The CHAIRMAN. Thank you.

Miss HURST. The committee will accept our petitions into the record?

The CHAIRMAN. Yes. Of course, I have said it would go into the record.

Miss HURST. Fine.

Senator BAYH. May I ask just one question, Mr. Chairman?

The CHAIRMAN. One. [Laughter.]

Senator BAYH. I did not have the privilege of hearing your statement, but do you feel, Miss Hurst and Mr. Rogers, that you are capable of making a judgment that the statements and the colloquy involved surrounding the statements at Brown did indeed constitute Mr. Rehnquist's own personal views?

Miss HURST. We assumed at the time, and had made the naive assumption, that what people say, especially with the force of Mr. Rehnquist, they do believe, or if they do not believe in those statements they make it clear. Since that time, of course, we have read parts of the transcript, and since that time Mr. Rehnquist has justified some of the tactics used at the May Day Demonstration, and we have heard him say, or we read the transcript and he said to the committee that had he not believed in Justice Department policy he would have resigned. We, therefore, more strongly believe that these were a reflection of his personal sentiments.

Senator BAYH. Thank you.

The CHAIRMAN. Thank you.

Mr. Forer, National Lawyers Guild.

Do you have a prepared statement?

TESTIMONY OF CATHERINE G. RORABACK, PRESIDENT, NATIONAL LAWYERS GUILD

Miss RORABACK. Yes; we do, Mr. Chairman.

My name is Catherine Roraback. I am the president of the National Lawyers Guild, and I am here on behalf of the guild to present our views in connection with the proposed nomination of Mr. Rehnquist and Mr. Powell to the Supreme Court. I believe our statement was filed with the committee.

The National Lawyers Guild is an association of attorneys and legal workers national in scope, as its name indicates, and in our meetings of the national executive board a week ago we went on record at that time in opposition to the nomination of both of these gentlemen, and the board asked me to present this statement to this committee.

Although the qualifications of these men appear to be an improvement over previous nominees who were overwhelmingly rejected by the people of the country and the Senate——

The CHAIRMAN. You are testifying against both nominees?

Miss RORABACK. That is correct, Senator; yes—in fact, both of the nominees have revealed by their conduct and public expression of their political beliefs that they are incapable of taking the oath required by their office to support the Constitution.

The views expressed by both men make it clear that they would be incapable of dealing fairly and impartially with issues arising out of the most pressing problems of our times: the struggle of blacks, other third-world people, women and other oppresses groups for social, political and economic equality.

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As the Constitution is now interpreted, there appears to be room for these struggles to operate within "the system." The National Lawyers Guild suggests that the reinterpretations promised by Messrs. Power and Rehnquist would have the effect of foreclosing these struggles, or forcing them outside the system.

Senator GURNEY. May I inquire what "third-world people" means?

Miss RORABACK. Yes; it covers any of the minorities, and this is a sort of word, a phrase, that has been adopted generally to cover such persons as Puerto Ricans, Chicanos, and other oppressed minorities who are not included within the phrase black.

Senator HRUSKA. Is third world as far as you would go? Senator Eugene McCarthy insists there is a fourth world, and he is about to prove it with his effort to be preferred for public, high public, office. Would you agree that three world is not enough, there should be more than that?

Miss RORABACK. Well, I suppose we might have millions of words, but for a short-time phrase to cover the group we are talking about, this is the reason for the words.

The CHAIRMAN. Proceed.

Miss RORABACK. Mr. Powell's views on some aspects of these struggles have been recorded by him in an article which originally appeared in the Richmond, Va., Times Dispatch on August 1, 1971, and which has since been reprinted in the October 1971 issue of the FBI Law Enforcement Bulletin and the New York Times on November 3. Since Mr. Powell has never held judicial or public office, and hence lacks a public record to examine, it is essential to closely scrutinize this article in order to ascertain whether he is fit to serve on the highest court of the land.

In the article, Mr. Powell goes into great detail about the Government's burgeoning use of wiretaps in the absence of prior court order. In this, as in other areas, his position is in basic conflict with the tenets of the Constitution. To support such untrammeled invasions of constitutionally protected privacy, Mr. Powell uses the rationale that "there are only a few hundred wiretaps annually," and that "law-abiding citizens have nothing to fear."

Aside from the fact that, by his statements, he has prejudged one of the most sensitive issues currently before the Supreme Court for adjudication at this time and hence is incompetent to pass upon it, should he be appointed, Mr. Powell's position reflects a total nonunderstanding of and/or lack of regard for the history and theory underlying the fourth amendment's prohibition against unreasonable searches and seizures.

The fourth amendment was written into the Constitution to guard against the possible repetition of the colonists' experiences with massive and unrestricted searches of their homes by English authorities conducting investigations into subversive activities. The fourth amendment was to act as a barrier against official lawlessness; the constitutional barrier it creates is not dependent upon Mr. Powell's assessment of who is law abiding and who is not. The constitutional protections guaranteed by the fourth amendment were designed to protect all citizens from all arbitrary, unreasonable, and unlawful governmental activity.

Mr. Powell's justification of such unconstitutional activity by the Government warrants the closest examination. Having determined the crucial issues of whether domestic dissident groups are included within the category of threats to national security, by asserting:

> . . . There may have been a time when a valid distinction existed between internal and external threats. But such a distinction is now largely meaningless.

He legitimizes the lawless actions of unsupervised wiretaps on the grounds of the need for secrecy. Mr. Powell heightens the urgency, in his view, of ignoring the Constitution by quoting from Attorney General Mitchell:

> Prohibition of electronic surveillance would leave America as "the only nation in the world unable to engage effectively in a wide area of counter-intelligence activities necessary for national security."

To begin with, Mr. Powell's use of Attorney General Mitchell's hyperbolic statement is at best irrelevant and at worst hypocritical and misleading. The issue is not now and never has been whether the Government has the power to wiretap; the issue is whether this power is to be supervised by an independent judiciary that will insure that the constitutional requirements of the fourth amendment—the requirements of probable cause and reasonableness—are met, or whether the power will be used by executive fiat without judicial supervision.

This issue is key. Mr. Powell's willingness, even eagerness, to entrust the enforcement of the protections of the 4th amendment exclusively to the executive branch of Government would undermine one of the firmest foundations of our constitutional form of government: that of the separation of powers and checks and balances. From the very beginning of our Nation, it has been the genius of our form of government to clearly divide and separate the powers of government into separate and equal branches, and to balance one branch's power against the power of its equals.

To place on the bench a man who would have the judiciary totally abdicate its constitutional mandate under the 4th amendment to supervise the actions of the executvie branch in this most sensitive area of individual privacy and liberty and who would give untrammeled power to the executive would be to gravely endanger our entire system of checks and balances and the separation of powers. Such a man is a far cry from the strict constructionist President Nixon claimed to have wanted.

Mr. Powell's apparent bias in favor of the executive branch to the detriment of the legislative and judicial branches is further evidenced by his glib dismissal of the allegations of several Senators and Congressmen that their telephones were being tapped or that they were under surveillance.

Despite the FBI campaign, recently discovered in the Media, Pa., FBI files, to instill the chilling fear in all Americans that there is an "FBI agent behind every mailbox," and that is a quote that came from those files, Mr. Powell blindly assesses that all such charges are "apparently . . . a part of a mindless campaign against the FBI."

An unstinting bias in favor of governmental action at the expense of constitutionally guaranteed rights is further evidenced by Mr. Powell's justification and commendation of the Government's policy of mass arrests in Washington, D.C., during the antiwar activities last May. He approves of the decision of the Justice Department to make

thousands of unlawful arrests, and then points to the wholesale dismissal of charges as an example of the soundness of our judicial system, a system he would have remain safely out of sight until after the damage of lawless governmental actions has ended.

In his article, Mr. Powell has passed judgment on several of the most important issues currently pending or that will probably come before the Supreme Court, in addition to that of the wiretap cases. Among other prejudgments, he states that, "the Kunstlers and others" are trying to disrupt trials and discredit and destroy our system. Not only does this libel courageous lawyers willing to defend unpopular clients and causes, but it indicates an attempt to intimidate others from doing the same.

Moreover, Mr. Powell may be called upon some day, if he were confirmed for the Court, to hear the contempt convictions of Mr. Kunstler and others now pending in the court of appeals and to hear cases of their clients. In his political views, Mr. Powell does not "bend" or "twist" the Constitution, to use the President's language. Rather, he totally ignores it.

Mr. Rehnquist has had greater opportunity to demonstrate his disregard of the Constitution, and demonstrate it he has clearly done. His invention of the fiction of "troop protection" to justify President Nixon's illegal invasion of Cambodia exhibited his attitude of total subordination of the legislative to the executive branch.

Mr. Rehnquist's views on the subject of wiretapping without prior court authorization for the purposes of "national security" are well known. Although he opposes integration in schools and public accommodations on the ground of maximizing individual freedom, he nonetheless supports gross invasions of first and fourth amendment rights by unsupervised wiretaps and governmental surveillance on the unproved grounds of governmental necessity.

Mr. Rehnquist's refusal to answer certain questions before this Senate Judiciary Committee on the ground that certain views were not his "personal views but rather those of a government advocate"—New York Times of November 4—is, at best, disingenuous. He was not forced into governmental service and was free to leave his employment at any time his conscience felt bruised. It seems safe to assume that the Nixon administration's policies on wiretaps and surveillance, policies that pose the greatest threat to liberty our Nation has faced in recent years, are clearly embraced by Mr. Rehnquist.

Furthermore, Mr. Rehnquist's public record of opposition to integration in schools and public accommodations alone is sufficient to disqualify him from sitting on the Supreme Court, since it reflects a complete disdain for basic constitutional rights that have been upheld by the Supreme Court in unanimous decisions for the past decade and a half.

Mr. Rehnquist's timely and recent disavowal of his opposition to a Phoenix public accommodations ordinance—New York Times of November 4—is not, we believe, as accurate an indication of his views as his original opposition. Many issues are and will be before the Court involving the legitimate demands of racial and other minority and disadvantaged groups for full equality on our society.

It woud seem that Mr. Rehnquist's often-stated position that "we give up a measure of our traditional freedom"—Rehnquist letter, 1964,

quoted in New York Times, November 3, 1971—whenever the courts read the 14th amendment as encompassing classes of citizens excluded from full participation in economic and political life would preclude him from determining such cases in such a way as to bring oppressed groups within the purview of equal protection of the law. As Mr. Rehnquist himself has stated:

> It is no accident that the provisions of the Constitution which have been most productive of judicial lawmaking—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. * * * If greater judicial restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court.

That is a quote from an article which he wrote in the Harvard Law Record.

It seems quite clear that Mr. Rehnquist would be just such a Justice and it is completely legitimate for the Senate and the American people to ask whether our country can afford such a narrow, insensitive, and unjust approach at this time. The National Lawyers Guild strongly believes that we cannot.

In a very concrete way, the appointment to the Supreme Court of two men who will read the protections of the 14 amendment in the most rigid and narrow fashion will serve to perpetuate the disadvantaged position of women and racial and economic minorities in our country. "Strict construction" in regard to the 14th amendment assures the continued exclusion of women and blacks, and other third-world persons, from full participation in our economic, social, and political system because of institutionalized sexism and racism. Such a position is intolerable in 1971 and should, by itself, serve to disqualify both Mr. Rehnquist and Mr. Powell from the Court. In addition, the complete inactivity and silence of the ABA on the question of equal rights for women while Mr. Powell was president, and Mr. Rehnquist's equivocal testimony on the equal rights amendment, demonstrate that both of these men are at best neutral and at worst hostile to the completely timely and legitimate demands of women for full equality in our society.

We believe it is important to put the issue of what qualities are minimally necessary for a prospective Supreme Court Justice into a theoretical as well as practical framework.

In his message announcing the nominations of Mr. Powell and Mr. Rehnquist, President Nixon states that one of the criteria he had used in making his selections was that the nominees have a conservative "judicial philosophy." In explaining what he meant by this, the President developed an elaborate dichotomy between a judge's judicial philosophy on the one hand and his personal political philosophy on the other. He states that a judge "should not twist or bend the Constitution in order to perpetuate his personal, political, and social views." (Transcript of Presidential announcement, New York, October 22, 1971.) Such a dichotomy is a complete denial of reality. There are indications that the President himself is aware of the unreality of the separation, since the examples he cited of what a judicial conservative would do included reversing the balance "against the peace forces, against Governors and mayors, against the police and courts." (Nixon, quoting Walter Lippmann with approval, in announcement, New York, October 22, 1971.), all of which are highly

political issues involving a Justice's social and political views of where the proper balance of rights between the society and the individual should be drawn.

In the past, Mr. Rehnquist has recognized how much a jurist's judicial philosophy is but the mirror of and funnel for his social and political beliefs. He recognized this explicitly when he wrote, "the law of the Constitution [is not] just 'there,' waiting to be applied in the same sense that an inferior court may match precedents." (Rehnquist, Harvard Law Record, 1969, quoted in New York Times, Nov. 3, 1971.)

Since the law is not just "there," a judge must bring to its interpretation all of his own social and political views. Mr. Rehnquist's views as stated in the Harvard Law Record would seem to be a more accurate guide to how he will function on the Supreme Court if approved, than his more recent statement, made under questioning by this committee, that he would "totally disregard [his] own personal beliefs in construing the Constitution and laws," (New York Times, Nov. 3, 1971.)

Before he became a nominee, Mr. Rehnquist had urged the Senate to "thoroughly inform itself of the judicial philosophy of a Supreme Court nominee before voting to confirm him." (New York Times, Nov. 3, 1971.) The National Lawyers Guild urges nothing less than what he recommended: that the Senate carefully scrutinize the judicial philosophies of the nominees before consenting to their appointment since those philosophies will help forge the political path our Nation is to take for many years to come.

The simple truth is that the Constitution has continued to survive as a viable instrument for the governance of our Nation because the Supreme Court has over the years had a majority of Justices who believed in interpreting the deliberately vague and flexible provisions of the Constitution in such a way as to begin to encompass some of the legitimate demands of oppressed and disadvantaged groups for full, equal, and meaningful participation in the economic, social, and political life of our Nation. The struggles of these groups have really only begun, but they have obtained sufficient momentum that they will not be turned around or suppressed. To revert at this time in our history to the days when the Supreme Court sanctioned and supported official governmental policies of racial inequality, injustice, sex discrimination, and gross economic disparities and deprivations would not only be morally indefensible but politically impossible as well. The Supreme Court requires today, as never before, the appointment of statesmen to it.

In confirming or rejecting nominees to the Court, the Senate, as a coequal of the President, is charged with the responsibility of insuring a qualified, independent bench. Such a role is far different from the one the Senate plays in passing upon the President's appointments to positions within his own executive branch of the Government. There the President's assessment of a nominee's qualifications carries far greater weight. A Supreme Court Justice is, instead, an independent servant of all the people and his qualifications must be assessed by the Senate within this context.

The Senate has rightly considered Mr. Powell's ownership of $1 million in stocks as a legitimate area of inquiry because of the effect such holdings might have on his ability to render impartial decisions

in cases involving such financial interests. The National Lawyers Guild believes that the social and political philosophies of both nominees are of far more critical importance in assessing whether they are fit to serve on the highest bench of the land, since the effect of their philosophies, while perhaps less tangible than that of financial holdings, will be far heavier and more pervasive when they decide issues and cases of the greatest importance.

The CHAIRMAN. Would you place the rest of your statement in the record?

Miss RORABACK. I just had one other interpolation I wished to make. I was down to the last two sentences.

The CHAIRMAN. All right.

Miss RORABACK. Nominees can divest themselves of their financial holdings; they cannot divest themselves of their social, political and economic prejudices and beliefs. And, in that connection, I would like to note that I saw a newspaper report of hearings before this committee since the preparation of this statement that Mr. Powell indicated he would disqualify himself in all cases involving his financial holdings, but on the question of the wiretap issue he saw no reason why he could not participate. This seems to me crucial in what we are saying that Mr. Powell and Mr. Rehnquist, because of their beliefs and biases, should be found by this committee to be unfit for service in the highest Court and, accordingly, I urge this committee to reject the nominations.

Might I also, if it has not been made a part of the record, submit a copy of the article by Mr. Powell as part of my statement.

The CHAIRMAN. It will be made an exhibit.

(The article referred to was filed with the committee.)

(Short recess.)

The CHAIRMAN. Let us have order.

I see here that John W. White, next on the list, is from Washington. I am going to take Mr. Paul O'Dwyer and then go back to Mr. White.

Senator BAYH. Mr. Chairman, while the next witness is coming to the table, could I make one observation, please?

The CHAIRMAN. Sure.

Senator BAYH. I apologize for being late and not being here when the committee started for the afternoon session. I understand that reference was made to a FBI report about the alleged voting irregularities supposedly involving Mr. Rehnquist.

The chairman has mentioned that Mr. Rehnquist's name was not contained in that report. I have had the opportunity of reading it myself, and while no validation is necessary of the chairman's assessment, I do want to say that Mr. Rehnquist's name is not in that report.

I think it could be further said without disclosing any of the privilege contained in the report, that this report covered only one precinct, the Bethune precinct, in one election in the 1962 elections.

The CHAIRMAN. Yes; it covered the whole FBI investigation.

Senator BAYH. Of the one precinct.

The CHAIRMAN. Correct.

Senator BAYH. In the one election in 1962

Mr. O'DWYER. Mr. Chairman, did you say Mr. White or Mr. O'Dwyer?

The CHAIRMAN. No; I said we would take you first and take him next.

Mr. O'DWYER. I see. Thank you, sir.

The CHAIRMAN. Senator, you are not leaving the inference there that Mr. Rehnquist was in any way involved?

Senator BAYH. No; quite the contrary.

The CHAIRMAN. In any other election?

Senator BAYH. I wanted to make it very clear, first of all, that I concurred in your assessment of what was not in the FBI report.

The CHAIRMAN. That is right.

Senator BAYH. His name was not in the report.

The CHAIRMAN. I think we ought to bring it all out now. The FBI keeps a cross-reference, and any time a man's name is mentioned in any investigation, when they begin a full field investigation, they show it in there, but there is no election matter that his name was mentioned.

Senator BAYH. Other witnesses have suggested voting irregularities. I asked Mr. Rehnquist himself. I do not know of any other FBI reports, I suppose there are none, but inasmuch as the allegations—and they may be totally erroneous; I suggest they are until we have proved the contrary—but allegations have been made. I have here clippings alleging various allegations, and I think many—if not all—of these allegations are politically motivated, having nothing to do with this nominee. But these allegations cover elections from 1962, 1964, 1966, and 1968.

The only FBI report we have, and the only FBI report that I can attest to, is the one concerning Bethune precinct in 1962.

The CHAIRMAN. Well, of course, there has been a full field investigation of Mr. Rehnquist, and he certainly came through with flying colors.

Mr. O'Dwyer, how long do you want, sir?

TESTIMONY OF PAUL O'DWYER, ATTORNEY, NEW YORK CITY

Mr. O'DWYER. About a half hour, sir.

The CHAIRMAN. I'm going to trade with you; let us make it 20 minutes.

Mr. O'DWYER. I am afraid that I will be halfway through, and I was very much impressed by the dialog between the Senators and the witnesses today. I think they sharpened up the issues, and I would hope we would have similar dialog between myself and the committee.

The CHAIRMAN. I cannot promise you unlimited time.

Mr. O'DWYER. We will see how it goes along, Mr. Chairman.

The CHAIRMAN. Sir?

Mr. O'DWYER. We will see how it goes along.

The CHAIRMAN. All right.

Mr. O'DWYER. I am here at the request of the New York Americans for Democratic Action, to submit a statement to the Senate committee in connection with the candidacy of Mr. Powell for a position on the U.S. Supreme Court, and I would like to offer that without reading it, so we have saved about 10 minutes there, Mr. Chairman.

The CHAIRMAN. That will be admitted.

Mr. O'DWYER. I would like to express my thanks to the committee for the opportunity to speak in opposition to the nomination of Lewis F. Powell, Jr., to the Supreme Court of the United States.