Senator McCLELLAN. Mr. Chairman, I would like to state for the record at this time that I have received letters endorsing both of these nominees, and one letter in particular from Mr. Edward L. Wright of Little Rock, Ark., immediate past president of the American Bar Association. I will ask to be permitted to introduce this into the record at this time. Since all of these witnesses are here this morning to testify or place statements in the record for Mr. Powell, I think it appropriate at this time to introduce this communication from the immediate past president of the bar association.

The CHAIRMAN. It will be admitted.

(The letter referred to follows.)

LITTLE ROCK, ARK.,
November 2, 1971.

Hon. JOHN L. McCLELLAN,
U.S. Senator,
Washington, D.C.

DEAR JOHN: I wish to reiterate my deep and continued appreciation for the affirmative interest you took in proposing me as a possible nominee to the Supreme Court of the United States. From the beginning I felt that my age was an insurmountable obstacle.

While all of us here have a natural and understandable disappointment in the failure of the President to nominate Herschel H. Friday, I am glad that the President came forth with the names of two excellent men. I have known Lewis F. Powell, Jr., intimately for many years and have worked extremely closely with him in many American Bar Association matters. He is a truly great man, whether measured by his impeccable character, his outstanding intellect, or his unselfish activities in the genuine public interest. In my opinion he will become one of the outstanding and recognized jurists of all times to sit on the Supreme Court of the United States.

I am not well acquainted personally with Mr. William H. Rehnquist, but I feel that he has all of the proper credentials to make an excellent member of the Supreme Court. For these reasons I trust that the Senate will promptly confirm both of them.

With worm regards and every good wish, I am

Sincerely,

EDWARD L. WRIGHT.

Senator BAYH. Mr. Chairman, is it appropriate to inquire for the benefit of the committee members what the schedule is going to be?

I was left with the gavel last evening and I advised our colleagues that some of our brethren on the Republican side would have an opportunity to address themselves to the previous witness.

The CHAIRMAN. You were not present when we began. The two Virginia Senators want to go to Senator Willis Robertson's funeral and they are presenting the nominee at this time.

We will go back to Mr. Rehnquist as soon as——

Senator BAYH. That is perfectly fine with me, Mr. Chairman. I just wanted to know what we could expect for the rest of the day.

The CHAIRMAN. Thank you, gentlemen.

Senator BYRD. Thank you.

TESTIMONY OF WILLIAM H. REHNQUIST—Resumed

The CHAIRMAN. Senator Burdick is recognized.

Senator BURDICK. Mr. Chairman, I would like to congratulate the nominee selected by the President.

Much of this ground has been gone over already. I would like to ask one question. Would you like to elaborate on your concept of stare decisis?

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Mr. REHNQUIST. I do not know that it would be elaboration. Senator, but I will certainly do my best to give you my ideas on the subject from, as you might imagine, a very general point of view which I feel is all that I could say at this time.

I think that in interpreting the Constitution, one goes first to the document itself, to the historical materials that may be available, casting light on what its framers may have intended, and to the decisions made by the Supreme Court construing it, and I think that precedent is very important in the case of all branches of the law.

I think it is important in constitutional law although I think traditionally it is regarded as less binding in the area of constitutional law than it is, for example, in the area of statutory construction.

I think it is nonetheless important and an important factor to be considered because basically it represents the judgment of what nine other Justices who took the oath of office to faithfully administer the Constitution thought it meant on the facts before them then. And I think any decision rendered in that matter is entitled to great weight by a subsequent Court in considering the same question.

Senator BURDICK. I believe you said yesterday that a unanimous decision would have greater weight than a 5-to-4 decision?

Mr. REHNQUIST. Yes; I did.

Senator BURDICK. But you also attributed weight to the 5-to-4 decision?

Mr. REHNQUIST. Yes; I would.

Senator BURDICK. What did you mean in saying that you thought that precedents had a greater weight in statutory construction than in constitutional construction?

Mr. REHNQUIST. I would hark back, and it seems to me it was Justice Brandeis in the *Ashwander* case, although I may be mistaken both as to the Justice and as to the case, where the observation was made that in the case of statutory construction, stare decisis should be given virtually controlling weight because it is always within the power of Congress to change a decision should it feel that the Court has misinterpreted congressional intent, whereas in the area of constitutional law, with the great difficulty of constitutional amendment as opposed to mere revision or amendment of the law by Congress, there is a tendency to be more willing to review a prior precedent on its merits.

Senator BURDICK. Thank you.

That is all I have.

The CHAIRMAN. Where were you, Birch, on the Republican side?

Senator BAYH. When we recessed yesterday, I think Senator Cook or Senator Mathias—why don't we let them decide, Mr. Chairman. Senator Fong was not here.

The CHAIRMAN. I understood you granted the right to be recognized to two Senators.

Senator BAYH. I think we ought to let the minority decide that amongst themselves, Mr. Chairman, if I might respectfully suggest.

The CHAIRMAN. Go ahead, Senator.

Senator FONG. Mr. Rehnquist, I want to join my colleagues in congratulating you on your nomination. You had a visit with me in my office and we discussed a few things. Primarily we talked about the wiretapping law.

You have a great responsibility when you assume the position of a Justice of the Supreme Court. This is a grand nation because it has a great Constitution and very strong Bill of Rights and a Supreme Court which dispenses equal justice under law.

The Supreme Court, as you know, is the last bulwark of freedom and justice for our citizens. Other countries have constitutions like ours. They have copied provisions of our Constitution, our Bill of Rights, but in the execution of these provisions sometimes they forget some of their citizens and render many of them very, very disadvantaged.

I refer to cases, where the Supreme Court of the United States has not only safeguarded the rights of citizens, but aliens too are given the equal protection of our laws.

In some other countries, aliens cannot even inherit what their fathers and mothers have left to them; they must sell their businesses within 6 months.

I know of countries where aliens cannot pursue innumerable different types of business callings. Even being butchers or barbers is barred to them because the Constitution does not give them that right.

I know of countries where people who are born there do not acquire citizenship.

One of the latest cases I have read about is that of two journalists who were born in the Philippines. They were allegedly espousing, I believe, some communist doctrine in a newspaper in Manila and were picked up by the Philippine Government. Even though they were born in the Philippines and had never been in Taiwan, they were put on an airplane and sent to Taiwan to be tried by the Government of Taiwan for communist activities. This despite the fact that they had been born in the Philippines and their activities had taken place in the Philippines.

Yes, there are many countries which have a great constitution—on paper, and yet the citizens are not protected. They do not have the same kind of rights as the people have in these United States.

Here you have a nation with a great Constitution and a glorious history and a fine Supreme Court which has not yielded to pressure from either the executive or the legislative in rendering its decisions.

You have been given a fine recommendation by the American Bar Association. All of the members of the standing committee on Federal Judiciary have felt you are competent; that you are a man of integrity; that you are very capable and you have judicial temperament; but some do not agree with your personal philosophical views.

As you know from our discussion in my office, I was one of four Senators who voted against the omnibus crime bill, I did so because I thought that title III, of that bill went far beyond what should be enacted into our laws. I refer to the wiretapping and the surveillance provisions of that bill.

Am I right in saying, Mr. Rehnquist, that you support the Justice Department's position that the President has an inherent right to use wiretap against those the Department deems to be domestic radicals, whatever that term may include, as well as support no-knock entry by the police and preventive detention?

Mr. REHNQUIST. Senator, I have made public statements as Assistant Attorney General in support of the constitutionality of pretrial detention and in support of the Department's position with respect to wiretapping in national security cases.

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Senator FONG. Yes; you support the Justice Department position in that respect, is that correct?

Mr. REHNQUIST. I have done that, yes.

Senator FONG. In fact, certain papers and columnists have averred that you were instrumental in developing the theory that there is an inherent right in the Executive to such use of wiretap or surveillance, even without prior court order. Is that correct?

Mr. REHNQUIST. I would say "No, Senator, I think that five administrations have taken that position from the time of Franklin Roosevelt until the time of President Nixon. We worked in an advisory capacity in our office on the Government's brief to be presented to the U.S. Supreme Court in defense of that authority. We worked with the Internal Security Division people. But we were dealing with materials that had been evolved previously.

Senator FONG. In other words, you are saying you followed the thinking that was evolved by other administrations, that such power was inherent in the Executive?

Mr. REHNQUIST. That certainly was our reading of the exchanges of correspondence between the Attorneys General and the Presidents.

Senator FONG. When you addressed the week-long symposium on law and individual rights held last December at the University of Hawaii, you were quoted in the Honolulu Advertiser as stating in an interview on Hawaiian Educational TV:

> I'm not sent out to be objective. I simply do what the Attorney General tells me to do.

That was your feeling at that time when you were a member—as you now are a member of the Justice Department. You did these things and made these speeches according to the wishes of the Justice Department, is that right?

Mr. REHNQUIST. That is correct, with this qualification, Senator: had I felt the positions I was taking or the doctrines I was espousing were utterly obnoxious to me personally, I simply would not have continued in that position, but I did regard myself as an advocate.

Senator FONG. You concurred with the Justice Department position?

Mr. REHNQUIST. I spoke for it as an advocate.

Senator FONG. Yes.

As I said, you are aware that I was one of four Senators who voted against the final passage of the omnibus crime bill because of its far-reaching wire-tap provisions. I was joined only by three of my colleagues in this opposition to the Omnibus Crime Act. My three colleagues were Senator Hart, Senator Cooper, and Senator Metcalf.

As early as May 1968 when the omnibus crime bill was under consideration, I voiced my strongly held opinion that wiretapping and electronic surveillance were enormously dangerous practices presenting an extraordinary threat to our individual liberties. I pointed out that: "In a democratic society, privacy of communication is absolutely essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas."

I then pointed out that: "When we open this door of privacy to the Government—when the door is widely agape, * * * it is only a very short step to allowing the Government to rifle our mails and search

our homes. A nation which countenances these practices," I said, "soon ceases to be free."

As early as May 1968, I pointed out that I was fearful that if wiretapping and eavesdropping practices were allowed on a widespread scale, we will soon become a nation in fear—a police state.

At the hearings this year before the Constitutional Rights Subcommittee it was clearly indicated, whether based upon fact or fancy, we are coming very close to being a nation in fear. All the way from Congressmen, to mayors, to soldiers, to students voiced their fears that they were under surveillance.

I am therefore particularly interested in hearing from you directly as to your personal position in regard to wiretapping and electronic surveillance in general as it relates to the fourth amendment, and your philosophical and legal reasons for such position.

Mr. REHNQUIST. Senator, I was asked the same question yesterday by another Senator and I told him that I felt having been an advocate for the Department in the matter and being presently in the position of a nominee, it would be inappropriate for me to answer that question.

If I might add this observation, having headed for a while last year the Justice Department's program of campus visitations and on one of which I had the pleasure of going to the University of Hawaii, I could not help but realize from talking to some of the student audiences that there was a very real fear in this area.

You made the comment, "whether based on fact or fancy." My impression from what I know about the facts and figures of the Federal Government's wiretapping activities is that it is not based on fact, but as you point out, whether it is based on fact or fancy, it can nevertheless have a chilling effect on one's feeling of freedom to communicate through the telephone and other such means.

And my own hope would be that by a campaign of bringing the facts to the attention of the citizenry, of the actually extraordinarily limited use of these mechanisms by the Government, that some of the fear based not on what is actually done but on third and fourth hand accounts of what is done could be put to rest.

I regret that I feel it inappropriate to answer your primary question.

Senator FONG. Do you feel that the crime bill which we passed has really gone far beyond what you feel we should do in pursuing criminals; that we have really allowed almost an indiscriminate use of wiretapping and surveillance, especially when we go to felonies which do not deal with organized crime or national security?

Mr. REHNQUIST. Senator, that very issue has been decided in two separate district courts and I would assume is probably on its way through the courts of appeal and ultimately to the Supreme Court. I just do not think it would be appropriate for me to answer.

Senator FONG. I see.

Now, do you feel that being such a strong advocate of statutes authorizing the use of wiretapping and surveillance you could sit as a Supreme Court Justice to decide on these cases should these cases come before the Court?

Mr. REHNQUIST. As I suggested yesterday in response to a question, having personally participated in an advisory capacity in the preparation of the Government's brief in the national security wiretapping case, and applying the standards laid down in the memorandum prepared for Mr. Justice White when he went on the Court, I would think

without obviously positively committing myself that I would probably be required to disqualify myself in that case.

Insofar as simply having generally advocated before students, student audiences, or otherwise defended the Government's use of the authority given it by Congress, I believe that I could divorce my role as an advocate from what it would be as a Justice of the Supreme Court should I be confirmed.

Senator FONG. Now, I would like to read you amendment IV to the Constitution of the United States: "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 warrants 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."

When it comes to searches and seizures, we have one search and one seizure of particular tangible evidence at one particular time and place and it is over. But when it comes to electronic surveillance or where wiretapping is concerned, it is almost unlimited and it is unlimitable because if you have a wiretap on my telephone or you keep me under surveillance, you are also keeping other people who associate with me or call me under surveillance too and wiretap their conversations as well. Do you see that there is a big difference here?

Mr. REHNQUIST. There certainly is a difference between a search warrant for particular tangible evidence thought to be located in a particular physical location and a court order for a wiretap, albeit limited in time, for the reasons that you state, Senator.

Senator FONG. Do you regard wiretapping and surveillance as very dangerous practices?

Mr. REHNQUIST. I think it would be inappropriate for me to answer that question, Senator, in view of my role as advocate. I can certainly say that promiscuous wiretapping I would regard as a very dangerous practice.

Senator FONG. Yesterday, I think, a question was presented to you by either Senator Hart or Senator Kennedy to which you replied that the only—I believe you called it "the only proper role" for secret surveillance was in pursuing criminals.

I should like to explore with you, what you deem to be such "pursuit" of criminals.

One of my objections to the surveillance provisions of the omnibus crime bill was that it permitted the continued surveillance of a person even after indictment, right up to the time of trial.

Again, I quote my statement of May 23 as it appeared in the Congressional Record, page 6196, with the paragraphs rearranged to give continuity of thought here.

I then said.

"The purpose of electronic surveillance is to collect evidence in order to obtain indictment. But under the initial bill (and it was so enacted), we would continue to hound the accused—nailing down the case and copper-riveting it by continuous surveillance—even after the indictment is secured. The bill would allow tapping and bugging even after the date of the indictment, right up to the time of trial.

". . . to so hound a defendant until the day of trial, after he has been indicted, is abhorrent to our enlightened system of jurisprudence.

These are surely police state tactics.

"I am fearful that if these wiretapping and eavesdropping practices are allowed to continue on a widespread scale, we will soon become a nation in fear—a police state.

"This is contrary to our Anglo-Saxon traditions of fair play and justice.

"This is contrary to our most deeply cherished liberty—the right of privacy."

Where does your philosophical approach to this pursuit of criminals end so as not to invade a person's right of privacy under the fourth amendment?

Would you say that after indictment we still have a right to pursue a person, to eavesdrop on him, to keep him under surveillance right up to the time of trial?

Mr. REHNQUIST. With the reservations I previously stated, Senator, and with my lack of familiarity with the detailed provisions of the bill which you are describing, I think I must keep my answer general.

Certainly any sort of electronic surveillance that would interfere with the lawyer-client relationship of a defendant after he has been charged would be very disturbing.

Senator FONG. I am glad to hear that view.

At the present time, Mr. Rehnquist, I am studying several reforms of our system of Federal grand jury proceedings so as to assure greater legal protection to persons subpenaed to testify as, and I quote, "witnesses on behalf of the Government," with a view to introducing such legislation.

Without considering any specific legislative proposal, would you care to express your views on the practice of subpenaing a witness to testify before a grand jury on behalf of the Government when the Government has already produced evidence to that grand jury upon which an indictment is sought against this so-called witness on behalf of the Government?

Is not the Government really asking a person to testify against himself in violation of the fifth amendment?

Mr. REHNQUIST. Senator, I have had, I think, one grand jury in my life and I am not intimately familiar with the practices or procedures governing grand juries. I would be hesitant to express a view simply from lack of knowledge on that point.

My impression from the situation which you describe is that at least in some cases the witness would be adequately protected by the invocation of the fifth amendment. However, I can imagine it being used in a harassing manner also.

Senator FONG. But in cases where the witness does not know the nature of the hearing, where he is brought in cold and he is asked questions, when they already have evidence to indict him and they are going to indict him and yet they call him as a witness "for the Government," do you think it is proper for them to subpena him as a witness for the Government and try to get him to testify against himself?

Mr. REHNQUIST. Oh, I certainly do not think any witness should be tricked by the Government. If your question goes further than that, I would have to almost say I would want to see the particular facts.

Senator FONG. Then, you would say that if what I have described was the procedure of the Government, it would be trickery on the part of the Government.

Mr. REHNQUIST. Well, I would want to know a more detailed set of facts, Senator, to say in a particular case trickery was engaged in by the Government.

I certainly don't think it should be and certainly the type of situation which you describe could in some circumstances amount to that.

Senator FONG. Thank, you, Mr. Rehnquist.

The Washington Post on November 3 quotes a Phoenix Democrat as stating that "in terms of legal ability," you are "simply top-notch," that your character is "absolutely unimpeachable," and that he has "no serious doubts" that you should be confirmed, but then he is quoted as continuing, and I quote him again:

> Bill has been an intellectual force for reaction. I do not believe he will put the manacles back on the slaves but I am sure from his point of view it will be more than a pause. There will be a backward movement. In terms of race relations I would expect him to be retrograde. He honestly does not believe in civil rights and will oppose them.
>
> On criminal matters he will be a supporter of police methods in the extreme.
>
> On free speech Bill will be restrictive.
>
> On loyalty programs, McCarthyism, he will be one hundred percent in favor.

This type of comment typifies some of the letters that I have been receiving in my office. In fairness to you, Mr. Rehnquist, would you care to comment on this type of statement?

Mr. REHNQUIST. My first comment would be I can defend myself from my enemies but save me from my friends. [Laughter.]

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

Senator FONG. I believe I am satisfied. Mr. Rehnquist, that you will do just that.

Thank you very much.

The CHAIRMAN. Senator Cook?

Senator COOK. Mr. Chairman, may I defer to Senator Scott?

Senator SCOTT. Mr. Chairman, yesterday I reserved the right to offer certain information into the record. I read from it in part yesterday. It was a statement of Attorney General Robert F. Kennedy on the 22d of May 1962, in support of H.R. 10185 which he had caused to be introduced and on which bill he was testifying in favor before this committee.

There were a number of other witnesses and fairly lengthy hearings and I will not again revert to the material except the paragraph which has been mentioned by the witness here, that "All Attorneys General since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases," and that "National security requires that certain investigations be conducted under the strictest security safeguards."

I would like to offer that into the record

The CHAIRMAN It is admitted.

(The material referred to follows.)

STATEMENT OF HON. ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, the problem of wiretapping is most perplexing because it involves the difficult task of balancing protection of individual privacy with the needs of law enforcement to keep pace with modern scientific advancement.

But I am here today because I believe that this balance can be found and because I wish to urge this Committee and the Congress to enact a wiretapping bill at this session.

Many people have strong views on wiretapping and the merits of these conflicting views have been debated for many years. But the fact remains that with all the debate, there has been little action and the result is that the individual rights of privacy in telephone conversations is not being protected at all and the needs of society to protect itself against the misuse of the telephone for criminal purposes are not being met.

So the present situation is entirely unsatisfactory, and on this I believe both the proponents and opponents of H.R. 10185 will agree. It is inconceivable to me that we should permit this situation to continue and it is also inconceivable to me that we cannot find a fair balance between the legitimate needs of law enforcement and the protection of individual rights of privacy.

We believe that H.R. 10185 strikes this balance. It would make wiretapping illegal except when specifically authorized in investigations of certain major crimes—thus giving far greater protection to privacy than exists today while permitting law enforcement officers to use wiretapping to obtain evidence of certain major crimes under the supervision of the courts.

There are those who sincerely feel that the bill would limit law enforcement officers too much. Others, who are equally sincere, feel that the bill would permit too much invasion of individual rights. Different people will draw the line at different places.

But I earnestly hope that differences of emphasis, and disagreements as to detail, will not be allowed to obscure the basic fact that the existing unsatisfactory situation is getting steadily worse and that corrective legislation is needed now.

Why do I say the existing situation is unsatisfactory?

The existing federal law on wiretapping is Section 605 of the Communications Act of 1934, which provides in part:

". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

This law is unsatisfactory in two respects. It permits anyone to tap wires. Mere interception is not a crime; a crime is not committed until the intercepted information is divulged or published. (Another provision makes it a crime to use such information for one's own benefit.)

Thus even if we find an intercepting device attached to a telephone line, and find out who is doing the intercepting, we still cannot prosecute. We have to find that the information was divulged or published or used improperly. This means that no one's privacy is adequately protected. Anyone can listen in to your telephone conversations, and mine, without violating the federal law.

On the other hand, all divulgence is prohibited. This means that it is against the law for law enforcement officials to disclose in court any of the words they overhear from wiretapping or the substance, purport, or effect of those words—even though what they overhear is clear evidence of a vicious crime.

The Supreme Court so held with respect to federal officers in the *Nardone* case, decided in 1937. And it so held with respect to state officers in the *Benanti* case, decided in 1957. Indeed, the federal courts refuse to receive in evidence, not only the substance of the intercepted conversation, but any evidence obtained as a result of leads which that conversation gave. As a result, wiretapping cannot be used effectively by the federal government or the states to aid in law enforcement, even for the most serious crimes.

The strange paradox is that under this federal law a private individual is free to listen in to telephone conversations for the most improper motives, but law enforcement officials cannot use wiretapping effectively to protect society from major crimes.

State and local prosecutors emphatically agree with me when I say that the law as it exists today does not meet the legitimate needs of law enforcement.

And you will, I think, find complete agreement that it does not adequately protect the privacy of telephone users and the integrity of the interstate telephone network.

I am sure you will agree that legislation is needed and that it is urgently needed. What kind of bill should be enacted?

Again I want to talk today about general principles. We have drafted H.R. 10185 with considerable care. We have furnished a detailed analysis of the provisions of that bill with our letter to the Speaker, and I ask that that letter and the accompanying analysis be included in the record of these hearings.

I don't want to take time in this statement to go into a detailed section-by-section analysis of H.R. 10185 although I will be happy to answer any questions which any member of this Committee may have. I want rather to emphasize certain basic principles which I think must be met in any satisfactory bill, and to show how we have tried to meet them in H.R. 10185.

A satisfactory bill, must in my opinion, do the following:

1. Provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes;
2. Prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers;
3. Provide procedural safeguards against abuse of the limited wiretapping which it would authorize;
4. Establish uniform standards for the federal government and the states.

Let me take up these criteria in turn and indicate how, in my judgment, H.R. 10185 meets them.

1. The bill must provide adequate authority to law enforcement officers to enable them effectively to detect and prosecute certain major crimes

Wiretapping is an important tool in protecting the national security. In 1940, President Roosevelt authorized Attorney General Jackson to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

As Congress has been advised each year by the Director of the Federal Bureau of Investigation, the practice has continued in a limited number of cases upon express permission from the Attorney General. But, as I have pointed out, the evidence received from these wiretaps or developed from leads resulting from these wiretaps cannot be used in court. It is an anomalous situation to receive information of a heinous crime and yet not be able to use that information in court.

And, of course, this applies not only in cases of espionage and treason but in pressing the fight against organized crime. Testimony presented to committees of both Houses of Congress last year highlighted, as did the Kefauver and McClellan Committees' investigations, how the nation is being corrupted financially and morally by organized crime and racketeering.

The problem of organized crime is growing progressively more serious. It is a far graver threat now than in the 1920's and 1930's. The limited wiretapping authority for which we ask in this bill would help greatly in our effort to bring organized crime down to the point where it can be controlled effectively by local law enforcement.

There are over 100 million phones in the United States. The organized criminal syndicates which are engaged in racketeering activities involving millions of illicit dollars, do a major part of their business over this network of communication.

The very fact that the telephone exists has made law enforcement more difficult. It permits criminals to conspire and carry out their activities without ever getting together and, therefore, without giving the police the opportunity to use other techniques of investigation.

The telephone is not only a means of facilitating crime, but it may be an instrumentality of crime. It is used in bribery, extortion, and kidnapping, with the added advantage of protecting the identity of the criminal.

As Attorney General Robert H. Jackson said in 1941: "Criminals today have the run of our communications system, but the law enforcement officers are denied even a carefully restricted power to confront the criminal with his telephonic and telegraphic footprints. Unless we can use modern, scientific means to protect against the organized criminal movements of the underworld, the public cannot look to its law enforcement agencies for the protection it has a right to expect."

I submit that the federal government should be permitted to use wiretaps to investigate and to use the evidence so gained to prosecute for certain specified crimes, with appropriate procedural safeguards and centralized control.

This legislation also is necessary to clarify the authority of state officials to wiretap and use the evidence so obtained. Even though, under applicable state laws, state law enforcement officers may wiretap, recent federal court decisions make it clear that the disclosure in court of evidence obtained by such wiretapping is illegal under Section 605.

Although the federal courts have refused to enjoin the introduction in state courts of such evidence, prosecuting attorneys in New York City have dropped cases dependent on evidence obtained through wiretapping because they feel that to introduce the evidence would be a violation of federal law.

Some state judges no longer will issue orders giving state law-enforcement officers authority to wiretap notwithstanding the fact that the applicable state law authorizes such orders. As a result, a number of important state criminal prosecutions have been abandoned or are in jeopardy.

The particular offenses for which wiretapping should be authorized will, I have no doubt, be the subject of much discussion before your committee. There is room for honest difference of opinion on this point. We have tried to draw a line that seems logical to us. The Congress may feel that we have included too many offenses or excluded some that should be included.

H.R. 10185 would authorize wiretapping and introduction of wiretap evidence in court for the following federal offenses:

Crimes affecting the national security: Espionage, sabotage, treason, sedition, subversive activities and unauthorized disclosure of atomic energy information;

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana;

Interstate transmission of gambling information and interstate travel in aid of racketeering enterprises.

H.R. 10185 would permit state officials to tap wires for the following state offenses if state law permits such action:

Murder and kidnapping;

Extortion and bribery;

Dealing in narcotics and marihuana.

Many state prosecutors feel that the states should be authorized to tap wires for gambling offenses also. They are entirely correct in saying that gambling is central to the problem of organized crime. On the other hand, to permit tapping the wires of every two dollar bettor would be to permit very extensive wiretapping. We have thought it best to limit the authority to tap wires for gambling to those offenses which involve interstate transmission of gambling information, in the thought that this would be sufficient to reach the large organized operators.

Let me clarify one possible misconception. H.R. 10185 would leave it entirely up to the states as to whether they want to authorize wiretapping. Some states may feel that they do not want to authorize any wiretapping. They will be free to make that judgment. All that H.R. 10185 does, as to the states, is to impose limits beyond which they cannot go.

2. The bill must effectively prohibit all wiretapping by private persons and all unauthorized wiretapping by law enforcement officers

H.R. 10185 would remove the impediments to effective prevention of unauthorized wiretapping that now exist. Section 3 of the bill provides explicitly that it is unlawful for any person, except as authorized by the bill, to intercept any wire communication or to disclose the contents of such communication or to use the contents of such communication. "Intercept" and "contents" are broadly defined.

Attempts and procuring others to act are also prohibited. The general conspiracy statute would apply to conspiracy to do any of these things. Violations would be punishable by two years imprisonment or a fine of $10,000, or both.

These prohibitions will, we believe, enable us effectively to protect telephone users from unauthorized wiretapping. They will enable us to arrest, prosecute and convict for the mere fact of interception. The only evidence we will need for a conviction is evidence that an intercepting device was attached and that the defendant attached it, or procured someone to attach it, or conspired with someone to attach it. This will plug the loophole in the existing law.

These prohibitions would apply not only to private persons but to public officers who tap wires otherwise than in accordance with the bill. Until now the Department of Justice has been reluctant to prosecute state or local officials for actions taken in good faith in conformity with a state law authorizing wiretapping and disclosure in court of wiretap evidence. If this bill is passed, I assure you that we will prosecute anyone, private person or government officer, who is found tapping wires without lawful authority.

In addition to these criminal sanctions the bill attempts to remove a major incentive to illegal wiretapping by providing, in sec. 4, that no evidence obtained by unauthorized wiretapping may be received in any state or federal court, department, agency, regulatory body or legislative committee. This exclusion applies not only to the contents of the intercepted message but also to any information obtained by leads furnished by that message. It enacts in statutory form the rule declared by the Supreme Court in the second *Nardone* case, prohibiting use in evidence of the so-called "fruits of the poisonous tree."

These provisions of the bill, together with the safeguards which I am about to discuss, will mean that if the bill is passed the privacy of telephone users will be much better protected than it is now.

3. The bill must provide effective procedural safeguards against abuse of the limited wiretapping it would authorize

We have made a determined effort to surround the limited wiretapping which the bill would authorize with workable safeguards against abuse. Let me indicate some of the important safeguards.

First. Except for cases involving the national security, which I shall discuss in a moment, wiretapping could be authorized only by order of a judge. Section 8 specifies in detail the information which would have to be submitted under oath and the findings which a judge must make in order to issue such an order. The judge must find that there is probable cause for believing that—

(1) an offense for which an application may be filed under the bill is being, has been, or is about to be committed;

(2) facts concerning that offense may be obtained through the interception;

(3) no other means are readily available for obtaining that information; and

(4) the facilities to be intercepted are being used in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by, a person involved in such offense.

Law enforcement officers could not just tap any telephone. The judge must find that the telephone is being used in connection with the commission of an offense or is leased to, listed in the name of, or commonly used by the suspected criminal. And his order must specify the particular telephone which may be tapped.

A wiretap could not be in effect for more than 45 days. Any extension would require a new application and new findings by the judge.

This requirement of a court order is considerably more restrictive than the procedure on searches of a man's home or person. Many searches are made without a warrant, either where incident to an arrest or involving a moving vehicle or under a statute—such as the customs laws—permitting administrative searches.

Moreover, a federal search warrant can be issued by a United States Commissioner or any state court of record. Under this bill, authority to issue wiretapping orders will be confined to federal district and circuit judges (in the case of federal offenses) and to state judges of courts of general criminal jurisdiction (in the case of state offenses).

In cases involving national security we have provided alternative procedures. Application may be made to a court under the procedures outlined above, but in addition the bill provides that the Attorney General, in person, may authorize interception of wire communications if he finds that the commission of the offense is a serious threat to the security of the United States and that use of the court order procedure would be prejudicial to the national interest.

In a narrowly limited class of cases, both because of the sensitivity of the information involved and in the interests of speed, the Attorney General needs this executive authority to permit wiretapping.

National security requires that certain investigations be conducted under the strictest security safeguards. All Attorneys General since 1940 have been authorized by the President to approve wiretapping in national security cases. Attorney General Clark, with President Truman's concurrence, extended this authorization to kidnapping cases.

This legislation would authorize the Attorney General to order wiretapping after the determination that there was a reasonable ground for belief that the national security was being threatened. In order to proceed, the Attorney General would have to find and certify that the offense under investigation presented a serious threat to the security of the United States; that facts concerning that offense may be obtained through wiretapping; that obtaining a court order would be prejudicial to the national interest and that no other means are readily available for obtaining such information.

Thus, the bill would limit the authority now held by the Attorney General to authorize wiretapping but it would permit evidence obtained thereby to be presented in court. I believe these are most important points.

Second. Responsibility for applying for wiretap orders would be centralized. At the federal level, any application to a court must be approved by the Attorney General or an Assistant Attorney General designated by him. And, in those grave national security cases where wiretapping would be authorized without a court order, the Attorney General must give the authority. Thus, all federal wiretapping must be authorized by a Presidential appointee who is publicly accountable for his acts.

At the state level, the application must be made by a state attorney general or by the principal prosecuting attorney of a city or county, if such person is authorized by state law to make such an application. Some state officials feel that this is too limited. Perhaps it is. The Congress will have to make the decision. But we feel that the principle of focussing responsibility for all wiretapping applications in a small number of officials who can be held publicly accountable is an important safeguard.

To help maintain this public accountability, we have also provided for annual reports to the Congress of statistics on wiretap orders applied for, issued by and denied by federal and state judges.

Third. The bill would limit the disclosure and use of information obtained by authorized wiretapping. It authorizes use of this information by law enforcement officials only in the proper discharge of their official duties. It authorizes disclosure only to other law enforcement officials to the extent appropriate to the performance of their duties, or while testifying under oath in criminal proceedings in federal or state courts or grand jury proceedings. This limitation reflects our view that the justification for wiretapping is to aid in the enforcement of the criminal law, and, therefore, disclosure of information obtained by wiretapping should be permitted only in connection with criminal proceedings.

Fourth. The bill would establish federal court procedures for testing the legality of a wiretap. The defendant may move to suppress any evidence obtained by wiretapping on the grounds that the communication was unlawfully intercepted, that the order or authorization is insufficient on its face, that there was no probable cause for the court order authorizing the tap, or that the interception was not made in conformity with the order or authorization. The granting of such a motion would render the evidence inadmissible in any proceeding.

We believe that these safeguards are practical and will not unduly impede the legitimate use of the limited wiretapping which the bill would authorize. We believe that they provide a large measure of protection against abuse.

4. The bill must establish uniform standards for the federal government and the states

We are here concerned with an interstate telephone network which is regulated by the Congress in detail. A wiretap cannot differentiate between local and long distance calls from the same telephone. For this reason the Supreme Court, in the *Weiss* case in 1939, held that Section 605 of the Communications Act prohibited interception and disclosure of the contents of a telephone call between two parties in the same city.

A national telephone system requires a national policy. I believe it is the responsibility of Congress to protect the integrity of the interstate telephone network and the privacy of its users. Hence, we believe Congress should define the conditions by which any wiretapping by federal or state officials will be permitted.

Moreover, as the Supreme Court has pointed out on a number of occasions, including the recent case of *Mapp* v. *Ohio*, differences in federal and state rules as to investigative techniques and the introduction in court of evidence obtained by such techniques have unfortunate results for the administration of criminal justice.

Hence, we feel that uniform rules and standards for the federal and state governments are important in any wiretapping legislation.

I do not want to conclude this statement without reiterating my strong belief, and the strong belief of every responsible official in the Department of Justice, in the importance of individual privacy. We believe, with Justice Brandeis, that the right to be let alone is one of the basic liberties of free men.

We believe that every citizen of the United States has a right not to have strangers listen in on his telephone conversations. Indeed, one of the major reasons we are proposing this legislation is because under existing law the privacy of telephone users is not adequately protected.

But this right of privacy, like most other individual rights in our society, is not absolute or unqualified. Society also has a right to use effective means of law

enforcement to protect itself from espionage and subversion, from murder and kidnapping, and from organized crime and racketeering.

Senator SCOTT. I offer it together with a statement by the former Attorney General Kennedy appearing in an article called "Attorney General's Opinion on Wiretaps."

"He believes they can and should be regulated with due regard for both law enforcement and the right of privacy."

(The material referred to follows:)

ATTORNEY GENERAL'S OPINION ON WIRETAPS

(By Robert F. Kennedy)

In 1959, while inspecting a firealarm station, the Fire Chief of a large Western city made a startling discovery. The recording system had been rigged to record not only firealarm calls but also all calls on the Chief's private line. The Chief looked further. He found a recording tape on which was transcribed a personal telephone conversation between him and a United States Senator.

The Department of Justice discovered the identity of the wiretapper—but was forced to close the file on this case last September without any action against him. He could not be prosecuted under the present Federal wiretapping statute, which should protect against such gross invasion of individual privacy, but does not.

Last fall, District Attorney Frank Hogan of New York City developed a strong case against seven of the top narcotics distributors in the country—men who had operated a multi-million dollar narcotics ring in the New York City area for more than five years. Yet on Nov. 14, Mr. Hogan abandoned his prosecution of the seven men. Much of his evidence came from wiretapping and—although the wiretaps had been authorized by a court, as is permissible in New York—he felt he could not introduce this evidence without committing a Federal crime.

In other words, the men could not be prosecuted because of the present Federal wiretapping statute, which should permit reasonable use of wiretapping by responsible officials in their fight against crime, but does not.

Clearly, there is almost no one who believes this law, which enhances neither personal privacy nor law enforcement, to be satisfactory. Indeed, bills to change it—Section 605 of the Federal Communications Act—have been introduced in virtually every session of Congress since it was passed in 1934. But the present law has remained on the books, the beneficiary of the stalemate resulting from an emotion-hardened debate on the question of wiretapping that has gone on between absolutists for decades.

It is easy to take an absolute position on wiretapping. Some, concerned with encroachments on individual rights by society, say wiretapping of any kind is an unwarranted invasion of privacy. Others, concerned with a rapidly rising crime rate say law-enforcement officers should be free to tap telephone wires to gather evidence.

The heart of the problem—a proper balance between the right of privacy and the needs of modern law enforcement—is easy to see. It is not so easy to devise controls which strike this balance. But it is not impossible, either, and I believe that in the wiretapping bill which the Department of Justice has proposed to Congress we have formed such a balance.

There is no question that the telephone is an important asset to criminals. Here is an instantaneous, cheap, readily available and *secure* means of communication. It greatly simplifies espionage, sabotage, the narcotics traffic and other major crimes.

I do not know of any law-enforcement officer who does not believe that at least some authority to tap telephone wires is absolutely essential for the prevention and punishment of crime. There are over 100 million phones in the United States and the bulk of business is transacted over the telephone. Increasingly, this business includes crime—the organized criminal and racketeering activities, involving millions of dollars, which are among our major domestic problems. Without the telephone, many major crimes would be much more difficult to commit and would be more easily detected.

Last year, Congress enacted five of eight crime bills proposed by the Justice Department. One of these laws recognized that the telephone is a major tool of organized crime and prohibited the use of the telephone for interstate transmission of gambling information. The President signed the bill on Sept. 13. Almost im-

mediately, several operators of major gambling services went out of business or curtailed their activities. The result has been that organized crime has been dealt an effective blow where it hurts—in the pocketbook.

This experience underscores the need for wiretapping legislation. Wiretapping often may be the only way of getting evidence or of getting the necessary leads to break up major criminal activity.

Yet, on the other hand, most people feel strongly about the privacy of their telephone conversations. None of us likes to think that some unknown person might be listening to what we have to say. There is no doubt that the Constitution confers on each individual a right of privacy—what the late Justice Louis Brandeis called "the right to be let alone."

The Fourth Amendment specifically protects "the rights of the people to be secure in their persons, houses, and papers, and effects against unreasonable searches and seizures." In the famous Olmstead case of 1928, involving a Seattle bootlegging ring, the Supreme Court held that to intercept telephone calls by wiretapping did not violate the Fourth Amendment because the law-enforcement officers did not enter the house, touch the person or seize the papers and effects of the people whose wires were tapped.

But in another sense, wiretapping involves a greater interference with privacy than does the conventional search and seizure. Every telephone conversation involves at least two persons, one of whom may be wholly innocent. And in many cases the telephone that is used by a suspected criminal may also be used by a large number of other persons.

Indeed, many professional criminals typically transact their criminal business over public telephones. A tap set up to catch the criminal may necessarily overhear hundreds of conversations by persons who are totally unsuspected of crime, but whose privacy is nonetheless violated.

Even though the Fourth Amendment is not literally applicable—and the Olmstead decision is still the law—the principles underlying it are important in considering wiretapping. The framers of the Constitution did not outlaw all searches of a man's house and seizures of his papers and effects. They only prohibited "unreasonable" searches and seizures.

In particular, they recognized that Government officials could search a man's house and seize his papers. But first they required these officials to obtain a warrant from a court upon a showing of probable cause to believe that illegal material was on the premises to be searched. In other words, the framers of the Constitution attempted to balance two objectives that criminals be caught and convicted, and that the privacy of innocent persons be protected.

This is precisely our objective today.

Wiretapping is not authorized in most states. Section 605 of the Federal Communications Act provides: "No persons not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

To the layman, this certainly sounds like an absolute prohibition of wiretapping except where one of the parties to the conversation consents to it. Yet wiretapping is practiced by Federal law-enforcement officers, at least some state and local governments, and—as in the case of the Fire Chief's phone—by many private individuals. Indeed, the laws of the six states, such as New York, specifically authorize wiretapping by law-enforcement officials under court order.

How can this be? The legal answer is that the Communications Act does not prohibit interception alone; it prohibits interception and disclosure. For this reason, every President since Franklin D. Roosevelt has authorized the Attorney General to permit wiretapping in cases involving the national security. In 1941, Attorney General Robert H. Jackson indicated that "disclosure" within the Federal Government—among officials—also was not prohibited by the act. Yet, disclosure in court—using the lawfully obtained evidence to convict a criminal—has been regarded itself to be a criminal act.

This is unsatisfactory. There is no guarantee of privacy in the use of the telephone under the existing law because anyone can listen in without violating that statute. To convict someone of illegal wiretapping we have to prove both the tap and an unlawful disclosure. That is a very difficult burden indeed.

At the Federal level, wiretapping is limited to a small number of cases involving the national security and criminal cases in which the life of a victim is at stake. It is done only with the express approval of the Attorney General.

The extent of wiretapping by state and local law enforcement officers is very difficult to determine. In those states which have legislation permitting wiretapping under court order, the records indicate that it is fairly common. A poll conducted

in New York State showed that between 1950 and 1955, 2,392 wiretap orders were obtained—about 400 taps a year. Some investigators contend that several times as many wires were tapped illegally. At that time there were well above 6,500,000 telephones in use in New York State.

In states where there is no law permitting wiretapping, the indications are that a certain amount of police wiretapping goes on, nevertheless. There also are assertions that some corrupt police officers may use information obtained from wiretaps for purposes of blackmail, enforcing payoffs, and for other motives of personal profit.

No figures are available as to the extent of private wiretapping. Most people who have studied the matter believe that private investigators and other individuals tap wires extensively to obtain evidence in divorce cases, stock-market tips, information about competitors, and the like.

This is a shocking situation. When law-enforcement officials themselves violate the law, violations by other, go unpunished, and everyone's respect for law is seriously damaged. Further, no one's privacy is protected.

The critics of all wiretapping quote Justice Holmes to the effect that wiretapping is "dirty business" and use this as a slogan against the method of gathering evidence. To give Justice Holmes' words a modern application, it is the present state of law, the present chaos, which is really the "dirty business." And the solution is a coherent law which, with stringent safeguards, permits the gathering of evidence by wiretapping in vital cases but at the same time effectively forbids other wiretapping, public or private.

Only Congress can clear up the present chaotic situation. Certainly we ought to put an end to a law which:

(1) Fails to prevent illegal action—indiscriminate wiretapping—by law-enforcement officials and private individuals; and

(2) Fails to recognize the legitimate needs of law enforcement for limited authority.

I don't think it is possible—or workable—to attempt to deal in absolutes. I cannot agree with those who say that wiretapping should not be permitted in any circumstances and that the right to privacy outweighs any other considerations. If a child were kidnapped and there were any possibility of getting that child back unharmed by the use of wiretaps, I would feel that this strongly outweighed anyone's right to a private conversation. I take the same view with respect to protecting the security of the United States from espionage, sabotage and other possible acts of foreign agents.

At the other extreme, some law-enforcement officials feel there must be an extensive use of wiretapping with little or no supervision by courts or high administrative authority.

With this I also disagree strongly, If we are to authorize wiretapping for law-enforcement and prevention of crime, we must subject it to the most rigorous checks against abuse which we can devise. To put it simply, we should not lightly invade the privacy of individuals.

The details of new wiretapping legislation will have to be worked out by Congress. However, I believe that it should include—as drafted in our proposed law—the following features:

(1) Wiretapping should be prohibited except under clearly defined circumstances and conditions involving certain crimes. Because wiretapping potentially involves greater interference with privacy than ordinary search and seizure, it is proper to limit it narrowly and permit it only where honestly and urgently needed. Wiretapping is absolutely required in cases involving national security, human life, narcotics and interstate racketeering. Under our bill, other, unauthorized interception or disclosure of wire communications would be punishable by a maximum penalty of two years in prison and a $10,000 fine.

(2) In general, I believe wiretapping should be authorized only by court order and that even then the right to apply to the court should be limited to relatively few responsible officials. We would make one necessary exception. In cases involving serious threats to national security, it is extremely important that the identity of suspects be tightly held within the F.B.I. The fewer who know our suspicions, the more effective our security. For this reason, we would continue the present practice of having the Attorney General, in person, authorize wiretapping in these cases.

(3) Uniform rules for the Federal Government and the states should be established. We are dealing here with an interstate communication network whose integrity is a matter of importance to everyone using it. The maximum extent

to which state officials may be authorized by state law to tap interstate facilities should be regulated by Congress.

(4) Applications for wiretapping orders to a court necessarily should be made in secret since it would be useless to tap if suspected criminals were alerted. This should not mean that orders would be issued as a matter of course by judges. Any wiretapping statute should—as does our proposal—spell out in detail the findings a judge must make on the basis of evidence presented to him and should state the duration of any order which he can issue. When a case is brought to trial, I believe the defendant should be given the opportunity to see the order authorizing the tap and to challenge its validity as, is now done in the case of search warrants.

(5) Even though wiretapping would be authorized by court order, or, in some national security cases, by the Attorney General, the law should limit the disclosure and use of the wiretap information. Limiting the use of wiretap information to proper discharge of official duties would effectively prevent corrupt officers from using it for personal benefit and would confine any disclosure and use to legitimate law enforcement purposes.

(6) Finally, the law should continue, and extend to state courts, the rule at present applied in Federal courts that any evidence derived by means of an unlawful wiretap should be excluded.

To enact legislation along these lines will be a difficult job. Opinions differ as to each of the points I have listed and as to many details relating to them. But these difficulties should not be allowed to stand in the way of enactment of comprehensive legislation by Congress.

The need for such legislation is real. It would help us maintain the national security and stamp out organized crime. And, equally important, it would put an end to the violation of law by law-enforcement officers and, less excusably, by private individuals, including blackmailers.

It would, in fact, protect the privacy of all of us who use the telephone.

The CHAIRMAN. Senator Cook.

Senator COOK. Mr. Rehnquist, for the benefit of the record I would like to give to the reporter at a later date the remarks that were made by you at a panel discussion on "Privacy and the Law in the 1970's," at the American Bar Association meeting in London.

Contrary to some of the remarks that were made yesterday, I do not see here where you become a great advocate for wiretapping other than in the strictest sense under the statute which was passed by the Congress of the United States and which the Justice Department is empowered to enforce.

If I may, I would like to read into the record what I think sums up your opinion.

Whatever may be the ultimate decision by our highest court on the merits of the question, I believe that a refusal of the Justice Department in its role as advocate before the courts or the executive branch of the Government to vigorously argue in favor of its legality would be a wholly unwarranted abdication of the Department's responsibility.

You then go into a discussion of surveillance, not only from the standpoint of wiretapping but also from the standpoint of visual surveillance. In regard to the discussion yesterday relative to probable cause, it is very interesting, I think almost essential, and I think most lawyers in this room would concur, "probable cause for an arrest or specific search is hopefully to be found at the conclusion of an investigation and ought not to be required as a justification for its commencement."

You said those words then. Do you agree with them now?

Mr. REHNQUIST. Yes, I do.

Senator COOK. I certainly agree with them also.

Getting back to another discussion of yesterday, I feel that great emphasis was made of how you completely and absolutely condoned, and were enthusiastic about, or words to that effect, the Government

action in the May Day affair in Washington. Again, Mr. Chairman, I would like to put into the record the speech that Mr. Rehnquist made at Appalachian State University, I might say out of a speech of some 24 pages, the first five and a half pages dealt with a very general discussion of the ability of police departments to function, the ability to formulate a policy in its broadest sense under certain conditions. I find nowhere in here any endorsement of the actions of, or any mention of the police officials in the city of Washington other than the fact that you made reference to the fact that there was a metropolitan police force of approximately 5,000 men and that within the first few hours they had to make no less than 7,000 arrests.

Then you allude to what is referred to as qualified martial law. I might suggest I hope you and I both agree that this qualification is nothing new in the law.

I have before me a book entitled A "Practical Manual of Martial Law" that was written in 1940 by Frederick B. Wiener, Special Assistant to the Attorney General of the United States. It has quite a dissertation in the field of qualified martial law.

Would you tell me what you feel would be a definition of qualified martial law?

Mr. REHNQUIST. Recalling as best I can from Mr. Wiener's book, which I believe is the source of my knowledge on the subject, it is the situation where the force brought to bear against the law enforcement forces is such that the normal procedure of individual arrest and booking and admission to bail and appearance before a community magistrate simply cannot be carried out and in this situation it is my understanding that the courts, including the Supreme Court of the United States in the case of *Moyer* v. *Peabody*, have said it was lawful for the Government in that situation to resort to a situation of arrest not on the basis of criminal charge of individual wrongdoing but on a very temporary basis of simply restoring order, and that the process was not arrest in the normal sense and that release was required in a very short order as soon as the serious emergency had passed.

That is a short summary of my understanding of it, Senator.

Senator COOK. And, as a matter of fact, rather than be of the opinion as we discussed yesterday that there may have been either martial law or qualified martial law on that occasion, in your speech in North Carolina you took the position that there had been neither. I quote from page 4, "Indeed if one takes a more extreme situation than that which prevailed in Washington during the past couple of days," and then you went into a dissertation on qualified martial law. Is that not correct?

Mr. REHNQUIST. It is correct, Senator.

Senator COOK. Thank you, Mr. Rehnquist.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

I would like to complete the congratulations to Mr. Rehnquist, and add to my congratulations some acknowledgement of his fortitude and strength.

Yesterday as we were adjourning I said I thought the hearing approached a violation of the eighth amendment after he had been on the stand since 10:30 in the morning.

But in a sense, Mr. Rehnquist, you brought it on yourself. One of the old political saws of this country, attributed to Calvin Coolidge and to various other politicians, is that what a man does not say can never hurt him. Some years ago you wrote an article in the Harvard Law Record, published in 1959, in which you said:

> Specifically until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee, before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

I think we are perhaps learning from your 1959 admonition. Your history will not be the same as that of Justice Whittaker that you were recounting in which you said, and I further quote:

> If any interest in the views of Mr. Justice Whittaker on these cases were manifested by the Members of the Senate, it was done either in the cloakroom or meeting of the Judiciary Committee. Discussion of the new Justice on the Floor of the Senate succeeded in adducing only the following facts, (a) proceeds from skink trapping in rural Kanasa assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal court, (c) he was the first Missourian ever appointed to the Supreme Court, and (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two States.

I think we can assure you that your case will be distinguished from that of Mr. Justice Whittaker's.

Now, it seems to me if we deal with the appointments to the Supreme Court as one of the highest responsibilities of the Senate, every Member of the Senate must have some concept in his own mind as to what qualifies a nominee for the Court.

Certainly basic qualifications are integrity and competency. In these areas I think everything that has been said here in the past day and a half indicates that there is no question as to your integrity and competence. Certainly fidelity to the Constitution, which was mentioned very eloquently by the Senator from North Carolina, Senator Ervin, is another basic qualification. And here again, I think there is no problem as far as you are concerned.

In addition, I think every nominee must be in a position to reinforce public confidence in the Court, and certainly in the years immediately ahead the Court is going to be called upon to answer very profound and pervasive social questions. So it must have the respect of citizens in order that their decisions compel public compliance and acceptance. And it is in the area of the decisions of the court in interpreting the unwritten but compelling parts of the Constitution that I think we have to concern ourselves.

I would like to address some questions to you on the philosophy with which you will approach the issues—the kinds of issues that may come before the Court. You do not have to answer the questions with any such particularity that you will feel obliged to disqualify yourself either here or there, but answer them only in a general manner.

Before you came to the Justice Department, you had in an active civic life expressed your position on a very wide range of issues, especially in 1964 and 1967 on the subject of civil rights.

Although we have covered some of this ground, I would like to ask you again whether your views as a private citizen are any different today than they were then.

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Mr. REHNQUIST. As I said yesterday in response to another question, Senator Mathias, with respect to the public accommodations ordinance, I think my views have changed.

With respect to the 1967 letter which I wrote in the context of the Phoenix school system as it then existed, I think I still am of the view that busing or transportation over long distances of students for the purpose of achieving a racial balance where you do not have a dual school system is not desirable.

Senator MATHIAS. It has been said here and elsewhere that your political views tend to be conservative. What effect, assuming this is the case, will this have on you as a judge and, consequently, as a man who should be able to decide cases impartially?

Mr. REHNQUIST. I would hope none. I realize that that is the same question I would want to be asking a nominee if I were a member of the Senate Judiciary Committee, and I cast about for some way of perhaps giving some objective evidence of the fact, rather than simply asking you to rely on my assurance.

I was on several occasions in Phoenix chosen to be an arbitrator between lawyers who found themselves in dispute with respect to particular claims, and I think the reason I was chosen was because there was a feeling that I would be fair, that whatever I might feel about personalities involved or about personal doctrine, I would try to apply whatever law there was to the facts and reach a fair conclusion.

I have always felt that, as I think Justice Frankfurter said, you inevitably take yourself and your background with you to the Court. There is no way you can avoid it, but I think it was Frankfurter who also said, if putting on the robe does not change a man, there is something wrong with the man. I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to enforce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress, and whatever relevant legal materials there may be in the case before you.

Senator MATHIAS. In the same Harvard Law Record article you quoted, I thought with some approval but I may have read that into it, an editorial from the New York World which opposed Judge Parker's confirmation as Justice of the Supreme Court in 1930. The New York World said editorially:

> The Senate has every right if it so chooses to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion of the Court as a whole.

From what you have just said, I would assume that this would make less difference to you today than when you wrote that article and quoted from the editorial.

Mr. REHNQUIST. It is so difficult to pin down the terms "liberal" and "conservative," and I suspect they may mean something different when one is talking about a political alinement as opposed to a judicial philosophy on the Supreme Court.

I think it would be presumptuous of me to suggest to the Senators on this committee, or to the Senate as a whole, what standards they ought to look for, but I cannot think of a better one than fidelity to the Constitution and let the chips fall where they may, so to speak, whether the particular decision pleases one group or pleases another.

I think to an extent in discussion about the Court there has been a tendency to equate conservatism of judicial philosophy not with a conservative political bias, but with a tendency to want to assure one's self that the Constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that at least on the part of the person making the observation that the person tends to read his own views into the Constitution.

I think the difference is well illustrated by Justice Frankfurter's career, who came on the Court at a time when I think it was clear to most observers that the old Court of the nine old men of the twenties and thirties was indeed, on any objective analysis, reading its own views into the Constitution, and Justice Frankfurter, of course, prior to his ascent to the bench, had been critical of this, and as a Justice he helped demolish the notion that there was some sort of freedom of contract written into the Constitution which protected businessmen from economic regulation.

And yet, when other doctrines were tested later in the Court, it proved that he was not simply an exponent of the current politically liberal ideology and reading that into the Constitution.

He was careful to try to read neither the doctrine of the preceding Court nor perhaps his own personal views at a later time to the Constitution, but to simply read it as he saw it.

Senator MATHIAS. In an effort to get at this question of judicial philosophy, maybe we ought to look at some specific areas of the Constitution which would necessarily, I think, be embraced in a judicial philosophy, but which due to their very nature are not susceptible of strict construction: Words such as "unreasonable" in the fourth amendment, "excessive" in the eighth, "due process" in the fifth and fourteenth amendments. I think these are areas which refer to rights which are not clear and absolute so that they have to be qualified and interpreted in protecting the freedoms and privileges, assessing the liabilities that the Constitution addresses itself to.

What would you consider, for example, to be reasonable searches and seizures as contemplated by the fourth amendment?

Mr. REHNQUIST. Senator, I honestly think that is too specific a question for me to answer. I know there are several cases pending up there now and I would anticipate that there would be a number in the future.

Senator MATHIAS. Would you feel that you could give the committee your ideas on what you think excessive bail would be? Some broad definition which you could apply the word "excessive" to.

Mr. REHNQUIST. I do not believe I ought to, Senator.

Senator MATHIAS. Well, I am not trying to put you in a position where you would prejudice your usefulness to your colleagues in the future, but I think this question may be important in the future as to which defendants or classes of defendants would be suited for bail. This is an area which would be of concern to the Senate, to the courts, and to the country.

What about due process?

Mr. REHNQUIST. I just think it would be inappropriate for me to try to now advance some sort of definition of a term which may well, if I were confirmed, come before me and on which I would hear argument and read briefs and have the benefit of discussion in the conference room.

Senator MATHIAS. In August you were in Alabama, and you said then, and I am now quoting from your speech:

> The purpose of the guarantee of freedom of expression in our Constitution is not to assure everyone the same opportunity to influence public opinion, but to assure that any conceivable view on a subject may be advocated by someone.

I must confess that particular expression of philosophy gives me some concern for one practical consideration. I am wondering who would appoint who to express a particular viewpoint.

Mr. REHNQUIST. I think what was meant, Senator, was——

Senator MATHIAS. This may, in taking it out of context, distort it, but——

Mr. REHNQUIST. No. I do not think it really does distort it. I think what was meant was that the guarantees of the first amendment do not mean that everybody is going to be provided with a printing press in order that they can have their own newspapers, but instead that anyone who has a newspaper is going to be permitted to say whatever he thinks.

Senator MATHIAS. Well, I agree with you; however, I had not read that from that quotation.

I think we want to do the best job we can in eliciting for the other Members of the Senate, who are not members of this committee, and the public, a profile of your judicial philosophy. You yourself suggested it is our duty. I may want to come back to some of these questions, but for the moment, Mr. Chairman, reserving the right to further questions, I will pass.

The CHAIRMAN. Senator Gurney?

Senator GURNEY. Thank you, Mr. Chairman.

I want to echo my colleagues in congratulations to you, Mr. Rehnquist, on this great honor, your nomination to the Supreme Court.

I do not think, Mr. Chairman, that I could add anything by way of questioning of the witness. I think his judicial philosophy has been thoroughly explored.

I think President Nixon is to be highly commended and congratulated for having sent the name of Mr. Rehnquist here for confirmation.

I think his qualifications speak for him in a very clear and resounding tone. He is exceptionally well-qualified for appointment to the, High Court, and I think he will add luster to his proper role, that is, an administration being one of law and not of men. In my view, the time is long overdue for the Supreme Court to exit from the role of lawmaking and return to its proper role of law-interpreting.

Thomas Jefferson, perhaps the greatest of the Founding Fathers, certainly had as much to do with the shaping of our Republic as any one man. He had great reservations about the judicial branch of Government. Here are some of the things he said about it. One quote:

> The Constitution is a mere thing of wax in the hands of the judiciary.

Another quote:

> A great object of my fear is the Federal judiciary.

Another one:

> It has been long my opinion and I have never shrunk from its expression that the germ of dissolution of our Federal Government is in the Constitution of the Federal judiciary.

I think if Jefferson were a member of the Committee on the Judiciary today, and had listened to the answers of Mr. Rehnquist concerning his understanding of the proper role of the Supreme Court, I think that Mr. Jefferson would be reassured and I firmly believe that a majority of the Nation's people also share that feeling.

I think Mr. Rehnquist's appointment will help restore confidence to the people in the Court, a state of mind that is badly needed and long overdue.

I have no questions.

The CHAIRMAN. Senator Kennedy?

Senator KENNEDY. Mr. Rehnquist, I also share this feeling, which I think you have become very much aware of during the last day, about the difficulty of trying to get some better kind of handle on your personal philosophy and concerns and commitments. Senator Hart pointed out yesterday that the Constitution of the United States as it was written and drafted never anticipated many of the challenges which are presented to our society. I think you have gathered from the questioning that for us, attempting at least to resolve in our own minds how you approach these problems, not how you are going to decide them but how you are going to approach these problems, is terribly important for preserving the institution of the Court.

My colleagues and I have asked you many questions in the areas of separation of powers, due process, equal protection, free speech, and so forth. As you pointed out so well in your article in the Harvard Law Record these are legitimate areas of inqury for us. I think you have been extremely cautious and guarded in your responses in these areas for those who are interested in how you are going to approach these questions.

You have indicated that you are going to attempt to put your political philosophy behind you and that you are going to assume a new kind of a responsibility when you take on the robe.

I think what I am interested in is, what are the various kinds of factors in your own philosophy that are going to help you make objective decisions? Of course, as was brought out yesterday by Senator Ervin and others, you are part of all that you have met, and this has been something which I know has troubled me in trying to bring out a greater degree of responsivemess from you.

You mentioned the role that Justice Frankfurter played in going on the Court with those remaining from the "nine old men" and the fact that he was perhaps a judicial conservative and that maybe the "nine old men" had been superimposing their own political philosophy on the Constitution.

Well, you know, what were those factors which so distressed you in the exercising of their political philosophy? How do you distinguish between Frankfurter's temperament as compared to those who had been making the decisions at that time?

Mr. REHNQUIST. Well, I would say that the series of freedom of contract cases, *Lochner* v. *New York*, *Adkins* v. *Children's Hospital*, by the objective judgment of historians, represented an intrusion of personal political philosophy into constitutional doctrine which the framers had never intended, and that Frankfurter had criticized that from the outside of the Court. It was not entirely clear until he had

been on the Bench whether the basis for his criticism was that he did not want laws like that held unconstitutional or whether it was that he felt there was no constitutional warrant for invalidating them, and I suppose you never know about an advocate until he does get on the Bench because it is only then that he is put to the test.

But the test came for him, I suspect, not so much in those cases but in other cases which later came before the Court, where he had great personal reservations, I suspect, about what was being done but, nevertheless, felt that the Constitution did not prevent it.

Senator KENNEDY. Well, as you believe that imposing personal views was the problem when Justice Frankfurter came to the Court, and as historians have made the same judgment, would you make the same criticism of the Warren court?

Mr. REHNQUIST. Could you spell out the question a little more?

Senator KENNEDY. The "Warren court," as a phrase, is generally associated with protection of liberties and rights and, as you are prepared to comment on your interpretation and other historians' interpretation of the Court which Frankfurter found as superimposing its views, would you be as quick to feel that the Warren court was following the Constitution or interpreting or were its Justices superimposing their views?

Mr. REHNQUIST. Well, trying to keep it in the terms of historical analysis rather than my own estimate of how I would decide something, I think Justice Frankfurter's behavior while he was a member of the Warren court is some indication at least of his agreement with them in some areas and disagreement in others.

He joined the unanimous decision in the school desegregation cases. He dissented from some of the cases involving the rights of criminal defendants.

Senator KENNEDY. Well, of course, that was not my question.

You felt and you have stated here and you have referred to legal historians feeling that the Court in the 1930's was superimposing the Justice's personal philosophies rather than objectively applying the Constitution—you made that judgment or recognized the legitimacy of that judgment—I am wondering whether you would make that same judgment about the Warren Court.

Mr. REHNQUIST. Well, it is much easier to make a historical judgment with at least a degree of confidence about decisions that were handed down over a period of years from 1905 to 1935 than it is with respect to a Court whose decisions are handed down from a period of 1953 until 2 years ago, if that is what you mean by the Warren Court, and therefore I think there is a great deal of difference in the confidence with which one can say history, in the sense of legal historians objectively evaluating it, has said that the so-called nine old men were wrong, at least a majority of them were wrong, in reading in freedom of contract.

I do not claim to be a keen student of legal historians analyzing the Warren Court. I would think that in the area of the Warren Court's criminal law decisions there probably is not the same consensus as to legal historians at the present time.

Senator KENNEDY. Well, maybe it is more difficult to make a judgment now than looking back over the earlier part of the century. But that is what I am asking of you as a student, not with reference to any

specific kind of case evaluation, but since you are prepared to make of the nine old men the judgment that they were superimposing personal judgments rather than following the strict letter of the law, I am interested in your judgment whether you would feel that the Warren Court had done the same.

Mr. REHNQUIST. Well, what I am giving you is my understanding of a historical consensus, and——

Senator KENNEDY. Would you agree with that historical consensus?

Mr. REHNQUIST. Yes, on the freedom of contract doctrine I think I would agree.

I think the historical consensus, because of the recency of the Warren Court's decision, is less firm, partly for that reason. I think there is substantial historical consensus in accord with the *Brown* versus *Board of Education* decision. I think that in the criminal law area, it is my understanding that there simply is not that sort of consensus. Whether it is from lack of time to develop or from disagreement——

Senator KENNEDY. I am not asking you to tell me what the historians are going to say. I am interested in what your feeling is. I am not saying can you predict what historians are going to say about this period or what others are going to say about it. I was interested in how you regard it.

Mr. REHNQUIST. Well, I certainly would not set myself up to make some sort of sweeping generalization about the Warren Court which sat from 1953 to 1969.

Senator KENNEDY. Well, you were prepared to do it about the nine old men.

Mr. REHNQUIST. I was prepared to do it in the sense of a very specific doctrine that was enunciated over a period of years from about 1905 to 1935.

Senator KENNEDY. There would be those who would say that the Warren Court is also recognized for particular doctrines in terms of individual rights and liberties as well.

Would you not agree with me on that, that there are some very relevant cases, lines of cases, flow of logic, flow of decisions as well on very particular areas, especially the rights of the accused and civil rights?

Mr. REHNQUIST. Certainly the Warren Court was known for those types of cases; yes.

Senator KENNEDY. Could you give me your evaluation in those areas?

You are prepared to do it in other——

Mr. REHNQUIST. I have given you my evaluation in terms of my understanding of a historical consensus. I wrote publicly on two cases decided by the Warren Court in 1957 or 1958. That was on the basis of making a reasonably careful study of the cases and the precedents and coming to a conclusion.

I certainly would not attempt to categorize all streams of cases without having had some opportunity to research the precedents, even from a historical point of view.

Senator KENNEDY. And you are not prepared to say that the Warren Court was making decisions based upon personal philosophy rather than the Constitution?

Mr. REHNQUIST. No. I am not prepared to say that.

Senator KENNEDY. Again in terms of the responses in the areas that we have covered, albeit briefly, will respect to wiretapping, the May Day demonstrations, preventive detention, the investigation of dissidents, you have indicated time and again when asked questions in these areas that you were—and correct me if I misstate your view on this—that you were presenting a view as an advocate and therefore, were presenting the view of the Department, but if you found any of these views to be personally obnoxious, you would not have stated them or would not have testified on those or made those comments, speeches. Is that——

Mr. REHNQUIST. That is substantially correct, yes.

Senator KENNEDY. You see, I think we then have to take those statements or comments pretty much as the basis for your views, since I think you have been generally reluctant to develop them to a great extent in the course of this hearing. And we have to place that against the background of the experience, for example, that there were a number of men during the course of this administration—Leon Panetta, Secretary Hickel, Terry Lenzner, perhaps even Cliff Alexander, a number of others within the administration, who for one reason or another separated themselves from the administration on the basis of strongly held views covering a wide variety of different issues. But you never felt constrained to do so, I would gather, at least on the basis of what you have commented on here so far.

Mr. REHNQUIST. No I am still here.

Senator KENNEDY. And to that extent, I guess, we have to value the representations that you have made in these areas in the past really to be your views.

Mr. REHNQUIST. I do not think that is an entirely fair statement.

Senator KENNEDY. Well, could you give us some idea which statements represent your views and which don't? That is all we are asking, Mr. Rehnquist, if we can. We have all of us been fencing around on this. I know we would be interested in what help you can give us.

Mr. REHNQUIST. I know we have. I think it would be inappropriate in an area where I have acted as an advocate to express a personal view.

I realize that leaves you in an unsatisfied position, but I do not feel I can do otherwise.

Senator KENNEDY. Well, then, help us—what kind of questions do you think we ought to be asking you to fulfill our duty according to your Harvard article, if we are to perform our roles as you think we should, and we are running up against this kind of situation? You help me.

Mr. REHNQUIST. I am simply not able to.

Senator KENNEDY. Thank you, Mr. Chairman.

The CHAIRMAN. Birch?

Senator BAYH. I think I expressed yesterday similar frustration, realizing that the responsibility that you must meet as a prospective nominee, as a part of this administration, as an adviser of the Attorney General, as a participant in many ways, an advocate, comes head-on with the responsibilities we have and it is not an easy problem to resolve.

I tried your patience for well over an hour yesterday and will not do so today.

Let me just touch on two or three areas, two or three points that might clarify a bit the questions asked yesterday.

I notice in looking at the various rights that were discussed yesterday, and I have not had a chance to look at all the transcript, but a summary of them, one area of rights that is very much in discussion today that was not touched upon yesterday is the rights of women citizens in this country.

You have been asked to testify and have testified relative to EEOC cease and desist orders and this type of thing, so I will not ask your opinion on that.

The administration, so far as I know, has not taken a position, despite my efforts as chairman of the Constitutional Amendments Subcommittee, has not taken a position before the subcommittee relative to the importance of the equal rights for women amendment. But my staff tells me you have testified in favor of it. Is that right?

Mr. REHNQUIST. I testified before the House Judiciary Committee.

Senator BAYH. In favor of the amendment?

Mr. REHNQUIST. Yes.

Senator BAYH. I have been unable to get——

Senator COOK. Senator, we now have another man on our side, another advocate.

Senator BAYH. I am almost afraid to ask him whether this is the administration's view or his personal view.

Is that a fair question that I dare?

Mr. REHNQUIST. I think I must refrain from answering.

Senator BAYH. Let me phrase the question a little differently. Senator Cook and I have been trying to help, to lead the charge in this area, so we perhaps do not come as totally unbiased Members of this body. To date the Court has not yet looked upon women as full citizens under the 14th amendment.

Would you care to offer a personal opinion about how women should be treated under the 14th amendment?

Mr. REHNQUIST. Well, I think that, if I may speak with extreme generality as I feel is required, that——

Senator BAYH. May I interrupt just enough to say you know there are now two specific cases before the Supreme Court, and I will not ask you at all to deal with either one of those. So perhaps I should wave that red flag.

Mr. REHNQUIST. Certainly the equal protection of the laws clause in the 14th amendment protexts women just as it protects other discrete minorities, if one could call women a minority.

Senator BAYH. One should not.

Senator COOK. Not even discreetly.

Senator BAYH. Can you cite us a case, Mr. Rehnquist, where the Court has ruled that discrimination against women is a violation of the constitutional rights?

Mr. REHNQUIST. No. I think the Court has been quite unwilling—in that Michigan bartender case decided about 1940 or 1949, they held that a limitation on a right of women to tend bar, as I recall, which was a fairly stringent limitation, nonetheless was not a violation of the equal protection clause, and it seems to me that there is one other case which I do not recall in which they also held something claimed to be a violation of equal protection clause was not one.

Senator BAYH. I do not know of a case where women have been described as persons under the 14th amendment. Does it strike you as rather inequitable to say that it is constitutional to prohibit women from serving liquor behind the bar, but all right to have them serving it in front of the bar to patrons?

Mr. REHNQUIST. I think that is one of the issues in one of the cases that is up there now.

Senator BAYH. All right. I do not think it is, but that is neither here nor there. I can see why you might not want to answer that.

Let me just try once again to be a bit more definitive, or get you to be a bit more definitive, in a couple of the areas we discussed yesterday because I think this is critical to us in trying to determine in our own minds whether you meet the test that you indeed set for yourself.

Do you believe this is a constitutional right?

Mr. REHNQUIST. Yes.

Senator BAYH. You stated that yesterday.

Do you concur in the general concept related in *Griswold* v. *Connecticut* back in 1965 as the way they describe this right, the broad basis of it?

Mr. REHNQUIST. I think it is not appropriate for me to get any more specific. To say whether I agree with the doctrine of a particular case or not I think would be entirely inappropriate for a nominee.

Senator BAYH. Well, if I read specific passages or sentences without relating them to a case, could I then ask if you concur in that general philosophy or——

Mr. REHNQUIST. You mean as a matter—do I think it philosophically sound in accordance with my own personal notions?

Senator BAYH. Yes.

Mr. REHNQUIST. Well, I will certainly try to answer that, with the understanding that this is not the same thing as saying that the Constitution so provides.

Senator BAYH. We have had a great deal of discussion here both from you and from some of us relative to where the Constitution enters and where one's personal views enter.

It seems to me that it is impossible for any human being not to let his personal views interfere or intervene in some way as he brings the Constitution into focus on a given problem.

You think personally, do you, that the right to privacy is important?

Mr. REHNQUIST. Yes.

Senator BAYH. It is an important right?

You see, where I have concern is that the way I understand what you said yesterday, and let me just try to paraphrase it and you tell me whether I am right or wrong, that you feel personally that there are a number of instances in which—many of them discussed yesterday—bad government policy involving an invasion of individual right to privacy is nevertheless not in violation of an individual's constitutional rights.

Is that an accurate paraphrasing of your feeling?

Mr. REHNQUIST. That was the view I took in the testimony I presented to Senator Ervin's committee on behalf of the Justice Department.

Senator BAYH. Well, but is that your personal view? You as an individual?

Mr. REHNQUIST. My personal view as to whether something that may be bad government policy is nonetheless not unconstitutional?

Senator BAYH. Well, let me use specific questions, either identical to or similar to ones I thought we dealt with yesterday.

For example, let's take a peace rally on the War Memorial steps in Indianapolis, Ind., totally peaceful. A speech is being given, a speech is being read. Policemen are taking pictures of everyone there. There are no threats or signs of violence at all.

Now, do you believe that that is a violation of the constitutional rights of those present to have this type of thing continuing to happen?

Mr. REHNQUIST. I think that calls for a judgment on the very specific factual situation.

Senator BAYH. Well, do I need to be more specific than the specifics I just related—totally peaceful, no threat of violence, no unruly mob, and yet the crowd was adequately dispersed by law enforcement officials taking pictures with the supposition that dossiers are being compiled on those there, or that the material gathered, pictures gathered, were being put into dossiers already compiled?

Mr. REHNQUIST. I think that calls for a constitutional judgment on the very specific sets of facts and I do not think I ought to give it.

The CHAIRMAN. We will recess now until 2 o'clock.

(Whereupon, at 12:25 p.m., the committee recessed, to reconvene at 2 p.m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. Let us have order.

TESTIMONY OF WILLIAM H. REHNQUIST—Resumed

Senator BAYH. Mr. Chairman, inasmuch as Senator Hart is senior to me, and he has some conflicting hearings involving a problem in his own local community today, his State, which makes it impossible for him to be here right now, may I have permission to read three questions for Mr. Rehnquist and ask him to respond to these as if they were asked by Senator Hart?

The CHAIRMAN. Of course.

Senator BAYH. Is there any objection to that, Mr. Rehnquist?

Mr. REHNQUIST. None at all, Senator Bayh.

Senator BAYH. I don't know that I can read these as concisely as Senator Hart:

Mr. Rehnquist, yesterday you testified at great length, with great patience, on a variety of matters. I do have a few questions I would like to ask, not to belabor any of the discussions yesterday, but to try to refocus a bit on some of the fundamental concerns I have.

Senator Bayh and Senator Tunney have already asked about your opposition to the Phoenix civil rights order of 1964 and I appreciate you indicated your views on the merits and on that one you had changed. Here is still what is on my mind: Yesterday when we talked about the role of a Justice in constitutional litigation, I think you agreed with me that those clauses promising due process and equal protection of the law in Learned Hand's phrase of "majestic generalities" which require interpretation with the aid of history and

precedents. President Nixon has recognized the importance of judicial interpretation in the field of civil rights. When he accepted his party's nomination in Miami in 1968 he said, "Let those who have the responsibility for enforcing our laws and our judges who have the responsibility to interpret them be dedicated to the great principles of civil rights." I agree. The President's promise is particularly critical in the case of our highest tribunal. One thing that has troubled me is whether your record can fairly be said to reflect the dedication "to the great principle of civil rights" of which President Nixon spoke. What have you ever done or said that could help me on that concern?

That is the first question. I will repeat the question: What have you ever done or said that could help me on that concern?

Mr. REHNQUIST. I think that there are some paragraphs in my Houston law day speech which recognize the great importance of recognition of minority rights, that the progress is not as fast as we would like and that more remains to be done. I am trying to think of some other public statement that may contain similar—well, you know, I am just going back through isolated passages in public statements.

Senator BAYH. If I might just interpolate a bit, and perhaps this is an interpolation that Senator Hart wouldn't want me to make, but have there been things that you have done—it doesn't necessarily mean you have to have said them—relevant to the committee inquiry? You mentioned one in response to the question I asked yesterday relative to your change in opposition to the equal accommodation ordinance. I think Senator Hart's question could reasonably be interpreted as an expansive question, not limited to particular things you may have said in speeches.

Mr. REHNQUIST. Well, I am trying to think through, perhaps going backward from the public remarks I have made in the Justice Department. I think in my so-called New Barbarians speech I made the statement that the people who lie on railroad tracks to prevent the carrying out of the laws stand on exactly the same footing as a Southern Governor who stands in the schoolhouse door.

Now, this may not indicate anything more than a statement on my part but it certainly indicated that I have, long before my nomination to the Supreme Court was made, felt strongly that the law of the land should be carried out in every part of the country and that resistance to it, whether in the name of interposition or something else in the South, or whether in the name of consciencious objection somewhere else, couldn't be tolerated.

Senator BAYH. May I suggest in the capacity which you hope soon to hold that it is a bit more than carrying out the law that Senator Hart asked your opinion on, but how you view the purpose of the law, the interpretation of the law in a general term, not just carrying it out.

Once the Supreme Court has decided, it is one thing to say you shouldn't stand in a schoolhouse door. That is a ministerial function; but the point, it seems to me, that Senator Hart's question is directed to, is as to whether that decision should have been made in the first place because of its effect on human rights. If that is not a fair interpretation, let's just go to the question.

Mr. REHNQUIST. Justice Miller, I think, made the statement in the slaughterhouse cases that in his opinion the principal import of the post-Civil War amendments was to benefit the Negro race.

I have always felt that was contemporaneous construction and a sound one of those amendments.

Senator BAYH. I am willing to let that stand if you are.

Mr. REHNQUIST. I am.

Senator BAYH. The second question from Senator Hart is:

Coming back one more time to your view of the Court's role, I have a further question relating to our discussion yesterday about the need for judicial interpretation. My impression is, and please correct me if I am wrong, that you responded to Senator McClellan yesterday that you agreed that the Court should not reinterpret the Constitution to bring it up to date, so to speak? I would like to explore that.

I understand you support the decision in *Brown* versus *Board of Education*. By your view of the Justices' role, how would you justify the Court's departure from *Plessy* versus *Ferguson* and subsequent decisions, when they were overruled in *Brown*?

Mr. REHNQUIST. I think I would justify it in this manner: that presumably the nine Justices sitting on the Court at the time that *Brown* versus *Board of Education* came before them canvassed, indeed they canvassed to such an extent that they set the case down for reargument on specific issues, deeply canvassed the historical intent of the 14th amendment's framers, the debates on the floors of Congress, and concluded that the Court in *Plessy* against *Ferguson* had not correctly interpreted that.

Now, that seems to me a very proper role of the Court. Precedent is not sacrosanct in that sense. Due weight has to be given to the Justices of an earlier day who gave their conscientious interpretation, but if a recanvass of the historical intent of the framers indicates that that earlier Court was wrong, then the subsequent Court has no choice but to overrule the earlier decisions.

Senator BAYH. Are you aware that probably few cases in history have provoked louder cries of anguish from some members of this committee than *Brown* versus *Board of Education* and that there is probably not a better example that they would use to support the contention that you should not support "lawmaking" as a Supreme Court judge as symbolized in their minds in *Brown* versus *Board of Education*?

Mr. REHNQUIST. Of course, I do not support lawmaking as a Supreme Court judge; but as I stated yesterday, if nine Justices, presumably of the same varying temperaments that one customarily gets on the Supreme Court at the same time, all address themselves to the issue and all unanimously decide that the Constitution requires a particular result, that, to me, is very strong evidence that the Constitution does, in fact, require that result. But that is not lawmaking. It is interpretation of the Constitution just as was contemplated by John Marshall in *Marbury* versus *Madison*.

Senator BAYH. I suppose Senator Hart asked the question to ask you to examine that historically, now looking back on *Brown* versus *Board of Education*. Does an individual judge in making a determination as to whether there should be a dramatic change—is it his responsibility to count the number of votes or to determine whether that change should be made?

I am sure you would say it is the latter?

Mr. REHNQUIST. Count the number of votes where?

Senator BAYH. In other words, you suggested in response that such a dramatic change would not be just bringing the Court up to date, in spite of strong precedents, when nine judges get together and feel this way. It seems to me at the time that is not relevant. At the time they don't have that decision before them. They have to determine whether precedents before are to be sustained or whether a significant change in Court interpretation should be made. And thus you have to use broader philosophical reasons, it seems to me, than the one you just gave, if I may say so.

Mr. REHNQUIST. Is the thrust of your question the idea that I was suggesting that unless all nine of them agree, none of them should have voted to overrule *Plessy* versus *Ferguson*?

Senator BAYH. No. I was trying to get a better idea of what situations would have to exist at the moment you might be called upon to make a dramatic reversal such as *Brown* versus *Board of Education* to compel you to make that.

The fact that you fall back on, the strong precedent of a nine Court decision that has been sustained over a period of years, is irrelevant at the moment that a decision must be made in the first place to chart a new course or reinterpret old law.

Mr. REHNQUIST. Well, I don't think you would ever say that a unanimous decision of the Supreme Court is irrelevant in determining a case before you as a Justice of the Supreme Court. I think one would approach a unanimous decision, particularly one that has been reexamined and reaffirmed, with the greatest deference. That doesn't say you never decide otherwise.

Senator BAYH. Let me try to phrase the question again because apparently I have done it very poorly.

At the time *Brown* versus *Board of Education* came before the Court, there was no nine to zero vote in support of *Brown* versus *Board of Education*. I am asking you, and I think what Senator Hart is trying to do is to ask you, to put yourself in a similar situation, not on that particular case necessarily but to discuss with us what circumstances you feel generally need to exist before you as a Justice would feel that you could overturn such a strong precedent as that which had existed under *Plessy* versus *Ferguson*.

Mr. REHNQUIST. Well, an examination into the intent of the framers of the 14th amendment. If you became convinced that the *Plessy* Court had not properly interpreted that intent, that it had simply adopted a view that was too narrow to be consistent with what the framers of the 14th amendment intended, then I think you would be entitled to disregard *Plessy*.

Again, an 8-to-1 decision is not one lightly to be disregarded, but nonetheless, if upon reexamination giving the weight that you ought to give to a precedent it appears wrong, then it is wrong.

Senator BAYH. Is it possible that in addition to making the determination that the previous Court had been wrong, one could come to the conclusion that certain circumstances had arisen in the interim which made the previous decision unable to accomplish the purpose that the Court sought to accomplish?

Mr. REHNQUIST. Well, I suppose one is entitled to take into account the fact that public education in 1954 is a much more significant institution in our society than it was in 1896. That is not to say that

that means that the framers of the 14th amendment may have meant one thing but now we change that, but just that the rather broad language they used now has a somewhat different application because of new development in our society.

Senator BAYH. One of those new developments is the very thorny thicket of busing, and you have mentioned twice now that you are opposed to busing children over long distances for any purpose. "Long distances" is a significant qualifier that perhaps you could get most of us to agree with you on, but unfortunately that is not the case before us on most occasions.

Let me ask you this: Do you feel that busing is a reasonable tool or a worthy tool or that it is a useful instrument in accomplishing equal educational opportunities, quality education for all citizens?

Mr. REHNQUIST. I have felt obligated to respond with my personal views on busing because of the letter which I wrote and I have done so with a good deal of reluctance because of the fact that obviously busing has been and is still a question of constitutional dimension in view of some of the Supreme Court decisions, and I am loath to expand on what I have previously said.

My personal opinion is that I remain of the same view as to busing over long distances. The idea of transporting people by bus in the interest of quality education is certainly something I would feel I would want to consider all the factors involved in. I think that is a legislative, or at least a local school board type of decision.

Senator BAYH. Fortunately or unfortunately, that probably will reach the highest court and that is why it is a matter of concern to you and a matter of concern to us.

Mr. REHNQUIST. Well, there is no doubt of that.

Senator BAYH In the Phoenix educational climate that existed at the time you wrote the letter to the editor, did you have some schools that were inferior to others in the Phoenix school corporation?

Mr. REHNQUIST. I am not sure that I know that much about the various schools in Phoenix at the time to answer that.

Senator BAYH. Well, you apparently knew enough about them to be opposed to the program that was suggested by the superintendent of schools.

The reason I ask that question is that it is conceivable to me that the reason for busing was to make more equal the educational opportunities in schools that were unequal at the time.

Mr. REHNQUIST. Well, I will stand on my earlier statement that the busing over long distances to achieve racial balance which many might think also contributed to quality education was a burden that the schools in Phoenix as they existed at that time should not have to bear.

Senator BAYH. Do you feel a school board has the responsibility to provide equal quality education in all segments of the community? Is that a reasonable goal?

Mr. REHNQUIST. Oh, certainly.

Senator BAYH. What does a school board do about the inconsistencies that exist in many of our communities, some of which I represent, in which there is strong opposition to busing, and yet equal opposition to a tax plan or a financial plan which would upgrade inferior schools that exist within the school corporation?

Mr. REHNQUIST. Senator, I think that goes beyond the bounds of simply my present view as to the comments I made in 1957 and since it is so obviously something that could come before the Supreme Court, I don't think I ought to answer it.

Senator BAYH. It seems to me that would be the purpose of the whole program espoused in Phoenix at the time, not just to say that you had *x* percentage of Chicanos and Blacks sitting in your classroom, to provide quality education. That is why I think the question is meaningful in terms of your original opposition. It is too easy simply to oppose busing over long distances, which is a very inefficient way to provide educational opportunities. I would concur with that. But to suggest that that is the only reason for busing, the only way it can be utilized, I think is not consistent with the facts.

Mr. REHNQUIST. I think I will stand on my earlier statement.

Senator BAYH. The third question from Senator Hart:

Returning to the May Day demonstrations, Senator Hart wants to follow up on one point Senator Kennedy raised yesterday, leaving aside the question of whether sweeping arrests were made without probable cause, the second point is that because a decision had been made to dispense with even the field arrest procedures, it soon became clear to most observers that the overwhelming bulk of the arrestees couldn't possibly be prosecuted. There was no proper means of indicating who had arrested them or for what offense or in what location. In fact, random assignment of officers as the arresting or complaining policemen was made at the District of Columbia stadium for a number of the arrestees.

Didn't it concern you sufficiently to speak up about it and even after it had become clear they couldn't be lawfully prosecuted, many youngsters were still detained in deplorable conditions and after release their cases were not dropped until the prosecution was in effect kicked out of court by the U.S. court?

Didn't that bother you at all?

Mr. REHNQUIST. I have to assume it is a hypothetical question, although some elements have certainly been demonstrated to the satisfaction of the local courts here. I think some of them are assumptions. But speaking to it as a combined factual and hypothetical question, I did not make any effort to intervene in the matter after the turmoil for two reasons, I suspect:

One is that the Office of Legal Counsel is basically an advisory branch of the Justice Department. The operational divisions—the criminal division, civil rights division, internal security division—are the people who handle things in the courts and in this case, as a matter of fact, I think it was the District of Columbia Corporation Counsel and the U.S. attorneys who were handling it.

The second thing is that, as I recall, my last day in the office before I was down with this back trouble was sometime around May 8 or 9, and I was simply incapacitated from that time until early June.

Senator BAYH. Senator Hart wanted me to make one final comment for him in which he apologizes to you, Mr. Rehnquist, and to the committee, for not being able to be here personally this afternoon to hear the answers to these questions. He said: I thought they were important and I will study the record for the replies.

Now, let me, if I may, go back to where we were before we all had a much needed break for lunch.

It has been my opinion, and I am sure that I am not alone, that you have done a very honest and articulate job of fielding the questions that have been posed.

I have felt that you have handled them sincerely and I hope that you feel that we have asked them with equal sincerity.

It seems to me we are on the horns of a real dilemma, one that I am sure you recognize. You in your writings in the Harvard Law Record suggested that you felt that the nominee's philosophy is ground that should be considered, a subject that thsould be considered by the Senate, on a Supreme Court nominee.

The President, as few presidents have done before, stressed strongly at the time your name as submitted publicly that it was because of your philosophy and the philosophy of Mr. Powell that you were chosen. That was a compelling reason, that you are a judicial conservative. Before we were told the goal was for a strict constructionist. It has been difficult and perhaps meaningless to try to find any definition of those terms, but what the man himself believes. Because of the responsibility you have had, and it has been a significant one, at Justice Department, you felt compelled not to answer questions covering your own personal views on issues, respecting judicial philosophy, for several different reasons.

I would like to try to define these reasons to see if perhaps there isn't a way that we can deal with the responsibility I feel you have and I sense that you feel that you have, and the committee has, to try to explore in more detail what you really feel about some of these important fundamental issues.

You indicated that you felt it improper to give us your personal views with regard to certain matters where you have been involved in the Justice Department's activities, including in a number of cases refusing to answer questions on the grounds that you have been the Justice Department's official spokesman regarding these subjects either before congressional committees or in making public speeches at universities and other forums.

Could you tell us once again why do you feel, now that you are a Supreme Court nominee, hopefully soon to leave the executive branch, you still feel it is improper to give us your personal views, your personal views on these matters of concern?

Mr. REHNQUIST. I think that it is a generally applicable principle in the lawyer-client relationship that the lawyer does not express his personal view as to the merits of the client's case. I think that that has added applicability here because the effect, assuming that there were some areas in which I disagreed with the position I have publicly taken for my clients would be disadvantageous to them. For that reason I certainly don't feel I can simply answer in areas where I may be in agreement and say "No comment" where I am in disagreement, since the obvious implication would be that where I say "No comment" I am in disagreement; and I think this is less than fateful advocacy on the part of a lawyer toward his client.

Now, I realize that this puts the committee in something of a dilemma. I don't know that it is much different than that posed by the position of other nominees who have come here, but at any rate I am simply unwilling now, even though I may be a Supreme Court nominee, to foresake what I conceive to be my obligation to my clients.

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Senator BAYH. You see, I appreciate and respect that. I was asked by some of the members of the press if I felt that anyone who espoused radical views that you have articulated should be kept off the Supreme Court and I said that frankly I didn't know whether you held radical views. I felt that radicals, left and right, would not benefit the Court, and I thought some of the views that you had espoused could be interpreted by me as radical but that you are interpreting them as part of the Justice Department philosophy. This depending on the Government's selfrestraint, this whole business, I feel is very bad. And thus—let me see if there isn't a way to break this log jam.

You feel very strongly about the attorney-client relationship, not only that this would be adverse to the client if you took a contrary position to your client's, but I suppose more basically the common law tradition of not disclosing matters of privilege that are shared by you and your client. Is that accurate?

Mr. REHNQUIST. Both are certainly involved in many of the cases.

Senator BAYH. Well, who is your client?

Mr. REHNQUIST. My clients are the Attorney General and the President.

Senator BAYH. As agent for the entire United States, I suppose, right?

Mr. REHNQUIST. Well——

Senator BAYH. In essence your client is the United States and——

Mr. REHNQUIST. No. That, Senator, I regard as a great oversimplification. Certainly as to the President, if one conceives him to be a client and have a lawyer which I don't think is the happiest expression of that relationship, he is, for all practical purposes, a popularly elected executive who is responsible to the Nation as a whole every 4 years for an electoral mandate.

The Attorney General is the President's appointee. He is responsible to the President. I am the President's appointee to a position where I am responsible both to the Attorney General and to the President.

The CHAIRMAN. I think if you took the position that the whole American people were your clients that you would be fired and you should be fired.

Senator BAYH. I would just as soon not comment on that profound statement.

Senator HRUSKA. Would the Senator allow a comment from the Senator from Nebraska?

Senator BAYH. I will be happy to.

Senator HRUSKA. Thank you.

Perhaps there isn't such a thing as anyone who represents all the people in America, either as a client or as a public official or in any other way; but isn't it true, Mr. Rehnquist, that anyone who represents the President as counsel is representing the man chosen to represent all of the people? As such it is important that he receive the best and most complete legal advice possible. And of necessity much of it must be confidential and bound by the attorney-client privilege.

Mr. REHNQUIST. Certainly the President is the closest thing in a Republican form of government that may be typified as representing the people.

Senator BAYH. Well, let me leave the question, then, that you really have as your clients the entire United States, but confine it to

your having as your client the Attorney General and, one step removed the President.

Am I wrong in suggesting that both at common law and statutorily, from the canon of ethics' standpoint, that the lawyer-client privilege is designed to help the client and not the lawyer? Is that privilege not one to the client and not from the client to the lawyer?

Mr. REHNQUIST. Certainly, the client is entitled to waive the privilege. The lawyer is not.

Senator BAYH. All right. Then we have two types of concern. One, your advocacy in those areas where you now might say that your personal opinion is different from the administration's and you don't want to disclose that because you might undercut your own client.

The second deals with revealing lawyer-client secrets. What relevance does that type of obligation have when the position of the client is already known publicly? In other words, if the administration and the Attorney General have said what they feel about certain elements of the basic tenets of the Bill of Rights, then why do you as a lawyer have any right to protect them from your involvement in that?

Mr. REHNQUIST. Well, I think to the extent that the Department, the administration, takes a public position, I feel free to discuss and have discussed my own personal contribution to that position—the New York Times case being an example; the preparation of the national security wiretapping brief being another example. But insofar as I may have been asked for advice in the process of making administration policy decisions upon which the administration has not taken a public position, there, I think, the lawyer-client privilege very definitely obtains.

Where the administration has taken a public position and the lawyer is asked not what advice did you give in connection with that position but basically do you personally agree with the position or not, there, I think, it is inappropriate to answer even though a public position has been taken.

Senator BAYH. You see, what concerns me is that not only in testimony before subcommittees of this committee, but also on several college campuses, you have made statements, and when some of us have tried to ask you about the statements you made specifically, each time you said you were speaking as a Justice Department spokesman—also that the audience expected a hard liner, I think, was another response you made to one of our colleagues. In these areas, we haven't been able to get Bill Rehnquist's philosophy for our consideration, and it is those areas that concern me.

You feel those are still protected by the attorney-client relationship?

Mr. REHNQUIST. Yes; I do.

Senator BAYH. That is the type of relationship that I suppose could be waived by the client, could it not?

Mr. REHNQUIST. I would think that it could be; yes.

Senator BAYH. And if some members of this committee would send to the Attorney General a letter asking him to let you have the opportunity to freely express your own personal philosophy, and we got his assent to that, or he gave his assent to you, then you would be free to give us the answers to some of the questions which heretofore you have not answered because of the lawyer-client relationship?

Mr. REHNQUIST. I would certainly think the privilege could be waived by the clients. Now, just who the client is, whether it is the President or the Attorney General, is something that would depend on the particular circumstances.

Senator BAYH. But at least it is not all the people of the United States? We have agreed on that?

Mr. REHNQUIST. I agree on that.

Senator BAYH. Well, would you have any strong objections if I were to send such a letter to both the Attorney General and the President? Is there anyone else who should be asked to participate?

Mr. REHNQUIST. Without suggesting at all my own impressions as to what a response would be, I would certainly have no objection to your sending——

Senator BAYH. I am not making this suggestion lightly. I think you are absolutely sincere and feel you have a responsibility to adhere to the lawyer relationship, but I must say I feel I have an equal responsibility to find a way to penetrate it. You have admitted that by your own writings. The President has admitted it, and yet because of the nuances of the lawyer-client relationship, we aren't really able to get what you feel.

Since you have no feeling that this would embarrass you, I will send such a letter to the President and to the Attorney General and await their reply. And I appreciate your patience in going through all of this with me.

Mr. Chairman, I will send this letter today before the sun goes down, because I don't want this to be "drug" out. I would like for it to be consummated quickly.

The CHAIRMAN. Don't worry; it is not going to be "drug" out. [Laughter.]

About this business, I think that is something this committee ought to pass on.

Senator BAYH. Pardon me?

The CHAIRMAN. I think that is something this committee ought to pass on. I am opposed to it.

Senator BAYH. Do you feel that as one Senator, one member of the committee, I don't have a right as an individual, Mr. Chairman?

The CHAIRMAN. Go ahead.

Senator HRUSKA. Will the Senator yield?

Senator BAYH. I will be glad to discuss this with any of you here, either privately or publicly. It seems to me this gives us an opportunity to let this gentleman express his own opinion.

The CHAIRMAN. This gentleman has been on the witness stand for the last 2 days and has acquitted himself very, very well.

Senator BAYH. I agree. I have said that to the press. I will continue to say it, but one of the problems he has been faced with, Mr. Chairman——

The CHAIRMAN. I am ready to vote.

Senator BAYH. Pardon me?

The CHAIRMAN. And I am ready to vote.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. Yes; I will be glad to get the thoughts of the Senator from Nebraska.

Senator HRUSKA. Mr. Rehnquist, the President in his comments on your nomination designated you, I believe, as a judicial conservative. Is my recollection correct?

Mr. REHNQUIST. I believe it is, Senator.

Senator HRUSKA. Have you ever discussed with the President personally whether you are a judicial conservative or not, in the context of the nomination for the Supreme Court?

Mr. REHNQUIST. It is not that I have any hesitancy in answering the question, except as to the propriety of repeating any discussion with the President. Since there was none here, I suppose I need have no hesitancy; no, he did not.

Senator HRUSKA. Then, obviously the President, in referring to you and describing you as a judicial conservative, resorted to the same type of information that is presently available to the committee, to wit: Your testimony before committees, your statements, your articles, opinions that you have written, and the observations and the contacts and recommendations of different people who know you. Wouldn't that follow?

Mr. REHNQUIST. Certainly those sources were available to him.

Senator HRUSKA. Yes. Presumably he did consult all or some of these sources. We know, at least as much as he knew when he determined your philosophy. I submit we can do the same.

Now, as to the interest, the very intense interest, of some members of this committee in some expression from you as to your personal philosophy, I would venture the suggestion that this is a rather newfound interest. I recall very well in the committee room when another nominee for the Supreme Court was occupying the nominee's chair which you now occupy. I think for the better part of 2 days the Senator from North Carolina repeated question after question almost without limit, requesting insight into his personal philosophy on various subjects. The answer was always the same. And at one juncture, the nominee said:

> Mr. Senator, I have talked to no one, no place, no how at no time about anything since I received this nomination.

Now, that was Thurgood Marshall.

I heard no expression of interest on the part of some other members of this committee in following up that line of questions with that nominee. Always before when a nominee has declined to answer a question when, in his own mind, for whatever reason, it has appeared inappropriate, this committee has honored that decision. This nominee should be treated no differently.

To require answers, aside from the attorney-client privilege, would not be fair to his future colleagues on the Court, assuming confirmation; it would not be fair to the litigants in the Court or to their respective counsel.

And so even if we have a letter here from all of the people of the United States saying it is all right for you to talk, Mr. Rehnquist, those considerations would not be solved, would they?

Mr. REHNQUIST. No; I don't believe they would.

Senator HRUSKA. And that has been my experience, reaching back to the time of Justice Brennan's confirmation. That has been the standard answer, and it has been accepted by this committee. I do

not believe that there is much hope of getting away from the immutable fact that there is a limit beyond which no nominee can in good conscience go in expressing opinions either personal or legal in character at this particular juncture.

As to the waiver, I don't see how you can get a waiver. There is no particular way it can be received nor issued.

Mr. REHNQUIST. Certainly past nominations have generally taken that position, and I think their refusals to answer that sort of question were probably justified.

Senator HRUSKA. They certainly have, and I think upon the reading of any of the prior hearings, that same decision, that same answer, will be found. It has always been accepted by the committee and also by the Senate.

I think you have been more liberal than some of the nominees before us in the extent that you have answered many questions. I would have asserted the answer, the historical answer, much sooner than you have done.

Thank you, Senator Bayh, for yielding to me.

Senator BAYH. Well, I appreciate getting the comments of my colleague from Nebraska. I am sure he is aware as a distinguished attorney that there is ample precedent. One has to look no farther than the American Bar Association Code of Professional Responsibilities, Code of Ethics, under canon 4, to find that the lawyer-client relationship can be waived by the client.

Now, perhaps the client in this circumstance would have no reason to waive it. I feel that this nominee has been struggling as we have been struggling to reconcile the differences which exist in our responsibility. They are not the same and I don't suggest that they are. I sat way down there when we had that particular nominee here and I think the Senator from Nebraska is absolutely right; that is exactly what happened. And I think all of us have to recognize that many times it all depends on whose ox is getting gored and we don't always face each problem with consistency as much as we would like to; we are bound up in our own ideas.

But I do not recall in my public life—that has not been nearly as long as my distinguished friend from Nebraska's—a President of the United States who has ever come on television and has made as the second prerequisite for his nominee, the second consideration, his judicial philosophy, and then to be confronted with that same nominee, a very distinguished legal scholar, who says himself:

> Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Now, there are the horns of the dilemma on which we are impaled.

Senator HRUSKA. If the Senator will yield for comment on that point, I don't think there are any horns at all nor any dilemma.

The CHAIRMAN. And no one's ox is being gored.

Senator HRUSKA. The fact is, and the Senator has as good a knowledge of that history as I, that Franklin Delano Roosevelt after he failed legislatively to pack the Court, turned to a deliberate course of appointing liberal judges and he chose them for that and he called them that. Let's not kid ourselves; that is why they were chosen.

And I sat here since 1954, sometimes in semiagony, sometimes in frustration, also sometimes in despair, wondering when that line of judges of liberal philosophy would ever run out and we would come to another kind of philosophy which would lend balance to the utterances and the statements of the Court. And I believe it is about time now that this committee and the Senate and the country take advantage of the happy circumstance that another type of nominee with another philosophy is being considered. It is not true that it is for the first time that that second consideration is being asserted for the appointment of members of the Supreme Court. That is not so. History disproves it; and it is a little late to try to rewrite that history.

The CHAIRMAN. Well, let's proceed.

Senator BAYH. If I might just make one other observation, Mr. Chairman, I think that there probably are some distinguished judges on that Court that have been appointed in the interim described by the Senator from Nebraska who would shudder a bit to be described as part of the liberal bent. I will not name them but I think the record will show who they are.

I want to make clear the distinction between what I am concerned about and what—maybe there isn't a distinction, but it seems to me there is one—a prospective nominee should refuse, has, and undoubtedly will refuse to comment on certain areas because this might abridge his sitting as a judge in cases that come before him. This is one area.

Together we can go through the transcript and enumerate those areas that have confronted Mr. Rehnquist with a problem. I am not at all concerned about those but we can also go through that transcript and we can find a number of areas, a number of questions which I will not repeat at this time, where that was not the basis, where I had the feeling that here was a man who was willing and wanted to give us his thoughts, but he could not do so because he felt he was violating the trust he had with the Attorney General or speaking as a Justice Department spokesman. I see no reason why that should not be lifted. I don't see how it is going to hurt the President or the Attorney General and it is surely going to help the Senate in its consideration.

I am not going to hold my breath until we get that waiver.

Senator HRUSKA. Or until it is asked, either.

Senator BAYH. Oh, perhaps I should hold it until it is asked. But that will be probably an easier time frame than receiving a reply.

Senator HRUSKA. The Senator does not recall a time when any nominee has been before this committee or any of its predecessor committees and when the nominee said "I feel it is improper; it is an improper question which is directed to me and therefore I respectfully regret that I cannot answer it," that that assertion on his part has not been respected by the committee? The validity of that statement is open for examination of previous transcripts by any of the members of this committee or anyone else. The refusal is for the nominee to assert and when it has been asserted, whoever the nominee has been, it has always been respectfully abided by.

Senator BAYH. Then may I ask my colleague from Nebraska if he would help resolve the problem in my mind where the nominee is on record as having said, in support of the administration, speaking

as a Justice Department spokesman, that he favors certain positions that I feel are not in the best interests of the country?

Now, I am unable to separate the nominee from the philosophy that he espoused wearing that hat. Am I obligated then to vote against him?

Senator HRUSKA. Well, in the first place, we have always recognized that a man's status changes when he becomes a nominee. Prior writings will speak for themselves but if he speaks on that same subject in terms of either expressing an opinion on a legal or constitutional proposition, or his present convictions on a proposition of that kind, then he runs into trouble and possible unfairness to his future colleagues if he would have to withdraw from a case. You cannot separate that.

We have always had that and we can examine the writings. We have Mr. Rehnquist's prior record and we will have the opinions of witnesses that will come here; they will give us many interpretations of his philosophy. I can hardly wait until next Tuesday when those explanations start. A witness has a right to be wrong, too.

And so the position that a man assumes when he becomes a nominee is different; it immediately changes and it should be governed by the new circumstances.

Senator BAYH. Well, I want to compliment the nominee again as I have in the past.

You say he has a right to be wrong.

Senator HRUSKA. Any witness has a right to be wrong; any witness.

Senator BAYH. On occasion even a U.S. Senator might be.

Senator HRUSKA. I have known of some times when that has happened also. [Laughter.]

Senator BAYH. The admission has been less frequent, but I think the fact that the nominee has said in the area of equal accommodations that he felt now in retrospect that he would not have that same position, I salute him for that. I just might——

Senator MATHIAS. Would the Senator yield just for one brief observation?

Senator BAYH. If you will let me just read one paragraph from the Congressional Record, I will yield and not force further patience on my colleague or the witness who has been very patient.

I just want to remind my friend from Nebraska that there are some rather distinguished authorities for the line of questioning we were following here which go as follows:

"When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest, and I admit that this nominee possesses both of these qualifications"—as I do about our present nominee—"but we ought to know how he approaches the great questions of human liberty." A gentleman by the name of George Norris, distinguished Senator from Nebraska, made that observation in a similar situation.

Senator HRUSKA. It is still true; still true.

Senator BAYH. All right. I yield.

Senator MATHIAS. Just a very brief observation: I join with my colleague from Nebraska, the Senator from Nebraska, in his feeling. I think that Mr. Rehnquist deserves a considerable degree of understanding and admiration because he has observed the important rules which govern the profession of law.

Perhaps what the Senator from Indiana seeks to do and which I seek to do and other members of the committee think can be done, is limited by our ingenuity and not by the subject matter. We can get at what we need to get at without applying to the President for any waiver. I agree with the Senator from Nebraska.

The CHAIRMAN. Judge Craig.

Identify yourself for the record.

STATEMENT OF HON. WALTER EARLY CRAIG, A U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Judge CRAIG. Mr. Chairman, I am Walter Early Craig. I am currently U.S. district judge for the District of Arizona. I am a former president of the American Bar Association.

I am here, gentlemen of the committee, in support of the nomination of Mr. William H. Rehnquist to be an Associate Justice of the Supreme Court. In passing I might say that I would be less than honest if I did not also say that I endorse wholeheartedly the nomination of Mr. Lewis Powell. I have known him for 25 years. Mr. Powell has a number of witnesses, I understand, to come before this committee, and I endorse everything they say that is good about him. I know nothing but complimentary things about him.

I can say the same for Mr. Rehnquist. I have known Mr. Rehnquist since his admission to practice law in Arizona, both in a professional capacity and since I have been on the bench, which I ascended in 1964.

Mr. Rehnquist's academic achievements are already a matter of record. They are remarkable. The only reason I mention those high achievements is because it relates to his qualifications as a lawyer. In my experience, Mr. Rehnquist's professional skills and ability are outstanding.

I have prepared and submitted to you a written statement with respect to my observations and concern with Mr. Rehnquist's appointment. I am certain that in my experience, throughout the United States, and my acquaintanceship and knowledge of members of the profession, that I could find no one that I would recommend more highly than Mr. Rehnquist to occupy the office of Associate Justice of the Supreme Court of the United States.

He has demonstrated, I think, his patience and judicial temperament in appearing before this body. I have observed it for 19 years, so it does not come as a surprise to me that he has handled himself so magnificently here. I have seen only a relatively few minutes of his testimony, but I have kept in some touch with the progress of the hearings.

In his appearances before my court, Mr. Rehnquist conducted himself not only with outstanding professional skills but with dignity, intelligence, and integrity. I think he has conducted his life that way so long as I have known him.

I do not know, Mr. Chairman, if you care for anything further, but I might comment in one additional respect. I read someplace or heard something about Mr. Rehnquist probably not being the leader of the Phoenix bar or of the Arizona bar. If there is a "leader" of the Phoenix bar or the Arizona bar, I do not know who it is, with the possible exception that it may be my 97-year-old father who is still going to his office.