privilege, and in fact the client must assert such privilege, since it exists for his benefit." E. Conrad, *Modern Trial Evidence* § 1097 (1956).

And as Professor McCormick has noted (*Handbook of the Law of Evidence* § 96 (1954)), "it is now generally agreed that the privilege is the client's and his alone."

Despite my view that the privilege is inapplicable here, I am writing to urge you—in the interest of the nominee and of the nation—to waive the lawyer-client privilege in this situation. I have made a similar request of the President. This would release Mr. Rehnquist from any obligations he might have under Canon 4 of the American Bar Association Code of Professional Responsibility, see Code of Professional Responsibility, DR 4-101 (c)(1), or any other obligations he may have to refuse to answer questions involving his own views on questions of public policy or judicial philosophy. It is essnetial that the Senate, which must advise and consent to this nomination, have the fullest opportunity to determine for itself the nominee's personal views of the great legal issues of our time. I hope you will be able to cooperate to this end.

Sincerely,

BIRCH BAYH, *United States Senator.*

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 5, 1971.

Hon. BIRCH BAYH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BAYH: As I understand your letter of November 4, 1971, you are requesting that I, as Attorney General of the United States, waive what you refer to as the "lawyer-client privilege" with respect to matters on which William H. Rehnquist, as an Assistant Attorney General in the Department of Justice, has advised me and with respect to which he has taken a public position on my behalf. I further understand that this request is made by you individually rather than by the full Senate Judiciary Committee before whom Mr. Rehnquist has appeared as a nominee as an Associate Justice of the Supreme Court of the United States.

The issue raised by Mr. Rehnquist or any Supreme Court nominee's refusal to respond to certain questions during confirmation hearings is far broader than the scope of the lawyer-client privilege. There are other considerations which prompt a refusal to comment. For example, a nominee may feel that it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions, declining to provide their view of the Constitution as it applies to specific facts.

Even in those few instances wherein Mr. Rehnquist, relying on the lawyer-client privilege, declined to answer questions concerning what advice he may have rendered me, I feel constrained to say that a waiver would be entirely inappropriate. As Attorney General of the United States, I am acting on behalf of the President. In such a capacity as a public official, I do not consider the same factors the private client considers in deciding whether to waiver the lawyer-client privilege.

I can well appreciate your personal, intense interest in probing into all aspects of Mr. Rehnquist's work while at the Department of Justice. I am sure you appreciate, however, that it is essential to the fulfillment of my duties and obligations that I have the candid advice and opinions of all members of the Department. Further, I am sure you realize that if I should consent to your request or other requests to inquire into the basis and background of advice and opinions that I receive from the members of my staff, it would be difficult to obtain the necessary free exchange of ideas and thoughts so essential to the proper and judicious discharge of my duties. It would be particularly inappropriate and inadvisable for me to give a blanket waiver of the lawyer-client privilege in this situation. Ordinarily, a waiver should only be considered as it may apply to a specific set of facts. The range of questions which may be put to a nominee is so broad that it would be difficult, if not impossible, to anticipate what a general waiver would entail. Because Mr. Rehnquist, as Assistant Attorney General in charge of the Office of Legal Counsel, renders legal advice to others, including the President and members of the Cabinet, obviously I cannot waive the privilege that may exist by reason of those lawyer-client relationships. And determining the limits of each relationship cannot be done with precision.

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I have received a letter from Chairman Eastland and Senator Hruska stating, in their experience, that the Senate Judiciary Committee has never gone behind a claim of the attorney-client privilege or made an effort to obtain a waiver of the privilege from a client of the nominee. While ordinarily I would defer a decision until a request had been received from the Committee, I felt it necessary and desirable in this case to explain to you why I considered your request, or any similar request, inappropriate.

This letter may be considered a response by the President to you with respect to your letter to him of the same date and with respect to the same subject matter.

Sincerely,

JOHN MITCHELL, *Attorney General.*

Senator BAYH. To capsulize the very thoughtful 2-page letter, the Attorney General refused to waive the attorney-client relationship. I will read excerpts from it. For example—

There are other considerations which prompt a refusal to comment. For example, the nominee may feel it would be improper for him to respond to the kind of question that might come before him as a Justice of the Supreme Court. Past nominees have confined themselves to fairly general expressions declining to provide their view of the Constitution as it applies to specific facts.

I suppose it is fair to say that that is a legitimate hypothesis on the part of the Attorney General that we should not require a prospective nominee nor should he reply to questions in this regard that cause him to prejudge a cause.

Mr. Rauh, as a learned attorney, would you concur with that assessment?

Mr. RAUH. Precisely. It was exactly because of that point that I said the lawyer-client privilege did not apply. The right not to comment on cases that are coming before the Court obviously is correct, and we would make no challenge to his refusal on that ground, Senator Bayh.

Senator BAYH. Well, I want to say that this was not the request that I made. I do not see how I could ask a nominee—or the Attorney General to force a nominee or make it possible for a nominee—to answer such questions. That would be totally inappropriate. But contrary to a letter sent by our two distinguished colleagues, Senator Eastland and Senator Hruska, that in their experience the Senate Judiciary Committee has never gone beyond the claim of attorney-client privilege, I do not recall in the 9 years I have been in the Senate a prospective nominee to the highest Court of the land invoking a client-lawyer relationship. Now, I do not recall that ever happening. There are grounds for where a man should refuse to testify, but it is difficult for me to determine what William Rehnquist himself feels in general terms about the critical problems that confront us today unless he can separate himself from the statements that he has made which he now says were made totally as a representative of the Justice Department, which concern me very much.

Do you have any specific suggestions as to how we can get around this lawyer-client relationship, and the prohibition of the Attorney General to waive it?

Mr. RAUH. No; I guess I feel as defeated as you do. I do not think there was any lawyer-client privilege in any situation about which you asked him. I think some of the questions to which he pleaded lawyer-client privilege might, carefully analyzed, have included some possibility of a case before him later on. If he had then said, "I do not want to answer this because it may come before me," I think you would have

stopped right away. In fact, you always did stop when that point was raised, so I do not see that problem.

I think the Attorney General made a terrible error of law. First, he assumed that there was a privilege that does not exist and then he said he would not waive it. I do not know who is acting as his lawyer now; Rehnquist was supposed to be his lawyer and obviously could not act in this matter. So I do not know who is acting as the lawyer for the Attorney General at the moment. But what he is saying is, "There is a privilege that does not exist and we will not waive it anyway."

Senator BAYH. It concerns me, I do not know what to do about it and I thought maybe you could tell me what to do.

Mr. RAUH. I can tell you what you have to do about it. In the absence of any other answer, one has to assume that he meant what he said. In other words, when he went out on the hustings and made a statement, one has to assume that that is what he believes just as you would assume that Mr. Mitchell and I, although we stand here representing more than a hundred organizations, are saying what we believe, not what the organizations believe or what somebody else would tell us. Roughly, we are trying to describe their position, but when we say something we believe it.

I think the only thing the Members of the Senate can do, in the absence of his willingness to amplify his position, is to assume what Rehnquist said is what he believes. And on what he has said, he is not fit to be a Supreme Court Justice.

Senator BAYH. On a number of these occasions, and this will be my last question—you have been very patient and so have my colleagues—on a number of these questions that I posed to him, as you recall from what you said, you read the transcript of the record, I have taken specific quotations and have asked him if these represented his views, his views on human rights, or the administration position. Very frankly this concerns me. I have asked him one basic question: "Did you say this and does this now represent your point of view?" Is that a fair question?

Mr. RAUH. Certainly. I do not see how there can be any question about it or any assertion of confidentiality necessary for the lawyer-client privilege. I think the whole lawyer-client privilege thing before this committee is just like the emperor walking down the street without his clothes on. Nobody knew it until the child said the emperor did not have his clothes on. It is just simply that. There is not a lawyer-client problem here.

Senator BAYH. Thank you.

Senator HART. Senator Hruska.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. I yield completely.

Senator HRUSKA. Even partially would be all right, temporarily. In this committee room not many years ago, the first black man who was ever appointed to the Supreme Court appeared and was questioned. He was subsequently confirmed, and is serving well and creditably across the street.

Time after time after time he was interrogated by some Senators who sat to the right of the chairman, and time after time after time he said, "I decline to answer that question," not only as to his views past and present, but as to comments on cases that had in the past or might in the future come before the court.

Now, I can hardly differentiate that from the situation here where a question is asked of a nominee, and he says, "I do not choose to answer that question; I do not think I should answer it; I think it is an improper question." We have never in the past gone beyond this type of answer of the nominee in this committee to my recollection.

Now insofar as the law on waiver of privileged communications is concerned, my own belief, and I have done some reading and have had some personal experience in this area, is that a lawyer representing other people has no business nor has he a right to waive privileged communications without consulting with those whom he represents. In many instances, as the Attorney General has indicated in his letter, Mr. Rehnquist has served as lawyer and counselor to many officials of the executive branch. It would be impossible to contact all the people he has represented for the purpose of asking their permission to waive the privilege.

But I come back to this proposition: we sat here for 2 or 3 days when Mr. Thurgood Marshall was before us, and we respected his answer when he said, "Mr. Chairman, that is an improper question to ask of one who has been nominated to the bench," because of the many reasons which he recited.

Senator BAYH. If the Senator will yield, or if I have not yielded totally and may reclaim the part I did not yield.

Senator HRUSKA. I will yield.

Senator BAYH. I just want to make one statement because as we look through the record before us we will find the nominee respectfully, very respectfully, and I am not at all concerned about the demeanor or the way he approached this, I think he has legitimate concern, conscientious concern, but in this particular instance he relied on two different and distinguishable grounds. One was that he did not want to put himself in the position where his opinion and his articulating it before the committee would prejudge a case which might come before him as a Supreme Court Justice. That was the answer that has been used on several occasions by almost every nominee that I have had the good fortune to sit on this side of the table to listen to. That was the basis of the refusal of Justice Marshall.

I do not recall anybody relying on another type of reason for not answering. Indeed, the lawyer-client relationship which, as we read through the record, Mr. Rehnquist often involved—he did this not on the basis that he did not want to prejudge the case but that he did not want to disclose any confidence he might have with the Attorney General. He said he did not want to embarrass the administration or something like this, and that is why I think it is entirely proper to ask for a waiver of the privilege. It would be helpful if the Attorney General had sent back a different answer than he sent back to us so we could get not the administration's position, not the Attorney General's position, but get Mr. Rehnquist's position, his thoughts on these critical issues in a general way so we could know whether he indeed did believe the words that came out of his mouth concerning these important matters that we have discussed.

Now, that is the difference I have with my distinguished colleague from Nebraska and the distinguished Attorney General.

Senator HRUSKA. May I suggest that the Senator from Indiana recall that Thurgood Marshall served on the bench before he became

Solicitor General, that he was Solicitor General when he testified to this committee, a highly comparable situation to that of an Assistant Attorney General who is in charge of the Office of Legal Counsel. If he had been asked questions similar to those asked Mr. Rehnquist regarding internal Justice Department affairs his refusal to answer would have been totally justifiable because there are many situations in which the Attorney General requires complete candor from his associates in setting departmental policy and in serving as lawyer for the executive branch. If advice given, and possibly rejected, is to be made public, this candor will be lost.

Mr. MITCHELL. Mr. Chairman, I would like to say I was, of course, present at all of the hearings and I recall distinctly that on one occasion when Mr. Marshall was being considered as an appointee to the Second Circuit Court of Appeals, the only way that it was possible to conduct a hearing was because you, although you were a member of the minority party, convened the hearing and did conduct it.

I recall distinctly also that there were many questions which it seemed to me if Mr. Marshall answered it would raise a lot of additional questions, and to me it seemed that it was not necessary to do it. But I must say he performed in a manner of disclosing everything that anybody could conceivably think of as relevant, and my recollection is that in those hearings you personally commended him for his willingness to try to tell the committee everything within reason that it wanted to know.

I think the problem with the contrast between the Marshall hearings and the Rehnquist hearings is here are matters of great moment which affect the country no matter which administration is in power, and it does seem to me that everybody ought to bend over backward in that kind of a situation to make a full disclosure of the public business.

We have laws which make disclosure mandatory with respect to the ordinary citizen, and I think when something so vital as the Supreme Court is involved there ought to be a full disclosure and the administration itself ought to be willing to bend over backward.

Of course, I agree that nobody ought to be asked to predict how he is going to rule on a question that comes before him in the Court. But I do think that his general philosophy ought to be spread on the record so that the public may know in minute detail just what he stands for.

Senator HRUSKA. During the hearings last week, the witness will remember that it was my suggestion that Mr. Rehnquist was guilty almost to a fault in trying to express himself by way of answering on general personal philosophy. But when he was asked as to matters that came to his official attention as counsel to the President and the Attorney General he respectfully refused, and regretted that he could not answer. I submit that refusal was proper and mandatory.

Senator BAYH. If the Senator would yield.

Senator HRUSKA. I thought that was very fair and it is in keeping with the privilege, confidential privilege, of communication between lawyer and client.

Senator BAYH. If the Senator would please address himself to the question he just raised, that issue was not brought before this committee when Mr. Marshall was here.

Senator HRUSKA. Which question?

Senator BAYH. The relationship he had had with certain administration officials. The concern some of us have is that out of Mr. Rehnquist's mouth have come some statements in support of the administration position concerning the Bill of Rights that are of great concern to us. We simply want to know whether they are his opinions or whether they constitute the Justice Department's, for whom he was serving as a lawyer, as an agent or whatever, and he has refused to disclose whether this is the case or not. I do not see how that bears on the questions directed at Justice Marshall when he refused to answer not because of any secrecy that was necessary between him as Solicitor General and the administration but because he did not want to prejudge a case that might come before him.

Cannot the Senator from Nebraska make a distinction between those two?

Senator HRUSKA. The record will show the nature of the questions which Senator Ervin asked as well as some questions which Senator McClellan asked of Thurgood Marshall. Some of them did bear upon situations that arose while he was the Solicitor General and concerned the discharge of his duties and the Supreme Court cases decided while he held that high office. He declined to answer them, and very properly so, and the same thing is true in regard to the answers given by Mr. Rehnquist.

Mr. RAUH. May I make two points, Senator Hruska, in answer to what you have been saying? First, I do not believe Thurgood Marshall at any time pleaded the privilege of lawyer and client.

Secondly, I do not believe that Senator Bayh in any way is suggesting that he wants any privileged communications. You keep using the words "privileged communications." That means a confidential relationship between lawyer and client. When Mr. Rehnquist went to Brown and made a speech on wiretapping and Senator Bayh now wants to ask him whether that is his view or not, that is not a question based on a privileged communication. Therefore, the lawyer-client relationship does not apply.

If he wants to say, "I intend to sit on that case and, therefore, I will not answer," it would be a proper answer.

Now, he cannot say that because he does not intend to sit on that case as he has already worked on the brief.

Senator HRUSKA. And he frankly said so and he said he would disqualify himself on that particular case.

Mr. RAUH. That is exactly why the lawyer-client privilege does not apply.

Senator HRUSKA. Not privileged communication in that particular instance, perhaps, but in the other instances it did apply. The Senator from Indiana asked the Attorney General to wave some kind of a magic wand and say, "This privilege has now disappeared, you may testify." It does not work and it cannot work that way if the sanctity of privileged communications is to mean anything at all.

Senator HART. Senator from North Dakota.

Senator BURDICK. I would like to thank Mr. Mitchell and Mr. Rauh for their contributions here. I am disturbed by a contradiction in testimony. We will put the two together and perhaps Mr. Mitchell can clarify it for me. On page 4 you talked about the letter from Mr. Moses Campbell, and in the letter it states, and I will quote: "I was

present at the time our Past President"—that was of the NAACP—"Reverend George Brooks and Mr. William Rehnquist exchanged bitter recriminations concerning the group's purpose for marching, intimating that the march was communistically inspired." Mr. Campbell further asserts that Mr. Rehnquist's conduct, "brought irreparable harm and insult to the blacks of Phoenix, Ariz." You say "He opposes the nomination of Mr. Rehnquist. I offer a copy of Mr. Campbell's letter for the record."

On Monday of this week, at page 297 of the record, we find the following language, question put by Senator Hruska——

Judge Craig, in regard to the first whereas of the resolution of the southwest area NAACP I would like to read you an excerpt from yesterday's Washington Post. "When Rehnquist was nominated for the Supreme Court the former Reverend George Brooks"—

I presume the same one mentioned in the letter—

charged in 1965 Rehnquist confronted him outside the State Capitol and argued in abusive terms that a Civil Rights Act later passed by the State legislature should be opposed.

Further quoting from the record—

The Arizona NAACP promptly passed a resolution and the text of the resolution and the whereas read by the Senator from Indiana a little bit ago, now getting back to the story of the Washington Post. By the end of last week Brooks was telling a different story. He now says that the discussion with Rehnquist was calm, the tone was professional, constitutional, and philosophical.

Have you any idea when Mr. Brooks was right?

Mr. MITCHELL. I would say that on two occasions Mr. Brooks had indicated that the conversation was heated and there were recriminations. On one occasion, if he is correctly quoted in the Washington Post, he takes the opposite position. The first time he made that assertion was when Mr. Rehnquist was under consideration for his present position of Assistant Attorney General. In fact, Mr. Brooks was one of the leaders of the group which tried to prevent the confirmation of that nomination by writing to various people and nothing came of it but one of the principal points in the argument against Mr. Rehnquist was his performance up there at the State capital.

Then, subsequently Mr. Brooks made a similar statement which, I think, was published in the New York Times. After that publication I talked with him on the telephone and said I hoped very much that he would comes here to testify. He said he would not do so. I subsequently learned that Mr. Brooks' status has changed, that he is now in a position which I think has some connection with either the Federal or the State government, and apparently, like other persons who have information, he is unwilling now to describe the incident in the same fashion as it was described then.

I do not say that to be derogatory or to disparage Mr. Brooks. It is an ugly fact of life in this country, and I guess in many places that when your economic circumstances are at stake it requires a great deal of courage to be willing to come out and make a statement which might cause you to lose that status, so I would think on the basis of all the information that has been given to us that the Campbell description of that is correct, and that the first two Brooks descriptions are correct, but that the more temperate description is not correct.

Senator BURDICK. Is Mr. Brooks still president of the local chapter?

Mr. MITCHELL. No; he is not the president now.

Senator BURDICK. That is all. Thank you.

The CHAIRMAN. Senator Tunney.

Senator TUNNEY. Thank you very much, Mr. Chairman.

Mr. Rauh and Mr. Mitchell, I want to thank you for your contribution here today for having highlighted before the committee your reasons for opposition to Mr. Rehnquist.

I would like to determine more precisely the parameters of your objections to Mr. Rehnquist. First of all, does either one of you think that he is not qualified on the basis of professional competence?

Mr. MITCHELL. May I say I think he is not qualified on the basis of professional competence for the reason that I cannot separate from professional competence the duty of a lawyer to be fair and impartial or a judge to be fair and impartial. This is where I part company with so many people, and I am awfully reluctant to say this because I do not want to offend anybody, but as a black man, and a lawyer, I cannot believe that an individual who is blind to the requirements of the 14th amendment, who believes that it is some kind of imposition on a drugstore owner because you ask him to open the doors so somebody can buy an aspirin tablet, I cannot believe that this represents legal competence.

Senator TUNNEY. Mr. Rauh, do you wish to make a statement?

Mr. RAUH. I think we have a little bit of a semantic problem here. I subscribe to everything that Mr. Mitchell said. I, too, feel a person is not competent who does not have equality in his heart.

If you are giving me the specific question whether I think he had a good record in law school, and so forth, I have to answer that, in all honesty, yes. But I think that, in truth, Mr. Mitchell comes closer to it than a more legalistic answer. Had he not spoken first, I might have given too legalistic an answer to you. I suggest that competence means more than the ability to pass an exam or try a case. Competence, as Mr. Mitchell and I are using the term, means in its broadest sense a lawyer loyal to the community, a lawyer making a better world. In that sense I wholly subscribe to Mr. Mitchell's suggestion that this man is not competent.

Senator TUNNEY. You would be referring perhaps to judicial temperament, that he did not have the judicial temperament?

Mr. RAUH. I think it is obvious that he is an activist of the most amazing type. That is clear from his statement, his actions. If he gets on that Court, heaven help the lawyer who tried to argue his own case. This is one of the most intermeddling of lawyers—rushing out when nobody else in Phoenix wants to stop this ordinance, rushing in to fight for de facto segregation, saying that store decision does not apply in constitutional cases. If there ever was an activist, Mr. Rehnquist is it. For President Nixon to call him a judicial conservative is absolutely 180 degrees wrong. This will be the most judicial radical for reaction that we have ever had.

Senator TUNNEY. Do you feel that President Nixon was attempting to politicize the Court and, if so, do you feel that the Congress, the Senate, would be escalating the politization if we should turn down Mr. Rehnquist?

Mr. RAUH. I did not get one of the words.

Senator TUNNEY. Was the President trying to politicize the Court, and would we be escalating that politization of the Court if in fact we should reject Mr. Rehnquist's nomination?

Mr. RAUH. Again, I think there is a problem of semantics in the words "politization of the Court." I think President Nixon has been trying to put on the Court people who share his views of criminal law. I think he has had some bad luck, if you want to know the truth. I think he really thought Mr. Rehnquist was his kind of man on criminal law who was against all these frills of the Warren court like *Miranda* and *Escobido*, and these other things that the Warren court has done. I think Mr. Nixon is the most surprised man in America to find out that Clarence Mitchell has a case against him on civil rights that is overwhelming.

I do not think the administration realized that they were getting an anti-civil-rights nominee. I think what they were looking for was a nominee who would reverse the Warren decisions on the Bill of Rights and they did not figure that they were getting this man who was so extremely reactionary on Negro and brown and other rights like that. I think they just made another blunder.

It seems to me that Rehnquist is the same type of administration blunder that Haynsworth and Carswell were. It is not really a question, it seems to me, of politicizing the Court so much as the fact that they have again made a blunder by inadequate investigation. And I can see how this happened.

On Wednesday, October 20, they were planning to appoint two other people. Then Wednesday night comes the "no" from the Bar Association. Within 24 hours they have to have two Supreme Court nominees. They were unable to do any adequate research into Mr. Rehnquist's civil rights record. They found his anti-Warren court record exactly what they wanted, and they never looked for the other.

For you to accept that nomination, it seems to me, whether you call it politization or not, would simply be acceptance of someone who has no qualifications in the sense in which Mr. Mitchell so eloquently put it.

Mr. MITCHELL. My I comment on that, too, Senator Tunney? I think you have to look at the whole picture of this administration on civil rights questions to understand that this is, in fact, a political appointment, and an attempt to politicize the U.S. Supreme Court.

If you start back with the Republican National Convention, you will remember that the President in his acceptance speech made some reference to the fact that one of the first things he was going to do as President of the United States was fire the Attorney General. Now, everybody knows that the Attorney General would not serve under the administration, and this was one of those things that appeals to the gut reactions of crowds.

Then he made some reference to the fact that he was not going to have a Supreme Court——

Senator KENNEDY. Do you think if we fired this Attorney General that that would cause a gut reaction?

Mr. MITCHELL. I did not hear that.

Senator KENNEDY. Do you think if we fired this Attorney General it would cause a gut reaction in the crowd?

Mr. MITCHELL. I think upper or lower depending on your point of view. [Laughter]

He referred to the Supreme Court as sitting in the capacity of a school board. This again was one of those things that causes a crowd to get emotional.

Now this, you could say, is just politics. But what happened when the administration was called on to take a position with respect to school desegregation? The first thing that the administration did was to get one of the beloved and highly respected Solicitors General, who as dean of Harvard had always been on the side of civil rights, and it was a very painful experience for me to sit in the Supreme Court and to find the dean, now the Solicitor General of the United States, acting on the advice of the administration, taking a position against the acceleration of school desegregation; and the two appointments of Mr. Nixon that he made did not pay any attention to that so he is continuing to try to get on the Court somebody who will please that element of this country which somehow believes that the Supreme Court is the great advocate of racial mixing, busing, and all that kind of thing, and if you put people on there who will stop that then you are going to have a different situation.

Now, as to the second part of your question with respect to the politicizing of the issue if the Senate rejects him, I think the Senate in this case is the only bulwark between the people of this country and a demeaning of the U.S. Supreme Court, and I would say that if the Senate of the United States concurs in this nomination it will never be able to explain to the people of this country that it was not a party to the demeaning politicizing of the U.S. Supreme Court.

Senator TUNNEY. Mr. Mitchell, as I understand your arguments against the confirmation of Mr. Rehnquist, as contrasted to Mr. Rauh's, your objections are purely on civil rights, whereas Mr. Rauh goes into civil liberties in his statement, is that a fair analysis?

Mr. MITCHELL. This was a division of labor, and he has a greater love for that, although mine is amorous.

Senator TUNNEY. I would like to ask you, you have read the record and you have read, I am sure, most of the published statements of Mr. Rehnquist in the past 10 years. Do you feel that Mr. Rehnquist' civil rights attitudes have changed within the last 7 years?

Mr. MITCHELL. I do not believe that there has been the slightest change, Senator Tunney, and I reject wholly his present statement—it is very interesting if you listen carefully to what he said, one of the statements that Senator Hart read this morning, I believe he said, "I think that I would probably have a different position now." It seems to me if he does not know as distinguished from thinking then he probably has not changed.

Senator TUNNEY. Do you think anyone who is not in favor of making public accommodations open to all races should be, on that basis alone, excluded from consideration for the Supreme Court?

Mr. MITCHELL. I would say emphatically yes; because if a person is so insensitive, and so contemptuous of the feelings of his fellowman that he does not believe a mother with a child has a right to go in and get a meal at a lunch counter, or a person shivering and cold does not have a right to go in and get a cup of coffee to warm himself up, then that person has no business on the Supreme Court.

I will just mention this: Senator Thruston Morton once told me, he was a Senator from Kentucky, he told me one of the reasons he

had decided to vote for the public accommodations legislation in 1964 was because he was a friend to a Negro who was in the Kentucky Legislature, Mr. Anderson, and he said, "You know, I would think about Anderson's wife going downtown with that child of theirs and if the child", as he put it "wanted to tinkle, there was no place for that child to go because it was black." He said that kind of humiliation just ought not to exist in this country.

Well, I think that is an evidence of a sensitive person reacting. But to somebody who just feels, "Well, it is too bad, let him go somewhere else," I do not see how he has any place on the Supreme Court.

Senator TUNNEY. Do you feel, Mr. Rauh, that Mr. Rehnquist's attitudes on civil liberties have changed in the last few months, particularly since the time that he was nominated by the President to the Supreme Court, from his record?

Mr. RAUH. I do not think Mr. Rehnquist's attitudes have changed. As I said, he gave certain evasive answers which were for the purpose of possibly mollifying those who believe in civil liberties. But I do not see any change over a long history. The history goes back to 1957 when he suggests that the Supreme Court, to which he should have been loyal, had an ideological sympathy with communism. I should point out here something that I did not make clear this morning. When he later was trying to explain what he meant, he said the Court had an ideological sympathy with the underdog. But that word "ideological" is evidence that he was trying to imply that the Supreme Court, to which he should have been loyal, had an ideological sympathy with something bad. From the moment in 1957 and 1958 when he wrote the articles trying to imply that there was something wrong with the Warren court, through the civil rights period, his actions were all part and parcel of the same thing.

Let me say very frankly that the same people usually oppose civil rights and civil liberties. It is not strange that you find the same people opposing both. So you get Mr. Rehnquist in 1957 accusing the Warren court of ideological wrongs; in 1958 saying the same thing in his article in the ABA Journal; in the 1960's, back in Phoenix, attacking all along the civil rights front; then down here as the architect of the Mitchell anticivil liberties front. You get a picture of 13, 14 years in this thing. I think that a man who has lived roughly his whole adult life in the milieu of anti-human-rights and anti Bill of Rights is incapable of change.

Incidentally, there was a very good article in the Washington Post on Sunday making the point that most Supreme Court Justices have not changed on the Court. In other words, the Justices have largely carried out the views with which they went on the court. It is a myth, even if it was said by great men, that there is a change when one puts on robes. The fact of the matter is that that has not been proven by history. History shows us that the record of the past is what the man takes to the court and what he is on the court. Especially is this so with an outspoken and aggressive a man like Mr. Rehnquist who has fought all the advances in civil rights and civil liberties of the last decade and a half. I think the chance of change is very limited, and I say that we certainly see in these hearings no evidence of change. What you see is an evasion of the record, an effort to try to rewrite the record, not a showing of change.

Senator TUNNEY. I have two last questions that I would like to ask: One, Mr. Rauh, would you more fully describe the evidence on which you conclude that Mr. Rehnquist was merely participating in legal aid activities in Arizona as an involuntary ex officio duty?

Mr. RAUH. I did not use, Senator Tunney, the term involuntary or at least I did not mean to use it because I do not know that much about it.

I do have the record of the Maricopa County Legal Aid Society for the period that I understand that Mr. Rehnquist was on the board, and he is listed this way: "Ex officio, William H. Rehnquist, Maricopa County Bar." So it appears that he was there as an ex officio member.

I could not say that he did not want to be there. I simply am saying that for him to raise that ex officio membership as his great contribution to civil rights, I think that is to overstate the case on his own behalf.

Senator TUNNEY. The last question is, do you note any distinctions between Mr. Rehnquist and Mr. Powell and, if so, what are those distinctions?

Mr. RAUH. Well, obviously, Mr. Mitchell and I do draw a distinction.

The Leadership Conference on Civil Rights is not opposing Mr. Powell. We would, I suppose, not have appointed him; maybe as Senators we would vote no. But, when you take an organization as important as this one into a struggle, you must have overwhelming proof that you are correct. You must have it black and white, if I may use the expression. With Mr. Powell there appears to be a number of areas in which one must praise him. Jean Cahn writes an eloquent letter about his record on legal assistance for the poor. One must take note of that.

Apparently, although I am not a student of Mr. Powell's record—I have spent all my time on this struggle that we have before you today—I gather that there is no question that Mr. Powell did make a fight for legal aid for the poor inside the bar association.

Second, if one looks at the record in Richmond on school desegregation, it was a serious problem. I think Mr. Powell did something quite bad when he let State money get to Prince Edward County. Nevertheless, there is on the other side the fact that he did, over and over again, speak for keeping the schools open at the time of massive resistance. While I do not claim to be an expert on Mr. Powell, I gather from those who do know that there are things in his life where he has made real contributions. It seemed to us that to take our organization into opposing him, when one might say it was in a gray area, would have been a mistake.

Here we feel that there are no redeeming factors. We find nothing in Mr. Rehnquist's record in the civil rights area, like Mr. Powell speaking to keep the schools open. With Mr. Rehnquist we find nothing in the civil liberties area like aid to the poor for legal assistance. In other words, the record is all one way with Mr. Rehnquist.

That does not appear to be true of Mr. Powell, and so we decided we would take no position as we did in the case of Mr. Burger and Mr. Blackmun. We do not find any great joy in being the spearhead of the opposition in these matters. We felt we had to oppose when it came to Judge Haynsworth and Judge Carswell. We felt the same way on Mr.

Rehnquist. We did not feel the same way on Mr. Powell, and we are not taking any position on his nomination whatever.

Senator TUNNEY. Mr. Mitchell, do you have anything to add?

Mr. MITCHELL. I would just like to emphasize what Mr. Rauh said about our attempt to be fair. In all of these fights we have tried to get the story of the nominee before we made any kind of declaration about his position. When Mr. Blackmun was nominated by the President I undertook to get from the State of Minnesota and from the State of Arkansas, because Arkansas was in the circuit in which he served, information concerning his attitude on racial matters, and it was entirely favorable. In fact, the observation was made that Mr. Blackmun had come down from the bench on one occasion and said to our lawyers that he thought the Department of Justice was making a terrible mistake in trying to slow down school desegregation. So, obviously, we were not going to oppose that nomination.

In the case of Mr. Powell, we made a careful inquiry among his associates and friends in Virginia. There were mixed feelings on the part of black lawyers and others. I understand that there are those who are going to come forward and make observations about him, so it seemed to me they, because I know that one of them is a member of the Virginia Bar, a distinguished member of the Virginia Bar, ought to be the people who would say whatever had to be said. So we stood mute on the Powell nomination and were not for or against it.

Senator TUNNEY. Thank you very much, Mr. Chairman.

Thank you, Mr. Mitchell and Mr. Rauh.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. I just have two questions of Mr. Mitchell and Mr. Rauh. I want to commend you, Mr. Mitchell, for your opening statement and also Mr. Rauh. I thought it was terribly helpful in pulling a great deal of information together, and I think it provided some very valuable insights.

How do you respond to the observation that is made that Mr. Rehnquist was really the lawyer for a rather authoritarian Attorney General, so to speak, in terms of his actions, whether you're talking about May Day, surveillance, or many of the wiretappings, and so on? Now he came up here, he indicated to the Committee that if he felt that these positions had been obnoxious to him he would not have defended them, which I find distressing in trying to distinguish his own views from those he had presented. How do you rebut the argument made by those saying that those who try to take from his speeches or statements a personal philosophy are doing a disservice to him? He was actually acting for a more authoritarian Attorney General, how do you react or respond to that?

Mr. RAUH. Senator Kennedy, it seems to us that Mr. Rehnquist has two choices. He may either disavow those positions or he may ask to be confirmed on the basis of them. He chose the latter when, for different reasons and especially for a nonexistent reason of lawyer-client privilege, he refused to tell you whether he accepted those positions and whether those were his present positions.

Now, I believe they were his personal positions. He did not just work as a quiet drone in the Attorney General's office, Senator Kennedy. He went out on the hustings as the administration spokesman. He wrote articles, he wrote letters to the papers. It is one thing to be

the inside person working with the Attorney General; but would anybody except a true believer be the principal spokesman outside the Department and especially on college campuses? He told the committee how he was the leader of the task force that went to college campuses. He is the principal article writer of the Department, the principal letter writer of the Department. I would say that, if he did not believe all this, it would be a great reflection on his character.

I think the truth of the matter is that he does believe what he said. His entire record, as I was trying to say, from 1957 through 1971, makes him a part of that rightwing philosophy. I have little doubt that he believes what the Attorney General believes. Whether the Attorney General could get confirmed here is a different story. But I believe that Mr. Rehnquist's views and the Attorney General's are identical. You gave him a chance to try to dissociate himself and he rejected it. I think you have to, as a legal matter, act on the presumption that the views he gave in his speeches, articles and letters are his views.

Senator KENNEDY. And how much weight do you think we can give or should give to those views in fulfilling our responsibility to advise and consent?

Mr. RAUH. Senator Kennedy, I guess this is really coming back to where we started. If you take the Professor Charles Black view, you have a right to consider everything that the President can consider. I fully accept that as the better view of the responsibility of the Senate based on the history set forth by Professor Black. But I do not believe for the rejection of Mr. Rehnquist that it is necessary for you to accept what we might call the expansionist view of the Senate's role. It seems to me that a narrower position is possible than that Professor Black proposes. The lesser position is this: That the Senate, at least, has the right to see that court nominees are of such a nature that the Constitution is carried out and that the people of this country have the feeling that there is on the court a man dedicated to human rights.

In this period of our history the court has been the last resort of black and brown people. I think the Senate, even if it does not go as far as Professor Black, must at least go to the point of insuring that the nominees are dedicated to the Constitution and to the rights of minorities.

Therefore, I would suggest that you would be remiss in your duty if you did not go into these matters, whether you are willing to go as far as Professor Black did or not.

Senator KENNEDY. Let me, Mr. Mitchell, just ask a final question, and to you, Mr. Rauh. You know we talk about whether men change when they take on the robes of the Supreme Court, and you mentioned, I think, Mr. Rauh, the fact that history shows that they really have not changed that much. I am not familiar with the article that refers to it, but I am not so sure I would be willing to accept that as a general thesis.

I would suppose one of the very perplexing problems that any of us has is trying to look on into the future and see how these men will decide a range of different issues of questions relating to human rights or liberties.

Mr. Mitchell, do you think you would, knowing what you did about Hugo Black, have been up here prepared either to support him? or

from what you have known about any of these other men who have gone on the Court, what can you say to help us on this question, really? I mean, when you put those robes on, I personally do feel there is a change. How significant and how weighty and how important that is, it is terribly difficult for any of us to judge. But certainly in Hugo Black you saw an enormous difference. What can you tell us about this in terms of our being fair to any of these nominees?

Mr. MITCHELL. Well, Senator Kennedy, when Justice Black was nominated to the Supreme Court, I, along with some of my contemporaries, attempted to stage a huge protest demonstration. Part of our equipment was Ku Klux Klan hoods. We all agreed we would go out and distribute handbills for this meeting wearing Ku Klux Klan hoods dramatizing the fact that Mr. Black had been a member of the Ku Klux Klan.

But there was living at that time Walter White, who was the Executive Secretary of the National Association for the Advancement of Colored People.

Mr. White had known Mr. Justice Black as a Senator from Alabama, had known him intimately, and had great respect for him. It was Mr. White who convinced us that although the Justice had this Ku Klux Klan identification in earlier life that he was in fact a person who had deep convictions.

It was because we trusted Mr. White as an expert witness on the nominee that we took off our Ku Klux Klan hoods, and we refrained from protesting, and up until one of the last decisions that Mr. Black made in the *Mississippi Park Closing* case, we have never regretted that.

I think in the case of people like Judge Haynsworth, Judge Carswell, and the present nominee, Mr. Rehnquist, you have to rely on the assurances that you get from people who are really experts on them either because they have worked with them intimately and known them well or are convinced themselves that this individual is different from the image that he projects. That is not present in the Rehnquist nomination.

The only thing we have as evidence of a change of heart is the fact that under circumstances where the prize for conformity is the U.S. Supreme Court he has been willing to say to men of good will like yourself, willing to say on the record, and in a somewhat evasive manner, that he has changed.

I do not think that is sufficient evidence. I do not think that the country can afford to take that kind of chance, and I repeat, as I said, in the earlier part of my testimony, in the words of Senator Hart, can you ever, could you ever, expect that a black man going into the U.S. Supreme Court, seeing Mr. Rehnquist sitting up there, knowing what his record is, would believe that he could get fair consideration? I think it is important that the people will believe that they get fair consideration, and I do not believe that Mr. Rehnquist has been convincing in that respect.

Senator KENNEDY. Have there been any—let me just ask—have there been any black leaders at all who have come forward that you know about or that you have respect for in behalf of Mr. Rehnquist, who would fill that same role as Mr. White did for you at the time of Justice Black's nomination?

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Mr. MITCHELL. No one has, Senator Kennedy. The people of Arizona who know him by direct contact, have been unanimous in their condemnation of him. There has not been a single person of any importance who has come forward saying that they feel he has changed and he ought to be on the Supreme Court.

Mr. RAUH. Senator, may I say a word on the Justice Black analogy? I was a law clerk at that time for Justice Cardozo. When Justice Black went on the Court, he was one of America's foremost liberals. At the moment Justice Black, as a Senator, was President Roosevelt's leader in the Senate of the United States. When, I guess it was Justice Vandevanter retired, and there was a vacancy, the question arose whether Senator Black should get it. This was based on whether he could be spared from his New Deal duties in the Senate. He was, after Senator Barkley, the leader of the group seeking to get New Deal legislation through Congress. He had already proved his anti-Klan feelings.

What happened was that Black was then confirmed as a very liberal man.

Subsequent to his confirmation the story of the Klan association came out. There were people who felt as Mr. Mitchell did, and they were answered by Mr. White. But even at the time the story came out about the Klan, Black was at that moment respected as one of the great liberal Senators of the time. So, it is not really fair to put the question in those terms.

Had Black's record in the 20 years previous to his nomination been consistent with his Klan membership, it would have been one thing. But his record for 20 years was totally inconsistent with that short Klan membership.

Senator KENNEDY. And I suppose the point that you are making, Mr. Rauh, is that Mr. Mitchell indicated how heavily he relied on Mr. White's giving those kinds of assurances, having an intimate knowledge of Mr. Black. And I suppose the point you are making here is that the same kind of human concern or human compassion toward fellow human beings is lacking in Mr. Rehnquist's experience, so far as you have been able to detect both from what he has been able to present here and also from your own study.

Mr. RAUH. Precisely.

Senator KENNEDY. That might be at least helpful and useful to us, if someone could show a broader spirit or a man who conducted himself in that manner.

Thank you very much.

Mr. RAUH. Mr. Chairman, I have two things that Senator Cook mentioned this morning. May I quickly answer them for the record?

Senator HART. Yes.

Mr. RAUH. I promised Senator Cook I would get the dates on the Arizona civil rights law and I have them. The Arizona civil rights law passed the senate on February 16, 1965. It passed the house on February 26, 1965. It was finally passed by both houses on March 26, 1965. It was approved by the Governor April 1, 1965. That is the Arizona civil rights law which includes the Arizona Civil Rights Commission and no discrimination in either voting or public accommodations. Senator Cook asked me for the dates.

The other point that Senator Cook raised was the question of the press picking up the "qualified martial law" statement and using it.

I said that I believed it had been used even after the nomination since it was so commonly known. I would like to refer to the New York Times, Wednesday, November 3, 1971, where the following is reported:

> Reacting to the criticisms that during the May Day protest in the District of Columbia many individuals had been swept into the police mass arrest net and held without opportunity to make bail, Mr. Rehnquist replied that an undeclared qualified martial law had existed.

I would also like to refer to the Washington Post of Sunday, November 7, 1971, in which the following occurs in the B section (I do not have the page number):

> At the last mass arrests that were made by Washington police in the May Day, Rehnquist espoused the doctrine of qualified martial law.

I only mention those two items because Senator Cook had indicated he was going to bring forth some evidence that this was not the accepted newspaper reporting.

Thank you, sir.

Senator HART. Gentlemen, thank you very much. As has been true on other occasions, your testimony has been relevant and of great significance. Thank you.

Mr. MITCHELL. Thank you.

Mr. RAUH. Thank you.

Senator HART. Before I recognize Senator Kennedy, let me say that next we shall hear on behalf of himself and members of the congressional black caucus and a very distinguished colleague of mine of the Michigan delegation in the House, the Congressman from the First Michigan Congressional District, the Honorable John Conyers.

Senator Kennedy?

Senator KENNEDY. Mr. Chairman, yesterday I asked that a memo utilized in questioning Mr. Powell be made a part of the record. It was the memo regarding the consensus of the FBI conference that the FBI ought to enhance the paranoia endemic in the New Left so as to "get the point across there is an FBI agent behind every mailbox."

I said it was not a classified memo because it did not have the usual stamped classification in the usual place. However, I now notice that at one point the text says that it should be given the security afforded a document classified confidential. Although the memo has appeared many times in the media, I file it now with the suggestion that the committee determine from the FBI whether there are any continuing national security reasons for treating it as a classified document.

Senator HART. Before I say yes, shall I have a newspaper copy?

Senator KENNEDY. You figure that.

Senator HART. This will be placed in the record.

Congressman, we first welcome you, and then we express our appreciation that you have been willing, and that your schedule permitted you, to wait.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; ACCOMPANIED BY HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI, AND HENRY L. MARSH III, ATTORNEY

Mr. CONYERS. Thank you, Mr. Chairman, Senator Hart, and the distinguished members of this committee.

Again I am very honored to come before you. I bring with me my dear friend from Missouri, Congressman William Clay; and to my right, I bring a distinguished attorney from Virginia, Henry L. Marsh III.

I will say more about him as we proceed.

I am here, Mr. Chairman, under the authority of the black congressional caucus which, as you probably know, is composed of the Honorable Shirley Chisholm, of New York; my colleague, William Clay, of Missouri; Congressman Charles Diggs, of Michigan; Congressman Robert Nix, of Pennsylvania; Congressman Augustus Hawkins, of California; Congressman Louis Stokes, of Ohio; Congressman Charles Rangel, of New York; Congressman Ronald Dellums, of California; Congressman Walter Fauntroy, of Washington, D.C.; Congressman Parren Mitchell, of Maryland; Congressman Ralph Metcalfe, of Illinois: and Congressman George Collins of Illinois.

We are delighted to be here even though the wait has been a long one. I would suggest that there is little room to quarrel with the view in connection with the nomination of William H. Rehnquist to the Supreme Court, that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the High Court. Beyond these requisites, his judicial philosophy is of the highest importance, and that is what we will emphasize and dwell upon in the time we have before you.

That is to say, his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution, are clearly affected by his basic convictions on the socioeconomic issues of the day.

It is fundamental that an individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past.

No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and social and political understanding, by his experiences, and by his personal sense of justice regarding the great questions of his age.

And so, in passing on the very heavy question before you, might I quote from Professor Black of the Yale Law School, who has been mentioned during these proceedings. He wrote a passage that summarizes a great many pages of the testimony that will be inserted into the record:

> * * * there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote.

Our statement is replete with evidence of what might be called the socioeconomic viewpoint of the nominee in question.

We cited him at length to illustrate an outlook on life. We mentioned statements and illustrations from speeches, quotations, and activities that are perhaps not new to you and which have apparently been

gone over a good many times, but they do illustrate an outlook on life, a view of the world, which is too narrow, too ill suited for the times, and clearly out of step with the new responses that have emanated from the courts in an attempt to harmonize age-old challenges that still yet require constitutional interpretation.

Although it could be argued that no one of these statements taken alone presents in and of itself a serious threat to civil rights or civil liberties, it is maintained by us that they, taken as a whole, do, in fact, reveal a philosophy so rigid and conservative that it cannot help but have a chilling effect upon those who have struggled so valiantly to achieve the small gains made in the last 17 years under a system of law which has grudgingly given support and shelter to those legal doctrines that enshrine the first amendment and the 14th amendment.

We are presently witnessing increasing numbers of violent acts of State terror in America: The overreaction of law enforcement officers in Watts, Newark, and Detroit; the massacres at Kent State, Jackson State, and Orangeburg. The tragedies at Attica and San Quentin are current examples of attempts to spread a psychology of fear among oppressed ethnic groups who are demanding power and freedom. And so, nearly 200 years after the establishment of this Government, the contradictions and antagonisms have become regulated and institutionalized, but not eradicated.

The question becomes then whether the Constitution will be used to moderate the conflicting racial and economic struggle in America and keep it within the bounds of law and order, or whether it can be used as a document to lead us to a unified, harmonious, and peaceful society.

To reconcile traditional antagonisms rather than regulate them is the new challenge confronting the Supreme Court of the land.

What are we to say of an individual nominated for the Highest Court who views the Constitution with an ante bellum eye, who sees the gigantic steps forward by the Court as requiring two giant steps backward, and one whose philosophy if it had been consistently applied since the inception of the Republic would by now have left us with very little progress in the areas of civil rights and civil liberties.

A careful study of these excerpts from Mr. Rehnquist's remarks reveals a clear call for the curtailment of due process, of habeas corpus, and of freedom of speech. You will find the justification for wiretapping and other surveillance. The expressed fear of nonviolent disobedience is to be met by force. It's all there: The defense of Haynesworth, the SACB, and the handling of the May Day demonstrators.

And so, in brief conclusion, the real question is: Can this country afford at this perilous time in its history an individual on the Court with an ideology so out of tune with the times that if his philosophy should prevail, even in part, it would threaten to tear at the slender threads now holding us together? Make no mistake about it, the Court is viewed as the last hope by millions of Americans—especially blacks and other oppressed minorities.

Short of the ultimate fulfillment of the American drean, that hope must be maintained. Holding our society together may well depend on maintaining the faith, which still survives even among the most disaffected, that in our highest courts there may still be found equal justice under law.

We can ill afford to move backward at a time when we are moving forward at a dangerously low rate.

The Senate should not confirm or fail to confirm this nomination because of a threat from any segment of our society, but it must recognize the consequences of its actions.

The Senate has not only the responsibility, if I may humbly suggest, to advise and consent on Presidential nominations to the Court, but has the obligation to examine the candidate's fitness in relation to the potential harm that might be done.

Again, as Professor Black observed—

> . . . a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by doing so.

Because there are reasonable grounds to believe that the views of William H. Rehnquist are inimical to the best interests of this Nation, the Senate is respectfully urged to advise the President negatively on this nomination.

I hope that the chairman and members of the committee will permit these Members of Congress and distinguished counsel from Virginia to make these suggestions because it seems very clear to me that unless this view is approached in evaluating this and the other nomination confronting you perhaps a rather serious mistake might be made. In other words, we are suggesting something that is really not new, but has been used and employed by the Senate in being that middle link between a nomination and a commission of Presidential nomination many, many times.

We are asking now that it be carefully reviewed, thoroughly considered, and fairly applied in the instant nomination.

Senator HART. Congressman, you have also a prepared statement which, I take it, you want to be printed in the record in full as if given.

Mr. CONYERS. Yes, Senator; I do ask that this statement be included in the record.

The CHAIRMAN (presiding). We will take it.

(The statement follows:)

TESTIMONY BEFORE SENATE JUDICIARY SUBCOMMITTEE CONSIDERING THE NOMINATION OF WILLIAM H. REHNQUIST TO THE SUPREME COURT OF JUSTICE

PRESENTED BY HON. JOHN CONYERS, JR., MEMBER OF CONGRESS ON BEHALF OF HIMSELF AND MEMBERS OF THE CONGRESSIONAL BLACK CAUCUS

Mr. Chairman and distinguished members of the Judiciary Committee, I consider it a privilege to appear before you in consideration of this Supreme Court nomination.

There would seem to be little room to quarrel with the view that adequate legal experience and honesty alone are insufficient in reaching a determination of a nominee's fitness for the high court. Beyond these requisites, his judicial philosophy is of the highest importance. That is to say his perception of the function of the Court, his obligations as a Justice in interpreting the Constitution are clearly affected by his basic convictions on the socio-economic issues of the day. An individual cannot divorce himself from his past sets of experiences. Even though he may not feel bound by the restraints of personal or constitutional judgment on issues he considered as a citizen, few men can achieve this degree of independence from their past. No one seriously believes that a judge's professional work is not influenced and formed by his world outlook, by his economic and