years on the Court, Associate Justice Rehnquist has proven himself to be a man of great intellect, and also of high integrity.

More importantly, he has continued in his respect for, and has continued a defense of, his views of the Constitution.

Now the President has appointed Associate Justice Rehnquist as the Chief Justice with the full knowledge and recognition of those strong views. The President knows that strong leadership is needed on the Court, and that Justice Rehnquist has shown the capability of carrying out that responsibility.

The president also has the right, and I think the responsibility, to nominate a person who shares his views on the interpretation of the Constitution.

I look forward, Mr. Chairman, to the exchange of views in these hearings, and participation of these witnesses before the committee. Thank you very much.

The CHAIRMAN. Thank you very much. Is Senator Ted Stevens in the Hall? He indicated he wanted to make a statement.

[No response.]

The CHAIRMAN. Senator Stevens can place his statement in the record or he can come later, as any other Senator can.

Now, we will have one witness this afternoon whose wife is in the hospital and he has got to leave. That is the Honorable Griffin Bell, a former circuit judge. Judge Bell, if you will come around.

Judge Bell, if you will stand and be sworn. Will the evidence you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BELL. I do.

The CHAIRMAN. You may proceed.

TESTIMONY OF HON. GRIFFIN B. BELL, KING & SPALDING, ATLANTA, GA

Judge BELL. Mr. Chairman and members of the committee, I have a statement which I have submitted and I would ask that it be included in the record.

The CHAIRMAN. Without objection, so ordered.

Judge BELL. I will make a very short statement, based on the paper that I have submitted.

I appear in support of the President's nomination of the Honorable William H. Rehnquist to be Chief Justice of the United States.

I have known Justice Rehnquist since shortly after his appointment and confirmation to be an Associate Justice of the Supreme Court, and have followed his career, as well as his writings on the Supreme Court. In fact I have followed the opinions of the Court throughout the period of his service, 15 years of service on the Court.

We are inclined, as Court watchers, to divide the members of the Court into liberals, moderates or centrist, and conservatives. Some of the Justices move from one category to another, depending upon the subject matter before the Court.

Probably Justice Brennan is more steadfast in his positions on the liberal side than any other member of the Court, or as much so. And perhaps Justice Rehnquist occupies an opposite position on the conservative side. I do not consider either Justice Brennan or

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Justice Rehnquist to be extremist. We are fortunate in our country, that we do not have an extremist, in my judgment, on the Supreme Court.

They can be compared, because they are—that is, Justice Brennan and Justice Rehnquist—because they are true leaders on the Court. They are bright, articulate, well-versed in constitutional and statutory law, and judicial philosophy. And because they reason from a firmly held philosophical view of the Constitution, and the role of the Court in American society.

As such they are similar in that they render reasoned decisions, based, in most part, on their philosophical leanings, and, as such, are predictable.

Justice Rehnquist is a leader on the Court, because of his towering intellect, his well known and recognized capacity as a constitutional law scholar, and because he is, beyond doubt, greatly respected by the other members of the Court.

These are the elements required for one to be a great Chief Justice. It has been said that Justice Rehnquist takes conservative positions in criminal law. Some equate the individual rights of criminal defendants with the great concepts of social justice for the downtrodden. This is a good approach, but one that sometimes overlooks the rights of society. Among the criminal defendants class are many people who are trafficking in drugs and dealing in violence, and are not downtrodden at all. Society needs to be protected from them.

The criminal justice system must be workable, and Justice Rehnquist has adopted views that tend in that direction. The Burger court has not set aside landmark decisions, such as those that have afforded the right to counsel, *Miranda* rights, or the exclusionary rule.

In some instances, Justice Rehnquist has joined in making those great rights more workable, and thus preserving them. The good faith exception to the exclusionary rule is a good example of Justice Rehnquist's role in saving the exclusionary rule from its own excesses.

The same may be said of some of the fourth amendment rulings of the Court. I spent some time on the lower court myself, and that is the most difficult area of the law, that is, what to do with some of the fourth amendment cases.

These criminal decisions have not been the work of extremists, but of Justices of good will, reasoning together within liberal and conservative parameters.

It has been said that Justice Rehnquist believes that some attention should be paid to the original intent of the drafters of the Constitution. It has also been said that he believes that the Court has been too expansive in its use of the 14th amendment, particularly the due process and equal protection clauses. I read somewhere, Professor Howard's article, I believe, that he thinks the 14th amendment should be restricted to what it was originally enacted to do, and that was to eliminate racial injustice.

Well, he is entitled to these views. It would be certain that a lot of people would not agree with those positions, but he is certainly—they are not extreme and he is entitled to those views.

It has been said that his views of the first amendment, freedom of religion clause, are such that he goes back to the Framers' intent, and he does not believe that the Constitution requires the Government to be neutral as between religion and irreligion. This view has substantial underpinnings in history, and is by no means unreasonable. Justice Rehnquist has a decent respect for federalism. He has some appreciation of the role that the States occupy in our governmental structure, especially in health, safety and education.

I think that his views in these areas are the ones that I read, that people think are unusual, and while they are debatable, they certainly are not extreme, and——

The CHAIRMAN. Judge Bell.

Judge BELL. Yes, sir.

The CHAIRMAN. We are having a vote in the Senate, and we just have about 4 minutes left to vote.

Judge BELL. I need 1 minute.

The CHAIRMAN. We will take a recess and come back in about 10 minutes.

Judge BELL. All right.

The CHAIRMAN. We will take a recess at this time for 10 minutes.

[Recess.]

The CHAIRMAN. The committee will come to order.

Judge Bell, you may now continue with your testimony.

Judge BELL. Mr. Chairman, I had almost finished. I was just getting ready to say that under the constitutional system, the President has the right and the duty to nominate the Chief Justice and the Senate has the power to advise and consent. One of the most important issues in any Presidential campaign is what type of justices and judges will a particular candidate appoint to our courts.

President Reagan carried 49 States, and the people were well aware of his views on the judiciary. There has never been any doubt that he intended to appoint conservatives. This was an issue that was resolved by the election.

I was asked once when I was Attorney General on "Meet the Press," I think it was, why we did not appoint more Republicans. And I said, "Well"—I hedged on the question—and finally, I said, "Well, I have to say that we do not have an affirmative action program for Republicans."

That is what the Presidential election is about in this country. If we want to get Democrats, or more liberal people on the courts, we will have to win the election.

The President has nominated Justice Rehnquist, and I think he has to be tested to see if he possesses integrity, ability, leadership capacity, intellectual attainment, and good health; and on top of that, I would want to be certain that he had a modicum of common sense. It seems to me that he meets all of these standards and that the President's nominee for Chief Justice should not be rejected. He has a public record of 15 years on the Court, and I think his record supports that same conclusion.

Were I a Senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with a decided view that he would serve our Supreme Court and our Nation well.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Judge. We are very pleased to have you here. You would have made a great member of the Supreme Court yourself.

Senator Metzenbaum—no, Senator Biden.

Senator BIDEN. No; go ahead.

Senator METZENBAUM. Judge Bell, you supported the Brad Reynolds nomination in an op-ed piece. As you know, this committee turned down his confirmation.

Judge BELL. I am well aware of that.

Senator METZENBAUM. And you were paid by E.F. Hutton to prepare a report supporting the Justice Department's conclusion not to bring criminal prosecution against the E.F. Hutton $10 billion check-kiting case. And now, you testify today. One almost begins to get the feeling that you are the Republicans' favorite Democrat; when they need a Democrat, they look to Griffin Bell.

Let me ask you, has the administration or somebody spoken to you about coming up here to testify today?

Judge BELL. Well, I volunteered to testify.

Senator METZENBAUM. But before you volunteered, did somebody call you, or did you call them?

Judge BELL. No, I did not——

Senator METZENBAUM. And if you did call somebody whom did you call?

Judge BELL. No, no; I did not call them.

Senator METZENBAUM. Who did you call?

Judge BELL. I did not. Somebody called me and asked me if I would like to testify for Justice Rehnquist, and I said yes, I would be glad to; I have already spoken out for him on three television stations in Atlanta.

Senator METZENBAUM. Who called you?

Judge BELL. Brad Reynolds. [Laughter.]

Senator METZENBAUM. He is the one—you and Brad Reynolds—well, I will withdraw that.

Judge BELL. We are friends.

Senator METZENBAUM. Pardon me?

Judge BELL. Mr. Reynolds and I are friends. I have known him since he graduated from Vanderbilt Law School. I tried to recruit him as a law clerk, and I have known him over the years. I almost gave him a job when I was Attorney General, but I never could find one that suited him.

Senator METZENBAUM. Well, as you know, this committee could not find one that suited him, either, or else he did not suit us. [Laughter.]

Judge BELL. Well, he has got a job, and he was confirmed over here once.

Senator METZENBAUM. That is true, and also was denied confirmation——

Judge BELL. Once.

Senator METZENBAUM [continuing]. On the other occasion on which you wrote the op-ed piece.

Judge BELL. Right. As I told you recently when I was here, I have a right as an American to write that article.

Senator METZENBAUM. Now, let me ask you this. In the *Batson* case, Justice Rehnquist took the position that you could strike all blacks from juries. Do you agree with that position?

Judge BELL. No.

Senator METZENBAUM. Justice Rehnquist, in *Wallace* v. *Jaffrey,* took the position that the Government can promote religion as long as it does not favor a particular religion. Do you agree with that position that he took in that case?

Judge BELL. Almost. I agree that the Constitution does not require the Government to be neutral as between religion and no religion. But I do not think the Government ought to promote religion. You see, there is a difference in the way you said that. It is sort of like the difference between what I did for E.F. Hutton and the way you stated your question a minute ago. [Laughter.]

Senator METZENBAUM. Well, I think that we will get into that. You were hired by E.F. Hutton, and——

Judge BELL. There is no question about that—but I was not hired to do what you said I was hired to do.

Senator METZENBAUM. Well, let us say that the result——

Judge BELL. If you want to have a hearing on that, we will have one.

Senator METZENBAUM. Let us say the result came out that way. Do you think that government can promote religion?

Judge BELL. No; I think there is a line between neutrality. I said I do not think the Government has to be neutral, but I said I am not certain that I think the Government ought to promote religion. The next thing you know, they are writing a prayer, you see, and you cannot go that far. There is a big balance always in constitutional law, and there are nuances, and we are dealing in one right now.

Senator METZENBAUM. Well, we are dealing with more than nuances, because in the case of *Wallace* v. *Jaffrey,* as I understand it and as I read it, it indicates that the nominee for Chief Justice had taken the position that the Government can promote religion as long as it does not favor a particular religion. In fact, if my recollection serves me right—and I do not have the case in front of me—I think some of that actual language is included in Justice Rehnquist's dissent.

And I am trying to find out from you—you are testifying for him; you say you think he would be a good Chief Justice of the Supreme Court, and I am just trying to find out, whether you are here just as an accommodation to the administration, or if you sincerely believe this.

Judge BELL. I think he is a very fine Justice.

Senator METZENBAUM. I think he is a very fine man, too.

Judge BELL. All right. Now, that does not mean that I would agree with every decision he has written. I did not come here to endorse a check of any sort. I just came here to say that I think he is a very fine judge, and I think he writes reasoned opinions—you can understand his opinions and where he is coming from—and I do not think he is an extremist. I think he is a conservative. And maybe I am somewhat more liberal than he is, and perhaps you would be. But that does not mean he is not entitled to be on the

Supreme Court, or that the President is not entitled to nominate him. That is what we are having the problem about.

Senator METZENBAUM. Nobody denies the President's right to nominate him, nor are we at issue with whether he has a right to be on the Supreme Court. The issue before us now is should he be confirmed Chief Justice of the Supreme Court, which is a totally different issue, and I am sure you agree with that.

Judge BELL. Fine, fine; surely.

Senator METZENBAUM. You raised the issue of extremism, although some of us in our opening statements have talked about that. Let us assume for the moment—and I am not asking you to accept this as a fact—but let us assume that this committee were to conclude that Justice Rehnquist is an extremist, or takes the most extreme view. If we were to reach that position—and I am not saying that we can or will—but if we were to reach that position, do you have an opinion as to whether or not, if we came to that conclusion, that it would be an appropriate basis on which to reject his confirmation?

Judge BELL. Well, stated differently, I would not support him if I thought he was an extremist. He could not lead the Court. No extremist could lead the Court. Getting a majority on an appellate court is a very difficult thing in these close cases, and one of the things you have to do is be enough of a leader to forge a majority. And I do not think any extremist would be able to do that, so he would not have the necessary leadership capacity to be a Chief Justice.

Senator METZENBAUM. I think that answers my question.

I thank you.

Judge BELL. Thank you.

The CHAIRMAN. The distinguished Senator from Wyoming, Senator Simpson.

Senator SIMPSON. Mr. Chairman, when I came here in 1979, I was in the minority, and I remember very distinctly coming to know Attorney General Griffin Bell. I do not review him as a hired gun type of person. I view him as a man of great ability, great, good intellect, great common sense, and great good humor. I think it would be unfortunate to leave the impression that he just shows up to handle the Republican cause every once in a while. He was a pretty rabid Democrat when I remember him from my day.

It is always a pleasure to have you here because you have something to impart, and what you impart is your impressions of a person that we are going to have to confirm. You have never held back in my time of knowing you, and I admire that. I think you are not here to rehabilitate anybody.

Mr. Metzenbaum has not even started. Lord's sake, we will all have to be rehabilitated when we get going on that.

Senator METZENBAUM. I am not sure it is possible.

Senator SIMPSON. But I think it is important to know that you are a man that served a Democratic administration, and in that capacity, I have the greatest regard and admiration for you, and I say that again.

Judge BELL. Thank you.

Mr. Chairman, if I may say so, my first duty is to be an American, and after that, I will decide what my political position is.

Senator BIDEN. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Delaware, Senator Biden.

Senator BIDEN. Judge Bell, I would like to talk to you not as a Democrat or a Republican, or whether you are a rabid Democrat as the Senator from Wyoming suggests, or how deeply you hold the view you have. I would just like to talk to you about your experiences having been a judge yourself.

In your opinion, Judge, had the so-called Nixon tape case been decided 5-to-4—well, there were 8 Justices—say, 5-to-3—would that have had any impact upon the Republic at the time, as opposed to a unanimous decision, 8-to-0?

Judge BELL. Decidedly so.

Senator BIDEN. In what way would it have?

Judge BELL. It would have meant the—people often have doubt as to whether a Supreme Court decision is the law. And if it is a close decision, 5-to-4, or something like we have been getting in recent years, what we call the plurality opinion, people are not inclined to follow those decisions, and they do not know for sure what the law is. They say if there had been one different judge, it would not have come out that way.

In the Nixon tape case, it was very important for our Nation that it be decided unanimously, and it was. The *Brown* decision was another example. The *Brown* decision was hard enough to carry out, and if there had been a divided Court, it would probably not have been carried out. As you know, Congress failed to act for so many years, and the courts were having to do it on their own, particularly the Southern courts, and we would not have been able to do it had that not been a unanimous decision.

There are certain great issues that face our country, where you ought to—and usually do—get a majority or almost a majority. These are some of these cutting edge issues that face society.

Senator BIDEN. I could not agree with you more. Both the *Brown* case, as you point out, which was unanimous—and as I understand, if you read the Court—and you, having been on it, understand—not the Supreme Court, but the Federal Bench—you understand this much better than I—we lawyers are the last people to understand how juries work, and we Senators are really, I guess, maybe least informed as to what happens in a conference, when you all close the door, and you sit down, and what you do as judges—I am not asking you to comment on that now. But the histories that have been written of the Warren era, during the *Brown* decision, and the book—less historical, some would argue, than others—but several books written that cover the period of the Nixon tapes case, indicate that in both instances—in one case, Chief Justice Burger; in the other case, Chief Justice Warren—lobbied very hard the Court, their colleagues. Without going into any detail now, I think it is accepted as historically accurate that Justice Warren felt very, very strongly that one Southern judge on the Supreme Court—he was reluctant to go along with the *Brown* case—should join, because he felt that if, in fact, that one well-known Southern jurist concluded that the Court was wrong that it would have been very difficult, or maybe even resulted in some physical bloodshed, in at-

tempting to—I do not want to exaggerate, and I am not suggesting civil war, but it was pretty serious.

Judge BELL. No; but I think that is a fair assessment of the situation.

Senator BIDEN. Now, having said that—and I truly have an open mind on this—one of the things about the role of the Chief Justice is, as you point out, they must be able to lead the Court in that regard. Can you tell me—and you can amend this question in any way it is suitable for you—are there any particular Chief Justices that you have admired as a student of history, that you have admired more than others—whether you go back to Marshall or to Justice Burger? I mean, leaving Justice Burger aside, whom we all admire——

Judge BELL. Well, I have only known three Chief Justices.

Senator BIDEN. That is pretty good out of 15.

Judge BELL. Vinson and Warren and Burger—and they were all quite different. I was just a young law student and a young lawyer when Vinson was the Chief Justice. He had been in the Government here a long time, and I do not know that he was Chief Justice long enough to make a mark. But we were in a period of history when not much was going on.

When Chief Justice Warren came on, he was a very dominant personality, and had decided views, deeply held philosophies, and was a great leader. And he started addressing the social ills of the Nation, and it required the use for the first time in many years of the 14th amendment and a complete refurbishment of the law under the 14th amendment. And he was able to do that. He paid very little attention to the court system as a whole. He was more interested in these great issues, social issues.

When Chief Justice Burger came on, most everything had been done under the 14th amendment's refurbishment, as we used to say, and they started maybe rounding out some rough spots on some of the opinions. But he became very interested in the court system as a whole, and he realized that you could lose your rights because you could not get a hearing, and that the procedural side of the law was in disrepair. And he spent his time emphasizing that.

So, they all were different.

John Marshall, of course, he was writing on almost a clean slate, so he is the most famous Chief Justice of all for that reason. But we have had some other times where we did not—we never should have had the *Dred Scott* decision, for example. That is an example of the Court going the wrong way.

There was something said here today I wanted to mention, now that you have brought this up, about the dissent, that Justice Rehnquist had dissented too many times. The great dissenter, one of the greatest that has ever been and one of the most famous, and a man I have always admired almost more than any other Justice, is Justice Oliver Wendell Holmes. He was called the great dissenter. And in the *Leo Frank* case, which was a disgraceful case from Georgia, Justice Holmes and Justice Hughes dissented on the grounds that the Court should have considered whether there was mob violence at his trial, as a part of your right under the writ of habeas corpus. And the Court ruled 7-to-2 that that was outside the

jurisdiction of the habeas corpus, that writ. In a very short time, Leo Frank was taken out of jail in Georgia and hanged by a mob. The very thing that he contended happened to him at his trial. Five years later, Justice Holmes, or Justice Hughes—I have forgotten which; one or the other of them—wrote a majority opinion, this time 7-to-2, holding just the opposite in the case of a prisoner from Arkansas who contended that you should be able to raise that question under the Federal writ of habeas corpus.

That is a good example of dissent. Sometimes you feel strongly about something, and eventually—and this happened to Holmes a lot of times—eventually, his views became the majority. But you have to start out if you have strong views about things. Now, that is different from somebody that just dissents to be dissenting.

There is an article written by Justice Hutchison, who was Chief Judge of the Fifth Circuit where he made quite a strong talk against Justices for dissenting without any good reason to dissent. That is different.

Senator BIDEN. Justice Holmes and Justice Hughes—but in Justice *Holmes'* case, was an Associate Justice, not the Chief Justice—but your point is, I think, very accurate and very well taken, and historically precise.

Let me ask you two more short questions. Do you think that Justice Douglas would have been a good Chief Justice at the time that he was on the bench?

Judge BELL. No; I tell you, I do not think he would have.

Senator BIDEN. Why?

Judge BELL. I do not think he had any interest in being Chief Justice. I think you have to want to do it. And I think he had such a bright mind, and he was so interested in so many different things besides being an administrator, that he would not have been a good Chief Justice. That takes nothing away from his ability.

One of the great statements I ever heard was when Justice Rehnquist was nominated to be an Associate Justice, some conservative writer somewhere said that the President had put Justice Rehnquist on the Court to trump Justice Douglas.

Senator BIDEN. I think that is an accurate—I do not know if that is historically accurate, but I think——

Judge BELL. No, I do not, either. I just remember that. I do not know.

Senator BIDEN. You have great knowledge and experience in this area, but I know other of my colleagues want to speak. Let me just wish your wife well.

Judge BELL. Thank you. She has had terrible arthritis, and she's had her hip joints replaced, and she's doing well.

Senator BIDEN. I know it's painful, and one of our colleagues has recently gone through that on several occasions, and I know from observation it's difficult. My best wishes.

The CHAIRMAN. The able Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman. I extend my regards to your wife, too. I suggest she try Arizona, Judge; that would help her, I hope.

Judge Bell, you represented E.F. Hutton up here before the committee. You were paid a fee for that?

Judge BELL. Oh, yes.

Senator DECONCINI. When you came here and testified for Mr. Reynolds, were you paid a fee for that?

Judge BELL. No.

Senator DECONCINI. And have you been paid a fee——

Judge BELL. I did that out of a friendship and because I thought he should have been confirmed.

Senator DECONCINI. And have you been paid a fee for testifying today?

Judge BELL. Oh, no, not at all. I am very happy to be here to testify as a citizen for Justice Rehnquist.

Senator DECONCINI. There is a certain distinction upon the reason you are here in behalf of Justice Rehnquist, and of course the reason you were here on behalf of your client, E.F. Hutton.

Judge BELL. No, I was paid by E.F. Hutton. And a reporter asked me one day if I didn't think that since I was doing a special investigation, if it wasn't wrong for them to pay me. And I said, well, can you think of someone else who would pay me? [Laughter.]

And I would have been glad for someone else to pay me.

Senator DECONCINI. My point, of course, is that you make a living practicing law and you charge your clients a fee.

Judge BELL. Exactly.

Senator DECONCINI. And, as a personal matter, you also have an opinion, being a former judge and Attorney General, as to the qualifications of certain appointees.

Judge BELL. Right.

Senator DECONCINI. That's why you are here today.

Judge BELL. Exactly.

Senator DECONCINI. Judge Bell, when you were Attorney General, you made a number of recommendations to President Carter, is that correct, as to judges?

Judge BELL. I did—over 200.

Senator DECONCINI. Over 200. Was one of those Patricia Wahl?

Judge BELL. Yes.

Senator DECONCINI. She was an employee, I think, of——

Judge BELL. She was Assistant Attorney General in charge of the Legislative Affairs Office, same job Senator McConnell used to have.

Senator DECONCINI. She was considered a very liberal nominee, is that correct?

Judge BELL. That's what people said about her.

Senator DECONCINI. And she has obviously distinguished herself on the circuit court here of the District of Columbia?

Judge BELL. Made a fine judge, I'm told—everybody thinks so. And I've read some of her opinions. I think she has.

Senator DECONCINI. And is it true also, Judge Bell, that you recommended to President Carter the appointment of Mary Schroeder for the ninth circuit, and Bill Canby of the ninth circuit, which happened to be recommendations of mine?

Judge BELL. True.

Senator DECONCINI. My point being that you were very able to pick qualified people, whether they may fall on the liberal spectrum or on the conservative spectrum, is that safe to say?

Judge BELL. I never did pay any attention to whether they were liberal or conservative. Naturally, with Democrats, I think maybe

you get more liberals, but we put some conservatives on the court. But we put more liberals on it.

Senator DECONCINI. You are interested primarily in those recommendations for—what were the main criteria you used in recommending someone to President Carter when you were in that position?

Judge BELL. Well, I was looking for ability, things I listed here a minute ago—ability, integrity, and good health—I wanted them to be able to serve for a good long while. And I never did tell the President whether they were conservatives or liberals.

Senator DECONCINI. So that same standard is what has brought you here in support of Justice Rehnquist's nomination, is that correct?

Judge BELL. Well, I have this unusual feeling that our country would do better if we paid more attention to excellence, and Justice Rehnquist happens to be excellent. His career is one based on excellence.

And I was asked by all three of the television channels in Atlanta, after his appointment was announced, if I would say something about the appointment, and I took the same position about Judge Scalia, that they both are people that have excellent records. And it made me feel good that we were going along that route.

Senator DECONCINI. So in your judgment and standard the fact that they are liberal or conservative is certainly not the primary judgment or measure of whether or not they would be——

Judge BELL. Well, I know that this committee would not consider that in making its judgment, because it would be really against the Constitution to try to block a conservative or block a liberal. And I never had any trouble with the Republicans trying to block a liberal.

Senator BIDEN. I can remind you of a couple, Judge.

Senator DECONCINI. I can, too.

Judge BELL. Well, I can't remember them.

Senator DECONCINI. But, Judge Bell, as to your measure or criterion, that is not a measure as to whether some should be or not be appointed.

Judge BELL. It should not be. That's inherent in the system, it's according to who the President—is the way I look at it. I may not understand the Constitution, but I think I do, and I think that's part of the system.

Senator DECONCINI. I thank you, Judge. I have no further questions.

The CHAIRMAN. The distinguished Senator from Alabama.

Senator HEFLIN. Judge Bell, you served on the fifth circuit for what period of time?

Judge BELL. 1961 to 1976.

Senator HEFLIN. You were on the fifth circuit when Justice Rehnquist served for several years as a member of the Supreme Court.

Judge BELL. Exactly. I sent him one law clerk. That's my only connection with Justice Rehnquist. I didn't send him to him, he hired one of my law clerks.

Senator HEFLIN. Did he ever reverse you?

Judge BELL. I'm sure he did. If he didn't, he was the only Justice that didn't. [Laughter.]

Senator HEFLIN. There's been a question raised of race and gender. During your term as Attorney General, do you remember how many blacks were put on the Federal bench with your recommendation?

Judge BELL. I don't have the number, but more than had ever been put on the Federal courts in the entire history of the Nation added together we put on in 2½ years, and the same with women.

Senator HEFLIN. During the time that you served on the fifth circuit, was the fifth circuit the battleground for civil rights in this country?

Judge BELL. Absolutely. I was called a school superintendent of Mississippi at one time, but when I was up to be confirmed as Attorney General I didn't get much credit for anything I ever did with that. I thought at the time I was really doing a lot.

But it was a battleground.

Senator HEFLIN. I don't believe anybody can question your background and history in regard to civil rights, your belief in individual justice toward gender and race. And I compliment you on your fine record.

Judge Bell, this appointment—it seems to me that we need to hone in on the issues, and we sometimes get off on matters that have already been decided. Justice Rehnquist has not resigned from the Supreme Court, has he?

Judge BELL. Oh, no.

Senator HEFLIN. If he is not confirmed as Chief Justice, you would expect him to serve there as long as if he was confirmed as Chief Justice, would you not?

Judge BELL. Oh, yes, I'm sure he will. This is just what you might call an elevation.

Senator HEFLIN. Therefore he is a voting member and his ideology as we confront it, has pretty well been decided; he's going to serve and he will be voting on cases and expressing that ideology.

The issue, as I see it, is the difference between him as a Justice and him as a Chief Justice. And one aspect is the idea that I think Senator Biden was directing, one toward being a leader and toward being a consensus-builder.

Now, your experience for many years on the bench—and the fifth circuit had a number of chief judges during that particular time—doesn't it also involve, to some degree, to the ability to build a consensus or to be a leader, to try to obtain a unanimous decision, to depend upon the strength and the support of lieutenants.

Judge BELL. Other judges.

Senator HEFLIN. Other judges that may be, in effect, lieutenants to the Chief Justice.

Judge BELL. Oh, yes.

Senator HEFLIN. Therefore, a single Chief Justice by himself without some support toward trying to bring about a unanimous decision, such as in the Watergate tapes case or the *Brown* v. *Education*, may well be influenced and will be a matter of whether the result is obtained by some support and the strength of his supporters, to some degree.

Judge BELL. Oh, that's very true, and if you think about the *Brown* case, the great judges that we had on the Court—some of them were as strong as the Chief Justice.

I'd say if you had a dominant Chief Justice and weak Associate Justices, you'd have a bad situation. But no Chief Justice could do much unless he had some strong support. You've got to have two or three other judges of like view.

Senator HEFLIN. We therefore look at, in trying to define the issues that are before us, what we should look at—we see leadership, ability as a consensus builder; and then we see the leadership role that the Chief Justice plays toward the entire American system of justice, which is a distinction from being an Associate Justice of the Supreme Court.

Judge BELL. Exactly.

Senator HEFLIN. That role, as we look toward the future, can be a very important role and a role that will demand leadership, as we face the problems that are going to confront the judicial system the rest of this century and into the next century. We've become a quite litigious nation, and there are many aspects.

What is your feeling concerning Justice Rehnquist's ability as a leader of the entire justice system?

Judge BELL. I've said something about that in my prepared statement. This is something I considered separately. Is he a type person who would take the time to be the leader of the whole Federal judicial system, and to some extent the State system?

Justice Burger's done a fine job on that, and I hearken back to the time when I was head of—I was chairman of the division of judicial administration, you will recall, of the American Bar Association, back when I was on the bench. Justice Rehnquist, although a young judge at the time, took an interest in this division and one year was a speaker at the annual dinner, I recall—and I don't know of anything that would indicate that he wouldn't do his duty, his extra duty that the Chief Justice has, to run the court system.

But that will be something he'll have to face, and I am sure he will address that when he testifies.

But you've got to remember that that is a very important point, as you are pointing out now, of being Chief Justice. The American people can lose more rights because the procedures in the lower courts are not right than they are ever going to lose in the Supreme Court. There are very few Americans who ever have a case in the Supreme Court; a lot of them are going to be in the lower courts, and you have to be certain that they are operating the way they should operate.

And you'll have to ask him, because he has not had that much experience dealing with the lower courts.

Now, in the last year or two, the Chief Justice has been assigning him some things; for example, the American College of Trial Lawyers group that I am affiliated with is getting ready to sponsor a legal exchange between Canada and the United States. And the Chief assigned that duty to Justice Rehnquist—and that is just beginning right now. And the Anglo-American exchange, I believe he assigned that to Justice O'Connor.

But the Chief was beginning to put him in that sort of a role. But you need to ask him that question. It's an important question.

Senator HEFLIN. I have attempted to define some issues that are before us, such as leadership of the Court as distinguished from a mere voting member and an opinion writer of the Court, either dissenting or majority concurring or otherwise—the leadership of the judicial system.

What other distinctions do you see between an Associate Justice and the Chief Justice?

Judge BELL. Well, the Chief Justice has got to preside over impeachment trials. Now, Chief Justice Burger, I assume, will be presiding in a few days in the Senate on the Claiborne impeachment—that's an extra duty. For some reason, the statute requires that the Chief Justice be the Chairman of the Board of the Smithsonian—I've never known why that is, but that is true.

And then you have to keep up good relations with the State courts and be certain that the National Center for State Courts is operating.

It's a very broad-gauged job, and it would be unfortunate to have someone in the Chief Justice's job who ignored everything but just the Court. On the Court he is one among equals, as somebody said today. But he does get to assign the writer of the majority opinion, but only if he is in the majority group—only if he is in that group. If he's not in the group, then the senior Justice who is in the group that makes the majority assigns the writer.

Senator HEFLIN. Well, there may be other things that we would look at as we go along, but I think you've covered most of them. There may be other issues or distinctions to which we would be addressing a lot of inquiries.

Judge BELL. Well, you've been a Chief Justice, so you perhaps can counsel with your brothers and sisters about it.

The CHAIRMAN. The distinguished and able Senator from Illinois.

Senator SIMON. I thank you, Mr. Chairman. I have no questions for Judge Bell.

The CHAIRMAN. Judge, I have just one question.

Judge BELL. All right, sir.

The CHAIRMAN. Is it your opinion that Justice Rehnquist has the competency, the dedication, the courage, the character, the compassion, and the fairness to make a great Chief Justice?

Judge BELL. That is my opinion.

The CHAIRMAN. You are now excused.

Judge BELL. Thank you. I appreciate your taking me out of turn, your honor.

The CHAIRMAN. Thank you very much.

[The following was received for the record:]

STATEMENT OF GRIFFIN B. BELL

BEFORE

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

IN SUPPORT OF THE NOMINATION OF

HONORABLE WILLIAM H. REHNQUIST

TO BE CHIEF JUSTICE

I appear in support of the President's nomination of Honorable William H. Rehnquist, now an Associate Justice of the Supreme Court of the United States, to be Chief Justice of the United States. I have known Justice Rehnquist since shortly after his appointment and confirmation to be an Associate Justice of the Supreme Court and have followed his career as well as his writings on the Supreme Court. In fact, I have followed the opinions of the Court throughout the period of his service.

In addition, several years ago I served while a member of the federal judiciary as Chairman of the Division of Judicial Administration of the American Bar Association. Justice Rehnquist took and takes a keen interest in the activities of the lower courts of our nation and was the principal speaker at one of the annual meetings of the Division of Judicial Administration.

I am familiar with the Office of Legal Counsel at the Department of Justice and know of the service of Justice Rehnquist as Assistant Attorney General in charge of that office just prior to his service on the Supreme Court. I am not familiar with his service as a lawyer or his activities as a law student. I do know of the brilliant record that he made as a law student at Stanford.

We are inclined as court watchers to divide the members of the Court into liberals, moderates or centrists, and conservatives. Some of the justices move from one category to another, depending on the subject matter before the Court. Probably, Justice Brennan is more steadfast in his

positions on the liberal side than any other member of the Court or as much so, and perhaps Justice Rehnquist occupies an opposite position on the conservative side.

Justices Brennan and Rehnquist are true leaders on the Court because they are bright, articulate, well-versed in Constitutional and statutory law and judicial philosophy, and because they reason from a firmly held, philosophical view of the Constitution and the role of the Court in American society. As such, they are similar in that they render reasoned decisions based in most part on their philosophical leanings, and as such are predictable. The thing most lacking in American law today is predictability, and these two Justices in particular give some hope to the American lawyer and the American public toward a day when we can again predict to a reasonable degree what the law is and will be in the foreseeable future.

Justice Rehnquist is a leader on the Court because of his towering intellect, his well-known and recognized capacity as a Constitutional law scholar and because he is, beyond doubt, greatly respected by the other members of the Court. These are the elements required for one to be a great Chief Justice.

As an aside, it may well be that his views will be tempered somewhat as he begins to live with the discipline that comes from the responsibility of being Chief Justice and the necessity to forge majority opinions on the great issues of our time. In recent years we have seen too many plurality opinions. There is some consternation in our nation in certain areas of the law because we have never been able to receive a solid majority view from our Supreme Court. Affirmative action is but one example. There are certain matters that should be put to rest by the Court; our nation deserves to know what the law is on some of the difficult social issues.

It has been said that Justice Rehnquist takes conservative positions in criminal law. Some equate the individual rights of criminal defendants with the great

concepts of social justice for the downtrodden. This is a good approach but one that sometimes overlooks the rights of society. Among the criminal defendant class are many people who are trafficking in drugs or dealing in violence and are not downtrodden at all. Society nees to be protected from them.

The criminal justice system must be workable, and Justice Rehnquist has adopted views that tend in that direction. The Burger court has not set aside landmark decisions such as those that have afforded the right to counsel, Miranda rights, or the exclusionary rule. In some instances Justice Rehnquist has joined in making those great rights more workable and thus preserving them. The good-faith exception to the exclusionary rule is a good example of Justice Rehnquist's role in saving the exclusionary rule from its own excesses.

The same may be said of some of the Fourth Amendment rulings of the Court in which Justice Rehnquist has participated. We can be proud that our Constitutional rights have been preserved; we can be reassured that they have been fashioned, refashioned, and preserved in a system where Justice Brennan and Justice Rehnquist and those other Justices with views in between have debated, reasoned and reached conclusions that are in the interests of the individual and society. This has not been the work of extremists but of justices of good will reasoning together within mere liberal-conservative parameters.

Justice Rehnquist apparently believes that the original intent of the drafters of the Constitution should be ascertained when interpreting the Constitution where possible. It has been said that he also contends that the Fourteenth Amendment was drafted to prevent racial discrimination and should not have been extended beyond that. He is certainly entitled to these views. As to the latter position, he has had little success in preventing the Court's expansive use of the due process and equal protection clauses of the Fourteenth Amendment far beyond racial matters. It is highly unlikely at

this point in our history that such a view of the Fourteenth Amendment, if he holds such a view, will ever prevail.

Justice Rehnquist's views on the First Amendment and Freedom of Religion rest on his reading of the framers' intentions and his belief based thereon that the Constitution does not require government to be neutral as between religion and irreligion. This view has substantial underpinnings in history and is by no means unreasonable.

Justice Rehnquist has a decent respect for federalism. This should not be a ground for criticism. Our government is structured on federalism. Senators for a large part of our history were elected by the state legislatures to represent the states. The states occupy a very important role in our governmental structure, especially in health, safety and education. I believe that senators still have a duty to see to the interests of the states along with the interests of the people and the federal government despite the fact that we amended the Constitution to provide for popular election of senators.

Lastly, I would like to note that under our Constitutional system the power to nominate the Chief Justice and the Associate Justices was and is vested in our President. This came after considerable debate at the constitutional convention where some urged that the Senate be in charge of appointing judges. The matter was resolved by placing the power in the President with the right and responsibility to advise and consent being placed on the Senate. I think it important that we take care not to denigrate our constitutional system by attempting to substitute the Senate for the President in the nomination process.

One of the most important issues in any presidential campaign is what type of justices and judges will the particular candidate appoint to our courts. President Reagan

carried forty-nine states, and the people were well aware of his views on the judiciary. He intended to appoint conservatives. That was an issue that was resolved by the election. He is entitled to his nominees in my judgment if they meet suitable levels of qualification based on integrity, ability, intellectual attainment, and good health. A modicum of common sense is also important. It seems to me that Justice Rehnquist meets all of these standards and that the President's nominee for Chief Justice should not be rejected. His public record of 15 years on the court supports this conclusion.

Were I a senator, I would vote to confirm Justice Rehnquist as Chief Justice. I would do so with the decided view that he would serve our Supreme Court and our nation well.

Thank you.

65-953 O - 87 - 4

The CHAIRMAN. Justice Rehnquist, this is your hearing, but you haven't had a chance to say anything yet. We now ask you to come around.

If you will stand and raise your right hand and be sworn.

[Justice Rehnquist stands and raises his right hand.]

The CHAIRMAN. Will the evidence you give at this hearing be the truth, the whole truth, and nothing but the truth, so help you god?

Justice REHNQUIST. It will.

The CHAIRMAN. Have a seat. We won't ask any questions this afternoon, but first would you like to introduce your family who is here?

TESTIMONY OF HON. WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, TO BE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Justice REHNQUIST. Yes, I would very much, Mr. Chairman. My wife of 33 years, Nan. My daughter, Janet. My son-in-law, Joe Lynch.

The CHAIRMAN. Thank you very much. Do you have any opening statement that you would care to make?

Justice REHNQUIST. Yes, I do, Mr. Chairman. Mr. Chairman, members of the Senate Judiciary Committee, it is a great honor to have an opportunity to appear before this committee today. I am deeply grateful to the President for the confidence he manifested in me when he nominated me to be Chief Justice of the United States, and I welcome the opportunity these hearings afford the committee and the Senate to discharge their constitutional duty in the appointment process.

I want to thank Senator Dole, Senator DeConcini, Senator Warner, and Senator Trible for spending the time and effort necessary to introduce me to the Committee.

I am at the committee's disposal, Mr. Chairman.

The CHAIRMAN. Are there any other remarks you would like to make at this time?

Justice REHNQUIST. No, Mr. Chairman. I understand the questioning is reserved for tomorrow.

The CHAIRMAN. That's correct; we will refrain from questioning you this afternoon. And, unless somebody has something else to say, we will now stand in recess.

Senator BIDEN. Mr. Chairman, I have no questions, but——

Senator METZENBAUM. I don't want the nominee for Chief Justice to overlook the fact that Senator Goldwater put a statement in the record.

You want to thank him, too, don't you?

Justice REHNQUIST. Thank you, Senator Metzenbaum. Let me amend my statement to thank Senator Goldwater.

Senator BIDEN. Senator Metzenbaum would make a heck of a clerk, wouldn't he? [Laughter.]

Mr. Chairman, I have no questions for the Chief Justice, but I do think there are two things that we should settle unrelated to the Chief Justice's presence, raised by two of my colleagues, and one item raised by me, before we begin tomorrow morning so we can