.

The CHAIRMAN. Yes, sir. It is a matter we will discuss in executive session.

Senator DODD. Mr. Chairman, I assume we will all have an opportunity to question the nominee.

The CHAIRMAN. Yes, sir.

Senator SMATHERS. Mr. Chairman, is it the intention of the Chair to question the Attorney General, and thereafter have an executive session with respect to the unanimous-consent request?

The CHAIRMAN. That is right. The matter of the Attorney General was requested by the committee.

Senator ERVIN. I would have no objection to hearing the Attorney General or anything else, as far as I am concerned, at this time, provided I have an opportunity after studying the matters that I mentioned a little further, to examine Mr. Fortas next week. But I do not want to waive my right. Under the rules of the committee I have a right to demand this matter go over in its entirety. I do not want to do that, I do not want to postpone it. But I would like to have unanimous consent——

Senator DODD. The Chairman has said we will all have an opportunity.

Senator ERVIN. After I am thoroughly prepared or before I am thoroughly prepared?

Senator SMATHERS. This will be determined in the executive session.

The CHAIRMAN. That is the judgment of the Chair. I do not think it is a matter that requires unanimous consent.

Senator ERVIN. Mr. Chairman, I have a stack of opinions I am reading and I would like to make it certain that I can ask questions next Tuesday.

Senator SMATHERS. After we have finished with the Attorney General, it is not the intention of the committee to then go forward even though the distinguished Senator from North Carolina is himself not yet ready to ask questions of Justice Fortas, there are others who are.

The CHAIRMAN. Well, we have two Senators—Senator Gore, are you going to present the nominee, or do you desire to testify?

Senator GORE. I will present the nominee, sir.

The CHAIRMAN. Well, we have a Senator who desires to testify, and we have five witnesses. I thought we would take them today, or we can get together this afternoon on Senator Ervin's request if we do not this morning.

Senator SMATHERS. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Attorney General.

STATEMENT OF HON. RAMSEY CLARK, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General CLARK. Good morning, Mr. Chairman, members of the committee.

The CHAIRMAN. You were requested for your views on whether or not a vacancy exists for Chief Justice of the U.S. Supreme Court.

Now, what are your views?

Attorney General CLARK. Mr. Chairman——

The CHAIRMAN. Do you have a prepared statement?

Attorney General CLARK. Yes, I have a prepared statement, and a memorandum which has been filed with the committee. The statement is briefer, and if it is the pleasure of the committee, I will read it into the record.

Senator SMATHERS. Do you have copies of that?

Attorney General CLARK. Yes, I believe they have been distributed.

Senator SMATHERS. Thank you.

Attorney General CLARK. From the earliest years of the Union, Presidents have nominated and the Senate has confirmed persons to high office where no vacancy existed at the time. Now these powers of the President and the Senate have been questioned.

The CHAIRMAN. I do not have a copy of your statement. Yes; I see it. Thank you.

Attorney General CLARK. Now these powers of the President and the Senate have been questioned.

The Constitution, the laws made in pursuance thereof, the decisions of courts construing both, the time-honored practice of virtually every President and the Senate then serving, and the basic needs of effective government demonstrate beyond question the power does exist.

Article II, section 2, clause 2 of the Constitution provides the President:

"* * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; * * *"

Since ratification of the Constitution, Presidents have frequently and as a preferred method in the interest of continuity in government nominated persons to every position so defined in the Constitution while an incumbent served until his successor could relieve him of the duties of office. The Senate has not questioned its power to confirm.

Every sound principle of political science compels the conclusion that interruption of government is wrong and inimical to the public interest. It was never more so than in our time. Is the post of ambassador to a major power so insignificant that our system should inflict upon itself the necessity of periods perhaps months in duration without Presidential representation?

I might point out here that this year General Westmoreland was confirmed by the Senate many days before his predecessor, Harold Johnson, retired as Chief of Staff of the Army. That George Ball was confirmed as Ambassador to the United Nations many days before his predecessor, Arthur Goldberg, retired from that office.

And what of the Chief Justice of the United States? What theory of government would require vacancies in that high post, and for what purpose? Is justice of so little value that we force ourselves to wait longer than nature ordains? Senator Hruska is right, "There must always be a Chief Justice."

The Congress has provided methods by which justices and judges of Federal courts may elect to retire. By letter dated June 13, 1968, Chief Justice Warren notified the President:

Pursuant to the provisions of 28 U.S.C., section 371(b), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

The Chief Justice chose as a matter of right thus to retire. The statute creating this right provides:

The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

President Johnson, noting his deep regret, advised the Chief Justice by letter of June 26, 1968:

With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

By return telegram, the Chief Justice acknowledged the President's "letter of acceptance of my retirement," expressing his appreciation of the President's warm words.

The same day the President sent to the Senate the nomination of Associate Justice Abe Fortas to be Chief Justice of the United States, vice Chief Justice Warren, and of Judge Homer Thornberry to be Associate Justice of the Supreme Court, vice Justice Fortas.

A major part of all the actions of our Government through its history in both the executive and judicial branches have been under the authority of persons nominated and confirmed for offices still occupied

by their predecessors, at the time of confirmation. Scores of judges have ruled on the rights of our citizens, affecting their life, liberty, and property, who were confirmed by the Senate for judicial position while their predecessors still held office. Will anyone be heard to say all of these acts are void?

The most recent, as an illustration, is the Honorable James McMillan, U.S. district judge for the western district of North Carolina. Judge Wilson Warlick of that district advised the President by letter of February 24, 1968, of his election to retire upon the appointment and qualification of his successor. With the strong recommendation of Senator Ervin, President Johnson nominated James McMillan to succeed Judge Warlick on April 25, 1968. The Senate duly confirmed and President Johnson appointed Mr. McMillan on June 7 of this year. Judge Warlick continued to serve as the active U.S. district judge until his successor qualified by taking the oaths of office on June 24, 1968.

This procedure has been clearly understood and practiced throughout our history as a nation. In *Marbury* v. *Madison*, 1 Cranch 137, 155–157, in 1803 the constitutional appointment process was explained as consisting of three major steps:

The nomination by the President;

The senatorial advice and consent; and

The appointment by the President, of which the commission is merely the evidence.

Each is essential to assumption of authority, as is the final step to qualification, taking the oath of office.

The first volume of the Executive Journal of the Senate, which covers the years 1789 through 1805, contains a variety of instances in which the Senate confirmed nominees to positions where no vacancy existed at the time. Surely we would not repudiate so wise and beneficial a method in 1968.

The Supreme Court has on a number of occasions approved this interpretation of the Constitution so consistently followed by Presidents and the Senate. There is a series of cases, where the President has nominated and the Senate confirmed appointments to executive positions occupied by others, which hold the office to be automatically vacated upon the appointment of the sucessor. *McElrath* v. *United States*, 102 U.S. 426; *Blake* v. *United States*, 107 U.S. 227; *Mullan* v. *United States*, 140 U.S. 240.

Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by the elevation, the Senate confirmed the nomination to the lower court before that of the judge who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith, Jr., chief judge of the District of Columbia court of general sessions, to the U.S. District Court for the District of Columbia, and of Harold H. Greene, vice John Lewis Smith. 112 Congressional Record 25524. The confirmation of Judge Greene occurred on October 18, and that of Judge Smith, whom he succeeded, on October 20. 112 Congressional Record 27397, 28086.

Another interesting illustration of the desired flexibility provided by this historic practice occurred in connection with the retirement of

Circuit Judge Barrett Prettyman. The original letter of retirement, dated December 14, 1961, merely stated:

I simply hereby retire from regular active service, retaining my office.

President Kennedy accepted that decision on December 19, 1961. On December 26, 1961, however, the President expressed the hope to Judge Prettyman by letter that he would—

continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office.

On January 2, 1962, Judge Prettyman advised the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite."

The history of the Supreme Court includes a number of examples in which Justices and a Chief Justice were nominated and confirmed for positions on the Court which were not as yet vacant.

Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1, 1870. However, due to his death on December 24, Stanton never ascended to the bench.

Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Theodore Roosevelt nominated First Circuit Judge Day to be Associate Justice of the Supreme Court, vice Mr. Justice Shiras; second, Solicitor General Richards to be Circuit Judge, vice Circuit Judge Day; and third, Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, 1 day prior to the effective date of Justice Shiras' resignation.

On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18 of that year. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination the same day. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, 1922, "commencing September 18, 1922."

On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. On June 12, President Roosevelt nominated Associate Justice Stone to be Chief Justice, and Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." The Senate confirmed Chief Justice Stone's nomination on June 27, before the effective retirement date of Chief Justice Hughes, and Associate Justice Jackson's nomination on July 7.

Mr. Justice Gray notified President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the right to resign at full pay, and added:

* * * I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.

In accepting the resignation on July 11, 1902, President Roosevelt stated:

If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.

This is precise precedent for what has been done here.

On August 11, 1902, President Roosevelt appointed Oliver Wendell Holmes, Jr., to succeed Justice Gray. The Congress was then in recess. Holmes chose not to serve under the circumstance. Justice Gray died in September and the President nominated Holmes on December 2, 1902, the day after the Senate reconvened. He was confirmed December 4.

The manner in which judicial retirement has been effected through the years has varied. Many, perhaps most in recent years, have provided the important opportunity for continuity in office. The method which best serves the public interest is retirement at the pleasure of the President. The different phrases used to accomplish this are as many as the scores of judicial positions which have been filled this way. No problem has ever arisen over the language chosen.

We should encourage retirements which offer continuous service in the judiciary. Justice is served. Our Constitution, our statutes, our historic practice and effective justice all commend it.

The CHAIRMAN. Now, do you desire to have the memorandum on the powers of the President to nominate and the Senate to confirm Mr. Justice Fortas as Chief Justice, and Judge Thornberry to be Associate Justice of the Supreme Court to be placed in the record?

Attorney General CLARK. Yes, sir.

(The memorandum referred to for inclusion in the record was marked "Exhibit 1" and appears in the appendix.)

The CHAIRMAN. I want to ask you this question.

In your judgment is the resignation of Chief Justice Warren irrevocable?

Attorney General CLARK. Mr. Chairman, the notice of intent to retire that has been given by Chief Justice Warren was conditioned, as have been scores of similar notices of election to retire by judges through our history, upon the pleasure of the President, or upon the qualification of a successor, there really being no difference between the two (the latter in effect depending upon the pleasure of the President who nominates). There is no precedent that we have found that answers the question that you have raised. It has been thonght irrelevant through the years in confirmation hearings for the purpose of determining the qualifications of a successor under such circumstances.

The CHAIRMAN. Is it irrevocable?

Attorney General CLARK. As I say, there is no precedent in law that we have found on that issue. The question itself seems immaterial to the purposes of this hearing.

The CHAIRMAN. Did he not announce that he would continue as Chief Justice?

Attorney General CLARK. There are two letters, there is one telegram, and there is a public statement, all of which express the Chief Justice's intention. And I am unable to elaborate beyond what they say. They are all in the record, I believe, because they are all included in the memorandum that has been submitted by me, with the exception of the public statement.

The CHAIRMAN. Senator McClellan.

Senator MCCLELLAN. No questions.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. Since you have referred to my letter to the President, I would just like to say that I would commend an indication that

the Department of Justice is willing to follow a precedent by me. I take that as a very high compliment. But I think you and I can agree that any action I take would not amend in any way the act of Congress governing the retirement of judges, and governing the appointment of successors to retired judges.

Attorney General CLARK. We reviewed Mr. McMillan's qualifications and found them of the highest quality. I think he will make a very fine judge. The Senator is correct. He, as an individual Senator, has no power to override the will of the Congress or the Senate.

Senator ERVIN. As a matter of fact, I had talked to Judge Warlick, and he told me he was going to retire on a certain day, which he postponed at my request to a later date. I never saw the letter that he sent to the President, until after these things occurred. My colleague, Senator Jordan, received a letter, as I recall, on February 27—I believe that was the date—and 3 days later I received a letter from Judge Warlick. They were both written on the 26th. For some strange reason, due to the post office, I never got mine until the 29th. I believe it was. And Judge Warlick submitted his letter to the President on February 24, which did state that he retired effective upon the qualification of his successor. I never saw that letter until after I had recommended his successor. Then on the 26th day of February, my colleague, Senator Jordan called me by phone and said he had received a letter from Judge Warlick to the effect that he retired, and he asked me to prepare a statement for us to send to the President recommending Jim McMillan for successor. This letter stated this in the first paragraph:

DEAR MR. PRESIDENT: Due to the fact that Judge Wilson Warlick has announced his retirement as United States District Judge for the Western District of North Carolina, a vacancy now exists in that office. We wish to recommend that James Bryan McMillan of Charlotte, North Carolina, be nominated by you to fill this vacancy.

Now, I wrote the letter under the impression that Judge Warlick had absolutely announced his retirement, effective as of that date.

About 3 days later Judge Warlick's letter was delivered to me. I immediately wrote Judge Warlick a letter which stated: "The post office service has been extremely bad between here and North Carolina and I have just received your letter today concerning your retirement. However, I did find out of your intentions, and, as I am sure you have seen, Senator Jordan and I have both moved swiftly to recommend your successor." So I was not passing upon the statute. If I had, I think it is immaterial, because as you and I agree, I could not have amended the statute.

Now, in all of these cases you have mentioned in your letter about retirement of Supreme Court judges, except that of Justice Gray, were cases in which the Justice absolutely resigned his office with a stipulation that the resignation would take effect a certain date in the future—were they not?

Attorney General CLARK. That would not be at all clear, Senator. I think that would require a construction of each of those letters and perhaps involve other questions.

Senator ERVIN. Well, let's examine the examples mentioned in your statement. The first one says: "Mr. Justice Grier submitted his resig-

nation on December 15, 1869; to take effect on February 1, 1870." In other words, it was an absolute resignation to take effect in the future.

Attorney General CLARK. I did not intend to construe the letter in that way. I was just summarizing what the letter said, Senator.

Senator ERVIN. As you state there, the President did not nominate Edward M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission was to take effect on or after February 1, 1870. However, due to his death on December 24, Stanton never ascended to the Bench.

Now, as a matter of fact, doesn't history show not only that Stanton died before the day the resignation of Justice Grier took effect, but that Justice Grier was still acting as a justice and attended Mr. Stanton's funeral?

Attorney General CLARK. He may have, Senator. I have not read that part of history recently.

Senator ERVIN. Well, I call your attention to what Charles Warren, a great historian of the Supreme Court, says in volume II of his "History of the Supreme Court of the United States." He says on page 507 and 508:

> Very early in January, the President had informed visitors that he had decided to appoint Judge Strong to the Grier vacancy.

Now, mind you, that was after he had appointed Stanton to take office on February 1, 1870, the date of Justice Grier's resignation. And after Stanton died, he talked about appointing his successor, to take the place of Justice Grier.

> Early in January the President had informed visitors that he had decided to appoint Judge Strong to the Grier vacancy, but the hope was generally expressed that he would not repeat what the Nation termed "an act of very doubtful propriety" when the President had nominated Stanton to the Supreme Court Bench long before any vacancy existed, the immediate result of which was the curious spectacle of a judge dead and buried in state, while his prdecessor sits on the Bench and goes to the funeral.

This was a statement of Charles Warren. Nation magazine says it was an act of very doubtful propriety, and a dangerous precedent—when the President had nominated Stanton to the Supreme Court long before any vacancy existed.

So it is important to have a vacancy in the eyes of the historian of the Supreme Court, as I would interpret it, and he quotes this with apparent approval.

Attorney General CLARK. Whether he approved it or not was not clear to me from the way you read it. That is perhaps an interesting bit of history. The fact remains that the President and the Senate construed themselves in that particular case to have the power to fill a position that was presently held, and they did so, as they have done on scores and scores of other nominations to the judiciary throughout history.

Senator ERVIN. That occurred before the law authorized the retirement of the Supreme Court Justices was passed, too, did it not?

Attorney General CLARK. I did not get the question.

Senator ERVIN. I said that event occurred before there was a law authorizing the retirement of Supreme Justices. This is not a resignation. This is an announcement of intention to retire.

Attorney General CLARK. I think at that time the statute still talked in terms of resignation. Throughout our history, you have had the right to resign. The question is whether you have any retirement pay if you do.

Senator ERVIN. Now, it is your position, is it, that a President can nominate and the Senate can confirm the appointment of Supreme Court Justices when no vacancy exists on the Supreme Court?

Attorney General CLARK. Absolutely, Senator. And if not, Judge McMillan and a good many other men on the bench today may be acting without power.

Senator ERVIN. Oh, no; that would not follow, because they have a commission power to act.

Attorney General CLARK. The commission is a ministerial act.

Senator ERVIN. There is not a single case where the title of any Justice was ever called into question, where it was adjudicated—any Justice of the Supreme Court.

Attorney General CLARK. This is the first time I have really seen the issue raised. You are raising it now, Senator Ervin.

Senator ERVIN. Now, if the President can appoint—can nominate, and the Senate can confirm the nomination of a Supreme Court Justice when there is no vacancy, then a President, if he has an agreeable—I started to say subservient—but I will say an agreeable Senate, could appoint nine Supreme Court Justices to take the place of any nine sitting Chief Justices at any time that they retired or resigned or died, could he not?

Attorney General CLARK. My experience with the Senate, brief thought it is, indicates it is unlikely that they would be confirmed under those circumstances. We have checks and balances in the Government—among the branches of Government. But the power of the President to nominate and the power of the Senate to confirm has been manifested time and time again.

Senator ERVIN. I am not asking you a question about your opinion of the wisdom of the Senate. I am asking you a question about law, the Constitution.

Now, if the President can nominate a Justice of the Supreme Court, and the Senate can confirm him, when no vacancy exists, then the President and the Senate working together can preempt appointments to the Supreme Court for a quarter of a century, can they not?

Attorney General CLARK. No, I really think not, Senator. I think that is such a far-reaching hypothetical.

Senator ERVIN. What limit is there, Mr. Attorney General, on the power of a President and the Senate to appoint a Justice of the Supreme Court when no vacancy exists? Where is there any legal or constitutional power?

Attorney General CLARK. No President has undertaken this opportunity yet. No Senate has had to consider it yet. The probability of either doing it or of a successor ever qualifying would seem quite remote to me. Here as in all the cases that have happened through history—and there have been scores just in the judiciary—not to mention the other offices covered by the same constitutional provision—there has always been an anticipation, an assumption that there will be a vacancy at a time in the future, and the Congress, the Senate, and

the President have acted on that assumption to the benefit of the country in avoiding gaps in the service of the judiciary and the executive branch.

Senator ERVIN. If you construe the Constitution, however, there is nothing in the Constitution that requires any such indication.

Attorney General CLARK. I assume there might well be. I am not sure the analogy to State governments might not be applicable—that the President cannot act to fill a position that will become vacant at some time in the future beyond the term of his office. But we have no precedent for that. We are not going to have any precedent for that. It is not going to happen. It never has happened.

Senator ERVIN. Well, something else has happened in this case that never has happened, and I will get to it in a minute.

Now, I will ask you if every one of these resignations that you have talked about in your statement of Supreme Court Justices were not resignations where the incumbent resigned the office with the provision that the resignation or retirement would become effective on a particular date named—not on the happening of some uncertain thing in the future.

Attorney General CLARK. Well, the short answer is "No." But more specifically, we have not endeavored to analyze each of these letters, to see whether it is absolute or whether it is conditional. I am not sure that is relevant. The whole history of appointments to the judiciary shows this is done time and time again. It is a very vital and important opportunity for the Congress and the President together to keep the judiciary full so it can perform its vital service.

Senator ERVIN. In the interests of time—you state on page 8—"Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870." I assume that statement means exactly what it says. The resignation was to take effect on a stated date in the future.

Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903.

On September 1, 1922, Associate Justice Clark tendered his resignation as of September 18. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1.

Every one of those letters—if your statement is correct—were resignations or retirements which, according to the term, would take effect absolutely on the designated date.

Now, the only exception to that, as I see it, is Mr. Justice Gray. Mr. Justice Gray, according to your statement, notified President Theodore Roosevelt on July 9, 1922, he desired to resign and added:

> I shall resign to take effect immediately but for a doubt whether a resignation to take effect at a future date or on the appointment of my successor may be more agreeable to you

Then President Roosevelt accepted the resignation. You said on August 11, 1902. President Roosevelt appointed Oliver Wendell Holmes, Jr., to succeed Justice Gray. Congress was in recess. Holmes chose not to serve under the circumstances.

So Holmes was nominated, apparently; but he declined to accept because he did not want an interim appointment.

In the meantime, my recollection is that Gray died; and that Holmes—his appointment was not confirmed—was nominated a sec-

ond time. Justice Gray died in September without the Senate ever acting on the appointment of Holmes, because Holmes had refused to accept an interim appointment. And then after Gray died in September, the President nominated Holmes on December 2, 1902, at a time the office was vacant, because the incumbent had died. Then the Senate confirmed Holmes after the office had become vacant through the death of the incumbent. So that is not a precedent, either.

Now, you stated a moment ago that it was necessary to have a Chief Justice.

Attorney General CLARK. I quoted Senator Hruska as to that proposition.

Senator ERVIN. Yes. Well, I would hate to take issue with my distinguished friend, Senator Hruska—because Congress thinks otherwise. Congress enacted the statute codified as 28 United States Code annotated, section 3, which says this:

Whenever the Chief Justice is unable to perform the duties of his office, or the office is vacant, his powers and duties shall devolve upon the Associate Justice next in precedence who is able to act until such disability is removed or another Chief Justice is appointed and duly qualified.

Now, Congress recognizes you can have an Acting Chief Justice by that statute. And certainly Justice Black, who has been over there all these years, since about 1938, is fully competent, in your opinion, is he not, to act as a Chief Justice?

Attorney General CLARK. There is no question about the competency of Mr. Justice Black. Also there is no question about the undesirability of an Acting Chief Justice. It is awfully important to have a man duly nominated and confirmed to serve as Chief Justice at all times.

Senator ERVIN. It would have beeen very easy in this particular case for Chief Justice Warren to either resign or absolutely retire; would it not? There was all the summer until October 1 to select a Chief Justice.

Attorney General CLARK. It would have been absolutely contrary to good judicial administration—as the Chief Justice wisely recognized. He followed the precedent that has been followed as a preferred matter by most judges in recent years, to provide for continuity in office, and also by these precedents as to the Supreme Court which have been cited.

Senator ERVIN. I would like to call your attention to a State decision on the subject. They lay down this rule.

A prospective resignation, even though accepted, does not take effect until the day named, and when an officer tenders his resignation before the time to hold an election, to take effect after such time, the office is not vacant, and no election to fill the office can be legally held.

That is the State ruling on matters of this kind. That is held in two Florida cases, Kentucky cases, and other cases which are cited, 67 Corpus Juris, page 227.

Here is another statement of the law, general law, on the subject of resignations in public offices:

A statement by an officer that he contemplates a resignation, or that his statement may be regarded as a resignation on a certain contingency which does not occur is without effect.

Then:

A proposal to resign under a specified condition cannot be accepted, except on terms made by him.

Now, the statute or the Supreme Court of the United States says the Supreme Court of the United States shall consist of a Chief Justice and eight Associated Justices.

Attorney General CLARK. Are you asking me?

Senator ERVIN. Yes.

Attorney General CLARK. Yes, sir.

Senator ERVIN. Now, I would ask you this question. Leaving out of consideration of the condition that existed when John Jay was appointed, when there was no Court—leaving out anything about questions of impeachment and removal from office, I will ask you if there are not only three ways in which a vacancy can occur in a Supreme Court, in the Office of Supreme Court Justice. First, the death of the incumbent; second, the resignation of the incumbent; third, the retirement of the incumbent.

Attorney General CLARK. There are those three ways, plus the other ways that you indicated earlier.

Senator ERVIN. Yes. And the only contention in this case is that Chief Justice Warren has announced his intention to retire at the pleasure of the President. Isn't that true? Plus——

Attorney General CLARK. His letters and the President's reply and his telegram in response to the President's reply have been read into the record.

Senator ERVIN. I have a copy of the letters, but no copy of the telegram.

Attorney General CLARK. The telegram was quoted in the statement that I read, Senator, and it should be set forth in full in the appendix to the memorandum.

Senator ERVIN. Well, anyway, the Chief Justice's letter is as follows:

"Dear Mr. President, pursuant to the provisions of 28 U.S.C."—that is United States Code—"371(b) I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure. Respectfully yours, Earl Warren."

Now, do you not agree with me that standing alone that does not constitute a retirement?

Attorney General CLARK. I think the letter speaks for itself, it states an intention to retire.

Senator ERVIN. An intention to retire in the future.

Attorney General CLARK. Yes, it has been done a great many times.

Senator ERVIN. To retire in the future, at the pleasure of the President.

Attorney General CLARK. It is the present intention to retire at some time in the future that pleases the President.

Senator ERVIN. The present intention to retire some time in the future. Correct.

Attorney General CLARK. Yes.

Senator ERVIN. Then to understand the situation that exists, you have to consider that in conjunction with the President's reply, don't you?

Attorney General CLARK. Yes, I think——

Senator ERVIN. Now, the President stated in his letter, which is undated, apparently——

Attorney General CLARK. It is June 26, isn't it?

Senator ERVIN. Chief Justice Warren's letter was dated according to this statement on June 13, 1968. And the statement does not say when the President replied. But the President stated this in the reply:

My Dear Mr. Chief Justice, it is with the deepest regret that I learn of your desire to retire—knowing how much the Nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

Now—the telegram—does not the telegram of the Chief Justice say he has received that letter from the President? I have never seen it.

Attorney General CLARK. It is set forth on page (C), in appendix I, Senator. It says:

My secretary has read to me over the phone your letter of acceptance of my retirement. I am deeply appreciative of your warm words, and I send my congratulations to you on the nominations of Mr. Justice Fortas as my successor and of Judge Homer Thornberry to succeed him. Both are men of whom you can well be proud and I feel sure they will add to the stature of the Court.

The language the Senator will be interested in is "your letter of acceptance of my retirement."

Senator ERVIN. Would you not say, taking those communications together, that Chief Justice Warren has announced he has a present intention of retiring when his successor is qualified?

Attorney General CLARK. That is the substance of it as it now stands.

Senator ERVIN. And until that event occurs, according to these communications, there is no vacancy in the office of Chief Justice of the United States, simply because the Chief Justice has not retired.

Attorney General CLARK. At this time Earl Warren is Chief Justice of the United States.

Senator ERVIN. Now, are you prepared to affirm that he could not withdraw his resignation—I mean he could not withdraw his offer to retire at any time?

Attorney General CLARK. I am not prepared to speak for the Chief Justice, Senator Ervin. I think we would have to have him speak.

Senator ERVIN. I am not asking you about that. I am asking you about the law of the situation.

Attorney General CLARK. As I have said earlier, there is no precedent in this area. We are talking about the three highest offices in the United States—the office of President, the office of the Chief Justice, and the highest legislative body, the U.S. Senate.

Senator ERVIN. I agree with you, I find no precedent in this area. But I do find one in the court of claims decision where a circuit judge resigned and they said he claimed it had not been accepted by the President, and they said the resignation of a judge is a matter for the judge only. The President has nothing to do with it from a legal standpoint. Don't you believe the same thing is true of the retirement?

Attorney General CLARK. On the terms of the retirement, Senator, there have been scores of different methods of retiring. There has not been a form book for the language. The men have proceeded with honor, and the purpose has been accomplished in every case, and it has not been questioned heretofore.

Senator ERVIN. Well, everything is questioned for the first time once, isn't it?

Attorney General CLARK. Everything that is questioned is questioned for the first time.

Senator ERVIN. Unless it goes unquestioned forever. Well, anyway, I tried to find some precedents. In fact, I spent the Fourth of July and the July recess on it. The only precedents I can find is to the effect that when a man submits a resignation, or announces the purpose to retire in the future, his resignation or his retirement is not effective until that date happens, and any time before that date arrives, he can withdraw his resignation or his retirement and resume his office, even though his resignation has been accepted by the appointing body and the successor has been appointed. Now, I am not insinuating that Chief Justice Warren would do that, but that is in his power, in my opinion, from the decisions I have read.

Attorney General CLARK. Well, we find no precedent on that. It seems a quite hypothetical question. If there is a risk there, it is a risk this country has run scores of times as to the judiciary, and thousands of times as to Executive announcements.

Senator ERVIN. Well, there is a precedent in the State on the subject.

Attorney General CLARK. Yes; but your precedents from the State court do not purport to construe the Constitution of the United States and the laws thereunder.

Senator ERVIN. No. But the word "retire" and the word "resign" and the word "vancancies" have had certain meanings in the English language, whether they are used in Federal statutes or whether they are used in State statutes; is that correct?

Attorney General CLARK. As a matter of law I would always prefer a Federal interpretation of a Federal statute if there were one on the issue, rather than a State decision which might come under a State constitution.

Senator ERVIN. There is a State case in Minnesota where the constitution provided that a State judge could retire upon petition to the Governor, and it said that where there is a vacancy in the office of State judge it had to be filled at the next general election. This incumbent judge sometime before the election set a petition to retire to the Governor of Minnesota, the retirement to take effect on the 15th day of November. And in the meantime, an election was to be held on the third day of November. The Governor accepted the retirement, as of November 15, and appointed another judge to take office on the 16th of November, and the claimant to the office ran in the election and got elected—got all the votes cast in the election. And the Minnesota court said he was not entitled to the office because there was no vacancy in the office to be filled on election day. The vacancy did not take place until the 15th of November.

Well, my dictionary says that—and the decisions say—that to retire means to withdraw or go away or depart to a place of abode, shelter, or seclusion. That is one definition. The second is to die. And the third is this. To withdraw from office, business, or active life—that is what retirement means. Don't you agree with me that to retire, insofar as an office is concerned, is to withdraw from the office, business, or active life?

Attorney General CLARK. That is a generally reasonable definition of the word.

Senator ERVIN. Now, I invite your attention to the fact of what the statute says. Justice Warren invokes this particular statute, although he does not comply with it, as I see it. Here is the statute:

Subsection (b) of 28 United States Code 371. Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of 70 years, after serving at least ten years continuously. Or otherwise, or after attaining the age of sixty-five years, and after serving at least fifteen years continuously or otherwise. He shall during the remainder of his lifetime continue to receive the salary of the office. The President shall appoint by and with the consent of the Senate a successor to a justice or judge who retires.

Now, is not that the statute that we have that applies to retirement of Supreme Court Justices?

Attorney General CLARK. Chief Justice Warren cited section 371(b), as I noted in the statement.

Senator ERVIN. Doesn't that statute itself define what it means to retire? When it says that any Justice may retain his office but retire from regular active service does that mean when a Justice retires, that he ceases to officiate, perform the regular and customary duties of his office as a Justice?

Attorney General CLARK. Upon the taking effect of a retirement, that is the intention of the language.

Senator ERVIN. That is the only way he can retire, is it not? This is all the statute——

Attorney General CLARK. That is a result of retirement, not the act of retirement itself. It says a judge may retire, and if he does, then his powers as a judge——

Senator ERVIN. Does not that describe what he does when he retires? How he retires?

Attorney General CLARK. It describes what happens to him when he has retired.

Senator ERVIN. Well, it describes the conditions on which he retires. And that is the only law to be invoked here.

Attorney General CLARK. It is the law that has been invoked since it has been on the books by scores of judges who have retired under similar language.

Senator ERVIN. Well, as a matter of fact originally a judge could only resign. When he resigns, he relinquishes his office. Is not that true?

Attorney General CLARK. Until there were provisions for retirement.

Senator ERVIN. And then it said he could retain the office, but he could retire from regular active service. And that shows how he retired and when he has retired.

Attorney General CLARK. Well, I am not sure that this is at all relevant to the purpose of the hearing. The statute states generally the qualifications that he must have to exercise the right to retire that is here described. It also describes his status after his retirement.

Senator ERVIN. Yes. It also describes how he retires. He retires from regular active service. That is the right way to retire.

Attorney General CLARK. Well, I do not know. I would think if it described "how" he retired, it would say by sending a letter or by standing up in open court and making a declaration, or by some other means. This does not purport to cover that.

Senator ERVIN. Well, he has got to retire from regular active service to be retired, does he not? Is not that clear as my big nose on my face?

Attorney General CLARK. No, sir.

Senator ERVIN. Well, do you claim a judge can retire under this statute and still perform the regular active duties of the office from which he is allegedly retiring?

Attorney General CLARK. No, I do not.

Senator ERVIN. OK. Maybe we agree. This statute also sets out the only conditions under which a successor can be appointed under this statute.

Attorney General CLARK. It describes in generic language of the Constitution what the President shall then do.

Senator ERVIN. And it says that the President shall appoint by and with the consent of the Senate a successor to a Justice who retires, is not that what it says?

Attorney General CLARK. Yes. It does not say "who has retired." It is in the present tense.

Senator ERVIN. But it is all in the present tense. So consequently, the only reasonable interpretation to give to this statute is that this power to appoint on retirement does not exist except in respect to a Justice who retires. And all of the precedents to the contrary cannot change the meaning of this statute—even precedents set by me. So I take the position on this, under the plain words of the statute, the President has no power to nominate and the Senate has no power to confirm the nomination of any Justice—uuder subsection (b), section 28, United States Code 371—unless the Justice has retired, before the appointment is made, and that he does that by retiring from regular active service. And I think that is as clear as the noonday sun in a cloudless sky.

Now, I have read some articles in the press that Chief Justice Warren—this is the Ashville Times, July 6, 1968. "Warren to Stay if Fortas nixed."

This states that "Earl Warren says he will stay on as Chief Justice of the United States if the Senate does not confirm Abe Fortas as his successor."

Have you read articles to that effect in the paper?

Attorney General CLARK. I am not sure whether I have or not, Senator.

Senator ERVIN. Isn't that a pretty good statement of the sum total of communications between the Chief Justice and the President?

Attorney General CLARK. Well, I do not believe it purports to describe those communications. I think those communications state in effect he will retire upon the qualification of his successor.

Senator ERVIN. Well—no, but—I would like to offer in the record here this news item.

The CHAIRMAN. It will be admitted.

(The material referred to for inclusion in the record was marked "Exhibit 2" and appears in the appendix.)

Senator ERVIN. Also this statement from the New York Times June 27, 1968, entitled "Warren-Johnson Letters."

The CHAIRMAN. They will be admitted.

(The article from the New York Times referred to was marked "Exhibit 3" and appears in the appendix.)

Senator ERVIN. Is not the effect of these communications to say to the Senate of the United States that you can take Mr. Fortas as Chief

Justice or keep Mr. Warren as Chief Justice? Is not that the effect of them?

Attorney General CLARK. These communications are not addressed to the Senate of the United States, Senator. They are between the President and the Chief Justice. The President acting on the basis of these has nominated Mr. Justice Fortas to be Chief Justice, and that is the issue before the Judiciary Committee and the Senate.

Senate ERVIN. Well, is not it also plain that Mr. Warren will retain the office of Chief Justice if the Senate does not confirm Mr. Fortas?

Attorney General CLARK. Should there be no qualification of a successor, on the basis of the intention at this time expressed by the Chief Justice, he would retain that office.

Senator ERVIN. Well, then, it comes down to this—that the Senate must confirm Mr. Fortas as Chief Justice or retain Mr. Warren as Chief Justice. Is it not that simple?

Attorney General CLARK. I think that is not really the issue——

Senator ERVIN. Pending some unforeseen events now sleeping somewhere in the future.

Attorney General CLARK. I would hope that the Senate would not construe its duty as meaning a choice. The duty of the Senate is to advise and consent as to the nomination of Mr. Justice Fortas, and he should be considered on his qualifications, because in the constitutional scheme of things, he has been nominated, duly nominated, by the President of the United States to be Chief Justice.

Senator ERVIN. Well, do you not consider that my able and distinguished friend, Senator Mansfield, as Democrat majority leader of the Senate, speaks for the administration on matters of this kind?

Attorney General CLARK. Senator Mansfield sometimes speaks for the administration, and sometimes he speaks for Senator Mansfield.

Senator ERVIN. Well, anyway, I call your attention to the fact that the Washington Evening Star on Friday, June 28, 1968, contained an article entitled—an article by Lyle Denniston, entitled "Mansfield Warns Foes on Court Fight." It says that Senator Mansfield—and puts this in quotations—" 'The choice before the Senate' "—Mansfield said in a remark clearly aimed to GOP hopes of keeping the Chief Justiceship for the next President to fill—" 'is between Fortas being approved or Warren staying on.' "

I would like to have this put in the record.

The CHAIRMAN. It will be admitted.

(The article referred to for inclusion in the record was marked "Exhibit 4" and appears in the appendix.)

Senator ERVIN. I will just summarize my position very briefly.

The only authority the President has to appoint a successor to a member of the Supreme Court under the retirement statute is the authority to appoint a successor to a man who has actually retired. And that is the only authority that the Senate has to act on such appointment. I think both the President and the Senate have an obligation to obey the acts of Congress. It is apparent here that the present Chief Justice has not retired, and it is apparent that he has no intention to retire until his successor is appointed and qualified. That statute is binding on the President. The President has no power to make an appointment that does not comply with the statute. The

Senate has no powers to act on the appointment. In this whole situation, this argument could be very quickly dissipated if the President would tell the Chief Justice to go ahead and retire today and be done with this controversy. In the absence of such action, the only thing I can infer is that Senator Mansfield was correct when he said that you can confirm Mr. Fortas or you can retain—or you will retain the present Chief Justice.

There is another question in my mind, and that is this, and I will be through in a second.

As I construe the Constitution, before a successor to a Supreme Court Justice can qualify or be qualified, he not only has to be nominated by the President and confirmed by the Senate, and take an oath to support the Constitution—is not that true?

Attorney General CLARK. I believe there are four elements. You left out what we consider the third, and that is the appointment following confirmation, which precedes the oath.

Senator ERVIN. Which is issued through the Commission by the President.

Attorney General CLARK. The issuance of the Commission is evidence of the fact of the appointment.

Senator ERVIN. No, what troubles me—and I do not want to split legal hairs, because I think there is a question of substance here—but how can you have two Chief Justices, if you cannot have but one, and if the Chief Justice does not retire until his successor is qualified, then you are going to have two Chief Justices, notwithstanding the fact of acts of Congress. It may be just for a fleeting minute. But you are going to have two Chief Justices when the statute of Congress says you can only have one.

Mr. Warren is going to hold office until his successor is qualified. And his successor cannot qualify until all four of the steps are taken and he takes the oath to support the Constitution.

So with no retirement, temporarily you have two Chief Justices.

I thank you.

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Attorney General, I appreciate the research that went into your paper, and based on your testimony that you presented, coupled with the memorandum which has been available to the committee, I for one have no doubt that the Senate clearly can act upon a nomination such as the one that has been filed for Justice Fortas. I have no doubt, either, that the President acts in pursuance of the constitutional power, that he react to the Warren telegram and letter as he has. I think our responsibility now is to consider the qualifications of Justice Fortas.

Senator Ervin said that one of the most solemn duties of the Senate is to evaluate, measure the man who would go on the Supreme Court, or become its Chief Justice. And I agree. It is one of our most solemn duties. It is made very simple and easy for me in this case. The discharge of that duty is very easy, because of the extraordinary qualifications and backgrounds of Abe Fortas. I think he has honored the Court, he has honored the President who put him there, he was reflected credit on the Judiciary Committee for recommending him once. And that is what history's verdict will be when we do it a second time.

Senator ERVIN. If I may interject at this point, and keep silent hereafter. I am not impressed by precedents, the nature of those you stated. Most of them are not applicable to this situation. In fact none of them as far as the Chief Justice of the Supreme Court is concerned. I do not think that precedents can alter the words of a statute. Murder has been committed in all generations, and so has larceny, but the commission of murder has not made murder meritorious or larceny legal. The same thing about precedents which are in conflict with the law.

Excuse me.

Senator HART. Sam, I have listened to you recite precedents to me in the civil rights debate until I thought the world would never end.

Senator ERVIN. They were all sound ones, though—all sound ones.

Senator HART. Thank you very much.

The CHAIRMAN. Senator Bayh.

Senator BAYH. Mr. Chairman—Mr. Chief Justice, I have no questions. I personally find myself very much in line with the expression of my colleague from Michigan. With all due respect to my colleague from North Carolina, I do not see how he can sit here and listen to the ample supply and the excellent quality of the precedent, historical means by which our country has approached problems specifically on the point, that you have given us today, without being moved. I find him to be a reasonable man under most circumstances. I feel your argument as far as this is concerned—not your argument, sir, but your presentation amply answers the questions which have been raised. I think we have ample precedent in dealing with this. I think we have the interest of our country and the maintenance of the judiciary as a functioning body to compel us to move quickly, not hastily, but with all due haste, to deal with this problem. I think the President has ample jurisdiction—and I think the Chief Justice—I mean has ample authority to make this appointment, the Chief Justice certainly is within his right to retire, and I think the means which he chose is not unique. We of the Senate have the responsibility of filling this vacancy, which I feel in light of the precedents which you have given us does exist when a successor is chosen. I am also impressed, as was my colleague from Michigan, with the contribution that Justice Fortas has already made to the Bench. I feel that he is well qualified to be Chief Justice. I think that is the question that we in this committee must address ourselves to—is this man, or should I say are these men qualified. And I feel that endless debate over whether we are involved in a futile search for a candidate for a vacancy which does not exist, frankly I think this is a rather specious argument.

The CHAIRMAN. Senator Burdick.

Senator BURDICK. Mr. Chairman—Mr. Attorney General, in lawyer's language you have rendered a well-reasoned opinion. Thank you.

The CHAIRMAN. Senator Smathers.

Senators SMATHERS. Mr. Attorney General, as one who has recommended to the powers that be that we avoid this particular argument as to whether or not a vacancy did or did not exist by designating a date certain upon which he was to retire or the President to accept it as of a day certain, so that we would not have this splitting of hairs and a day wasted on this type and character of argument—I must say that

my advice was not followed. I nevertheless commend you, sir, for having made a very fine statement to the effect that in point of fact a vacancy does exist insofar as the Senate is concerned with respect to discharging its responsibility of confirming or considering and confirming, if we choose to do, a successor.

I am interested in the question which the chairman asked you with respect to whether or not the resignation of the Chief Justice was irrevocable. And your answer was that, as I gather—the question was not particularly relevant, you thought, and it was a matter for the Chief Justice to decide himself.

I think in terms of history or precedent we better make it clear that it is revocable—for were it to be construed that it were irrevocable, then it would seem to me that if after the election this fall, and after the swearing in of the new President, if the new President considered it to be the statement of the letter of Chief Justice Warren as irrevocable, at that point the new President might send over a new name on that assumption. I agree with what you implied in your statement that this was a matter for the Chief Justice himself to determine.

Now, having delivered myself of those pronouncements, I want to just say this.

With respect to the argument of the distinguished Senator from North Carolina whether or not a vacancy does exist, and whether or not we would have two Chief Justices at one time if the Senate went ahead at this point, and considered the nomination of Abe Fortas, and confirmed it, and all the other steps were taken that you mentioned in your statement needed to be taken to properly qualify him—is the question that he asked, not exactly the same question, that we probably should have asked ourselves, and he certainly should have asked himself in the North Carolina case, where Judge Warlick stated that he wished to retire effective upon the qualification of his successor, and did not the U.S. Senate, not having a day certain, really not having the man retire, we nonetheless considered and confirmed his successor, so that technically we did have two judges filling one spot on that day, is that not a fact?

Attorney General CLARK. No, I do not believe that is a fact, Senator. He would not qualify until after confirmation, and after being appointed by the President, he took the constitutional and statutory oaths of office. At that moment—and this gets a little metaphysical, but our whole history shows us this is not a problem, never has been, never will be—he qualifies, and automatically his precedessor is retired.

Senator SMATHERS. In other words, the day before he took the oath, we did have a district court judge in North Carolina, Judge Warlick. But the date that McMillan—what you are saying is that the day he took that oath of office, as of that date, and as of that moment that he took the office—that he took the oath, as of that moment, Warlick was out, and McMillan was in.

Attorney General CLARK. It was in February that Judge Warlick announced his intention to retire. He served on the bench for 4 full months, adjudicating the rights of individuals after announcing that. His successor, on whose qualification he himself had conditioned his own retirement, was duly nominated, confirmed by the Senate, appointed by the President; and two and a half weeks after the appoint-

ment by the President, during which time Judge Warlick continued to act as the Federal district judge, he took the oath of office. I think that is June 24, last month. And I think as of that moment Judge Warlick was retired—not in any way having done anything to indicate any other intention than that originally expressed in his letter of February 1968.

Senator SMATHERS. And that has long been the practice and the custom?

Attorney General CLARK. It has been done scores of times. It is the preferred practice. It provides the opportunity to maintain a full judiciary. It is important to judicial administration. It is more important in the office of Chief Justice of the United States than in any other office within the Federal judiciary.

Senator ERVIN. Just one question.

Senator SMATHERS. All right.

Senator ERVIN. The situation about Judge Warlick's retirement was not susceptible of the interpretation that Judge Warlick's retirement was to take effect when Jim McMillan or some other specific person was appointed to take his place. He left it up to the President to pick anybody in the western district of North Carolina to take his place, did not name a specific person. There is no connotation to that effect.

Attorney General CLARK. No; there was not.

Senator SMATHERS. Well, they had sent over a name. The Senators from North Carolina had sent the name over, McMillan.

Senator ERVIN. And said Judge Warlick had announced his retirement.

Senator SMATHERS. That is right. When Justice Warren sent his letter in, at that point there had been no statement by the President as to who he was going to nominate to succeed him. So I do not see that there is any difference—except that this is the custom. That is the point that I gather you make. And it has been the custom almost since the beginning of our system of government. Is that not correct?

Attorney General CLARK. I would assume at the time a judge elects to retire, he has no knowledge—in any instance in our history—of who his successor may be. A successor is nominated at some subsequent time by the President. That is the practice, and has been done scores of times.

Senator SMATHERS. All right. I have no further questions.

Senator ERVIN. I will subside after one more question. When did the President announce he was going to recommend or going to nominate Justice Fortas as successor to Justice Warren?

Attorney General CLARK. Chief Justice Warren wrote the President on June 13 of this year. The President replied to the Chief Justice on June 26 of this year. And on that same day, he nominated Mr. Justice Fortas and Judge Thornberry.

Senator ERVIN. The President's letter and the nomination both about the same time, simultaneously reported in the press?

Attorney General CLARK. They came out the same day.

Senator SMATHERS. That was the letter, though, indicating his acceptance of the retirement, or recognizing it—acknowledging the letter. Thirteen days elapsed from the day, however, that Justice Warren announced his desire to retire effective upon the qualification of a

successor—before the President acknowledged the Chief Justice's letter and at the same time indicated his intention to nominated Justice Fortas.

Senator ERVIN. Wait a minute. There was no public announcement made by Chief Justice Warren of his retirement. As a matter of fact, it was not general knowledge in the country that he had retired when the President announced it and simultaneously announced the nomination of his successor; was there?

Attorney General CLARK. I am not sure of the facts on that.

Senator ERVIN. There was no opportunity given to the country to know a vacancy was impending, and give the country an opportunity to recommend somebody else besides Mr. Fortas for the consideration of the President.

Senator SMATHERS. That is not a constitutional right.

Senator ERVIN. No. But 200 million American people are entitled to have some thoughts on the matter.

Senator SMATHERS. I would challenge the Senator from North Carolina to show me in the statute or anywhere else where it says so many days has to elapse between the letter from the judge who seeks to retire, and before the President is authorized to send over a nominee to fill the vacancy. There is nothing in the statute which requires that.

Senator ERVIN. The Senator from North Carolina has shown one statute which the Senator from Florida won't accept.

Senator SMATHERS. I have no further questions.

Senator HRUSKA. Mr. Attorney General, you have stated that it is irrelevant whether the Chief Justice's notice of intention to retire is revocable. Is it truly irrelevant inasmuch as there is a possibility—and I would not want to impute any ulterior motive of any kind to the Chief Justice or anyone else—of a refusal to confirm, or maybe confirmation of someone who did not meet the pleasure of the Chief Justice, and he chose to exercise the right to withdraw and to revoke his letter of intention to retire, what would be the situation then? Could it be said under those circumstances that the question of revocability is irrelevant?

Attorney General CLARK. Under those circumstances, it would raise different issues. The question before the committee is the power of the committee to consider nominations under these circumstances, and the question that the Senator propounds is irrelevant to the answering of that question. It is really not a matter of substance, though, even in the subsequent context that you indicate, because—and I hope no one would think this of the highest officials of one of the three branches of our Government—I think we would all assume they act in good faith. Certainly I do. But if a judge who has the exclusive option whether he will retire or not should happen to want to try to have some role in choosing his successor, it seems perfectly apparent by the very nature of things that he can condition his retirement in conversations with the appointing authority or any other way—"I will retire if you appoint so-and-so, otherwise I won't." That has never happened to my knowledge in the history of our judiciary. I am confident it is not going to happen. It is hardly a fear that we need to be concerned with.

Senator HRUSKA. Of course, under that view the Chief Justice would be affecting the appointment of his successor, rather than the President, which the Constitution requires; would he not?

Attorney General CLARK. If people have such intents they can endeavor to accomplish such purposes. I cannot imagine any such intent has existed, and there has been no manifestation of it in the entire history of the Federal judiciary.

Senator HRUSKA. Let us engage in a supposition. Suppose there is no confirmation of the nominee in this session of the Congress, and the matter would go over into the days of a new administration. Would the exchange of letter and telegrams between the President and the Chief Justice be binding upon the successor administration?

Attorney General CLARK. If the successor administration, under the hypothesis, improbable though it may be, that you pose, did not choose to nominate someone, the matter would be immaterial anyway. In other words, I take it your question is, "Would a succeeding President be bound by these letters between the Chief Justice and President Johnson?" The point is that from that succeeding President's standpoint, it makes no difference—if he does not choose to nominate, he does not nominate.

Senator HRUSKA. Well, but can the new President say——

Attorney General CLARK. The only binding effect the letters could possibly have on him would be to create a vacancy.

Senator HRUSKA. Well, can the President say "I am disregarding the letter of June 26 signed by the then President of the United States. I accept your resignation. I accept it as of now. That is my pleasure." Can he do that?

Attorney General CLARK. He can say that "My pleasure is that you remain on the Court," or "My pleasure is that you retire effective as of now." Whether either would have any meaning in terms of law is something that would have to be considered under all the facts that might exist at that future date.

Senator HRUSKA. Well, there is only one fact, isn't there? There is the letter of June 13 saying to the President of the United States——

Attorney General CLARK. There is a letter of June 13. There is a letter of June 26. There is a telegram of June 26. There are subsequent public statements. We do not know what the morrow brings.

Senator HRUSKA. Yes. But there is only one fact, isn't there? That is the letter of June 13, in which the Chief Justice said, "I hereby advise you of my intention to retire as Chief Justice effective at your pleasure." Now, that is addressed to the President. And one President could say, "Well, I accept it subject to the confirmation of your successor." Can another President come along and say in reply to that letter of June 13, "It is my pleasure that the resignation is effective today," and would it then be effective?

Attorney General CLARK. Well, as I say, he could say that. Whether it would be effective would depend upon all the circumstances. That is a hypothetical question that is irrelevant to this hearing. We have no precedent in law by which to determine that. It would depend upon what the President had done in the interim. It would depend upon what the Chief Justice did in the interim. It would depend upon what the two people that held those offices at that time might do.

Senator HRUSKA. I am sure that is right. We would have to wait for the event. But here we are called upon to rule on a point of law, parliamentary law, constitutional law, and also statute law, and we would like to know what the potential is so that we would have some guidance. That is the reason for my question.

Senator ERVIN. If the Senator will pardon me, I think the question is answered by 67 Corpus Juris Secundum, section 55, page 227, and by 72 Indiana 1, 87 Northeast—137 American State Reports 355, and other cases cited. And it says this:

A proposal to resign under a specified condition cannot be accepted except on the terms made by it.

That is the only law I can find on the subject. I think it is clear that the Chief Justice retiring under conditions named to the President can stay on. He stays on, has a legal right to stay on unless his successor is appointed. Therefore he can withdraw it at any time.

Senator HRUSKA. A staff member of the Judiciary Committee handed me a memorandum citing 67 Corpus Juris Secundum on officers, at pages 228, 229, and section 55(f) reading as follows:

A resignation

He prefaces it by saying this.

My research has not developed any case on this subject dealing with federal offices, but the following statement of the general rule,

Citing several State cases, is found at this page, in 67 Corpus Juris Secundum.

A resignation to take effect at a future date may be withdrawn before such date, even though it has been accepted, and even against the will of the body to which it is tendered, and which has accepted it, and it has been held that a resignation which is both contingent and prospective may be withdrawn before the occurrence of the specified contingency, notwithstanding a purported acceptance.

It is because this was drawn to my attention that I sought an answer from you, Mr. Witness, as to what your judgment is as to the applicability of a precedent of this kind to Federal officers, inasmuch as the search made confirms your conclusion that there does not seem to be any precedent as to Federal officers.

Attorney General CLARK. The question before the committee is whether it has the power to consider a nomination before it. If it does, the question before the committee is then the qualifications of the person nominated. We have had a long history in which this procedure before the committee has been used scores of times as to the judiciary, and hundreds, probably thousands of times as to the executive branch—all under the same clause of the Constitution. The hypothetical situation that the Senator is worried about has never occurred and the committees and the Senate have considered this problem these hundreds of times without letting this cause them any great concern. They go ahead, and they do their duty.

The question is a rather unique legal question. There is no precedent on it. It is not relevant to this hearing. I have not personally studied the question and do not think it would be of service, considering my office, to render some off-the-cuff opinion here on the issue under those circumstances.

Senator HRUSKA. Well, if that situation, however, would arise, I wonder if we would not, in a succeeding administration—whether it is of one major party or another—be confronted with quite a constitutional crisis. I would like a little guidance.

Senator ERVIN. Could I interrupt you on that point. I think it has arisen in States with respect to public offices and in addition to the thing you talk about. Sixty-seven Corpus Juris, subject "Offers," Section 55, page 227 says this direct on the point:

A statement by an officer that he contemplates a resignation or that his statement may be regarded as a resignation under a certain contingency which does not occur is without effect.

That is sustained by *State* v. *Board of Education*, 108 Kansas 101, 193, Pacific, 1,074, and other cases.

This announced intention to retire under a contingency fixed by the President is without effect.

Senator HRUSKA. Mr. Attorney General, there are some people bothered and disturbed by the final sentence in section 371, title 28, which says:

The President shall appoint, by and with the consent of the Senate a successor to a justice who retires.

What importance do you attach to that statutory provision?

Attorney General CLARK. The statute paraphrases the Constitution. The history and practice under the Constitution was perfectly clear to the Congress at the time it enacted the statute, that nominations and confirmations to positions where there is an incumbent have regularly occurred under every President, every administration, by every Senate then sitting. The statute itself speaks in the present tense, not in the past tense. I do not think if it spoke in the past tense you would have a very different legal question. But it does not say "who has retired." It does not say a justice who has retired. It says a justice who retires.

We have filled, in the 7 years I have been in the Department of Justice, dozens of judicial offices under these same circumstances. These men sit on the bench today throughout the United States.

Senator HRUSKA. Well, up until the time you started talking about what has been done as a matter of practice, I followed you very, very happily, and would probably concur.

However, I would agree with the Senator from North Carolina that a practice in violation or in contravention of any statute or any Constitution does not change that statute or that Constitution. On that score, I make my reservation. Up until you cited that practice I kind of followed you. I think that probably makes sense.

Your statement was kind enough to refer to a statement of mine to the effect that, "There must always be a Chief Justice." It does not pain me when my colleague from North Carolina differs with the construction that I place on the law, but it makes me a little uncomfortable, normally, because he is such an eminent scholar of the law, and my respect for his judgment and opinion of the law is great.

There was reference to section 3 of title 28 which reads this way:

Whenever the Chief Justice is unable to perform the duties of his office, or the office is vacant, his powers and duties shall devolve upon the Associate Justice next in precedence who is able to act, and until such disability is removed or another Chief Justice is appointed and duly qualified.

Now that has been cited as being somewhat contrary to the statement of this Senator, that there must always be a Chief Justice.

I would cite that section 3 as being in confirmation of that statement. It is a statutory way of saying there will always be a Chief Justice. It may be the named one, it may be an Acting Chief Justice. But there will always be a Chief Justice.

Senator ERVIN. I concur in your interpretation, Senator.

Senator HRUSKA. I am happy to know that.

We do have, of course, a provision—the language is almost the same as the language in the Constitution itself having to do with the Presidency and Vice-Presidency—which says that in case of the removal of the President from office or of his death, or his inability to discharge the powers and duties of said office, the same shall devolve on the Vice President. The question arose whether he was an Acting President or whether he remains a Vice President with duties which devolve upon him in certain instances. And that has been construed to mean that he actually did become President.

Now, it seems to me that section 3 of title 28 would be pretty much on the same basis, because if there would be inability of the Chief Justice, or if he should die, there is the devolution of these duties and powers upon the next man in order of seniority.

So I would think that that would be on a parity with it. And it was in that sense that this Senator made that statement. I still believe it is true.

Mr. Attorney General, I would not want the questions I have asked to indicate that this Senator has prejudged the point of law and the point of order which are being raised, and which have been mentioned by others on this committee. I do believe we have a duty, as you have had, and as you have tried to discharge so well, to canvass the points raised, and to do so in order that the public and the citizenry of this Republic will be informed as to what the implications are, and what the responsibilities of this committee and of the Senate are. On that point, I shall still keep an open mind until all the testimony is in. I understand we are going to have other testimony on it. And it is at that point, of course—and I presume when a ruling is made on it—that we can then go into the matter of the qualifications of the nominee and his eligibility to fill the office which is presently held by Chief Justice Warren.

That is all the questions I have at the present time, Mr. Chairman.

Senator ERVIN. Senator Fong.

Senator FONG. Mr. Attorney General, there is no doubt in my mind, and I agree with you that the President and the Senate can act upon the letter of intention of the Chief Justice to retire. Technically I agree with my distinguished colleague, Senator Ervin, that there is no vacancy, and that the retirement letter should have designated a day certain for retirement. But from a practical standpoint, I feel that this is proper and expeditious, and that we are proceeding in an expeditious manner.

The job which we are talking about has life tenure—unlike the other executive appointments which terminate upon the termination of the incumbency of the President—all resignations are submitted.

Now, should a successor not be confirmed, and there is a probability that a successor may not be confirmed in this instance, could the next President of the United States, say President Nixon, act upon that request and appoint a successor, and if he does, and the Senate does confirm the successor, but the Chief Justice does not retire, can he still legally retain the office of Chief Justice?

Attorney General CLARK. There are so many improbables in your hypothesis, it is very difficult for me to wrestle with it. I won't say which seems the most improbable. It would be hard to measure.

Senator Fong, that is a question that we have considered several times this morning. In substance, what I have said in answer is that it is not relevant to this hearing. The question before the committee is its power to act now. If it has the power, the question then before the committee is the qualifications of the two men who have been nominated. In my judgment, the committee has a duty to act upon the nominations and a vote for confirmation will remove the possibility, much less any probability, which is hard to believe, of the question that you fear ever arising.

Senator FONG. Yes, I agree with you that we should act, and that there is a matter before us to act upon. But what I am trying to get at is this.

Is the retirement intention irrevocable? I think it is conditioned upon the selection of a successor, and confirmation by the Senate. And if that is so, then it is conditional. Would you say that is so?

Attorney General CLARK. By definition, if it is based upon a condition, it is conditional.

Senator FONG. Yes. Then being a conditional one, then you go one step further and say "This is an irrevocable resignation retirement."

Attorney General CLARK. That involves a great many issues, the factual basis for which we cannot now know. I think it is noteworthy that through history this has happened as to the judiciary scores of times, and the situation that you envision has never happened and does not seem likely to happen, and is not relevant to the duty of this committee or the Senate at this time. Your duty is to determine whether you have the power to act. And if you do have the power to act, to then determine the other issue. And the fact that it is possible that these things that you indicate may happen should not be a factor in your doing your duty and making your judgment on these two other issues on their merits now.

Senator FONG. Yes. We understand that. Usually there are various things which we take into consideration which we should not take into consideration. But the senatorial mind is a very peculiar mind. It does ramble all over the place, and does take things which are not pertinent or may not be too relevant into consideration. This is one problem. One matter which we as Senators would like to know, as to whether this is a revocable resignation or retirement. And judging from the decisions that have been made, this Senator feels it is a revocable retirement. In other words, if a successor is not appointed, the Chief Justice could say "I desire not to retire." Would you say I am correct in that premise?

Attorney General CLARK. I do not have a legal judgment. It is not an issue that I have studied. We did review our history for precedent. We

found no precedent. At this time I have not voiced an opinion on this issue.

Senator FONG. Yes. But would you say that the question of retirement still is in the hands of the Chief Justice?

Attorney General CLARK. Well, that is a part of your general question. I think that depends on many things. You could ask is it in his hands alone? Is it in the President's hands alone? Is it in their hands together? Is it in the hands of the succeeding President? These are the issues that you raise. But they are not issues that are before this committee this morning, or that have ever before been of any interest in these United States through out history, although this very thing has been done hundreds of times.

Senator FONG. Suppose the Chief Justice decides tomorrow that he has a change of mind. Then is there anything before the committee?

Attorney General CLARK. This is the same question that the committee has had in considering hundreds of confirmations heretofore, and it has gone ahead and considered them and acted on them, and we have never had an instance that I am aware of at this time in which anyone has changed his mind.

Senator FONG. It just happens now the committee is asking the questions, and would like to get the answers.

Attorney General CLARK. My answer is that it is irrelevant to the duties of the committee and that the committee should proceed to determine its power to act, and if it decides it has the power, it should act on the confirmation on the basis of the qualifications of the individuals nominated.

Senator FONG. Well, it may be irrelevant or it may be relevant. But if the committee wants the answer, can the committee get the answer?

Attorney General CLARK. The Senator has already given his answer. As I have said, I have not reviewed the law, and I do not believe it would be fair to this committee or to my office to make an off-the-cuff judgment.

Senator FONG. In other words, you feel at this time you are not ready to agree with the decisions which were read by the distinguished Senator from South Carolina?

Attorney General CLARK. As a lawyer, I hear what he reads, and I see maybe a weak analogy, but I see many distinctions and differences that the legal mind could draw.

Senator FONG. Thank you.

Senator ERVIN. Senator Thurmond?

Senator THURMOND. Mr. Attorney General, we are glad to have you with us. There have been a number of questions asked. There may be a little duplication, but I hope not too much.

Article II, section 2, clause 2 of the Constitution reads, in relevant part, as follows:

> And he, the President, shall nominate and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and counsels, judges of the Supreme Court, and all other officers of the United States.

Mr. Attorney General, are you aware of any provision in the Constitution which allows any member of the Supreme Court a role in the choice of a Justice or Chief Justice?

Attorney General CLARK. It depends on what you mean by allow, Senator. If you mean does such a person have a power, no.

Senator THURMOND. Well, a part, if you want to call it a part—a role or a part in the choice of a Justice or Chief Justice?

Attorney General CLARK. There is no power given to a judge—by the Constitution—to participate in the selection of his successor.

Senator THURMOND. In a recent news conference, Chief Justice Warren indicated that should Justice Fortas not be confirmed as his successor, Warren would stay on as Chief Justice. Does this not give the Chief Justice an extraconstitutional role in the choice of his successor by allowing him to say to the Senate, "Confirm my friend and protege, Justice Fortas, or simply continue to put up with me."

Attorney General CLARK. Not at all. But if it does, he had that option before.

Senator THURMOND. Mr. Attorney General, in view of the ever increasing role of the Court as a broad policymaking body, would not such a precedent by which Justices could use their resignations to influence the choice of their successors serve to make the Supreme Court even less responsive to the democratic process than it is?

Attorney General CLARK. Senator, the election to retire is dependent upon the desire of the individual Justice. Chief Justice Warren has evidenced his desire to retire. He has evidenced it in the most beneficial and effective way from the standpoint of judicial administration, and justice in the United States, that there is. This committee has acted upon comparable nominations of members of the judiciary, including nominations to the Supreme Court on many, many occasions. And it will continue to do so in the future on many, many occasions.

Senator THURMOND. In the Chief Justice's letter to the President, it is clear what he said, I believe, it is undisputed, that he said "I hereby advise you of my intention to retire as Chief Justice." He does not say "I hereby retire." He merely says "of my intention." He more or less is putting him on notice; is he not?

Attorney General CLARK. I think the technique that he has used is the technique that has generally been used. If you want to read the whole exchange of correspondence, it has been read several times. You will note in the telegram of reply he appreciates the acceptance of his retirement by the President.

Senator THURMOND. Now, should this nomination be confirmed, is there anything in your judgment which would prevent future resignations effective upon the qualification of a successor, and thus allow each retiring Justice, with the collusion of the President, in influencing the choice of his successor?

Attorney General CLARK. This has been done scores of times in the past. I would very much hope it will be done scores of times in the future, because it is the best way to proceed. It provides the opportunity for continuity in office. If one has, however, a conspiratorial view of life, if one does not have confidence in the integrity of men in the highest offices of our Government, one has to recognize that a Justice on the Supreme Court has this option anyway, because if he wants to retire, he can in his conversations with the President condition his retirement upon the selection of a successor satisfactory to him. That has never happened in our history. I do not expect it to happen in our history.

Senator THURMOND. Mr. Attorney General, if future retirements are made in this fashion, and it should be noted that a number of Justices are advanced in years, would this lessen the power of the Senate to act as a check on Court appointments as provided in the Constitution?

Attorney General CLARK. Not in the least, Senator. The Senate would have its full power to determine the qualifications of nominees.

Senator THURMOND. Mr. Attorney General, would not such a policy of acquiescing to Justice influencing the choice of their successors in this manner have a tendency to allow the present Court to perpetuate itself and the concept of judicial activism?

Attorney General CLARK. The Senator has no evidence of any Justice influencing any succession to his position in the entire history of the United States.

Senator THURMOND. Mr. Chairman, I had some other questions, but I believe that the Senate is now in session, and——

Senator ERVIN. If you do not object, I would like to make a statement, make one observation.

Senator THURMOND. I will withhold that temporarily.

Senator ERVIN. Mr. Attorney General, I think the question as to whether the announcement of the Chief Justice of an intention to retire upon the happening of some future event is very relevant to the inquiry, because if the Senators come to the conclusion that the Senate must either take Mr. Fortas or keep Mr. Warren, some Members of the Senate might want to keep Mr. Warren, and some of them might want to displace him with Mr. Fortas. And I think that it is very relevant to enable those Senators to make up their decision how to vote on the question, as to whether the transaction here represents a binding, irrevocable retirement, or is without legal effect.

Attorney General CLARK. Well, my understanding of the duty of the Senate is not to make choices, or take preferences, but to advise and consent with the President of the United States on the nomination of Mr. Justice Fortas, and that is the scope of the inquiry appropriately before this committee, and before the Senate. And I would assume that this committee and the Senate would limit itself to the proper scope of its constitutional powers.

Senator ERVIN. How is the Senate going to advise and consent with intelligence to the question of whether it wants to have Chief Justice Warren or Mr. Fortas as Chief Justice, when it does not know what effect of its vote or rejection will have, of effect of——

Attorney General CLARK. The question before the Senate is not whether it wants Chief Justice Warren to remain as Chief Justice, or Associate Justice Fortas to become Chief Justice. The Chief Justice of the United States has evidenced his desire to retire. He has stated his reason as being age. The issue before the committee solely is whether it has the power to consider the nomination of Justice Fortas, and if it does have the power, then his qualifications.

Senator ERVIN. If that is so, why doesn't the Chief Justice say "I here and now retire," and not allow the President to make it condition upon the confirmation by the Senate of the man the President selected for his successor.

Attorney General CLARK. Because he has such devotion to duty, and such respect for the high office that he holds, and such intelligence

as to the needs of judicial administration, that he would not leave and create the risk of a vacancy in that high office while he is in good health. I respect him for his judgment. I think it is the proper, the best method in terms of the public interest for him to proceed by.

Senator ERVIN. He announced the only reason he had is his age. He is not going to get any younger.

I would like to make this clear. I think this is very relevant. I do not see how a Senator can know which way he ought to advise and consent, whether he ought to advise and consent or refuse, unless he knows what the effect of his vote is going to be. We won't argue that more.

I am not questioning the authority of any judge that ever made a decision. What I am questioning is the power of the President and of the Senate to appoint a Justice to take the place of a Justice who has announced that he intends to retire at some time in the future when some kind of a contingency occurs. That is all I am questioning. I think he has no power. Thank you very much.

Senator HART. Would the Senator from South Carolina withhold his objection just to make a very brief comment.

Senator THURMOND. That will be all right.

Senator HART. We have sat around here scores of times and never doubted our authority to take action under these circumstances. So it is not unreasonable to suggest the possibility that motives have nothing to do with the question of authority, and revolve pretty largely upon the personalities, and the politics of the member.

Senator ERVIN. I have my concern. I think if Chief Justice Warren would say "I here and now retire"—I think it is a matter for him, and not for the President, because here is a decision, I think in the Court of Claims—I have the citation, *Clark* v. *the United States*, 72 Federal Supplement, 594, which says, speaking of resignation—the President has nothing to do with the resignation of a Federal judge. That is a matter for the judge alone. And I think that the President has no power to nominate a successor to Chief Justice Warren if Chief Justice Warren has not retired. But if Chief Justice Warren would just retire, there would be no impediment to Senate action. I think the President has full constitutional authority to appoint a Justice to take the place of the Justice who retires, but not to take the place of the Justice who does not retire. And I would like to put in the record an editorial from the New York Times.

(The editorial referred to for inclusion in the record was marked "Exhibit 5" and appears in the appendix.)

Senator THURMOND. Mr. Chairman, I have one more question, while we are here.

Mr. Attorney General, if Justice Fortas is not confirmed for Chief Justice, is Warren still the Chief Justice? If so, how long is he still Chief Justice?

Attorney General CLARK. Well, that is a question we have been up and down over several times, Senator. He is Chief Justice now. He will remain Chief Justice for some indefinite and unforeseeable time in the future. I would be quite confident that, as has been the case every time this issue has arisen in history, as it has scores of times as to the Federal Judiciary, upon the confirmation of Mr. Justice

Fortas to be Chief Justice of the United States, he will qualify, and become Chief Justice of the United States, and Chief Justice Warren will retire as he has chosen to do.

Senator THURMOND. In a news conference held by Chief Justice Warren he stated that he could serve on and would be willing, I believe, to do so. Did you see that statement by him?

Attorney General CLARK. I have read his statement, yes. I have seen newspaper clippings on it.

Senator THURMOND. Therefore, does it not come down to this. Chief Justice Warren is virtually saying to the Senate "You confirm Justice Fortas or I will continue to serve." And if that is the case, how can there be a resignation of Chief Justice Warren? How is there a resignation if he can continue to serve? Either there is a resignation, or there is not a resignation. I ask you which is it?

Attorney General CLARK. Well, there is no resignation. There is no discussion of resignation. The question is whether his retirement is effective. If so, when it will be. And as I have said a number of times, it is conditioned upon the qualification of a successor, as is the best practice—the recommended practice. And this stems from a devotion to duty, a recognition of the importance of continuity in the highest judicial post of the United States, for which Chief Justice Warren is to be commended.

Senator THURMOND. Then are you going on custom or policy or are you going on the law?

Attorney General CLARK. Senator, as I said in my opening statement, we go on the Constitution, which was cited, the precedents under the Constitution, the statutes enacted pursuant thereto, the time-honored pracice of every President of the United States, every Senate that has served while he has been President, and the very clear needs of jurisprudence and judicial administation in the United States. This is the best way, this is the accepted way. And we will all be better off if we encourage this way, as does the Constitution, as do the statutes, as do the precedents.

Senator THURMOND. The Senate cannot confirm an appointment for a vacancy unless there is a vacancy, and how can there be a definite firm vacancy if Mr. Warren can serve on if Justice Fortas is not confirmed?

Attorney General CLARK. Well, your premise is in error, Senator, in several respects. We have been over this several times.

Basically, the Senate clearly has the power, has clearly exercised the power granted it under the Constitution and under the statutes and confirmed by the Supreme Court of the United States in cases that have come before it, to confirm in the absence of a vacancy. It has been done scores of times. There are dozens of men serving on the Federal Judiciary today who at the time of their nomination, at the time of their confirmation, and even the time of their appointment were heading toward a position occupied by someone else.

Senator THURMOND. This question was asked, which appeared in the U.S. News & World Report of July 15, 1968. The question: "I was thinking of a comment the majority leader of the Senate made, if Associate Justice Fortas was not confirmed."

Answer by Mr. Chief Justice Warren: "I suppose I would be obliged under my oath, because my retirement does not take effect until my successor is qualified, and I am under oath to perform the duties of the office, and if the first of October rolls around and there is no successor, I suppose I will be obliged to act as Chief Justice. I neither expect nor hope that to be the fact."

Is not that clear there is no vacancy? If he can serve on until October, if he can serve on until January, if he can serve on all through the year 1969 where is there a vacancy? Either there is a vacancy or there is not a vacancy. Now, why not face up to it.

Mr. Chairman, I have nothing else for the Attorney General, unless he would care to answer that.

Attorney General CLARK. I have answered it several times. The question, Senator, clearly is not whether or not there is a vacancy. Chief Justice Warren is the Chief Justice of the United States today.

Senator ERVIN. The Attorney General expresses an opinion that the President nominates Justices to serve on the Supreme Court of the United States, even though a vacancy does not exist.

Senator THURMOND. Mr. Chairman, I invoke the rule that the Senate is now in session.

Senator ERVIN. I would request for the information of the committee and the subcommittee, and the Senate, sections 371 and 294 of title 28 of the United States Code be printed in full in the record so as to disclose the conditions under which a successor can be appointed to judge who retires, and also what official acts a retired Justice can perform.

(The document referred to for inclusion in the record was marked "Exhibit 6" and appears in the appendix.)

Senator ERVIN. Mr. Attorney General, on behalf of the committee I want to thank you for your presence and your effort to be of assistance to the committee.

Attorney General CLARK. Thank you, Senator.

Senator ERVIN. The committee will stand in recess under order from the chairman until 10:30 tomorrow morning.

(Whereupon, at 12:45 p.m. the committee was recessed, to reconvene at 10:30 a.m. Friday, July 12, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

FRIDAY, JULY 12, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:30 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Dodd, Hart, Smathers, Dirksen, Fong, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. The committee will come to order.

Senator Griffin, you may proceed.

STATEMENT OF HON. ROBERT P. GRIFFIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator GRIFFIN. Mr. Chairman, and my distinguished minority leader, and members of the committee, yesterday I delivered the substance of my statement on the floor of the Senate, and as there were no members of the Judiciary Committee present, other than the distinguished Senator from Tennessee, Mr. Gore, I would like, with the chairman's permission, to present my statement in full. I have certain areas in my speech that I would like to emphasize.

Mr. Chairman, positions on the Supreme Court of the United States should never be regarded as ordinary political plums, and when they are, the Senate has a clear responsibility.

A good deal of the current controversy revolves around the appropriate functions of the President and of the Senate in the circumstances which confront us. There are some who suggest that the Senate's role is limited to merely ascertaining whether a nominee is qualified in the Senate that he possesses some minimum measure of academic background or experience.

I should like to emphasize at the very outset that any such view of the Senate's function with respect to nominations for the separate judicial branch of Government is wrong. It does not square with the precedents, or with the intention of those who conferred the advice and consent power upon the Senate.

The CHAIRMAN. Are you testifying against both nominees?

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Senator GRIFFIN. Yes, Mr. Chairman, my statement will involve both nominations.

The CHAIRMAN. That is what I understand.

Senator GRIFFIN. In the Constitutional Convention of 1787, James Madison generally favored the creation of a strong executive. He advocated giving the President an absolute power of appointment within the executive branch of the Government. He stood with Hamilton against Benjamin Franklin and others who were concerned about granting the President such power, on the ground that it might tend toward a monarchy.

While he argued for the power of the President to appoint within his own executive branch, it is very important to note that Madison drew a sharp distinction with respect to appointments to the Supreme Court. Madison did not believe that judges should be appointed by the President; he was inclined to give this power to "* * * a senatorial branch as numerous enough to be confided in—and not so numerous as to be governed by the motives of the other branch; as being sufficiently stable and independent to follow clear, deliberate judgments."

At one point during the Constitutional Convention, after considerable debate and delay, the Committee on Detail reported a draft which provided for the appointment of judges of the Supreme Court by the Senate.

Governor Morris and others would not go along, and the matter was put aside. It was not finally resolved until next to the last day of the Constitutional Convention.

The compromise language agreed upon provides that the President—

*** * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the Supreme Court and all other officers of the United States * * *.**

Clearly, the compromise language does not confer upon the President an unlimited power to appoint within the executive branch. And the language does not give the Senate a similar power of appointment with respect to the judiciary, as Madison suggested. But I think it is interesting and significant to observe how far we have moved in actual practice over the years toward those original objectives of Madison.

It is a fact, though sometimes deplored by political scientists, that judges of the lower Federal courts are actually nominated by Senators and that the President really has nothing more than a veto authority.

On the other hand, the Senate has generally accorded the widest latitude to the President in the selection of the members of his own Cabinet. It is recognized that unless he is given a free hand in the choice of his Cabinet, he cannot be held accountable for the administration of the executive branch of Government.

Throughout our history, only 8 out of 564 Cabinet nominations have failed to win Senate confirmation. The last such instance was the refusal in 1959 of a Senate majority, led by Senator Lyndon Johnson, to confirm the nomination of Lewis Strauss to be Secretary of Commerce in President Eisenhower's Cabinet.

But surely the general attitude of the Senate over the years with respect to Cabinet nominations was expressed by Senator Guy Gillette in these words:

One of the last men on earth I would want in my cabinet is Harry Hopkins. However, the President wants him. He is entitled to him * * *. I shall vote for the confirmation of Harry Hopkins * * *.

In this context, I think it is interesting to take some note of the Senate's approach toward nominations for the regulatory boards and commissions—agencies which are "neither fish nor fowl" in the scheme of government and perform quasi-executive functions and quasi-judicial functions.

For example, in 1949, President Truman nominated Leland Olds for a third term as a member of the Federal Power Commission. Since Olds had served on the Commission for 10 years, it was difficult to argue that he lacked qualifications.

Senator Hubert Humphrey supported the reappointment of Olds. But Senator Lyndon Johnson was a leading opponent, and the Senate finally voted to reject the nomination. Afterward, there was general comment in the press that the real issue had little or nothing to do with the nominee's qualifications but everything to do with Government policy concerning the regulation of the price of natural gas.

In considering such nominations, it has not been unusual for the Senate to focus on the charge of "cronyism." For example, that was the issue in 1946 when President Truman nominated a close personal friend, George Allen—not to a lifetime position on the Supreme Court, but as a member of the Reconstruction Finance Corporation.

Not only did such columnists as David Lawrence react sharply, but the New York Times opposed the nomination as well.

Senator Taft led the opposition and declared that Allen was one of three who was nominated—

* * * only because they are personal friends of the President * * *. Such appointments as these are a public affront.

In 1949, the Washington Post severely criticized the nomination by President Truman on Mon C. Wallgren—not for a lifetime position on the Supreme Court, but to be a member of the National Resources Board. A former Governor and Senator, the nominee had become a close friend of President Truman when the two served together on the Truman committee.

The Washington Post characterized this nomination as a "* * * revival of 'Government by crony' which we thought went out of fashion with Warren G. Harding."

The Senate committee which considered Wallgren's nomination voted seven to six against confirmation and the matter of his nomination, with respect to that particular position, did not reach the Senate floor.

One may argue reasonably with respect to nominations within the executive branch, for which the President can be held accountable, that it should be enough for the Senate merely to ask: "Is he qualified?" But, obviously, even in that sphere there is nothing new about the Senate considering "cronyism" or other matters beyond the mere qualifications of a nominee.

However, Mr. Chairman, I think the important point to recognize against the backdrop of history is that the Senate has not only the right, but the responsibility to consider more than the mere qualifications of a nominee to the Supreme Court of the United States—the highest tribunal in a separate, independent, and coordinate branch of

the Government. It is clear that in the case of nominations to the Supreme Court, the Senate has a duty to look beyond the question: "Is he qualified?"

A distinguished former colleague, Senator Paul Douglas of Illinois, put it this way:

> The "advice and consent" of the Senate required by the Constitution for such appointments (to the Judiciary) was intended to be real, and not nominal. A large proportion of the members of the (Constitutional) Convention were fearful that if judges owed their appointments solely to the President, the Judiciary, even with life tenure, would then become dependent upon the executive and the powers of the latter would become overweaning. By requiring joint action of the legislature and the executive, it was believed that the Judiciary would be made more independent.

To assure the independence of the judiciary as a separate and coordinate branch, it is vitally important then to recognize that the "advice-and-consent" power of the Senate with respect to the judiciary is not only real, it is at least as important as the power of the President to nominate.

Of course, the service of a Cabinet officer usually ends with the term of the appointing President. But when a President and the Senate jointly fill a vacancy on the Supreme Court, they affect judicial policy with all its impact on the lives of the people for generations to come.

Throughout our history as a Nation, up until the pending nominations were submitted ,125 persons have been nominated to be Justices of the Supreme Court. Of that number, 21, or one-sixth, have failed to receive confirmation by the Senate.

I think it may be of interest that the question of qualifications or fitness was an issue in only four of the 21 instances when Supreme Court nominations failed to win Senate approval.

Incidentally, in the administration of President Washington, when Chief Justice Jay resigned, President Washington nominated John Rutledge, of South Carolina, one of the most distinguished members of the bar that he could find. And history tells us that Mr. Rutledge, whose qualifications were never questioned, happened to give a speech in Charleston shortly before the nomination was made, criticizing the Jay Treaty, and the Senate for ratifying it. And for that reason—not because of any lack of qualifications—when the Senate reconvened in December, it voted 14 to 10 to reject the nomination of Rutledge after he had served on an interim basis from July to December. So the very first time in the administration of George Washington when the Senate exercised its prerogative in this area, it did not make its decision on the basis of mere qualifications.

In debating nominations for the Supreme Court, the Senate has never hesitated to take into account a nominee's political views, his philosophy, writings, and attitude on particular issues, or other matters.

No less a spokesman than Felix Frankfurter has emphasized the responsibility of the Senate to look beyond mere qualifications in the case of a Supreme Court nominee. He said:

> The meaning of "due process" and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views * * *. Let us face the fact that five justices of the Supreme Court are the molders of policy rather than the impersonal vehicles of revealed truth.

Of course, most everyone is familiar with the oft-quoted statement of Chief Justice Hughes:

We are under a Constitution, but the Constitution is what the judges say it is.

If there are some who believe, even for purely political reasons, that the opportunity to make such nominations at this particular point in time should be reserved for the new President soon to be elected by the people, there is ample precedent for such a position.

In September, before the election of 1828, when Andrew Jackson defeated John Quincy Adams, a Justice died, leaving a vacancy on the Supreme Court. Well aware of the political problems he might face with a politically hostile Senate, Adams sought out and nominated—not a personal crony, but the most distinguished lawyer he could find, John J. Crittenden of Kentucky. Even Chief Justice Marshall praised this nomination in the highest terms by writing:

I do not know of a man I could prefer to him.

But the position of a majority of the Senate was simple and straightforward: The appointment should be left to the next President. The Senate stood its ground, refused to confirm, and the new President, Andrew Jackson, filled the vacancy.

In August 1852, Whig President Fillmore tried to fill a Supreme Court vacancy by nominating—not a personal crony, but a very distinguished lawyer, Edward A. Bradford of Louisiana. But a majority in the Senate took the position that the appointment should be made by the President about to be elected that November.

After election of Franklin Pierce, but before his inauguration, Fillmore tried again to fill the vacancy. Thinking that the nomination of one of its own Members might commend itself to the Senate, Fillmore sent up the name of Senator Badger of North Carolina, a very able, eloquent lawyer and former Secretary of the Navy under two Presidents. But the Senate refused to budge and the new President, Franklin Pierce, made the appointment following his inauguration in March 1853, nearly 8 months after the vacancy occurred.

Mr. Chairman, despite all I have said, I recognize that it would be unusual for this Senate in this century to reject the pending nominations. But the circumstances which surround these nominations are highly unusual and they should be rejected.

It is true that in this century only one nomination to the Supreme Court has failed to win Senate confirmation. That was the nomination by President Hoover of John J. Parker, who was bitterly opposed by some groups, not because he lacked outstanding qualifications, but because of his alleged views on certain social and economic issues.

That the Senate has asserted itself on only one such occasion in this century might attest to the high quality of the nominations which have been submitted by the several Presidents for the Supreme Court.

On the other hand, it could be evidence of a withdrawal, if not an abandonment, by the Senate of its historic and intended role in the perpetuation of an independent Supreme Court. Any such tendency to be dominated by the Executive, I suggest, would be a dangerous development, out of step with the high purposes and responsibilities of the Senate.

However, I suggest, Mr. Chairman, that the principal and most significant reason relates to the fact that in this century there have been no "lame duck" nominations to the Supreme Court—except and until the two which are before us now. By "lame duck" I mean nominations for the Supreme Court made by a President in the final year of his last term in office.

There have been 16 such "lame duck" nominations to the Supreme Court. History records that the Senate confirmed seven of those nominations including Chief Justice Marshall. But the Senate refused to confirm the other nine.

Mr. Chairman, in almost every previous instance, the "lame duck" nominations to the Supreme Court were submitted to fill a vacancy left by the death of a sitting Justice. Only three out of the 16 "lame duck" nominations were made to fill vacancies which resulted from resignations.

And never before has there been such obvious political maneuvering to create a vacancy so that an outgoing President can fill it and thereby deny the opportunity to a new President about to be elected by the people.

Such maneuvering at a time when the people are in the process of choosing a new government is an affront to the electorate. It suggests a shocking lack of faith in our system and the people who make it work.

It should surprise no one that such a political maneuver has been met head-on by a political response from within the Senate. Indeed, it would signal a failure of our system if there were no reaction to such a blatant political move.

Those who oppose these nominations are engaged in politics—but this is nonpartisan politics in the purest and finest sense. I have no way of knowing who will be nominated or who will be elected President in November, and the polls now indicate that the likely nominee of my party would probably lose.

But I do know that this Nation is seething with unrest and is calling for change. A new generation wants to be heard and demands a voice in charting the future of America. Particularly at this point in our history, the Senate would be unwise to put its stamp of approval on a cynical effort to thwart the orderly processes of change.

What is the reason for such haste in denying the people a voice in shaping the course of the Supreme Court for years to come?

There is no urgent reason. Indeed, there is not even a vacancy on the Supreme Court.

As previously indicated, the charge of "cronyism" is not new to Senate confirmation debates. Although frequently mentioned with respect to lesser offices, it is highly unusual for a President to subject himself to the charge of "cronyism" in connection with a nomination to the Supreme Court of the United States. And never before in history has any President been so bold as to subject himself to the charge of "cronyism" with respect to two such nominations at the same time.

Senator THURMOND. Would the Senator interrupt just a minute. Mr. Chairman, General Westmoreland, the new Army Chief of Staff, is being presented a Distinguished Service Medal at the White House this morning at 11:30. He is a native and citizen of South Carolina.

I feel that I should be there. If you would excuse me at this time, I have a couple of questions to be propounded to the distinguished Senator when he finishes.

Thank you.

Senator GRIFFIN. The argument has been advanced that if a "crony"—nominated because he is a "crony"—is "qualified," he should be approved. I reject such a view because it demeans the Senate and the Supreme Court.

At a time when there is a desperate need to restore respect for law and order, as well as respect for the institutions which bear the responsibility for maintaining law and order, the cause is not well served by nominations to the highest court which can be branded as "cronyism"—and legitimately so.

In this connection, Mr. Chairman, it is necessary to call attention to another matter—an issue raised in the public press which in my opinion cannot be ignored by this Committee.

I need not state in detail what members of the committee already know: That the doctrine of separation of powers is the most fundamental concept embodied in our Constitution and that its preservation is crucial to the survival of free government.

Separation of powers was not an invention of the delegates assembled at Philadelphia in 1787. Even before the constitutional convention, those who drafted every State Constitution made or revised during the Revolutionary period, took the doctrine of separation of powers as the very starting point—creating in each instance separate and distinct executive, judicial, and legislative branches.

As James Madison told the Convention, separation of powers is "a fundamental principle of free Government." Only when power is divided under a system of checks and balances, can we expect to find Government limited, responsible and free.

Surely those who assume positions of high responsibility in any of the several branches of our Government have no license to ignore this fundamental principle which is at the core of our system.

Of course, I do not suggest that a Justice of the Supreme Court should have no contact whatever with the President or with the members of the legislative branch while he sits on the bench. But I do believe the people have a right that such contacts will not breach the line which necessarily separates the branches of our Government, and that such contacts will recognize the restraints customarily observed by members of the judiciary.

I think President Harry Truman stated very succinctly what should be the principle when he said:

> Whenever you put a man on the Supreme Court, he ceases to be your friend.

In this connection, it has been alleged that Mr. Fortas, since his elevation to the bench, has continued to play an active, important role in the executive decisionmaking process.

For example, according to the New York Times magazine of June 4, 1967:

> It doesn't occur to him (President Johnson) not to call Fortas just because he's on the Supreme Court. Fortas is also drawn into nonjudicial matters by friends who want Government jobs and know he still carries weight at the White House.

Periodically word leaks out about Fortas' involvement in such matters as the unsuccessful campaign to land Bill D. Moyers the job of Under Secretary of State and his efforts to secure a Federal judgeship for David G. Bress, the U.S. Attorney for the District of Columbia. Other moonlighting chores are White House assignments—advising the President on coping with steel price increases and helping to frame measures to head off transportation strikes. With the increasing intensity of war in Vietnam, Fortas is also consulted more and more on foreign policy.

The relationship over the years between President Johnson and Mr. Fortas was described in the Newsweek magazine issue of July 8, 1968, as follows:

When "Landslide Lyndon" squeaked through his first Senate primary by a disputed 87-vote margin, it was Fortas who argued him onto the November ballot—and saved his nascent career in the bargain. It was Fortas who first took on the Bobby Baker case * * *. Fortas who mapped the Warren Commission and the Johnson family-trust agreement, Fortas who got Walter Jenkins into the hospital after his morals arrest and helped try to talk the papers out of printing the story. * * *

Referring to a continuing relationship after Mr. Fortas went on the Bench, the same Newsweek article reads:

More mornings than not, says one intimate, Fortas wakes up to a phone call from the President and a pithy reading of the "literary gems" from the eight or ten morning papers Mr. Johnson peruses regularly. And few important Presidential problems are settled without an opinion from Mr. Justice Fortas. "My guess," says an insider well placed to make one, "is that the first person the President consults on anything is Abe Fortas!"

According to the July 5, 1968, Time magazine:

No one outside knows accurately how many times Fortas has come through the back door of the White House, but any figure would probably be too low."

* * * * * * *

It probably never occured to Johnson that his friend's elevation to the high court would make him any less a Presidential adviser. And to date, it has not.

The same publication, Time magazine, reported in its July 5, 1968, edition that:

One achievement for which Fortas can claim no laurels was Johnson's response to last summer's Detroit riot. Fortas wrote the President's message ordering Federal troops into the city.

"It was an unfortunate speech, blatantly political and overly technical at a time that called for reassurance. Johnson, however, was shocked that anyone would dare criticize it. "Why," he told a visitor, "I had the best constitutional lawyer in the United States right here, and he wrote that."

Mr. Chairman, the Senate does not know how many times Mr. Fortas has been consulted, or the extent to which he has been involved, if at all, in actions and decisions of the White House while he has been a member of the Court.

The Senate does not know whether, in fact, Mr. Fortas participated in the making of decisions and the drafting of the President's statement concerning the Detroit riots last summer.

But, Mr. Chairman, if a Justice of the Supreme Court can serve as a legal adviser to the President, would the Chief Executive not be better served by utilizing the legal talent and speech-writing abilities of three or four sitting Justices— or, for that matter, the whole Court?

Of course, it is not unusual for a member of the judicial branch to disqualify himself from consideration of a case because of his activity within the executive branch before going on the Bench. But if the doctrine of separate powers is important, what justification could be offered in the event a member of the judicial branch should actively participate on a regular, undisclosed basis in decisions of the executive branch while serving on the Bench?

Surely this principle was clearly and effectively established long ago. In 1793, Secretary of State Thomas Jefferson, acting on behalf of President George Washington, sought the advice of the Justices of the Supreme Court on some 29 controversial issues. At that time Jefferson asked the Justices whether "the public may with propriety be availed of their advice on these questions." The Supreme Court firmly declined to give its opinion. The Court said in part:

> We have considered the previous question stated—regarding the lines of separation drawn by the Constitution between the three departments of government. These being in certain respects checks upon each other, and our being judges of a court in the last resourt, are considerations which afford strong argnments against the propriety of our extra judicially deciding the qnestions alluded to, especially as to the power given by the Constitution to the President of calling on the heads of departments for opinions seems to have been purposely as well as expressly united in the Executive Departments.

Mr. Chairman, in view of the widespread reports in the press, such as those to which I have called attention, it would seem incumbent upon this committee to reexamine very carefully and in great detail the matter of this relationship which was, in fact, raised in this committee in 1965 when Mr. Fortas first was appointed to the Court.

During the committee hearing at that time the following colloquy took place:

> Senator HRUSKA. Now, there is another general proposition that also has been widely discussed. Through the years, you have formed a very close friendship and relationship with onr President, which is not merely personal and social, it has also involved professional, business, and political dealings including many personal transactions with the President's own estate, and so on. * * *
>
> I presume in due time various aspects of this administration's program will wind np before the Supreme Court of the United States. Now, for the benefit of those who have asked me to ask this question, is there anything in your relationship with the President that would militate in any way against your being able to sit on that bench and pass judgment on cases that come along and thus would affect your ability to function in the true judicial fashion and tradition?
>
> Mr. FORTAS. The short answer to that, Senator, is "absolutely not", but let me take this opportunity to say to you that there are two things which have been vastly exaggerated with respect to me.
>
> One is the extent to which I am a Presidential adviser, and the other is the extent to which I am a proficient violinist. I am a very poor violinist but very enthusiastic, and my relations with the President have been exaggerated out of all connections with reality.

It will be recalled that in April 1952, President Truman issued an Executive order seizing the steel mills, and shortly thereafter, in June 1952, the Supreme Court ruled that he had no authority as President to take such action.

Let us assume for a moment that several Justices of the Supreme Court had privately participated with President Truman in making the executive decision which culminated in the seizure of the steel mills.

Is it in the public interest to assume that Justices who have engaged privately in such executive activity would disqualify themselves from consideration of resulting litigation?

If Justices who engage privately in such executive activity while sitting on the Bench do disqualify themselves, of course, the number of Justices available on the Court to decide particular cases is accordingly reduced.

If the Senate should be satisfied that there is nothing wrong in the case of one or two Justices participating in executive decisions, there could be nothing wrong if the President consults regularly and privately with four or five Justices—or more. In such a situation, who will decide the cases that come to the Supreme Court?

Mr. Chairman, questions raised by the relationship between Mr. Fortas and President Johnson are brought into sharper focus by the President's simultaneous nomination of Mr. Thornberry.

The fact that Mr. Thornberry is known to be one of the President's closest confidants is not reason alone to foreclose his confirmation if the Senate is satisfied that he is one of the "best qualified" in the Nation for appointment to the Supreme Court.

Perhaps it can be overlooked that Mr. Thornberry's nomination in 1963 to the Federal district court in Texas was generally regarded by many as a reward for past support of administration policies.

However, I wish to call attention to the New York Times of July 21, 1963, which reported that although Mr. Thornberry's appointment "was confirmed by the Senate last Monday, it has not yet been signed by the President and the Attorney General, as required. Mr. Thornberry plans to stay in the House until the commission is signed * * *. Sources privy to the arrangement said they understood the commission might be held up for nearly all this session of Congress."

It is more disturbing to recall, Mr. Chairman, that Mr. Thornberry continued to serve in the House of Representatives for more than 5 months, after being nominated to the Court and confirmed by the Senate, while the White House held onto his commission.

When a member of the legislative branch is nominated and confirmed to become a member of the judicial branch—and then continues to serve in the House of Representatives, with the President holding his commission—a question is necessarily raised. Particularly amid reports that the arrangement was designed to insure Mr. Thornberry's vote on certain legislative issues, particularly in the Rules Committee during the interim. This situation again suggests a flagrant disregard of the constitutional doctrine of separation of powers.

Mr. Chairman, I have not had an opportunity to read all of the opinions of Judge Thornberry, but I have read some of them. I believe the committee's attention should be focused on one decision in particular.

In April of this year, in a case arising out of civil disturbances surrounding a visit by President Johnson to Central Texas College near Killeen, Tex., a three-judge Federal court, in a per curiam opinion signed by Judge Thornberry, held as follows:

> We reach the conclusion that Article 474 (of the Texas statutes) is impermissibly and unconstitutionally broad. The Plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the en-

forcement of Article 474 as now worded, insofar as it may affect rights guaranteed under the First Amendment. However, it is the Order of this Court that the mandate shall be stayed and this Court shall retain jurisdiction of the cause pending the next session, special or general, of the Texas legislature, at which time the State of Texas may, if it so desires, enact such disturbing-the-peace statute as will meet constitutional requirements. (*University Committee, et al., v. Lester Gunn, et al.*, Civil Action 67–63W, W. D. Texas.)

As a lawyer, I have always thought that a statute was either constitutional or unconstitutional. And that a Federal court when confronted with a constitutional issue, appropriately raised, is under an obligation to resolve it.

In this case, however, Judge Thornberry and his two colleagues seem to be saying that a State statute which they declare to be unconstitutional shall remain in effect, affording the plaintiffs no relief whatever, even though they admit they are entitled to it, until and unless the legislature may get around to changing it.

This committee, which is composed of distinguished members of the bar, might wish to consider whether this unusual—if not unique—decision is indicative of the contribution which Mr. Thornberry would bring to the highest court in the land.

Mr. Chairman, the circumstances surrounding these nominations raise the most serious, fundamental questions.

There are times in the course of history when the great Senate of the United States must draw a line and stand up.

This is such a time. Thank you.

Mr. Chairman, I would like to submit in the record at this point information supplied by the Library of Congress listing the nominations to the Supreme Court made during the last year of a President's last term in office—those which were confirmed, and those which were not confirmed.

(The documents referred to were marked "Exhibit 7" and appear in the appendix.)

The CHAIRMAN. Senator Griffin, you have made a very able statement.

Senator Dirksen.

Senator DIRKSEN. Mr. Chairman, I was unavoidably absent yesterday, because of an official meeting in Illinois.

Mr. Chairman, as I indicated, I was unavoidably absent yesterday because of an official meeting in Illinois. So I know of the testimony only from what I have gleaned from the newspaper accounts. And I will be reasonably brief. There are only three or four things which I presently will express, and I may amplify them at some later time.

First, I find that term "lameduck" as applied to the President of the United States as entirely improper and a very offensive term. That came into our political lexicon when we adopted the 20th amendment under which the President would be inaugurated on the 20th of January and the congressional session would start on the third of each year, and the long and short sessions of the Congress were abolished. And the reason they referred to it as the "lameduck" amendment was because those who were defeated, whether in the House or Senate, could still pass upon legislation until their tenure expired in March of the following year. It has absolutely no application to one who voluntarily retired from office.

There are nine Senators who will not be in the 91st Congress. Only one of them was defeated in a primary. All the rest have voluntarily indicated, on both sides of the aisle, that they prefer to retire.

Now, are we going to offend them, and affront them by referring to them as "lameduck" Senators?

I think it is a wholly improper use of the term "lameduck," Mr. Chairman. And that is equally true with respect to the incumbent President of the United States, because he has chosen not to be a candidate for office again or seek the nomination of the party. And I think it is about high time that we be a little more circumspect about the kind of terminology we use when we so freely throw at people and refer to them as "lameducks."

Now, the second thing I want to talk about is "cronyism." Well, Webster defines a crony as an intimate companion. And I do not think anybody could be an intimate companion unless he is a friend. Certainly, you are not going to have an enemy as an intimate companion.

Well, President Truman had some rather intimate companions who were his friends, and he sent them to the High Court. He nominated Harold Burton out of the Senate, and you can call Harold Burton not only a colleague, but a crony of President Truman. His Attorney General was Tom Clark, the father of the present Attorney General—and he could be called a crony of Mr. Truman's.

If anybody was a crony of President Truman's, it was Senator Minton of Indiana, and I was around in the House when he was elected to the Senate, and I add to this list Fred Vinson of Kentucky, who became Chief Justice of the Court. Of course—it was so commonly said in Washington that they loved nothing better than to go down the Potomac on the yacht on a Saturday afternoon, and play a little friendly poker. Well, I do not know anything about cards—I do not play cards—but if ever anybody was a crony to a President of the United States, it was Fred Vinson of Kentucky.

Now, I served long years with Fred Vinson in the House. He was probably the best tax expert that we ever had on the House Ways and Means Committee. He filled many responsible spots in Government. And he was a close crony of Truman, and Truman nominated him as Chief Justice.

I do not know that anybody got up on his hind legs and shouted cronyism.

And then I can get to the late John Fitzgerald Kennedy, because his first nominee to the Court was Byron White of Colorado, who was affectionately called "Whizzer," one of the great football stars of our time. Well, he was not only a supporter of John Fitzgerald Kennedy, he was one of his campaigners. And if that is not a crony, I do not know what is.

So he named Whizzer White to the High Court.

But I want to tell you about another case, Mr. Chairman, that is most intriguing to me. It is a man who went to public school in Maryland, long long ago. From there he went to Kenyon College, Ohio, and did his college work. He then went to Massachusetts to study law, and then finished his legal studies in New Haven, Conn. He went out to Illinois, got admitted to the bar, and he set up a law office in the city of Pekin, Ill., in 1836. Now, that town had a population of about

2,000. And what intrigues me about it, Mr. Chairman, is that that is my home town, and I still live there.

Well, he was elected to the general assembly, he was elected as circuit judge in the State circuit a good many times, he got interested in politics, and finally he got himself named as delegate to the convention in Chicago in the Big Wigwam in 1860. He was a good campaign manager, and he was the manager of one of the candidates running for presidential nomination in 1860.

Well, he did an all right job, and as a result, his candidate was nominated and was elected and was inaugurated as President of the United States in 1861. He thereupon nominated this man, his friend, his crony, and his campaign manager, in 1862. His name is David Davis, and the President's name is Abraham Lincoln.

Now, Davis was a crony of Abraham Lincoln, and he served on the Court for 15 years and then he was elected to the U.S. Senate in 1877, and there he served another 6 years, and he became President pro tempore of the Senate in 1881.

Mr. Chairman, I would hate to think that history is going to rise up to say that Lincoln was guilty of cronyism. Where do you find people that you can put your trust in if it is not someone you know, and with whom you have been associated, and whose background and antecedents are familiar to you.

You do not go out looking for an enemy to put him on the Court, or somebody whose views are so divergent that you could not countenance them for a minute.

And so Lincoln found a friend and a crony, and he put him on the Court, and he was there for quite a while. And the people of Illinois did not think badly of it, because he served for 6 years in the Senate of the United States by the suffrage of the people of Illinois.

Well, he is the patron saint of my county, Mr. Chairman. And I allude to these things because maybe these have got to be guidelines for future Presidents. They better look out with whom they get associated. They better look out whom they appoint. They may appoint some fellow who may not be a good violin player, but if he is a crony you are going to be indicated on the pages of history.

I never heard of an argument more frivolous than that. And it ought to be stamped for what it is at the present time.

That is the second point I want to make.

The third point is this question of precedents and whether or not there is a vacancy on the Court and whether or not the President of the United States in this instance ought to fill it.

Article II of the Constitution says he shall name the Justices. Well, if he is not to carry out his duties under the Constitution, what about the Senators who are not going to run again? Are they to abstain from voting in the U.S. Senate, so long as we are in session, and so long as their tenure is valid? Are we to ask them to step aside and say "Look, you are a lameduck, you should not vote." What kind of logic would that be? If you had enough of them, you might not have a quorum in the Senate.

But let me direct your attention to one case that goes back to 1881.

I direct your attention to the case of Justice Horace Gray, who—whose service on the Court began on the 20th of December 1881. He served actively and continuously until February 3, 1902.

According to my arithmetic, that would be 21 years. And on that day he suffered a paralytic stroke that impaired his physical vitality.

July 9, 1902, he sent his resignation to President Theodore Roosevelt—and get this language—"to take effect on the appointment and qualifying of his successor."

On August 11, 1902, Theodore Roosevelt appointed Oliver Wendell Holmes, a great Justice. So 32 days after Justice Gray announced his resignation to take effect on the appointment and qualifying of the successor, Justice Gray died on September 15, 1902. But Holmes had been nominated 34 days before he died. He could not be confirmed by the Senate for a very simple reason—we were under the old rule, and there was no Senate in session at that time. So we had to wait until the Senate got back, and then they confirmed him.

Now, if that is not a clear precedent on all fours, then, Mr. Chairman, I do not know what a precedent is.

I went to the trouble to call up Dr. Charles Fairman, out in La Jolla, Calif., who is regarded as one of the outstanding authorities on the Supreme Court, its technique and its functions and its history. The reason I am interested in Dr. Fairman is because he is from Illinois—he comes from Aldon, Ill., you see, that makes him kinfolks to me.

Senator SMATHERS. A crony?

Senator DIRKSEN. Yes, a crony; that is right. He was a second lieutenant in artillery in World War I. So was I. That makes us closer cronies.

Senator SMATHERS. Terrible.

Senator DIRKSEN. Yes—you know that old artillery song; don't you?

Well, he became professor of government and political science. He has been on the faculty of Stanford University. He has been on the Harvard faculty and other faculties. And he is truly regarded as an outstanding authority on the Court.

He expressed an opinion as late as January 30, 1968, that the retirement of a Supreme Court Justice based on the qualifying of his successor "is certainly the mode of succession most in the public interest."

Now, I said that was June 30. But last Wednesday evening at 6 o'clock, in the presence of another Senator and staff members, I called up Dr. Fairman and had a long talk with him. I just wanted to get verification of this matter, and I wanted to get verification of his general views. And he amplified them. And before we get through, I will probably have a special airmail document from him that I will use in connection with this nomination.

So I just wanted to nail down that there are precedents, there is authority, there are others in the political succession who have named friends to the Court, including Abraham Lincoln, who I thought was one of the most revered Presidents, renowned all over the world, and whom you can only explain as having been ordained by God Almighty.

So, are we to charge him with cronyism?

That is why I say this is a frivolous, diaphanous—you know what that means, don't you—gossamer—you know what that means, don't you—argument that just does not hold water. And I have not seen an argument yet that will stand up, durably stand up, against the nomination and the confirmation of the two men who are—whose names are before us at the present time.

The rest of it I will waive until later, Mr. Chairman. But I want to put that it now.

Senator GRIFFIN. Mr. Chairman, if I may make a statement.

The CHAIRMAN. Yes, sir.

Senator GRIFFIN. Of course, I would not try to engage in a debate with my distinguished minority leader, who is so eloquent, and for whom I have the highest admiration and regard. But I would like to comment in general on some of the points he has made.

I want to make it very clear that no one used the term "lameduck"—perhaps it is not the appropriate term—until Mr. Johnson saw fit, in what has all the appearances of an arrangement to create a vacancy which does not exist, to deny the people and the next President an opportunity to provide some leadership and direction for the Supreme Court. This is the first time this term had been raised.

But the real point has nothing to do with whether Mr. Johnson is a "lameduck" President or what his constitutional rights and powers are. There is no question that Mr. Johnson, up until the last day of his office, has all the powers of the President of the United States. He can do many things that I hope he will not do. As Senator Baker of Tennessee said on the floor, the President can escalate the war in Vietnam in massive proportions. I hope he does not do it. He could attempt to unilaterally disarm the United States. I hope he does not do it.

My argument does not focus on whether the President can make or send up such a nomination. My argument focuses on the Senate's responsibility, which is a coequal responsibility and just as important as the President's power to nominate. The Senate has the right and the duty to try to ascertain that the best people are appointed to the U.S. Supreme Court. The Senate should never rubberstamp the appointment of a nominee—especially under the circumstances surrounding the pending nominations.

I want to assure the committee that I have not taken lightly upon myself the responsibilities that go along with the raising of the serious questions which have been raised.

As a lawyer and as a Senator, I am deeply concerned about the importance of maintaining the highest respect for the Supreme Court of the United States. But I cannot overlook the responsibility that the Senate has in making sure that the prestige and stature of the Supreme Court will be in the future what the people think it should be.

Unfortunately, there is a great need at the present time to reestablish and restore some confidence and respect for the Supreme Court. And this need was very obvious before the current controversy erupted.

Mr. Chairman, a very recent survey made by George Gallup, which appeared in the Washington Post dated July 10, based on a survey taken in June, indicates that today unfavorable feelings toward the Supreme Court outweigh the favorable sentiment by a 3 to 2 ratio. This contrasts with a similar survey taken in July of 1967, which indicated that sentiment toward the Court was evenly split between those giving it an excellent or good rating and those giving it a fair to poor rating.

I ask unanimous consent, Mr. Chairman, that this article from the Washington Post appear in the record.

The CHAIRMAN. It will be admitted.

(The article referred to for inclusion in the record was marked "Exhibit 8" and appears in the appendix.)

Senator GRIFFIN. I do not condemn Mr. Thornberry or Mr. Fortas because they happen to be cronies of the President. I do not condemn Mr. Fortas because he represented Mr. Johnson when he was finally declared the winner in a primary contest by a landslide margin of 87 votes. I do not condemn Mr. Fortas because he has been Mr. Johnson's personal lawyer and his advisor throughout much of his career. I do not condemn Mr. Fortas because as a lawyer he has represented Bobby Baker. I do not condemn Mr. Fortas because he helped Walter Jenkins when he was in difficulty, and with some limited success, tried to suppress newspaper coverage of his difficulties.

But, Mr. Chairman, I do raise the question whether Mr. Fortas should be rewarded with the position of Chief Justice of the U.S. Supreme Court because he performed such services as a friend of Lyndon Johnson.

The committee has a very grave fundamental question to resolve, and that is the question whether he was appointed to this position because he is the best qualified person or because of these past associations. Now I do not disregard some of the points that my distinguished minority leader has made, but it is also true that in the past other Presidents have gone to great lengths in their efforts to try to enhance and increase the stature of the courts.

I am not going to attempt to name them all, but for example, President Hoover appointed Mr. Justice Cardoza to the Court, a Democrat and one of the most brilliant lawyers in the country.

President Eisenhower appointed Mr. Justice Brennan, a Democrat, who has been a very outstanding member of the Court. I focus on these two appointments only as examples of the fact that in the past, other Presidents at least have been somewhat concerned about maintaining some degree of political balance on the Court—as well as the highest degree of competence.

Finally, I must take issue with my minority leader on one example which he cited. He pointed to the nomination of Oliver Wendell Holmes to succeed Justice Gray as supporting his position.

I would like to read from the testimony given yesterday by the Attorney General of the United States which in part says this:

> On August 11, 1902, President Roosevelt appointed Oliver Wendell Holmes, Jr., to succeed Justice Gray. The Congress was in recess. Holmes chose not to serve under such circumstances. Justice Gray then died in September, and the President nominated Holmes on December 2, 1902, after the election, after the day the Senate reconveyed. He was then confirmed on December 4.

So I do not think that this example is valid support for the minority leader's position.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Smathers?

Senator SMATHERS. Senator Griffin, I understand your concern is whether or not the Senate—one of your concerns is whether or not the Senate exercises its responsibility by examining into the qualifications of these men and then making a judgment thereon. Is that correct—is that what you just said?

Senator GRIFFIN. I have made the point that the Senate has a responsibility, not only to examine the matter of qualifications, but to look beyond the matter of qualifications to other matters as well.

Senator SMATHERS. But your concern is that the Senate have the opportunity to do that?

Senator GRIFFIN. Yes.

Senator SMATHERS. Therefore I gather from what you state that you would not be a party to a filibuster which would keep the Senate from exercising its judgment or its will with respect to either of these two nominees.

Senator GRIFFIN. I am glad the Senator asked that question.

Senator SMATHERS. I am glad I did, too. I want to hear the answer.

Senator GRIFFIN. Let me just make this point—we are talking now about the third highest officer of the United States, and as the distinguished Senator from North Carolina, Senator Ervin, said yesterday—perhaps the highest officer of the United States because his powers and his policies go far beyond the term of any President.

When one considers the time and the care that is exercised by the people in nominating and selecting the President of the United States, and the degree and the care that is taken to examine their views and their background as well as to resolve all questions that might arise, it is unsound to expect the Senate to confirm these nominations in a few days. Under these highly unusual circumstances, and against the backdrop of history, it would be unwise for the Senate to rubber stamp the appointment of these nominees.

I am suggesting, if the Senator will let me continue——

Senator SMATHERS. No. I want to ask the Senator a couple of questions.

Senator GRIFFIN. I am suggesting that the Senate should take a great deal of time in these matters.

Senator SMATHERS. I would appreciate the Senator answering these questions. He has already made his speech several times. I am interested in seeing if he would answer a few questions.

I gather, then, the Senator does not want the Senate to exercise its responsibility, but rather he wants to make this a political issue to be debated in the elections which are upcoming in November.

Senator GRIFFIN. I think that the Senate should exercise its responsibility, and its responsibilities, in my opinion, require it to take a considerable amount of time—not only in these hearings, but investigating to such an extent as will bring out the facts on a basis other than the newspaper reports on the issues that have been raised, and then taking as much time on the floor as may be necessary to reach the best judgment possible.

Senator SMATHERS. If it were the opinion of the majority of the Members of the Senate that they would like to vote up or down on the confirmation of these nominees, is it the position of the Senator from Michigan that he is not going to let them do that?

Senator GRIFFIN. I might say to the distinguished Senator from Florida that he is one of the most knowledgeable people in the Senate, and knows full well that one of the great distinguishing features of the Senate of the United States is that there are times when even one Senator or a small group of Senators can exercise their prerogatives,

and say to the Nation "Wait, this is something that should not go sliding through. This is something that the country should know more about. This is something that should be debated. This is something that the people need more information about." And in due time—in due time—as the Senator knows—even on such matters as civil rights, if it is the will of the people, we get to the point in the Senate, despite the efforts of those who might want to block it, where you do invoke cloture, and ultimately the majority prevails.

Senator SMATHERS. I gather from what the Senator is saying is that in truth and in fact he does not want the Senate to be permitted to exercise its will.

Senator GRIFFIN. I think it would be a tragedy if there was any effort to push this to a vote within the next few weeks.

Senator SMATHERS. So the answer is not what the Senator started out to say originally, that he wanted the Senate to have an opportunity to consider this. The fact is he does not want the Senate to consider this.

Senator GRIFFIN. I do not agree with the Senator's conclusion.

Senator SMATHERS. I would like ask the Senator this question——

The CHAIRMAN. Let me ask you a question right there. Our mutual friend from Florida has been opposed a number of times on the Senate reaching a vote on a number of questions.

Senator SMATHERS. I recognize the Senator's right. But I have never said in a——

Senator GRIFFIN. Maybe that is just a right that southern Senators are supposed to have.

Senator SMATHERS. In a doubled way, that I wanted the Senate to act, and I wanted the Senate to consider it, and then in the next breath said that as a practical matter I did not want the Senate to do it, and I was not going to let the Senators do it. I have not run both ways at one time.

I would like to ask the Senator this question. If he follows his logic it is that a President who is finishing up his last term should not have the power or the authority or the right to make these nominations, whether it be for the Chief of Staff, or the United Nations or the Supreme Court or whatever.

I expect, then, that that means to the Senator from Michigan that if Nixon should be elected in 1968, and should somehow be elected in 1972, that you would oppose every nominee that he would send over to the Senate from 1972 until he finished his last 4 years.

Senator GRIFFIN. That is not true at all, Senator.

Senator SMATHERS. Well, that is a consistent argument.

Senator GRIFFIN. I want to restate again. The Senator and others keep saying that there is some question directed at the power of the President to make these nominations. There is no question about that power. I have said it over and over again, and I say it again—the question is, What is the Senate going to do?

Senator SMATHERS. In other words, you say he has got the power, but you just do not want him to exercise it?

Senator GRIFFIN. He has only half the power. And it is about time the Senate realized that, especially with regard to the Supreme Court of the United States. He only has half the power, and we have the other half, and we ought to assert ourselves.

Senator SMATHERS. I am sure if the Senate is given an opportunity to vote on this, you will find that the Senate will assert itself. I would suspect that a vast majority of the Senators want to assert themselves if given the opportunity.

I would like to touch on what Senator Dirksen said. When you were a member of the House of Representatives and served under the administration of President Eisenhower, and a vacancy in a postmastership occurred, and you were called upon by the Postmaster General, whoever it may have been, to fill that vacancy, did you at that point go and look at a list of your enemies or your friends to determine who you were going to send over there?

Senator GRIFFIN. Just like you, I looked at a list of those that were recommended by the party.

Senator SMATHERS. And usually they were your friends.

Senator GRIFFIN. No—lots of times I had never heard of them.

Senator SMATHERS. Well, sometimes.

Senator GRIFFIN. Occasionally I knew who they were; yes.

Senator SMATHERS. Do you recall having nominated any enemies of yours?

Senator GRIFFIN. Yes.

Senator SMATHERS. You do. Well, you are an unusual fellow. Did you let them go through?

Senator GRIFFIN. Yes.

Senator SMATHERS. You were very generous. I wish you would be as generous in this situation as you were in those.

Senator GRIFFIN. I do not think of course, Senator, there is any comparison whatsoever with postmasterships, or appointments to other positions in the Federal Government—even the district judges of the United States, of which there are more than 300. There is no comparison whatsoever with nominations to the Supreme Court of the United States.

Senator SMATHERS. I agree that the Supreme Court is higher than the district court, and is higher than the circuit court. But nevertheless, those district court judgeships and the circuit court judgeships are for life.

Senator GRIFFIN. Let me just make the point that if President Johnson were to appoint Abe Fortas to be his Attorney General or to any position in his Cabinet, you know and I know that the Senate would not reject the nomination. I think there would not be any question about confirmation. You are talking here, however, about lifetime positions on the Supreme Court, and in order for that body to be the separate, independent branch of Government that it is supposed to be, they cannot owe their allegiance only to the Executive. The Senate has a coequal responsibility.

Senator SMATHERS. I think the Senator remembers that we have already voted on Justice Fortas once to be a member of the Supreme Court. If his memory is not so short, I think he will remember that the Senate has confirmed him once.

Senator GRIFFIN. I am aware of that.

Senator SMATHERS. Maybe the Senator voted for him; I do not know.

Senator GRIFFIN. Well, I did not happen to be in the Senate at that time.

Senator SMATHERS. But he has already been confirmed by the U.S. Senate. I am satisfied if given the opportunity, the Senate would confirm him again. But my questions are directed at this matter that the Senator has raised, as to whether or not a President—or I am particularly concerned about a Senator, because I am retiring this year, and I did not get defeated. I just wondered if the Senator would take away from me what I consider my right to make a nomination with respect to filling a vacancy on a Federal district court or a Federal circuit court.

Senator GRIFFIN. Not at all—not any more than anybody is trying to take away President Johnson's right to send up nominations for the Supreme Court. The only question is what the Senate is going to do.

Let me focus on something that the Senator has said.

He made the point that Mr. Fortas has been confirmed once before. Actually both of these nominees have been confirmed before. I want to make the point that a position on the Supreme Court of the United States, as I have said before, is not by any means the same as a position on a lower court. Lower court decisions can be appealed. But the Supreme Court is the Court of last resort. And let us not fall into the trap of assuming that because a person meets the minimum qualification to become one out of the more than approximately 300 district Federal judges, that he is therefore automatically qualified to be one of the nine Supreme Court Justices. It must always be kept in mind that five members of the Supreme Court determine the law of the land. And I think we also must recognize that the position of Chief Justice is not the same as the position of Associate Justice—not that I want to exaggerate the distinction, but there is a distinction, and it is an important one.

I do not think we need to overlook that in this instance, the President of the United States has ignored seniority as well as the outstanding performance over the many years of other Justices on the Court who would appear to me at least, and to others, to be more deserving of this distinction in order to prefer one of the most junior Justices, who just happens to be one of the President's closest personal friends.

Senator SMATHERS. I would like to interrupt the Senator to say this. I am confident that if and when—and I hope it does not happen, but it may well happen—that the Republicans get the nomination—I mean that Nixon would get the nomination, and probably could get elected—now, if that is the case——

Senator GRIFFIN. I am glad to hear that assessment.

Senator SMATHERS. I said probably. But I would say to the Senator he will find himself when the opportunity comes for him to nominate a man to fill a vacancy which occurs in the State of Michigan, in one of the courts there, he will obviously appoint that man whom he knows and that man whom he respects, and that man whom he admires the most. And that is the way it happens.

I have had the good fortune to appoint a former law partner of mine who happens to be the most distinguished member of the district court that we have ever had in Florida, who now serves in the Fifth Circuit Court of Appeals, and who recommends Judge Thornberry's nomination with the greatest enthusiasm, because he knows him, he has served with him.

That is what I think the Senator would do when that time comes.

But the point that I want to make with the Senator from Michigan is that I do hope that he would mean what he says when he says, "I want the Senate to have an opportunity to consider these nominations and to work their will." This is what I hope the Senator would permit us to do.

I do not have any further questions.

The CHAIRMAN. Senator Hart.

Seantor HART. The Senators from Michigan have a different point of view with respect to the contribution that Abe Fortas has made to the Supreme Court and his merit as its Chief Justice.

I have listened faithfully to Bob, and he has listened to me, and neither of us are going to turn around on the question.

I think that history will have to search hard to find a man whose mental equipment, temperament, skills with language, sensitivity to social needs will excel those of Abe Fortas.

I just happen to think America can be a little proud of itself that there is a man like Abe Fortas in our land, and that this Nation affords to such an individual full opportunity to advance.

But having said that, I know that Bob will not say amen, so I have no more to say.

The CHAIRMAN. Senator Fong.

Senator FONG. Senator Griffin, I want to congratulate you for a very excellent statement. It is well researched, and well presented.

As I understand the gist of your statement, you do not question the President's power to appoint?

Senator GRIFFIN. To nominate, that is right.

Senator FONG. To nominate—even at this time.

But you feel that the power of the Senate to advise and consent is a real one, and should be exercised very very carefully?

Senator GRIFFIN. And just as important.

Senator FONG. Yes. And you have presented cases in which the Senate has used that power and made it real in denying confirmation or in making confirmation, have you not?

Senator GRIFFIN. Yes.

Senator FONG. I want to add to your list of real advise-and-consent power of the Senate—I would like to bring to your notice what happened when Hawaii became a State. We became a State on August 21, 1959, and according to the statehood act, it read as follows:

> The terms of the office of the District Judges for the District of Hawaii then in office shall terminate upon the effective date of this section and the President shall appoint by and with the advice and consent of the Senate two District Judges for the said District who shall hold office during good behavior.

Thence upon receiving statehood of Hawaii, the tenure of the two Federal district judges terminated, and Hawaii had no judges.

I was elected a Senator——

Senator GRIFFIN. Hawaii had no judges at all at that time?

Senator FONG. No Federal district judges at all. I was elected Senator, so I recommended the name of C. Nils Tavaras, a very very able attorney, and the attorney general, former attorney general of the State. Because President Eisenhower did not have a majority of the Senate, Nils Tavaras was not confirmed by the Senate. So this was a

real power, a power of advise and consent, which the Senate did not feel that it should——

Senator GRIFFIN. Who was the majority leader of the Senate then?

Senator FONG. At that time it was Lyndon Johnson. And Nils Tavaras was not confirmed, although his name was presented during 1960, which was the last year of President Eisenhower's term—although the term did not terminate until January 20, 1961.

Nils Tavaras, because the Senate wanted to wait until a new President was elected—so they waited, and, it was not until 2 years afterward that Hawaii received the services of a district judge.

So the District Court of Hawaii was vacant for 2 years, and in that time no less than 16 borrowed judges came to Hawaii to preside over the cases in Hawaii.

And when Senator Kennedy finally came into office, because Nils Tavaras had taken an interim appointment, he was one of three regions out of 115 judges which were appointed by President Kennedy who finally took office.

Now, to show you another——

Senator GRIFFIN. Before the Senator goes on from that point, there was a situation where there was not only a vacancy, but no judges at all?

Senator FONG. Yes.

Senator GRIFFIN. And I know of many other instances, including instances in my own State of Michigan where very able, qualified individuals were nominated during that period for judgeships, and there was just a complete block on confirmation as far the the Senate majority led by Lyndon Johnson was concerned.

Senator FONG. But in regard to your statement, there were seven unfilled circuit judges, judgeships, at the time that President Eisenhower went out of office, and there were 35 district court judges, altogether there were 42 unfilled judges.

The Judicial Council had recommended that there be 45 new judges—new judgeships—on August 27, 1969, Attorney General William P. Rogers, in an attempt to overcome Democratic resistance, urged Congress to create 45 new Federal judgeships to carry out the recommendations of the Judicial Conference. He said that he had been authorized by the President to tell congressional leaders——

The CHAIRMAN. Just a minute. Policemen, would you close those doors.

Senator FONG. Attorney General William Rogers said he had been authorized by the President to tell congressional leaders that he would fill the new posts on a 50–50 basis, from the two political parties, no matter how many new judgeships the Congress eventually voted to create. This pledge of Attorney General Rogers was amplified in February 1960, when a House Judiciary subcommittee held hearings on the judgeship bills. Chairman Emanuel Celler indicated that Democratic opposition to the bills had decreased since Attorney General Rogers had made his 50–50 pledge. But he asked Deputy Attorney General Lawrence E. Walsh whether the Democratic appointments to be true Democrats, or Democrats across party lines.

Walsh assured Celler that by Democrats the administration did not mean Eisenhower Democrats.

But no final approval was given any of the judgeship bills when the Congress recessed for the national convention in 1960.

When the Congress reconvened in August, Democratic leaders, gambling that Democrats would win the presidential congressional elections in November 1960, and would thus be able to fill the new judgeships, decided not to bring any of the bills to the floor.

So S. 912 passed the Senate on May 3, 1961, after President Kennedy came into office. This bill was originally passed April 19, 1961. That bill created 10 circuit judges and 63 district judgeships. So with the 73 circuit judges and district judgeships which were created, plus the 42 which were unfilled, which when we add 73 and 42 we had 115 judgeships which were filled by President Kennedy, and which were sadly needed when President Eisenhower was in office. And out of the 115 filled by President Kennedy, only three were Republicans. So this shows how real the power of advise and consent is in the Senate.

Now, there was an allusion made to the question of postmasters. I am a member of the Civil Service and Post Office Committee.

During the Eisenhower administration he submitted quite a number of names for postmasterships to the committee. But the committee, again because of political purpose, held up the postmasterships until after President Kennedy was nominated and elected. And all these names were thrown out, and new appointments were made by the President.

So you can see, even in a question of postmasterships, the question of advise and consent in the hands of the Senate is very, very real.

So I want you to add that to your research papers.

Now, Senator Griffin, you suggested that there seemed to be no separation of powers between Justice Fortas and the President. In fact, from the various elaboration of things that have happened, activities that have existed between the two, you almost seem to say that there is a conflict of interest.

Can you give us specific instances in which there has been such conflicts?

Senator GRIFFIN. Well, Senator, I believe that the purpose of my statement is to focus the committee's attention on the very real and widespread reports that have been made by responsible news reporting agencies about this relationship, and to relate these reports to the very important principle of separation of powers.

Now, I do not come before the committee testifying as one who personally is privy to what goes on between Mr. Johnson and Mr. Fortas. But I do not think this committee should fail to take notice of what is reported in the press. It is my suggestion that the committee has a responsibility to ascertain whether or not those reports are accurate.

Now, I suggest that the committee ought not be satisfied with any perfunctory answers on a question so fundamental and basic as this. Without meaning any disrespect, I think that it justifies calling more than just the nominee himself to testify on this matter. There must be others who could testify with personal knowledge as to the things that I have called attention to.

For example, did Mr. Fortas write the speech that Mr. Johnson delivered in connection with the Detroit riots. I think that is a very

important question—not only to ask Mr. Fortas, but to explore fully with other witnesses.

Senator FONG. And you feel it is improper if he wrote it for him?

Senator GRIFFIN. I certainly do.

Senator FONG. Do you feel that a Justice of the Supreme Court should not be placed in such a position, that he does things for the Executive so that when a matter comes before him, he will be biased in that respect?

Senator GRIFFIN. In most instances that we know about, where someone is elevated to the Bench and later disqualifies himself because of his involvement in some way in a matter that took place before he went on the Bench, his activity and reasons for disqualification are known. He may have been an official of some kind or worked in the Justice Department, as did Thurgood Marshall.

You have a situation here where it is alleged in the press that there is an undisclosed activity going on. Nobody knows the extent of this involvement.

Is this to be condoned by the committee, and if it is to be condoned by the committee with respect to one Justice, is it to be condoned by the committee with respect to any number of Justices? What happens to the doctrine of separation of powers if the committee does not look into this?

You have used the term conflict of interest. I am going to use the term propriety. I do not have to pose as an expert on this particular subject. The Supreme Court of the United States in 1793, as I pointed out in my statement, addressed itself to the question of whether even on an open basis the Supreme Court or Justices of the Supreme Court should provide advice to the President. And even on that basis, the Supreme Court said "No," under the doctrine of the separation of powers. The Court said this was not their function, but the function of the Attorney General.

Obviously, if Mr. Johnson wanted Abe Fortas to be his legal adviser, he should have appointed him to be Attorney General. That would have been the appropriate thing to do.

Senator FONG. Thank you.

The CHAIRMAN. Senator Griffin, Senator Thurmond has left a memorandum which he requested me to read and ask you two questions on his behalf:

Senator Griffin, I am going to read a passage from No. 76 of the Federalist Papers which was written by Alexander Hamilton:

> To what purpose then require the cooperation of the Senate? I answer, that the necessity of their consurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.
>
> It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclinations and interests than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from hetraying a

spirit of favoritism or an unbecoming pursuit of popularity to the observation of a body whose opinion would have great weight in forming that of the public could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

Question No. 1: There has been much criticism concerning the opposition of many of us in the Senate, yourself included, to these nominations. Do you not think that Alexander Hamilton's reasoning very much applies to the circumstances we are facing today?

Senator GRIFFIN. The answer is "Yes."

The CHAIRMAN. Question No. 2: Senator Griffin, there has been considerable discussion in the news media and otherwise of pressure originating in the White House to compel the Senate to confirm this nomination. I should like to read to you a further passage from No. 76 of the Federalist Papers:

To this reasoning it has been objected that the President by the influence of the power of nomination, may secure the complaisance of the Senate to his view. * * * Bnt it is as little to be doubted that there is always a large proportion of the body which consists of independent and public-spirited men who have an influential weight in the councils of the Nation. Hence it is (the present reign not excepted) that the sense of that body is often seen to control the inclinations of the monarch, both with regard to men and to measures. Though it might therefore be allowable to suppose that the executive might occasionally influence some individuals in the Senate, yet the supposition that he could in general purchase the integrity of the whole body would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its cooperation in the business of appointments will be a cousiderable and salutary restraint upon the conduct of that magistrate.

Question: Senator Griffin, would you not agree that Alexander Hamilton showed great foresight in dealing with the problems surrounding Presidential appointments, particularly in view of the President's lame duck status, would serve as a valuable precedent to prevent further misuse of the President's power to nominate Supreme Court Justices?

Senator GRIFFIN. Mr. Chairman, my answer is "Yes."

The CHAIRMAN. Any further questions?

Thank you, Senator Griffin.

Judge Homer Thornberry?

Senator Yarborough, you may proceed, and try to be brief, Ralph.

STATEMENT OF HON. RALPH YARBOROUGH, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator YARBOROUGH. Thank you, Mr. Chairman. You lay upon me a hard injunction when you say do not be too long when I am here to present a fellow Texan, and a man with outstanding judicial and legal qualifications of this nominee. And considering the length of time that I have known him.

I have known him, Mr. Chairman, for over a third of a century. I was a young district judge in Texas, the youngest in the State, in the

thirties, and he was the chief deputy sheriff in the same courthouse. I was judge 5 years. He worked his way through the University of Texas Law School while he was chief deputy sheriff. I have a letter from the dean of the University of Texas Law School telling how his grades improved, his scholarship improved from the beginning, a good student, until he became an excellent student, and finished in the top 15 percent of his class while serving as a full-time chief deputy sheriff in the county in which the State capital of Texas is located.

So that is the kind of scholar he was in school. A tough job in law school. This was the University of Texas, one of the very top law schools in the country, now recognized—then and now—as being about one of the 10 most difficult in standards, grades, and admission.

I ask consent that the committee include in the record this letter addressed to the chairman from Dean Keeton, of the University of Texas School of Law, concerning the nomination of Judge Thornberry, writing to say that he believes in his opinion, the President has exercised his very good judgment in nominating him for Justice of the Supreme Court of the United States and certifying that Homer is a student of his:

He was a good student throughout the time that he was in the law school, and indeed became an excellent student. His scholastic record in his senior year was such as to put him in the honor category and within the top fifteen percent. He did this while working full time as a deputy sheriff. This was a significant intellectual accomplishment.

It seems to me that Homer Thornberry has had the kind of rare and varied experience that is especially needed for a position on the Supreme Court, and that few other men in our society could claim. He practiced law with a well-established law firm here in Austin prior to World War II; he served this district with distinction as a Congressman for a great many years, a type of experience that at least some members of our Supreme Court should have; he has been a Federal District Judge, and those trial lawyers with whom I have conversed about his performance as a trial judge have universally praised him both for his fairness and firmness; he has served, as you know, as an Appellate Judge of the Court of Appeals for the Fifth Circuit, and in that capacity has written some outstanding opinions.

I am confident that his native legal ability, combined with the rare experience that he has had, and as related herein, gives assurance that he can contribute significantly to the solution of the tremendously important and highly controversial issues with which our Supreme Court is necessarily confronted.

(The letter referred to was marked "Exhibit 9" and appears in the appendix.)

Senator YARBOROUGH. Mr. Chairman, I knew him after he graduated from the law school. He went to the Legislature of Texas and served some 7 years. I was then an attorney in the city of Austin. I served—I practiced law there for over 2 years, served as assistant district judge for 5 years. He then became district attorney, was serving as district attorney of that judicial district when he resigned to enter the military service in World War II. He entered the Navy, and won successive promotions as an officer in the U.S. Navy.

He came back. So great was his popularity, the people of Austin, Travis County, picked him for the first vacancy for anything they could elect him to, and elected him to the city council. He was immediately elected mayor pro tem, and served as mayor pro tem of the city of Austin for 2 years until he was elected to Congress in 1948 with an overwhelming victory, when President Lyndon Johnson left that con-

gressional seat to seek a place in the Senate. And he served in the Congress then some 14 years until, as this committee knows, he was appointed to the Federal district bench. And serving as a Federal district judge, and then as a Federal appellate judge on the fifth circuit, he has a more various judicial experience prior to being appointed to the Supreme Court than any judge now serving on the Supreme Court. No other judge there had been trial and appellate judge before ascending the bench, although several had been appellate judges.

Having known him all these years, having heard good reports on him everywhere, having heard the lawyers whose clients were prosecuted by him as a district attorney talk about his fairness as a prosecutor, having experienced as a trial judge—having prisoners brought before me for trial—a third of my jurisdiction was criminal cases—from the jail over which he had jurisdiction, never in my experience on that bench did any prisoner brought before the bar claim that he had been mistreated in jail, had been unfairly treated with reference to confessions.

Now, Mr. Chairman, I exchanged benches with other judges and served in some other cities, and I have had prisoners on other cities complain they had confessions beat out of them, that they had been mistreated in jail. But never in Travis County at the State capital.

This man is firm but fair. It did not take a bunch of Supreme Court decisions to make him be fair to the prisoners there, and before he had been licensed as an **attorney.**

Mr. Chairman, there are many things I want to say. So many things have been said so much better by judicial officers of this Government, that I ask leave of the court to quote from this letter from Chief Judge John R. Brown, chief judge of the fifth circuit, the most overburdened circuit in America now. Chief Justice Brown is a Republican, appointed by President Eisenhower. He writes this letter today to this committee, with copies to me and to Senator Tower.

He says to this committee, sent to the chairman of the Committee on the Judiciary, with the leave of the committee I would like to read Justice Brown's letter, because I think it is the finest letter on behalf of a nominee that I have ever seen in my life:

My Dear Senator Eastland, it is my privilege to affirm to you and your fellow committee members and to the Senate as a whole my high esteem for the professional judicial qualifications of Judge Homer Thornberry nominated to be an Associate Justice of the U.S. Supreme Court. As you know, Judge Thornberry came to the court of appeals from the fifth circuit in July 1965. He has thus served us through 3 full court years—1965–66, 1966–67, 1967–68, both as one of his Associate Judges, and now since July 17, 1967, as the Chief Judge, I know intimately and first hand the tremendous talents of this dedicated public servant. He is a vigorous, industrious worker. He has more than carried his full share enthusiastically and without shirking. This is a real tribute in view of the explosive growth of our docket in these few 3 years, 1,079 filings in 1965, 1966, and 13,040 in the year just closed.

I know the chairman and the Senator from Florida being in the fifth circuit, as Texans, know of this tremendous docket and tremendous problems of that circuit.

But industry, putting in hours of struggle, is not enough. A judge must now be an effective worker. Judge Thornberry is blessed with this capacity, and this includes a number of skills. One is the capacity to make up his mind. Closely

akin is the capacity, once the decision has been reached by an open-minded consideration of the problem and the contrary views of others, to adhere to a determination once made. This is an absence of that trait so unfortunate in a judge who suffers from the torment of vacillation. Next, he has the capacity to write and write effectively. This is finally the test for an appellate judge. His opinions are pieces of excellent professional craftsmanship, revealing organized thinking, analysis, discussion, and decision, that bear the mark of high literary quality and a style that is both readable and understandable. He writes not only effectively, but with productive dispatch, so that he makes a continuous contribution to the output of our court, over 1,000 opinions for the court this year. In volume of work done, opinions written, his output is at or near the top. Fortunately, too, these capacities are Catholic in nature, free of parochialism, either geographic, economic or in specialized fields of law. He handles and writes well, and has done so in areas of the law, criminal, civil, State-oriented problems, covering the whole of life experience, as well as Federal question cases including of course the ever-prevalent cases invoking the Federal Constitution. Undoubtedly his long experience in elected public life, and especially in the Congress, has given him both breadth of outlook and tools of understanding. In the workaday problems of judging as such, court administration is now more and more important. The bench, the bar and the cause of justice need leadership and action in this field. No better place to find such leadership than on the U.S. Supreme Court could ever exist. Judge Thornberry has unusual talents for this activity. He has handled with great efficiency a number of administrative matters delegated to him by me as Chief Judge.

Now, Mr. Chairman, I am reading the letter the Republican Chief Judge appointed by President Eisenhower of that fifth circuit. I am approaching the end of his letter.

But these things, essential as they are to the judge, and especially the good judge, pertain primarily to the professional craftsmanlike skills. What is more vital is superior intelligence, wisdom, judgment, a disposition to hear, consider, weigh, with a mind as open and free of predilection as possible for human beings, and then make a decision.

He has these qualities in great store. He would of course be the first to deny this. And this highlights another quality, now so rare. A genuine humility, a modest disclaimer which undoubtedly leads him to leave nothing undone in his work. Study, research, and hammering out the finished product to assure himself of the right decision as he sees it. Although as Chief Judge I would not consider that I have a right to speak for the Court itself, or to bind even the judge as members thereof to a matter of this kind, I know from the close association we all have, and the extended discussions we have had among ourselves since the President sent Judge Thornberry's nomination to the Senate, that all share these views that I have tried to express. And now he has talked to the judges of the fifth circuit, from which the two senior members of the Senate of this committee come. To a man, all look upon Judge Thornberry as an able, energetic, and conscientious person, having exceptional talents as a judge which he has demonstrated in his service with us. We will miss him sorely on the fifth circuit, but we know that with all of these qualities, both as a man and as a judge, he would make a distinguished Associate Justice of the Supreme Court. I take the liberty of sending copies of these letters to your distinguished associates on the committee and my fellow Texans, Senators Yarborough and Tower.

Mr. Chairman, it is a great honor for me to come here to accompany a nominee to the Supreme Court from my State before this great committee, which itself has a long and distinguished history.

I count it one of the high privileges of my office to be here, at a point in history and time, when I am permitted to accompany this man, with such a distinguished public record, such a distinguished scholastic record in college, such a distinguished judicial record. Few men have ever been appointed to the Supreme Court of the United States, among the 85 Associate Justices that have been appointed in the history of this Nation, and the 14 Chief Justices, few have ever

been appointed that had the demonstrated judicial ability in all aspects of a great judge as has this nominee, Justice Thornberry. I commend him to your good judgment and your action as befits the great qualifications, certified to best by the men who know him best, the men who serve on that appellate court with him.

I thank the committee.

The CHAIRMAN. Any questions?

Senator SMATHERS. I want to make a brief statement sometime. I do not know whether you want me to make it now or later.

STATEMENT OF HON. HOMER THORNBERRY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

The CHAIRMAN. Judge Thornberry, stand up, please. Hold up your hand.

Do you solemnly swear the testimony will give throughout these hearings is the truth, the whole truth, and nothing but the truth, so help you God?

Judge THORNBERRY. So help me God.

The CHAIRMAN. Now, I place in the record the notice of the hearing and the endorsement of the American Bar Association.

(The documents enumerated by the chairman for inclusion in the record follow:)

JULY 12, 1968.

The hearing this morning has been scheduled for the purpose of considering the nomination of Homer Thornberry, of Texas, to be an Associate Justice of the Supreme Court of the United States.

Notice of the hearing was published in the Congressional Record, July 1, 1968.

By letter of July 8, 1968, the standing Committee on Federal Judiciary, of the American Bar Association, states that the "Committee is of the view that Judge Thornberry is highly acceptable from the viewpoint of professional qualifications."

SENATE JUDICIARY COMMITTEE,
July 8, 1968.

ALBERT E. JENNER, JR.,
Chairman, Standing Committee on Federal Judiciary,
American Bar Association,
Chicago, Ill.

Public hearings have been scheduled on nominations of Abe Fortas, of Tennessee, to be Chief Justice of the United States, Vice Earl Warren, for Thursday, July 11, 1968, at 10:30 a.m., and Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States, Vice Abe Fortas, for Friday, July 12, 1968, at 10:30 a.m. in room 2228, New Senate Office Building. It is requested that any opinions or recommendations the association desires to make be submitted to the committee on or before those dates.

JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., July 8, 1968.

Re Hon. Homer Thornberry, Austin, Tex.

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

DEAR SENATOR EASTLAND: Thank you for your telegram affording this Committee an opportunity to express an opinion or recommendation on the nomination of Honorable Homer Thornberry to be an Associate Justice of the Supreme Court of the United States.

Our Committee is of the view that Judge Thornberry is "highly acceptable from the viewpoint of professional qualifications".

As the past distinguished chairman of our Committee, Robert W. Meserve, Esquire, of Boston, Massachusetts, wrote you under date of September 7, 1962 in respect of the report of the Committee concerning the qualifications of Honorable Arthur J. Goldberg to be an Associate Justice of the Supreme Court of the United States, we conceive it to be, in respect of the qualifications of a nominee to serve as a Justice of the United States Supreme Court, our responsibility to express our opinion only on the question of professional qualification, which includes, of course, consideration of age and health, and of such matters as temperament, integrity, trial and other experience, education and demonstrated legal ability. It is our practice to express no opinion at any time with regard to any other consideration not related to such professional qualification which may properly be considered by the appointing or confirming authority. This position is, of course, not in any way confined to Judge Thornberry's case, nor is it in any respect stimulated by or related to his nomination.

We are gratified that you and your distinguished Committee continue to ask for our opinion respecting the qualifications of nominees for appointment to lifetime federal judgeships and otherwise to permit us to assist your Committee in the discharge of its important constitutional function.

With best wishes.

Sincerely yours,

ALBERT E. JENNER, Jr., *Chairman.*

The CHAIRMAN. You have a biography there. Is it correct?

Judge THORNBERRY. I have not seen it.

The CHAIRMAN. If it is correct, it will be placed in the record.

(The biography of Judge Thornberry for inclusion in the record follows:)

HOMER THORNBERRY

Born: January 9, 1909, Austin, Tex.

Education: 1932–36, University of Texas B.B.A. degree, LL.B. degree.

Bar: 1936, Texas.

Military service: 1942–46, U.S.N.R.—LCDR.

Employment: 1937–40, Powell, Raubut, Wirtz & Gideon, Austin, Tex., attorney; 1941–42, district attorney Travis County, Tex.; 1937–39, member of State legislature; 1946–48, Jones & Thornberry, Austin, Tex., law partner; 1946–48, member of Austin City Council; 1947–48, mayor pro tem of Austin; 1949–63, U.S. Congressman from 10th District of Texas; December 17, 1963–July 1, 1965, U.S. District Judge, Western District of Texas; July 1, 1965–present, U.S. Circuit Judge, Fifth Circuit.

Marital status: Married, 3 children.

Office: U.S. Circuit Court, Austin, Tex. 78701.

Home: 1403 Hardouin, Austin, Tex. 78703.

To be Associate Justice of the Supreme Court of the United States.

Senator YARBOROUGH. Mr. Chairman, while Judge Thornberry is examining this, may I offer for the record a copy of a letter from Elbert P. Tuttle, circuit judge from Atlanta, Ga., addressed to Senator Javits, commending Judge Thornberry on the writing of opinions, and many other things. I offer that for the record, please, Mr. Chairman.

I would also like to offer a copy of a letter from John Minor Wisdom, U.S. Circuit Court at the Fifth Circuit, New Orleans, addressed to the President of the United States.

The CHAIRMAN. That request will be given consideration.

Judge, I have some questions. The time is late. I have got to catch a plane. Senator Ervin has requested that you come back. He desires to ask you some questions. Therefore I am not going to ask any questions today. Now, we would like for you to be back next Wednesday.

Judge THORNBERRY. All right, sir.

The CHAIRMAN. Senator Smathers.

Senator SMATHERS. Mr. Chairman, I do not have any questions. I would like to say this for the record. I am very pleased that the President of the United States has seen fit to nominate Homer Thornberry as an Associate Justice of the Supreme Court of the United States. I was privileged to serve in the House a brief period of time with Judge Thornberry, when he was a Member of that House, but happily I have been able to know him and have been privileged to associate with him on numerous occasions since then. I know him as a man with a fine family, I know he is a fine man, a representative of all that is best in our life. I know he has got a marvelous family that we will look upon with great pride.

I had introduced many years ago—because I did not like some of the decisions of the Supreme Court, the way the Supreme Court was ruling—a constitutional amendment which regrettably never got very far. But I believe we should require the President of the United States to put on the Supreme Court only those who have had previous judicial experience that being the top judicial job we have in this country. And I had recommended in this proposed constitutional amendment that the President be limited in his appointment to men who had served previously on lower Federal courts, either at the district court level or the circuit court level, or on the supreme court of the State.

Homer Thornberry has had that experience. He has been on the district court, and served with great distinction, and he more recently—now as a matter of fact he is serving on the Fifth Circuit Court of Appellate which, as the distinguished Senator from Texas says, is the busiest circuit court that we have in the United States. It has, I believe, the greatest variety of cases.

Now, the other experience which Judge Thornberry has which I personally believe would be very useful to the Supreme Court of the United States is this, and that is he has had legislative experience—some 14 years, I think it was as a Member of the U.S. Congress.

I think as I read the decisions of the Supreme Court, they are frequently trying to say what was the intention of the Congress when they passed a certain law, and their duty, of course, is to interpret our intention as well as the intention of those who wrote the Constitution.

On the present Supreme Court, we only have one person who has had legislative experience, as I understand it, and that is Justice Black. He is 82 or 83 years old. Obviously we can expect his retirement, if not in the immediate future, some time in the rather near future.

But I do believe that the Court can be well served by this legislative experience which Judge Thornberry has had. I think he will be able to make a very substantial and real contribution to the deliberations of the Supreme Court, because of his experience.

As I said earlier today, in talking to Senator Griffin, I was further impressed by the ability, the scholarly ability, and the capacity of Homer Thornberry to discharge in the best sense of the word the duties of Justice of the Supreme Court—when I got this letter from one of his cojudges on that fifth circuit, a young man whom I respect highly, David W. Dyer, who, in my personal knowledge is the most brilliant lawyer and brilliant judge I have ever been privileged to

know. He has now been serving with Judge Thornberry for a number of years, and he wrote me this letter, part of which I would like to read, and then I will put it all in the record.

The CHAIRMAN. You appointed him.

Senator SMATHERS. I appointed him. I was delighted with that appointment. If there is one thing I am proud of it is that the appointments we have made in Florida have received the highest possible grade from the American Bar Association of any that is possible for them to get. And they were all friends of ours, I am happy to say, even though some people might have called them cronies—they were great friends. And that is why we knew them and appointed them, because we knew something about them. And I am proud of the record which they have made.

He said:

I am disturbed by the criticism appearing in the news media leveled at President Johnson's nomination of Homer Thornberry. The criticism is based upon two irrelevant reasons; that is, that it is a lameduck appointment, a cronyism. Of course, the President has the constitutional duty to fill a vacancy on the Supreme Court. I am sure that Homer is a longtime friend of the President, and for this reason, the President no doubt has great confidence in Homer's ability and integrity. The one relevant factor that the news media omits mentioning is that Homer has the unquestioned superior ability to fulfill the qualification of an Associate Justice. The undisputed fact is that the committee on judicial selection of the American Bar Association has found him well qualified to be appointed to the Supreme Court. The committee previously made such a finding with respect to his nomination to the U.S. district court and later to the court of appeals. I have had the pleasure and honor of serving with Homer for 2 years, and I know that he will make an outstanding Justice, as he has made an outstanding record as judge on our courts. The Supreme Court's gain will certainly be our loss. I earnestly solicit your full support and influence in connection with this confirmation by the Senate.

I want that letter to be in the record.

The CHAIRMAN. That will be admitted.

(The letter referred to for inclusion in the record was marked "Exhibit 10" and appears in the appendix.)

Senator SMATHERS. For the record, I also have a letter from the dean of the law school of Southern Methodist University, addressed to the chairman, recommending the approval of the nomination of Judge Thornberry.

(The letter referred to for inclusion in the record was marked "Exhibit 11" and appears in the appendix.)

Senator SMATHERS. Also a letter addressed to me by a professor from the University of Florida Law School whom I know, and in whom I have great confidence—and I did not know this—knows Judge Thornberry. He writes a very detailed and flattering letter about the qualifications of Judge Thornberry. I would like to have that made a part of the record.

The CHAIRMAN. That will be done.

(The letter referred to for inclusion in the record was marked "Exhibit 12" and appears in the appendix.)

Senator SMATHERS. Then here is a particularly appropriate, it seems to me, editorial from the Wichita Eagle of Friday, January 28, with respect to the charge that the President is appointing cronies; but they go on to say that the trouble about that charge is that both Abe Fortas and Thornberry are not second raters, but highly qualified for the

positions to which they have been nominated. I would like to have that made a part of the record.

(The article referred to for inclusion in the record was marked "Exhibit 13" and appears in the appendix.)

Senator SMATHERS. Then if I could, I would like to have this American Bar Association recommendation, where they unanimously——

The CHAIRMAN. It has been placed in the record.

Senator SMATHERS. All right. Thank you, Mr. Chairman. That is all I have at this time.

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Chairman, Senator Smathers has handed me a copy of a letter that was addressed to me. I have the original, brought it with me this morning, and intended, as I now shall, to offer it for the record.

It is a letter from circuit judge of the sixth circuit, which is Michigan, Ohio, Kentucky, Tennessee circuit. It is Judge Wade McCree, whose nomination I may have had some small part in, and who is a very close and intimate friend of mine.

I shall not read it in full, but Judge McCree explains that:

> I have had a unique experience since 1964 with respect to Judge Thornberry.
>
> You will recall that when the Congress enacted the Criminal Justice Act, it required the judicial conference to establish a committee to implement its provisions by promulgating rules, practice, and guidelines.
>
> The committee originally consisted of three circuit judges and six district judges representing geographical diversity and representative district throughout the country, and Judge Thornberry and I have served together on this standing committee since its inception.
>
> I consider him not only a warm, gregarious person in whose company everyone is comfortable, but also as a dedicated judge of considerable experience and demonstrated ability. The committee responsibility of establishing rules and guidelines for the appointment of counsel throughout the entire judiciary system requires, among other things, an intimate knowledge of the structure and function of the courts and an understanding in depth of substantive and procedural criminal law and many of its peripheral civil aspects
>
> Judge Thornberry's participation in this committee activity has been enthusiastic and faithful and his contributions have been extensive and valuable.

Judge McCree concludes:

> I have a personal test which I employ in evaluating a judge. I ask myself whether I could accept an adverse verdict from him with the abiding conviction that I had received a fair hearing in terms of the judge's knowledge of the law, his capacity for patience and his desire to ascertain the truth. Judge Thornberry meets my test.

(The letter referred to for inclusion in the record was marked "Exhibit 14" and appears in the appendix.)

Senator HART. Anyone who knows Wade McCree knows that he grades his papers pretty efficiently. This is all the testimony I need with respect to Judge Thornberry.

I cannot fail to say, however, that Ralph Yarborough is a very persuasive advocate, too.

But I, as a lawyer, would be very uncomfortable sitting around biting my thumbs over whether the Supreme Court is going to be demeaned or enhanced when we are talking about the opportunity to put two men like this on it.

They are goth good, competent lawyers. They are both men whose public lives have been tested. They are both men whose integrity cannot be questioned.

Senator YARBOROUGH. I compliment the distinguished Senator from Michigan. I agree with him.

Mr. Chairman, may I make one more statement in the light of certain colloquy between Senators Fong and Griffin. I served on the Post Office Committee with Senator Fong, since I came to the Senate in April of 1957, we had almost 4 years to go at that time on President Eisenhower's term. Of the nominations for the Postmastership sent up from my State to the Post Office and Civil Service Committee by President Eisenhower, I am certain that I saw that over 80 percent of those were confirmed. I want to get that and place the numbers in the record. I never personally held up one. But I did hold up some over bitter controversies in the cities that the people themselves raised. But not on my own volition. I never held up one.

Furthermore, there were two judicial vacancies in the Federal bench. One of those was filled by President Eisenhower's nomination. The other he nominated for the southern district of Texas, the Honorable Everett Kennedy, a son of a much-beloved former Republican district judge. I personally approved him. I regretted that he was not confirmed. But some matter arose. He was not confirmed. I did not hold up the judicial nominations in my State on a partisan basis during the years that I was here while President Eisenhower was President.

Senator HART. Mr. Chairman—the nomination and confirmation of a judge, district, circuit, Supreme, justice of peace, takes a political action. Is anybody shocked? What is wrong with this?

Just a minute, Ralph.

The test, what we should seek, what this Nation is entitled to, is competent men and women, if you will, on the courts of the country.

Now, it may be interesting from which side of the railroad tracks they grew up, or came, or who their friends were, or whether, as with Frankfurter, he wrote Franklin Roosevelt a lot of letters and got a lot back.

These things are of great interest.

But let us not fog this question up to a point where we lose sight of what our obligation is.

Is Abe Fortas a distinguished American lawyer, does he have the intellectual capacity effectively to preside on the Supreme Court, has he been tested, can you make that judgment? Of course we can.

Senator SMATHERS. If given the opportunity.

Senator HART. Is Homer Thornberry equipped to go to that High Court? We have heard the testimony of men who have observed him intimately as fellow judges. He has a public record that shows he had no head start, but he has landed where he has landed, because he is good.

What is wrong with that?

I started off by saying there is political activity in the creation of courts. Of course there is. To the extent that that is a factor here—it is not a question so much of whether these are political plums—it is whether we are going to have the plums sit on the shelf until November and see if something else can grab it. If that is the way we want to argue, let them. It falls both ways. It is irrelevant. The basic obligation of this Senate is to find out if these two men are equipped, would the Court be enhanced.

As a lawyer, I have not the slightest doubt that I am talking about two men who would run rings around me as a lawyer.

The CHAIRMAN. Thank you, Judge.

Senator YARBOROUGH. I thank the Senator for his fine statement. I think that proves my case here.

The CHAIRMAN. Kent Courtney.

Senator HART. Before that—may I add, that Judge Ment of Maine is confirmed by men who would devote out of dedication to their profession and country an enormous amount of time to making this kind of judgment. The American Bar Association's Committee on Judicial Selection, whose chairman has been patiently sitting here for these several days. They say of these two men they are highly acceptable to serve on that Court. Let us not get that lost in the political fog around here, either.

The CHAIRMAN. Proceed, sir.

STATEMENT OF KENT COURTNEY, NATIONAL CHAIRMAN OF THE CONSERVATIVE SOCIETY OF AMERICA

Mr. COURTNEY. My name is Kent Courtney. I am National Chairman of the Conservative Society of America. My business address is Post Office Box 4254, New Orleans, La. I am also publisher of the Conservative Journal.

I agree with the Attorney General, Ramsey Clark, that President Johnson has a right to appoint a new Chief Justice——

Senator YARBOROUGH. Mr. Chairman, may Justice Thornberry be excused?

The CHAIRMAN. Yes, sir; until next Wednesday.

Proceed.

Mr. COURTNEY. I agree with the Attorney General that President Johnson has a right to appoint a new Chief Justice in contemplation of a retirement and a resultant vacancy. To attempt to delay the appointment by senatorial procedural manipulation and party politics seems inappropriate and beneath the dignity of the Senate. In my opinion, the overriding issue today is the issue of communism, and the international Communist conspiracy is a fact, not a theory.

Other committees of this Congress and the Senate have heard thousands of hours of testimony regarding communism in government, in unions, in peace movements, student riots, and behind the guerrilla warfare in our cities. The pro-Communist decisions of the Republic Chief Justice have been documented, well documented by speeches by the Chairman.

Now, let us review certain major decisions that Mr. Fortas has made while a member of the U.S. Supreme Court. These decisions are probably just as revealing as the previous affiliations because one may be connected to the other.

A man could possibly belong to a couple of Communist fronts and could claim that his membership was innocent, and if his decisions later on proved that he had the Constitution in mind, that he was against communism, then you could forgive his previous associations. But when you look at the decisions made by Mr. Fortas as a member of the Court, you see that in seven key cases he has found himself

on the side of the Communists, then you would have to give more credence to the charges that have been made earlier before this committee that his membership on Communist fronts may have been no accident.

In *Hogo de Gregory* v. *New Hampshire*, which was decided in 1966, Mr. Fortas ruled with the majority that the State of New Hampshire could not imprison a person for refusing to answer an investigating committee's questions about past Communist activities. The State of New Hampshire was trying to determine whether a man was suitable to hold a job paid for by the taxpayers. They said if the law in New Hampshire was, if a man refused to reveal or to answer questions concerning his past Communist associations, he could be imprisoned for refusing to answer the questions of the investigating committee. And the U.S. Supreme Court Justice Fortas concurring said, in effect, that the State of New Hampshire did not have the right to inquire into the Communist affiliations of State employees and furthermore could not put them in prison for refusing to answer such questions.

Abe Fortas, in other words, was in favor of Communists have the right to hold jobs in the State of New Hampshire.

Arizona had a law that required that all State employees in Arizona declare they were loyal to the United States and were not sympathetic to or members of any Communist organization. On April 18, 1966, Justice Fortas voted to invalidate the Arizona loyalty oath.

The Congress of the United States has passed a law saying that Communists could not hold office in unions if those unions wanted to be represented before the National Labor Relations Board. It so happened there were six men who were overseers of the Union of Mine, Mill & Smelter Workers who filed affidavits saying four officers of the union were not members of the Communist Party when in fact they were. Justice Fortas wrote the decision, and the men who had been convicted of defrauding of the Government by signing false affidavits were set free.

In other words, Abe Fortas is of the opinion, and his opinion now has the effect of being the law of the land, that a member of the Communist Party has a right to be a member of a union, and this union then has a right to be represented by the National Labor Relations Board.

In January 1967, another case involving loyalty oaths, Abe Fortas ruled that the State of New York did not have a right to pass laws that prevented Communists from holding jobs in State universities and public schools. Now, here again Justice Fortas found himself on the side of Communists who wished to teach and preach the overthrow of the U.S. Government by force and violence. On the basis of this decision alone, it is my opinion that Justice Fortas should not be allowed to sit on the Supreme Court, much less be its Chief Justice.

In November 1967, in the case of *Whitehill* v. *Elkins*, Abe Fortas voted with the majority to declare unconstitutional the loyalty oaths required of all State employees in Maryland. Now, therefore, in several cases Abe Fortas has said that Maryland, Arizona, and NewYork cannot have loyalty oaths. In effect, this means that it throws out the loyalty oath requirements of all of the States of the Union.

In two other decisions, Justice Fortas indicated that he was more interested in protecting the right of the Communists than he was the rights of the citizens and the taxpayers. On December 11, 1967, in the case of the *United States* v. *Robel*, Fortas ruled with the majority on the Court to invalidate section 5 of the 1950 Subversive Activities Control Act which made it a crime for a Communist Party member to work in a defense plant. And on January 17, 1968, Justice Fortas agreed in a unanimous decision in the case of *Schneider* v. *Smith*, that the Federal Government not put up a screening program against subversives, Communists, anarchists, who want jobs in the U.S. merchant marine. Here is a case where the merchant marine is subsidized by the taxpayer, and certainly a lot of us do not want Communists on board the ships. We want loyal seamen aboard our ships, men who won't tell about the contents of the cargo, about the movements of the ships: especially when we are at war. But here we find that Abe Fortas and the rest of the Court said that the U.S. Government and the operators of the ships do not have the right to keep Communists off the ships. In these two cases, then, Justice Fortas has indicated that he is opposed to the Congress of the United States setting up protective laws to control Communists in defense plants and in the merchant marine.

In summary, in these seven cases Justice Fortas ruled with the Communists, with Communist individuals on behalf of the Communist conspiracy, and voted against the Congress of the United States, and voted against the individual States in their efforts to control subversion among teachers and other employees. Based on these seven decisions, it is my personal belief, and I believe the majority of the 20,000 readers of my publications, that Justice Fortas should not be allowed to sit as a justice of the least important court of the land, the least important court in any of the States, much less be appointed and elevated to the Chief Justice of the U.S. Supreme Court. In conclusion, and as a matter of my personal opinion, I believe that Abe Fortas should be impeached.

The CHAIRMAN. Thank you, Mr. Courtney.

Now, who is the next witness from out of town?

Mr. LEWIS. I am—Marx Lewis.

The CHAIRMAN. Come up, sir.

STATEMENT OF MARX LEWIS, CHAIRMAN OF THE COUNCIL AGAINST COMMUNIST AGGRESSION

Mr. LEWIS. I will try to read this rather hurriedly.

The CHAIRMAN. Identify yourself for the record.

Mr. LEWIS. Yes, sir—I will from the statement.

The CHAIRMAN. Yes, sir. You can read it. Identify yourself for the record, please.

Mr. LEWIS. My name is Marx Lewis. I am the chairman of the Council Against Communist Aggression. Our national office is in Philadelphia. We were organized back in 1951, the middle of the Korean war, when a great many liberals were opposing our policy there, and were favoring a policy which we thought would add another chunk of free territory to the Communists.

Now, I have been identified with the American labor movement for many years—at the time of the formation of this council, and up until a few years ago, I was general secretary-treasurer of the United Hatters Cap and Millinery Workers International Union, AFL–CIO.

We believe that the elevation of Mr. Justice Fortas to the position of Chief Justice of the United States should be viewed by the Senate in the light of its impact on our ability to defend our institutions against Communist subversion. Let me say at the outset that I am not questioning the loyalty, patriotism, or legal competence of Justice Fortas. I know nothing about him except what has appeared in the public record. That record is not adequate to justify any firm judgment on my part. I presume that the members of this committee have examined and evaluated all the public and confidential material bearing on these aspects of Mr. Fortas' qualifications for an office of trust. I am sure that it is understood by every member of this committee that the fact that a man has achieved great prominence and has won the confidence of important people is no substitute for careful consideration prior to assuming any position of trust with the Government.

The committee also knows that the public record does reveal that Mr. Fortas was associated in his earlier years with several Communist-front organizations and that those years covered a period when it was very common for American intellectuals to succumb to Marxist ideas and to become involved in Communist activities in varying degrees.

There is nothing in the public record which shows clearly whether Mr. Fortas was one of those who subscribed to the Communist philosophy or whether he differed strongly with those about him who were known to have a Marxist bent. All the public knows is that Mr. Fortas had some association with four groups that have been designated as Communist fronts. Some might conclude from this that he probably had views during the period that he was associated with those groups that were not hostile to the Communists.

It would no doubt clear the air and set minds at ease if the committee would elicit for the public record a clear statement from Mr. Fortas about his attitudes toward communism in this early period of his career and the subsequent changes, if any, in his thinking. I cannot imagine that Mr. Fortas would have any objections to this, since he himself argued in one of his early legal cases that it was more important to examine the known beliefs and attitudes of a Government employee than to examine only his associations in resolving questions about security.

Those who have impugned Mr. Fortas' loyalty on the basis of his past associations would no doubt resolve their doubts if this committee were to establish that in the 1930's Mr. Fortas was known to be a vigorous critic of Stalin's brutal forced collectivization of Soviet agriculture, of the show trials and the bloody purge of 1937–38, of the Hitler-Stalin pact, and the Soviet invasion of Finland. They could hardly continue to question Mr. Fortas' opposition to totalitarianism if the committee could establish the fact that Mr. Fortas was not one of those who favored turning Eastern Europe over to the tender mercies of Stalin and that he did not agree with those who argued in

1945 that we should share our atomic bomb secrets with the Soviet Union. They would be relieved to learn that he never believed Mao Tse-tung to be merely an agrarian reformer, if that is the case.

I suggest that these hearings could serve a very useful purpose in setting the minds of the doubters at rest if they would put in the public record the views that Mr. Fortas held on these and other important issues that would demonstrate clearly that he was never a Marxist-Leninist or a follower of the party line.

My objection to Justice Fortas' confirmation does not rest upon any doubts about his past associations or beliefs. It rests entirely upon the fact that Mr. Fortas has long been in the forefront of the battle to weaken the defenses our Government has erected to protect this country against Communist subversion. Mr. Fortas has been a vigorous opponent of the Government's loyalty and security programs since they were instituted in the Truman administration. His views were outlined in considerable detail in an article he wrote for the Atlantic Monthly in August 1953. After severely criticizing the loyalty program, he advanced a proposal for certain reforms which would have virtually destroyed the program as a means of screening out security risks.

For example, he suggested that no employee should be subjected to a loyalty hearing unless there was reason to believe that the employee had engaged in activities inimical to the United States within the last 3 or 5 years. Anyone familiar with the way in which the Communists operate knows that this is completely unrealistic. Consider, for example, the fact that the only evidence that pointed to the Communist ties of the notorious Soviet agent, Harold "Kim" Philby, was his Communist activity during his student days at Cambridge. He carried on a successful masquerade for over three decades, all the time doing his own country and ours tremendous damage. None of the actions inimical to his own country were carried out in the open, of course. It should have been clear to Mr. Fortas in 1953 that the screening rules he proposed would have been completely ineffective against such dangerous Soviet agents as Alger Hiss, Harry Dexter White, and Laughlin Currie, whose treachery was still very fresh in everyone's mind.

Mr. Fortas also proposed excluding from consideration in loyalty hearings any involvement in Communist-front organizations prior to the time they were officially designated as front organizations. He would have made an exception from this exclusion for those who appeared to have been a part of the Communist control apparatus of the front, but Mr. Fortas strains our credulity in suggesting that until the Attorney General officially applied the red label to the front groups only the Communists knew that they were Communist fronts. The adoptions of a rule of this type would have provided an escape for many an individual who knowingly cooperated with the Communists during the period before the front groups were officially so labeled by the Attorney General. This would have badly weakened the security program.

Mr. Fortas made a number of other suggestions that would have greatly hampered the weeding out of security risks from Government employment had they been adopted. He implicitly took the position

that it was better for the Government to err on the side of employing security risks than to err on the side of safeguarding our national security.

Fortunately neither Congress nor the executive branch agreed with Mr. Fortas in this stand. Our Government has consistently held that national security considerations must take precedence over the rights to Government employment of those individuals whose record of association and beliefs provides good reason to suspect that they may not be completely loyal to the United States.

Unfortunately, the judicial branch of the Government has demonstrated both the will and the power to override the other two branches of Government in this matter. The Supreme Court has taken the lead to emasculating and nullifying laws passed by Congress that were designed to safeguard this Nation against subversion by the agents of the Soviet Union. Since his elevation to the Supreme Court Mr. Fortas has clearly demonstrated that his opposition to effective safeguards against subversion remains as strong as ever.

This was demonstrated by his concurrence in the opinion delivered by Chief Justice Warren in *United States* v. *Robel* last year. This opinion found that Congress had acted unconstitutionally in making it illegal for members of the Communist Party to work in designated defense plants. The opinion denied that the Government had any right to invoke its "war power" or the "concept of national defense" to safeguard our vital defense plants from infiltration by known members of the Communist conspiracy as had been done by the Subversive Activities Control Act of 1950.

The Court found a new and previously undiscovered right in the first amendment—the right of association. Justice Fortas and the four other members of the Court who joined in this opinion equated the protection of this new-found right to the defense of the Nation itself. They said:

> It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

The Court—and Justice Fortas—specifically rejected the suggestion that it should balance the interests of the Government in safeguarding our security against "the first amendment rights asserted by the appellee." The Court said, "We deem it inappropriate for this Court to label one as being more important or more substantial than the other."

This must be one of the most shocking utterances ever to come from any Court. What it means is that the Court denies to the Government the basic right of defense against those who associate together, under the control and direction of a foreign power, for the purpose of overthrowing our free institutions. In view of Justice Fortas and four of his colleagues on the Supreme Court the right to associate to conspire against the Government actually takes precedence over national security, since the Court found for the appellee. Those who understand the nature of the Communist conspiracy and its objectives have found the Court's reasoning in *Robel* beyond all comprehension. Justice White wrote a stinging dissent in which he gave an excellent description of the Communist conspiracy and the reason we must defend ourselves against it. He said:

The national interest asserted by the Congress is real and substantial. After years of study, Congress prefaced the Subversive Activities Control Act of 1950 * * * with its findings that there exists an international Communist movement which by treachery, deceit, espionage, and sabotage seeks to overthrow existing governments: that the movement operates in this country through Communist-action organizations which are under foreign domination and control and which seek to overthrow the Government by any necessary means, including force and violence; that the Communist movement in the United States is made up of thousands of adherents, rigidly disciplined, operating in secrecy, and employing espionage and sabotage tactics in form and manner evasive of existing laws. Congress therefore, among other things, defined the characteristics of Communist-action organizations, provided for their adjudication by the SACB, and decided that the security of the United States required the exclusion of Communist-action organization members from employment in certain defense facilities.

Justice White noted that there was no question but that the Communist Party was a Communist-action organization within the meaning of the act, meeting all the criteria described above. He also observed that the Supreme Court itself had accepted the finding of Congress that the Communist Party posed a threat "not only to existing government in the United States, but to the United States as a sovereign, independent nation."

It was not at all clear to Justices White and Harlan, who joined in his dissent, why the Constitution should be interpreted as giving priority to the rights of association of conspirators over the rights of all the rest of us to protect ourselves against their freedomphobic conspiracy. If in the name of national defense the Government can ask our fine patriotic young men to give up their lives, why can it not ask a participant in a foreign-controlled conspiracy against the United States to give up the privilege of working in one of our vital defense plants?

The *Robel* decision opens the door for the infiltration of Communist saboteurs and agitators into our vital industries. This is bad enough, but it portends an even more dangerous development. It is certain that before long the Supreme Court will be asked to rule on the right of the Government to bar the employment of Communists by the Government itself. With *Robel* as a precedent it seems highly likely that a Court headed by Chief Justice Fortas will find that the Government has no right to refuse to hire Communist Party members. And if members of the Communist Party itself are ruled eligible for Government employment, loyalty as a test of eligibility for Government employment will become a dead letter.

Our Government's defense against penetration by Soviet agents and sympathizers will be even more completely emasculated than they would have been by the hamstringing changes suggested by Mr. Fortas back in 1953. The doors will have to be opened to the secret party members such as Alger Hiss and to the open party members alike. We will again find ourselves as wide open to espionage and subversion as we were in the days when Hiss, White, Currie, Witt, Pressman, et al., were able to wheel and deal on Moscow's behalf with complete impunity.

The *Robel* opinion in which Justice Fortas concurred did suggest that it might be permissible under the Constitution to exclude some Communists from some types of employment. It drew a distinction between active and passive members of the Communist Party. In concurring in the drawing of this distinction Justice Fortas does not enhance our respect for either his legal logic or his perspicuity, if not his

honesty. The implication is that there are members of the Communist Party who are sufficiently dangerous to our national security that the Government may be justified in overriding the constitutional rights guaranteed by *Robel* and may legally exclude them from employment in certain defense plants. The Court in taking this position seems to be saying that national security considerations can take precedence over freedom of association provided the threat to national security is demonstrable to the satisfaction of the Court. Justice White pointed out that the Court apparently wished to arrogate to itself the right to determine which members of the Communist conspiracy were sufficiently dangerous that they might be denied one of their purported constitutional rights. We may infer from this that Justice Fortas and his colleagues did not object to the Subversive Activities Control Act of 1950 because it infringed upon a previously unknown constitutional right in making the employment of Communists in defense plants illegal. They imply that they would be willing to accept such a restriction in the case of certain party members. Their real objection to the act, therefore, is that it presumes that all Communist Party members pose a danger to our national security if employed in strategic industries or positions. The Court employed a specious constitutional argument in order to nullify the judgment Congress had made about the significance of membership in the Communist Party.

As Justice White pointed out, Congress after long and careful study decided that the members of the Communist Party were potentially dangerous. This was no casual "seat of the pants" judgment. Those who have studied the Communist Party know that there is no such thing as an inactive or passive party member unless he has taken that status on orders from the party. They know that the most dangerous participants in the Communist conspiracy are the so-called sleepers who seem to be inactive or without ties to the party but who may do extremely valuable work covertly and who may be summoned to more active or more open duty whenever it is to the advantage of the party.

When five Justices of the Supreme Court suggest that these passive members of the Communist Party are benign, innocent individuals who pose no potential threat to our national security, we can only conclude that these Justices are uninformed and naive. However, it is very difficult to conceive of Justice Fortas being uninformed and naive in this area. He has been able to observe the machinations of the Communists at close range since he entered Government service in 1933. He was personally acquainted with the most dangerous passive Communists who penetrated our Government.

When they were exposed he must either have been shocked to discover what they had done, or he must have had sufficient knowledge of Communist methods to know that those who appear benign can actually be very deadly. He undertook the defense of a number of Government employees accused of having Communist connections in the late 1940's and early 1950's. Knowing him to be a thorough lawyer, we may assume that he undertook to inform himself about the nature of the Communist movement in connection with these cases.

I find it difficult to believe that Justice Fortas really thinks that a passive member of the Communist conspiracy is less dangerous to our national security than an active party member. I would think that since he has seen the great damage that passive Communists can do from

an unusually good vantage point he would be in the forefront of those warning the Nation of the danger posed by covert members of the party and seemingly harmless fellow travelers.

I am at a loss to understand how Justice Fortas can concur in a decision of the Court that is predicated upon a proposition that is demonstrably false. This committee should explore this question with Justice Fortas and discover, if possible, whether Justice Fortas, despite all his experience, is truly ignorant of the dangerous fallacy involved in trying to assign degrees of dangerousness to Communists depending upon the intensity of their activity. If Justice Fortas professes ignorance in this area, we will be forced to conclude that his learning ability has been greatly exaggerated. On the other hand, if he recognizes the fallacy, he must be asked to explain why he concurred in the *Robel* opinion predicated upon it.

Justice Fortas in concurring in the *Robel* opinion gives us clear notice that he still favors the hamstringing of the Government's internal security program. This process has already been far advanced by the Supreme Court, and there seems to be no reason to doubt that Mr. Fortas would use the office of the Chief Justice to advance it still further. The confirmation of Mr. Fortas to that post would be tantamount to a vote for judicial repeal of laws that are absolutely vital to our national security. It would be tantamount to saying that the Senate agrees with Justice Fortas that it is more important to protect the right of a few to take part in a foreign-controlled conspiracy to destroy our liberties than it is to protect ourselves against that conspiracy.

I am sure that there is not a single Member of the U.S. Senate who would want to run for election on such a platform. The American people do not agree with Justice Fortas and his four colleagues that the Constitution requires them to disarm this country in the battle against Soviet subversion. Since the Constitution does not require that Justice Fortas and his colleagues be responsive to the wishes of the electorate, the people must of necessity look to the Senate to speak for them in this matter of vital national interest. I am sure that if the vast public were informed of the vital issues at stake they would demand overwhelmingly that you recommend against confirmation of Justice Abe Fortas for the office of Chief Justice.

Senator SMATHERS. All right, sir.

Our next witness will be Charles Callas, former research assistant, Internal Security Subcommittee.

This is the last out-of-town witness. When we conclude with this witness, we will go over until 2:30 and hear the balance of the witnesses that we have listed.

All right, Mr. Callas, you may proceed.

STATEMENT OF CHARLES CALLAS, FORMER RESEARCH ASSISTANT, INTERNAL SECURITY SUBCOMMITTEE

Mr. CALLAS. Thank you.

My name is Charles Callas. My mailing address is Box 1222, Grand Central Station. I was formerly a research assistant to the Internal Security Subcommittee, and I served on that committee at the time of the Owen Lattimore hearings in 1952.

I would also like to state in the past I was a member of the National Youth Administration Advisory Board of New York City. I was appointed to that board by Anna M. Rosenburg, who has long been a confidant of the President of the United States, and of course President Johnson himself had been one of the leaders of the National Youth Administration itself.

I would like to add before I begin that after I had left the Internal Security Subcommittee, I gave this committee important information upon a witness who had been used by this committee and other committees of the Congress, a man who had been a Communist, was declared to be an ex-Communist, and I gave the committee information that he had compromised his testimony and was doing a great deal of damage.

I continued reporting on this, both to the Congress and to the Federal Bureau of Investigation, and in 1955, the Internal Security Subcommittee took up the matter of Harvey Matuso, and in 1956 he was convicted of perjury, after he had been indicted by a grand jury. I aided in that grand jury investigation.

I have always tried to get at the basis and facts of all discussion on the matter of communism, and that is why I am here today.

I did appear previously as a witness against the nomination of Mr. Abe Fortas on August 5, 1965.

As a former researcher for your Subcommittee on Internal Security, I am aware of the necessity for the Members of the Senate to have accurate and factual information upon which to base their actions in performing their responsibilities to the American people. I believe strongly that if anyone misinforms, or in any way attempts to deceive the Senate, he not only maliciously interferes with the business of the Senate but he harms the American people as well.

I strongly oppose the nomination of Mr. Abe Fortas to be the Chief Justice of the Supreme Court of the United States because I believe that the record shows that the nominee has indeed misinformed and deceived the Senate. On August 5 of 1965, I asked this committee to conduct an inquiry into the purpose of Mr. Fortas in not aiding the Senate when he was in a position to do so. This committee responded by requesting Mr. Fortas to write the chairman a letter dealing with my aspect of the record that he felt he would like to deal with just to be sure that the record was absolutely complete for all posterity.

That is found on page 55 of the printed hearings.

Mr. Fortas did write the letter which did not add any information for the moment—much less posterity. His letter stated his view that "Upon reflection, I doubt if further comment—in addition to the statements that I made at the hearing—with respect to the testimony of the two hostile witnesses who appeared in the proceedings, would serve any purpose." He added that his firm has represented various persons accused of activities which were repugnant to them as well as to Americans generally.

The only client of Mr. Fortas that I had mentioned in my testimony was Owen Lattimore and I submit, Senators, that it was Mr. Fortas' defense of Mr. Lattimore that should concern you. If Mr. Fortas at this late date would state that Mr. Lattimore's activities on behalf of the Communist position was repugnant to him, Mr. Fortas would go far

toward removing some of the opposition to his appointment. But the record again will show that this stand by Mr. Fortas is not likely to take place.

Let us remember that Mr. Fortas has been associated with two legal groups organized by the Communists to aid Communists in legal difficulties. Mr. Fortas says he has a "blank" mind about his joining the International Juridical Association, and that although he was a member of the National Lawyers Guild, he left that organization when it appeared "rather clearly that a leftwing group had moved in to take control of that organization."

Mr. Fortas, then, in fact states that he knew the difference even between Communists and leftwing positions. So when Mr. Fortas used known Communists and leftwingers, as well as documents from Communist sources, in his defense of Mr. Lattimore, it must be acknowledged that Mr. Fortas knew what he was doing. And when you realize that Mr. Fortas attempted thereby to destroy ex-Communists by the use of Communist sources, his actions must bear scrutiny.

The testimony of Dr. Marjorie Shearon on that same date is valuable for its listing of the many Communists organized in front organizations. A perusal of the members of the Committee for Nation's Health will show you Mr. Fortas was associated with persons who were members of the National Lawyers Guild at a time when Mr. Fortas was reportedly withdrawn from that organization.

Senators, Mr. Fortas cannot have it both ways. He states that he left the National Lawyers Guild because a leftwing group took control, and then joined the people from the same group in another organization at a later date.

You should also remember, Senator, that Mr. Fortas told this committee in August of 1965 that it has been his law firm's position that when it had a client with a clearance problem the policy was to have the client make full disclosure or the firm would not represent him.

In the specific case of Owen Lattimore, this stated policy of Mr. Fortas was obviously ignored.

And I would suggest Mr. Fortas attempted to leave certain thoughts with this committee that were in variance with the facts.

It is important for this committee to remember that Mr. Lattimore was probed by two Senate committees. The first time by the Tydings committee in 1950, and the second time by the McCarran committee in 1952. On both occasions, Mr. Lattimore was represented by Mr. Fortas. The Tydings committee cleared Mr. Lattimore of any wrongdoing, while the McCarran committee accused Mr. Lattimore of being a "conscious, articulate instrument of the Soviet conspiracy."

One of the main reasons that the McCarran committee came to the opposite opinion of the findings of the Tydings committee was that the McCarran committee had use of the files of Mr. Lattimore while the Tydings committee did not.

But it was not with the help of Mr. Lattimore or Mr. Fortas that the Lattimore files were available to the McCarran committee. The files were found and subpenaed as a result of information supplied to the office of Senator Joe McCarthy. Of course, the Tydings committee thought that it had access to the Lattimore files when it received a letter from Mr. Fortas stating that "We have also collected Mr. Lattimore's private files as well as published works, and we request that

your committee direct its investigators to examine these documents."

The perusal of the lengthy record of the Tydings and the McCarran hearings makes it quite clear that Mr. Lattimore said one thing to the Tydings committee and was forced to admit quite another to the McCarran committee. The difference in testimony—it must be stressed—was in the possession of the real filles by the McCarran committee.

Now is can be thought that when Mr. Fortas told the Tydings committee that he had the files of Mr. Lattimore that he really believed that the Lattimore files had been given to him to aid in the preparation of Lattimore's position. But the time Mr. Lattimore appeared before the McCarran committee it was obvious that the wrong files had been available previously. At that time I would imagine that Mr. Fortas would have demanded an explanation from his client. But no—Mr. Fortas continued as counsel even after Mr. Lattimore was indicted on several counts of perjury by a Federal grand jury following the McCarran hearings.

And what now, Senators, of Mr. Fortas' statement that if a client did not make full disclosure, he would not be represented by the Fortas law firm?

At this point I would like to read one paragraph of a statement made by the chairman on behalf of the Unanimous Subcommittee of the Internal Security Subcommittee in 1952 at the termination of the Owen Lattimore hearings. I would request, Mr. Chairman, to put the entire statement that was prepared by seven Senators in the record following this part of my statement.

The chairman stated:

The hearings of the witness Owen Lattimore are now closed. But the committee has something to say. What I am going to say now comes from the Unanimous Committee that heard this hearing. It has been the settled practice of this committee to research its conclusions with respect to the substance of testimony that it has taken until the conclusion of the hearings on the particular matter under investigation. After careful consideration, however, this committee feels it proper at this time to make a statement with respect to the conduct of this witness as a witness during the time he has been before us. In doing this, the committee is not reversing its policy of reserving judgment. What the committee has to say now represents facts, not conclusions—not the findings of the committee, but its observations with respect to the deportment and conduct of Mr. Lattimore as a witness.

Mr. Lattimore came here at his own request to appear and testify. He came with a 50-page statement which was no casual document, the more obvious indicia of careful preparation and the witness testified he had been working on it for months and had been assisted by the counsel.

I would like to add that his counsel was, of course, Abe Fortas.

It was released to the press before delivery, and Mr. Lattimore's invective was scattered to all parts of the country. Many times when asked if he had facts to support the insulting conclusions, the witness replied that he did not. The committee has been confronted here with an individual so flagrantly defiant of the U.S. Senate, so outspoken in his discourtesy, and so persistent in his efforts to confuse and obscure the facts that the committee feels constrained to take due notice of his conduct.

And the rest of this I would like to have put in the record, sir.

(The material referred to for inclusion in the record was marked "Exhibit 15" and appears in the appendix.)

Mr. CALLAS. I might add, Senators, I participated in the preparation of that statement that has just been put into the record.

Another statement to this committee by Mr. Fortas in August of 1965 was to the effect that he, Mr. Fortas, could not conceive of misrepresenting whether Dr. Dodd or any other witness was or was not a Communist.

At the time of her use as a witness before the Tydings committee by Mr. Fortas, Dr. Bella Dodd had recently been expelled from the Communist Party. She did eventually become an ex-Communist, but at the time of her appearance she, in her own words wirtten later in her book, "School of Darkness," "reacted emotionally as a Communist and answered as a Communist."

A perusal of her testimony clearly shows this.

According to Lattimore in his book, "Ordeal by Slander," written with the help of Mr. Fortas, Dr. Dodd's status as an expelled Communist was supposedly checked by Mr. Fortas through the Department of Justice.

If Mr. Fortas had really checked with the Justice Department he would have learned that Dr. Dodd had not yet aided the Justice Department's continual investigation of communism. But Mr. Fortas could have learned that Dr. Louis Budenz was a real ex-Communist and had really aided the Justice Department. Of course, Mr. Fortas would not have used this information because it was Dr. Budenz' credibility he was trying to destroy.

Mr. Fortas did not tell the Tydings committee of Palmer Weber, a Communist known at the time to Dr. Dodd, and who met Dr. Dodd in Washington to help prepare her testimony. Mr. Weber has pleaded the fifth amendment in testimony before your Internal Security Subcommittee in 1953. It was Mr. Weber who brought Dr. Dodd to Mr. Fortas' office, where her statement was mimeographed.

And Mr. Fortas has asked this committee to believe that he left the National Lawyers Guild because a leftwing group had taken over. At the time of the Tydings committee hearings, the record shows that Mr. Fortas surrounded himself with leftists who winged right into the Communist Party itself.

I would like at this point to read into the record the citation of Palmer Weber from your own hearings.

These are from the Internal Security Subcommittee hearings of October 10, 1960.

It states that they are excerpts from the testimony of Frederick Palmer Weber.

The CHAIRMAN. You want to put that in the record?

Mr. CALLAS. Sir, I am only going to recite two points of it, that is all.

The CHAIRMAN. Well, we are running out of time. We will put it in the record.

Mr. CALLAS. All right, fine.

Exhibit 20. Excerpts from testimony of the Frederick Palmer Weber hearing as printed in part 4 hearings on Interlocking Subversion in Government Departments April 21, 1953, pp. 177–200, being questions on which Mr. Weber, pleaded his privilege under the fifth amendment:

Did you use the office of the National Lawyers Guild to conduct a campaign against the OBER bill P. 195? Did you work in conjunction with a man named Robert Silverstein who was an executive secretary of the National Lawyers Guild in this project (P195)?

Hearings before the Subcommittee on Investigating the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, U.S. Senate, 86th Congress, second session, October 10, 1960:

Mr. SOURWINE. Are you presently, Mr. Weber, a member of the Communist Party U.S.A.?

Mr. WEBER. I shall plead the privilege, Mr. Chairman.

Mr. SOURWINE. Did you resign from the Communist Party U.S.A. January 1951?

Mr. WEBER. I again plead the privilege.

I suggest also that my testimony before this committee on August 5, 1965, should be considered for the detailed information it contains relative to the various techniques used by Mr. Fortas to misinform the Tydings committee. The one part that I would like to put into the record is a part, Senator, that involves putting a transcript into a sealed envelope by Mr. Fortas, handing it to his client, Mr. Lattimore, who had later testified before the McCarran committee that he had never seen the contents of that envelope. Mr. Tydings turned that envelope, through Mr. Lattimore—I apologize, sir. Mr. Fortas turned that testimony in the sealed envelope through Mr. Lattimore to the Tydings committee. I will just read this part here:

When the matter came up before the Internal Security Subcommittee, as it did, the counsel and the Senators of the subcommittee were quite interested in the fact of why it was put in a sealed envelope.

I am now quoting Mr. Abe Fortas, before your own subcommittee.

The character of the transcript was such that I concluded that it had a bearing upon Mr. Budenz' credibility as a witness. But it was also such that I concluded that I did not want to have anything to do with making it public. The reason for that being is that the transcript contained matters pertaining to Mr. Budenz' private life which I found to be quite distasteful, but also quite relevant to the issue of Mr. Budenz' credibility, that being a legal judgment.

Now, Mr. Fortas later testified in the hearings that the material had been handed to him by a fellow attorney named Mr. Joseph Fengillie. Mr. Fengillie testified before the McCarran committee that there was no reason that he knew that this had to be put in a sealed envelope, because it was a public document. Subsequently, Senator, I went back into the files of the New York Times and discovered that on September 13, 1947, and so forth, the various days thereafter, all the material presented in the New York Times that Mr. Fortas said he did not want to have anything to do with making it public. I submit that Mr. Fortas did not tell the truth to a subcommittee of this very committee, which is now asked to elevate him to be Chief Justice.

(The material referred to for inclusion in the record was marked "Exhibit 16" and appears in the appendix.)

Mr. CALLAS. I oppose Mr. Fortas because of the record. I have always believed, and I so wrote Mr. Fortas years ago, that charges such as I exhort today should be investigated so thoroughly that there will be no doubt in anyone's mind that the final results are the truthful ones.

But, Senators, the record is clear that over the years this Senate as well as the House has been denied the proper use of the files of the Federal Bureau of Investigation. The Congress has been fed a "doctored" version of the files on occasion after occasion.

I do not believe that the chairman of this committee has seen the real file on this nominee, and I am prepared to give this committee my reasons for this belief. Let me add that I have discussed the matter of FBI files on many occasions with a distinguished former chairman and friend, the late Senator William Langer.

Millions of Americans are today divided in their attitudes toward the Supreme Court. This committee has a responsibility to unite these Americans. The manner in which this nomination is handled can go far into changing the national mood to one of support of the Court instead of the present divisiveness.

That is the end of my statement, Senator Smathers.

Senator SMATHERS. All right, sir. Thank you very much. The committee stands in recess until 2:30 p.m.

(Whereupon, at 1:40 p.m., the committee was recessed, to reconvene at 2:30 p.m., on the same day.)

AFTERNOON SESSION

Senator HART (presiding). The committee will be in order.

We resume to hear Mr. Benjamin Ginzburg.

Mr. Ginzburg.

STATEMENT OF BENJAMIN GINZBURG, A RETIRED CIVIL SERVANT

Mr. GINZBURG. Mr. Chairman, my name is Benjamin Ginzburg. I am a retired civil servant. My last post with the Government was that of research director for your distinguished committee's Subcommittee on Constitutional Rights.

At the time it was chaired by the late Senator Hennings.

I am a former assistant editor of the Encyclopedia of the Social Sciences. I have written extensively on scientific, economic, and moral-political subjects.

I mention these personal qualifications because I speak for no organization or group and voice only my own views. I am here to testify concerning doctrines advocated by Justice Abe Fortas in his recently published pamphlet, "Concerning Dissent and Civil Disobedience." And I want to point out at the outset that Justice Fortas has stated that his pahphlet is "in part * * * frankly a statement of a moral, ethical, or philosophical point of view about dissent and how it may properly—and effectively—be expressed." The Justice has thereby waived immunity from political debate, for many of the matters he talks about vitally concern everybody as a citizen and as a moral beiug. Since moral and political doctrines often have subtle implications which are not fully grasped on first reading—they are, if I may say so, like icebergs, 95 percent hidden underwater—I feel it is not presumptuous of me to use my philosophic training to bring to the surface the implications of the views the Justice has expressed in his pamphlet.

For the sake of clarity let me state my conclusions before seeking to demonstrate them. It is my judgment—and I believe it should be your judgment after you have heard what I have to say—that the views expressed by Jusice Fortas in his pamphlet should disqualify him for promotion to the august post of Chief Justice of the United

States. Had the Justice published his pamphlet before his nomination and confirmation as Associate Justice, the views he has expressed should have disqualified him even for associate membership in the Supreme Court. As the situation is today, Justice Fortas' views probably do not furnish grounds under the law for removing him as Associate Justice, but, as I shall show, they do make it incumbent on the Senate to reject his promotion to the post of Chief Justice, a post from which he could wreak far more havoc on our institutions than from his present position.

Mr. Chairman, I need hardly remind you that we are living in tense times. Relations between racial groups have become so embittered by reckless agitation and rioting as to jeopardize the chances of achieving the peaceful progress of all groups in a national community commanding the loyalty of all citizens without distinction of race, color, or creed. This is certainly no time to cry "Fire! Fire!" But this is exactly what Justice Fortas has done.

He has done this in several ways. He has enthusiastically endorsed the doctrine of mass civil disobedience founded on the technique used by Mahatma Gandhi to bring down British rule in India. He has at the same time proclaimed—by what authority I do not know—that the Nation has "confessed" that we have denied to 20 million Negroes "the rights and opportunities to which they are entitled." And he has told Negro militants that all the progress in the condition of the Negroes has been wrested from the white "establishment" by the strength and massiveness of their protests and demonstrations, including the mass civil disobedience campaigns.

Finally, in imitation of the class struggle tenets popularized by Marx and the Marxists, Justice Fortas has warned Negro militants that some of their number who get jobs in the white establishment, "will be assimilated in their outlook and will lose their separate value to the Negro cause." In other words, he has warned that some Negroes will become traitors to the Negro cause by acting as Americans first and Negroes second, even as the Marxists constantly warned that workers who collaborate with the capitalists and law and order become traitors to the working class.

Under our free institutions, I recognize the right of Justice Fortas as an individual to publish and proclaim these and other dangerous sophistries. But, Mr. Chairman, I submit that we have no business rewarding the utterer of these dangerous sophistries by promoting him to be Chief Justice of the United States. I submit also that the promotion of Justice Fortas is calculated to give added strength to these sophistries. They will be quoted in briefs to the courts as authoritative doctrine, and they will embolden both Negro and white civil rights activists, so called, to embrace the disastrous adventure of trying to solve racial problems by mobilizing "black power" against the so-called white establishment.

Lest it should be charged that I am quoting isolated phrases and sentences out of context, I propose, with the Chairman's indulgence, to review the entire pamphlet of Justice Fortas insofar as it bears on civil disobedience and the Negro problem. Justice Fortas also discusses the youth revolt and student rioting. Although he indulges in similar dangerous sophistries on this topic, I prefer not to deal with this part of the pamphlet at this time.

The first question that comes to mind is, Why did Justice Fortas write this pamphlet? What purpose was it meant to serve? The answer the Justice gives in his preface is that "I have written this little book because I think it is important that as many people as possible should understand the basic principles governing dissent and civil disobedience in our democracy." But has civil disobedience been an established and accepted trend of thought in this country—say, like the doctrine of States rights? No. Except for the isolated literary espousal of civil disobedience by Thoreau more than a century ago, nothing has been heard about civil disobedience in this country until the term was reintroduced into our political vocabulary by civil rights groups, notably by Martin Luther King and his followers, as a borrowing from the practices and techniques of Mahatma Gandhi and his campaign against British rule.

If it is to be discussed by a moral and political theorist, one would expect that the first question would be to discuss whether the idea is generally sound or is sound in some respects and not in others. But Justice Fortas does not approach the problem in this fashion. He proceeds from first to last as a convinced partisan of civil disobedience. What, in his view, is civil disobedience designed to accomplish? The clue is given by another sentence in his preface, a sentence which I have already quoted—to wit, that he is expressing a "point of view about dissent and how it may properly—and effectively—be expressed."

Here we have the story in a nutshell. Justice Fortas belongs to that class of liberals, who not only believe in the right of dissent as we all do, but who also believe that dissent by minorities must be made effective against the majority will. Thus, he champions the doctrine and technique of civil disobedience as guaranteed to make dissent effective.

We have all heard the recent complaints of dissenters that they have spoken and agitated against the majority will and feel themselves frustrated because the majority have not yielded to their demands. Justice Fortas has written his pamphlet to tell them to try civil disobedience and thus make their dissent effective. Incidentally, this is the basis on which Martin Luther King organized the civil disobedience march of the poor on Washington. In a circular prepared by him shortly before his death, King wrote:

We are taking action after bitter reflection. We have learned from bitter experience that our Government does not correct a race problem until it is confronted directly and dramatically. SCLC had to precipitate a Birmingham to open public accommodations; it had to march against brutality in Selma before the constitutional right vote was buttressed by Federal statutes.

(The material referred to was marked "Exhibit 17" and appears in the appendix.)

In contemplating the current craze for making dissent effective and using such techniques as civil disobedience to make it effective, I cannot resist indulging in an aside on how times have changed. There was a time when it used to be said that one man and the spirit of God with him make up a majority. The dissenter was admired because he sought out the truth and trusted to God to make it prevail in God's good time. Today, however, our godless liberals tell us to honor the

dissenters from the majority. Not only that, but also that we have a sacred duty to make the dissenting minorities prevail against the majority both by researching physical and psychological techniques for the dissenters and by persuading the Government and the courts to accept these techniques as somehow in accord with our constitutional and democratic system.

If we can get over our initial surprise at finding an Associate Justice of the Supreme Court engaged as a partisan in the battles of the marketplace, then his pamphlet becomes clear as a bell. The Justice is engaged in extolling dissent by the minorities, particularly the dissent that is disseminated by the self-styled leaders of the Negro minority, and in recommending the virtues of civil disobedience to make the dissent effective.

Part of the time he addresses an oratorical appeal to those already converted by singing emotionally the praises of civil disobedience. Part of the time he seeks to reason with political and constitutional theorists in an effort to persuade them that civil disobedience is in accord with the constitutional and political tradition. And still a third part of the time he celebrates the achievements of Negro militancy and warns the Negro militants to expect that some of their number will be bribed away by the white establishment.

That the central message of the pamphlet is the praise of civil disobedience is indicated by the passage the editor of the pamphlet selected to go on the cover. This quoted passage reads as follows:

> Dr. Martin Luther King said that many Negroes would disobey "unjust laws." These he defined as laws which a minority is compelled to observe, but which are not binding on the majority. He said that this must be done openly and peacefully, and that those who do it must accept the penalty imposed by the law. This is "civil disobedience" in a great classic tradition.

This is what is advertised on the cover of Justice Fortas' pamphlet.

Also addressed to the converted in order to reinforce their faith in militancy and civil disobedience is the opening gambit in the text, which seeks to liken southern segregation laws to the infamous edicts of Hitler against the Jews.

> If I have lived in Germany in Hitler's days—

The reader is told—

> I hope I would have refused to wear an armband, to heil Hitler, to submit to genocide. This I hope, although Hitler's edicts were law until allied weapons buried the Third Reich.
>
> If I had been a Negro living in Birmingham or Little Rock, or Plaquemines Parish, La., I hope I would have disobeyed the State law that said that I might not enter the public waiting room reserved for "whites."
>
> I hope I would have insisted upon going into the parks and swimming pools and schools which State or city law reserved for "whites."
>
> I hope I would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.

It is a little disconcerting to see this passage of poisonous rhetoric being followed by the Justice's promise to logically and rationally reconcile what he calls his "basic need to disobey" Hitler-like laws with his profound belief as "a man of the law * * * to uphold the law and to enforce its commands."

The attempted reconciliation, when it comes, turns out to be a piece of sophistical reasoning which is not only totally unnecessary for the

converted but should infuriate the students of political theory and constitutional law—unless they should be so overawed by the Justice's prestige that they would go along with a demonstration on his part that 2 plus 2 make 7.

I would not bother you with an analysis of the sophistry were it not that it demonstrates how strongly Justice Fortas is committed to the advocacy of civil disobedience. It is this emotional commitment which so dominates his reasoning that he not only perpetrates an outrageous fallacy but is robbed of the power to recognize the fallacy—and therefore imagines that others will see it as truth rather than fallacy.

Here, then, is what you might call the shell game by which Justice Fortas has tricked himself. He expounds the view—proposition—one, that the Martin Luther King type of mass civil disobedience resembles the Gandhi technique, with its emphasis on peaceful disobedience and the injunction to the practitioners to pay the penalty of going to jail—or accepting whatever other punishment the law prescribes—for their disobedience. As we all know, Dr. King and his successor, Dr. Ralph Abernathy, have frequently emphasized that by the device of "filling the jails" they are increasing the moral and psychological pressure of the disobedience campaign.

Then comes proposition 2. It is actually laid down in an earlier page of the pamphlet and says that civil disobedience closely resembles the procedure used by citizens to test the constitutionality of laws before obeying them. This procedure in certain cases—as say, in testing the constitutionality of a law making it a crime to impart birth control information—this procedure means committing a crime by violating the law, and later going to jail if the violated law is held to be constitutional.

In drawing the analogy between civil disobedience and the constitutional testing procedure, Justice Fortas makes no mention of the fact that civil disobedience refers to mass defiance of the law, and that the disobedience is applied not only to laws that are judged unconstitutional but to any and all laws that the protesters deem "unjust."

Indeed, mass defiance is also used as pressure to bring about new laws and new social conditions of unspecified nature that are supposed to usher in the millennium. These characteristics, which have all been observed in the practice of civil disobedience by King and his followers, make the comparison with the individual constitutional testing procedure exceedingly tenuous. They indicate that the real likeness is with the practice pursued by Gandhi and his followers of defying all laws with the object of breaking down British rule in India.

And now comes the actual manipulation of the shells. Since the testing procedure and mass disobedience both involve going to jail—although at different times and under different circumstances—Justice Fortas is able to interpret King's quoted injunction to his followers to accept punishment—in reality an injunction to fill the jails—as if it were simply the duty of an individual constitutional tester to go to jail if his constitutional suit is lost. On the basis of this verbal ambiguity, Justice Fortas is able, first, to hail the mass disobedience of King's followers as "civil disobedience in a great tradition" and then to reconcile it speciously with universal obedience to law.

This is how Justice Fortas performs his reconciliation. He begins by characterizing this disobedience as "peaceful, nonviolent disobedi-

ence of laws which are themselves unjust and which the protester challenges as invalid and unconstitutional"—a definition which, as I have previously stated, is already far removed from the true character of mass disobedience. Then he goes off on a complete tangent, as is revealed in the following passage:

Dr. King was involved in a case which illustrated this conception. He led a mass demonstration to protest segregation and discrimination in Birmingham. An injunction had been issued by a State court against the demonstration. But Dr. King disregarded the injunction and proceeded with the march as planned. He was arrested. He was prosecuted in the State court, convicted of contempt, and sentenced to serve 5 days in jail. He appealed, claiming that the first amendment protected his violation of the injunction.

I have no doubt that Dr. King violated the injunction in the belief that it was invalid and his conduct was legally as well as morally justified. But the Supreme Court held that he was bound to obey the injunction unless and until it was set aside on appeal; and that he could not disregard the injunction even if he was right that the injunction was invalid. Dr. King went to jail and served his time.

I have no moral criticism to make of Dr. King's action in this incident, even though it turned out to be legally unjustified. He acted in good faith. There was good, solid basis for his belief that he did not have to obey the injunction—until the Supreme Court ruled the other way. The Court disagreed with him by a vote of 5 to 4. I was one of the dissenters. Then Dr. King, without complaint or histrionics, accepted the penalty of misjudgment. This, I submit, is action in the great tradition of social protest in a democratic society where all citizens, including protestors, are subject to the rule of law.

Yes, ladies and gentlemen, the hand is quicker than the eye. What Justice Fortas has done is to palm off an isolated incident about Dr. King in his individual capacity (an incident closely resembling an ordinary citizen's constitutional testing procedure) as descriptive of the nature and impact of a movement of mass civil disobedience. I have no doubt that Justice Fortas deceived himself by this shell game, for it is inconceivable that, had his critical faculties been awake, he would have attempted to impose such a raw fallacy on expert students of political and constitutional theory.

After the experience Washington has had with the Poor Marchers and Resurrection City, I believe it should be unnecessary to stress the obvious—that a mass civil disobedience campaign, for all the semantic torturing of words like "peaceful" and "nonviolent," is just the opposite of obedience to the rule of law. And if there be those who blame the excesses of the Poor Marchers on Dr. Abernathy's mismanagement rather than on the principle of civil disobedience, let them read the King circular from which I have already quoted.

We intend,

Wrote Martin Luther King,

To channelize the smoldering rage of the Negro and white poor in an effective militant movement in Washington and elsewhere. A pilgrimage of the poor will gather in Washington * * * We will go there, we will demand to be heard, and we will stay until America responds. If this means forcible repression of our movement, we will confront it, for we have done this before. If this means scorn or ridicule, we will embrace it, for that is what America's poor now receive. If it means jail, we accept it willingly, for the millions of poor already are imprisoned by exploitation and discriminaton. We will in this way fashion a confrontation unique in drame but firm in discipline to wrest from the government fundamental measures to end the long agony of the hard core poor.

Do we find here the spirit of peace, obedience to law and order and democratic institutions? I challenge Justice Fortas' pamphlet wherein

he reveals his philosophy of history. It is a philosophy which pictures the oppressing, exploiting group being forced, by the process of history and the rise of a revolutionary class, to surrender, unwillingly and with stubborn reluctance, their privileges of exploitation. At the same time it pictures the new revolutionary group preparing a golden day for the world. Thus Justice Fortas writes:

> We have confessed that about twenty million people—Negroes—have been denied the rights and opportunities to which they are entitled. This national acknowledgment—typically American—is in itself a revolutionary achievement. We have proclaimed our national obligation to repair the damage that this denial has inflicted. We have made a beginning—and important, substantial beginning—in the long, difficult and enormously costly and disrupting task of reparation and reform.

Note the word "disrupting." It is an indication of Justice Fortas' belief that the reforms benefiting the Negroes are not the result of the cooperative labors of all groups in the community, but are imposed on the exploiting white class, and hence are bound to be socially and economically disruptive.

In line with this philosophy of history and the picture of a bitter struggle between the exploiting and exploited classes, Justice Fortas feels it necessary to warn militant Negro leaders to reckon with the fact that some of them will be bought off by the white establishment. Let me read you the entire passage in which this warning is made:

> The Negroes have gained much by the strength of their protests and the massiveness of their demonstrations. Even their riots—much as we dislike acknowledging it—produced some satisfaction of their demands, some good response as well as some that was negative * * *
>
> Negroes have acquired in this revolutionary process some solid instruments of solid advance. The very fact that they have been able to unite and, as a united people, bravely to assert their rights by vigorous protest and demonstration, has been a miracle * * *
>
> They have discovered that they can mass their strength and pool their protests and achieve great benefits. They have induced the establishment to accept Negroes in its highest offices. These Negroes are obtaining invaluable training as lawyers, government officials, educators, business executives, and administrators. While some of these will be assimilated in their outlook and will lose their separate value to the Negro cause, some will be a source of new and more skillful leadership and of inspiration to the younger generation.

In conclusion, Mr. Chairman, let me say that I was stunned when I read—and digested—Justice Fortas' pamphlet. I can well understand the incredulity which may be the initial reaction to charges such as I have made. The fragmentary publicity and reviewing which has attended the release of this pamphlet has not prepared the American people for these allegations.

But, gentlemen, I make no charges beyond what can be read and inferred from the text of the pamphlet. I come before you only because I consider it to be my public duty to bring this information to your attention.

I emphasize strongly that I do not accuse Justice Fortas of being a revolutionist intent on overthrowing the American system of government. I rather believe that the doctrines espoused in the pamphlet express the Walter Mitty dream life of the Justice. But I submit that even as somnambulistic ideas, these doctrines are dangerous when they are lodged in the head of a Chief Justice of the United States.

They are all the more dangerous when they have been put on paper and invested with the divinity that "doth hedge" a reigning Chief Justice.

I thank you for your kind attention.

Senator HART. Mr. Ginzburg, the committee thanks you for your willingness to voice your concern.

Did you have anything you would like to add?

Mr. GINZBURG. I would like to point out the semantic torturing which Justice Fortas is guilty occasionally of.

In discussing the revolt of youth, he says that "Where the law violation is nonviolent or technical"—and then he illustrates this—"such as blocking entrance to a campus building, or even orderly occupancy of a university facility"—in other words these are illustrations of nonviolent and technical violations of the law. In other words, if some students should come and orderly take over the Capitol of the United States or the Senate Office Building, he would regard this as nonviolent, and merely technical violation of the law.

Now, I submit that his judgment is somewhere at fault.

Senator HART. Mr. Ginzburg——

Mr. GINZBURG. I may also say in connection with this craze of nonviolence and civil disobedience—I mean nonviolence, peacefulness, and so on, I came across a passage in the review of Bertrand Russell's Autobiography, and the reviewer says that the Nazis gave his pacifism too stiff a test. "Nonviolent resistance" he says—that is Bertrand Russell—"depends upon the resistance of certain virtues against those whom it is employed." In other words, nonviolence is a technique of moral blackmail which you can use against sentimental people as a technique, but it is actually pure bunk in the claim that it is pure peaceful. It is an attempt to blackmail your moral sympathies, provoke violence on the part of the police authorities, and so on. And yet Justice Fortas celebrates this kind of direct action as nonviolent and peaceful.

Senator HART. Mr. Ginzburg, while you were testifying the committee was joined by the able Senator from Connecticut, Mr. Dodd. Senator, did you have any questions?

Senator DODD. Thank you, Senator. I have not had a chance to read the statement or hear the testimony. I think it best if I read it.

Senator HART. Mr. Ginzburg, thank you very much.

Senator DODD. What are you doing now, Mr. Ginzburg?

Mr. GINZBURG. I am retired.

Senator DODD. What do you do actively?

Mr. GINZBURG. I am writing on morals, religion, and politics, and I am concerned with cases of this sort. I have found that nobody, but nobody, has called attention to the fallacies in Justice Fortas' pamphlet.

Wednesday there was a big article on Justice Fortas in the Washington Star. It took over a page and a half, newspaper pages. And yet not a word was said about his pamphlet or what it contains on civil disobedience.

Similarly, Time magazine had a piece about Justice Fortas five or six pages long, they discussed his ability as a champagne taster, his ability to dance with the ladies, and so on, and they had one paragraph about his pamphlet on civil disobedience from which you could get no information whatsoever as to what it contained.

Senator DODD. I should tell you I have known him most of my life. He is a very, very, bright lawyer, a very fine man.

Mr. GINZBURG. I do not dispute that. As I have said, I have regarded that as his Walter Mitty dream life. You know, there are lots of people who are practical men of affairs in their daily life, but in the evening they want to let off their religion—what they call their ideology, and they will start talking Bolshevism and so on. And I submit that for the Justice of the Supreme Court, this is a dangerous practice, because people will take him seriously.

Senator DODD. I have no further questions.

Senator HART. Thank you very much. Thank you, Senator.

Scheduled as a witness is W. B. Hicks, Jr., executive secretary of the Liberty Lobby. Mr. Hicks.

If there is no objection, a statement that has been prepared by Mr. Hicks and filed with the committee, pursuant to our rules, will be made a part of the record.

(Mr. Hicks subsequently testified on Monday, July 22, 1968.)

Senator HART. This concludes the witnesses scheduled for hearing today.

The committee adjourns to resume Tuesday morning next, at 10:30, in this room.

(Whereupon, at 3:15 p.m., the committee was recessed, to reconvene at 10:30 a.m., Tuesday, July 16, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

TUESDAY, JULY 16, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:40 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), McClellan, Ervin, Dodd, Hart, Burdick, Tydings, Smathers, Dirksen, Hruska, Fong, Scott, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. The hearing this morning has been scheduled for the purpose of considering the nomination of Abe Fortas to be Chief Justice of the United States. Notice of the hearing was published in the Congressional Record, July 1, 1968. By letter of July 8, 1968, the Standing Committee on the Federal Judiciary of the American Bar Association states the committee is of the view that Associate Justice Fortas is highly acceptable from the viewpoint of professional qualifications.

Now, the biography—do you have a copy?

Justice FORTAS. I have examined it, Mr. Chairman.

The CHAIRMAN. Is it correct?

Justice FORTAS. Yes, it is.

The CHAIRMAN. It will be admitted into the record.

(The biography referred to for inclusion in the record at this point follows:)

ABE FORTAS

Born: June 19, 1910, Memphis, Tennessee.

Education: 1930, Southwestern College, Memphis, Tennessee, A.B. degree; 1933, Yale University, New Haven, Connecticut, LL.B. degree.

Bar: 1934, Connecticut; 1945, District of Columbia.

Employment: 1933–37, Yale University, Assistant Professor of law; 1934–39, Securities and Exchange Commission, Assistant Director and Consultant; 1939–41, Department of Interior, General Counsel, Bituminous Coal Division; 1941–42, Director, Division of Power; 1942–46, Under Secretary; 1946–65, Private practice of law, District of Columbia; 1965 to present, Associate Justice, Supreme Court of the United States.

Marital Status: Married.

Office: Supreme Court of the United States.

Home: 3210 R Street, Washington, D.C. 20007.

To be Chief Justice of the United States.

The CHAIRMAN. Senator Gore.

STATEMENT OF HON. ALBERT GORE, A U.S. SENATOR FROM THE STATE OF TENNESSEE

Senator GORE. Mr. Chairman, members of the committee, I have the honor and pleasure of presenting to this committee a distinguished son of Tennessee, Mr. Justice Fortas, nominee for Chief Justice.

He was born in Memphis, Tenn., where he attended public schools and Southwestern College in Memphis. After receiving his degree at Southwestern, he attended Yale Law School. He received the highest academic honors at Yale, and was editor-in-chief of the Yale Law Journal.

Thereafter he was elected to the law school faculty of Yale, in which capacity he was employed for 5 years.

He then entered Government service, and served in various Government posts, culminating in his service as Under Secretary of the Interior from 1942 to 1945, a post for which he was confirmed by the Senate.

His distinguished career as a member of the law firm of Arnold, Fortas, and Porter is well known. In 1965, he was nominated as an Associate Justice of the U.S. Supreme Court. After a hearing before this committee, he was confirmed by the Senate, his second confirmation by this body.

As an Associate Justice he began his duties in October 1965, and he has served in that capacity to this time.

On June 21, 1968, President Johnson sent to the Senate the name of Mr. Justice Fortas to be Chief Justice vice Earl Warren. If confirmed, Mr. Justice Fortas will be the 15th Chief Justice in the 179 years of our history. None of his predecessors as Chief Justice appeared before a Senate committee for confirmation as Chief Justice. He is the first and only nominee as Chief Justice to appear before a committee of the Senate. He is the only nominee to that post who has been asked to appear. The others have been confirmed either without a hearing or without personally appearing before a Senate committee.

Justice Fortas is also the first and the only sitting Justice, except for those holding recess appointments, who has ever appeared before a Senate committee.

Two other Associate Justices, White and Stone, were promoted to be Chief Justice, but neither appeared before a Senate committee in connection with their appointment to that post.

One who loves the Senate, one who deeply believes the cause of good government is served by a coequal status of our three coordinate branches of government—I welcome the precedent which the appearance of Justice Fortas establishes today. Yet we are aware, I am sure, that there are severe limitations upon the kind of questioning that a legislative committee may wish or may properly submit to a sitting Justice of the Supreme Court and that he may himself answer.

Fundamentally, these limits are because our Constitution provides for an independent judiciary, and the separation of powers between the legislative and judicial branches. Just as a Senator or a Congressman may not be called upon by the courts to explain or justify his votes as a representative of the people, or his speeches on the floor of the Congress, so a Justice of the Supreme Court may not be

required, by the Senate or a Senate committee, to explain or justify his votes on decisions by the Court or his judicial opinions.

Also, as we know, a judge is under the greatest and most compelling necessity to avoid construing or explaining opinions of the Court lest he may appear to be adding to or subtracting from what has been decided, or may perchance be prejudging future cases.

This problem always creates difficulties for both the committee and the nominee. It is particularly acute in the present situation, because Mr. Justice Fortas is now and has been an active Justice of the Court, and will continue to serve as such regardless of whether he is or is not confirmed as Chief Justice.

Nevertheless, Justice Fortas, I am proud to say, is here; is here to answer the questions which the committee may wish to put to him, with awareness, of course, of constitutional limitations.

It is, Mr. Chairman and gentlemen of the committee, a matter of personal pride and honor that I present Mr. Justice Fortas.

The CHAIRMAN. Any questions?

Senator ERVIN. I would like to ask something.

Senator, I did understand your statement with reference to the fact that the present nominee is the only sitting Justice that has ever come before the Judiciary Committee. But I did not quite understand your statement which seemed to imply that this was something novel in respect to the Supreme Court Justices.

Senator GORE. I did not say it was novel. I said it was precedential.

Senator ERVIN. Since I have been a Member of the Senate, Justice Whittaker—I remember he came before the committee—Justice Brennan, Justice Goldberg, Justice Potter Stewart, and Justice Fortas, when he was first here, and Justice Marshall.

So it is very customary for nominees for the Supreme Court, at least Associate Justices, to come before the Judiciary Committee.

Senator GORE. But neither——

Senator ERVIN. In order to afford the Judiciary Committee an opportunity to explore and ascertain their constitutional philosophy.

Senator GORE. They were not nominees for Chief Justices.

Senator ERVIN. No. But this is the first time we have ever had this kind of a situation.

Senator GORE. Well, let me emphasize, Senator Ervin, that I welcome the precedent. I thought it was worthy of note to call it to the committee's attention.

Senator ERVIN. All I was trying to establish was that there was a precedent to hear nominees to the Supreme Court which has existed at least since I have been here. I do not know what happened before.

Senator TYDINGS. Mr. Chairman, for the record, I think this is the first time that a sitting Justice of the Supreme Court has ever appeared before a Senate committee to answer questions, in the history of the Republic.

Senator HART. Mr. Chairman, if I could amend that, I think we would get it square.

There have been sitting Justices who have appeared. They have been interim appointees, and I did not like it.

Senator GORE. Recess appointments.

Senator HART. Yes. It is bad medicine. For the very reason that this is a very difficult morning. But I think if anybody is worried

about the history, there has not been a man nominated for Chief Justice in front of us before. There have been men who have been sitting as Justices, Associate Justices, by reason of an interim or recess appointment, a practice which I think is unfortunate.

Senator GORE. This is on all fours with the statement I made.

Senator ERVIN. My recollection is that Judge Marshall—Judge Thurgood Marshall—was appointed during the session of the Senate, and he was here.

Senator HART. He was. But if he was appointed during the session of the Senate he was not sitting on the Supreme Court when he was here.

Senator ERVIN. No. I say that the resolution which I think the Senate overwhelmingly adopted requested Presidents not to make recess appointments in the future. I think that was a wise provision, because I had the very painful duty here as chairman of an ad hoc subcommittee one time to recommend the rejection of a nomination for a Federal judge who had been given a recess appointment.

Senator HART. The Senator from North Carolina is correct. The Senate did adopt a resolution expressing the view that it is undesirable that Presidents make recess appointments to the Supreme Court. That followed the experience some of us had in connection with the hearing this committee held for Justice Potter Stewart. The very circumstance that would make it difficult this morning is compounded when you have a recess appointee whose presence on the Court hinges on the attitude of this committee.

But I think the Senator from Tennessee has, in his usual thoughtful fashion, underscored the problem that confronts us when we talk to a man who is now a member of the Court.

I do not want that Court member asking me why I voted against the omnibus crime bill, so-called. We should exercise legislative restraint, and not ask him why he wrote an opinion in thus and so cases. The record is there—based on the briefs, reflection of his reaction to the oral arguments, he has put it in black and white. It is there for us to see—but not to cross-examine.

The CHAIRMAN. Any further questions?

Mr. Justice, a Senator testified last week against your nomination, and he quoted from the New York Times magazine, and other sources, about your activities.

Now, I think it is very proper to go into that.

The testimony is:

> Fortas is also thrown into nonjudicial matters by friends who want government jobs, and know he still carries weight at the White House. Periodically word leaks out about Fortas' involvement in such matters as the unsuccessful campaign to land Bill Moyers the job of Under Secretary of State, and his efforts to secure federal judgeship for David G. Bress, United States Attorney for the District of Columbia.

Now, what are the facts about that?

Senator DODD. Mr. Chairman, before the Justice answers, could I make an observation?

The CHAIRMAN. Yes, sir.

Senator DODD. I have to be away, as I have told the chairman. I would like the Justice to know it is no disrespect if I absent myself.

And I will get back as soon as I can. I wanted my colleagues to know that, and I wanted you to know it. It is not lack of interest. It is something I must do.

Justice FORTAS. Thank you, Senator.

STATEMENT OF HON. ABE FORTAS, NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice FORTAS. Mr. Chairman, may I address myself to the colloquy with Senator Gore, and then come to your question?

The CHAIRMAN. Yes.

Justice FORTAS. I want to say that I am very happy to be here. And I am very happy to answer any and all questions that the committee may ask. I am not a novice in Washington. I am not a novice in Senate hearings. There is a constitutional problem that perplexes this committee, and it perplexes me. There is nothing I love better than a legal discussion or debate. And I would like to discuss all questions that anybody may have in mind about the work of the Court. I shall, however, while I keep that in mind, as I must, because that is the kind of person I am—I shall be and continue to be conscious of the constitutional limitations upon me. But I did want to make clear to the committee that I am not here unwillingly. I am here very willingly, and I hope that your questions and my statements will serve to clear thoughts that are in your minds.

Now, with that preliminary statement, I address myself to your question.

In the first place, I do not believe, Mr. Chairman, and I am rather certain of this, that I have at any time had—at any time, since I have been Justice of the Supreme Court, recommended anybody for any public position. I want to make a precise and specific qualification of that statement. I have been asked, just as all Justices from time to time are asked, my opinion about various persons. Sometimes that has been done by the FBI. Sometimes it has been done by officials of the Government, and I have, of course, responded to those inquiries.

Let me add to that, that I have never, since I have been a Justice—and I do not remember having done it before I was a Justice—initiated any suggestions or any proposal to the President of the United States.

Now, with respect to the two specific matters that you mentioned in your question—Mr. Moyers—that is completely, absolutely, totally without foundation in fact. I not only did not make any recommendation for Mr. Moyers in connection with any position; I was never asked. That is No. 1. I do not know whether he was ever considered for that position.

No. 2, with respect to Mr. Bress. Mr. Bress is a practicing attorney in Washington—he was—he is now U.S. attorney. I have known him in that way for many years. I remember seeing in a column this statement to which you have referred. I did not recommend Mr. Bress for a U.S. judgeship. To the best of my knowledge and belief, I have never, since I have been a Justice, recommended anybody for a judgeship.

The CHAIRMAN. Now, the charge was made that you were adviser of the President in coping with steel price increases and helping to frame measures to head off transportation strikes—with the increasing

intensity of the war in Vietnam "Fortas is also consulted more and more on foreign policy."

Justice FORTAS. All right, Senator.

Let me say in the first place—and make this absolutely clear—that since I have been a Justice, the President of the United States has never, directly or indirectly, approximately or remotely, talked to me about anything before the Court or that might come before the Court. I want to make that absolutely clear.

No. 2, the President of the United States, since I have been an Associate Justice, has done me the honor, on some occasions, of indicating that he thought that I could be of help to him and to the Nation in a few critical matters, and I have, on occasion, been asked to come to the White House to participate in conferences on critical matters having nothing whatever to do with any legal situation or with anything before the Court or that might come before the Court.

Mr. Chairman——

The CHAIRMAN. What about the steel price increases—and helping to frame measures to head off transportation strikes?

Justice FORTAS. Mr. Chairman, I confess I cannot—I do not know what that refers to. I just cannot place it; I cannot identify it. I do not want to talk about specific matters on which I have been consulted. But I do, if I may, want to tell you of the nature of the consultation, if it can be called that.

It is well known that the President and I have been associated, mostly as lawyer and client, for a great many years. The President does me the honor of having confidence in my ability, apparently, to analyze a situation and to state the pros and cons.

In every situation where I have been called to the White House for this purpose, so far as I can recall, my function—the President runs conferences, as I am sure all of you know—my function has been to listen to what is said. The President has called on me last. And it is my function, then, to sum up the arguments on the one side, the considerations on the other side.

Mr. Chairman, it would be very misleading to allow the impression to prevail that this is a matter of frequency. It occurs very seldom. And it has occurred only in matters that are very perplexing and that are of critical importance to the President, where he wants some additional assistance. That has been the extent of my role. The situations that I recall——

The CHAIRMAN. If you were helping to frame measures, that is a matter that would come before the Court.

Justice FORTAS. I do not believe that is so. I am sure that is not so, Mr. Chairman.

The CHAIRMAN. Then you say it is not true.

Justice FORTAS. It is not true. And I say I could not recall any such incident. It is not true that I have ever helped to frame a measure since I have been a Justice of the Court. I have described to you as precisely as I can the exact nature of the function.

The CHAIRMAN. Now, the charge was made that "Fortas wrote the President's message ordering Federal troops into the city of Detroit."

Justice FORTAS. Again, Mr. Chairman, I do not want to—I do not think it would be proper to go into specifics, but I can say to you that

I did not write that message. I did see it before it was delivered. But I did not write it.

The CHAIRMAN. Did you approve it?

Justice FORTAS. No, sir; the President does not ask my approval.

The CHAIRMAN. Why was it shown to you, if you had no authroity in it?

Justice FORTAS. Mr. Chairman, again, I do not want to do anything, say anything, go into anything that is an act of violence on the office of the Presidency, or that, in any way, may operate now or in the future to hamper any President of the United States in the discharge of his terrible burdens in consulting anybody he wants to. But I may say to you in this specific instance that the President, in that critical and desperate situation, called together not only members of his Cabinet, but as is his custom, as is well known, people in whom he has trust, to make sure that when he reached a decision, it was reached on the basis of taking into account all possible factors. And I was one of those people, and I am proud if I was able then or at any other time to be of the slightest service to the President or to my country.

The CHAIRMAN. Is it your view that the words of the Constitution of the United States and laws enacted pursuant thereto retain their original meaning, or do you believe that provisions of the Constitution and laws should be reassessed and reinterpreted by the Court in light of changing social and economic conditions?

Justice FORTAS. Senator, if I could answer that question with precision and with the ultimate wisdom, I would do something that no man has succeeded in the entire history of the law. But I want to tell you as well as I can what my view is.

Let me say this, Senator. I was thinking about this the other day. In the Ten Commandments there is a very simple phrase "Thou shalt not kill"—very simple phrase. But that very simple phrase, Senator, takes on different meanings.

We all believe that we obey it. But different people have different ideas of its meaning—even to this day, thousands of years after the Ten Commandments were written. Some people think that it means that you must not kill even in a defensive war. Some people think that it means that capital punishment is in violation of the law of God and so on.

Now, I myself, so far as the Constitution is concerned, firmly and absolutely believe that the language of the Constitution is controlling, and that no man and no group of men, whether they are called judges or legislators or what not, is entitled to deviate or to vary from that by one jot or one tittle. I believe that. I believe that about the laws enacted by the Congress. Some of my opinions and some of my dissents will demonstrate that.

I could not tell you, Senator, that the words of the Constitution—those words particularly that Learned Hand referred to as "majestic generalities," like "due process of law"—that words like that, are simple and clear and unmistakable in their meaning, because that would not be so.

The CHAIRMAN. To what extent and under what circumstance do you believe that the Court should attempt to bring about social, economic, or political changes?

Justice FORTAS. Zero, absolutely zero.

The CHAIRMAN. Senator McClellan.

Senator MCCLELLAN. I did not understand your statement. I could not hear.

Justice FORTAS. I beg your pardon, sir.

Senator MCCLELLAN. I did not clearly understand the statement you made with respect to the nature of those things in which you served or in which you were invited to consult the President before he acted.

Justice FORTAS. Yes, sir.

Senator MCCLELLAN. Would you clarify that somewhat, please.

Justice FORTAS. Yes, sir. No. 1, there have been very few subjects. No. 2, they have been matters of critical importance. No. 3, they have not been matters on which I have or claim any expertise, and the President knows it. No. 4, my role has been solely that of one who sits in the meeting while other people express their views. The President always turns to me last, and he then expects me to summarize what has gone on. And that is about the way it is, Senator, and that is the way it works.

Senator MCCLELLAN. What are some of these matters of "critical importance"—can you give us some illustrations?

Justice FORTAS. Senator, perhaps I can——

Senator MCCLELLAN. I am not pressing you.

Justice FORTAS. I say perhaps I can without doing something you would not want me to do or I would not want to do.

Senator MCCLELLAN. I am not insisting you do that.

Justice FORTAS. Perhaps I can say there have been stages in the fantastically difficult decisions about the war in Vietnam where I have participated in meetings of the kind that I described. I say that because it has been published, and it is true. Now, I am not an expert on Vietnam or the Far East, or anything like it. But the President seems to think that I can serve a function by setting forth the considerations that have been stated by others on various sides of the question. And that I have done.

Senator MCCLELLAN. Are there any other areas of consultation you would be willing to identify, or feel you can identify?

Justice FORTAS. Well, I have already referred to one, so I guess I can cite that, and that is when the riots started. And that is about it, as I recall. I guess I have made full disclosure now.

Senator MCCLELLAN. I am sorry.

Justice FORTAS. I beg your pardon, sir.

Senator MCCLELLAN. I am sorry, I did not hear your last remark.

Justice FORTAS. I said I guess I have made a full disclosure now, because so far as I can recall those are the two things.

Senator MCCLELLAN. One of the purposes of these questions that I have just asked you is to supplement your statement, to give some explanation, to inquire, to establish some certainty with respect to your statement as I understood you. Nothing that the President has consulted you about could possibly, from your viewpoint, become an issue for the courts to resolve. If I understood you correctly, that is what you said.

Justice FORTAS. Yes, sir.

Senator MCCLELLAN. And so you feel in the two areas that you have referred to, which you now say you believe is a full disclosure, there

was nothing involved in those critically important matters which you feel an issue could arise which the Court might be called upon to resolve.

Justice FORTAS. There was nothing involved in the conferences, the consultations, or the issues that were discussed in which the Court might possibly become involved.

Senator MCCLELLAN. I was not present at the last meeting of the committee—I had to be away—and I am not current on the statement from which Senator Eastland quoted, or other statements that may have gone into the record at the last hearing. For that reason, unless there is something else shown, I am going to base my decision concerning your nomination primarily upon your record since you have been an Associate Justice. I interrogated you to a certain extent when you appeared here for confirmation on your nomination as an Associate Justice. I asked you a few questions then that gave rise to, or at least suggested to you some of my philosophy.

Justice FORTAS. Yes, sir.

Senator MCCLELLAN. You could not be pressed at that time to any great length, as you cannot now. No one can say definitely what you will do in the future. I have disagreed with some previous decisions of the Court and I am sure you know of my position. I have battled very hard in this branch of government—the legislative branch—to try to find, to develop and to enact a statute which, I am hopeful, will modify some of those decisions. There is one in particular, that I feel very strongly should be modified. I cannot press you to say what you would do. You have already acted.

Therefore, I will have to take that difference of philosophy into account when I make my decision. Mr. Justice, I think that difference of philosophy is very vital to the internal security of this country. While I esteem your professional achievements in life, I may wholly and completely and in some respects I do disagree with some of the philosophy you have expounded.

Very well, I will pass.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. Mr. Chairman, I think I should make some preliminary statements to illustrate why I think it is so important for Senators to know something about the constitutional philosophy of a Supreme Court Justice, particularly a Chief Justice.

The good, wise men who fashioned the Constitution, had a most magnificent dream. They dreamed they could enshrine the fundamentals of the government they desired to establish and the liberties of the people they wished to secure in the Constitution, and safely entrust the interpretation of that instrument according to its true intent to a Supreme Court composed of mere men. They knew that some dreams come true and others vanish, and that whether their dream would share the one fate or the other would depend on whether the men chosen to serve as Supreme Court Justices would be able and willing to lay aside their own notions and interpret the Constitution according to its true intent.

They did three things to make their dream come true. They decreed that Supreme Court Justices should be carefully chosen. To this end they provided that no man should be elevated to the Supreme Court

until his qualifications had been twice scrutinized and approved, once by the President and again by the Senate. They undertook to free Supreme Court Justices from all personal, political and economic ambitions, fears and pressures which harass the occupants of other public offices, by stipulating that they should hold office for life, and receive for their service a compensation which no authority on earth could reduce.

They undertook to impose upon each Supreme Court Justice a personal obligation to interpret the Constitution according to its true intent by requiring him to take an oath or make an affirmation to support the Constitution.

It is no exaggeration to say that the existence of constitutional government in America hinges upon the capacity and the willingness of a majority of the Supreme Court Justices to interpret the Constitution according to its true intent. In consequence, no more awesome responsibility rests upon any Senator than that of determining to his own satisfaction whether or not a Presidential nominee to the Supreme Court possesses this capacity and this willingness.

I would like to say there are a great many people in the United States who do not feel that the Supreme Court during recent years, particularly during the past 3 years, has manifested a willingness, and an ability to interpret the Constitution according to its true intent.

Now, I do not question the good intentions of any Supreme Court Justices now sitting. But I do call the attention of the committee to a statement of Daniel Webster. He said:

> Good intentions will always be pleaded for every assumption of power. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

I would like to show some of the concern of people by putting in the record at this point what 36 State chief justices said about the Supreme Court at Pasadena, Calif., on August 28, 1958. Of course, Mr. Fortas was not a member of the Supreme Court at that time. But this has relevancy to what I think is the solemn duty of the Senate to give consideration to what, if anything, is happening to our Constitution as a result of Supreme Court decisions.

These 36 State chief justices said that they believed that the fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution, and then they took a step which was without precedent in American history. By a resolution they adopted these words:

> That this conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers respectively, and as to the validity under the Federal Constitution and the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers, the power of judicial self-restraint—by recognizing and giving effect to the difference between that which on the one hand the Constitution may prescribe or permit and that which on the other a majority of the Supreme Court as from time to time constituted may deem desirable or undesirable to the end that our system of Federalism may continue to function with and through the preservation of local self-government.

Now, these men were primarily interested in the preservation of the system of federalism. I ask this complete statement and the supporting

authorities which the 36 Chief Justices cited to sustain their contention, that the Supreme Court was not confining itself to its constitutional sphere in cases dealing with Federal-State relationships, go into the record.

The CHAIRMAN. It will be admitted.

(The document referred to for inclusion in the record was marked "Exhibit 18" and appears in the appendix.)

Senator ERVIN. I would like to call attention to the fact that this is not only the view of State chief justices, but some Justices of the Supreme Court have recognized this.

In the case of *Smith* v. *Allwright*, 321 U.S. 649, at page 669, a former Justice of the Supreme Court, the late Justice Owen J. Roberts, had this to say about his feeling, which I believe is shared by many members of the bench and bar as a result of the recent decisions of the Supreme Court—that the Constitution has become about as stable as a quivering aspen leaf. He said this:

> The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.

In the case of *Brown* v. *Allen*, 344 U.S. 643, the late Justice Robert H. Jackson had this to say:

> Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law, but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

Now, what I have read indicates why I have much concern and consider that the duty of passing on the qualifications of a Justice of the Supreme Court and particularly that of the office of Chief Justice is a most solemn duty which confronts a Senator. Because frankly, I do not believe that constitutional government can endure in the United States unless a majority of the Supreme Court Justices interpret the Constitution according to its true intent. And I happen to hold to the constitutional philosphy that Chief Justice John Marshall was correct in the case of *Ogden* v. *Gibbons* when he said that the enlightened patriots who framed our Constitution, and the people who ratified it, must be presumed to have intended what they said.

Now, Mr. Fortas, I read this statement in the U.S. News & World Report for July 8, 1968. It says this in an article entitled "Abe Fortas, What Kind of a Chief Justice Would He Be?":

> In his own words, Abe Fortas is a man of the law, and one who believes that the specific meaning of the words of the Constitution has not been fixed.

Now, I want to ask you whether or not these words which are in quotations, and which say that you are one who believes that the "specific meaning of the words of the Constitution has not been fixed" —is that a statement that you made?

Justice FORTAS. Senator, I do not recall that statement. I recall saying that I am a man of the law. I have said that many times. I do not recall saying that the words of the Constitution are not fixed. Perhaps I did. But I do not recall that.

Senator ERVIN. You do not recall ever having made the statement——

Justice FORTAS. I do not, sir.

Sentor ERVIN. Then I assume you cannot explain what the statement means.

Justice FORTAS. Well, I can explain my thoughts about the problem underlying it, and I did that in response to Senator McClellan's question.

Senator, you yourself, both as a judge and Senator, have addressed yourself to that problem. I am very familiar with what you have said from time to time, and I have the greatest respect for your work.

But certainly I believe firmly, profoundly, that the words of the Constitution are our guideposts, and our only guideposts in deciding what the Constitution says. And then you have to take a look at what judges have decided in the ensuing years, and what they have said about the meaning of those words. That is our system of law, as you know, Senator. And that is what I try to do, with all my heart, and all the intelligence that I have.

Senator ERVIN. Well, don't you agree with me that law would be destitute of social value if the law—if the Supreme Court is going to indulge habitually in overruling prior decisions?

Justice FORTAS. Senator, we should not overrule prior decisions lightly, except in the clearest kind of case.

I came across a statement that you made, when you were on the North Carolina Supreme Court, in a case called State against Ballance, in 1949.

Senator ERVIN. I am glad you recall that. Now, you might give us that statement.

Justice FORTAS. I would be delighted to, Senator. I am sure you have it in mind. That was a case, if I may recall it to you, which involved the constitutionality under the North Carolina due-process clause of a statute providing for the licensing of photographers. About 10 years before you handed down your opinion, your court had decided that the law was constitutional. That was the only decision to that effect. It came——

Senator ERVIN. By a sharply divided court, four to three.

Justice FORTAS. Yes, sir; that is right. That is the way we divide quite often. Except we do it five to four. But then, Senator, the case came before you in 1949, and in a very cogently, carefully reasoned opinion, if I may say so, you arrived at the opposite result. And here are some of the things you said about the problem of stare decisis. You said—after pointing out there had been just one decision affirming constitutionality, you said, and I quote:

"Besides, the doctrine of stare decisis will not be applied in any event to preserve and perpetuate error and grievous wrongs," citing some cases. "As was said in Spitzer against Commissioners, supra—'there is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right.' "

Senator, I would not go that far myself. This is what you said in that very well-reasoned opinion. And Chief Justice Stacy, as you may recall, wrote a dissent which sounds to me like some of the dissents

that I write on the Court and some of my brethren write when we are a bit carried away, in which he criticized the majority for bending the constitutional prohibitions—that is to say the due process clause in North Carolina—"to the Court's inconstant economic views or predilections, and for overruling a recent decision on the basis of their 'conceptions of public policy.'"

Senator, I cite that—I came across it the other day. I have tried to read everything I can that you have written and said. I came across it the other day. And I cite it here because it so illustrates our problem—your problem as a judge, our problem.

I am sure what you tried to do is to interpret and apply the due process clause of your constitution as it is written, and that I assure you is what I do and what I will always do.

Senator ERVIN. Applied it in accordance, with the exception of the previous decision of the Supreme Court of North Carolina, with every case I could find on the subject in the United States.

Justice FORTAS. I am not criticizing your opinion, sir.

Senator ERVIN. I know. I followed all of the previous decisions except one decision, which had been handed down just a few years earlier by a divided court which was clearly out of harmony with the provision of the North Carolina constitution which says that no man should be deprived on liberty without due process of law, and it certainly is depriving a man without due process of law in that case.

Justice FORTAS. I am not quarreling with you, Senator.

Senator ERVIN. That has been cited before, that case. At any rate the chief justices of the supreme courts of the States said in effect that the Supreme Court, you were not a party then, had been changing the meaning of the Constitution. I say that nothing is ever settled until it is settled right. But nothing is ever settled right unless it is settled in the right way by the agency of government having the right to settle it. Certainly the Supreme Court of the United States has no power, and is not settling anything right when it changes the meaning of the Constitution, is it?

Justice FORTAS. That is right. Senator, may I comment?

Senator ERVIN. Yes, sir.

Justice FORTAS. In the first place, I stand on my record—I stand on my record, on nobody else's record. In the second place, Senator, with respect to the statement, I think it was in 1958, the statement of the justices of the State supreme courts—I was not on the Supreme Court at that time. But I would like to say one thing. As my record will show, I firmly believe in very powerful, strong recognition of the individual place of the States in our federal system. Perhaps if I may, without violating the constitutional principles that have been discussed here, I would like to refer to one case. That is my dissent in the case where the one-man one-vote principle was applied to county government, a case in which I had an opportunity and was called upon to express perhaps most forcefully the feeling that I have about the importance of maintaining the autonomy of the States and local governments. And I believe that that is the correct constitutional principle. Perhaps I should not have said this—but I do not want to be associated with the object of the criticism of those State judges in 1958.

Senator ERVIN. Well, I think you agree with me that anybody has a right to comment on the actions of courts.

Justice FORTAS. Absolutely.

Senator ERVIN. Chief Justic Harlan Stone said, where the courts deal with important questions as ours do, the only protection we have against unwise decisions, and even against judicial usurpation, is careful scrutiny of the action, and ability to comment upon it.

Justice FORTAS. Absolutely. May I comment on that a moment? Senator, I believe firmly that the Supreme Court, in all of its acts and deeds, should be subject to open, full criticism. I will continue to be on the Court, whatever happens here. If the Senate agrees and I become Chief Justice, there is one thing that has thus far occurred to me very strongly, and that is that we must carefully explore some means of communicating to the public more information about what the Court does, so that the people can understand and the people can more openly and more effectively criticize what we do. I firmly believe in that.

Senator ERVIN. I do not know whether you want to answer this question or not, but I read this statement from the late Justice Robert H. Jackson. I will withdraw the question if you have a reluctance to answer it. But do you not agree with me there is a great deal of truth in the statement of Justice Jackson as to what the attitude of the bar of America is with respect to the Supreme Court?

Justice FORTAS. I really cannot comment on that, Senator.

Senator ERVIN. I can see why. So I will certainly not request you to do so.

Justice FORTAS. Thank you very much.

Senator ERVIN. Now, the Washington Sunday Star for March 27, 1966, quoted you as having said in a speech to the Virginia Trial Lawyers Association shortly after you became an Associate Justice of the Supreme Court "The great invention of the Supreme Court by the framers of the Constitution makes change possible with some degree of care."

Now, can that mean anything except that the Supreme Court has the power to change the provisions of the Constitution, of amending the Constitution?

Justice FORTAS. Senator, it certainly does not mean that. That was an extemporaneous speech that I made at the request of my good friend Justice Hoffman, before the Virginia Trial Lawyers Association. But what I mean there—what I meant by that statement is this.

In many countries in this world, if people have a grievance—for example, they believe that they are being deprived of their right to go to public schools, or something of that sort—they have only one alternative, and that is to go into the streets and fight it out. That is not our system. Ours is a system of law. And in those situations, the American people, any person, however, humble he may be, even if he is a Clarence Gideon, or a person of no funds, no background whatever, can go into court and assert his rights, and his grievance can then be tried out and tested up to the Supreme Court where the principles of the Constitution—no other principles—the principles of the Constitution will be applied. That is what I mean.

Senator ERVIN. Well, the Constitution provides that we do not have to have any changes made by the Supreme Court in these matters.

Justice FORTAS. Somebody has to say what the Constitution means, Senator.

Senator ERVIN. But if the Constitution says one thing, and the Justices do not like what the Constitution says, they are certainly not at liberty to change the meaning, are they?

Justice FORTAS. Absolutely not. Of course not. That would be a violation of their oath.

Senator ERVIN. It is true, is it not, that time after time the Supreme Court has overridden previous decisions interpreting the Constitution in fields like those we have mentioned?

Justice FORTAS. Yes, sir.

Senator ERVIN. Now, one of the men who helped write the Constitution, a man who is called the father of the Constitution, James Madison, had this to say:

"That useful alterations will be suggested by experience could not but be foreseen. It was requisite therefore that a mode of introducing them should be provided. The mode preferred by the Constitution seems to be stamped with every mark of propriety. It guards equally against the extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate if discovered false.

"It moreover equally enables the Federal and the State Governments to originate the amendment of errors as they may be pointed out by experience on one side or the other."

Now, don't you believe that the only power to change the Constitution is that set forth in article V, and it belongs to Congress and the States, and not to Supreme Court Justices?

Justice FORTAS. I certainly do.

Senator ERVIN. Well, now, how could the Supreme Court change these things, then? I am unable to reconcile the statement in the Star with anything but that the Supreme Court can change the fundamental things.

Justice FORTAS. Senator, that certainly is not—I beg your pardon, but it certainly is not the meaning. The meaning of it is that if people believe that laws are operating in an unconstitutional way, they can start a lawsuit, and they can go to the Supreme Court, and the Supreme Court can rule upon it, applying the Constitution—not in spite of the Constitution, but applying the Constitution.

Senator ERVIN. So the Supreme Court, in applying it, can give one interpretation of the Constitution one time and another interpretation later on.

Justice FORTAS. Senator, there is no way to avoid error in human affairs. And men can make error in a case that is being overruled, or they can err in overruling the case. You know that, Senator.

Senator ERVIN. Well, I would say that I happen to agree with Justice Brandeis, who said on one occasion that it was better for the law to be settled than it is for the law to be settled right.

Justice FORTAS. Senator, when I said that perhaps your statement from *State* v. *Ballance* is a little broader than I would make it, that is exactly what I had in mind. There are many areas of the law where it is much more important for the law to be settled than for it to be settled right. The whole area of private law, for example, does not lend itself by and large to anything except the strictest application of stare decisis. And even in the field of public law, the overruling

of a precedent should be undertaken only with the greatest hesitation, in the most extreme circumstances, where palpable injustice or error was committed originally.

Senator ERVIN. What criteria do you believe a Supreme Court Justice should follow when it comes to the question of whether he should overrule a previous decision?

Justice FORTAS. I think that what he does—what I try to do, and I suppose every judge tries to do, is to go back to the Constitution, go back to the debates, no matter how many times you have read them, look at the relevant parts again, look at all of the precedents that have been decided since that time, and look at them—this again, Senator, as you know—through the glass of the particular facts and the particular problem that is presented. That is our task. And it usually is not a question of a difference as to the legal principles. The problem usually is the fantastic variation and complexity in the facts of life, to which you apply these strict rules. And you know—your own opinions, which I have read with the greatest care, and I may say admiration, demonstrate your own awareness of that, Senator. Forgive me for personalizing this.

Senator ERVIN. I never voted to overrule but one case.

Justice FORTAS. Is that right? Well, forgive me for personalizing this. I guess I got a little carried away.

Senator ERVIN. Now, you do not need to comment on this if you do not want to, but in this case which I shall ask you about your vote upheld the majority's interpretation of the Constitution, an interpretation which I might add was contrary to all of the precedents that had been created during the previous 177 years. I refer to the *Stovall* case.

Justice FORTAS. Referred to what?

Senator ERVIN. The *Stovall* case, which was an application of the *Wade* and *Gilbert* cases, handed down on the 12th day of June 1967. The majority opinion, which you did not write, said in the *Stovall* case they would not make this new ruling applicable to past cases, and in fairness to you, you thought it ought to be made applicable to past cases. The Court said that it would not be fair to do so, because law enforcement officers and the courts and the bar could not have anticipated the Court would ever hand down a decision of that kind.

Don't you think it is rather shocking for a majority opinion of the Supreme Court to say they were handing down a decision that nobody connected with law enforcement could have anticipated would ever be handed down?

Justice FORTAS. Senator, if I dissented I guess that is the way I felt. I must have felt pretty strongly.

Senator ERVIN. No; you did not dissent from the rule which the Court refused to apply retroactively. Apparently you went along with the rule. Just as a metaphysical question, Don't you think it is rather shocking to have a majority opinion of the Supreme Court state in substance that in overruling an interpretation which had been placed on the Constitution for the previous 177 years, that they would not make it retroactive, because nobody could anticipate such a decision would be handed down?

Justice FORTAS. Senator, I think that is one on which I ought to be excused. All I can say to you is that the problem of retroactivity is one

of the really baffling problems, and I hope one of these days I will achieve more wisdom than I have now.

Senator ERVIN. I am not talking about—I do not want to talk about the *Johnson* case—*Johnson* v. *New Jersey*—I believe you concurred in that opinion where you held the *Miranda* case would not be made retroactive; didn't you?

Justice FORTAS. I do not recall, Senator.

Senator ERVIN. Well, anyway, from all practical intents and purposes, when the decisions of the Court hold one thing for 177 years, and then they adopt an absolutely new, inconsistent interpretation, for all practical intents and purposes you have the words of the Constitution being interpreted to mean one thing for 177 years and another thing thereafter.

Justice FORTAS. Well, Senator, you know how difficult this problem is. I call your attention to *Flast* v. *Cohen*. That was a case that you argued before us eloquently, and very well indeed. And that case, as we decided it, and as you argued it, did not involve a constitutional principle. But it overturned in a very significant and fundamental way what had been considered to be the law since *Frothingham* v. *Mellon* way back in the ancient days.

Senator ERVIN. 1923 is the date.

Justice FORTAS. You presented that case to us, and we decided it. You will remember that I wrote a concurring opinion in which I tried to confine the scope of the decision precisely to the facts of the case.

Senator ERVIN. That case did not overrule *Frothingham* v. *Mellon*.

Justice FORTAS. That is what we said. But your adversaries thought it did.

Senator ERVIN. I think *Frothingham* v. *Mellon* just illustrates that sometimes judges emulate Senators and talk too much. In other words, in the *Frothingham* case when they got down to the point that they could not invoke equitable jurisdiction to recover an infinitesimal amount of money, that was the end of the situation. In other words, Judge Sutherland just went ahead and talked too much. In that respect, he did what some of us Senators do on occasion.

I want to say, I think that the *Flast* case is one of the most eminently sound decisions of the Supreme Court.

On the question of amending the Constitution, I want to put in the record a statement by Justice Thomas M. Cooley, in his book on "Constitutional Limitation," eighth edition, volume 1, page 70. I won't take the time to read it.

(The material referred to for inclusion in the record was marked "Exhibit 19" and appears in the appendix.)

Senator ERVIN. Now, I am somewhat intrigued by an article in Time for July 5, 1968, which says:

> The Justices of the Supreme Court, Fortas mused, are in some respects nine Emperors. A Chief Justice can neither coerce nor cajole his associates. He can do little more than recommend what actions they should take. They are the mix in the carburetor. A good courts needs Justices from different backgrounds. In applying the law in his view the Justices should not be as concerned as they sometimes have been in squeezing judicial decisions into a neat pattern. They should instead make full use of all the modern tools, not only law, but medicine, psychiatry, mass psychology, economics, and social engineering.

Now, how should the Justices make use of social engineering?

Justice FORTAS. Senator, I am not sure I know what social engineering is.

Senator ERVIN. I don't either. They quote you as having said——

Justice FORTAS. Is that a quote?

Senator ERVIN. Well, it says "In applying the law in his view"—it is talking about your view, allegedly—"the Justices should not be concerned as they sometimes have been in squeezing judicial decisions into neat patterns"——

Justice FORTAS. I could not have said that.

Senator ERVIN (continuing):

They should instead make full use of all the modern tools, not only law, but medicine, psychiatry, mass psychology, economics and social engineering.

Justice FORTAS. Let me say one thing, Senator, to try to get to the heart of what you may have in mind. I would not comment on that statement, because it is not my statement. But, for example——

Senator ERVIN. I realize that a person can be both misquoted, and where they are not misquoted they can be misconstrued. And one is as bad as the other.

Justice FORTAS. I am not suggesting I was misquoted. Usually people are not misquoted. And I am not suggesting that. But to get to what I think is the substance of what you have in mind. There are many areas in our work, as well as in the work of other courts and lawyers, where factual understanding is of tremendous importance. Let us take the very important area of the antitrust law, Senator. I myself do not believe that what was reasonably in the 1890's is necessarily the same thing that is reasonable today. And to make an evaluation of that, one has to study, one has to work, one has to use the information that is available—the economic information, the business information, to try to get some conception of the factual situation that is presented as of the time. That is what I do—I do believe that, Senator.

Senator ERVIN. Well, you said you did not know what social engineering was, and I frankly concede I do not. But I cannot see much function for the Supreme Court Justices in writing decisions which are settling a controversy between litigants in a lawsuit having to do with social engineering.

Justice FORTAS. Well, if I knew what it was, maybe I could be more precise.

Senator ERVIN. I wish to read you from the case of *South Carolina* v. *United States*, 1905, 199 United States 437, pages 448 and 449, and I think maybe I can read you this, since you did not participate in the decision. It says:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred.

In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in *Dred Scott* v. *Sanford*, 19 How. 393, 426:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present

form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflect of the popular opinion or passion of the day."

It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculation or theories, but practical men, dealing with the facts or political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 188, well declared:

"As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey ,the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Do you agree with that?

Justice FORTAS. Senator, that statement is to my mind excellent, and has always been a statement which I have greatly valued.

Senator ERVIN. You realize, do you not, that Judge Thomas M. Cooley, who was dean of the Law School at the University of Michigan for a time, and also a justice of the Supreme Court of Michigan, was one of the greatest legal scholars, and particularly in the field of constitutional law, of any American?

Justice FORTAS. I agree.

Senator ERVIN. Well, I would like to read you this statement from the eighth edition of his "Constitutional Limitations," pages 123 to 124:

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficient maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

Now, my question is, Do you agree with those observations of Judge Cooley?

Justice FORTAS. Senator, I do. I ask you to take into account our previous colloquy, because that is only part, as I remember, of Professor Cooley's long discussion. In substance, I agree with him, yes.

Senator ERVIN. Now, I would like to ask you about this statement in 11 American Jurisprudence, Constitutional Law, section 382, page 659:

SECTION 50. Uniformity of Construction. A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable. In accordance with this principle, a court should not allow the facts of the particular case to influence its decision on a question of constitutional law, nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like circumstances and conditions. Furthermore, Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action, and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founders.

Justice FORTAS. That is pretty much a paraphrase of Professor Cooley's passage in "Constitutional Limitations," which I think is cited in the 11 American Jurisprudence.

Senator ERVIN. I call your attention to another text—16 Corpus Juris Secundum, constitutional law, section 39, page 117:

In view of the rule, discussed Supra Section 14, that the meaning of a constitution is fixed when it is adopted, the construction given it must be uniform, so that the operation of the instrument will be inflexible, operating at all times alike, aud in the same manner with respect to the same subjects; and this is true even though the circumstances may have so changed as to make a differeut rule seem desirable, since the will of the people as expressed in the organic law is subject to change only in the manner prescribed by them.

Do you have any comments on that?

Justice FORTAS. That is the same thing. It shows the stream of the law.

Senator ERVIN. Now I would like to call your attention to another statement from American Jurisprudence, volume 11, on the subject of constitutional law, section 51, page 661. We hear a great deal about the flexibility of constitutions. And this says—

The principle of flexibility, however, does not overhalance or destroy the doctrine of uniformity; the actual meaning of the provision always remains the same. In making a Constitution applicable to conditions which did not exist when it was drafted, the courts cannot read into the instrument provisions wihch are not there merely because so doing will be helpful in dealing with conditions which exist at the present.

I will invite your attention to this ruling in *Gordon* v *Conner*, 183 Oklahoma 82, 80 Pacific Second, 322—118 American Law Records. 783:

When the sovereign will of the people has been expressed in a written constitution, it is the duty of the courts rigidly to enforce it, and not to circumvent it, because of the private notions of Justices or because of personal inclinations.

Do you have any comment on that?

Justice FORTAS. No, sir.

Senator ERVIN. Before passing to the next phase, I want to call attention to one other thing. George Washington was the President of the Constitutional Convention, was he not?

Justice FORTAS. Yes, sir.

Senator ERVIN. And we can reasonably assume that he understood pretty well what they did when they drafted the Constitution, don't you think?

Justice FORTAS. Yes, sir.

Senator ERVIN. In the interests of time I will not read all of this, but I would like to put it in the record at this point his statement in his farewell address to the American people. He said in substance that it was just as important to preserve constitutional principles as it was to create them in the first place, and he left us this advice:

To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation. For though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

(The document referred to for inclusion in the record was marked "Exhibit 20" and appears in the appendix.)

Senator ERVIN. Now, what George Washington is saying that a change in the meaning of the Constitution, as I interpret it, by any method except by constitutional amendment, as authorized by article V, will result in the destruction of constitutional government.

Do you agree wtih that?

Justice FORTAS. Senator, I completely agree with that. And he is also emphasizing the point that each branch of the Government must respect the authority of the other. And I am sure—I hope, anyway—that as you look at my opinions, you will see what has been called by some commentators an unusual emphasis upon the deference that must be paid to acts of Congress, to the States, and to administrative agencies. That is part of my fundamental attitude toward our Constitution.

Senator ERVIN. And one of your predecessors on the Supreme Court, whose work I greatly admire, was Justice Benjamin Cardozo. He wrote a very wonderful little booklet called "The Nature of the Judicial Process." And he said this, at page 68 of the 1957 edition:

I have said that Justices are not commissioned to make and uumake rules at pleasure, in accordance with changing views of expendiency or wisdom.

And then speaking on page 136 about the theory that judges are permitted to substitute their personal sense of justice for rules of law, he said this:

That might result in a benevolent despotism if the judges were benevolent men. It would an end to the reign of law.

Do you agree with Judge Cardozo?

Justice FORTAS. Yes, sir.

Senator ERVIN. Now, I bought a new book on constitutional law a couple of days ago. It said in substance that the greatest function of the Supreme Court of the United States was to determine the current meaning of constitutional principles involved in cases coming before it.

Now, my dictionary says the word "current" means passing, or relating to the present time. Do you think that expresses true constitutional philosophy?

Justice FORTAS. No, sir; I do not. I certainly do not.

Senator ERVIN. There is a great deal of education going on in the American schools in political science by law professors in that respect; is there not?

Justice FORTAS. Yes, sir; there is, but there is also the opposite going on, too, I am glad to say.

Senator ERVIN. You agree with me that constitutional government cannot endure in America if a majority of the Supreme Court Justices do not interpret the Constitution according to its true intent?

Justice FORTAS. Senator, I agree with you. But I have to hasten to say that in these past 3 years I have had a remarkable experience which I have prized very highly of working with eight other men, each of whom is completely dedicated to the Constitution of the United States, and each of whom, without sparing effort or dedication, is trying to do his very best in accordance with these sound principles. We make mistakes, and we vary, and we stray. But I would not want anything I have said here to indicate anything other than my veneration for the institution, my admiration for the men who occupy these posts, and my hope, my hope that the American people will venerate the institution and appreciate that the men who occupy these posts of trust are doing the best that they can, as God gives them wisdom and intelligence.

Senator ERVIN. Could you estimate the number of prior decisions of the Supreme Court which have been either expressly or impliedly overruled by the Supreme Court since you became a member?

Justice FORTAS. I could not; no, sir.

Senator ERVIN. The number would be a pretty high number; would it not?

Justice FORTAS. I should not think so, Senator. But maybe you are right. I have not made a calculation.

Senator ERVIN. Just one observation on this point.

On May 20 of this year the Supreme Court majority, seven to two—you being in the majority—overruled all of the past decisions holding that there was no constitutional right of a jury trial in a criminal contempt case. Those past decisions must approximate, according to Justice Frankfurter in the *Green* case, at least 20, which were cited in a footnote. Also the Court overruled on that same day, by the same vote, as I recall, all of the decisions which had been handed down in the past prior years holding that the provisions of the jury trial provisions of the sixth amendment did not apply to the State trials, and in doing that I think that you would find there was anywhere from 25 to 40 decisions of one kind or another that were overruled in that case.

Justice FORTAS. Well, Senator, I do not want to comment on that beyond expressing the hope, the confident hope, that you have read or will read my concurring opinion in that case, in *Bloom* v. *Illinois*.

Senator ERVIN. I did. And frankly it gives me concern, because it indicates an intention on your part to do some more to change the interpretation of the sixth amendment jury trial provisions further than they are.

Justice FORTAS. On the contrary, Senator, may I respectfully suggest that the contrary is the correct interpretation of it; and what that opinion does is again to emphasize my own feeling about the authority of the State systems.

Senator ERVIN. It seems to me that the best way of setting an authority for the States would have been to adhere to all of those previous decisions which said that the jury trial provisions of the sixth amendment had no application to State trials.

Justice FORTAS. I would like to talk that over with you some time, Senator.

The CHAIRMAN. We are going to recess now until 2 o'clock.

(Whereupon, at 12:10 p.m. the committee was recessed, to reconvene at 2 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN. Come to order.

Senator Ervin.

STATEMENT OF HON. ABE FORTAS—Resumed

Senator ERVIN. Do you agree with me that the Constitution was written in part to keep impatient Congresses, impatient Presidents, and impatient Supreme Court Justices within the spheres of action assigned to them by the Constitution?

Justice FORTAS. Senator, there was a little interruption here. I beg your pardon. I am so sorry.

Senator ERVIN. Do you agree with me that one of the objectives the Founding Fathers had in view when they wrote and ratified the Constitution was to keep impatient Congresses, impatient Presidents, and impatient Supreme Court Justices within the spheres allocated to them by the Constitution?

Justice FORTAS Absolutely.

Senator ERVIN. Do you also agree with me that another purpose of the Constitution, which is in harmony with that purpose just mentioned, was to establish for this Nation a government of laws rather than a government of men?

Justice FORTAS. Absolutely.

Senator ERVIN. And is it not true that if Supreme Court Justices or Congresses or Presidents ignore the words of the Constitution, and substitute their personal notions of what they should do for the Constitution, that you will have a government of men in which the American people would be ruled by the uncertain and unconstant and arbitrary wills of men rather than by laws?

Justice FORTAS. Yes, sir.

Senator ERVIN. Now, Mr. Chairman, when the question was before the Senate of whether Thurgood Marshall should be confirmed as an Associate Justice of the Supreme Court, I made a speech on the floor which set out my views of the duties of the role of the Supreme Court in the interpretation of the Constitution. I called attention to many authorities. In the interests of time, I would like to have this printed at this point in the body of the Record.

(The document referred to for inclusion in the Record was marked "Exhibit 21" and appears in the appendix.)

Senator ERVIN. Now, I do not want to call on you for anything that is improper. I am a little disconcerted by the statement of my able

and distinguished and beloved friend from Tennessee, Senator Gore, this morning.

I recognize that it would be improper for me to ask you questions as to what you would do as Chief Justice in the future. But I conceive that it is sort of necessary to ask you as to what you have done as an Associate Justice in the past in order to ascertain your constitutional philosophy.

Now, I do not want to insist on you answering these questions if you deem them improper. But I deem, from my standpoint as a Senator, that they are quite proper questions.

Justice FORTAS. Senator, may I add a little footnote to what has been said on that subject.

I believe that this is an area in which there is truly a constitutional dilemma. I believe that it is a dilemma for the committee as well as for the nominee.

From the committee's point of view I thoroughly agree that not only do you have to inquire into the qualifications of a candidate, but you have to do that in a realistic and meaningful way, and that is a very high responsibility.

On the other hand, from the point of view of the committee, and from the point of view of the nominee, as Senator Gore said, there is a very real problem, because the Constitution does provide for a separation of the judicial and the legislative branches, and the Constitution expressly provides, as you know, a principle in which I firmly believe, in so many words, that members of the Congress shall not be called to answer in any other place for their votes or statements on the floor. And I think that probably it is true that the correlative of that applies to the Court.

I say this to you, Senator Ervin, not because I like to be in that position—I do not—because I am an outspoken man, I think, ordinarily, and I like to discuss things freely. But that is the problem that confronts me as well as it does you. I just say that by way of preamble.

Senator ERVIN. We discussed this morning sort of what I call abstract matters of philosophy of Constitution. There is an old saying that the proof of the pudding is in the chewing. And the important thing it seems to me is in what practical aspects you have applied your conception of the Constitution in times past. We have the fact that you sat on the Court approximately 3 years, and you have participated in a number of decisions. I think those decisions themselves constitute the surest light that Senators can get as to what your conduct as Chief Justice would be because there is nothing truer than, the best way to judge the future is by the past.

Justice FORTAS. Senator, may I make a point there.

As Chief Justice, I would still have just one vote. I will continue as an Associate Justice—I will continue to vote as my native wit suggests and, I hope that God gives me light to vote correctly. Now, that will continue.

The Chief Justice of the United States has lots of burdens in addition to those of an Associate Justice. The importance of those burdens has varied with different Chief Justices. Before he became Chief Justice, Mr. Justice Stone said that he did not want to be Chief Justice because it was like being the dean of a law school—that you

do things that the janitor cannot or refuses to do. I think he changed his mind after he became Chief Justice.

The importance of the job has varied a great deal. But primarily, and inescapably, a Chief Justice assumes a large administrative job in addition to voting, which he carries on with no greater status than that of any other Justice of the Court. I am sure you knew that. But I wanted to state it.

Senator ERVIN. I may be wrong, but I am under the impression that the Chief Justice not only has burdens which are common to the Associate Justices, but he also has powers which are not comparable to those of the Associate Justices. One of them which occurs to me is that he has the authority, as I understand it, under the practice that prevails in the Supreme Court, to select the Judge who will write the opinion.

Justice FORTAS. When the Chief Justice is in the majority, that is true. If he is not in the majority, then the senior Justice who is in the majority selects the person to write the opinion.

Senator ERVIN. I think that is a rather tremendous power, myself, because somebody said that if they just allowed him to make the songs the people sing, he didn't care who made the laws. I think that is comparable.

Justice FORTAS. That is correct—that is a decision of force. But I assure you, Senator, that by the time it goes through the elaborate machinery of scrutiny by all the other Justices, what one Justice singly writes reflects the consensus.

Senator ERVIN. Senator Hart has asked me to yield to him momentarily.

Senator HART. To make an observation which really does not ease our problem, but refers us back to another chapter of the same story, and I think adds balance, perhaps, to the discussion—this committee many years ago had before it Felix Frankfurter. At that time, Dr. Frankfurter was not a member of the Court, but was a public figure, had written many papers, some books. If I may, Senator, I would like to read a part of Dr. Frankfurter's reply when this same dilemma was presented to the committee, and to him.

Included in his answer was this comment:

> While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should 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.

And that was spoken by a man who was not even on the Court. And while there was a record of his attitude on public questions, it was not a record so precise as the nominee's record; namely, opinions which he himself had written.

This is not to quarrel or anticipate any problem. But again, to suggestion that this is a problem that has confronted the committee before and I am sure has never been resolved happily.

Senator ERVIN. Certainly, as I have stated, I have a high respect for judicial office. Sometimes I very foolishly yield to the temptation

of writing a letter in answer to an editor, because I think I can state my position better than the editor, and I won't certainly insist on Judge Fortas answering any question. I would, however, insist that the committee be fully advised as to the decisions in which he has participated. And I can put these decisions in the record with my comments on them. And if he thinks my comments are wrong, if he wishes to, he can reply, or stand moot, or sit moot.

Justice FORTAS. Thank you, Senator. You make it very tempting for me to do what I would like to do personally but what I suspect my sense of constitutional duty may prevent me from doing. I just want to underline to you that I will proceed in this respect, not on account of my personal wishes, but because of what I consider to be the mandate of the Constitution.

Senator ERVIN. I respect your judgment on that matter. Therefore, I will undertake to state my interpretation of these cases, and for fear I may misinterpret them, I will put the opinions in the record, so that the members of the committee and the Senate can judge them for themselves.

I was a little concerned by your statement this morning that the order sending the Federal troops into Detroit was submitted to you for perusal before the order was promulgated by the President.

Justice FORTAS. I would not agree with that way of characterizing it Senator. I tried to describe the scene.

I was one of a number of people there during that critical moment of national danger, and I do remember that at one point the remarks that the President was about to make on television were circulated among us. And that is the way to state it, Senator. It was not that the remarks were submitted to me for perusal.

Senator ERVIN. You were just there as an innocent bystander, just out of courtesy, or because your opinions were desired?

Justice FORTAS. I did not say that, Senator.

Senator ERVIN. I will not insist upon your answer, because it is a prerogative of communications in the executive branch of the Government. But to my mind, it is sort of odd for a member of the judiciary to be involved in those deliberations of the executive branch of the Government. I was brought up by a very orthodox father who said that when a man became a judge, that he ought to use as his criterion the words inscribed over the inferno according to Dante—that he would devote himself to his judicial labors.

Justice FORTAS. Senator, whatever it may be, whatever opportunity I had to aid my country in these crises to which I have referred, that opportunity will be concluded on January 20 of next year.

Senator ERVIN. I do not understand the significance of that remark.

Justice FORTAS. All I am saying to you, Senator, is that I—as is well known—I did work with the President for many years, many, many years, over a quarter of a century. During those years he did me the honor of having some trust in my discretion, some belief in my patriotism, and some respect for my ability to analyze a problem.

I did not seek the post of Justice of the Supreme Court of the United States. That was not part of my life plan. I wrote the President by hand a letter, of which I have no copy, but I wrote it to him in longhand, after he first suggested that I accept the position. I wrote it

to him in longhand, Senator, because I was not writing it for the record. I dislike being in the position of rejecting a call by the President of the United States to public service. I did not want to make it a part of the record. He nevertheless, as is well known, insisted that I do this—that it was my duty to do it. And I took on this responsibility. It is in the same vein, I assure you, in exactly the same vein and reluctance, but with a feeling of pride and honor, that I have responded to his calls to come and help in these few instances of national crisis.

Senator GORE. Mr. Chairman, might I interject to say that at the time President Johnson displayed to me the letter in the hand of Mr. Fortas and said at the time that he was going to personally request and insist that he accept the responsibility.

Senator ERVIN. Do you know what transpired about the order for the call to send troops to Detroit? In other words, would your presence at that occasion disable you in any way or make you feel that you would be disqualified to sit on any case that might reach the Supreme Court of the United States out of the riots in Detroit, or other cities?

Justice FORTAS. As you know, Senator, from your own judicial experience, that would depend upon what the issue was and how it arose. It is a little difficult for me to conceive of an issue that might arise. But if an issue arose in which I felt—or if upon discussion with my colleagues, any of them felt—that I should be disqualified, I would of course disqualify myself. It is, however, hard to imagine that such a thing would arise.

Senator ERVIN. Now, Mr. Chairman, in view of the statement of the nominee, I will refrain from asking him questions about his participation in prior decisions. But I think that these decisions are matters which the committee must or should consider in passing upon the nomination. And therefore I will have to undertake to state them myself, because I think it should be in the record.

I will try to state them the way I construe them—that is the only way I can state them—and then I will put them in the record—all of the opinions in each case—so that the members of the committee can appraise them for themselves.

Senator TYDINGS. Could I ask a question, Mr. Chairman.

Senator, are you going to state them now?

Senator ERVIN. Yes, right now; because we are making the record.

Senator TYDINGS. I was just wondering in the interests of time—if we could not finish questioning Mr. Fortas, those others of us who might have a question or two—and after he is finished—because his time is valuable, too—he is sitting on the Court now—then go ahead and put it in the record with all of us here, but not keep him here.

Senator ERVIN. If he prefers it that way. However, I thought there might be some erroneous interpretations placed by me on these cases. For example, one of them I am going to comment on is concurring opinion in the *Bloom* and *Duncan* cases, which he alluded to this morning.

Senator TYDINGS. Unless Justice Fortas objects—I might suggest we all have our chance of asking him questions.

Justice FORTAS. I would appreciate that very much, Senator.

Senator ERVIN. Mr. Chairman, I believe I would rather finish my part of the examination at this time.

Senator TYDINGS. No objection.

The CHAIRMAN. You have been recognized.

Senator ERVIN. The first case I would call attention to is *Amalgamated Food Employees Union Local 590 et al., petitioners*, v. *Logan Valley Plaza, Incorporated et al.* This was a 6-to-3 decision. The opinion was written by Mr. Justice Marshall, and Mr. Justice Fortas adhered to the majority opinion. Mr. Justice Black, Mr. Justice Harlan, Mr. Justice White dissented.

The facts in this case are very simple.

Logan Valley Plaza built a parking center outside of Altoona, Pa. One of the stores in the parking center was operated by Weis Markets, Inc., which I will call Weis.

Weis operated a supermarket. The land it was operated on was privately owned by him, or by the company. The remainder of this parking center, which was fairly large, was owned by the Logan Valley Plaza, Inc.

Weis used a store building in which he sold merchandise. He had a porch on the building which his customers used to load their automobiles. Then he had a place, a parking lot along the porch, which his customers also used to put their cars on when they were loading their purchases.

The loading plaza had some land used by Weis' customers for parking purposes, and the adjoining store, Sears, Roebuck & Co.

Weis operated with nonunion labor in his supermarket. This parking center was located between two roads—one called Good's Lane, and the other U.S. Route 220. The store was 350 feet from Good's Lane—in other words, it was that far from public property in the neighborhood. And it was between 400 and 500 feet from public property road on the other side, Route 220.

This union came on with their pickets, carrying placards which were designed either to coerce Weis into compelling his nonunion employees to join the union, or to discourage customers of Weis from trading with him. They not only carried placards, but they walked to and fro, they patrolled at times on the porch and at times on the parking place where the customers of Weis came to load their purchases into their cars. And to some extent by their patrolling to and fro, back and forth, they obstructed the use of the porch and the parking plaza by Weis' customers.

Weis had posted notices to the effect that nobody had a right to come onto his property, prohibiting trespassing, and also prohibiting any solicitation by anyone, other than his employees on the porch or the parking lot.

Despite this fact, these pickets came and carried the placards. Carrying placards has been held to be an exercise of the right of freedom of speech when done in public places. Also, they patrolled, exercising a right which was not protected by the right of freedom of speech.

Weis and the Logan Plaza brought suit in the equity courts of Pennsylvania to enjoin these pickets from trespassing on this property, which was private property, and as I pointed out, at least 350 feet on one side and from 400 to 500 feet on the other side from any public property, such as streets.

The Pennsylvania court issued the injunction on the ground that these people were trespassing upon the property, and the lower court

also on an additional ground that they were trying to coerce Weis into coercing his employees to join the union.

The case was appealed to the Supreme Court, to the highest appellate court of Pennsylvania, which affirmed, with three judges dissenting. It was then brought to the Supreme Court of the United States, and the Supreme Court of the United States—in my view, as far as I can find, for the first time in the history of this country—held that the right of freedom of speech guaranteed by the first amendment prohibited the courts of Pennsylvania from enjoining the use of this property by the pickets in carrying their placards and patrolling.

The majority opinion—I won't analyze it in detail—assumed, in the face of the fact that Weis had forbidden trespassing, and forbidden any kind of solicitation, other than by his employees, that for some strange reason, by inviting people to come in there to trade with him, that he had extended an invitation which entitled these pickets to come on there and make use of his private property.

The only decision of any consequence was relied on in the majority opinion was the *Marsh* case from Alabama, which involved what was really public property, and it said by inviting these customers in there—at least this is the inference—to come there and buy his goods in the supermarket, that he had somehow made his private property almost public property. And on this basis the majority held, and I think for the first time in history, that pickets could go on and patrol and picket on private property against the will of the owner of this private property and to some extent discommode the use for which that property was acquired—namely, the use in selling goods.

Now, if the U.S. Government had sent its officials on that private property—this is my observation—to try to proclaim some policy of the U.S. Government that ought to be followed by the customers of Weis, the U.S. Government would have been depriving Weis of his property without due process of law in violation of the fifth amendment, in my honest opinion. But yet these private individuals were allowed by this opinion, the majority opinion, to do something which I think would have been unconstitutional for the U.S. Government to have done. In my own personal opinion, under the laws of this country relating to private property, this was well expressed by these words in the dissenting opinion of Justice Black:

> In allowing the trespass, the majority opinion indicates that Weis and Logan invited the public to the shopping center's parking lot. This statement is contrary to common sense. Of course, there was an implicit invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or several of them together less entitled to have a parking lot set aside for customers and other property owners? To hold the store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the Constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patrolling, is not free speech and not protected as such. These pickets do have a Constitutional right to speak about Weis' refusal to hire union labor, but they do not have a Constitutional right to compel Weis to furnish them a place to do so on his property.

I ask unanimous consent that the entire—the majority and dissenting opinions be printed in full at this point in the record.

(The material referred to for inclusion in the record was marked "Exhibit 22" and appears in the appendix.)

Senator TYDINGS. Mr. Chairman, I ask unanimous consent that we put the Pennsylvania opinion together with the dissent in there, too.

Senator ERVIN. I have no objection.

The CHAIRMAN. That will be granted.

(The material referred to for inclusion in the record was marked "Exhibit 23" and appears in the appendix.)

Senator ERVIN. As I stated, I do not request the Justice to remain here. If he wants to go—I am going to take up other decisions.

Justice FORTAS. No, sir; I shall not comment on it pursuant to the constitutional principle that I previously mentioned. And I shall remain, if I may, Senator.

Senator ERVIN. Surely.

Justice FORTAS. Thank you.

Senator ERVIN. I would just observe that the nominee concurred in the majority opinion by his vote.

Now, while I am on the matter of unions, I will call attention to another case. *National Labor Relations Board* v. *Allis Chalmers Manufacturing Co.*, which was decided on June 12, 1967.

The report of the case I have is volume 388—the preliminary print—volume 388, U.S. part 1, page 1-292.

This was a 5-to-4 decision in which the nominee agreed with the majority opinion. In fact, the majority opinion would not have been the majority opinion without his vote.

Now, this involved an interpretation of the Taft-Hartley Act—not a constitutional question. I will use this case, however, because I think it illustrates that sometimes the Supreme Court usurps and exercises authority to amend acts of Congress, which is a power the Supreme Court does not possess, because under the first section of the Constitution, the first article, it says that all legislative power herein granted is vested in the Congress.

Section 7 of the Taft-Hartley Act, which at the time of its enactment was hailed as the Magna Charta of labor, both organized and unorganized, provides that employees shall have the right to engage in concerted activities, and shall also have the right to refrain from any and all such activities, subject to a union-shop agreement. Other provisions of the act provide that a union-shop agreement can only compel the employee to pay dues and ordinary initiation fees as a condition of employment.

It is difficult to imagine that the Congress could have found clearer words than it used in section 7, to say that employees shall have the right to engage in concerted activities, and shall also have the right to refrain from any and all such activities.

Certain employees of the Allis-Chalmers Manufacturing Co. refused to participate in a strike, and instead of doing so crossed the picket line and continued their work. In other words, they elected not to participate in concerted activities. The union fined them, and there was a great deal of litigation in the lower Federal courts about the matter. As I recall, one decision upheld the right of courts to uphold the union fines, and then another ruling exactly the contrary—I believe that is right. In any case, it reached the Supreme Court of the United States.

My personal opinion is that no human beings could have found clearer language to say that employees should have the right to re-

frain from engaging in concerted activities than employed in section 7 of the Taft-Hartley Act.

The Supreme Court, by a divided vote of 5 to 4, upheld the right of the union to have fines imposed and enforced by the Court against these employees who elected to exercise what they thought was the freedom given them by Congress in section 7. And they did so under section 8(b) which says:

> It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in Section 7 provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to acquisition or retention of membership therein.

Now, it is to be noted that that proviso undertook to give the union the power to prescribe rules for acquiring and retaining membership. It is a very familiar principle of law that the expression of one thing is the exclusion of another. And under that rule of law, the right to fine members for not participating was excluded. They might have had the right to expel them from membership in the union, but not to fine them—if it is interpreted according to the canons of statutory construction.

But the Court held in effect that Congress did the very peculiar thing of saying "You shall be free not to participate provided the union does not take this right away from you." And so they held by a 5-to-4 decision that this proviso gave the union the right to take away the right which Congress clearly gave—along with the interpretation that they had a right to expel them from membership for not participating. But that would not have accomplished the job of coercion, because they could have retained their jobs merely by paying initiation fees and dues. The act was intended to prevent coercion, and it certainly is coercion to fine a man and have the Court enforce the fine for exercising the freedom that is supposed to be guaranteed by section 7, not to participate.

So the majority of the Court negatived the plain freedom which Congress manifestly intended to vouchsafe to all employees, but it also amended the proviso by saying something Congress did not say—that instead of expelling them from membership, they can fine them, and have the fine enforced by the Court.

I will close by saying I think this was a rewrite of an act of Congress by a majority of the Court which clearly violated the constitutional provision vested in the power of the legislating Congress, and I agree with what Justice Black says in the dissenting opinion on page 216 and 217 of this decision:

> Sections 7 and 8 together bespeak a strong purpose of Congress who believed workers were wholly free to determine in what concerted labor activities they will engage or are inclined to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration. In my judgment, it ill behooves this Court to strike so diligently to defeat this unequivocally declared purpose of Congress merely because the Court believes that too much freedom of choice for workers will impair the effective power of unions. A court enforced fine is certainly coercive, it certainly affects the employee's job, and certainly is not a traditional method of internal union discipline. When applied by a union to an employee who had joined it as a condition of obtaining employment in a union shop, it defeats the provisions of the Act designed

to prevent union security clauses to be used for purposes other than to compel payment of dues. In such a decision it cannot be justified on any theory that the employee has contracted away or waived his Section 7 rights. Where there is clear legislative history to justify the courts often decline to follow the literal meaning of a statute. But this practice is fraught with dangers, when the legislative history is at best inconclusive and ambiguous. This is precisely such a case. And I dissent, because I am convinced that the court has ignored the liberal language of Section 8(b)(1)(a) in order to give unions a power which the Court but not Congress thinks they need.

Mr. Chairman, I ask unanimous consent that the staff provide the reporter a copy of the majority opinions, and any concurring or dissenting opinions to be printed in full at this point in the body of the record.

The CHAIRMAN. So ordered.

(The material referred to for inclusion in the record was marked "Exhibit 24" and appears in the appendix.)

Senator ERVIN. Now, I mentioned the *Amalgamated Employees* case in which the Court stretched the free speech clause of the first amendment further than it has ever been stretched so far as I can find in the history of this Republic.

I now want to call attention to two cases which are somewhat related, in which the Court used the right of association, which as I understand from the decisions arises out of the right to freedom of speech, and the right of freedom of assembly in the first amendment.

These two cases are *United States* v. *Robel* which was cited on December 11, 1967, and which is reported in the preliminary print of official reports on the Supreme Court, volume 389, U.S. part 2, beginning at page 238.

Now, before I discuss this case, I would like to discuss a case that was decided by the Supreme Court before the nominee became a member of that Court, which throws light upon these decisions, or at least background for these decisions. The case I refer to is the *Communist Party* v. *The Control Board*, volume 367 U.S. Reports, at page 1.

In that case, the Supreme Court held most of the provisions of what we commonly call the Subversive Control Act by a five to four decision.

One of the provisions of this act, section 2, recites legislative findings based upon evidence adduced before various congressional committees. The first of these is as follows:

There exists a world Communist movement which, in its origins, its development, and its present practice, is a worldwide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

The statute provides in section 7:

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

Now, in this case which was handed down on June 5, 1961, the majority of the Supreme Court upheld the provisions of this act as far as registration is concerned and adopted, or at least said they would, the findings of fact which intended to sustain the congressional declarations made by the circuit court which heard the case.

Now, in *United States* v. *Robel*, a case decided on December 11, 1967, the Court passed upon an act of Congress which constituted a part of the Subversive Activities Control Act of 1950, which provides that when a Communist action organization is under a final order to register, it shall be unlawful for any member of the organization to engage in any employment in any defense facility.

The Court held by a divided opinion in this case that this statute was unconstitutional. The majority opinion placed the decision on the basis of the right of association created under the decision by the free speech and free assembly provisions of the first amendment. In other words, the Court held in this case that the right of a Communist—the accused was alleged to have been a Communist, and there seemed to be no question about that matter—that the right of a Communist to associate with other Communists under the right of association created by the first amendment was so strong that it disabled Congress to enact a law making it unlawful for a Communist to work in a defense industry.

As is stated, this was a case in which the nominee participated and concurred in the majority opinion to that effect.

Now, I am not a person who looks for Communists under every bed. As a matter of fact, I served on the committee which recommended the censure of the late Senator Joe McCarthy of Wisconsin, who made it a practice to charge people with being Communists. And I believe if a man wants to associate with Communists, that he has a right of association which entitles him to do so—as long as he does not actively engage in efforts to overthrow the country by force or violence. But I find it impossible to believe that the first amendment to the Constitution of the United States makes unconstitutional an act which was passed by at least two-thirds of each House of Congress over President Truman's veto which denies the Communists a right to work in a defense industry.

And so I agree with the minority, the dissenting opinion of Justices Harlan and White in that case.

Certainly under the decisions, the Supreme Court itself has held, by a divided Court, that the objective of communism is to extinguish liberty throughout this earth, and establish a Communist dictatorship. So I say this is putting an interpretation upon the right of association which is inconsistent, not only with commonsense, but also with the ability of Congress to protect the security of this Nation.

Now, I wish to call attention at this time to another case in this field—Keyishian et al., against the Board of Regents of the University of the State of New York, which was decided on January 23, 1967.

This was decided by a divided Court, divided by five to four. The nominee was one of the five. The majority opinion would not constitute a decision in this case without the vote of the nominee.

Now, in this case, the majority opinion held that an act of the State of New York, passed by the State of New York, which provided that

no person shall be appointed to any office or position in the service of the State or of any civil division thereof, nor shall any person employed in any such office of position be continued in such appointment, nor shall any person be employed in the public service as superintendent, principal, or teacher, in a public school or academy, or in a State college, or any other State educational institution who, (*a*) by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine that the Government of the United States or of any State or of any political subdivision thereof shall be overthrown or overturned by force, violence, or any unlawful means, or, (*b*), prints, publishes, edits, issues, or sells any book paper document or written or printed matter in any form containing or advocating, advising or teaching, the doctrine that the Government of the United States or of any State or of any political subdivision thereof shall be overthrown by force, violence, or any unlawful means, or who advocates, advises, teaches, or embraces the duty, necessity, or propriety of adopting the doctrine contained therein, or (*c*) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the Government of the United States or of any State or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. For the purposes of this section membership in the Communist Party of the United States of America or the Communist Party of the State of New York shall constitute prima facie evidence of disqualification or appointment to or retention of any office or position in the service of the State or of any city or civil division thereof.

Now, you will notice that this makes membership in the Communist Party prima facie evidence of disqualification to teach under this statute.

Now, this statute and other statutes and regulations provide that a teacher, or other State employee, could rebut the presumption of the prima facie case of disqualification in one of three ways. First, by denying and proving that the party was not a member of the Communist Party. Or by disproving that the organization in question, whatever it was, in this case the Communist Party, advocated the overthrow of government by force, or by proving that the teacher or State employee had no knowledge of such advocacy.

The majority of the Supreme Court held this statute unconstitutional. They talked about it being vague.

I cannot imagine a statute drawn in this field that is so lacking in vagueness, which is so specific in its provisions.

In the majority opinion, written by Justice Brennan, it attacks the statute on the ground that proof of nonactive membership or showing of the absence of intent to further unlawful aims will not rebut the presumption and defeat dismissal. And that was the theory on which the majority of the Court said that New York had no right under this statute to bar Communists from teaching in the public schools and colleges of New York, and judged the statute unconstitutional. And they did this under the same right of association. The Court held in substance that the right of a teacher who was a Communist to associate with other Communists was so strong that the State of New York could not adopt legislation of this character, disqualifying that

teacher who was a Communist from teaching the youth and the children of the State of New York, and they did that on the ground that the teacher might voluntarily join the Communist Party, might be paying dues to the Communist Party, might be encouraging the Communists with whom he or she associated, but as long as the person did not have the actual intent to further the aim of overthrowing the Government by unlawful means, that they had a constitutional right to continue to teach in the schools of New York.

I think that is stretching the right of association beyond the limits of commonsense, and beyond the limits of the right of a State to prescribe reasonable qualifications for teachers—and beyond the right of a State to protect itself against subversion and infiltration by Communists.

Now, my views of that decision are pretty well expressed by Justice Tom Clark in his dissenting opinion on page 385. He says the majority says that the Feinberg law is bad because it has an overbroad sweep.

I regret to say, and I do so with deference, that the majority has by its broadside swept away one of our most precious rights, namely, the right of self preservation. [??] Our public educational system is the genius of our democracy. The minds of our youth are developed there, and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of the press, freedom of assembly, or of association, even in the Communist Party. It is simply this. May the state provide that one who after having a full judicial review is found to have wilfully and deliberately advocated, advised or taught that our government should be overthrown by force or violence, or other unlawful means, or to have wilfully and deliberately printed, published, and supported any book or paper that so advocated, and who has personally advocated such doctrine himself, or to have wilfully and deliberately become a member of an organization that advocates such doctrine, is prima facie disqualified for teaching in its universities. My answer, in keeping with all of our cases up until today, is yes.

Mr. Chairman—in the absence of any objection, it is ordered that the full copy of the opinion of the majority and the dissenting opinions and concurring opinions be printed in the record at this point.

(The material referred to for inclusion in the record was marked "Exhibit 25" and appears in the appendix.)

Senator ERVIN. The only observation I make, if the vote of the nominee had been different, it would have been held that New York had the power to enact the law which was struck down as unconstitutional on the right of association in that case.

I will close the discussion of these selected first amendment cases by observing that I find it impossible to believe that the men who drafted and ratified the first amendment intended to make it unconstitutional for Congress to enact a law prohibiting the employment in defense industries vital to our defense of men who belong to an organization which is dedicated to the purpose of overthrowing our Government by force or other unlawful means, or to deprive a State of the United States of the power to prohibit a person belonging to such organization from instructing the youth in its public colleges and schools.

Now I wish to call the attention of the committee to some decisions which have been much discussed throughout the United States since they were handed down in 1966, and which many of us honestly believe have seriously handicapped our law enforcement officers in ap-

prehending criminals, and our courts in administering criminal justice in such a fashion as to give to the victims of crime and society the same consideration which it gives to those charged with perpetrating crimes. I refer to the case of *Miranda* v. *Arizona*, which is reported in 384 United States at page 436 and which was decided by 5-to-4 vote on June 13, 1966.

I observe at this time that the nominee participated with the majority in this decision, and that if he had voted otherwise, the rules concerning the admission of voluntary confessions which prevailed in this country from the day the self-incrimination clause became a part of the Constitution on June 15, 1790, would still be the law of the land.

Now, this case involved the interpretation of what we call familiarly the self-incrimination clause of the fifth amendment. This clause says this: "No person shall be compelled in any criminal case to be a witness against himself."

Prior to this date, it was the general rule in all of the Federal courts, and in all of the courts of the 50 States of this Nation, that an extrajudicial voluntary confession of an accused should be admissible against him on his trial, and that the involuntary confession of guilt made by an accused should not be admitted against him on his trial.

I respectfully submit that this was a sensible rule, that the practice which prevailed in most States was a sound practice. When an accused objected to the admission of an extrajudicial confession made by him on the ground that it was involuntary, the trial judge refused to admit it, and received evidence from both the prosecution and the accused on that point. The trial judge would permit the accused to offer any testimony available to him which tended to show that his confession was involuntary and would permit him to testify to all of the circumstances surrounding the making of his confession without requiring him to be subjected to any questions about the merits of the case or his guilt.

And therefore the judge would make a finding as to whether the confession was voluntary or involuntary. And that is a finding which any judge capable of being a judge can make without too much difficulty. And if a trial judge is not capable of making a determination on that question, he is not capable of being a judge in any capacity.

In addition to the judge hearing the testimony pro and con on the issue of the voluntariness of the confession, in case he ruled that the confession was voluntarily made, he would then instruct the jury to pass on that same question, and to disregard the confession if it found it to be involuntary. And the rulings of the trial judge in these respects were to be reviewed on appeal to the highest appellate courts of the State if it was a State trial, or the highest appellate courts of the United States and even of the Supreme Court of the United States, if the Supreme Court saw fit to grant certiorari, if it was a Federal trial.

That was the rule that protected both society and the accused, because if the confession was involuntary, the Supreme Court of the United States could review the matter itself, and make its own findings.

The *Miranda* case illustrates an overweaning, it seems to me, solicitude for the welfare of those accused of crime, and it overlooks a very

significant truth, that society and the victims of crime are just as much entitled to justice as the accused.

The Supreme Court of the United States had the right, under the due process clause of the 14th amendment, to review all State decisions on this point, and to reverse them in case they found the confession to have been involuntarily made.

Justice Learned Hand, who in my judgment was one of the greatest jurists this country ever had, said the chance there was much danger of innocent parties being convicted in our criminal system of justice was very remote.

Under the law, prior to the *Miranda* case, every person accused of crime was presumed to be innocent, he was entitled to be acquitted, he was entitled to be tried ordinarily by a jury—with some exceptions in the State of Louisiana, maybe one or two other States I will mention later. For a serious crime, in most States he had to be indicted by a grand jury before he could be put to trial. He had the right of assistance of counsel for his defense. He had the right to confront and cross-examine his accusers. And he had the right to testify or refrain from testifying at his election, without having his failure to testify commented on by the prosecution. He had the right to compulsory process to obtain witnesses in his behalf. And, as I say, he could not be convicted until his guilt was established by testimony beyond a reasonable doubt, and that means that the jury must be fully satisfied of the truth of the charges before they convicted him.

This was enough protection in my judgment for the accused to insure him a fair trial and to make it as certain as is humanly possible that no innocent person will every be convicted of a crime which he did not commit.

But on June 13, 1966, the Supreme Court, by a 5-to-4 decision, invented a new formula which was composed of several things which the Supreme Court itself had repudiated time and time again in previous cases when it was urged on them. They said no matter how voluntary a confession might be—this is the effect, not the words—that no confession should be offered in evidence unless the law-enforcement officer first told him he did not have to say anything, he could remain silent, that anything he said could be used against him in the trial and he did not have to answer any questions at all unless he had a counsel present, and if he was unable to get a counsel of his own selection, that the court would furnish him counsel before he had to say anything.

And the Court went ahead and further held that he could not even waive this warning, or right to this warning, the right to counsel, unless de did so expressly.

Now, we had some hearings here before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee in which the subcommittee took the testimony of Federal and State judges, Federal and State—State prosecuting attorneys, law-enforcement officers—and I put this question to them almost invariably. I said, how many people in the United States who are suspected of serious crimes do not already know that they have a right to remain silent, and do not already know that what they say will be used against them if it is derogatory to them, and do not already know that they have the right to counsel before they answer any questions. And these Federal and

State judges and law-enforcement officers and prosecuting attorneys invariably said that virtually every man in the United States already knew those things, which this *Miranda* decision required them to be told for the first time now.

Then I put this question to them. So as a practical matter, self-confessed criminals are having to be freed in Federal and State courts throughout this land simply because the law-enforcement officers do not tell them something they already know. And they all agreed with me that that was a fact.

So this *Miranda* case has very little relationship to the practical kind of a world in which people live.

I wish it had been in effect when I was practicing law, because a lot of my clients had voluntarily confessed their guilt, but would have been turned loose. I say that because the first thing I ever told my clients was to keep their mouths shut and say nothing to anybody. And this rule is designed to encourage all persons suspected of crime to keep their mouth shut. And it could not have been more efficacious in its design if those who promulgated it and studied on the subject had studied for a thousand years to find a rule that will keep anybody from confessing to guilt.

This case not only holds that he cannot confess his guilt, but he cannot even claim to be innocent. In other words, it applies to what we lawyers call exculpatory statements, as well as to confessions of guilt.

I am not going to discuss it further, because it is discussed in an opinion which starts on page 435 of the Supreme Court report, and ends on page 545. I am just going to ask that the entire opinion and dissenting opinion be printed at this point in the body of the record so everybody can observe the case for himself.

The CHAIRMAN. So ordered.

(The material referred to was marked "Exhibit 26" and appears in the appendix.)

Senator ERVIN. I would observe if the nominee had not joined the majority, the *Miranda* case would not have been a majority opinion. If the Court split even 4 and 4, the old law would still have been the law of this land.

Now, that is the way the Constitution of the United States is written. I say that because this applies to statements made by a suspect to a law-enforcement officer outside of the court. Mark the words on which this newly invented doctrine is based. No person shall be compelled in any criminal case to be a witness against himself.

In other times where the question arose in Federal and State courts, between the 15th day of June 1790 and the 13th day of June 1966, it was held these words had no possible application to voluntary confessions for three reasons.

In the first place, they only applied to compelled testimony, and a voluntary confession is not compelled. In the second place, they only applied to testimony given in a court, or before some kind of tribunal, or some kind of committee in which a person was compelled to be a witness by a law or rule of court. So that is the second reason. And the third reason, a man had to be a witness—not a mere suspect in custody. But on the 13th day of June 1966, the interpretation placed

upon these words of the Constitution was changed, and it was such a drastic change that when the question came up whether the change was going to apply retroactively, the majority of the Court held no. They held that in *Johnson* v. *New Jersey*, reported in 384 U.S. 719. This was also a Court-decided majority opinion, and Justice Harlan, Justice Stewart, and Justice White said they continued to believe that the *Miranda* case was erroneous, and Justice Clark said he still believed the *Miranda* case was erroneously decided—that is four of the Justices. This is a 5-to-4 decision. And the nominee concurred with the five, and his vote made that the majority opinion.

Now, for me as a lawyer it is rather queer for members of the Supreme Court to say that a provision in the Constitution applies to certain people up to a certain date in one way, and then applies to other people in another way after that date. That is the way legislative bodies work. And in my honest judgment, I think that the Supreme Court exercises power to amend the Constitution when it changes a ruling under those circumstances where the ruling has been in effect 166 years. And no amount of words can obliterate or erase that plain fact.

And I might state, by way of proof as well as pleasantry, that I think that in dealing with the subject of voluntary confessions in the *Miranda* case, the majority opinion made a voluntary confession, or maybe it was an involuntary confession. The majority opinion admits that the formula was one which was devised that day. The Court talked about "the warnings which we enunciate today" and that was 166 years after the constitutional principle on which they were allegedly based, had become part of the Constitution.

I am not going to introduce the entire decision, but there is a case of *Schmerber* v. *California*, reported in 384 U.S. 757, in which the majority of the Court held that it was not unconstitutional for a physician to extract blood from a suspect in custody, against the suspect's will, for determining whether the blood showed that the suspect was intoxicated right after he had been involved in an automobile accident in which he was alleged as driving in a drunken state.

The nominee dissented in that case. He was in the minority that time. And I quote only one of his statements—it will be very short—from the dissenting opinion, page 779.

> In my view, petitioner's privilege against self-incrimination applies.

Now, virtually all the cases before that time held, and still hold, that the self-incrimination clause of the fifth amendment applies only to compelling communications or testimony—that is testimony statements—and it does not apply to compulsion which makes a suspect or an accused the source of real or physical evidence.

Now, it may be that the law should have been like the nominee stated in his dissenting opinion—that the Constitution should have been like that. But that dissenting opinion was contrary to virtually all of the cases so far as I have been able to find which antedated that particular case.

I will now call the attention of the committee to three related cases dealing with the right to counsel clause of the sixth amendment, which specifies in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense.

Now, prior to the 22d day of June 1964, the Supreme Court of the United States held that the right to counsel under this clause accrued when and only when a formal accusation charging an accused with a commission of a crime was filed against him by some public official or in some cases by a private person who was authorized by law to make such a formal charge.

Now, before the nominee became an Associate Justice, the Supreme Court handed down another one of these 5-to-4 decisions in *Escobedo* v. *Illinois*, 378 U.S. 478, in which it altered either the words of the right-to-counsel clause of the sixth amendment or the interpretation placed upon those words from June 15, 1790, down to June 22, 1964—it held in the *Escobedo* case, which as I have stated, antedated the time the nominee became an Associate Justice—that the right of counsel did not accrue at the time an accusation of crime was made against a suspect or an accused, but it accrued when a law enforcement officer having him in custody began to suspect somewhere in the innermost recesses of his mind that perhaps the suspect had committed a crime which the law enforcement officer was investigating.

Now, the nominee is not responsible for that decision, because he did not participate in it. But that decision was approved in the *Miranda* case and in the *Wade* case and the *Gilbert* case and the *Stovall* case in which the nominee did participate.

From June 15, 1790, down to June 12, 1967—it appears lacking only 3 days of being 177 years—it was held by Federal and State courts throughout the length and breadth of this land that a law-enforcement officer could permit an eyewitness to a crime to look at a suspect in custody for the purpose of identifying the suspect as the person he saw commit the crime, or for the purpose of exonerating the suspect as the person he did not see commit the crime. That was a very sensible procedure. There was no requirement that the lawyer had to be there with the suspect, representing the suspect. As a matter of fact, anyone that has had any experience with practical enforcement of law knows that in a large percentage of cases there was never any occasion to get an attorney for one of these suspects, simply because the eyewitness said, "That is not the man that I saw commit the crime."

When that happens, the law-enforcement officer released the suspect and he went on about his business without the necessity of any trial. And then the law-enforcement officers tried to find out who the guilty party was.

When you analyze the situation, there is really not any very great reason why you should have an attorney present at a pretrial inspection of a suspect by an eyewitness. This is true because, as the Circuit Court of Appeals of the Second Circuit pointed out in the *Stovall* case, which was entitled "*Theodore Stovall* v. *Denno*," reported in 55 Federal 2, page 731, an eyewitness to a crime identifies a suspect by his physical appearance or perhaps his voice, if he speaks. And the lawyer could not possibly change the physical appearance of a suspect by being there—the color of his eyes, the color of his hair, his height, his weight, his physical appearance—that is the way you identify him.

But on the 12th day of June 1967, the Supreme Court, by another one of the 5-to-4 decisions, held that the interpretation placed on the right of counsel clause of the sixth amendment had changed, and that what it meant for 177 years it no longer meant, and held it was unconstitutional for a law-enforcement officer to permit an eyewitness to

the crime, even if the eyewitness was the sole surviving victim of the crime, to look at a suspect in custody for the purpose of saying whether the suspect was or was not the person the witness said committed the crime, unless the suspect had a lawyer present.

As I construe the majority opinion in that case, which was written by Mr. Justice Brennan, it is based upon two theories, one of which I think is an insult to the great majority of the American people, and particularly to the law-enforcement officer. It says it is necessary to have an attorney present because law-enforcement officers might suggest to the eyewitness he ought to identify the suspect in custody as a person he saw commit the crime even though he did not see him, and that the witness is so unreliable that he might just accept that suggestion of a law-enforcement officer regardless of its truth or falsity. I think that is a deplorable attitude for the highest Court of this land to take of the citizenship of America, and to say that you have to establish a rule that applies to all law-enforcement officers, because law-enforcement officers are so disreputable as a profession that you cannot trust them.

There is another reason they gave for this decision, and that was stated in the majority opinion in the *Wade* case, that a lawyer could not cross-examine the eyewitness about the circumstances surrounding the identification unless the lawyer was present at the identification. Well, now, if that reason has any sense in it, you are going to have to extend this rule, and say the right of counsel arises when a criminal commits a crime, because if the second theory of justification they gave for this rule is valid, a lawyer cannot cross-examine the witnesses who saw a crime committed, or in respect to the circumstances surrounding the commission of the crime unless the lawyer was present and saw the crime committed. That is just as logical as the basis on which the Court attempted to justify the new rule saying that it was now unconstitutional for an eyewitness to be allowed to look at a suspect in custody unless a lawyer is present.

I do not know how they are going to make this rule work, because in the cities particularly they have what they call lineups, where they have a lot of criminals, or suspected criminals in a line, 15, 25, or 30 and you would have to call a meeting of the bar association to apply this rule in cases of that kind.

Now—I am saving a lot of time by giving my version of this, because I do not want to read all these documents. But here is what the Court held. Now, remember that the question is whether an eyewitness is telling the truth. When an eyewitness say "I saw that accused commit this crime of which he stands charged"—that has always been a question of fact for juries, under the practice in Federal and State courts.

But on June 12, 1967, the Supreme Court, by this 5 to 4 vote, invented a new rule, and based it on the right of counsel clause of the sixth amendment. They said that where an eyewitness is permitted to view a suspect in custody for the purpose of identification or exoneration of the suspect, in the absence of a lawyer representing the suspect, the trial judge cannot permit the positive testimony of the eyewitness on the trail that he saw the accused commit the crime of which he stands charged unless the trial judge first stops the proceedings before the jury and conducts a preliminary inquiry, and he ascertains by clear and convincing evidence, I believe it is, that the pretrial

view which the eyewitness had in the absence of a lawyer representing the suspect did not influence in any way his mental conviction that the accused is the man he saw commit the crime. And if the trial judge cannot find that, he has to exclude this evidence—even though the eyewitness is willing to take the witness stand and say "I saw the accused commit the crime, and I base my identification solely on what I saw at the time the crime is committed.

That ought to be a question for the jury.

Now, I do not see how a trial judge can ever truthfully make that kind of a finding about the look the witness had at the suspect, while the suspect had no lawyer present—did not influence him, simply because if a person sees another commit a crime and then later is permitted to identify the party by looking at him while in custody, what he sees while the man is in custody is bound to influence him, because it confirms the man's original opinion that that was the man he saw commit the crime. So they have erected a rule that is impossible in operation, wholly out of harmony with the way people live, move, and have their being, in the way they identify criminals.

Now, this *Wade* case came up. Another case came up on the same day. And I would like to have a copy of the opinion printed in the record at this point.

(The document referred to for inclusion in the record was marked "Exhibit 27" and appears in the appendix.)

Senator ERVIN. On the same day the Court handed down the case of *Gilbert* v. *State of California*, which Mr. Justice Brennan wrote the majority opinion. And it made the same holding with respect to State. I would like to have the *Gilbert* case printed at this point in the body of the record.

(The document referred to for inclusion in the record was marked "Exhibit 28" and appears in the appendix.)

Senator ERVIN. Incidentally, the *Gilbert* case is reported in 388 U.S. at 263, and the *Wade* case is 388 U.S. 218.

Then the same day the Court handed down the opinion in the *Stovall* v. *Denno* which is reported at 388 U.S., at page 293. I would like to call to the attention of the committee that they approved the rule laid down in the *Wade* and *Gilbert* cases, placing this newly invented limitation upon the right of an eye witness to testify to the identification of the person they say committed the crime, and also upon the right of the jury to hear the eye witness so testify.

But the question came up in the *Stovall* case whether the new role invented on that day was to be applied retroactively. And the majority of the Court held that it was not. And I state in behalf of the nominee that he did not concur in that—he said it ought to be applied retroactively, in a concurring opinion.

I want to invite the attention of the committee to the reasons which the majority gave in the *Stovall* case for not applying the rule retroactively.

The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; no court announced such a requirement until Wade was decided by the Court of Appeals for the Fifth Circuit, 358 F. 2d 557. The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Wall, Eyewitness Identification in Criminal Cases 38. Law enforcement authorities fairly relied on this virtually unanimous

weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of Wade and Gilbert "would seriously disrupt the administration of our criminal laws."

Those are remarkable words for the Supreme Court of the United States to say, because when you reduce it to plain, unambiguous English, here is what they mean. It would not be fair for the people of the United States, for us to apply this newly invented interpretation of the right to counsel clause of the sixth amendment retroactively because nobody having any concern with the question could ever have anticipated that this Court would hand down such decisions.

And I take it that is a voluntary confession by the majority in this case that it was really amending the Constitution, because they were certainly changing what the Constitution had always been said to mean throughout the preceding 177 years.

Now, in fairness to the nominee, I would like to point out while he concurred in the ruling in the *Wade* and *Gilbert* cases, and the approval of that ruling in the *Stovall* case, he did not agree that these new rules should not be retroactive. I read from his opinion which I will call the concurring opinion—it may be called partly concurring and partly dissenting. On page 303:

Mr. Justice Fortas would reverse and remand for a new trial on the ground that the states reference at trial to the improper hospital identification violated petitioner's 14th amendment rights and was prejudicial. He would not reach the question of retroactivity of Wade and Gilbert.

I do not believe I have offered in evidence a copy of *Stovall* v. *Denno* I would like to have it printed in full in the record.

(The document referred to for inclusion in the record was marked "Exhibit 29" and appears in the appendix.)

Senator ERVIN. Now, the nominee thought the case ought to be sent back to be tried. And this new rule, I presume, invented in *Wade* and *Gilbert*, should be applied on the retrial of the case.

Now, that case is pretty well reported in United States on the relation of *Theodore R. Stovall* v. *Denno*, 355 F. 2d 731. And the record in that case shows that on the original trial, in the State court, that the prosecution did not bring out any evidence about the unconstitutional provision or view which the eyewitness has of the accused in a hospital room, but that was brought out by the accused himself, his attorney. The evidence in that case showed that the eyewitness who was a relative of the doctor testified positively on the trial that she identified the accused as the man she saw murder her husband, and stabbed her 11 times in an effort to kill her while she was trying to prevent him from killing her husband. She was so badly injured by these stab wounds that she had to be taken to the hospital for an operation. And it was in doubt whether or not she would live or die. She was the only human being on the face of this earth who was an eyewitness to the crime. And the report of the case indicates there was little other evidence.

So when they took the accused before the magistrate, and he asked the accused whether he wanted the court to furnish him a lawyer, or whether he wanted to get a lawyer of his own selection. The accused said he wanted to get a lawyer of his own selection, and the law-enforcement officer, not knowing whether the eyewitness was going to live or die—took the suspect to the hospital room, and she identified

him as the person she saw murder her husband and stab her 11 times. And as I remarked a while ago, she was the only human being of all earth's inhabitants, who saw the crime committed, and could testify that the accused was the man that perpetrated it. Yet under this newly invented rule of the case that had been remanded, the trial judge would have had to have gone into her mind before he could let in the mere testimony "I saw this man murder my husband," and ascertain that the look she saw in the hospital room had nothing whatever to do with her conviction that the accused was the man she saw commit the crime. And I do not see how the judge could have done anything except hold that it did influence her because it confirmed her impression that she had gotten at the time she saw the crime committed.

Now, that is the kind of rules, artificial rules, rules out of harmony with the practice of all Federal law-enforcement officers, and all Federal courts, and all State law-enforcement officers, and all State courts, which are being invented by the Supreme Court, and which have the effect of making it more difficult to bring criminals to justice at a time when the crime rate in the United States is soaring in an unprecedented fashion.

With all due deference to the Court, I am constrained to say that in my humble judgment it is time for the Supreme Court members to realize that society and the victims of crime are just as much entitled to justice as an accused and to stop inventing artificial rules contrary to the experience for 177 years, and contrary to all of the decisions during that period of time, as they did in the *Wade* and the *Gilbert* and the *Stovall* cases.

I asked the nominee this morning if he could give a statement of how many times the Supreme Court, usually by a narrow margin, has overruled previous decisions during the past few years, and he said he could not do so. But the truth is they have literally overruled scores of cases.

On May 20, 1968, the Supreme Court handed down two decisions which must have overruled somewhere in the neighborhood of 75 or a hundred cases, at least. I refer to the case of *Duncan* v. *Louisiana*, which was decided on May 20, 1968, by a divided court of 7 to 2. The nominee was one of the seven. And the case of *Bloom* v. *Illinois*, which was decided on May 20, 1967, by a 7 to 2 vote, with the nominee being one of the seven.

Now, the *Duncan* case—the majority opinion was written by Mr. Justice White.

The decision is allegedly based on the words of the sixth amendment which says:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

This amendment became effective, as I have remarked before, on June 15, 1790. From that time down to May 20, 1968, a period of almost 178 years, the Supreme Court consistently held that these words of the sixth amendment applied only to trials in the Federal courts, and had no application whatsoever to trials in the State courts.

They had held prior to May 20, 1968, that the due process clause of the 14th amendment, which is the instrument which the Supreme Court Justices have used to change the Constitution, or constitutional

interpretation, had not made these words of the sixth amendment applicable to State trials.

The State of Louisiana has its law based in part upon the code of Napoleon, and as I understand it the State of Louisiana has always operated under a system in which only felonies, persons charged with felonies, have a right to be tried before a jury, and under which persons charged with misdemeanors have no right to a jury trial.

So in the *Duncan* case the Supreme Court reversed the interpretations which it had placed upon the right to counsel clause of the sixth amendment for 178 years, in a case which arose in Louisiana, and held that therefore, that in that case and thereafter the words of the jury trial provisions of the sixth amendment should have a quite different meaning than it had throughout the preceding 178 years.

I will not discuss the *Duncan* case at any great length.

On the same day, the Court handed down the *Bloom* case by a 7-to-2 decision. In the *Bloom* case it also placed an interpretation on the jury trial provisions of the sixth amendment contrary to the interpretation which had been placed uniformly upon those words throughout the previous 178 years.

They held for the first time in the history of this Republic that the jury trial provisions of the sixth amendment in some unaccountable way had suddenly become applicable to criminal contempt trials.

This meaning was entirely contrary to the history of criminal contempt trials in this country, both Federal and State, and contrary to all the previous interpretations made by the Supreme Court and State courts on this subject. I ask unanimous consent that the *Duncan* and *Bloom* cases be printed in full at this point in the body of the record.

Senator McCLELLAN. So ordered.

(The material referred to for inclusion in the record was marked "Exhibit 30" and "Exhibit 31" and appears in the appendix.)

Senator HART. Would you yield?

I note that Senator Ervin is putting into the record in full both of reads this part of the hearing, it is fair to note that the nominee, Justice Fortas, did argue to his colleagues in the *Duncan* case that it ought not to extend automatically all of the Federal rules to some of these State proceedings. Is that not correct?

Senator ERVIN. That is correct. The nominee has the deciding vote, as I have already said, in the *Wade* and *Gilbert* cases. He also participated in the majority decision—concurred in, in the *Duncan* case, subject to exceptions. And also concurred in the majority opinion in the *Bloom* case. And I will have to say to the credit of the writer of these opinions, Mr. Justice White, that he just made an honest and voluntary confession that they were changing the law from what it had been during the preceding 178 years.

Now, I would say about the nominee that he is not satisfied with the change just thus far—he wants to make it some more, according to his concurring opinion in the *Duncan* and *Bloom* cases which I put in the record.

If anybody wats to contradict me, this will give him an opportunity. But according to my reading of the decisions of the Supreme Court of the United States, it was held at all times, down through May 20, 1968, that the right of trial by jury secured to the accused in Federal prosecutions was to be interpreted in the light of the common law, and that under the common law, and this constitutional provision, that

the right of trial by jury required a trial by jury of 12 men—no more, no less—and also required a unanimous verdict of the entire 12.

Now, Mr. Justice Fortas indicated that he wants to change this rule, or hold that these words of the Constitution mean one thing in Federal criminal trials and another thing in State criminal trials, because this is what he says. And incidentally, the nominee stated this morning this illustrates his devotion to the Federal principle. I suggested this morning, in reply to that suggestion, that if he wanted to abide by the Federal principle as it has been expounded for 178 years, he ought to have joined Justices Harlan and Stewart in dissenting against changing the 178-year rule, and not agreed with the majority that the sixth amendment became applicable to the States on May 20, 1968. But he did not do that.

But he does state in his concurring opinion the following:

> But although I agree with the decision of the Court, I cannot agree with the implication, see n. 30 ante, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that "due process" requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

Now, what that means to me is that the nominee has expressed an opinion that the words of the sixth amendment relating to the jury trials should possibly mean one thing applied to Federal trials, and an entirely different thing as applied to State jury trials. It must require a jury of 12 if you are going to have it under Federal, but you can require some other number, three, four, five, six, seven, in the State. I am eminently incapable of comprehending how the words can mean one thing when applied to Federal criminal trials, and quite a different thing when applied to State criminal trials. It is a whole lot harder for me to understand that than to understand why the Supreme Court Justices might hold that the Constitution means one thing for 178 years and a different thing thereafter, because I do understand something about love of human beings for power.

Now I want to show what has happened with these jury trials.

Eleven years before this Supreme Court had the case of *Green* v. *The United States*, reported in 353 U.S. 165. It involved the question whether the accused in that trial, charged with criminal contempt of Federal courts had a constitutional right to a trial by jury under the sixth amendment. And it was decided by a divided Court—I believe the Court divided 6 to 3, because while Justice Brennan dissented, he dissented on other grounds. The Court decided that there was no right to a jury trial under the sixth amendment in criminal contempt cases in the Federal court.

In his concurring opinion, Mr. Justice Frankfurter, in the *Green* case and this is very illuminating, says:

> In joining the Court's opinion I deem it appropriate to add a few observations. Law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of its origin. What Magna Carta has become is very different indeed from the immediate objects of the barons at Runnymede. The fact that scholarship has shown that historical assumptions regarding the proce-

dure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions. Moreover, the most authoritative student of the history of contempt of court has impressively shown that "from the reign of Edward I it was established that the Court had power to punish summarily contempt committed . . . in the actual view of the Court." Fox, History of Contempt of Court, 49–52.

Whatever the conflicting views of scholars in constructing more or less dubious manuscripts of the Fourteenth Century, what is indisputable is that from the foundation of the United States the constitutionality of the power to punish for contempt without the intervention of a jury has not been doubted. The First Judiciary Act conferred such a power on the federal courts in the very act of their establishment, 1 Sta. 73, 83, and of the Judiciary Committee of eight that reported the bill to the Senate, five members including the chairman, Senator, later to be Chief Justice, Ellsworth, had been delegates to the Constitutional Convention. In the First Congress itself no less than nineteen members, including Madison who contemporaneously introduced "the Bill of Rights, had been delegates to the Convention." And when an abuse under this power manifested itself, and led Congress to define more explicitly the summary power vested in the courts, it did not remotely deny the existence of the power but merely defined the conditions for its exercise more clearly, in an Act "declaratory of the law concerning contempts of court." Act of Mar. 2, 1831, 4 Stat. 487.

Although the judge who had misused the power was impeached, and Congress defined the power more clearly, neither the proponents of the reform nor Congress in its corrective legislation suggested that the established law be changed by making the jury part of the procedure for the punishment of criminal contempt. This is more significant in that such a proposal had only recently been put before Congress as part of the draft penal code of Edward Livingston of Louisiana.

Nor has the constitutionality of the power been doubted by this Court through its existence. In at least two score cases in this Court, not to mention the vast mass of decisions in the lower federal courts, the power to punish summarily has been accepted without question.

And this is based on a footnote which states a multitude of decisions holding that the right to trial by jury under the sixth amendment does not apply to criminal contempt cases.

It is relevant to call the roll of the Justices not including those now sitting, who thus sustained the exercise of this power:

Washington	Gray	Pitney
Marshall	Blatchford	McReynolds
Johnson	L. Q. C. Lamar	Brandeis
Livingston	Fuller	Clarke
Todd	Brewer	Taft
Story	Brown	Sutherland
Duval	Shiras	Butler
Clifford	H. E. Jackson	Sanford
Swayne	White	Stone
Miller	Peckham	Roberts
Davis	McKenna	Cardozo
Field	Holmes	Reed
Strong	Day	Murphy
Bradley	Moody	R. H. Jackson
Hunt	Lurton	Rutledge
Waite	Hughes	Vinson
Harlan	Van Devanter	Minton
Mathews	J. R. Lamar	

To be sure, it is never too late for this Court to correct a misconception of an occasional decision, even on a rare occasion to change a rule of law that may have long persisted but also have long been questioned and only fluctuatingly applied. To say that everybody on the Court has been wrong for 150 years and

that that which has been deemed part of the bone and sinew of the law should now be extirpated is quite another thing. Decision-making is not a mechanical process, but neither is this Court an originating lawmaker. The admonition of Mr. Justice Brandeis that we are not a third branch of the Legislature should never be disregarded. Congress has seen fit from time to time to qualify the power of summary punishment for contempt that it gave the federal courts in 1789 by requiring in explicitly defined situations that a jury be associated with the court in determining whether there has been a contempt. See, e.g. 18 U.S.C. Par. 3691; Civil Rights Act of 1867, 71 Stat. 634, 638, 42 U.S.C.A. Par. 1995. It is for Congress to extend this participation of the jury, whenever it sees fit to do so, to other instances of the exercise of the power to punish for contempt. It is not for this Court to fashion a wholly novel constitutional doctrine that would require such participation whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation.

And yet in this case the Supreme Court of the United States, with the vote of the nominee twice in respect to jury trials on the 20th of May of this year, voted for the Court to do what Justice Frankfurter calls to fashion a whole novel constitutional doctrine that would require such participation whatever Congress may think on the matter, and in the teeth of an unbroken legislative and judicial history from the foundation of the Nation.

Now, this is what is happening to the Constitution of the United States all too frequently during these recent years.

There has been this question of the right to trial by jury in a criminal contempt case.

It has been before the Court more than a score of times prior to the 20th of May of this year. On all of those occasions a majority of the Court held that the Constitution did not give a person charged with criminal contempt a right of trial by jury, that that right can only be given by an act of Congress. And Justice Frankfurter enumerated the 53 Justices who previous to the *Green* case had so held, or had participated in decisions before the Court. And since that time we have had Justices Frankfurter, Burton, Clark, Harlan, Whittaker, and Stewart, adding to those 53 Justices.

We have had Chief Justice Warren, Justices Black, Douglas, Brennan, White, Fortas, and Marshall, to take the contrary view.

So according to 59 Justices the Constitution of the United States meant one thing for 178 years, and according to seven Justices, the Constitution of the United States meant exactly the opposite for about 6 weeks. I ask unanimous consent that the opinion of Justice Frankfurter be printed in full at this point in the record.

The CHAIRMAN. It will be admitted.

(The document referred for inclusion in the record was marked "Exhibit 32" and appears in the appendix.)

Senator ERVIN. Those who comment on actions of the Supreme Court during recent years have frequently observed that the Justices use two provisions of the Constitution chiefly to justify changing rules of law and interpretations of the Constitution that have endured anywhere from 100 to 178 years; namely, the due process clause of the fifth and the due process clause of the 14th amendments, and equal protections clause of the 14th amendment.

There are some of us who are convinced that many of these rulings are made simply because the majority of the Justices merely regard other former rulings as not fitting into their ideas as to propriety or wisdom of things.

I think one of the cases that illustrates this the most is the case based upon—allegedly based—I will put it this way—on the equal protection clause of the 14th amendment—*Harper* v. *The Virginia Board of Elections*, reported in 383 United States, page 663.

This decision was handed down on March 3, 1966. It was handed down by a divided Court—Justices Harlan, Stewart, and Black dissenting.

The *Harper* case overruled two previous decisions of the Supreme Court—*Breedlove* v. *Sutles*, 302 U.S. 277, and *Butler* v. *Thompson*, 341 U.S. 937.

This case involved the constitutionality of the statutes which had been in force in various American States from time immemorial; namely, statutes which required citizens of States to pay poll taxes as a prerequisite to vote.

What was involved in the *Harper* case was the validity of the constitutionality of the Virginia poll tax law which required a man to pay $1.50 to the support of government annually as a prerequisite to the right to vote.

And contrary to the converse decisions in the *Breedlove* and *Butler* cases, the Supreme Court held the Virginia statute imposing a poll tax as a prerequisite to vote unconstitutional.

I do not believe anyone could read this decision without coming to the conclusion that the only reason the Court held the act unconstitutional was because of the policy embodied in the act that was contrary to the individual opinions of a majority of the Justices. Because if the Constitution makes anything plain, it makes it plain that under section 2, article I of the Constitution, and under the second article of the Constitution, and under the 10th amendment, and under the 17th amendment, that the right to prescribe qualifications for voting belongs to the States.

Now, it is interesting to note the ground on which the majority of the Court struck down the Virginia poll tax.

The CHAIRMAN. We are going to recess now until 10 o'clock in the morning.

Senator ERVIN. For the consolation of everybody concerned, I anticipate finishing very early in the morning.

(Whereupon, at 4:40 p.m. the committee was recessed, to reconvene at 10 a.m. Wednesday, July 17, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

WEDNESDAY, JULY 17, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Hart, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. The hearing will be in order.

STATEMENT OF HON. ABE FORTAS, NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES—Resumed

Senator ERVIN. Mr. Chairman, on August 22, 1966, I made a speech on the *Miranda* case entitled "*Miranda* v. *Arizona*: A Decision Based on Excessive and Visionary Solicitude for the Accused," and I ask unanimous consent that a copy of this speech be printed in the record.

The CHAIRMAN. It will be admitted.

(The document referred to for inclusion in the record was marked "Exhibit 33" and appears in the appendix.)

Senator ERVIN. When we recessed on yesterday, I had started to discuss the case of *Harper* v. *The Virginia State Board of Elections.*

The *Harper* case and the other case I am going to discuss involved the equal protection clause of the 14th amendment. Under multitudes of decisions, the equal protection clause of the 14th amendment is the pledge of equal protection of the laws or protection of equal laws, and it means and is a guarantee of this and this only. That is, all persons subjected to State legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and liabilities imposed.

The *Harper* case is a plain example of judicial activism at work.

The majority opinion was written—I might add it was a 6 to 3 decision—the majority opinion was written by Mr. Justice Douglas. With all due respect to the writer of the majority opinion, he cited a number of cases which were totally irrelevant to the case in hand, and in the words of the old song, were like the flowers that bloom in the spring, tra-la, and had nothing to do with the case.

The only reason and substance he gave for overruling the *Breedlove* and *Butler* cases and placing an absolutely new interpretation upon the equal protection clause of the 14th amendment is set forth in this sentence, which appears on page 669 of the majority opinion: "Notions of what constitutes equal treatment for purposes of the equal protection clause do change.

Now, the necessary implication of that is that every time the notions of the majority of the Justices of the Supreme Court of the United States change, the meaning of the Constitution changes.

I am very much disturbed by this case for that reason, because it is rather distressing to take the meaning of the word "notion"—the word "notion" in all the dictionaries I have been able to find, it says that notions are "more or less general, vague, or imperfect conceptions of ideas."

If the Constitution of the United States is changed when the notions of Justices change, then the United States is in for a very uncertain constitutional future.

I wish to read a short passage from the dissenting opinion of Justice Harlan. This passage appears on pages 681 and 682. Justice Harlan says:

> My disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause.
>
> The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy. See, e.g., Powell v. Pennsylvania, 127 U.S. 678; Barrett v. Indiana, 229 U.S. 26; Walters v. City of St. Louis, 347 U.S. 231; Baxtrom v. Herold, ante, p. 107. This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of "equal protection" cases.

Now, the question involved in the *Harper* case was whether the Virginia statute, which required each citizen of Virginia to pay an annual poll tax of $1.50, as a prerequisite to voting in State elections in Virginia was valid. The decision is totally incompatible with the decision of the Senate and the House when they submitted the 24th amendment to the States to abolish the poll tax as a prerequisite to vote in Federal elections. It is totally incompatible with the interpretation placed upon the Constitution by three-fourths of the States or more which ratified the 24th amendment. It even goes beyond those advocates who said Congress could abolish the poll tax in State elections as a prerequisite for voting. The decision let a majority of the Justices of the Supreme Court under the equal protection laws say that a law which required all men, rich and poor, to pay $1.50 poll tax annually, as a prerequisite of voting in State elections in Virginia was unconstitutional because although it treated all men alike, it discriminated against poor men by imposing such an enormous tax upon them. And that tax amounted to a sum of money which a man working at the minimum wage would earn in 72 minutes out of the 365 days of the year.

This decision was like using an atomic bomb to get rid of a mouse, because poll taxes as a prerequisite to voting had been abolished in Federal elections by a constitutional amendment, the 24th amendment, and it had been abolished as a prerequisite to voting in most State elections with the exception of Virginia and Texas and possibly one or two more. Why the impatient Justices of the Supreme Court were not willing for those States to follow other States like my own and abolish the poll tax as a prerequisite to voting I do not know.

Let a complete copy of the *Harper* case be printed in the record.

(The document referred to for inclusion in the record was marked "Exhibit 34" and appears in the appendix.)

Senator ERVIN. I wish to call attention of the committee to the case of *Reitman* v. *Mulkey* which is reported in 387 U.S. 369. And I might state at this point that the nominee participated in the majority opinion in the *Harper* case, and also participated in the majority opinion in the *Reitman* case.

The *Reitman* case was a 5 to 4 decision.

In this case, the people of California undertook to repeal by a referendum an act of the California Legislature which established open occupancy in California.

Now, mind you, this related to the property of the people of California—not to the property of the people of the United States. And until recent years, it was always thought and held that the right to regulate contracts concerning real estate belonged exclusively to the States in which the real estate was located.

So the State had a referendum, and the people of California, by a vote of 4,526,460 too 2,395,747 adopted the following amendment to their State constitution:

> Neither the state nor any subdivision or agency thereof shall deny, limit or abridge directly or indirectly the right of any person who is willing or desirous to sell, lease, or rent any part or all of his real property, to decline to sell, lease, or rent such property to such person or persons as he in his absolute discretion chooses.

The Supreme Court of the United States, by this vote of 5 to 4, with the nominee participating, held this amendment to the California constitution unconstitutional for alleged violation of the equal protection clause of the 14th amendment.

Now, the legal language of the opinion will be put in the record. But it is very easy to interpret this decision in the layman's language, and in plain English. What this decision holds is that when California, by a vote of practically 2 to 1 in a referendum in which almost 7 million of its citizens participated, repealed an open occupancy law, and gave freedom to sell or rent property to all California, white and nonwhite, it practiced discrimination against nonwhites.

Isn't it an astounding thing for the Supreme Court to hold that a State, by giving freedom to all of its citizens, discriminates against one group of them.

So here we have five Justices thwarting the plain, expressed will of the people of California concerning the property of the people of California by an interpretation which the other four Justices said was totally incompatible with the equal protection clause of the 14th amendment.

I will read just a few words from Justice Harlan, who said in portions of the dissenting opinion that this is just a plain denial by five Justices of the Supreme Court of the right of the people of California or the Legislature of California to repeal an act of the California Legislature.

Mr. Justice Harlan said:

I consider this decision, which cuts deeply into state political processes, is supported neither by anything "found" by the Supreme Court of California nor by any of our past cases decided under the Fourteenth Amendment. In my view today's holding, salutatory as its result may appear at first blush, may in the long run actually serve to handicap progress in the extremely difficult field of racial concerns. I must respectfully dissent.

The facts of this case are simple and undisputed. The legislature of the State of California has in the last decade enacted a number of statutes restricting the right of private landowners to discriminate on the basis of such factors as race in the sale or rental of property. These laws aroused considerable opposition, causing certain groups to organize themselves and to take advantage of procedures embodied in the California Constitution permitting a "proposition" to be presented to the voters for a constitutional amendment. "Proposition 14" was thus put before the electorate in the 1964 election and was adopted by a vote of 4,526,460 to 2,395,747. The Amendment, Art. I, Par. 26 of the State Constitution, reads in relevant part as follows:

"Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing to desires to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

I am wholly at a loss to understand how this straightforward effectuation of a change in the California Constitution can be deemed a violation of the Fourteenth Amendment, thus rendering Paragraph 26 void and petitioners' refusal to rent their properties to respondents, because of their race, illegal under prior state law. The Equal Protection Clause of the Fourteenth Amendment, which forbids a State to use its authority to foster discrimination based on such factors as race, does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded. By the same token, the Fourteenth Amendment does not require of States the passage of laws preventing such private discrimination, although it does not of course disable them from enacting such legislation if they wish.

In the case at hand California, acting through the initiative and referendum, has decided to remain "neutral" in the realm of private discrimination affecting the sale or rental of private residential property; in such transactions private owners are now free to act in a discriminatory manner previously forbidden to them. In short, all that has happened is that California has effected a pro tanto repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutioual action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

I do not think the Court's opinion really denies any of these fundamental constitutional propositions. Rather, it attempts to reshape them by resorting to arguments which appear to me to be entirely ill-founded.

I will place in the record the complete copy.

(The document referred to for inclusion in the record was marked "Exhibit 35" and appears in the appendix.)

Senator ERVIN. I might add that a few days ago the Supreme Court, by an other explicit decision, with the nominee participating and voting for the majority opinion, rewrote an act of Congress, the Civil

Rights Act of 1866, 102 years after it had been enacted, to hold that Congress had intended to enact an open occupancy law, notwithstanding the fact that in 1866 nobody ever heard of such a law as an open occupancy law, and notwithstanding the fact that its decision was contrary to the words of the statute itself, and contrary to every decision interpreting those statutes, and contrary to the legislative history of the enactment of the statutes.

In this opinion, which is *Jones v. Mayer Company*, the Court entirely rewrote the Civil Rights Act of 1866 and attempted to rewrite history. Anybody that is familiar with the history of the enactment of that statute, as I am, because I have studied it for many weeks, knows that the rewriting of history by the Court was just as bad as the rewriting of the law.

There were at least four cases overruled in this opinion.

Furthermore, there is a principle of law which the majority opinion ignored, and that is that where a legislative body passes a statute dealing with a certain subject, and thereafter passes another subsequent statute dealing with the same subject, and the second statute is inconsistent with the first, that it amends to that extent or repeals to that extent the inconsistency in the first statute.

Now, after this case arose but before it was decided, Congress enacted an open occupancy bill which provided that no person during the present year under this new open occupancy law can compel an unwilling owner to sell to him a single-family dwelling. Even if the Court had been right in its new construction of the 1866 statute, which had meant an entirely different thing for 102 years, it should have held that this new law amended that statute and prohibited the Court from granting the relief which it had granted to the plaintiff in that case.

Now, on this point I just make this further observation. Until these latter years, any statute which undertakes to restrict the right of a man to use his own property for any lawful purpose by making his right to use it depend upon the will of other individuals would have been held unconstitutional by the Supreme Court under the due process clause of the fifth amendment, which prohibits the Federal Government from denying to any person his property without due process of law. As a matter of fact, there were several decisions of the Supreme Court—until these constitutional amending days—to that effect.

Well, the Court went a little further in *Katzenbach* v. *Morgan*. The decision handed down on June 13, 1966—incidentally, that was the same day on which the *Wade* and the *Gilbert* and the *Stovall* cases were handed down. It was a sort of dark day for constitutional government in America. It justifies the belief people have that 13 is an unlucky number. This was a 7-to-2 decision—*Katzenbach* v. *Morgan*.

Now, before I consider *Katzenbach* v. *Morgan*, I want to take up a little something about the 14th amendment.

Section 1 of the 14th amendment provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the law.

I just make this observation. Anybody that can read the English language can ascertain in less than a second that those words of the

14th amendment only relate to State action. They do not relate to individual action—only to State action, with the State acting through its executive, its legislators, and its judicial offices. There is no other way that a State can act. The Supreme Court itself has held that in 50 or 60 cases.

Now, section 5, "The Congress shall have the power to enforce by appropriate legislation the provisions of this article."

There are at least—well, there are a multitude of decisions of the Supreme Court of the United States that hold that this first section of the 14th amendment means exactly what it says, and that the fifth section means exactly what it says, and that is that the Congress can only enact legislation which is appropriate to enforce these prohibitions upon State action. I might read into the record one of them, *United States* v. *Cruikshank*. I will read from the case as reported in 23 Lawyers' Edition of the U.S. Supreme Court, beginning at page 588.

The 14th Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the law; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of Republicans. Every Republican government is in duty bound to protect all its citizens in the enjoyment of this principle if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do no deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

In other words, that is a statement that Congress cannot legislate under section 5 of the 14th amendment except to prevent a State from denying its citizens due process of law or equal protection of the laws or their privileges and immunities as federal citizens.

I wish to read an extract from the case of the *United States* v. *Harris*, reported in 27 Lawyers' Decision of the U.S. Supreme Court Reports at page 290.

They quoted with approval the passage I read from the *United States* v. *Cruikshank*.

The 14th Amendment prohibits a state from depriving any person of life, liberty or property without due process of law, or from denying to any person the equal protection of the laws. But this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guarantee against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty to protect all its citizens in the enjoyment of equality of rights was original assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees and no more. The power of the national government is limited to this guaranty.

Then further:

The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions, when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States, when no one of its departments has deprived any person of life, liberty or property without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws, when on the contrary the laws of the state as enacted by its legislative and construed by its judicial, and administered by its Executive departments recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress. Section 5519 of the revised statute is not limited to take effect only

in case the state shall abridge the privileges or immunities of citizens of the United States or deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws. It applies no matter how well the state may have performed its duty. Under it, private persons are liable for punishment for conspiring to deprive anyone of the equal protection of the laws enacted by the state. As therefore the section of the law under consideration is directed exclusively against the action of the private persons without reference to the laws of the states or their administration hy the officers of the state, we are clear in the opinion that it is not warranted by any clause in the 14th Amendment to the Constitution.

I wish to read an extract from the civil rights cases of 1883 as reported in volume XXVI of the lawyers' edition of the Supreme Court reports at page 836:

The first section of the 14th Amendment, which is the one relied ou, after declaring who shall be citizens of the United States and of the several states, is prohibitory in its character, and prohibitory upon the states. It declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is state action of a particular character that is prohibited. Individual invasiou of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation and state action of every kind which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will thus declared may not be brutum fulmen, the last section of the amendment invests Congress with power to enforce it by approriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with powers to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect, and such legislation must necessarily be predicated upon such proposed state laws or state proceedings and be directed to the correction of their operation and effect.

Then further:

And so in the present case, until some state law has been passed or some state action, through its officers or agents, has been taken, adverse to the rights of the citizens sought to be protected by the 14th Amendment, no legislation of the United States under said Amendment nor any proceeding under such legislation can be called into activity; for the prohibitions of the Amendment are against state laws and acts done under state authority.

Then further:

The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if tbe states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsonnd. It is repugnant to the 10th Amendment of the Coustitution which declares that powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people.

Now, the words of the 14th amendment which I have read, so far as relevant, are as plain in their meaning as the noonday sun is in a cloudless sky. And there are, I would estimate, at least 50 decisions of the Supreme Court of the United States recognizing two things under the 14th amendment: That the Federal Government has no power under the 14th amendment to legislate in respect to the actions of the private individuals and that the sole power that the Congress has to legislate under the 14th amendment is to legislate in such a way as to prohibit the States from denying privileges and immunities of Federal citizenship, and denying due process of law, and denying the equal protection of the laws. The 14th amendment, as these cases hold, gives the power to enact affirmative legislation on these points to the States, and denies it to the Federal Government.

Now, this case of *Katzenbach* v. *Morgan* involved the validity of a provision of the New York constitution which required a person to be literate in the English language in order to vote in New York—both in State elections and also in Federal elections. At this point I would like to call the attention of the committee to the provisions of section 2, article I of the Constitution which specifies this:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

Section 1, article II, of the Constitution, provides in part as follows:

> Each state shall appoint in such manner as the Legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress, but no Senators or Representative or person holding an office of trust or profit under the United States shall be appointed an elector.

That is the provision of the Constitution under which electors to choose a President and a Vice President are chosen. The second section of article I is a provision of the Constitution under which Members of the National House of Representatives are chosen.

The 10th amendment to the Constitution reads as follows:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people.

Under the original Constitution, the only Federal officers which could be elected by the people were, as a matter of right—were Members of the House of Representatives.

The Senators were elected by the State legislatures. But the Constitution was amended some time about 1860, or thereabouts, by adding to the Constitution the 17th amendment:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six years, and each Senator shall have one vote. The electors in each states shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.

It was correctly decided by the Supreme Court of the United States in a number of cases that under section 2, article I, and the 17th amendment, that the sole power to prescribe the qualifications of voters in Federal elections, as well as voters in State elections, resided in the States, and that Congress was totally without power to prescribe the

qualifications for voting in either Federal or State elections. And the power of the States to prescribe qualifications for voting was subject to only three limitations—namely, the provision of the equal protection clause of the 14th amendment—which, in effect, forbade a State having one set of qualifications voting for some people and others for others, in other words they had to all be uniform; and the provisions of the 15th amendment which prohibited a State from denying or abridging the right of any qualified person otherwise qualified under the State law to vote on account of race; and the provisions of the 19th amendment providing that the right of citizens of the United States to vote shall not be denied or abridged on account of sex. Subject to those three constitutional limitations, the State had undoubted power to prescribe the qualifications for voting, and Congress had no power to do so.

Now, the validity of the provision of the New York Constitution requirement, literacy in the English language as a qualification for voting, has been before the Court of Appeals of New York, which is the highest appellate court in New York, and before a three-judge Federal court sitting in New York, and both of these courts soundly held that the New York literacy test applied in like manner to everybody, in like circumstance. It applied to everybody who was literate in the English language, and denied everybody who was not literate in the English language the right to vote. Those were clearly sound decisions.

But in *Katzenback* v. *Morgan*, which was a 7-to-2 decision, in which the nominee participated, the Supreme Court ignored the plain words of the 14th amendment, and ignored the holdings of at least 50 previous decisions handed down by the Supreme Court, and held that the power of Congress to enact legislation appropriate to enforce the provisions of the equal protection clause conferred upon Congress the power to nullify a State law which was in complete harmony with the equal protection clause of the 14th amendment. The case held that Congress could not only nullify a State law which was in complete harmony with the equal protection clause of the 14th amendment, but could prescribe a Federal voting qualification which Congress was forbidden to pass by the second section of the first article of the Constitution, and the first section of the second article of the Constitution, and the 10th amendment and the 17th amendment, and by the equal protection of the laws clause itself.

In my judgment this is the most astounding decision ever handed down by the Supreme Court of the United States, because it gives Congress far more legislative power than the Constitution gives it. It disturbs me no end, because I do not see how constitutional government can exist in the United States if this is to be the way in which the Constitution will hereafter be interpreted.

The most primary rule for the interpretation of the Constitution is that all provisions of the Constitution are of equal dignity and none must be so interpreted as to nullify or impair the others.

The interpretation placed upon the Constitution in *Katzenbach* v. *Morgan* repudiates or ignores this rule of construction. In that case, the majority of the Court, instead of interpreting the Constitution as a harmonious instrument, viewed the Constitution as a self-destructive

document, consisting of mutually repugnant provisions of unequal dignity. By so doing, the Court reached the astounding conclusion that the fifth section of the 14th amendment, which as far as that particular case was only concerned with the power to enforce the equal protection clause of the 14th amendment by appropriate legislation, gave Congress the power to nullify a State law which was in complete harmony with the equal protection clause of the 14th amendment, and to absolutely nullify the power of the State of New York to act as it did act under the four separate provisions of the Constitution, and conferred upon the Congress of the United States the power to pass laws which Congress was forbidden to pass by five provisions of the Constitution.

The Court was interpreting the equal protection clause of the 14th amendment, and it said it was not even necessary for it to inquire whether the New York literacy test was in harmony with the equal protection of the laws clause. The Court said that the only thing they needed to inquire into was whether the act of Congress, and Congress had no power to legislate affirmatively, was appropriate to enforce the equal protection of the laws clause.

Now, isn't it absurd, leaving apart all questions of the Constitution—isn't it absurd to say that the power to enforce the equal protection of the laws clause gives Congress the power to take action which is absolutely inconsistent with the equal protection of the laws clause. That is what this case does.

I will read a little from the dissenting opinion of Justice Harlan:

> The Equal Protection Clause of the Fourteenth Amendment, which alone concerns us here, forbids a State from arbitrarily discriminating among different classes of persons. Of course it has always been recognized that nearly all legislation involves some sort of classification, and the equal protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy.

Now, I digress from reading from Justice Harlan's opinion to note what was involved. Congress had provided that the completion of a certain number of years in an American-flag school would be the new test, a Federal test, which supplanted the New York test. The thing was done because some Members of Congress, a majority, I regret to say, felt that there ought to be something done to prohibit New York from denying the right to vote to Spanish-speaking Puerto Ricans who do not read the English language, and in fact could not understand much of the political proceedings for that reason.

Continuing from Justice Harlan:

> It is suggested that a different and broader equal protection standard applies in cases where "fundamental liberties and rights are threatened," see ante, p. 655, note 15; dissenting opinion of Douglas, J., in Cardona, post, pp. 676–677, which would require a State to show a need greater than mere rational policy to justify classifications in this area. No such dual-level test has ever been articulated by this Court, and I do not believe that any such approach is consistent with the purposes of the Equal Protection Clause, with the overwhelming weight of authority, or with well-established principles of federalism which underlie the Equal Protection Clause.
>
> Thus for me, applying the basic equal protection standard, the issue in this case is whether New York has shown that its English-language literacy test is reasonably designed to serve a legitimate state interest. I think that it has.
>
> In 1959, in Lassiter v. Northampton Election Bd., supra, this Court dealt

with substantially the same question and resolved it unanimously in favor of the legitimacy of a state literacy qualification. There a North Carolina English literacy test was challenged. We held that there was "wide scope" for State qualifications of this sort. 360 U.S. at 51. Dealing with literacy tests generally, the Court there held:

The ability to read and write * * * has some relation to standards designed to promote intelligent use of the ballot * * * Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise . . . It was said last century in Massachusetts that a literacy test was designed to insure an "independent and intelligent" exercise of the right of suffrage. Stone v. Smith, 159 Mass. 413–414, 34 N.E. 521. North Carolina agrees. We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards. 360 U.S. at 51–53.

That is the end of the quotation from the *Lassiter* case.

Justice Harlan continues:

I believe the same interests recounted in Lassiter indubitably point toward upholding the rationality of the New York voting test. It is true that the issue here is not so simply drawn between literacy per se and illiteracy. Appellant alleges that she is literate in Spanish, and that she studied American history and government in United States Spanish-speaking schools in Puerto Rico. She alleges further that she is "a regular reader of the New York City Spanish-language daily newspapers and other periodicals, which * * * provide proportionately more coverage of government and politics than do most English-language newspapers," and that she listens to Spanish-langnage radio broadcasts in New York which provide full treatment of governmental and political news. It is thus maintained that whatever may be the validity of literacy tests per se as a condition of voting, application of such a test to one literate in Spanish, in the context of the large and politically significant Spanish-speakiug community in New York, serves no legitimate state interests, and is thus an arbitrary classification that violates the Equal Protection Clause.

Although to be sure there is a difference between a totally illiterate person and one who is literate in a foreign tongue, I do not believe that this added factor vitiates the constitutionality of the New York statute. Accepting appellant's allegations as true, it is nevertheless also true that the range of material available to a resident of New York literate only in Spanish is much more limited than what is available to an English-speaking resident, that the business of national, state, and local government is conducted in Euglish, and that propositions, amendments, and offices for which candidates are running listed on the ballot are likewise in English. It is also true that most candidates, certainly those campaigning on a national or statewide level, make their speeches in English. New York may justifiably want its voters to be able to nnderstand candidates directly, rather than through possibly imprecise translations or summaries reported in a limited number of Spanish news media. It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U.S.C. Par. 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community. Relevant too is the fact that the New York English test is not complex, that it is fairly administered, and that New York maintains free adult education classes which appellant and members of her class are encouraged to attend. Give the State's legitimate concern with promoting and safeguarding the intelligent use of the ballot, and given also New York's long experience with the process of integrating non-English-speaking residents into the mainstream of American life, I do not see how it can be said that this qualification for suffrage is unconstitutional. I would uphold the validity of the New York statute, unless the federal statute prevents that result, the question to which I now turn.

Let all the opinions in *Katzenbach* v. *Morgan* be printed in the record.

(The material referred to for inclusion in the record was marked "Exhibit 36" and appears in the appendix.)

Senator ERVIN. It is a pity that those who mould American opinion and those who engage in the news media would not study some of these questions. If they did, they would see the full implication of this decision in *Katzenbach* v. *Morgan*.

The equal protection of the laws clause of the 14th amendment has a possible application to every act of every State legislature, to every ordinance passed by every municipality in the United States, to every action taken by the Governor and other executive officers of the States, and to every decision handed down by all the courts of the State from the highest appellate court down through the courts of justices of the peace.

This decision holds for the first time in the history of this Republic that the fifth section of the 14th amendment gives Congress the right to nullify State laws and State actions which are in complete harmony with the 14th amendment, and to adopt in place of those laws Federal statutes regulating affairs within the borders of the States, affairs which are permitted by the Constitution of the United States itself to be regulated by the States of this Union rather than to Congress.

If you carry this very illogical decision to its logical conclusion, it justifies the proposition that the fifth section of the 14th amendment, which is merely the power to require the States not to deny equal protection of the laws as citizens, confers upon Congress the power to supervise all State laws in all respects. That is the logical extension of this very illogical opinion—an opinion which is contrary to every interpretation placed upon the Constitution from the time of this Republic being established down to the date the opinion was handed down.

Now, I want to refer to one other decision dealing with the equal protection clause of the 14th amendment, and that is the case of *United States* v. *Guest*, which was handed down on March 28, 1966, and in which the nominee concurred by his vote.

While this does not set out any dissenting opinions, there is a great cleavage between the judges in this case.

This case dealt with a very atrocious murder which occurred in Georgia. A reserve officer, Col. Lemuel Penn of the District of Columbia was driving through Georgia on his return from reserve training at Fort Benning, Ga., and he was atrociously murdered in the State of Georgia. The only question that was involved in the case that came to the Supreme Court was the question whether the bill of indictment charged the accused with a violation of section 241 of title 18 of the United States Code—that is what is generally called the conspiracy statute, which forbids two or more persons to conspire, to deprive any person of their constitutional rights.

Now, that is what the Court should have confined its consideration to, because the courts are not presumed to emulate the example of Senators and talk about a lot of extraneous matters. And it is contrary to good judicial conduct for judges to engage in dicta, and by the word "dicta" we lawyers mean comments and observations which are not necessary to the decision of the case at hand.

Now, the opinion of the Court was written by Justice Potter Stewart. He and all the other Judges agreed that the bill of indictment

charged State participation in the offenses alleged to be a violation of section 241, title 18, under State code—and that was all they needed to decide. They should have decided that and then stopped.

In this opinion, Justice Stewart, interpreted the 14th amendment to mean just exactly what all of these approximately 50 other Supreme Court decisions, and possibly several hundred State decisions held it meant—that it only applied to State action.

Justice Stewart said this, on page 755 of this opinion:

> It is commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not * * * add anything to the rights which one citizen has under the Coustitution against another." As Mr. Justice Douglas more recently put it, "The Fourteenth Amendment protects the individual against State action, not against wrongs done by individuals." This has been the view of the Court from the beginning.

However, there were two concurring opinions in this case, and these concurring opinions were not satisfied to stop with deciding the case—they went ahead and expressed some views which were not necessary to a decision of the case. One of the concurring opinions was written by Justice Clark. This opinion stated that Congress had the power to reach conspiracies committed by individuals by legislation under the 14th amendment, a conclusion which is absolutely inconsistent with the words of the 14th amendment and every interpretation placed upon them by the Supreme Court of the United States down to that date.

The nominee joined in this opinion of Justice Clark.

The other concurring opinion was written by Justice Brennan, and it stated, by way of dicta, that Congress had the power under the 14th amendment to reach the wrongful action of private individuals, a conclusion which is totally inconsistent with the words of the 14th amendment, and a conclusion which is totally inconsistent with every decision construing that amendment handed down between the time the amendment was ratified in 1868 and March 28, 1966.

I have said that these statements were dicta. And this is what these concurring opinions said in plain, simple English. That if Congress should hereafter pass some specific laws dealing with wrongs committed by some individuals upon other individuals, and a case should hereafter arise under those laws, the judges who participated in the concurring opinions would hold those laws to be constitutional before hearing the argument in the case or reading the record in the case.

With all due deference to all concerned, I say that is no way for judges to conduct themselves.

All the opinions in the *United States* v. *Guest*, which is reported in 383 United States at page 745, will be printed in the body of the record.

The CHAIRMAN. So ordered.

(The material referred to for inclusion in the record was marked "Exhibit 37" and appears in the appendix.)

Senator ERVIN. Now, Mr. Chairman, I have made a speech on several occasions entitled "The Role of the Supreme Court as an Interpreter of the Constitution." I discuss what the role of the Supreme Court is as such in this capacity, and mention a lot of cases other than those that I have mentioned here.

I ask unanimous consent that a copy of this address as made by me before the Atlanta Bar Association, Atlanta, Ga., May 6, 1966, be printed in the body of the record.

The CHAIRMAN. So ordered.

(The material referred to for inclusion in the record was marked "Exhibit 38" and appears in the appendix.)

Senator ERVIN. You know, those of us who do not fully approve of the actions of the Supreme Court during recent years are sometimes criticized by those who say we are making attacks on the Court. I get no pleasure out of saying the things I have. But I took an oath as a Senator and as a voter to support the Constitution of the United States, and I have to perform some unpleasant things in connection with the performance of this oath. I do that because I am thoroughly convinced that apart from the faithful observance of the principles of the Constitution by the President and by the Congress and by the Supreme Court, that neither our country nor any human being within its borders has any protection against anarchy on the one hand or tyranny against the other.

Now, there has been some comments made by other people about the Supreme Court. A very knowledgeable man in this field is Prof. Philip E. Kurland, a teacher of constitutional law in the Law School of the University of Chicago. On February 29, 1964, he made a speech at the Law School University of Notre Dame, which he entitled "The Court of the Union, or Julius Caesar Revised."

In this speech, he took up various charges that had been leveled at the Supreme Court's actions in recent years, and he called on certain witnesses to prove the charges. These witnesses were members of the Supreme Court themselves. He enumerated the charges, and then he quoted what members of the Supreme Court dissenting from the decisions had said about the Court's actions.

I want to put this in the record so that those who think that I have been somewhat extreme in my criticisms of the Court will come to the conclusion that I am a mild-mannered man. They will find that the Justices of the Supreme Court had more drastic things to say about the Court's departures from constitutional government than I have had to say. I would commend the reading of the dissenting opinions I have put in the record on these cases by those who wish to be informed about the trend of the Court in recent years. All of these cases I put in the record, with the exception of the *Green* case were decisions which have been handed down since the nominee became Associate Justice, and they were cases in which he joined in the majority opinions. I wish to put in the record a copy of Professor Kurland's speech at this point.

(The document referred to for inclusion in the record was marked "Exhibit 39" and appears in the appendix.)

Senator ERVIN. I wish also to put in the record an article which appeared in the "United States News and World Report" on March 7, 1958, which is headed "Famous Judge Rebukes Supreme Court," and is based on what the greatest jurist of our generation or our century has known, Judge Learned Hand, had to say about the Court.

(The document referred to for inclusion in the record was marked "Exhibit 40" and appears in the appendix.)

Senator ERVIN. I also wish to put in the record at this point a short article from the "U.S. News & World Report" of October 24, 1958, entitled "How United States Judges Feel About the Supreme Court."

(The document referred to for inclusion in the record was marked "Exhibit 41" and appears in the appendix.)

Senator ERVIN. Now, I am concerned about these things; because I think Alexis de Tocqueville, a Frenchman, with rare powers of perception who visited the United States about 1825, somewhere in that neighborhood, made some very trenchant observations upon American institutions and American life.

He had this to say:

The President, who exercises a limited power, may err without causing grave mischief in the state. Congress may decide amiss without destroying the union, because the electoral body in which Congress originates may cause it to retract its decisions by changing its members. But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war.

Now, let me make it very plain I am not saying that any of the Justices of the Supreme Court are bad men; but candor does compel me to confess that I think that any judge, whether he is on the Supreme Court or any other court, who is unable or unwilling to subject himself to the restraint which is inherent in the judicial process, when that process is understood and applied, is imprudent.

Now, the restraint which is inherent in the judicial process is simply the ability and the willingness of an occupant of judicial office to lay aside his personal notions of what a law or a constitutional principle ought to have said and to be guided solely by what the law or the constitutional principle does say. And I say this in all seriousness, as one who has studied the decisions of the Supreme Court with as much diligence as time and other duties permit—that I greatly fear that the road to destruction of constitutional Government in America is being paved with great rapidity by the good intentions of Supreme Court Justices.

Now, I wish to call attention to a statement which the Judiciary Committee of the U.S. Senate made some time ago. If I recall right, it was made some time in 1947, and it had some relevancy to the action of one Supreme Court Justice, Justice Owen J. Roberts, acting as chairman of a committee to investigate the Pearl Harbor disaster, and the action of another Justice of the Supreme Court, Justice Robert H. Jackson, acting as prosecutor in the Nuremberg trials.

The Judicicary Committee of the U.S. Senate had this to say at that time.

The Committee on the Judiciary of the United States Senate declares that the practice of using federal judges for nonjudicial activities is undesirable. The practice holds great danger of working a diminution of the prestige of the judiciary. It is a deterrent to the proper function of the judicial branch of the government. The committee is not now disposed to recommend legislative action. It believes the remedy lies in the first instance in the good sense and discretion of the Chief Executive. His is the prime initiative in the matter of these appointments, and that is the point where the independence of the judges and the prestige of the judiciary may best be preserved.

Now, I want to ask one question I think that the nominee is at liberty to answer.

The New York Times of January 4, 1967, carried an article written by Fred P. Graham entitled "The Many-Sided Justice Fortas." As I

understand it, Mr. Graham is a reporter who specializes in covering the Supreme Court, and is highly respected in the journalistic world.

This article has a picture of President Johnson and Mr. Justice Fortas entitled in part as follows:

"Activist"—As one of Johnson's closest friends, and one of the shrewdest lawyers in Washington. Fortas' instinct for making the wheels turn did not vanish when he donned the robes.

Now, I would be glad to have any comments you make on that. Of course, that is a statement of Mr. Graham, and not by you.

Justice FORTAS. Well, Senator, I went into the generalizations yesterday. There is one thing I did not do yesterday, and to my surprise there have been a lot of statements in the press this morning and on the air last night to the effect that this was unprecedented—that is to say that a Justice of the Supreme Court being called on to perform some services for the President was unprecedented. That just is not so.

In the little time available to me, I have dug out from published authoritative works some of the precedents.

I start back with President Washington, who from time to time asked and received the advice of Chief Justice John Jay. That is reported in Freeman's book "George Washington," volume VI, pages 269 to 271.

President Jackson called on Chief Justice Taney for advice. Chief Justice Taney gave it to him, both in writing and orally. That is reported in C. B. Swisher's "Roger Taney," pages 329 to 330.

Justice David Davis, who was Lincoln's campaign manager, Senator, was also his executor and his——

Senator ERVIN. Was he his campaign manager while he was on the Supreme Court?

Justice FORTAS. That is not my point. I am coming to just what he did.

Senator ERVIN. I just wanted to make it clear. He was not at that time.

Justice FORTAS. Shall I go ahead?

Senator ERVIN. Yes.

Justice FORTAS. Thank you.

Justice David Davis, who had been Lincoln's campaign manager, who was his executor, and his close friend, advised Lincoln on some legal matters which were later to be the subject of Davis' great opinion on martial law. And that is reported in King's book, "Lincoln's Manager, David Davis," at page 204.

Justice Brandeis was an administration adviser during the crises of World War I. An important distinction which he drew was that he would not go to the White House to discuss a political matter such as an appointment unless expressly requested to do so by the President. His biography includes a very colorful account of how on December 9, 1917, President Wilson came to Justice Brandeis' apartment to request advice on certain railroad problems. Justice Brandeis had been an expert on railroad problems prior to his access to the Bench. That is reported in Professor Mason's authoritative biography of Brandeis, at pages 521 and 522, and the preceding and subsequent pages report other counseling that Justice Brandeis did.

Now, Chief Justice Taft performed extensive advisory services for Presidents Harding, Coolidge, and Hoover. As a matter of fact, his

authoritative biography, by Professor Mason, includes a whole chapter entitled "Presidential Adviser." And that book by Professor Mason is called "William Howard Taft." The chapter begins at page 138.

Mr. Justice Stone, who later became Chief Justice, Senator, was a frequent adviser of President Hoover, as well as a member of what was called the Medicine Ball Cabinet, which was the famous Exercise Club. In Professor Mason's book entitled "Harlan Fiske Stone," beginning at page 270, Professor Mason recounts that Stone made comments on drafts of speeches and executive messages.

Justice Frankfurter continued, as has recently been widely reported, to advise President Roosevelt extensively. Some of their letters have been published quite recently, Senator, as I am sure you know. Justice Frankfurter is also credited with some appointment activities in Secretary Stimson's book, "On Active Service in Peace and War," page 334.

Justice Byrnes, James Byrnes, a former Member of this body, has in his autobiography, called "All in One Lifetime," a chapter entitled "Extracurricular Activities," in which he reports his extensive counseling service during his 1 year on the Court.

There are other illustrations, some of which appear in a very fine article, Senator, by the very distinguished Judge John Parker, from your State. The article appears in the New York University Law Quarterly, volume XXIII, 1948, and particularly at pages 236 to 238, where Judge Parker discusses at considerable length the issue of judges and Justices serving their Government outside of their judicial function.

He expresses himself as being in favor of it. He says,

[W]hen the call comes for a judge to do something for his country, which no one but a judge can do so well, he should not hesitate to undertake it. Chief Justice Jay properly undertook while Chief Justice the negotiation of a treaty with England.

I skip a sentence.

"Mr. Justice Harlan"—the first Mr. Justice Harlan—"was certainly not subject to criticism for serving as one of the arbitrators in the Bering Sea matter. And Mr. Justice Roberts would have shocked the conscience of the country," said Judge Parker, "if he had declined to serve upon the Pearl Harbor Commission when the President requested him to do so." And then he refers to Justice Jackson's well-known service, and so on.

That would be my comment to what you have read.

I do not like the word "activist," Senator. I do not know what it means. If it means someone who, as some of my predecessors on the Supreme Court—and I respect them—have done, offers and volunteers advice and recommendations, if that is what "activist" means, then it does not apply to me, sir.

Senator ERVIN. I would not undertake to define what meaning Mr. Graham had.

I am sure if the Supreme Court of the United States had been following the precedents interpreting the Constitution with the fidelity of these Justices following the precedents you have enumerated this would not have taken but 5 minutes.

Justice FORTAS. Yes, sir. Senator, I want to hasten to say I do not subscribe to the breadth of approval that Judge Parker indicates in

his article as to the advisability of judges and Justices participating in nonjudicial affairs. It is a difficult and delicate problem, and ultimately, as in so many other things, a man must consult his conscience and be held accountable for the decision of his conscience.

Senator ERVIN. I would have to say that associations between Supreme Court Justices and Presidents, giving advice even when solicited, gives me much pause, because in recent years, and it is becoming increasingly so, a large part of the cases which reach the Supreme Court of the United States are cases, in effect, which involve the policies of the administration, and there is no way a litigant before the Supreme Court can stand aside a Supreme Court Justice. If you have a juror you have certain preemptive challenges when you are going to have a juror to make the decision. If you think he is too closely related to the litigant, you can stand him aside.

Justice FORTAS. Well, Senator, you may remember Mr. Justice Tom Clark's vote in the steel seizure case. Mr. Justice Clark had been President Truman's Attorney General. There had been a very close relationship. The steel seizure case was dramatic, and very important to President Truman. Mr. Justice Clark, I am sure without hesitation, voted against it.

And, again, I cannot conceive of any President of the United States, and certainly not this President, talking to a Supreme Court Justice, whether his own nominee or not, about anything that might possibly come before the Court as far as the human mind can see. Presidents of the United States do not do that: Justices of the Supreme Court would not tolerate it. That is our country, Senator. That is our country.

Senator ERVIN. I am not talking about your individual case, because I know nothing about it, except what you have testified, but it seems to me there is a danger that the President who consults a Supreme Court Justice about the wisdom of policies, is running the risk of having subsequent litigation coming before the Court which may involve the validity of those policies.

Justice FORTAS. In the first place, Senator, that does not apply to my case, as I explained yesterday, so far as I know. In the second place, there are occasions, Senator, as you know I am sure, from your own experience, where a Justice has to disqualify himself. There have been cases, for example, when private persons have been so thoughtless or unaware of the niceties as to say things to a Supreme Court Justice that have caused him subsequently to disqualify himself. You know that, Senator.

Senator ERVIN. On one occasion I was holding a term in the court, and there was a litigation of civil action between the plaintiff and the defendant, and the defendant happened to be a former client of mine. The parties waived the jury trial. I said "Now, you waive me out of this case when you waive a jury trial, because I do not want to try a case involving a former client. The other man said, "We are perfectly willing to risk you."

I said, "I am not willing to risk myself for two reasons, One main reason, that is I may try to be so fair to the plaintiff that I may lean over backward against the defendant, and do an injustice to my former client."

Now, these decisions which I say place new interpretations on the Constitution, and which some people say—and I do not disagree too strongly—really amend the Constitution, have been virtually all decisions which concentrate more power in Washington, in the Federal Government, and concentrate more power in the Supreme Court itself. For example under the *Miranda* case and *Wade* and *Gilbert* cases, and other cases I could enumerate, but do not do so in the interests of time—the Supreme Court has practically taken the power to supervise all of the wisdom, desirability, of all of the processes in the State criminal courts, and made it extremely difficult for the State to prosecute its own citizens in its own courts for violations of its own laws.

All of these just augment and augment the power of the Supreme Court itself. Beyond that, in the *Katzenbach* v. *Morgan*, and according to the concurring opinions in the *Guest* case, the Supreme Court has given, I maintain, Congress more power than the Constitution gives Congress. The Federal Government is assuming under these decisions the powers to even regulate contracts between private individuals throughout the fifty States.

I'm glad you mentioned Justice Brandeis, whom I admire very greatly, because it brings to mind a remark I remember attributed to him by Learned Hand. It was this:

> The states are the only breakwater against the everpounding surf which threatens to submerge the individual and destroy the only society in which personality can exist.

And under these decisions, which is along with, I think, many acts of Congress, we are concentrating in Washington power in the Government to make decisions in multitudes of instances that ought to be made by individuals, and if we ever reach the point where the Government dictates to us in all these respects, certainly Justice Learned Hand was well anticipating the destruction of personality.

Now, I will go back to Fred Graham's article, and he mentions that there had been a meeting of businessmen down in Hot Springs, Va. Now, Mr. Graham said he made a mistake in naming the man in Hot Springs. But I will ask you this.

Did you call any businessman at a meeting in Hot Springs and remonstrate with him concerning a statement he had made about the increased cost of the Vietnam War, and tell him that the President was very much dissatisfied with this statement about some $5 billion figure, about increasing costs of the Vietnam war?

Justice FORTAS. I called a friend who was at Hot Springs at a businessmen's meeting, a man with whom I had served on the board of directors of one of the largest companies in the country. I told him at that time, as a citizen, that I was very distressed about a statement attributed to him that I considered to be wrong and which had as its purport—as its possible purport and possible effect the presentation of an incorrect view to the American people of the consequences, financial consequences, of this Nation's participation in the Vietnam war.

Senator ERVIN. Now, did you do that on your own volition, or did you do it at the request of someone?

Justice FORTAS. Senator, I will not go into any conversations, either to affirm them or to deny them, that I have had with the President.

I ask you please to understand that, and please to excuse me. I know how easy it is to say no, the President did not say something to me. But the question "What did he say?" would follow, and so on. I must ask you to indulge me to this extent. I have endeavored Senator, and Mr. Chairman, to err, if I erred, on the side of frankness and candor with this committee. But I think that it is my duty to observe certain limits, and one of those limits is any conversation, either affirmance or denial, that I may have had with the President of the United States.

Senator ERVIN. Well, had this man that you called made a speech at a businessmen's meeting at Hot Springs?

Justice FORTAS. I do not recall whether it was a speech or a statement to the press or just what the circumstances were. But he is a very dear and old friend of mine, as well as a fellow director of a corporation of which I was a director, and of which I had been a vice president and director for many years—positions which, of course, I resigned upon being appointed to the Court—at great financial sacrifice, I must say.

Senator ERVIN. Did you make a statement to the effect that the thing you were discussing was a statement he made that Government spending for Vietnam would go up $5 billion the next fiscal year over the administration's public estimate?

Justice FORTAS. Senator, I really do not recall the particulars of that. If I did, I would tell you. But I do not recall it. I do recall that he made what I thought was a very exaggerated statement about the costs of the Vietnam war, a statement which I thought would do great harm to the country. And because he was my friend, I called him. Because he was my friend, and because of my solicitude for the country as a citizen. I am a Justice of the Supreme Court, but I am still a citizen.

Senator ERVIN. Now, the July 8, 1968, issue of Newsweek magazine had a statement in it to this effect:

> More mornings than not, says one intimate, Fortas wakes up to a phone call from the President and a pithy reading of the literary gems from eight or ten morning papers Mr. Johnson peruses regularly, and few important Presidential problems are settled without an opinion from Mr. Justice Fortas.

Do you wish to make any comment on that?

Justice FORTAS. I won't comment on that beyond recalling what I said at my last meeting with this committee, when I was confirmed as an Associate Justice, and I think I said this in response to a question by Senator Hruska: That two things have been vastly exaggerated. One is the intimacy of my relationship with the President, and the other is my proficiency as a violinist. They are still exaggerated.

Sentor ERVIN. Well, do you put yourself in a class with Jack Benny as a violinist?

Justice FORTAS. No, sir, I am not as good as he is. He is really quite good.

Senator ERVIN. Mr. Chairman, that completes my interrogation of the nominee, and also my observations on Supreme Court decisions. I would make this observation. I wish some foundation would endow a study of the number of Supreme Court decisions and number of State court decisions which have been in effect cast into the judicial

garbage can by divided opinions of the Supreme Court of the United States during the last few years.

On May 20 of this year alone the Court reversed interpretations of the Constitution which had been in effect for 178 years, and by so doing, in my judgment as a lawyer, overruled about a hundred of its decisions to the contrary. And I think that the decisions that have been overruled recently by changes in the interpretation of the Constitution are probably likely to be well described in the words of the poet "As thick as the leaves which sprawl the brooks in Vallambrosa." I think the law is very unstable as a result. I just do not think that people do not object to these things. Of course these decisions mean nothing to anybody who would just as soon be ruled by the personal opinions of the majority of the Supreme Court as by a written Constitution, but I just do not happen to be in that group, because I think that the only security we have is faithful adherence to the root words of the Constitution. As Justice Cardoza said, "Justices of the Supreme Court have no power to revise the Constitution while professedly interpreting it." I think that has been done on many, many occasions, and it is being done increasingly.

I would just like to close with this. Justice Cardoza said when he was Chief Judge of the New York Court of Appeals, in the case of *Sunday Printing & Publishing Association* v. *The Remington Paper & Power Co.*, 235 New York 338, 139 Northeastern 470, "We are not at liberty to revise while professing to construe." Judge Sutherland also elaborated on that distinction between amending the Constitution and interpreting the Constitution. Whenever the meaning of the Constitution is changed, there is an amendment. The sole function of the Court is to interpret. And that function is simply the function of ascertaining and giving effect to the meaning of the Constitution. Justice Sutherland said this in *Westcrost Hotel Co.* v. *Parrish*, 300 U.S. 379 at page 404—

> The judicial function is that of interpretation. It does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for, and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

And I think that there is no surer way to destroy constitutional government in the United States than for a Justice of the Supreme Court to amend the Constitution while professing to interpret it.

Thank you.

I appreciate your patience.

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Charman, when you get this adviser to the President business in historic perspective, I think most of us would agree that Justice Fortas is restrained, he is not an activist. I fear some of the press stories will lose starch, some Senate speeches will lose punch, not wind, but punch when we see his restrain compared to the actions of many other aud very outstanding Supreme Court justices. But I confess I think all of us, as citizens, had the notion that contact between Presidents and Justices of the Court would be social only.

Justice FORTAS. Senator, may I comment on that.

I am concerned about it. I think it could be a problem. I do not know what the right answer to it is. Historically, there is a great deal of precedent. I have just mentioned those that can be documented from leading sources. I think it is a problem. I think it has to be carefully looked at.

Of course it is a problem that for me is very temporary, because I am sure that, as I tried to develop yesterday, President Johnson's calling on me for what I would not say is advice, but for essentially analytical help—how can I advise him on Vietnam—is due entirely to the fact that for about a quarter of a century before I went on the bench, I had worked with him on various problems. When he retires from office and his successor comes in, that will certainly no longer be the case, whoever his successor might be.

Senator HART. I think it is good that it is on the record, that we do understand. Our understanding of history with respect to Presidents and Justices is upgraded, too—at least mine has been. And I repeat—you would be labeled a very restrained Justice in the light of history.

Indeed one could suggest that the President is restrained in the pursuit of you, because if there was a mind as talented as yours and as many tough problems as are at his elbow, he must have had to have bitten his tongue many times not to have called you.

Justice FORTAS. Senator, he is a fantastic worker, as everybody knows, and as history records—a most meticulous worker.

Senator HART. But I am sure we will hear much about this nonetheless, whatever history tells us about the problem.

The Senator from North Carolina has reviewed a good many of these cases, and I would like for the record to indicate that I think that that is both appropriate and proper. I think your declining to attempt to amend an opinion here is also appropriate—but that the committee present to the Senate in this record as contained in those opinions the reflection of your philosophy is right. I think we can thank Senator Ervin for doing it.

Justice FORTAS. Senator, may I say that I agree with what you have said. My only regret is that necessarily, of course, there are opinions that I think are significant in addition to those that Senator Ervin has talked about. For example—may I mention one, I wonder, without breaching my constitutional responsiblity as I see it—just one.

For example, I think that one of the most important decisions that we made in my 3 years on the Court in the field of criminal law is a case that has received no notice, a case called *Warden* v. *Hayden.* In that case we did overrule a precedent. We overruled the case of *Gouled v. United States*, decided in 1921 by a unanimous Court. Holmes and Brandeis were on that Court, and if I correctly recall, Justice Clarke—not the present Justice Clark—C-l-a-r-k-e—wrote the opinion. We overruled that case, and established for the first time that the fourth amendment did not prohibit the police when they were making a valid and authorized search from seizing evidence, evidentiary material. Under Gouled, if the police got a proper warrant and, made a search, all they could seize were the instrumentalities of the crime, the fruits of the crime, and contraband: but they could not seize evidence—for example a shirt that a fellow wore when he was committing a crime. We overruled Gouled in *Warden v. Hayden.* I believe we overruled it by an 8-to-1 vote—maybe 7-to-1—maybe one of us was disqualified. And we overruled it because we had arrived at the con-

clusion, after careful reconsideration, that it had been wrongly decided, and that it was a limitation on the police which the Constitution did not compel.

There are other cases—stop and frisk, and so on.

But I say that, please believe me, without any intent at all to be critical in the slightest, but just to say that the process of constitutional application is very complicated.

For example, it surprises people to know that 92 percent of the criminal cases that were presented to us this last term—92 to 93 percent—were either affirmed or allowed to stand. Most of those, of course, were cases where people had been convicted. And it is 92 percent out of about 1,800 cases. The trouble with the Supreme Court is it writes and publishes only the hard cases. The cases that are not hard, that are not on the frontier of the law, we handle by orders. This is the first time an analysis has been made as far as I know. And the Supreme Court has never published the figure. That is one of the reasons, I think, for misunderstanding. But we had over 1,800 criminal cases presented to us this past term of Court. I had them analyzed by the Clerk of the Court. And there were, I think the figure is, 139, only 139 that were reversed or vacated. Most of those were remanded for new trial. And in most instances, for example in the *Miranda* case, after the retrial, the follow was convicted all over again.

But in any event, there were only 139 out of about 1,800 that were reversed or vacated and remanded for new trial. And that means that all but about 8 or 9 percent of the criminal cases that came before the Court during this past term of Court, we either affirmed or allowed the decision below to stand.

It is kind of rough when all that is visible on the Court, Senator, are the hard cases.

I am sorry to have taken so long and spoken so much. I probably should not have, and I hope you will forgive me.

Senator HART. On the contrary, I think it is well that all of us understand what you have just told us. And I am reminded that yesterday you said that if confirmed it would be your hope, as Chief Justice, to make the Court's work and the role it occupies in our system better understood.

Justice FORTAS. It certainly is my feeling, very strongly.

Senator HART. I will not ask you how you intend to do it. But I wish you great luck in the undertaking.

Justice FORTAS. Thank you, sir.

Senator HART. Because it is important, yet difficult.

You run into the fact that it is only the crisis and controversy that will sell a newspaper or give a Senator a basis for a speech. You will have to break that very understandable preoccupation with the the exception which is exciting and get it to the level of where we understand what is happening generally.

On the matter of judicial restraint—before I forget—I would ask, Mr. Chairman, that the *Warden* case and the stop and frisk cases—do you recall the title of those?

Justice FORTAS. Well, there were three of them. Sibron was one—I will supply them.

Senator HART. The staff will be able to identify them to be made part of the record.

Senator ERVIN. Let the record show the staff will procure copies of those cases and insert them in the record.

Senator HART. Thank you very much.

(The decisions referred to were marked "Exhibit 42," "Exhibit 43," and "Exhibit 44" and appear in the appendix.)

Senator HART. May I offer for the record a memorandum suggesting what I conceive to be some demonstration of judicial restraint in opinions of Mr. Justice Fortas.

And I think it is rather clear.

Justice FORTAS. Thank you.

Senator HART. In fact, if I did not realize I was not in your league as a lawyer, I might quarrel with you about a few of them.

(The material referred to for inclusion in the record was marked "Exhibit 45" and appears in the appendix.)

Senator HART. Senator Ervin, as he concluded the review of some of those decisions, made a point that his opposition, his criticism, reflected his response to the oath that he took to support and defend the Constitution. I know that is why he undertakes to analyze the cases and voice the criticism he does.

But all of us took that oath, including the nine men on the Court. And as you have reminded us, each Justice seeks to respond to that obligation as God gives him the faculties to resolve those tough questions that you have. And that is the way we act in the Senate.

Now, a few of those more recent cases are the result of legislative actions that the Senate took. And Senator Ervin and I just happen to have found ourselves in very basic disagreement as to both the appropriateness of the legislation which gave rise later to the cases and the constitutionality of it. In supporting those bills, I thought they were constitutional. I am gratified that on review they were held to be. But again it is just an indication of the fact that men seeking honestly to discharge their oath of office may reach different conclusions—motives and patriotism in no case should be questioned.

I have indicated before, Mr. Justice, that I agree with Senator Ervin's suggestion that there is no more serious responsibility that confronts a Senator than to advise and consent to the nomination of a member of the Supreme Court. I think Senator Ervin said it was one of the most solemn duties we have. And I find that its discharge in this case is made very easy for me, because of the extraordinary qualifications that you possess. I wish that I could voice my respect as I would like. I think Senator Gore's willingness to sit here for 2 days voiced the respect that he, as a very able lawyer himself, holds for you.

Justice FORTAS. Thank you, Senator.

Senator HART. Thank you, Mr. Chairman.

Senator ERVIN. Senator Burdick.

Senator BURDICK. Mr. Chairman, on the state of the record I am satisfied that Justice Fortas possesses the necessary qualifications for Chief Justice, and I have no further questions.

Senator TYDINGS. Mr. Chairman, I endorse the statements of Senator Hart and Senator Burdick. I might say the historical relation cited by Justice Fortas of the role and relatonship with some of our great Presidents and past Justices is most appropriate for the record, and that the longer I have sat in these hearings, the more persuaded I am

that Mr. Fortas can become one of the great Chief Justices of this country.

Justice FORTAS. Thank you, Senator.

Senator ERVIN. I will interject myself at this point.

Has anybody connected with the Supreme Court compiled any record which shows the number of cases which could not be prosecuted on account of the newly invented rules in the *Miranda* and the *Wade* and the *Gilbert* and the *Stovall* cases?

Justice FORTAS. No, Senator. As you know, a vast literature has grown up on the subject. There are statements by prosecuting attorneys and trial judges saying that *Miranda* has had little effect, and there are statements by prosecutors and trial judges saying *Miranda* has had a great effect. I know of no study that I consider to be very reliable, even studies that come out to the effect that *Miranda* has had very little effect. I do not think they are very complete or scientific.

Senator ERVIN. The thing that puzzles me, and it is beyond my power of comprehension, that if the Constitution means what it was held to mean in the *Miranda* case, why one of the smart judges who had sat on the Court during the preceding 176 years did not discover that, and if the Constitution means what it was held in the *Wade* and the *Gilbert* cases, why one of the smart judges that sat on the Court during the preceding 177 years did not discover that meaning. And if the Constitution means the things that were announced in the opinions handed down on May 20, 1968, why one of the smart judges who served on the Supreme Court during the preceding 178 years did not discover it?

Justice FORTAS. Senator, again, much as I would like to discuss this, I am inhibited from doing it. I respectfully note, if I may, sir, that the granddaddy of these cases, in my judgment, and as reflected in the opinions of the Court, is a case that was decided in 1932. That case was decided by a Court that was subjected to criticism of a virulence and intensity that we had not theretofore encountered. That was the "Court of the Nine Old Men." They were criticized for being too reactionary. And the result was that this decision in 1932, this opinion written by Mr. Justice Sutherland—a much maligned Justice of the Court in those days— went without anything except a very temporary notice by the public. But it has affected subsequent judicial decisions in this field profoundly. That was the case of *Powell* v. *Alabama*. It was the famous *Scottsboro* case. It was in that case that Mr. Justice Sutherland said that the critical period in a criminal prosecution is from arraignment to trial—arraignment to trial. I think that can fairly be characterized as dictum. But it was that statement that I think has been sort of the granddaddy of all of this.

Now here I have done something I should not have done. I am sorry, sir.

Senator ERVIN. If *Miranda*, *Wade*, and *Gilbert* and those cases are descendants of that dictum, they are illegitimate descendants. They were not born in holy wedlock.

Justice FORTAS. The same thing was said about Alexander Hamilton.

Senator ERVIN. Excuse me for trespassing on your time.

The CHAIRMAN. We will recess until 10 in the morning to meet in the caucus room in the morning.

(Whereupon, at 12:30 p.m. the committee was recessed, to reconvene at 10 a.m., Thursday, July 18, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

THURSDAY, JULY 18, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess at 10 a.m., in room 318, Old Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Hart, Burdick, Tydings, Dirksen, Hruska, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. The hearing will come to order.

Senator Hruska.

STATEMENT OF HON. ABE FORTAS, NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES—Resumed

Senator HRUSKA. Thank you, Mr. Chairman.

Mr. Fortas, 3 years ago next month you were the honored guest of this Judiciary Committee. And at that time, before I asked questions, I indicated that I had been requested by my colleagues to ask a few questions. Some of the questions I propounded were inventions of my own thinking, others were as a result of these requests. Whenever it is a pertinent question, and when it is relevant, I like to comply with these requests.

That same background will attend a few questions that I have today—not more than one or two—because a good many of the questions I have been asked to propound to you already have been asked by other members of this committee. There is something to be said for asking questions requested by colleagues. It is fair to the colleague who makes the request, it is fair to those who are interested in the question, to our colleagues in the Senate, and also to the nominee, because he gets a chance to comment upon things which are current in the press and in the thinking of people generally.

Now, on yesterday you referred to the occasion when you said that there were two things that have been vastly exaggerated with respect to you—I am reading now from the hearings of August 1965—"One is the extent to which I am a Presidential adviser, and the other is to the extent to which I am a proficient violinist." And then you stated, "I am a very poor violinist, but very enthusiastic."

Justice FORTAS. That is true, Senator.

Senator HRUSKA. There are some people who think you are good as well as enthusiastic.

Justice FORTAS. I appreciate that.

Senator HRUSKA. Nevertheless, from your avocation with the violin and violin music comes the question which I want to ask. It has to do with your participation in a case that was decided on May 20, 1968, entitled "*American Federation of Musicians* v. *Joseph Carol and others*" It is thought by some, because you have a union card—and I presume you have——

Justice FORTAS. I do not.

Senator HRUSKA. Did you at one time?

Justice FORTAS. Senator, when I was a boy in high school and in college, I played the violin professionally in Memphis to make my way through school. I was not a union member. The union was virtually unknown there. I have never been a union member. For many years now, my musical activities have been strictly, and perhaps excessively, on the amateur side. My former partner, Paul Porter, used to refer to the quartet with which I play at my own house as the "3025 N Street strictly no refund string quartet." And that was the limit of it.

Senator HRUSKA. At any rate, it has been suggested to this Senator that because you were a union member, or are, or had been, together with the fact that one of your law associates or law partners disbursed some moneys for the 1964 inaugural committee—he was chairman of the music committee, and he paid out the money of the committee to the various bands that played at the different places in Washington during those festivities and I think the amount was about $28,000—it was suggested to this Senator that perhaps that should have been a basis for your disqualifying yourself as a participant in the case of *American Federation of Musicians* v. *Joseph Carrol*.

So with those allegations, if you have any further comment, this is the time to make it.

Justice FORTAS. Thank you, Senator, I do. Number one, as I said, I am not and have never been a member of the union. Number two—I do not believe that there is any accuracy whatever in the statement that one of my former partners was head of the music committee for the last inauguration, and paid out money to the orchestras.

Senator HRUSKA. Well, I believe I should call your attention to the letter of James Symington, who does sign himself as chairman of the music committee.

Justice FORTAS. Oh, James Symington——

Senator HRUSKA. As I understand it, Jim had the job of disbursing the moneys furnished him by the inauguration committee to those bands who had rendered some professional services.

Justice FORTAS. I am sorry. I did not think of Jim Symington. Jim Symington was never a partner of my former firm—much to my regret, and the regret of my partners then. Young Symington did not stay with the firm long enough to achieve a position of a partner. I just did not think of him in connection with your question.

Senator HRUSKA. Well, would either of those contingencies have resulted in any different treatment of your continuing to participate

in that case? Was there anything in the activities of Mr. Symington that would have laid a foundation for your disqualifying yourself from participating in that case?

Justice FORTAS. Senator, I do not even know whether he was—this would have been 1964——

Senator HRUSKA. Correct.

Justice FORTAS. I do not know whether Jim Symington was associated with the firm at that time. If he had been associated with the firm at that time, and if I had recalled, which I did not, or had it been called to my attention, which it was not, that he had paid out money to the musicians' union, I would certainly have pondered that, and probably discussed it with some of my brethren on the Court. I doubt very much that that remote set of circumstances would have justified disqualification.

May I say this about disqualification, Senator?

Senator HRUSKA. I would like to know, because Mr. Justice Marshall and the Chief Justice disqualified themselves in this particular case.

Justice FORTAS. I——

Senator HRUSKA. That is my understanding—if you do not mind—because I have the file here, and you would have to draw on your memory. The reason Mr. Justice Marshall disqualified himself was that he sat on a panel of the circuit court in earlier stages of the litigation, but I do not know what the fact is with reference to the Chief Justice.

Justice FORTAS. Well, I do not know whether I am disclosing a fact from the Chief Justice's past, but he once played the clarinet, I believe. And I believe that he did have an honorary membership—a membership, or an honorary membership—in the American Federation of Musicians. If I had been a member of the federation, I probably would have disqualified myself, too, just out of an excess of caution.

It is a lot easier to disqualify oneself sometimes than it is to serve. You get some time off that way, Senator.

Senator HRUSKA. Well, perhaps the statute of limitations has run on the Chief Justice's activities on the clarinet.

Justice FORTAS. Perhaps. I think he still has a honorary membership. But I think he is no longer a clarinet player.

Senator HRUSKA. Have you any further comment on this situation?

Justice FORTAS. No, thank you, sir.

Senator HRUSKA. Now, then, the other series of questions has to do with your representation of the government of Puerto Rico at a time following your separation from service of the Government. Your latest post at that time, as I remember it, was Under Secretary in Charge of Territorial Affairs. Is that correct?

Justice FORTAS. No; it is not. I was Under Secretary of the Interior. One of my responsibilities was the supervision of the Division of Territories, which had its own chief. My principal responsibilities at that time were the management of the Department—the budget, the personnel, and that sort of thing.

Senator HRUSKA. How long had you been in that post?

Justice FORTAS. About three and a half years, since 1942, at the time.

Senator HRUSKA. And then at a later time, after you separated yourself, you did, on a retainer basis, represent the government of Puerto Rico?

Justice FORTAS. After a time, yes—not immediately, but after a time.

Senator HRUSKA. How many years did that arrangement continue?

Justice FORTAS. I think it continues with my former firm up to this time. It certainly continued until I resigned my membership in the firm.

Senator HRUSKA. It was some time after you left the service that you negotiated with them for this representation, and participated in it; is that correct?

Justice FORTAS. May I explain the circumstances there, Senator, because I do remember them—even though this was 1946, 22 years ago.

I had written a letter, when I was Under Secretary of the Interior, to the Governor of Puerto Rico—Puerto Rico was then a territory, in fact, a colony of the United States, and the Governor was an appointed Governor, appointed by the President with the advice and consent of the Senate. The Governor at that time was Tugwell. When I was Under Secretary of Interior I had written a letter to Governor Tugwell, as I remember, expressing my concern and doubts about a retainer agreement that the government of Puerto Rico then had with an outside firm of lawyers to do their general governmental work. And it was my view then that that work should have been done either within the staff—either within the staff of Puero Rico, or the Interior staff.

When I resigned, Governor Tugwell and Don Luis Muñoz Marín, the majority leader of the senate of Puerto Rico, who subsequently became its first elected Governor, asked me to come down there. They paid my expenses. There was no fee in the first instance. I went down there, and I consulted with them—I do not remember the subjects. I have a vague recollection that it may initially have been a question of land policy and of their land law. Then I went down several other times and told them I would not take the fee, but I would continue to consult with them. Whether those were legal consultations or policy consultations or a mixture of both would be hard to say. I rather think it was a mixture of both.

At that time, my legal work was just starting. Their demands became greater and greater on me for this specialized type of work. And I remember quite distinctly that they talked to me about the unfairness of it, of my going down there for no compensation whatever. And what we finally did—and I do not remember when—it was quite a while—what we finally did was to agree to what was essentially a nominal retainer of $12,000 a year for the services of Judge Arnold, my partner, myself, and my firm, on these specialized problems. That is the story, Senator.

Senator HRUSKA. Now, the letter to which you refer, which had been written while you were still in service, was quoted quite extensively in a Washington Post story by Marquis Childs on May 22, 1946. With your permission, I shall read a part of it, and then ask you a question or two about it.

(The material referred to for inclusion in the record was marked "Exhibit 46" and appears in the appendix.)

Senator HRUSKA. Now, this was a letter that was written about a year before you had left the Government service, or certainly during your Government service—its exact date is not specified. [Reading:]

I believe that continued representation of a government or a government agency by private attorneys is unsound and unwise. I know that, from time to time, government agencies must and should retain private counsel on specific matters in order to assist government counsel. But except for such specialized assistance, governments and governmental agencies should, in my opinion, be represented by lawyers who are public officials. In my opinion, it is neither seemly nor appropriate for governmental agencies to be represented by counsel who are not regularly constituted public officials.

And you go on to say that such a relationship is "apt to lead to embarrassment regardless of the unimpeachable character of the private attorneys who might be concerned. In the event that the private lawyers obtain law business from private sources which involve dealing with the Government, it is obvious that the situation will be embarrassing for both the lawyers and the Government."

Now, that is the letter to which you referred a little bit ago, or part of it; is it not?

Justice FORTAS. That is indeed, Senator. And it refreshed my recollection so that I can repeat quite confidently that the point to which the letter was addressed was the regular, continuing general counselship, in effect, of a Government agency by outside lawyers.

May I say also, Senator, that the reference there to a possible conflict of interest if the lawyer undertook representation of private companies down there—that figured, too, in the precise situation to which that letter was really addressed.

Senator HRUSKA. Now, attention was called in the news story in which I refer that Puerto Rican legal matters in this country have been ably handled by the Department of the Interior and the Department of Justice at no cost to the government of Puerto Rico. "In the past 3 years 13 cases have been briefed and argued by Justice and Interior. Of the cases in which decisions have been rendered, only one has been lost." That is a pretty good record, isn't it?

Justice FORTAS. Yes, sir. Of course you will remember, Senator, that it was about that time that there was a strong popular independent movement in Puerto Rico. You will remember that it was about that time that Albizu Campos was very active as the head of revolutionists in Puerto Rico. And it was shortly thereafter, and largely because of the marvelous work of Luis Muñoz Marín, that Puerto Rico began developing what turned out to be a marvelous scheme which has been imitated in other parts of the government, that is the creation of the Commonwealth of Puerto Rico—or as it is put in Spanish, "Free and Associated State." Under this scheme Puerto Rico was given by this Congress, in various acts, with the agreement of Puerto Rico, a great deal of autonomy, perhaps complete local autonomy, with association in essential respects with the United States. As part of that process, the furnishing of legal services by the Department of the Interior and the Department of Justice of the United States ceased.

Senator HRUSKA. Now, would you be in a position to say whether the cases and the type of cases handled by Interior and Justice are in the nature of the continuing representation to which you refer in your letter, as opposed to specific matters of special and unique nature?

Justice FORTAS. Senator, as I said, the representation of Puerto Rico by the Interior Department and the U.S. Department of Justice ceased a good many years ago. I think it completely ceased as of 1952, when

the United States, by an act of Congress, and Puerto Rico, created the Commonwealth of Puerto Rico, and gave it its internal autonomy. Then and thereafter Puerto Rico has itself handled its legal work with the assistance of such lawyers as it may retain from time to time.

Senator HRUSKA. But, of course, I am referring to that earlier period.

Justice FORTAS. I could not possibly recall that, Senator. That was 22 years ago.

Senator HRUSKA. But it was even after the establishment by Puerto Rico of its own legal representation within its government that your relationship as special counsel continued?

Justice FORTAS. Yes, sir; it was. They needed a lot of help, then, because they really had a great deal of difficulty in staffing their essential posts.

Senator HRUSKA. Have you any other comment to make about this Puerto Rican situation and representation?

Justice FORTAS. No, Senator. Whenever there is talk about Puerto Rico, I feel that it is important to say that the story of Puerto Rico, and the practically complete elimination of radical, violent, independent movements down there, revolutionist movements, just by statesmanship and by careful handling, is one of the finest chapters in the history of the U.S. Government. It is a great tribute to the United States and to Puerto Rico. I am proud to have had a part in it.

Senator HRUSKA. Well, thank you very much, Mr. Justice. I want to say that I have been impressed by the candor of your replies to various questions, and your patience with us.

Mr. Chairman, that is all the questions I have for the present time.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Justice Fortas, before I ask you several questions, I should like to comment briefly on the premises upon which my questioning is based.

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

Ideally, the Supreme Court is thought to be removed and insulated from politics, and if the members of the Court had wished it, the Court would still be nonpolitical in its function. However, in the last decade and a half, the Court has made so many decisions affecting the lives of the American people in very fundamental ways that it would seem to me that the Senate, as representatives of the people, is entitled to consider these views, much as the voters do with regard to candidates for the Presidency, or indeed for a seat in the U.S. Senate.

Second, I believe the Senate must concern itself with the role of the Supreme Court in our system of government, both what this role has in fact become, and what it should become.

While there are other methods by which the role of the Court can be examined and changed, the confirmation of Justices with a record consistent with a particular viewpoint is, I believe, one effective and legitimate way.

Thus, for these two reasons I shall not confine my questioning either to your personal qualifications, in a narrow sense, or to the legal and ethical problems involved in the actions of the present Chief Justice and the President with regard to this confirmation.

I have long been concerned about the flow of government power from the States to the Federal Government. As a Senator who believes that Congress is possessed only with delegated powers, and the States or the people under the 10th amendment are possessed with all non-delegated powers, I am disturbed at the implications in *Katzenbach* v. *Morgan*, 348 U.S. 641, handed down in 1966, and *Cardona* v. *Power*, 384 U.S. 672, also handed down in 1966.

The case of *Cardona* v. *Power* involved a New York State law which required literacy in the English language as a requirement of registering to vote. The majority held that this law did not violate the 14th amendment. Justice Fortas, I believe you signed the dissenting opinion of Justice Douglas which held there was no rational basis for the State to require literacy in English, and that thus the New York law was unconstitutional, even if Congress had not passed the Voting Rights Act.

The case of *Katzenbach* v. *Morgan* concerned a 1965 Voting Rights Act. In that act, persons who are literate in Spanish, if evidenced by completion of the sixth grade in a Puerto Rican school, are eligible to vote, thus abrogating the New York requirement. The majority, which included you, Justice Fortas, held that Congress has the power, under section 5 of the 14th amendment, to prohibit the English literacy requirement. Thus the State can be prevented from exercising its judgment on requirements for electors by a contrary finding of the Congress.

Justice Harlan, in a dissent, argued that the power of Congress to enforce the 14th amendment against the States existed only upon the passage of an unconstitutional law by the State.

Under the reasoning of the majority in the *Morgan* case, are not the States prevented from exercising an otherwise constitutional legislative prerogative, such as the requirement of literacy in the English language, merely because the Congress declares otherwise?

Justice FORTAS. Senator, with all deference, I must ask you to understand and to excuse me from addressing myself to that question. I do so only because of my conception of the constitutional limitations upon me. As a person, as a lawyer, as a judge, I should enjoy the opportunity—I always do—of discussing a problem of this sort. But as a Justice of the Supreme Court, I am under the constitutional limitation that has been referred to during these past 2 days, and must respectfully ask to be excused from answering.

Senator THURMOND. Now, I am not asking you about any case that is coming before the Court, that has not been decided. I realize that that would be a case in which you would properly ask to refuse to answer. I am asking you about a case that has already been completed, it has already been decided—both of these cases have been handed down. There is nothing further in those cases to be done.

Justice FORTAS. Senator, with the greatest deference, and the greatest respect, I assure you, my answer must stand. I cannot address myself to the question that you have phrased because I could not possibly

address myself to it without discussing theory and principle. And the theory and principle that I would discuss would most certainly be involved in situations that we have to face.

Also, I could not discuss a case decided by us without discussing theory and practice, and thereby laying open the possibility of petitions for rehearing, thereby laying open the possibility of references to prejudgment on my part, thereby laying open the possibility that litigants and their counsel would use some remarks that I might have made here in the course of the presentation of their case.

The judgments of the Supreme Court, the judgments made by each of us, are made after meticulous and conscientious work. And that is the way it should be. We should not, as I see it, Senator, with regard to our constitutional duty, proceed otherwise, and I am trying to follow my constitutional responsibilities here.

I regret this. I regret this more deeply than I can say. It would be a lot easier to answer your questions than not to answer them. But I see no alternative if I am to be true to my oath, and I am certainly going to try to do that.

Senator THURMOND. Don't you think the Members of the Senate, of this Judiciary Committee, are entitled to know what your philosophy is if they are going to consider you for Chief Justice?

Justice FORTAS. Absolutely.

Senator THURMOND. And shouldn't they have the benefit of that? And shouldn't you have the opportunity to explain why you took what a great many feel is a peculiar position in the cases to which I just referred?

Justice FORTAS. I should love to have that opportunity, Senator, love to have it. But it is my view, after weighing the considerations that we have discussed here, that it is my duty to refrain from doing what I would like to do. I certainly believe that the Senate should have the fullest information available to it about my views. I think my views are spread out on the record in the opinions that I have written in 3 years on this Court, and in a professional life extending back about 35 years, Senator. All of that is before you. I do this, I repeat again—perhaps unnecessarily—I do this not because I want to. I do this out of a sense of duty.

Senator THURMOND. Your views are expressed in your decisions. Why would you object to being asked some questions about your views that you had expressed?

Justice FORTAS. I cannot add to what I have said. I believe the Constitution of United States, which I am sworn to uphold, says to me that I must not do it—that it is incompatible with a sitting Justice's obligation, and incompatible with the theory of the separation of powers that our Constitution embodies.

Senator THURMOND. You have expressed your views to the President when he has called you down there, and over the telephone; haven't you?

Justice FORTAS. No, sir; never——

Senator THURMOND. And he got the benefit of your views on matters; did he not?

Justice FORTAS. Never——

Senator THURMOND. Why shouldn't a Senator have the benefit of your views?

Justice FORTAS. I have never, never been asked by the President. Nor have I expressed by views on any pending or decided case—never, Senator, never.

Senator THURMOND. Well, the views you expressed to him were probably on policy, were they not, which would probably be objectionable, and to which you should not have responded? Here we are asking you about the participation, your participation in decisions on the Court, decisions that affect every citizen in the United States—every American today who is going to read the paper tomorrow is going to see that you refused today, that you failed today, to answer questions of vital importance to them, and they are going to get an impression and maybe rightly so, that you are using this as a screen or an excuse not to go into these matters. The public wants these matters gone into. And a great many people feel that you are withholding your real true views, if you do not enter into the discussion of these matters as members of the Senate committee prefer to do.

Justice FORTAS. Senator, all I can say is that I hope and trust that the American people will realize that I am acting out of a sense of constitutional duty and responsibility.

Senator THURMOND. Well, I am disappointed, even more so, in you, Mr. Justice Fortas.

Justice FORTAS. I am sorry to hear that, Senator.

The CHAIRMAN. Let us have order.

Senator THURMOND. Nevertheless, I shall continue to propound questions to you, even though you may use some excuse not to answer them, as I feel that the questions I shall ask are fair, they are just, and the answers concern every American citizen, and his life and our constitutional form of government.

Recognizing that you and Justice Douglas believe the New York statute to be invalid that I referred to as a denial of equal protection, is it your opinion that the State laws independently valid under the 14th amendment can be invalidated by an act of Congress under section 5 of the 14th amendment?

Justice FORTAS. With all respect, Senator, the same answer.

Senator THURMOND. And you refuse to answer that?

Justice FORTAS. Yes, sir.

Senator THURMOND. Mr. Justice Fortas, if Congress were to pass a law prohibiting literacy tests for voting in all States—and I gather you believe such tests to be unwise—would it be your opinion that, if this matter came before the Court, the proper question would be whether this was appropriate legislation under section 5 of the 14th amendment, even if such legislation were constitutional in the absence of congressional action?

Justice FORTAS. I am afraid I have to make the same answer, if I have followed that correctly, Senator.

Senator THURMOND. You refuse to answer the question?

Justice FORTAS. Yes, sir.

Senator THURMOND. What is your answer?

Justice FORTAS. I said, yes, sir; for the same reason.

Senator THURMOND. Mr. Justice Fortas, in all but very few States a person must be 21 years of age in order to vote. Suppose Congress passed legislation, not an amendment to the Constitution, lowering this

to 18, based on findings that certain racial groups have a greater percentage of persons in the 18-to-20 age bracket—is there anything in the reasoning of the majority in the *Morgan* case which would prevent congressional action overriding the State's judgments on this matter?

Justice FORTAS. For the same reason—because of constitutional limitations upon me—I must decline to address myself to that.

Senator THURMOND. So you refuse to answer that question?

Justice FORTAS. I have so stated; yes, sir.

Senator THURMOND. Mr. Justice Fortas, in the dissent of Justice Douglas, in *Cardona* v. *Power*, which you signed, the following statement is made:

"In my view, there is no rational basis considering the importance or the right at stake for denying those with equivalent qualifications, except that their language is Spanish."

I have two questions concerning this.

First, how can you dismiss the value judgment of a State that literacy in the English language is relevant to intelligent exercise of the franchise by saying this has no rational basis?

Second, what constitutional basis is there for placing the right to vote in a category whereby a different rational basis would be required?

Justice FORTAS. Senator, with the greatest respect, my response must be the same.

Senator THURMOND. So you refuse to answer that question?

Justice FORTAS. My response is the same; yes, sir.

Senator THURMOND. Mr. Justice Fortas, I think we all recognize the growing unease and divisiveness in this Nation. Many things reflect this—public opinion policy, statements of public officials, including the President and many U.S. Senators, the urgent tone of the letters from constituents, to name only a few. One factor which in my judgment has contributed to this divisiveness is the growing reliance by many groups on methods of propounding political views which are not speech or the written word.

For example, sit-ins, marches, demonstrations, violent and nonviolent seizures of public buildings, and even riots, have all come to be vehicles for promoting points of view. These methods rely not on verbal persuasion, but in varying degrees upon creating a physical inconvenience, upon creating disorder, or fear of disorder, or perhaps upon creating a captive audience.

The Supreme Court dealt with this subject in *Brown* v. *Louisiana*, 383 U.S. 131, in a 1966 case, in which you wrote the prevailing opinion. It appears to me that this decision seriously interferes with the rights of the States, through their legislatures, and their courts, to preserve public order.

Do you believe that no evidence existed for the position of the State of Louisiana in view of the fact that a library as opposed to a street or sidewalk was involved?

Justice FORTAS. With the greatest, greatest regret, I must make the same response, Senator.

Senator THURMOND. So you refuse to answer that question?

Justice FORTAS. My response is the same: yes, sir.

Senator THURMOND. Does this decision not make a captive audience of library personnel, or potential library patrons?

Justice FORTAS. I must respond the same way, I regret to say.

Senator THURMOND. Recently the use of the right to protest has escalated to include the seizure of university buildings among other things. In my judgment, the Court has created a tremendous gray area of what is legitimate protest, and what may be constitutionally prohibited by State authorities.

Do you think the reasoning in the prevailing opinion in this case established sufficient justification for the reversal of the conviction?

Justice FORTAS. Senator, my views on this subject are set out in a number of opinions and also in a booklet that I wrote, and they are unmistakable. I hope and I believe they are unmistakable. Since they appear in this book, I suppose I can refer to them. My view is that no matter what the cause is, no matter whether the cause is just, no matter how holy or inspired a person thinks his cause to be, there is under our system of government no place for lawlessness or violence, and lawlessness includes trespass. That appears in my book.

Senator THURMOND. Well, now, how is it that you can publish a book and express views, and then when that is done, you can elaborate here on such a matter, whereas if you have not published a book, you refuse to elaborate here?

Justice FORTAS. Senator, because of the problem of separation of powers. I repeat again—I do not like this situation as a man. I am not that kind. I like debate and discussion.

The Constitution, so far as Members of the Congress are concerned, says that they shall not be held to answer in any other place for their votes or opinions while exercising their duties. In my opinion, that principle as applied to the Members of Congress is a fundamental one. It is the foundation of our system of government. The correlative, Senator, in my judgment, is true of judges. Judges may not be held to answer—which is very broad, has been construed by the Supreme Court in the case of Members of Congress very broadly—they shall not be held to answer before any other branch of the Government for their views. And it is that principle that is fundamental to our tripartite division of government, and it is that principle which I, being sworn to uphold the Constitution, am doing my level best in these trying circumstances to uphold.

Senator THURMOND. In the book you say you published, you did express your views voluntarily?

Justice FORTAS. That is correct. I have also expressed my views on this same subject to law schools and college audiences before whom I have been invited to lecture. And that is not a violation of a division of powers within the Government under our Constitution. In fact, in my judgment, as Judge Parker and many others have said, it is a part of the duty of a judge to advocate obedience to law and obedience to the Constitution by appropriate means, and one of those means is the writings of judges, with which library shelves are full, and another is lectures to universities and colleges and other appropriate groups.

Senator THURMOND. Now, if a Supreme Court Justice is allowed to go around to law schools over the country, or universities, and express his views—and there must be some purpose in doing that, to influence people along the line of a decision he has handed down—

would it not seem proper that a member of the Judiciary Committee and a Member of the Senate would have the right to propound some questions and to get the Justice's views on other phases of that decision which he discussed in a law school or somewhere else?

Justice FORTAS. Senator, I want to make it perfectly clear that nothing that I have said is, or should be construed as being, critical of any Member of Congress who may want to ask me any question at any time or any place or in any circumstance. All I am trying to do is, with what judgment I have, with the strength that I have, to look to the line of my constitutional responsibility. And I have already said that, in my judgment, my constitutional responsibility requires me, however unpleasant it may be, to decline to answer questions of the kind that you have propounded. I regret it. I repeat, I regret it deeply. But that is my duty, and I will stick to it.

Senator THURMOND. It might be hard to explain to the public, and even to the members of the Judiciary Committee, however, that you can go to a school or college and elaborate all you please on your decisions, and on your philosophy in the decision, and then when you come before the Judiciary Committee for a promotion to be Chief Justice of the United States, you then say you cannot answer questions of the members of the committee who may wish to ask you about the decision that you did discuss in the law school or in your lectures over the country, where you evidently expounded your views and defended your position. But here you refuse to answer.

The problems in this area of protest are illustrated by two incidents reported in day before yesterday's Evening Star, July 15.

I should like to read from these two articles.

One is entitled "Two 'Pearls' Toss Gem of a Party for 20,000." The first paragraph reads "Two Pearls, Washington hostess Perle Mesta and entertainer Pearl Bailey put on a party for 20,000 persons at Meridian Hill Park last night." Skipping down to another paragraph: "About 50 youths, some of them carrying placards, kept up a steady chant of 'No More Murders,' between and during some of the earlier performances. One sign protested the shooting of a citizen by District of Columbia policemen. While New York supper club singer, Hildegarde, was singing, the youths pushed their way through the crowd to the front and took over the reserved seats occupied by some of Mrs. Mesta's guests, including Senator Charles Percy, Republican of Illinois, and Mr. Walter E. Washington, who then left the park. The movement to the front touched off a general surge forward by the crowd, threatening to seriously crush many young children against a fence around the stake. Several children were lifted over the fence to safety by U.S. Park Police. Because of the incident, late-coming relatives of Vice President Humphrey stayed at the park for only 5 minutes."

Now, the other. This is from the Evening Star, July 15, shows a picture here entitled "Barefoot in the Street. Four Manhattan hippies, minus a lot more than shoes, put on an early morning show of nudity, bongo drumming and body painting in front of George Washington's statue at Federal Hall on Wall Street yesterday. They were led by Yayoi Kusama, a pshychedelic painter and sunbathing enthusiast. When police arrived, the four jumped into their hippy robes and slowly stole away."

These two incidents, Mr. Justice Fortas, both involve the right of protest, a right upheld in the *Brown* case. They also involve two different problems for law enforcement authorities. One might be described as a matter of morals, or perhaps of taste. The other incident appears to involve a threat to public safety.

My question is this:

In view of the decision in the *Brown* case, with what assurance can State authorities halt or prevent such incidents?

Justice FORTAS. I respectfully must make the same answer, Senator.

Senator THURMOND. You refuse to answer the question?

Justice FORTAS. I make the same response; yes, sir.

Senator THURMOND. Do we have a situation where in cases before the Supreme Court concerning the right to protest, which the Court seems to equate with free speech, there is what amounts to a presumption in favor of protesters rather than judging whether the State statute is reasonably related to the State's responsibility to maintain law and order.

Justice FORTAS. Senator, I believe that comes within the same category, but I respectfully call your attention, if I may again, to what I have said. I think that I have expressed my own views rather forcibly, somewhat too forcibly for the comfort of some people who believe in lawlessness and lawbreaking as a legitimate means of protest.

Senator THURMOND. Under the Supreme Court's ruling in this case, can a State constitutionally restrict the use of a public building to its intended purpose? Now, this is a vital question to the public.

Justice FORTAS. I respectfully submit that I must make the same response. I am sorry.

Senator THURMOND. So you refuse to answer that question?

Justice FORTAS. I make the same response; yes, sir.

Senator THURMOND. Has not the Court's attitude had the effect of encouraging forms of protest which, first, tend toward the disruption of public order, and second, infringe on the rights of nonpartisans not to listen if they so choose?

Justice FORTAS. All I can say to that, Senator, is that I hope the Court's decisions have not had that effect. I do not know, of course.

Senator THURMOND. Mr. Justice Fortas, would you agree with the criticism of the *Brown* case that it creates doubts—I repeat—doubts for law-enforcement personnel as to under what circumstances they can make arrests where protests are involved, thus encouraging reluctance on their part to interfere, and that it creates doubts in the minds of protesters which encourage them to attempt even more extreme forms of protest?

Justice FORTAS. I must make the same response to that, Senator. I am sorry.

Senator THURMOND. The practical problems which arise from the Court's attitude toward protests are well illustrated by the following article which appeared in the section on "Law" in the July 1968 issue to Time magazine. I should like to read this to you. It is entitled "Decisions"—"Correcting Students in Court." [Reading:]

In what they called a peaceful protest last spring, Columbia's rebellious students seized control of seven university buildings, held a dean hostage, and rifled private files. But university punishment, they insisted, would be downright illegal. Rather than answer a summons to a disciplinary proceeding, five

of them went to federal court. There they asked for an injunction barring any university action against them. Instead, last week they got a dressing down from Judge Marvin Frankel. Like an exasperated teacher correcting careless students back on the campus, the former Columbia law professor dismissed their legal arguments as a whole series of errors, equivocal legalisms, sprawling verbosities, gross flaws, parochial rhetoric. As the judge saw it, the students ran into fatal trouble on the very threshold issue. He was not convinced that his court had jurisdiction, despite the students' claim that the university was an agent of the state. Frankel agreed that some government money helped to support the university, but that is not enough to make the recipient an instrumentality of government, he said. Nothing supports the thesis that university education as such is a state action—nonsense. Although he left the way open for the students to seek further evidence to support their case, and to plead again for an injunction, Frankel offered them little hope of success. One by one he demolished their arguments. The Fifth Amendment privilege against self-incrimination would not be violated by disciplinary hearings, he said. There was no requirement to say anything at the hearings, nor should the hearings be delayed until after any criminal proceedings. A motor vehicles Commissioner authorized to suspend a driver's license for speeding need not wait for the month or years of a negligent homicide prosecution. The most fundamental and fuzzy student point was that the rule of law should be abandoned because the sit-ins were merely an exercise of the First Amendment rights of free speech and assembly. Said Frankel—"Arguments like this are at best useless, at worse deeply pernicious, nonsense in courts of law. It is surely nonsense of the most liberal kind to argue that a court of law should subordinate the rule of law in favor of more fundamental principles of revolutionary action denied forcibly to oust government, courts and all. This selfcontradictory sort of theory, all decked out in the forms of law with thick paper, strains of precedent, and the rest, is ultimately at the heart of the plaintiffs' case." It was not surprising that Frankel found their case both unsound and untenable.

Do you have any comments on this?

Justice FORTAS. No, sir; I do not.

Senator THURMOND. Do you see any relation in what happened here as to what happened in the Louisiana library case?

Justice FORTAS. I do not think I ought to comment on that, Senator. But my own views on this subject are perfectly clear and they are a matter of record. I have been criticized on the other side for my views, as being against lawlessness in any form. I think that that criticism has been rather vigorously and vociferously registered against me.

Senator THURMOND. Mr. Justice Fortas, there have been many charges to the effect that various members of the Supreme Court too often substitute their own ideas of what is right and wrong for actual constitutional or legal requirements. In this connection, I should like to ask you several questions concerning your dissent in the case of *Fortson* v. *Morris*. You are familiar of course with that Georgia case, found in 385 U.S., page 231 handed down in 1966.

Do you believe the implications of the constitutional guarantee of a republican form of government require a State's Governor to be popularly elected?

Justice FORTAS. Senator, I cannot comment on that. It is discussed in that case.

Senator THURMOND. And what about lesser State officials?

Justice FORTAS. The same answer, Senator.

Senator THURMOND. You refuse to answer that?

Justice FORTAS. I say that I cannot answer that consistent with my understanding of my constitutional duties.

Senator THURMOND. Mr. Justice Fortas, would it not be difficult to draw a logical distinction between lesser State officials and the Gover-

nor, once a constitutional requirement of popular gubernatorial election is established?

Justice FORTAS. The same answer, Senator.

Senator THURMOND. In my judgment, it is preferable for a Governor to be chosen by popular election. Yet I am unable to find a requirement to this effect in the Constitution. Would you consider your dissent in *Fortson* v. *Morris* to be an example of translating a personal preference into a constitutional requirement?

Justice FORTAS. I most certainly would not—but I should not say that. I must stand on the constitutional position. I cannot respond to that, Senator.

Senator THURMOND. I thought you did respond.

Justice FORTAS. I am sorry. It was an inadvertence.

Senator THURMOND. Well, maybe we need more inadvertent answers here this morning.

Justice FORTAS. It is pretty hard not to make them, Senator, as I am sure you will understand. I just repeat—this is not a pleasant role for me.

Senator THURMOND. Mr. Justice Fortas, in this same regard, I am concerned about the Court's decision in *Harper* v. *State Board of Elections*, found at 383 U.S. 663, a 1966 case. On what basis did the majority, through Mr. Justice Douglas, hold that State requirement of a poll tax is unconstitutional? I want to say that as Governor of South Carolina I led the movement to remove the poll tax as a prerequisite to voting. That is a matter for each State under the Constitution, and I know of no authority where it has been delegated to the National Government. In fact, for 20 or 30 years there was an effort in the Congress to remove the poll tax by a congressional action, by a statute. The Congress never acquiesced. And finally several years ago, the Congress did propose a constitutional amendment, the author of which was the distinguished Senator from Florida, Senator Holland, to remove the poll tax as a prerequisite to voting. But only then did the Congress act—where the Constitution was amended to do this—because the Congress had taken the position that it did not have the authority to pass a statute to do this. And I wondered if you would care to answer that: On what basis did the majority hold that State requirement of a poll tax is unconstitutional?

Justice FORTAS. No, Senator, thank you, I could not add anything to the opinion. I must refrain on the constitutional basis I have stated.

Senator THURMOND. Is there anything which reflects the intent of the framers to the effect that a State poll tax be prohibited?

Justice FORTAS. I must respectfully make the same response.

Senator THURMOND. Do you believe it to be beyond the power of the State to find that payment of a poll tax has some rational relationship to sound exercise of the franchise?

Justice FORTAS. I must respectfully make the same response.

Senator THURMOND. So you refuse to answer those questions?

Justice FORTAS. Yes, sir.

Senator THURMOND. *In Baker* v. *Carr*, handed down in 1962, before you went on the Supreme Court, there is a point I would like to ask you about.

The Supreme Court had traditionally refused to get into apportionment of State legislatures, considering it a political matter. This case

held that the Court had jurisdiction in this field, and in *Reynolds* v. *Sims*, a 1964 case, which was also decided before you went on the Supreme Court, on the principle of one man, one vote, the Court held that both Houses of State Legislatures must be based on population, in spite of the fact that Congress itself served as a guide for the system long used in most States.

Do you have any comment on those two decisions?

Justice FORTAS. No, sir.

Senator THURMOND. Another case that was decided after you went on the Court—*Harper* v. *Board of Elections*, 1966. The Court, in a 6-to-3 decision, held the States could not require payment of a poll tax as a prerequisite to voting. Justice Black, in his dissent, stated:

> 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.

Would you care to cite the authority where the Federal Government has jurisdiction to act on this matter?

Justice FORTAS. No, Senator; I cannot respond to that.

Senator THURMOND. You refuse to answer that question, now?

Justice FORTAS. I cannot answer.

Senator THURMOND. Now I would like to propound some questions along the line of criminal procedure.

Mr. Justice Fortas, I am concerned about the increased crime rate, as are many people in the United States today. I find it an inescapable conclusion that the numerous decisions of the Supreme Court which have resulted in an expansion of the rights of those accused of committing crimes, and which have made convictions more difficult, have been a significant factor in this increase in crime.

I am interested to know whether you believe these decisions in *Mallory*, *Escobedo*, *Miranda*, *Berger*, and other similar cases, have had the effect of increasing the crime rate. I am not asking you now about the decision. I am asking you if you feel they have had the effect of increasing the crime rate, and if so, what weight should this consideration have on the courts?

Justice FORTAS. Senator, as a citizen I, like everybody else, am deeply concerned about the crime rate in our country—deeply concerned about it. There have been various studies made and articles written as to whether or not decisions, or particular decisions, made by the courts have affected the crime rate. We discussed that somewhat yesterday when Senator Ervin was examining me. It is a very difficult matter to evaluate. I do not know any more than anybody else the extent to which all of these decisions or any decisions in particular have had an effect on the crime rate.

There is one thing that I have noticed, Senator, that may or may not indicate that perhaps other factors have had an important bearing, and that is this—that at a time when none of these rules of the Court applied to juveniles, the incidence of juvenile crime in this country, serious crimes, increased at a greater rate than that of adult crime, even after taking into account the proportionate increase in the growth of populations between the two groups.

But the answer to your question specifically is that I really do not know.

Now, the second part of your question is whether that influences or should influence the decisions of the Court.

So far as I am concerned, Senator, as well and as conscientiously as I can do it, within the limits of my intelligence and my understanding, what I try to do is to apply the constitutional principles and the relevant precedents to the problems that come before us, and to arrive at a result which is in keeping with the Constitution. And I have confidence myself that if we are wise—if judges are wise and Congress is wise, as it is generally in interpreting the Constitution—that faithful adherence to the Constitution will produce a result that is in the public interest. I believe that profoundly.

But my task, our task as a Court, is a very limited one.

In the first place, we decide only cases that come before us. In the second place, we can do nothing but decide the cases, and to the extent that God gives us guidance, decide them on the basis of the Constitution. And that is what I try to do, Senator.

Senator THURMOND. The first case I refer to was the *Mallory* case—*Mallory* v. *United States*, handed down in 1957, before you went on the Supreme Court.

This was a case in which the defendant voluntarily confessed to a serious crime, a serious assault, in fact, rape. He was convicted by the trial court, 12 men who heard his testimony, and the trial judge who heard it. They concluded the confession was voluntary. They concluded that all the details he had set out in that confession—he set out himself were true and correct. There is no question, no issue about the confession being voluntary. There was really no question that he committed the crime. But when it went to the Supreme Court, they reversed the case and the man went free. Why did he go free? A criminal, a convict, a guilty man, who committed a serious rape on a lady in this city. Simply because the Court said they held him a little too long before arraignment.

Do you believe in that kind of justice? Don't you think the main purpose of the courthouses, of the judges, of the jury is to go to the heart of a case and render justice, to convict them when they are guilty, and turn them loose when they are free, and not let technicalities control the outcome? And isn't that what happened in that case?

Justice FORTAS. With the greatest regret, I cannot respond to that, because of the constitutional limitation.

Senator THURMOND. Does not that decision, *Mallory*—I want that word to ring in your ears—Mallory—the man happened to have been from my State, incidentally—shackle law enforcement? Mallory, a man who raped a woman, admitted his guilt, and the Supreme Court turned him loose on a technicality. And who I was told later went to Philadelphia and committed another crime, and somewhere else another crime, because the courts turned him loose on technicalities.

Is not that type of decision calculated to bring the courts and the law and the administration of justice in disrepute? Is not that type of decision calculated to encourage more people to commit rapes and serious crimes? Can you as a Justice of the Supreme Court condone such a decision as that? I ask you to answer that question.

Justice FORTAS. Senator, because of my respect for you and my respect for this body, and because of my respect for the Constitution of

the United States, and my position as an Associate Justice of the Supreme Court of the United States, I will adhere to the limitation that I believe the Constitution of the United States places upon me and will not reply to your question as you phrased it.

Senator THURMOND. Can you suggest any other way in which I can phrase that question?

The CHAIRMAN. Let us have order.

Justice FORTAS. That would be presumptuous. I would not attempt to do so.

Senator THURMOND. Would you care to make any comment at all on this question?

Justice FORTAS. Not as phrased, no, sir.

Senator THURMOND. Well, as phrased differently, would you care to make any comment?

Justice FORTAS. No. No, Senator.

Senator THURMOND. The second decision I referred to was *Escobedo* v. *Illinois*, a 1964 decision which was handed down before you went on the Court. The defendant was convicted of murder on the basis of a voluntary confession. Because the defendant was not allowed to have his lawyer present during police questioning, the confession, even though voluntary, was held inadmissible in court. On the decision, the Court split 5 to 4. Justice White, in a dissenting opinion, sums up the damaging effect of the *Escobedo* verdict. Listen to these words of a fellow member of your Court, Justice White:

The decision is thus another major step in the direction of the goal which the Court seemingly has in mind, to bar from evidence all admissions obtained from an individual suspected of crime, whether voluntarily made or not. Law enforcement will be crippled and its task made a great deal more difficult, all, in my opinion, for unsound, unstated reasons which can find no home in any of the provisions of the Constitution.

Now, this man admitted his guilt. He made a voluntary confession. And yet he went free.

Do you condone that type of decision?

Justice FORTAS. I must make the same response, respectfully.

Senator THURMOND. A man who is guilty of murder, wrote out in detail how he committed the crime, all about it, and yet he was turned loose, in a 5 to 4 decision of the Supreme Court.

Justice FORTAS. I was not on the Court at that time, Senator.

Senator THURMOND. That is true, you were not. And that is the reason I thought if you did not want to comment on the decisions you did participate in, you might give us the benefit of your opinion for the common good, for the public good of the people of this country, on a decision in which you did not participate.

Justice FORTAS. You flatter me, Senator, by suggesting that I could be of such service, and if I could be, it is with the greatest regret that I must say that the constitutional limitations upon me prohibit me from responding.

Senator THURMOND. So you refuse to answer?

Justice FORTAS. For the reasons stated.

Senator THURMOND. The next case I refer to is the *Miranda* case. And I believe you were on the Court at that time—1966.

Justice FORTAS. That is correct.

Senator THURMOND. And this was another split decision. The Court considered four criminal cases on appeal. The *Miranda* case—a young

man by that name, Miranda, 23 years old, confessed—I repeat—confessed to the kidnaping and rape of an 18-year-old girl near Phoenix, Ariz. His voluntary confession, including a description of the crime, was made to police during a 2-hour interrogation. The Supreme Court overruled his conviction. The Court extended the *Escobedo* ruling holding that once a defendant is in the custody of police he must be informed of his right to have his lawyer there, and if he is indigent, one will be appointed for him, and further that the police must ask no questions of the defendant if he does not want to answer their questions or if he wants a lawyer present.

Again, I want to read you the words of Justice White, a colleague of yours on the Court. Now, let us see what he said about this.

In a strong dissent he said this:

> In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal, to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.

He noted further:

> The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it.

I believe you participated in that case, did you not?

Justice FORTAS. Yes, sir.

Senator THURMOND. Did you participate with the majority in that case?

Justice FORTAS. Yes, sir.

Senator THURMOND. And reversed the conviction?

Justice FORTAS. Yes, sir.

Senator THURMOND. Do you have any comment on that case?

Justice FORTAS. May I just refer to something that was developed in the record when Senator Ervin was conducting the examination, Senator. *Miranda* came up with three other cases. All of the cases were remanded for new trials. So far as I know, only three of those persons have yet been re-tried. Every one was convicted on re-trial. As of my last information, the fourth re-trial—I believe it was a California case—had not yet been held. That is in the record of yesterday's proceedings, I think, or the day before. That is all I have to say, Senator. Beyond calling your attention to what is in the record, I have nothing to say for the reasons stated.

Senator THURMOND. Well, that merely proved his guilt.

Senator ERVIN. I would like to make an observation right there.

Senator THURMOND. I would be pleased to yield to the distinguished Senator from North Carolina.

Senator ERVIN. As I understand it, Miranda's case was reversed because he had made a voluntary confession of his guilt to officers having him in custody when those officers did not give him the warnings which were not even in existence at the time he confessed to them, and which were thereafter made a part, or allegedly a part of the Constitution, because they were invented by five of the four judges on June 13, 1966. When the case went back for trial in the courts of Arizona, my understanding is that he was largely convicted on a voluntary confession made by him to one of his lady friends. So we have the situation as a result of voluntary confessions made to officers are inadmissible in the absence of these newly invented warnings, but voluntary confessions to lady friends and others are admissible.

Justice FORTAS. I guess that is a warning to be careful of lady friends.

Senator ERVIN. That is certainly so. I have always heard—we have been talking about writings of various kinds, court opinions and other things. I have always heard that you do right and fear no man, and not write and fear no woman.

Justice FORTAS. Yes, sir.

Senator THURMOND. Wasn't the effect of that decision to amend the Constitution of the United States and allow the Supreme Court to write rules and regulations of its own accord?

Justice FORTAS. I cannot comment on that, Senator, for the reasons stated.

Senator THURMOND. The next case I refer to is *Berger*. This was a case handed down in 1967.

Justice FORTAS. I beg your pardon, Senator. Is that *Berger* v. *New York*?

Senator THURMOND. *New York—Berger* v. *New York*.

Justice FORTAS. Thank you.

Senator THURMOND. The defendant was convicted of conspiracy to bribe the chairman of the New York State Liquor Authority, based upon evidence obtained by electronic eavesdropping. Justice Black, certainly no conservative, stated in his dissenting opinion:

> It is stipulated that without this evidence a conviction could not have been obtained, and it seems apparent the use of that evidence showed the petitioner to be a briber beyond all reasonable doubt. Yet the Supreme Court reversed a conviction on the grounds that this constituted unreasonable search and seizure.

How could the Supreme Court make such a holding that this action constituted an unreasonable search and seizure when there was no physical action in connection with the matter?

Justice FORTAS. I must respectfully make the same response, Senator, that I cannot address myself to that question.

Senator THURMOND. Mr. Justice Fortas, would it be your opinion that the use of a confession of the defendant as an element—as an effective element in obtaining convictions has been virtually done away with by the Court?

Justice FORTAS. Senator, perhaps—I do not know. It is very difficult to sit here and know which questions one may properly and one may not properly answer. But perhaps I can say to that one, I do not think so, no, sir.

Senator THURMOND. The law enforcement people tell me that right after a crime is committed, about nine out of ten will confess when they are guilty. And under the rulings of the Supreme Court now, it is most difficult, they tell me, to convict on the confession. Hasn't the confession been virtually done away with by the decisions of the Supreme Court?

Justice FORTAS. Senator, as we discussed in this hearing yesterday or the day before, the literature in the field runs both ways on that subject. And I have not seen what I consider to be a really satisfactory study on the subject. I do not know whether it is possible to make one. As to whether Supreme Court decisions have made confessions much more difficult, and if so the extent thereof, I do not know. Any answer would just be impressionistic.

Senator THURMOND. Do you know of any statute requiring a lawyer to be present when a law enforcement officer talks to a defendant right after he has committed a crime? Isn't this a provision that has been inserted entirely by the Supreme Court?

Justice FORTAS. I do not think I can address myself to that, Senator, except to say that the FBI rules have so required for many years, and the *Miranda* rule is just setting forth the FBI rules. That is not a statute, but it is an FBI regulation for its own personnel. Also, the laws of many countries are to that same effect. I do not know whether that is responsive to your question. I do not know of any statute. But I do know of the FBI practice, and I do know of the laws of a good many other countries that, I believe, are referred to in the published opinion.

Senator DODD. Will the Senator yield to me there?

Senator THURMOND. I will be pleased to yield to the distinguished Senator from Connecticut.

Senator DODD. Thank you.

Mr. Justice, you and I have known each other a long time.

Your answer in response to the remark prompts me to ask you this. I believe, certainly since you have been on the Court, that you have never questioned any FBI procedures. I think I am right about that.

Justice FORTAS. Well, Senator, I think, the fact of the matter is that, at least since I have been on the Court, very few cases have come up that involve any questions about the FBI. And the few cases that have come up have involved marginal questions, novelties.

That has been my impression about the FBI procedures, and the other day I checked around with some of the law clerks. I suppose in the last 3 years I have seen 9,000 to 10,000 criminal cases. And it is rather remarkable that even in the petitions that come before us, there have been only a handful, just a handful, of cases involving complaints about FBI procedure. They are mostly complaints that come up with respect to Bureau of Narcotics procedures—and that agency has just been moved over to Justice as I understand it—and State procedures. But the FBI practices very, very seldom figure in the complaints. As I said, the *Miranda* rules—whether they are good, bad, or indifferent, whatever one may feel about them—the *Miranda* rules were taken almost verbatim, as I understand it, from the FBI procedures. That is set forth in the opinion.

Senator DODD. I had that impression. Thank you.

Justice FORTAS. Yes, sir.

Senator THURMOND. If the FBI wishes to adopt the rules it has, it is perfectly all right. Maybe all police officers do not have the opportunity to receive the specialized training of the FBI officers. But do you know of anything in action by Congress that has required this? Isn't this entirely a decision that has been reached by the Supreme Court? Is there any reason why a law enforcement officer should not question a defendant right after he catches him, whether there is a lawyer present or not? Aren't you after getting the truth? Aren't you after getting the facts that actually occur? And what difference does it make whether there is a lawyer present or not? I practiced law for many years. I was a circuit judge 8 years. I have tried many cases, as a lawyer and a judge. And the thing I tried to look for was the

truth. Where does justice lie? And isn't that the purpose of having courts? And what difference does it make if you get the truth, within the guidelines of due process? Are you going to let a technicality permit a criminal to go free? Don't you feel the Supreme Court is going entirely too far in this matter of holding to the effect that if a defendant is held a little bit too long, the case is reversed. If there is a lawyer not present, the case is reversed? So long as you get the truth—and who is in a better position to judge that than the trial judge, where he can observe the demeanor of the witness, look him in the eye, and where the jury looks him in the eye, and they can judge his demeanor. After all, hasn't that been the practice down through the history of this country, up until just a few years ago when the Supreme Court took unto itself to reverse that procedure and that machinery, and now has inserted what it feels should take its place?

Do you have any comment on that?

Justice FORTAS. Senator, I don't quite know how to address myself to that beyond saying this: The Constitution of the United States governs us all. I assure you that there are times when a judge has to make the decision that sets somebody free—particularly a trial judge or a State court judge—and it gives him great pain and great agony. But he does it, because the Constitution compels him to do so.

I remember in my readings of some of the North Carolina cases coming across situations of that sort. I remember reading one case in North Carolina in which there is a reference to the famous Blackstone saying that letting 10 guilty men free is better than convicting one innocent man. Well, that's kind of oratory. But I remember seeing that.

Now, the application of the Constitution sometimes requires the observance of other values. For example, the self-incrimination provision of the fifth amendment of the Constitution says, in effect, that no person shall be required to give evidence against himself in any criminal prosecution. Sometimes a person who does give evidence against himself in a criminal prosecution and is convicted may very well be guilty of the crime—may very well be guilty of the crime, Senator. But there it is in black and white in the Constitution of the United States. And it is a judge's duty to follow the Constitution. It is a very complex process. No judge, no judge, from the lowest court to the highest court, likes to release a man who has a bad record or who appears to be guilty, but that is sometimes his duty. That is the hard part of being a judge. You have to do your duty, regardless of where the chips fall.

Senator THURMOND. Do you think that either the fifth or sixth amendments to the Constitution require the action that has been followed by the Supreme Court?

Justice FORTAS. I have nothing to say to that, Senator. The Supreme Court decisions go back to the earliest days. They are the law of the land and are binding on me.

Senator THURMOND. The fifth amendment to which you referred reads this way:

> No person shall be held to answer for a capital or other infamous crime unless, on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time

of war; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The sixth amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Now, where is there anything in the fifth or the sixth amendments that I just read that would give the Supreme Court the authority to do what it has taken unto itself the power to do, which Supreme Courts in all the years since this country was founded, since this Government was founded and began in 1789, and with tremendously great Chief Justices and tremendous able Associate Justices, all down through the years. They never found such interpretations in the Constitution; they never felt that they had the authority to make rules such as this Supreme Court has made, and to set out guidelines such as the Supreme Court is now doing.

Don't you think that the Supreme Court has taken unto itself legislative powers in not just interpreting the Constitution as it is written?

Justice FORTAS. Senator, beyond saying that I really don't—I don't know that I can add anything to what has been stated here.

Senator THURMOND. Mr. Justice Fortas, as an attorney called upon to represent a defendant being questioned in a criminal case, would you not feel that the best advice you could give him would be to say nothing to investigating officers?

Justice FORTAS. Senator, I am aware of that statement and I am aware that is was made by one of the most distinguished Justices on the Supreme Court, Mr. Justice Jackson, a long time ago—and I am aware that lawyers say that all the time.

On the other hand, many persons who are arrested, and by far the majority of them, do plead guilty.

I believe that perhaps Mr. Justice Jackson's statement has become a little too much of a general cliche. I am not sure that lawyers actually proceed that way. I just don't know. It is the subject of the greatest importance, and one that I hope the Bar Association will attend to more seriously. That is—I am bold enough to raise the question—is it in truth and in fact always to be assumed that a lawyer will tell his client who has been arrested to say nothing. Frequently they don't—otherwise there would not be all the pleas of guilty that there are. But I wonder if that is not sort of a mischieveous cliche that we have all just assumed to be correct.

I beg your pardon for wandering a little bit in response to your question. But I have pondered that question and worried about it, and I do hope that one of these days lawyers will discuss it a little more intensively.

Thank you for your indulgence.

Senator THURMOND. No confession, of course, should be admitted in evidence where there is any coercion or any compulsion used to obtain

that confession. Everyone agrees to that. But why does there have to be a lawyer present? Can't the trial judge and the jury determine whether it was free and voluntarily, and without coercion or compulsion? And this is the rule that the Supreme Court has established. It is not required by any act of Congress.

Justice FORTAS. Senator, I don't think I can add anything to the opinions and to our previous discussion.

Senator THURMOND. I should like to read to you again a comment by Justice White in one of his decisions—his dissent:

> In some unknown number of cases the Court's rule will return a killer, rapist or other criminal to the streets, and to the environment which produced him, to repeat his crime whenever it pleases him.

He also stated: "The easier it is to get away with rape and murder, the less the deterrent effect on those inclined to attempt it."

Now the question is, do you believe that Justice White's comments have been borne out by the continuing increase in serious crime in this Nation?

Justice FORTAS. I think I have already commented on that, Senator, and I have nothing to add, except to repeat my deepest respect and admiration and affection for my Brother White.

Senator THURMOND. Now, Mr. Justice Fortas, in *Witherspoon* v. *Illinois*, found at 391 U.S., 1969 decision, the Court held that a juror cannot be excluded on the basis of his opposition to capital punishment.

My question is—if a man is opposed to capital punishment and the juror cannot be excluded, will not this decision have the effect of making criminal convictions more difficult for capital crimes?

Justice FORTAS. I don't know, Senator. I don't know.

Senator THURMOND. Many State legislatures have done away with the death penalty in their States, while other States have retained it as an important part of their body of criminal justice. Is not the Court making conviction for a capital crime so difficult that in effect it is substituting the judgment of the Supreme Court for that of the State legislatures as to the wisdom or morality of capital puishment as opposed to the constitutionality of the composition of juries?

Justice FORTAS. I hope not, Senator. I don't know.

Senator THURMOND. The sixth amendment, which I just read to you a few moments ago, guarantees the accused in all criminal prosecutions the right to a trial by an impartial jury. Now the question is this. Can a juror act impartially who is opposed to the very law he is asked to enforce? How can he be an impartial juror in a capital crime case if he is opposed to capital punishment?

Justice FORTAS. I cannot respond to that, Senator. That is one of the problems discussed in *Witherspoon* as I remember.

Senator THURMOND. That is the case I referred to.

Justice FORTAS. Yes, sir.

Senator THURMOND. Isn't this a matter, then, that should have been determined by the Congress, and what authority did the Supreme Court have to hand down a decision that a man who is opposed to capital punishment could not be stood aside from the jury? How could you get a conviction in a capital crime case if you take a juror on there who is opposed to capital punishment?

Justice FORTAS. Senator, it would be inappropriate for me to try to add to or explain Mr. Justice Stewart's opinion in that case.

Senator THURMOND. Did you concur in that decision in that case?

Justice FORTAS. I did concur.

Senator THURMOND. You went with the majority.

Justice FORTAS. Yes, sir.

Senator THURMOND. And they held that although a juror is opposed to capital punishment, he cannot be excluded from the jury in a trial of a case where a man is charged with capital punishment, did they not?

Justice FORTAS. I will have to refer you to the case itself, with great respect.

Senator THURMOND. Mr. Justice Fortas, how could the Court take a position of that kind—how could you get an impartial jury if a man is opposed to the law and let him sit on the jury?

Justice FORTAS. I don't think I can respond to that, Senator.

Senator THURMOND. Which jurors do you think would render the most unbiased decision—those who have definite conscientious or religious scruples against a given penalty, or those who have no conscientious or religious scruples against such a penalty?

Justice FORTAS. Same answer, Senator.

Senator THURMOND. Mr. Justice Fortas, if a State has a law providing a penalty for a crime, and an accused is on trial for committing the crime, and jurors are allowed to have conscientious scruples against the imposition of that penalty, do you not think the jurors' decision will be biased in favor of the defendant?

Justice FORTAS. I must respond the same way, Senator.

Senator THURMOND. Mr. Justice Fortas, if a State has a law providing that an activity is unlawful, should the prosecution be allowed to challenge prospective jurors for cause if they believe that such activity is rightful?

Justice FORTAS. I beg your pardon Senator. I didn't get that question.

Senator THURMOND. I will be pleased——

Justice FORTAS. I'm so sorry.

Senator THURMOND. I will be pleased to repeat it.

If the State has a law providing that an activity is unlawful, should the prosecution he allowed to challenge prospective jurors for cause if they believe that such activity is rightful?

Justice FORTAS. Well, if I understand your question, I think the answer to it as a general matter has to be of course. I'm not sure; I'm not clear about the question. But if I understand it, that is the answer.

Senator THURMOND. The Court has accordingly held in *Reynolds* v. *the United States*, 98 U.S. 145, and *Miles* v. *the United States*, 103 U.S. 304, that a person who has a conscientious belief that polygamy is rightful may be challenged for cause in a trial for polygamy. How would you distinguish that decision—and that decision, I might say, was upheld, too, in *Logan* v. *the United States*, 144 U.S. 268—how would you distinguish those decisions from the recent decision handed down by the Supreme Court to which I referred—*Witherspoon* v. *Illinois*?

Justice FORTAS. I must make the same response, Senator. I cannot comment on that.

Senator THURMOND. It is a complete reversal, is it not? A juror who has conscientious scruples on any subject which prevent him from standing between the Government and the accused and from trying the case according to the law and evidence is not an impartial juror, is he?

Justice FORTAS. The same response, Senator.

Senator THURMOND. The fifth amendment has been widely used by defendants for it provides, and I quote, "nor shall any person be compelled in any criminal case to be a witness against himself."

Do you believe that requiring a suspect to repeat the same words as the other suspects in a police lineup, words that were allegedly uttered at the scene of a crime, is requiring a suspect to testify against himself?

Justice FORTAS. Senator, that is the precise question, or one of the precise questions, involved in a series of cases decided by the Supreme Court in the last term or two of the Court, and it would be inappropriate for me to comment on it. I respectfully direct attention to the discussion in the majority, concurring, and dissenting opinions in those cases.

Senator THURMOND. Well, of course the cases have been decided now. And you should be free to discuss here with us the same as you would discuss before a law school your philosophy or your position in the cases. In *United States* v. *Wade*, 388 U.S. 218, a 1967 decision, the defendant was required to stand in a lineup and repeat the same words as the others in the lineup. From this procedure, the defendant was identified by witnesses and subsequently convicted. The court upheld his conviction as not violating defendants fifth amendment rights. Yet you, Mr. Justice Fortas, in dissent said that requiring the defendant to repeat the same words as the other suspects in the lineup violated his fifth amendment rights, and therefore the identification by the witnesses should not have been allowed.

Mr. Justice Fortas, if the position you take in the minority opinion there is to be the permanent law of this country, does not what you advocate, or the position you took, impede police lineup procedures?

Justice FORTAS. Because the Constitution of the United States, as I understand it, provides that an Associate Justice of the Supreme Court of the United States shall not be held to answer before any other branch of the Government for his votes or opinions on the Court, I must respectfully decline to address myself to that question, much as I should like to.

Senator THURMOND. In this decision, you even went further than the Court went—and that is going pretty far.

In the case of *Berger* v. *New York*, 280 U.S. 41, a 1967 decision, in which you voted with the majority——

Justice FORTAS. That is 388, isn't it?

Senator THURMOND. 388 I believe it is—that's correct—388—U.S. 41—which you voted with the majority, the following statement appears in the majority opinion, and I quote:

"Eavesdropping is an ancient practice which at common law was condemned as a nuisance," and there is quoted Fourth Blackstone, Commentaries 168.

In view of this, do you think eavesdropping was recognized at the time our Constitution was drafted?

Justice FORTAS. I cannot comment on that, Senator.

Senator THURMOND. Do you think a comment on that would affect your work on the Court?

Justice FORTAS. I don't know, Senator. These are very narrow lines. Of course they did not have electronic devices in those days. But eavesdropping, in the sense of somebody overhearing what somebody else has said, either deliberately or by accident, has been known, I suppose, since the earliest days of man and the earliest days of language. If that is an answer to your question. I'm glad to submit it—if that's what you are asking me about. Perhaps I misunderstood you.

Senator THURMOND. The fourth amendment to the Constitution says that, and I quote, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no one shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Now, the question is do you think the framework of the Constitution intended this, the portion I have just quoted to you, in the fourth amendment to the Constitution, to include eavesdropping?

Justice FORTAS. Senator, to the extent that you are asking about the issues in *Berger* v. *New York*, I won't reply. To the extent that you are going beyond that, of course that illustrates one of the basic problems in constitutional interpretation. At the time the Constitution was adopted, there was no such thing as the electronic devices that were involved in *Berger* v. *New York*. One of the very perplexing problems that we all have to struggle with in applying the Constitution, results not from a different view of the law, but from the change in facts.

At the time these great, wonderful, historic words were written which you have just read, there was no such thing as a telephone, there was no such thing as wiretapping, there was no such thing as electronic devices which could be put in a person's home or his office so that what he said could be overheard some distance away. The problem is what do you do about that, how do you apply the Constitution there? And it is always extremely difficult.

Senator THURMOND. Would the proper thing to do be to let the Congress legislate on it rather than the Supreme Court?

Justice FORTAS. Senator, many of these problems arise from the State context. Many of the problems arise because lawyers litigate them in cases, and they come to the Court, and when they come to the Court, the Court has a duty to decide them. My own view, as indicated by my writings, is that if Congress has spoken, the greatest presumption of correctness and of constitutionality is to be indulged. If Congress has not spoken, however, then the issue is properly presented to the Court. Much as he would like to, a judge cannot say, "Take it away, take it away, I don't want to decide it."

Senator THURMOND. Well, Mr. Justice Fortas, I'm a little surprised at your answer to this in view of the *Olmstead* and *Goldman* cases. *Olmstead* v. *United States*, 277 U.S. 437, and *Goldman* v. *United States*, 316 U.S. 129—because before the *Berger* v. *New York* case had not the court specifically held that eavesdropping through a wiretap was not within the ambit of the fourth amendment, and did it not so hold in those two cases, *Olmstead* and *Goldman?*

Justice FORTAS. There was nothing in those cases that cuts across what I said, Senator. All I said is that sometimes we have to decide these issues in the absence of legislation, because they are issues presented to us in a case. Beyond that, the authorities are dealt with in Berger against the United States in the majority and other opinions. It would not be appropriate for me to try to embellish that.

Senator THURMOND. Well, then, what was the thinking of the Court when it reversed the *Olmstead* and *Goldman* cases where it held that the courts specifically said that eavesdropping through a wiretap was not within the ambit of the fourth amendment?

Justice FORTAS. I cannot respond to that, Senator, as I've already made clear.

Senator THURMOND. In lieu of a statute or a constitutional provision prohibiting eavesdropping, did not the Court, disregarding precedent which had held that eavesdropping was not wrong, hold in December 1967 in *Katz* v. *United States*, 389 U.S. 347, a 1967 case, that eavesdropping now violates the fourth amendment?

Justice FORTAS. I must make the same response, Senator, respectfully.

Senator THURMOND. In *Katz* v. *United States* is not the Court clearly legislating, unsupported by congressional legislation, or judicial precedence?

Justice FORTAS. I must make the same response, Senator, with greatest regret.

Senator THURMOND. Now, Mr. Justice Fortas, in *Spencer* v. *Texas*, 385 United States 554, a 1967 decision, the Court upheld the constitutionality of the rules of criminal procedure of Texas which allowed the prosecution to introduce at trial evidence of the defendant's past criminal record. The majority opinion, written by Justice Harlan, stressed that the formulation of evidentiary and procedural rules should ordinarily be left to the States. I believe you dissented in this opinion, is that not true?

Justice FORTAS. Yes, sir.

Senator THURMOND. Now, the question is this.

Justice FORTAS. Excuse me. I dissented in the case for the reasons stated in my dissent.

Senator THURMOND. Has any prior decision established the Supreme Court as a rulemaking organ for the promulgation of the State rules of criminal procedure?

Justice FORTAS. Senator, may I—I hope that I am not deviating from my constitutional duty. May I say that I believe very strongly, and that I have emphasized in my own writings, that the Supreme Court of the United States must never allow itself to become a State appellate tribunal. I feel that very deeply. It is part of my whole approach. On the other hand, it is also part of my approach and my fundamental commitment that the Constitution governs our actions, and that where the Constitution requires us to make a decision, we must make it. That is part of my fundamental philosophy, the first as well as the second.

Senator THURMOND. In the State of South Carolina, the evidence of a defendant's past criminal record is not admissible in the trial of a case. The judge can consider that after the trial is over, and take it

into consideration prior to the time he passes sentence. But in Texas, the situation is different. They do admit the evidence of the defendant's past criminal record. And why should the State of Texas be allowed to formulate its own rules, and it was allowed to do so all of the years since the State has been in existence.

Justice FORTAS. Senator, I don't believe this case had anything to do with whether Texas could—I would like to withdraw that, because I must not discuss individual cases.

Senator THURMOND. Well, I will just ask this question.

Justice FORTAS. Would you indulge me a moment, Senator? Let me see if I can—I guess what I had better do is just say that the problem, as that case illustrates, is the impact of the Constitution of the United States upon a particular State practice and whether it does have a particular impact in the particular case.

As I said before, I would be very much opposed, very much opposed to the Supreme Court of the United States ever overstepping the boundaries and becoming a State judicial, super-judicial, super review tribunal.

Let me say another thing here, Senator, if I may, about these cases that are coming up to the Supreme Court. The problem is that most of these questions have never been presented before, and now they are coming to the Supreme Court in great profusion. It is very interesting to figure out why. And I think one of the reasons for it, if I may venture this hypothesis, is that more and more young lawyers are going into criminal law. It is extraordinary sometimes, as we sit on the bench, to see some of these young lawyers fresh out of law school who have spotted questions that have never before been presented to any courts.

We talked about Flast against Cohen the other day. That is a case that was not presented to us by a young lawyer, but it was a case in which for many years constitutional doctrine had remained fixed. Then somebody got the idea of serving it up to the courts for a decision. When such a question is served up in a proper case sometimes you wish you could say, "Take it away, go away," because you would rather not face up to it. But you have to face up to it and go through the problem of deciding it.

Forgive me for this monolog. I beg your pardon.

Senator THURMOND. As I interpret the Constitution, the States have all the powers that have not been specifically delegated to the Union. Can you specify any provision in the Constitution where the States have delegated such power to the Union?

Justice FORTAS. I have nothing to add to what I have said, Senator.

Senator THURMOND. Under the theory of this decision, does it not imply that the Supreme Court has the power to regulate and develop rules of procedure for State courts, and do you feel that that is a proper function of the Supreme Court of the United States?

Justice FORTAS. I think you are referring to my dissent in *Spencer*, rather than the decision of the Court. I have already stated my view on that, Senator, and I have nothing to add.

Senator THURMOND. Now, Mr. Justice Fortas, I would like to turn our attention to a series of cases which deal with the Government power to regulate subversive activities within its borders.

In *Elfbrant* v. *Russell*, 348 U.S. 11, a 1966 case, the Court held that an oath of affirmation to support the Constitution of the United States

and the State of Arizona with its legislative gloss was a violation of the first amendment right of association, is that correct?

Justice FORTAS. I don't remember the case clearly enough, Senator. I remember it only very generally.

Senator THURMOND. I believe the language which concerned the Court was, as the majority indicated, language which subjected anyone to prosecution for perjury who took the oath and who knowingly and willfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose.

As you remember it, is that the language which five of the Justices said was too broad?

Justice FORTAS. Senator, I must confess I don't remember it very well. But I won't comment on the case, anyway, for the reasons stated, with all respect.

Senator THURMOND. Mr. Justice Fortas, if I may I would like to refresh your memory of the oath in question. It reads, and I quote:

> I—and the name—do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

I believe that most lawyers will admit that the Constitution of the United States has a number of vague provisions as do most of the constitutions of the States.

Would you please tell the committee how this oath to support these constitutions is any less vague than the language of the accompanying statute which five of nine Justices seized upon in this case?

Justice FORTAS. Senator, we have before us a number of these oath cases. There was one in which we upheld an oath that I think was the oath you just read. I think there were some other factors in *Elfbrandt*. I had better not comment on these for the reasons that I have stated, and also because memory at this moment won't serve me well enough. That is why I was a little confused when you first read the excerpt from the oath in the *Elfbrandt* case, because there is another oath case that takes care of that particular one the other way around.

Senator THURMOND. Mr. Justice Fortas, could you suggest to the committee how the vague language of this case could have been improved so as to not unlawfully infringe upon the right of association?

Justice FORTAS. No, sir; I have no suggestion.

Senator THURMOND. Mr. Justice Fortas, if I understand the series of cases dealing with loyalty oaths and the right of association, including *United States* v. *Robel*, 389 United States 258, a 1967 decision, the Court would have reached the same decision if the petitioner in the *Russell* case was only a passive member of the Communist Party. Would you say that this is a fair interpretation of these cases?

Justice FORTAS. No; I would not comment on that one way or the other, for the reason stated.

Senator THURMOND. Mr. Justice Fortas, in a dissenting opinion Mr. Justice White said, and I quote:

> The crime provided by the Arizona law is not just the act of becoming a member of an organization but it is that membership plus concurrent public employment.

Do you believe that the State should be concerned about Communists and other subversives employed in sensitive positions of public employment?

Justice FORTAS. I think I can answer that question, Senator, properly. I certainly do, absolutely.

Senator THURMOND. Mr. Justice Fortas, in *United States* v. *Robel* the dissenting opinion summarizes the congressional finding about the international Communist conspiracy. The dissenters noted that Congress found—

> That there exists an international Communist movement which by treachery, deceit, espionage and sabotage seeks to overthrow existing governments; that the movement operates in this country through Communist action organizations which are under foreign domination and control and which seek to overthrow the government by any necessary means, including force and violence; that the Communist movement in the United States is made up of thousands of adherents, rigidly disciplined, operating in secrecy and employing espionage and sabotage tactics in form and manner evasive of existing laws.

Would you say this is a fairly accurate description of the Communist organizations in this country?

Justice FORTAS. Senator, a number of nominees to the Supreme Court before—at least one—let me confine that to one, because I remember his name, although I think it has happened on other occasions as well—have refused to answer that question on the ground that the issue may come before them. I have reflected on it. I see no reason why, so far as I am concerned—I may be wrong, but I hope I am not—why I should not answer your question. If you would eliminate from that statement the reference to numbers, and I think it is the last sentence of that, which is a factual matter about which I have no knowledge, then so far as I know that statement is justified and is correct, and I so state. I don't know anything about whether it is thousands or hundreds or millions or whatever it may be. So I ask that you eliminate that sentence. The rest of it I believe to be correct.

Senator THURMOND. Mr. Justice Fortas, do you think the parent of a child who has a Communist for a teacher has cause for concern?

Justice FORTAS. Oh, I don't know how I can answer that, Senator. Of course, parents are concerned about the quality of the people who teach them. If there were somebody teaching the child subversive doctrine, or subversive attitudes toward the United States, a parent has every reason for indignation, not merely concern.

Senator THURMOND. Mr. Justice Fortas, what alternatives does a parent or the State have other than screening by oath or affirmation to prevent subversives from corrupting the minds of our children?

Justice FORTAS. Senator, I cannot answer that question without asking, respectfully, that the opinions of the Supreme Court of the United States on this subject be read with care—read with care.

I believe that the problem under our Constitution is a problem that calls for legislative precision, as so many of these matters do. It is a very delicate area of the Constitution, as everybody knows. The problem is for legislation to be drafted which draws a careful and precise

constitutional line. It is not a question of objectives. It is a question of the precise means. Beyond that I cannot with propriety go.

Senator THURMOND. Mr. Justice Fortas, the more I study these subversive cases, the more confused I become about what the States may do to protect themselves against seditious activities.

Did you vote with the majority in the *DeGregory* v. *New Hampshire* case, 383 United States 824, handed down in 1967, which denied the State attorney general the right to investigate the current trend of subversive activities in that State?

Justice FORTAS. I don't remember, Senator, at this moment. Did I vote with them? Do you have a record of it there?

Senator THURMOND. You don't recall how you voted in that case?

Justice FORTAS. At this moment, I don't.

Senator THURMOND. Yes, you voted with the majority.

Justice FORTAS. All right.

Senator THURMOND. And this decision denied the State attorney general the right to investigate the current trend of subversive activities in that State.

Would you care to tell us, as members of the Senate Judiciary Committee, your thinking behind such a decision or any remarks you would care to make in connection with that decision?

Justice FORTAS. The only remark I would care to make, with respect, Senator, is to make a reference to the precise facts and the precise circumstances of that case. Beyond that, I cannot at this moment go, and could not with propriety.

Senator THURMOND. In this case, DeGregory refused to answer questions about his early connections in the Communist Party, and the Court reversed his conviction for contempt, not because he pleaded the fifth amendment but on the basis of some undefined first amendment right; is that correct?

Justice FORTAS. I don't recall, Senator.

Senator THURMOND. You don't recall the case?

Justice FORTAS. I recall the name of the case. I don't recall the case with sufficient clarity to be able to respond to your question.

Senator THURMOND. This was a recent case, only handed down last year.

Justice FORTAS. I realize that, Senator.

Senator THURMOND. A very important case.

Justice FORTAS. Yes, sir.

Senator THURMOND. Mr. Justice Fortas, did the majority mean that the first amendment right of association is superior to the State's right to investigate seditious activities within its borders?

Justice FORTAS. With all respect, Senator, I cannot respond.

Senator THURMOND. Mr. Justice Fortas, are we to conclude that there is some undefined constitutional statute of limitations of the power to investigate the activities of the Communist Party?

Justice FORTAS. I have never heard of that, Senator.

Senator THURMOND. Would you like me to repeat the question?

Justice FORTAS. No, sir, I understand the question. I say I never heard of or thought of any such proposition.

Senator THURMOND. In this case, the Court did recognize the right of the State to provide protection from the danger of sedition against the State itself. Didn't the Court deny the State of New Hampshire the use of its powers of investigation so that it could discover the

nexus between the petitioner and the recent subversive activities in New Hampshire which the Court said did not exist?

Justice FORTAS. Senator, I don't recall the case well enough, and if I did, I could not appropriately respond.

Senator THURMOND. And I would ask you, as a member who voted with the majority in that decision, how can you tell whether there was a nexus between the petitioner and the subversive activities in New Hampshire if the attorney general is not allowed to investigate?

Justice FORTAS. I must make the same response, respectfully.

Senator THURMOND. Mr. Justice Fortas, I must say that I agree with the position of the dissenters, and I would like to read a quote from their opinion:

> New Hampshire in my view should be free to investigate the existence or nonexistence of Communist Party subversion or any other legitimate subject of concern to the State without first being asked to produce evidence of the very type to be sought in the course of the inquiry. Then, given that the subject of investigation in this case is a permissible one, the appellant seems to me a witness who could properly be called to testify about it; I cannot say as a constitutional matter that inquiry into the current operations of the local Communist Party could not be advanced by knowledge of its operations a decade ago. Believing that "our function . . . is purely one of constitutional adjudication" and "not to pass judgment upon the general wisdom or efficacy" of the investigating activities under scrutiny (Barenblatt v. United States, 360 U.S. 109, 125) I would affirm the judgment of the Supreme Court of New Hampshire.

And the Supreme Court of the United States reversed the Supreme Court of the State of New Hampshire in this case.

Do you have any comments on that?

Justice FORTAS. No, Senator; I have said on many occasions that I believe in the necessity of the exercise of the investigative power in the field of subversion. I do. It is always a difficult question—difficult questions do arise under the Constitution. And when they arise and are presented to judges, the judges have to vote in accordance with their best understanding of the mandate of the Constitution. But I certainly believe in the necessity, the wisdom, and the rightness of the exercise of the investigatory power with respect to subversion.

Senator THURMOND. If you believe in the power of investigation and believe a State has that authority in order to protect itself from subversive elements, then why did you go with the majority in that decision which prevented the attorney general of New Hampshire from doing the very thing you say you believe in?

Justice FORTAS. I don't think I can add anything, Senator.

Senator THURMOND. Mr. Justice Fortas, how can a parent or the school officials prevent the misuse of a position of trust such as that of teaching the members of our next generation?

Justice FORTAS. I think we have been over that, Senator. I have nothing further to say.

Senator THURMOND. I presume you are familiar with the case of Pennsylvania versus Nelson, handed down in 1956, are you not?

Justice FORTAS. Not by name, no. It is not in my mind at the moment.

Senator THURMOND. In that case Steve Nelson was convicted of sedition. The case went to the Supreme Court of the United States and the Supreme Court released Steve Nelson and he went free on the theory that when the Congress passed an antisedition law, it preempted the entire field of sedition and therefore struck down the State law on the subject.

Justice FORTAS. That was 1956, Senator?

Senator THURMOND. Yes.

Justice FORTAS. Yes, sir; I have a vague recollection of the principle now.

Senator THURMOND. The Smith Act designed to protect this Nation from Communist subversion is codified under title 18, United States Code, which contains the following clause:

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.

Nevertheless, the Court held in effect that antisedition laws in 42 States were invalid because Congress, by enacting a statute on this subject, had preempted the field.

Do you have any comment on this decision? Do you agree with this decision? Have you had occasion to act upon any other case since this decision was passed of a similar nature?

Justice FORTAS. Not that I recall, sir, and I have no comments.

Senator THURMOND. You have no comments on this case.

Justice FORTAS. No, sir.

Senator THURMOND. Do you believe that simply because Congress passes a law on this subject, for instance, such as gun control, which is now being considered, that the Supreme Court might reach the same decision and strike down all State laws on gun control? Wouldn't it be a similar situation as back when the Supreme Court struck down the State laws on the subject, on the theory that when the Federal Government passed a law on sedition, it preempted the entire field. What would be the difference if the Federal Government entered the field of gun control? Would that have the effect of striking down all State laws on the subject?

Justice FORTAS. Senator, I have no opinion on that.

Senator THURMOND. Isn't it a dangerous precedent for the Supreme Court of the United States to strike down State laws and preempt the entire field of a subject simply because Congress passes a law on the subject?

Justice FORTAS. Senator, you are talking about one of the most difficult fields of constitutional law, as you know, Senator, the question when does a Federal statute preempt the field. It is perplexing and difficult; it has been litigated in a variety of circumstances, and the results are various, depending upon the particular circumstances. I would have no comment, and any expression on an abstract proposition would certainly be both inappropriate and useless.

Senator THURMOND. Can you cite any authority where any such power has been delegated to the Federal Government in a matter of this kind?

In other words, why can't a State have a law on a subject if the Federal Government has one, too, without having the State law stricken if the Federal Government enacts a law on the subject?

Justice FORTAS. Senator, I think my previous answer covers that. It all depends on the particular situation. But primarily upon the intent of Congress—because there is a Supremacy Clause in the Constitution. Its application is always a matter of difficulty and perplexity.

Senator THURMOND. Are you familiar with the case of *Albertson* v. *Subversive Activities Control Board*?

Justice FORTAS. I know what the case is about.

Senator THURMOND. A 1965 decision.

Justice FORTAS. I know what the case is about; yes, Senator.

Senator THURMOND. And the Court held that since registration as a Communist might be used as an investigatory lead, the fifth amendment prevents the government from requiring registration as Communists. Having previously declared State antisedition laws invalid, the Court then made this important provision of the Federal Antisubversive Act ineffective. Are you in accord with that decision?

Justice FORTAS. I have no comments. Did I vote on that, Senator? What was the date of that?

Senator THURMOND. 1965.

Justice FORTAS. I don't think I was on the Court, was I? I don't think so. I began my service on the Court in October 1965. I think that was in the preceding term.

Senator THURMOND. This decision could have been handed down before you went on the Court that year.

Justice FORTAS. Yes; I think it was, Senator, unless my memory fails me.

Senator THURMOND. Would you care to comment on it anyway?

Justice FORTAS. No, sir.

Senator THURMOND. The decision of *United States* v. *Robel*, a 1967 decision, the Court held that the right of association voided the Federal law designed to prevent Communists from working in defense plants. The Court, which was divided again, refused to view membership in the Communist Party in any different light from other political parties—other political activities.

Do you have any comment on this decision?

Justice FORTAS. No, I don't, Senator: thank you.

Senator THURMOND. Mr. Justice Fortas, do you believe that our country should have the right—our Government should have the right to keep Communists from working in defense plants, which are so vital to the security of our country?

Justice FORTAS. I can appropriately say of course I do, most profoundly, and this right and power of the Federal Government, as I recall, Senator, is expressly and explicitly emphasized in the opinion in that case.

Senator THURMOND. But under the decision handed down, it seems to be a different matter. It is a very sensitive position.

Justice FORTAS. Senator, again, I think you will find that the problem is one of method, as we have previously discussed.

Senator THURMOND. If this Government cannot prevent Communists from working in defense plants or if the Supreme Court decisions prevent employers from keeping Communists from working in defense plants, and does not allow school authorities to keep Communists from teaching in schools and colleges, then we are subjecting our people to a tremendous hazard, would you not agree?

Justice FORTAS. I certainly would; yes, sir. But the question again is how.

Chairman EASTLAND. We are going to recess now until 10 o'clock in the morning. We will meet in the appropriations hearing room, which is 1202, in the New Senate Office Building.

(Whereupon, at 12:55 p.m. the hearing recessed to reconvene at 10 a.m., Friday, July 19, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

FRIDAY, JULY 19, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 1202 New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), McClellan, Ervin, Hart, Tydings, Dirksen, Scott, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

Senator MCCLELLAN. The committee will come to order.

The Chairman, Senator Eastland, said he would be delayed a little while, and asked if I would open the hearings this morning and preside until he could be present.

So we will proceed.

I was not here yesterday when the committee recessed. As I understand it, Senator Thurmond was interrogating the nominee at that time. Senator Thurmond, have you finished or do you wish to resume?

Senator THURMOND. I am not finished, Mr. Chairman, but I should be pleased to yield to the Chair, if the Chair has some questions.

Senator MCCLELLAN. I will have some a little later. You may proceed, if you wish.

STATEMENT OF HON. ABE FORTAS, NOMINEE TO BE CHIEF JUSTICE OF THE UNITED STATES—Resumed

Senator THURMOND. Good morning.

Justice FORTAS. Good morning.

Senator THURMOND. Mr. Justice Fortas, Justice Hugo L. Black, an Associate Justice of the Supreme Court, delivered a series of lectures on March 20, 21, and 23 at Columbia University Law School. An article about these lectures and containing numerous excerpts from them was published in the U.S. News & World Report of April 1, 1968. I should like to read this article to you. It is entitled "Justice Black warns 'I fear for our constitutional system.'"

Justice Hugo L. Black, speaking from the lecture platform instead of the United States Supreme Court bench has given in detail his views on the Constitution and the rule of judges in interpreting it. In a series of lectures that could go down as landmarks in Constitutional philosophy, the Justice has detailed his concern over the growing trend of the Supreme Court to adapt the Constitution to new times.

Justice Black has been considered a powerful voice of liberalism on the Court for more than a quarter of a century. It was his view of the Constitution, often stated in concert with Justice William O. Douglas, that played a large part in shaping the law of the land in such vital fields as racial desegregation, federal and state relationships, free speech, freedom of religion, and political equality.

In recent years, some observers of the Court have contended that Justice Black is leaning more towards the conservative side of Constitutional thinking in criminal and protest cases.

In the Carpenter lectures at Columbia University Law School, delivered March 20, 21, and 23, Justice Black spoke out on that subject and others of legal interest.

From the lectures:

I strongly believe that the basic purpose and plan of the Constitution is that the federal government should have no powers except those that are expressly or impliedly granted, and that no department of government, Executive, legislative or judicial, has authority to add to or take from the powers granted it, or the powers denied it by the Constitution. It is language and history that are crucial factors which influence me in interpreting the Constitntion, not reasonableness or desirability as determined by Justices of the Supreme Court.

That to me sounds to be a logical proposition, and a logical theory which could well guide the members of the Supreme Court. I am just wondering if, Mr. Justice Fortas, you agree with that statement, and if you do not, do you care to express your difference with it?

Justice FORTAS. No, Senator, I do not think it would be appropriate to say anything except that I, like all judges and, I think, all lawyers, have the greatest veneration for Mr. Justice Black, who is not only a great jurist, but has also served a very distinguished career in this body. I want to register that. But beyond that, it would not be appropriate for me to comment.

Senator THURMOND. Quoting from these lectures at the same place and time, the article goes on to say:

I can find in the Constitution no language which either specifically or implicitly grants to all individuals a Constitutional right of privacy. But even though I like my privacy as well as the next person, I am nevertheless compelled to admit that the States have a right to invade it unless prohibited by some specific Constitutional provision.

Mr. Justice Fortas, I am wondering if you would have any comment on that statement which to me appears to be a sound statement, and might be considered a sound guide for the members of the Court.

Justice FORTAS. I have no comment on that, Senator. I have written somewhat on the problem of privacy in a dissent in a case called *Time v. Hill*, which was argued before us, incidentally, by former Vice President Nixon.

Senator THURMOND. Quoting further from Justice Black's lectures:

I am well aware of the criticisms levelled against me that I try to follow the literal meanings of words and look too much to the history of the Constitution and the debates surrounding its adoption, and the adoption of the 14th Amendment, and I realize that in following this procednre, in many recent cases I have reached results which many people believe to be undesirable. This has caused a new criticism to spring up that I have now changed my views. But I assure you that in attempting to follow as best I can the Constitution as it appears to me to be written, and in attempting in all cases to resist reaching a result simply because I think it is desirable, I have been following a view of our government held by me at least as long as I have been a lawyer. This view is based on my belief that the fonnders wrote about our Constitution their unending fear of granting too much power to judges, for there 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.

Now, those are very strong words. Do you feel today that the Supreme Court is doing just what Mr. Justice Black said he feared?

Justice FORTAS. Senator, yesterday and the day before, and the day before that, in response to a question, I stated that I do not believe that the Supreme Court of the United States should or can appropriately make policy or seek to bring about social, political or economic change in this country. I repeat that.

Senator THURMOND. Do you believe the Constitution should be construed as it was written by the Founding Fathers, considering the history of the Constitution, the debates surrounding its adoption, and the adoption of the 14th amendment, and the other amendments, or do you believe in what some call considering it now as a living Constitution rather than construing the intent of those who wrote it.?

Justice FORTAS. As I have previously said here, I believe in interpreting and applying the Constitution as it was written, on the basis of its words. I believe in the conventional, accepted technique of lawyers and judges of construing and applying the words of the Constitution to the complex, intricate facts of particular cases. One must read those words, one must take into account the contemporaneous debates, one must take into account also the precedents, the previously decided cases. Those I believe, Senator, are accepted by lawyers and judges as the primary sources for interpretation and understanding of the Constitution. I thoroughly subscribe to that.

Senator THURMOND. Do you believe in the essence of the 10th amendment which provides that all powers not specifically delegated to the Congress are reserved to the States and the people, and if you do, do you think the Supreme Court is following that today?

Justice FORTAS. I not only believe in that, but I believe in it very strongly, as I have several times said in these hearings.

Senator THURMOND. Continuing quoting from Mr. Justice Black's lectures, he goes on to say:

> I would much prefer to put my faith in the people and their elected representatives, to choose the proper policies for our government to follow, leaving the courts questions of Constitutional interpretation and enforcement—leaving to the courts questions of Constitutional interpretation and enforcement.

In other words, it seems that he is saying here that he thinks the Court, and the courts in general should merely interpret the law and not attempt to write their own views of changes they feel should be brought about, that these should be brought about by the Congress. If I construe what he means in this paragraph, that appears to me the thought he is trying to convey.

I am wondering if you have any comment on that.

Justice FORTAS. Well, I concur. Every lawyer and every judge must concur with that. But I would add one thing to that statement, Senator. As I have said in various of my writings, I do not believe that the Supreme Court of the United States is the sole custodian of constitutional responsibility. I believe that the Congress of the United States has a role and a responsibility, a duty and a function, to carry out the mandates of the Constitution. I believe that State legislatures have that same responsibility to the State constitutions and the Federal Constitution. I believe that Presidents and Governors and all officials have that responsibility. I believe that the Supreme Court's responsibility is to construe and apply the Constitution, always presuming,

Senator—always presuming, as I have said in my writings, that the Congress, if it is a statute of the Congress under review, has faithfully and well discharged its duty—namely, that it has carefully considered and made a considered judgment entitled to respect that any statute that it enacts is constitutional.

Senator THURMOND. Mr. Justice Fortas, do you believe the Supreme Court should enter a field of activity which appears to have desirable goals, where the Congress has failed to take action in that field?

Justice FORTAS. Senator, there are some areas upon which the Constitution acts directly, not merely because of or through congressional legislation. So there are some areas in which, from the beginning of time, the Supreme Court has had to act without any congressional statute.

Senator THURMOND. Upon what theory did they act, unless such power was specifically delegated in the Constitution?

Justice FORTAS. It is specifically delegated in the Constitution. Perhaps I misunderstood you. But I thought you asked me whether the Supreme Court could act in areas where Congress has not enacted a statute. It can, it does act in such areas, because of specific mandates of the Constitution.

Senator THURMOND. Then could you cite the authority where the court has the power to act in fields where it has not been so delegated in the Constitution?

Justice FORTAS. Senator, perhaps—I am afraid I am not making myself clear. I said it cannot act unless there is something in the Constitution that authorizes it to act. But I was addressing myself to what I thought was your first question, which related to statutes of the Congress.

Senator THURMOND. You agree, then, that the Court should not act in a field unless it has specific authority under the Constitution?

Justice FORTAS. Of course I agree, provided that you take into account the Constitution's specific provision that the judicial power of the United States is vested in a Supreme Court and such inferior courts as the Congress may constitute. Then you have to construe what the judicial power of the United States is, and you construe that again, by reference to the words of the Constitution, the history of the provision, and the precedents.

Senator THURMOND. Ever since this country was founded, it was concluded that the States had the power to structure their own State governments. But under the apportionment decisions now it is held that a county in a State would not have the right to have a Senator even though the legislature and the people of that State may desire such. Under what authority of the Constitution did the Supreme Court act on that case?

Justice FORTAS. Senator, with the greatest regret I must say that we are back where we were yesterday. I tell myself every morning before I come here:

"You are not participating in this hearing as Abe Fortas, you are participating in this hearing as an Associate Justice of the Supreme Court of the United States, with responsibility solely to the Constitution of the United States."

It is on that basis, and with the utmost respect, with the utmost respect, that I have said to you that I cannot respond to questions of that

sort, because I cannot and I will not be an instrument by which the separation of powers specified in our Constitution is called into question. And I will not and cannot discuss in this forum opinions of the Court of which I am a member. That is my constitutional duty, Senator, just as it would be the constitutional duty of a Senator if he were called before a court, no matter how much he might want to explain his vote or his opinion—it would be his constitutional duty, respectfully as I am trying to do here, to decline to answer questions that were put to him about his work in the Congress.

That is the mandate of our Constitution, and that is what I am trying to fulfill here.

Forgive me for——

Senator THURMOND. Mr. Justice Fortas——

Justice FORTAS. Forgive me for the emotion there, Mr. Chairman, if there was some. Sorry.

Senator THURMOND. Do you consider the matter of the structure of the State government a political question or a judicial question?

Justice FORTAS. In general, of course it is a political question. There may be some respects in which the Constitution affects it.

Senator THURMOND. Then isn't it a matter for each State to make a determination as to the kind of government they want, whether they want a unicameral legislature, or whether they want a State government with two bodies. As you know one State has only one body.

Justice FORTAS. I know that.

Senator THURMOND. The other States have two bodies.

Justice FORTAS. Yes, sir.

Senator THURMOND. And where is the authority in the Constitution for the Supreme Court to enter this field and tell the State of South Carolina that "You cannot have a Senator from each county—although you have done that ever since 1789, when this country was founded, when George Washington took office and the Central Government was set up." Just in the last few years the Supreme Court has assumed unto itself to dictate to my State and every other State in this Nation the structure of government, rather than let the State make that determination.

Why did it take so long for a court to enter this field? Hasn't the Court, unlawfully, unconstitutionally, entered this field?

Justice FORTAS. I have nothing to say to that.

Senator THURMOND. In Mr. Justice Black's lectures, he goes on to say:

> Power corrupts, and unrestricted power will tempt Supreme Court Justices, just as history tells us it has tempted other judges. Fortunately, judges have not been immune to the seductive influences of power, and given absolute or near absolute power, judges may exercise it to bring about changes that are inimical to freedom and good government.

I am just wondering if, Justice Fortas, you will agree with that proposition?

Justice FORTAS. Senator, I not only agree with the proposition, but that maxim of Lord Acton which was paraphrased and which you have just quoted, is something that all public officials must keep in mind always, because power is in fact a dangerous thing. And I agree that it is a dangerous thing in the hands of judges.

Senator THURMOND. Justice Black goes on in his lectures to say:

For the reasons that I have been discussing, I strongly believe that the public welfare demands that Constitutional cases must be decided according to the terms of our Constitution itself, and not according to the judge's views of fairness, reasonableness, or justice.

In other words, he is saying that matters should be decided according to the Constitution, and not because a judge may have a view of what is fair or reasonable or just.

I wonder if you have any comment on that?

Justice FORTAS. As I have said several times in these proceedings, as well as elsewhere, Senator, I agree.

Senator THURMOND. The courts are given power to interpret the Constitution and laws which means to explain and expound, not to alter, amend, or remake.

Mr. Justice Fortas, do you believe that—do you believe that the courts are given the power to interpret the Constitution and laws, which allows for explanation and to expound upon it, but not to alter or amend or remake the law or the Constitution?

Justice FORTAS. As I have said several times, Senator, I fully agree.

Senator THURMOND. Justice Black's lectures go on:

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 adopt the Constitution to new times.

Mr. Justice Fortas, do you agree with that statement?

Justice FORTAS. I certainly do, and I point out that Justice Black himself has been the object of very serious and violent criticism over the years for having done just that—criticism which is unfounded. So I agree.

Senator THURMOND. Excuse me?

Justice FORTAS. I beg your pardon. I said in short, I do agree, Senator.

Senator THURMOND. Mr. Justice Fortas, Justice Black's lectures go on:

But adherence to the Constitution as written does not mean we are controlled by the dead. It means we are controlled by the Constitution, truly a living document——

Justice FORTAS. I beg your pardon, Senator. That we are not controlled by what?

Senator THURMOND (continues reading):

But adherence to the Constitution as written does not mean we are controlled by the dead.

Justice FORTAS. Thank you.

Senator THURMOND (continues reading):

It means we are controlled by the Constitution, truly a living document, for it contains within itself a lasting recoguition that it should be changed to meet new demands, new conditions, new times.

I am wondering, Justice Fortas, if you adhere to that statement by Justice Black?

Justice FORTAS. I am not sure that I quite get the import of it. But my own position has been stated several times, Senator. There is only

one authority for changing the Constitution, and that is the Constitution itself. It is the responsibility of a judge, as his intelligence and learning give him guidance, to interpret and apply the Constitution as it exists.

Senator THURMOND. And he goes on to say:

It provides the means to achieve these changes through the Amendment process.

Now, as I construe what he is attempting to say and convey in this message is that to meet new demands and new conditions and new times, the Supreme Court should not itself follow policies that would have the effect of amending the Constitution, or act without authority of the Constitution, but that such changes should be made in one or the other of the two ways provided to amend the Constitution. Of course, as you know, only one of the methods of amending the Constitution has ever been used. But there are two ways to amend the Constitution. And he is trying to convey here, as I am able to conceive his writing, that the Constitution should only be amended in the method provided in the Constitution, which means that the Congress itself, by a two-thirds vote of both bodies, may propose amendments to the States, and if three-fourths of the States ratify those amendments, the Constitution will be amended. That is the only method that has ever been used. Of course the other method can arise with the States. That is where requests can be made by two-thirds of the States to call a constitutional convention, and then Congress can call such convention and amendments may be proposed to the States which can be acted upon by the legislatures or conventions of the States. This method has never been used.

But either one of these two methods should be followed, if I properly understand this suggestion here by Justice Black, and with which I am in accord, and that the Supreme Court and the Judges should not attempt to amend it or rewrite it or interpret it in such a way that it would have that effect—rather than let it be amended in one of the two ways provided in the Constitution. I am just wondering if you have any comment on that.

Justice FORTAS. No, sir, I think I have covered that.

Senator THURMOND. Justice Black goes ahead in his lectures:

I do not believe that the First Amendment grants a Constitutional right to engage in the conduct of picketing or demonstrating whether on publicly-owned streets or on privately-owned property. The Constitution certainly does not require people on the streets, in their homes, or anywhere else to listen against their will to speakers they do not want to hear. Marching back and forth, though utilized to communicate ideas is not speech and therefore is not protected by the First Amendment.

Mr. Justice Fortas, would you care to express whether you are in accord with that statement by Justice Black?

Justice FORTAS. That is a very difficult problem. It is discussed back and forth, with all sorts of subtleties and variations, in a number of opinions of the Court, including some opinions of the last three terms, Senator.

Senator THURMOND. Justice Black continues in his lectures:

I deeply fear for our Constitutional system of government when life-appointed judges can strike down a law passed by Congress or a State Legislature, with no more justification than that judges believe the law is unreasonable.

Mr. Justice Fortas, would you care to comment on that?

Justice FORTAS. I would certainly subscribe to that.

Senator THURMOND. Mr. Justice Fortas, Chief Justice John C. Bell, Jr., of the Supreme Court of Pennsylvania, delivered an address this month, July 8, 1968, to the District Attorneys' Association of Pennsylvania, in Philadelphia. The full text of Judge Bell's speech was published in the U.S. News & World Report on July 22, 1968.

I should like to read this speech, or portions from it, because of its significance in the matter now before this committee.

The subject in the periodical referred to is "Law, Order and the High Court—A State Chief Justice Speaks Out." And then in smaller headlines, "Why the increasing disrespect for law and order in America—are the rulings of the Supreme Court in recent years the cause of it all? A distinguished State jurist examines the problem and suggests a course of action to help eliminate it."

And the article itself says:

The land of law and order, the land which all of us have loved in prose and poetry and in our hearts has become a land of unrest, lawlessness, violence and disorder, a land of turmoil, of riotings, lootings, shootings, confusion and Babel. And you who remember your genesis remember what happened to Babel. Respect for law and order, indeed, respect for any public or private authority is rapidly vanishing. Why? There is not just one reason. There are a multitude and a combination of reasons. Many political leaders are stirring up unrest, discontent, and greed by promising every voting group heaven on earth, no matter what the cost. Many racial leaders demand, not next year or in the foreseeable future, but right now a blue moon for everyone, with a gold ring around it. Moreover, many racial leaders, many church leaders, and many college leaders advocate massive disobedience and intentional violation of any and every law which a person dislikes. We all know and we all agree that there is a need for many reforms, and that the poor and unemployed must be helped. However, this does not justify the breaking of any of our laws or the resulting violence, burnings, or lootings of property, or sit-ins, lie-ins, sleepins in students, or mass lie-downs in the public streets, or the blocading of buildings, or rioting mobs. Television shows which feature gun battles, of course unintentionally, add their bit to stimulating widespread violence. Furthermore, the blackmailing demands of those who advocate a defiance of law and order under the cloak of worthy objectives and commit all kinds of illegal actions which they call civil rights are harming, not helping their cause. Let us face it. A dozen recent revolutionary decisions by a majority of the Supreme Court of the United States in favor of murderers, robbers, rapists, and other dangerous criminals which astonish and dismay countless lawabiding citizens who look to our courts for protection and help, and the mollycoddling of law-breakers and dangerous criminals by many judges, each and all of these are worrying and frightening millions of law-abiding citizens, and are literally jeopardizing the future welfare of our country. Is this still America, or are we following in the footsteps of ancient Rome, or are we becoming another revolutionary France?

Let us consider some of these problems, one by one. In the first place, we cannot think or talk about crime and criminals without thinking about the newspapers and other news media. Our Constitution, as we all remember, guarantees the "freedom of the press," and this freedom of the press means an awful lot to our country, even though it is not absolutely unlimited.

We all know that newspapers are written, edited and published by human beings, and therefore it is impossible for a newspaper to be always accurate or always fair or always right. Nevertheless, the newspapers and other news media are terrifically important in our lives, and particularly in showing up incompetent or crooked public officials and dangerous criminals. Indeed, it is not an exaggeration to say that they are absolutely vital and indispensable for the protection of the public against crime and criminals.

No matter what unrealistic people may say, the only way it is possible for lawabiding persons to adequately protect themselves against criminals is to be informed of a crime as soon as it happens, and all relevant details about when and where and how the crime occurred, together with pertinent data, about the suspected criminal or criminals.

I repeat, this is the quickest and surest way, although, of course, not the only way our people can be alerted and protect themselves.

For these reasons, it is imperative that we must resist constantly and with all our power, every attempt to "muzzle" the press by well-meaning and unrealistic persons who mistakenly believe that this press coverage with its protective shield for the public will prevent a fair trial.

I need hardly add that if the press publicity so prejudices a community that a fair trial for the accused cannot be held therein, the courts possess, and whenever necessary exercise, the power to transfer the trial of such a case to another county in Pennsylvania.

Let us stop kidding the American people. It is too often forgotten that crime is increasing over six times more rapidly than our population. This deluge of violence, this flouting and definance of the law and this crime wave cannot be stopped, and crime cannot be eliminated by pious platitudes and by governmental promises of millions and billions of dollars. We have to stop worshiping Mammon and return to worshiping God, and we next have to change, if humanly possible, the coddling of criminals by our courts.

The recent decisions of a majority of the Supreme Court of the United States, which shackle the police and the courts and make it terrifically difficult—as you well know—to protect society from crime and criminals, are, I repeat, among the principal reasons for the turmoil and the near-revolutionary conditions which prevail in our country, and especially in Washington.

Now, I want to repeat that last paragraph:

The recent decisions of a majority of the Supreme Court of the United States, which shackle the police and the courts and make it terrifically difficult, as you well know, to protect society from crime and criminals, are, I repeat, among the principal reasons for the turmoil and the near revolutionary conditions which prevail in our country, and especially in Washington.

Now, Mr. Justice Fortas, the question is—do you agree with that statement by the chief justice of the Supreme Court of Pennsylvania, that the recent decisions of a majority of the Supreme Court of the United States which shackle the police and courts and make it terribly difficult to protect society from crime and criminals are among the principal reasons for the turmoil and near-revolutionary conditions which prevail in our country and especially in Washington?

Justice FORTAS. No. [Applause.]

The CHAIRMAN. Let us have order. Another demonstration and the police will clear the room.

Senator THURMOND. I understood there had been recruiting actions to bring people here today which would try to cause such a demonstration, Mr. Chairman, but I did not believe it until I now see what is happening in the back of the room.

Senator HART. Now, Mr. Chairman, for the reader of the record, he will be completely fogged up by that exchange. All that happened was that some people were pleased that the Justice did not agree that, whatever the crime rate is, it is a consequence of Supreme Court decisions. As I look over the room, everybody looks nice and clean and fine and fresh.

The CHAIRMAN. I do not wish to comment about that. But we are not going to have demonstrations at this committee hearing.

Senator HART. The demonstration consisted of mild scattered applause for a statement that I would have applauded myself.

The CHAIRMAN. But you did not, Senator.

Senator HART. Happily, I can speak for the record.

My impression of the Bill of Rights is that it was intended to handcuff government. That is the whole purpose of the Bill of Rights. It might mean one thing—if you cannot hit somebody over the head or

hold him as long as you want—for a policeman but we are all better because you cannot.

Senator THURMOND. Mr. Chairman, I have not yielded, but I will be glad to yield to the Senator from Michigan if he wishes to say any more.

The CHAIRMAN. Proceed.

Senator THURMOND. Would you care to say anything further?

Senator HART. Yes. But I will resist the temptation, just the way Justice Fortas has.

Senator THURMOND. Justice Bell, continuing in his address:

No matter how atrocious the crime or how clear the guilt, the Supreme Court never discuss in their opinions or even mention the fact that the murderer, robber, or dangerous criminal or rapist, who has appealed to their court for justice is undoubtedly guilty, and they rarely ever discuss the rights and the protection of the law-abiding people in our country. Instead, they upset and reverse convictions of criminals who pleaded guilty or were found guilty recently or many years ago, on newly created technical and unrealistic standards made of straw.

Mr. Justice Fortas, do you agree with that statement by the Chief Justice of the Supreme Court of Pennsylvania?

Justice FORTAS. I do not, Senator.

Senator THURMOND. Mr. Chief Justice Bell continuing:

Although I do not doubt their sincerity, most judges, most lawyers and most of the law-abiding public believe that they have invented these farfetched interpretations of our Constitution with a Jules Verne imagination and a Procrustean stretch which out-Procrustes Procrustes; and either legally or constitutionally they must be changed.

Mr. Justice Fortas, do you agree with that statement by Chief Justice Bell?

Justice FORTAS. I do not, with all respect.

Senator THURMOND. Mr. Chief Justice Bell continues in his address:

Now, here is where you come in. The people of Pennsylvania need, as never before in our history, district attorneys who will without fear or favor act promptly, vigorously and, of course, fairly, to prosecute and convict the lawless, the violent and the felonious criminals who are alarming and terrifying our society. How can you do this? There are several ways which occur to me, and I am sure numerous additional ones will occur to you.

The First is: You must prosecute as quickly as possible all persons who violate any law, no matter how or under what cloak of sheep's clothing they may attempt to justify their criminal actions.

Second: Study—and you will have to study as never before—all of the many United States Supreme Court decisions handed down in the last few years concerning crime and criminals, their confessions and their newly created rights. These are so numerous that I will not have time to analyze and discuss them. However, I will capsulize my feelings with respect thereto by the following quotations from the dissenting opinions in *Wesberry* v. *Sanders* (on apportioning congressional districts so one person's vote is equal to another's) which said, inter alia:

"* * * The constitutional right which the Court creates is manufactured out of whole cloth;" and in the dissenting opinion in *Lucas* v. *Colorado General Assembly* (on apportioning the Colorado legislature on the basis of population), where one of the dissenting opinions said:

"To put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's Draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our federal union * * *."

In the very recent case of *Witherspoon* v. *Illinois*, which was decided on June

3 of this year, the dissenting Justices went even further, and said that the majority opinion was completely without support in the record and was "very ambiguous." With these conclusions I strongly agree.

Mr. Justice Fortas, do you concur with those statements?

Justice FORTAS. I have no comment on what you have read.

Senator THURMOND. Mr. Chief Justice Bell continuing:

However, what is more important is the question of what Witherspoon really holds. The majority opinion thus summarizes it:

"Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction * * * . Nor does the decision in this case affect the validity of any sentence, in this case * * * . We have concluded that neither the reliance of law-enforcement officials nor the impact of a retroactive holding on the administration of justice warrants a decision against the fully retroactive application of the holding we announce today."

Third: You will have to more carefully and more thoroughly prepare your cases than ever before, especially on the question of the voluntariness and admissibility of confessions, in order to avoid new trials, now or 25 years from now.

Fourth: You will have to personally make sure that a complete, detailed record is kept of all the trial and pretrial and postconviction proceedings in every case, in order to adequately answer and refute, immediately or many years after the trial, a convict's contentions that he was deprived of a number of his constitutional rights.

These allegations of unconstitutionality may include a contention that his confession or guilty plea was coerced or involuntarily; or that he did not have a lawyer at the taxpayers' expense at the time of his confession, or any time to adequately prepare his case; or that he was not advised or did not understand all his rights at every critical stage of the trial and pretrial proceedings, including his right to remain silent; and all of his other required constitutional warnings; or that he was not competent to stand trial; or that he was not advised of his right to appeal and to have a tax-paid lawyer represent him in his appeal; and also every imaginable lie which he can invent; as well as every technical defense which an astute criminal lawyer can after the trial or after many postconviction proceedings, conceive.

As I construe what he is trying to say here is that criminals are being turned loose on technicalities, and he is trying to advise them of the tremendous redtape that they will have to go through, and he is trying to advise them of every precaution, because the Supreme Court decisions have released criminals on technicalities, have reopened cases of men convicted years and years ago, and they will have to exercise every possible precaution in order to protect the public.

Mr. Justice Fortas, do you have any comment on that?

Justice FORTAS. I do not, Senator, except that perhaps you will indulge me if I say that I am always concerned when I hear a blanket reference to constitutional principles as technicalities. Perhaps—and this I will not and cannot discuss—perhaps some constitutional principles are applied erroneously or applied in a way that reduces them to technicalities. That is unfortunate, and it is an error. But I think that we can all agree that no matter how much one may criticize a particular Supreme Court at a particular point of time, or the decisions of a Supreme Court, we are all equally dedicated to the preservation of the institution.

May I respectfully suggest that it would be unfair to any Senator or any Congressman or any person who is loyal to this country if the impression got around to the contrary. Each of us is dedicated,

as I am sure each of you and everybody at this table is, to the preservation of the Supreme Court as an institution of Government. Now, the Supreme Court applies constitutional principles. Sometimes those principles result in the release of persons who have committed the crime with which they are charged. Sometimes the application of the Constitution does that. To take an extreme example—just because a man has been beaten in a police station and a confession extracted from him, it does not follow that he is innocent. He may have committed the crime anyway. But the Constitution requires, as I think we would all agree, that a conviction obtained on the basis of such a confession must be set aside and the case remanded for a new trial, at which the man may be convicted or he may be set free. That is the Constitution. And all that I have to say, Senator—if you will permit me—is that the use of the word technicality in those circumstances perhaps creates a danger of misunderstanding in the mind of the American people, whose loyalty to the Constitution you, as well as I, are interested in commanding. That is all I have to say.

Senator THURMOND. Mr. Justice Fortas, isn't it a little unusual, or possibly strange, that ever since this country was founded, the first Government, from 1789 until now, which is 179 years, that no Supreme Court has followed the course of action the courts are following now, and have released criminals on technicalities, and have done the very thing that Chief Justice Bell refers to in his address here to the district attorneys, and that we have never had a situation in the history of this country as we have had in recent years, similar to the actions of the Supreme Court?

Justice FORTAS. Senator, I have nothing to add to what we have covered on those subjects. Thank you.

Senator THURMOND. Justice Bell, in his address, continues:

Fifth: You will have to aid, of course, diplomatically, every trial judge in order that his rulings and his charge to the jury and his statement of the law and the facts are accurate, adequate, fair and comply with all the recently created technical standards.

Sixth: And this is very, very, very important—I strongly recommend:

First, that your association state courteously and publicly the position of the District Attorneys' Association of Pennsylvania with respect to every decision of the Supreme Court of the United States and of an appellate court of Pennsylvania, which the association is convinced is unfair to our law-abiding people and is unjustified by the Constitution or by any statutory law, together with the reasons and the legal authorities which support your position; and that you simultaneously send a copy of all the association's recommendations, resolutions and criticisms to the Supreme Court of the United States, and to the appellate courts of Pennsylvania.

Mr. Justice Fortas, have you ever known of the Chief Justice of the supreme court of a State feeling so strongly about a matter that he suggests that the district attorneys send a copy of their recommendations, their resolutions, and criticism to the Supreme Court of the United States? Does it not appear to you that the members of this court possibly could be wrong if so many of the law enforcement people and so many of the judges and so many of the people as a whole feel that the Supreme Court has gone entirely too far in interpreting the Constitution?

Justice FORTAS. The possibility of error, Senator, always exists. It is common to all humanity.

Senator THURMOND. Chief Justice Bell continues in his address:

Second, that each of you write, and likewise be sure to see the members of the State legislature from your district and your Congressman and your two United States Senators about the association's recommendations and resolutions and criticisms, and the reasons for the association's opinions and convictions.

Finally: You must fight with all your might and power and as never before for all the law-abiding people of our wonderful State who are consciously or unconsciously relying upon you and the courts to protect them from felonious criminals and from all lawbreakers.

Mr. Justice Fortas, when you hear an article like that from a great chief justice of a great State, does it make you pause and ponder as to whether the Supreme Court can be wrong in its decisions, when this great chief justice says, that the Supreme Court is shackling the police and the courts in making it difficult to enforce the law, and to protect the public against crime and criminals?

Justice FORTAS. Senator, I pause and ponder all the time. The literature of the law contains speeches and articles enthusiastically supporting the Supreme Court's decisions, and speeches and articles that are critical thereof. You will find a plethora of articles and speeches on both sides. And to the extent that I have time and energy to read them, I do and take them into account.

Senator THURMOND. I am going to yield for just a minute to the distinguished Senator from Arkansas. But just prior to that, if it is agreeable with him, I would like to yield to the distinguished Senator from Pennsylvania, who wanted to comment, I believe on this address from the State.

Senator MCCLELLAN. I will defer. Go ahead, sir.

Senator THURMOND. The distinguished Senator from Pennsylvania—since the address I just read and commented upon and asked questions about was delivered by the chief justice of his State.

Senator SCOTT. My purpose in asking the Senator to yield is primarily because we are, I hope, nearing the end of this particular phase of the hearings, and it becomes somewhat difficult to be here at all times. I would want to comment generally rather than upon the decisions of the Chief Justice of our Supreme Court. I admire him. I have disagreed with some of his decisions, too.

I did want to commend the distinguished Associate Justice for his judicial restraint in these proceedings, to express the hope that legislative restrain will continue on our part, and to observe that opposition, so far as I have heard it here, seems to be based, as in Mr. Justice Bell's opinion, and in the questioning that has been heard so far, the opposition seems to be based upon disagreement with the views of a majority of the Court. I may say that often I disagree with the views of a majority of the Senate and of the Court. But I have heard nothing contravening the right of the President to make these nominations. Should we do so by an 8-to-7 vote, it may be a subject of criticism, as are some of the 3-to-4 decisions of the Court. But I think that I personally have heard enough, having up to this point made no contribution to the hearings, and no statement as to my own views, I believe that I have heard enough to satisfy me that Mr. Justice Fortas' nomination should be confirmed, that it is indeed within the power of the President and the right of the President and the duty of the President. I know that he respects the fact that I do not agree with some of

his views, nor would I expect him to agree with mine, nor do I regard that as the issue.

When we come to the confirmation of Judge Thornberry, I will have a further comment to make after we have heard the testimony.

I would like to say, however, that it does occur to me that sometimes in our feeling over opinions of the Court, we may sometimes stand in our own light, since Mr. Justice Fortas will in any event remain upon the Court. The change of the Court will be the appointment of Judge Thornberry, if confirmed, in place of Chief Justice Warren. I served many years with Judge Thornberry on the Rules Committee of the House of Representatives. As a man who respects the institutions of government and particularly the intent of the Congress of the United States that its legislative enactments be accepted with respect, with dignity, with honor, and with all possible consideration, it is my judgment that perhaps, I believe, the addition of Judge Thornberry to the Court might add to that Court one member whose dedication to the Congressional functions, as a part of our separation of powers, might indeed tend to bring about some evolutionary and properly evolutionary points of view which would possibly be more in line with the views of those who have expressed opposition to the confirmation. Therefore I wonder if the delay in the proceedings, should there be a delay, and there are such rumors, might in fact rebound to the disadvantage of those who seem to be in no great hurry. Therefore I express the hope that the proceedings may be expedited as quickly as possible. I thank the Senator for permitting me to intervene at this time.

Senator THURMOND. I now yield to the distinguished Senator from Arkansas.

Senator MCCLELLAN. Mr. Chairman, I ask unanimous consent that the Senator from South Carolina may yield to me for a few questions without losing his right to resume his interrogation.

I may say that the reason I make this request is that I have a matter coming up in the Senate when the Senate convenes today and I feel I should be on the floor. Otherwise—and if you like, you may let this interrogation appear in the record at the conclusion of the Senator's interrogation. I would prefer it that way.

The CHAIRMAN. That will be so ordered.

Senator MCCLELLAN. Thank you very much.

Justice Fortas, on the opening day of the hearings I stated to you that I am going to base my decision primarily upon your record since you have been an Associate Justice.

Now, I though I heard you say earlier this morning that you appeared here only in the role of an Associate Justice of the Supreme Court, and not as an individual. I hope I misunderstood you.

Justice FORTAS. I did not intend to say that, Senator. What I intended to convey was that as I come to these hearings, which of course are trying for me, I try to impress upon myself that I must keep constantly in mind that I have a special responsibility, a responsibility in addition to my responsibility as a man and a citizen. This special responsibility derives from the fact that I am a Justice of the Supreme Court of the United States. It is that reason, and only that reason, that has caused me to refrain from addressing myself to some of the

very interesting and important questions of law that have been discussed.

Senator McCLELLAN. Well, I understand that. I may have misunderstood you. I did not interrupt at the time you stated:

> You are not participating in this hearing as Abe Fortas, you are participating in this hearing as an Associate Justice of the Supreme Court of the United States.

Now, I do not agree with that. I think that we will all agree that while you occupy that position, the personal record that you have made in the course of your duties is a legitimate issue to be considered by the Senate. I think that might well establish a course, of your professional competency and ability to perform your duties.

But in any nomination that comes before the Senate, there are always other questions that go beyond the mere professional ability of perform the functions of the office to which one is appointed.

I wish to reiterate that it it my pnrpose to primarily base my decision upon your record as an Associate Justice, where you have had equal authority and responsibility for making decisions along with the Chief Justice of the Supreme Court.

Now, I only asked you a very few questions the other day and thought maybe I would not ask any more. I reserved the right, however, to ask some further questions if I thought proper. Since I assume these hearings are now about to close, or will soon close, I feel that something has come up in the record that needs clarification or needs amplification, because I think it carries with it inferences that should be further explained or implications that should be clarified. That is about this telephone call.

I do not want to belabor the point. But I think from the record and from the newspaper article about it, the information I assume originally came from newspaper articles, one could infer if the article is correct, that you were acting at the time as an agent or representative of the President of the United States or actually engaged in carrying out an assignment or a mission or fulfilling a request that he made of you.

I am not quarreling with your position that you cannot say and do not want to say what conversations you may have had with the President. I respect that position if you wish to take it.

If I ask you any questions that you think are improper, that you feel should not be asked, assuming our positions were reversed, tell me so. I do not want to ask you anything improper. I do not want any impropriety on my part. I am trying to perform my duties here, Mr. Justice.

Justice FORTAS. I understand.

Senator McCLELLAN. I wish to quote from this article of June 4, which I presume gave impetus to this inquiry. I quote:

> Fortas' call—he told Nickerson—was to transmit Lyndon Johnson's ire to the Business Council over a statement that the President considered misleading.

Now, that carries with it certain implications at least. Maybe one could rightfully draw an inference from it. If the article is a correct interpretation of what happened, that you had ascertained some way that President Johnson was irritated, wouldn't you think that before a member of the Supreme Court would call a friend telling him of

President Johnson's ire, that he would have had some contact with the President about it?

Now, assuming you did not—and you say you do not want to say whether you did or did not—this telephone call carries an implication that you were acting in some capacity, in some relationship to the President, to phone up an old friend and to tell him what he was doing. And I read in your testimony yesterday where you said the reason for it—you say—

I told him at the time as a citizen I was very distressed in what I considered to be a statement contributed to him which was wrong and which had its purpose and as its possible purpose——

Justice FORTAS. Senator, that word—may I interrupt there?

Senator MCCLELLAN. Yes.

Justice FORTAS. I believe I said—I know the transcript said "purpose." I believe I said "purport."

Senator MCCLELLAN. All right. We will read it "purport."

Justice FORTAS. Yes. I was distressed when I saw the word "purpose."

Senator MCCLELLAN. Of course you will be permitted to revise the transcript and the record. "* * * which had as its purport and as its possible purpose"——

Justice FORTAS. Purport.

Senator MCCLELLAN. Again "purport"?

Justice FORTAS. Yes.

Senator MCCLELLAN. All right. We will substitute

Purport. And possibly affect the presentation of incorrect view of the American people of the consequences, finaucial consequences of this nation's participation in tbe Vietnam war.

Now, that is your statement.

Did you, by direct statement or by inference, or by language from which there could be inferred, imply to him or state to him that you were transmitting Lyndon Johnson's ire to the Business Council over the statement he made?

Justice FORTAS. No, sir., I suppose if the President wants to transmit his ire, he will do it directly. May I hasten to say, Senator, as Senator Ervin noted when he first brought this up, it was not Mr. Nickerson. That is an error. I do not personally know Mr. Nickerson. That was an error in the article.

Senator MCCLELLAN. Mr. Lazarus. Is that the one? I have difficulty determining which it was here. But this article says Nickerson, and later I think another article refers to Lazarus.

Justice FORTAS. You are quite correct that the article as it appeared said Nickerson, that was inaccurate. It is my understanding that Nickerson was at this Business Council meeting. I did not call him. I did not know him. I do not know him personally to this date. And a similar error is that I transmitted the Presidential ire. What I said in my testimony is what I stand by.

Senator, perhaps this will assume——

Senator MCCLELLAN. Mr. Justice, I feel, and I think you can appreciate my feeling, that this is something that would naturally give some concern to the Members of the Senate and to their constituents.

Justice FORTAS. Senator, may I explain the circumstances perhaps in a little more detail?

Mr. Ralph Lazarus is the person whom I called. Mr. Ralph Lazarus is now the chairman of the board of Federated Department Stores, and a member of the board of a number of other corporations. Some time after I left the Government in 1946, I performed legal services for Federated Department Stores. I was associated with them before my appointment on the Court. I became a director of Federated Department Stores. I become a vice president of Federated Department Stores as well as its counsel.

Mr. Ralph Lazarus is a very close friend of mine, an extremely close friend of mine, with whom I suppose I have discussed everything on earth from time to time—except, of course, Court business.

Senator McCLELLAN. I beg your pardon? I did not understand your first statement.

Justice FORTAS. I say he is a very close friend of mine with whom I have discussed just about everything, as you do with a friend. And I was startled to see his statement about Vietnam.

Senator McCLELLAN. He said the escalation of the war was probably going to increase the cost—is that not what he said?

Justice FORTAS. I believe he put a dollar figure on it. I have seen in some of the news accounts the past few days that he turned out to be right. If he turned out to be right, I was just plain wrong. But at the time it seemed——

Senator McCLELLAN. That is what appears here. And that is what would naturally give us, I think, Mr. Justice, legitimate concern. I am just trying to analyze the situation.

Here is a citizen out in a business meeting. After making their investigation, whatever they did, they came to the conclusion that the President's budget was too conservative, to use the moderate term, that it was an understatement, and the best they could get from other agencies of Government, that it would go up by $5 billion, the deficit, rather, would reach $5 billion—maybe by reason of the escalation of the war.

That seems to me it would be a legitimate discussion among citizens, and they would have a right to disagree with the budget estimates. I cannot quite understand why it would, as a friend, get you so disturbed that you would call him up about it. But assume it did.

Now, here is the next article from the same writer—I think this was written yesterday. He said: "Business executives at the meeting said at the time that Mr. Lazarus had quoted Justice Fortas as saying that 'the President was upset.' "

Did you use that language to your friend?

Justice FORTAS. Senator, I could not say one way or the other about that. I just do not remember. That was a long time ago. But Mr. Graham was apparently so informed at the time—I do not question that he was so informed at the time.

Senator McCLELLAN. He goes on later in the article to say that Lazarus was correct.

Just one other question.

The reason I bring this up is because it has come out in the testimony here. And I would ask you if, in all candor, you think this is the sort of practice that members of the Supreme Court should engage in? Just taking the facts as you state and represent them to be,

and what actually occurred—do you think this is a practice that should be followed by members of the Court?

Justice FORTAS. Senator, I beg your pardon, but I do have to emphasize the fact that Mr. Lazarus was a very close friend, and still is a very close friend. He was an intimate business associate for over 15 years, and I suppose we have discussed everything in our association. I don't know how anybody can be a person and not discuss with his friends these days questions about the budget and about the Vietnam war. I'm a person, too. I am a Supreme Court Justice, but I talk to people, and people talk to me. I don't see how you can avoid discussing questions like that. And with friends, particularly those with whom I have had a long business association, I do discuss economic problems, just as I am sure everybody else does. That is all there is to this, Senator, in my view. I may be wrong, but that is all I see to it.

Senator MCCLELLAN. I may be wrong—I am just looking at it from the standpoint of a citizen, and as a Member of the Congress. Here is a situation where apparently you were wrong and the man turned out right. But irrespective of that, suppose he had been wrong, to that extent. I am just looking at it from the standpoint of businessmen meeting, and they make their own investigation and do the best they can, and they think there has been a mistake made in the budget estimate in the amount of the deficiency. And yet, because they make some statement about it, it makes a President's friend on the Supreme Court so concerned that he calls him up. This would indicate he took him to task about it. Maybe you just had a friendly conversation.

But you see the implication of this, as it goes out, that businessmen may wonder, then, if they are going to be reprimanded, maybe they should keep their views to themselves if some member of the Supreme Court is going to call them up and take them to task about it. That is one aspect of this.

Justice FORTAS. I understand, Senator.

Senator MCCLELLAN. There may be a better picture. And I thought we ought to clear it up if we can.

Justice FORTAS. Senator, I really wonder if some of the impact of this originally was not due to an error, an innocent error, that I called Mr. Nickerson. That would have been a very different matter. I don't know Mr. Nickerson, and I didn't then. But I called a very old friend. I can't say to you that if I had last week seen a friend of mine and he had said something else, on whatever subject, I might not say to him, "That is a pretty poor thing for you to do, Joe." And I might turn out to be right or wrong.

Senator MCCLELLAN. Very well.

The CHAIRMAN. Could I ask a question? Taking your side of it, do you think that is a proper practice for a Supreme Court Justice?

Justice FORTAS. Senator—Mr. Chairman, I really hope I am not insensitive about this. But if you take the fact of long friendship and a statement that he made—I don't believe—I am not sure—but I don't believe that what we were talking about was a resolution or any action taken by the Business Advisory Council—I believe that this was a statement that Ralph had made.

The CHAIRMAN. You are explaining it. But it is a very simple question. Do you think this is a proper practice for a Supreme Court Justice?

Justice FORTAS. You mean to call a friend and tell him you think he made a mistake?

The CHAIRMAN. And remonstrate with him, yes—under the conditions——

Justice FORTAS. I don't see anything wrong with it, Senator.

The CHAIRMAN. All right.

Justice FORTAS. I hope I am not insensitive to these matters. But I really don't see anything wrong, taking into account the fact of friendship and long association. I engage in parlor discussions as everybody else does about a variety of subjects. That is the way I view this.

Senator MCCLELLAN. One or two more questions, Mr. Chairman.

Mr. Justice, I don't know whether this book has been placed in evidence or not, this book you wrote on alternatives to violence. Has this been placed in the record?

The CHAIRMAN. It has not.

Senator MCCLELLAN. I guess we can use the matter just for reference.

The CHAIRMAN. Do you want it in?

Senator MCCLELLAN. You know the book, of course, of which I am speaking, Mr. Justice?

Justice FORTAS. It is my book, yes.

Mr. MCCLELLAN. The book published in May of this year, I believe.

Justice FORTAS. Yes, sir.

Senator MCCLELLAN. The title of it is "Concerning Dissent and Civil Disobedience," and "We Have an Alternative to Violence." It is not necessarily about the contents of the book I wish to interrogate you—except to say that I have been strongly urged to learn more about your philosophy from the contents of this book—if I am correct in using it as a source and authority for your philosophy and viewpoint.

I want to ask you if, since the book was published in May and your appointment, I believe, was June 26, prior to that time you had been given any intimation or had reason to expect that you were being or would be considered for this appointment.

Justice FORTAS. No, Senator; quite to the contrary. Senator, may I say a word or two about the history of this little book?

Senator MCCLELLAN. Yes. I was urged to read this; that is what you wrote. But the proximity of the time between your nomination and the book naturally prompted me to inquire about this. Of course to just be frank about it—we all know the rumors that go around—that this thing had been planned for sometime, and so forth, had been discussed. I need not go any further. We are all pretty well familiar with what goes on on the Hill and in the Nation's Capital. I just thought we should clear it up. I am glad to have you do it.

Justice FORTAS. Senator, my first specific work that led to this book began in the summer of 1965. The first contract for this book with the publisher was made in 1966. It is a written contract with the publisher. I did an enormous amount of work on the book I then thought I was going to write. It was to be a book dealing generally with the relationships and the interrelationships of the state and the individual, with a vast historical sweep. The contract so indicates.

When all of the trouble in the country developed into crisis form, I called the publisher and said that I did not think that I would want

to publish a book discussing the pros and cons of the doctrine of tyrannicide and all the rest that I had planned—tyrannicide is a fascinating subject, incidentally. The publisher then suggested to me that if I wouldn't do that, I should get out a little broadside, which was a form that the publisher had invented. I don't know the exact time of that conversation, Senator, but it was a long time before the book actually came out in print, of course. It took me some time to write it, and it took the publisher some time to print it.

That is the history of this book.

I agreed to get out this broadside because I had been lecturing at colleges, and I had been talking to a lot of people. I was very disturbed because it seemed to me that faculties at universities, and parents of children—college children—were at a loss how to deal with their children when they advocated lawlessness in the occupation of schoolrooms and so on.

That is the history of the work.

Senator McCLELLAN. Well, I wanted to clear it up.

Now, the other two questions I wish to ask you—if you regard them as being improper in any sense, advise me, because I understand and you have acknowledged and candidly so, that you have conferred with the President, and he has called upon you for advice or comment on at least two problem areas. These questions I now ask you are again prompted by information, that is not conclusive. I would like to ask you whether you were consulted by the President or the Department of Justice about the President's safe streets and crime bill before it was drafted.

Justice FORTAS. No, sir; and I have not even read that bill.

Senator McCLELLAN. Were you consulted about his message that was issued at the time of signing it?

Justice FORTAS. No, sir. As I say, I have not read the bill, and I didn't even read the newspaper accounts carefully because I was sure it was coming before us.

Senator McCLELLAN. Mr. Justice, there was one Justice on the Court who occasionally rendered some decision and made some side remarks, that gave me some concern at the time we were considering the crime bill. The Justice on the particular occasion, at that particular time, had taken the opportunity to make some statements to buttress one of the Court's decision which the crime bill modified.

But I wanted this cleared up for the record. I am accepting your word for it that it didn't happen.

Now, I trust that I have not asked you a question that was improper or one that you would not have felt would be your duty to ask if our situations were reversed.

Justice FORTAS. Absolutely, Senator. Absolutely; entirely.

Senator McCLELLAN. Thank you kindly.

Justice FORTAS. It is because there is an area, a large area of questioning that is not only proper but, I think, required here, that I appeared before this committee and have done my best to cooperate.

Senator McCLELLAN. I think you know that our relations have been quite friendly.

Justice FORTAS. Yes, sir.

Senator McCLELLAN. I supported your confirmation before. I now again tell you I shall judge you primarily upon your record that you

have made since you have been an Associate Justice. Thank you very kindly, sir.

Justice FORTAS. Thank you, sir.

Senator MCCLELLAN. Thank you Senator—thank you for yielding.

Senator THURMOND. Mr. Justice Fortas, I wish to take up a matter now—I think this will wind up my questioning of you. It will probably take about an hour I think we can finish by the time—at the end of the morning hour of the Senate.

In 1958 the Conference of Chief Justices of State Courts adopted a resolution which incorporated a report on the activities of the Supreme Court. I would like to read this report so that you and the committee may hear it. I feel it is most important.

First, I would like to take up a column by David Lawrence which appeared in the Washington Evening Star, July 26, 1957. It discusses the background of this report.

Secondly, I should like to read portions of the report itself. And thirdly, the text of the brief resolution which adopted the report as the position of the Conference of Chief Justices of State Courts.

Now, although this report was made in 1958—almost 10 years ago—I believe it is noteworthy because of its foresight in determining that the Court had begun following a pattern toward unwarranted centralization of power and unwarranted involvement of the Supreme Court in State matters. You were not a member of the Court, of course, at that time, but since you have been a member it appears that your decisions have been in line with the trend as was expressed in this report at that time.

In this article by David Lawrence he says:

Criticism from laymen and lawyers concerning recent decisions of the Supreme Court of the United States has lately been attracting much attention, but how do some of the judges throughout the country feel about the highest court?

There are not many opportunities for judges to discuss these matters publicly. But something that occurred the other day at the Conference of the Chief Justices of the highest courts of each of the 48 states throws a light on this question. A substantial number of these state Chief Justices favored a resolution condemning in the severest terms some of the recent decisions of the Supreme Court of the United States.

And then he goes ahead and sets out this resolution.

Now, an article appeared in the Georgia Bar Journal, November 1958, entitled "In re: The Supreme Court of the United States." It is by the editor.

In the past decade, literally millions of words have been spoken and written about the Supreme Court of the United States, the role it has assumed in our Government, and the wounds its opinions and judgments have inflicted and are inflicting upon the body of Constitutional Law.

Lawyers, having the courage to speak out, have done so. Law school deans and professors have sometimes spoken. The House of Representatives of the United States has spoken in no uncertain terms. Thus far, politically ambitions Senators have prevented actual passage of curative legislation.

I have an idea he could be referring there to some legislation that was offered in the Senate and which was blocked in the Senate chiefly by the majority leader at that time, which would have curbed the powers of the Court in invading the rights of the States.

The most potent expression was that of the Conference of Chief Justices of August 23, 1958.

This expression was potent because of its source, the care with which it was prepared, considered and adopted, the firmness of its expression, and its utter lack of political considerations. It is unique in American history, and may well be the turning point in the road toward restoration of Constitutional Law and Government—of the rule of law, not of men.

The Conference of Chief Justices is composed of the Chief Justice of the Supreme Court—or the court of last resort—in each state of the Union and each territory. Thus there are fifty-two members each of whom is a lawyer and judge, trained in the law, and accustomed to applying legal principles and precedents in adjudicating the rights of men.

Arthur Krock, gifted political writer of the New York Times, has recently said: "* * * lawyers and judges have recognized the report, and the overwhelming adoption by the Chief Justices' Conference of the short resolution reflecting it, as events of great historic moment."

These events were the fruit of seeds planted by our own Chief Justice W. H. Duckworth at the Conference of Chief Justices held in Dallas, Texas, in 1956.

As a result of efforts initiated by him, a committee was appointed by the Chairman of the Conference at its New York meeting in 1957.

The Committee was headed by Frederick W. Brune, Chief Judge of Maryland. The others members of it were Albert Conway, Chief Judge of New York, John R. Dethmers, Chief Justice of Michigan, William H. Duckworth, Chief Justice of Georgia, John E. Hickman, Chief Justice of Texas, John E. Martin, Chief Justice of Wisconsin, Martin A. Nelson, Associate Justice of Minnesota, William C. Perry, Chief Justice of Oregon, Taylor H. Stukes, Chief Justice of South Carolina, and Raymond S. Wilkins, Chief Justice of Massachusetts.

After a year of consultation, consideration and drafting, the Committee submitted its report to the Conference of Chief Justices at the annual meeting in Pasadena, California, August 23, 1958.

Unexpurgated, uncensored, unedited, the report follows:

Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions.

Forward:

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School, several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;

2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Cramton;

3. "Congress, the States and Commerce" by Professor Allison Dunham;

4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and

5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs of the above subjects. We wish to express our deep appreciation to each of them for his very thorough

research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

BACKGROUND AND PERSPECTIVE

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon Federal-state relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by Acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting Federal-state relationships are the rulings and actions of Federal administrative bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board. Many important administrative powers are exercised by the several departments of the Executive Branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the Federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on Federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to laws made in pursuance hereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocations of such power would seem to lead to chaos. (See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between Federal legislation and administrative action on the one hand, and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply Acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether Federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand,

it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the Federal and the state governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times our criticism in making the comments and observations which follow.

PROBLEMS OF FEDERALISM

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and state governments.

This guiding principle, central to the American Federal system, was recognized when the original Constitution was being drawn and was emphasized by de Tocquevill. Under his summary of the Federal Constitution he says:

"The first question which awaited the Americans was to divide the sovereignty that each of the different states which composed the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exegiencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

No, Mr. Chief Justice—Mr. Justice Fortas——

Justice FORTAS. I thank you, Senator.

Senator THURMOND. We all make mistakes.

Justice FORTAS. Well, yours is highly retrievable.

Senator THURMOND. I am wondering if you are in accord with this statement that the difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the National and the State governments. I think that is a most important question that has been important since this country was founded and is vitally important today.

Justice FORTAS. I agree, Senator.

Senator, this is one issue on which I would like to refer you to my opinions, because it is an issue on which I have expressed myself over and over again. I have said—while you were reading, this sentence that I have used occurred to me—that the U.S. Government is not a monolith, it is a Federal union. And from one of the first opinions I wrote, in a case called *Bouligny*, all the way through my dissent in the one-man, one-vote case involving Midland County, Tex., I have repeated that these, perhaps ad nauseam.

Senator THURMOND. Now, this report goes on:

In the period when the Constitution was in the course of adoption the Federalist (No. 45) discussed the division of sovereignty between the Union and the states and said: "The powers delegated by the Constitution to the Federal

Government are few and defined. Those which are to remain in the state governments are numerons and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several states will extend to all the objects which, in the ordinary conrse of affairs, concern the internal order and prosperity of the state."

Those thoughts expressed in the "Federalist" of course are those of the general period when both the original Constitntion and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fonrteenth Amendment.

The fnndamental need for a system of distribntion of powers between national and state governments was impressed sharply npon the framers of onr Constitution not only becanse of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original states and the governments of those states after the Revolution. Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in nse in all of the states. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

But it is this spirit of self-government, of local self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed our late brother, Chief Jnstice Arthur T. Vanderbilt, on the division of powers between the national and state governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and its Present Day Significance"—are persuasive. They traced the origins of the doctrine of the separation of powers to four sources: Montesqilu and other political philosophers who preceded him; English constitntional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concInded his comments on the experiences of the American colonists with the British government with this sentence: "As colonists they had enongh of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

Mr. Justice Fortas, was that not one of the main purposes in writing the Constitution, to reserve for the State and the people all of the powers except those which it was felt the Union could have or use for the benefit of all of the States better than any one state could do for itself? And was that not a guiding principle? And have we not gotten away from that in the decisions of the Supreme Court in recent years?

Justice FORTAS. Senator, that was a guiding principle in the Constitution and one of its fundamentals.

Senator THURMOND (continues reading):

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several states indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means towards an end; and that the horizontal distribution or allocation of powers between national and state governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the Federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

TWO MAJOR DEVELOPMENTS IN THE FEDERAL SYSTEM

The outstanding development in Federal-state relations since the adoption of the national Constitution has been the expansion of the power of the national government and the consequent contraction of the powers of the state govern-

ments. To a large extent this is wholly unavoidable and indeed is a necessity. primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand, our Constitution does envision Federalism. The very name of our nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in Texas v. White, 7 Wall. 700, 721 (1868) : "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, we need to urge it.

Mr. Justice Fortas, do you agree with that statement?

Justice FORTAS. I think there is need every day of a judge's life, every day of a public official's life, for him to urge upon himself the need for self-restraint; yes, Senator.

Senator THURMOND. And not amend the Constitution and the laws or rewrite them, but confine their work to interpretation.

Justice FORTAS. Yes. But I emphasize, as this statement I think shows, interpretation is a very difficult, complex, vexatious task, with great subtlety and intricacy.

Senator THURMOND. Now, this report continues:

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is discounted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have. As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on Stare Decisos, 49 Columbia Law Review 735.

SOURCES OF NATIONAL POWER

Most of the powers of the national government were set forth in the original constitution: some have been added since. In the days of Chief Justice Marshall the supremacy clause of the Federal Constitution and a broad construction of the powers granted to the national government were fully developed, and as a part of this development the extent of national control over interstate commerce became very firmly established. The trends established in those days have never ceased to operate and in comparatively recent years have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint the increase in Federal revenues resulting from the Sixteenth Amendment (the Income Tax Amendment) has been of great importance. National control over the state action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon Federal-state relationships.

THE GENERAL WELFARE CLAUSE

One provision of the Federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general welfare clause. In *United States* v. *Butler*, 297 U.S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare. The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of the case. However, it was not long before that clause was relied upon and applied. See *Steward Machine Co.* v. *Davis*, 301 U.S. 548, and *Helvering* v. *Davis*, 301 U.S. 690. In those cases the Social Security Act was upheld and the general welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

GRANT-IN-AID

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report. Perhaps we should also observe that since the decision of *Massachusetts* v. *Mellon*, 262 U.S. 447, there seems to be no effective way in which either a state of an individual can challenge the validity of a Federal grant-in-aid.

Mr. Justice Fortas, do you feel that is the case, as is expressed in this report, in *Massachusetts* v. *Mellon*?

Justice FORTAS. Senator, I guess I can with propriety call attention to the discussion with Senator Ervin of the case of Flast against Cohen, a very recent case that relates to that subject.

Senator THURMOND. I believe I referred to that case yesterday in some of the questions.

Justice FORTAS. Yes, Senator. So did Senator Ervin. Perhaps you did, too. I am not sure.

Senator THURMOND (continues reading).

DOCTRINE OF PRE-EMPTION

Many, if not most, of the problems of Federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause. Most recently the doctrine has been applied in other fields, notably in the case of *Commonwealth of Pennsylvania* v. *Nelson*, in which the Smith Act and other Federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania anti-subversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Penusylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

LABOR RELATIONS CASES

In connection with commerce clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created (depending upon how one looks at the matter) by the Supreme Court's decision in *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, which overturned a state statute aimed at preventing strikes and lockouts in public utilities. This decision left the states powerless to protect their own

citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a (single) state."

I wonder if you would care to comment on that.

Justice FORTAS. No, Senator, except to say that preemption—that is to say the instances in which Federal legislation shall supersede State legislation—is an extremely important problem. To the greatest extent, it is within the province of the Congress. One example is the labor field. The task of the Supreme Court, which is very difficult, is to construe the language of Congress in the various Federal labor acts.

Senator THURMOND (continues reading).

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a state court was upheld. In *International Association of Machinists* v. *Gonzales*, a union member was held entitled to maintain a suit against his union for damages for wrongful expulsion. In *International Union, United Auto, etc. Workers* v. *Russell*, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that at the present time there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of *Textile Union* v. *Lincoln Mills*, 353, U.S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor Management Relations Act of 1947. Paragraph (a) of that Section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Paragraph (b) of the same Section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301(a) was held to be more than jurisdictional and was held to authorize Federal Courts to fashion a body of Federal law for the enforcement of these collective bargaining agreements and to include within that body of Federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.

What a state court is to do if confronted with a case similar to the Lincoln Mills case is by no means clear. It is evident that the substantive law to be applied must be Federal law, but the question remains, where is that Federal law to be found? It will probably take years for the development or the "fashioning" of the body of Federal law which the Supreme Court says the Federal courts are authorized to make. Can a state court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by state law, or is it limited to those which would be available under Federal law if the suit were in a Federal court? It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the Federal law and committed solely to the jurisdiction of the Federal courts, so that the state courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that Section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between state and Federal governments. As he points out much of this con-

fusion is due to the fact that Congress has not made clear what functions the states may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by Federal law, others in which it is protected by Federal law, and others in which the Federal law is silent. At the present time there seems to be one field in which state action is clearly permissible. That is where actual violence is involved in a labor dispute.

STATE LAW IN DIVERSITY CASES

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the states or the effect of state laws. The celebrated case of *Edie R.R.* v. *Tompkins*, 304 U.S. 64, overruled *Swift* v. *Tyson* and established substantive state law, decisions as well as statutory controlling in diversity cases in the Federal courts. This marked the end of the doctrine of a Federal common law in such cases.

I am wondering Mr. Justice Fortas, if you would care to express your opinion as to just how far the Supreme Court should go in the matter of preempting State laws.

Justice FORTAS. No, sir, Senator. But this really, as I understand it, is primarily a problem for Congress. It is a problem with which the able committees of Congress have wrestled and the courts have wrestled, and everybody would be very happy if a statute could be framed and enacted that would make it clear. This is a matter of statutory construction, as I think the report indicates. It is a problem that everybody has been struggling with, and everybody would be happy if it did not exist.

Senator THURMOND. The report goes on—

In many other fields, however, the Fourteenth Amendment had been invoked to cut down state action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State anti-subversive acts have been practically eliminated by *Pennsylvania* v. *Nelson* in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

Mr. Justice Fortas, do you agree with that statement—that State antisubversive activity has been practically eliminated by Pennsylvania versus Nelson?

Justice FORTAS. I wouldn't have any comment on that, Senator. Pennsylvania against Nelson was decided before I was on the bench. Senator Ervin discussed this issue, as I remember. I don't think I can contribute anything more to this subject.

Senator THURMOND. Now, this report goes on and raises more important points:

THE "SWEEZY" CASE—STATE LEGISLATIVE INVESTIGATIONS

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy* v. *New Hampshire*, 354 U.S. 234. In that case, the State of New Hampshire had enacted a subversive statute which imposed various disabilities on subversive persons and subversive organizations. In 1953 the legislature adopted a resulution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorization. He tesified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction,

but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins* v. *United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity." Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part: "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it can not be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the Attorney General's investigation. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state and hence that the liberties of the individual should prevail. Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the state's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says: "The most puzzling aspect of the *Sweezy* case is that reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power."

ADMISSION TO THE BAR

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned.

Konigsberg v. *State Bar of California*, 353 U.S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the state highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the state highest court of "whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark

shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

THE SUPREME COURT MADE ITS OWN REVIEW OF THE FACTS

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in *Dennis* v. *United States*, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269) would not support such an inference either. On the matter of advocating the overthrow of the national or state government by force or violence, the Court held (as it had in the companion case of *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, decided contemporaneously) that past membership in the Communist party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the Bar Committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but (at 353 U.S. 270) said that "prior decisions by this Court indicated that his objections to answering the questions (which we shall refer to below) were not frivolous."

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions." In a footnote appended to this statement it said (353 U.S. 259): "Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State Bar investigating his application. (353 U.S. 284–309.) Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations including the Communist Party. The Bar Committee conceded that he could not be required to answer a question if the answer might tend to incriminate him but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party. We think, on the of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion that the Committee was concerned with its duty under the statute "to certify as to this applicant's good moral character" (p. 295), and that the Committee was concerned with the applicant's "disinclination" to respond to questions proposed hy the Committee (p. 301), and that the Committee, in passing on his good moral character, sought to test his veracity (p. 303).

The majority, however, having reached the conclusion above stated that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decision, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is ipso facto, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners."

Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to Konigsberg we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist agianst answering certain questions. These might have served to test his veracity at the Committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point (pp. 270–271) it says that the Committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another (p. 273) it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar." The majority thus makes two stated concessions—each, of course, subject to limitations—one, that is important to leave the states free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a state is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the borden of proving in order to establish his right to admission to the bar. The power left to the states to regulate admission to their bars under Konigsberg hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of Konigsberg by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to their bars into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment (p. 312), he says: "[W]hat the Conrt has really done, I think, is simply to impose on California its own notions of public policy and judgement. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The Lerner and Beilan cases above referred to seem to indicate some recession from the intimations, though not from the decisions, in the Konigsberg and Slochower cases. In Beilan the school teacher was told that his refusal to

answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

STATE ADMINISTRATION OF CRIMINAL LAW

When we turn to the impact of decisions of the Supreme Court upon the state administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States.

There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least practical effect. Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view.

CONCLUSIONS

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows on the whole a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong central government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the states which the Supreme Court exercises under its view of the Fourteenth Amendment.

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgement and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendeucy of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policymaker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policymaking powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should have the most unlimited policy-making powers which it now exercises. It is strauge, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power betweea national and state governments one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurriag or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determination of constitutional questions. or for that matter of others. We concede that a slavish adherence to stare decisis could at times have unfortunate cousequences: but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. See the tables appended to Mr. Justice Douglas' address on Stare Decisis, 49 Columbia Law Review 735, 756-758.) The Constitution expressly sets up its owu procedures for amendment, slow or cumbersome though they may be.

Now, Mr. Justice Fortas, isn't that one trouble that has been taking place in recent years—that the Court has been amending the Constitution and the laws and because they've done that, we have had so many judges expressing different views in the same case that even the lawyers themselves hardly know what is the law today? And a lawyer can hardly safely advise a client on a legal opinion as to what

the law is, because the law seems to be what the judges make it today in interpreting the Constitution and interpreting it differently from what it has been interpreted in the past.

Justice FORTAS. Senator, it is true that that criticism, variously phrased, with various shadings, has been made of the Supreme Court of the United States since the time of John Marshall, shortly after the adoption of the Constitution. I, myself, would not subscribe to it. But the criticism has certainly been made during the entire history of the Court.

Senator THURMOND (continues reading):

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, as of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our Federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and Judicial decisions, bear repeating:

"If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." (Quoted in 31 Boston University Law Review 43.)

Now, Mr. Justice Fortas, hasn't the Supreme Court in recent years not been willing to wait on the Congress to do those things they felt were for the best interests of the country, and they have been using their powers in their decision to try to bring about the desired result?

Justice FORTAS. I would not concur with that observation, Senator.

Senator THURMOND. (continues reading).

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this Committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us

grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely, there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Mr. Justice Fortas, don't the statements made by these Chief Justices of the United States, of the Nation, make good sense to you?

Justice FORTAS. That was a very important report in 1958, Senator. It is still an important report. I believe that—and hope—that as time goes on, as the Nation begins to settle down from the turbulent events of the past few years—I sincerely, profoundly hope that a better feeling on all of these subjects will come about.

Senator THURMOND. Then the Chief Justices concluded their report with a brief resolution. It reads this way:

RESOLUTION ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Resolved—

1. That this Conference approved the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That in the field of federal-state relationships the division of powers between those granted to the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confined to it for the determination of questions as to the allocation and extent of national and state powers, respectively, and as to the validity under the federal Constitution of the exercise of powers reserved to the states, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships, as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

Conclusion

We conclude by repeating, so as to emphasize, the last paragraph of the Committee Report:

"The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their consciences adhere to views more consistent with our own."

Now, Mr. Justice Fortas, as I stated, this report was written back in 1958, before you became a member of the Court. And at that time

the chief justices of the Nation felt very concerned about the decisions being handed down by the Supreme Court in the matter of Federal-State relations, and in the other matters referred to in that report.

Since then, of course, the Court has gone much further in this trend. And do not you feel that it is time that the Supreme Court of the United States reappraised its position on these matters and strictly adhere to the Constitution in construing the various matters that come before it?

Justice FORTAS. Senator, I have spoken my piece on Federal-State relations. I earnestly request that reference be made to my written, filed, and published opinions for a reflection of my very strong feelings on this subject.

Senator THURMOND. It is my judgment that this report should have carried great weight with the Supreme Court, although I have perceived no self-imposed judicial restraint as a result of this report. However, I have noted a continuation of these very same trends.

Mr. Justice Fortas, my purpose in asking you these questions and in reading these criticisms of the Court has been to point up to this committee, to the Senate, and to you, what I consider to be very unwise trends in the Supreme Court.

It should be noted that under our form of government there are very few checks on the Supreme Court. The Court is not subject to the democratic process in the same way in which the executive and legislative branches are subject to the will of the people. One check on the Court which the Senate possesses is the power to advise and consent through the nomination of Justices to the Supreme Court.

There are are those who suggest that in exercising that power the Senate merely determines if the nominee is a qualified attorney with the necessary legal background to carry out the duties of this high office, and some go further and, of course, include his character and integrity. I must dissent from this view alone. In view of the Court's enormous influence and relative lack of checks on the Court, I believe the decisions of the Court and the influences they have had on this Nation are a proper consideration of the Senate and are determining in deciding whether or not to confirm a Justice or Chief Justice.

Now, Justice Fortas, I should like to conclude by making clear that my questions and my comments have been intended to point up the record of the Court. They have not been intended to cause you personal embarrassment and certainly have not been motivated by any personal animosity toward you as an individual. In fact, I have not had the pleasure of knowing you. My only concern has been the role of the Supreme Court in the structure of American Government. And I hope you understand that my questions have not been the result of personal ill will toward you.

Thank you very much.

Justice FORTAS. I appreciate that very much, Senator. Thank you.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. Mr. Chairman, I know this has become rather tedious and I appreciate the patience of the nominee. I shouldn't take the time to tell a story to illustrate the point I want to make, but I will.

Along about the beginning of the century, I had two residents in my home county. One of them was John Watts, and the other was Joe Hicks.

John Watts was a bricklayer, and a very fine bricklayer. But he was rather deficient in theology. One day he took the notion he was called to preach. He had no regular church, but when they had no preacher out in some of these small rural churches, John would go out and preach for them. As I say, he was rather deficient in theology.

Joe Hicks sometimes had the unfortunate habit of imbibing too much Burke County corn, which is alleged to be a very potent beverage. And one Sunday afternoon while John was preaching away in the little country church, Joe Hicks, who had had several drinks of Burke County corn, came staggering by. He saw John in the pulpit preaching. And he didn't exactly approve of John's theology, so he staggered up the isle, dragged him to the door, and threw him out.

Joe Hicks was tried in the Superior Court of my county for disturbing religious worship. And the jury convicted him. They had a rather merciful judge, Judge Robinson, looking for some way to let Joe off lightly because the judge apparently didn't approve of John's theology any more than Joe did.

So the judge said:

Mr. Hicks, you must have been so intoxicated at the time of your unseemingly conduct as not to realize what you were doing.

Joe Hicks said—

Your Honor, I had had several drinks, but I wouldn't want Your Honor to think that I could stand by and see the word of the Lord being moniched up like it was without doing something about it.

Now, frankly, I have studied the decisions of the Supreme Court pretty carefully for many years, and I cannot escape the conviction that the Constitution of the United States is being moniched up by the Supreme Court. And I could cite many examples. But I want to close with one in just a moment.

Now, from my study of the law, I am convinced that ever since back in the days of England, when the Chancellor acted as the King's conscience, and started to originate the rules of equity, that one of the most fundamental rules of equity has been injunctions to restrain individuals from trespassing upon the property of other individuals.

From my study, I am satisfied that this is one of the primary jurisdictions of the courts of equity. And every State in this Union, so far as I have been able to determine, recognizes the granting of injunctions to restrain trespasses upon property was a function of a court of equity. All of the courts having equity powers in all of the State courts exercise those powers. Similar powers are exercised by all of the Federal courts.

Just judging by the number of decisions in my own State, recognizing that courts of equity have a right to restrain persons from trespassing upon the property of others, I would venture the assertion, which is only an estimate, that there were probably a thousand cases in the Federal and State courts of the United States holding that this was a fundamental power of courts of equity.

Also, as I interpret the due process clause of the fifth amendment, and the due process clause of the 14th amendment, and the due process clause of all the State constitutions, it was well recognized that one of the basic rights of an American citizen is that he could acquire

and own real estate and use it for lawful purposes without interference from other individuals.

And so up to the 20th day of May 1968, every State court exercising equity jurisdiction in the United States had the power to issue injunctions to keep people from trespassing upon the property of other people. And the owners of such property had the right to use a reasonable amount of force by way of self-help to eject from their property people who came on there against their will. And this is all recognized as inseparable from the right of private property guaranteed by the due process clause of the fifth amendment and the 14th amendment, and similar provisions of the constitutions of all the States.

This leads up to this.

Mr. Justice Fortas said in his book, "Concerning Dissent and Civil Disobedience", at page 34:

> The Supreme Court of the United States has said over and over that the words of the First Amendment mean what they say, that they mean what they say and nothing else.

I agree with that statement 100 percent.

Now, here are the relevant words of the first amendment: "Congress shall make no law abridging the freedom of speech."

Now, the only thing that statement deals with is the right of freedom of speech.

However, on the 20th of May of this year, the Supreme Court of the United States handed down its decision in *Amalgamated Food Employees* v. *Logan Valley Plaza*. And here for the first time, so far as I have been able to read, the right of freedom of speech secured by the first amendment gave a man a constitutional right to go on the private property of another man engaged in a private business, against the will of this other man for the purpose of urging the customers of this other man not to patronize his lawful business. And as a consequence of that, the Supreme Court added words to the first amendment which nullified the trespass laws of the 50 States and nullified the jurisdiction of courts of equity in the 50 States. This man could not get any injunction from any court anywhere in the United States, either Federal court or State court, to restrain other people from coming on his private property and using his private property to try to persuade his customers not to deal with him.

The Court left this man helpless because since they converted what had always been a trespass into a constitutional right by adding to the freedom-of-speech clause in the first amendment something that is not in the first amendment. That is, the right to go on another man's property and use it against his will. They nullified not only the jurisdiction of all the courts of equity, but in my opinion the only conclusion you can make from that decision is that they also nullified the man's right which he had enjoyed throughout all the previous generations to use reasonable force to eject people from his premises who were on it against his will.

So this is an illustration and a very simple illustration of how I think the Constitution of the United States has been and is being moniched up by the Supreme Court, because if the words of the first amendment mean what they say you cannot possibly take those words concerning freedom of speech and say under the first amendment the

trespass statutes of all 50 States are nullified, that the jurisdiction of all courts exercising equity powers are nullified, and a man no longer has the right to deny to others the use of his private property against his will.

Now, I say that cannot be justified. And that is the decision handed down by a majority of the Court on the 20th of May.

I say that is taking words of the Constitution and stretching them to mean something which they don't say, and to accomplish purposes which are inconsistent with other clauses of the Constitution and inconsistent with, at least, I would say, estimate, a thousand decisions of State and Federal courts in times past.

And that is what has happened to the Constitution of the United States. And it is being done by judicial decisions, usually by a divided Court, made by judges. And I don't question their good intentions at all, but I just cite that.

I am going to close now. But if time permitted, I could cite you many other cases where the Supreme Court in interpreting the Constitution, or under the guise of interpreting the Constitution, has added to the Constitution things which are not in it, and subtracted from it things which are in it.

I would like to give you a chance to comment if you wish.

Justice FORTAS. I don't think it would serve any useful purpose.

Mr. Chairman, may I just say this. I want to express my thanks to you for your unfailing courtesy and consideration, not only in this hearing, but in the 1965 hearing, when I was before you.

I want to thank the members of the committee, and particularly if I may, I would like to express my thanks to my highly esteemed senior Senator from Tennessee, Albert Gore, who has sat here with me through all of this and has been a source of strength and of great comfort and understanding.

I would like the record to show my very deep appreciation for Senator Gore.

Senator ERVIN. Mr. Chairman, I would like to express to the nominee my deep appreciation of the extreme patience he has manifested throughout these hearings and also to express my regret that they have been so protracted. They have been protracted because, I think, that if the nominee becomes Chief Justice of the Supreme Court he will be the second most powerful man in the United States, next to the President, as long as he lives, which I hope will be a long time, and as Chief Justice Harlan F. Stone said in the *Butler* case:

> The Supreme Court can restrain the President and the Congress from unconstitutional actions, but the only power on earth which can restrain the Supreme Court itself from unconstitutional action is the self-restraint of its members.

And so it was necessary for me to put a lot of Supreme Court decisions in the record and I think only one in which the nominee did not participate to illustrate a lack of judicial restraint on the part of the Court.

I have to confess I think the nominee, for whom I have a great personal liking, is as congenial a gentleman as I have ever encountered.

Justice FORTAS. Thank you so much, Senator.

The CHAIRMAN. This will close the open hearings on Justice Fortas.

Now, the committee will meet in the Judiciary Room at 10:30 in

the morning on Mr. Justice Thornberry. He will be questioned by part of the committee. Part of the committee does not think that there is a vacancy on the Court. And he will probably be called back after Mr. Justice Fortas' matter is determined by the Senate.

(Whereupon, at 1:10 p.m., the committee recessed, to reconvene at 10:30 a.m., Saturday, July 20, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

SATURDAY, JULY 20, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 11 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), Ervin, Hart, and Scott.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos and Claude F. Clayton, Jr.

The CHAIRMAN. On yesterday the Chair asked Mr. Justice Fortas to explain his testimony about steps that the Court should take to disseminate public information about the decisions of the Supreme Court. He was requested to submit a letter, which he did. That will now go in the record.

(The letter referred to follows:)

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., July 19, 1968.

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

MY DEAR MR. CHAIRMAN: During the hearings on my nomination as Chief Justice. I affirmed my belief that the Supreme Court should be subject to open, full public discussion and criticism. I said that "If the Senate agrees and I become Chief Justice, there is only one thing that * * * has thus far occurred to me very strongly and that is that we must carefully explore some means of communicating to the public more information about what the Court does, so that the public can undersand and the public can more openly and more effectively criticize what we do" (p. 271). It has been suggested that I should elaborate this statement.

The subject is not a new one. It has received the attention of the Court, the legal profession, and the press and media for some years. There are many difficulties in the way of working out specific improvements, hut as public interest in the Court's decisions has increased, the need for finding some solutions to these problems seems to me to have increased.

As you know, the Supreme Court functions as a hody on all matters relating to the Court's work, so that anything that might be proposed would have to have the approval of the members of the Court as a whole. I must say at the outset that I have not had occasion or opportunity to consult my brethren on the Court as to their views, although I know that the problem has been given considerable attention by the Chief Justice of the Court and various of the associate justices.

With this reservation, I list some of the avenues that I think might be considered in connection with the objective of improving public informatiou about the Court's decisions:

(1) A few years ago the Court began announcing and releasing its decisions and opinions on any day in the week when the Court was sitting. This superseded the previous custom of announcing decisions only on Monday. This change resulted in relieving to some extent the tremendous burden placed upon the press of receiving the opinions only when the decisions are announced from the bench and writing or dictating their accounts of the decisions for publication forthwith or promptly.

Even with the change, the burden is still extremely heavy. The opinions are frequently long and complex. The time pressure is very great. Some of the media have specially qualified personnel who are assigned to cover the Court. All of the reporters, in my opinion, do a commendable job—sometimes even a superlative job—in the circumstances; but I think that all concerned would agree that if some way could be worked out to facilitate their task, the stories that appear in the press would be more informative—particularly in the sense that they could more adequately convey to the public the substance and tenor of the Court's opinions.

(2) The broader problems, however, are, first, to increase public education with respect to the Constitution and the Court—a matter which is substantially outside of our province but as to which there have been some good developments in recent years, and second, to devise some system by which the media can arrive at a better understanding of the work of the Court and its opinions, and to convey that to the public.

A group under the auspices of the Association of American Law Schools a few years ago adopted a program by which it provides analytical material to the press before the arguments of cases, in order to aid the media in obtaining a quick mastery of the issues to be presented and in understanding the decisions and opinions when handed down. It might be that the Association and representatives of the media which are interested in this service could explore its possible expansion, perhaps into the post-decision phase.

I should say that participation by Court personnel, other than the Justices, in this sort of service has been discussed from time to time, but it involves additional and significant problems of propriety and procedure.

(3) It has been suggested that means should be found of preparing statistical and other information about the Court's work in a form which would be usable by the media and informative to the public. For example, the bulk of the Court's work is concerned with cases which are handled at the level of petitions for certiorari and jurisdictional statements. This work is substantially unavailable to the public for examination and criticism because of its vast volume. It has been suggested that statistical analyses, tabulations, and other methods of presentation might be worked out which would make this information available to the media and the public. For example, you will recall my reference to the fact that between 92 and 93 per cent of all the criminal cases which were presented to the Court during its last term were either affirmed or allowed to stand. This type of information is not presently assembled by the Court as a routine matter nor is it readily available to the public.

(4) Some members of the bar of this Court have discussed from time to time the desirability of forming an organization of practitioners before this Court. It may be that this idea, if realized in fact, would assist in accomplishing the purpose under discussion. If such an organization were formed, it would of course be entirely on a private basis, separate and independent from the Court itself. There are many examples of specialized bar associations which have functioned extremely well and with benefit to the public and the profession.

(5) I am sure that other problems and possibilities exist which can be fruitfully explored, including—as an example—the special question of television and radio reporting of Court decisions. I should hope that the cooperative effort of all concerned would open many avenues for achieving the desired result.

Mr. Chairman, permit me to say that the hearings before your Committee have impressed upon me anew the acute interest and concern that exist with respect to the work of this Court. While there are many aspects of the functioning of a court that must necessarily be carried on in privacy in order to encourage the freest exchange of views, I believe that it is our duty constantly to seek means for exposing to the public as fully and realistically as possible the aspects of this Court's work which are of necessary and proper concern to the public. I repeat that the continuation of the effort to develop ways and means of accomplishing this result is not within the power or responsibility of any

single justice or of the Chief Justice alone. It is the function and prerogative of the entire Court, and it is also a task and a responsibility in which the Bar, the teaching profession and the media all share.

I appreciate your kindness and your courtesy and I submit this communication for the record if you deem appropriate.

Respectfully yours,

ABE FORTAS.

The CHAIRMAN. Judge Thornberry?

STATEMENT OF HON. HOMER THORNBERRY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The CHAIRMAN. Senator Hart?

Senator HART. I just welcome Judge Thornberry back, and hope we will be able promptly to move on the nomination, which, of course, I indicated last week I certainly favor. I indicated the high regard Judge McCree holds his colleague in, and that is just about enough for me.

Judge THORNBERRY. Thanks, Senator.

The CHAIRMAN. Senator Scott?

Senator SCOTT. I have nothing, Mr. Chairman.

The CHAIRMAN. Gentlemen, we are going to have several rollcall votes, and we cannot get attendance of the committee. I think it proper—I hate to ask you to stay over until Monday, but I think it proper that you do that.

Now, when the hearings first started, the Liberty Lobby and another group had requested to testify. I asked them to wait because we could not take all of the out-of-town witnesses with those who live in Washington that day. I closed the hearings on yesterday without realizing my commitment to these two organizations. Now, we will also hear them on Monday. I judge that it won't take long to get through.

Senator SCOTT. Mr. Chairman, I am glad to see Judge Thornberry here. He and I were associated together in the House Rules Committee for a number of years. I found him a very gracious, competent, amiable, and extremely fine legislator. I am told that he is equally excellent as a judge.

He knows the climate of Washington, and now that the heat wave is broken, I hope the weekend will not be too difficult.

Judge THORNBERRY. Thank you, Senator.

Senator HART. Mr. Chairman—do I understand, then, that the record on the Fortas nomination is not closed until after——

The CHAIRMAN. Those two witnesses, whom I am committed to. I forgot it yesterday when I closed the hearings.

Senator HART. In that event, Mr. Chairman, I would offer for that record a memorandum reviewing in some detail a large number of decisions in which Mr. Justice Fortas participated. I sensed that as the questioning of Justice Fortas proceeded, because of constitutional restraint under which he found himself, he was not able to respond to a great many of the questions that bore on decided cases.

I do not represent this memorandum in any wise as his attitude toward those cases, but I asked the Justice Department if they could

have some of their staff make some comment on a number of the cases in which he participated. That memorandum was given to me. I think it is helpful to all who want to see a balanced reflection of the quality of Justice Fortas' work on the Court. I offer it for the record.

The CHAIRMAN. It will be admitted.

(The document referred to was marked "Exhibit 47" and appears in the appendix.)

The CHAIRMAN. Senator Ervin.

Senator ERVIN. Judge, how long were you in Congress?

Judge THORNBERRY. Fifteen years.

Senator ERVIN. Did you practice any law during that time?

Judge THORNBERRY. No, sir.

Senator ERVIN. Did you study law during that time?

Judge THORNBERRY. Well, sir, I imagine I did; yes, sir.

Senator ERVIN. Did you study the decisions of the courts as distinguished from bills of Congress proposing to make new laws?

Judge THORNBERRY. I did not understand you, Senator.

Senator ERVIN. Did you study the decisions of the courts in addition to studying legislative proposals for making new laws?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. You wrote the opinions for the three-judge district court in the case of *United States of America* v. *the State of Texas* and others, which is reported in 252 Federal, starting at page 234?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. Wasn't that the first decision of any court, Federal or State, in this Nation which held that the imposition by a State of a poll tax as a qualification for voting was unconstitutional?

Judge THORNBERRY. I think that is correct, Senator.

Senator ERVIN. And you held it was unconstitutional under the due process clause of the 14th amendment, did you?

Judge THORNBERRY. Senator, I guess I am at that stage where I have to say that that opinion speaks for itself. I would be happy to discuss it with you. That case was assigned to me for tentative writing of an opinion by my colleagues after we had heard the arguments, studied the briefs. I undertook to propose the opinion. It was submitted to my colleagues. They concurred. And I will have to say, sir, if I may, that it speaks for itself.

Senator ERVIN. Well, you do agree with me in my view that Members of the U.S. Senate who are required to pass upon appointments to Supreme Court Justiceships have a perfect right, indeed an absolute duty, to ascertain the constitutional philosophy of any person nominated for that position?

Judge THORNBERRY. I certainly do, sir.

Senator ERVIN. But as I take it from your statement, that you are unwilling, because of your belief of either the limitations or the privileges of a judicial office, to explain your own constitutional philosophy as expounded by you in a decision you wrote.

Judge THORNBERRY. I would not say judicial privilege, Senator. If I may say—I must say, Senator, that I believe that under the separation of powers, under the provisions of the Constitution, under my judicial oath, after once having expressed my views for a court, I ought not to try to amend it, take back, add to, or anything else.

Senator ERVIN. Judge, how does the separation of powers have anything to do with it? The Constitution itself separates the powers in this respect, and says that the question of whether a judicial nominee shall be confirmed or disapproved, is one of the powers of Government that is assigned to the Senate.

Judge THORNBERRY. Yes, sir. And I think that is absolutely correct. And I think in reading the opinions—I know you have, and you are able to do—I can determine from them what my views on that question were.

Senator ERVIN. Well, the thing that has puzzled me through this hearing is this: I can understand why it would be improper to ask a nominee for a judicial office how he is going to decide cases in the future, but I cannot understand why they will not discuss cases they have decided in the past.

I see no reason for that any more than asking about any other writing they ever did, or any speech they ever made.

I have been intrigued during the previous hearings by the decision of the Supreme Court of the United States, by a divided Court, in *Logan Valley Plaza* case, where the Court said the right of freedom of speech for an individual not only gives him the right to speak, but the right to compel another man to furnish the use of his private property as a place for them to exercise that right of freedom of speech. This decision, which converts a trespass into a constiutional right, disables equity courts to grant any relief for that man. And with such a broad sweep of the right of freedom of speech as to private individuals, I am unable to comprehend why appointees to judicial office have no freedom of speech at all before a congressional committee investigating the question as to their constitutional philosophy.

I do not think there is anything in the Constitution that gives a virtual absolute right of freedom of speech to everybody else, and denies the right of freedom of speech to a judicial appointee when he comes to a Senate committee passing on his qualifications.

Well, you held that the poll tax in Texas, which amounted to $1.75 a year, was contrary to the due process clause of the 14th amendment. And you used the following expression to indicate what you thought was the meaning of the due process clause—something which you quoted from *Snyder* v. *Massachusetts* 291 U.S. 97, page 105. "To determine whether a right is protected by the due process clause, a court must look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental."

Now, don't you look to the past to ascertain what the traditions of the people are?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. And didn't you know at the time that you applied those words in that case, that according to the past practices of the American people, it had been a custom in this country from the earliest days to impose taxes as a condition precedent to the right to vote?

Judge THORNBERRY. I think the opinion speaks for itself, Senator.

Senator ERVIN. Well, I wasn't asking about the opinion. I was asking about the past practices of the American people.

At any rate, since you are reluctant, or unwilling for the reason assigned by you to answer that question, I will answer it for myself.

At the time the due process clause was written in the fifth amendment by the Founding Fathers, it was embodied in the Constitution and the laws of virtually all of the States that taxes could be imposed, not only on the poll, but also on real and personal property, as a condition of the right to vote. And not only that, but that the payment of such taxes was also in many cases a prerequisite to the right to vote.

And so frankly I am at a loss to say how something can be said to be incompatible with the traditions of our people when the traditions of our people show that that thing was practiced by our people. Furthermore, I cannot see how hostility to the imposition of such a tax is a fundamental principle rooted in the tradition and conscience of our people when virtually all of the State constitutions adopted by the people provided for such a tax at the time the due process clause of the fifth amendment was inserted in the Constitution.

Now, apart from the case, don't you agree with me that the due process clause of the fifth amendment has exactly the same meaning as applied to the Federal Government as the due process clause of the 14th amendment as applied to the States?

Judge THORNBERRY. Ordinarily, I think that is true.

Senator ERVIN. So here was something in perfect harmony with the traditions of our people, and in perfect harmony apparently with their collective conscience, which suddenly, on the 9th day of February 1966, became unconstitutional in the State of Texas under the due process clause.

Then the second meaning you assigned to the due process clause of the 14th amendment is this: You said:

> It inquires whether the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

Don't you agree with me that the base of our civil and political institutions was the base established, formulated and established by the men who wrote and ratified the Constitutions of the United States and the States?

Judge THORNBERRY. Subject to the bill of rights; yes, sir.

Senator ERVIN. Well, can you explain to me how a tax which was imposed and regarded as perfectly valid at the time our Nation was established, and the bill of rights written, can be negative to the base of our civil and political institutions?

Judge THORNBERRY. I endeavored to explain that for the Court in the opinion, Senator.

Senator ERVIN. Frankly, I could not understand the explanation, although I have read the opinion backward and forward.

Now, as a matter of fact, the people who elected the Members of Congress, and the people who elected the Presidential and Vice Presidential electors in our early days, and the people who elected the Governors of our States in such cases as those where the Governor was elected by popular vote, and the people who elected the State legislatures to legislate for them in our early days, when the bases of our civil and political institutions were all elected by voters—virtually all of these voters were required to possess certain amounts of property, and to pay taxes on that property as a condition precedent to their right to vote. That was generally recognized as a practice. To my mind, it is

incompatible with the words that you cited from *Powell* v. *Alabama* to say that those practices were not a part of the base of our civil and political institutions. To say anything is negative to the traditions and collective conscience of our people, when it was practiced by our people, and to say the things which were practiced when the base of all our civil and political institutions were laid are contrary to the due process of the law clause is nothing in the world but assuming the right to substitute for an acknowledge law of an earlier day the opinion of the judge. Is that not true?

Judge THORNBERRY. I hope not.

Senator ERVIN. Well, I will read something on this subject from Associate Justice Black which I think is directly relevant. This is another illustration of the fact that some Supreme Court Justices now on the bench are willing to take the due process law clause and use it as a vehicle in which to write their personal opinions into the Constitution.

I read from *United States* v. *Wade*, a decision which was handed down on the 12th of January 1966. I will read from Justice Black's opinion:

In the first place, even if this Court has power to establish such a rule of evidence, the rule fashioned by the Court is unsound. This "tainted fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind, to draw a sharp line between a courtroom identification today exclusive to an earlier line-up, and a courtroom identification due to memory, not based on the line-up. What kind of clear and convincing evidence can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest. How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses. All of these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using line-up identification as either an alternative to or corroboration of courtroom identification.

Then after omitting some other discussion on the rule of evidence which was manufactured for the first time in that case, Justice Black continues:

But more important, there is no Constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a Constitutional rule of evidence to govern, not only the federal government, but the states in their trial of state crimes under state laws in state courts. The Constitution deliberately reposed in states very broad power to create and try crimes according to their own rules and policies. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal Constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials.

I read this to illustrate the basis on which Justice Black referred to the due process clause.

But I have never been able to subscribe to the thought that the due process clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by Justices to claim power under the due process clause. I have a biding idea that if the framers had wanted to let judges write the Constitution on any such a day to day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written Constitution. With no more authority than the due process clause, I am wholly unwilling to tell that the state or federal courts, that the United States Constitution forbids them to allow courtroom identification without the prosecution first proving that the identification does not rest in whole or

in part on an illegal line-up. Should I do so, I would feel that we were deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the framers to put in it. That to me would be judicial activism at its worse. I would leave the state and federal government free to decide their own rules of evidence. That I believe is their Constitutional prerogative.

Now, as a matter of fact, the only general provisions that you used to invalidate the Texas poll tax as a qualification for voting in Texas was that it was contrary to the traditions of the people and that the right to vote without paying a poll tax had to be ranked as a "fundamental right." Now, isn't that true?

Judge THORNBERRY. Senator, with all due respect, the opinion speaks for itself. You have quoted from it.

Senator ERVIN. I am just trying to see if you put a different interpretation on that.

So, I will have to interpret it for myself.

Judge THORNBERRY. Yes, sir.

Senator ERVIN. I think we would have a very vague and indefinite Constitution if the due processes clause is to be used by a judge to invalidate a State action on the ground that it is contrary to traditions of our people when it is in harmony with the traditions of our people. And that the right to vote is a fundamental right as derived from the Constitution of the United States, when the Constitution of the United States does not give anybody the right to vote.

To my mind, if that is to be the interpretation of the due process clause, I think we are ruled by the personal notions of a judicial oligarchy, instead of by the words of the Constitution of the United States.

Now, you place great reliance in your opinion upon the case of *Griswold* v. *Connecticut*, reported in 381 United States, at page 479. You can comment on this if you care to, or, of course, you can refrain if you do not care to. The only similarity I find between the *Griswold* v. *Connecticut* and the Texas poll tax case is something said hy Justice Harlan in his concurring opinion, at page 581.

"Specific" provisions of the Constitution no less than "due process" lend themselves as readily to "personal" interpretatious by judges whose Constitutional outlook is simply to keep the Constitution in supposed "tune with the times."

Then he comments on certain cases and says that the interpretation in those cases was made in the face of irrefutable "and still unanswered history to the contrary." Now, that is the only part of this *Griswold* case that you cite so much that I see would have any application to the Texas poll tax case. I think your decision in the Texas poll tax case was an interpretation of the due process clause that was made in the face of irrefutable and still unanswered history to the contrary.

I always thought that a decision was only authority in a case if the facts in the first decision were substantially the same as the facts in the second case being considered.

So I am totally at a loss to understand how a decision which holds that a husband and wife have the liberty to use a contraceptive while engaging in intercourse with each other, has any application to the validity of people being required to pay a poll tax in the State of Texas.

Senator SCOTT. If the Senator will yield.

Senator ERVIN. Yes.

Senator SCOTT. Probably on the broad theory of insulation from the consequences.

Senator ERVIN. One is insulating from the consequences, and the other is taking and encouraging the consequences. For the life of me I cannot see, despite the very witty suggestion of the Senator from Pennsylvania, how the liberty of a husband and wife to use contraceptives in having intercourse in the State of Connecticut has anything to do with whether or not it is an unconstitutional burden to require the people of Texas to pay $1.75 poll tax as qualifications for voting.

Senator SCOTT. If the Senator would yield further, I would appreciate if the Senator would distinguish in his argument, based on the harmony with the traditions of the people, and the validity of a law which is founded upon the traditions of the people—How, then would he have argued against the action of the Indians in Boston Harbor in taking the ending of the stamp tax into their own hands? Would the Senator have stood there and said "Don't dump that tea"?

Senator ERVIN. But there was nothing in the Constitution of the United States that forbade them to do that. The Constitution has not been written. Yes, I think they were violators of the law——

Senator SCOTT. Thank God for it.

Senator ERVIN. But they were violating the law in order that we might rule ourselves, and be protected from governmental tyranny. The Constitution logically flowed from their actions and the Constitution is what I'm trying to protect this morning. So I am trying to save something which the Indians in Boston risked their lives for.

Senator SCOTT. I am sure you understand my concern in taking up for the Indians.

Senator ERVIN. Yes—so do I. In fact, I think I am the only man in the history of the U.S. Congress that took any pains to see whether they had some constitutional rights.

Senator SCOTT. You are the only Senator who wrote civil rights for the Indians into the recent Civil Rights Act.

Senator ERVIN. Yes. A lot of the Senate voted against it—said it was nongermane to give rights to red men in a bill which was designed to give rights to black men. But not me.

Senator HART. The Senator thinks the 1968 civil rights bill was good in part, then?

Senator ERVIN. Yes, that part and only that part.

Senator HART. That was part of it.

Senator ERVIN. Yes.

To continue, Judge Thornberry, you say in your opinion, in substance, the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause.

Now, you also said in your opinion that the case of *Breedlove* v. *Sutles* was not on the same subject, or at least had no application. So you might deny the words *of Breedlove* v. *Sutles* reported in 302 United States, at page 277.

But before I go into the *Breedlove* case, your statement said that the right to vote is one of the fundamental personal rights included within

the concept of liberty contained within the due process clause. Were you talking about the fifth amendment or the 14th?

Judge THORNBERRY. Senator, I think it is plain in the opinion.

Senator ERVIN. Well, in the *Breedlove* case they said this and I think this is absolutely a correct statement:

> The privilege of voting is not derived from the United States, but is conferred by the state, and safe as restrained by the 15th and 19th Amendments and other provisions of the Federal Constitutions, the state may condition suffrage as it seems appropriate.

Do you agree whether that is a correct statement of abstract law? That is not taken from your opinion—it is taken from the *Breedlove* case.

Judge THORNBERRY. You ask me what, Senator?

Senator ERVIN. Whether the following is a correct statement of law, of the Constitution:

> The privilege of voting is not derived from the United States, but is conferred by the state and safe as restrained by the 15th and 19th Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate.

Judge THORNBERRY. I agree with it as an abstract principle of law, except subject to what decisions have been made by the Supreme Court since then.

Senator ERVIN. An abstrct principle of law? It is an abstract principle of law that has been applied many times, hasn't it, in the history of this country?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. And thereby made concrete. Under the decisions, isn't it held that the State has a right to prescribe qualifications for voting, and that the right to vote comes from the States and not the Federal Government?

Judge THORNBERRY. Generally speaking, Senator, it has been true, except by actions of Congress and decisions of the Court since that time.

Senator ERVIN. Well certainly the acts of Congress cannot invalidate what the Constitution says.

Judge THORNBERRY. I agree with that unless those acts of Congress have been held constitutional.

Senator ERVIN. Well, before I pursue the question further at this time, I will go to something else.

Can you tell me any provisions of the Constitution that confers the right to vote?

Judge THORNBERRY. Other than that provision that I cited in the opinion.

Senator ERVIN. What provision is that? Due process?

Judge THORNBERRY. Yes, sir—as interpreted.

Senator ERVIN. Now, you state in your opinion that where there is a significant encroachment upon personal liberty "the State must show that the State law is necessary to the accomplishment of a permissible State policy." And you say in your opinion, you reach a conclusion that the imposition of a $1.75 poll tax is a significant encroachment upon personal liberty. Isn't that what you are holding?

Judge THORNBERRY. I think that is what the opinion states. You have it before you.

Senator ERVIN. Well, how does it encroach on personal liberty, any more than the payment of any other tax?

Judge THORNBERRY. Senator, in all deference, you would have me argue the opinion again. I cannot do that.

Senator ERVIN. Well, you think it is not a permissible State policy to impose a tax as a prerequisite to voting?

Judge THORNBERRY. I think you said that is what the opinion stated.

Senator ERVIN. You think no legitimate State purpose is served by the imposition of a poll tax as a qualification for voting, I take it?

Judge THORNBERRY. I stand on the opinion, Senator, with all due respect.

Senator ERVIN. Well, I will have to admit that subsequent to your decision the Supreme Court of the United States by a sharply divided Court, held the Virginia poll tax law invalid. They put it on a different ground than the due process ground. They put it on the equal protection of the law clause. They said that although the equal protection of the laws clause means in plain English that a State must treat all of its citizens alike in like circumstances, the poll tax was unconstitutional because it put a bigger burden on the poor man to pay $1.50 tax than it did on the rich man. And of course, a man in Virginia would have to work for 72 minutes under minimum wages to get enough money to pay the tax—only 72 minutes out of 365 days in the year, to help support his government. In Texas I have not figured that out. But it was $1.75 wasn't it?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. Also you stated in substance in your opinion that a tax of $1.75 was a burden on the people of Texas. That seems to be clear to the notion of most of us who think of all Texans as being oil millionaires.

Judge THORNBERRY. I wish it were true, sir.

Senator ERVIN. Judge, you actually think paying a tax of $1.75 is a very serious burden on the people of Texas? As a matter of fact, isn't that one of the bases of your opinion, that requiring them to pay $1.75 tax is a burden on the people of the very affluent State of Texas.

Well, I assume you do not want to answer.

Judge THORNBERRY. Yes.

Senator ERVIN. Now, Mr. Justice Harlan wrote a dissenting opinion in the *Harper* v. *Virginia Board of Elections* in which he said that "the final demise of State poll taxes" already totally proscribed by the 24th amendment with respect to Federal elections and abolished by the States in all but four States with respect to State elections is perhaps in itself not of great moment. But the fact that the coup de grace has been administered by this Court instead of being left to the affected States or to the Federal political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

I concur fully in that statement.

To my mind, your decision in destroying the poll tax in Texas and the decision of the divided Supreme Court destroying the poll tax in Virginia is like using an atomic bomb to get rid of a mouse. I say that because formerly virtually all States imposed poll taxes and other taxes as a condition to voting. But when their political, not the legal,

notions changed, they were abolished in most States. I hold no brief for the imposition of a poll tax as a qualification for voting as a matter of policy. My State of North Carolina abolished it by statute. That was about 1919.

But I think my State of North Carolina and the State of Texas have a perfect constitutional power to impose poll taxes as a prerequisite to voting.

Not only that. I think a very rational case could be made that it is in accord with a permissible policy.

Justice Harlan gives the reason why this should be permissible.

He talked about the statements that Justice Douglas wrote in the *Harper* case. I have observed previously in the hearings with Justice Fortas that everything that Mr. Justice Douglas said in the opinion in that case, in my judgment had nothing to do with the case except his words that notions of what constitute equal treatment under the equal protection clause do change, which left me with the implication that when the notions of judges change, the Constitution changes. And I think that happened in your decision in Texas.

He mentioned these expressions used by the judges to stretch the meaning of provisions of the Constitution, that things are "precious," that things are "fundamental." He says "and that to introduce wealth or payment of a fee"—personally I never did think $1.50 poll tax was wealth, or $1.50—"to introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious and irrelevant factor." Justice Harlan says this:

> These are of course captivating phrases. But they are wholly inadequate to satisfy the standards governing adjudication of the equal protection issue. Is there a rational basis for past poll tax as a voting qualification? I think the answer to that question is undoubtedly yes. Property qualifications and poll taxes have been a traditional part of our political structure. In the colonies, the franchise was generally a restricted one. Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed. Often restrictions were lifted only after wide public debate. The issue of women suffrage, for example, raised questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live. Eventually a consensus was reached which culminated in the 19th Amendment no more than 45 years ago. Similarly with property qualifications. It is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their admissibility. Most of the early colonies had them. Many of the states have had them during much of their histories. And whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the privilege.
>
> It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and the Nation would be better managed if the franchise were restricted to such citizens. Nondiscriminatory and fairly applied literacy tests upheld in this court by Lassiter v. Northampton Election Board 360 United States, 45, find justification on very similar grounds. These few points, to be sure ring hollow on most ears. Their lack of acception today is evidenced by the fact that nearly all the states left to their own devices have eliminated property or poll tax qualifications by the cognizant fact that Congress and three-fourths of the states

quickly ratified the 24th Amendment, and by the fact that rules such as the pauper exclusion in virginia law, the Virginia Constitution Section 23, Section 24–18, have never been enforced. Property and poll tax qualifications very similarly are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines properly accepted at a particular moment of our history, and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt compelled to remind the Court that the due process clause of the 14th Amendment does not enact the laissez-faire theory of society. Times have changed, and perhaps it is appropriate to observe that ueither does the equal protection clause of that amendment rigidly impose upon America an ideology of unrestrained egaliterianism.

And I would add to that—I am sorry that the State of Texas had not abolished the poll tax as a prerequisite for voting before you wrote that decision. I am sorry Virginia had not abolished it.

But the thing that makes me a whole lot sorrier is that the Court will take the equal protection clause on the one hand, and nullify laws that apply equally to all men in like circumstance, and that the three-judge court in Texas will take the due process clause and nullify the poll tax of Texas. In both of those connections, they are contrary to the history of this country, they are contrary to every decision on the subject ever handed down before, and are contrary, in my opinion, to four separate provisions of the Constitution of the United States.

Senator SCOTT. Would the Senator yield for a clarifying question.

Senator ERVIN. Yes, sir.

Senator SCOTT. What about it right now—to vote? There are times when some of our citizens feel that there is no choice offered to them among the candidates presented. But in some States the poll tax has been cumulative. Therefore, where a citizen elects not to vote, he assumes a penalty, say, of $1.50 during that election, which is carried over to the next. If he is sufficiently depressed or saddened over a period up to 16 years in one State I am told, and then suddenly feels a surge of enlightenment and enthusiasm and desires to vote, he is confronted, or has been in the past, in some of these cases, with the necessity of paying all of the delinquent cumulative taxes which he may be totally unable to do. Now, does the Senator feel that that situation calls for relief or not?

Senator ERVIN. I think the Senator from Pennsylvania has the wrong premise. These people are not denied the right to vote because they elected not to vote. They were denied the right to vote because they would not pay the taxes. A man can pay his taxes and still not vote. And I would say to the Senator from Pennsylvania that while I do not like the policy of a poll tax, I cannot shed any political or any crocodile or any actual tears over denying a man a right to vote when he refuses year after year to pay a poll tax amounting to $1.50 a year for the support of the government which gives him highways to travel over, which gives him schools to educate his children, which gives him law enforcement officers to protect his life and his limb and his property. And I do not think that any great contribution is made to the Government of this United States by people who are too trifling to pay $1.50 or $1.75 a year for the support of the government which

secures to them life, liberty, and property, the right to private property.

Senator SCOTT. Well, there is a fundamental difference there. The Senator refers to some people as "too trifling." I cannot imagine a citizen, applying a definition of a citizen, as being trifling. The right of citizenship is not trifle.

Senator ERVIN. Even in a place as near like the Garden of Eden as North Carolina there are some trifling citizens, and I would surmise there are some in Pennsylvania.

Senator SCOTT. Among all those who have voted for me, I have never found one I would so designate. [Laughter.]

The CHAIRMAN. Let us have order. We will have this room cleared.

Senator ERVIN. There may be some people in Pennsylvania that did not vote for you that entertain different kinds of opinions about people who did vote for you.

Now, when you get away from all the grandiloquent words which you used in your opinion, nullifying the $1.75 annual poll tax in Texas as a prerequisite for voting, and got down to something concrete, you held the poll tax in Texas was a tax on the right to vote, did you not?

Judge THORNBERRY. I believe that is what the opinion says.

Senator ERVIN. Pardon?

Judge THORNBERRY. I believe that is what the opinion says.

Senator ERVIN. Yes, sir. And you said that was made unconstitutional because you could not impose a tax upon the exercise of a constitutional right.

Am I correct in that interpretation?

Judge THORNBERRY. Senator Ervin, you read the opinion very carefully. You are entitled to your interpretation.

Senator ERVIN. That is the conclusion I came to. That when you got out of these grandiloquent words—if I may use that expression, and they are with beautiful words—when you got down to the concrete things, you held that the poll tax in Texas was a tax on the right to vote, and that it was unconstitutional, under the due process clause, to tax a man on the exercise of a constitutional right.

Well, now, as a matter of fact you stated *Grosteen* v. *American Press Co.*, 297 U.S. 233, wherein it held a tax on newspaper was unconstitutional as authority for the proposition that it is unconstitutional under the due process laws to tax the exercise of a constitutional right. I do not care to argue that case with you. But I draw it entirely differently. I do not think it holds that. In that case in the Legislature of Louisiana, some of the members did not like the big newspapers, and so they imposed a tax on advertising of big newspapers and not little ones. It was based on circulation fundamentally, not on the amount of the advertising. If a newspaper had 20,000 or more subscribers, the tax applied to it, if it had 19,999, it did not. And they held it was a discriminatory tax, which it clearly was. But they also said in that case that nothing they said would prohibit an imposition of ordinary taxes on newspapers.

Now, your poll tax is quite similar. It was imposed on all people in like circumstances. They did not pick out that red-headed men would be exempt from poll tax, and baldheaded men would have to pay it. So I do not think it sustains your position at all.

But I won't go along on that.

Don't you know, as a matter of fact, there are taxes laid upon the exercise of virtually all our fundamental constitutional rights—including those embodied in the equal protection clause itself? In other words, the equal protection clause is a guarantee of life, liberty, and property. Now, you have the constitutional right under that to accumulate property, and yet all of our property has taxes on it—it is well recognized it is perfectly constitutional to impose taxes on property.

It is also well recognized most of the taxes of this country, the Federal Government gets the income taxes, and the right to pursue a livelihood and earn money is one of the liberties secured by the 14th amendment, is it not? And yet all income taxes are imposed on the exercise of the right to pursue an employment. So that is a tax on the exercise of a constitutional right. And that is a constitutional right secured by the 14th amendment. Since you cite the *Griswold* case, I think the most personal of all rights is the right to get married. And don't you know virtually every State in this Union imposes a tax on the right to get married in the form of a license fee.

Senator SCOTT. That is their last opportunity to warn them.

Senator ERVIN. And every State in the Union imposes a tax upon the right to pursue many special occupations. The right of a lawyer to practice law, don't they tax that in Texas? Yet under your decision it would be unconstitutional.

The right to operate a filling station in North Carolina, we tax. There are thousands of taxes in this country on the exercise of constitutional rights.

So as I see it, the foundation on which your opinion rests does not exist, to be perfectly frank about it.

I cannot escape the conviction that you and the other judges who concurred in it just personally did not think that was the kind of policy Texas ought to have, and that, therefore, the due process clause invalidated it because it was contrary to your personal notions of the decent thing, and not referred to the Constitution.

Judge THORNBERRY. I am sorry if you have that impression, Senator.

Senator ERVIN. Well, I am going to ask you some questions—not about your cases. Section 2, article I of the Constitution says:

> The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Don't you agree with me that all of the decisions interpreting that provision of the Constitution say that the only people who can vote for Congressman are persons who have a right to vote for the most numerous branch of the State legislature, and that the State legislature only has a right to prescribe those qualifications?

Judge THORNBERRY. Generally speaking, that is right.

Senator ERVIN. Then I call your attention to article II, section 1, subsection 2:

> Each State shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.

Don't you agree with me that under all of the decisions interpreting that clause of the Constitution the power to prescribe qualifications

for those who vote for the presidential and vice presidential electors belongs to the State?

Judge THORNBERRY. Senator, I assume we are not overlooking the 24th amendment.

Senator ERVIN. Well, that places a limitation that they shall not prescribe a poll tax as a prerequisite to voting——

Judge THORNBERRY. For Federal officials; yes, sir.

Senator ERVIN. And isn't the conclusion inescapable that the two-thirds of the Congress that voted to submit the 24th amendment, and the legislators of three-fourths of the States who voted to ratify it entertained the opinion that the right to levy a poll tax would exist in the absence of the adoption of that amendment?

Judge THORNBERRY. I do not know what is inescapable in the mind of those men.

Senator ERVIN. And so your opinion——

Senator HART. If the Senator would yield just a second—here are two Senators who voted for it who do not believe in this either.

Senator SCOTT. I agree with the Senator from Michigan.

Senator ERVIN. At least as far as you can affirm personally—at least two-thirds of the Senate, two-thirds of the House, short of the Senator from Pennsylvania and the Senator from Michigan, entertained the opinion I suggested.

Senator SCOTT. I would say it is as difficult to read my mind, until I have spoken, as it is to read the minds of judges.

Senator ERVIN. That is the reason you can only define the minds by taking the language they use. And that is where I thought you could only determine the Constitution. But I have found that people can read the Constitution contrary to the words in it. And that is what I am trying to demonstrate right now. I want to invite your attention to the 10th amendment:

> The powers not delegated to the United States by the Constitution nor prohibited by the State are reserved to the States respectively, or to the people,

Don't you agree that under that provision of the Constitution the States have the right to describe the qualifications for voters subject only to limitations placed upon that right by the 14th amendment, or equal protection clause; and the 15th amendment; and the 17th amendment; and I believe the 19th?

Judge THORNBERRY. Well, I agree that it is subject to the limitations you have mentioned. I would not describe the 14th amendment as limited as you have.

Senator ERVIN. Well, I am frank to state I think the 14th amendment does limit the right, because it says you cannot have one kind of voting law for one man and another for another.

Judge THORNBERRY. No; Senator. You said the equal protection clause. The opinion does say something about the due process clause of the 14th amendment. I just had to add that exception.

Senator ERVIN. Then I invite your attention to the 17th amendment, which says:

> The Senate of the United States shall be composed of two Senators from each State elected by the people thereof for six years, and each Senator shall have one vote. The electors in each State shall the qualifications requisite for electors of the most numerous branch of the State legislature.

Don't you agree with me that also gives the States the right to prescribe the qualifications for voters, subject to——

Judge THORNBERRY. Subject to——

Senator ERVIN. To the 14th, the 15th and the 19th amendments?

Judge THORNBERRY. Subject to the amendments to the Constitution, the Constitution of the United States, and the Supreme Court decisions interpreting them.

Senator ERVIN. And there are four provisions—four provisions of the Constitution giving the States the right to prescribe the qualifications for voting. And in none of those four provisions of the Constitution is there any prohibition upon a State adopting as a qualification of voting a poll tax. But you hold that that is put there by the due process clause.

There is something in the Book of Proverbs that says that "there be three things which are too wonderful for me; yea, four—the way of an eagle in the air, the way of a serpent upon a rock, the way of a ship in the midst of the sea, and the way of a man with a maid."

Well, there is a fifth thing that is more mysterious to me.

The CHAIRMAN. Wait a minute. There is a rollcall vote.

Senator ERVIN. Wait a minute. There is one thing that is even more mysterious to me than that, and that is how can the due process clause invalidate four other provisions of the Constitution.

The CHAIRMAN. We will recess now until 10 o'clock Monday morning.

Senator ERVIN. Before you do, I would like to have printed in the record the *Breedlove* case. And that completes the examination.

(The document referred to for inclusion in the record was marked "Exhibit 48" and appears in the appendix.)

The CHAIRMAN. The committee is recessed until Monday morning at 10 o'clock. Thank you.

(Whereupon, at 12:40 p.m. the committee was recessed, to reconvene at 10 a.m. Monday, July 22, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

MONDAY, JULY 22, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 a.m., in room 318 Old Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Ervin, Hart, Burdick, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos, and Claude F. Clayton, Jr.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. Mr. Chairman, I would like to make a unanimous consent request at this time, and that is that the staff procure a complete copy of *United States of America* v. *The State of Texas*, 252 Federal Supplement, at page—beginning at page 2–34, and put it in the record at this point.

The CHAIRMAN. It will be admitted.

(The material referred to for inclusion in the record was marked "Exhibit 49" and appears in the appendix.)

STATEMENT OF HON. HOMER THORNBERRY, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES—Resumed

Senator ERVIN. Judge, I asked you yesterday if you did not agree with me that the imposition of poll taxes as a prerequisite to voting was considered to be constitutional prior to your decision in the Texas poll tax case.

Judge THORNBERRY. Yes, sir: you asked me that, and I answered.

Senator ERVIN. You answered in the affirmative.

Judge THORNBERRY. Yes, sir.

Senator ERVIN. Mr. Chairman, I would like to read this which corroborates the judge. 18 American Jurisprudence, Subject: "Elections," section 72, starting on page 226.

> The state in its constitution or the legislature, if its powers in this respect have not been restricted by fundamental law, may require the payment of taxes as a condition to the right to vote.

That is sustained by all of the cases cited, which are multitudinous—about as thick as the leaves in the brooks of Vallhombrosa. And among

the multitude of cases sustained is one of *Friescleben* v. *Shallcross Delaware* case, reported in 2 Houston 1, 19 Atlanta, 576, 8 LRA 337.

Contribution to the support of the government may be made a condition of the privilege of voting. This idea was early prevalent in our scheme of government, and only those who paid taxes, that is only those who helped to support the government, could vote. Those who had real estate or other property were rated upon it, and those who had none were assessed upon the poll.

Now I would like to read from your opinion in the case of *United States* v. *Texas* at page 255:

The State of Texas contends that the 1937 Supreme Court case, Breedlove v. Suttles, 1937, 302 U.S. 277, 58 S.Ct. 205, 82 L.Ed. 252, controls the questions raised in this suit. The only issues, however, discussed by the Court in that case were whether the Georgia poll tax violated the equal protection clause, since it applied only to persons between the ages of 21 and 60 and to women who registered to vote; whether payment of the poll tax as a prerequisite of voting denied any privilege or immunity protected by the Fourteenth Amendment; and whether the poll tax requirements abridged the provisions of the Nineteenth Amendment. Although dicta may be found in the opinion supporting the validity of the poll tax as a prerequisite to voting, we do not believe that the holding in Breedlove applies to the issues raised here or that the dicta, in the light of more recent Supreme Court pronouncements concerning the right to vote (see e. g., Wesberry v. Sanders, supra; Reynolds v. Sims, supra), should guide our decision.

Before I continue with questions I will read you a sentence from the *Breedlove* case. It was by a unanimous count, something which very rarely happens nowadays in the Supreme Court. It used to happen very frequently.

Breedlove v. *Suttles* is reported in 302 U.S. 277. I will read this from page 283:

The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation, long enforced in many states, and for more than a century in Georgia.

Now, wouldn't you read that and say that *Breedlove* v. *Suttles* held that a State poll tax as a prerequisite for voting is within reasonable regulation of the Constitution?

Judge THORNBERRY. You read that statement, Senator, and it speaks for itself. I endeavored to meet the issue in the opinion, Senator.

Senator ERVIN. Let us read this, and see how you reconcile this with what you said in the opinion.

I will read from page 279:

The appellant contends that the privilege of voting for federal officials is one to which he is entitled unrestricted by tax unreasonably imposed through state invasion of his rights as a citizen of the United States. As such citizen, he is entitled to participate in the choice of electors for the President and the Vice President of the United States, and of Senators and Representatives in Congress, and no state may exercise its taxing power so as to destroy this privilege. If the tax imposed by Georgia were increased to a high degree as it can be, if valid, it could be used to reduce the percentage of voters in the population to even less than 8 percent as at present, or to destroy the franchise altogether.

Now—

Whatever property and other economic restrictions on the franchise may have been upheld in the earlier periods of our history, the admission today that a state has the power to prevent its poor inhabitants from participating in the choice of federal officials would be totally contrary to the contemporary spirit of American institutions, and inconsistent with the purposes which are announced in the preamble of the United States Constitution.

Now, it appears a little later in the opinion that they also attacked the poll tax in the *Breedlove* case as a prerequisite for voting in State elections in Georgia.

Now, isn't that last thing, that this poll tax would be totally contrary to the contemporary spirit of American institutions and inconsistent with the purposes announced in the preamble to the U.S. Constitution—isn't that broad enough to assert it was unconstitutional on all grounds, including not only the Constitution, but its preamble?

Senator ERVIN. Well, now—as a lawyer, the only thing I can draw from your opinion on the *Breedlove* case is that you hold that the *Breedlove* case did not decide the question—although the Supreme Court expressly said it did. You base your conclusion that it did not decide the case—although that was the only point before it—because the plaintiffs may have alleged in the complaint not only the facts constituting their cause of action, but also drawing certain conclusions of law, and that they insisted particularly on the argument that it violated the equal protection clause of the 14th amendment, and that it violated the 19th amendment.

I will go away from that case, but isn't it true that the pleadings of a party, the position of a party, the view of the party in its pleadings is to set out the facts constituting its claim. And although we lawyers usually put some conclusions of law in it, the conclusions of law have no proper place in a pleading. Isn't that true?

Judge THORNBERRY. Ordinarily we say that; yes.

Senator ERVIN. Well, in the *Breedlove* case, didn't the plaintiff set out the facts constituting their claim, instead of setting out the law?

Judge THORNBERRY. They may have.

Senator ERVIN. And yet you hold the *Breedlove* case has no application simply because they did not pass on the claim that the poll tax in Georgia was invalidated by the due process clause of the 14th amendment. Is not that the sole basis of that?

Judge THORNBERRY. Senator Ervin, you read the opinion, you read the opinion very carefully, and you are entitled to draw your conclusions from it.

Senator ERVIN. I am trying to draw your conclusions.

Judge THORNBERRY. I know you are, sir. As I tried to state the other day, and I do this in all deference, Senator, perhaps—you know, nobody likes to be disagreeable, and certainly I am one of the least that does. But the opinion is the opinion of the Court, and I have to stand on it, and I will.

Senator ERVIN. Well, when the question confronts the Senate committee, as to whether or not they should confirm you, and they have got to judge that on the basis of your actions in the past, I think you would render a service not only to me but to the Senate and to the country if you would be willing to explain what you meant by the decision.

Judge THORNBERRY. You may be right, Senator. But I stand on the opinion.

Senator ERVIN. It was said here the other day by one of my fellow Senators that the courts did not question the votes of Senators, which of course was not absolutely factual, because I have found they question our votes very frequently. They do it every time an act of Con-

gress comes before them. And I have noticed whenever an act of Congress relating to Communists comes before them, the majority of them always find we voted unconstitutionally. So they question our votes.

But that is beside the point so far as you are concerned.

The CHAIRMAN. Let me ask a question.

Judge, how long were you district judge?

Judge THORNBERRY. A year and a half.

The CHAIRMAN. I want to ask you a question in all seriousness. Did you permit any witnesses on the stand to refuse to answer questions as you have refused to answer them in this hearing?

Judge THORNBERRY. I don't recall—that the occasion ever arose, Senator. But I expect you are right.

The CHAIRMAN. You know I am right. Now, I think, in all candor, that a Member of the Senate cannot try you out as to how you are going to decide a case. He cannot—he should not put you in a position as to how you would decide a case. But I think that is the extent of it. And I am certain that Senator Ervin has got a right to ask you the questions and I think you should answer them, about decisions that you have made. After all, we have a responsibility. And this argument of separation of powers just does not do, because the Supreme Court has constantly gone into the powers of the Executive and the Congress.

Senator ERVIN. A good case can be made for the proposition that judicial nominees ought to answer questions about their past judicial labors when the question before the committee is whether it is going to permit them to go to a greater judicial position. The refusal of nominees for judicial posts to discuss former opinions in which they participated has virtually created a new right not found in the Constitution, which might well be designated as the judicial appointee's right to refrain from self-incrimination.

I want to read something on this point that has some appeal to me. It is a North Carolina newspaper and was written by a very fine editor, Jay Huksins. It is entitled "Advice and Consent."

Television gliberals and their counterparts in the press are doing their best to give Senator Sam J. Ervin, Jr., the Goldwater treatment for having the audacity to question the qualifications of Abe Fortas to sit as Chief Justice of the United States.

And Justice Fortas, like Thurgood Marshall before him, has taken refuge behind the theory of the separation of powers in refusing to answer questions touching upon his understanding of the role of the Court in interpreting and applying the Constitution.

But from some of the admissions he made before the Senate Judiciary Committee, he has not always been too careful to observe this separation of powers in practice.

He admitted having consulted with President Johnson on a number of high policy matters, such as sending troops into Detroit, Vietnam war decisions and the best approach to riot control in the big cities of the Nation.

Thus, Justice Fortas wants to use the separation of powers argument as a one-way street. It is a convenient dodge when Senators, who are charged under the Advise and Consent Clause of the Constitution with approving his appointment as Chief Justice, seek to discover his legal philosophy. But it is quite another thing when he helps to determine Executive policy, such as riot control, which might later have to be settled before the Court on which he sits.

If we were a member of the United State Senate we would automatically vote against the confirmation of any nominee to the Supreme Court who declined to discuss, freely and openly, his philosophy of the role of the Court in the Republic.

These are crucial points. Justice Marshall refused to say what he thinks

certain constitutional provisions mean, and Justice Fortas said only recently that "the exact meaning of the words of the Constitution has not yet been fixed."

If we are to continue to pack the Court with unknown quantities, with men whose future course cannot reasonably be anticipated from statements they are willing to make publicly, then this compact between the people and their government, the Constitution and its amendments, can be made to say anything five men on the Court want to say at any given time.

So we hope Senator Ervin and his associates on the Judiciary Committee continue to hammer away at all nominees to the Supreme Court. Indeed, we hope that they become a little more selective in the individuals they are willing to confirm.

As distinguished a commentator as the Chief Justice of the Pennsylvania Supreme Court said no later than July 8—"let us face it, a dozen recent revolutionary decisions by a majority of the Supreme Court of the United States in favor of murderers, robbers, rapists and other dangerous criminals, which astonish and dismay countless law-abiding citizens who look to our courts for protection and help, and the mollycoddling of law-breakers and dangerous criminals by many judges—each and all of these are worrying and frightening millions of law-abiding citizens and are literally jeopardizing the future welfare of our country. Let us stop kidding the American people. It is too often forgotten that crime is increasing six times more rapidly than our population. This deluge of violence, this flouting and defiance of law and this crime wave cannot be eliminated by pious platitudes and by governmental promises of millions and millions of dollars. The recent decisions of a majority of the Supreme Court of the United States, which shackle police and make it terrifically difficult to protect society from crime and criminals are, I repeat, among the principal reasons for the turmoil and near revolutionary conditions which prevail in our country, and especially in Washington."

It is time somebody started asking questions about how the Court got that way, for pretty soon somebody is going to have to come up with some answers.

I realize you did not participate in those decisions of the Supreme Court. But do you think that the words of the fifth amendment "No person shall be compelled in any criminal case to be a witness against himself" have any possible application to volnutary confessions made to a police officer having the confessor in custody?

Judge THORNBERRY. Senator, you ask me to comment now on some future decision that I may have to make—if you should consent to my appointment—on the Court on which I am sitting if I am not confirmed as to an interpretation of the *Miranda* case.

Senator ERVIN. Now, that is a past decision of the Supreme Court. I am asking you about the constitutional philosophy on which it is based in your opinion.

Judge THORNBERRY. Well, you would bave me comment on what the Supreme Court said about it, Senator Ervin.

Senator ERVIN. Well, is there any place where you would look to find out what the Constitution means than the opinions of the Supreme Court?

Judge THORNBERRY. I did not understand that question, Senator.

Senator ERVIN. Well, is there any better way to test a man's constitutional philosophy than by asking about the opinions of the Court? Do you know any better way? I don't know of any other way to do it.

Judge THORNBERRY. Senator, all I can say is that I cannot answer that question. You ask me to comment upon something the Supreme Court has decided, and with which the court of which I am a member is confronted every time it sits.

Senator ERVIN. Well, due to the vast extent of the jurisdiction which it has manifested in recent years, isn't it possible that the Court will have to pass on about everything that happens in the United States?

Judge THORNBERRY. I cannot answer that.

Senator HART. Mr. Chairman——

Senator ERVIN. I will yield for a moment.

Senator HART. Just a comment.

Mr. Chairman, all of us are unhappy that able nominees, I think very properly, feel themselves restrained from the kind of discussion that lawyers always delight in having in private except when they are talking to a judge—except when they are talking to a judge. And that is really basically our problem here.

We do have the responsibility to consider the qualifications of the men who are nominated. I suppose it would be even more difficult if those men had never written a single article or if they were not judges on a court of record and had never decided a single case. But the two nominees that we consider here are men who have written. And there it is in black and white. After the consideration of briefs and records and oral argument their views with respect to what the Constitution may require and what specific statutes mean are available to us. Parenthetically, this business of how clear is the Constitution sort of amuses me, because we sit in Congress and enact laws, and we do not agree with what we have done ourselves. There is very great argument later as to what we really meant when we enacted a statute.

But the point of my interruption is to attempt to give a little balance on this.

I know it is great for an editorial writer to flail off about the incredible scene in the Judiciary Committee—a man before the committee to go on the High Court and he declines to respond to a specific question. In my book, that is unfortunately the responsibility which is his. And it is not new. It just is not new.

This committee considered for nomination to the Supreme Court a man who was not even a judge—he was not on a court, he was not inhibited in that sense. That is Felix Frankfurter. It occurred in 1939. This committee did call him. And here is what he said in part:

> While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumption on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee, no less than for a member of the Court, to express his personal views on controversial political issues, for example. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should 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.

That man was not even on a court. And his views were not as easily accessible to this committee as the views of Justice Fortas and Justice Thornberry, both of whom have written opinions that are available in the court reports to everybody.

Sure it would be nice to have reactions to hypotheticals, reactions to decided cases. But pleasant as it would be, informative as it might be to this committee, I think the responsibility of this committee is to read what Judge Thornberry wrote in specific cases, the four corners of the paper—read the opinions of Justice Fortas.

That is the unhappy situation that confronts us. It is why, incidentally, I strongly reacted against interim appointments, because we later find before us a man sitting on the Court, but whose right

to remain on the Court lies in the Senate's hands. It is a very uncomfortable thing.

Senator ERVIN. I do not know whether I understood that completely. You said that the nominee shall not participate. If that is so, Judge Thornberry should not be here. The practice we have of inviting him to testify is to do what Justice Frankfurter said.

Senator HART. This was Professor Frankfurter. He was not even a Justice.

Senator ERVIN. Well, they cannot tell us anything about the future, and they cannot tell us anything about the past, which means they cannot tell us anything.

We cannot judge the future except by the past, and we cannot ask about the past. We cannot ask about the future. I will have to say that all of the lack of answers remind me of one time I was defending old man Benton for running a blockade still. They caught him right by the blockade still, at his house, a small copper still, 20 gallon capacity. They caught him redhanded. The only thing I could do is to enter a plea of guilty, and throw him on the mercy or the ignorance of the Court, as one fellow quoted me when I was holding court. So they called him around to the witness stand. The prosecuting attorney asked him where he got his still. He said, "I ain't gwine to tell you." He asked him three or four times where he got his still, and every time he said "I ain't gwine to tell you." Finally the prosecuting attorney appealed to the judge to ask him to tell where he got the still. So the judge was a very diplomatic fellow. He said to the witness, "Now, you told the prosecuting attorney you were not going to tell where you got the still. I assume that you meant to say that you didn't want to tell him." And he said, "That's right, judge. But I ain't gwine to tell him nohow."

Now to digress a little about the applicability of the *Breedlove* case. It has always been my understanding that a plaintiff makes his claim by stating facts, and that strictly speaking it is improper for him to set out conclusions of law as to what constitutional rights these facts invoke, but that the conclusion is supplied by the Court when the Court adjudicates the case, on the basis of the facts alleged.

Now, I just invite attention to the case of Baker v. Warner, 231 U.S. 588, at page 5893:

> The plaintiff Baker had a judgment in the trial court. The defendant Warner took the case to the Court of Appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error in some of those rulings but not on others. We are not limited however to a consideration of points presented by the plaintiff. But this being a writ of error from an intermediate appellate court, tribunal must render the judgment which should have been rendered by the court below on the record then before it.

I think if the courts are going to discharge their function—and I I think the Supreme Court discharged its function in the *Breedlove* case—they are going to have to render judgments based on the facts in the record, and if a lawyer does not argue a point of law, if the facts raise that point of law, I think they necessarily have to decide that point. I think that is exactly what they did in the *Breedlove* case, and I think the *Breedlove* case was a square authority by a unanimous Supreme Court, which should have been followed in the

Texas Poll Tax case, and the *Texas Poll Tax* case is not only contrary to that decision, but it is contrary to every decision handed down before that time in the practice of this country from the beginning of time.

With all due respect, since I have to do all of the talking—ask the questions and then answer them—I think that the decision in the *Texas Poll Tax* case is one of the most illuminating proofs of the validity of the charge which has been made against the Supreme Court of the United States—and I might add other courts—that the meaning of the due process clause of the 14th amendment as applied by the courts is determined by the evanescent philosophy of the judge. This is substantially what Mr. Justice Black says in *Adamson* v. *California*, 332 U.S. 46, page 68. And *Rochin* v. *California*, 342 U.S. 165, page 174. In other words, the due process clause can be made to mean anything the judge wants it to mean. And under that practice, the Constitution is being rewritten by what I call judicial action.

Now, did it ever occur to you that the reason the Court did not specifically pass on the due process clause in the *Breedlove* case is because nobody up to the time the Government made its argument in the *Texas Poll Tax* case ever was so far away from the Constitution as to even imagine that the due process clause had any possible application to the subject?

Judge THORNBERRY. I do not know what they had in mind at the time of the *Breedlove case*, Judge Ervin.

Senator ERVIN. Well, up to that time I think people figured that the Constitution meant what it said, and nobody ever thought up to the time of the *Texas Poll Tax* case the due process clause of the 14th amendment had the slightest thing to do with it, because liberty secured to us by the due process clause gives us the right to travel the highways, and yet we have to pay awful heavy taxes to exercise that constitutional privilege or right. The *Texas Poll Tax* case says, "it is unconstitutional to tax the exercise of a constitutional right."

If you do not have any comments to make about the matter, I will proceed to one other thing, and I hope to finish very briefly.

You participate in the decision of a case in the U.S. District Court for the Western District of Texas, Waco Division, entitled "University Committee to End the War in Vietnam," James M. Damon, John E. Morby, and Zigmunt W. Smigaj, Jr., versus Lester Gun, sheriff of Bell County, Texas, A. M. Turland, justice of the peace, Bell County, precinct No. 4, John T. Cox, county attorney, Bell County, did you not?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. Did you write the opinion?

Judge THORNBERRY. No, sir.

Senator ERVIN. It was a per curiam opinion?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. This is nothing personal. I used to have a lawyer friend down in North Carolina that was somewhat of a wag and he said there were two judges he did not like, did not trust, one was Judge Per Curiam, and the other was Judge Expediency. To some of my audience who are not lawyers like you and I, the per curiam opinion is one that is written for the court, but nobody is willing to assume its paternity.

Well, anyway, you concurred in that per curiam opinion?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. And these people were trying to do some demonstrating, were they not, on the occasion of a visit of the President of the United States down to Texas?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. And they were indicted, or rather warrants were issued, charging them with something in the nature of disorderly conduct, and they were arrested, and then they brought this suit for two purposes. One, to get an adjudication that the Texas statute under which these warrants had been issued, article 474, was unconstitutional under the right of freedom of speech, under the first amendment. They asked for injunction against the prosecution of the cases, and asked also for a declaratory judgment that article 474 of the Texas law was unconstitutional under the first amendment. I do not know whether you want to comment on that or not.

Judge THORNBERRY. Senator, here is my problem again. There is an application for certiorari on that case. It is a very delicate area. I do not believe I ought to be commenting on a case that is on appeal.

Senator ERVIN. There is an application for certiorari?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. Well, I won't insist on you answering. Anyway, I was just asking about the facts that gave rise to it.

As I construe the opinion, those facts are these. These demonstrators were demonstrating for the purpose of expressing their opinion about the undesirability of the Vietnam war. They were charged with violating article 474, Texas law concerning disorderly conduct. And the court held that this crime was unconstitutional under this statute. That is, article 474 was unconstitutional under the first amendment.

I just read this into the record.

We reach the conclusion that Article 474 is impermissible and unconstitutionally broad. The plaintiffs herein are entitled to their declaratory judgment to that effect, and to injunctive relief against the enforcement of Article 474 as now worded, insofar as it might affect rights guaranteed under the First Amendment.

I digress from reading to observe, since I have to do the interpretation of the opinion—that the three-judge district court of which you were one of the members found most emphatically, and in the clearest language, that article 474 was unconstitutional and was therefore something that should not have been enforced against anybody in Texas.

Now, this is what disturbs me.

After reaching that conclusion the Court says—

However, it is the order of this Court that the mandate be stayed and that this Court shall retain jurisdiction of the cause pending the next session of the Texas Legislature at which time the State of Texas may, if it so desires, enact such disturbing the peace statute as will meet constitutional requirements.

Now, here is an opinion on which they held that the statute was unconstitutional, that these people were entitled to a declaration to that effect, but that the Court would refrain from making is declaration that the statute was unconstitutional effective until the next Legislature of Texas should meet and have a change to enact a law that would be constitutional.

Now, isn't that a correct analysis of what the Court did?

Judge THORNBERRY. I think that is correct.

Senator ERVIN. In other words, here the plaintiffs were entitled to relief against the Texas statute, and all other similarly situated were entitled to relief against the Texas statute on the ground it was unconstitutional, and a unanimous district court composed of yourself and two other Federal judges held it was unconstitutional. But they held further that you would not do anything about it, you would not give these people any relief, until the Texas Legislature—in other words, the court suspended its decision that the article 474 was unconstitutional, and left it within the power of the law enforcement officers of Texas to harass people with it until the Texas Legislature could meet and have an opportunity to pass a constitutional statute.

Now, for fear I have misinterpreted that decision, because I have to do my interpreting, and perhaps I am a biased man because I believe Senators ought to scrutinize nominees for the Supreme Court, instead of accepting them—I want to put this decision in the record.

The CHAIRMAN. It will be admitted.

(The document referred to was marked "Exhibit 50" and appears in the appendix.)

Judge THORNBERRY. Senator, may I add, in connection with the application of certiorari, that the mandate—that court's mandate has been stayed.

Senator ERVIN. Yes. But the application for certiorari was not made until some time after——

Judge THORNBERRY. After this judgment; that is right.

Senator ERVIN. After the three-judge district court suspended the constitutional provisions.

Judge THORNBERRY. The courts are criticized continually for not exercising restraint. This court was striking down a State statute which was too broad—and the court had confidence the State authorities were not going to harass these people any more, and did not want to take away from the State a disturbing-the-peace statute.

Senator ERVIN. Well, under the doctrine of separation of powers, the question whether somebody is going to employ this statute was a subject for the executive branch of the government of Texas, and not for the court. So it looks like there was a transgression of the separation of powers there.

Judge THORNBERRY. I do not think so. But you may be right.

Senator ERVIN. Well, here is the trouble——

Senator HART. Excuse me.

Really, that is what we have been doing for years, as an example, when courts find that the one-man, one-vote constitutional right has been violated. There is some restraint. They respect the legislature, they seek to bide their time, and attempt to have some respect for the legislature.

Judge THORNBERRY. There was precedent for this action.

Senator HART. It is not an easy case.

Senator ERVIN. Well, that has become a reason for suspending the Constitution. It was not always so. The Constitution ought not to be suspended for a single instance except the carrying out the thing while there is an appeal. There was no appeal there in your case, no application for writ of certiorari.

Now, here is what I think is an incorrect interpretation of the Constitution. My feeling that the American people are entitled to be ruled by the Constitution causes me much grief in respect to many decisions of late. The Supreme Court whenever it wants to, and other courts have gotten in the habit of suspending people's constitutional rights at their election. And here is what the law used to be when the Constitution was more respected.

I read from the greatest decision the Supreme Court of the United States ever handed down, *ex parte Milligan:*

> The Constitution of the United States is a law for rulers of the people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the witness of man than that any of its provisions can be suspended during any of the great exigencies of government; such a doctrine leads to anarchy or despotism.

And yet this three-judge court in Texas suspended the first amendment, not until the appellate court could rule on it, but until the Texas Legislature convened and could perhaps have a law more in harmony with the Constitution.

It has not been my purpose to embarrass you in any way. But I do hold a very solemn obligation as a Senator of the United States, because I have to either vote to approve or disapprove the nomination made by the President for appointment to the Supreme Court of the United States, and it has most serious consequences. In my judgment—and this is something Justice Fortas and myself agreed on—if a majority of the Supreme Court of the United States will not adhere to the Constitution in rendering its decisions, constitutional government cannot endure in this country.

Now, just one more reference as to the doctrine of the separation of powers. You were a very distinguished Member of the House, and were a very important member of the Rules Committee. Were you not appointed and confirmed as a judge for 5 months before you retired from the House?

Judge THORNBERRY. Yes, sir.

Senator ERVIN. And you remained in the House in order to assist as a member of the Rules Committee, and as a Member of the House in the capacity of legislator; did you not?

Judge THORNBERRY. I remained in the House; yes, sir.

Senator ERVIN. Well, you had a commission as a judge at that time?

Judge THORNBERRY. No, sir; no, sir.

Senator ERVIN. But you had been——

Judge THORNBERRY. Confirmed.

Senator ERVIN. You had been nominated by the President and confirmed by the Senate.

Judge THORNBERRY. Yes, sir. Now, Senator——

Senator ERVIN. And what happened to your commission? Normally the President issues a commission immediately after the Senate confirms a nominee for a judicial office.

Judge THORNBERRY. Well, Senator, always when you have one person living and one not living, it is a little difficult to explain a situation. But here is the situation.

At the time I was confirmed, I had the hope, as we always had, and I am sure you have had that hope, that Congress would soon

adjourn. It had been my intention to serve until that particular session of Congress adjourned, so that the people in the district which I had been privileged to represent would not be without representation in the House. When it became apparent that that would not happen, I think it was within 2 months I wrote a letter to the Governor of Texas resigning as a Member of Congress, made it effective December 20. He immediately called an election to fill that vacancy, effective that date. And the issuance of the commission has nothing to do with that at all.

Senator ERVIN. Why wasn't the commission issued after your confirmation by the Senate.

Judge THORNBERRY. I am unable to answer that question.

Senator ERVIN. Well, I would have gotten a little restive if I had that kind of a situation.

Judge THORNBERRY. Well, sir, I had no doubt the President would tender the commission when I tendered my resignation, I made it effective.

Senator ERVIN. I was just struck this is not too much of a separation of powers. Here is a man who has been nominated and confirmed as a district judge, who was eligible to receive an immediate commission, and for some reason, passing strong, or very unusual, does not receive a commission for 5 months, and continues to function as a legislative officer while he has been selected and confirmed as a judicial officer. I do not see too much devotion to the doctrine of separation of powers during that 5-month period.

Judge THORNBERRY. Well, sir, you may be right, Senator. I thought that I exercised my responsibility as a Member of the Congress, and I had not taken a judicial oath. I tendered my resignation, without any thought that President Kennedy would withhold the commission. Of course, he did not issue the commission because, unfortunately, he was assassinated. But the commission was issued.

Senator ERVIN. Well, it certainly is refreshing to run into a man who at any time since about 1960 anticipated that Congress would adjourn on an early date. I have long since abandoned that hope.

Thank you.

Judge THORNBERRY. Yes, sir; thank you.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. Judge Thornberry, I shall not ask you any questions. Chief Justice Warren has never submitted a firm resignation. The President of the United States has never made a firm acceptance. So in my opinion, there is no vacancy. I see no need to propound questions to a nominee where there is no vacancy.

I would hope that the chairman of the committee would ask you to come back later in the event that favorable action should be taken on Justice Fortas' nomination for Chief Justice.

Thank you very much.

Judge THORNBERRY. Thank you.

The CHAIRMAN. Thank you, sir.

Judge THORNBERRY. Thank you.

The CHAIRMAN. Any questions?

Senator HART. Mr. Chairman, several letters that have been addressed either to you or to others of us on the committee——

The CHAIRMAN. Any questions for the nominee?
Senator HART. No.
The CHAIRMAN. You may stand aside.
Judge THORNBERRY. Thank you, sir.
The CHAIRMAN. Thank you.
Senator YARBOROUGH. Mr. Chairman, may Judge Thornberry be excused at this time?
The CHAIRMAN. Yes.
Senator YARBOROUGH. And he will not be required to come back except on order of the Chair. He has been waiting in the city day after day to be called. Is he free to go back now?
The CHAIRMAN. I know he has. Now, if some Member of the Senate, of the committee wants to ask him some questions, I would hold it until plane time today, until this afternoon.
Senator YARBOROUGH. But after today, he would be free to return to his home?
The CHAIRMAN. Yes.
Senator YARBOROUGH. Thank you, Mr. Chairman. Thank you members of the committee.
Senator HART. Mr. Chairman, may I, in connection with the consideration of Judge Thornberry, read just a very brief portion of the letter from the chief judge of the Fifth Circuit?
The CHAIRMAN. That has been put in the record.
Senator HART. In it, the chief judge expresses the strong conviction that both as a man and a judge "Judge Thornberry would make a distinguished Associate Justice of the Supreme Court," from the background of experience and association with Judge Thornberry on that very busy, demanding circuit. I think it very hard to find a more reliable source for evaluation of a man's ability to go on the Court than one who had been serving daily with him and observing his manner, his writing style, his intellect, and his decency.
The CHAIRMAN. Mr. W. B. Hicks.

STATEMENT OF W. B. HICKS, JR., EXECUTIVE SECRETARY, LIBERTY LOBBY; ACCOMPANIED BY MICHAEL JAFFEE, GENERAL COUNSEL

Mr. HICKS. Mr. Chairman, I am W. B. Hicks, Jr., executive secretary of Liberty Lobby. With me today is Michael Jaffe, our general counsel. We are appearing to present the views of our nearly 200,000 supporters, including 15,000 members of our board of policy.
I would like to depart here from my prepared statement and make it clear to this committee we are not here today opposing the appointment of Judge Thornberry. We are here in connection with the appointment of Justice Fortas.
We oppose the nomination of Associate Justice Abe Fortas to the position of Chief Justice of the United States. The reasons for our opposition to his confirmation can be summarized as follows:
1. We are deeply concerned about the effects of the philosophy of "permissiveness" on the right of the people to live in safety—free from the fear of the ever-increasing wave of crime, licentiousness, and pornography that is today inundating the United States—a right that

is far more precious to man than any of the "rights" that have monopolized the attention of the Supreme Court and the Congress recently. We feel that the confirmation of Justice Fortas as Chief Justice will accelerate the ascension of this philosophy of permissiveness which he has publicly advocated.

2. Our second concern is our feeling that the position of the Supreme Court as an institution would be irreparably damaged. Liberty Lobby has the highest regard for the Supreme Court as an institution and as a vital, separate part of our system of government. We feel that the role of the Supreme Court in our governmental system is seriously threatened by the growing public cynicism concerning the independence and stature of the Supreme Court; and we feel that the independence and stature of the Supreme Court demand to be strengthened in the minds of the American people, rather than weakened, as we feel they will be if Justice Fortas is confirmed.

3. Our third objection is that the Congress of the United States—the ultimate repository of the power of the people to govern themselves—is itself threatened by a subordination of the judicial branch to the will of the executive. Liberty Lobby believes that the Congress should jealously guard the position of power assigned to it by the Constitution since the beginning of our Nation; and we think that this power should be reinforced and strengthened rather than weakened by what amounts to a merger of the other two branches of government in opposition to the Congress. We urge this committee and the Senate to begin the process of reasserting the power of the people by rejecting the selection of Mr. Fortas to be Chief Justice.

Is the Senate obliged to concur?

There are those who argue that the power of the President to select members of the Supreme Court should not be interfered with by the Senate, even though the power of the Senate to reject such selections is just as clearly spelled out in the Constitution as is the power of the President.

There are those who would attribute base motives to any who oppose this particular nomination. We say that no Senator should fear such arguments. In the first place, the Senate has already confirmed Justice Fortas on one occasion, to be an Associate Justice. If proof were needed that the Senate is willing to grant great latitutde to the President in such appointments, the previous act of confirmation should serve as such proof. Justice Fortas has been accepted as a member of the Court. It does not follow that he must be accepted as Chief Justice.

There is no reason why this committee should deal with the nomination of a Chief Justice in the same manner in which it deals with the nomination of an Associate Justice of the Supreme Court. After all, the Chief Justice decides the direction of the Court. This is particularly true of a court that is preoccupied with the making of new law, such as the present Court. Supreme Court Justices have a normal human desire to leave their mark on history. To accomplish this it is virtually necessary that they be permitted to author majority decisions of the Court. This is an honor accorded to very few men. More important it is an honor accorded only to those who are personally selected by the Chief Justice.

The CHAIRMAN. When you say the Chief Justice decides the direction of the Court, I know what you mean by the power to assign when in the majority who shall write the opinion. How else can he determine the direction of the Court?

Mr. HICKS. There are several ways, sir, in which—which follow in our statement here.

The CHAIRMAN. Yes. Proceed.

Mr. HICKS. Through the use of this power to dictate who shall and who shall not be allowed to write the new law that issues from the High Bench, a Chief Justice can exercise influence over his fellow members of the Court that is not available to the other Justices.

There are other powers exclusive to the Chief Justice, such as the power to extend time for oral argumentation before the Court, and the vast administrative power that he exercises in his capacity as chairman of the U.S. Judicial Conference, the semiannual gathering of the top Federal judges of the Nation's circuit and district courts. In this capacity, the Chief Justice can have a far-reaching effect on the administration of the justice throughout the Federal court system.

By adding these considerable powers to the already legendary abilities of Justice Fortas to sway the actions of others, the influence of his philosophy on the Court will be undeniably overwhelming. That is why it is important that this committee not overlook the beliefs and motivations so evident in the public record of Justice Fortas.

It may be well and good for this committee to overlook the political viewpoint of a candidate for the position of Associate Justice. We do not agree, but it can be argued that the positions taken in the past by such a candidate need not dictate his future performance on the Supreme Court.

However, the case of Justice Fortas is different. Not only is he noted for his exceptionally strong positions on issues that are vital to the interests of the American people and the future of our Nation; but, in addition, he has amply proved that his philosophical attitudes have not been changed by appointment to the Court in the slightest degree; and we may conclude, therefore, that they would not change by virtue of his being granted the overwhelming power given only to a Chief Justice.

We therefore say to this committee that if the Senate should concur in this nomination, any reasonable person must conclude that the Senate is placing a stamp of approval on the domination of the Supreme Court by the political and judicial philosophy of Abe Fortas, at a crucial moment in the history of the Court and the Nation.

What is the political and judicial philosophy of Abe Fortas?

It is said by the defenders of Justice Fortas that he is a "man of law." We believe that the meaning of this description is clear, that Justice Fortas personally believes that a law must be adhered to until it can be legally changed or repealed.

However, we note that Justice Fortas himself has qualified his belief in the law in writing a booklet entitled "Concerning Dissent and Civil Disobedience," published this year by the New American Library, and described by the publishers as being "in the tradition of the American revolutionary press."

In this booklet, on page 30, Justice Fortas proclaims that:

Revolutionists are entitled, of course, to the full benefit of constitutional protections for the advocacy of their program. They are even protected in the many types of action to bring about a fundamental change, such as the organization of associations and the solicitation of members and support at the polls.

As we read this statement, it can have only one meaning: It is lawful to advocate the violent violation of the law and even the overthrow of the Government by violent means, just as long as the advocate doesn't take part in the action that he stimulates.

Liberty Lobby submits that it is just this kind of permissive philosophy that has created the Rap Browns and Stokely Carmichaels of America today, and we further submit that no member of this committee—or any Member of the Senate—would make such a statement as a part of his platform for reelection, because this kind of thinking is in direct opposition to the will and desires of the American people; and for good reason.

If there is any question concerning the nature of the "revolutionists" referred to by Justice Fortas—whether or not it is the advocacy of violent revolution which he believes is protected by the Constitution—we need only go to his long record of legal defense of violent revolutionaries to discover his true meaning; and perhaps it is best illustrated by a phrase he used as a lawyer in pleading the case of one Milton Friedman before the Supreme Court.

Friedman was appealing his discharge from a top level post on the War Manpower Commission, where he had been fired for disseminating Communist Party propaganda. Now, as we all know, the Communist Party is a foreign-controlled organization which has as its aim the violent overthrow of the Constitution and Government of the United States. Certainly, Justice Fortas was fully aware of this fact at the time.

In the event there should be any question concerning this state, I depart from the record to point out that Justice Fortas has known and has been intimately acquainted with and has worked with some of the top Communist agents in this Nation throughout his career in government and in private life. He was responsible, together with Alger Hiss, and Harry Dexter White, both of whom were Communist agents, for drafting the charter of the United Nations in San Francisco in 1945. In addition to that, earlier, in 1933 and 1934, he served in the Legal Division of the Agricultural Adjustment Administration. Now, this Legal Division contained Alger Hiss, Lee Pressman, John Abt, and Nathan Witt, all of whom were Communist agents.

In addition to that, he was an officer and a national committeeman of the International Juridical Association, which was a Communist Party front group, where Lee Pressman and Nathan Witt and others were also associated. In addition to that, he was affiliated with the National Lawyers Guild, a subversive organization, in the 1930's. In addition to that, he was a member of the Washington Committee for Democratic Action, a subversive organization on the Attorney General's list in the 1940's. In addition to that, he was a member of Harry Dexter White's policymaking circle under Roosevelt. Harry Dexter White, as you will recall, in the Treasury Department was responsible for making many of the policies of this Government, and he did this in connecton with Abe Fortas, Laughlin Currie, amongst others. In

addition to that, Abe Fortas, of course, was the chief defender of Owen Lattimore before this committee in previous years.

And so we cannot say that Abe Fortas is unaware of what the Communist conspiracy was.

Yet in the knowledge that it was his government that was the target of this conspiracy; and his nation that was to be destroyed by the violent revolution being advocated by Mr. Friedman; Justice Fortas went before the Court to plead that the law recognize the "right" of Mr. Friedman to engage in "free commerce in opinion and political expression."

We know that there are those who urge us not to associate the legal advocate of a cause with the cause itself. "Because a lawyer defends murders," it is argued, "is no reason to accuse him of being a murderer, or advocating murder." We agree.

We agree—that is—that a lawyer has every right to defend to the utmost of his ability any kind of accused criminal, guilty or otherwise, with the single aim of establishing his client as being "not guilty." We refuse to accept the idea that a lawyer may claim with impunity that his client has some kind of right to commit a murder—or any other crime against the people—without smearing himself with the guilt of his client.

Had Justice Fortas made a career of defending accused Communists on the grounds that they were not Communists—rather than basing his defenses on the grounds that they had a right to be Communists and to advocate the violent overthrow of the Constitution—that would be a different matter. But we contend that by his past actions and his recent writings, he has consistently demonstrated a "permissive" attitude toward the Communist Party; an attitude that is reflected most clearly in the recent decision of the Supreme Court declaring that Communists have a "right" to employment in the defense industry, even while we are fighting a bloody war against Communists in Vietnam * * * a war that could obviously become bloodier as a result of Communist sabotage in defense plants, thanks to the Supreme Court.

If the Senate votes to confirm to nomination of Justice Fortas to be Chief Justice, it will be voting to impose the Fortas philosophy of "permissiveness" toward communism on the Court and on the Nation.

Would any member of the committee or any Senator care to campaign on a platform calling for the right of a Communist to employment in a defense plant? We think not. But a vote for Chief Justice Fortas is a vote to firmly establish that "right."

As Chief Justice, we can safely assume that Justice Fortas will turn the Court toward the type of "permissive" attitude toward criminal insanity reflected in the *Durham* rule. After all, it was Justice Fortas who, as a lawyer, devised the rule under which a violent criminal may commit rape or murder as though he possessed a license to do so, just so long as he has a proven or provable record of past mental aberration that might have contributed to the foul act which he commits.

We submit that this ruling is an affront to commonsense and an abomination to justice. The people of the United States are entitled

to a far greater consideration from the forces of law and order than this.

Here again I would like to depart from the record just to cite a few of the other cases with which we are certain that Mr. Justice Fortas agrees, such as *Miranda*, *Stovall*, and—well, rather than go on, I would just refer to the reader of the record to the numerous cases that have been discussed by Senator Ervin and Senator Thurmond with Justice Fortas, all of which he agrees.

When is the Supreme Court—and for that matter, the entire judicial system of this Nation—going to recognize that the victims and potential victims deserve at least as much consideration as the courts tenderly extend to those who prey upon them?

One thing is certain: The courts of this Nation will never recognize the needs of the people so long as the Senate rewards the author of the *Durham* rule by giving him the highest position on the highest court of all.

A vote to confirm Justice Fortas is a vote to impose the "permissive" philosophy of "excusable" crime on the Court and on the Nation. What member of the committee or what Senator would wish to campaign on a platform that puts forth the principle of the *Durham* rule, at a time when the people of the Nation are in an unparalleled state of apprehension for the safety of their lives and property?

Permissive toward communism; permissive toward crime; this is the public record of Justice Fortas. These are the objective facts. Then there are the subjective facts which indicate a certain degree of permissiveness toward "corruption." Subjective, we call them, because not everyone agrees on just what constitutes "corruption."

We believe that the majority of the responsible voters of the United States would agree that some kind of corruption is involved when a widely publicized "trust fund" is established, ostensibly for the purpose of preventing conflicts of interest from arising between a President of the United States and owner of a vast network of TV stations, banks, and other properties that are regulated by the Government; when in fact the "trust fund" is carefully designed to allow the continued exercise of the power of ownership by the President and his immediate associates.

In effect, the "trust fund" has been established for one purpose only: to deceive the public. Now, then, comes the designer of the "trust fund" established to deceive the public, and he, Justice Fortas, seeks the approval of the public—through its elected representatives, the U.S. Senate—for promotion to the highest position in the American system of justice.

The subjective facts would show other occasions when Justice Fortas has shown little concern for the public's right to the truth. He has been accused by the press of attempting to suppress news stories that might affect the political career of the President * * * notably, the cases of the Bobby Baker "stereo" gift and the unfortunate Jenkins affair. We think that the President was lucky to have a friend like Justice Fortas who would go so far to protect him from political danger—but we question whether the American people would consider themselves equally lucky to have the "fixer" rewarded by appointment and confirmation to the third most honored office in the Nation.

Then there was the occasion when the subjective facts indicated the strong probability that an election to the Senate of the United States had been stolen by a margin of 87 votes through the falsification of voting records in precinct 13 of Alice, Tex., in 1948. Surely, the public had a right to know the truth of the matter; else how do we expect our elective system to function?

In fact, the candidate who had been defeated by the false votes contended that he had a civil right—guaranteed him by the Constitution—to an investigation of the alleged falsification. But * * * when he took his case to the Federal courts in Texas, and the court agreed that an investigation was in order, Justice Fortas stepped into the case—and I should point out at that time he was a lawyer—in Washington, and took measures to insure that the Federal court could not protect the civil right of the candidate to a fair election.

Justice Fortas was showing little concern for the right of the public to know the truth, or the right of the voters and the candidate to a fair election. Aside from being a probable denial of civil rights in which Justice Fortas participated, we believe that the American people would feel that the "Case of Ballot Box 13" indicates permissiveness toward corruption.

This is the record of Justice Fortas. This is the direction in which the Senate is being asked to guide the Supreme Court. Surely there is somewhere within our judicial system—somewhere within our political system * * * somewhere within our legal system someone who is not so intimately acquainted with corruption who is equally qualified in other ways to become Chief Justice. Surely, there is someone who we cannot only honor with this appointment, but whose appointment would also honor the Supreme Court.

Liberty Lobby calls the attention of the committee to the Gallup poll that appeared in the Post and other papers only week before last. We do so, because the poll illustrates the truth of our next argument. The poll shows what we and the committee already knew, which is that the stature of the Supreme Court in the minds of the American people has declined greatly. In fact, the decline of the Court's stature is proceeding at an ever-faster rate, having fallen 20 percent just in the last year.

The board of policy of Liberty Lobby is overwhelmingly convinced that the power of the Supreme Court—as compared to the power of the Congress—has been, and is still, too great. We might, under other circumstances, welcome a fall from public grace by the Supreme Court: but this is a very dangerous development which cannot be welcomed by anyone.

The respect of the American people for the Supreme Court as an institution is a necessary ingredient in the carefully balance tri-partite system of government under which we live.

I would like at this point to quote briefly from Justice Felix Frankfurter, comments on *Baker* v. *Carr*. He said:

> The Court's authority possessed of neither the purse nor the sword ultimately rests on sustained public confidence in its moral sanction

"Sustained public confidence in its moral sanction." It has no purse, no sword, it has only public confidence, and it is losing that public confidence at an alarming rate.

I doubt that any member of the committee would look with regret on the Court's decision to overrule the presidential seizure of the steel mills in 1952. In retrospect, it appears that the Court—under some circumstances—can prove to be the last counterweight to the power of the executive branch. This is as the Founding Fathers intended, and is a part of the checks and balances which hold our Government together.

President Truman was no tyrant. He was, if anything, overzealous in his actions, which were no doubt motivated by a desire to promote the war effort of the day. But that is not to say there will never be a President whose zeal or desire for power might lead him to confront the Congress and the Court with an act of presidential tyranny. And, if that day should come, and find the Supreme Court utterly devoid of public stature and support, the structure of our Nation could collapse.

Therefore, we can only view with alarm such a development of a loss of public faith in the Supreme Court. It has been brought on by the Court's own actions and the Court's own lack of restraint, we recognize, but it is a bad thing, and it should not be aided and abetted.

There is no question but that Chief Justice Earl Warren is in large part the reason behind the present low status of the Court. His appointment and subsequent service on the Court has damaged the Court almost beyond repair. He was a mistake. He should not have been appointed, and he should not have been confirmed.

But the Senate cannot be held responsible for the damage done to the Court by Earl Warren. There was nothing—absolutely nothing—in his public record to indicate the amount of damage or the kind of damage he was to do to the Court. Liberty Lobby regrets Earl Warren, but we recognize that he has done just about all he can possibly do to bring down the Court in the public mind.

That is why we would prefer to see Chief Justice Warren continue to serve rather than to see him replaced with a younger, more ambitious Chief Justice whose record—unlike Warren's—is an open book for all to read. If the Warren Court is bad—and it is—a Fortas Court would be worse—and it will be.

And the American people will be the losers thereby. They will lose—perhaps most important of all—their last vestige of faith in the Supreme Court as a functioning, integral part of our Government. Instead, the Fortas Court will be seen—at best—as a mere subordinate to an ever more powerful Executive; or—at worst—a useless, untrustworthy appendix that has no worthwhile purpose. Either way, the nature of our system of checks and balances will be dangerously unbalanced.

Therefore, we urge the Senate to honor the Court. Insist that the President name for you a man whose presence on the Court will add to its stature, rather than detract from it. You do the Court no honor if you confirm Justice Fortas.

Finally, Liberty Lobby urges the Senate to consider its own stake in this matter of stature and independence. You are here the guardians of the position of the entire Congress.

Is the Senate to accept without question every appointee of the President, regardless of his value? If this is so, then the Congress should without hesitation proceed to propose an amendment to the Constitution to that effect, for there are many, many important mat-

ters which await the attention of the Congress while the Senate is preoccupied with presidential appointments.

We do not consider the time wasted that is spent by the Senate on such deliberation. Liberty Lobby feels that it is the duty of the Senate to give time and attention to presidential appointments; particularly when the appointment is the highest appointment that he President can make and the highest appointment in which the Senate can concur.

But we must make this qualification. If, given the highest appointed position of all to confirm; and given the worst possible of all candidates to consider for confirmation; if in that case the Senate cannot bring itself to reject the candidate * * * then the Senate has indeed abdicated.

We await your decision. Thank you.

The CHAIRMAN. Any questions?

Senator ERVIN. No questions.

Senator HART. No questions.

The CHAIRMAN. Any questions?

Senator THURMOND. Mr. Chairman, I think the statement is complete. I wish to thank the witness for appearing here. I have no questions.

The CHAIRMAN. Thank you, sir.

Mr. HICKS. Thank you, sir.

The CHAIRMAN. Mr. James J. Clancy.

STATEMENT OF JAMES J. CLANCY, ATTORNEY FOR THE EXECUTIVE BOARD OF THE NATIONAL ORGANIZATION CITIZENS FOR DECENT LITERATURE, INC.; ACCOMPANIED BY CHARLES H. KEATING, ATTORNEY

Mr. CLANCY. Mr. Chairman, honorable Senators, my name is James J. Clancy. I am an attorney. I appear before this committee at the direction of the executive board of the National Organization Citizens for Decent Literature, Inc.—short title, CDL—to oppose the confirmation of Associate Justice Abe Fortas as Chief Justice of the U.S. Supreme Court. These remarks are also made on behalf of three of CDL's legal counsels: Attorney Charles H. Keating, Jr., of Cincinnati, Ohio, the founder of CDL, Attorney Ray T. Dreher of St. Louis, Mo., and myself, an attorney from Los Angeles, Calif.

Citizens for Decent Literature, Inc., an Ohio corporation, was founded over 10 years ago by a group of concerned businessmen and family heads, under the leadership of Attorney Charles H. Keating, Jr., of Cincinnati, Ohio. These individuals took a look at the condition of the materials appearing on the neighborhood newsstands and became alarmed at what they saw creeping onto the American scene. They formed a community organization with two objectives in mind:

(1) To alert the community to the nature of the obscenity problem, and

(2) To press for enforcement of the obscentity laws—laws which the history of our Government has proven essential to the development of good family living. This movement spread

throughout the United States and before long, the individual local community organizations joined in this national organization with headquarters in Cincinnati, Ohio.

Just recently the Congress of the United States also became alarmed. In Public Law 90–100, signed into law this year, that body, in establishing a Commission on Obscenity and Pornography, declared in its findings of fact that the obscenity traffic was "a matter of national concern." The event which motivated Congress to act was a series of obscenity decisions handed down in May and June of 1967 in which the U.S. Supreme Court reversed 23 of 26 state and Federal obscenity determinations. The community standards of 13 States were upset. Eight findings of fact by juries were reversed. Justice Fortas participated in every one of these decisions, and in each instance voted to reverse the findings of the juries and courts below. Those cases were decided during the October 1966 term. The same pattern was followed by Justice Fortas in his handling of the 26 additional cases which were ruled upon by the Court, during the recent October 1967 term, which ended in June of this year. A summary of these cases, including the subject matter involved and the legal citations thereto, is offered for filing with this statement as exhibit C.

The CHAIRMAN. Do you want it a part of the record, or filed as an exhibit?

Mr. CLANCY. As a part of the record, sir—it is attached; yes, sir.

The CHAIRMAN. All right.

(The document referred to for inclusion in the record was marked "Exhibit 51" and appears in the appendix.)

Mr. CLANCY. We find good reason in these decisions for responding to Justice Fortas' invitation for "open criticism" (see Evening Star, July 16, 1968, at p. 4–5).

In his testimony, Justice Fortas has agreed that "the public is entitled to know" his judicial philosophy, but has declined to comment on his opinions under the constitutional privilege, upon the grounds that his beliefs are "spread on the record" of three terms of the Court (Washington Post, Friday, July 19, 1968, at p. A6). While this may be so in other areas of the law, we are of the opinion that his statement would require an amendment, if the question were pressed as to its relevance insofar as obscenity cases are concerned. Twenty of the 23 cases reversed during the 1966 October term, including the *Shackman* case referred to hereinafter, were without an opinion to discuss the facts or conduct of the case and the reasoning involved. In the other three cases, only one brief majority opinion was filed and that opinion was not written by Justice Fortas. The cases decided by the Court during the recent 1967 October term were also without an opinion to discuss the facts or conduct of the case and the reasoning involved. In actuality, the materials and facts involved in these cases are very effectively "buried" in the records of the Court below.

While Justice Fortas voted with the majority to affirm the convictions of Ginzburg and Mishkin during the 1965 October term, his vote in those cases is completely contradicted by the position taken by him in the following two terms of the Court. His vote in *Ginzburg* can be understood when one considers the great weight that he accords to the right of privacy (see his dissenting vote in *Time* v. *Hill*). The evi-

dence upon which Ginzburg's indictments were based was advertising materials which Ginzburg had addressed to a boys' school, and members of clerical and religious organizations. However, this facet of the case was not mentioned in the majority opinion in which he joined, nor was the majority opinion based upon that legal principle. His vote in the *Mishkin* case is completely irreconcilable with his voting in the 1966 and 1967 term cases, particularly *Friedman* v. *N.Y.* dealing with almost identical material, and *Lee Arts Theatre* v. *Virginia*, in which the Court took an extreme position regarding the seizure of obscene materials.

In this regard, there was a sizable search and seizure problem in the *Mishkin* case which Justice Fortas chose to disregard. The police had seized several hundred thousand copies without a search warrant. He glossed over it saying that the record was not perfected, and therefore the Court would not comment on it. In the *Lee Arts Theatre* v. *Virginia* case, a police officer had reviewed two films, "Body of a Female," and another sex picture, had gone to a magistrate, named the films, alleged that in his opinion they were obscene, and asked for a search warrant. The search warrant was issued; the Court in the *Lee Arts Theatre* v. *Virginia* said this was not a proper basis for a seizure of obscene materials.

Citizens for Decent Literature, Inc. has recently completed a 35-millimeter slide film documentary of the October 1966 term decisions. A copy of the first draft of the script for this documentary has been submitted for filing with this committee as exhibit A to our letter of July 16 requesting permission to appear before this committee, and is at this time offered for filing with this statement as exhibit A. The documentary traces the history of the 26 cases from their origin in the trial court, up to the final decision of the U.S. Supreme Court and shows pictorially the materials involved. A short 30-minute slide adaption of the same is available for your viewing. Portions of this slide presentation have already been seen by Senators McClellan, Long, and Fong, the members of the subcommittee appointed for this purpose.

The disturbing feature of the decisions handed down in May and June 1967 which prompted the formulation of this documentary was the radical departure of the present court from its historic position, which has always supported the people's position in the enforcement of the Nation's obscenity laws. The modern court has been responsible for a developing change in the past 10 years in the obscenity area which parallels closely the recent changes in the criminal law areas, so ably documented by Senator Ervin in his presentation to this committee. Never before, however, have the members of the court acted in a manner which so completely unmasks their own individual performance. This they did in the obscenity decisions handed down in May and June of 1967.

The common issue in all of these recent court storm centers is whether the judgments of the court are grounded upon constitutional principle or upon the personal judgments of the individual members. If Senator Ervin has not convinced you that the recent developments in criminal law procedures are based upon personal judgments, as he has urged, it is only because semantics plays such a large part in masking the individual philosophy of the judges concerned. The average per-

son is aware that the results reached appear to be clearly wrong, but is confused when he is told by judges in the majority opinion that the Court is following "constitutional principles." The same difficulty does not exist when one analyzes the Court's recent action in obscenity cases, for there is a common reference in obscenity matters—a norm which all of the legalisms known to our system of Government cannot confound or confuse. That reference is the contemporary community standards. No amount of legal semantics emanating from the most learned of counsel can mislead the average citizen's understanding of what is filth—what is beyond the contemporary community standards—what is destructive of public morals. The many findings in the lower courts in the cases herein considered (see exhibit C) bear this out. None of the materials involved have any relevancy whatsoever to "speech," or constitutionally protected values. In this connection, I would like to suggest to Senators Ervin and Thurmond that these obscenity cases are the common denominators which explain and lay open for inspection to the nonlawyer, just what is happening in the U.S. Supreme Court in other areas of the laws.

If one is to make use of this common reference in an analysis of the obscenity decisions it is necessary that the Court's opinions be considered in the light of the subject matter involved. Without an understanding of the material that the Court is passing on, the Court's judgments lose much of their significance. We have therefore in the documentary presented visually the actual materials involved in each of the cases discussed.

The type of materials brought before the High Court in the 1966 October term was uniform. There were 20 sex paperback books. Their titles were: "Sex Life of a Cop," "Lust School," "Lust Web," "Sin Servant," "Lust Pool," "Shame Agent," "Lust Job," "Sin Whisper," "Orgy House," "Sin Hooked," "Bayoo Sinner," "Lust Hungry," "Shame Shop," "Flesh Pots," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Sin Warden" and "Flesh Avenger"; 12 bondage books; a series of photographs of nude females in provocative poses with focus on the pubic area and suggested invitations to sexual relations; eight motion picture films of the striptease type; 10 girlie magazines; one nudist magazine, and two homemade so-called "underground" films. Photographs of some of the actual exhibits are offered for filing with this statement as exhibit D.

An overall impression of Justice Fortas' philosophy can be gleaned from the fact that he voted to reverse the jury and State court obscenity determinations in each of the cases he acted upon, during the 1966 and 1967 terms. A more precise understanding of his philosophy in the obscenity area can be gained from a consideration of his vote in *Shackman* v. *California* decided in June of 1967. In that case, three striptease films entitled "O–7," "O–12," and "D–15" were ruled hard-core pornography by Federal District Judge Hauk, a Los Angeles jury, and the California appellate system. Those determinations were reversed in the U.S. Supreme Court by a 5–4 decision, with Justice Fortas casting the deciding vote. This judgment is representative of his actions in the other cases.

A copy of the 14-minute striptease film entitled "O–7," which Justice Fortas voted not obscene, has been submitted for filing with

this committee as exhibit B to our letter of July 16 and is at this time offered for filing with this statement as exhibit B. I personally viewed the motion film "O–7" at the time that it was an exhibit in the U.S. Supreme Court case, and can attest that the copy filed with this committee is an exact copy of the film considered by Justice Fortas and the U.S. Supreme Court in the *Shackman* case. I would like to emphasize that the one and only issue passed upon by the Court in that case was whether or not the films "O–7," "O–12," and "D–15" were constitutionally protected, and that the 5–4 *Shackman* decision held that they were, with Justice Fortas casting the deciding vote.

The nature of the material appearing in the motion picture film entitled "O–7" was described by Federal District Judge Hauk in 258 F. Supp. 983, wherein he ruled the three films to be hard-core pornography.

In this particular decision, he refused to call a three-judge constitutional court, and instead held that the material was not constitutionally protected, and that it definitely should stand trial.

Here are his quotes as rendered in the opinion:

The film "O–7" is virtually the same as Exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible . . . At one time the model pulls her panties down so that the pubic hair is exposed to view . . . the focus of the camera is emphasized on the pubic and rectal region, and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the material, taken as a whole, appeals to a prurient interest in sex of the viewer, and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

The nature of the material appearing in the film "O–12" is described by Federal District Judge Hauk with equal clarity in the same opinion.

The film, "O–12" . . . was viewed by the court. The film consists of a female model clothed in a white blouse opened in front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, and lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story-line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, "——— you", "——— me". The dominant theme of the film taken as a whole, obviously is designed to appeal to the purient interest in the sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal areas clearly showing the pubic hair and the outline of the external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

Because of this decision, such films, and others going substantially beyond, are now appearing in neighborhood movies and, from reports that I have received from various parts of this Nation, in open-air theaters. The smut industry takes its direction from the High Court's decisions, advancing a giant step forward each time that the U.S. Supreme Court hands down a decision adverse to the people's interest. Senator Scott noted this same phenomenon in Report No. 1097 of the Omnibus Crime Control Act of 1967. He said:

To those who say that a Court decision cannot "cause" crime, I would remind them of the excellent communications system of the underworld . . . One need not be a legal scholar to sense the tendency of the law, and where it is felt that a "technicality" will prevent prosecution, the result is bolder action.

I have been following the developments in this area for 10 years and can say, without exaggeration, that the 1966 term reversals were the causative factor which brought about, subsequent to June 1967, a release of the greatest deluge of hard-core pornography ever witnessed by any nation—and this at a time when statistics indicate a pronounced breakdown in public morals and general movement toward sexual degeneracy throughout our Nation.

If as Justice Fortas indicates, the Constitution is a moving document which takes into account the social needs of our time, it would appear that the drastic change encountered in these decisions runs contrary to the experience we are presently witnessing. If social engineering is a factor in these decisions, then from our philosophical viewpoint it is being applied in the wrong direction.

We also respectfully call this committee's attention to the possible conflict of interest described in the CDL documentary on the 1966 term decisions. See exhibit A page 22, beginning at line 1. That part of the text reads.

A paperback entitled, "Sin Whisper" from the same mold as those ruled to be hard-core pornography by the Kansas Supreme Court was before the Georgia Supreme Court on December 18, 1966. That court described the material as:

The book entitled "Sin Whisper" is composed substantially of lengthy detailed, and vivid accounts of preparation for the acts of normal and abnormal sexual relations between and among its characters . . . The book . . . considered as a whole has as its predominant appeal the arousing of prurient interest in the average man of our national community . . . has no redeeming literary or social value or importance and goes substantially beyond the customary limits of candor in description and representation of its subject matter and . . . judged as a whole by Georgia statutory standards . . . is obscene . . . The book is filthy and disgusting. Further description is not necessary and we do not wish to sully the pages of the reported opinions of this court with it.

The publisher, Corinth Publications, Inc., a corporation wholly owned by William Hamling, once told investigating law enforcement officers that they should go back to chasing spies and that he could beat them anywhere in the United States; that he hired the best attorneys and that one of these was Abe Fortas in Washington, who could fix anything no matter who was in power. He further boasted that he had paid Fortas $11,000 to get his mailing permit for the girlie magazine "Rogue." Fortas' law firm had in 1957 filed an amicus brief on behalf of Greenleaf Publishing Co., publisher of "Rogue," urging the reversal of the Roth conviction. On December 14, 1966, Corinth Publications, Inc., filed its appeal in the U.S. Supreme Court. This time Hamling had a new attorney. His ex-attorney, Abe Fortas, had been appointed to the Bench and was to sit in judgment on his former client's claims.

Justice Fortas' appearance in *Roth* v. *United States* as counsel for amicus curiae, Greenleaf Publishing Co., urging the reversal of Roth's conviction on an obscenity charge for sending this material through the mails, is documented in 1 L. ed. 2.

Moreover, lower appellate courts in taking their direction from these Supreme Court reversals have upset landmark trial court convic-

tions against major producers. Recently a jury in Sioux City, Iowa, returned guilty verdicts on all counts of a 164 count indictment against Milton Luros of North Hollywood, for his manufacture and national distribution of nudist magazines and lesbian-type paperbacks. The Circuit Court of Appeals for the Eighth Circuit, relying upon recent Supreme Court decisions reversed those convictions. The same result was obtained in the Pennsylvania Supreme Court which reluctantly reversed after the paper book "Candy" had been found to be obscene in the trial court. The citations are *Luros* v. *United States*, 389 Fed. 2d 200, *Commonwealth of Pennsylvania* v. *Brandon House, Parliament News et al.*, 233, Atlantic 2d 840.

The 4-hour conversation referred to, took place in Palm Springs, Calif., in February 1965, between FBI Agent Homer Young of the Los Angeles Section on Obscenity, and William Hamling—this time doing business as Corinth Publications, Inc., the publisher of "Sin Whisper."

Justice Fortas' vote in the "Sin Whisper" and the other like paperback book cases was contrary to that cast by his predecessor, Associate Justice Arthur Goldberg. When such materials came before that Justice his vote was cast for a denial of certiorari. (See, for example, his vote in *People* v. *Fried*, involving "College for Sinners" decided June 22, 1964.)

Citizens for Decent Literature, Inc., is deeply concerned by this recent turn in events. Justice Fortas will continue to sit upon the Court as an Associate Justice, and we entertain small hope that his personal convictions on this subject will change in the ensuing years. Nevertheless, we oppose his nomination as Chief Justice on the grounds that the authority that goes with the Office of Chief Justice will place the nominee in a position of prominence from which he can give greater propulsion to what is interpreted to be his personal determination in these matters. The 30-minute color slide documentary on the 1966 October term decisions and the 14-minute motion picture film "O–7", cleared by Justice Fortas in the *Shackman* case, irrefutably bear this out. We respectfully request that the individual Senators view and consider these materials before they cast their votes in this matter.

Justice Fortas' opinion demonstrates a wide tolerance as to the types of conduct which are acceptable to public morals, particularly is this so in the area of obscenity crime. Left unchecked, the personal judgments of today become the constitutional principles of tomorrow. In this connection, I would like to refer the following Senators on this committee to certain decisions discussed in this statement which have affected their State.

Senator Hugh Scott, *Pennsylvania* v. *Dell Publications, Inc.*, 233 Atlantic 2d 840, particularly the dissenting opinion of Associate Justice Musmano.

Senator Hart, *Aday* v. *United States*, 357 Fed. 2d 855.

Senator McClellan, *Gent* v. *Arkansas*, 393 Southwest 2d 219.

Gentlemen, we have already shown part of the documentary to Senator McClellan, Senator Hart, and Senator Fong, and we appreciate the opportunity to show both the documentary and the film to the full committee and to the press, recognizing that the film is not the type of subject matter which should be shown to the general public.

We would ask the committee for permission to do this, possibly in a different room.

Thank you very much.

The CHAIRMAN. Is that all?

Mr. CLANCY. I have one additional comment, sir. There is an article written by William Buckley, appearing in the Post, Washington, D.C., February 18, 1968, and he makes reference to the *Shackman* case.

What did occur—some individual sent a mailing brochure to Mr. Buckley's son. Mr. Buckley wrote to the Los Angeles City Police and said "Why don't you take care of this individual for sending this type of material into my home—it appears to me you can do it under the Ginzburg decision."

Captain Nelson wrote to Mr. Buckley, and asked him if he ever was in Los Angeles, he would like to show him something in connection with the Supreme Court decisions. Mr. Buckley did visit Los Angeles, and Captain Nelson showed him the exhibits which were used in the *Shackman* case. This is what Mr. Buckley said in the concluding paragraph:

But whether it does or whether it does not, I intend to schedule a private showing. I shall rent myself a 16-millimeter projector, having sent off for a copy of O–12. I shall then invite the head of the New York Civil Liberties Union, the editor of Commentary, and Dwight Macdonald, Max Lerner, and maybe three or four other worldly and permissive gentlemen, and will run through this 21-minute film. I shall not then ask them whether in their judgment the film should be available to children. I know what they are likely to answer—and would not go to such pains to contrive my having to hear them say it again. I shall merely ask them whether by the Supreme Court's own definitions the film is obscene. Confident they will agree with me that it is, I shall join my guests in sponsoring a committee for a new Supreme Court, and will dispatch Mr. Macdonald to Washington to picket the Justice chambers.

That is the end of the statement, sir.

The CHAIRMAN. Senator Ervin.

Senator ERVIN. No questions.

Senator HART. No questions.

Mr. CLANCY. I would like to file exhibit D for examination by the members of this committee, referred to in my statement, which is photographs—photos of the actual exhibits which were involved in these cases, and reversed. These are photographs taken of the actual exhibits.

The CHAIRMAN. That will be received.

Mr. KEATING. Mr. Chairman, may I make a brief comment. My name is Charles Keating. I am an attorney from Cincinnati, Ohio. I simply want to say I endorse the statements of Mr. Clancy and join therein. I would like you to know in my consideration as an attorney, all of the facts which we have alleged are supremely well documented and painstakingly so. I had the opportunity when Senator Hart was a freshman Senator to present before a committee at that time some of the materials which we felt were offensive and obscene. I can say to Senator Hart that the material is as depraved as it was at the time. Your interest was keen, and very intelligent on the subject. The depravity and base nature of this material has gone so far beyond what we presented just those few years ago, that it is almost unbelievable. And I think that the decisions of the Supreme Court have to be examined in the light of this hurtling into the abyss of immorality.

Thank you very much.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Mr. Clancy, I wish to express appreciation for your appearing here. I was very pleased to learn that we have a Citizens for Decent Literature in this country that is trying to protect your young people from the obscene and indecent literature that has been distributed with the Supreme Court's approval.

Now, as I understand from your statement, these decisions have chiefly been handed down in 1966 and 1967, which go so far? Is that correct?

Mr. CLANCY. That is correct, sir.

Senator THURMOND. I believe you made the statement that the Supreme Court had reversed 23 of the 26 State and Federal obscenity determinations. You have that documented?

Mr. CLANCY. Yes, sir.

Senator THURMOND. You are asserting that is correct?

Mr. CLANCY. Yes, sir. That is documented in exhibit C, which is appended thereto, and shows the action in each of the cases involved. For example, referring to exhibit C, the first case mentioned there is case No. 2. That was the case number in 1966 term, *Keney* v. *New York*, which was a jury decision. In that case, the jury found the subject matter which was three paperback books to be hard-core pornography under the definition as given by the New York Judiciary. That was affirmed by the appellate court. The New York Court of Appeals refused to grant a hearing and it went up to the U.S. Supreme Court in two terms previous. That is the reason for the 793 designation. It was carried over to the succeeding term, and became case No. 39. And then it was carried forward to the 1966 term and became case No. 2. And it was reversed in 18 Lawyers Edition Second 1302, on June 12, 1967.

In this regard, I would like to give you an example of the type of opinion that was rendered in that case.

This is titled 18 Lawyers Edition Second, 1302.

David E. Keney v. *New York*, June 12, 1967, on petition for writ of certiorari to the County Court of Monroe County, New York. Per curiam. The petition for writ of certiorari as granted in the judgment of the county court of Monroe County New York is reversed. *Redrup* v. *New York* 386 U.S. Mr. Justice Harland adheres to the views expressed in the separate opinion in *Roth* v. *United States*, and on the basis of the reasoniug set forth herein would affirm.

In each one of the 23 cases Justice Harlan voted to affirm. And the basis of his constitutional judgment was that there are two tests in this area. One, the Federal test. The Federal Government has no business in the area of public morals, and they may only proscribe hard-core pornography. But in the area of States' rights, each community, each State has the right to set its own standards. Historically, the guardian of the public morals is the State jurisdiction. His method of review in State cases would be if there is a logical reason to affirm the decision of the State supreme court, he must do so, because he does not have the power as a member of the Supreme Court to reverse their factual findings and what their community standards are. He said that this is necessary, because we have here a federation of States wherein we have a testing ground, and without this testing ground we have concentration of power in the Federal Government. We must have the testing ground to see what is the best way of getting at these problems. He mentioned in the *Roth* opinion, in his con-

curring opinion, he said "the State can reasonably conclude that the indiscriminate dissemination of material, the essential character of which is to debase sex, will, over a long period of time, have an eroding effect on moral standards." And I submit that we are living in an era in which everyone recognizes this. And notwithstanding the complete knowledge by every citizen that the moral standards are being eroded throughout the Nation, we have a set of decisions by the U.S. Supreme Court which completely throws caution to the winds, and is an open invitation to every pornographer to come into the area and distribute millions of copies—and I am not exaggerating—millions and millions of copies of what historically had been regarded even in France as hard-core pornography.

Justice Harlan has said that the constitutional view is that the States have an extraordinary right in this area of public morals. And, of course, it is my belief that our constitutional history bears this out.

I would like to comment on the *Shackman* decision.

For example, if you analyze the decision in relation to the subject matter, you see how ridiculous the Justice's viewpoints are.

For example, the film that I talked about, which is O–7. Four members voted it obscene—Justice Warren, Justice Brennan, Justice Harlan, and Justice Clark. But when it came to still photographs of the same type of activity, for example a woman thrusting her vagina forward, or showing an invitation to sexual intercourse in still, Justice Brennan said that was not obscene. For the first time in the obscene cases, Chief Justice Warren voted to reverse four jury convictions—this was the *Keney* case to which I referred, the *Austin* case, and two other jury verdicts.

Now, prior to this most recent decision, he had always said that in this area—we should give a great deal of deference to the courts and the judgment of the people below, that there is no such thing as a national community standard. But in these most recent decisions, he voted to reverse jury convictions in these four cases—completely upsetting his prior opinion in this area.

I submit there must have been some extraordinary advocacy in the U.S. courtroom to bring this about.

Senator THURMOND. Also in May and June 1967 decisions, I believe the community standards of 13 States were upset.

Mr. CLANCY. Yes, sir. These 26 cases involved 13 States.

Senator THURMOND. And in those same decisions, eight findings of fact by juries concerning obscene material were reversed?

Mr. CLANCY. Yes, sir.

Senator THURMOND. That is May and June 1967 decisions?

Mr. CLANCY. Yes, sir. I might point out that in exhibit C, after each case we have noted whether it was decided by a court or jury. For example, *Keney* v. *New York*, on page 1 of exhibit C, so states that it was decided by a jury. *Redrup* v. *New York* was decided by a three-judge court. *Austin* v. *Kentucky* was decided by not one, but two juries.

Senator THURMOND. And in all of these decisions, according to your statement, Justice Fortas participated in them and in each instance he voted to reverse the findings of the juries and the courts below?

Mr. CLANCY. Yes, sir.

Senator THURMOND. Your careful research reveals that?

Mr. CLANCY. Absolutely.

Senator THURMOND. Now, in the 1966 term, I believe you said the same pattern was followed by Justice Fortas in his handling of the 26 additional cases which were ruled upon by the Court?

Mr. CLANCY. Yes, sir. Not all of those were obscenity determinations. I am referring here to 26 which I have listed which were obscenity cases. A good number of those were obscenity determinations, as for example on page 7 of exhibit C, *Conrad Chance* v. *California* was a jury verdict. That was reversed. *I & M Amusement Corp.* v. *Ohio*, that was a court decision, that was reversed. *Central Magazine Ltd.* v. *United States* was a court determination which barred the importation of certain homosexual nudist magazines. That was reversed. G. I. Distributors, they refused to listen to that. *Rabeck* was reversed. That was reversed on the judgment that the statute was bad.

Robert-Arthur Management Corp. v. *Tennessee* was a determination that the film "Mondo Freudo" was obscene. The opinion on that is in 414, Southwest 2d 638. That was reversed. *Teitel Film Corp.* v. *Cusack*—that was an injunction in which the Supreme Court of the State of Illinois said that "Rent a Girl" and "Body of a Female" were obscene. They reversed that, but on procedural grounds.

In *Percy Henry* v. *Louisiana*, that was a court determination that certain girlie magazines were obscene. And notwithstanding the court's decision in *Redrup*, *Austin* and *Gent*, the Supreme Court of Louisiana refused to reverse that decision. After it had been decided by the Louisiana Supreme Court, the appellant came back after the *Redrup*, *Austin* and *Gent* cases and pointed to them and said "You are required to reverse." And notwithstanding the Louisiana Supreme Court did affirm, the court pointed out that the magazines were not in the record, and that the appellant did not perfect his right. And from there on, the appellant went to the U.S. Supreme Court, and notwithstanding that the magazines were not in the record, the Court nevertheless reversed anyway.

Felton v. *City of Pensacola*, that was a court determination that nudist magazines were obscene. That was reversed. *Pennsylvania* v. *Dell*, they refused to hear a petition by the district attorney of Philadelphia County. *Lee Arts Theatres Virginia* was a jury determination that "Erotic Touch of Hot Skin," and "Rent a Girl" were obscene. This "Rent a Girl" is the same film passed upon by the Illinois Supreme Court—the Court reversed that on the grounds that not the obscenity issue, but on the grounds that the search procedures were improper, and what did occur, as I mentioned before was that a police officer went out and viewed the two films, went to a magistrate, filed an affidavit stating that he had seen the two films, and in his opinion they were obscene. He obtained a search warrant from the magistrate and went out and made the arrests. There was a conviction by a jury, affirmed in the Virginia Supreme Court. It went up to the U.S. Supreme Court on the search and seizure provision, and the U.S. Supreme Court most recently said that a police officer—now, this is the real significant point of that case—that a police officer could not seize material which is obscene even though he had witnessed the crime—in effect, that he could not even go to a magistrate and tell him he had seen and named that film specifically, and asked for a search warrant. He had to do more than that.

This particular decision I would venture to say is going to throw absolute catastrophe into this area in the succeeding year or two.

Reed Enterprises v. *Clark* was a statutory construction of the Federal statute permitting prosecution in the area of distribution. *California* v. *Noroff*, was a petition by a Los Angeles city attorney to review a decision in California that a nudist magazine is not obscene.

So a good number of those cases were actually dealing with determinations of material which had been declared obscene by State and Federal and appelate court decisions. The ones I have just referred to are of the most recent 1967 term.

The CHAIRMAN. Could I ask a question.

Senator THURMOND. Yes, sir. I yield to the distinguished Senator from Mississippi.

The CHAIRMAN. Is it your experience or do you have any idea that material of this kind would cause a person of unbalanced mind, psychotic mind, to create acts of violence?

Mr. CLANCY. Yes, sir. In our most recent amicus curiae brief, filed in the *Ginzburg* case, *Ginzburg* v. *New York*, we cited at least 50 cases in which such had occurred. For example, when I was assistant city attorney of Burbank, we had a case in which a girl was raped about four blocks from city hall in a culvert. At that time she reported to the police that the person who had raped her had a girlie magazine in his pocket, and had thrown it aside. So they went back to the scene. They found the girlie magazine. They questioned her further. She gave them a description. They located the defendant from the knife—she described the jacket. They went to trial on a kidnaping and rape charge, and they found out that at that time he had done it previously to another girl in the same area, from the same school. They were classmates. This was one case which interested me.

Well, there is no indication this is the thing that drove him to it. But there is this relationship.

Another case in New Jersey, a boy had witnessed a stag film. On the way back at an intersection, he got into a car, he commandeered the car, he took the girl and raped and killed her. You could not say what causal connection there is.

I do not say, however, that the real reason they proscribe this is the direct reaction to which you refer—it is a reason that Justice Harlan stated—that the indiscriminate dissemination of this material in the community, and the tolerance by the community of this material, gives the mistaken impression to the youth that this is acceptable. In fact, the U.S. Supreme Court in their most recent decision pointed out in a footnote to the *Ginzburg* case, where they made mention of the testimony of a psychiatrist. His testimony was as follows:

He said there are two dangers. One is that it will cause criminal conduct. And he says we are not so concerned with this. But the second is that it will cause the youth to believe that because it is tolerated in the community, it is an acceptable standard. And this is what we are concerned with.

So actually what the psychiatrist was saying was that by permitting this material to be given freely in the community, they think it is all right, and they think accordingly. And this is what Justice Harlan said is the basis for State action.

The CHAIRMAN. Who are the usual victims? Are they women and children?

Mr. CLANCY. Sir?

The CHAIRMAN. Aren't women and children the usual victims?

Mr. CLANCY. Oh, yes, sir.

The CHAIRMAN. Senator Thurmond.

Senator THURMOND. Thank you.

Now, Mr. Clancy, I believe in those cases, 20 out of the 23 cases that were reversed during the 1966 term, including the *Shackman* case, they were reversed without any opinion to discuss the facts and conduct of the case and the reasoning involved, isn't that true?

Mr. CLANCY. That is correct, sir. I read you a typical example of the law reports appearing in 18 Lawyers Edition Second, which is the volume which reports all of these cases. There is no indication of the conduct involved, no discussion of the lower court action, or any of the issues involved, except "appeal is granted, judgment reversed." And this is one of the points we make. Justice Fortas has said his views are spread upon the record of the Court. They are not in this area.

Now, nobody sitting at this table, all of these committee members I would venture—they are attorneys—they would know something about this area. But they have no indication of what the subject matter is. I have not seen the statement of the U.S. attorney concerning Fortas' opinion. I would venture to say that he makes no mention of these obscenity decisions, although I am sure that he is well aware of what did occur in May and June of 1967.

Senator THURMOND. Other than being ashamed of the decisions, and ashamed to write in detail their reasoning, as a lawyer, could you assign any other reason?

Mr. CLANCY. No, sir. Of course my analysis of what did actually occur in the U.S. Supreme Court during that term of the Court, would take a little longer to explain. I could do that, but it is not relevant, particularly relevant to these bearings on Justice Fortas. What did occur I think is strange. They took these three cases on one issue alone, and that was scienter. They were asked by the petitioners to consider the obscenity matter. In their preliminary ruling they denied certiorari on that issue. In effect they said this subject matter is not constitutionally protected. They had 7 months in which they were arguing among themselves, trying to decide the scienter issue. They could not do it. This is an extraordinary length of time for the U.S. Supreme Court to have any case under submission. They got to the end of the 1966 term. Not being able to get together on the scienter issue, along came a case known as *Ginzburg* v. *New York*, which was a case dealing with a minors' statute, which was flawless in presentation, also in the type of legislation which was used in the New York jurisdiction, and it is my opinion that they felt that the solution to get out from under the controversy in this area, was to grant jurisdiction to the *Ginsberg* v. *New York* case, and affirm the minors' statute, and then to get rid of these cases. And I do not believe they analyzed these cases fully before they voted on them. I cannot understand how Chief Justice Warren would have upset four jury verdicts if he was being consistent with his prior philosophy in this area. I cannot understand how Justice

Brennan would vote to reverse in "D–15" and "O–7", a girlie striptease film, and yet would not affirm in a case dealing with still photos of the same material.

There is a peculiar situation which exists here.

It is generally felt amongst lawyers that Fortas, Brennan, and Warren are in agreement on the test to be employed. Yet when you examine and apply their test—to each one of these cases, you find none of them can agree.

For example, in the girlie striptease film, Justice Warren thought it was obscene. Justice Brennan thought it was obscene. But Justice Fortas thought it was not obscene. In the still pictures of nude females in provocative poses, Justice Warren thought it obscene, Justice Brennan thought it not, Justice Fortas thought it not obscene. In the paperback book cases, Justice Fortas thought it not obscene, Justice Brennan thought it not obscene, but Justice Warren wanted to set if for argument.

So that even applying a test that they believed in, that they were in agreement on, they could not, in their own personal differences, come into agreement.

Senator THURMOND. Well, do you not feel that a community has a right to protect its young people in that community by taking steps to prevent such obscene material from being available to them?

Mr. CLANCY. Yes, sir. This is one of the reasons for the obscenity laws. We trace it in this documentary, which I hope to be able to show you—of how the community feels that the crime here is the conduct of the pornographer, the fellow who is distributing. It is not a crime for anyone to read this material. This is the one who is seduced. But it is a crime for the person to commercially distribute this to the disadvantage of the community and its interest, particularly its interest in the growth and development of its youth, which are going to be the foundation for our Nation of tomorrow. I think the best parallel that can be drawn is in the distinction that a prosecutor drew in 1688 when this crime came into being. He drew a distinction between private morality and public morality, which he related to fornication and the maintenance of a bawdy house. Fornication which is the sin of the individual, unlawful sexual intercourse, is not indictable at common law, because this is something between the individual and whoever he regards as a Supreme Being. But the maintenance of a bawdy house is because it rubs itself off on the community and affects community standards. So the maintenance of a bawdy house was indictable at common law. He says:

> I do not mean to say every sin or lie is indictable in common law. But when it so affects the community standards as to become a public concern, then it is indictable.

And of course the Court incorporated the arguments of the prosecutor, in that historic case, establishing the obscenity crime as an indictable offense, and said that the community does have this interest. And of course it includes the interest that you have stated, the interest in the youth, so that they will not be exposed when they are outside the influence of their family to an undue risk of harm.

Senator THURMOND. In view of the decisions that have been handed down by the Court in 1966 and 1967 sessions, is there any way a com-

munity can protect itself from the filth to which you have referred, and is there any way to prevent the contemporary community standards from being violated that are so destructive of public morals?

Mr. CLANCY. In my opinion, there is not. And I cannot impress upon you Senators enough how serious this problem is. I wish I could go into it more fully with you, to show you the extent to which these individuals have gone, and the magnitude of the operation.

For example, the film "O–7," which was shown to certain members of the subcommittee, something much less offensive than that was the standard for the Los Angeles prosecutors in Los Angeles County, and which they relied upon in trying to control this subject matter. Now, with the reversal of "O–7" and "D–15" and O–12," they said—"Well, there is nothing we can do." This material is being disseminated in the mail at $10, anyone can buy it, anyone can buy a small projector for about $30 and have their own stag show. The prosecutor is saying "There is nothing I can do"—looking at these decisions. And of course the pornographers, as Senator Scott observed in the other criminal area—they read these decisions, they take their advice from their defense attorneys, and they have said that all stops have been pulled, and anything goes. As a consequence, for example, there is an organization in Los Angeles County now called Collectors Publications, Inc., which is flooding the market with hundreds and hundreds of titles which have always been regarded as the hardest of hard-core pornography, even under the counter in France—and this is going out through the mails, going out over the counter. And police, law enforcement officers are saying "There is nothing we can do about it."

Mr. KEATING. They just sued Mr. Clancy and me for $3 million, Collectors Publications.

The CHAIRMAN. Would you repeat that.

Mr. KEATING. Collectors Publications, the publisher he just referred to, has just sued Mr. Clancy and myself for $3 million. They do not like the way we talk and act toward their product.

It interested me. I thought it might interest the Senators.

Senator THURMOND. Now, the films to which you referred, O–7, O–12, and D–15, it seems to me would appear obscene and filthy and obnoxious to any right-thinking person?

Mr. CLANCY. Well, Senator Thurmond, I think you are 100 percent correct. And this is why I say—these obscenity decisions are the common denominator of what is occurring in the U.S. Supreme Court—because the average citizen recognizes what you have just said. You have read what Judge Hauk said about them. You do not have to be convinced to look at the exhibit. But I sincerely hope you will take the time out to see what Senator McClellan, Senator Hart, and Senator Fong saw. And I hope I have the opportunities to show the entire committee, so that they recognize just exactly what is occurring.

Senator THURMOND. And in spite of the fact in the *Shackman* case these three films were ruled hard-core pornography by the Federal district judge, Judge Hauk, and a Los Angeles jury, and that their findings were affirmed by the California Appellate Court, still the Supreme Court of the United States reversed their action and Justice Fortas cast the deciding vote in a 5-to-4 decision?

Mr. CLANCY. That is correct. Each one of the girlie magazine film cases was a 5-to-4 decision, with the five members, Justice Fortas in-

cluded, voting to reverse. I might point out in connection with the California decision that the instruction which was read to the jury as to the test to be employed was the strictest which has ever been given to any jury in regard to protection of free speech. They had to find that the material taken as a whole constituted an appeal to prurience, which was an abnormal interest in nudity, sex, or excretion, which went substantially beyond customary limits of candor. They further had to find it was patently offensive, and that it was utterly without redeeming social force—three separate tests. This is the most recent test enunciated by certain members of the Court—Fortas, Brennan, and Warren. And notwithstanding that the State of California employed the very test that those three Justices had enunciated, for example, in the *Fanny Hill* case, in the trial of the matter, nonetheless they reversed the jury finding on that issue.

Senator THURMOND. Now, as long as the publishing houses who produce this smut material can get decisions like were handed down by the Supreme Court, will not this encourage them to go even further and further, and produce even more obscene material if it is possible to do so?

Mr. CLANCY. Yes, sir. They have already done that. Not only that. They have gone further in the area of exhibition, as I have mentioned. Previously, these films would be sold in certain locations. Now they are going into the liquor—into the bars. You will see signs in Los Angeles which say "Girlie Films." In a bar, they have a little projector, and will throw these films on the wall. This has replaced the topless situation. This is one use of the film. They now have—they are taking over movie theaters which have fallen because they could not show regular films, and they are showing eight of these in 2 hours—they charge about $2. They throw the 16-millimeter version on the full screen, and play "Clair de Lune" and the classics to those people who view it. And I have heard reports—this appears down in Florida, and up in northern California—where they have actually shown these in open air theaters. So that they have gone further, not only in the content. They have gone as far as they can go. But they also have gone further in the manner of distribution.

Senator THURMOND. It appears that you may have raised a conflict-of-interest question here in these obscene cases. I observe on page 6 of your statement you say that the publisher, Corinth Publications, Inc., a corporation wholly owned by William Hamling, once told investigating law enforcement officers that they should go back to chasing spies and that he could beat them anywhere in the United States, that he hired the best attorneys, and that one of these was Abe Fortas in Washington who could fix anything no matter who was in power.

Would you care to elaborate any further on that?

Mr. CLANCY. Well, the conversation was to the effect—he said "I have Fleishman in California, I have Percy Forman in Texas. I have Bieber in Chicago, and I have Abe Fortas in Washington, D.C. Now, the only thing we would like to point out in this regard is the reference to the 1956 representation of Fortas of Greenleaf Publishing Co., which at that time was owned by William Hamling. He did represent him, and the facts do jibe with what William Hamling said 10 years later in 1966. He said that at that time he had him for counsel.

Now, whether or not that is so, I do not know. But I do know that, *Corinth Publications* v. *Georgia*, involved William Hamling, who was operating in San Diego, Calif., Corinth Publications was wholly owned by William Hamling. And his books had been prosecuted in Georgia by the State literature commission, and found to be obscene by the court and the Georgia Supreme Court. It was on an injunction in which they filed their action against Corinth Publications, Inc., and the local distributor.

Now, this was the case which was in the U.S. Supreme Court and was passed upon by the U.S. Supreme Court. I might also point out that of the 20 sex paperback books, all but two were the same type. "Sin Whisper" is the only one that can be directly linked to William Hamling by virtue of his ownership of Corinth Publications. These books are what were known as the night stand books. Four years ago any vice officer, if he saw one of these in his town, would make an immediate arrest. These were considered the most obscene books available in the market. They started in Illinois. They were distributed by All-State News, Ray Kirk, from Chicago. In 1963, Ray Kirk was indicted for the distribution of these books. He escaped. They did not bring him to trial. They brought the secretary-treasurer, Secora, to trial. Kirk escaped from the Illinois jurisdiction. In *Illinois* v. *Secora*, dealing with three of these books, the jury found them to be obscene, and the Illinois Supreme Court affirmed. They did not take it further. The operation then went to New York, where they were set upon by the New York district attorneys, and became the subject of a series of cases there. One of them was *People* v. *Fried*, to which I referred. When it got up to the U.S. Supreme Court in 1964, the vote was to deny certiorari and let the conviction stand. Justice Goldberg was on the Court at that time. Thereafter, they went from New York down to San Diego, Calif., and became Corinth Publications, and began publishing what is known as the Corinth publications. And it was one of these books which was attacked by the Georgia jurisdiction and held to be obscene when ruled upon by the court.

Senator THURMOND. I just have a few questions here on this matter. I will propound these to you.

One of the activities of Greenleaf Publishing, I believe, was the publication of Rogue magazine.

Mr. CLANCY. Yes, sir.

Senator THURMOND. Now, do you have any information that Justice Fortas represented Rogue magazine, Greenleaf Publishing, or Mr. Hamling, in any other significant action, either before a court of law or in any administrative procedure?

Mr. CLANCY. Well, in the amicus brief in the *Roth* case, that brief is signed by Abe Fortas, his firm was of counsel. Therein is mentioned the fact that they represented Greenleaf Publishing Co. in the administrative hearing on an order to show cause why Rogue should not be given a second-class mailing permit. It also cites the district court case in which an injunction was sought against Summerfield to permit the passage of the Rogue magazine through the mail.

Hamling made an observation in the conversation that it was the Rogue permit which was issued which broke the back of the resistance against girlie magazines passing through the mail. Playboy had a per-

mit issued at the same time. But it was—this was the case which actually set the postal inspector back in this area.

Senator THURMOND. As I understand, you are saying that specifically Justice Fortas did represent Rogue magazine in the matter of obtaining second-class mailing permit privileges?

Mr. CLANCY. I have not seen the administrative hearing or the district court case. I have seen the appellate brief in which is mentioned the fact that that action, that representation did take place. And of course Mr. Hamling said as much in the statement to the law enforcement officer.

Senator THURMOND. In the *Roth* case, Justice Fortas' brief contended that judicial interpretation of the term "obscene" has supplied no workable standard for administration of the Federal statutes. He also argued that the Federal statutes were unconstitutional under both the first and fifth amendments, as vague and undefinable, invading the protected area of free speech.

Now, do you think that the arguments in this brief were reflected in the decisions of the Supreme Court considering the *Redrup* case?

Mr. CLANCY. Well, I would not—I have not examined in detail his arguments, and I do not say that he does not have—absolutely have the right to make these arguments that he did make in the *Roth* case. This is perfectly normal. But the question that I raise, and is raised by the Organization of Citizens for Decent Literature, is the propriety.

If I had represented the publisher in this area, and if I were carried on retainer—I do not know this is so—this is merely a question in my mind, whether his activities ceased between 1956 and 1966, because there is an indication from what Mr. Hamling said that possibly there was a retainer involved. If this did occur, I would be very circumspect in my review of obscenity cases. And, of course, one of the things in these cases, they were not even let out for argument. The normal occurrence—the usual occurrence in a situation like this, if a substantial question is raised in the original appeal or petition, the Court will grant the appeal and hear the issue, and then it will be let out for briefs on both sides. But this did not occur. The decisions in all of these cases, in all 23 cases, was summary without briefs by appellants, and responding briefs by the parties after jurisdiction had been noted. It was "petition for writ of certiorari granted, judgment reversed," whereas normally it would be petition for writ of certiorari granted, the issue is thus and so, and it is set for argument on such and such a date, at which time the appellants or the petitioners and the respondents file their respective brief bringing before the Court all of the arguments in the case.

Senator THURMOND. Now, the owner of Corinth Publications appears to be Mr. William L. Hamling, former publisher for Greenleaf Publishing, in Illinois, and publisher of Rogue magazine. Do you not feel that because of the role which Justice Fortas played in Mr. Hamling's earlier litigation, that the ethics demanded of a Supreme Court Justice that he should have disqualified himself from sitting in judgment upon Mr. Hamling's case in the matter of Corinth Publications?

Mr. CLANCY. Well, it would depend—I believe it would depend upon the extent of his activity in this area. I do not know what occurred

between 1956 and 1966. Certainly if he was active or his firm were active in this area, he would from the nature of the publication recognize who the publisher was, or would have some indication, or would have reason to believe—because this area is headed by only a certain few individuals, and if you have any involvement in the obscenity area, any knowledge, you know the type of book, where it comes from, and who are the people behind it.

Now, I do not know, nobody knows, and this is a question which is raised, as to the extent of his involvement between 1956 and 1966. But Mr. Hamling seemed to indicate in 1965, in February, that he still had the counsel of someone in Washington, and that someone was Mr. Fortas. Now, whether or not he was boasting, that I do not know. Nor do we have any way of ascertaining whether or not there were retainers involved, because those are private matters between Mr. Hamling and his counsel.

Senator THURMOND. Mr. Clancy, I want to thank you for coming here, for the contribution you have made to these hearings.

Mr. CLANCY. Thank you very much, sir. I would again make the offer to show both the documentary, and would like to show it to the full committee, and to the press, so that the people who are sitting—the press who should be interested in these peculiar results, would see just exactly what we are talking about. Thank you.

Senator THURMOND. Thank you, Mr. Chairman.

Senator ERVIN. You have caused two or three questions to arise in my mind.

These decisions in obscenity matters are customarily based on the right of freedom of speech under the first amendment, are they not?

Mr. CLANCY. Yes, sir.

Senator ERVIN. And the Supreme Court recognizes, does it not, that there is no absolute right to free speech in respect to obscenity matters?

Mr. CLANCY. Yes, sir. They made that ruling in 1957 in the *Roth* case.

Senator ERVIN. Now, the various States and various municipalities have adopted laws or ordinances in this subject, dealing specifically with various aspects of what they conceive to be obscenity?

Mr. CLANCY. Yes, sir; every State in the Union and the Federal Government, based upon our heritage, which was brought over in the 1700's, the common law, obscene libel.

Senator ERVIN. And do you not agree with me that this is a field in which the most, the higest degree of respect should be accorded the local legislative bodies in this area?

Mr. CLANCY. Yes, sir. I agree with you, as I have agreed with every statement you have made in the other areas of the law.

Senator ERVIN. Thank you, sir.

Now, the result of the interpretation that the Supreme Court places on the first amendment in these cases is that the Supreme Court arrogates to itself the power to make standards or alleged standards by which the rights of 200 million Americans in this field are to be regulated, is that not true?

Mr. CLANCY. That is the effect of these cases; yes, sir.

Senator ERVIN. It illustrates in a very striking way the fact that the 200 million Americans are being ruled to a very large extent by the

notions of the Supreme Court Justices rather than by the notions of people on the local level?

Mr. CLANCY. Yes, sir. It affirms everything you said in the other area, which deals more in semantics than constitutional issues. But I might point out that none of the material—none of the subject matter in any of these cases has the slightest resemblance to any subject matter which would be believed to have constitutional protection. For that reason, I think they are unique.

Senator ERVIN. And has not the Supreme Court in these cases normally acted by a sharply divided Court, often by five to four decisions?

Mr. CLANCY. Yes, sir. Starting in 1957, it was a seven to two decision with Black and Douglas saying there is no such law. In the subsequent years between 1957 and 1967, there has been a shift in personnel in the Court, and it has been dominated by the Black and Douglas philosophy. So that it has become that situation over the years. It used to be seven to two. By the addition of personnel it now is up to the point where it is probably six to three against the people.

Senator ERVIN. Doesn't that illustrate that when there is a new Justice ascends the Court, or an old Justice wavers in mind, that the Constitution of the United States is assigned a different meaning?

Mr. CLANCY. Yes, sir. We make one point in our documentary, Senator, which I think has real relevance, and that is that Justices Black and Douglas, at the time of the constitutional issue, they said there was no such thing as an obscenity law. They have been saying that for 10 years. And this is the real problem, because they have led with their dissent. And I make the argument, that leaning upon the argument of Justice Clark in the *Wade* case—he made mention of a principle in constitutional law—he said "In the *Miranda* decision I dissented originally, but that case having been decided, I am bound by that decision as other Justices are."

Justices Black and Douglas have not.

Senator ERVIN. I might state that I was astounded by that statement of Justice Clark in the *Wade* case, as I recall, when he said that he thought the *Miranda* case was decided bad, that it was poor law, that it was not compatible with the Constitution—that is what he said in his concurring opinion in the *Miranda* case. And then when he got to the *Wade* case, he said he was bound by a decision which reached what he considered to be an unconstitutional decision. And how the Justice can reconcile that kind of position is something I am incapable of comprehending, because it would seem to me that his oath to support the Constitution, which he says he observed in the *Miranda* case, in his dissenting opinion, would have bound him to also continue to observe the Constitution in the *Wade* case.

But some Supreme Court Justices are like the Lord in one respect, they move in mysterious ways their wonders to perform.

Mr. CLANCY. Senator Ervin, would you care to see the documentary? I notice you have a tremendous interest and tremendous knowledge of the Constitution. I have sat here and listened to you, and you sound like a law professor. Would you care to see the documentary and the film?

Senator ERVIN. I would like to if——

Mr. CLANCY. Certainly it would add to your understanding of the cases in constitutional law.

Senator ERVIN. The position of Black and Douglas in these cases is rather consistent with their position in other cases involving the right of freedom of speech. They essentially take the position that there is an absolute right of freedom of speech.

Mr. CLANCY. Yes, sir.

Senator ERVIN. And that therefore nobody should be permitted to sue for libel or slander, however false the libel or slander should be——

Mr. CLANCY. With one exception, sir. This is the interesting part of this case. I would like to go into it now. An explanation of what did occur in this term of the Court is as follows. They took the cases upon the scienter issue, whether or not the test was did he know the contents—*U.S.* v. *Rosen* said if you know the contents, and if it is held to be obscene, you can be held guilty. Or is it criminal liability, something beyond ordinary negligence. It was my personal opinion they were going to raise this test to the standard of criminal negligence.

They had enough votes in the nine members to establish that standard. But at the same time the case in *Time* v. *Hill* was before them. If you read that case, you will find that the issue was whether or not an action in New York could be brought for damages based upon the right of privacy assuming ordinary negligence. And they were split—one term of the Court they could not decide, so that they carried it over to the next term of Court. In order to have a constitutional principle, five persons have to agree, not only in the result, but in the reasoning. In *Time* v. *Hill*, they were split 3–2–2–2 and they would have had no constitutional judgment except for Black and Douglas, for the first time in history, crossing the line to agree, not only in the result, but in the reasoning. But they went on to say that "We do not believe this principle is going to stand, and it is going to fall," to arrive at a majority of five. If they had done the same thing in the obscenity case, and crossed over and created a different standard, they would have won the battle but lost their argument for absolute standards.

Senator ERVIN. That is all the questions I have. Thank you very much for your statement.

The CHAIRMAN. Thank you, sir.

(The chairman subsequently made the following letter from Paul A. Porter a part of the record.)

WASHINGTON, D.C., *July 26, 1968.*

HON. JAMES O. EASTLAND,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I have examined the testimony of James J. Clancy before your Committee concerning the confirmation of Justice Abe Fortas as Chief Justice of the United States and noted the reference to this firm's representation of the Greenleaf Publishing Company. I have checked the files of this office and desire to put the matter in perspective as follows:

1. In 1956, the Postmaster in Chicago refused to mail the magazine "Rogue for Men" which is published by Greenleaf Publishing Company. The matter was referred to this firm by Maurice Rosenfield, Esq., a leading member of the Chicago bar, and this firm was retained by him on behalf of Greenleaf Publishing Company to appeal the Post Office's decision.

We filed a complaint in the United States District Court for the District of Columbia to compel the Postmaster General to mail the publication. A temporary restraining order was granted by the Honorable Burnita S. Matthews, United States Judge for the District of Columbia, under which the Postmaster was restrained from refusing to transmit the magazine as second class mail.

We then handled the Greenleaf Publishing Company's application for a permanent second class mailing permit through the Post Office's hearing procedure,

through an appeal to the United States District Court for the District of Columbia, and through the new Post Office hearing which the court ordered. This final Post Office hearing sustained our original position that "Rogue for Men" magazine was not obscene and granted a permanent second class mailing permit. Examination of our files indicates that Mr. Fortas did not participate in this representation of Greenleaf.[1]

2. In 1957, this firm was retained jointly by H.M.H. Publishing Co., Inc., and Greenleaf Publishing Co. to file a brief as Amicus Curiae in their behalf in a case then pending before the United States Supreme Court, *Roth* v. *United States*, 354 U.S. 476 (1957). The matter was also referred to this firm by Maurice Rosenfield who was counsel for H.M.H. Publishing Company.

As filed, the brief Amicus Curiae was devoted primarily to a discussion of the constitutionality of 18 U.S.C. § 1461. This brief was signed by four members of our firm at that time: Abe Fortas, William L. McGovern, Charles A. Reich and Abe Krash. It was also signed by Mr. Rosenfield as well as by Mr. Rosenfield's firm, Friedman, Zoline and Rosenfield. Messrs. McGovern and Krash had primary responsibility for the preparation of this amicus brief. Mr. Fortas did not participate in the preparation of the amicus brief except as reviewing partner.

These appear to be the only two instances in which this firm ever represented the Greenleaf Publishing Company. In both these matters, our contact with officials of the Greenleaf Publishing Company was always through and in cooperation with Mr. Rosenfield and was limited to preparing materials necessary for the litigation in court and before the Post Office Department.

Corinth Publications, Inc., the company involved in the 1967 Supreme Court case which is said to be successor to the Greenleaf Publishing Company, is unknown to this office. Nor do our records disclose that there was every any discussion, association or communication between this office and William Hamling referred to in the testimony of Mr. Clancy.

Sincerely,

ARNOLD & PORTER,
By PAUL A. PORTER.

The CHAIRMAN. Now, Senator Ervin, you have material to put in the record?

Senator ERVIN. Mr. Chairman, after the last session I discovered that the Department of Justice had started to propagandize the committee. It prepared a document called "Memorandum re Judicial Performance of Mr. Justice Fortas." And that has provoked certain new inquiries on my part. Also Mr. Justice Fortas presented a list of incidents where other judges in times past had participated in outside affairs. I did not think that the precedents were too compelling, because as I have pointed out on other occasions, murder has been practiced in all generations, and so has stealing. And I do not think that that has made murder meritorious or larceny legal. So I have done some investigating in that field, which I would like to call to the attention of the committee so that the committee can call it to the attention of the Senate.

I have also got other information on the question of the propriety of the method by which this appointment was made, which I would want called to the attention of the committee. Also I need to comment on some of the statements in this propaganda which the Justice Department made. I would personally like for the lawyers to come back in and be cross-examined a little bit. If they won't come, I would like to ask

[1] This matter was handled in our firm primarily by William L. McGovern and Charles A. Reich; Thurman Arnold and Milton V. Freeman assisted in obtaining the temporary restraining order before Judge Matthews. Most of the papers in this matter were also signed by Mr. Rosenfield, as well as Mr. Rosenfield's firm, Friedman, Zoline and Rosenfield.

the committee to extend an invitation to the Attorney General or the Deputy Attorney General to come down and justify these statements.

So I would like to ask that the invitation be extended to the Justice Department by the chief counsel of the committee to request to send these lawyers down to answer some questions about this document, and request in the alternative that if the Attorney General will not send them down, that he come or send the Deputy Attorney General. But irrespective of that I have some other data which I would present myself to the committee, which will take an hour or so. Then I hope to conclude.

The CHAIRMAN. We will recess——

Senator HART. Mr. Chairman, in fairness to the Justice Department, maybe the definition of propaganda would not fit the situation in the memorandum. Propaganda generally is generated on a self-starting basis. As I indicated when the memorandum was introduced, I had asked the Justice Department to react, feeling that had Justice Fortas himself been in a position to make a response to questions asked in respect to cases decided, or could have volunteered for the record cases not discussed, we might have had a record more balanced. I think that memorandum does in part give us a balance.

If that is propaganda, so be it. But my notion of propaganda is when something floats something as a self-starter. And the Department did not do that all all.

I think that—I have disagreed over the years with some of Senator Ervin's interpretations of cases, as well as legislation. He may well disagree with the evaluation and interpretations in the memorandum. As lawyers, we do that all the time. But I think the memorandum does serve to give balance when we are talking about cases that are not simple, resolving issues that are not easy.

Senator ERVIN. I will certainly agree they make the case very difficult when they undertake to write an opinion contrary to the Constitution, and contrary to the decisions interpreting those words for 178 years, which they did three times on the 20th of May this year. They say "Notwithstanding the quibbles with particular votes and decisions, the verdict of the American Bar is that Justice Forras performed remarkably well in 3 years, fulfilling the promise of one of the Nation's greatest lawyers to become one of its greatest Justices." I would like to take my quibbles and the Supreme Court decisions, put them on one side, against these conclusions of this document on the other and get the thing sort of balanced away.

Senator HART. I think it is balanced now as a result of the introduction of the memorandum.

The CHAIRMAN. Well, we are going to recess until 10 o'clock in the morning.

(Whereupon at 1:05 p.m. the committee was recessed, to reconvene at 10 a.m. Tuesday, July 22, 1968.)

NOMINATIONS OF ABE FORTAS AND HOMER THORNBERRY

TUESDAY, JULY 23, 1968

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess at 10 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland (presiding), McClellan, Ervin, Hart, Tydings, and Thurmond.

Also present: John Holloman, chief counsel; Thomas B. Collins, George S. Green, Francis C. Rosenberger, Peter M. Stockett, Robert B. Young, C. D. Chrissos and Claude F. Clayton, Jr.

The CHAIRMAN. Come to order.

Mr. Christopher, you were present yesterday and you know the reason for this.

Mr. CHRISTOPHER. Yes, Mr. Chairman.

STATEMENT OF WARREN CHRISTOPHER, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Senator ERVIN. Mr. Christopher, you prepared this memorandum?

Mr. CHRISTOPHER. Senator Ervin, I did not personally prepare it, but I would take responsibility for it.

Senator ERVIN. Well, you take responsibility for the statement on page 26——

The CHAIRMAN. Let him identify himself for the record.

Mr. CHRISTOPHER. For the record, Mr. Chairman, I am Warren Christopher, Deputy Attorney General, and the memorandum to which Senator Ervin is referring, I assume, is the memorandum entitled, "Memorandum re Judicial Performance of Mr. Justice Fortas," which was placed in the record by Senator Hart.

(The memorandum appears as "Exhibit 47" in the appendix.)

Senator HART. Would the Senator yield for a moment.

Mr. Chairman, I think I made clear yesterday, but I have not had the chance to read the record—let me make very clear the origin of the memorandum.

For several days, with Justice Fortas before us, members of the committee had addressed questions to the witness with respect to a series of decisions, some of which the witness had participated in, others that predated his accession to the Court. And my colleagues on

the committee, who were questioning, analyzed those cases as they read them.

For reasons that I understand, the witness felt it wise not to enter into any discussion with the questioner regarding the cases.

I did ask the Deputy Attorney General if he would have prepared, by competent staff, an interpretation as they read them of the cases that were raised, and additionally, to include in the memorandum additional cases which would give the full flavor of the nominee's judicial philosophy and pronouncements.

The memorandum was delivered in due course.

I first thanked Mr. Christopher, and then inserted it into the record. I am not even sure what I said when I put it in, but I said I hoped this would give some balance to the record. It does not balance the number of pages that have been taken, but it does balance the cases.

Senator ERVIN. The memorandum states on page 26:

> As Justice Fortas told the committee, all of the cases which come to the Court are different. The easy cases to which there are obvious answers never get to the highest Court in the land.

I will ask you if on May 30 of this year, in the Supreme Court did not hand down a divided opinion in the case of *Bloom* v. *Illinois*, reported in 20 Lawyers Edition to the Supreme Court of the United States Reports Second Series, 522, in which they held for the first time in American history that the sixth amendment, guaranteeing the right of trial by jury, extended to criminal contempt case.

Mr. CHRISTOPHER. Senator Ervin, I am not closely familiar with that opinion. I have a "press" familiarity with it. I am sure if you say it was handed down on that day and held that, it did

Senator ERVIN. It did. And this was not any novel question. This was a question which had reached the Supreme Court, according to Judge Frankfurter, at least 20 times, as he stated in the *Green* case.

Now, don't you think the task of a Supreme Court Justice would be comparatively easy if he would follow the 20-odd decisions that had been handed down uniformly holding through a period of 178 years, what the Constitution meant?

Mr. CHRISTOPHER. Senator Ervin, questions of following prior precedent, as you know, are very complicated and very difficult for the Court. When you argued the *Flast* case earlier this year, the Government was contending that the Court should follow the precedent laid down in *Massachusetts* v. *Mellon*, which had stood for more than three decades, and which the Court modified or overturned on the basis of your advocacy, among others. I mention that not in any way to be argumentative about it, but just to indicate the difficulty of dealing with longstanding precedents. Sometimes they are modified, sometimes they are overturned, sir.

Senator ERVIN. Well, I took the position in arguing that case that *Massachusetts* v. *Mellon* had nothing to do with the question of the right of a taxpayer to contest the constitutionality under the first amendment of grants or loans of Federal tax moneys to religious institutions. And that was an opinion the Court took in the *Flast* case, which was a sound opinion.

So that was not overturned.

But don't you see any difference between overruling one case, which has been in existence for 45 years, and overruling more than 20 cases that have been in existence 178 years?

Mr. CHRISTOPHER. There certainly is a factual difference there, Senator.

Senator ERVIN. Yes. And so don't you think a judge makes his task more important when he undertakes to put an interpretation on a constitutional provision which is totally inconsistent with an interpretation based on that constitutional provision for as much as 178 years?

Mr. CHRISTOPHER. I think Justice Fortas testified when he was here, Senator, that any judge approached the task of overturning a longstanding precedent with great reluctance and with great caution.

Senator ERVIN. He so testified. But I could not get him to testify about this case.

Following a line of reasoning which Justice Frankfurter pointed out in the *Green* case, you have a situation here where 59 members of the Supreme Court in some 20-odd cases held that the jury trial provisions of the sixth admendment meant one thing, and then seven judges come along and throw all of these 20-odd decisions and 178 interpretations of the Constitution into the judicial garbage can.

Now, don't you think judges make their task harder when they undertake to do things like that?

Mr. CHRISTOPHER. I am sure that any judge approaches overturning longstanding precedents with great care and great caution, Senator.

Senator ERVIN. Well, now, it says here in this opinion, "The easy cases for which there are obvious answers never get to the highest Court in the land." And yet this question has gotten to the highest Court in the land more than 20 times before the Supreme Court threw the interpretation of 178 years on the garbage heap.

Now, on the same day, in the case of *Duncan* v. *Louisiana*, which is reported in 20 Lawyers Edition United States Supreme Court Reports, Second Series, page 291, the Court also put a new interpretation on the right-of-counsel clause of the sixth amendment—also by a divided vote.

Now, in so doing, I would venture the assertion that the Supreme Court handed down a decision which was repugnant to perhaps a hundred decisions of the Supreme Court, which held that the right-of-counsel clause of the sixth amendment had no application whatever to State criminal trials.

Now, if that question had reached the Supreme Court in one form or another almost a hundred times prior to that day, this statement in this memorandum that "The easy cases to which there are obvious answers never get to the highest Court of the land," is not correct: is that right?

Mr. CHRISTOPHER. Senator, my understanding of that comment is that even most of the cases which reach the Supreme Court, I believe, by a margin of about seven or eight to one, are not set for argument—they are denied on certiorari or dismissed on appeal.

Now, that comment is meant to indicate that it is only the hard cases that the Court takes, where more than four members of the Court wish to hear full argument.

Senator ERVIN. Mr. Christopher, you consider a case hard to decide when the Court rules the same way on it anywhere from 25 to 100 times?

Mr. CHRISTOPHER. Senator, with all respect, I think the question is what the Court regards as a difficult case. It is obvious that more than four members of the Court wished to hear that case, and when they came to deciding it, it was decided not by a bare majority, as I recall, but by a substantial majority.

Senator ERVIN. Seven to two.

Mr. CHRISTOPHER. Yes, sir.

Senator ERVIN. Yes. But you think it is very good practice for the Supreme Court of the United States, as they did in this case, and in the *Bloom* case, to throw away an interpretation placed on the Constitution of the United States for 178 years?

Mr. CHRISTOPHER. Senator, my comment to that would have to be very much in terms of your decision in North Carolina—that the importance of being right sometimes overwhelms the importance of following prior precedent. Judges reach that conclusion very reluctantly, but sometimes they do, sir.

Senator ERVIN. Well, the case I wrote an opinion overruling in North Carolina was a precedent that was about 7 years old; it was handed down by a court divided four to three, it was contrary to every decision in every State of the United States that had passed on the question. And so you think that is comparable to overruling anywhere from 25 to 100 cases that have been in existence 178 years?

Mr. CHRISTOPHER. Senator, there certainly is the factual difference that you suggest.

Before we leave *Duncan* v. *Louisiana*, not wanting to prolong the discussion about it, I should point out that Justice Fortas took a somewhat different position in that case than his colleagues. He wrote a separate opinion saying that—

> Neither logic nor history nor the intent of the draftsmen of the 14th amendment can possibly be said to require that the sixth amendment or its jury trial provisions be applied to the states together with the total gloss that this Court's decisions have supplied.

In short, that is an example in which Justice Fortas felt that the States ought to be free to apply this amendment wtih some more flexibility than it had been applied in the Federal courts.

Senator ERVIN. Well, to me that is an example of the willingness of Judge Fortas to go ahead and amend the interpretation placed on the Constitution for 178 years in more respects.

Now, do you not know, as a lawyer, that every decision of the Supreme Court of the United States applying the right to jury trial of the sixth amendment to criminal trials in the Federal courts hold that the right of trial by jury requires a jury of 12 men and a unanimous verdict from the 12 men?

Mr. CHRISTOPHER. Justice Fortas, I think——

Senator ERVIN. I am asking you your opinion as a lawyer. You are Deputy Attorney General of the United States, and second highest legal adviser to the President and the Government.

Mr. CHRISTOPHER. Senator, I thank you for the compliment, but I would not want to indicate a close familiarity with all the decisions under the sixth amendment. I know what you say is generally true.

Senator ERVIN. So Mr. Justice Fortas in his concurring opinion in the *Duncan* case, said in effect that I am prepared to change the inter-

pretations of the Supreme Court that a jury trial under the sixth amendment requires a jury of 12 men and a unanimous verdict, and have in the future, the sixth amendment mean one thing as applied to jury trials in the Federal courts and another thing as applied to jury trials in the State courts, notwithstanding the words of the sixth amendment are identical, both as to the old rulings of the Court and as to the new rulings in this case.

Mr. CHRISTOPHER. Senator, I may have missed your context. I did not get what the question was, sir.

Senator ERVIN. Do you agree with me that the jury trial provisions, according to your best recollection, of the sixth amendment as applied to Federal criminal trials had always been construed to require a jury of 12 men and a unanimous verdict from those 12? Now on the 30th of May for the first time in the history of this Nation, the Supreme Court decided they were going to change the interpretation they placed on those words for 178 years, and they did. And they now apply to jury trials in State courts. Then how can Mr. Justice Fortas take the position that exactly the same words as applied to jury trials in Federal courts mean one thing, and the same words as applied to jury trials in State jury trials means something entire different?

Mr. CHRISTOPHER. Senator Ervin, I could do no better than to read the language of Justice Fortas' separate opinion in the *Duncan* case where he said that the sixth amendment:

> Requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method in detail upon the States.

What he is saying here, Senator, if I understand him, is that the States ought to have an opportunity to experiment with differences in detail in carrying out the basic thrust of the sixth amendment.

Senator ERVIN. Yes. But that is saying exactly what I said he said. And that as far as he is concerned, he is ready to write some new laws, new interpretations, saying that the words which mean one thing as applied to Federal criminal trials mean something quite different as applied to State criminal trials. I do not see much zeal to protect the States in that. They take a whole loaf away from the States and say we will give you back a few crumbs later.

Now, I am at a loss to understand why we have so many of these decisions changed. So I would like to read for your comment the statement by the late Justice Owen J. Roberts in *Smith* v. *Allright*, 321 U.S. 666, *Mannhick* v. *Southern Steamship Company*, 321 U.S. 96, page 105.

> I have expressed my views with respect to the present policy of the Court freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency seems to me indicates an intolerance for what those who have composed this Court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors.

Now, do you have any comments as to why the Court as now constituted, and particularly since Mr. Justice Fortas became an Associate Justice, has taken precedent after precedent and cast it into the judicial garbage can?

Mr. CHRISTOPHER. Senator Ervin, if I may, I would like to indicate what I regard to be the unimportance of my views on that subject.

The question before the committee and the issue here is whether or not a majority of the committee think that Justice Fortas and Judge Thornberry are qualified for the high post to which they have been nominated. The broader question is whether a majority of the Senate feel that way. I would be delighted to talk with you about these legal questions. But I would say that I would not want the expression of my personal views to delay the hearings. I believe this is already the longest interrogation that any Justice has ever undergone in connection with a nomination for the Supreme Court of the United States—if not the longest, one of the longest. I believe that the record in this proceeding is as long or one of the longest in any proceedings of this character.

And so although I will certainly answer if you wish to have me do so——

Senator ERVIN. I certainly would. I certainly would.

Mr. CHRISTOPHER. Well, I can only say to you, as Justice Fortas did, that he would approach the overturning of precedents with great care and caution, and move in that field with a great respect for precedent.

Senator ERVIN. Well, you are familiar with the case of *Amalgamated Food Employees* v. *The Logan Valley Plaza*, which has handed down on May 20 of this year.

Mr. CHRISTOPHER. Senator, I know of the case and I am generally familiar with it.

Senator ERVIN. Well, don't you know that under the laws of 50 States of this Union, as well as under Federal law, prior to that day, it was an illegal trespass for one man or a group of men to go on private property of another against his will?

Mr. CHRISTOPHER. Yes; subject to various exceptions, that is true, Senator.

Senator ERVIN. Well, what exceptions were there to that rule?

Mr. CHRISTOPHER. Well, there have been the historic exceptions of dire emergency or situations of great peril, among others.

Senator ERVIN. Don't you know that from the foundation of this Republic, down to the 20th of May this year courts of equity—both Federal courts of equity and State courts of equity in all 50 States had power to issue injunctions to prevent private persons or groups of private persons from trespassing upon the property of another man against his will?

Mr. CHRISTOPHER. In general that is true, Senator. But in the *Amalgamated Feed Employees* case, as I recall that opinion—and I would not want to pose as a great expert on this, Senator—I found that opinion as following in the line of *March* v. *Alabama* and the other company town case, as did the Court.

Senator ERVIN. Well, that case illustrates the type of case in which Justice Fortas has participated. The first amendment says that Congress shall make no law abridging the freedom of speech. That is what the amendment says. Then the Court says in this case that the right of freedom of speech gives a group of private individuals a constitutional right to go on the private property of a businessman against his will and there urge his customers not to trade with him.

Now, that just shows how they take one constitutional principle and stretch it. So they say that what was illegal trespass before that day

has now become a constitutional right. And then they do some more stretching of their own decisions, after stretching the Constitution.

Now, the decisions are that people have a right to exercise the right of freedom of speech on public streets and public sidewalks. And that was all the Federal law on the subject until the *Marsh* case in Alabama. Now, in the *Marsh* case in Alabama, this company built a company town, they built streets, they built sewers, they built sidewalks, and they clearly invited all of the public to come and walk on those sidewalks and walk on those streets, and so the Court said in the *Marsh* case that they had invited all of the public—not a part of the public, but all of the public to walk on those streets and sidewalks. The Court held that those people had a right to carry placards and exercise the right of freedom of speech on those streets they were invited to.

So then comes along this case, and they stretch the *Marsh* case. They take that decision and say that decisions which entitle people to demonstrate on public streets and on streets to which all of the public are invited to give a man the right, or a group of men the right to go on a man's private property and exercise freedom of speech on his private property against his will for the purpose of persuading people not to trade with him. And you see no difference in those cases?

Mr. CHRISTOPHER. Senator, I wonder, with all due respect, if I may indicate again that I think my personal views or those of any lawyers at the Department of Justice are not of significance in this proceeding. What is important here is what the views are of a majority of this committee and the majority of the Senate.

Senator ERVIN. Well, what is important here is to ascertain whether or not the nominee is willing to interpret the Constitution, not by what it says, but by what it would have said if he had written it. That is the important thing. So it is important for you as a lawyer to say whether you think that the Court has a right to stretch the first amendment and then to stretch their previous decisions, as they did in the *Amalgamated Food Employees* case which not only is contrary to the words of the first amendment, but is absolutely contrary to the words of the due process clause which clearly contemplate that a man has a constitutional right to own private property and to forbid people to come on that property to interfere with his business if they come on there without his consent.

In other words, this is a decision that strikes a body blow to the Constitution itself and the right of private property, and it is just stretching it. That is the important thing.

Now, your memorandum attempts to justify the decisions of the Supreme Court in *U.S.* v. *Robel* 389 U.S. page 258, in which the majority Court, five to four, by the vote of Mr. Justice Fortas, held that an act of Congress which forbade a Communist working in the defense industry was unconstitutional. And also you defend *Keyishian* v. *The Board of Regents*, 385 U.S. 589, where the Court, by a five to four vote, and with Justice Fortas voting for the majority, held that a statute of the State of New York, which prohibited Communists from teaching in the public schools of New York, was unconstitutional.

Now, do you support those two decisions and think they are justified?

Mr. CHRISTOPHER. Senator, recurring to my comment, that my own views are unimportant—I was reading only last night in the current issue of the Stanford Law Review an article by Prof. Gerald Gunther, one of the leading constitutional law experts in the country who pointed to the *Robel* case as being a very desirable approach in constitutional decision in that it mapped out for the Congress the way in which it could accomplish the end which the Court found had been ineffectively accomplished by the earlier statute.

As you will recall, what the Court held in *Robel* was that the statutory provision was unnecessarily broad. The Court went on to say, and if I could quote this one sentence at 389 U.S., page 266—I believe it is crucial—

> We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities.

And the Court went on in this decision to lay down specific guidelines for the way Congress could draw a constitutional statute.

Senator ERVIN. Well, they talk about the decision being overbroad. That question was raised in the *Rains* v. *Bibb County, Ga.* The statutes are not too broad when they tried to catch some southern election officials, but the statute is too broad when they try to catch Communists.

Now, can you tell me any evidence more complete that a man is willing to disrupt the purposes of our Government than for that man to entertain the conviction that our Government ought to be overthrown by force and violence?

Mr. CHRISTOPHER. Senator, I would answer that by referring to the guidelines which I understood the Court to lay down in the *Robel* and other cases for the drawing of a constitutional statute. First, that the employee be an active member of the Communist Party. Second, that he be aware of the partys' illegal aims. And third, that his membership be intended to advance those illegal aims.

Senator ERVIN. In other words, they said how can a man better evidence his purpose to advance the illegal aims of the Communist Party to overthrow this Government by force and violence than to belong to a party which he knows has that objective in view, and to make payments of dues to the party that has that objective in view, and to associate with people who have that objective in view.

Mr. CHRISTOPHER. Senator, I could only refer you to the decision as indicating the way in which the Court felt that the statute was unnecessarily broad and reached what might be regarded as innocent activity.

Senator ERVIN. Well, hasn't the Supreme Court struck down about every statute that had any relationship to individual Communists, and thereby proved that Congress is incapable in the Court's opinion of writing a statute that will meet with the Court's ideas?

Mr. CHRISTOPHER. Senator, I would not, again, want to pose as an expert in that area. It is a very rare thing for the U.S. Supreme Court to strike down a statute of Congress. There are certainly statutes in the Communist area which have been held constitutional in some of their purposes, sir.

Senator ERVIN. Don't you know that the Supreme Court laid down some guidelines on this general subject in the *Adler* case, and then when the legislative bodies complied with those guidelines, the Court struck them down as being overbroad?

Mr. CHRISTOPHER. No, sir; I am not aware of that.

Senator ERVIN. And don't you consider that virtually all positions in a defense plant are sensitive in nature?

Mr. CHRISTOPHER. Senator, I would not be enough of an expert to comment on that—with our growth of conglomerates today in this country there may be jobs in defense plants that have——

Senator ERVIN. I am just asking you to justify the position of this memorandum on these decisions. And I do not see how you could without that.

Now, didn't the Court hold in that case—how they stretched the Constitution—that the right of freedom of speech added to the provision of the first amendment that Congress shall make no law abridging the right of people peaceably to assemble and petition the Government for the redress of grievances, and add those together and create what they call the right of association of people who have like ideas? And I am not quarreling with this judge-made concept. But isn't that what the Court has done?

Mr. CHRISTOPHER. Well, Senator, that is your description of the opinion.

Senator ERVIN. I am asking you about a decision which this memorandum attempts to justify, and which you came here to explain the memorandum, as I understand.

Senator HART. Mr. Chairman, would the Senator from North Carolina yield very briefly?

Senator ERVIN. Yes.

Senator HART. What I asked, and what I think the memorandum does, is put these decisions in perspective, and suggests the impact these decisions have as read by lawyers other than the Senator from North Carolina. I did not ask—I do not think the memorandum purports to justify or get quarrelsome.

Senator ERVIN. Well, I am not——

Senator HART. No. The memo is not an effort to provide surrebuttal to anybody. I wanted, and I think the memorandum gives the record, an indication of the scope of the consequences of these decisions as read by other competent lawyers. It wasn't asked for in an effort to justify the opinions. Lawyers can make their own judgments about that. But it does reflect what the opinions suggest the law to be as seen by the writer of the memorandum.

Mr. CHRISTOPHER. That is correct, Senator. The basic intent was to show what the cases held, and what they did not hold.

Senator ERVIN. Yes. But I thought you came down here to show that these decisions, interpretations of the Constitution, were sound.

Mr. CHRISTOPHER. Senator, I came down because at the hearing yesterday you asked to have a representative from the Department of Justice appear, sir.

Senator ERVIN. Yes, so I could examine him about the decisions. I did not bring you down here to examine you about the flowers that bloom in the spring, tra-la, or something like that, if I can use a facetious expression.

Now, you are justifying the decision in this case. Isn't this the basis of the decision? That the words of the first amendment which say Congress shall make no law abridging the freedom of speech or the right of people peaceably to assemble, to petition the Government for redress of greivances—adding those two things together, gives people of like mind the right to associate with each other. Now, isn't that the first part of the bedrock on which this *Robel* case rests?

Mr. CHRISTOPHER. Senator, my personal understanding is that these cases do announce or follow what is called the right of association. But I would like to indicate again that my personal views on these matters are really quite unimportant, and that the task of the committee is to determine whether or not they feel as a majority that Justice Fortas and Judge Thornberry are qualified for this nomination.

At the Justice Department we think they are both quite exceptional men and are highly qualified.

Senator ERVIN. I think they are both fine gentlemen. But I think that the cases in which they have participated show fundamentally that they are judicial activities, and a judicial activist in my lexicon is an occupant of a judicial office who is willing to interpret the Constitution, not according to what the Constitution says, but according to what the Constitution would have said if he had written it.

Now, let us come back to this question of the *Robel* case.

I thought that you came down to justify this thing as a lawyer, and as a sound constitutional interpretation.

I will ask you again. If this case is not based upon this premise, which I do not object to, I think it is a proper conclusion—that the right to freedom of speech and the right to assemble together to petition for redress of grievances gives groups the right of association. I do not have any quarrel with that. I defend it.

Now, that is the first step they take in this case.

Then they stretch that to say that that right of association disables Congress to deny a Communist the right to work in the defense industry.

Now, I do not see any connection between the right of association and the right to a job. If you can justify this under anything in the Constitution or anything in the first amendment, as they attempt to do in this thing, I would like to know what the justification is.

Mr. CHRISTOPHER. Senator, our basic point with respect to the *Robel* case was that the Court very carefully indicated that there was a way under narrowly drawn legislation for Congress to protect vital installations such as defense plants, and the Court told Congress what the guidelines would be for such legislation, sir.

Senator ERVIN. Well, do you see anything in the first amendment which distinguishes between the right of Congress to legislate in respect to a sensitive job and a nonsensitive job in a defense industry?

Mr. CHRISTOPHER. As a general principle of constitutional law, Senator, it has always seemed clear to me that where legislation impinges on first amendment rights it must be drawn as narrowly as it practically can be, so that there is a minimum chilling of first amendment rights.

Senator ERVIN. Well, why, if there is such a distinction to be made,

does not the power belong to Congress rather than five of the nine Judges?

Mr. CHRISTOPHER. There is a long history of constitutional interpretation in which the Supreme Court has held statutes unconstitutional where they impinged on first amendment rights, and were drawn more broadly than need be to cover the problem involved.

Senator ERVIN. So you justify the position of the Supreme Court that the first amendment right of a Communist is superior to the right of Congress to protect the national security of this country.

Mr. CHRISTOPHER. Stated that way; no, sir.

Senator ERVIN. Well, I do not know any other way to state it. I agree with you, I do not know what the Supreme Court means by a sensitive job. But I do not think there is any valid basis to strike down the law on the grounds that it is all right to take a man who looks at the plans of a battleship, for instance, who is bent on overthrowing this Government by force and violence, and say he can be excluded; and another man who builds the battleship, or helps build it, and carries out those plans is nonsensitive. But I will go on. I do not want to burn too much daylight.

Now, in the New York case, the Court held that this right of school teachers to associate with Communists gave them a constitutional right—or rather disabled Congress to prohibit the employment in the public schools of teachers who are adherents of the Communist Party, did it not?

Mr. CHRISTOPHER. Yes, sir; in the circumstances of that case.

Senator ERVIN. Do you believe that States and local school authorities have a right to prescribe the qualifications for teachers?

Mr. CHRISTOPHER. Yes, sir; within the limits required by the Constitution.

Senator ERVIN. And within the limits of the Constitution, as construed in the *New York Board of Regents* case.

Now, this case also goes on the right of association, and it says that the right of one Communist to associate with another Communist disables New York to pass a law saying that Communists cannot teach in the public schools of New York, if they are members of the Communist Party.

Now, don't you agree with me that if a teacher—a teacher wanted to teach geography in the schools of New York, and she wanted to teach the earth was flat instead of round, that the school board would have a right to deny her a job as a teacher of geography?

Mr. CHRISTOPHER. Senator, with all due respect, I would like to say again that whether or not I agree with you does not seem to me to be the issue here. The issue here is whether or not a majority of this committee regards the nominees as qualified.

Senator ERVIN. No. The issue here that I am trying to raise is whether this memorandum which attempts to justify these decisions as sound decisions is sound.

Mr. CHRISTOPHER. On that point, Senator, you have expressed your views in the last several days, and this memorandum attempts to express the views that the lawyers at the Department of Justice have about them. I do not think that we serve a useful purpose by debating back and forth.

The common theme that runs through these three decisions is that Congress cannot be unnecessarily broad or paint with a broad brush when enacting statutes which impinge on first amendment rights.

Senator ERVIN. Well, are you familiar with the celebrated opinion of Justice Oliver Wendell Holmes when he was on the Supreme Judicial Court of Massachusetts in the case of *McAuliffe* v. *New Bedford*, reported in 155 Massachusetts, page 216.

Mr. CHRISTOPHER. Senator, I am not familiar with it by that description, sir.

Senator ERVIN. I will state the case to you. And I think there is some good sense that the Supreme Court ought to follow in the *Robel* case and in the *Keyishian* case.

In that case the town of New Bedford had adopted a statute of Massachusetts which provided that no member of the police department be allowed to solicit money or any aid on any pretense for any political purpose whatever, and another ordinance which forbade them to be active in politics.

McAuliffe, the plaintiff, was active in politics—he was a policeman of New Bedford. And New Bedford fired him under this statute. And he brought a suit against New Bedford alleging that he had been deprived of a constitutional right. He said that he had a constitutional right to participate in politics, and that they could not deny him a job because he exercised a constitutional right. And Justice Holmes gave this answer to that argument:

> One answer to this argument is that there is nothing in the Constitution or the statute to prevent the city from attaching obedience to this rule as a condition of the office of policeman, and making it a part of good conduct required.

Here is the significant thing:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

And that is a doctrine which ought to have been applied in these cases because it is a sensible argument.

I think Communists have a right to associate with other Communists, but I do not think a Communist has a constitutional right, as the Court said, to have a job in a defense industry or a job teaching school. To my mind it is a reasonable regulation for a State or school board to refuse to keep a teacher who believes that the free society which the United States endeavors to maintain is so iniquitous that it ought to be overthrown by force and violence or other unlawful means, and have substituted for it a form of government and communistic stature which extinguishes the lights of liberty in all aspects of our national life. And yet that is the holding. Incidentally, there are four judges on my side. You say you are not down here to express your opinions on the law, or the Department of Justice. And so I see no reason to go much further. Justice Fortas said we could not ask him about these opinions, and you say in effect that we cannot ask you about the opinions, or rather that your opinion about these opinions is immaterial.

Mr. CHRISTOPHER. Well, Senator, not to prolong this, but I will say that I do not think that all of Justice Holmes' bromides, great a man as he was, solve our 20th-century problems. I do not think a man

has a constitutional right to be a policeman. But I also do not think he give up all his constitutional rights when he becomes a policeman.

Senator ERVIN. Well, anyway, we got the same Constitution now that we had when this case arose, haven't we?

Mr. CHRISTOPHER. Yes, sir.

Senator ERVIN. And there is at least four of the judges that entertain my views in about a fourth of those cases. And a man I think has a right to be a Communist, and a right to associate with them. But I do not think that man has any right under the first amendment of the Constitution to have a job in a defense industry, or a constitutional right to a job teaching school, or in government, as far as that is concerned.

Senator HART. If the Senator will yield—I think Congress responsibility is to write a statute that insures that he continues to have the right to be a Communist, and still at the same time keeps him out of the defense plants—not an easy job for the Court or the Congress We have blown it several times.

Senator ERVIN. I would say that there could not have been a more narrowly drawn law, or a law more easy of comprehension and understanding than the State of New York had in forbidding the teaching in the public schools, not only of Communists, but of all other people who believe that our Government ought to be overthrown by force and violence. And to say that it is vague, as the Court did, is just to misuse the words of the English language.

To go back to the Parking Plaza, and this will be about the last question I ask you, because I see you think your opinions have nothing to do with this subject, or the opinions of the Department of Justice. Under the decision in the *Parking Plaza* case, these people were said to have a constitutional right under the first amendment to go on the porch which was not a porch to which the public was invited, but only to a porch where the customers who had purchased goods were invited to load their purchases in their cars on a narrow parking strip adjacent. And the court held that this group of men, these pickets, had a right under the doctrine of freedom of speech, not only to invade the man's private property, but to patrol to and from, carrying placards on the porch, to which they were not invited, and also to obstruct the use of the parking ground by the customers trying to load their car, to which they were not invited?

Mr. CHRISTOPHER. Yes, Senator, that sounds to me to be——

Senator ERVIN. And they held that no court in the United States, Federal or State, could issue an injunction to prevent such acts on their part. Didn't they?

Mr. CHRISTOPHER. Yes, sir.

Senator ERVIN. Yes. Before that decision such acts constituted a trespass. But in that decision, for the first time in American history, the Court took an illegal trespass, and converted it into a newly created constitutional right, didn't they?

Mr. CHRISTOPHER. Senator, as I indicated earlier, I personally believe that that decision is a logical application of the principle enunciated in *Marsh* v. *Alabama*.

Senator ERVIN. Well, *Marsh* v. *Alabama* was a company town where the people were using the public street and sidewalk, wasn't it?

Mr. CHRISTOPHER. I believe the company owned the entire town.

Senator ERVIN. But they invited everybody to use the street and the widewalk. So it was tantamount to a public street. And that decision I do not quarrel with. But this case just stretches the *Marsh* case.

Now, I want to ask one other question about that, and then I think I will desist. I wanted to ask you to justify these decisions, but you do not feel like that is your responsibility.

Before that decision was handed down, a man can go to a court of equity, and did go to a court of equity in Pennsylvania, in that case, and obtain an injunction against such people coming on his property against his will, to disrupt his business. Isn't that so?

Mr. CHRISTOPHER. Yes, sir.

Senator ERVIN. Now, they cannot do it, can they?

Mr. CHRISTOPHER. Senator, in the limited situation of facts that that case presents, there is a right to picket on the property that was previously free from such action, yes, sir.

Senator ERVIN. Yes. In other words, a man can come on a man's property and try to persuade people not to deal with him and they have a constitutional right to do that. And he cannot get an injunction against that.

Now, before that time a man had not only the right to go to court to get protection for the property, but he had a right to use reasonable force to eject the trespassers, didn't he?

Mr. CHRISTOPHER. Yes, as a general statement of law.

Senator ERVIN. Yes. And after this decision, if he undertook to do this, he would be guilty of an assault, or an assault and battery, wouldn't he?

Mr. CHRISTOPHER. If he tried to remove by force the pickets who were exercising a constitutional right, he would be subject to whatever provisions of the law that would be applicable, Senator.

Senator ERVIN. Now, I will ask you if under this decision, the plaintiff could not get a group of his friends and come into a lawyer's office and parade to and fro with placards in that office, saying the lawyer ought to quit representing the defendant because the defendant has the wrong side of the case?

Mr. CHRISTOPHER. Senator, I think there is a major factual distinction between one of these giant shopping centers, where the private property becomes very much a public thoroughfare, and a lawyer's office, sir.

Senator ERVIN. Then do you construe that case to give the union pickets rights of freedom of speech superior to that of all other Americans?

Mr. CHRISTOPHER. I would have to answer that question by saying that those who are exercising a constitutional right would come within the bounds of that decision, Senator.

Senator ERVIN. Don't you think that people have a constitutional right to tell a lawyer that he is on the wrong side of a case and ask him to mend his ways in aiding the wrong side?

Mr. CHRISTOPHER. I just repeat, Senator, I think there is a major factual distinction between the privacy of a lawyer's office and the very public aspects of a major shopping center.

Senator ERVIN. Well, does not the lawyer invite the public to come to his office? I sure did when I practiced law.

Well, you will excuse me if I ask some of my questions with a little vigor, because I think this is a crucial question.

Don't you think that a Senate committee has a right to try to ascertain the constitutional philosophy of a nominee for a Federal judgeship?

Mr. CHRISTOPHER. Yes, sir, I do, Senator. I think that the main inquiry ought to go to his intellectual qualifications and his integrity. But I think you are entitled to know also his process of decisionmaking. And if I could extend that answer just a moment, Senator—we at the Department of Justice feel we have a very particular responsibility in connection with judicial appointments. It is one of my honors and duties to be involved with them. I do not suppose that I regard anything I do as more important.

We begin with a recommendation, almost always from a Senator. We make exhaustive personal inquiries. We contact the ABA for their views. The FBI conducts in excess of a hundred interviews. And following that rather exhaustive inquiry, a recommendation is made to the President. And so I am at one with you on the importance of these nominations.

Senator ERVIN. Well, don't you believe that the best way to ascertain any man's adjudicating processes is by a study of his opinions?

Mr. CHRISTOPHER. Yes, sir.

Senator ERVIN. And do you not believe that fairness for the nominee should prompt a Senator who is troubled by those decisions which indicate to the Senator that the nominee is not willing to interpret the Constitution in accordance with its true intent, that misgivings should prompt the Senator to give the nominee an opportunity to explain the things in the decisions which give trouble to the Senator?

Mr. CHRISTOPHER. Senator, in Justice Fortas' case you have 3 years of Supreme Court decisions. In Judge Thornberry's case, you have 5 years of judicial performance. I believe that the committee should examine those decisions, and that a majority of the committee should decide on the basis of that examination whether or not the men are qualified. I think it is an abridgement of the constitutional separation of powers for a man to be asked to talk to the Senate about his opinions or to talk about his future judgments in connection with his nomination. I think the raw material is there for an evaluation of Judge Thornberry and Justice Fortas. At the Department of Justice we think they are exceptionally well qualified, and we hope that a majority of the committee will reach that same conclusion, Senator.

Senator ERVIN. Well, you do not think there is any obligation on the part of the man who has held a judicial office to remove from a Senator's mind what may possibly be a misconstruction of his position on an opinion?

Mr. CHRISTOPHER. Senator, I think a Justice's highest duty is to honor the independence of the judiciary by declining to be called to answer by another branch of the Government, sir.

Senator ERVIN. Even when the other branch of the Government has a duty to find out the constitutional philosophy?

To put it a little more understandably—I think the Constitution intends a Justice to be independent. But I do not think it contemplates he is going to be independent of the Constitution. And in any case

where a Senator, who is sitting on a committee like this, thinks that the Justice has been independent of the Constitution in his judicial labors, don't you think that the Senator at least should allow him an opportunity to explain?

Mr. CHRISTOPHER. Senator, I make two points about that, I think, sir.

Until 1925, I believe it was, the Senate was able to engage in this process without interrogation of any of the nominees. I would say, secondly, as I said earlier, I believe that at no time in history have there been more hours of interrogation of a nominee than there has been in this instance.

Senator ERVIN. Well, don't you think that when a man is going to be appointed to office for life, and he is going to exercise the greatest power of any public official in the United States, save perhaps the President, that it is a duty of a Senator in passing on the nomination to try to ascertain the constitutional philosophy of the nominee, notwithstanding that there may be some length in it?

Mr. CHRISTOPHER. Yes, Senator, I think you ought to, through analysis of the opinions and his record and his background, make your best judgment about his intellectual qualities, his courage, his integrity, and his approach to judicial action.

Senator ERVIN. Now, I do not care to pursue anything with Mr. Christopher further. I appreciate your coming and discussing these matters with me.

But one decision that the Supreme Court handed down on June 17, 1968, which I think is contrary to the interpretation placed upon the Civil Rights Act of 1866 for 102 years, contrary to the words of the 13th amendment, and contrary to the history of the statute, and contrary to the open occupancy law which was enacted this year by the Congress—*Joseph Lee Jones* v. *Alfred H. Mayer Co.* I ask that be printed at this point in full in the body of the record.

(The document referred to was marked "Exhibit 52" and appears in the appendix.)

Senator ERVIN. I want to put in the record at this point another statement from Justice Owen Roberts which appears in *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 113:

> Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct. But this is not such a case. The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow.

Senator ERVIN. Also another statement by former Justice Owen J. Roberts, in *Smith Allwright*, 321 U.S. page 670:

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

I ask that at this point the following editorial from the New Republic for July 20, 1968, be printed in the record.

The Chief Jnstice:

The senatorial brouhaha over the confirmation of Abe Fortas as Chief Justice is a tempest in a teacup. Presidents do not generally cease making Jndicial appointments because they are due to leave office in a half a year even thongh while in office they sometimes unfortunately delay making them for as long as that. And a retirement or resignation effective upon the qualification of a successor creates a vacancy. The Senate can, therefore, vote to confirm a successor. It does so just about every week with respect to myriad offlces.

Yet the manner of Chief Justice Warren's retirement, while it has no bearing on the propriety of the President's nomination of a successor, or on the Senate's function in voting confirmation, does leave a great deal to be desired. Execntive officers serve under the direction and at the pleasure of the President. It is unobjectionable, and often right, that they should make their resignation effective at his pleasure—which is what making a resignation effective upon the qualification of a successor amounts to. But judicial officers are independent of the President. They retire under an act of Congress that gives them the absolute right to do so, and they communicate their retirement or resignation to tbe I'resident only for his information.

It is perhaps a small, symbolic point only, but the symbols of Jndicial independence are not trivial; they are an important source of judicial power and effectiveness. The point, moreover, goes beyond the symbolic, as Chief Justice Warren himself ingenuously emphasized at his press conference on July 5. He was still in office, said the Chief Jnstice, and would return to preside in the fall if the Senate fails to confirm Abe Fortas, of whom he thinks well. That may not have been intended as a form of pressnre, but it looked like it. The pressure was in any event implicit in the manner of Chief Justice Warren's retirement. Life tenure, specified in the Constitution and nndoubtedly essential, is one thing: life tenure with a right to influence confirmation of a sncccssor is rather another. Retirements which are effective on a date that is certain and irrevocable ensnre that a replacement will be considered on his own merits, not as a choice between himself and his predecessor.

The practice of retiring or resigning, as Chief Justice Warren did, effective upon the qualification of a successor, is unprecedented in tbe Supreme Court. It seems to have grown up among lower federal judges. It has nothing to commend it.

Now, another thing that bothers me.

Mr. Fortas stated that he could not make any statements to this committee respecting any decisions that he might be called on to make in the future, with which I agree. He also stated that he could not answer any questions directed to any decisions he had participated in the past. a position with which I disagree. So we are told in effect that Mr. Justice Fortas, whom I think is a very congenial gentleman, cannot tell the committee much about the future and nothing about the past, as far as his decisions.

That is a rather queer position in view of the fact that Mr. Fortas is willing to write a book "Concerning Dissent and Civil Disobedience," for everybody in the United States to read, in which he discusses in detail four decisions in which he participated—*Brown* v. *Louisiana*, which is on page 13 of the book; *Cox* v. *Louisiana*, which is discussed on pages 16 and 17 of the book; the case involving the arrest of Dr. Martin Luther King, which is discussed on page 35 of the book, and the *Sedger* case, which is discussed on page 50 of the book. Mr. Fortas did not have any hesitation whatever to write the book giving all the reading public in the United States his opinion about decisions, and why they were handed down, why he voted as he did. And yet for some strange reason, he cannot tell the committee that.

I would like to put in the record what I read parts of before, an editorial "Advise and Consent" in which some comments are made about the fact that Mr. Justice Fortas confers with the President.

(The editorial referred to was marked "Exhibit 53" and appears in the appendix.)

Senator ERVIN. I would also like to call attention to an article which appeared in the New York Times of May 24, 1968, merely for the purpose of showing Mr. Justice Fortas grants interviews relating to his judicial philosophy to newspaper reports.

(The article referred to for inclusion in the record was marked "Exhibit 54" and appears in the appendix.)

Senator ERVIN. I would also like to call attention to the fact that Mr. Justice Fortas stated here that he would accept invitations on occasions to speak to school groups, and other public groups, in which he discussed decisions of the Supreme Court.

I have a little more on this.

I am like Mr. Christopher, I think this is a rather long investigation. I would like to get my part over. But I would like to yield to the Senator from Arkansas for some questions, without losing my right to the floor.

Senator MCCLELLAN. Mr. Christopher, would you come back for just a moment please, sir.

I understand Senator Thurmond wishes to ask you some questions.

Senator ERVIN. I wonder if I could finish my presentation before he starts.

Senator MCCLELLAN. I have some questions at this time.

Would you yield to me for two or three questions?

Senator ERVIN. Yes.

Mr. CHRISTOPHER. Pardon me, Senator, I did not realize you were not finished with me.

Senator MCCLELLAN. I am sorry, I was preoccupied here. I did not notice you had left the witness stand.

In the course of the questioning this morning, I have had a chance to glance at this statement or brief, whatever it is, that the Justice Department has submitted to the committee. It probably could be described as a memorandum in support of the confirmation of Justice Fortas. It appears to me like a little lecture from the Department of Justice as to how the Senators should make their decision with respect to a Presidential appointment or judicial appointment of this nature.

If this is the case and you feel you can tell us how we ought to go about making our decision, you ought to be able to answer questions as to the Department's position with respect to some of these court decisions that are in question.

Your state:

> The judicial performance of a Justice cannot properly be assessed by selecting a scattering of cases decided over three years, most of which the Justice did not write, and in disputing with him over the result of those cases.

Do I understand that you question the propriety and wisdom of the Members of the Senate in questioning decisions in which Justice Fortas participated, though he did not write the opinion?

Mr. CHRISTOPHER. Not at all.

Senator MCCLELLAN. And decisions with which he agreed, though he did not write the opinion?

Mr. CHRISTOPHER. Not at all, Senator. The dichotomy there is basically this.

We think that you ought to look at his judicial work as a whole, and ask yourself whether it displays intelligence, craftsmanship, insight, and a fidelity to constitutional principles.

Senator McCLELLAN. I was going to come to that. Then you go on to say, after saying we cannot properly assess it by selecting a scattering of cases, "the proper measure by which to assess the performance of a Justice is to ask whether his work as a whole reveals intelligence"—no one here questions Justice Fortas' intelligence—"his craftsmanship"—I assume he is quite crafty in the law—"his insight"—well, I do not know the full depth of it, but no doubt he has great depth of insight, "and an understanding of the Constitution and Government."

Well, one may understand the Constitution, and no one questions Justice Fortas' knowledge of the Constitution, I certainly would not, I think he is a highly capable lawyer. But when it comes to rendering opinions that interpret the Constitution, and when giving practical application to those interpretations, I think it is incumbent upon the Members of the Senate if they truly meet their responsibilities under the Constitution, in carrying out the provisions of advice and consent, that they try to know and understand the philosophy of judges who are going to serve for life once they are confirmed.

I think we must go further than merely understanding the Constitution, we must go to the integrity of its construction, we must go to the philosophy behind that construction. As a Senator, undertaking to meet my responsibility in the matter of confirmation of a nominee to the highest Court of the land, I think I have a duty to try to understand how this nominee is going to meet his responsibility with respect to his interpreting the Constitution.

Now, if I find during that 3-year period of time that he has either written or joined in a majority opinion, or even in a minority opinion, expressing absolute contrary views to my judgment and understanding of what the Constitution means and how it should be interpreted, then I think I have a duty to express that opposition. If we cannot hear from him, as he refuses to do, to give an explanation or to give a reason or a statement that would give us some hope that his position and views and philosophy would change in the future, which would be pretty hard for him to do, then I think we are bound to judge him on what he has done and what he has said. That judgment may be harsh. But it must be applied if we are to meet our responsibilities. There is such a divergence between some of the philosophy he has expressed and some that I entertain. This has been demonstrated by the hard battle I fought in the Senate to get a law enacted to modify some of these decisions. Without some further explanation, without something to intervene here, that would give me some hope that he will pursue a different philosophy in the future, I do not see how I can consistently vote for confirmation and meet fy responsibility.

I had hoped Justice Fortas would come before this committee and give some intimation that we could expect something a little better from him in the future.

You agree, do you not, that if we cannot agree on philosophy, and I believe that he is pursuing a dangerous philosophy, I should not vote for his confirmation. Certainly you will agree to that?

Mr. CHRISTOPHER. Senator, I agree completely with your statement of what your duty is, sir.

Senator MCCLELLAN. Thank you, sir.

Now, speaking about the *Miranda* case. I did not insist or try to insist that Justice Fortas give an explanation of this case because it is true there is a difference of opinion about whether he should or should not discuss these matters. However, he voluntarily writes articles, publishes them, and gives lectures in which he discusses them. Although it is said that he is not answerable to this branch of the Government, it is this branch of the Government which has a duty to perform certain constitutional duties before he can become Chief Justice of the Court. I think he is answerable. I think it is his duty to clearly, clearly, ventilate his philosophy before this committee. I think he has an absolute duty to do it, so that we might be advised and informed sufficiently to meet our constitutional responsibility properly.

I notice on the *Miranda* case, on page 3, you make reference that "The Supreme Court in the *Miranda* opinion specifically invited the Congress to enact appropriate legislation dealing with confessions and police interrogation."

I wonder what they meant by "appropriate legislation" when the Supreme Court in that opinion simply declared what the law is. Now, how could we enact appropriate legislation if they have already declared what the law is? In other words, what could we do unless we newly enacted a law repeating the same thing the Supreme Court said. What would be your interpretation? Can you think of any piece of legislation that could be enacted in this field in response to this "appropriate legislation" to which you refer?

Mr. CHRISTOPHER. Senator, my understanding of the Court's opinion in that regard is that the Court felt that there was a variety of alternatives available to Congress in prescribing the necessary warnings to be given, how they ought to be given, and various other aspects of pretrial interrogation. I do not think the Supreme Court, in my reading of the opinion, felt that the warnings they prescribed or the way they prescribed them were the absolute last word.

I think it was an invitation by the Court to Congress to see if they could perfect a better set of warnings, a better group of ways to carry out the constitutional requirements that the Court announced in that case, sir.

Senator MCCLELLAN. In other words, if we would go a little further than the Supreme Court, it would be all right. A lot of us think the Court has already gone too far.

Mr. CHRISTOPHER. Senator, I think the Court contemplated the——

Senator MCCLELLAN. I think you have placed a correct interpretation on it. If the Congress wants to go further than we have, OK, enact legislation. I think that is exactly what the five members of the Court meant. "But unless you are willing to go further, then we have said what the law is and the Constitution means, and there cannot be anything else."

Mr. CHRISTOPHER. Senator, I think the Court's decision also contemplates reaching the same result, but in a different way, not solely by going further, but by meeting the constitutional requirements in other ways.

Senator McCLELLAN. How can we get the same result with doing less? Can you anticipate that?

Mr. CHRISTOPHER. I think there is no frozen mold, there is no absolute——

Senator McCLELLAN. I am going by the position they take. I do not see that they have left us any room.

Senator SCOTT. Would the Senator yield on that point?

Senator McCLELLAN. I am glad to yield—with this one further statement. We have undertaken to do it, to modify those decisions.

Mr. CHRISTOPHER. Yes, sir.

Senator McCLELLAN. Now, the clash is going to come, and it will be a clash of philosophy—when these decisions go back up there. Unless the Supreme Court modifies its position, or some member modifies his position in the majority of the five—there is only three of the majority left now, because one has been supplanted by an appointment—unless someone in the majority modifies their position then they can well hold that the act of Congress is unconstitutional, and it is with that philosophy that I fully disagree. I do not believe the Constitution requires, as a correct interpretation, the conditions that *Miranda* has imposed. I cannot see how I could reconcile my vote, voting for someone who will perpetuate a philosophy on the Court that I cannot at all subscribe. Now, I am glad to yield.

Senator SCOTT. Along those lines—Congress enacted, Mr. Christopher, in the D.C. Criminal Code a limitation of 3 hours on interrogation, and in the crime bill a limitation of 6 hours on interrogation which was my amendment, in order to secure some precision and preciseness in that aspect of the law—that was my amendment. I would accept 3 hours. It was an agreement with the Senator from Arkansas. Because there might be a detention at midnight, and it might be until 6 a.m. before some further more distant authority could——

Senator ERVIN. Wait a minute, Senator. I want to make it clear that I yielded to the Senator from Arkansas, and I consent that he yield to you, with my right to recover when you and the Senator from Arkansas complete.

Senator SCOTT. I appreciate the Senator's generosity—when the Senator said some 30 minutes before he paused that he was through, I received that statement with certain minimal optimism. But I appreciate the generosity.

Senator ERVIN. All I am trying to insist on is that I do be permitted to get through. That is the reason I made the statement.

Senator SCOTT. That is understood. That is generally the case.

If I may go on with the matter of the 6-hour interrogation period, in your opinion, Mr. Christopher, was the Congress there acting within the guidelines suggested by the invitation of the Court in an attempt to secure at least to that degree, without regard now to the other warnings—but to that degree, an element of precision which the Court seemed to be indicating was an area where Congress might proceed?

Mr. CHRISTOPHER. Yes, sir.

Senator McCLELLAN. Would you yield for one question on that? When you answer this question, do you now speak for the Department of Justice, or only for yourself?

Mr. CHRISTOPHER. Senator, I believe that Senator Scott's question was whether or not Congress was acting in an area that seemed to be called for by the Supreme Court's decision in the *Miranda* case.

Now, my feeling about the District of Columbia bill providing for 3 hours' interrogation, and the provision of the Safe Streets and Crime Control Act providing for 6 hours' interrogations is that they are modifications of the Federal Rules of Criminal Procedure, which now provides for prompt arraignment. Those provisions seem to us to have a good chance of sustaining a constitutional challenge, and we did not recommend a veto either of the District of Columbia bill on that basis or of the Crime Control Act. As you know, both bills were signed by——

Senator MCCLELLAN. That is all right. Then you speak for the Department—do I understand you? I just asked if you speak for the Department or just yourself.

Mr. CHRISTOPHER. I spoke for the Department in replying to the question of Senator Scott that the bill was an attempt by Congress to move within the parameters of the Supreme Court's decision.

Senator MCCLELLAN. That is all I wanted to know. You are speaking, you say, now for the Department of Justice in your reply. I thank you—if that is correct.

Senator SCOTT. May I proceed. Just briefly.

Reference has been made to the power of the Senate to advise and consent. I think the Supreme Court has given us some precedent for that in their recent stop-and-frisk decision. The Senate is proceeding to stop the candidates and frisk them for their ideas. But it does seem to me—and I want to make this observation, because my opportunity to participate in these hearings is rather limited—that most of the inquiry seems to turn, not on the right or the duty of the President to make the nomination—a vacancy existing under the conditional situation, nor does it seem to turn on the right of the Supreme Court to decide what the law is. Reference has been made to proceeding upon an unchartered sea. We in the Legislature, every time we act upon a new law, move in unchartered seas. In an evolving nation, it seems to me the future decisions of the Supreme Court are equally uncertain until they are handed down.

I observe, so far as I am concerned, I am not moved by the fact that Senators may disagree with the Court. I do myself. It does not seem to me that a clash of philosophy is a function of the Senate's advise and consent. It seems to me that the question here is simply whether or not the Justices of the Court or those nominees to that post proceeded in accordance with the Constitution of the United States as they see it, and therefore I think that most of the statements indicating disagreement with the opinions of the Court's or nominees is beside the point.

I do think Justice Fortas was required to reply and did explain his function from time to time as an adviser to the President. There he was opened up properly to inquiry and he answered. I do not think any Justice should be required to explain or interpret his decisions or his participation in opinions.

But I hope that when the committee meets in executive session it will consider, not the philosophy of the nominees, with whose philos-

ophy we may or may not be in agreement, but whether or not they are qualified to serve on the Court by reason of intellectual and competence and respect for the constitutional system as well—which, of course, includes respect for the principle of separation of powers, and the principle of advise and consent. Thank you.

Senator McClellan. Others may disregard a man's philosophy in judging his fitness to serve in any position, including the Supreme Court, but I shall not disregard it in making my decision.

Senator Ervin. Mr. Justice Fortas, as I pointed out a moment ago, has written books about cases, he has discussed public issues, meeting with students, and it also appears he has conferred with the President on various public matters, and also that he called up a friend to get his friend corrected on a matter relating to the Vietnam war, that is the cost of the Vietnam war.

I think one reason that Supreme Court Justices should stick to their judicial knitting and stop their involvement in politics is that the matters they concern themselves with in their extra-judicial activities may become matters of controversy.

This is illustrated by the case of *United States* v. *David Paul O'Brien*, which was handed down on May 27, 1968. Mr. Justice Douglas, in the dissenting opinion, says:

> The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.

This David Paul O'Brien contended that the draft law was unconstitutional on the ground that nobody could be conscripted to serve in time of war where there had been no declaration of war by Congress. I just cite that to manifest that point.

Now, a great deal was made of the fact that Mr. Fortas called attention to the fact that other Justices of the Supreme Court had engaged in extra-judicial labors, and one mentioned was Justice Owen J. Roberts.

After Justice Owen J. Roberts retired or resigned from the Supreme Court, as the case may have been, he made a speech entitled, "Now is the Time, Fortifying the Supreme Court's Independence." He spoke of certain proposals then pending.

Before I get to that, I would say he also said this—and it goes further than I would have gone. He says that a man ought not to be promoted from Associate Justice to the Chief Justice—and he gives a reason for it.

> Just by so much as the Supreme Court is set apart, just cause of the great powers the Supreme Court exercises in our constitutional system, there ought not to be any ambition in any man who sits in that Court to go beyond where he is. I would go farther than that. As a matter of personal belief, I do not think an Associate Justice ought to be eligible to be Chief Justice.

This is what a former member of this Court said, because he is under a temptation to do more for a President, enforcing a President's policy, than he otherwise would be. I am not talking about the Supreme Court, but I digress here to say that I think one of the great tragedies of the Federal judicial system is that the Department of Justice, which is the chief law-enforcement agency of the Government, practically selects, or at least approves every district judge before he can be made a district judge. It does the same thing with respect to

every circuit judge before he can be promoted from a district judge to the circuit judge, and it does the same thing to a large extent in passing on the President's approval of the Supreme Court nominee. And yet it is the chief litigant in the Federal courts, before the very judges it selects, and who are dependent for promotion upon its good will. I hope the Government never prosecutes a case against me, because I do not want to be tried before a judge they select.

Also, the chief litigant in the U.S. Supreme Court is the Department of Justice, and the attorneys representing the executive branch of the Government, and the executive branch of the Government is headed by the President. And most of the cases that reach the Supreme Court, where the Government is a party, are cases which involve the constitutional validity of the policies of the administration in power, whatever it may be. And so for that reason I do not think Supreme Court judges should be advising with Presidents.

Justice Roberts goes on to say:

Another proposal is that the Chief Justice or any Associate Justice or any judge of any other court of the United States shall not during his term of office hold any other governmental or public office or position. A bill providing something of that sort was introduced in the last Congress. I feel very strongly that that would be a great protection to the Court. Perhaps it is enough protection to embody it in an act of Congress. It may be a little out of part for me to speak on this subject, for as you know, I accepted at the hands of two Presidents commissions to do work not strictly of a judicial nature.

And here is what I wish to invite your attention to:

I have every reason to regret that I ever did so. I do not think it was good for my position as a Justice, nor do I think it was a good thing for the Court.

Then he says:

If any of the federal judges have time to run around on all sorts of administrative work, then we have too many federal judges.

Then he speaks in here:

When I went to Pearl Harbor for three weeks, I was out of the arguments and consultations of my Court. Chief Justice Stone agreed to my going with the greatest reluctance because he said there are some important cases coming up here, and I do not want a Court of eight to hear them. A full Court ought to hear them. But as I say he regretfully gave his consent to the President, and the President wanted me to go.

I ask that an entire copy of Justice Roberts' speech be printed at this point in the body of the record, and I would like to add this observation. Chief Justice Harlan F. Stone refused the request of the President that he embark on some nonjudicial labor.

(The speech by Justice Roberts referred to for inclusion in the record was marked "Exhibit 55" and appears in the appendix.)

Senator ERVIN. Now, Justice Fortas said that in going to the White House, to read about the proposed order to send troops into the riotous sections of Detroit, and the other times he has been with the President discussing matters of policy, he was serving his country, and justified it on that ground.

On July 18, 1793, Thomas Jefferson, Secretary of State of the United States, addressed this letter to Chief Justice Jay and the Associated Justices of the Supreme Court:

Gentlemen, The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficnlty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognisance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public man, with propriety, be availed of their advice ou these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honor to be with sentiments of the most perfect respect, gentlemen, your most obedient and humble servant, Thos. Jefferson.

Now, on July 20, 1793, Chief Justice Jay replied to that letter, and he told Thomas Jefferson that he would summon the Court together to get their advice on the question, whether they should advise the President on matters which even involved the peace of the United States. The Justices met. On August 8, 1793, Chief Justice Jay and the Associate Justices wrote the following letter to President Washington:

Sir:

We have taken iuto consideration the letter written to us, by your direction, on the 18th instant, by the Secretary of State. The question, "whether the public may, with propriety, be availed of the advice of the judges on the questions alluded to," appears to us to be of much difficulty as well as importauce. As it affects the judicial department, we feel a reluctance to decide it within the advice and participation of our absent brethren.

The occasion which induced our beiug couvened is doubtless urgent; of the degree of that urgency we cannot judge, and consequently cannot propose that seems to have beeu purposely as well as expressly united to the executive departments.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflectiou that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

We have the honor to be, with perfect respect, sir, your most obedient and most humble servants.

Now, this was a case where the Supreme Court told George Washington in response to a letter written to them by Thomas Jefferson, acting as Secretary of State, and asking for advice from the Court as to governmental policies essential, as the Secretary of State said, to the preservation of peace in the United States, that it did not have a proper regard for the lines of separation drawn by the Constitution between the three departments of the Government. They also stated that it would be against the rules of propriety for them to give advice to the President, and they went on to suggest to the President that he ought to get his advice from members of his Cabinet, instead of Supreme Court Justices.

Now, I have been interested in this because I believe, as Justice Fortas admitted he believed, that constitutional government cannot

endure in America if a majority of the Supreme Court Justices do not give a true interpretation of the Constitution. I think that in these cases I called attention to, which were participated in by Justice Fortas, that the Supreme Court did not give a true interpretation of the Constitution.

I want to read and put into the record an article by David Lawrence upon a book containing three lectures that Justice Learned Hand delivered at Harvard University. And I would like to say that Judge Learned Hand in my book was the greatest jurist that America has known during this century. Unfortunately he could not get to be a member of the Supreme Court because he did not know the Presidents too well, and was not politically active.

I read this part of the article:

A "Third Legislative Chamber."

Judge Hand's View that High Court has Exceeded its Power is Quoted:

* * * Judge Hand says, moreover, that he "has never been able to understand" on what basis the Supreme Court adopted the view that it may actually legislate. He ask whether we should establish a "third legislative chamber," and then adds:

If we do need a third chamber, it should appear for what it is, and not as the interpreter of inscrutable principles.

Judge Hand, however, doubts whether any judge should be permitted to 'serve as a communal mentor' and deplores any wider form of judicial review that is based on the 'moral radiation' of court decisions.

Judge Hand says, in effect, that the Supreme Court these days is not following the Constitution or the precepts of the "founding fathers." If there is to be a "third legislative chamber," Judge Hand does not want its members serving by appointment.

He writes:

"For myself it would be most irksome to be ruled by a bevy of platonic guardians. Even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

"Of course I know how illusory would be the belief that my vote determined anything; but nevertheless, when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture."

This is but another way of saying that, if the Supreme Court is to write new laws and new amendments to the Constitution as, in effect, has been done in recent years, then it is much better to entrust such power to a legislative body for whose members the citizen can vote in approval or disapproval. In a broad sense, this is what parliamentary governments do. They are elected by the people and they write the "supreme law of the land."

Congress is today face to face with the issue of whether the Supreme Court as a "third legislative chamber" should continue to usurp power.

Now, I think the opinions that I have discussed in various cases show that the majority of the Supreme Court, against the express opposition of four of its members, has constantly changed the meaning of constitutional provisions since Justice Fortas ascended the bench as an Associate Justice.

I think that a 5-to-4 majority of the Supreme Court in the *Allis Chalmers Manufacturing Co.* case actually nullified a part of the will of Congress, and rewrote and amended an act of Congress.

I think that in the *Amalgamated Food Employees* case that they made a serious misconstruction of the right of private property as made by the Constitution.

I think that in the *Miranda* case that they usurped the power of Congress to legislate and adopted a code of conduct for Federal

officers, and usurped the power to amend the Constitution insofar as they applied that decision to the States.

And in the *Miranda* case, which dealt with voluntary confessions, the Court made a confession, whether voluntary or involuntary I do not know, that they were creating new constitutional requirements on that day, because they referred to this warning as "the principles we are enunciating today." And not only that, in that case the Supreme Court ignored the fact that the Supreme Court itself, in times past, had repudiated any idea that the fifth amendment required any warnings of that nature.

I think that in the *Robel* case and the *Keyishian* case, the Supreme Court held unconstitutional an act of Congress and an act of the Legislature of New York simply because five of the four judges did not think that Congress and New York had legislated in a manner in which they thought they should have legislated.

Now, I have had some very strong statements to make. I think there is a serious question here whether the constitutional government is going to continue to endure in this country. It cannot endure in this country if Supreme Court Justices substitute their personal notions of what the Constitution should say for what the Constitution actually does say.

During recent years, the Court has overruled and repudiated and cast into the judicial garbage can hundreds and hundreds of decisions of the Supreme Court of the United States itself, and hundreds and hundreds of decisions of State courts in fields assigned to it by the Constitution to the States.

Now, I have said these things because I believe them to be true, and I have given a lot of study to this problem. But I revere the Court as an institution. I think that what I have said, I have said with reference for the Court as an institution.

We used to have a retired naval chaplain in my home town named Edmundson. He was a Methodist preacher and a very fine preacher, before he became a naval chaplain. And then he went into the Navy, and he made a fine sailor. He not only made a fine sailor, but he learned to cuss, like sailors are reputed to cuss. And so he retired and came back to my town, which was his home town, and sometimes he lapsed into the habits as a sailor, and he cursed. And so some of the people that did not approve of a preacher cursing, they went to the local Methodist preacher and asked him to remonstrate with Brother Edmundson about his evil ways. So this man saw Brother Edmundson, and told him it was reported to him that he cursed and he said, "I have even heard on occasions you go so far as to take the Lord's name in vain."

And Chaplain Edmundson said:

> Brother, it is true I do curse, and it is true that sometimes I take the Lord's name in vain, but, brother, I would have you understand that I always do so with the utmost reverence.

Everything I have said about decisions of the courts and nominees has been said with the utmost reverence for the Court as an institution.

Now, I want to call attention to an article—and I am going to be through shortly.

This is written by a great constitutional scholar, Philip B. Kurland, Professor of Constitutional Law at the University of Chicago. This article appeared in "Nation's Business" for May 1968, very timely. It is entitled "Wanted, a Nonpolitical Supreme Court," and it bears the caption "A distinguished authority tells what has gone wrong with our highest Court." I will read a few things from the article and I am going to put the whole article in in a moment.

Appointments to the United States Supreme Court are among the most important tasks assigned to the President. And yet the appointments are generally made with the same bows to political expediency as appointing of local postmasters. The fault lies not alone with the President, for the Senators who treat lower federal court appointments as personal prerogatives have been willing to leave appointments to the Supreme Court as the personal prerogative of the Chief Executive. Not since Judge John Parker was rejected more than three decades ago has the Senate blocked a Presidential Supreme Court nomination. So seldom do nonpolitical factors play a part in judicial appointments, that the surprise of the matter is that we have a Court which is not worse than it is. The President ought to put aside politics and patronage and seek out only the best talents to staff the Court.

I digress from reading just to make a comment here.

Under the communications which passed between the Chief Justice and the President, and the action which accompanied the President's action, as Senator Mike Mansfield so well said, the only choice left to the Senate was to either take Mr. Fortas or keep Mr. Warren as Chief Justice. The procedure absolutely precludes from any consideration the hundreds and hundreds of qualified men, men qualified for the Supreme Court, found among the other 200 million Americans. Certainly that is contrary to the principle that the President ought to put aside politics and seek out only the best talents to staff the Court.

Now, the Chief Justice sent his letter to the President on June 13, and so far as I know, the first public announcement of that letter was made by the White House on 13 days later, simultaneously with announcing the nomination of Justice Fortas to succeed Justice Warren, and Judge Thornberry to succeed Justice Fortas.

In other words, the people of the United States were not given any opportunity to recommend anybody else for either of these positions.

I will read again:

The President ought to put aside politics and patronage, and seek out only the best talents to staff the Court. Obviously there is something wrong with the method that allows a Learned Hand to remain a judge of the Court of Appeals while appointments are offered to a Frank Murphy; to allow a William H. Hastie to remain on the Court of Appeals but give a Thurgood Marshall a High Court seat. The shame of the matter has been that a long list could be made of the names of those best qualified to do the task of a Supreme Court Justice who were never appointed because political considerations took precedence. There have been times when a President acknowledged the appropriate standards as when President Hoover appointed Benjamin Cardoza to the Conrt. But these have been rare.

And I would like to digress there to say that when the question of ratification of the Constitution was being considered by the American people, many wise men, including Eldridge Gary of Massachusetts, and George Mason of Virginia, pointed out that there were no limitations, actual limitations upon the power of the Supreme Court, and that under the guise of interpreting the Constitntion, they could substitute their personal notions for the Constitution. But Alexander

Hamilton said there would be very few men in the country capable of being Supreme Court Justices. They would be men, he said, in substance who have devoted their lives to the law, and who by long and laborious labor, have familiarized themselves with the precedents, and they will feel themselves bound down by the precedents.

During most of our history, Alexander Hamilton's statement prevailed and Presidents appointed the best-qualified men devoted to the Constitution to the Supreme Court.

Alexander Hamilton said that this notion that Supreme Court Justices would substitute their personal notions for law was unfounded. But I tell you in later years Alexander Hamilton's warning has become alive on the American scene.

"History demonstrates that Presidents have not infrequently named persons to the Supreme Court because the appointees were expected to express judicial views sympathetic to those of the President." "President Johnson may expect that the ideals of the Great Society, whatever they may be, will be furthered by Justice Fortas and Marshall."

Skipping some not germane—"The error of the way of Supreme Court appointments lies not only in the choice of individuals because of their political proximity to the Chief Executive, geography, race, religion, and the personal friendship of the President among other factors that have played or should not play a part in the making of a Justice."

I am not satisfied to stop with criticism. I would like to make this statement.

During the last few weeks the Senate has been called upon to perform one of its most important constitutional functions—the consideration of the President's nominations to the Supreme Court. Our deliberations on the qualifications of these nominees have, once again, focused attention on what I feel is a primary weakness in the Court. That is, the method for selecting a new Justice.

Because of the present Court's easy willingness to depart from precedents and the plain meaning of the Constitution, I feel that today our Federal system stands in great jeopardy, and I believe we must begin now to devise some means which would insure that only the best-qualified people serve on the Court. Rather than continuing the present method which often results in appointments for political purposes and not for judicial excellence, we should try to find some way to complete the job begun by the Constitution of having a truly qualified and independent judiciary.

Changing the methods of selecting the members of our three branches of Government is not a novel idea. Both the executive and legislative branches have undergone perfecting changes through the years. For example, a person cannot be elected President more than twice, and the Vice Presidency is no longer filled by the person having the second largest number of votes in a presidential election. Women are no longer denied the right to vote and no longer is the ballot denied to those on account of race. In the legislative branch, Senators used to be elected by the legislatures of the States. This is no longer true.

But the method of selecting the Supreme Court Justices continues unchallenged just as it was in 1791, and I feel, Mr. President, that it is even more important to insure careful selection of the judiciary than the other two branches. As Alexis de Tocqueville, one of the most perceptive observers of American institutions and life, said:

> The President, who exercises a limited power, may err without causing grave mischief in the State. Congress may decide amiss without destroying the union, because the electoral body in which Congress originates may cause it to retract its decisions by changing its members. But if the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or civil war.

This quote takes on particular significance at this time in our Nation's history when the judgment of just five men has been allowed, with increasing frequency, to seriously change the economic, social, and political direction of our Nation and to do so by overriding our written Constitution and the prerogatives of the States and our Federal Legislature.

Mr. Chairman, the drafters of the Constitution undertook to free Supreme Court Justices from all personal, political, and economic ambitions, fears and pressures which harass the occupant of other public offices by stipulating that they should hold office for life, and receive for their service a compensation which no authority on earth could reduce. They undertook to impose upon each Supreme Court Justice a personal obligation to interpret the Constitution according to its true intent by requiring him to make an affirmation to support the Constitution. It causes me great pain to observe that the actions of the present Supreme Court lead to the inescapable conclusion that the Founding Fathers did not devise a method of selecting Justices comparable to the trust they placed in them.

Mr. Chairman, I intend to offer a constitutional amendment designed to insure, as far as humanly possible, the appointment of the best qualified people to the Supreme Court. In order to afford greater protection to the judicial branch, my amendment proposes a three-step method of approving a Supreme Court Justice.

The procedure is as follows:

(1) Whenever a vacancy occurs in the office of the Chief Justice of the United States or Associate Justice of the Supreme Court, the President shall convene a conference which shall be attended by the presiding judge of the highest appellate court of each State and the chief judge of each judicial circuit of the United States. The senior chief judge of a judicial circuit of the United States shall preside at the conference. By majority vote, the conference shall designate, and the presiding officer of the conference shall transmit to the President in writing, the names of five or more persons deemed by the conference to be qualified to fill the vacancy.

(2) The President shall nominate one of the persons so designated to fill the vacancy.

(3) If the Senate advises and consents to the appointment of such person, such person shall be appointed to fill the vacancy. If the Senate does not advise and consent to the appointment of any person so nominated, the President shall nominate another person so designated to fill the vacancy.

I believe that my proposed amendment will not be chosen on the basis of personal friendship with the President, political service rendered to the political party in power, or past association with politically potent groups. Undoubtedly, these are worthwhile objectives.

Mr. Chairman, I hope all Members of the Senate will study the problem and will support my proposed solution. At the very least, however, I hope my proposed amendment will serve as a catalyst to inspire dialog on this vital and unfinished constitutional business.

I ask unanimous consent that a copy of this statement, and a copy of my proposed constitutional amendment, and copy of the article by Professor Kurland in the "Nation's Business" be printed in full at this point in the record.

The CHAIRMAN. That material will be admitted.

(The documents referred to were marked "Exhibit 56," "Exhibit 57," and "Exhibit 58" and appear in the appendix.)

Senator ERVIN. Mr. Chairman, I would like to say I have finished. I would like to thank Mr. Christopher for his appearance.

Mr. CHRISTOPHER. Thank you, Senator, for your courtesy.

The CHAIRMAN. Senator Thurmond, would you rather continue now, or would you rather we recessed?

Senator THURMOND. Mr. Chairman, we have a Republican policy luncheon at 12:30. If it would suit the Deputy Attorney General as well, I would suggest we come back at 2:30 or 3.

The CHAIRMAN. Come back at 2:30.

Senator THURMOND. I have some very important matters to go into. I would like to question the Attorney General especially on the pornography angle. I do not believe you referred to that in your memorandum, did you?

Mr. CHRISTOPHER. No, sir, Senator, I did not. I would be glad to be back whenever the chairman and you want to have me here.

(Whereupon, at 12:20 p.m. the committee was recessed, to reconvene at 2:30 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN. Proceed, Senator Thurmond.

STATEMENT OF WARREN CHRISTOPHER—Resumed

Senator THURMOND. Mr. Chairman—Mr. Deputy Attorney General, I have a few questions to ask you growing out of the hearing yesterday.

Have you had the opportunity to read the statement by Mr. James J. Clancy?

Mr. CHRISTOPHER. Senator, I was here yesterday when he testified.

Senator THURMOND. You heard him testify?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. In the statement, he said the type of materials brought before the High Court in the 1966 October term was uniform. There were 26 paperback books. Their titles were—then he goes on to name all of those. It starts out with "Sex Life of a Cop," and ends up with "Flesh Avenger." Then [illegible]ndage" books, series of photo-

graphs of nude females in provocative poses with focus on the pubic area, and suggested invitations to sexual relations, eight motion picture films with a strip-tease title, 10 girlie magazines, one nudist magazine, and two home-made so-called underground films.

Now, you are familiar with the case of *Shackman*, are you not?

Mr. CHRISTOPHER. I heard him testify about it yesterday, Senator.

Senator THURMOND. Justice Fortas participated in that case, did he not?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. Yesterday afternoon I saw for the first time one of the films that was described in Mr. Clancy's testimony. Have you had an opportunity to see any of those films in the *Shackman* case?

Mr. CHRISTOPHER. No, sir; I have not.

Senator THURMOND. They are designated "films O–7, O–12, and D–15."

The nature of the material appearing in the motion picture film entitled "O–7" was described by a Federal District Judge Hauk. Do you know Judge Hauk?

Mr. CHRISTOPHER. Yes, sir; I do.

Senator THURMOND. He is a Federal district judge in California?

Mr. CHRISTOPHER. Yes, sir, he is; that is correct.

Senator THURMOND. In 258 Federal Supplement 983—wherein he ruled the three films to be hard-core pornography.

And then he described this film, O–7. Judge Hauk says:

> The film O–7 is virtually the same as Exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible . . . at one time the model pulls her panties down so that the pubic hair is exposed to view . . . the focus of the camera is emphasized on the pubic and rectal region, and the model continuously uses her tongue and mouth to stimulate a desire for, or enjoyment of acts of a sexual nature. The dominant theme of the material, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

From what Judge Hauk described about that film, L–7, you think that would be a very wholesome film for the public to see?

Mr. CHRISTOPHER. Senator, I would not comment without having seen the film. The description of it does not make it sound wholesome. Senator, perhaps you can enlighten me—was the decision by Judge Hauk the exact case which was on appeal in the Supreme Court of the United States in *Shackman* v. *California*?

Senator THURMOND. Let me take up all these at one time, and then we will go into that.

Now, the next was O–12. This was another film described by Federal District Judge Hauk, with equal clarity in the same opinion.

> The film, "O–12"—was viewed by the court. The film consists of a female model clothed in a white blouse opened in front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, and lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound,

story-line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state—and then there are some four-letter words used here which I shall not repeat, which I think would be repnlsive to anyone. The dominant theme of the film taken as a whole, ohviously is designed to appeal to the prurient interest in the sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal areas clearly showing the pubic hair and the outline of the external parts of the female genital area. The film is entirely without artistic or literary significance and is utterly without redeeming social importance.

Now, the O–7 was a 14-minute strip-tease film which Justice Fortas voted was not obscene. That is the first one I described. And that, I believe, has been filed with the committee. I do not know whether the committee members have had a chance here to see it or not.

It was an exhibit in U.S. Supreme Court case. It also filed here.

And Mr. Clancy says he can attest that the copy filed with this committee is an exact copy of the film considered by Justice Fortas and the U.S. Supreme Court in the *Shackman* case.

I believe that was the question you asked—whether it was involved in the *Shackman* case.

Now——

Mr. CHRISTOPHER. Senator Thurmond, I——

Senator THURMOND. Now—excuse me.

Mr. CHRISTOPHER. I would not want to hold you up even for a minute on a technical point. I was just looking at page 5 of the exhibits, and the suggestion is there that perhaps the case had come up, not from the opinion by Judge Hauk, but in some other way.

Senator THURMOND. Well, it went to the court of appeals; did it not?

Mr. CHRISTOPHER. I see no indication of that, sir; and I was just asking you for clarification.

Senator THURMOND. Well, here is the decision right here. Appeal from the Superior Court of California, County of Los Angeles. Would you like to see it?

Mr. CHRISTOPHER. That would be different from an appeal from the U.S. district court, on which Judge Hauk sits.

Senator THURMOND. Now, this case was heard by the trial judge and the jury, and the court of appeals heard it, and they all held it obscene. And yet the Supreme Court, in a 5-to-4 decision, where Justice Fortas held the balance in the voting, and they reversed the case.

I just want to ask you this.

You probably have a family; don't you?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. You would not want your wife or daughter to see a film that was described as O–7 or O–12, would you?

Mr. CHRISTOPHER. Well, I have not seen the film, Senator. The description does not make it sound like family entertainment.

Senator THURMOND. What?

Mr. CHRISTOPHER. The description does not make it sound like family entertainment.

Senator THURMOND. Yet Justice Fortas, and the majority—five of the judges held it was not obscene.

Now we will go on.

There was a paperback book entitled "Sin Whisper," from the same mold as those ruled to be hard-core pornography by the Kansas Su-

preme Court. And this was before the Georgia Supreme Court, on December 18, 1967. Judge Fortas was a member of the Court at that time, was he not?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. And this is a description of the Georgia Supreme Court concerning this book or the materials in it. And I quote:

> The book entitled "Sin Whisper" is composed substantially of lengthy detailed and vivid accounts of preparation for the acts of normal and abnormal sexual relations between and amongst its characters. The book considered as a whole has as its predominant appeal the arousing of prurient interest in the average man of our national community. It has no redeeming literary or social value.

Now, that is the reason they tried to justify some of the books of this nature and magazines—is that they have literary or social value, I believe, is it not?

Mr. CHRISTOPHER. That is one of the tests that the Court has used, Senator; yes, sir.

Senator THURMOND. Well, the Georgia Supreme Court says that this publication "Sin Whisper" has no redeeming literary or social value or importance, and goes substantially beyond the customary limits of candor in description and representation of its subject matter, and judged as a whole by Georgia statutory standards is obscene:

> The book is filthy and digusting. Further description is not necessary, and we do not wish to sully the pages of the reported opinions of this court with it.

In other words, the Georgia Supreme Court took the position it was so filthy they did not even wish to publish in their opinion the full description of it.

Now, the publisher, Corinth Publications, a corporation owned by William Hamling, according to Mr. Clancy, once told investigating law enforcement officers that they should go back to chasing spies and that he could beat them anywhere in the United States, that he hired the best attorneys, and that one of them was Abe Fortas in Washington, "who could fix anything no matter who was in power."

He further boasted that he had paid Fortas $11,000 to get his mailing permit for the girlie magazine "Rogue." Fortas' law firm had in 1957 filed an amicus brief on behalf of Greenleaf Publishing Co., the publisher "Rogue" urging the reversal of the *Roth* conviction.

On December 14, 1966, the Corinth Publications filled its appeal in the U.S. Supreme Court. This time Hamling had a new attorney. His ex-attorney, Abe Fortas, had been appointed to the bench and was to sit in judgment on his former client's claims. Justice Fortas' appearance in *Roth* v. *United States* as counsel for amicus curiae, Greenleaf Publishing Co., urging the reversal of Roth's conviction on an obscenity charge for sending his materials through the mails is documented in Lawyers Edition 2 at page 2208. William Hamling was then doing business as Greenleaf Publishing Co., the publisher of Rogue, a girlie magazine. The 4-hour conversation referred to was between Wiliam Hamling, this time doing business as Corinth Publications, Inc., the publisher of "Sin Whisper," and Homer Young, FBI agent in charge of the Los Angeles section on obscenity, and took place in Palm Springs, Calif., in February of 1954.

Now, Mr. Christopher, from a description of this book, "Sin Whisper," do you feel that is the type of publication that the public ought

to be exposed to? Do not you feel that this shocked the local community, the people of Georgia, that this shocked and repulsed the members of the Supreme Court of Georgia—do not you feel that they ought to have some say-so in this matter, and that the Supreme Court should not overrule the Supreme Court of Georgia in a matter of this kind, where the obscenity is perfectly clear as, you can tell from what I read to you?

Mr. CHRISTOPHER. Senator, with great respect, I would like to reiterate what I have said this morning. The issue in this hearing, as I understand it, is not what my views are, or what the views of the lawyers of the Department of Justice are. The issue is whether or not a majority of this committee thinks that Justice Fortas and Judge Thornberry are qualified for the positions to which they have been nominated by the President.

The further issue, the ultimate issue, is whether or not a majority of the Senate so regards them as being qualified.

This hearing has gone on for a number of days, longer, I believe, than any other hearing at which Justices have appeared as witnesses.

I would not want to protract it by a statement of my views, which I think to be quite irrelevant to the purpose for which the hearing is being held, sir.

Senator THURMOND. Did you prepare this memorandum that you gave to the public and gave great publicity to, and I believe have made available now on the judicial performance of Mr. Justice Fortas?

Mr. CHRISTOPHER. Sir——

Senator HART. If the Chair would permit me to ask Senator Thurmond to yield just a minute—Senator, perhaps before you arrived this morning I identified for the record the memorandum, and the reason that it is here.

I asked Mr. Christopher to have prepared a memorandum that would indicate the scope and the impact of some of the decisions that Mr. Justice Fortas had been asked to comment on, but which I think properly he felt he could not comment on. I asked additionally that other decisions that might give us a clearer understanding of the nature of Mr. Justice Fortas' philosophy be added to the memorandum. I introduced it in the record Saturday last, and thus it was made public.

Senator THURMOND. I had understood the distinguished Senator from Michigan had asked that it be prepared. I just asked him if he prepared it, or if he was familiar—are you thoroughly familiar with it, if you did not?

Mr. CHRISTOPHER. Senator, I did not prepare it, but I stand by it, and take responsibility for it.

Senator THURMOND. Then why didn't you or the Justice Department consider Justice Fortas' obscenity decisions in the memorandum, as you considered some of the other decisions in the memorandum?

Mr. CHRISTOPHER. Senator, there are two reasons for that.

The obscenity decisions of Justice Fortas came into this hearing for the first time, I believe, yesterday. This memorandum, was placed in the record last Saturday. It purported to discuss most or all of the opinions which had been cited by you and Senator Ervin in your discussion up to that time.

A second reason would be that there is only one opinion by Justice Fortas on the subject of obscenity in the years he has been on the Court, and that is an opinion in which he is writing only for himself, and which I believe was an opinion earlier this year, in April of this year.

Senator THURMOND. Well, whoever prepared the memorandum was trying to explain his position in those decisions, or explain it favorably to him, were they not?

Mr. CHRISTOPHER. Senator——

Senator THURMOND. Has that been a custom in the past, that the Justice Department would make an analysis of the past actions of a judge when he is being considered for an appointment? Why was it done in this case especially? I mean what was—I understand the request made by the distinguished Senator from Michigan.

Mr. CHRISTOPHER. Senator, it is normal and customary for the Department of Justice to respond to requests from Congress. In this Congress alone we have responded to more than 700 requests for memorandums or opinions. Sometimes we are forced to decline because of the shortage of manpower. But we are particularly concerned to respond to requests from members of the Judiciary Committee, which is naturally the committee with which we work the most.

Senator THURMOND. Now, Justice Fortas says his opinions are expressed on the record. But there is no opinion in the *Corinth* case on the record, was there, in this memorandum?

Mr. CHRISTOPHER. Senator, as I said before, the memorandum which we prepared at the request of Senator Hart was directed to opinions which you and Senator Ervin had cited and called attention to in the prior days of the hearing. Only yesterday did the subject of obscenity come into the hearing. Beyond that, I agree with you, there is no opinion by anyone, neither Justice Fortas nor any other member of the Court, in the *Corinth* case, I believe. To reiterate what I said earlier, as far as I know—and I do not pose as an expert on this subject—I think the only opinion in the obscenity area, written by Justice Fortas, is his separate opinion in *Ginsberg* v. *State of New York*, which was decided last April.

Senator THURMOND. Now, in this case where Justice Fortas made an appearance, in *Roth* v. *United States*, as counsel for amicus curiae, Greenleaf Publishing Co., there his client was not even a party litigant, was he? He came in amicus curiae, friend of the court, asked to be made—asked to come in and intervene in the case.

Mr. CHRISTOPHER. Senator, I believe that case took place before Mr. Fortas was on the U.S. Supreme Court.

Senator THURMOND. That is right. He was an attorney in the case.

Mr. CHRISTOPHER. I am not personally familiar with it, sir.

Senator THURMOND. Well, he was an attorney in the case. And William Hamling was his client. He was a man who also owned the Corinth Publications. And he represented this man, William Hamling, as an attorney in that case. Then later, when he went on the Supreme Court, he acted on a case with the same William Hamling in the *Corinth* v. *Wesberry*, did he not?

Mr. CHRISTOPHER. Senator, I do not know that of my own knowledge, but I have no reason to doubt your statement in that regard.

Senator THURMOND. I am just wondering if you feel maybe there should be a conflict of interest there. If not a conflict of interest, certainly wouldn't it have been improper where he represented this party, and went right on the Court and then handed down a decision along the same line of pornography, upholding William Hamling's position in *Corinth* v. *Wesberry*?

Mr. CHRISTOPHER. Senator, the question of whether or not a judge should disqualify himself is one of the hardest questions that a judge faces. I think you heard the testimony of Justice Fortas on that question when he was here. In any event, it is in the record. And I think it would be really quite presumptuous of me to comment on the cases in which he recuses himself.

Senator THURMOND. Now, let us consider some of these cases in which Justice Fortas—obscenity cases that were reversed.

On May 8, 1967—I believe Justice Fortas was a member of the Court then—is that right?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. *Redrup* v. *New York*, *Austin* v. *Kentucky*, *Gent* v. *Arkansas*. These were obscenity cases in which Justice Fortas participated, in which he voted to reverse. Are you familiar with those cases?

Mr. CHRISTOPHER. I know them by name, Senator. I have not examined any of the material in those cases. I think it fair to say, Senator, that Justice Fortas has voted in obscenity cases, as in many other cases, on both sides of the ledger.

For instance, in perhaps the most famous obscenity case in a decade, in March of 1966, shortly after he came on to the Court, Justice Fortas provided the crucial fifth vote in affirming the conviction in *Ginzburg* v. *United States*, 383 U.S. 463. In that case, the Court affirmed the conviction of Ralph Ginzburg for transmitting through the mails three allegedly obscene publications—the magazine Eros, the newsletter "Liaison," and a book called "Housewives Handbook for Selective Promiscuity." At about the same time, in *Mishkin* v. *New York*, 383 U.S. 502, the Court, with Justice Fortas as part of the majority, sustained the conviction of a New York publisher on a large number of dirty books.

Now, I mention this only to indicate that in this area, as in others, judges review the record, examine the Constitution and the statutes, examine their consciences, and make their decisions as best their wit and courage will guide them.

Senator THURMOND. That seems to have been an exception to the position he took in the other obscenity cases, doesn't it? Was that to throw the public off view, to make them feel he was going to take that position, or that he was going to be purely objective in these matters, as he should have been of course. Then he turns around and in 26 cases he reverses. On June 12, 1967, citing the *Redrup* case, in *Kency* v. *New York*, in *Friedman* v. *New York*, in *Ratner* v. *California*, in *Cobert* v. *New York*, in *Shepherd* v. *New York*, in *Lewis* v. *New York*, in *Bloomberg* v. *New York*, in *Avasino* v. *New York*, in *Sessa* v. *New York*, in *Stombelline* v. *New York*, in *Gaggi* v. *New York*, in *Constanza* v. *New York*, in *Aday* v. *United States*, *Corinth Publications* v. *Wesberry*, *Books, Inc.* v. *United States*, *Rosenbloom* v. *Vir-*

ginia, *Wenzler* v. *Pitchess*, *Jacobs* v. *New York*, *A Quantity of Books* v. *Kansas*, *Mazes* v. *Ohio*, *Tannenbaum* v. *New York*, *Shackman* v. *California*, and *Landau* v. *Fording*. In all of these cases, 26 of them, Justice Fortas voted to reverse the lower courts. The lower courts had heard the cases. The material had been found obscene. Justice Fortas voted the other way.

Mr. CHRISTOPHER. Senator——

Senator THURMOND. Are you familiar with those cases?

Mr. CHRISTOPHER. Senator, I know the citations of them, but in many of the cases they were reversals without opinion, and I am not of course familiar with the record in those cases, or the allegedly obscene material.

I was going to say, Senator, that as I read the Court's opinions—and I do not regard myself as an expert on them—it seems to me that Justice Fortas is prepared to sustain convictions in the obscenity area in three instances at least. The first instance is where there is pandering or advertising of the obscene material. Thus, in both the *Ginsberg* case and the *Mishkin* case that I referred to, the majority held that there could be taken into account the setting in which the activity or the publication was being sold—more particularly the Court said you could take into account whether the defendant had engaged in pandering or aggressively pushing the material. So that is one area in which Justice Fortas has been affirming convictions or currently is prepared to.

The second area is where a State or municipality prepares a carefully drawn, narrowly conceived statute to apply to children or juveniles. The separate opinion of Justice Fortas in *Ginsberg* v. *New York*, April 22, 1968, makes it clear that he is quite prepared to apply a different test in a situation where juveniles or children are involved.

The third area in which Justice Fortas is apparently prepared to sustain convictions in the obscenity field is where there are offensive displays so obtrusive as to make it impossible for an unwilling individual to avoid seeing them.

Now, I mention this just to show you that in this field, as in others, it appears to an observer that Justice Fortas has a philosophy and is applying a set of principles.

Senator THURMOND. Now, the *Ginsberg* decision in 1966 makes the 1967 decisions all the more harder to understand. The Court simply disagrees in the latter cases with the lower courts on a value judgment, and not a determination of law.

Let me ask you this.

Although the memorandum you submitted here was prepared earlier, what is the opinion of the Justice Department today on the obscenity decisions? Or do you care to express an opinion at this time? Does the Justice Department defend these decisions? I believe you said this morning you spoke for the Justice Department.

The CHAIRMAN. We will have to suspend. That is a rollcall vote.

Senator THURMOND. We will have to suspend for a little while. We will be back in few minutes.

(Short recess.)

The CHAIRMAN. Proceed.

Mr. CHRISTOPHER. Senator, is there a pending question, sir, or would you want to rephrase the question you were stating?

Senator THURMOND. Yes—all right.

Mr. Deputy Attorney General, since the Justice Department memorandum did not cover obscenity, I am just wondering now what the Department of Justice has to say about the reversal of 23 out of 26 obscenity cases as testified to by the Citizens Committee for Decent Literature yesterday.

Mr. CHRISTOPHER. Speaking overall, Senator Thurmond, our view would be that Justice Fortas has taken a moderate and reasonable position in the field of obscenity. In that connection, if I may, Senator, I would like to refer briefly to the opinion of Mr. Justice Harlan in the *Ginsberg* case, which came down on April 22 of this year, 1968. Justice Harlan, of course we all recognize, is a distinguished member of the Court who generally has a conservative outlook on judicial decisions.

Justice Harlan said:

> As the Court enters this new area of obscenity law it is well to take stock of where we are at present in this constitutional field. The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication. Two members of the Court steadfastly maintain that the First and Fourteenth Amendments render society powerless to protect itself against the dissemination of even the filthiest materials. . . . But there is among the present members of the Court a sharp divergence as to the proper application of the standards in Roth, Memoirs, and Ginsberg, 383 U.S. 463, for judging whether given material is constitutionally protected or unprotected. Most of the present Justices who believe that "obscenity" is not beyond the pale of governmental control seemingly consider that the Roth-Memoirs-Ginsberg tests permit suppression of material that falls short of so-called "hardcore pornography," on equal terms as between state and federal authority. Another view is that only hardcore pornography may be suppressed, whether by federal or state authority. And still another view, that of this writer [i.e. Justice Harlan], is that only hardcore pornography may be suppressed by the Federal Government, where as under the Fourteenth Amendment States are permitted wider authority to deal with obnoxious matter. . . .

Senator, what I draw from that description by Justice Harlan of the position of the various Justices is that it places Justice Fortas in the center of the Court, with Justices Black and Douglas taking the view that the first amendment forbids any prohibition of pornography, with Justice Stuart and Justice Harlan taking the view that only hard-core pornography may be suppressed, and with Justice Fortas, along with Justice Brennan and Justice Warren, applying the tests of the *Roth*, *Memoirs*, and *Ginsberg* cases. In responding to your question, sir, I would say Justice Fortas has a basically reasonable and moderate view in this extremely difficult area.

As I said just before the recess, Justice Fortas appears to be willing to hold material obscene in three instances—in the first place, where it might be involved in pandering or commercialization, second, where a statute attempts to apply a more severe test for juveniles, and third, where the material is thrust or forced upon people.

In this very difficult area, that seems to be a reasonable and moderate position.

Senator THURMOND. The Justice Department, I believe, has defended the actions of the Court in which Justice Fortas participated, releasing criminals on technicalities, allowing Communists to work in

defense plants, and allowing Communists to teach in schools and colleges. And now does the Justice Department defend the decisions on obscenity in which Justice Fortas participated?

Mr. CHRISTOPHER. Senator, it is not the purpose of my appearance here today to state what the view of the Justice Department is on matters of substantive law. I believe what is relevant in this hearing is to try to determine whether or not the views of Justice Fortas and of Judge Thornberry as reflected in their opinions are such as to qualify them for the positions to which they have been nominated by the President.

Senator THURMOND. I know. But in doing that, the Justice Department has gone out of its way, and has analyzed these decisions which Senator Ervin and I felt were unreasonable, and felt were dangerous to the best interests of this country. And the Justice Department has tried to explain away those matters. I am wondering if they now take the same position with regard to the obscenity cases?

Mr. CHRISTOPHER. Senator, with all respect, we have not tried to explain away any of the matters. We have tried to put the cases in what we regard as their proper context. If you disagree with that analysis of the opinions, sir, I can only say with respect that we probably are in an area of disagreement between us.

Senator THURMOND. Now, the Justice Department investigates candidates for judgeship. I am wondering why it has not volunteered or discussed the information concerning Justice Fortas' conflict of interest in the *Corinth* case.

Mr. CHRISTOPHER. You are right, Senator, in saying that a very careful analysis and evaluation is made of all judicial candidates, and that applies to the Supreme Court as well as to lower Federal courts. There is no indication in the files of the Department of Justice that there is a conflict of interest that would prevent Justice Fortas from taking his seat as Chief Justice of the United States.

Senator THURMOND. Does the Justice Department have any comment on the reversal of 23 out of 26 obscenity cases in which Justice Fortas participated?

Mr. CHRISTOPHER. No comment, Senator, beyond the fact, as Justice Harlan puts it, that this is an area unmatched in any other course of constitutional adjudication in its difficulty.

The CHAIRMAN. Rollcall vote. We will have to suspend.

Senator THURMOND. Let me ask these two questions.

Would you care to say where this leaves law enforcement in obscenity matters today?

Mr. CHRISTOPHER. I believe it leaves them able to fashion statutes for juveniles and able to proceed in situations where there has been pandering or where the obscene material or other offensive material is thrust upon people—at least in those areas prosecution is possible, sir.

Senator THURMOND. If you will pardon me, we have to go and vote again. We will be right back.

(Short recess.)

The CHAIRMAN. Proceed.

Senator THURMOND. Mr. Deputy Attorney General, I believe the last question I asked or started to ask—in view of the reversal of 23

out of 26 obscenity cases by the Supreme Court, where does this leave law enforcement in obscenity matters?

Mr. CHRISTOPHER. Well, Senator Thurmond, first let me say with respect to those 23 out of 26 cases, I have not examined the records in each of them, and I do not know what the basis for reversal was—whether they were applying an unconstitutional statute, whether the test applied by the lower court was an improper one, or whether there was a difference of view between the lower court and the Supreme Court as to the nature of the material.

But taking the question as you have phrased it, and putting that qualification in, I would say that law enforcement is left to follow the decisions of the Supreme Court of the United States as the law of the land, and left to apply the test laid down in *Roth* and other cases.

Looking at Justice Fortas' views in the obscenity field, as I have said before, and I do not want to prolong this, there are at least three fields in which at least Justice Fortas would apparently approve action by law enforcement, and that is in the cases where obscene or filthy material is exhibited to juveniles or children, where there is an offensive display of such material, and where there is pandering or excessive commercialization in connection with such material.

Senator THURMOND. Now, in the *Redrup* case, the Court ruled that distribution of obscene materials was protected by the first and 14th amendments. It ruled that the States could not constitutionally judge the materials obscene.

Now, the question is—is local determination on this subject now out of the window? And further, how can we protect the young people from such materials if the local standards cannot be applied?

Mr. CHRISTOPHER. Well, Senator, I think we probably have a difference of view as to the *Redrup* case and its impact. In the *Redrup* case, the Supreme Court specifically pointed out that there were at least three kinds of cases not involved there, and the implication was that in those three kinds of cases, a State or any other governmental body could impose sanctions against obscenity. The Court in *Redrup* said first—in none of the cases was there a claim that the statute in question reflected a specific and limited State concern for juveniles. Second, in *Redrup*, the Court said in none of the cases was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. And third, in *Redrup*, the Court said in none of these cases was there evidence of the sort of pandering which the Court found significant in *Ginsberg* v. *United States*.

To summarize, in those three areas prosecution by state and local authorities is feasible. Particularly, the Court has indicated in the *Redrup* case, as well as in the recent *Ginsberg* case—that a carefully drawn statute applying to juveniles and forbidding the dissemination of filthy or obscene material to them will be held valid.

Senator THURMOND. Now, going back to this conflict of interest matter where you say you have nothing in your files in the amicus curiae brief in *Roth* v. *United States*, which was handed down in 1957, Mr. Abe Fortas, William L. McGovern, Charles A. Reich, Abe Krash, and Arnold, Fortas & Porter, all of Washington, D.C., and

Maurice Rosenfeld, Harry Kalven, Jr., and Friedman, Zoline & Rosenfield, all of Chicago, Ill., filed a brief for Greenleaf Publishing Co., and HMH Publishing Co., Inc., amicus curiae, in No. 582, U.S. Supreme Court Reports, in which was included these provisions, or paragraphs:

Judicial interpretation of the material "obscene" has supplied no workable standard of administration of Section 1461.

Another:

The ambiguity of section 1461 is underscored by the absence of any evidence that writings or pictures have any harmful effects.

Would the Justice Department go along with that last statement? That the absence of—that the ambiguity of section 1461 is underscored by the absence of any evidence that writings or pictures have any harmful effects?

Mr. CHRISTOPHER. Senator, I would not want to make any comment on that single sentence taken out of an advocate's brief 11 years ago.

Senator THURMOND. Another paragraph:

Section 1461 is unconstitutional under both the First and Fifth Amendments as a vague and indefinite statute which invades the protected area of free expression.

Would the Justice Department go along with that?

Mr. CHRISTOPHER. Senator, with all respect, I cannot see the relevance of my commenting at this hearing on Justice Fortas', and Judge Thornberry's nomination, on a statement made in a lawyer's brief 11 years ago in a case in which Justice Fortas did not participate as a judge.

Senator THURMOND. Well, there is no question about that these provisions were included in the brief, or do you know?

Mr. CHRISTOPHER. Senator, I would not doubt your word that they were included in the brief if you are reading from it. Of course, I have not seen that brief or examined the case.

Senator THURMOND. Now, Greenleaf Publishing Co. is an Illinois corporation, incorporated October 18, 1950. President from 1950 to date, William L. Hamling, 3303 Kremm Avenue, Highland Park. Secretary-treasurer, Fances Hamling, ditto. Both also directors. Third director is Glenn A. Schroeder, 1507 Shadford Road, Ann Arbor, Mich. This information was provided by the Illinois State Corporation Decisions.

Now, allegations of Mr. Clancy yesterday is that Justice Fortas assisted Hamling in getting second-class mailing privileges for Rogue magazine, a landmark decision in granting such valuable privileges to pinup magazines. Hamling allegedly told the FBI that he paid Fortas an $11,000 fee to get the permit, as we have heard heretofore.

Mr. CHRISTOPHER. Senator, I wonder if you could clarify that for me. What year was that?

Senator THURMOND. This statement does not say, but following right after that is a statement that—further boasts he paid Fortas $11,000 to get his mailing permit for the girlie magazine Rogue. Fortas' law firm in 1957 filed an amicus brief.

Then he goes on to December 1966.

I think it might be well, in fairness to Judge Fortas, Mr. Chairman, for—in view of this information that was brought out yesterday, for

him to be invited to appear back if he cares to, to answer these allegations, because they are rather serious allegations. And if he does come, then the matter can be probed.

Mr. CHRISTOPHER. Senator, I did not mean an impertinence by asking a question. But Justice Fortas went on the Bench in October of 1965, I believe, and soon thereafter the name of the firm, to my recollection, was changed to Arnold & Porter. So I believe it would be inaccurate to refer to it as the Fortas law firm in 1967.

Senator THURMOND. 1967, of course, he was on the Bench. He went on in 1965.

Mr. CHRISTOPHER. Yes, sir. That is why I say it would be inaccurate to refer to it ——

Senator THURMOND. 1957 is when he filed the brief.

Mr. CHRISTOPHER. Well, at page 6 of the statement you are looking at, it says "Fortas' law firm had in 1967 filed an amicus brief on behalf of the Greenleaf Publishing Company."

Senator THURMOND. Well, that is a typographical error. That should be 1957. That is from Mr. Clancy's statement yesterday. That should be changed to 1957.

Now, the Post Office Department says that Rogue magazine currently has second-class privileges at Evanston, Ill., and additional privileges at Chicago, Ill. It was first denied second-class permit on November 7, 1955. In December 1955, the issue was ruled nonmailable. It was denied second-class permit May 8, 1956. It was denied second-class permit June 3, 1957. Second-class permit granted October 12, 1958. Statement of ownership and circulation is not on file. On June 12, 1967, Justice Fortas voted per curiam to reverse the obscenity convictions in *Corinth Publications* v. *Wesberry*, in the Georgia Supreme Court decision concerning the book entitled "Sin Whisper" which we have already referred to.

The Corinth Publications is a California corporation, operating in San Diego, formerly at 3839 Mission Gorge Road, now at 3511 Camino del Rio S. Listed at same address are Reed Enterprises, Greenleaf Classics, and Phoenix Publishing, Shirley Wright, manager. California State Corporation Commission lists Richard A. Yerxa, president, 1262 Cuyamaca, San Diego, Sam Campagna, 3235 West First Street, Chicago, Bart Brown, 4250 West North Avenue, Chicago; Shirley Wright, secretary. William L. Hamling now resides at 8111 Camino del Oro, La Jolla, California, and 350 Via Lola, Palm Springs.

I have here a photostat of the application for a municipal business license for Corinth Publications in San Diego, 1966 application, signed by William L. Hamling. This application was made July 1, 1966, exactly 17 days after *Corinth* v. *Wesberry* was filed in the Supreme Court.

Mr. Chairman, I would ask that this be placed in the record, if there is no objection.

The CHAIRMAN. So ordered.

(The photostat referred to was marked "Exhibit 59" and appears in the appendix.)

Senator THURMOND. The Justice Department has not investigated this matter to determine whether there is a conflict of interest?

Mr. CHRISTOPHER. Senator, as I said earlier, a careful review of the

investigative files has indicated that there is no reason why Justice Fortas should not be confirmed as Chief Justice.

Senator THURMOND. No, in the *Redrup* case—and this is United States Reports, volume 386, October term, 1966, Mr. Justice Harlan, whom Mr. Justice Clark joins, dissenting, states—and I want to quote this:

> Two of these cases, *Redrup* v. *New York* and *Austin* v. *Kentucky*, were taken to consider the standards governing the application of the scienter requirement announced in *Smith* v. *California*, 361 U.S. 147, for obscenity prosecutions. There it was held that a defendant criminally charged with purveying obscene material must be shown to have had some kind of knowledge of the character of such material, the quality of that knowledge, however, was not defined. The third case, *Gent* v. *Arkansas*, was taken to consider the validity of the comprehensive Arkansas anti-obscenity statute in light of the doctrines of vagueness and prior restraint. The writs of certiorari in *Redrup* and *Austin*, and the notation of probable jurisdiction in Gent, were respectively limited to these issues, this laying aside for the purposes of these cases the permissibility of the state determinations as to the obscenity of the challenged publications. Accordingly, the obscenity of these publications was not discussed in the briefs or oral arguments of any of the parties. The three cases were argued together at the beginning of this term. Today the Court rules that the materials could not constitutionally be adjudicated obscene by the states, thus rendering adjudication of the other issues unnecessary. In short, the Court disposes of the cases on the issue that was deliberately excluded from review, and refuses to pass on the questions that brought the cases here. In my opinion, these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided. Failing that, I prefer to cast my vote to dismiss the writs in *Redrup* and *Austin* as improvidently granted, and in the circumstances to dismiss the appeal in Gent for lack of a substantial federal question. I deem it more appropriate to defer an expression of my own views on the questions brought here until an occasion when the Court is prepared to come grips with such issues.

I am wondering if you have any comment on that?

Mr. CHRISTOPHER. Only this, Senator, with all respect. Seven Justices felt the other way.

Senator THURMOND. What?

Mr. CHRISTOPHER. That dissenting opinion you just read was concurred in by two Justices. Seven Justices obviously felt the other way.

Senator THURMOND. Now, what do you have to say to this point:

> The Court rules that the materials could not constitutionally be adjudged obscene by the states, thus rendering adjudication of the other issues unnecessary.

Has it gotten to the point where the States can have no say in obscenity matters? Is the Supreme Court of the United States going to make the final decision in all of these cases?

Mr. CHRISTOPHER. Well, Senator, the Supreme Court of the United States is, under our system of government, the final arbiter when there is a Federal question and the matter is taken on appeal to that Court.

Senator THURMOND. Now, I want to say, Mr. Christopher, that since these Court decisions the Nation has been flooded—I repeat flooded—with hard-core pornography. This material is being sent through the mails—and I want to—now, there is a magazine that came through the mail that to me is obscene, it is foul, it is putrid, it is filthy, it is repulsive, it is objectionable, it is obnoxious, and it should cause a flush of shame to the cheeks of the members of the Supreme Court who affirmed decisions that allow such material as this to go through the mails. I just hold it up to show you one page. This is called the "Weekend Jaybird," which was handed to me I believe yesterday, by an interested citizen. Now, I want to hand that down to you.

Take that down and let him see it.

I want to hand you that, and ask you if the Justice Department approves of publications of this kind, obscene publications, being sent through the mail. And what protection does the public have when the Supreme Court reverses decisions when such material has been held to be obscene?

Mr. CHRISTOPHER. Senator, the question is not whether the Justice Department approves of this material. The question is whether or not a prosecution can constitutionally be mounted. But I would want to say again it seems to me we are straying a long way from the central issue in these proceedings, and that is not whether I or any other lawyer in the Department of Justice is outraged or made to feel nauseated by particular material, but rather whether Justice Fortas and Judge Thornberry are so well qualified that they are entitled to receive the favorable view of the majority of this committee.

Senator THURMOND. I think it boils down to this:

Is the Senate, or should the Senate confirm a man for Chief Justice of the United States—and I believe that is the title, isn't it—Chief Justice of the United States——

Mr. CHRISTOPHER. That would be the title, yes, sir, if confirmed.

Senator THURMOND (continuing). A man who has reversed the decisions in obscenity cases and allowed such material as this to be sold on the newsstands of this city and other cities of this Nation.

Now, I sent a member of my staff today down the street just to see if material of the kind you have there was available in the city in which you live, and I want to hand you another—just to show you the obscene material—I want you to look at these magazines. I want the Justice Department to know what is being sold in the city of Washington, and in other cities of this Nation, because the Supreme Court has allowed this to be done. They are not allowing the States, they are not allowing the communities, to keep this filthy material away from the newsstands in their own cities.

And here is another one. Now, here is the front cover—isn't that disgraceful? Hand that down—let him see that.

And here is another one entitled "Friendly Females."

Now, the last three that we just handed you were picked up by a member of my staff today, Tuesday, the 23d of July, 1968. And I was told that material of this kind is just plentiful at various places in this city, and also is available in other cities of the Nation.

Mr. Christopher, how much longer are the parents, the Christian people, the wholesome people, the right-thinking people, going to put up with this kind of thing? How much longer should they do it? And you are up here defending Justice Fortas on his decisions. He has reversed the decision, I repeat, in 23 out of 26 cases where the local courts held the material was obscene. He has thrown it out and said it is not obscene. This is the kind of material that they said was obscene, and yet Justice Fortas, and a majority of the Court, many decisions five to four, have allowed this material to be available and sold on the streets of this Nation.

Cannot the States have something to do to protect themselves? Cannot the communities follow some course?

Can you suggest something?

Mr. CHRISTOPHER. Well, I would simply say again, Senator, that the views on obscenity of Justice Fortas are reasonable and moderate views. He is in that group of the Court which is most inclined to uphold obscenity statutes. At least he is in the middle group of the Court.

As far as the suggestion that I would make, it would be that other areas of the country follow the lead of the District of Columbia, or indeed follow the lead of the Congress in making laws for the District of Columbia, in fashioning a statute that will protect juveniles and children from pornographic or other filthy literature. In his opinion in *Ginsburg* v. *New York*, Justice Fortas has explicitly said such a statute could constitutionally be drawn.

Senator THURMOND. Do you think this material that I have just handed you from the newsstands is wholesome material to be sold to people on the streets?

Mr. CHRISTOPHER. With all respect, Senator, what I think about it is almost totally irrelevant. I do not think it wholesome. But I really implore you to permit me to answer the questions which are relevant to this hearing.

Senator THURMOND. If you were a judge on the Supreme Court, would you hold such material as this obscene?

Mr. CHRISTOPHER. Senator, I am not able to answer that question. I do not have enough experience in judging obscene material to reply offhand, nor do I have before me the particular statute that might be brought before the Court. The question of obscenity is one of the most complicated ones we have in our society today, and I would be, I think, misleading you if I gave a glib answer to a question that complex.

Senator THURMOND. Does it shock you that this material is so readily available in the city in which you live and in most of the cities of the Nation?

Mr. CHRISTOPHER. No, I am not surprised by it, Senator.

Senator THURMOND. You are not surprised by it—in view of the decisions by the Supreme Court permitting it to be sold?

Mr. CHRISTOPHER. Were you asking a question, Senator?

Senator THURMOND. You say you are not surprised because the decisions of the Supreme Court permit it to be sold, or do you think the material is all right for the public to buy?

Mr. CHRISTOPHER. I just answered, Senator, that I was not surprised to see that magazines like this were on sale at newsstands.

Senator THURMOND. I ask you why—upon what your answer is based. Why are you not surprised at this filthy, obscene material which you are now looking at, or were just a moment ago?

Mr. CHRISTOPHER. Because it has become commonplace in our society, not only in the United States, but elsewhere for there to be magazines of a girlie character.

Senator THURMOND. And why is it commonplace? Because the Supreme Court has made it commonplace, hasn't it?

Mr. CHRISTOPHER. No, I think the Supreme Court is only following the Constitution as best they know how to do so, sir.

Senator THURMOND. Now, many of these newsstands have nothing but obscene literature. I am not talking about simply nudist magazines of the sunshine and health type, but materials showing undraped nudes of both sexes in suggestive poses. Most of these maga-

zines and books specialize in one sex or the other. The ones I handed you there, there are some on different sexes, are there not—the ones I just handed you?

Mr. CHRISTOPHER. Both sexes are represented in the magazines you handed me.

Senator THURMOND. One magazine, the small magazine, is only on males, isn't it?

Mr. CHRISTOPHER. Yes, sir.

Senator THURMOND. Or contain pictures and written material designed specifically for the market in various types of perversion.

Now, what I would like to emphasize is—this material spread across the shelves and counters of these "adults only" bookstores is hard-core pornography. If the definition given those three words is anywhere near what it used to be since the English language was developed, these magazines are aimed directly at one type of sexual deviation or another, and are utterly devoid of any conceivable redeemable social value. Here in the city of Washington are numerous magazine stores devoted entirely to this trash, which has mushroomed as a result of the decisions of the Supreme Court in the past few years. It has grown much worse—since Mr. Fortas has been on the Supreme Court, and the Supreme Court has reversed the cases that we have talked about. These magazines I have here today, some of which were purchased, as I stated, this morning—there is no telling what could be brought out from under the counter. And to believe this material does not find its way into the hands of young people is wishful thinking.

Now, I want to turn to another subject.

In the *Robel* case, the Court, with Justice Fortas joining, held a congressional statute invalid for two reasons. First, it did not distinguish between a dues-paying member of the Communist Party who subscribed to the objectives of the party and a dues-paying member who does not or may not so subscribe.

How enforceable, Mr. Christopher, is such a distinction?

Mr. CHRISTOPHER. Senator, perhaps you were not here when I discussed that case rather fully this morning.

Senator THURMOND. I had to be over in the Defense appropriations part of the day.

Mr. CHRISTOPHER. The most significant thing about the *Robel* decision in my view is that it charts a very careful course for Congress to follow in enacting a constitutional statute to protect the Government in its vital installations. This is one of the first times when the Court has laid down guidelines for the enactment of a statute in this area. And as I mentioned this morning, the judicial technique involved here has been admired by writers on constitutional law.

Senator THURMOND. Now, second, a Communist activist who works in a sensitive area of a defense plant, and one who works in a nonsensitive area of such a plant. I ask you, Mr. Deputy Attorney General, how enforceable and practical is such a distinction?

Mr. CHRISTOPHER. Well, Senator, once again, that is an area in which I do not think my reaction would be very helpful to you, but I would say that, with the very large establishments that are called in a generic

way defense plants, I can easily conceive that it would be possible and feasible to make such a distinction.

Senator THURMOND. Now, Mr. Deputy Attorney General, at the hearing on his nomination to be Chief Justice, Justice Fortas declined to answer questions on particular Supreme Court decisions on the ground that judges had the same sort of immunity for their official actions and words as do Members of Congress.

Article I, section 6, of the Constitution applies exclusively to the Senators and Representatives. It provides, and I quote: "And for any speech or debate in its House, they shall not be questioned in any other place."

There is no similar provision for judges either in the Constitution or in the laws enacted by Congress, is there?

Mr. CHRISTOPHER. Senator, the basic separation-of-powers concept, which is the underpinning of our whole Government structure, is in my view so strong as to require that judges be free from interrogation by senatorial committees as to their past, pending, or future decisions.

Senator THURMOND. Well, the Constitution refers to Members of Congress—article I, section 6, that I just read to you. Now, again I ask the question: Is there any statute or any provision of the Constitution of the United States similar to this for the judiciary?

Mr. CHRISTOPHER. Senator, my answer to that is that the overall structure of the Constitution imposes——

Senator THURMOND. I am not asking you that now. If you would answer whether there is a statute, and then you can go into that and explain further. You have already explained that. I am asking you, Do you know any statute or any provision of the Constitution that gives such immunity to the judges?

Mr. CHRISTOPHER. And, Senator, my answer to that would be, with all respect, that the structure of the Constitution gives such an immunity, but that there is no provision and no need for such a provision.

Senator THURMOND. So you know of no statute or provision of the Constitution, do you, because there is none, is there?

Mr. Christopher. Except the structure of the Constitution itself, Senator.

Senator THURMOND. So I guess what is wrong with a little judicial legislation, one consideration is that article I, section 1 of the Constitution provides: "All legislative powers herein granted shall be vested in the Congress of the United States which shall consist of the Senate and House of Representatives." No legislative power is granted to the courts, is it?

Mr. CHRISTOPHER. That is correct, Senator.

Senator THURMOND. It might be well for the Court to be reminded of that, wouldn't it?

Mr. CHRISTOPHER. I think the Court is very well aware of it. And when Justice Fortas was here being examined he made it perfectly clear that he believes that the Court does not sit to legislate or to write its own social philosophy into the Constitution.

Senator THURMOND. Now, another objection to the judicial legislation that would extend the congressional immunity to the Court is

that it would nullify the constitutional provisions for impeachment, the penalty for which is removal from office. Now, if the Senate has no right—I want you to listen carefully—if the Senate has no right to question the decision of a judge, how could it possibly impeach him for official conduct?

Mr. CHRISTOPHER. Senator, we are dealing with a hearing in which there are nominations pending of a Justice and a judge. The point I was making, which has been made throughout these hearings, is that, in these proceedings, the Senate does not have a right to compel answers of the Justice or judge with respect to their views about pending or future cases. And that foreclosure applies as well to a discussion of the language of their past decisions, because to talk about them at this point would be to elaborate or interpret them.

Senator THURMOND. I ask you this question:

Is the Senate's scope of inquiry with respect to nominations more restricted than in cases of impeachment? May we lock the barn door only after the horse is stolen?

Mr. CHRISTOPHER. Senator, I would not want to answer that question without having an opportunity to study more carefully the impeachment procedure. I state to you that I believe the structure of the Constitution, and the careful provisions for an independent judiciary, make it necessary that judges and Justices being examined on their nominations should be free from having to comment on decisions.

Senator THURMOND. Of course, Justice Fortas has no legal duty to answer the Senator's questions. He has no legal duty even to attend the hearing. Likewise, the Senate has no legal duty to advise and consent to his appointment as Chief Justice. This claim of immunity is as nifty a bit of self-serving judicial legislation as can be imagined. Does it befit a Chief Justice?

Mr. CHRISTOPHER. Senator, I think it is very befitting for a Justice to have come here and be interrogated longer, I believe, than any Justice in the history of our country, and to enable you to reach a judgment about him based upon 3 years of judicial opinions and a lifetime in which his views are laid on the record.

Senator THURMOND. They are laid on the record. But he would not answer questions about his record.

In effect, he took the fifth amendment, didn't he?

Mr. CHRISTOPHER. No, sir; he did not. He declined to answer questions about his judicial decisions or his views on matters that might come before the Court. He was free and open in discussing his record before going on the Court and other aspects of his personal life.

Senator THURMOND. And the Justice Department is here defending his decisions, defending the Court's decisions, and I understand you are defending the decisions on obscenity, along with the rest of them, is that right?

Mr. CHRISTOPHER. We are here saying to you, Senator, with all respect, that we believe that the President's nominations are highly qualified, exceptional men, and we hope that the committee, acting through a majority of the members, will approve the nominations and send them to the floor where they can be acted upon by a majority of the Senate.

Senator THURMOND. I want to thank you for your appearance here. I regret it was necessary to delay you as we did on account of the rollcalls.

Mr. CHRISTOPHER. Thank you for your courtesy, Senator.

Senator THURMOND. Mr. Chairman, that is all I have.

The CHAIRMAN. I submit as an exhibit a copy of Executive Report 7, 80th Congress, first session, 1947, made by the Committee on the Judiciary, on the use of judges in nonjudicial offices in the Federal Government.

(The report was marked "Exhibit 60" and appears in the appendix.)

The CHAIRMAN. I also submit as an exhibit a copy of Report 1893, 86th Congress, second session, 1960, made by the Committee on the Judiciary, expressing the sense of the Senate that recess appointments to the Supreme Court of the United States should not be made except under unusual circumstances.

(The report was marked "Exhibit 61" and appears in the appendix.)

The CHAIRMAN. This will close the hearings subject to whether or not Justice Fortas decides to return. Your request was——

Senator THURMOND. To offer him the opportunity if he cares to return.

The CHAIRMAN. That is right.

We will close the hearings subject to Justice Fortas returning.

(Whereupon, at 5 p.m., the hearing was adjourned, to reconvene subject to the call of the Chair.)

APPENDIX

EXHIBIT 1

Department of Justice

MEMORANDUM

Re: Power of the President to nominate and of the Senate to confirm Mr. Justice Fortas to be Chief Justice of the United States and Judge Thornberry to be Associate Justice of the Supreme Court

On June 13, 1968, Chief Justice Warren advised President Johnson of his "intention to retire as Chief Justice of the United States effective at your pleasure." In his reply, dated June 26, the President stated, "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified." On the same day Chief Justice Warren sent to the President a telegram in which the Chief Justice referred to the President's "letter of acceptance of my retirement," and expressed his deep appreciation of the President's warm words.[1/]

On June 26, the President also submitted to the Senate the nominations of Mr. Justice Fortas to be Chief

1/ See Appendix I, Nos. 1-3 for the texts of the letters and telegram exchanged between Chief Justice Warren and the President. The letters appear in 4 Weekly Compilation of Presidential Documents 1013-14.

Justice of the United States vice Chief Justice Warren, and of Judge Thornberry, of the United States Court of Appeals for the Fifth Circuit, to be Associate Justice of the Supreme Court vice Justice Fortas. 114 Cong. Rec. (Daily Ed. June 26, 1968) S7834.

Questions have been raised as to the power of the President to make and of the Senate to confirm these nominations. The primary objection is based upon the assertion that there is at present no vacancy in the office of Chief Justice, and that nomination and confirmation of Mr. Justice Fortas is therefore improper. Secondarily, there seems to be an objection that nomination and confirmation of Judge Thornberry cannot be accomplished in these circumstances because the office to which he has been named is not yet vacant.

Neither objection appears to be well taken. The terms of Chief Justice Warren's retirement, established in the correspondence between him and the President, are that the Chief Justice's retirement will take effect upon the

qualification of his successor.[2/] Judge Thornberry has been nominated in anticipation of the elevation of Mr. Justice Fortas. As this memorandum will show, it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy. This power exists where it has been agreed that retirement of an incumbent Justice or judge will be effective upon the qualification of his successor. Such power also exists where an incumbent Justice or judge is simultaneously nominated for elevation to a higher position.

I.

It is not unusual for a Justice or judge to advise the President of his intention to retire and to leave it to

2/ The term "qualification" or "qualifies" refers in this context to the taking of the two oaths prerequisite to holding federal judicial office, (1) the oath to support the Constitution required by Article VI, clause 3 of the Constitution of all officers of the United States, and (2) that required by 28 U.S.C. 453 of each Justice or judge before performing the duties of his office.

the President to propose a timing best suited to prevent an extended vacancy and the resulting disruption of the operation of the court on which he sits. Nomination of a successor in such circumstances is but one example of the power to fill anticipated vacancies.

The more general power will be analyzed below, but it is instructive first to consider two directly pertinent instances for which documentation is available.

Mr. Justice Gray of the Supreme Court advised President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the privilege to resign at full pay, and added:

> "* * * I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you."

President Roosevelt's acceptance, two days later, contained the following passage:

> "It is with deep regret that I receive your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor. 3/

3/ See Appendix I, Nos. 4-5 for the pertinent passages of the Gray - Roosevelt correspondence.

Mr. Justice Gray died in September, before his successor, Mr. Justice Holmes, took office (187 U.S. iii).[4/] The Memorial Proceedings in honor of Mr. Justice Gray pointed out that "he submitted his resignation to take effect upon the appointment and qualification of his successor. So he died in office." See also Lewis, Great American Lawyers, Vol. 8, p. 163.

More recently, Circuit Judge Prettyman advised President Kennedy on December 14, 1961, that he intended to take advantage of the statutory retirement provisions of section 371(b), Title 28, United States Code, and continued:

> "The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.
>
> "The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note."

President Kennedy replied on December 19:

> "It was with regret that I received the notification that you were retiring from

4/ The circumstances surrounding the Holmes appointment will be discussed infra.

> 'regular active service.' The way in which you phrased your letter left me with no alternative but to accept your decision."

A few days later, however, President Kennedy sent the following additional note to Judge Prettyman:

> "As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.
>
> "I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist."

Judge Prettyman replied to the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite."[5/]

Judge J. Skelly Wright was nominated on February 2, 1962, confirmed on February 28, and appointed March 30.

5/ See Appendix I, Nos. 6-9 for the pertinent passages of the Kennedy - Prettyman correspondence.

He qualified on April 16, and Judge Prettyman retired as of April 15.

The exchange of communications between Chief Justice Warren and the President must be understood in the light of these precedents. The Chief Justice advised the President of his intention to retire, leaving it to the President to suggest terms of retirement which would be suitable in allowing sufficient time for nomination and confirmation of a successor without the disruption and over-burdening of the remaining Justices which might result from an extended vacancy, in particular such a vacancy in the office of the Chief Justice. The President suggested that the Chief Justice's retirement should take effect upon the appointment and qualification of his successor. The Chief Justice agreed to this condition.

It is a condition of retirement that was used with respect to the Supreme Court in the case of Mr. Justice Gray. It has been frequently resorted to in the case of other judicial retirements. (For a partial list of retirements by federal judges effective upon the appointment and qualification of their successors, see Appendix II.)

The effect of this form of retirement is that the Chief Justice remains in office until the condition occurs; i.e., until his successor qualifies by taking the oaths of office.

II.

The power of the President to appoint Justices of the Supreme Court, by and with the advice and consent of the Senate, is specified in Article II, section 2, clause 2 of the Constitution. It provides that the President shall

> "nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law * * *."

Article II, section 3 provides additionally that the President shall "Commission all the Officers of the United States."

As explained in Marbury v. Madison, 1 Cranch 137, 153-157 (1803), the Constitutional appointment process consists of three major steps:

> The nomination by the President;
>
> the Senatorial advice and consent (confirmation); and
>
> the appointment by the President, of which the Commission is merely the evidence.

See also 4 Op. A.G. 218, 219-220.

There is no indication in this early analysis of the constitutional appointment process that a matured vacancy is a necessary prerequisite. Nomination and confirmation to fill anticipated vacancies are consistent with the constitutional plan, and have been frequent occurrences in our history.

It should be noted that anticipated vacancies may be grouped into two categories: First, those that will

take effect on a day certain; e.g., when a resignation is submitted as of a specific date, or a statutory term is about to expire. Second, those that will take effect upon fulfillment of a condition; e.g., when the removal or elevation of the incumbent takes effect, or the appointment and qualification of his successor. Nothing in the Constitution prevents advance nomination and confirmation to fill either category of anticipated vacancies. Logic and experience, running from the earliest years of the Republic to the present, support this conclusion.

If the Senate's power to confirm were conditioned on the present effectiveness of the vacancy, there would continually be gaps in the holding of important offices. In all cases, nomination, confirmation and appointment would have to wait until the incumbent leaves office. Interruptions in the discharge of public business would necessarily result. The needs of prudent administration suggest the unsoundness of a constitutional interpretation that would force this result upon every resignation or retirement of Presidential appointees.

As a matter of fact, from the earliest years the Senate has exercised the power to confirm nominations to offices in which a vacancy in the near future is anticipated to take effect, by action of the incumbent or of the President, as the case may be. The first volume of the Executive Journal of the Senate, covering the years from 1789 to 1805, gives instances in which the Senate confirmed nominees in the following situations: To fill a vacancy to be created by the promotion of the incumbent; to replace an official who desired to be recalled; to rename an officer whose term was about to expire; to replace an official who had resigned as of a day certain; and to replace an official about to be superseded. (For details as to these nominations, see Appendix III.)

This practical interpretation of the Constitution by the early Presidents and the Senate has been judicially supported in a number of Supreme Court decisions holding that an officer who serves at the pleasure of the President is ousted from his office when the President appoints a successor by and with the advice and consent of the Senate.

McElrath v. United States, 102 U.S. 426; Blake v. United States, 103 U.S. 227, 237; Mullan v. United States, 140 U.S. 240, 245. These rulings clearly presuppose that the Senate has the power to confirm a nomination while the incumbent is still in office.

The history of the Supreme Court contains several examples of actions, by Presidents and the Senate, to fill positions of Justices and the Chief Justice in advance of the effective date of the resignation or retirement of the incumbent:

1. Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1. However, due to his death on December 24, Stanton never ascended to the Bench. See Warren, The Supreme Court - United States History (1937 Edition) Vol. 2, pp. 504, 506.

2. Mr. Justice Gray resigned on July 9, 1902, effective on the appointment of his successor (see supra, pp. 4-5).

On August 11, the newspapers announced that Oliver Wendell Holmes had been "appointed" to succeed Mr. Justice Gray. Bowen, Yankee from Olympus, 346. President Roosevelt had in fact on that day given Holmes a recess commission, which subsequently was cancelled. Holmes, who then was Chief Judge of the highest court of Massachusetts, apparently did not want to serve without prior confirmation by the Senate. Holmes - Pollock Letters, Vol. I, p. 103.[6/]

As shown above, Mr. Justice Gray died on September 15. The President nominated Holmes on December 2, the day after the Senate reconvened. The nomination was confirmed two days later. Journal of the Executive Proceedings of the Senate, Vol. XXXIV, pp. 5, 21. There can be no question but that President Roosevelt would have submitted the Holmes nomination to the Senate prior to Justice Gray's death, had the Senate then been in session.

6/ See also a letter of August 21, 1902 from President Roosevelt to Holmes:

> "After consulting one or two people, I feel that there is no necessity why you should be nominated in the recess. Accordingly I withdraw the recess appointment which I sent you, and I shall not send you another appointment until you have been confirmed by the Senate, which I think will be two or three days after it meets. Meanwhile, I strongly feel that you should continue as Chief Justice of Massachusetts."

3. Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to be Associate Justice of the Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation. Journal of the Executive Proceedings of the Senate, Vol. XXXIV, pp. 202, 215.

4. On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. 260 U.S. iii. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, "commencing September 18, 1922."

5. On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. 313 U.S. iii. On June 12, President Franklin D. Roosevelt nominated Associate Justice Stone to be Chief Justice, and Attorney General Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." 87 Cong. Rec. 5097. The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7. 314 U.S. iv. 7/

These precedents relating to Supreme Court appointments thus show instances in which the Senate confirmed judicial nominations which were made in anticipation of a vacancy, either where a resignation or retirement was to

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7/ Chief Justice Stone took his oath on July 3 (314 U.S. iv), but the delay in Justice Jackson's confirmation until July 7 had no relation to that fact. The Jackson hearings, which commenced on the same day as the Stone hearings, took place over several days, June 21-30, and the Judiciary Committee reported on the nomination June 30. On the same day the Jackson confirmation by arrangement was put over until the next session for conducting substantial business of the Senate, which was July 7. 87 Cong. Rec. 5701,5756,5759 (1941).

take effect on a day certain (Stanton; Day; Sutherland; Stone), or where the nomination was vice an Associate Justice nominated to be Chief Justice (Jackson) or vice a judge nominated to be a Justice (Richards).[8/]

As noted earlier, in recent years a very sizable number of federal judges have retired subject to the appointment and qualification of their successors. The Senate has confirmed their successors in the same way it acts on other nominations which are submitted in anticipation of a vacancy. (See examples in Appendix II.) The same is true of the situations, very frequent in the lower Federal courts, in which nominations have been made and confirmed to replace incumbent judges being elevated to higher posts at the same time. Thus, acceptance

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8/ Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the judge who was to fill the vacancy ahead of the one who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith,Jr., Chief Judge of the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice the elevation of Judge Smith. 112 Cong. Rec. 25524. The confirmation of Judge Greene occurred on October 18, 1966, and that of Judge Smith on October 20. 112 Cong. Rec. 27397, 28086.

of the assertion that the Senate lacks the power to confirm Mr. Justice Fortas on account of the condition affecting the timing of Chief Justice Warren's retirement, or that it lacks the power to confirm Judge Thornberry at this time to replace Justice Fortas, would create serious doubt about the validity of the appointments of a sizable portion of the Federal judiciary.

There is nothing inconsistent with the Constitution in the practice of anticipatory nomination and confirmation in the present circumstances. To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history. As President Kennedy wrote to Judge Prettyman in 1961, it has the beneficial effect that the "Court may not be handicapped for any time during which a vacancy might otherwise exist."

Appendix I

1. Letters from Chief Justice Warren to President Johnson, dated June 13, 1968:

a. My Dear Mr. President:

Pursuant to the provisions of 28 U.S.C., Section 371(B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,
Earl Warren

b. My Dear Mr. President:

In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem ofage, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court.

I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my very best wishes for your continued good health and happiness, I am

Sincerely,
Earl Warren

2. Letter from President Johnson to Chief Justice Warren dated June 26, 1968:

My Dear Mr. Chief Justice:

It is with the deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have so well advanced.

Sincerely,
Lyndon B. Johnson

3. Telegram from Chief Justice Warren to President Johnson, dated June 26, 1968:

THE PRESIDENT
THE WHITE HOUSE

DEAR MR. PRESIDENT: MY SECRETARY HAS READ TO ME OVER THE PHONE YOUR LETTER OF ACCEPTANCE OF MY RETIREMENT. I AM DEEPLY APPRECIATIVE OF YOUR WARM WORDS, AND I SEND MY CONGRATULATIONS TO YOU ON THE NOMINATIONS OF MR. JUSTICE FORTAS AS MY SUCCESSOR AND OF JUDGE HOMER THORNBERRY TO SUCCEED HIM. BOTH ARE MEN OF WHOM YOU CAN WELL BE PROUD, AND I FEEL SURE THEY WILL ADD TO THE STATURE OF THE COURT.

EARL WARREN

4. Letter from Mr. Justice Gray to President Theodore Roosevelt, dated July 9, 1902:

Dear Mr. President,

Being advised by my physicians that to hold the office of Justice of the Supreme

Court for another term may seriously endanger my health, I have decided to avail myself of the privilege allowed by Congress to judges of seventy years of age and who have held office more than ten years. I should resign to take effect immediately, but for a doubt whether a resignation to take effect at a future day, or on the appointment of my successor, may be more agreeable to you.

Wishing that the first notice of my intention should go to yourself, I have not as yet mentioned it to any one else.

Very respectfully and truly yours
Horace Gray

5. Letter from President Roosevelt to Mr. Justice Gray, dated July 11, 1902:

My dear Judge Gray:

It is with deep regret that I received your letter of the 9th instant, and accept your resignation. As you know, it has always been my hope that you would continue on the bench for many years. If agreeable to you, I will ask that the resignation take effect on the appointment of your successor.

It seems to me that the valiant captain who takes off his harness at the close of a long career of high service faithfully rendered, holds a position more enviable than that of almost any other man; and this position is yours. It has been your good fortune to render striking and distinguished service to the whole country in certain crises while you have been on the court - and this in addition of course to uniformly helping shape its action so as to keep it

up on the highest standard set by the great constitutional jurists of the past. I am very sorry that you have to leave, but you go with your honors thick upon you, and with behind you a career such as few Americans have had the chance to leave.

With warm regards to Mrs. Gray, believe me,

Faithfully yours,
Theodore Roosevelt

6. Letter from Judge Prettyman to President Kennedy, dated December 14, 1961:

Dear Mr. President:

On October 17th last, I had been on the court sixteen years. In August I was seventy years old. Being thus qualified I wish to take advantage of the statute (Sec. 371(b) of Title 28, U.S. Code) which says a judge with such qualifications "may retain his office but retire from regular active service". The statute prescribes no procedure for retiring; accordingly I simply hereby retire from regular active service, retaining my office.

The statute provides that you shall appoint a successor to a judge who retires. Hence I am sending you this note.

With great respect I have the honor to be

Yours sincerely,
E. Barrett Prettyman

7. Letter from President Kennedy to Judge Prettyman, dated December 19, 1961:

Dear Judge Prettyman:

It was with regret that I received the notification that you were retiring from "regular active service." The way in which you

phrased your letter left me with no alternative but to accept your decision.

I was pleased, however, that you were retaining your office and would be available to continue your distinguished service on the Bench. Your record for justice and humanity, your efforts in behalf of more efficient administration of the law, and your legacy of sound precedent entitle you to some relaxation from the demands of regular active service.

I am happy that you have elected to continue in the capacity of chairman of the Administrative Conference. I am looking forward to receiving the recommendations and suggestions which flow from the meetings of the Conference. It seems to me that this offers an opportunity to make a major contribution toward the improvement of the regulatory agency procedures. Under your leadership I am sure that the Conference will take advantage of that opportunity.

With every good wish, I am

Sincerely yours,
JOHN F. KENNEDY

8. Letter from President Kennedy to Judge Prettyman, dated December 26, 1961:

Dear Judge Prettyman:

As you know, I have announced that I intend to fill the vacancy which will be created when you retire from active service. However, I hope you will continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office. Your letter does not specifically mention when your retirement from regular active service takes

effect, but I have been informed that you have no objection to continuing in your present capacity until your successor is sworn in.

I appreciate your willingness to continue for this limited period in order that the Court may not be handicapped for any time during which a vacancy might otherwise exist.

Sincerely,
JOHN F. KENNEDY

9. Letter from Judge Prettyman to President Kennedy, dated January 2, 1962:

My dear Mr. President:

I have your note of December 26th. I am glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite. I shall advise the keepers of the records to enter my retirement upon the date when my successor qualifies.

May I take advantage of this opportunity to express to you my deep appreciation of your generous remarks regarding my service.

With great respect, I am

Yours sincerely,
E. BARRETT PRETTYMAN

Appendix II

By letter dated February 24, 1968, Judge Wilson Warlick, North Carolina, Western, retired effective upon the appointment and qualification of his successor. James McMillan was nominated on April 25, appointed June 7, and entered on duty June 24. Judge Warlick retired June 23.

By letter dated March 30, 1967, Judge Frank M. Scarlett, Georgia, Southern, retired effective upon the appointment and qualification of his successor. To date no one has been appointed and he is still on the bench in regular service.

By letter dated November 28, 1966, Judge Frank A. Hooper, Georgia, Northern, retired effective upon the appointment and qualification of his successor. Newell Edenfield was nominated May 24, 1967, appointed June 12, and entered on duty June 30. Judge Hooper retired June 29.

By letter dated September 21, 1965, Judge William G. East, Oregon, retired effective upon the appointment and qualification of his successor. Robert Belloni was nominated February 21, 1967, appointed April 4, and entered on duty April 10. Judge East retired April 9.

By letter dated March 12, 1965, Judge William C. Mathes, California, Southern, retired effective upon the appointment and qualification of his successor, or not later than June 30, 1965. Irving Hill was nominated May 18, appointed June 10, and entered on duty June 25. Judge Mathes retired June 9.

By letter dated February 19, 1964, Judge Walter M. Bastian, D. C. Circuit, retired effective upon the appointment and qualification of his successor. Edward A. Tamm was nominated March 1, 1965, appointed March 11, and entered on duty March 17. Judge Bastian retired March 16.

By letter dated March 26, 1963, Judge David W. Ling, Arizona, retired effective upon the appointment and qualification of his successor. C. A. Muecke was nominated August 17, 1964, appointed October 1, and entered on duty October 12. Judge Ling retired October 11.

A number of other instances early in this century of retirements to be effective upon the appointment and qualification of the successor have been assembled from incomplete records of the Department of Justice. It is believed that in these cases the successor was appointed between the date of the announcement of retirement as shown in the third column and the effective date of retirement as shown in the fourth column.

NAME	COURT	ANNOUNCEMENT OF RETIREMENT	EFFECTIVE DATE OF RETIREMENT
Benedict, Charles	New York, E	5/26/97	7/20/97
Brown, Addison	New York, S	7/1/01	9/3/01
Baker, John	Indiana	11/8/02	12/18/02
Hallett, Moses	Colorado	4/7/06	5/1/06
Lockren, Wm.	Minnesota	4/3/08	7/11/08
Saunders, Eugene	Louisiana, E.	1/8/09	2/8/09
Dallas, George	Third Circuit	3/15/09	5/24/09

NAME	COURT	ANNOUNCEMENT OF RETIREMENT	EFFECTIVE DATE OF RETIREMENT
Reid, Silas	Alaska	6/14/09	7/1/09
Cooley, Alford	New Mexico	6/6/10	7/10/10
Brawley, Wm.	S. Carolina	4/18/11	6/14/11
Donworth, George	Washington	1/24/12	7/8/12
Locke, James	Florida, So.	7/9/12	9/2/12
Peele, Stanton	Court of Claims	1/2/13	2/11/13
Stuart, Thomas	Hawaii	8/8/16	11/23/16
Whitney, Wm.	Hawaii	1/25/17	3/19/17
Shepherd, Seth	D.C. Ct. Appeals	5/1/17	9/30/17
Dyer, David	Missouri, E.	5/15/19	11/3/19
Batts, Robert	Fifth Circuit	8/22/19	4/9/20
Davis, John	New Jersey	6/5/20	6/12/20
Riner, John	Wyoming	10/13/21	10/31/21
Rudkin, Frank	Washington	1/17/23	1/18/23
Anderson, Albert	Seventh Circuit	10/31/29	11/6/29

Appendix III

Examples in Vol. I of the Journal of the Executive Proceedings of the Senate, of Senatorial Confirmations in Anticipation of a Vacancy.

I. Nominations vice an incumbent who is being elevated at the same time.

December 21, 1796, p. 216.[1/]

I nominate the following persons to fill the offices annexed to their names, respectively, which became vacant during the recess of the Senate:

* * *

Jonathan Jackson, of Massachusetts, to be Supervisor for the district of Massachusetts, vice Nathaniel Gorham, deceased.

John Brooks, of Massachusetts, to be Inspector of Survey No. 2, in the district of Massachusetts, vice Jonathan Jackson, appointed Supervisor.

Samuel Bradford, of Massachusetts, to be Marshal for the district of Massachusetts, vice John Brooks, appointed Inspector of Survey No. 2, in that district.

* * *

Confirmed December 22, 1796, p. 217. A number of similar nominations and confirmations took place in February, 1801, in connection with the staffing of the circuit courts. pp. 381-385.

1/ The page numbers refer to the pages of Volume I of the Journal of the Executive Proceedings of the Senate.

II. Nominations vice incumbents who desire to be relieved of their duties.

May 19, 1796, p. 209

I nominate Rufus King, of New York, to be Minister Plenipotentiary of the United States at the Court of Great Britain, in the room of Thomas Pinckney, who desires to be recalled.

David Humphreys, of Connecticut, to be the Minister Plenipotentiary of the United States at the Court of Spain; William Short, the resident Minister to that Court having desired to be recalled.

Confirmed, May 20, 1796, p. 209.

III. Nominations to fill terms about to expire.

1. January 10, 1798, p. 258

I nominate the following persons to be Marshals of the United States;

John Hobby, for the District of Maine; Philip B. Bradley, for the district of Connecticut; Thomas Lowry, for the district of New Jersey; Samuel McDowell, Jr., for the district of Kentucky: each for the term of four years, to commence on the twenty-eighth of January, current, when their present terms will expire.

Confirmed, January 12, 1798, p. 258.

2. December 9, 1799, p. 325

I nominate * * * David Mead Randolph the present Marshal of the District of Virginia, for the term of four years, to commence on the 15th instant when his existing commission will expire.

Confirmed, December 6, 1799, p. 326.

3. February 4, 1803, p. 441

I nominate * * * William Henry Harrison, to be Governor of the Indiana Territory from the 13th day of May next, when his present commission as Governor will expire.

Confirmed February 8, 1803, p. 442.

IV. Nominations to fill vacancy which will be caused by a resignation on a future day certain.

May 7, 1800, p. 352

I nominate the Honorable John Marshall, Esq. of Virginia, to be Secretary of the Department of War, in the place of the Honorable James McHenry, Esq., who has requested that he may be permitted to resign, and that his resignation be accepted to take place on the first day of June next.

May 12, 1800, p. 353

I nominate the Honorable John Marshall, Esq., of Virginia, to be Secretary of State, in place of the Honorable Timothy Pickering, Esq. removed.

The Honorable Samuel Dexter, Esq. of Massachusetts, to be Secretary of the Department of War, in the place of the Honorable John Marshall, nominated for promotion to the Office of State.

Confirmed, May 13, 1800, p. 354

V. Nomination to fill office, the incumbent of which is to be superseded.

December 23, 1799, p. 329

I nominate Ambrose Gordon, of Georgia, to be Marshal of the district of Georgia, in the place of Oliver Bowen, to be superseded.

Confirmed, December 24, 1799, pp. 329-330.

EXHIBIT 2

[From the Asheville Times, July 6, 1968]

WARREN TO STAY IF FORTAS NIXED

WASHINGTON (AP).—Earl Warren says he will stay on as chief justice of the United States if the Senate does not confirm Abe Fortas as his successor.

But, Warren told a news conference Friday, he expects Fortas to be approved despite the declared opposition of 19 Republican senators and he believes Fortas will be "a great chief justice."

"I am obliged to (stay on)," Warren said. "I suppose that under the oath I am obliged to perform the duties of my office, I neither expect nor hope that would be a fact."

Michigan's Sen. Robert P. Griffin, leader of the Republican opposition bloc, declined comment on Warren's declaration. There was no immediate reaction from the others, scattered across the country for the long July 4th weekend.

But the Republicans, who claimed unnamed supporters among Southern Democrats, say their campaign is based on principle more than personalities.

They have accused President Johnson of "cronyism" in naming Fortas as chief justice and long-time Texas friend Homer Thornberry as an associate justice. They are mainly opposed, however, to what they call a "lame duck" president making court appointments.

They said they would press ahead with their campaign even when Democratic Senate Leader Mike Mansfield declared last week that he expected Warren to stay on if he had to and in effect gave his colleagues a choice between Warren and Fortas.

Mansfield's comments were viewed by some of the Republicans as an effort to weaken any Southern Democratic support. The Southerners have been loudly critical of the court under Warren and presumably would find little difference between Warren and Fortas who often have voted together.

In talking with newsmen in the court's east conference room Warren stoutly defended Johnson's authority as well as his selections.

Johnson, said Warren, is no more a "lame duck" president than any other president serving his last term in office. The chief justice rejected the idea that Johnson should have left the nominations to the next President, saying: "I thought that as long as a man is president he has a right to perform the duties of the office."

Lavish in praise of Fortas, Warren said he had "a great record" on the court and earlier as a lawyer, teacher of law and government administrator.

Asked also what he thought of Thornberry, now a U.S. Circuit Court judge in New Orleans, Warren said he did not know him as well but that he beileved he will become "an excellent justice."

EXHIBIT 3

[From the New York Times, June 27, 1968]

WARREN-JOHNSON LETTERS

WASHINGTON, JUNE 26.—Following are the texts of a letter of retirement and a letter of explanation sent June 13 by Chief Justice Earl Warren to President Johnson and the text of the President's reply today:

CHIEF JUSTICE'S LETTERS

MY DEAR MR. PRESIDENT: Pursuant to the provisions of 28 U.S.C. Section 371 (B), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure.

Respectfully yours,

EARL WARREN.

MY DEAR MR. PRESIDENT: In connection with my retirement letter of today, I desire to state my reason for doing so at this time.

I want you to know that it is not because of reasons of health or on account of any personal or associational problems, but solely because of age. I have been advised that I am in as good physical condition as a person of my age has any right to expect. My associations on the court have been cordial and satisfying in every respect, and I have enjoyed each day of the fifteen years I have been here.

The problem of age, however, is one that no man can combat and, therefore, eventually must bow to it. I have been continuously in the public service for more than 50 years. When I entered the public service, 150 million of our 200 million people were not yet born. I, therefore, conceive it to be my duty to give way to someone who will have more years ahead of him to cope with the problems which will come to the Court.

I believe there are few people who have enjoyed serving the public or who are more grateful for the opportunity to have done so than I. I take leave of the Court with the warmest of feelings for every member on it and for the institution which we have jointly served in the years I have been privileged to be part of it.

With my very best wishes for your continued good health and happiness, I am

Sincerely,

EARL WARREN.

THE PRESIDENT'S LETTER

MY DEAR MR. CHIEF JUSTICE: It is with deepest regret that I learn of your desire to retire, knowing how much the nation has benefited from your service as Chief Justice. However, in deference to your wishes, I will seek a replacement to fill the vacancy in the office of Chief Justice that will be occasioned when you depart. With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.

You have won for yourself the esteem of your fellow citizens. You have served your nation with exceptional distinction and deserve the nation's gratitude.

Under your leadership, the Supreme Court of the United States has once again demonstrated the vitality of this nation's institutions and their capacity to meet with vigor and strength the challenge of changing times. The Court has acted to achieve justice, fairness, and equality before the law for all people.

Your wisdom and strength will inspire generations of Americans for many decades to come.

Fortunately, retirement does not mean that you will withdraw from service to your nation and to the institutions of the law. I am sure that you will continue, although retired from active service as Chief Justice, to respond to the calls which will be made upon you to furnish continued inspiration and guidance to the development of the rule of law both internationally and in our own nation. Nothing is more important than this work which you undertook so willingly and have so well advanced.

Sincerely,

LYNDON B. JOHNSON.

EXHIBIT 4

[From the Washington Star, June 28, 1968]

MANSFIELD WARNS FOES ON COURT FIGHT

(By Lyle Denniston)

Senate Majority Leader Mike Mansfield, D-Mont., today promised he would move to cut short any filibuster against President Johnson's two new Supreme Court nominations.

He also put added pressure on the Republican challengers by saying that the issue would have to be decided without any lengthening of the congressional session.

Moreover, he warned the Republicans that, if they blocked the nominations of Justice Abe Fortas to be the new chief justice and Homer Thornberry to be an associate justice, they may not get the result they want—the chance for the next president, perhaps Republican, to replace Earl Warren, the retiring chief justice.

"Speaking personally," Mansfield said to newsmen, "I believe Warren would be so cognizant of the nation's need that he would stay on and take his place in the court when it reconvenes in October, if the new appointment is not acted on by the Senate."

Some of Mansfield's assistants have been predicting privately that if the Senate failed to act finally on his successor, Warren would simply withdraw his retirement and remain on the court for a long time further.

If he did that, he could—if his health held up—serve beyond the period of service of the next president.

"The choice before the Senate," Mansfield said in a remark clearly aimed at GOP hopes of keeping the chief justiceship for the next president to fill, "is between Fortas being approved or Warren staying on."

But Mansfield conceded that timing was becoming a crucial factor. Even a brief filibuster or any prolonged debate on the new nominations, he said, could endanger the prospect of congressional adjournment before the start of the Republican nominating convention Aug. 5.

And he implied that he would oppose a return to Washington by the Senate after the GOP and Democratic conventions to take up the nominations.

"I would dread coming back between or after the two conventions," the Democratic chief said. The Democrats' convention opens Aug. 26.

Contributing to the time problems is the fact that the Senate Judiciary Committee will not hold a hearing on the nominations until July 11, at the earliest.

Even that date is in some doubt, committee sources said today, because of a legal question raised by Sen. Sam J. Ervin, D-N.C., over whether any vacancy actually exists in the high court.

His complaint, which so far remains his alone, is that Warren has not retired because he has set no specific date. The President said the retirement would take effect only when a replacement had won Senate approval.

The committee will look into that issue on July 11 when it questions Atty. Gen. Ramsey Clark. It is possible that, if the dispute does not become deeply troubling to the committee between now and then, the panel would hold hearings on the two nominees right after Clark has appeared.

MANSFIELD DEFENDS

Today, Mansfield defended the terms of the agreement between Warren and the President on the retirement.

Asked whether he thought the chief justice should write another letter stating an intention to make his retirement effective on a specific date, Mansfield replied:

"There is absolutely no need for another letter. The President acted entirely within his responsibility."

The majority leader also attempted to answer the argument being made by some GOP senators that Johnson, as a president on his way out of office, is a "lame duck" who should not be filling the important post of chief justice.

"There is no snch thing as a lame duck president," Mansfield said. "If President Johnson is a lame duck, anyone who even ran for a second term as president would have to be considered a lame duck."

JUSTICE DEPARTMENT RESPONSE

Mansfield's brief reply to the legal challenge raised by Ervin followed a much more extensive answer last night by the Justice Department.

The department offered a mass of evidence to try to prove that Johnson does have a vacancy to fill and that he acted with complete legality in filling it.

Staff members continued to prepare other evidence for Atty. Gen. Clark's Senate testimony July 11.

It was apparent that the administration was taking much more seriously the new legal complication than the political challenge that has been developing among Senate Republicans.

Sen. Robert Griffiin, R-Mich., a leader in that move, yesterday dismissed the appointment of two close friends of Johnson as "cronyism at its worst." He acknowledged that he plans to filibuster against the nominations.

DIRKSEN DISCOUNTS ISSUE

But the GOP leader, Sen. Everett M. Dirksen of Illinois, who has no objection to the appointments, tried anew yesterday to dismiss the effort led by Griffin and Sen. George Murphy, R-Calif.

"You'll find that that is going to drop to a simmer," he said of the protest.

Mentioning a petition signed by 19 GOP senators against Senate approval of any Johnson nominee to the court, Dirksen sarcastically said that "some of those people feel a little sheepish."

He said that "several of the names on that list are not going to be there" after a few days. And he contended, in direct contradiction of Sen. Griffin's plans, that "there won't be a filibuster" by the GOP on the nominations.

The Illinois Republican also tried to discount the significance of Sen. Ervin's legal protest.

"I fancy it'll be worked out," he said as he walked away from reporters.

PRESSURE THEORY

It could not be learned on Capitol Hill whether Ervin's complaint was anything more than a lawyer's dispute over language. One theory making the rounds among some observers was that Southern Democrats were trying to pressure Warren into setting a definite date for leaving the chief justiceship, to eliminate all possibility that he might return to the bench when the court reopens in October.

But Ervin made his protest only in legal terms. He said the federal law cited by Warren in his retirement letter to the President June 13 speaks of presidential power to name "a successor to a justice . . . who retires."

As the North Carolina lawmaker, a former state judge, interpreted the word "retires," it means actually setting a date for retirement.

But Deputy Atty. Gen. Warren Christopher, meeting with newsmen later, produced a series of documents to show that many federal judges on lower courts had retired on the terms agreed to by Johnson and Warren—that is, that the retirement would take effect when a successor had won Senate approval.

In none of those cases, Christopher contended, did anyone dispute that a "vacancy existed" in the judgeship.

Moreover, the government's No. 2 legal officer argued, those federal judges are covered by precisely the same law on retirement as justices of the Supreme Court.

Christopher also attempted further to answer Ervin with a letter Ervin himself signed last Feb. 27.

It was a letter to President Johnson by the senator and his North Carolina colleague, Sen. Everett Jordan, proposing James Bryan McMillan for a vacant federal court seat in their state.

In an earlier exchange of letters, the retiring judge—Wilson Warlick—and President Johnson had agreed that the retirement would take effect "upon the appointment and qualification" of a successor. No specific date was set. Those terms were the same as Warren's.

The first paragraph of the Ervin-Jordan letter said that "due to the fact that Judge Wilson Warlick has announced his retirement . . ., a vacancy now exists in that office."

EXHIBIT 5

[From the New York Times, June 30, 1968]

THE COURT AND THE MEN

In the Federalist Papers, James Madison and Alexander Hamilton clearly explained that the framers of the Constitution sought to protect the Supreme Court against encroachments by Congress. "The complete independence of the courts of justice," Hamilton declared, "is peculiarly essential in a limited constitution."

The principle of the Supreme Court as the independent third branch of government has been recognized ever since the first appointments were made by the first President. The right of appointment throughout a Presidential term gained recognition from the beginning. Although President Adams was defeated in November, 1800, his nomination of John Marshall to be Chief Justice was sent to the Senate the following January. Marshall assumed the burdens of office when a new President was sworn in; he served brilliantly for 35 years.

History and precedent are on the side of President Johnson against the Republican Senators who question his right to appoint Abe Fortas as Chief Justice and Homer Thornberry as Associate Justice. The President has the right to appoint them just as the Senate has the right to assess their qualifications.

President Johnson is President until be steps down next January. He bears the immense responsibilities of Commander in Chief of the armed forces in Vietnam and elsewhere; of guiding the peace negotiations in Paris; of snbmitting new legislation to Congress and of acting on old legislation that will affect the life of the cities and the welfare of the people long after he leaves the White House.

It is unfortunate, therefore, that a calculated vagueness in the exchange of letters between President Johnson and Chief Justice Warren gives Senate obstructionists an oportunity to play games about whether the vacancies do in fact exist. Chief Justice Warren made his retirement "effective at your pleasure" and President Johnson accepted it "effective at such time as a successor is qnalified."

Now that the uiceties are over, it is time for formalities. The President ought to stop the end runners on Capitol Hill by accepting the Warren retirement without opening up an escape hatch of his own. The reasons of age the Chief Justice gave for quitting the bench preclude his return in any event,

President Johnson has made two good choices for the high court. For although both are old Presidential cronies, they are also appointees of quality. No one can predict how a man will behave on the bench when it comes to deciding coustitutional issues. But this much is certain: There is basis for hope that, like Chief Justice Warren, they can grow in stature in this historic branch of government. They deserve confirmation, not the mortification they are now undergoing out of a G.O.P. desire to embarrass Mr. Johnson and the Democrats in this Presidential year.

EXHIBIT 6

Title 28, United States Code, section 371. Resignation or retirement for age.

(a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his life, continue to receive the salary which he was receiving when he resigned.

(b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires. (June 25, 1948, ch. 646, 62 Stat. 903; Oct. 31, 1951, ch. 655, § 30, 65 Stat. 724; Feb. 10, 1954, ch. 6, § 4(a), 68 Stat. 12.)

Title 28, United States Code, section 294. Assignment of retired Justices or judges to active duty.

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned hy the Chief Justice of the Unitd States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371 (b) or 372 (a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned hy the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall he made to the Supreme Court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned. (June 25, 1948, ch. 646, 62 Stat. 901; July 9, 1956, ch. 517, § 1(c), 70 Stat. 497; Aug. 29, 1957, Pub. L. 85–219, 71 Stat. 495; Aug. 25, 1958, Pub. L. 85–755, § 5, 72 Stat. 849.)

EXHIBIT 7

SUPREME COURT NOMINATIONS MADE DURING THE LAST YEAR OF A PRESIDENT'S LAST TERM IN OFFICE

INFORMATION SUPPLIED BY THE LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE

Nominations made during the last year of a President's last term in office which were not confirmed by the Senate:

John Jordan Crittenden, nominated Dec. 17, 1828, postponed Feb. 12, 1829. John Quincy Adams made this nomination after being defeated in the election of 1828 and left office March 3, 1829.

Reuben Hyde Walworth, nominated March 13, 1844, postponed June 15, 1844, withdrawn June 17, 1844. John Tyler did not run for re-election in the election of 1844 and left office March 3, 1845.

Edward King, nominated June 5, 1844, postponed June 15, 1844, renominated Dec. 4, 1844, postponed Jan. 23, 1845. John Tyler did not run for re-election in the election of 1844 and left office March 3, 1845.

John Meredith Reed, nominated Feb. 7, 1845, not acted upon. John Tyler did not run for re-election in the election of 1844 and left office March 3, 1845.

Edward A. Bradford, nominated Aug. 16, 1852, not acted upon. Millard Fillmore did not receive his party's nomination for President in the election of 1852 and left office March 3, 1853.

George E. Badger, nominated Jan. 10, 1853, postponed Feb. 11, 1853. Millard Fillmore did not receive his party's nomination for President in the election of 1852 and left office March 3, 1853.

William C. Micou, nominated Feb. 24, 1953, not acted upon. Millard Fillmore did not receive his party's nomination for President in the election of 1852 and left office March 3, 1853.

Jeremiah S. Black, nominated Feb. 5, 1861, rejected Feb. 21, 1861. James Buchanan did not run for re-election in the election of 1860 and left office March 3, 1861.

Stanley Matthews, nominated Jan. 26, 1881, not acted upon. Rutherford B. Hayes did not seek re-election in 1880 and left office March 3, 1881. Matthews was subsequently re-appointed on March 14, 1881 by James Garfield and the appointment was confirmed May 12, 1881.

Nominations made duriug the last year of a President's last term which were confirmed by the Senate:*

John Marshall, nominated Jan. 20, 1801, confirmed Jan. 27, 1801. John Adams had been defeated in the election of 1800 when this appointment was made.

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*This list does not include Melville W. Fuller who was nominated April 30, 1888, and confirmed July 20, 1888. Although Grover Cleveland made this appointment before losing the election of 1888, his last term of office was from 1893–1897.

John Catron, nominated March 3, 1837, confirmed March 8, 1837. Andrew Jackson had not run for reelection, and his Vice President, Martin Van Buren, had been elected when Jackson made this appointment.

Peter V. Daniel, nominated Feb. 26, 1841, confirmed March 2, 1841. Martin Van Buren had lost the election of 1840 when he made this appointment.

Samuel Nelson, nominated Feb. 4, 1845, confirmed Feb. 14, 1845. John Tyler made this appointment after the election of 1844, in which he did not run.

William B. Woods, nominated Dec. 15, 1880, confirmed Dec. 21, 1880. Rutherford B. Hayes made this appointment after the election of 1880, in which he did not run.

George Shiras, Jr., nominated July 19, 1892, confirmed July 26, 1892. Benjamin Harrison made this appointment before losing the election of 1892.

Howell E. Jackson, nominated Feb. 2, 1893, confirmed Feb. 18, 1893. Benjamin Harrison had lost the election of 1892 when he made this appointment.

EXHIBIT 8

[From the Washington Post, July 10, 1968]

THE GALLUP POLL—HIGH COURT GETS A LOW RATING

(By George Gallup)

PRINCETON, N.J., JULY 9.—Favorable attitudes toward the U.S. Supreme Court have declined during the last year, as judged by a nationwide Gallup survey just completed.

Today, unfavorable feelings toward the High Court outweigh favorable sentiment by a 3–2 ratio. In a survey reported in July, 1967, Americans showed feelings toward the Court—with about as many giving it "excellent" or "good" marks as gave it "fair" or "poor" rating.

Over the past 30 years the Gallup Poll has regularly checked on the public's attitudes toward the Supreme Court as a branch of government. This survey was not designed to gauge public reaction to the recent Administration appointments of Abe Fortas and Homer Thornberry to the Court.

This is a question put to a representative national sample of 1534 adults the last weekend in June:

"In general, what kind of rating would you give the Supreme Court—excellent, good, fair or poor?"

[In percent]

	Latest	July 1967
Excellent	8	15
Good	28	30
Total, favorable	36	45
Fair	32	29
Poor	21	17
Total, unfavorable	53	46
No opinion	11	9

A person's opinion of the Supreme Court is closely related to how he identifies himself politically. Rank-and-file Republicans are most critical of the Court (60 percent give the Court an unfavorable rating) while Democrats are about evenly divided between favorable and unfavorable ratings.

Persons with college training are more inclined to give the Court a favorable rating than those with less formal education. Still, college-trained persons are evenly divided in their evaluation of the Court.

Southerners are more critical of the Court than are residents of other regions. About half of young adults, those in their twenties, give the Court either an "excellent" or "good" rating, while older persons tend to be less favorably disposed toward the Court.

Following are the results by major groups in the population:

[In percent]

	Excellent	Good	Fair	Poor	No opinion
National	8	28	32	21	11
Republicans	7	21	35	25	12
Democrats	10	32	30	17	11
Independents	7	29	32	24	8
College	14	34	27	21	4
High school	6	29	35	20	10
Grade school	6	21	31	23	19
East	11	32	31	16	10
Midwest	8	31	29	17	15
South	5	18	35	31	11
West	9	31	33	19	8
21 to 29 years	11	37	32	12	8
30 to 49 years	9	31	31	18	11
50 and older	6	19	32	29	14

The public favors certain changes in the way Supreme Court Justices are selected. Sixty-one per cent support the proposal that the American Bar Association draw up a list of candidates it prefers and then let the President make a choice from the list.

In addition, three out of every four people in this country favor President Eisenhower's proposal that Justices of the Supreme Court and other Federal judges be required to retire at the age of 72.

EXHIBIT 9

THE UNIVERSITY OF TEXAS,
SCHOOL OF LAW,
Austin, Tex., June 28, 1968.

Re Nomination of Judge Homer Thornberry as a Justice of the Supreme Court of the United States.

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

DEAR SENATOR EASTLAND: I am writing simply to say that the President has, in my opinion, exercised very good judgment in nominating Judge Homer Thornberry for a Justice of the Supreme Court of the United States.

I was a young and inexperienced law teacher when he was in my class in Torts during the 1933–34 school year. He was a good student throughout the time that he was in the law school, and indeed became an excellent student. His scholastic record in his senior year was such as to put him in the honor category and within the top fifteen percent. He did this while working full time as a deputy sheriff. This was a significant intellectual accomplishment.

It seems to me that Homer Thornberry has had the kind of rare and varied experience that is especially needed for a position on the Supreme Court, and that few other men in our society could claim. He practiced law with a well-established law firm here in Austin prior to World War II; he served this district with distinction as a Congressman for a great many years, a type of experience that at least some members of our Supreme Court should have; he has been a Federal District Judge, and those trial lawyers with whom I have conversed about his performance as a trial judge have universally praised him both for his fairness and firmness; he has served, as you know, as an Appellate Judge of the Court of Appeals for the Fifth Circuit, and in that capacity has written some outstanding opinions.

I am confident that his native legal ability, combined with the rare experience that he has had, and as related herein, gives assurance that he can con-

tribute significantly to the solution of the tremendously important and highly controversial issues with which our Supreme Court is necessarily confronted.

The only criticism I have heard is that Homer Thornberry has been a long-time friend of the President. So he has. But that, of course, is not the issue. The issue is whether or not Homer Thornberry is qualified, and I have a deep conviction that he is.

Sincerely,

PAGE KEETON, *Dean.*

EXHIBIT 10

U.S. COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT,
Miami, Fla., July 1, 1968.

Hon. GEORGE SMATHERS,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR GEORGE: I am disturbed by the criticism appearing in the uews media leveled at President Johnson's nomination of Homer Thornberry of our Court of Appeals to be an Associate Justice of the Supreme Court of the United States.

The criticism is based upon two irrelevant reasons, i.e., that it is a "lame duck appointment" and "cronyism." Of course the President has the constitutional duty to fill a vacancy on the Supreme Court. I am sure that Homer is a long time friend of the President and for this very reason the President no doubt has great confidence in Homer's ability and integrity. The one relevant factor that the news media omits mentioning is that Homer has the unquestioned superior ability to fulfill the qualifications of an Associate Justice. The undisputed fact is that the Committee on Judicial Selection of the American Bar Association has found him well qualified to be appointed to the Supreme Court. The Committee previously made such a finding with respect to his nomination to the District Court and to the Court of Appeals.

I have had the pleasure and honor of serving with Homer for two years, and I know that he will make an outstanding justice as he has made an outstanding record as a judge on our court. The Supreme Court's gain will certainly be our loss.

I earnestly solicit your full support and influence in connection with his confirmatiou by the Senate.

With warm regards,

Sincerely yours,

DAVID W. DYER.

EXHIBIT 11

SOUTHERN METHODIST UNIVERSITY,
SCHOOL OF LAW, OFFICE OF THE DEAN,
Dallas, Tex., July 1, 1968.

Senator JAMES O. EASTLAND,
The Senate Building,
Washington, D.C.

MY DEAR SENATOR EASTLAND: It is my very great pleasure to join the endorsement of the nomination of Judge Homer Thornberry to be an Associate Justice of the Supreme Court of the United States. I have known Judge Thornberry as a District Jndge and a Circuit Judge and had the pleasure only a few months ago of working with him very closely in connection with the organization of the Fifth Circuit Judicial Conference here in Dallas.

I have great respect for him as a person and for his ability as a lawyer and judge. I recommend him to your committee without reservation.

Yours very sincerely.

CHARLES O. GALVIN.

EXHIBIT 12

UNIVERSITY OF FLORIDA LAW SCHOOL,
July 6, 1968.

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

MY DEAR SENATOR EASTLAND: This letter is in regard to the appointment of William Homer Thornberry to the Supreme Court of the United States. The appointment of this man to the august position of Supreme Court Justice will be a fortunate one for the following reasons:

a. Born of poor but solid American stock, has instilled in him, humility and an awareness of the problems of poverty.

b. Starting to work at an early age and the problem of financing his own education has given him the drive and singleness of purpose that will be of great value in the labors attendant to the work of the Supreme Court.

c. His early initiation into and his continued interest in politics, gives him an insight into this area that will be invaluable.

d. As a practicing attorney, he has become aware of the "common sense" values that are important as well as the importance of our legal system in the peaceful settlement of disputes. He will know that the law is flexible and subject to change for the betterment of all people.

e. Service on the bench has started his seasoning process that is so necessary to the judicial temperament. Reading his opinions substantiate the excellent progress that he has made.

f. He has the fortunate admixture in the proper degree of both conservatism and liberalism, and as a result will be able to appreciate both points of view. Thus he will be able to make a reasoned decision.

9. William Homer Thornberry was born and raised in the Southwest. Inasmuch as we are supposed to have proper representation in our government from all sections of the nation, the Supreme Court can certainly benefit with the appointment of a representative from the Southwest section of the United States.

I trust that you and your colleagues will give William Homer Thornberry serious consideration for this vital post in our government.

Yours truly,

KENNETH L. BLACK,
Professor of Law.

EXHIBIT 13

[From the Wichita Eagle, June 28, 1968]

THE PRESIDENT'S 'CRONIES' ARE BOTH OUTSTANDING MEN

One thing about Lyudon Baines Johnson—he has impressive cronies.

Cronyism and lame-duckism are going to be the two main arguments used by those who oppose President Johnson's two Supreme Court nominations, Abe Fortas for chief justice, and Homer Thornberry for associate justice.

The President fairly well cuts the ground out from under the critics by his astute choices. Neither Fortas nor Thornberry are second-raters. Viciously attacked as merely a "crony" when Johnson appointed him in 1965, Fortas has proved an able associate justice, whose performance in the court has won him the respect of most observers. If confirmed, Fortas would become the first Jew ever to be chief justice of the U.S. Supreme Court.

It's hard to level a charge of provincial cronyism at a President who appointed the first Negro to the court, and who now wants to see a Jew presiding.

Thornberry, another close friend of the President, is also a man of proven ability. While his appointment would put a Texan upon the bench again, presumably pleasing both Texas and the South, he is no Southern conservative, but a man who has shown liberal views in his federal court decisions on such questions as civil rights, desegregation and freedom of speech.

Neither Fortas nor Thornberry can truthfully be called a "political" appointee.

If these two men are confirmed, President Johnson will have left a mark upon the Supreme Court that will last for years. Fortas is 58, Thornberry is 59, and the other Johnson appointee, Thurgood Marshall, is 60. In a body where longevity and long service are the rule (Justice Hugo Black, is 82 and has served 31 years),

these men are likely to be around a long while. And they would comprise one-third of the court.

This is what is infuriating some congressmen—that LBJ would have the effrontery, in the declining months of his last year in office, to make such important appointments. Eighteen senators are reported ready to block them. That includes Kansas Senator Frank Carlson, who also happens to be in the lame duck category. However, majority and minority leaders are reported to be pleased with the nominations. So the nation shouldn't be surprised if both men are approved.

EXHIBIT 14

U.S. COURT OF APPEALS,
SIXTH CIRCUIT,
Detroit, Mich., July 1, 1968.

HON. PHILIP A. HART,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: It has come to my attention that some questions have been raised about the qualifications of Judge Homer Thornberry to serve as Associate Justice of the Supreme Court. I know that your Judiciary Committee has access to the Department of Justice and American Bar Association files and to other material useful in evaluating a nominee as well as to Judge Thornberry's published opinions. Nevertheless, I have presumed to write because of a unique experience I have enjoyed since 1964 with Judge Thornberry.

You will recall that when the Congress enacted the Criminal Justice Act, it required the judicial conference to establish a committee to implement its provisions by promulgating rules, practice and guidelines.

The committee originally consisted of three Circuit Judges and six District Judges representing geographical diversity and representative districts throughout the country and Judge Thornberry and I have served together on this standing committee since its inception.

I consider him not only a warm, gregarious person in whose company everyone is comfortable, but also as a dedicated judge of considerable experience and demonstrated ability. The committee responsibility of establishing rules and guidelines for the appointment of counsel throughout the entire judiciary system requires, among other things, an intimate knowledge of the structure and function of the courts and an understanding in depth of substantive and procedural criminal law and many of its peripheral civil aspects.

Judge Thornberry's participation in this committee activity has been enthusiastic and faithful and his contributions have been extensive and valuable.

I have a personal test which I employ in evaluating a judge. I ask myself whether I could accept an adverse verdict from him with the abiding conviction that I had received a fair hearing in terms of the judge's knowledge of the law, his capacity for patience and his desire to ascertain the truth. Judge Thornberry meets my test.

If it is your pleasure, I will be pleased to go into further detail about his qualifications as I have been privileged to become acquainted with them.

With kindest regards, I am,

Sincerely yours,

WADE H. MCCREE, JR.

EXHIBIT 15

EXCERPT FROM HEARINGS, PART 10, INTERNAL SECURITY SUBCOMMITTEE, 1952

The CHAIRMAN. Then the hearings of the witness, Owen Lattimore are now closed.

But the committee has something to say. What I am going to say now comes from the unanimous committee that has heard this hearing.

It has been the settled practice of this committee to reserve its conclusions, with respect to the substance of testimony that is taken, until the conclusion of the hearings on the particular matter under investigation. After careful consideration, however, this committee feels it proper at this time to make a statement with respect to the conduct of this witness, as a witness, during the time he has been before us. In doing this, the committee is not reversing its policy of

reserving judgment. What the committee has to say now represents facts, not conclusions—not the findings of the committee, but its observations with respect to the deportment and conduct of Mr. Lattimore as a witness.

Mr. Lattimore came here at his own request to appear and testify. He came with a 50-page statement which was no casual document. It bore obvious indicia of careful preparation, and the witness testified he had been working on it for months, and had been assisted by his counsel. It was released to the press before delivery, and Mr. Lattimore's invective was scattered to all parts of the country. Many times when asked if he had facts to support his insulting conclusions, the witness replied that he did not.

The committee has been confronted here with an individual so flagrantly defiant of the United States Senate, so outspoken in his discourtesy, and so persistent in his efforts to confuse and obscure the facts, that the committee feels constrained to take due notice of his conduct. The United States Senate is a constitutional institution, representing the States and the people thereof. A deliberate affront to the Senate of the United States, or to the Congress, is not necessarily an affront to the individuals who compose those bodies, but is an affront to the people of this Nation, who are here represented.

The committee might have had a right to expect that a witness who claimed to be an objective scholar and a patriotic citizen would first objectively analyze the past policy of the United States in the Far East and help point the way to a determination of what has been wrong, and what corrective measures may be required. The committee might have had a right to expect that he would lend eager aid in exposing whatever Communist infiltration there may have been in the Institute of Pacific Relations, or in any other organization in a position to exert influence on the thinking of our diplomats and the conduct of our foreign affairs. The committee might have had a right to expect that Mr. Lattimore's statement would be calm, temperate, and factual.

Instead, the committee was confronted with an initial fusillade of invective, and a consistently evasive, contentious, and belligerent attitude.

Suggestions have been made that the committee should seek to discipline Mr. Lattimore for his contumacious and contemptuous conduct.

Clearly Mr. Lattimore did, on many occasions, stand in contempt of the committee. Clearly he took that position voluntarily and intentionally. Mr. Lattimore used, toward the committee, language which was insoleut, overbearing, arrogant, and disdainful. He flouted the committee, he scoffed at the committee's efforts, he impugned the committee's methods, and he slandered the committee's staff. His language was frequently such as to outrage and offend both the committee as a whole and its members individually and, apparently, with intent to do so.

There has been no striking back on the part of the committee. The committee has employed no sanctions against Mr. Lattimore because, through forbearance, it has been found possible to make progress without disciplinary action. Despite Mr. Lattimore's recalcitrance at many points, the committee believes a record has been made covering his essential testimony with respect to the major matters here being investigated.

The fact remains that Mr. Lattimore was allowed to use the witness chair as a rostrum from wbich to attack the committee, its staff, and its hearings. He was, to use a phrase from his own prepared statement before the committee, "accorded the publicity facilities" of the committee's hearings; and the record shows in many ways that neither was he insensible of his opportunity in that regard, nor did he fail to take advantage of it. There is no other country in the world where a witness before a committee of the principal legislative body of the Nation would be granted any such latitude.

Few witnesses within the memory of the members of this committee have been permitted to use language as intemperate, provocative, and abusive of the committee as Mr. Lattimore used in his prepared statement, which he was permitted to read. No witness, so far as any member of the subcommittee can recall, ever before was given free rein to read, before a Senate committee, a prepared statement so clearly contemptuous of the committee and of the Senate.

The committee is aware that in this direction lies one of the present dangers to our democratic way of life: the fact that there are those in this country today who seek to use the right of free speech in furtherance of their efforts to set up a system within which freedom of speech will not exist. But the committee has preferred to err, if at all, on the side of allowing the witness too much latitude, rather than on the side of allowing too little. That preference does not include any predilection toward allowing a witness to escape reproof for contumacy.

Contumacy may take many forms, as Mr. Lattimore has demonstrated during his appearances here. Willful unresponsiveness is one of the forms of contumacy often resorted to by disputatious witnesses, and this witness has proved himself expert at disputation. The committee frequently found it extremely difficult to get Mr. Lattimore to give a direct answer; and on numerous occasions he was reluctant to give any responsive answer at all. This witness, who had stated he was "not interested in fine or technical distinctions," proceeded throughout his testimony to split hairs with glib facility.

At times Mr. Lattimore refused to testify with respect to conclusions; at other times, he appeared eager to do so; and he did so testify on a number of occasions. In fact, in some instances he testified vehemently to conclusions which the committee found itself unable to draw from facts of record—as in the case of his testimony that he did not have any influence on United States foreign policy with respect to the Far East.

On this point, as on other matters of substance, the committee prefers to reserve its own conclusions. However, Mr. Lattimore's testimony is significant with respect to the facts. He testified that he wrote a letter to the President of the United States, in 1945, making certain statements with regard to conditions in the Far East, and urging a review of United States foreign policy with respect to the Far East, from which review then top officials of the State Department should be excluded. Mr. Lattimore testified that he saw the President personally, and left with him memoranda suggesting certain courses of action with respect to Japan and China; and that these memoranda included a recommendation for giving a larger measure of high authority to officials with China backgrounds.

Soon thereafter, according to Mr. Lattimore's own testimony, the then top officials of the State Department were replaced, including former Ambassador Grew. Further, the number and importance of top jobs in the State Department, held by persons with China backgrounds, was increased. Finally this witness testified that the policy advocated, shortly thereafter, in the so-called directive of December 15, 1945, on China policy, and which our Government sought to carry out in China, was substantially the same as the policy outlined in Mr. Lattimore's memoranda with respect to China; and that the policy adopted by the United States, with respect to Japan, was substantially the same as the policy with respect to Japan outlined in Mr. Lattimore's memoranda.

These facts, to which Mr. Lattimore testified before this committee, went unmentioned by him during his testimony before the Tydings committee.

Mr. Lattimore has testified to having a type of memory with which the committee is quite familiar. With respect to some matters, he has demonstrated that his memory is extremely good. But he has testified that his memory was unreliable with respect to matters which ordinary men might be expected to remember most clearly. Very few men forget about their visits to the President of the United States, if the number of such visits is small. But Mr. Lattimore, who said he saw President Truman just once, wanted this committee to believe he had forgotten the incident when he testified before the Tydings committee with respect to his influence on foreign policy.

Mr. Lattimore also has testified before this committee that all during that prior Senate investigation he forgot the fact that he had a desk in the State Department Building for 4, 5, or 6 months during the last war.

The precise extent to which Mr. Lattimore gave untruthful testimony before this committee will never be determined. Human limitations will prevent us from ever attaining the complete knowledge of all his activities which would make it possible to assess each statement he has made and to catalog fully whatever untruths he may have uttered. That he has uttered untruths stands clear on the record. Some of these have been so patent and so flagrant as to merit mention at this time, as illustrative of the conduct and attitude of the witness.

The witness testified concerning an occasion when he had luncheon with the Soviet Ambassador to the United States. The date of this luncheon was later placed as during the period when Soviet Russia elected, for its own purposes, to team up with the Nazi war machine. But in spite of the anxiety which freemen throughout the world experienced at the alliance of those two totalitarian colossi, the witness testified that his luncheon with the Soviet Ambassador took place after the Soviet Union had abandoned its alliance with the Nazis. Confronted later with evidence that the meeting took place during the Hitler-Stalin pact, the witness admitted he had testified incorrectly.

In connection with that same matter, the witness testified there had been much publicity about his appointment as adviser to Chiang Kai-shek, at the time of his meeting with the Soviet Ambassador, with whom he had discussed the

appointment, though the record shows that the announcement of the appointment was not made until 11 days after the luncheon meeting in question.

The witness testified that he never read an article by a Mr. T. A. Bisson which had provoked considerable controversy within the Institute of Pacific Relations in 1943. He testified further that the expressions of opinion in that article were contrary to what he himself was writing at that time. Thereafter the witness identified a letter over his own signature which indicated that he had not only read the Bisson article but had agreed with it; and that the only fault he found with it was that the underlying thoughts could have been expressed more convincingly.

Mr. Lattimore has given us many plausible but differing answers as to when he realized that Frederick V. Field was pro-Communist. The witness and Field have been shown by frequent and extensive testimony to have been closely associated in the Institute of Pacific Relations. The witness initially testified that he discovered that Field was pro-Communist sometime in the 1940's, and not until then. When presented with a letter which he said he received in 1939, and which clearly reflected the Communist expressions of Mr. Field, the witness said that "judging from this letter my memory was in error by about 2 years."

Later in the hearings, the witness was shown to have recommended the same Mr. Field, at a time subsequent to 1939, as a person who could supply personnel for the Defense Advisory Commission. Thereupon Mr. Lattimore avoided admitting that he had recommended to the Defense Advisory Commission a man whom he knew to be at least pro-Communist, by reversing his preceding testimony.

In going back to his original position, he stated that at the time when he testified his "memory was in error by about 2 years," his admission was not accurate because he was weary from long days of examinations. This explanation took no account of the fact that the admission in question took place during the first day of examination after the witness had finished reading his statement, and apparently ignored the existence of the letter which had impelled the first change in testimony on this point.

The wituess made no similar claim of being unsure of himself when he testified erroneously with respect to handling Mr. Lauchlin Currie's mail. In reply to the questiou "Is it your testimony that you did uot, at the request of Lauchlin Currie, take care of his mail at the White House when he was away?" Mr. Lattimore replied, "That certainly is my statement."

Subsequeutly, Mr. Lattimore identified a letter which he had writteu in July 1942, which iucluded the statement:

"Currie asked me to take care of his correspondence while he was away and in view of your telegram of today, I think I had better tell you that he has gone to Chiua on a special trip. This news is absolutely confidential until released to the press."

When confrouted with this letter, the witness said: "Obviously my memory was inaccurate."

When the witness was asked, in connectiou with discussion of a trip he had made in 1937 to Communist headquarters in China, "Did you or auyone in your party make prearrangements with the Communist Party in order to get in?" he answered, "None whatever." He was then presented with the text of an article which he had written for the London Times, and was asked if the statements in that article were true. After he affirmed that they were, he read into the record from that article—his own article—the statement: "I sent a letter to the Red Capital by ordinary mail and got in answer—'cordial invitation.'"

These are all instances of significant untruths, established as such. They all concern matters of obvious importance to this committee in trying to determine the nature of the organization, methods of operation, aud influence of the Iustitute of Pacific Relations. The committee attempts to draw no conclusions from these matters at this time.

Aside from matters of self-contradiction, the record coutains also instances of testimony by this witness concerning matters with respect to which other witnesses have testified to the exact opposite. Some of these instances concern matters which are highly relevant to the subject of the committee's inquiry and which are snbstantial in import.

For example: Over a period of 2 years, first before the Senate Foreign Relations Committee of the United States Senate, later before this committee in executive session, and then again before us in open session, Mr. Lattimore stated that he did not know that Dr. Ch'aoting Cbi was a Communist. Mr. Ch'aoting Chi was a man shown to have been an associate of the witness, and the witness admitted the association. But Mr. Lattimore testified that no one had told him

that Chi was a Communist, or shown him a report that Chi was a Communist, or given him any reason whatever to believe that Chi was a Communist.

On the other hand, Prof. Karl Wittfogel of Columbia University, a witness before this committee, and E. Newton Steeley of the Review Board of the Civil Service Commission, have given testimony that flatly contradicts Mr. Lattimore's clear and unequivocal assertions in this regard.

Another instance concerns the question of whether Mr. Lattimore knew that a certain German Communist who wrote under the pseudonym of Asiaticus for the publication Pacific Affairs while Lattimore was editing it, was, in fact, a Communist, Mr. Lattimore has flatly asserted that he did not know or have reason to believe this writer to be a Communist. Contra, the record contains the testimony of Prof. Karl Wittfogel that he did tell Mr. Lattimore about the Communist background and the Communist affiliation of Asiaticus. Minutes of meetings in Moscow, taken from the files of the Institute of Pacific Relations, and a letter written by Mr. Lattimore, are among the items of evidence in the record which also purport to show that Mr. Lattimore knew or believed Asiaticus to be a Communist writer.

One of the most important, relevant, and substantial questions respecting which the committee has been seeking the truth is whether when this witness was working with, and publishing articles for, certain Communists, he knew them to be Communists. The finding on this question is essential to a proper characterization of a whole series of actions by Mr. Lattimore, and will directly affect the committee's ultimate findings with respect to the Institute of Pacific Relations.

The shaping of United States policy with respect to China was a factor in the success of communism in that land, in the establishment of firm roots for Soviet influence in all Asia and in the subsequent ordeal through which United States boys now are being taken in Korea, if this policy in its initial stages, or at any time, was affected by acts or strategems on the part of anyone having any slightest purpose except the welfare of this Nation, it would be a matter not to be lightly dealt with, nor one which the American people should easily overlook or forget. The intimate knowledge which this witness had of Asia and of Asiatic affairs, coupled with his deliberate and adroit attempts to mold American thinking with respect to those affairs, including his effort to establish certain concepts, in the mind of the Chief Executive of the United States, necessarily bring this witness within the orbit of any realistic appraisal of this whole situation. When, in the face of the record, he undertook before this committee a deliberate attempt to deny or cover up pertinent facts, this witness placed himself in a most unenviable position.

The hearing is closed.

(Whereupon, at 5:30 p.m., Friday, March 21, 1952, the hearing was recessed, subject to the call of the Chair.)

EXHIBIT 16

EXCERPT, PAGE 26, STATEMENT OF CHARLES CALLAS IN HEARINGS ON NOMINATION OF ABE FORTAS, AUGUST 5, 1965

Now, Mr. Fortas later testified on a couple of pages later that the material had been handed to him by a fellow attorney friend of his named Mr. Joseph Fanelli who has also appeared as a lawyer before various committees. Mr. Fanelli testified before our committee in which I was also present that there was no reason that he knew that this had to be put in a sealed envelope because it was a public document, and, as a matter of fact, I went back into the files of the New York Times and discovered that on September 13, 1947, on page 9, column 7, and so forth, ou the various days thereafter, all the material printed in the New York Times that Mr. Fortas did not want this committee to know about, he said he did not want to have anything to do with making it public. It had been public for 3 years.

As an attorney I think he owed it to the man who he was trying to defame to have double checked this and made sure that it was something like this. He was trying to destroy Mr. Budenz's credibility as a witness which as an attorney was a perfectly legal and wonderful thing to do, but he used an unethical way to do it.

I think I have made my point on that.

There is a great deal of material on that Santo transcript which the gentlemen of the Senate might be interested in.

EXHIBIT 17

ATLANTA, GA., *April 1968.*

DEAR FRIEND: Our national government is playing Russian roulette with riots; it gambles with another summer of disaster. Not a single basic social cause of riots has been corrected. Though ample resources are available they are squandered substantially on war. However, the inhumanity and irresponsibility of Congress and the Administration are not a reflection of popular attitudes—legislation to abolish slums and end all unemployment has been endorsed by a wide majority of the American people in reputable polls. Yet, these positive proposals, like the recommendations of the President's Commission will be filed away to gather dust if the people do not generate relentless pressure on Congress.

It was obdurate government callousness to misery that first stoked the flames of rage and frustration. With unemployment a scourge in Negro ghettos, the government still tinkers with trivial half-hearted meaures—refuses still to become an "employer of last resort". It asks the business community to solve the problem as though its past failures qualified it for future success. In the halls of Congress Negro lives are too cheap to justify resolute measures it is easier to speculate in blood and do nothing.

SCLC cannot wait; it cannot watch as the only systematic response to riots are feverish military preparations for repression. It cannot sit in appalled silence and then deplore the holocaust when tragedy strikes.

We cannot condone either violence or the equivalent evil of passivity.

We intend, before the summer comes, to initiate a "last chance" project to arouse the American conscience toward constructive democratic change.

We intend to channelize the smoldering rage of the Negro and white poor in an effective militant movement in Washington and elsewhere. A pilgrimage of the poor will gather in Washington from the slums and the rural starvation regions of the nation. We will go there, we will demand to be heard, and we will stay until America responds. If this means forcible repression of our movement, we will confront it, for we have done this before. If this means scorn or ridicule, we wil embrace it, for that is what America's poor now receive. If it means jail, we accept it willingly, for the millions of poor already are imprisoned by exploitation and discrimination. We will in this way fashion a confrontation unique in drama but *firm in discipline* to wrest from government fundamental measures to end the long agony of the hard core poor. A prosperous society can afford it; a moral society cannot afford to do without it.

We are taking action after sober reflection. We have learned from bitter experience that our government does not correct a race problem until it is confronted directly and dramatically.

SCLC had to precipitate a Birmingham to open public accommodations; it had to march against brutality in Selma before the constitutional right to vote was huttressed by federal statutes. There was a thunderous chorus that sought to discourage us when we initiated direct action in Birmingham and Selma. Yet, today our accomplishments in these cities, and reforms that radiated from them are hailed with pride in all circles.

The nation has been warned by the President's Commission that our society faces catastrophic division in au approaching doomsday if the country does not act. We have, through this non-violent action, an opportunity to avoid a national disaster and to create a new spirit of harmony.

Please send the maximum contribution in this crisis year that your circumstances permit. While we are engaged in our Washington project we will also be continuing our far-flung work in voter registration, citizenship education and other activities. We can, together, write another luminous moral chapter in American history. All of us are on trial in this troubled hour, but time still permits us to meet the future with a clear conscience. Please mail your check *today* to fill tomorrow with optimism and hope.

With warmest good wishes,

MARTIN LUTHER KING, JR.

Tax deductible contributions may be made to fund the educational and voter registraton projects of SCLC. If tax deductibility is important to you, or will enable you to increase your contribution, you may make your check payable to SCL Foundation.

EXHIBIT 18

[From the U.S. News & World Report, Oct. 3, 1958]

WHAT 36 STATE CHIEF JUSTICES SAID ABOUT THE SUPREME COURT—FOR THE FIRST TIME, HERE IS FULL TEXT OF HISTORIC REPORT

The chief justices of 36 States recently adopted a report critical of the Supreme Court of the United States, declaring that the Court "has tended to adopt the role of policy maker without proper judicial restraint."

This report, approved by the chief justices of three fourths of the nation's States, found that the present Supreme Court has abused the power given to it by the Constitution. The Court is pictured as invading fields of Government reserved by the Constitution to the States.

Full text of this historic document has not previously been given wide distribution. It is printed below, together with the formal resolution of approval by the Conference of State Chief Justices.

The Conference of Chief Justices, meeting in Pasadena, Calif., on Aug. 23, 1958, adopted a resolution submitted by its Committee on Federal-State Relationships as Affected by Judicial Decisions. Vote on the resolution was 36 to 8, with 2 members abstaining and 4 not present. Text of the resolution:

Resolved:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That, in the field of federal-State relationships, the division of powers between those granted to the National Government and those reserved to the State Governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our National Government and control of matters primarily of local concern is reserved to the several States, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written Constitution is to promote the certainty and stability of the provisions of law set forth in such a Constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent

of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

Following is full text of the Committee's report as approved by the State chief justices:

FOREWORD

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School, several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts," by Professor Kurland.;

2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty," by Assistant Professor [Roger C.] Cramton;

3. "Congress, the States and Commerce," by Professor Allison Dunham;

4. "The Supreme Court, Federalism, and State Systems of Criminal Justice," by Professor Francis A. Allen; and

5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive mono graphs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized.

The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either.

We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication.

Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

BACKGROUND AND PERSPECTIVE

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-State relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of good practical importance as affecting federal-State relationships are the rulings and actions of federal administrative bodies. These include the independent-agency regulatory bodies, such as the Inter-

state Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board.

Many important administrative powers are exercised by the several departments of the executive branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-State relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of tbe United States. Any other allocation of such power would seem to lead to chaos. See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.

Third, there is obviously great interaction between federal legislation and administrative action on the one hand and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist and, if so, in what form is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and State governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court—even though we are bound by them—or when we see trends in decisions of that Court which we think will lead to unfortunate results.

We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our State courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

PROBLEMS OF FEDERALISM

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of

our national Constitution acted in outlining the division of powers between the national and State governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by De Tocqueville [Alexis de Tocqueville, author of "Democracy in America"]. Under his summary of the Federal Constitution he says:

"The first question which awaited the Americans was so to divide the sovereignty that each of the different States which compose the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption, the "Federalist"—No. 45—discussed the division of sovereignty between the Union and the States and said:

"The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist," of course, are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and State governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original States and the governments of those States after the Revolution.

Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the States. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

Local Government: "a Vital Force"

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt [of the New Jersey Supreme Court], on the division of powers between the national and State governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present-Day Significance"—are persuasive.

He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British Government with this sentence:

"As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several States indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means toward an end; and that the horizontal distribution or allocation of powers between national and State governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the Federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

TWO MAJOR DEVELOPMENTS IN THE FEDERAL SYSTEM

The outstanding development in federal-State relations since the adoption of the National Constitution has been the expansion of the power of National Government and the consequent contraction of the powers of the State governments. To a large extent this is wholly unavoidable and, indeed, is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production.

On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of States. The Supreme Court of a bygone day said in *Texas* v. *White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the National Government has been the development of the immense power of the Supreme Court in both State and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy making.

Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But, if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even it is discounted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have.

As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on "*Stare Decisis*" [to stand by decided matters], 49 Columbia Law Review 735.

SOURCES OF NATIONAL POWER

Most of the powers of the National Government were set forth in the original Constitution; some have been added since. In the days of Chief Justice Marshall, the supremacy clause of the Federal Constitution and a broad construction of the powers granted to the National Government were fully developed and, as a part of this development, the extent of national control over interstate commerce became very firmly established.

The trends established in those days have never ceased to operate and, in comparatively recent years, have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint, the increase in federal revenues resulting from the Sixteenth Amendment—the income tax amendment—has been of great importance. National control over State action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-State relationships.

THE GENERAL WELFARE CLAUSE

One provision of the Federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general-welfare clause. In United States v. Butler, 297 U.S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general-welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare.

The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See Steward Machine Co. v. Davis, 301 U.S. 548, and Helvering v.

Davis, 301 U.S. 690. In those cases the Social Security Act was upheld and the general-welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

GRANTS-IN-AID

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report.

Perhaps we should also observe that, since the decision of Massachusetts v. Mellon, 262 U.S. 447, there seems to be no effective way in which either a State or an individual can challenge the validity of a federal grant-in-aid.

DOCTRINE OF PRE-EMPTION

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause.

More recently the doctrine has been applied in other fields, notably in the case of Commonwealth of Pennsylvania v. Nelson, in which the Smith Act and other federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania antisubversive statute which sought to impose a penalty for conspiracy to overthrow the Government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

LABOR-RELATIONS CASES

In connection with commerce-clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created—depending upon how one looks at the matter—by the Supreme Court's decision in Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, which overturned a State statute aimed at preventing strikes and lockouts in public utilities. This decision left the States powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] State."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a State court was upheld. In International Association of Machinists v. Gonzales, a union member was held entitled to maintain a suit against

his union for damages for wrongful expulsion. In International Union, United Auto, etc. Workers v. Russell, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from enterning the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that, at the present time, there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of Textile Union v. Lincoln Mills, 353 U.S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor-Management Relations Act of 1947.

Paragraph (a) of that section provides: "Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Paragraph (b) of the same section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdicional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective-bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective-bargaining agreements.

What a State court is to do if confronted with a case similar to the Lincoln Mills case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains: Where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a State court aet at all? If it ean act and does act, what remedies shound it apply? Should it use those afforded by State law, or is it limited to those which would be available under federal law if the suit were in a federal court?

It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the federal law and committed solely to the jurisdiction of the federal courts, so that the State courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor-Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between State and federal governments.

As he points out, much of this confusion is due to the fact that Congress has not made clear what functions the States may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which State action is clearly permissible. That is where actual violence is involved in a labor dispute.

STATE LAW IN DIVERSITY CASES

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the States or the effect of State laws. The celebrated case of Erie R.R. v. Tompkins, 304 U.S. 64, overruled Swift v. Tyson and established substantive State law, decisional as well as statutory, as controlling in diversity [of citizenship] cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

IN-PERSONAM JURISDICTION OVER NONRESIDENTS

Also, in cases involving the in-personam [against the person] jurisdiction of State courts over nonresidents, the Supreme Court has tended to relax rather than tighten restrictions under the due-process clause upon State action in this field. International Shoe Co. v. Washington, 326 U.S. 310, is probably the most significant case in this development.

In sustaining the jurisdiction of a Washington court to render a judgment in personam against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now-familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there."

Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including McGee v. International Life Insurance Co., 355 U.S. 220, until halted by Hanson v. Denckla, 357 U.S. decided June 23, 1958.

TAXATION

In the field of taxation, the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street. In recent years, cases involving State taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a State has sought to tax a contractor doing business with the National Government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years toward the validity of State taxation than it formerly took.

OTHER FOURTEENTH AMENDMENT CASES

In many other fields, however, the Fourteenth Amendment has been invoked to cut down State action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State antisubversive acts have been practically eliminated by Pennsylvania v. Nelson, in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

THE SWEEZY CASE—STATE LEGISLATIVE INVESTIGATION

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in Sweezy v. New Hampshire, 354 U.S. 234.

In that case, the State of New Hampshire had enacted a subversive-activity statute which imposed various disabilities on subversive persons and subversive organizations. In 1953, the legislature adopted a resolution under which it constituted the attorney general a one-man legislative committee to investigate violations of that act and to recommend additional legislation.

Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the State during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire.

He was adjudged in contempt by a State court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins* v. *United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."

Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

"The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The attorney general has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the attorney general to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the attorney general's investigation.

Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the State and, hence, that the liberties of the individual should prevail.

Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the State's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says:

"The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation-of-power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities.

"Under these circumstances, the conclusion of the Chief Justice that the vagueness of the resolution violates the due-process clause must be, despite his protestations, a holding that a State legislature cannot delegate such a power."

PUBLIC-EMPLOYMENT CASES

There are many cases involving public employment and the question of disqualification therefor by reason of Communist Party membership or other questions of loyalty.

Slochower v. Board of Higher Education, 350 U.S. 551, is a well-known example of cases of this type. Two more recent cases, Lerner v. Casey, and Beilan v. Board of Public Education, both in 357 U.S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness.

Lerner was a subway conductor in New York and Beilan was a public-school instructor. In each case the decision was by a 5-to-4 majority.

ADMISSION TO THE BAR

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element on the subject with which this report is concerned.

Konigsberg v. State Bar of California, 353 U.S. 252, seems to us to reach the high-water mark so far established by the Supreme Court

in overthrowing the action of a State and in denying to a State the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the State highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the State highest court of "whether or not it did in fact pass on a claim properly before it under the due-process clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable State statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the National or State Government by force or violence. The committee of bar examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in Dennis v. United States, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions, "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269), would not support such an inference either.

Meaning of Refusal to Answer

On the matter of advocating the overthrow of the National or State Government by force or violence, the Court held—as it had in the companion case of Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, decided contemporaneously—that past membership in the Communist Party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the Government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the bar committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but—at 353 U.S. 270—said that "prior decisions by this Court indicated" that his objections to answering the questions—which we shall refer to below—were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California bar simply because he refused to answer questions."

In a footnote appended to this statement it is said, 353 U.S. 259: "Neither the committee as a whole nor any of its members even intimated that Konigsberg would be barred just because he refused to answer relevant inquires or because he was obstructing the committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

A "Convincing" Dissent

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State bar investigating his application. 353 U.S. 284–309. Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party.

The bar committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party.

We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the committee was concerned with its duty under the statute "to certify as to this applicant's good moral character"—p. 295—and that the committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee—p. 301—and that the committee, in passing on his good moral character, sought to test his veracity—p. 303.

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the bar committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto* a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the bar examiners."

Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to Konigsberg, we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist

against answering certain questions. These might have served to test his veracity at the committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point—pp. 270–271—it says that the committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another—p. 273—it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an independent bar."

The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the States free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

Avoiding "a Test of Veracity"

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a State is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar.

The power left to the States to regulate admission to their bars under Konigsberg hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of Konigsberg by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-State relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment—p. 312—says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The Lerner and Beilan cases, above referred to, seem to indicate some recession from the intimations, though not from the decisions, in the Konigsberg and Slochower cases. In Beilan, the schoolteacher

was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

STATE ADMINISTRATION OF CRIMINAL LAW

When we turn to the impact of decisions of the Supreme Court upon the State administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States.

There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect.

Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in Moore v. Michigan, 355 U.S. 155.

In the Moore case, the defendant had been charged in 1937 with the crime of first-degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education—only the seventh grade—and as being of rather low mentality.

He confessed the crime to law-enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered, he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed

About 12 years later the defendant sought a new trial, principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned.

The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court.

The Supreme Court of the United States reversed.

The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the State to prove its case against him—saying the evidence was largely circumstantial—by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor.

The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the State might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is Lambert v. California, 355 U.S., decided Dec. 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles.

Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined.

The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of the process of law.

"A Deviation From Precedents"

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of State and federal statutes which imposed criminal penalties for nonfeasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas-corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas-corpus matters because what is probably the most far-reaching decision of recent years on State criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas-corpus case. That is the case of Griffin v. Illinois, 351 U.S. 12, which arose under the Illinois Post Conviction Procedure Act.

The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a State permits an appeal by those able to pay for the cost of the record or its equivalent, then the State must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings.

Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in Griffin v. Illinois are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that, in order to give full effect to the doctrine of Griffin v. Illinois, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily he put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The Griffin case was very recently given retroactive effect by the Supreme Court in a *per curiam* [by the court as a whole] opinion in Eskridge v. Washington State Board of Prison Terms and Paroles, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge.

A statute provided for so furnishing a transcript if "in his (the trial judge's) opinion, justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial.

The defendant then sought a writ of mandate from the Supreme Court of the State, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed.

In 1956 he instituted habeas-corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in Griffin, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself.

Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied

to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in Griffin that it should not be retroactive. He did not participate in the Eskridge case.

Just where Griffin v. Illinois may lead us is rather had to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the nonmeritorious appeals eliminated.

One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions.

Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the State.

Whether this latter approach, which we may call "screening," would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U.S.C.A. contains a sentence reading as follows: "An appeal may not be taken *in forma pauperis* [as a poor man] if the trial court certifies in writing that it is not taken in good faith."

This section or a precursor thereof was involved in Miller v. United States, 317 U.S. 192, Johnson v. United States, 352 U.S. 565, and Farley v. United States, 354 U.S. 521, 523. In the Miller case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that, in order that such a review might be made by the Court of Appeals, it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought.

Similar holdings were made by *per curiam* opinions in the Johnson and Farley cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in Johnson, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The Eskridge case, above cited, decided on June 16, 1958, rejected the screening process under the State statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the Eskridge case thus seems rather clearly to be that, unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, States, such a classification would doubtless require legislative action. In the Griffin case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant

based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some State appellate courts under the flood of appeals which may be loosed by Griffin and Eskridge is not a reassuring prospect. How far Eskridge may lead and whether it will be extended beyond its facts remain to be seen.

CONCLUSIONS: THE JUSTICES SUM UP

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend toward increasing power of the National Government and correspondingly contracted power of the State governments.

Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central Government and of the plentitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the National Government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the States which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong State and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that, in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are affected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. Here we think that the over-all tendency of decisions

of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly.

There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of Justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that, in the fields with which we are concerned and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the tole of policy maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role. We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights.

We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy.

We further believe that, in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of State action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

"Doubt" in Recent Decisions

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years. See the tables appended to Mr. Justice Douglas's address on *"Stare Decisis,"* 49 Columbia Law Review 735, 756–758.

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the Court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so.

It is our earnest hope, which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides.

The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield

to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." Quoted in 31 "Boston University Law Review" 43.

We believe that what Mr. Root said is sound doctrine to be followed toward the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this Committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course.

Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the State appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe.

And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

* * *

Report on High Court: Who Wrote It, Who Approved It

These 10 State justices were members of the committee which drew up the report on the Supreme Court:

Frederick W. Brune, Chief Judge of Maryland, chairman.
Albert Conway, Chief Judge of New York.
John R. Dethmers, Chief Justice of Michigan.
William H. Duckworth, Chief Justice of Georgia.
John E. Hickman, Chief Justice of Texas.
John E. Martin, Chief Justice of Wisconsin.
Martin A. Nelson, Associate Justice of Minnesota.
William C. Perry, Chief Justice of Oregon.
Taylor H. Stukes, Chief Justice of South Carolina.
Raymond S. Wilkins, Chief Justice of Massachusetts.

Also voting to approve the report were chief justices from 26 other States: Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Washington, Wyoming.

Voting against the report were chief justices from seven States, one territory: California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, Hawaii.

Abstaining: Nevada, North Dakota.

Not present: Arkansas, Connecticut, Indiana, Puerto Rico.

EXHIBIT 19

HOW CONSTITUTION IS AMENDED

COOLEY'S CONSTITUTIONAL LIMITATIONS, EIGHTH EDITION, VOL. 1, PAGE 70

"[The framers of the Constitution realized that it might, in the progress of time and the development of new conditions, require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article [2] which provides: 'The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths thereof, as one or the other made of ratification may be proposed by the Congress' ". . . .

EXHIBIT 20

EXCERPT FROM GEORGE WASHINGTON'S FAREWELL ADDRESS

"It is important likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power and proneness to abuse it which predominate in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions of the others, has been evinced by experiments ancient and modern: some of them in our country and under our own eyes.—To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates.—But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield."

EXHIBIT 21

[From the Congressional Record, Aug. 30, 1967]

NOMINATION OF THURGOOD MARSHALL TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Mr. ERVIN. Mr. President, the good and wise men who fashioned the Constitution had earth's most magnificent dream.

They dreamed they could enshrine the fundamentals of the government they desired to establish and the liberties of the people they wished to secure in the Constitution, and safely entrust the interpretation of that instrument according to its true intent to a Supreme Court composed of mere men.

They knew that some dreams come true and others vanish, and that whether their dream would share the one fate or the other would depend on whether the men chosen to serve as Supreme Court Justices would be able and willing

to lay aside their own notions and interpret the Constitution according to its true intent.

They did three things to make their dream come trne.

They decreed that Supreme Court Justices should by carefully chosen. To this end, they provided that no man should be elevated to the Supreme Court until his qualifications for the office had been twice scrutinized and approved, once by the President and again by the Senate.

They undertook to free Supreme Court Justices from all personal, political, and economic ambitions, fears, and pressures which harass tbe occupants of other public offices by stipulating that tbey shonld hold office for life and receive for their service a compensation which no authority on earth could reduce.

They undertook to impose npon each Snpreme Court Justice a personal obligation to interpret the Constitution according to its true intent by requiring him to take an oath or make an affirmation to support the Constitution.

It is no exaggeration to say that the existence of constitutional government in America hinges upon the capacity and willingness of a majority of the Supreme Court Justices to interpret the Constitution according to its true intent. In consequence, no more awesome responsibility rests upon any Senator than that of determining to his own satisfaction whether or not a Presidential nominee to the Supreme Court possesses this capacity and this willingness.

In expressing my views concerning the President's nomination of Judge Thurgood Marshall to be a Supreme Court Justice. I shall ignore these words of advice which were reputedly spoken by Mark Twain: "Truth is precious, use it sparingly."

I shall tell some fundamental truths about the Constitution and some tragic truths about the Supreme Court as it is now constituted. Moreover, I shall state with candor the basis for my siucere conviction that the addition of Judge Marshall to that Court would bode little good for constitutional government in the United States.

I know that in so doing I lay myself open to the easy, but false, chargo that I am a racist. I have no prejndice in my mind or heart against any man because of his race. I love men of all races. After all, they are my fellow travelers to the tomb.

But I also love the Constitution. I know that apart from its faithful observance by Congress, the President, and the Supreme Court, neither our conntry nor any single human being within its borders has any security against anarchy or tyranny.

For this reason I will not let any false charge or any other consideration deter me from my abiding purpose to do everything within my limited power to save the Constitution for all Americans of all generations.

Let us recur to the dream of the Founding Fathers.

If we are to understand why the Founding Fathers had this dream and how they undertook to make it a reality, we must know what was in their minds and hearts, and analyze their handiwork in the light of snch knowledge.

The Founding Fathers had suffered many wrongs at the hands of a centralized and distant government, whose arbitrary actions they were powerless to check or restrain. Their tragic experience had implanted in their minds a fear of centralized and distant government and instilled in their hearts a love of freedom.

To them, freedom was not an intellectual abstraction, or an empty word to adorn an oration upon an occasion of patriotic rejoicing. It was an intensely practical reality, which was capable of concrete enjoyment in a multitude of ways in daily life. It meant the power to determine one's own actions and live one's own life free from governmental tyranny. As a consequence, it is not surprising that the Founding Fathers stated in its preamble that they wrote the Constitution to preserve the blessings of liberty for themselves and their posterity.

The Founding Fathers did not rely solely upon the practical wisdom gained by them from their own experience in framing the Constitution. They were profound studeuts of history. As such, they were well versed in the heartbreaking lesson taught by the story of man's fight against governmental tyranny in all generations and in all lands for the simple right to govern himself and live in freedom. This lesson is epitomized in these words of Woodrow Wilson:

"Liberty has never come from the government. Liberty has always come from the subjects of it. The history of liberty is a history of the limitation of governmental power, not the increase of it. When we resist therefore the concentration

of power, we are resisting the processes of death, because concentration of power is what always precedes the destruction of human liberties."

The Founding Fathers were also familiar with the political philosophy of Thomas Hobbes, John Locke, and Baron Montesquieu. They accepted as an absolute verity the aphorism of Hobbes that "freedom is political power divided into small fragments." Indeed, one of their number, James Madison, elaborated upon it in this way:

The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, few, or many, and whether heredity, self-appointed or elective, may justly be pronounced the very definition of tyranny.

Like Locke, they knew that no man is free if he is subject to the inconstant, uncertain, unkown, and arbitrary will of other men; and like Daniel Webster, they knew that "whatever government is not a government of laws is a despotism, let it be called what it may."

The Founding Fathers had meditated much upon their own experience, history, and political philosophy, and had discovered this shocking but everlasting truth: Nothing short of tyranny can put an end to the insatiable hunger of government for power; and in its ardor to expand and multiply its power, government will extinguish the right of men to govern themselves and live in freedom, unless it is restrained from so doing by basic law which it alone can neither repeal nor amend.

For these reasons, the world has never known any other group of men as well qualified as the Founding Fathers to write a Constitution for a nation dedicated to the proposition that its people are entitled to govern themselves and live in freedom.

What has been said makes it plain that the Founding Fathers purposed in their minds and hearts to create a nation which would be ruled by the dictates of laws rather than the wills of men and in which the people would have the right to control government and live in freedom. To this end, they wrote a constitution, which they intended to last for an indefinite time and constitute "a law for rulers and people" alike at all times and under all circumstances (*Ex Parte Milligan*, 4 Wall. 2 18 L. ed. 281). This Constitution became effective as the supreme law of the land upon its subsequent ratification by the States.

The Founding Fathers set out in the Constitution the fundamentals of the Government they desired to establish and the liberties of the people they wished to secure. Their chief object in so doing was to put these fundamentals and these liberties beyond the reach of impatient public officials, temporary majorities, and the varying tides of public opinion and desire (*Ex Parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *South Carolina* v. *United States*, 199 U.S. 437; 50 L. ed. 261; Thomas M. Cooley's "Constitntional Limitations.")

They undertook to further this object by inserting in article VI the requirement that all legislators, all executive officers, and all judges, Federal and State, "shall be bound by oath or affirmation to support this Constitution." by this requirement, the Founding Fathers clearly meant to impose upon all occupants of Federal and State offices the absolute obligation to perform their official duties in conformity with the intent of those who framed and ratified the Constitution as expressed in that instrument (*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Ex Parte Bain*, 121 U.S. 1, 30 L. ed. 849; *Lake County* v. *Rollins*, 130 U.S. 662, 32 L. ed. 1060).

The Founding Fathers knew, however, that "useful alterations" of the Constitution would "be suggested by experience." Consequently, they made provision for amendment in one way, and one way only, for example, by the concurrence of Congress and the States as set forth in article V (James Madison: The Federalist, No. 43).

Since the Constitution is a written instrument, its meaning does not change, unless its wording is altered by an amendment adopted in the manner prescribed by article V (*South Carolina* v. *United States*, 199 U.S. 437, 50 L. ed. 437). Those who assert the contrary merely seek ostensible reasons to justify disobedience to the Constitution's commands and evasion of its prohibitions.

These considerations moved Judge Thomas M. Cooley to declare in his great work on Constitutional Limitations that "a court or a legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty."

Let us consider what additional things the Constitution does to make the Federal Government a government of laws and not of men, and to secure to the people the right to control such government and live in freedom.

First. The Constitution divides the powers of government between the Federal Government and the States by delegating enumerated powers to the former and reserving all remaining powers to the latter. By so doing, the Constitution enables the Federal Government to perform its limited functions as a central government, and leaves to the States the authority to regulate their internal affairs. This division of powers has inestimable values for a country as big in area and population as the United States. It lessens the danger of tyranny inherent in concentrating power in a distant government, and recognizes the truth that "local processes of law are an essential part of any government conducted by the people." Manifestly, "no national authority, however benevolent, that governs over" 190 million people in 50 States "can be as closely in touch with those who are governed as the local authorities in the several States and their subdivisions." (*Bute* v. *Illinois*, 333 U.S. 640, 92 L. ed. 986). This division of the powers of government inspired Chief Justice Chase to make this terse and accurate analysis of our organic laws:

"The Constitution, in all its provisions, looks to an indestructible union composed of indestructible states. (*Texas* v. *White*, 7 Wall, 700, 19 L. ed. 227)."

Second. The Constitution distributes all the powers delegated by it to the Federal Government to the legislative, executive, and the judicial departments of that government to prevent "the accumulation of all powers in the same hands." (James Madison: The Federalist, No. 47.) In so doing, it vests the power to make laws in Congress, the power to enforce laws in the President, and the power to interpret laws in the Supreme Court and such inferior courts as Congress might establish.

Third. The Constitution limits the powers of the Federal and State Governments in various ways. For example, it forbids them to pass bills of attainder and ex post facto laws, or to deprive any person of life, liberty, or property without due process of law.

Fourth. The Constitution secures to each person specific liberties, which he is entitled to assert against government itself. For example, it secures to him the right to freedom of speech and religion, the right to earn his livelihood in any lawful calling, the right to acquire, use and dispose of property, and the right to do such things and enter into such contracts as may be necessary to the exercise of the liberties secured to him.

Fifth. The Constitution confers upon the people the direct power to elect Senators and Representatives and the indirect power to select the President. But neither the States nor the people have anything to do with the appointment of Supreme Court Justices or other Federal judges, although such Justices and judges have power to adjudicate their rights and responsibilities under the Constitution and the laws. Such Justices and judges are nominated by the President and confirmed by the Senate, and for this reason are independent of the States and the people.

Sixth. The Constitution establishes the principle that in all cases involving the interpretation of the Constitution, the Supreme Court has final authority, and its interpretation is binding on Congress, the President, the States, and the people, This is an awesome authority because upon its proper exercise hangs the existence of constitutional government in the United States.

Seventh. The Founding Fathers were acutely aware of this, and took strong measures for men bent on establishing a republic to induce Supreme Court Justices to decide cases in accordance with the Constitution and to use its provisions as the sole tests for determining the validity of congressional, Presidential, and State action. To this end, they undertook to make the Justices independent of Congress and the President and immune to State and political pressures by providing in the Constitution itself that they are to hold their offices for life and receive for their services a compensation which cannot be diminished.

Eighth. The power to interpret the Constitution, which is assigned to the Supreme Court, and the power to amend the Constitution, which is vested in the Congress and the States acting concurrently, are vastly different. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning. Justice Cardozo put the distinction between the two powers tersely when he said:

"We are not at liberty to revise while professing to construe (*Sun Printing and Publishing Ass'n* v. *Remington Paper and Power Co.*, 235 N.Y. 338, 139 N.E. 470)."

Justice Sutherland elaborated upon the distinction in this way:

"The judicial function is that of interpretation: it does not include the power of amendment under the guise of interpretation. To miss the point of difference

between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections (*West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 404, 81 L. ed. 703, 715)."

Ninth. Since it is a judicial tribunal, the Supreme Court acts as the interpreter of the Constitution only in a litigated case whose decision of necessity turns on some provision of that instrument. As a consequence, the function of the Supreme Court in the case is simply to ascertain and give effect to the intent of those who framed and ratified the provision in issue. If the provision is plain, the Court must gather the intent solely from its language, but if the provision is ambiguous, the Court must place itself as nearly as possible in the condition of those who framed and ratified it, and in that way determine the intent the language was used to express. For these reasons, the Supreme Court is obligated to interpret the Constitutiou according to its language and history.

The Founding Fathers did not put their sole reliance in these things to keep Congress and the President in bounds. They incorporated in the Constitution a system of checks and balances to deter them from improvident and unconstitutional behavior. But they did not devise a single positive provision other than the requirement of an oath or affirmation to safeguard the country against the danger that the Supreme Court might abuse its power to interpret the Constitution, and amend that instrument while professing to interpret it.

Chief Justice Harlan F. Stone had this omission in mind when he stated this truth concerning Supreme Court Justices:

"While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraiut, the only check upon our exercise of power is onr own sense of self restraint (*U.S.* v. *Butler*, 297 U.S. 1)."

The omission of the Constitution to provide any real check upon unconstitutional behavior on the part of the Supreme Court was not overlooked during the contest over ratification.

Elbridge Gerry, George Mason, and others opposed ratification on this ground. Let me quote what they had to say on the subject.

Elbridge Gerry asserted:

There are no well defined limits of the Judiciary Powers, they seem to be left as a boundless ocean, that has broken over the chart of the Supreme Lawgiver, *thus far shalt thou go and no further*, and as they cannot be comprehended by the clearest capacity, or the most sagacious mind, it would be an Herculean labour to attempt to describe the dangers with which they are replete."

George Mason made this more specific objection:

"The judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states."

Others declared, in substance, that under the Constitution the decisions of the Supreme Court of the United States would "not be in any manner subject to revision or correction," that "the power of construing the laws" would enable the Supreme Court of the United States "to mould them into whatever shape it" should "think proper;" that the Supreme Court of the United States could "substitute" its "own pleasure" for the law of the land; and that the "errors and usurpations of the Supreme Court of the United States" would "be uncontrollable and remediless."

Alexander Hamilton overcame these arguments, however, to the satisfaction of the ratifying States by giving them this emphatic assurance:

"The supposed danger of Judiciary encroachments . . . is, in reality, a Phantom."

He declared, in essence, that this was true because the men selected to serve as Supreme Court Justices would "be chosen with a view to those qualifications which fit men for the stations of judges" and that they would give "that inflexible and uniform adherence" to legal precedents and rules, which is "indispensable in the courts of justice." He added that these qualifications could be acquired only by "long and laborious study."—Hamilton: The Federalist, Nos. 78, 81.

By these statements, Alexander Hamilton correctly declared that no man is qualified to be a judge unless he is able and willing to subject himself to the self-restraint, which is an essential ingredient of the judicial process in a government of laws.

Two questions arise: What is the self-restraint which constitutes an essential ingredient of the judicial process in a government of laws? How is it acquired?

Alexander Hamilton's statement furnishes answers for these questions.

Self-restraint is the capacity and the willingness of the qualified occupant of a judicial office to lay aside his personal notions of what a constitutional provision ought to say and to base his interpretation of its meaning solely upon its language and history. In performing his task, he does not recklessly cast into the judicial garbage can the sound precedents of his wise predecessors.

This self restraint is usually the product of long and laborious legal work as a practicing attorney or long and laborious judicial work as a judge of an appellate court or a trial court of general jurisdiction. It is sometimes the product of long and laborious work as a teacher of law.

One does not come into possession of self restraint, however, by occupying executive or legislative offices or by rendering aid to a political party or by maintaining a friendly relationship with a President or by adhering to a particular religion or by belonging to a particular race. And, unhappily, some men of brilliant intellect and good intentions seem incapable of acquiring it or unwilling to exercise it. Daniel Webster undoubtedly had these men in mind when he said:

"Good intentions will always be pleaded for every assumption of power . . . It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they meau to be masters."

I have discussed in detail the sound doctrine that self restraint on the part of judges is an essential ingredient of the judicial process in a government of laws.

This inquiry naturally arises: Why is this so? This inquiry is especially pertinent at a time when judicial activists declare by their actions, if not by their words, that it is permissible for them to revise or update the Constitution according to their personal notions while they are professing merely to interpret it.

Justice Benjamin N. Cardozo answered this inquiry tersely and conclusively in his illuminating book on the "Nature of the Judicial Process." In demolishing the basic premise of judicial activists that the judge is always privileged to substitute his individual sense of justice for rules of law, Justice Cardozo said:

"That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law."

What has been said makes this obvious: The Founding Fathers intended that the Constitution should operate as an enduring instrument of government whose meaning could not be changed except by an amendment made by Congress and the States in conformity with article V. The contention to the contrary is necessarily founded on the assumption that George Washington and the other good and wise men who fashioned the Constitution were mendacious nitwits who did not mean what they said.

Chief Justice Marshall undertook to entomb this contention forever in his great opinion in *Gibbons* v. *Ogden*, 22 U.S. 1. He declared in that case:

"The enlightened patriots who framed our Constitution and the people who ratified it must be understood . . . to have intended what they said."

Since the true meaning of a provision of the Constitution always remains the same unless it is altered by an amendment under article V, it should receive a consistent interpretation, and not be held to mean one thing at one time and another thing at another time, even though circumstances may have so changed as to make a different rule seem desirable.

Chief Justice Edward Douglas White, one of the ablest lawyers and wisest judges ever to grace the Supreme Court Bench, made some sage comments on this subject in his famous dissenting opinion in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U.S. 429, 651–652. He said:

"In the discharge of its function of interpreting the Constitution, this Court exercises an august power. . . . It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. . . . The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the conrt without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my jndgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."

What has been said does not deny to the Supreme Court the power to overrule a prior decision in any instance where proper judicial restraint justifies such

action. A sound criterion for determining when proper judicial restraint justifies a judge in overruling a precedent is to be found in the standard which Judge Learned Hand says his friend and colleague, Judge Thomas Swan, set for his own guidance:

"He will not overrule a precedent unless he can be satisfied beyond peradventure that it was untenable when made; and not even then, if it has gathered around it the support of a substantial body of decisions based on it."

In ending this phase of my remarks, I emphasize that precedent set by the Supreme Court on constitutional questions were tenable when made if they conformed to the intention of those who framed and adopted the constitutional provisions involved, no matter how inconsistent they may be with the views of Justices subsequently ascending the Bench.

For several generations, the people of America had no reason to doubt Alexander Hamilton's assurance concerning the kind of men who would be selected to sit upon the Supreme Court. With rare exceptions, Presidents appointed to the Court men who had long and laboriously participated in the administration of justice either as practicing lawyers or as judges of State courts or as judges of Federal courts inferior to the Supreme Court, and who possessed and exercised the self-restraint which constitutes an essential ingredient of the judicial process in a government of laws. As a consequence, they performed their judicial labors in obedience to the principle that it is the duty of Supreme Court Justices to interpret the Constitution, not to amend it.

Candor compels me to say, however, that these things are no longer true, and that a substantial number of recent appointees to the Supreme Court are judicial activists who seek to rewrite the Constitution in their own images by adding to that instrument things which are not in it and by subtracting from that instrument things which are in it.

I shall not make any dogmatic assertion as to why this is so. But I will have the temerity to suggest that too many political appointments have been made of late to these judicial offices.

The task at hand compels me to tell the truth about the Supreme Court.

I know it is not popular in some quarters to tell the truth about the Supreme Court. Admonitions of this character come to us daily from such quarters:

"When the Supreme Court speaks, its decisions must be accepted as sacrosanct by the bench, the bar and the people of America, even though they constitute encroachments on the constitutional domain of the President or the Congress, or tend to reduce the States to meaningless zeros on the nation's map. Indeed, the bench, the bar, and the people must do more than this. They must speak of the Supreme Court at all times with a reverence akin to that which inspired Job to speak thus of Jehovah—'Though He slay me, yet will I trust Him.'"

To be sure, all Americans should obey the decrees of the Supreme Court in cases to which they are parties, even though they may honestly and reasonably deem such decrees unwarranted. But it is sheer intellectual rubbish to contend that Americans are required to believe in the infallibility of Supreme Court Justices, or to make mental obeisance to their aberrations or usurpations. Americans have an inalienable right to think and speak their honest thoughts concerning all things under the sun, including the decisions of Supreme Court majorities. It is well this is so because the late Chief Justice Harlan F. Stone spoke truly when he said:

"Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."

As one who has spent much of his energy and days in the administration of justice as a practicing lawyer, and trial and appellate judge, I have the abiding conviction that "tyranny on the bench is as objectionable as tyranny on the throne," and that my loyalty to the Constitution requires me to oppose it.

I do not enjoy expressing my disapproval of actions of the Supreme Court. My father, who practiced law at the North Carolina bar for 65 years, taught me at an early age to venerate the Supreme Court. One of the most treasured memories acquired by me as a small boy is that of the day he took me to the old Supreme Court Chamber, showed me the busts of great jurists of the past, and said to me in a tone of reverential awe: "The Supreme Court will abide by the Constitution, though the heavens fall."

I regret to say, however, that the course of the Supreme Court in recent years has been such as to cause me to ponder the question whether fidelity to fact

ought not to induce its members to remove from the portal of the building which houses it the majestic words, "Equal justice under law," and to substitute for them the superscription, "Not justice under law, but justice according to the personal notions of the temporary occupants of this building."

In saying this, I am not a lone voice crying in the wilderness. I call the attention of the Senate to what the late Justice Robert H. Jackson said of the Court of which he was then a member in his concurring opinion in *Brown* v. *Allen* (344 U.S. 643).

I quote Justice Jackson's word:

"Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impresisons which from time to time may be shared by a majority of the Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Justice Jackson closed his observation on this score with this sage comment:

"I know of no way we can have equal justice under law except we have some law."

I hold in my hand many documents revealing that Supreme Court Justices, judges of Federal courts inferior to the Supreme Court, State judges, lawyers, and journalists have charged that during recent years a majority of the Supreme Court has repeatedly rendered decisions incompatible with the language and the history of the Constitution. To substantiate their charges, I ask unanimous consent that several of these documents, which are marked exhibit A, be printed in the Record at the conclusion of my remarks.

The PRESIDING OFFICER (Mr. Hollings in the chair). Without objection, it is so ordered.

(See exhibit A.)

Mr. ERVIN. One of these documents is a resolution which was adopted by the chief justices of the States of Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming, at Pasadena, Calif., on August 23, 1958.

This resolution is an astounding document without precedent in the annals of our country. the 36 State chief justices who adopted it loved the Constitution and were qualified by legal learning and judicial experience to apraise aright what the judicial activists on the Supreme Court are doing to the system of government taht instrument was ordained to establish. In this resolution these State chief justices cited many recent decisions of the Supreme Court inconsistent with the powers allotted or reserved by the Constitution to the States, and implored the Supreme Court to "exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government."

The tragic truth is that in recent years, the Supreme Court has repeatedly usurped and exercised the power of the Congress and the States to amend the Constitutiou while professing to interpret it.

On some occasions it has encroached upon the constitutional powers of the Congress as the Nation's legislative body. On other occasions it has stretched the legislative powers of Congress far beyond their constitutional limits. On occasions too numerous to mention, it has struck down State action and State legislation in areas clearly committed by the Constitution to the States.

In so doing, the Supreme Court has overruled, repudiated, or ignored many precedents of earlier years. Its prodigality in overruling previous decisions prompted one of its recent members, the late Justice Owen J. Roberts, to make this comment in his dissenting opinion in *Smith* v. *Allwright*, 321 U.S. 649, 669:

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

Supreme Court Justices attempt to justify their action in attributing new meanings to the Constitution in these ways:

First. Supreme Court decisions are binding on all persons except Supreme Court Justices. The reason for this distinction is that Supreme Court Justices must be free to consider and decide anew all constitutional questions coming before the Court. Otherwise, the Constitution will be frozen in the pattern which one generation gave it, and government will be seriously handicapped, notwithstanding the powers granted by the Constitution to the United States and the powers allotted or reserved by that instrument to the States extend into the illimitable future. Since the doctrine of stare decisis, that is, the principle that judges stand by the decisions of their own courts, would handicap Supreme Court Justices in considering and deciding anew all constitutional questions, the doctrine has become obsolete and must be disregarded, despite the fact that such a course of action will rob constitutional interpretations of their continuity and stability and leave public officials and people without meaningful constitutional rules to govern their conduct.

Second. The due process clauses of the fifth and 14th amendments empower Supreme Court Justices to strike down as unconstitutional any Federal or State laws or procedures which do not comport with their undefined notions of decency, fairness, or fundamental justice.

Third. As the majority opinion in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, states:

"Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."

When the "notions" of Supreme Court Justices change, the meanings of constitutional provisions change accordingly.

One comment on the Harper case seems to be appropriate. If the Constitution is to change its meaning to match the fluctuating notions of Supreme Court Justices, America is in for an uncertain unconstitutional future. This is true because the dictionary says that notions are "more or less general, vague, or imperfect conceptions or ideas."

Time does not permit me to analyze or even enumerate all of the decisions which sustain what I have said.

I wish to cite at this point three decisions which reveal that the Supreme Court has encroached upon the constitutional powers of the Congress as the Nation's legislative body.

Congress was told by the Court in the Girouard (328 U.S. 61) and Yates (354 U.S. 298) cases that it really did not mean what it said in plain English when it enacted statutes to regulate the naturalization of aliens and to punish criminal conspiracies to overthrow the Government by force. Congress was told by the Court in the Watkins case (454 U.S. 178) that its committees must conduct their investigations according to rules imposed by the Court which make it virtually certain that no information will ever be obtained from an unwilling witness.

Two recent cases, *U.S.* v. *Guest*, 383 U.S. 745, and *Katzenbach* v. *Morgan*, 384 U.S. 641, demonstrate the readiness of the Supreme Court, as now constituted, to stretch the legislative powers of Congress far beyond their constitutional limits by attributing a newly invented meaning to section 5 of the 14th amendment. Section 5 confers upon Congress the power to enforce by appropriate legislation the provision of the first section of the 14th amendment, which forbids any State to deny to any person within its jurisdiction the equal protection of the laws.

A majority of the Supreme Court Justices gave Congress the gratuitous assurance by way of dicta in the Guest case that they would vote to hold future congressional legislation making the acts of private individuals Federal crimes under this provision of the 14th amendment, notwithstanding the language of the equal protection of the laws clause applies only to State action, and notwithstanding the Court has held without variation in a multitude of cases that Congress has no power to legislate under that clause in respect to the acts of private individuals.

It is passing strange for judges to announce in advance how they will decide a case which may never arise under a law which may never be enacted.

The Court squarely held, however, in the Morgan case that the fifth section of the 14th amendment empowers Congress to supplant a nondiscriminatory State voter qualification with a newly created Federal voting qualification, notwithstanding the State voting qualification is in complete harmony with the

equal protection of the laws clause, and notwithstanding articles I and II and the 10th and 17th amendments confer the power to prescribe voting qualifications upon the States and deny such power to the Congress.

Another recent case indicating the willingness of the Supreme Court, as now constituted, to stretch the powers of Congress far beyond their constitutional limits by devising new meanings for constitutional provisions in *South Carolina* v. *Katzenbach* (383 U.S. 301). In this case the Court held that in the exercise of its power to enforce the 15th amendment by appropriate legislation, Congress can condemn the election officials of six Southern States of violating the 15th amendment without affording them a judicial trial, and on that basis suspend the undoubted constitutional power of those States under article I, section 2, of the 10th and 17th amendments to use a nondiscriminatory voting qualification, notwithstanding the guarantee of due process of the fifth amendment, the prohibition upon congressional enactment of bills of attainder of article I, and the sound decision of ex parte Milligan that—

"The Constitution of the United States is a law for rulers and people * * * at all times and under all circumstances and no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The novel method of interpretation by which the Court reaches its decisions in the Guest, Morgan, and South Carolina cases is without parallel in our judicial annals.

It belies the essential principle that all provisions of the Constitution are of equal dignity and none must be so interpreted as to nullify or impair the others. Instead of interpreting the Constitution as a harmonious instrument in these cases, however, the Court views it as a self-destructive document consisting of mutually repugnant provisions of unequal dignity. By so doing, the Court reaches the astounding conclusion that section 5 of the 14th amendment and section 2 of the 15th amendment authorize Congress to do these things: First, to nullify constitutional powers clearly allotted or reserved to the States by article I, and article II, the 10th amendment and the 17th amendment; and, second, to pass congressional acts which the provisions allotting or reserving those constitutional powers to the States and the substantive provisions of the 14th amendment forbid it to enact.

This method of interpretation, which sanctions the use of one provision of the Constitution to nullify some other provisions, may be pleasing to judicial activists. It bodes ill, however, for the future of constitutional government.

What the judicial activists on the Supreme Court have done to the powers allotted or reserved by the Constitution to the States beggars description.

A study of the decisions invalidating State action and State legislation compels the conclusion that these Supreme Court Justices now deem themselves, to be the final and infallible supervisors of the desirability or wisdom of all State action and all State legislation.

This is tragic, indeed, because there is nothing truer than the belief attributed to the late Justice Louis D. Brandeis by Judge Learned Hand:

"The States are the only breakwater against the ever pounding surf which threatens to submerge the individual and destroy the only kind of society in which personality can survive."

Time does not suffice for me to analyze or even enumerate the cases past numbering in which the Supreme Court, as now constituted, has struck down State action and State legislation in fields clearly committed to the States by the Constitution. Consequently, I shall mention only a few of them.

Seventeen States and the District of Columbia were told by the Court in the *Brown* (347 U.S. 483) and *Bolling* (347 U.S. 497) cases that the equal protection clause of the 14th amendment and the due process clause of the fifth amendment had lost their original meanings because the state of "psychological knowledge" had changed. California was told by the Court in the *Lambert* case (355 U.S. 225) that it cannot punish its residents for criminal offenses committed within its borders if such residents are ignorant of the statutes creating such criminal offenses. California was told by the Court in the first *Konigsberg* case (353 U.S. 252) that it cannot resort to cross-examination to determine the fitness or qualifications of those who apply to it for licenses to practice law in its courts. New Hampshire and Pensylvania were told by the Court in the *Sweezey* (354 U.S. 234) and *Nelson* (350 U.S. 497) cases that they cannot investigate or punish seditious teachings or activities within their borders. New York was told by the Court in

the *Slochower* case (350 U.S. 551) that it cannot prescribe standards of propriety and fitness for the teachers of its youth. North Carolina was told by the Court in the first *Williams* case (317 U.S. 287) that it cannot determine the marital status of its own citizens within its own borders.

Twenty-four States were told by the Court in the *Mapp* case (367 U.S. 643) that the fourth amendment had somehow lost its original meaning 170 years after its ratification, and that in consequence they no longer had the power which they possessed in times past to regulate the admissibility in their own courts of evidence obtained by searches and seizures. Virginia was told by the Court in the *Button* case (371 U.S. 415) that the NAACP and its attorneys were immune to prosecution or punishment for violating its law against barratry, champerty, and maintenance.

Virginia was told by the Court in the *Harper* case (383 U.S. 633) that its law requiring the payment of a polltax as a qualification for voting violated the Constitution because it is more difficult for a poor man than it is for an affluent man to pay an annual tax equal to the amount which one can earn by working 72 minutes out of the entire year at the minimum wages established by the Fair Labor Standards Act. And California was told by the Court in the Reitman case, which was handed down on May 29, 1967, that its new law repealing its open occupancy law and giving all Californians of all races freedom of choice in the sale or rental of their residential property constituted an unconstitutional discrimination against nonwhites.

For some reason too deep to fathom, the Supreme Court, as now constituted, has a solicitude for persons charged with crime which blinds it to the truth that society and the victims of crime are as much entitled to justice as the accused.

It has manifested this solicitude by repeatedly overruling State courts in criminal cases simply because it disliked their appraisal of facts on conflicting evidence. In so doing, it has ignored the obvious truth that the best judges of the trustworthiness of human testimony are the trial judges who see the witnesses, and that the evidence of a George Washington and that of an Ananais look exactly alike when reduced to cold print.

Other decisions of the Court sanction a practice by which the lowest court in the Federal Judicial System, that is, the U.S. district court, can set at naught the decisions of the highest court of a State, even in cases where the Supreme Court itself has refused to grant certiorari to review the State court decisions. Under this practice the doctrines of *res adjudicata* is virtually abolished, and the States are unable to obtain judgments having finality insofar as the accused are concerned. To minimize the chaos which this practice entails, the States have been compelled to enact statutes providing for post-conviction hearings which in plain English permit the accused to try State courts after State courts have tried them.

In addition to these things the Supreme Court has recently erected some new artificial rules of evidence which apply to criminal trials in both Federal and State courts, and which greatly handicap the efforts of the prosecution to procure convictions.

The self-incrimination clause of the fifth amendment, which declares that "no person shall be compelled in any criminal case to be a witness against himself," became a part of the Constitution on June 15, 1790. From that date until June 13, 1966, the U.S. Supreme Court interpreted these words to mean what they said, that is, to have no possible application to voluntary confession made outside court.

On June 13, 1966, the Supreme Court handed down *Miranda* v. *Arizona* (384 U.S. 346) which held that the self-incrimination clause had suddenly acquired a new meaning, and by virtue thereof it was unconstitutional under such clause for either Federal or State trial courts to admit in evidence any confession made by a suspect to a police officer having him in custody, no matter how voluntary it might be, unless such police officer first gave the suspect certain warnings which did not even exist until the decision was made.

According to the testimony of Federal and State judges, prosecuting attorneys, and law-enforcement officers before the Judiciary Subcommittee on Criminal Laws and Procedures, Federal and State courts throughout our land are being compelled to permit self-confessed murderers, rapists, burglars, robbers, and other felons to go unwhipped of justice as a consequence of the Miranda case.

On June 12, 1967, the Supreme Court handed down Gilbert against California, Stovall against Denno, and United States against Wade. In these cases the Su-

preme Court held for the first time that a provision, which has been in the sixth amendment since June 15, 1790, made it unconstitutional for the victim or eyewitness of a crime to look at a suspect in custody for identification purposes at any time between the commission of the crime and the trial of the case unless an attorney representing the suspect is present, and that positive testimony given by the victim or eyewitness of the crime upon oath in open court at the trial on the merits to the effect that the witness saw the crime committed and based his identification of the accused as its perpetrator solely upon what he observed at that time, would have to be excluded from consideration by the jury or court trying the facts, unless the presiding judge conducted a preliminary inquiry, and ascertained by clear and convincing evidence that the psychological certainty of the witness that the accused was the person he saw commit the crime was not influenced in any way by the unconstitutional view he had of the prisoner.

For all practical purposes, the Snpreme Court Justices who joined in the Miranda, the Gilbert, the Stovall, and the Wade cases made voluntary confessions that they were amending rather than interpreting the Constitution by holding that these uecisions had no retroactive effect.

In closing this phase of my remarks, I will take note of one other case, the *Board of Trust* case (353 U.S. 230) in which the Supreme Court undertook to rewrite the will of Stephen Girard, who had slumbered "in the tongueless silence of the dreamless dust" for 126 years, and who entertained the sound belief while he walked earth's surface that disposing of private property by will is a matter for its owner rather than for judges.

In making the foregoing remarks, I have been conscious of the inadequacy of language. I have necessarily used the term Supreme Court or the term Supreme Court Justices to signify members of the Court who were responsible for the decisions I have mentioned. I have not overlooked the fact, however, that most of these decisions were handed down by a sharply divided court, and that in many of them there were strong dissents by some of the Justices who asserted in no uncertain terms that the majority decisions were incompatible with the Constitution.

Complete candor compels the identification of the judicial activists now serving on the Supreme Court. While some other Justices may on occasion follow Homer's bad example and nod, the judicial activists now occupying the Supreme Court Bench are Chief Justice Warren and Justices Douglas, Brennan, and Fortas. Add to them a fifth judicial activist, and the American people will be ruled throughout the foreseeable future by the personal notions of the five rather than by the precepts of the Constitution.

What has been said makes these things as clear as the noonday sun in a cloudless sky:

First. Apart from faithful observance of the Constitution by Congress, the President, and the Supreme Court, neither our country nor any human being within its borders has any security against anarchy or tyranny.

Second. The Supreme Court can compel Congress and the President to observe the Constitution. But no authority external to themselves can compel Supreme Court Justices to observe their constitutional obligation to base their interpretation of the Constitution upou its language and history.

Third. It is idle to suggest that Congress and the States can redress the consequences of judicial usurpations by exercising their power to amend the Constitution. In the first place, the Constitution cannot be amended fast enough to redress the consequences of wholesale judicial usurpations; and in the second place, it is absurd to expect that Supreme Court Justices who do not observe the language and history of existing constitutional provisions will abide by the language and history of newly adopted ameudments.

Fourth. This being true, the only restraint on unconstitutional behavior on the part of Supreme Court Justices is their own sense of self-restraint.

Fifth. No matter how great his qualifications in other respects may be, no man is fit to be a Supreme Court Justice if he lacks a sense of self-restraint or is unwilling to exercise it. The presence of such Justices on the Supreme Court imperils our most precious right—the right to be governed by the Constitution. They are invariably judicial activists, who seek to rewrite the Constitution according to their personal notions while professing to interpret and love it. Unlike the foreign conqueror, they do not rob us of our rights in one fell swoop. No. They nibble them away one by one and case hy case. But the end result is the same: The destruction of constitutional government. In his Farewell Address

to the American people, George Washington warned us not to travel the road which the judicial activists would have us take. He said:

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. . . . But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield."

Sixth. This is no time to add another judicial activist to the Supreme Court. The Court, as now constituted, has already taken us a long way down the road which George Washington told us not to travel. As a consequence, words of the Constitution no longer mean what they have always meant, history and precedents are disregarded, and decisions on crucial constitutional questions are based on personal notions which a majority of the Justices happen to share from time to time.

These things mean little or nothing to those who would as soon have our country ruled by the arbitrary, uncertain and inconstant wills of judges as by the certain and constant precepts of the Constitution. But they mean everything to those of us who love the Constitution and believe it evil to twist its precepts out of shape even to accomplish ends which may be desirable.

If desirable ends are not attainable under the Constitution as written, they should be attained in a forthright manner by an amendment under article V and not by judicial alchemy which transmutes words into things they do not say. Otherwise the Constitution is a meaningless scrap of paper.

I shall now apply what I have said to the pending question: Should the Senate advise and consent to the President's nomination of Judge Thurgood Marshall to be a Supreme Court Justice?

It is clearly a disservice to the Constitution and the country to appoint a judicial activist to the Supreme Court at any time. The present composition of the Supreme Court renders the gravity of such disservice greater today than it has ever been.

In consequence of these considerations, my duty to my country compels me to vote to reject any Presidential nominee for a Supreme Court Justiceship if I have reason to believe he would be a judicial activist, who would seek to add to the Constitution things which are not in it or to subtract from the Constitution things which are in it.

Our want of clairvoyance disables us to view in advance the future behavior of another. In the nature of things, we are compelled to judge what another's behaviour will be by his past conduct and the philosophy it reflects. This being true, it is folly to assume that a Supreme Court Justice will put off his practices and philosophy of a lifetime when he puts on his judicial robes.

In a sincere effort to be fair to the nominee and faithful to my country, I have diligently studied and seriously considered Judge Marshall's past activities as a lawyer and circuit judge and the philosophy those activities reflect, and have been impelled by them to this conclusion: Judge Marshall is by practice and philosophy a legal and judicial activist, and if he is elevated to the Supreme Court, he will join other activist Justices in rendering decisions which will substantially impair, if not destroy, the right of Americans for years to come to have the Government of the United States and the several States conducted in accordance with the Constitution.

My conclusion on this score is shared by eminent commentators on the national scene. To corroborate this statement, I offer this limited documentary evidence:

First. An editorial from the Washington Star of June 14, 1967, entitled "Dr. King's Conviction."

Second. An editorial from the Washington Star of June 15, 1967, entitled "Mr. Marshall's Nomination."

Third. An article by Dana Bullen from the Washington Star of July 21, 1967, entitled "Marshall Leaves Questions Open."

Fourth. An article by Clayton Fritchey from the Washington Star of June 23, 1967, entitled "Marshall Appointment to Court Greeted Quietly."

Fifth. An article by James J. Kilpatrick from the Washington Star of June 18, 1967, entitled "Marshall's Appointment Upsets Court Balance."

Sixth. An article by David Lawrence from the Washington Star of June 16, 1967, entitled "Why Not a Woman on High Court?"

Seventh. An article by William S. White from the Washington Post of June 19, 1967, entitled "Marshall to the Court. Can Moderation Survive?"

I ask unanimous consent that copies of these editorials and articles, which I have marked exhibit B, be printed in the Record at the conclusion of my remarks.

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

(See exhibit B.)

Mr. ERVIN. Mr. President, I digress slightly to comment on the cliches of those who champion or seek to justify judicial activism. They assert with glibness that the Constitution is a living document which the Court must interpret with flexibility.

When they say the Constitution is a living document, they really mean that the Constitution is dead, and that activist Justices as its executors may dispose of its remains as they please. I make an additional observation on this subject: If the Constitution is, indeed, a living document, its words are binding on those who pledge themselves by oath or affirmation to support it.

What of the cliche that the Supreme Court should interpret the Constitution with flexibility? If those who employ this cliche meant by it that a provision of the Constitution should be interpreted with liberality to accomplish its intended purpose, they would find me in hearty agreement with them. But they do not employ the cliche to mean this. On the contrary, they use the cliche to mean that the Supreme Court should bend the words of a constitutional provision to one side or the other to accomplish an object the provision does not sanction. Hence, they use the cliche to thwart what the Founding Fathers had in mind when they fashioned the Constitution.

The genius of the Constitution is this: The grants of power it makes and the limitations it imposes are inflexible, but the powers it grants extend into the future and are exercisable on all occasions by the departments in which they are vested. In consequence, Congress may change at any time the laws governing any matter the Constitution commits to the Federal Government. Like observations apply to the powers the Constitution allots or reserves to the States.

I now return from my slight digression. In so doing, I wish to make emphatic a statement in William S. White's article of June 19, 1967, which declares in a nutshell what I have been trying to say with a multitude of words. I quote Mr. White:

"Still, the probabilities of the future can only be rationally estimated by the known and certain past. By this standard it is likely that Marshall's elevation will only aggravate an already profound imbalance by which an already disproportionate majority of liberal justices has for years been acting not as detached arbiters but as lawmakers, not as interpreters of the Constitution but as amenders of the Constitution to suit their own notions."

It is not strange that Judge Marsball should be a legal and judicial activist. Indeed, it would be little short of miraculous if we were not.

His activities as a practicing lawyer were calculated to make any man a constitutional iconoclast.

For years he devoted virtually all his efforts to the trial of cases in which he sought to persuade courts to attribute to the 14th and 15th amendments new meanings incompatible with the intent of those who fashioned their provisions. In so doing, he urged the courts to repudiate or ignore all history and all precedents which stood in the way of the rulings he desired.

Judge Marshall argued some of these cases with singular success before the Supreme Court, which repudiated or ignored the history of the 14th and 15th amendments, overruled or misconstrued or ignored former decisions interpreting the amendments in accord with the purpose of those who framed and ratified them, and attributed to the amendments new meanings implementing the notions of its members.

The cases in which the Supreme Court took this action are fairly familiar, and for this reason I omit any detailed discussion of them.

When he abandoned the practice of law for the post of judge of the U.S. Court of Appeals for the Second Circuit, Judge Marshall carried his philosophy as a constitutional iconoclast to the bench.

As a member of the court of appeals, Judge Marshall made these things manifest:

First. He accepts the thesis that the due process clause of the 14th amendment makes Supreme Court Justices and other Federal jndges day-to-day Constitution-makers, and empowers them to strike down as unconstitutional any

State law, procedure, or practice inconsistent with their undefined notions of decency, fairness, and fundamental justice.

Second. When "misty ideals collide with the grim realities of law enforcement," his solicitude for the accused aligns him with the judicial activists who create without constitutional warrant so-called constitutional rules of criminal procedure which handicap society in its struggle to protect law-abiding people against crime and to bring lawbreakers to justice.

The validity of these conclusions is demonstrated by *United States* v. *Wilkins*, 348 F. 2d, 844, where Judge Marshall undertook to apply the fifth amendment's guaranty against double jeopardy to State criminal cases, despite contrary rulings by the Supreme Court itself; and United States against Denno, an unreported case, in which a panel of the Second Circuit Court consisting of Judge Marshall and Judge Friendly undertook to establish a new exclusionary rule allegedly based on the right-to-counsel clause of the sixth amendment, which was without support in the language of the clause and which was contrary to rulings and practices throughout the United States during the preceding 175 years.

Judge Marshall concurred in Judge Friendly's decision in the Denno case that the right-to-counsel clause of the sixth amendment had suddenly acquired a new meaning, and that by virtue thereof it was unconstitutional for the eyewitness of a crime, who happened also to be one of its victims, to look at a suspect in custody with a view to identifying or disavowing him as the perpetrator of the crime unless an attorney representing the suspect was present.

The novel holding of this panel evidently outraged the majority of the judges of the second circuit, who met en banc and reversed this ruling by a decision recorded in 355 F. 2d 731.

The Supreme Court subseqnently reviewed the Denno case under the title Stovall against Denno. The court handed down the decision in the case on June 12, 1967—the same day on which it announced the Constitution-amending decisions in United States against Wade and Gilbert against California.

By the Wade and Gilbert cases, the Supreme Court decreed by a vote of 5 to 4 that subsequent to June 12, 1967, the right-to-counsel clause of the sixth amendment must be interpreted by all courts, Federal and State, to forbid the eyewitness to any crime, even though he may be its sole surviving victim, to look at any suspect in custody for identification purposes in the absence of an attorney representing the suspect.

Although it thus adopted the new constitutional concept initially conceived by Judge Marshall and Judge Friendly in the Denno case, the Supreme Court affirmed the result of the ruling of the circuit court sitting en banc, which rejected that concept, on the paradoxical ground that words, which had been in the Constitntion since June 15, 1790, meant one thing before June 12, 1967, and another thing thereafter.

The fact that the Justices sitting in the Wade and Gilbert cases approved and implemented by a bare majority of one Judge Marshall's views in respect to the right-to-counsel clause of the sixth amendment emphasizes the unwisdom of adding him to the Court as it is now constituted.

This is so because it enhances the probability that if he becomes a Justice, the Supreme Conrt will be manned for years to come by a cohering majority of judicial activists who distrust human testimony, and for that reason invent new artificial and unrealistic rules to restrict the right of society to present and the opportunity of the jury to hear and consider in both Federal and State criminal proceedings the most reliable human testimony; that is, the voluntary confession of the accused that he committed the crime with which he stands charged, and the testimony of the eyewitness that he saw the accused commit the crime with which he stands charged.

This probability is not lessened a whit by words attributed to Judge Marshall while serving as Solicitor General which indicate that he thinks society should not be permitted to employ to detect crime the eavesdropping devices which criminals employ to prey on society.

The Senate Judiciary Committee conducted hearings on the Marshall nomination. On those hearings, members of the committee put to Judge Marshall questions designed to elicit from him his philosophy of the Constitution. He was understandably reluctant to answer many of those questions.

Nevertheless, his answers to some of them did implant in my mind the indelible impression that he endorses and approves the drastic canon of construc-

tion invented by some of the Justices in the Guest, South Carolina, and Morgan cases that the Constitution is a self-destructive instrument composed of mutually repugnant provisions of unequal dignity, and that the limited power to legislate vested in Congress by section 5 of the 14th amendment and section 2 of the 15th amendment empowers Congress to legislate virtually without limitation in areas clearly committed by the Constitution to the States and thus nullify the provisions of the Constitution which forbid Congress to so legislate. The threat which this drastic canon of construction poses to the Constitution and the system of government it was fashioned to establish cannot be overmagnified. By it, the Court undertakes to vest in Congress authority to transfer to a centralized national government the powers the Constitutional allots or reserves to the States and the people.

As I pass from this phase of my remarks, I ask unanimous consent that the decision in the Wilkins case, the unreported decision of the panel in the Denno case, the decision of the circuit court sitting banc in the Denno case, and the opinions of the several Justices in Stovall against Denno be printed in the Record at the conclusion of my remarks.

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

(See exhibit C.)

Mr. ERVIN. I love the Constitution. I love the Constitution with all of my mind and all my heart. I love the Constitution with all my mind and all my heart because I know it was fashioned to secure to all Americans of all generations the right to be ruled by a government of laws rather than by a government of men.

I know, moreover, that apart from the faithful observance of the precepts of the Constitution by the Congress, the President, and the Supreme Court, neither our country nor any single human being within its far-flung borders has any security against anarchy on the one hand and tyranny on the other.

I have considered with diligence, and I believe with objectivity, the career of Judge Marshall and the philosophy it reflects, and I have been driven by my consideration of these things to the abiding conviction that Judge Marshall is by practice and philosophy a constitutional iconoclast, and that his elevation to the Supreme Court at this juncture of our history would make it virtually certain that for years to come, if not forever, the American people will be ruled by the arbitrary notions of Supreme Court Justices rather than by the precepts of the Constitution. I use the words "if not forever" deliberately, because history teaches that a right once lost is seldom regained. For these reasons, my duty to my country forbids me to advise and consent to Judge Marshall's appointment to the Supreme Court.

I love the Constitution. I love the Constitution with all my mind and all my heart. I am convinced that a great Senator, Daniel Webster, who also loved the Constitution with all his mind and all his heart, spoke tragic truth when he said these things 135 years ago:

"Other misfortunes may be borne, or their effects overcome. If disastrous wars should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests.

"It were but a trifle even if the walls of wonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All of these may be rebuilt.

"But who shall reconstruct the fabric of demolished government?

"Who shall rear again the well-proportioned columns of constitutional liberty?

"Who shall frame together the skillful architecture which unites national sovereignty with State Rights, individual security, and Public prosperity?

"No, if these columns fall, they will be raised not again. Like the Colisseum and the Parthenon, they will be destined to a mournful and melancholy immortality. Bitterer tears, however, will flow over them than ever were shed over the monuments of Roman or Grecian art; for they will be the monuments of a more glorious edifice than Greece or Rome ever saw—the edifice of constitutional American liberty."

Mr. President, I now yield the floor. But, Mr. President, in yielding the floor I make this pledge to all Americans: As long as God gives me a mind to think, a tongue to speak, and a heart to love the Constitution, I shall never yield in my purpose to do everything within my limited power to prevent the Supreme Court as well as the Congress and the President from selling your constitutional birthright for the pottage of tyranny.

EXHIBIT 22

SUPREME COURT OF THE UNITED STATES

No. 478.—OCTOBER TERM, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, *v.* Logan Valley Plaza, Inc., et al.	On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated. We granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution. 389 U. S. 911 (1967).[1] We reverse.

Logan Valley Plaza, Inc. (Logan), one of the two respondents herein, owns a large, newly developed shopping center complex, known as the Logan Valley Mall, located near the City of Altoona, Pennsylvania. The shopping center is situated at the intersection of Plank

[1] Petitioners also contend (1) that the state courts were without jurisdiction in this case because the controversy involves issues that are within the exclusive jurisdiction of the National Labor Relations Board, see *Meat Cutters Local 427* v. *Fairlawn Meats, Inc.*, 353 U. S. 20 (1957), and (2) that the picketing herein was protected as a "concerted activity for . . . mutual aid or protection" by § 7 of the National Labor Relations Act, 29 U. S. C. § 147. Because of our disposition of the case, we do not reach either contention.

Road, which is on the east of the center, and Good's Lane, which is to the south. Plank Road, also known as U. S. Route 220, is a heavily traveled highway along which traffic moves at a fairly high rate of speed. There are five entrance roads into the center, three from Plank Road and two from Good's Lane. Aside from these five entrances, the shopping center is totally separated from the adjoining roads by earthen berms. The berms are 15 feet wide along Good's Lane and 12 feet wide along Plank Road.

At the time of the events in this case, Logan Valley Mall was occupied by two businesses, Weis Markets, Inc. (Weis), the other respondent herein, and Sears, Roebuck and Co. (Sears), although other enterprises were then expected and have since moved into the center. Weis operates a supermarket and Sears operates both a department store and an automobile service center. The Weis property consists of the enclosed supermarket building, an open but covered porch along the front of the building, and an approximately five-foot wide parcel pickup zone that runs 30 to 40 feet along the porch. The porch functions as a sidewalk in front of the building and the pickup zone is used as a temporary parking place for the loading of purchases into customers' cars by Weis employees.

Between the Weis building and the highway berms are extensive macadam parking lots with parking spaces and driveways lined off thereon. These areas, to which Logan retains title, provide common parking facilities for all the businesses in the shopping center. The distance across the parking lots to the Weis store from the entrances on Good's Lane is approximately 350 feet and from the entrances on Plank Road approximately 400 to 500 feet. The entrance on Plank Road furthest from the Weis property is the main entrance to the shopping center as a whole and is regularly used by customers of

Weis. The entrance on Plank Road nearest to Weis is almost exclusively used by patrons of the Sears automobile service station into which it leads directly.

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees. A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot. On December 17, 1965, members of Amalgamated Food Employees Union, Local 590 began picketing Weis. They carried signs stating that the Weis market was nonunion and that its employees were not "receiving union wages or other benefits." The pickets did not include any employees of Weis, but rather were all employees of competitors of Weis. The picketing continued until December 27, during which time the number of picketers varied between four and 13 and averaged around six. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. Although some congestion of the parcel pickup area occurred, such congestion was sporadic and infrequent.[2] The picketing was peaceful at all times and unaccompanied by either threats or violence.

On December 27, Weis and Logan instituted an action in equity in the Court of Common Pleas of Blair County, and that court immediately issued an *ex parte* order enjoining petitioners[3] from, *inter alia*, "picketing and trespassing upon . . . the [Weis] storeroom, porch and parcel pick-up area . . . [and] the [Logan] parking area and

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[2] Such congestion as there may have been was regulated by portions of the order not here challenged. See n. 4, *infra*.

[3] In addition to Local 590, the petitioners herein are various members and officials of the local who were engaged in the picketing in one way or another.

entrances and exits leading to said parking area." [4] The effect of this order was to require that all picketing be carried on along the berms beside the public roads outside the shopping center. Picketing continued along the berms and, in addition, handbills asking the public not to patronize Weis because it was nonunion were distributed, while petitioners contested the validity of the *ex parte* injunction. After an evidentiary hearing, which resulted in the establishment of the facts set forth above, the Court of Common Pleas continued indefinitely its original *ex parte* injunction without modification.[5]

That court explicitly rejected petitioners' claim under the First Amendment that they were entitled to picket within the confines of the shopping center, and their contention that the suit was within the primary jurisdiction of the NLRB. The trial judge held that the injunction was justified both in order to protect respondents' property rights and because the picketing was unlawfully

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[4] The court also enjoined petitioners from blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees of their duties. Petitioners make no challenge to these parts of the order and it appears conceded that there has been no subsequent picketing by petitioners in violation of these provisions. A portion of the order also directs that no more than "—— pickets" be used at any one time, but no number has ever been inserted into the blank space and thus no limitation appears to have ever been imposed.

[5] We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forthcoming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. Compare *Construction Laborers' Local 438* v. *Curry*, 371 U. S. 542 (1963).

aimed at coercing Weis to compel its employees to join a union. On appeal the Pennsylvania Supreme Court, with three Justices dissenting, affirmed the issuance of the injunction on the sole ground that petitioners' conduct constituted a trespass on respondents' property.[6]

We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *AFL* v. *Swing,* 312 U. S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942); *Teamsters Local 795* v. *Newell,* 356 U. S. 341 (1958). To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i. e.,* patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See, *e. g., Hughes* v. *Superior Court,* 339 U. S. 460 (1950); *International Bhd. of Teamsters* v. *Vogt,* 354 U. S. 284 (1957); *Cox* v. *Louisiana,* 379 U. S. 559 (1964); *Cameron* v. *Johnson, ante.* Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.

The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, *e. g., Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490 (1949); *Building Service Employees Local 262* v. *Gazzam;*

[6] Petitioners did not argue their pre-emption contentions in their brief before the Pennsylvania Supreme Court and, accordingly, that court does not appear to have passed on them.

339 U. S. 532 (1950); *Plumbers Local 10* v. *Graham,* 345 U. S. 192 (1953), or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice, *e. g., Carpenters Local 213* v. *Ritter's Cafe,* 315 U. S. 722 (1942) (secondary boycott); *Teamsters Local 309* v. *Hanke,* 339 U. S. 470 (1950) (self-employer union shop). Compare *NLRB* v. *Denver Bldg. & Const. Trades Council,* 341 U. S. 675 (1951), and *International Bhd. of Electrical Workers* v. *NLRB,* 341 U. S. 694 (1951).

Those cases are not applicable here because they all turned on the purpose for which the picketing was carried on, not its location. In this case the Pennsylvania Supreme Court specifically disavowed reliance on the finding of unlawful purpose on which the trial court alternatively based its issuance of the injunction.[7] It did emphasize that the pickets were not employees of Weis and were discouraging the public from patronizing the Weis market. However, those facts could in no way provide a constitutionally permissible independent basis for the decision because this Court has previously specifically held that picketing of a business enterprise cannot be prohibited on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *AFL* v. *Swing,* 312 U. S. 321 (1941). Compare *Bakery Drivers Local 802* v. *Wohl,* 315 U. S. 769 (1942). Rather, those factors merely supported the court's finding of a trespass by demonstrating that the picketing took place without the consent, and against the will, of respondents.

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[7] Needless to say, had the Pennsylvania Supreme Court relied on the purpose of the picketing and held it to be illegal, substantial questions of pre-emption under the federal labor laws would have been presented. Compare *Hotel Employees Local 255* v. *Sax Enterprises, Inc.,* 358 U. S. 270 (1959).

The case squarely presents, therefore, the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises. It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 412 (1943). The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.

The fact that *Lovell*, *Schneider*, and *Jamison* were concerned with handbilling rather than picketing is immaterial so far as the question is solely one of right of access for the purpose of expression of views. Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true. Obviously, a few persons walking slowly back and forth holding placards can be less obstructive of, for example, a public sidewalk

than numerous persons milling around handing out leaflets. That the manner in which handbilling, or picketing, is carried out may be regulated does not mean that either can be barred under all circumstances on publicly owned property simply by recourse to traditional concepts of property law concerning the incidents of ownership of real property.

This Court has also held, in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh*, the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation. "The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. . . . [T]he residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of 30 feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U. S., at 502–503.

The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so and was arrested for violating Alabama's criminal trespass statute. In reversing her conviction under the statute, this Court held that the fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby. Likewise the fact that appellant Marsh was herself not a resident of the town was not considered material.

The similarities between the business block in *Marsh* and the shopping center in the present case are striking. The perimeter of Logan Valley Mall is a little less than 1.1 miles. Inside the mall were situated, at the time of trial, two substantial commercial enterprises with numerous others soon to follow.[8] Immediately adjacent to the mall are two roads, one of which is a heavily traveled state highway and from both of which lead entrances directly into the mall. Adjoining the buildings in the middle of the mall are sidewalks for the use of pedestrians going to and from their cars and from building to building. In the parking areas, roadways for the use of vehicular traffic entering and leaving the

[8] We are informed that, in addition to Weis and Sears, 15 other commercial establishments are presently situated in the shopping center.

mall are clearly marked out. The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in *Marsh*.

It is true that, unlike the corporation in *Marsh*, the respondents here do not own the surrounding residential property and do not provide municipal services therefor. Presumably, petitioners are free to canvass the neighborhood with their message about the nonunion status of Weis Market, just as they have been permitted by the state courts to picket on the berms outside the mall. Thus, unlike the situation in *Marsh*, there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. While it is probable that the power to prevent trespass broadly claimed in *Marsh* would have encompassed such an incursion into the residential areas, the specific facts in the case involved access to property used for commercial purposes.

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the

functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district, were the decisions of the state courts to stand, would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing.

Such a power on the part of respondents would be, of course, part and parcel of the rights traditionally associated with ownership of private property. And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh* v. *Alabama,* 346 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[9]

We do not hold that respondents, and at their behest the State, are without power to make reasonable regula-

[9] The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We

tions governing the exercise of First Amendment rights on their property. Certainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property. Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. See *Adderley* v. *Florida*, 385 U. S. 39 (1966). Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably to interfere with the free ingress or egress to and from any . . . county . . . courthouses." *Cameron* v. *Johnson*, *ante*, p. 4. Likewise it has been indicated that persons could be constitutionally prohibited from picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice." *Cox* v. *Louisiana*, 379 U. S. 559 (1964).

In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. Thus it has been held that persons desiring to parade along city streets may be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public by regulating the time, place, and

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are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

manner of the parade. *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); *Poulos* v. *New Hampshire,* 345 U. S. 395 (1953). Compare *Kovacs* v. *Cooper,* 336 U. S. 77 (1949) (use of sound trucks making "loud and raucous noises" on public streets may be prohibited).

However, none of these cases is applicable to the present case. Because the Pennsylvania courts have held that "picketing and trespassing" can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot.[10] Likewise, *Adderley* furnishes no support for the decision below because it is clear that the public has virtually unrestricted access to the property at issue here. Respondents seek to defend the injunction they have obtained by characterizing the requirement that picketing to be carried on outside the Logan Mall premises as a regulation rather than a suppression of it. Accepting *arguendo* such a characterization, the question remains, under the First Amendment, whether it is a permissible regulation.

Petitioners' picketing was directed solely at one establishment within the shopping center. The berms surrounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads along which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to

[10] Compare *Cox* v. *New Hampshire, supra; Cox* v. *Louisiana, supra; Cameron* v. *Johnson, supra.* It should be noted that portions of the injunction, not contested here by petitioners, do accomplish precisely such a regulation of the picketing. See n. 4, *supra.*

whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high. Likewise, the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were petitioners permitted to pass them out within the mall to pedestrians.[11] Finally, the require-

[11] Respondents argue that this case does not involve petitioners' right to distribute handbills, notwithstanding that the provision of the injunction prohibiting trespassing would seem to encompass entry for the purpose of distributing leaflets, because the petitioners were never engaged in handbilling within the mall. Similarly respondents suggest that the only question concerning picketing in this case relates to the picketing carried on in the parcel pickup area, since almost all the picketing occurred there prior to the issuance of the injunction. We reject the notion that an injunction that by its terms clearly prohibits entry onto the entire mall premises to picket should be given the reading suggested by the respondents simply because it is broader than the facts at the time required. The injunction is presently still operative and no limiting construction has been placed on it by the Pennsylvania courts. We see nothing to suggest that petitioners could not be immediately cited for contempt if they violated the plain terms of the injunction, whatever its relationship to their previous conduct may be. As for handbilling, the opinion of the trial court reveals that it was prepared to enjoin the handbilling being carried on along the berms had respondents so requested. Given that, the suggestion that the absolute prohibition against petitioners' trespassing on the mall does not include handbilling is likewise untenable. We do not treat petitioners' right to distribute leaflets separately in this opinion simply because a holding that petitioners are entitled to picket within the mall obviously extends to handbilling

ment that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only.[12]

It is therefore clear that the restraints on picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis. The fact that the nonspeech aspects of petitioners' activity are also rendered less effective is not particularly compelling in light of the absence of any showing, or reliance by the state courts thereon, that the patrolling accompanying the picketing sought to be carried on was significantly interfering with the use to which the mall property was being put by both respondents and the general public.[13] As we observed earlier, the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

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as well and also because petitioners themselves make no separate issue of it.

[12] Petitioners point out that they could conceivably find themselves charged with conducting an illegal secondary boycott if they do not comply with the rules laid down by the NLRB and the courts governing common situs picketing. Compare *Electrical Workers Local 761* v. *NLRB*, 366 U. S. 667 (1961).

[13] Moreover, the parts of the injunction not contested by petitioners already went a long way towards preventing any such interference. See n. 4, *supra*.

The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.[14]

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar

[14] Kaylin, A Profile of the Shopping Center Industry, Chain Store Age, May 1966, at 17.

criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh* v. *Alabama,* 326 U. S., at 506, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Logan Valley Mall is the functional equivalent of a "business block" and for First Amendment purposes must be treated in substantially the same manner.[15]

The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[15] A number of state courts have reached similar conclusions as to shopping centers. See, *e. g., Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local 31,* 61 Cal. 2d 766, 394 P. 2d 921 (1964), cert. denied, 380 U. S. 906 (1965); *Moreland Corp.* v. *Retail Store Employees Local 444,* 16 Wis. 2d 499, 114 N. W. 2d 876 (1962). Compare *Amalgamated Clothing Workers* v. *Wonderland Shopping Center, Inc.,* 370 Mich. 547, 122 N. W. 2d 785 (1963) (affirming four-to-four a lower court holding that handbilling in a shopping center is protected by the First Amendment).

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, *v.* Logan Valley Plaza, Inc., et al.	On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Douglas, concurring.

Picketing on the public walkways and parking area in respondents' shopping center presents a totally different question from an invasion of one's home or place of business. While Logan Valley Mall is not dedicated to public use to the degree of the "company town" in *Marsh* v. *Alabama*, 326 U. S. 501, it is clear that respondents have opened the shopping center to public uses. They hold out the mall as "public" for purposes of attracting customers and facilitating delivery of merchandise. Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business. Why should respondents be permitted to avoid this incidence of carrying on a public business in the name of "private property"? It is clear to me that they may not, when the public activity sought to be prohibited involves constitutionally protected expression respecting their business.

Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated. See *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776–777 (concurring opinion); *Hughes* v. *Superior Court*, 339 U. S. 460, 464–465; *Building Service Union* v. *Gazzam*, 339 U. S. 532, 536–537. Thus, the provisions

of the injunction in this case which prohibit the picketers from interfering with employees, deliverymen, and customers are proper. It is said that the picketers may be banished to the publicly owned berms, several hundred feet from the target of their criticism. But that is to make "private property" a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse. Logan Valley Mall covers several acres and the number of picketers at any time has been small. The courts of Pennsylvania are surely capable of fashioning a decree that will ensure noninterference with customers and employees, while enabling the union members to assemble sufficiently close to Weis' market to make effective the exercise of their First Amendment rights.

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[May 20, 1968.]

Mr. Justice Black, dissenting.

While I generally accept the factual background of this case presented in the Court's opinion, I think it is important to focus on just where this picketing, which was enjoined by the state courts, was actually taking place. The following extract is taken from the trial court's "Findings of Fact": [1]

> "(7) . . .
>
> "(a) small groups of men and women wearing placards . . . walked back and forth in front of the Weis supermarket, more particularly *in the pick-up zone* adjacent to the covered porch [emphasis added];
>
> "(b) occasional picketing as above described has taken place *on the covered porch itself* [emphasis added]";

Respondent Weis Markets, Inc., the owner-occupant of the supermarket here being picketed, owns the real property on which it constructed its store, porch, and parcel pick-up zone. Respondent Logan Valley Plaza, Inc., owns the other property in the shopping center, including the large area which has been paved and marked off

[1] This appears in the opinion of the Court of Common Pleas of Blair County, Pennsylvania, dated February 14, 1966, and unreported.

as a general parking lot for customers of the shopping center.

Anyone familiar with the operations of a modern-day supermarket knows the importance of the so-called "pick-up zone"—an area where the frequently numerous bags of groceries bought in the store can be loaded conveniently into the customers' cars. The phenomenon of the supermarket combined with widespread ownership of automobiles and refrigeration facilities has made the purchase of large quantities of groceries on a single shopping trip a common occurrence in this country. And in line with this trend the stores have had to furnish adequate loading areas and facilities including in many instances, such as here for example, extra employees to assist in loading customers' cars. Respondent Weis' parcel pick-up zone is fairly typical of the type of loading area that has been provided: it is located alongside the front of the store and is 4 to 5 feet wide, 30 to 40 feet in length, and is marked off with bold double yellow lines; the words "Parcel Pick-Up" are printed in large letters in the zone. Testimony at trial showed that this pick-up area was used "strictly for customers to come and enter to pick up their parcels which they had purchased. . . . They drive into this particular area, and there the groceries are loaded into the cars by [Weis employees] on . . . pick-up duty."

It seems clear to me, in light of the customary way that supermarkets now must operate, that pick-up zones are as much a part of these stores as the inside counters where customers select their goods or the check-out and bagging sections where the goods are paid for. I cannot conceive how such a pick-up zone, even by the wildest stretching of *Marsh* v. *Alabama*, 326 U. S. 501, could ever be considered dedicated to the public or to pickets. The very first section of the injunction issued by the trial court in this case recognizes this fact and is aimed

only at protecting this clearly private property from trespass by the pickets. Thus the order of the court separately enjoins petitioners from:

> "(a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area."

While there is language in the majority opinion which indicates that the state courts may still regulate picketing on respondent Weis' private property,[2] this is not sufficient. I think that this Court should declare unequivocally that Section (a) of the lower court's injunction is valid under the First Amendment and that petitioners cannot, under the guise of exercising First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing.[3] It would be just as sensible for this Court to allow the pickets to stand on the check-out counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pick-up zone which interferes with customers' loading of their cars. At the very least, this wholly severable part

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[2] The majority opinion contains the following statement: "Because the Pennsylvania courts have held that 'picketing and trespassing' can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot." P. ——, *supra*. This statement ignores the fact that the injunction order of the Common Pleas Court contains separately designated sections which are easily divisible.

[3] Since the majority opinion does not reach any issue under the National Labor Relations Act, 29 U. S. C. § 147, neither do I. My declaration of validity is concerned with the First and Fourteenth Amendments. I do not find that the injunction, and most importantly § (a), violates any First Amendment rights.

of the injunction aimed at the pick-up zone should be affirmed by the Court as valid under the First Amendment. And this is in fact the really important part of the injunction since, as the Court's opinion admits, "the picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto."

I would go further, however, and hold that the entire injunction is valid.[4] With the exception of the Weis property mentioned above, the land on which this shopping center (composed of only two stores at the time of trial and approximately 17 now) is located is owned by respondent Logan Valley Plaza, Inc. Logan has improved its property by putting shops and parking spaces thereon for the use of business customers. Now petitioners contend that they can come onto Logan's property for the purpose of picketing and refuse to leave when asked, and that Logan cannot use state trespass laws to keep them out. The majority of this Court affirms petitioners' contentions. But I cannot accept them, for I believe that whether this Court likes it or not the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

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[4] See n. 3, *supra*.

In affirming petitioners' contentions the majority opinion relies on *Marsh* v. *Alabama, supra,* and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact that it "is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. Again toward the end of the opinion we emphasized that "the town of Chickasaw does not function differently from any other town." 326 U. S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was indistinguishable from any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town." [5] Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be "commercial establishments." The

[5] In *Marsh* v. *Alabama, supra,* a deputy of the Mobile Sheriff, paid by the company, served as the town's policeman. We are not told whether the Logan Valley Plaza shopping center had its own policeman.

remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers. All I can say is that this sounds like a very strange "town" to me.

The majority opinion recognizes the problem with trying to draw too close an analogy with *Marsh*, but faces a dilemma in that *Marsh* is the only possible authority for treating admittedly privately owned property the way the majority does. Thus the majority opinion concedes that "the respondents here do not own the surrounding residential property and do not provide municipal services therefor." But that is not crucial, according to the majority, since the petitioner in *Marsh* was arrested in the business district of Chickasaw. The majority opinion then concludes that since the petitioner in *Marsh* was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads *Marsh* and begs the question. The question is under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i. e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. I can find nothing in *Marsh* which indicates that if one of these features is present, *e. g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In allowing the trespass here, the majority opinion indicates that Weis and Logan invited the public to the shopping center's parking lot. This statement is contrary to common sense. Of course there was an implicit

invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or several of them together less entitled to have a parking lot set aside for customers than other property owners? To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patroling, is not free speech and not protected as such. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460. These pickets do have a constitutional right to speak about Weis' refusal to hire union labor, but they do not have a constitutional right to compel Weis to furnish them a place to do so on his property. *Cox* v. *Louisiana*, 379 U. S. 559; *Adderley* v. *Florida*, 385 U. S. 39; *Cameron* v. *Johnson*, — U. S. —.

For these reasons I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, *v.* Logan Valley Plaza, Inc., et al.	On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Harlan, dissenting.

The petitioner argues for reversal of the decision below on two separate grounds: first, that petitioner's picketing was protected by the First Amendment from state injunctive interference of this kind; second, that the Pennsylvania courts have strayed into a sphere where the power of initial decision is reserved by federal labor laws to the National Labor Relations Board. I think that, if available, the second or "pre-emption" ground would plainly be a preferable basis for decision. Because reliance on pre-emption would invoke the authority of a federal statute through the Constitution's Supremacy Clause, it would avoid interpretation of the Constitution itself, which would be necessary if the case were treated under the First Amendment. See, *e. g., Zschernig* v. *Miller,* 389 U. S. 428, 443, 444–445 (concurring opinion of the writer). Dependence on pre-emption would also assure that the Court does not itself disrupt the statutory scheme of labor law established by the Congress, a point to which I shall return.

On the merits, it seems clear from the facts stated by the Court, see *ante,* at ——, and from our past decisions [1]

[1] See, *e. g., Construction Laborers* v. *Curry,* 371 U. S. 542, 546–548; *Hotel Employees* v. *Sax,* 358 U. S. 270; *Youngdahl* v. *Rainfair,* 355 U. S. 131, 139; *NLRB* v. *Babcock & Wilcox Co.,* 351 U. S. 105,

that the petitioner has a substantial pre-emption claim. However, upon examination of the record I have come reluctantly to the conclusion that this Court is precluded from reaching the merits of that question because of the petitioner's failure to raise any such issue in the Pennsylvania Supreme Court. The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. Section 1257 of Title 28, which defines this Court's certiorari jurisdiction, states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

Since the Pennsylvania Supreme Court did not advert in its majority opinion to the pre-exemption issue,[2] it is necessary to determine whether that question was "specially set up or claimed" within the meaning of § 1257. In deciding that question, it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of issues. See, *e. g., Beck* v. *Washington*, 369 U. S. 541, 549–554; *Wolfe* v. *North*

112–114; *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226, 229–232; cf. *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24–25. See also *Marshall Field & Co.*, 98 N. L. R. B. 88, 93, enforced as modified *sub nom. Marshall Field & Co.* v. *NLRB*, 200 F. 2d 375, 380.

[2] Where the highest state court has actually ruled on a federal question, this Court's concern with the proper raising of the question in the state court disappears. See, *e g., Raley* v. *Ohio*, 360 U. S. 423, 436; *Whitney* v. *California*, 274 U. S. 357, 360–361; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134.

Carolina, 364 U. S. 177, 195; *John* v. *Paullin,* 231 U. S. 583, 585.[3] Rule 59 of the Pennsylvania Supreme Court provides:

> "The [appellant's] statement of the questions involved must set forth each question separately, in the briefest and most general terms . . . . This rule is to be considered in the highest degree mandatory, admitting no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

The Pennsylvania Supreme Court has consistently held that it will not consider points not presented in the manner prescribed by this rule, and that such points are regarded as abandoned or waived.[4] In this case, the petitioner's statement of questions involved did not refer to the possibility of federal pre-emption,[5] and of course the Pennsylvania Supreme Court's majority opinion did not mention it either. A similar rule of the Washington

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[3] The only circumstances in which a federal claim will be entertained despite the petitioner's failure to raise it below in the prescribed manner are when the State's rules do not afford a reasonable opportunity for a hearing on the federal issue, see, *e.g., Central Union Tel. Co.* v. *Edwardville,* 269 U. S. 190, 194–195, or are applied in a discriminatory fashion to evade the federal claim, see, *e.g., Hartford Life Ins. Co.* v. *Johnson,* 249 U. S. 490, 493. No such allegation is made in this case.

[4] See, *e.g., Dunmore* v. *McMillan,* 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger,* 390 Pa. 331, 135 A. 2d 395; *Kerr* v. *O'Donovan,* 389 Pa. 614, 134 A. 2d 213.

[5] The petitioner stated that the question involved was:

"Did the lower court err in granting a Preliminary Injunction . . . where in a suit in equity by the owner of a shopping center and one of its tenants it is established that the appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?"

Supreme Court was involved in *Beck* v. *Washington, supra,* and we held that when a defendant has failed to comply with such a rule "the argument cannot be entertained here under an unbroken line of precedent. *E. g., Ferguson* v. *Georgia,* 365 U. S. 570, 572; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248." 369 U. S., at 553.[6] I am therefore led to conclude that we have no jurisdiction to consider the question of pre-emption.[7]

Turning to the First Amendment question, I believe that in the circumstances it is not an appropriate one for this Court to decide. This controversy arose in the course of a labor union's efforts to achieve labor goals by informational picketing. Although no pre-emption question is properly before us, I do think that we can take notice that this is an area in which Congress has enacted detailed legislation, see, *e. g.,* 29 U. S. C. § 158 (b)(7)(C), and has set up an administrative agency to resolve such disputes in the first instance. The reason why it was deemed necessary to fashion the doctrine of pre-emption under the federal labor laws was that it would be intolerably disruptive if this statutory scheme were interpreted differently by state and federal courts. See, *e. g., Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491; *San Diego Unions* v. *Garmon,* 359 U. S. 236, 242–245. It seems to me that a similar objection applies to this Court's resolution of such disputes by resort to the Constitution. For the establishment by this Court of

[6] See also *Wolfe* v. *North Carolina,* 364 U. S. 177, 195; *Parker* v. *Illinois,* 333 U. S. 571; *CIO* v. *McAdory,* 325 U. S. 472, 477.

[7] The petitioner contends that this Court has jurisdiction to consider the pre-emption issue despite the petitioner's failure to raise it below, because the question is one of "subject matter jurisdiction." Although some implied support for this proposition may be found in *Seaboard Airline R. Co.* v. *Daniel,* 333 U. S. 118, 122–123, I am unable to perceive how the nature of the federal question involved can affect the specific limitation on our jurisdiction contained in 28 U. S. C. § 1257.

a rigid constitutional rule in a field where Congress has attempted to strike a delicate balance between competing economic forces, and in circumstances where we cannot know how the controversy would be settled by Congress' chosen instrument, may also have a considerable disruptive effect. I therefore believe that we should exercise our discretion not to reach the First Amendment issue, and that we should dismiss the writ as improvidently granted. Such a disposition would not be unfair to the petitioner, since the failure to bring the preemption question properly before us was its own.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, *v.* Logan Valley Plaza, Inc., et al.	On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice White, dissenting.

The reason why labor unions may normally picket a place of business is that the picketing occurs on public streets which are available to all members of the public for a variety of purposes that include communication with other members of the public. The employer businessman cannot interfere with the pickets' communication because they have as much right to the sidewalk and street as he does and because the labor laws prevent such interference under various circumstances; the Government may not interfere on his behalf, absent obstruction, violence, or other valid statutory justification, because the First Amendment forbids official abridgment of the right of free speech.

In *Marsh* v. *Alabama,* 326 U. S. 501 (1946), the company town was found to have all of the attributes of a state-created municipality and the company was found effectively to be exercising official power as a delegate of the State. In the context of that case, the streets of the company town were as available and as dedicated to public purposes as the streets of an ordinary town. The company owner stood in the shoes of the State in attempting to prevent the streets from being used as public streets are normally used.

The situation here is starkly different. As Mr. Justice Black so clearly shows, Logan Valley Plaza is not

a town but only a collection of stores. In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pick-up zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. It may be more convenient for cars and trucks to cut through the shopping center to get from one place to another, but surely the Court does not mean to say that the public may use the shopping center property for this purpose. Even if the Plaza has some aspects of "public" property, it is nevertheless true that some public property is available for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities. *E. g., Adderley* v. *Florida,* 385 U. S. 39 (1966). The point is that whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.

The most that can be said is that here the public was invited to shop, that except for their location in the shopping center development the stores would have fronted on public streets and sidewalks, and that the shopping center occupied a large area. But on this premise the parking lot, sidewalks, and driveways would be available for all those activities which are usually

permitted on public streets. It is said that Logan Valley Plaza is substantially equivalent to a business block and must be treated as though each store was bounded by a public street and a public sidewalk. This rationale, which would immunize nonobstructive labor union picketing, would also compel the shopping center to permit picketing on its property for other communicative purposes, whether the subject matter concerned a particular business establishment or not. Nonobstructive handbilling for religious purposes, political campaigning, protests against government policies—the Court would apparently place all of these activities carried out on Logan Valley's property within the protection of the First Amendment, although the activities may have no connection whatsoever with the views of the Plaza's occupants or with the conduct of their businesses.

Furthermore, my Brother BLACK is surely correct in saying that if the invitation to the public is sufficient to permit nonobstructive picketing on the sidewalks, in the pick-up zone, or in the parking area, only actual interference with customers or employees should bar pickets from quietly entering the store and marching around with their message on front and back.

It is not clear how the Court might draw a line between "shopping centers" and other business establishments which have sidewalks or parking on their own property. Any store invites the patronage of members of the public interested in its products. I am fearful that the Court's decision today will be a license for pickets to leave the public streets and carry out their activities on private property, as long as they are not obstructive. I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well. I do not think the First Amendment, which bars only official interferences with speech, has this reach. In *Marsh,* the company

ran an entire town and the State was deemed to have devolved upon the company the task of carrying out municipal functions. But here the "streets" of Logan Valley Plaza are not like public streets; they are not used as thoroughfares for general travel from point to point, for general parking, for meetings, or for Easter parades.

If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis on which the Court proceeds, and I therefore dissent.

Exhibit 23

LOGAN VALLEY PLAZA, INC., AND WEIS MARKETS, INC.

v.

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, AFL–CIO, PENN CENTER BLVD., PITTSBURGH, PENNSYLVANIA AND JOHN DOE AND RICHARD ROE, SAID NAMES BEING FICTITIOUS, TRUE NAMES UNKNOWN, SAID PERSONS BEING OFFICERS, EMPLOYEES, AGENTS, SERVANTS AND PICKETS EMPLOYED BY DEFENDANT UNION, AND ANY OTHER INDIVIDUALS, LABOR UNIONS OR LABOR ORGANIZATIONS ACTING IN CONCERT, APPELLANTS

SUPREME COURT OF PENNSYLVANIA, MARCH 21, 1967

Proceeding to enjoin picketing in shopping center. The Common Pleas Court at No. 1915, in Equity, Blair County, John M. Klepser, President Judge, entered decree enjoining union from picketing. The union appealed. The Supreme Court, No. 23 January Term 1967, Jones, J., held that union pickets, who walked back and forth in parcel pick-up zone and occasionally on porch in front of non-union store which was located in shopping center and who also picketed in parking lot and at entrances and exits of shopping center, were trespassing on private property of store and shopping center owner and such trespass constituted reasonable ground upon which to grant preliminary injunction.

Decree affirmed.

Cohen, Eagen, and Musmanno, JJ., dissented.

1. Appeal and Error ⟸*863*

On appeal from decree refusing or granting preliminary injunction, court will look only to see if there were any apparently reasonable grounds for action of trial court and will not further consider merits of case or pass upon reasons for or against such action, unless it is plain that no such grounds existed or that rules of law relied on are palpably wrong or clearly inapplicable.

2. Constitutional Law ⟸*81*

The commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass.

3. Constitutional Law ⟸*87*

General invitation to certain classes of persons to use premises and the exclusion of certain other classes of persons from such use is fully consistent with right of property owner to use and enjoyment of his property.

4. Trespass ⟸*10*

Although shopping center owner and occupant of store located in shopping center granted to segment of public certain rights in connection with use of their store and adjacent parking lot to attract customers, such cession of rights did not constitute grant of all their rights to all the public.

5. Labor Relations ⟸*965*

Union pickets, who walked back and forth in parcel pick-up zone and occasionally on porch in front of non-union store which was located in shopping center and who also picketed in the parking lot and at entrances and exits of shopping center were trespassing on private property of store and shopping center and such trespass constituted reasonable ground upon which to grant preliminary injunction.

John R. Strawmire, Altoona, for appellants, Emil Narick, Pittsburgh, of counsel.

John Woodcock, Jr., Hollidaysburg, Sidney Apfelbaum, Sunbury, for appellees, Robert Lewis, Jackson, Lewis & Schnitzler, New York City, of counsel.

Before BELL, C.J., and MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

OPINION

JONES, Justice.

This appeal challenges the grant of injunctive relief the effect of which was to restrain certain picketing concededly peaceful in nature.

Logan Valley Plaza, Inc., [Logan], owns a newly-developed and large shopping center, known as the Logan Valley Mall, located at the intersection of two public highways in Logan Township near the City of Altoona, Blair County. At the time of the events related, at this shopping center only two stores were occupied, one by Weis Markets, Inc. [Weis], a concern engaged in the sale of food and sundry household articles, and the other occupied by Sears department store and automobile service station.[1] The Weis property consists of the store proper, a porch and, directly in front of the porch, a parcel pick-up zone for the loading of purchased goods into customers' cars.[2] Directly in front of the Weis property is a very large parking lot extending toward two public highways from which highways there are entrances and exits to and from the parking lot. The parking area is owned by Logan and provided for the use of Weis, Sears and any future occupants of store properties in the shopping center. Separating this parking area from the several public highways is a fifteen foot berm.

Weis—whose employees are not union members and were not picketing—opened for business on December 8, 1965 and, eleven days thereafter, four pickets, members of Amalgamated Food Employees Union, Local 590, AFL–CIO [Union], appeared.[3] The pickets—ranging in number from 4 to 13—walked back and forth in front of the Weis store, occasionally on the porch of the store but usually in the parcel pick-up zone, on the parking lot and on the berms near the property entrances and exits. The court below found, and it is established by the evidence, that the picketing was peaceful in nature.

Ten days after the picketing began, Weis and Logan instituted an equity action in the Court of Common Pleas of Blair County and that court, *ex parte*, issued a preliminary injunction against the Union. That injunction restrained the Union from: (1) picketing and trespassing on Weis' property, i.e., the store proper, the porch and the parcel pick-up area; (2) picketing and trespassing upon Logan's property, i.e., the parking area and entrances and exits thereto; (3) physically interfering with Weis' business invitees entering or leaving the store or parking area; (4) violence toward Weis' business invitees; (5) interference with Weis' employees in the performance of their duties.[4] Four days thereafter, a hearing was held on a motion to continue the injunction and, after hearing, the court entered a decree continuing the preliminary injuction. From that decree the instant appeal was taken.

The rationale of the decision in the court below was two fold: (a) that the picketing was upon private property and, therefore, unlawful in manner because it constituted a trespass; (b) that the aim of the picketing was to compel Weis to require its employees to become members of the Union and, therefore, the picketing, albeit peaceful, was for an unlawful purpose.

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[1] Sears is not a party to this litigation.

[2] This area—approximately 4–5 feet in width and 30–40 feet in length—is marked off with yellow lines and is directly in front of the porch.

[3] The pickets—employees of nearby Atlantic & Pacific stores which are competitors of Weis—carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" and they passed out handbills which stated—"We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market" * * * "Please Patronize Union Markets! A & P—QUAKER—ACME" * * * We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets."

[4] The practical effect was to restrict picketing to the berm areas near the entrances and exits, picketing which could be carried on without danger from traffic on the public highways. The court did attempt, apparently, to limit the number of pickets but the record does not reveal how many pickets were allowed.

[1] Our scope of review is well settled. In Philadelphia Minit-Man Car Wash Corp. v. Building and Construction Trades Council of Phila. & Vicinity, 411 Pa. 585, 588, 589, 192 A.2d 378, 380 (1963) we said: "The validity of the preliminary injunction is determined by the well-established rule repeated in Mead Johnson & Co. v. Martin Wholesale Distributors, Inc., 408 Pa. 12, 19, 182 A.2d, 741, 745 (1962): 'Our uniform rule is that, on an appeal from a decree which refuses, [or] grants * * * a preliminary injunction, we will look only to see if there were any apparently reasonable grounds for the action of the court below, and we will not further consider the merits of the case or pass upon the reasons for or against such action, unless it is plain that no such grounds existed or that the rules of law relied on are palpably wrong or clearly inapplicable: (citing authorities).'"

The Union contends that the court below erred in ruling that the picketing constituted a trespass upon private property of Weis and Logan and urges that the parcel pick-up area and the parking lot were not private, but quasi-public, property.[6]

[2] That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: Thornhill v. State of Alabama, 310 U.S. 88, 105, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union, 413 Pa. 420, 431, 197 A.2d 614 (1964); Wortex Mills, Inc. v. Textile Workers Union of America, CIO, 369 Pa. 359, 363, 364, 85 A.2d 851 (1952). Our immediate inquiry is whether, in the factual matrix of the case at bar, the conduct of these pickets constituted an invasion of the private property of Weis and/or Logan. Do the parcel pick-up zone and the parking areas constitute private or quasi-public property?

Our research does not disclose that we have ever determined whether the property in a shopping center, accessory to its main purposes, constituted private or quasi-public property. Resolution of that question involves the consideration of many factors. There is no doubt that this shopping center was not conveyed, donated or otherwise dedicated to the public use generally; neither the record nor common sense would justify such a finding. Both Weis and Logan, the former in opening its store and the latter in creating its shopping center as an area upon which commercial enterprises would be conducted, fully anticipated that that portion of the public interested in patronage of Weis' store and the other commercial enterprises, opened and expected to be opened, would not only enter the stores but would utilize fully the parking and the parcel pick-up facilities of the center. The provision of such facilities furnishes attractive features in the complex of the shopping center to attract potential shoppers. The success of both Weis' store and the Logan shopping center depends upon the extent to which both are able to induce and persuade the public to visit and shop in the area. Both Weis and Logan, by their provision of the parking and pick-up facilities impliedly invited the public to utilize such facilities. However, the invitation to the public was not without restriction and limitation; it was not an invitation to the general public to utilize the area for whatever purpose it deemed advisable but only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture.

The invitation to the public, extended by the operation of the parking area and parcel pick-up area, was limited to such of the public who might benefit Weis' and Logan's enterprises, including potential customers as well as the employees of the shopping center concerns. That the invitation to the public was general, as the Union implicitly urges, offends the common sense of the matter.

[3] Moreover, in the case at bar, that Weis had taken special precautions against an indiscriminate use of its property is evident from this record. It had

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[6] We do not construe the Union's position to be that picketing on the porch of the Weis property did not constitute a trespass. Our reading of the record indicates that the picketing that did take place on the porch was sporadic at most and that the Union itself discouraged such picketing.

posted a sign on its property which stated "No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management". A general invitation to certain classes of persons to use the premises and the exclusion of certain other classes of persons from such use is fully consistent with the right of a property owner to the use and enjoyment of his property. See: Adderley v. State of Florida, 385 U.S. 39, 87 S.Ct. 242, 247, 17 L.Ed. 2d 149 (1966). Those who were picketing Weis' and Logan's property certainly were not within the orbit of the class of persons entitled to the use of the property.

Great reliance is placed by the Union on Great Leopard Market Corporation, Inc. v. Amalagamated Meat Cutters and Butcher Workmen of North America, 413 Pa. 143, 196 A.2d 657 (1964). In *Great Leopard*, seven employees of Great Leopard went on strike and the picketing was conducted by blocking the sole driveway entrance to the supermarket and a foot-bridge which connected a municipal parking lot and the supermarket property. We were of the opinion that the terms of the injunction were too broad and modified the injunction to permit picketing in the front and the rear of the supermarket. In *Great Leopard*, we did not determine either the status of the supermarket property nor whether the employees were trespassers. Moreover, it is to be noted that the pickets were employees of the supermarket whereas in the case at bar the pickets were not and never had been employees of Weis. In our view, *Great Leopard* is not controlling of the instant appeal.

[4, 5] While both Weis and Logan granted to a segment of the public certain rights in connection with the use of their property, such cession of rights did not constitute a grant of all their rights to all the public. To hold that these property owners solicited the use of their property by persons who were attempting to discourage the public from patronizing the store facilities lacks any basis in law or common sense. These pickets, even though engaged in picketing of a peaceful nature, had no right or authority whatsoever to utilize the private property of Weis and/or Logan for such picketing purposes; such use constituted a trespass which very properly was restrained.

The court below had reasonable grounds upon which to grant injunctive relief in the factual situation presented upon this record.

In view of the conclusion reached, we deem it unnecessary to determine whether the instance picketing was for an unlawful purpose.

Decree affirmed. Appellants pay costs.

COHEN, J., files a dissenting opinion in which EAGEN, J., joins.

MUSMANNO, J., dissents.

COHEN, Justice (dissenting).

The majority opinion determines that because the picketing occurred on private property it constituted a trespass and, as such, was properly enjoined by the court below. The majority have chosen to regard the rights attendant to private ownership of property but not the burdens which attach thereto. Throughout the law, there is recognized the principle that even owners of private property must observe and conform to certain community standards in the use and maintenance of their land, as witness the law of nuisance, zoning and negligence of property owners. And, most especially, as witness the law of labor relations. In Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), the United States Supreme Court held that peaceful picketing is entitled to the same constitutional protection as other forms of free speech. In *Thornhill*, the pickets were employees of the picketed employer, with whom they had a labor dispute. Only a year later, the Supreme Court extended the constitutional protection under *Thornhill* to a situation wherein the pickets were not employees of the picketed establishment but were members of a union which had unsuccessfully attempted to organize the establishment's employees. A.F.L. v. Swing, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941). Such "stranger picketing" is, therefore, constitutionally protected. The instant matter cannot be resolved by an analysis limited to the rights associated with private property. Concomitant to

these rights are certain restrictions, one of which is that freedom of speech and freedom of the press often require that the rights of private ownership yield. In Marsh v. State of Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), the Supreme Court stated, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506, 66 S. Ct. at 278. In *Marsh*, the Court held that the constitutional guarantees of freedom of the press and of religion precluded the enforcement of a state criminal statute against a Jehovah's Witness who distributed religious literature on a street of a company owned town. The court reasoned that because the street was open to the public in general and, though privately owned, served a public function, private management could not curtail precious constitutional liberties.

In the sense that both are freely accessible to the public, a company town and a shopping center are analogous arrangements, and for purposes of considering possible constitutional abridgments should be similarly analyzed. Accordingly, I deem unincisive the majority's failure to recognize any conflict between the rights of private ownership and the constitutionally guaranteed freedoms of speech and of the press. Just as there exists a conflict between the right to distribute printed religious matter in a company town and a statute restricting such activity, so too there exists a conflict between a union's right to picket peacefully and a shopping center's policy not to permit such activity within the boundaries of the center. Only by a thorough consideration of these conflictiug values can the issue herein presented by properly resolved.

A case involving a related issue is Marshall Field & Co. v. NLRB, 200 F.2d 375 (7th Cir. 1953), wherein the Seventh Circuit decided that a company owned street which divided the store and which was used only occasionally by employees and customers to enter the store, partook of the nature of a city street to an extent sufficient to invalidate a company rule prohibiting non-employees from engaging in union activity in the street. As one observer commented, shopping center grounds are possessed of more attributes of a public way than the Marshall Field owned street because the public would use the shopping center public ways to a far greater extent than it could use the company owned street. Note, Shopping Centers and Labor Relations Law, 10 Stanford L.Rev. 694, 701 (1958).

Perhaps the most sensible appraisal of what an appellate court must know to decide a shopping center picketing case was set forth in two cases: (1) Moreland Corporation v. Retail Store Employees Union Local No. 444, AFL–CIO, 16 Wis.2d 499, 114 N.W.2d 876 (1962), wherein the Supreme Court of Wisconsin in an action by the owner of a shopping center seeking an injunction restraining defendant union from picketing on a sidewalk in front of a tenant's store in the center, stated:

"The issue is whether the respondent, because it has designed its private property for use as a shopping center, has lost its right to ban otherwise lawful picketing. If the record before us clearly established that the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing. See Freeman v. Retail Clerks Union Local No. 1207, supra (concurring opinion). See also, Notes, 1960 Duke L.J. 310; Note 73, Harv.L.Rev. 1216, and Note 10, Stanford L.Rev. 694. Compare, Marsh v. [State of] Alabama (1946), 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, iu which the United States Supreme Court held that the freedom of religion guaranteed by the First and Fourteenth Amendments prevented the enforcement of a criminal trespass statute against a person distributing religious pamphlets on the sidewalk of a company-owned town. See also, National Labor Relations Board v. Babcock & Wilcox Co. (1956), 351 U.S.

105, 76 S.Ct. 679, 100 L.Ed. 975, a decision under the National Labor Management Relations Act involving the right of labor union representatives to circulate literature in an employer's private parking lot. The rationale of the United States Supreme Court in the Babcock & Wilcox Case was used to help resolve a constitutional free speech issue in Nahas v. Local 905, Retail Clerks Ass'n, supra [144 Cal.App.2d 808, 301 P.2d 932, rehearing denied 144 Cal.App.2d 808, 820, 302 P.2d 829].

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise. * * *" 114 N.W. 2d 879–880.

(2) Freeman v. Retail Clerks Union Local No. 1207, 58 Wash. 2d 426, 363 P. 2d 803 (1961) (concurring opinion), wherein a concurring judge observed:

"Under ordinary circumstances, the owner of property can control who goes on it and for what purpose; however, a formal dedication to public use is not necessary to greatly limit that control. The legislature has imposed limitations upon the owner's right to exclude persons from his premises or to refuse service to them on account of race or creed, if the premises are used as a place of public resort. In other instances, entirely apart from the legislative action, the courts have placed a limitation on the control that an owner might exercise over his property, as in company towns.

"In this case, it is conceded that legal title to the property, over which the pickets carried their signs, was in the appellants—and not in the public. The issue presented was whether the property owners, despite their precautions and efforts to protect their right to control the use of the property, had lost the right to prevent the pickets from carrying their signs. (I take it that the pickets, sans signs, where just like other members of the public, and entitled to be where they were.)

* * * * * * *

"If intsead of being a shopping center, the property in question was merely a forty-acre pasture for contented cows, but a desirable place from which pickets could carry signs imparting information (relative to the nonunion status of the employees of the J. C. Penney Company) to the customers of that company, there could be no question that the owner would be entitled to an injunction—not to restrain the picketing, but to prevent tbeir trespass on property where they had no right to be."

If the union activity involved herein did not amount to a trespass, then there arises the question of federal preemption. I shall avoid a lengthy discussion of that subject, but want to emphasize that the federal decisions stress the high degree of freedom allowed union activity on the property of the employer. While those cases are not controlling authority, they do indicate that the case before us is not as open-and-shut as the majority believe. Many of the federal cases are tboughtfully analyzed in Annot., 100 L.E.D. 984 (1956).

There is another basis for my disagreement with the majority. By restricting picketing to the berm areas at the entrances and exits, the majority have lent their sanction to an activity which has overtones of a secondary boycott. Again, I do not intend to discuss at length the unlawful and harmful effects which can occur to neutral employers by such activity bnt recommend 10 Stanford L. Rev. 694, 702–706, which considers the evils and possible cures of picketing at shopping center entrances.

Had the majority opinion made reference to the foregoing inescapable conflicts, I might not enjoy the result any more than I now do, but at least I would be satisfied that the majority opinion recognized the problems involved.

I dissent.

EAGEN, J., joins in this dissent.

EXHIBIT 24

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* ALLIS-CHALMERS MANUFACTURING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 216. Argued March 15, 1967.—Decided June 12, 1967.

Lawful economic strikes were called at two of respondent Allis-Chalmers' plants in accordance with duly authorized union procedures by the locals of the union representing the employees. Some union members crossed picket lines and worked during the strikes. After the strikes were over the locals brought proceedings against these members, imposed fines of $20 to $100, and sued in state courts to collect the fines. The collective bargaining agreement contained a union security clause which required each employee to become and remain "a member of the union to the extent of paying his monthly dues." Allis-Chalmers filed unfair labor practice charges against the locals alleging violation of § 8 (b) (1) (A) of the National Labor Relations Act. The NLRB held that even if the union action were restraint or coercion proscribed by that section, the conduct came within the proviso that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The Court of Appeals reversed, holding that the union conduct violated § 8 (b) (1) (A). *Held:*

1. The history of legislative action surrounding § 8 (b) (1) (A)'s prohibition of union activity to "restrain or coerce" employees in the exercise of rights guaranteed by § 7 justifies the conclusion, in light of the imprecision of the words "restrain or coerce," and the repeated refrain throughout the debates that Congress did not propose limitations on the internal affairs of unions, that Congress did not intend § 8 (b) (1) (A) to prohibit the imposition of reasonable fines on full union members who decline to honor an authorized strike or to prohibit attempts to collect such fines. Pp. 178–195.

2. Since Allis-Chalmers offered no evidence that the fined employees enjoyed other than full union membership, the contrary will not be presumed. The question of the applicability of the statute to employees whose membership was limited to the obligation to pay monthly dues is not presented here.

358 F. 2d 656, reversed.

Solicitor General Marshall argued the cause for petitioner. With him on the brief were *Robert S. Rifkind, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come*. *John Silard* argued the cause for respondent International Union, UAW–AFL–CIO (Locals 248 and 401), on behalf of the petitioner. With him on the brief were *Joseph L. Rauh, Jr., Stephen I. Schlossberg* and *Harriett R. Taylor*.

Howard C. Equitz argued the cause for respondent Allis-Chalmers Manufacturing Co. With him on the brief were *Maxwell H. Herriott, James A. Urdan, John L. Waddleton, Edward L. Welch* and *William J. McGowan*.

Martin C. Seham argued the cause and filed a brief for the New York Times Display Advertising Salesmen Steering Committee, as *amicus curiae*, urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8 (b)(1)(A) of the National Labor Relations Act of engaging in conduct "to restrain or coerce" employees in the exercise of their right guaranteed by § 7 to "refrain from" concerted activities.[1]

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[1] The relevant provisions of §§ 7 and 8 (b)(1)(A), 61 Stat. 140, 141, 29 U. S. C. §§ 157 and 158 (b)(1)(A), are

"SEC. 7. Employees shall have the right to . . . engage in . . . concerted activities . . . , and shall also have the right to refrain from any or all of such activities . . . ."

"SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall

Employees at the West Allis, and La Crosse, Wisconsin, plants of respondent Allis-Chalmers Manufacturing Company were represented by locals of the United Automobile Workers. Lawful economic strikes were conducted at both plants in support of new contract demands. In compliance with the UAW constitution, the strikes were called with the approval of the International Union after at least two-thirds of the members of each local voted by secret ballot to strike. Some members of each local crossed the picket lines and worked during the strikes. After the strikes were over, the locals brought proceedings against these members charging them with violation of the International constitution and bylaws. The charges were heard by local trial committees in proceedings at which the charged members were represented by counsel. No claim of unfairness in the proceedings is made. The trials resulted in each charged member being found guilty of "conduct unbecoming a Union member" and being fined in a sum from $20 to $100. Some of the fined members did not pay the fines and one of the locals obtained a judgment in the amount of the fine against one of its members, Benjamin Natzke, in a test suit brought in the Milwaukee County Court. An appeal from the judgment is pending in the Wisconsin Supreme Court.

Allis-Chalmers filed unfair labor practice charges against the locals alleging violation of §8(b)(1)(A).[2]

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not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

[2] Two locals were involved, Local 248 at the West Allis plant, and Local 401 at the La Crosse plant. Although Allis-Chalmers' charges of unfair labor practices mentioned threats of fines as well as imposition of fines, the only proof that fines were specifically threatened during a strike consisted of a letter to strikebreaking West Allis members of Local 248 in 1959. As to the 1962 strike at West Allis and both the 1959 and 1962 strikes at La Crosse, men-

A complaint issued and after hearing a trial examiner recommended its dismissal. The National Labor Relations Board sustained the examiner on the ground that, in the circumstances of this case, the actions of the locals, even if restraint or coercion prohibited by § 8 (b)(1)(A), constituted conduct excepted from the section's prohibitions by the proviso that such prohibitions "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 149 N. L. R. B. 67. Upon Allis-Chalmers' petition for review to the Court of Appeals for the Seventh Circuit, a panel of that court upheld the Board's decision. Following a rehearing *en banc*, however, the court, three judges dissenting, withdrew the panel opinion, held that the locals' conduct violated § 8 (b)(1)(A), and remanded to the Board for appropriate proceedings. 358 F. 2d 656. We granted certiorari, 385 U. S. 810. We reverse.

I.

The panel and the majority *en banc* of the Court of Appeals thought that reversal of the NLRB order would be required under a literal reading of §§ 7 and 8 (b)(1)(A); under that reading union members who cross their own picket lines would be regarded as exercising their rights under § 7 to refrain from engaging in a particular concerted activity, and union discipline in the form of fines for such activity would therefore "restrain or coerce" in violation of § 8 (b)(1)(A) if the section's proviso is read to sanction no form of discipline other

tion of fines first occurred after the strikes were over. The threat of court enforcement of the fines was first made in 1960 in letters sent to fined members of Local 248 who had not paid their fines; the letter informed them of the outcome of a Wisconsin Supreme Court opinion holding fines enforceable, *UAW, Local 756* v. *Woychik*, 5 Wis. 2d 528, 93 N. W. 2d 336 (1958). Local 401's test suit was brought after the 1962 strike.

than expulsion from the union. The panel rejected that literal reading. The majority *en banc* adopted it, stating that the panel "mistakenly took the position that such a literal reading was unwarranted in the light of the history and purposes" of the sections, 358 F. 2d, at 659, and holding that "[t]he statutes in question present no ambiguities whatsoever, and therefore do not require recourse to legislative history for clarification." *Id.*, at 660.

It is highly unrealistic to regard § 8 (b)(1), and particularly its words "restrain or coerce," as precisely and unambiguously covering the union conduct involved in this case. On its face court enforcement of fines imposed on members for violation of membership obligations is no more conduct to "restrain or coerce" satisfaction of such obligations than court enforcement of penalties imposed on citizens for violation of their obligations as citizens to pay income taxes, or court awards of damages against a contracting party for nonperformance of a contractual obligation voluntarily undertaken. But even if the inherent imprecision of the words "restrain or coerce" may be overlooked, recourse to legislative history to determine the sense in which Congress used the words is not foreclosed. We have only this Term again admonished that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union* v. *Labor Board*, 357 U. S. 93, 99–100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 619–620. Indeed, we have applied that principle to the construction of § 8 (b)(1)(A) itself in holding that the section must be construed in light of the fact that it "is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of

the Congress to fashion a coherent national labor policy." *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 292.

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment,[3] and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term,[4] and his right to refuse to cross a lawful picket line.[5] The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy." [6] "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338.

[3] See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332; *Medo Photo Supply Corp.* v. *Labor Board*, 321 U. S. 678; *ILGWU* v. *Labor Board*, 366 U. S. 731, 737.

[4] See *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 280.

[5] See *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71.

[6] Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1333 (1958).

It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, 386 U. S. 171, 182. For the same reason Congress in the 1959 Landrum-Griffin amendments, 73 Stat. 519, enacted a code of fairness to assure democratic conduct of union affairs by provisions guaranteeing free speech and assembly, equal rights to vote in elections, to attend meetings, and to participate in the deliberations and voting upon the business conducted at the meetings.

Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.[7] That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."[8] Provisions in

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[7] See, *e. g.*, Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Philip Taft, The Structure and Government of Labor Unions 117–180 (1954); Taylor, The Role of Unions in a Democratic Society, Selected Readings on Government Regulation of Internal Union Affairs Affecting the Rights of Members, prepared for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare 17 (Committee Print, 85th Cong., 2d Sess., 1958) (hereafter Selected Readings); Kerr, Unions and Union Leaders of Their Own Choosing, Selected Readings, *supra*, at 106, 109.

[8] Summers, *supra*, n. 7, at 1049.

"Strikebreaking is uniformly considered sufficient reason for expulsion whether or not there is an express prohibition, for it undercuts the union's principal weapon and defeats the economic objective for

union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.[9]

In addition, the judicial view current at the time § 8 (b)(1)(A) was passed was that provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that "The courts' role is but to enforce the contract." [10] In *Machinists* v. *Gonzales*, 356 U. S. 617, 618, we recognized that "[t]his contractual conception of the relation between a member and his union widely prevails in this country . . . ." Although state courts were reluctant to intervene in internal union affairs, a body of law establishing standards of fairness in the enforcement of union discipline grew up around this con-

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which the union exists." Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 495 (1950).

[9] National Industrial Conference Board, The Union, The Leader, and The Members, Selected Readings, at 40, 69–71; Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 508–512 (1950); Disciplinary Powers and Procedures in Union Constitutions, U. S. Dept. of Labor Bulletin No. 1350, Bur. Lab. Statistics (1963).

It is suggested that while such provisions for fines and expulsion were a common element of union constitutions at the time of the enactment of § 8 (b)(1), such background loses its cogency here because such provisions did not explicitly call for court enforcement. However the potentiality of resort to courts for enforcement is implicit in any binding obligation. Surely it cannot be said that the absence of a "court enforceability" clause in a contract of sale implies that the parties do not foresee resort to the courts as a possible means of enforcement. It is also suggested that court enforcement of fines is "a rather recent innovation." Yet such enforcement was known as early as 1867. *Master Stevedores' Assn.* v. *Walsh*, 2 Daly 1 (N. Y.).

[10] Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L. J. 175, 180 (1960).

tract doctrine. See *Parks* v. *Electrical Workers*, 314 F. 2d 886, 902–903.[11]

To say that Congress meant in 1947 by the § 7 amendments and § 8 (b)(1)(A) to strip unions of the power to fine members for strikebreaking, however lawful the strike vote, and however fair the disciplinary procedures and penalty, is to say that Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of the internal affairs of unions. It is also to attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort "to fashion a coherent labor policy" and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon. It is no answer that the proviso to § 8 (b)(1)(A) preserves to the union the power to expel the offending member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine. Where the union is weak, and membership therefore of little value, the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience.[12]

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[11] See generally Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930); Note, Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 835–836 (1960).

[12] "Since the union's effectiveness is based largely on the degree to which it controls the available labor, expulsions tend to weaken the union. If large numbers are expelled, they become a threat to union standards by undercutting union rates, and in case of a strike they may act as strikebreakers. . . . Therefore, expulsions must

Yet it is just such weak unions for which the power to execute union decisions taken for the benefit of all employees is most critical to effective discharge of its statutory function.

Congressional meaning is of course ordinarily to be discerned in the words Congress uses. But when the literal application of the imprecise words "restrain or coerce" Congress employed in § 8 (b)(1)(A) produces the extraordinary results we have mentioned we should determine whether this meaning is confirmed in the legislative history of the section.

II.

The explicit wording of § 8 (b)(2), which is concerned with union powers to affect a member's employment, is in sharp contrast with the imprecise words of § 8 (b)(1)(A). Section 8 (b)(2) limits union power to compel an employer to discharge a terminated member other than for "failure [of the employee] to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:

> "The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and *do not require*

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be limited to very small numbers unless the union is so strongly entrenched that it cannot be effectively challenged by the employer or another union." Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 487–488 (1950).

the employer to inquire into the internal affairs of the union." S. Rep. No. 105, 80th Cong., 1st Sess., 20, I Legislative History of the Labor Management Relations Act, 1947 (hereafter Leg. Hist.) 426. (Emphasis supplied.)

Senator Taft, in answer to protestations by Senator Pepper that § 8 (b)(2) would intervene in the union's internal affairs and "deny it the right to protect itself against a man in the union who betrays the objectives of the union . . . ," stated:

> "*The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion." [18] (Emphasis supplied.)

Section 8(b)(1)(A) was under consideration when Senator Taft said this. Congressional emphasis that § 8 (b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8 (b)(1)(A) as contemplating regulation of internal discipline. This is borne out by the fact that provision was also made in the Taft-Hartley Act for a special committee to study, among other things, "the internal organization and administration of labor unions . . . ." § 402 (3), 61 Stat. 160.

What legislative materials there are dealing with § 8 (b)(1)(A) contain not a single word referring to the

[18] 93 Cong. Rec. 4193, II Leg. Hist. 1097.

application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.

The provision was not contained in the Senate or House bills reported out of committee, but was introduced as an amendment on the Senate floor by Senator Ball. The amendment was adopted in the Conference Committee, without significant enlightenment from the report of that committee. The first suggestion that restraint or coercion of employees in the exercise of § 7 rights should be an unfair labor practice appears in the Statement of Supplemental Views to the Senate Report, in which a minority of the Senate Committee, including Senators Ball, Taft, and Smith, concurred. The mischief against which the Statement inveighed was restraint and coercion by unions in *organizational campaigns*. "The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence." S. Rep. No. 105, *supra*, at 50, I Leg. Hist. 456. Senator Ball proposed § 8 (b)(1)(A) as an amendment to the Senate bill, and stated, "The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices." 93 Cong. Rec. 4016, II Leg. Hist. 1018. Senator Ball gave numerous examples of the kind of union conduct the amendment was to cover. Each one related to union conduct during organizational cam-

paigns.[14] Senator Ball reiterated this purpose several times thereafter,[15] including remarks added after passage of the amendment.[16] The consistent thrust of his arguments was the necessity of controlling union conduct in organizational campaigns. Indeed, when Senator Holland introduced the proviso eliminating from the reach of § 8 (b)(1)(A) "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership . . . ," Senator Ball replied,

> "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. *It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions.*" [17] (Emphasis supplied.)

After acceptance of the proviso, and on the same day as the vote on the amendment itself, Senator Ball said of the proviso: "That modification is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees." [18]

Another co-sponsor of the amendment, Senator Smith, echoed this purpose: "The pending measure is designed

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[14] 93 Cong. Rec. 4016–4017, II Leg. Hist. 1018–1021. Examples were given in debate of threats by unions to double the dues of employees who waited until later to join. It is suggested that this is no less within the ambit of internal union affairs than the fines imposed in the present case. But the significant distinction is that the cited examples necessarily concern threats against nonmembers designed to coerce them into joining, and are therefore further evidence of the primary concern of Congress with organizational tactics.

[15] 93 Cong. Rec. 4271, 4432, 4434, II Leg. Hist. 1139, 1199, 1203.

[16] 93 Cong. Rec. A–2252, II Leg. Hist. 1524–1525.

[17] 93 Cong. Rec. 4272, II Leg. Hist. 1141.

[18] 93 Cong. Rec. 4433, II Leg. Hist. 1200.

to protect employees in their freedom to decide whether or not they desire to join labor organizations, to prevent them from being restrained or coerced." [19]

Senator Taft also initially confined his comments on the amendment to examples of organizational tactics.[20] However, in debate with Senator Pepper, he suggested a broader but still limited application:

> "If there is anything clear in the development of labor union history in the past 10 years it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right to protest against *arbitrary powers which have been exercised by some of the labor union leaders.*" [21] (Emphasis supplied.)

In reply to Senator Pepper's protest that union members can protect themselves against such "tyranny," Senator Taft stated, "I think it is fair to say that in the case of many of the unions, the employee has a good deal more of an opportunity to select his employer than he has to select his labor-union leader." [22] Senator Taft further observed that union leaders sometimes penalize those who vote against them. Senator Pepper then attempted to draw an analogy between union members and shareholders in a corporation, to which Senator Taft replied, "The Congress has gone much further in protecting the rights of minority stockholders in corporations than it has in protecting the rights of members of unions. *Even*

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[19] 93 Cong. Rec. 4435, II Leg. Hist. 1204.

[20] 93 Cong. Rec. 4021–4022, II Leg. Hist. 1025–1027.

[21] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

See Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483: "It is significant that among the major changes made in the Wagner Act by the Labor Management Relations Act of 1947 was the addition of sections purported to be aimed at protecting individual union members against undemocratic and corrupt leaders."

[22] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

in this bill we do not tell the unions how they shall vote or how they shall conduct their affairs . . . ." [23] (Emphasis supplied.) Senator Pepper attempted twice to clarify the effect of the amendment on internal affairs, but Senator Taft answered only that the amendment applied to nonunion men as well.[24]

It was one week after this debate between Senator Taft and Senator Pepper that § 8 (b)(1)(A) was adopted by the Senate as an amendment to the bill. There was no further reference in the debates to the applicability of the section to internal union affairs, by Senator Taft or anyone else, despite the repeated statements by Senator Ball that it bore no relationship to the conduct of such affairs. At one point, Senator Saltonstall asked Senator Taft to provide examples of the kind of union conduct covered by the section. Senator Taft responded with examples of threats of bodily harm, economic coercion, and mass picketing in organizational campaigns and coercion which prevented employees not involved in a labor dispute from going to work.[25] But any inference

[23] 93 Cong. Rec. 4024, II Leg. Hist. 1030. It was in the context of the quoted limiting statements that, in answer to Senator Ives' suggestion that the matter of union coercion should be further investigated, Senator Taft made the broad remark that "[m]erely to require that unions be subject to the same rules that govern employers, and that they do not have the right to interfere with or coerce employees, either their own members or those outside their union, is such a clear matter, and seems to me so easy to determine, that I would hope we would all agree." 93 Cong. Rec. 4025, II Leg. Hist. 1032.

[24] 93 Cong. Rec. 4023, 4024, II Leg. Hist. 1029, 1030. It is this colloquy to which the dissent apparently refers in its statement that in answer to Senator Pepper's charge that the amendment protected workers against their own leaders, "Senator Taft did not deny it." It may be more accurate to say that Senator Taft evaded the issue.

[25] 93 Cong. Rec. 4435–4436, II Leg. Hist. 1205–1206. The following statement of Senator Taft had no reference to the conduct of a union *vis-à-vis* a member who crossed the union's picket line but

applicable to the relationship of a union member to his own union. Union membership allows the member a part in choosing the very course of action to which he refuses to adhere, but he has of course no role in employer conduct, and nonunion employees have no voice in the affairs of the union.[27]

Cogent support for an interpretation of the body of § 8 (b)(1) as not reaching the imposition of fines and attempts at court enforcement is the proviso to § 8 (b)(1). It states that nothing in the section shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." Senator Holland offered the proviso during debate and Senator Ball immediately accepted it, stating that it was not the intent of the sponsors in any way to regulate the internal affairs of unions.[28] At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than

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[27] Cf. statement of Justice Stone in *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184–185, n. 2:

"State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. [Citations omitted.]

"Underlying the stated rule has been the thought, often expressed in judicial opinion, that *when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.*" (Emphasis supplied.)

A commentator has noted that "the ballot in a free election is the individual union member's weapon for inducing performance in accordance with his desire." Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1329 (1958).

[28] 93 Cong. Rec. 4272, 4433, II Leg. Hist. 1141, 1200.

that Senator Taft envisioned that § 8 (b)(1)(A) intruded into and regulated internal union affairs is negated by his categorical statements to the contrary in the contemporaneous debates on § 8 (b)(2).

It is true that there are references in the Senate debate on § 8 (b)(1)(A) to an intent to impose the same prohibitions on unions that applied to employers as regards restraint and coercion of employees in their exercise of § 7 rights.[20] However apposite this parallel might be when applied to organizational tactics, it clearly is in

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referred to union conduct in preventing employees not in the bargaining unit from going to work—"mass picketing, which absolutely prevents all the office force from going into the office of a plant."

"The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." 93 Cong. Rec. 4436, II Leg. Hist. 1206.

His statements in a colloquy with Senator Morse were made in the same context. 93 Cong. Rec. 4436, II Leg. Hist. 1207. We read his "Supplementary Analysis of Labor Bill as Passed" as also referring to coercion of nonmembers of the striking bargaining unit. 93 Cong. Rec. 6859, II Leg. Hist. 1623. That he distinguished members from nonmembers also appears from his statement concerning the section that "[i]ts application to *labor organizations* may have a slightly different implication, but it seems to me perfectly clear that from the point of view of the *employee* the two cases are parallel." 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis supplied.)

It is not true that "the sponsors of the section repeatedly announced that it would protect union members from their leaders." Only Senator Taft's statements provide limited support for the proposition.

[20] S. Rep. No. 105, 80th Cong., 1st Sess., 50, I Leg. Hist. 456; 93 Cong. Rec. 4025, 4436, II Leg. Hist. 1032, 1207.

expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for nonpayment would not be an unfair labor practice. Assuming that the proviso cannot also be read to authorize court enforcement of fines, a question we need not reach,[29] the fact remains that to interpret the body of § 8 (b)(1) to apply to the imposition and collection of fines would be to impute to Congress a concern with the permissible *means* of enforcement of union fines and to attribute to Congress a narrow and discrete interest in banning court enforcement of such fines. Yet there is not one word in the legislative history evidencing any such congressional concern. And, as we have pointed out, a distinction between court enforcement and expulsion would have been anomalous for several reasons. First, Congress was operating within the context of the "contract theory" of the union-member relationship which widely prevailed at that time. The efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled. Second, as we have noted, such a distinction would visit upon the member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of the weak union by requiring it either to condone misconduct or deplete its ranks.

There may be concern that court enforcement may permit the collection of unreasonably large fines.[30] How-

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[29] Our conclusion that § 8 (b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions.

[30] The notification by Local 248 to its strikebreaking employees that each day they continued to work might constitute a separate

over, even were there evidence that Congress shared this concern,[31] this would not justify reading the Act also to bar court enforcement of reasonable fines.[32]

The 1959 Landrum-Griffin amendments, thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs,[33] also negate the reach

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offense punishable by a fine of $100 was sent only to members of Local 248, not those of Local 401, and only during one of the two strikes called by Local 248. The notification was sent only to those employees who had already decided to work during the strike. Most important, no inference can be drawn from that notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of § 8 (b) (1), such notification would not be an unfair labor practice. It is not argued that the fines for which court enforcement was actually sought were unreasonably large.

[31] Senator Wiley's reference in a speech after § 8 (b) (1) was passed to $20,000 fines for crossing a picket line was not directed to the section. 93 Cong. Rec. 5000, II Leg. Hist. 1471.

[32] It has been noted that the state courts, in reviewing the imposition of union discipline, find ways to strike down "discipline [which] involves a severe hardship." Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1078 (1951).

It is suggested that reading § 8 (b) (1) to allow court enforcement of fines adds a "new weapon to the union's economic arsenal," and is inconsistent with the mood of Congress to curtail the powers of unions. The question here, however, is not whether Congress gave to unions a new power, but whether it eliminated, without debate, a power which the unions already possessed.

[33] In 1958, in *Machinists* v. *Gonzales*, 356 U. S. 617, 620, we said: "[T]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied."

See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852:

"The act is the first major step in the regulation of the internal affairs of labor unions. It expands the national labor policy into the area of relations between the employees and the labor union. Previously national policy was confined to relationships between management and union."

given § 8 (b)(1)(A) by the majority *en banc* below. "To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit." *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 291–292. In 1959 Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline. Even then, some Senators emphasized that "in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents." S. Rep. No. 187, 86th Cong., 1st Sess., 7. The Eighty-sixth Congress was thus plainly of the view that union self-government was not regulated in 1947. Indeed, that Congress expressly recognized that a union member may be "fined, suspended, expelled, or otherwise disciplined," and enacted only procedural requirements to be observed. 73 Stat. 523, 29 U. S. C. § 411 (a)(5). Moreover, Congress added a proviso to the guarantee of freedom of speech and assembly disclaiming any intent "to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . ." 29 U. S. C. § 411 (a)(2).

The 1959 provisions are significant for still another reason. We have seen that the only indication in the debates over § 8 (b)(1)(A) of a reach beyond organizational tactics which restrain or coerce nonmembers was Senator Taft's concern with arbitrary and undemocratic

union leadership. The 1959 amendments are addressed to that concern. The kind of regulation of internal union affairs which Senator Taft said protected stockholders of a corporation, and made necessary a "right of protest against arbitrary powers which have been exercised by some of the labor union leaders," [34] is embodied in the 1959 Act. The requirements of adherence to democratic principles, fair procedures and freedom of speech apply to the election of union officials and extend into all aspects of union affairs.[35] In the present case the procedures followed for calling the strikes and disciplining the recalcitrant members fully comported with these requirements, and were in every way fair and democratic. Whether § 8 (b)(1)(A) proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader, are matters not presented by this case, and upon which we express no view.

Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in light of the repeated refrain throughout the debates on § 8 (b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.

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[34] 93 Cong. Rec. 4023, II Leg. Hist. 1028.

[35] 29 U. S. C. §§ 411–415, 431 (c), 461–464, 481–482. Significantly, the Landrum-Griffin amendments expressly rendered it unlawful for any union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled . . ." under that Act. 29 U. S. C. § 529.

III.

The collective bargaining agreements with the locals incorporate union security clauses. Full union membership is not compelled by the clauses: an employee is required only to become and remain "a member of the Union . . . to the extent of paying his monthly dues . . . ." The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F. 2d, at 660. But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed his union's picket line. It is clear that the fined employees involved herein enjoyed full union membership. Each executed the pledge of allegiance to the UAW constitution and took the oath of full membership. Moreover, the record of the Milwaukee County Court case against Benjamin Natzke discloses that two disciplined employees testified that they had fully participated in the proceedings leading to the strike. They attended the meetings at which the secret strike vote and the renewed strike vote were taken. It was upon this and similar evidence that the Milwaukee County Court found that Natzke "had by his actions become a member of the union for all purposes . . . ." Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary. Cf. *Machinists* v. *Street*, 367 U. S. 740, 774.[36] Indeed, it

[36] In *Machinists* v. *Street*, we held that employees who were members of a union under a union security agreement authorized by the

is and has been Allis-Chalmers' position that the Taft-Hartley prohibitions apply whatever the nature of the membership. Whether those prohibitions would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view.[37]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE, concurring.

It is true that § 8 (b)(1)(A) makes it an unfair labor practice for a union to restrain or coerce any employees in the exercise of § 7 rights, but the proviso permits the union to make its own rules with respect to acquisition and retention of membership. Hence, a union may expel to enforce its own internal rules, even though a particular rule limits the § 7 rights of its members and

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Railway Labor Act, had a right to relief against a union using their dues payments for political purposes. We said, at 774:

"Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of [the Act] . . . were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. . . . Thus we think that only those who have identified themselves as opposed to political uses of their funds are entitled to relief in this action."

[37] Under § 8 (a)(3) the extent of an employee's obligation under a union security agreement is "expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core." *Labor Board* v. *General Motors Corp.*, 373 U. S. 734, 742.

Not before us is the question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law. Compare *Machinists* v. *Gonzales*, 356 U. S. 617; *Plumbers' Union* v. *Borden*, 373 U. S. 690.

even though expulsion to enforce it would be a clear and serious brand of "coercion" imposed in derogation of those § 7 rights. Such restraint and coercion Congress permitted by adding the proviso to § 8 (b)(1)(A). Thus, neither the majority nor the dissent in this case questions the validity of the union rule against its members crossing picket lines during a properly called strike, or the propriety of expulsion to enforce the rule. Section 8 (b)(1)(A), therefore, does not bar *all* restraint and coercion by a union to prevent the exercise by its members of their § 7 rights. "Coercive" union rules are enforceable at least by expulsion.

The dissenting opinion in this case, although not questioning the enforceability of coercive rules by expulsion from membership, questions whether fines for violating such rules are enforceable at all, by expulsion or otherwise. The dissent would at least hold court collection of fines to be an unfair labor practice, apparently for the reason that fines collectible in court may be more coercive than fines enforceable by expulsion. My Brother BRENNAN, for the Court, takes a different view, reasoning that since expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a reasonable fine than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive.

I do not mean to indicate, and I do not read the majority opinion otherwise, that every conceivable internal union rule which impinges upon the § 7 rights of union members is valid and enforceable by expulsion and court action. There may well be some internal union rules which on their face are wholly invalid and unenforceable.

But the Court seems unanimous in upholding the rule against crossing picket lines during a strike and its enforceability by expulsion from membership. On this premise I think the opinion written for the Court is the more persuasive and sensible construction of the statute and I therefore join it, although I am doubtful about the implications of some of its generalized statements.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART join, dissenting.

The United Automobile Workers went on a lawful economic strike against the Allis-Chalmers Manufacturing Co. Some union members, refusing to engage in the concerted strike activities, crossed the picket lines and continued to work for Allis-Chalmers. The right to refrain from engaging in such "concerted activities" is guaranteed all employees by the language of § 7 of the National Labor Relations Act, as amended, 61 Stat. 140, and § 8 (b)(1)(A) of the Act, 61 Stat. 141, makes it an unfair labor practice for a union to "restrain or coerce" employees in their exercise of their § 7 rights. Despite these emphatic guarantees of the Act, the union filed charges against the employees and imposed fines against those who had crossed its picket lines to go back to work. Though the proviso to § 8 (b)(1)(A) preserves the union's "right . . . to prescribe its own rules with respect to the . . . retention of membership therein," the union did not attempt to exercise its right under the proviso to expel the disciplined members when they refused to pay the fines. Instead, it brought legal proceedings in state courts to compel the payment of the fines. The Court now affirms the Labor Board's action in refusing to find the union guilty of an unfair labor practice under § 8 (b)(1)(A) for fining its members because they

crossed its picket lines. I cannot agree and, therefore, would affirm the judgment of the Court of Appeals which set aside the Labor Board's order.

I.

In determining what the Court here holds, it is helpful to note what it does not hold. Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, the Court correctly assumes that the proviso to § 8 (b)(1)(A) cannot be read to authorize its holding. Neither does the Court attempt to sustain its holding by reference to § 7 which gives employees the right to refrain from engaging in concerted activities. To be sure, the Court in characterizing the union-member relationship as "contractual" and in emphasizing that its holding is limited to situations where the employee is a "full member" of the union, implies that by joining a union an employee gives up or waives some of his § 7 rights. But the Court does not say that a union member is without the § 7 right to refrain from participating in such concerted activity as an economic strike called by his union. Such a holding would be clearly unwarranted even by resort to the legislative history of the 1947 addition to § 7 of "the right to refrain from any or all of such activities." According to Senator Taft, that phrase was added by the Conference Committee to "make the prohibition contained in section 8 (b)(1) apply to coercive acts of unions against employees who did not wish to join *or did not care to participate in a strike or a picket line.*" 93 Cong. Rec. 6859, II Leg. Hist. 1623. (Emphasis added.)

With no reliance on the proviso to § 8 (b)(1)(A) or on the meaning of § 7, the Court's holding boils down to this: a court-enforced reasonable fine for nonparticipation in a strike does not "restrain or coerce" an employee in the

exercise of his right not to participate in the strike. In holding as it does, the Court interprets the words "restrain or coerce" in a way directly opposed to their literal meaning, for the Court admits that fines are as coercive as penalties imposed on citizens for the nonpayment of taxes. Though Senator Taft, in answer to charges that these words were ambiguous, said their meaning "is perfectly clear," 93 Cong. Rec. 4021, II Leg. Hist. 1025, and though any union official with sufficient intelligence and learning to be chosen as such could hardly fail to comprehend the meaning of these plain, simple English words, the Court insists on finding an "inherent imprecision" in these words. And that characterization then allows the Court to resort to "[w]hat legislative materials there are." In doing so, the Court finds three significant things: (1) there is "not a single word" to indicate that § 8 (b)(1)(A) was intended to apply to "traditional internal union discipline in general, or disciplinary fines in particular"; (2) the "repeated refrain" running through the debates on the section was that Congress did not intend to impose any limitations on the "internal affairs of unions"; (3) the Senators who supported the section were primarily concerned with union coercion during organizational drives and with union violence in general.

Even were I to agree with the Court's three observations about the legislative history of § 8 (b)(1)(A), I do not think they alone justify disregarding the plain meaning of the section, and it seems perfectly clear to me that the Court does not think so either. The real reason for the Court's decision is its policy judgment that unions, especially weak ones, need the power to impose fines on strikebreakers and to enforce those fines in court. It is not enough, says the Court, that the unions have the power to expel those members who refuse to participate in a strike or who fail to pay fines imposed on them for such

failure to participate; it is essential that weak unions have the choice between expulsion and court-enforced fines, simply because the latter are more effective in the sense of being more punitive. Though the entire mood of Congress in 1947 was to curtail the power of unions, as it had previously curtailed the power of employers, in order to equalize the power of the two, the Court is unwilling to believe that Congress intended to impair "the usefulness of labor's cherished strike weapon." [1] I cannot agree with this conclusion or subscribe to the Court's unarticulated premise that the Court has power to add a new weapon to the union's economic arsenal whenever the Court believes that the union needs that weapon. That is a job for Congress, not this Court.

II.

Though the Court recognizes that a union fine is in fact coercive, it seeks support for its holding—that court-enforced fines are not prohibited by § 8 (b)(1)(A)—by reference to the proviso which authorizes a union to prescribe its own rules with respect to the retention of membership. The Court first assumes that the proviso protects the union's right to expel members for the express purpose of discouraging them from going to work. From that assumption the Court then suggests that "[a]t the very least . . . the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion,

[1] Those members of the Senate who opposed § 8 (b)(1)(A) shared the Court's concern that it would impair the effectiveness of strikes. To that concern, Senator Taft replied:

"I can see nothing in the pending measure which . . . would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way . . . All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." 93 Cong. Rec. 4430, II Leg. Hist. 1207.

and to impose fines which carry the . . . threat of expulsion for nonpayment." And finally, departing a third step further from the literal language of the proviso, the Court arrives at its holding that Congress could not have meant to preclude unions from the alternative of judicially enforcing fines.

Contrary to the Court, I am not at all certain that a union's right under the proviso to prescribe rules for the retention of membership includes the right to restrain a member from working by trying him on the vague charge of "conduct unbecoming a union member" and fining him for exercising his § 7 right of refusing to participate in a strike, even though the fine is only enforceable by expulsion from membership. It is one thing to say that Congress did not wish to interfere with the union's power, similar to that of any other kind of voluntary association, to prescribe specific conditions of membership. It is quite another thing to say that Congress intended to leave unions free to exercise a court-like power to try and punish members with a direct economic sanction for exercising their right to work. Just because a union might be free, under the proviso, to expel a member for crossing a picket line does not mean that Congress left unions free to threaten their members with fines. Even though a member may later discover that the threatened fine is only enforceable by expulsion, and in that sense a "lesser penalty," the direct threat of a fine, to a member normally unaware of the method the union might resort to for compelling its payment, would often be more coercive than a threat of expulsion.

Even on the assumption that § 8 (b)(1)(A) permits a union to fine a member as long as the fine is only enforceable by expulsion, the fundamental error of the Court's opinion is its failure to recognize the practical and theoretical difference between a court-enforced fine, as here, and a fine enforced by expulsion or less drastic

intra-union means.[2] As the Court recognizes, expulsion for nonpayment of a fine may, especially in the case of a strong union, be more severe than judicial collection of the fine. But, if the union membership has little value and if the fine is great, then court-enforcement of the fine may be more effective punishment, and that is precisely why the Court desires to provide weak unions with this alternative to expulsion, an alternative which is similar to a criminal court's power to imprison defendants who fail to pay fines.

In this case, each strikebreaking employee was fined from $20 to $100, and the union initiated a "test case" in state court to collect the fines. In notifying the employees of the charges against them, however, the union warned them that each day they crossed the picket line and went to work might be considered a separate offense punishable by a fine of $100. In several of the cases, the strikes lasted for many months. Thus, although the union here imposed minimal fines for the purpose of its "test case," it is not too difficult to imagine a case where the fines will be so large that the threat of their imposition will absolutely restrain employees from going to work during a strike. Although an employee might be willing to work even if it meant the loss of union membership, he would have to be well paid indeed to work at the risk that he would have to pay his union $100 a day for each day worked. Of course, as the Court suggests, he might be able to defeat the union's attempt at judicial enforcement of the fine by showing it was "unreasonable" or that he was not a "full member" of the union, but few employees would have the courage or the financial means to be willing to take that risk. Cf. *Ex parte Young*, 209 U. S. 123.

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[2] See generally Comment, 115 U. Pa. L. Rev. 17 (1966), 80 Harv. L. Rev. 683 (1967).

The Court disposes of this tremendous practical difference between court-enforced and union-enforced fines by suggesting that Congress was not concerned with "the permissible *means* of enforcement of union fines" and that court-enforcement of fines is a necessary consequence of the "contract theory" of the union-member relationship. And then the Court cautions that its holding may only apply to court enforcement of "reasonable fines." Apparently the Court believes that these considerations somehow bring reasonable court-enforced fines within the ambit of "internal union affairs." There is no basis either historically or logically for this conclusion or the considerations upon which it is based. First, the Court says that disciplinary fines were commonplace at the time the Taft-Hartley Act was passed, and thus Congress could not have meant to prohibit these "traditional internal union discipline" measures without saying so. Yet there is not one word in the authorities cited by the Court that indicates that court enforcement of fines was commonplace or traditional in 1947, and, to the contrary, until recently unions rarely resorted to court enforcement of union fines.[3] Second, Congress' unfamiliarity in 1947 with this recent innovation and consequent failure to make any distinction between union-enforced and court-enforced fines cannot support the conclusion that Congress was unconcerned with the "means" a union uses to enforce its fines. Congress was expressly concerned with enacting "rules of the game" for unions to abide by. 93 Cong. Rec. 4436, II Leg. Hist. 1206. As noted by the Labor Board the year after § 8 (b)(1)(A)

[3] These authorities are cited at n. 9 of the Court's opinion. One of them notes that the union's "discipline power has its own practical limitations" simply because the union's ultimate sanction at that time was limited to expulsion. Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483, 487 (1950). That practical limitation is today removed by the Court's holding.

was passed, "[i]n that Section, Congress was aiming at means, not at ends." *Perry Norvell Co.*, 80 N. L. R. B. 225, 239. At the very least Congress intended to preclude a union's use of certain means to collect fines. It is clear, as the Court recognizes, that Congress in enacting § 8 (b)(2) was concerned with insulating an employee's job from his union membership. If the union here had attempted to enforce the payment of the fines by persuading the employer to discharge the nonpaying employees or to withhold the fines from their wages, it would have clearly been guilty of an unfair labor practice under § 8(b)(2).[4] If the union here, operating under a union shop contract, had applied the employees' dues to the satisfaction of the fines and then charged them extra dues, that, under Board decisions, would have been a violation of § 8 (b)(1)(A), since it would have jeopardized the employees' jobs.[5] Yet here the union has resorted to equally effective outside assistance to enforce the payment of its fines, and the Court holds that within the ambit of "internal union discipline." I have already pointed to the impact that $100 per day court-enforced fines may have on an employee's job—they would totally discourage him from working at all—and I fail to see how court enforcement of union fines is any more "internal" than employer enforcement. The undeniable fact is that the union resorts to outside help when it is not strong enough to enforce obedience internally. And even if the union does not resort to outside help but uses threats of physical violence by its officers or other members to compel payment of its fines,

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[4] See, *e. g.*, *NLRB* v. *Bell Aircraft Corp.*, 206 F. 2d 235 (collective bargaining agreement between employer and union provided that employer could not promote employee who had disciplinary charges pending against him by union).

[5] See, *e. g.*, *Associated Home Builders of Greater Green Bay*, 145 N. L. R. B. 1775, remanded on other grounds, 352 F. 2d 745.

I do not doubt that this too would be a violation of § 8 (b)(1)(A).

Finally, the Court attempts to justify court-enforcement of fines by comparing it to judicial enforcement of the provisions of an ordinary commercial contract—a comparison which, according to the Court's own authority, is simply "a legal fabrication."[6] The contractual theory of union membership, at least until recently, was a fiction used by the courts to justify judicial intervention in union affairs to protect employees, not to help unions. I cannot believe that Congress intended the effectiveness of § 8 (b)(1)(A) to be impaired by such a fiction,[7] or that it was content to rely on the state courts' use of this fiction to protect members from union coercion.[8] Particularly is that so where the "contract" between the union and the employee is the involuntary

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[6] "The contract of membership is . . . a legal fabrication . . . . What are the terms of the contract? The constitutional provisions, particularly those governing discipline, are so notoriously vague that they fall far short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any term at any time. . . . In short, membership is a special relationship. It is as far removed from the main channel of contract law as the relationships created by marriage . . . ."

Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1055–1056 (1951).

[7] Although the Court states that Congress was operating within the context of the "contract theory," I have been unable to find any reference to this theory in the legislative history, even by the opponents to curtailing union power. When Senator Pepper suggested that the section should not apply to union members because they elect their own leaders, Senator Taft rejected that premise as a frequent fiction. See p. 210, *infra*.

[8] Congress was, indeed, primarily concerned with the kind of coercion state courts were unable to cope with. 93 Cong. Rec. 4016, 4024, II Leg. Hist. 1018, 1031.

product of a union shop. Although the Court of Appeals held that to be the case here, the Court takes the surprising position that "what motivated" the full union member to make the "contract" is immaterial. I doubt that even an ordinary commercial contract is enforceable against a party who entered into it involuntarily. But I am certain that Congress did not intend to insulate union coercion from the literal language of § 8 (b)(1)(A) merely because the union has secured a "full" but involuntary contract from those it desires to coerce.

III.

While the Court may be correct in saying that resort to legislative history is proper here, it is certainly not justified in ignoring the plain meaning of § 8 (b)(1)(A) on the basis of the inconclusive legislative history it points to. In the first place, "[w]hat legislative materials there are dealing with § 8 (b)(1)(A)" are only the remarks of a few Senators during the debate on the floor. The section was added on the floor after the bill had cleared the Senate Committee. There were no debates on the section in the House, there were no committee reports on the section, and debate in the Senate was brief. In the second place, though the Court deems the words "restrain or coerce" to be "imprecise," it somehow is willing to attribute a magical quality of clarity to the refrain "internal affairs of unions." The Court is thus willing to attribute more certainty and careful consideration to a refrain used by several Senators in a heated debate in response to certain criticism than it is to the words repeatedly used in the Act itself.

The repeated refrain of the debates on § 8 (b)(1)(A) was actually that it was aimed to secure "equality . . . between employers and employees."[9] Over and over

[9] 93 Cong. Rec. 4021, II Leg. Hist. 1025. See generally 93 Cong. Rec. 4432–4436, II Leg. Hist. 1199–1207.

again, Senator Taft and others emphasized that if a union indulges in conduct that would be an unfair labor practice on the part of an employer, it too should be guilty of an unfair labor practice.[10] Although the Court deems "this parallel . . . clearly . . . inapplicable to the relationship of a union member to his own union," it is clear that the sponsors of § 8 (b)(1)(A) did not think so. Several times, Senator Pepper tried to persuade Senator Taft that there was a difference between an employee's relation to his employer and his relation to his union. On each occasion, Senator Taft replied, "I cannot see any difference." 93 Cong. Rec. 4022, II Leg. Hist. 1026, 1027. When Senator Pepper asked whether the words "restrain or coerce" might have a different application to unions than to employers, Senator Taft replied:

> "The Board has been defining those words for 12 years, ever since it [the Act] came into existence. Its application to labor organizations may have a slightly different implication, but it seems to me perfectly clear that from the point of view of the employee the two cases are *parallel*. . . . If there is anything clear in the development of labor union history in the past 10 years it is that more and more *labor union employees* have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders. Certainly it seems to me that if we are willing to accept the principle that employees are entitled to the same protection against labor union leaders as against employers, then I can see no reasonable objection to the amendment . . . ." 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis added.)

[10] 93 Cong. Rec. 4016, II Leg. Hist. 1018; 93 Cong. Rec. 4021, II Leg. Hist. 1025; 93 Cong. Rec. 4023, II Leg. Hist. 1028.

When Senator Pepper replied that Senator Taft was overlooking "the fact that the workers elect their own officers, whereas they do not elect their employers"—precisely the fact that the Court points to in finding the parallel between unions and employers inapplicable—Senator Taft replied:

> "I think it is fair to say that in the case of many of the unions, the employee has a good deal more of an opportunity to select his employer than he has to select his labor-union leader; and even if he has that opportunity, . . . the man who is elected may have been voted against by various of the employees who did not desire to have that particular man elected as the union leader. In such cases the very fact that they did vote against that man is often used later by the union as a means of coercing such employees, and *in some cases the union expels them from the union or subjects them to treatment which interferes with their rights as American citizens.*" 93 Cong. Rec. 4023, II Leg. Hist. 1028. (Emphasis added.)

And finally, when Senator Pepper charged that the "amendment is an effort to protect the workers against their own leaders," Senator Taft did not deny it.[11] He clearly stated that the bill was designed to warn unions "that they do not have the right to interfere with or coerce employees, either *their own members* or those outside their union." 93 Cong. Rec. 4025, II Leg. Hist. 1032. (Emphasis added.)

It is true that the Senate sponsors of § 8 (b)(1)(A) were primarily concerned with coercive organizational tactics of unions and that most of the examples of abuse referred to in the debates concerned threats of violence

[11] 93 Cong. Rec. 4023, II Leg. Hist. 1029. Senator Taft merely responded that the section protects nonunion employees as well as union members.

by unions against nonmembers employees. But to say that §8(b)(1)(A) covers *only* coercive organizational tactics, which the Court comes very close to doing, is to ignore much of the legislative history. It is clear that §8(b)(1)(A) was intended to protect union as well as nonunion employees from coercive tactics of unions, and such protection would hardly be provided if the section applied only to organizational tactics. Also, it is clear that Congress was much more concerned with nonviolent economic coercion than with threats of physical violence. As Senator Ball, who introduced the section, put it: "But we are less concerned here with actual acts of violence than we are with threats . . . ." [12] And Senator Taft noted: "There are plenty of methods of coercion short of actual physical violence." [13] Examples were given of cases where unions threatened to double the dues of employees who waited until later to join.[14] It is difficult to see how fining a member is less coercive than doubling his dues, or how the one is "within the ambit of internal union affairs" and the other is not. After the bill was passed, in commenting on some of the abuses it was designed to correct, Senator Wiley said there are "instances in which unions . . . have imposed fines upon their members up to $20,000 because they crossed picket lines dared to go to the place of employment." [15] Twice during the debate, Senator Taft emphatically stated that the section guarantees employees who wished to work during a strike the right to do so.[16] Though on neither occasion did he expressly

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[12] 93 Cong. Rec. 4017, II Leg. Hist. 1020.

[13] 93 Cong. Rec. 4024, II Leg. Hist. 1031.

[14] 93 Cong. Rec. 4017, II Leg. Hist. 1020; 93 Cong. Rec. 4433, II Leg. Hist. 1200.

[15] 93 Cong. Rec. 5000, II Leg. Hist. 1471.

[16] See n. 1, *supra;* statement by Senator Taft quoted in n. 25 of the Court's opinion.

limit his examples to organizational strikes, the Court reads them as having such a limited reference.[17] Once again the Court utilizes ambiguous, extemporaneous legislative comments to circumvent the unambiguous language of a carefully drafted statute. Congress certainly knew how to limit expressly the applicability of the section to organizational coercion, if it intended to do so.[18]

The Court finds the strongest support for its position in statements of Senator Ball when he accepted the proviso proposed by Senator Holland. When Senator Holland observed, "Apparently it is not intended by the sponsors of the amendment to affect *at least that part of the internal administration* which has to do with the admission or the expulsion of members," [19] Senator Ball replied, "It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions." [20] From this statement by Senator Ball accepting the proviso the Court unjustifiably implies an intent to broaden it. First, there is no reason to suppose that Senator Ball was referring to any "part" of internal affairs other than that to which Senator Holland had referred. Second, the sponsors of the section repeatedly announced that it would protect union members from their leaders, and that protection would be impossible if the section did not to some extent interfere with the internal affairs of unions. As Senator Wiley said, "None of these provisions interferes *unduly* with union affairs, *except to the extent necessary to protect the individual rights of employees.*" [21] Third, the Court recognizes—without hold-

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[17] See n. 25 of the Court's opinion.

[18] See, *e. g.*, § 8 (b)(4)(B).

[19] 93 Cong. Rec. 4271, II Leg. Hist. 1139 (emphasis added).

[20] 93 Cong. Rec. 4272, II Leg. Hist. 1141.

[21] 93 Cong. Rec. 5091, II Leg. Hist. 1472 (emphasis added).

ing—that the section may protect union members from "arbitrary" action of union leaders. However, it is difficult to understand how the arbitrariness or nonarbitrariness of a fine determines whether it is within the scope of "internal union affairs." [22]

What the Court does today is to write a new proviso to § 8 (b)(1)(A): "this paragraph shall not impair the right of a labor organization nonarbitrarily to restrain or coerce its members in their exercise of § 7 rights." Nothing in the legislative history supports the creation of this new proviso.

IV.

The Court seeks further support for its holding by reference to the fact that the 1959 Landrum-Griffin

[22] The NLRB has itself recognized that a union "fine is by nature coercive." In *Local 138, Operating Engineers*, 148 N. L. R. B. 679, and *H. B. Roberts, Business Manager of Local 925, Operating Engineers*, 148 N. L. R. B. 674, enforced, 121 U. S. App. D. C. 297, 350 F. 2d 427, the Board held § 8 (b)(1)(A) prohibited a union from fining members who violated an internal union rule against filing charges with the NLRB. The Board concluded that "the imposition of a fine by a labor organization upon a member who files charges with the Board does restrain and coerce that member in the exercise of his right to file charges. The union's conduct is no less coercive where the filing of the charge is alleged to be in conflict with an internal union rule or policy and the fine is imposed allegedly to enforce that internal policy." *Local 138*, 148 N. L. R. B., at 682. In the present case, the Board distinguished *Local 138* and *Roberts* on the ground that the union rules involved there were "beyond the competence of the union to enforce" and were "not the legitimate concern of a union." 149 N. L. R. B. 67, 69. My Brother WHITE seems to take a similar position in resting his concurrence on the Court's holding that the union rule against crossing a picket line is "valid." But neither Congress' aim in § 8 (b)(1)(A) of proscribing certain means used to accomplish legitimate ends, nor the Court's view that Congress intended no interference with internal union affairs, would allow the application of the section to depend on the Board's or this Court's views of whether a particular internal union rule is "valid" or not.

amendments were "thought to be the first comprehensive regulation by Congress of the conduct of internal union affairs." And the Court thinks that to construe § 8 (b) (1)(A) according to its literal language to prohibit fines "is to say that Congress preceded the Landrum-Griffin amendments with an even more pervasive regulation of the internal affairs of unions." [25] But again the Court fails to distinguish between court-enforced fines and fines enforced by the traditional method of expulsion. Although both kinds of fines are coercive, I have already indicated that the proviso to § 8 (b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted. If one assumes that the only fines prohibited by the section are court-enforced fines, then the section was not a pervasive regulation of union internal affairs. If court enforcement of fines is within the ambit of internal union affairs, which I doubt, then those affairs were only incidentally regulated by a flat prohibition of this seldom-used method of union discipline. If the common forms of union discipline—expulsion and fines enforceable by expulsion—were not prohibited or regulated by Taft-Hartley, then Landrum-Griffin was indeed the first comprehensive regulation of them.

V.

The union here had a union security clause in its contract with Allis-Chalmers. That clause made it necessary

[25] Although the Landrum-Griffin Act might be resorted to for the purpose of determining the limits of "vague language" in the Taft-Hartley Act, it should not be used, as the Court here uses it, to deprive employees of rights unequivocally granted them by the earlier Act. Section 103 of the Landrum-Griffin Act, 73 Stat. 523 (1959), 29 U. S. C. § 413, expressly provides: "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any Federal law . . ."

for all employees, including the ones involved here, to pay dues and fees to the union. But § 8 (a)(3) and § 8 (b)(2) make it clear that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers' Union* v. *Labor Board*, 347 U. S. 17, 41. If the union uses the union security clause to compel employees to pay dues, characterizes such employees as members, and then uses such membership as a basis for imposing court-enforced fines upon those employees unwilling to participate in a union strike, then the union security clause is being used for a purpose other than "to compel payment of union dues and fees." It is being used to coerce employees to join in union activity in violation of § 8 (b)(2).

The Court suggests that this problem is not present here, because the fined employees failed to prove they enjoyed other than full union membership, that their role in the union was not in fact limited to the obligation of paying dues. For several reasons, I am unable to agree with the Court's approach. Few employees forced to become "members" of the union by virtue of the union security clause will be aware of the fact that they must somehow "limit" their membership to avoid the union's court-enforced fines. Even those who are brash enough to attempt to do so may be unfamiliar with how to do it. Must they refrain from doing anything but paying dues, or will signing the routine union pledge still leave them with less than full membership? And finally, it is clear that what restrains the employee from going to work during a union strike is the union's threat that it will fine him and collect the fine from him in court. How many employees in a union shop whose names appear on the union's membership rolls will be willing to ignore that threat in the hope that they will later be able to convince the Labor Board or

the state court that they were not full members of the union? By refusing to decide whether § 8 (b)(1)(A) prohibits the union from fining an employee who does nothing more than pay union dues as a condition to retaining his job in a union shop, the Court adds coercive impetus to the union's threat of fines. Today's decision makes it highly dangerous for an employee in a union shop to exercise his § 7 right to refrain from participating in a strike called by a union in which he is a member in name only.

VI.

The National Labor Relations Act, as originally passed and amended from time to time, is the work product of draftsmen skilled by long experience in labor affairs. These draftsmen thoroughly understood labor legislation terminology, especially the oft-used words "restrain or coerce." Sections 7 and 8 together bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration. In my judgment it ill behooves this Court to strike so diligently to defeat this unequivocally declared purpose of Congress, merely because the Court believes that too much freedom of choice for workers will impair the effective power of unions. Cf. *Vaca* v. *Sipes*, 386 U. S. 171, 203 (dissenting opinion). A court-enforced fine is certainly coercive, certainly affects the employee's job, and certainly is not a traditional method of internal union discipline. When applied by a union to an employee who has joined it as a condition of obtaining employment in a union shop, it defeats the provisions of the Act designed to prevent union security clauses

from being used for purposes other than to compel payment of dues. In such a situation it cannot be justified on any theory that the employee has contracted away or waived his § 7 rights.

Where there is clear legislative history to justify it, courts often decline to follow the literal meaning of a statute. But this practice is fraught with dangers when the legislative history is at best brief, inconclusive, and ambiguous. This is precisely such a case, and I dissent because I am convinced that the Court has ignored the literal language of § 8 (b)(1)(A) in order to give unions a power which the Court, but not Congress, thinks they need.

EXHIBIT 25

UNITED STATES *v.* WADE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 334. Argued February 16, 1967.—Decided June 12, 1967.

Several weeks after respondent's indictment for robbery of a federally insured bank and for conspiracy, respondent, without notice to his appointed counsel, was placed in a lineup in which each person wore strips of tape on his face, as the robber allegedly had done, and on direction repeated words like those the robber allegedly had used. Two bank employees identified respondent as the robber. At the trial when asked if the robber was in the courtroom, they identified respondent. The prior lineup identifications were elicited on cross-examination. Urging that the conduct of the lineup violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel, respondent filed a motion for judgment of acquittal or, alternatively, to strike the courtroom identifications. The trial court denied the motions and respondent was convicted. The Court of Appeals reversed, holding that though there was no Fifth Amendment deprivation the absence of counsel at the lineup denied respondent his right to counsel under the Sixth Amendment and required the grant of a new trial at which the in-court identifications of those who had made lineup identifications would be excluded. *Held:*

1. Neither the lineup itself nor anything required therein violated respondent's Fifth Amendment privilege against self-incrimination since merely exhibiting his person for observation by witnesses and using his voice as an identifying physical characteristic involved no compulsion of the accused to give evidence of a testimonial nature against himself which is prohibited by that Amendment. Pp. 221–223.

2. The Sixth Amendment guarantees an accused the right to counsel not only at his trial but at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine his fate and where the absence of counsel might derogate from his right to a fair trial. Pp. 223–227.

3. The post-indictment lineup (unlike such preparatory steps as analyzing fingerprints and blood samples) was a critical prosecutive stage at which respondent was entitled to the aid of counsel. Pp. 227–239.

(a) There is a great possibility of unfairness to the accused at that point, (1) because of the manner in which confrontations for identification are frequently conducted, (2) because of dangers inherent in eyewitness identification and suggestibility inherent in the context of the confrontations, and (3) because of the likelihood that the accused will often be precluded from reconstructing what occurred and thereby obtaining a full hearing on the identification issue at trial. Pp. 229–235.

(b) This case illustrates the potential for improper influence on witnesses through the lineup procedure, since the bank employees were allowed to see respondent in the custody of FBI agents before the lineup began. Pp. 233–234.

(c) The presence of counsel at the lineup will significantly promote fairness at the confrontation and a full hearing at trial on the issue of identification. Pp. 236–238.

4. In-court identification by a witness to whom the accused was exhibited before trial in the absence of counsel must be excluded unless it can be established that such evidence had an independent origin or that error in its admission was harmless. Since it is not clear that the Court of Appeals applied the prescribed rule of exclusion, and since the nature of the in-court identifications here was not an issue in the trial and cannot be determined on the record, the case must be remanded to the District Court for resolution of these issues. Pp. 239–243.

358 F. 2d 557, vacated and remanded.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson, Nathan Lewin* and *Ronald L. Gainer.*

Weldon Holcomb argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for

identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like "put the money in the bag," the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial, the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The

Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate Wade's Fifth Amendment rights, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights . . . ." 358 F. 2d 557, 560. We granted certiorari, 385 U. S. 811, and set the case for oral argument with No. 223, *Gilbert* v. *California, post,* p. 263, and No. 254, *Stovall* v. *Denno, post,* p. 293, which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I.

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ." *Schmerber* v. *California,* 384 U. S. 757, 761. We there held that compelling a suspect to submit to a withdrawal of a sample of his blood for analysis for alcohol content and the admission in evidence of the analysis report were not compulsion to those ends. That holding was supported by the opinion in *Holt* v. *United States,* 218 U. S. 245, in which case a question arose as to whether a blouse belonged to the defendant. A witness testified at trial that the defendant put on the blouse and it had fit him. The defendant argued that the admission of the testimony was error because compelling him to put on the blouse was a violation of his privilege. The Court

rejected the claim as "an extravagant extension of the Fifth Amendment," Mr. Justice Holmes saying for the Court:

> "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 218 U. S., at 252–253.

The Court in *Holt*, however, put aside any constitutional questions which might be involved in compelling an accused, as here, to exhibit himself before victims of or witnesses to an alleged crime; the Court stated, "we need not consider how far a court would go in compelling a man to exhibit himself." *Id.*, at 253.[1]

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying

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[1] *Holt* was decided before *Weeks* v. *United States*, 232 U. S. 383, fashioned the rule excluding illegally obtained evidence in a federal prosecution. The Court therefore followed *Adams* v. *New York*, 192 U. S. 585, in holding that, in any event, "when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." 218 U. S., at 253.

physical characteristic, not to speak his guilt. We held in *Schmerber, supra,* at 761, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence,'" *Schmerber, supra,* at 764. We recognized that "both federal and state courts have usually held that . . . [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.,* at 764. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II.

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. Our rejection of the right to counsel claim in *Schmerber* rested on our conclusion in that case that "[n]o issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." 384 U. S., at 766. In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable

to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact." [2] The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Note, 73 Yale L. J. 1000, 1030–1033 (1964). "Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed." 73 Yale L. J., *supra*, at 1033–1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today.[3] The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal

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[2] See *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Beaney, Right to Counsel in American Courts 8–26.

[3] See Note, 73 Yale L. J. 1000, 1040–1042 (1964); Comment, 53 Calif. L. Rev. 337, 347–348 (1965).

prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*" (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell* v. *Alabama, supra,* we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings . . . ," *id.,* at 57, during which the accused "requires the guiding hand of counsel . . . ," *id.,* at 69, if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment—for example, that provided by Alabama—where certain rights might be sacrificed or lost: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted . . . ." *Hamilton* v. *Alabama,* 368 U. S. 52, 54. See *White* v. *Maryland,* 373 U. S. 59. The principle was also applied in *Massiah* v. *United States,* 377 U. S. 201, where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting a concurring opinion in *Spano* v. *New York,* 360 U. S. 315, 326, that "[a]nything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " 377 U. S., at 204.

In *Escobedo* v. *Illinois,* 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's pres-

ence if the accused was to have a fair opportunity to present a defense at the trial itself:

> "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' . . . . 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."' " 378 U. S., at 487–488.

Finally in *Miranda* v. *Arizona*, 384 U. S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions "no more than reflect a constitutional principle established as long ago as *Powell* v. *Alabama* . . . ." *Massiah* v. *United States*, *supra*, at 205. It is central to that principle that in addition to counsel's presence at trial,[4] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[5] The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the

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[4] See, *e. g.*, *Powell* v. *Alabama*, 287 U. S. 45; *Hamilton* v. *Alabama*, 368 U. S. 52; *White* v. *Maryland*, 373 U. S. 59; *Escobedo* v. *Illinois*, 378 U. S. 478; *Massiah* v. *United States*, 377 U. S. 201.

[5] See cases cited n. 4, *supra*; *Avery* v. *Alabama*, 308 U. S. 444, 446.

Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *Texas*, 380 U. S. 400.

In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III.

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at

trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

IV.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[6] Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commenta-

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[6] Borchard, Convicting the Innocent; Frank & Frank, Not Guilty; Wall, Eye-Witness Identification in Criminal Cases; 3 Wigmore, Evidence § 786a (3d ed. 1940); Rolph, Personal Identity; Gross, Criminal Investigation 47–54 (Jackson ed. 1962); Williams, Proof of Guilt 83–98 (1955); Wills, Circumstantial Evidence 192–205 (7th ed. 1937); Wigmore, The Science of Judicial Proof §§ 250–253 (3d ed. 1937).

tor has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." Wall, Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways.[7] And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." [8]

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in *Stovall* v. *Denno*, *supra*. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.[9] But

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[7] See Wall, *supra*, n. 6, at 26–65; Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col. L. Rev. 94, 98–99 (1966); Williams, Identification Parades, [1955] Crim. L. Rev. (Eng.) 525; Paul, Identification of Accused Persons, 12 Austl. L. J. 42 (1938); Houts, From Evidence to Proof 25; Williams & Hammelmann, Identification Parades, Parts I & II, [1963] Crim. L. Rev. 479–490, 545–555; Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am. J. Police Sci. 79 (1930); Wigmore, The Science of Judicial Proof, *supra*, n. 6, at § 253; Devlin, The Criminal Prosecution in England 70; Williams, Proof of Guilt 95–97.

[8] Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

[9] Williams & Hammelmann, Identification Parades, Part I, *supra*, n. 7.

as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . . ." *Miranda* v. *Arizona, supra,* at 448. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers;[10] in any event, the participants' names are rarely recorded or divulged at trial.[11] The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives.[12] In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.[13] Improper in-

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[10] See Wall, *supra,* n. 6, at 57–59; see, *e. g., People* v. *Boney,* 28 Ill. 2d 505, 192 N. E. 2d 920 (1963); *People* v. *James,* 218 Cal. App. 2d 166, 32 Cal. Rptr. 283 (1963).

[11] See Rolph, Personal Identity 50: "The bright burden of identity, at these parades, is lifted from the innocent participants to hover about the suspect, leaving the rest featureless and unknown and without interest."

[12] See Williams & Hammelmann, Identification Parades, Part II, [1963] Crim. L. Rev. 545, 546; Borchard, Convicting the Innocent 367.

[13] An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect cannot see the witness. See *Gilbert* v. *United States,* 366 F. 2d 923 (C. A. 9th Cir. 1966). In some a one-way mirror is used and what is said on the witness'

fluences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.[14] Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; [15] the jury's choice is between the accused's unsupported version and that of the police officers present.[16] In short, the accused's

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side cannot be heard. See *Rigney* v. *Hendrick*, 355 F. 2d 710, 711, n. 2 (C. A. 3d Cir. 1965); *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961).

[14] Williams & Hammelmann, Part I, *supra*, n. 7, at 489; Napley, *supra*, n. 7, at 99.

[15] See *In re Groban*, 352 U. S. 330, 340 (BLACK, J., dissenting). The difficult position of defendants in attempting to protest the manner of pretrial identification is illustrated by the many state court cases in which contentions of blatant abuse rested on their unsupportable allegations, usually controverted by the police officers present. See, *e. g.*, *People* v. *Shields*, 70 Cal. App. 2d 628, 634–635, 161 P. 2d 475, 478–479 (1945); *People* v. *Hicks*, 22 Ill. 2d 364, 176 N. E. 2d 810 (1961); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmon* v. *Commonwealth*, 321 S. W. 2d 397 (Ky. Ct. App. 1959); *Lubinski* v. *State*, 180 Md. 1, 8, 22 A. 2d 455, 459 (1941). For a striking case in which hardly anyone agreed upon what occurred at the lineup, including who identified whom, see *Johnson* v. *State*, 237 Md. 283, 206 A. 2d 138 (1965).

[16] An instructive example of the defendant's predicament may be found in *Proctor* v. *State*, 223 Md. 394, 164 A. 2d 708 (1960). A prior identification is admissible in Maryland only under the salutary rule that it cannot have been made "under conditions of unfairness or unreliability." *Id.*, at 401, 164 A. 2d, at 712. Against the defendant's contention that these conditions had not been met, the Court stated:

"In the instant case, there are no such facts as, in our judgment, would call for a finding that the identification . . . was made under conditions of unfairness or unreliability. The relatively large number of persons put into the room together for [the victim] to look at

inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:

> "In a Canadian case . . . the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over." [17]

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal

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is one circumstance indicating fairness, and the fact that the police officer was unable to remember the appearances of the others and could not recall if they had physical characteristics similar to [the defendant's] or not is at least suggestive that they were not of any one type or that they all differed markedly in looks from the defendant. There is no evidence that the Police Sergeant gave the complaining witness any indication as to which of the thirteen men was the defendant; the Sergeant's testimony is simply that he asked [the victim] if he could identify [the defendant] after having put the thirteen men in the courtroom."

[17] Wall, Eye-Witness Identification in Criminal Cases 53. For other such examples see Houts, From Evidence to Proof 25; Frankfurter, The Case of Sacco and Vanzetti 12–14, 30–32; 3 Wigmore, Evidence § 786a, at 164, n. 2 (3d ed. 1940); Paul, Identification of Accused Persons, 12 Austl. L. J. 42, 44 (1938); Rolph, Personal Identity 34–43.

numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness,[18] that the other participants in a lineup were grossly dissimilar in appearance to the suspect,[19] that only the suspect was required to wear distinctive clothing which the culprit allegedly wore,[20] that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail,[21] that the suspect is pointed out before or during a lineup,[22] and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.[23]

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identi-

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[18] See *People* v. *James*, 218 Cal. App. 2d 166, 170–171, 32 Cal. Rptr. 283, 286 (1963); *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963).

[19] See *Fredericksen* v. *United States*, 105 U. S. App. D. C. 262, 266 F. 2d 463 (1959); *People* v. *Adell*, 75 Ill. App. 2d 385, 221 N. E. 2d 72 (1966); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *People* v. *Seppi*, 221 N. Y. 62, 116 N. E. 793 (1917); *State* v. *Duggan*, 215 Ore. 151, 162, 333 P. 2d 907, 912 (1958).

[20] See *People* v. *Crenshaw*, 15 Ill. 2d 458, 460, 155 N. E. 2d 599, 602 (1959); *Presley* v. *State*, 224 Md. 550, 168 A. 2d 510 (1961); *State* v. *Ramirez*, 76 N. M. 72, 412 P. 2d 246 (1966); *State* v. *Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927); *Barrett* v. *State*, 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[21] See *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961); *Bishop* v. *State*, 236 Ark. 12, 364 S. W. 2d 676 (1963); *People* v. *Thompson*, 406 Ill. 555, 94 N. E. 2d 349 (1950); *People* v. *Berne*, 384 Ill. 334, 51 N. E. 2d 578 (1943); *People* v. *Martin*, 304 Ill. 494, 136 N. E. 711 (1922); *Barrett* v. *State*, 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[22] See *People* v. *Clark*, 28 Ill. 2d 423, 192 N. E. 2d 851 (1963); *Gillespie* v. *State*, 355 P. 2d 451, 454 (Okla. Cr. 1960).

[23] See *People* v. *Parham*, 60 Cal. 2d 378, 384 P. 2d 1001 (1963).

fying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that had entered the bank." [24]

The lineup in *Gilbert, supra,* was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each other's presence, a procedure said to be fraught with dangers of suggestion.[25] And the vice of suggestion created by the identification in *Stovall, supra,* was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31–32.

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the

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[24] See Wall, *supra,* n. 6, at 48; Napley, *supra,* n. 7, at 99: "[W]hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms . . . ."

[25] Williams & Hammelmann, Part I, *supra,* n. 7, at 486; Burtt, Applied Psychology 254–255.

secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. Williams & Hammelmann, in one of the most comprehensive studies of such forms of identification, said, "[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . ." Identification Parades, Part I, [1963] Crim. L. Rev. 479, 483.

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas*, 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no

effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial,[26] there can be

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[26] One commentator proposes a model statute providing not only for counsel, but other safeguards as well:

"Most, if not all, of the attacks on the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.

"This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are similarly garbed. A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.

"This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.

"The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each

little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama,* 287 U. S. 45, 57. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." See *Carnley* v. *Cochran,* 369 U. S. 506. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice to counsel would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.[27] And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the

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witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.

"The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible." Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 627–628.

[27] Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel.

basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda* v. *Arizona* concerning presence of counsel during custodial interrogation, 384 U. S., at 480–481:

> "[A]n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.[28] That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.[29]

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[28] Concern is also expressed that the presence of counsel will force divulgence of the identity of government witnesses whose identity the Government may want to conceal. To the extent that this is a valid or significant state interest there are police practices commonly used to effect concealment, for example, masking the face.

[29] Many other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend, Napley, *supra*, n. 7, at 98–99; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial. Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 621–627.

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." [30] But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda* v. *Arizona*, *supra*, at 467.

V.

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is

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[30] Thirty years ago Wigmore suggested a "scientific method" of pretrial identification "to reduce the risk of error hitherto inherent in such proceedings." Wigmore, The Science of Judicial Proof 541 (3d ed. 1937). Under this approach, at least 100 talking films would be prepared of men from various occupations, races, etc. Each would be photographed in a number of stock movements, with and without hat and coat, and would read aloud a standard passage. The suspect would be filmed in the same manner. Some 25 of the films would be shown in succession in a special projection room in which each witness would be provided an electric button which would activate a board backstage when pressed to indicate that the witness had identified a given person. Provision would be made for the degree of hesitancy in the identification to be indicated by the number of presses. *Id.*, at 540–541. Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial. See discussion of fingerprint and like tests, Part III, *supra*, and of handwriting exemplars in *Gilbert* v. *California*, *supra*.

to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 79, n. 18.[31] Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified.[32] See *Nardone* v. *United States*, 308 U. S. 338, 341. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark

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[31] See *Goldstein* v. *United States*, 316 U. S. 114, 124, n. 1 (Murphy, J., dissenting). "[A]fter an accused sustains the initial burden, imposed by *Nardone* v. *United States*, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin."

[32] We reach a contrary conclusion in *Gilbert* v. *California*, *supra*, as to the admissibility of the witness' testimony that he also identified the accused at the lineup.

in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun* v. *United States*, 371 U. S. 471, 488, "'[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt 221 (1959)." See also *Hoffa* v. *United States*, 385 U. S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.[33]

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[33] Thus it is not the case that "[i]t matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime." Such factors will have an important bearing upon the true basis of

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. The court stated that "it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred," and that the testimony of the two witnesses "may well have been colored by the illegal procedure [and] was prejudicial." 358 F. 2d, at 560. Moreover, the court was persuaded, in part, by the "compulsory verbal responses made by Wade at the instance of the Special Agent." *Ibid.* This implies the erroneous holding that Wade's privilege against self-incrimination was violated so that the denial of counsel required exclusion.

On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman* v. *California,* 386 U. S. 18, and for the District Court to reinstate the conviction or order a new trial, as may be proper. See *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233, 245–246.

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the witness' in-court identification. Moreover, the State's inability to bolster the witness' courtroom identification by introduction of the lineup identification itself, see *Gilbert* v. *California, supra,* will become less significant the more the evidence of other opportunities of the witness to observe the defendant. Thus where the witness is a "kidnap victim who has lived for days with his abductor" the value to the State of admission of the lineup identification is indeed marginal, and such identification would be a mere formality.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins the opinion of the Court except for Part I, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE FORTAS.

MR. JUSTICE DOUGLAS joins the opinion of the Court except for Part I. On that phase of the case he adheres to the dissenting views in *Schmerber* v. *California*, 384 U. S. 757, 772–779, since he believes that compulsory lineup violates the privilege against self-incrimination contained in the Fifth Amendment.

MR. JUSTICE CLARK, concurring.

With reference to the lineup point involved in this case I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect—a prerequisite to establishment of guilt—occurs at this stage, and with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. I dissented in *Miranda* but I am bound by it now, as we all are. *Schmerber* v. *California*, 384 U. S. 757 (1966), precludes petitioner's claim of self-incrimination. I therefore join the opinion of the Court.

MR. JUSTICE BLACK, dissenting in part and concurring in part.

On March 23, 1965, respondent Wade was indicted for robbing a bank; on April 2, he was arrested; and on April 26, the court appointed a lawyer to represent him.

Fifteen days later, while Wade was still in custody, an FBI agent took him and several other prisoners into a room at the courthouse, directed each to participate in a lineup wearing strips of tape on his face and to speak the words used by the robber at the bank. This was all done in order to let the bank employee witnesses look at Wade for identification purposes. Wade's lawyer was not notified of or present at the lineup to protect his client's interests. At Wade's trial, two bank employees identified him in the courtroom. Wade objected to this testimony, when, on cross-examination, his counsel elicited from these witnesses the fact that they had seen Wade in the lineup. He contended that by forcing him to participate in the lineup, wear strips of tape on his face, and repeat the words used by the robber, all without counsel, the Government had (1) compelled him to be a witness against himself in violation of the Fifth Amendment, and (2) deprived him of the assistance of counsel for his defense in violation of the Sixth Amendment.

The Court in Part I of its opinion rejects Wade's Fifth Amendment contention. From that I dissent. In Parts II–IV of its opinion, the Court sustains Wade's claim of denial of right to counsel in the out-of-court lineup, and in that I concur. In Part V, the Court remands the case to the District Court to consider whether the courtroom identification of Wade was the fruit of the illegal lineup, and, if it was, to grant him a new trial unless the court concludes that the courtroom identification was harmless error. I would reverse the Court of Appeals' reversal of Wade's conviction, but I would not remand for further proceedings. Since the prosecution did not use the out-of-court lineup identification against Wade at his trial, I believe the conviction should be affirmed.

I.

In rejecting Wade's claim that his privilege against self-incrimination was violated by compelling him to appear in the lineup wearing the tape and uttering the words given him by the police, the Court relies on the recent holding in *Schmerber* v. *California*, 384 U. S. 757. In that case the Court held that taking blood from a man's body against his will in order to convict him of a crime did not compel him to be a witness against himself. I dissented from that holding, 384 U. S., at 773, and still dissent. The Court's reason for its holding was that the sample of Schmerber's blood taken in order to convict him of crime was neither "testimonial" nor "communicative" evidence. I think it was both. It seems quite plain to me that the Fifth Amendment's Self-incrimination Clause was designed to bar the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood. The Government simply took his blood against his will and over his counsel's protest for the purpose of convicting him of crime. So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by the Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself. Consequently, because of this violation of the Fifth Amend-

ment, and not because of my own personal view that the Government's conduct was "unfair," "prejudicial," or "improper," I would prohibit the prosecution's use of lineup identification at trial.

II.

I agree with the Court, in large part because of the reasons it gives, that failure to notify Wade's counsel that Wade was to be put in a lineup by government officers and to be forced to talk and wear tape on his face denied Wade the right to counsel in violation of the Sixth Amendment. Once again, my reason for this conclusion is solely the Sixth Amendment's guarantee that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." As this Court's opinion points out, "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" And I agree with the Court that a lineup is a "critical stage" of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, *Miranda* v. *Arizona*, 384 U. S. 436, for, contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.

I agree with the Court that counsel's presence at the lineup is necessary to protect the accused's right to a "fair trial," only if by "fair trial" the Court means a trial in accordance with the "Law of the Land" as specifically set out in the Constitution. But there are

implications in the Court's opinion that by a "fair trial" the Court means a trial which a majority of this Court deems to be "fair" and that a lineup is a "critical stage" only because the Court, now assessing the "innumerable dangers" which inhere in it, thinks it is such. That these implications are justified is evidenced by the Court's suggestion that "[l]egislative or other regulations . . . which eliminate the risks of abuse . . . at lineup proceedings . . . may also remove the basis for regarding the stage as 'critical.'" And it is clear from the Court's opinion in *Gilbert* v. *California, post,* p. 263, that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though "critical" in the sense of the prosecution's gathering of evidence—is "critical" to the Court's own view of a "fair trial." I am wholly unwilling to make the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though thought to be empirical, assessment of the "risk that . . . counsel's absence . . . might derogate from . . . [a defendant's] right to a fair trial." *Ante,* at 228. See *Pointer* v. *Texas,* 380 U. S. 400, 412 (concurring opinion of Goldberg, J.).

III.

I would reverse Wade's conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification. But the prosecution here did neither of these things. After prosecution witnesses under oath identified Wade in the courtroom, it was the defense, and not the prosecution, which brought out the prior lineup identification. While stating that "a *per se* rule of exclusion of courtroom identification would be unjustified," the Court, nevertheless, remands this case for "a

hearing to determine whether the in-court identifications had an independent source," or were the tainted fruits of the invalidly conducted lineup. From this holding I dissent.

In the first place, even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The "tainted fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy "tainted fruit" hearing. The fact of and circumstances surrounding a prior lineup identification might be used by the defense to impeach the credibility of the in-court identifications, but not to exclude them completely.

But more important, there is no constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state

crimes under state laws in state courts. See *Gilbert* v. *California, supra.* The Constitution deliberately reposed in the States very broad power to create and to try crimes according to their own rules and policies. *Spencer* v. *Texas,* 385 U. S. 554. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials. Cf. *Berger* v. *New York, ante,* p. 70 (BLACK, J., dissenting). Neither *Nardone* v. *United States,* 308 U. S. 338, nor *Wong Sun* v. *United States,* 371 U. S. 471, both federal cases and both decided "in other contexts," supports what the Court demands of the States today.

Perhaps the Court presumes to write this constitutional rule of evidence on the basis of the Fourteenth Amendment's Due Process Clause. This is not the time or place to consider that claim. Suffice it for me to say briefly that I find no such authority in the Due Process Clause. It undoubtedly provides that a person must be tried in accordance with the "Law of the Land." Consequently, it violates due process to try a person in a way prohibited by the Fourth, Fifth, or Sixth Amendments of our written Constitution. But I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. See, *e. g., Rochin* v. *California,* 342 U. S. 165. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution.

With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution's first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be "judicial activism" at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

I would affirm Wade's conviction.

MR. JUSTICE WHITE, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting in part and concurring in part.

The Court has again propounded a broad constitutional rule barring use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel. This was the approach of the Court in *Miranda* v. *Arizona*, 384 U. S. 436. I objected then to what I thought was an uncritical and doctrinaire approach without satisfactory factual foundation. I have much the same view of the present ruling and therefore dissent from the judgment and from Parts II, IV, and V of the Court's opinion.

The Court's opinion is far-reaching. It proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admis-

sible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel—admittedly a heavy burden for the State and probably an impossible one. To all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present.

The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who had committed the crime.

The premise for the Court's rule is not the general unreliability of eyewitness identifications nor the difficulties inherent in observation, recall, and recognition. The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in

order to detect recurring instances of police misconduct.[1] I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it.[2] Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials. Cf. *Washington* v. *Texas, ante,* p. 14.

The Court goes beyond assuming that a great majority of the country's police departments are following improper practices at pretrial identifications. To find the lineup a "critical" stage of the proceeding and to exclude identifications made in the absence of counsel, the Court must also assume that police "suggestion," if it occurs at all, leads to erroneous rather than accurate identifications and that reprehensible police conduct will have an unavoidable and largely undiscoverable impact on the trial. This in turn assumes that there is now no adequate source from which defense counsel can learn about the circumstances of the pretrial identification in order to place before the jury all of the considerations which should enter into an appraisal of courtroom identification

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[1] Yet in *Stovall* v. *Denno, post,* p. 293, the Court recognizes that improper police conduct in the identification process has not been so widespread as to justify full retroactivity for its new rule.

[2] In *Miranda* v. *Arizona,* 384 U. S. 436, 449, the Court noted that O'Hara, Fundamentals of Criminal Investigation (1956) is a text that has enjoyed extensive use among law enforcement agencies and among students of police science. The quality of the work was said to rest on the author's long service as observer, lecturer in police science, and work as a federal crime investigator. O'Hara does not suggest that the police should or do use identification machinery improperly; instead he argues for techniques that would increase the reliability of eyewitness identifications, and there is no reason to suggest that O'Hara's views are not shared and practiced by the majority of police departments throughout the land.

evidence. But these are treacherous and unsupported assumptions,[3] resting as they do on the notion that the defendant will not be aware, that the police and the witnesses will forget or prevaricate, that defense counsel will be unable to bring out the truth and that neither jury, judge, nor appellate court is a sufficient safeguard against unacceptable police conduct occurring at a pretrial identification procedure. I am unable to share the Court's view of the willingness of the police and the ordinary citizen-witness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification.

There are several striking aspects to the Court's holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such con-

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[3] The instant case and its companions, *Gilbert* v. *California*, *post*, p. 263, and *Stovall* v. *Denno*, *post*, p. 293, certainly lend no support to the Court's assumptions. The police conduct deemed improper by the Court in the three cases seems to have come to light at trial in the ordinary course of events. One can ask what more counsel would have learned at the pretrial identifications that would have been relevant for truth determination at trial. When the Court premises its constitutional rule on police conduct so subtle as to defy description and subsequent disclosure it deals in pure speculation. If police conduct is intentionally veiled, the police will know about it, and I am unwilling to speculate that defense counsel at trial will be unable to reconstruct the known circumstances of the pretrial identification. And if the "unknown" influence on identifications is "innocent," the Court's general premise evaporates and the problem is simply that of the inherent shortcomings of eyewitness testimony.

frontations, it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards.

Third, courtroom identification may be barred, absent counsel at a prior identification, regardless of the extent of counsel's information concerning the circumstances of the previous confrontation between witness and defendant—apparently even if there were recordings or sound-movies of the events as they occurred. But if the rule is premised on the defendant's right to have his counsel know, there seems little basis for not accepting other means to inform. A disinterested observer, recordings, photographs—any one of them would seem adequate to furnish the basis for a meaningful cross-examination of the eyewitness who identifies the defendant in the courtroom.

I share the Court's view that the criminal trial, at the very least, should aim at truthful factfinding, including accurate eyewitness identifications. I doubt, however, on the basis of our present information, that the tragic mistakes which have occurred in criminal trials are as much the product of improper police conduct as they are the consequence of the difficulties inherent in eyewitness testimony and in resolving evidentiary conflicts by court or jury. I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments everywhere.

But, it may be asked, what possible state interest militates against requiring the presence of defense counsel at lineups? After all, the argument goes, he *may* do some good, he *may* upgrade the quality of identification evidence in state courts and he can scarcely do any

harm. Even if true, this is a feeble foundation for fastening an ironclad constitutional rule upon state criminal procedures. Absent some reliably established constitutional violation, the processes by which the States enforce their criminal laws are their own prerogative. The States *do* have an interest in conducting their own affairs, an interest which cannot be displaced simply by saying that there are no valid arguments with respect to the merits of a federal rule emanating from this Court.

Beyond this, however, requiring counsel at pretrial identifications as an invariable rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before an indictment is returned or an information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances *accurate* identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognizance, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identifica-

tion stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until the lineup occurs whether or not the police really have the right man.[4]

Finally, I think the Court's new rule is vulnerable in terms of its own unimpeachable purpose of increasing the reliability of identification testimony.

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.[5] To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must

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[4] I would not have thought that the State's interest regarding its sources of identification is any less than its interest in protecting informants, especially those who may aid in identification but who will not be used as witnesses. See *McCray* v. *Illinois*, 386 U. S. 300.

[5] "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U. S. 78, 88. See also *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28; *Napue* v. *Illinois*, 360 U. S. 264; *Brady* v. *Maryland*, 373 U. S. 83; *Giles* v. *Maryland*, 386 U. S. 66; *Miller* v. *Pate*, 386 U. S. 1.

be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[6] Our interest in not con-

[6] One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82–83. "What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. . . . If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness.' The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. 'You may,' writes Harris, 'sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.' Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him "hang himself." 'And thus,' adds Taft, 'it may happen that not only is the value of his testimony lost, but the side which produces him

victing the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe[7] but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

I would not extend this system, at least as it presently operates, to police investigations and would not require counsel's presence at pretrial identification procedures. Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any

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suffers for seeking aid from such a source'—although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"'An intimidating manner in putting questions,' writes Wigmore, 'may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value.'"

[7] See the materials collected in c. 3 of Countryman & Finman, The Lawyer in Modern Society; Joint Committee on Continuing Legal Education of American Law Institute and the American Bar Association, The Problem of a Criminal Defense 1–46 (1961); Stovall, Aspects of the Advocate's Dual Responsibility, 22 The Alabama Lawyer 66; Gold, Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer, 14 Clev.-Mar. L. Rev. 65; Symposium on Professional Ethics, 64 Mich. L. Rev. 1469–1498.

movements or to speak any words in a lineup or even to appear in one. To that extent the impact on truthful factfinding is quite obvious. Others will not only observe what occurs and develop possibilities for later cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful factfinding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court's new rule, at least absent some clearly defined limits on counsel's role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. It may well produce fewer convictions, but that is hardly a proper measure of its long-run acceptability. In my view, the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present.

Whether today's judgment would be an acceptable exercise of supervisory power over federal courts is another question. But as a constitutional matter, the judgment in this case is erroneous and although I concur in Parts I and III of the Court's opinion I respectfully register this dissent.

MR. JUSTICE FORTAS, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

1. I agree with the Court that the exhibition of the person of the accused at a lineup is not itself a violation of the privilege against self-incrimination. In itself, it is no more subject to constitutional objection

than the exhibition of the person of the accused in the courtroom for identification purposes. It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest. It does not require that the accused take affirmative, volitional action, but only that, having been duly arrested he may be seen for identification purposes. It is, however, a "critical stage" in the prosecution, and I agree with the Court that the opportunity to have counsel present must be made available.

2. In my view, however, the accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. I am confident that it could not be compelled in court. It cannot be compelled in a lineup. It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilege against compelled self-incrimination.

Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, "Your money or your life"—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system.

I completely agree that the accused must be advised of and given the right to counsel before a lineup—and I join in that part of the Court's opinion; but this is an empty right unless we mean to insist upon the accused's fundamental constitutional immunities. One of these is that the accused may not be compelled to speak. To compel him to speak would violate the priv-

ilege against self-incrimination, which is incorporated in the Fifth Amendment.

This great privilege is not merely a shield for the accused. It is also a prescription of technique designed to guide the State's investigation. History teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape. But this is not the end of the story. The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state.

An accused cannot be compelled to utter the words spoken by the criminal in the course of the crime. I thoroughly disagree with the Court's statement that such compulsion does not violate the Fifth Amendment. The Court relies upon *Schmerber* v. *California*, 384 U. S. 757 (1966), to support this. I dissented in *Schmerber*, but if it were controlling here, I should, of course, acknowledge its binding effect unless we were prepared to overrule it. But *Schmerber*, which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court. It is the latter feature which places the compelled utterance by the accused squarely within the history and noble purpose of the Fifth Amendment's commandment.

To permit *Schmerber* to apply in any respect beyond its holding is, in my opinion, indefensible. To permit

its insidious doctrine to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith and to discard one of the most profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the balance between the rights of the individual and of the state, achieved over centuries of conflict.

3. While the Court holds that the accused must be advised of and given the right to counsel at the lineup, it makes the privilege meaningless in this important respect. Unless counsel has been waived or, being present, has not objected to the accused's utterance of words used in the course of committing the crime, to compel such an utterance is constitutional error.*

Accordingly, while I join the Court in requiring vacating of the judgment below for a determination as to whether the identification of respondent was based upon factors independent of the lineup, I would do so not only because of the failure to offer counsel before the lineup but also because of the violation of respondent's Fifth Amendment rights.

*While it is conceivable that legislation might provide a meticulous lineup procedure which would *satisfy* constitutional requirements, I do not agree with the Court that this would "remove the basis for regarding the [lineup] stage as 'critical.'"

EXHIBIT 26

MIRANDA *v.* ARIZONA.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 759. Argued February 28–March 1, 1966.—
Decided June 13, 1966.*

In each of these cases the defendant while in police custody was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases the questioning elicited oral admissions, and in three of them signed statements as well, which were admitted at their trials. All defendants were convicted and all convictions, except in No. 584, were affirmed on appeal. *Held:*

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 444–491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 445–458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial inter-

*Together with No. 760, *Vignera* v. *New York*, on certiorari to the Court of Appeals of New York and No. 761, *Westover* v. *United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28–March 1, 1966; and No. 584, *California* v. *Stewart*, on certiorari to the Supreme Court of California, argued February 28–March 2, 1966.

rogation as well as in the courts or during the course of other official investigations. Pp. 458–465.

(c) The decision in *Escobedo* v. *Illinois*, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 465–466.

(d) In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 467–473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 473–474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 475.

(g) Where the individual answers some questions during in-custody interrogation he has not waived his privilege and may invoke his right to remain silent thereafter. Pp. 475–476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant. Pp. 476–477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 479–491.

3. In each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 491–499.

98 Ariz. 18, 401 P. 2d 721; 15 N. Y. 2d 970, 207 N. E. 2d 527; 16 N. Y. 2d 614, 209 N. E. 2d 110; 342 F. 2d 684, reversed; 62 Cal. 2d 571, 400 P. 2d 97, affirmed.

John J. Flynn argued the cause for petitioner in No. 759. With him on the brief was *John P. Frank*. *Victor M. Earle III* argued the cause and filed a brief for petitioner in No. 760. *F. Conger Fawcett* argued the cause and filed a brief for petitioner in No. 761. *Gordon Ringer*, Deputy Attorney General of California, argued the cause for petitioner in No. 584. With him on the briefs were *Thomas C. Lynch*, Attorney General, and *William E. James*, Assistant Attorney General.

Gary K. Nelson, Assistant Attorney General of Arizona, argued the cause for respondent in No. 759. With him on the brief was *Darrell F. Smith*, Attorney General. *William I. Siegel* argued the cause for respondent in No. 760. With him on the brief was *Aaron E. Koota*. *Solicitor General Marshall* argued the cause for the United States in No. 761. With him on the brief were *Assistant Attorney General Vinson*, *Ralph S. Spritzer*, *Nathan Lewin*, *Beatrice Rosenberg* and *Ronald L. Gainer*. *William A. Norris*, by appointment of the Court, 382 U. S. 952, argued the cause and filed a brief for respondent in No. 584.

Telford Taylor, by special leave of Court, argued the cause for the State of New York, as *amicus curiae*, in all cases. With him on the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Barry Mahoney* and *George D. Zuckerman*, Assistant Attorneys General, joined by the Attorneys General for their respective States and jurisdictions as follows: *Richmond M. Flowers* of Alabama, *Darrell F. Smith* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *Earl Faircloth* of Florida, *Arthur K. Bolton* of Georgia, *Allan G. Shepard* of Idaho, *William G. Clark* of Illinois, *Robert C. Londerholm* of Kansas, *Robert Matthews* of Kentucky, *Jack P. F.*

Gremillion of Louisiana, *Richard J. Dubord* of Maine, *Thomas B. Finan* of Maryland, *Norman H. Anderson* of Missouri, *Forrest H. Anderson* of Montana, *Clarence A. H. Meyer* of Nebraska, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Robert Y. Thornton* of Oregon, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Waggoner Carr* of Texas, *Robert Y. Button* of Virginia, *John J. O'Connell* of Washington, *C. Donald Robertson* of West Virginia, *John F. Raper* of Wyoming, *Rafael Hernandez Colon* of Puerto Rico and *Francisco Corneiro* of the Virgin Islands.

Duane R. Nedrud, by special leave of Court, argued the cause for the National District Attorneys Association, as *amicus curiae*, urging affirmance in Nos. 759 and 760, and reversal in No. 584. With him on the brief was *Marguerite D. Oberto*.

Anthony G. Amsterdam, Paul J. Mishkin, Raymond L. Bradley, Peter Hearn and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae*, in all cases.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965), with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker & Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobeda* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality, and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra,* n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S. 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo,* with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia,* 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

> questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker,* 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States,* 217 U. S. 349, 373 (1910):

> ". . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Colo. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931).

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97–115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244–437, 490–521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

> more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." [11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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[11] O'Hara, *supra*, at 99.

[12] Inbau & Reid, *supra*, at 34–43, 87. For example, in *Leyra* v. *Denno*, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

[13] Inbau & Reid, *supra*, at 43–55.

One writer describes the efficacy of these characteristics in this manner:

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." [14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

[14] O'Hara, *supra*, at 112.

> cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?" [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial." [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

> ". . . In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." [17]

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[15] Inbau & Reid, *supra*, at 40.

[16] *Ibid.*

[17] O'Hara, *supra*, at 104, Inbau & Reid, *supra*, at 58–59. See *Spano* v. *New York*, 360 U. S. 315 (1959). A variant on the tech-

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." [18] Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

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nique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski* v. *New York*, 324 U. S. 401, 407 (1945): "Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[18] O'Hara, *supra*, at 105–106.

[19] *Id.*, at 106.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it.. You can handle this by yourself.' " [22]

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[20] Inbau & Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau & Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court as in those cases reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was handed over to the Federal Bureau of Investigation by

[25] In the fourth confession case decided by the Court in the 1962 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir. 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[29] The current practice of incommunicado interrogation is at odds with one of our

[29] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, III Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Haller & Davies, The Leveller Tracts 1647–1653, p. 454 (1944).

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence 289–295 (McNaughton rev. 1961). See also Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (1956) (DOUGLAS, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[30] Compare *Brown* v. *Walker*, 161 U. S. 591 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [31]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffin* v. *California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U. S., at 7–8.[33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

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[33] The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961); *Wan* v. *United States*, 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, *e. g.*, *Malinski* v. *New York*, 324 U. S. 401, 404 (1945); *Bram* v. *United States*, 168 U. S. 532, 540–542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson* v. *Denno*, 378 U. S. 368 (1964); *United States* v. *Carignan*, 342 U. S. 36, 38 (1951); see also *Wilson* v. *United States*, 162 U. S. 613, 624 (1896). Appellate review is exacting, see *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). In addition, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

making a free and rational choice.[34] The implications of this proposition were elaborated in our decision in *Escobedo* v. *Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U. S., at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U. S., at 481, 488, 491.[35] This heightened his dilemma, and

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[34] See *Lisenba* v. *California*, 314 U. S. 219, 241 (1941); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Spano* v. *New York*, 360 U. S. 315 (1959); *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Haynes* v. *Washington*, 373 U. S. 503 (1963).

[35] The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its

made his later statements the product of this compulsion. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[56] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp* v. *Ohio*, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). Cf. *Pointer* v. *Texas*, 380 U. S. 400 (1965).

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wake. See *People* v. *Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628, 243 N. Y. S. 2d 841 (1963) (Fuld, J.).

[56] *In re Groban*, 352 U. S. 330, 340–352 (1957) (BLACK, J., dissenting); Note, 73 Yale L. J. 1000, 1048–1051 (1964); Comment, 31 U. Chi. L. Rev. 313, 320 (1964) and authorities cited.

III.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

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[37] See p. 454, *supra*. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." Devlin, The Criminal Prosecution in England 32 (1958).

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; [38] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

[38] Cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts* v. *Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker* v. *California*, 357 U. S. 433, 443–448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People* v. *Dorado*, 62 Cal. 2d 338, 351, 398 P. 2d 361, 369–370, 42 Cal. Rptr. 169, 177–178 (1965) (Tobriner, J.).

In *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial

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[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738–739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L. Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 64–81 (1965). As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963):

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Douglas* v. *California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

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ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People* v. *Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser* v. *United States*, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

some information on his own prior to invoking his right to remain silent when interrogated.[45]

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Sim-

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[45] Although this Court held in *Rogers* v. *United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

ilarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo* v. *Illinois*, 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,[47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to

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[46] The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect." *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.).

[47] See *People* v. *Dorado*, 62 Cal. 2d 338, 354, 398 P. 2d 361, 371, 42 Cal. Rptr. 169, 179 (1965).

protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[48]

IV.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, 240–241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same

[48] In accordance with our holdings today and in *Escobedo* v. *Illinois*, 378 U. S. 478, 492, *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958) are not to be followed.

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Malinski* v. *New York*, 324 U. S. 401, 402 (1945).[52]

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[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Lynumn* v.

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California* v. *Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Illinois, 372 U. S. 528, 537–538 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

[53] See, *e. g.*, Report and Recommendations of the [District of Columbia] Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

. . . . . .

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated. . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

. . . . . .

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

> "At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.
>
> "'(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?
>
> "'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 684 (1965), and *Jackson* v. *U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 935.
>
> "'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

" '(2) When is the warning given?

" 'The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S.* v. *Konigsberg*, 336 F. 2d 844 (1964), cert. den. 379 U. S. 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

" '(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

" 'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz* v. *U. S.*, 351 F. 2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram* v. *U. S.*, 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

" 'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell* v. *U. S.*, 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'" [55]

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912 under the Judges' Rules is significant. As recently

[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdiction of the FBI are kidnapping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241–242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[57]

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[57] [1964] Crim. L. Rev., at 166–170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

"'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

. . . . . .

"III. . . .

. . . . . .

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

. . . . . .

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. . . .

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

. . . . . .

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been ex-

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make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England 137–141 (1958).

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim. L. Rev., at 182; and articles collected in [1960] Crim. L. Rev., at 298–356.

[58] The introduction to the Judges' Rules states in part:

"These Rules do not affect the principles

. . . . . .

"(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . . ." [1964] Crim. L. Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, [1954] Scss. Cas. 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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[60] "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25.

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India 553–569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession." *Sarwan Singh* v. *State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

[61] I Legislative Enactments of Ceylon 211 (1958).

[62] 10 U. S. C. § 831 (b) (1964 ed.).

[63] *United States* v. *Rose*, 24 CMR 251 (1957); *United States* v. *Gunnels*, 23 CMR 354 (1957).

whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[64]

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.[65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt* v. *Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our

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[64] Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20 (3). See Tope, The Constitution of India 63–67 (1960).

[65] Brief for United States in No. 761, *Westover* v. *United States*, pp. 44–47; Brief for the State of New York as *amicus curiae*, pp. 35–39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23–26.