Senator BAYH. I understand there is an affidavit coming from the Justice Department from Mr. Rehnquist avowing that—has that been received by the committee?

The CHAIRMAN. Just a minute. "William H. Rehnquist being first duly sworn on his oath deposes and says that:

"He is not now, nor has he at any time in the past, been a member of the John Birch Society. William H. Rehnquist."

That will be placed in the record. There goes that bunch of stuff. [Laughter.]

(The affidavit referred to follows:)

AFFIDAVIT

William H. Rehnquist being first duly sworn on his oath deposes and says that: He is not now, nor has he at any time in the past, been a member of the John Birch Society.

WILLIAM H. REHNQUIST.

Subscribed and sworn to before me this ninth day of November , 1971.

ANGELINE JOHNS,
*Notary Public.*

My commission expires April 14, 1972.

Senator HART. I think I will inquire on behalf of one of my colleagues on the committee whether that had a seal on it.

The CHAIRMAN. It is properly sealed.

Mr. MITCHELL. I would like to say, Mr. Chairman, right very respectfully, in the light of the evasive tactics of the nominee, I would not assume myself that a mere disavowal on his part was a sufficient puncturing of whatever this is described as being.

Senator BAYH. Let me say this, as one member of the committee who has had a good bit of his staff involved in trying to find answers to questions and trying to differentiate fact from rumor, it is awfully difficult and none of us want to become involved in the character assassination of someone just because we disagree with him. That is why I want to get it all out on the table. I heard this morning this affidavit was forthcoming and I was not totally surprised to see our distinguished chairman had it as of this time. But I have investigated with the greatest care from a number of sources the rumor that the nominee has been a member of the John Birch Society. I have not found any evidence to substantiate this myself. I say that very frankly. I am alarmed about the philosophical difference we have. He has appeared and made speeches before a number of rather extreme rightwing groups. I have not found any evidence that he belongs to any of them.

Now, if anybody has any records to the contrary, I am sure the members of the committee would be glad to have them.

Let me say I think that your request that this be investigated is proper and I don't hold out our investigation as infallible, but we did make a good faith effort to deduce whether there was any fire as well as the smoke there.

Mr. MITCHELL. I would say, Senator, it is not customary for people who are members of organizations like that to leave a clear and available record of their identification and activity and, as I said, I do feel that mere disavowal is not necessarily the whole story.

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Senator BAYH. Just a matter of mere speculation does not prove the contrary to be the case; I am sure you would be the first to say that.

Mr. MITCHELL. No.

Mr. RAUH. Senator Bayh, I never thought much of this Birch thing.

Senator BAYH. Would you please say John Birch, Mr. Rauh? [Laughter.]

Mr. RAUH. I never thought much of this John Birch stuff until I heard that affidavit. I have been in this field for a long time where people are accused of right or leftwing activities.

The normal answer to a charge of extreme right or leftwing activities is much different from that. Usually if you are denying that you were in an organization of the extreme right or left you would not only deny membership but you would also deny any connection with it. I previously had not thought much of the charge but I think that affidavit is one of the most potentially revealing documents. The real point isn't a simple statement of nonmembership; the question is what was the connection. From the failure to say anything about the connection, I for the first time think there might be something in the charges. All morning I have been saying I didn't think there was anything in it, but that affidavit is the weakest denial I have ever heard. It says he wasn't a member. What about all the relationships that are possible short of that? I am absolutely flabbergasted that a man who is trying to get on the Supreme Court of the United States should send up an affidavit so limited in its denial of relationships.

Senator KENNEDY. Now, Mr. Rauh, if you would yield, I think your suggestion here is completely unwarranted and completely uncalled for; and I reject that suggestion as one who has been very seriously concerned about it. I may be proven wrong. I talked to Mr. Rehnquist myself about this question and I am completely satisfied with it and I don't think it serves the cause for those of us who have some very serious reservations to have this kind of a charge to leave the atmosphere as suggested by you and Mr. Mitchell, by this kind of an association. So I just want you to understand very clearly my position on it, and I don't feel that you are serving the cause of enlightenment with regard to the nominee by this kind of suggestion.

Mr. RAUH. I have made no suggestion. I said I didn't consider a denial of membership——

Senator KENNEDY. You have commented on this——

Mr. RAUH (continuing). A total denial.

Senator KENNEDY (continuing). Very adversely and left an atmosphere which I think is rather poisonous in terms of the nominee. And if he has made that statement and anybody is able to rebut it, then we obviously ought to have that information. But to try to suggest from it any kind of question in terms of—I have questioned a lot of his positions, but I don't think there has been a fundamental question in terms of his basic integrity, in terms of this type of misleading suggestion, and if there is then I think you ought to have a good deal more to go along with it than the kind of suggestions you are making here.

Senator BAYH. I would just like to reiterate what I said before: I think it is a fair question to be raised. Having been raised and having

the nominee's opinion and the result of a rather extensive investigation which I personally have made, I have not found any evidence to sustain this allegation. I did find that he made a speech before one very ultra-rightwing organization. Beyond that, we have no evidence of membership.

Let me move on, if I might, please, so that some of my colleagues can have an opportunity to share their views.

Are either one of you gentlemen familiar with Judge Walter Craig?

Mr. MITCHELL. I am not.

Senator BAYH. He is a former president of the American Bar Association, now a Federal judge in Phoenix. Judge Craig testified in support of Mr. Rehnquist. He happens to be a Democrat, as I recall, and I asked some of these same questions of him that I would ask of Mr. Rehnquist in trying to explore Judge Craig's knowledge, as one of the leading members of the Phoenix bar as well as the American Bar Association and now on the Federal bench, if he had personal knowledge about any bias or prejudice that Mr. Rehnquist may have, and he said quite the contrary. I just wondered if either of your gentlemen would care to comment on that? I thought Judge Craig made a very strong witness in behalf of Mr. Rehnquist.

Mr. MITCHELL. Well, you know, Senator Bayh, I don't want to sound like a racist, but as I have listened to the committee's reaction to some of the testimony that we have presented, the reaction to Mr. Rauh's position, and the assertions made by Senator Cook after the hearing, the trouble with all this is that for some reason the white people that I know and have worked with or who come up and testify before these committees, just don't seem to see this thing in the same light that we who are the victims of injustice see it. So I am not surprised if a judge, who is a Federal district judge, were to come up and say that so far as he knows this is a very wonderful gentleman, and that he is the epitome of fairness, and that kind of thing.

But against that statement which the judge has made, there is a whole body of information by the black community, and it really boils down to a question of whether, in a Senate Judiciary Committee, and in the U.S. Senate, the testimony of a large number of black people against the nominee will have sufficient weight to influence the statement of one white person from the community who happens to be a Federal judge?

I am sorry to say that in my experience in dealing with a great many people who are in important positions in this country you can have 100 black people who are eye witnesses, and stated unequivocally what happened, but one white person can come up and say to the contrary and the testimony of 100 black people will be discredited.

So I would say I think it ought to stand on its own feet. We have said what the people down there who were black think of him, and against that is the statement of a judge.

It would be interesting to see whether the Senate of the United States attaches more weight to the testimony of that one white man than it does to all these other colored people who have expressed themselves as they have.

Senator BAYH. Well, Mr. Mitchell, it has been my good fortune to know you for some time, and we have had some rather intimate conversations on a number of legislative issues. From hearing of your

personal experience I must concur, although I wish it were otherwise, and it probably would be absolutely impossible for anybody who has not walked in your shoes and been subjected to the type of abuse that you have over the years to look at every issue with the same kind of perception that you do, since you have been there.

Do you really think it is fair, let me ask you, in light of some of the battles that have been fought before this committee over the last few years concerning this very subject, a Supreme Court nominee, to say this committee and some of its members have not been sensitive to what the black people of a given constituency have said about a proposed nominee?

Mr. MITCHELL. I would not say that the committee members have not been sensitive. But I would say, with a few notable exceptions, when a statement is made which a black man considers devastating in its impact it just does not seem to have the same credibility and attention that a white person making a counterstatement has.

For example, how could we possibly in the Carswell nomination have been insensitive to the fact that the judge had, as a candidate for office, made an open declaration of his belief in white supremacy? But there were many people who did not think that in itself was sufficient to be against him, and they were prepared to forgive it on the ground that he was young.

But then, as I said this morning, after the nomination was rejected, on the record, in his Florida campaign, the judge went back and did what we had figured he would do all along.

The same thing is true in the Haynsworth nomination. It was our contention that Judge Haynsworth in his interpretation of the Constitution was going to do it in a way that was against the civil rights of Negroes.

It was only a few days ago that there was a case before the Fourth Circuit Court of Appeals in which a majority held that a place of recreation which anybody with a scintilla of eyesight and commonsense could see was being operated under the guise of a private club when in fact it was public but operated under the guise of being a private club for purposes of evading the law, Judge Haynsworth was one of the judges who said it was a private club and there was a very good dissent in that by Judge Butzner, pointing out that to reach that kind of conclusion it was necessary to fly in the face of precedents.

Well, this did not surprise me on Judge Haynsworth's part but I am sure if we had said at the time we were up here testifying that we expected that kind of thing would happen there would be a whole lot of people who would have said no; that just could not happen.

Senator BAYH. Well, you are not looking at one Senator who would have said that, are you?

Mr. MITCHELL. No; I hope I am making it clear that I certainly am not.

Senator BAYH. Your statement was rather sweeping and I wanted to make sure that I was not included.

Mr. MITCHELL. As I remember in that effort, to me the only thing that was needed for the purpose of defeating those nominees was the question of whether they had been faithful to equality under the law as a legal principle, and that, of course, in the judgment of many other people, was not sufficient, and other extensive matters were brought into the picture.

But I said then and I say now and I will always believe that anybody who publicly at any time in his adult career takes a position that the black citizens of the United States are not entitled to equal treatment under the law is unfit to sit on the U.S. Supreme Court and that ought to be the rule.

Senator BAYH. Unfortunately, there are not as many people who share that specific judgment as you would want, and thus it seems to me the responsibility we have for a true test of the quality of the nominee or nominees is to see what their judgment is now and the fact that you are here and I think are making such a credible record indicates that one man with a black face would be received with open arms and with great consideration by this committee.

I am concerned about what white people or black people have said about the nominee, and I am also concerned about what the nominee himself has said.

Mr. MITCHELL. That is what I tried to develop.

Senator BAYH. We developed this on the accommodations and the school matters, we tried to get at it, and I hope we will get testimony from those who have first-hand information on the voting matter. But let me deal just one other question as far as what the nominee himself believes.

I did send a letter referred to by our distinguished colleague from Nebraska to the Attorney General. I have received a reply and since there are no objections, I do not think there is any lawyer-client relationship between the two of us, I would like to put it in the record at this time so everybody would have the opportunity to examine it.

Senator HART. Without objection, it will be received.

(The letters referred to follow.)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C., November 4, 1971.*

Hon. JOHN MITCHELL,
*Attorney General of the United States,*
*Department of Justice, Washington, D.C.*

DEAR MR. ATTORNEY GENERAL: When President Nixon announced the nomination of William Rehnquist to be a Justice of the Supreme Court, he stated that one of the criteria he used was "the judicial philosophy of those who serve on the Court." The President has said that these nominees share his judicial philosophy, "which is basically a conservative philosophy."

The Members of the Senate Judiciary Committee have been attempting for the last two days to explore for themselves the judicial philosophy of William Rehnquist. Many Members of the Committee appear convinced that this is a fit subject for inquiry by the Senate. Indeed, Mr. Rehnquist has stated at the hearings that he believes that the Senate should fully inform itself on the judicial philosophy of a Supreme Court nominee before voting on whether to confirm him. *See also* William H. Rehnquist, "The Making of a Supreme Court Justice," Harvard Law Record, Oct. 8, 1959 p. 7; C. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale L. J. 657 (1970).

Unfortunately, the Committee has been unable to inform itself fully regarding Mr. Rehnquist's judicial philosophy because he has felt it necessary to refrain from answering a number of questions. Some of the questions at issue involve Mr. Rehnquist's refusal to respond based upon his claim of the lawyer-client privilege arising out of the work as Assistant Attorney General since 1969. In my view, the lawyer-client privilege does not require Mr. Rehnquist to remain silent concerning his *own* views on questions of public policy and judicial philosophy merely because he has advised the Department of Justice on these matters or because he has publicly defended the Department's position. As one scholarly observer has noted:

"The protection of this particular privilege is for the benefit of the client and not for the attorney, the court, or a third party. The client alone can claim the