Senator BIDEN. Mr. Justice, you and I spoke briefly yesterday about the role of Chief Justice Warren in the *Brown* case, and we ended, when my time was up, beginning to speak to the role of the Chief in the *Nixon* tapes case, which was as we both know—you, better than I—a different role; the Chief was in that case the one person that was slightly out-of-sync with the other eight Justices, according to historical—he ended up voting the same way, but the issue there was not the Chief bringing along a potential dissenter; the issue there was the Chief, who thought the tapes should be given up, having a rationale the same as the other eight Justices.

And I think it has been characterized by everyone as the Chief having compromised somewhat—not compromised in a bad way, but having compromised some to gain again total unanimity on the Court.

Is that your perception of how that occurred?

TESTIMONY OF HON. WILLIAM H. REHNQUIST, NOMINEE, TO BE CHIEF JUSTICE OF THE UNITED STATES

Justice REHNQUIST. I do not have any perception of how that occurred, Senator. I did not participate in the case. I do not believe I saw any of the circulations. And it is just, really, as if I had not been there.

Senator BIDEN. Well, in the book "Brethren," the following exchange allegedly occurred, the following episode. When Nixon heard the results, the President said he hoped there would be "some air" in the opinion. He was speaking to General Haig. And Haig told him it was unanimous, and Nixon said, "Unanimous?" and Haig said, "Unanimous. There is no air in it at all."

"None at all?" Nixon asked.

"HAIG. It is tight as a drum."

After a few hours spent complaining to his aides about the Court and the Justices, Nixon decided he had no choice but to comply, and 17 days later, he resigned.

Now, if that is correct, that Chief Justice Burger subsumed his view to the Court as a whole so that there would be a unanimous opinion on what we both had agreed yesterday was a critical decision, if that is true would you be prepared to do a similar thing?

Justice REHNQUIST. I think the Chief Justice probably has a greater obligation than anyone else on the Court in those very rare, great cases where it is apparent that unanimity would be highly desirable to not only try to get colleagues together by way of consensus, but to himself adapt some of his views.

Senator BIDEN. I appreciate that answer, Mr. Justice, because this, as I have told you, is a very important part of my decision here. As I said, you are on the Bench, and you are on the Court, and God willing, you will stay on that Court in good health for some time to come. So the issue for me is the role of the Chief Justice here.

Let me ask you, do you believe, had you been Chief, would there have been the necessity in any of your 8-to-1 decisions where you were the dissent that you think you could have changed? I mean, can you imagine having changed? Do any of those decisions rise to that level?

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Justice REHNQUIST. You are talking about cases in which I dissented in lone dissent?

Senator BIDEN. Where you were the one dissent.

Justice REHNQUIST. I do not have those readily before me. And I am trying to think whether any one of them might have. My feeling is no.

Senator BIDEN. Can you tell me why you dissented in the *Bob Jones* case?

Justice REHNQUIST. I do not believe I can, Senator, and the reason for that is that I think that would be a form of being called to account here before the Senate Judiciary Committee for a judicial act which I performed as a member of the Supreme Court of the United States.

My opinion, of course, is available, explaining reasons. But how I came to that conclusion I think is something that I think ought not to be inquired into here.

The CHAIRMAN. I think your reason is a valid one.

Senator BIDEN. Do you think that decision in the *Bob Jones* case was an important decision in terms of how black Americans think the Supreme Court thinks about them? I mean, do you think that is viewed as a seminal decision by black Americans?

Justice REHNQUIST. They would be better spokesmen than I would, but I should think—I do not know seminal, but I would say important.

Senator BIDEN. That was the one case where you—and I will go into it in my next round with you—your rationale—we can speak to your rationale, I assume, as written, was as I understand it, the end result of it was that had you been in the majority, we would have been able to continue to subsidize a private institution that is segregated. And that is not to suggest that was the reason you decided—we will go into that later. It related to your—well, I will not characterize it now.

The CHAIRMAN. Senator, I might say his opinion is available, and if you want to put it in the record, you are welcome to do that.

Senator BIDEN. I will put it in the record, and before the day is over, we will discuss it in detail. I am prepared to do that, and I am anxious to do that.

Let me if I may——

Justice REHNQUIST. Senator, if I might, the *Bob Jones* case was a statutory case, not a constitutional case in any significant way.

Senator BIDEN. No, I understand that. But the end result would have been, had you been in the majority, had your fellow Justices agreed with you, the end result would have been that Bob Jones would be able to continue to segregate and get Federal funding.

Justice REHNQUIST. The end result would have been that that would have been left up to Congress. Congress could have changed the law, as I saw it in my dissent, simply by a legislative act.

Senator BIDEN. Unless Congress changed the law, they would have been able to.

Justice REHNQUIST. Right.

Senator BIDEN You pointed out yesterday, and I thought with some great facility and clarity, that your role as you saw it for the Supreme Court to recognize and protect the rights of the majority.

And you talked about communities, and the right of victims, and the like.

Let me ask you a broader question. You point out—let me back up. It seems to me that the majority has ample access to at least two of the branches of Government in a direct electoral way, that they can make their will felt by showing up at the polls, and they do; and that oftentimes, that pure majoritarian role at the polling place, notwithstanding the fact that the Founding Fathers gave Senators 6 years instead of two to provide some——

The CHAIRMAN. Senator, your time is up, but he can answer this question.

Senator BIDEN. I guess the best way to put the question is this. Isn't part of the role of the Court, isn't the Court uniquely suited, more than either of the other two branches, to be the guardian of the rights of minorities?

Justice REHNQUIST. Yes, I think it is.

Senator BIDEN. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator LAXALT. Wrong State, Mr. Chairman.

The CHAIRMAN. Excuse me—from Nevada.

Senator LAXALT. I do not mind the association at all, however.

The CHAIRMAN. The distinguished Senator from Nevada.

Senator LAXALT. The Justice and I had an extended discussion yesterday, and he certainly cleared the areas of my concern, so I will follow the chairman's lead and pass on my time. However, Justice, there may be some matters arising that we might submit written questions to you.

Justice REHNQUIST. I would be happy to answer them.

Senator LAXALT. I will yield my time to Senator Hatch, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Mr. Chairman, I would like to point out a few things about the *Bob Jones University* case.

I happen to agree with the majority of the Court in that particular opinion. It is safe to say that of the four judges who ruled on the *Bob Jones* case before the Supreme Court, two of them took the view that the University was entitled to an exemption under section 501(c)(3) of the Internal Revenue Code. This demonstrates that the question was not an open and shut question as some of my colleagues would indicate. It should also be pointed out that District Court Judge Chapman ruled in favor of the University and believed that it was entitled to section 501(c)(3) exemption. And that is in a 1978 decision.

In the 2-to-1 fourth circuit ruling reversing the district court judge, Judge Widener dissented. He expressed his view that section 501(c)(3) exempted the University.

There have been a number of scholarly Law Review articles written that sustain and have supported the Government's section 501(c)(3) argument, including the prestigious Supreme Court Review for 1983, published by the University of Chicago Law Review. And of the 26 articles which were published on the case up to 1985, 18 of those articles were critical of the Supreme Court's majority decision.

Rightly or wrongly, the point I am making is that there were legitimately two sides to the question. And in the zeal to make points sometimes we fail to look at some of these very critical points.

I believe that Prof. Lawrence Tribe of the Harvard Law School, truly one of the great constitutional law professors in this country—with whom I disagree on a lot of occasions, and agree on some—severely criticized the Government's action in the case. However, he later published an article in the Indiana Law Journal that the Court's use of congressional inaction in *Bob Jones* was not a legitimate method of inferring congressional intent.

We can beat these things to death, but there are two sides to them. These are intricate, difficult questions, and it takes courage to stand up on one side or the other. I happen to have agreed with the one side, but that does not mean that there was not a legitimate point of view on the other side.

I waive the rest of my time.

The CHAIRMAN. All right. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Justice, as this hearing develops, I think it is on a double track—maybe a triple track—one part of the track has to do with your ability to lead the Court, to be an individual who can weld the Court together. The second part relates to whether indeed, you are an extremist and relates to some of your opinions. But there is a third part that probably disturbs me as much or maybe more than any of the first two portions. That has to do—and I want to use the most sensitive language I can—with your credibility, with the honesty of your representations to this body in 1971 and the present time as well.

On the voter challenge issue, we have the matter of your making a specific representation to the committee at that time, and then we had the total disavowal yesterday as pertains to the facts. That is an issue that is still left unanswered because the witnesses will not be here until tomorrow. But it has to do not with whether you did or did not do something, but whether you did or did not represent the facts correctly to this body.

Then, the second part of that whole credibility question relates to your answer to Senator Leahy yesterday that you did not know of the typed-in restrictive covenant. This was a boilerplate form that had a typed-in restrictive covenant with reference to selling or leasing your property to any member of the Hebrew race.

Well, just as something on its face, something typed-in, a good lawyer, an excellent scholar, it certainly would have been normal to expect you would have noted that. I guess as one of the most knowledgeable people that graduated from Stanford high honors, everybody agrees you are extremely intelligent, and it almost stands out: "Hebrew race." There is no such thing as a "Hebrew race." It is the Hebrew religion. I mean, that would obviously be a point that almost would stand out. So, when you say you did not know about it, that concerns me. It is bad enough that it is in the deed; it is worse if it was in the deed, and if you knew about it in your representation to the committee.

And the third aspect having to do with the matter of credibility relates to your claim that the memo to Jackson was not representative of your views, but were those of the Justice himself. I had

some questions of you yesterday on that subject, and I did not get a chance to finish. I have a few more.

But I wanted you to understand what is going through this Senator's mind as to one of the most important issues that I believe this committee has to deal with, and that is credibility, integrity.

The title of the memo is "A Random Thought on the Segregation Cases." If these were Jackson's views, why would you describe a statement of Jackson's views in that way?

Justice REHNQUIST. I do not know, Senator.

Senator METZENBAUM. Isn't it illogical—you wrote a two-page memo, and across the top was written, "A Random Thought on Segregation Cases." It just perforce comes out that that would be your thoughts, not his thoughts. The memo says, "I realize that this is an unpopular and unhumanitarian position for which I have been excoriated by liberal colleagues. But I think *Plessy* v. *Ferguson* was right and should be reaffirmed."

Now, if it is supposed to be Jackson's views, then was he excoriated by his liberal colleagues, and if so, who excoriated him—the other Justices?

Justice REHNQUIST. I was not a party to the conference discussion or any of the discussions of the Court on the *Brown* case.

Senator METZENBAUM. Well, I understand that. But what I am saying is that in the memo, and I am quoting your language, you state, "for which I have been excoriated by liberal colleagues." And this relates to the question of whether it is a memo from William Rehnquist, stating his views, or a memo which reflected the views of Justice Jackson, which is the point that you made. And in fact, you say, in your letter to Senator Eastland, "It was intended as a rough draft of a statement of his." And the word "his" is even underlined—"his views at the conference of the Justices, rather than as a statement of my views."

Again I am saying, Justice Rehnquist, that I am not questioning your views; I am questioning the reliability of your representations to the Senate back then in 1971, because that issue had been raised, and in order to put it to rest, you took the position that all that was in that memo was a rough draft of a statement of "his" views.

And I believe that—in fact, you even try to prove that point by saying, "Because of these facts I am satisfied that the memorandum was not designed to be a statement of my views on those cases," and again you underlined the word "my." And then at another point, you say, "I am fortified in this conclusion because the bald, simplistic conclusion that *Plessy* v. *Ferguson* was right and should be reaffirmed is not an accurate statement of my own views at the time."

My difficulty comes about by reason of the fact that the memo by its language, by everything in it, including its title, would indicate it was yours. But in your letter of December 8, 1971 when you were up for confirmation, you went to great lengths in a three-page letter to say to the chairman that it was not really your views that were being stated; those were the views of Justice Jackson. And I think you ought to have an opportunity to explain to us why that which would appear to be an obvious conflict with the facts was

the statement of Mr. Rehnquist at that time, subsequently Justice Rehnquist.

Justice REHNQUIST. I do not know if it was you, Senator Metzenbaum, or Senator Biden, that asked me about this yesterday, but one thing I said yesterday was that the thesis which is very roughly and very shortly, certainly, developed in the memo that most of the Court's mistakes up to that time had been reading its own moral notions into the Constitution was a view that Justice Jackson was a champion of. His entire book, "Struggle for Judicial Supremacy," is devoted to that thesis.

I also would like to point out—and I think that would conform to what I said yesterday—that one reason that makes me think it was not simply a memo of my views to him is that the bald statement that *Plessy* was right and should be reaffirmed was not an accurate reflection of my views at the time.

Also, I think that the tone of this particular memorandum is not the tone of a law clerk even expressing a great deal of his own opinions and submitting to a Justice; it is a tone of one equal speaking to another.

Senator METZENBAUM. Well, are you now saying that this memo that has the initials at the bottom, "W.H.R.," was not your memo?

Justice REHNQUIST. I am certainly not saying that, Senator. The reason I know of the authenticity—I had no recollection in 1971 and do not have now of ever having actually sat down and written out these particular memos. I recognize the typescript. This was the way the office proceeded. I am sure this was typed by me, initialed by me.

Senator METZENBAUM. So it was your memo, and yet you went to great lengths to tell Senator Eastland that the memo reflected the views of Justice Jackson. And I have difficulty in reconciling the facts.

Here is the memo, which is very clear, and it is written as a memo from a law clerk to his Justice, and it goes on to say—it talks about all the things that—your position—and you actually state, "I have been excoriated by liberal colleagues."

My question to you is doesn't that absolutely make it your memo? It was your liberal colleagues who were excoriating you. Wasn't that the fact?

Justice REHNQUIST. Senator, a lot depends on what you mean by "my memo." If you are suggesting that I am saying that someone else prepared the memo, no. The memo was prepared by me, typed by me.

The question that I understood you to be asking is whose views does the body of the memo contain. And there, I have answered you, I think it is principally, in fact, entirely, Justice Jackson.

The CHAIRMAN. The Senator's time is up, and you are a minute and a half over.

On this point about the deed, I might state that the Washington Post this morning had an article, headed, "Deed Excludes 'Hebrew Race'." I want to read a couple of excerpts for the record since this matter was brought up.

Greensboro, Vermont, town clerk and treasurer Bridget Collier said in a telephone interview yesterday that it was unnecesary for Rehnquist to sign the deed

and that it carried only the signatures of John and Joan Castellvi, who sold the property to the Rehnquists.

"He did not necessarily sign anything," said Collier, who said she had no record of Rehnquist's signature on documents.

Collier said the language in the deed dates from 1933. "You find them (such restrictions) once in a while in some of the older deeds," she said, noting that the provision is no longer binding.

Collier said FBI agents asked for copies of the deed when they visited her office recently. "They asked me if that was a legally binding provision in Vermont, and I checked with the Secretary of State's Office and said 'no,'" she said

This article was written by Susan Benesche and Jonathan Karp.

Senator HATCH. Mr. Chairman, do I have any remaining time? I would like to make a point on the deed, along with the chairman.

Do I have some time left?

Senator HEFLIN. How much time does the chairman have left?

The CHAIRMAN. I have not taken any time yet.

Senator HATCH. Could I just take a minute, Mr. Chairman?

Let me just point out one thing.

The CHAIRMAN. Yes, go ahead.

Senator LEAHY. We have special clocks.

Senator HATCH. Under chapter 31 of the Vermont Code, entitled, "Discrimination," the appropriate provision which was enacted in 1967 is under section 1452, "Real Estate Exception."

The sale, lease or other transfer of title occupancy or possession of real estate offered for sale or lease to the general public shall not be denied to any person because of the race, religion, creed, color, or national origin of that person.

I do not think anybody really gives much credibility to that argument. Everybody knows it is void under law. And some of these vestiges of the past do exist in boilerplate.

Senator LEAHY. Would the Senator yield for just a moment on that point?

The CHAIRMAN. We requested the FBI, at the request of Senator Leahy, to look into this matter.

The distinguished Senator from Iowa.

Senator GRASSLEY. Justice Rehnquist, when you are a law clerk, are there times that you should play devil's advocate and raise arguments that you may not always be in full agreement with?

Justice REHNQUIST. Yes, I think there are.

Senator GRASSLEY. Would private informal memos be used to raise and discuss such arguments?

Justice REHNQUIST. I think they were on occasion in Justice Jackson's chambers.

Senator GRASSLEY. OK. Well, then, Justice Jackson did ask you to prepare memos making arguments for a position with which you might not agree?

Justice REHNQUIST. It was not necessarily that he would say, "You do not agree with this position so make an argument." But he would say, "I want both sides presented."

Senator GRASSLEY. OK. Justice Rehnquist, after several decades of legal experience and including your 15 years on the Supreme Court, do you personally agree with everything that was said in these private, informal memos to Justice Jackson?

Justice REHNQUIST. No, no, I do not.

Senator GRASSLEY. And of course, isn't this true then of the Justice Jackson memo that is under discussion at this point?

Justice REHNQUIST. Yes, I certainly tried to make clear to the committee that I did not agree then, and I certainly do not agree now, with the statement that Plessy against Ferguson is right and should be reaffirmed.

Senator GRASSLEY. Mr. Chairman, I have no more questions at this time.

The CHAIRMAN. The distinguished Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Justice Rehnquist, I want to proceed with some questions regarding the 14th amendment and your interpretation of it. Scholars of your decisions agree that you have a limited view of the 14th amendment—limited in comparison to some of the other decisions that the Supreme Court has handed down. I do not say that critically. I just state that as what some scholars have said. These scholars, in reading your opinions, suggest that it is your view that the 14th amendment should apply only to racial discrimination.

Do you agree with that analysis?

Justice REHNQUIST. No, I do not.

Senator DECONCINI. Do you believe that women should have equal rights as men have under our Constitution?

Justice REHNQUIST. Yes, I certainly do.

Senator DECONCINI. And does that fall within the 14th amendment, in your judgment?

Justice REHNQUIST. Yes, I think it does.

Senator DECONCINI. Do you believe that permanent resident aliens should have equal rights with citizens?

Justice REHNQUIST. If you are asking me, Senator, whether under the Constitution——

Senator DECONCINI. Under the Constitution.

Justice REHNQUIST [continuing]. Permanent resident aliens should have equal rights, there has been disagreement on our Court about that. And I do not know that any of the positions would be phrased in terms of saying that permanent resident aliens ought to have every right that a citizen does.

For example, I do not think anyone on our Court has contended that a permanent resident alien ought to be entitled to vote even if a State statute says that you have to be a citizen to vote. But there is no question that the 14th amendment protects permanent resident aliens; it is just a question of how much it protects.

Senator DECONCINI. So who makes that determination—the court?

Justice REHNQUIST. Yes; if a claim is made under the 14th amendment on behalf of a permanent resident alien, a court would have to decide it.

Senator DECONCINI. If the popular elected branches of Government want to ensure equal rights for some segment of our society—say, women—what do you think of a constitutional amendment to guarantee equal rights for women?

Have you ever taken a position on that?

Justice REHNQUIST. Yes, I think on behalf of the Justice Department, I presented the administration's view that the ERA should pass.

Senator DECONCINI. Should pass?

Justice REHNQUIST. Should pass, yes.

Senator DECONCINI. When was that done, Justice?

Justice REHNQUIST. I think it was in 1971. It was when I was in the Justice Department.

Senator DECONCINI. Did you write a memo, or something to that effect?

Justice REHNQUIST. I presented testimony which had been prepared for me.

Senator DECONCINI. And do you have copies of that testimony?

Justice REHNQUIST. No. I would think it would be in the records. As I recall, it was a House committee, because I remember Congressman Wiggins gave me a very hard time on the testimony.

Senator DECONCINI. Your recollection is that you presented the administration's position in support of passing the equal rights amendment?

Justice REHNQUIST. Yes, it is.

Senator DECONCINI. Was that your view personally, too?

Justice REHNQUIST. I had reservations, I think, at the time. You know, I could see arguments pro and arguments con. But I do not think I was as enthusiastic—I thought there were more problems with the ERA than the administration's position would have indicated.

Senator DECONCINI. So you took the administration's position to support the ERA because that was your job and your position at the Justice Department?

Justice REHNQUIST. Yes, yes.

Senator DECONCINI. Had you exercised, or do you remember giving your opinion prior to that position being taken? Were you part of the process, in other words, of what that——

Justice REHNQUIST. Oh, sure; I am sure there was discussion back and forth, and it was just simply resolved.

Senator DECONCINI. And in any event, officially, you stood by the Justice Department's position or the administration's position, which was clearly in support of the equal rights amendment.

Justice REHNQUIST. Yes, I did.

Senator DECONCINI. Justice Rehnquist, some of your critics have attempted to make much of the fact that you have written so many dissenting opinions. I believe that the criticism is unfair and quite frankly irrelevant.

Let me ask you some questions. Do you believe that it is your responsibility to keep voicing your view on an issue even if stare decisis leads the Court to decide a specific case in another way?

Justice REHNQUIST. I think generally, yes, Senator, that if one sees a constitutional issue a particular way and simply is not persuaded, that in most cases it is a part of a function of a judge to say something in dissent.

I think on statutory cases, it may be somewhat different. The ballgame is over when the Supreme Court decides a statutory case. Congress can change the result if they do not like it. And I think there, a dissent, particularly a sole dissent, has a good deal less to be said for it.

Senator DECONCINI. So it is your position of course, if I can assume, that you will continue to dissent when you feel the compelling legal reasons to do so, but less so in the cases where stare decisis is applied to a statute.

Justice REHNQUIST. Exactly, Senator.

Senator DECONCINI. That does not mean that you would not dissent, but less so?

Justice REHNQUIST. Yes.

Senator DECONCINI. Do you believe there is much difference in one Justice dissenting or two Justices dissenting or more?

Justice REHNQUIST. I never thought a great deal about it, to tell the truth. It is regarded as some evidence of the strength of the majority opinion, the number of dissents it attracts. But I had never thought there was a lot of difference between one Justice and two Justices dissenting, other than the obvious fact that the numbers are different.

Senator DECONCINI. Isn't the number of times one votes with the majority and the number of majority decisions one is selected to write a better example of one's position with respect to the "mainstream" of thought on the Court?

Justice REHNQUIST. Yes, I think that is quite right, Senator.

Senator DECONCINI. And you measure up rather well in that criterion, do you not?

Justice REHNQUIST. I think so, when compared with a number of my colleagues; the number of times I have been with the majority as opposed to in dissent is greater for me than with some of my colleagues.

I am by no means the person that is most often with the majority.

Senator DECONCINI. Thank you, Justice Rehnquist.

I just want to comment on the question that was raised regarding the deed and your property in Vermont. I am satisfied with the explanation you gave yesterday. I also would suggest to my friends that maybe they should look at all their deeds. I have not done that myself, but having several pieces of property in the State of Arizona, it would not surprise me if some of them might have embarrassing clauses that were put there before I was born. And I certainly would resent anybody—and I am not accusing anybody of doing that—who raised the issue that I was unsensitive to the Hebrew religion or any other sect, because I do not think that is the case at all. And I think the Senator from Vermont spelled it out very clearly yesterday. There is a procedure to rectify the problem of the restrictive covenant. I understand from the testimony yesterday that you are prepared to rectify this situation, even though it may not be necessary, to demonstrate your sensitivity to that subject matter.

Justice REHNQUIST. Yes, I am.

Senator DECONCINI. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Kentucky.

Senator MCCONNELL. Mr. Chairman, I will be happy to yield back my time.

The CHAIRMAN. The distinguished Senator from North Carolina.

Senator BROYHILL. Mr. Chairman, this committee has a great number of witnesses that are waiting to testify, and I would like to yield back my time so that we can finish our work. It seems to me that we need to move ahead.

Senator LEAHY. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts. The next one would have been Vermont, but I can take you since you are ranking. What do you want to do.

Senator KENNEDY. I have got some questions.

Senator LEAHY. Certainly, I will yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you.

Senator HEFLIN. I will yield, too, to the Senator from Massachusetts.

Would you yield, Senator Simon?

Senator SIMON. Yes.

Senator KENNEDY. I hope my time is starting now.

The CHAIRMAN. Ten minutes, Senator.

Senator KENNEDY. Mr. Justice, the Senator from Vermont brought up some questions yesterday about the restrictive covenants in certain titles, and Senator DeConcini has referred to it again.

The FBI report indicates that also on October 24, 1961, you obtained a title to lot 3, which is in the Palmcroft subdivision in Phoenix, AZ.

Are you familiar with that?

Justice REHNQUIST. Certainly, we owned a home in Palmcroft, AZ from about——

Senator KENNEDY. Well, did you acquire it in 1961?

Justice REHNQUIST. Yes, that sounds right.

Senator KENNEDY. And October 24 sounds like about the time?

Justice REHNQUIST. Yes, that sounds right.

Senator KENNEDY. Do you still own that?

Justice REHNQUIST. No.

Senator KENNEDY. You sold it. When did you sell it?

Justice REHNQUIST. I believe early 1969.

Senator KENNEDY. On that particular provision, there is a report by Mrs. Gladys Cavett, who is the Customer Service Department, Arizona Title Co., who advised that further research of the records of the title company revealed a warranty, deed number 328623, dated July 30, 1928, relating to lot 3 of the Palmcroft subdivision, Maricopa County, AZ.

And article 11 of the warranty deed is as follows:

> No lot nor any part thereof within a period of 99 years from the date of filing of the record on the plot of Palmcroft shall ever be sold, transferred or leased to, nor shall any lot be a part thereof, within said period be inhabited by or occupied by any person not of the white or Caucasian race.

Were you familiar with that particular provision?

Justice REHNQUIST. I certainly do not recall it, no.

Senator KENNEDY. Well, would you have read through the warranty deed when you bought the land? Do you have any recollection? It is a long time ago.

Justice REHNQUIST. It is 1961. I simply cannot answer that, Senator. It was a title company transaction, I think, and one relies on the title company for the sufficiency of the deed.

I simply cannot answer whether I read through the deed.

Senator KENNEDY. But you have no knowledge whether in that warranty—you did not examine the warranty deed about any restrictions on the property?

Justice REHNQUIST. I certainly have no recollection of it.

Senator KENNEDY. Would you now, if you purchased property?

Justice REHNQUIST. Would I——

Senator KENNEDY. Yes. Would you now examine the warranty if you purchased property today?

Justice REHNQUIST. Well, if a lawyer were handling the thing for me, and there were any sort of a complicated warranty, I think I would tend to rely on the lawyer.

Senator KENNEDY. Even when you are familiar that there were those kinds of restrictions in many parts of the country—I expect even in my own part—with regard to either Caucasians, whites, blacks, or Jews?

Justice REHNQUIST. Your question is would I examine a warranty deed now?

Senator KENNEDY. Yes, to see if there is any restriction. Would you care if you joined a country club or something that restricted women or Jews——

Justice REHNQUIST. Oh, no, certainly not.

Senator KENNEDY [continuing]. Or blacks?

Justice REHNQUIST. No.

Senator KENNEDY. Well, you would know about that, then. You would find about that before you made application, I assume.

Justice REHNQUIST. Yes, I would.

Senator KENNEDY. Well, would you check and see if there were any restrictions in terms of the purchase of property?

Justice REHNQUIST. Well, in terms of—yes, I think I would.

Senator KENNEDY. Well, you did not before, evidently; you did not in 1961.

Justice REHNQUIST. It simply had not occurred to me.

Senator KENNEDY. Well, when did it start occurring to you?

Justice REHNQUIST. Well, the discussion today, or last evening certainly has brought it out. [Laughter.]

Senator KENNEDY. Well, you do not think that you should have before, any time? You do not think you should have before today, or yesterday?

Justice REHNQUIST. Well, I must say my normal approach in looking at a statement, or a statement of title, was does it convey good title and that sort of thing. I certainly not only thought, but knew, that this sort of a covenant is totally unenforceable and had been for years, since a Supreme Court decision a long time ago.

So, while very offensive, it has no legal effect.

Senator KENNEDY. Well, did you sign the deed of transfer when you sold the property?

Justice REHNQUIST. I am sure I must have.

Senator KENNEDY. Well, was the restriction still in it then?

Justice REHNQUIST. I cannot answer from my own knowledge, but certainly, we had done nothing to remove it, as I recall, in the years—I would think it probably was.

Senator KENNEDY. Let me go to the *Laird* v. *Tatum* situation Mr. Justice.

You wrote a memorandum justifying your decision to sit on the case, did you not?

Justice REHNQUIST. Yes, I did.

Senator KENNEDY. And you talked about the ABA standard, that it talked about not just impropriety, but the appearance of impropriety, and you basically had already made up your mind about that issue and about the very case that raised the issue in *Tatum* v. *Laird*. And I would suggest there was no abstract constitutional question. You were discussing the very case you later decided to rule on. You told Senator Ervin when you thought about the merits of the case, which was then in the court of appeals. You in the case arrived on the Supreme Court decision, sat on the case, and made the ruling, and cast the deciding vote, 5-to-4.

In your testimony before Senator Ervin in the subcommittee you said,

> My only point of disagreement with you is to say whether, as in the case of *Tatum* v. *Laird* that has been pending in the court of appeals here in the District of Columbia, that an action will lie by private citizens to enjoin the gathering of information by the executive branch, where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the government.

One of the obviously fundamental principles of the judicial system is that the judges have to be fair and impartial, and judges are not supposed to sit on cases where their minds are already made up.

You had basically made up your mind on that issue, had you not, Mr. Rehnquist?

Justice REHNQUIST. Senator, as you say, I prepared a memorandum considering the request that I disqualify myself in deciding that I was not obliged to, and that I should not. I think disqualification is a judicial act, and I do not believe that I ought to be in a position here of defending something that I did in that capacity as a Supreme Court Justice.

Senator KENNEDY. Well, the question, I think, is whether you had taken a position on it. This is not what you may consider an ordinary case. It was involving the demonstrators—it involves first amendment rights—demonstrators, surveillance by military personnel. You basically resented those demonstrators. Now you had a chance to do something about it. You indicated what your position would be; whether it was a justiciable cause, in response to an exchange with Senator Ervin. You made up your mind evidently that those demonstrators were not going to get their way in the Supreme Court, even if you had to sit on the case to break a tie, even if you had to violate the ABA rules and the fundamental principles of justice to do it. I thing that is wrong. I am not alone in that thinking. I do not know if you are familiar with the articles that were written by Jack MacKenzie about this case. It says, "Justice Rehnquist called this exchange"—the one I just read, where you indicated that there was not a justiciable cause in the *Tatum* v. *Laird*—"in his memorandum, 'a discussion of the applicable law' "—these were the words you used in your memorandum on this issue. And then MacKenzie continues, "But this, as all lawyers will recognize, and most lawyers will freely state, is not a mere discussion of the applicable law; it is a statement of how the law should be applied to a particular case. And, try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view."

What is your reaction to MacKenzie's conclusion on this as well?

Justice REHNQUIST. That I was performing a judicial act, and that——

The CHAIRMAN. The Senator's time is up, but we will let him answer this question.

Justice REHNQUIST [continuing]. I ought not to be called upon somewhere else to justify this.

Senator KENNEDY. Mr. Chairman, I would just ask that the Rehnquist memorandum, the exchange with Senator Ervin, and the McKenzie article be printed in the record.

The CHAIRMAN. Without objection, so ordered.

[Documents follow:]

a riot, again which is close to associational rights. That the executive branch or the legislative branch may not even propose legislation like that, that the executive branch may not submit it or that Congress may not even debate it, is, I think, the logical conclusion to be drawn from such a broad extension of the chilling effect doctrine.

In short, I think you have got to have some governmental sanction imposed on the person before you get a first amendment problem.

Senator ERVIN. What more sanction can you have imposed on people than for the military, for example, to send military agents to photograph people and have helicopters flying overhead to watch them? Isn't that governmental sanction?

Mr. REHNQUIST. No, it is not a governmental legal sanction, in my opinion.

Senator ERVIN. What is it? In other words, I don't think that the Constitution permits the President of the United States to use military forces to discharge functions of a national police force or to spy on the civilian population of this country.

Mr. REHNQUIST. Well, certainly the Posse Comitatus Act places substantial limitations in that area.

Senator ERVIN. But it does not authorize the President to use the military except to suppress insurrection against the Government or violent actions which are so serious in nature as to obstruct the enforcement of the Federal Constitution or Federal laws or interfere with the ordinary course of justice in the courts. That is all the power he gets under the Constitution and under the acts of Congress implementing the Constitution.

There is not a syllable in there that gives the Federal Government the right to spy on civilians; that is, which gives the Army the right to spy on individuals who are not connected with the military. Yet we even had them spying on people in churches where presumably they had gone to worship the Almighty according to the dictates of their own consciences.

Mr. REHNQUIST. Well, as I say, I think that was unauthorized and reprehensible. I do disagree with you as to the first amendment question.

Senator ERVIN. Well, do you agree with me that the legislative branch of the Government has no right to collect information which tends to stifle the individual's inclination or desire to exercise his first amendment rights?

Mr. REHNQUIST. I agree with that it can't collect it by compulsory process.

Senator ERVIN. But you do take the position that the Army or the Justice Department can go out and place under surveillance people who are exercising their first amendment rights even though such action will tend to discourage people in the exercise of those rights?

Mr. REHNQUIST. Well, to say that I say they can do it sounds either like I am advocating they do it or that Congress can't prevent it or that Congress has authorized it, none of which propositions do I agree with.

My only point of disagreement with you is to say whether as in the case of *Tatum* v. *Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the execu-

tive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Senator ERVIN. Well, now, this information that is collected goes into the Government files, doesn't it, and it is used to determine whether a man will be employed to work for the Government, and in some cases it is even made accessible to private industry for them to determine that question; is this not true?

Mr. REHNQUIST. I am not certain what use was made by the information gathered by the Army. The Justice Department has its own investigation made at the time a person seeks employment and, so far as I know, the information gathered by the Army was not used by the Department.

Senator ERVIN. We have a great deal of difficulty finding out what use the Army made of it. As a matter of fact, it appears here from testimony that the second in command of the military intelligence didn't even know that the information was over at Fort Holabird in a computer, and still they want us to believe some little doughboy who was sniped at in the Detroit riots was in some way hep to that information when the second in command of military intelligence didn't even know where it was or what it was.

In a dissenting opinion in a case from Arkansas where the State of Arkansas required teachers to make a disclosure of all the organizations they had belonged to for 5 years, Justice Harlan dissented from the ruling that the information sought there didn't serve a legitimate State purpose, but he laid down this proposition: he said when the Government goes to exercise its investigatory power there are two questions that have to be answered. The first is that the information which the Government seeks must be for a legitimate governmental purpose and, second, that even if it is for a legitimate governmental purpose, it must be relevant to the accomplishment of that purpose.

Do you agree that is a correct statement of law?

Mr. REHNQUIST. Certainly I agree when the Government seeks to obtain it either by threat of discharge from a job or by threat of compulsory process.

Senator ERVIN. But you think the executive branch of the Government can go out and obtain it either by overt or covert methods, and no constitutional question is involved even though it may intimidate people in the exercise of their first amendment rights?

Mr. REHNQUIST. Senator, I think you are putting words in my mouth which I have no desire to have put there. I do not think there is a first amendment violation in that situation. However, the general authority of the Government to do that, or when Congress has authorized it, these situations may present an entirely different question.

Senator ERVIN. The inference I would draw is that the power of the Congress under the Constitution is inferior to that of the executive branch of the Government.

Mr. REHNQUIST. Certainly I would hope you wouldn't draw it from anything I have said because I don't believe that.

Senator ERVIN. Well, in other words, a congressional committee can't get information about people under certain circumstances but the Army or any other Government agency can go out and collect that

THE APPEARANCE OF JUSTICE

John P. MacKenzie

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A JUDGE AND HIS CAUSE

"Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations should proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion, to recuse him before issue joined, so that the cause go to another."

Justinian Code

"No man can be a judge in his own cause."

Sir Edward Coke (1614)

Just as the independence and the impartiality of a court seem to go together, so is it hard to separate an attack on a court's independence from an attack on its ability to be fair. Any time a president of the United States—be he Nixon, Roosevelt, or whoever—makes a political issue of his determination to "turn the Supreme Court around," there is an attack on the court's independence that is fraught with danger for justice and the appearance of justice. Some conservatives may smack their lips at the hope for change, liberals may quail at the prospect of lost civil liberties; but thoughtful persons of left and right and middle will be concerned over the politicization of the highest court. The concern will be no less when the Court is conservative and its attackers are liberal.

Periods of such marked and conspicuous change put a heavy

strain on judicial ethics. Failure of a jurist to abide by high ethical standards can exacerbate the tensions that already run high when the courts are confronted by highly emotional, somewhat political, and deeply divisive issues. Observance of ethical restraints can ease tension and produce judicial decisions that are not only more fair, but that are also perceived as such.

Even under fairly normal circumstances, the changes in Supreme Court personnel can be unsettling to the law. Justice Felix Frankfurter, in a 1950 dissent from the Court's third change of direction in search-and-seizure law in three years, complained: "Especially ought the court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the court's composition and the contingencies in the choice of successors." In the spring of 1971, Justice Hugo L. Black dissented from an overruling made possible by the replacement of two justices by Nixon appointees. "This precious fourteenth amendment American citizenship should not be blown around by every passing political wind that changes the composition of this court," said Black. "While I remain on the court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is 'fair' and 'reasonable.' "

In the fall Black was gone, and with him John Marshall Harlan, and the winds of change were stirring anew. After a period of surveying a field of unqualified candidates, a period that itself was disquieting to those who appreciated the loss of the two judicial giants, the Nixon administration at last came up with two qualified nominees, Lewis F. Powell, Jr., and William H. Rehnquist. Both men were aptly classified as "conservatives," and even allowing for some slippage between a president's expectations and a justice's performance, the third and fourth Nixon nominees were certain to have a profound effect on the Supreme Court's future course. Powell's prestige and the moderation that for the most part had tempered his philosophy enabled him to sail through Senate confirmation with but a single dissenting vote. Rehnquist, however, had been the cutting edge

of Nixon's major differences with Congress, civil libertarians, and civil rights advocates. His confirmation on December 11, 1971, by a vote of sixty-eight to twenty-six, followed a bitter battle during which senators—both those who opposed him and some who ended up voting for him—were frustrated in their efforts to question Rehnquist about his views because he invoked the "attorney-client" privilege as the president's "lawyer's lawyer."

This chapter deals with how Rehnquist responded to the ethical issues raised by his sitting in judgment on matters deeply affecting his former client, the president. The sad conclusion—sad because it must be made of a jurist with brains, ability, and dedication to the Court—is that Rehnquist's performance was one of the most serious ethical lapses in the Court's history. Sad, too, because his behavior, documented in his own extraordinary memorandum justifying his conduct, came at an ethical watershed when the distress of past scandals was supposed to be behind us. The memorandum, the only one ever published by a justice in response to a motion to disqualify himself (such motions are themselves almost as rare), is itself a monument both to Rehnquist's technical ability and to his ethical shortsightedness. If the standards set forth in the memorandum are allowed to stand for Supreme Court justices or for the lower federal judiciary, we shall have learned nothing for all our anguish.

Rehnquist had been through much of the anguish himself, first in giving advice to Attorney General John N. Mitchell during the Fortas episode in the spring of 1969, later that year as the lawyer trying to usher the Haynsworth nomination through the Senate, and in 1970 while performing similar functions for both the Carswell and Blackmun nominations. Indeed, he appeared to have learned from the Haynsworth fight that whatever might be said in judgment of that unfortunate nominee, the Senate had opted for a stricter ethical standard for the present and future. The Justice Department's correspondence with the Senate Judiciary Committee over Justice Blackmun's finances carried a notation that perhaps the old disqualification statute itself had been given a stricter modern meaning by the way the Senate interpreted it in the Haynsworth vote. And Rehnquist, quite possibly the author of that comment, testified at his own hearing

that as a justice "my own inclination would be, applying the standards laid down by [the disqualification law] and to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Senators had been anxious to know whether Rehnquist would consider himself qualified to sit in the forthcoming test of the president's power to wiretap, in the name of national security and without court authorization, individuals classified by the executive branch as domestic subversives. After many questions on the subject, Rehnquist assured the Judiciary Committee that since he had given key legal advice in the preparation of the Justice Department's position before the Supreme Court, he would not sit in the case although he did not personally sign the government's legal brief. Similar anxieties were expressed about Powell's participation in the same case, in view of his strong published statements that opponents of wiretapping were exaggerating its dangers. (Justice Rehnquist did indeed recuse himself in the case as the Court rejected the Justice Department's position by an eight to zero vote in an opinion by none other than Justice Powell.) Rehnquist indicated also that he would not sit in another important case, testing the power of prosecutors, grand juries, and even congressional committees to give only limited or "use" immunity from prosecution rather than total immunity when coercing them into giving self-incriminating testimony. In that case Rehnquist had actually signed the brief and had been prepared to argue for the government in support of such power. (The decision, which incidentally upheld the constitutionality of the procedures later used to squeeze testimony from many Watergate suspects, was by a five to three vote, with Justice Powell again writing the majority opinion.)

The most ethically sensitive cases that faced Rehnquist were the *Branzburg* and *Tatum* cases. The *Branzburg* case pitted much of the newspaper industry against the government's claimed power to subpoena unpublished and sometimes confidential information from newsmen Paul M. Branzburg of the *Louisville Courier-Journal*, Earl Caldwell of the *New York Times*, and Paul Pappas of television station WTEC-TV in New Bedford, Massa-

chusetts. The *Tatum* case, which would ultimately produce the famous Rehnquist memorandum, raised the question of whether peace workers and antiwar groups could take the government to court over the army's program of surveillance, infiltration, intelligence gathering, and dissemination to other federal agencies of information about law-abiding civilians.

Another case with a lurking though perhaps a more tenuous ethical question was the *Gravel* case, involving the government's attempt to elicit grand jury testimony about the source of the copy of the Pentagon Papers that came into the hands of Senator Mike Gravel, Democrat of Alaska, and that he published after unsuccessfully trying to make it a part of Congress's official record. Rehnquist as assistant attorney general had fired the first volley in the Pentagon Papers fight by telegraphing editors at the *New York Times* and *The Washington Post* to ask voluntary suspension of publication, a request that, when refused, was converted into a demand and a court complaint to enjoin publication. So far as anyone knew, Rehnquist had little to do with the Pentagon Papers after dealing with the issue of prior restraint on their publication by the press (decided in the newspapers' favor in June 1971) and before his Supreme Court nomination the following October. While the *Gravel* case also involved the Pentagon Papers and whether they could be lawfully disclosed to the public, the legal issues were different. While Justice Rehnquist clearly would have been disqualified from the prior restraint case, it is harder to insist on the basis of known facts that he should have stayed out of the *Gravel* case.

Although it was not a surprise to see Justice Rehnquist on the bench taking part in the *Gravel* hearing, it was a shock to see him there when the *Branzburg* and *Tatum* cases were called for oral argument. Assistant Attorney General Rehnquist had been the Justice Department's chief public spokesman, second only to the attorney general himself, for the Justice Department's controversial policy of subpoenaing newsmen for investigations of Black Panthers and other groups. On one occasion immediately recalled by newsmen, Rehnquist had appeared in the role of administration spokesman to defend the department's 1970 subpoena guidelines, which his Office of Legal Counsel had

helped to prepare. He played the apologist's role on a panel of commentators that included critics of administration policy. The guidelines were instructions to United States Attorneys' offices across the land, and they served as "litigating" material that the government cited in every court case to show the reasonableness of Mitchell's policy. Justice Rehnquist, from the outset of his Supreme Court service an active questioner from the bench, showed no consciousness of impropriety in his frequent give-and-take discussions with counsel for the three newsmen. He said nothing, however, during the entire oral argument in the *Tatum* case, perhaps signaling that it did involve an ethical question on which he was reserving judgment. This unaccustomed reticence only added confusion to the stunned surprise of counsel for Arlo Tatum, director of the Central Committee for Conscientious Objectors, and the other political dissenters who were trying to maintain their suit against the army. Did Rehnquist actually intend to vote in the case or was he merely sitting to hear the case out of interest? Was he there on some sort of provisional basis to determine for himself whether his previous involvement was disqualifying? Unlikely as this was, did not this possibility counsel caution to anyone tempted to move to strike the justice from the case? If the justice were inclined against participating, a move to recuse him might offend not only him but perhaps others on the Court as well. Senator Sam J. Ervin, Jr., the North Carolina Democrat whose outspoken defense of privacy rights and First Amendment freedoms later entered millions of American households through televised coverage of the Watergate hearings, was more sensitive than most to why Justice Rehnquist should not sit; but sitting alongside lawyers from the American Civil Liberties Union in the High Court's hearing room, he quietly counseled the cautious approach. Ervin, who joined the argument as a friend of the court on the side of the civilian plaintiffs, was unwilling to assume the worst. He recalled that when he argued in the *Darlington* labor cases, Justice Potter Stewart sat on the bench but dropped out when something said at the hearing reminded him of a close association with a textile official.

Broadly, Rehnquist was considered disqualified because of his

role as principal administration defender and witness at extensive hearings on military surveillance held before Ervin's Subcommittee on Constitutional Rights. There Rehnquist stated that the Pentagon program, however unwise or regrettable, did not violate anyone's constitutional rights. Specifically and crucially, he had testified that the *Tatum* lawsuit, which was pending in lower courts while the Ervin hearings were under way, was not "justiciable"; that is, it was the kind of lawsuit that courts should and would dismiss as judicially unmanageable. This was the very issue in the case when it reached the Supreme Court.

Furthermore, Rehnquist had made clear to Ervin the department's determined resistance to any legislation attempting to control the military practices—which he said had stopped anyway—or to any attempt to impose a judicial remedy by statute. The problem was best left to the "self-discipline" of the executive branch, Rehnquist testified in a vein that later became so much more familiar to Americans when the war and Watergate were aired publicly.

Central to the administration's position that there was no violation of constitutional rights was its contention that nobody had been hurt. It was not enough, in this view, that there was no congressional authorization for the program, or even that the military exceeded its constitutional bounds by intruding into the civilian sector of American life. The program would have been unconstitutional not because of its mere existence, but only if it actually infringed the rights of specific plaintiffs who went to court. According to the *Tatum* complaint, the surveillance did just that by threatening the privacy of political dissidents and hindering their exercise of First Amendment rights of free speech, assembly, and political association. But, said the Justice Department, Tatum and his friends were not hindered; they continued meeting, marching, protesting the war, and they even went to court to assert their rights to do so. Tatum countered by pointing to that portion of his complaint that specified that other less hardy souls were indeed inhibited from associating with the Tatums and other protesters. It was not denied—indeed, it could not be denied under the rules of pleading. When a party moves to dismiss a lawsuit without undergoing a trial, it must accept

every charge in the complaint as true, at least for the sake of argument, and then go on to show the court that there is no case under the law even if all the charges are true.

In large measure the case came down to how one viewed First Amendment rights and the measures necessary to safeguard them. To civil libertarians, First Amendment rights are not only basic, they are also very fragile. They need the solicitude of courts—what Justice William J. Brennan, Jr., calls "breathing space"—to survive. Government conduct that discourages free expression may defy precise measurement, since the identities of those discouraged are often by definition unknown and unknowable. When the federal government or a state is challenged on these grounds, it conventionally argues that there is nobody in the case with the requisite injury, no one with the kind of legal standing to make the case judicially manageable.

This description of the issues might seem weighted on the side of the *Tatum* plaintiffs, but it is their perspective that must be appreciated when considering their ethical complaint. The rest of the ethical issue is whether the complaint was grounded on a reasonable fear that the jurist was biased against them. They said that they felt just such a fear about a jurist who not only was out of sympathy with their cause but also had publicly stated his opinion that they had no case.

On June 29, 1972, the Supreme Court ruled against the newsmen. Three days earlier the Court had ruled that the *Tatum* lawsuit should be dismissed without a trial to examine the Pentagon practice or to demonstrate the alleged injuries. Each time the vote was five to four and each time the four Nixon appointees—Chief Justice Burger and Justices Blackmun, Rehnquist, and Powell—were joined by Justice White to make the majority. In each case the dissenters were Justices Douglas, Brennan, Stewart, and Marshall. By the same margin and by the same lineup the Court rejected the contention of Senator Gravel, which the Senate itself had supported, that the senator and his aide were constitutionally immune from inquiry into the acquisition of the Pentagon Papers. On these highly contested issues at least, the Supreme Court had indeed been turned around, the result swung by appointees of a different philosophy.

With little hesitation, both the American Civil Liberties Union on behalf of the *Tatum* plaintiffs and Senator Gravel decided to seek a rehearing and disqualification of Justice Rehnquist. Although the newsmen and their lawyers appeared to have a stronger claim than Gravel to an ethical challenge, it was not in their strategic interest to file a protest and they did not. In two of the three cases the withdrawal of Justice Rehnquist would not have made a difference, since a four to four vote would only affirm their contempt convictions for refusing to cooperate with grand juries; the third newsman, Caldwell, by this time was no longer sought by the grand jury. Some counsel privately expressed reluctance to appear to join a cabal of dissatisfied litigants in moving against Justice Rehnquist in so personal a manner. Unquestionably the course of moving to disqualify a justice would be a disagreeable, abrasive process, but the ACLU deemed the legal issue clear enough. If they had been silenced by a Velvet Blackjack, they would remain silent no longer.

"This motion is not made lightly," the ACLU told Justice Rehnquist, "but only after careful consideration by counsel and their colleagues in full knowledge of its unprecedented nature." The only precedent the ACLU could cite for such an action by a party was that unhappy episode in 1945 when the losing party in a celebrated miners' wage dispute had called for a rehearing on the ground that Justice Black, whose law partner of two decades earlier had argued for the labor union, should not have participated. The Court rejected this motion, however, with a most unusual separate concurrence by Justice Robert H. Jackson, joined by Justice Felix Frankfurter, pointing out that a justice's colleagues lacked power to judge the propriety of his action. Two years later, in a bitter open letter, Justice Jackson made clear that he indeed disapproved of Justice Black's role in the case. (Current canons support Justice Black and call for disqualification only where the case was in the law firm when the jurist and lawyer were partners.) That regrettable precedent did not augur well for the ACLU or for the Court's ability to handle the new motion dispassionately.

Accompanying the motion asking Justice Rehnquist to step aside was a petition for rehearing addressed to the entire Court.

The petition pointed to five separate instances in which the ACLU claimed that the five-member majority had accepted as though proven critical facts that underlay the decision, including the unproven assertion that the government had destroyed key surveillance records whose existence had been part of the complaint. In addition, the petition contended, the majority opinion had ignored numerous assertions of fact by the plaintiffs that, under the previously mentioned pleading rules governing motions to dismiss, must be accepted by the courts. It was needless to add that none of these alleged errors could have been committed by the Court if there had been no majority, since the consequences of a four to four tie vote are an affirmance of the lower court's judgment, which was that the case should go to trial rather than be dismissed, and no written opinion of any kind. The petition seemed correct in all respects and was most temperately worded. There was no opportunity for the government to dispute these points since the Supreme Court's rules do not call for an answer to a rehearing request unless the Court is considering granting it.

The motion to recuse Justice Rehnquist was based in part on the same federal disqualification statute, Section 455 of Title 28 of the U.S. Code that had been debated during the Haynsworth fight: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit. . . ."

The second prong of the ACLU motion, more telling as a matter of policy though not based on any yet-recognized law, was the new ABA Code of Judicial Conduct. The code had been published in final draft form and was then scheduled for final ABA approval at the summer convention. Approval took place on schedule and the code was ABA policy by the time the Supreme Court convened again in the fall.

The motion said Rehnquist had been a self-styled Justice Department "spokesman" on the broad question of the constitutionality of surveillance and had appeared twice as a witness before Ervin's subcommittee. On one occasion the witness said he

did not agree that "there are any serious constitutional problems with respect to collecting data on or keeping under surveillance persons who are merely exercising their rights of peaceful assembly or petition to redress a grievance." The witness did not limit himself to such generalities, the petition continued, but instead, "the concrete factual setting which he chose to discuss was the surveillance of civilians by the United States Army as depicted in the pleadings and the District Court decision in *Tatum v. Laird*, the very lawsuit" he voted on as a justice. A second statement had been even more pointed as Assistant Attorney General Rehnquist told Ervin:

> My point of disagreement with you is to say whether in the case of *Tatum v. Laird* that has been pending in the Court of Appeals here in the District of Columbia that an action will lie by private citizens to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of those individuals on the part of the Government.

Besides speaking publicly in the same vein, Rehnquist also complied with a request from Senator Roman L. Hruska, Republican of Nebraska, for a legal memorandum supporting his constitutional thesis. The memorandum denied that there had been any interruption in robust debate as a result of the program of surveillance. In addition, Rehnquist during the hearings had been the government's custodian of large amounts of computerized evidence that the ACLU had been trying to get.

As for the new ABA code, the motion emphasized the broad admonitions of canon 2 that a judge "should avoid impropriety and the appearance of impropriety in all his activities" and canon 3C requiring disqualification when "his impartiality might reasonably be questioned." The ACLU said it was by no means questioning the good faith of Rehnquist's pre-judicial expression of views. "Indeed, it was precisely because of the clarity and finality of his testimonial views and the intimacy of his knowledge of the evidentiary facts at issue in this case that the respondents [the *Tatum* plaintiffs] were convinced that Mr. Justice Rehnquist would not participate in the Court's deliberation and decision. . . ."

The disqualification statute, strictly construed, was indeed severe, the ACLU admitted, but it argued that, in the language of an important 1955 Supreme Court decision, it "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " There was no need to get into the question of actual bias, the ACLU said, when the judge has merely the normal concern about a case he had started before going on the bench. Citing a decision disqualifying then federal trial judge G. Harrold Carswell from a case that had been handled in his office when he had been United States attorney, the ACLU described it as "the interest that any lawyer has in pushing his case to a successful conclusion." This was a broad definition of the term "case" suggested by the fact that the Ervin hearings and the *Tatum* lawsuit were parallel proceedings going on in different forums.

Under the circumstances, said the ACLU,

> Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department in Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.

The answer came from the Court and the justice on October 10, 1972, the first decision day of the new term: "Motion to withdraw opinion of this Court denied. Motion to recuse, *nunc pro tunc*, presented to Mr. Justice Rehnquist, by him denied." There followed a sixteen-page memorandum by the justice that was as unusual for its content as it was unprecedented in law.

First the memorandum disposed of the ABA code as a separate and distinct basis for decision on the motion. "Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration," Justice Rehnquist said. This was a startling statement in light of the universally acknowledged fact that the new canons set a much

stricter disqualification standard than the existing federal statute. As discussed in the previous chapter, the new canons applied the "appearance of justice" test that would disqualify a judge in a doubtful case in place of the "duty to sit" concept that federal judges had evolved so that they would sit in the doubtful cases. For his legal authority in support of this remarkable conclusion, the justice cited none other than the 1969 report of the Senate Judiciary Committee majority supporting the Haynsworth nomination, which argued that the old canons then in effect should be read to harmonize with the federal statute in judging that nominee's ethical conduct. That this was dubious authority indeed was underscored by Rehnquist's own confirmation hearing testimony, quoted earlier in this chapter, that the full Senate's vote against Judge Haynsworth, which had of course *rejected* the Judiciary Committee's views, inclined him, in applying the federal disqualification law, "to the extent there is no conflict between them and the canons of judicial ethics, to try to follow that sort of stricter standards that I think the Senate, by its vote, indicated should prevail."

Having reduced his problem to the dimensions of the less restrictive federal law, Justice Rehnquist proceeded to take the narrowest possible view of the word "case." Said he: "I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court in the government's conduct of the case of *Laird v. Tatum.*" He added, "Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. . . . I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*. . . ."

Turning to the statements made before the Ervin subcommittee, Rehnquist said there were two. One, in his prepared statement, was simply that the government had retained one printout from the army's computer for inspection by the court in the *Tatum* case. Justice Rehnquist quoted this statement in his memorandum. He did not quote the second statement, however, the one set out in full on page 217. If he had, he might have faced the disqualification issue more squarely. This was the remark of witness Rehnquist disagreeing with Chairman Ervin over

whether "an action will lie" in the case of *Tatum v. Laird*. Justice Rehnquist called this exchange "a discussion of the applicable law." But this, as all lawyers will recognize and most lawyers will freely state, is not a mere discussion of the "applicable law." It is a statement of how the law should be applied to a particular case. Time after time throughout the memorandum's sixteen pages, Justice Rehnquist repeated that characterization of his Senate testimony. Time after time he refused to treat the ACLU charge that he had commented on the merits—or, as witness Rehnquist had testified, lack of merits—of the lawsuit itself.

For example, the memorandum said that since most justices come to the bench no earlier than their middle years, "It would be not merely unusual, but extraordinary, if they had not at least given opinions *as to constitutional issues* [emphasis supplied] in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." The ACLU had not contested this truism.

Later in the memorandum the justice said that since no jurist starts from dead center on such issues, "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding *of the meaning of some particular provision of the Constitution.*" [Emphasis supplied.] This, too, was not contested as a general proposition.

Although the ACLU pitched that part of its argument based on the federal statute on the so-called mandatory clauses of section 455—those that require disqualification if a judge has a substantial interest, has been of counsel, or is or has been a material witness—Justice Rehnquist devoted most of his memorandum to the so-called discretionary clause—"so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit"—on which the ACLU apparently had deemed it useless to rely. Much of his argument here had to do with the historic practices of different justices, some of whom sat in close cases. He noted that Justice Black had been criticized for sitting in Fair Labor Standards Act cases but not, to Rehnquist's knowledge, because he had been the legisla-

tion's floor manager while a senator from Alabama. Frankfurter wrote about the evils of the antilabor injunction and helped sire the 1933 federal law against it, then wrote the Court's opinion in a major 1941 case involving the law. Justice Jackson voted in a 1950 case based on an issue he had decided as attorney general before he joined the Court in 1941. Charles Evans Hughes criticized a decision in a law lecture a few years before becoming chief justice and nine years later wrote the Court's opinion in another case overruling the decision. Justice Harlan felt free in 1961 to join with the Court in rejecting a view he had expressed while a judge on the Second U.S. Circuit Court of Appeals. And Justice Holmes sat on no fewer than eight cases in which he had taken part while chief justice of the Massachusetts Supreme Judicial Court (this at a time when the federal law on such matters, enacted in 1891, did not apply to members of the U.S. Supreme Court). But all of these examples, except possibly the Holmes cases, were irrelevant, since they did not involve a justice sitting in a *case* about which he had already publicly commented while it was pending.

Justice Rehnquist's final reason for sitting was based on supposed problems in judicial administration posed by an equally divided Court and the doctrine, developed in several federal circuits but repudiated in the new ABA code and perhaps by the Senate's Haynsworth vote, that a jurist had a "duty to sit" unless clearly disqualified. He deemed it undesirable that a case heard by the Supreme Court should be nondecided by a deadlocked vote. It should not be left "unsettled" in that fashion. This concern, which is a valid concern as a general proposition, scarcely applied to the *Tatum* case, which might have been quite effectively resolved by a four to four affirmance. A tie vote would have sustained the court of appeals and required a trial on the complaint. How much preferable such a result, rather than having it decided by the vote of a disqualified justice, fresh from the ranks of the Nixon administration where he had made something of a cause out of defending the challenged surveillance practice from legal attack.

Justice Rehnquist said the "duty to sit" doctrine impelled him to sit even though "I would certainly concede that fair-minded

judges might disagree about the matter." In addition to the doctrine's abandonment in the new ABA code, another code provision seemed to apply with special relevance to his situation: the section that said a judge formerly employed by a governmental agency "should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." That test would seem to call for disqualification under the justice's own concession that his judgment might indeed reasonably be questioned. But of course Justice Rehnquist had already rejected any argument based on the new code since he saw them as not "materially different" from the standards he was applying.

Admittedly, some close questions, intriguing to lawyers and scholars, may arise when a judge sits in a case with a trace of past involvement. Often the proper response is a matter of degree. For example, Justice Thurgood Marshall's participation in civil rights cases sometimes stirs discussion, despite the fact that jurists of the white race decided civil rights cases without challenge for generations. Justice Marshall has recused himself when the National Association for the Advancement of Colored People is a party in a case before him but understandably does not sit out every new case brought by lawyers for the NAACP Legal Defense Fund, Inc., where he served as director-counsel before 1962. Justice Byron R. White repeatedly declines to sit in some criminal cases, apparently because they involve a law he lobbied through Congress as deputy attorney general under Attorney General Robert F. Kennedy. Others on the Supreme Court constantly confront ethical problems with subtle features. But there was nothing subtle about the *Tatum* case and Justice Rehnquist's relationship to it. Try as he might to restate the matter, Rehnquist judged the rights of parties after giving his view that one of the parties had no rights and after working to defeat that party's claim to rights.

Even when the Supreme Court has been taken over and reconstituted by a series of new appointments, justice is not administered by lining up the Court's members and simply polling them on controversial questions. The Court sits to decide cases, and unless its work is done judicially and judiciously it is

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not a court, it is only supreme, and that not for long if its credibility erodes. The civil libertarians who were so heavily engaged in the *Tatum* case could not expect to win on the issue in the long run, given the High Court's makeup, but they had a right to expect that they would not lose the issue except in a case decided by disinterested justices.

Melvin R. LAIRD, Secretary of Defense, et al., Petitioners,

v.

Arlo TATUM et al.

No. 71-288.

Oct. 10, 1972.

Memorandum of Mr. Justice REHNQUIST.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.[1]

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Sub-

1. In a motion of this kind, there is not apt to be anything akin to the "record" which supplies the factual basis for adjudication in most litigated matters. The judge will presumably know more about the factual background of his involvement in matters which form the basis of the motion than do the movants, but with the passage of any time at all his recollection will fade except to the extent it is refreshed by transcripts such as those available here. If the motion before me turned only on disputed factual inferences, no purpose would be served by my detailing my own recollection of the relevant facts. Since, however, the main thrust of respondents' motion is based on what seems to me an incorrect interpretation of the applicable statute, I believe that this is the exceptional case where an opinion is warranted.

committee on Constitutional Rights of the Judiciary Committee of the United States Senate at its hearings on "Federal Data Banks, Computers and the Bill of Rights," and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. § 455 which provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.[2]

Respondents in their motions summarize their factual contentions as follows:

> "Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department and/or Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my "intimate knowledge of the evidence underlying the respondents' allegations" seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a *dozen*. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

> "As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . . ." Hearings, p. 619.

There is one reference to the case of Tatum v. Laird in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The

2. See Executive Report No. 91-92, 91st Cong., 1st Sess., Nomination of Clement F. Haynsworth, Jr., pp. 10-11.

former appears as follows in the reported hearings:

"However, in connection with the case of Tatum v. Laird, now pending in the U. S. Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed."

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of Laird v. Tatum, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department's statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in Laird v. Tatum, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

[1] Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government's conduct of the case of Laird v. Tatum.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. § 455. The so-called "mandatory" provisions of that section require disqualification of a Justice or judge "in any case in which he has a substantial interest, has been of counsel, [or] has been a material witness . . . ."

[2] Since I have neither been of counsel nor have I been a material witness in Laird v. Tatum, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of Mr. Justice White shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or "if he actively participated in any case even though he did not sign a pleading or brief." I agree. In both United States v. United States District Court for Eastern District of Michigan, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in S & E Contractors v. United States, 406 U.S. 1, 92 S.Ct. 1411, 31 L.Ed.2d 658 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of Laird v. Tatum, the application of such a role

would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge "is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, Disqualification of Judges, 56 Yale Law Journal 605 (1947), and Disqualification of Judges: In Support of the Bayh Bill, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

> "Other relationships between the Court and the Department of Justice, however, might well be different. The Department's problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection." Frank, *supra*, 35 Law & Contemporary Problems, at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not. 320 U.S., at 207, 63 S.Ct., at 1375.

I have no hesitation in concluding that my total lack of connection while in the Department of Justice with the defense of the case of Laird v. Tatum does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

[3] However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

> "And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position." Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, *supra*, 56 Yale Law Journal, at 612.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the

Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the "Black-Connery Fair Labor Standards Act." Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. See S.Rep.No.884, 75th Cong., 1st Sess. (1937). Nonetheless, he sat in the case which upheld the constitutionality of that Act, United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), and in later cases construing it, including Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so.[3] But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurther had, prior to coming to this Court, written extensively in the field of labor law. "The Labor Injunction" which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal courts of their equitable jursdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

> "The book was in no sense a disinterested inquiry. Its authors' commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its energy and direction. It is, then, a brief, even a 'downright brief' as a critical reviewer would have it." Kadish, Labor and the Law, in Felix Frankfurter The Judge 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101–115. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), Justice Frankfurter wrote the Court's opinion.

Justice Jackson in McGrath v. Kristensen, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S., at 176, 71 S.Ct., at 232. Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled The Supreme Court of the United States (Columbia University Press, 1928). In a chapter entitled "Liberty, Property, and Social Justice" he discussed at some length the doctrine expounded in the case of Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1922). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209–211. Nine years later, Chief Justice Hughes authored the Court's opinion in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 573, 81 L.Ed. 703 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because

3. See denial of petition for rehearing in Jewel Ridge Coal Corp. v. Local 6167, UMW, 325 U.S. 897, 65 S.Ct. 1550, 89 L.Ed. 2007 (1945) (Jackson, J., concurring).

of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

"In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no." Frank, supra, 35 Law & Contemporary Problems, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson;[4] that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v. Judicial Council, 398 U.S. 74, 137, 90 S.Ct. 1648, 1681, 26 L.Ed.2d 100 (1970), strikes me as being equally true of the Justices of this Court:

"Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordi-

4. The fact that Mr. Justice Jackson reversed his earlier opinion after sitting in Kristensen does not seem to me to bear on the disqualification issue. A judge will usually be required to make any decision as to disqualification before reaching any determination as to how he will vote if he does sit.

nary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. See, *e. g.*, the opinion of Mr. Justice Harlan, joining in Lewis v. Manufacturers National Bank, 364 U.S. 603, 610, 81 S.Ct. 347, 350, 5 L.Ed.2d 323 (1961). Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court. See Worcester v. Worcester Consolidated Street R. Co., 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905), reviewing, 182 Mass. 49, 64 N.E. 581 (1902); Dunbar v. Dunbar, 190 U.S. 340, 23 S.Ct. 757, 47 L.Ed. 1084 (1903), reviewing, 180 Mass. 170, 62 N.E. 248 (1901); Glidden v. Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798 (1903), reviewing, 179 Mass. 486, 61 N.E. 54 (1901); and Williams v. Parker, 188 U.S. 491, 23 S.Ct. 440, 47 L.Ed. 559 (1903), reviewing, 174 Mass. 476, 55 N.E. 77 (1899).

Mr. Frank sums the matter up this way:

> "Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way." Frank, *supra*, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.[5]

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

[4, 5] Here again, one's course of action may well depend upon the view he

5. In terms of propriety, rather than disqualification, I would distinguish quite sharply between a public statement made prior to nomination for the bench, on the one hand, and a public statement made by a nominee to the bench. For the latter to express any but the most general observation about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oath, briefs, or argument, how he would decide a particular question that might come before him as a judge.

takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*. Edwards v. United States, 334 F.2d 360, 362 (CA5 1964); Tynan v. United States, 126 U.S. App.D.C. 206, 376 F.2d 761 (1967); In re Union Leader Corporation, 292 F.2d 381 (CA1 1961); Wolfson v. Palmieri, 396 F.2d 121 (CA2 1968); Simmons v. United States, 302 F.2d 71 (CA3 1962); United States v. Hoffa, 382 F.2d 856 (CA6 1967); Tucker v. Kerner, 186 F.2d 79 (CA7 1950); Walker v. Bishop, 408 F.2d 1378 (CA8 1969). These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. See, *e. g.*, Tinker v. Des Moines etc. School District, D.C., 258 F. Supp. 1971, affirmed by an equally divided court, 383 F.2d 938 (CA8 1967), certiorari granted and judgment reversed, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances.[6] Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instance is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down "one rule in Athens, and another rule in Rome" with a vengeance. And since the notion of "public statement" disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

[6] The oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of

6. Branzburg v. Hayes, In re Pappas, and United States v. Caldwell, — U.S. —, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Gelbard v. United States and United States v. Egan, — U.S. —, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). Evansville-Vanderburgh Airport Authority District v. Delta Airlines Inc. and Northeast Airlines Inc. v. New Hampshire Aeronautics Commission, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972).

this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents' motion that I disqualify myself in this case should be, and it hereby is denied.[7]

Motion denied.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Just one comment. Why don't we clear this up. This is the biggest "red herring" I have seen in the whole hearing. There are a number of them, is this business of these titles.

Justice Rehnquist did not know about it. He found out about it through this hearing. It is good that he has. Under *Shelly* v. *Kramer*, everybody who understands constitutional law knows that these provisions are unconstitutional and may not be enforced by the courts in this country.

I wonder if I could ask my two colleagues from Arizona and from Vermont if they would just ask the public officials to strip those deeds of those provisions, and let us get rid of them. Or I suppose you could go through a quit-claim process and just get them stripped off. As I understand it, Justice Rehnquist has suggested he is going to take them off.

Senator KENNEDY. Mr. Chairman——

The CHAIRMAN. Just a minute. Let Senator Hatch get through.

Senator HATCH. Justice Rehnquist said he did not know about them. He is going to take them off. I think it is ridiculous to make a big brouhaha about something this ridiculous.

The CHAIRMAN. Well, they are unenforceable, anyway. They do not amount to anything. They will all go out.

Senator HATCH. It is ridiculous.

Senator METZENBAUM. I do not know if it is ridiculous.

Senator HATCH. Of course it is ridiculous. You know it is ridiculous, I know it is ridiculous. It is not enforceable.

Senator METZENBAUM. No, I do not know it is ridiculous at all.

Senator KENNEDY. If the Senator would——

The CHAIRMAN. Senator Hatch has the floor.

Senator HATCH. You are jumping on every little possible detail. Let us be honest about it. I do not know a lawyer alive who goes through a house closing who reads every one of those documents if he has another lawyer doing it for him. I never have; I do not think you have.

Senator KENNEDY. Would the Senator just yield on that point?

Senator HATCH. I would be happy to.

Senator KENNEDY. I think part of the question is, this nominee was an official of the Justice Department, the Justice Department of the United States——

Senator HATCH. Well, what has that got to do with it?

Senator KENNEDY [continuing]. In 1969 when he transferred a property that had that kind of a restrictive provision in it. And I think that is completely——

Senator HATCH. And 2 years before, Vermont enacted a statute saying that is not possible to do.

Senator KENNEDY. That is completely—we are not talking about a person who transfers a home who has not that particular responsibility. This is a member of the legal counsel of the Justice Department.

Senator DECONCINI. If the Senator would yield——

The CHAIRMAN. I might make this statement——

Senator HATCH. Would you do that for us, Senator DeConcini. I would be happy to yield.

The CHAIRMAN. I might make this statement. We have had numbers of nominees here that have been involved in this way.

Senator HATCH. This is ridiculous.

The CHAIRMAN. They bought property and did not realize it had certain restrictions. But whether it had restrictions or not, they are unenforceable, and they do not amount to anything, and that has all been acknowledged, so why waste more time?

The distinguished Senator from Vermont.

Senator HATCH. The Senator from Arizona asked me to yield.

The CHAIRMAN. Oh. I thought you were through.

Senator HATCH. No, I was not.

Senator DECONCINI. Would the Senator from Utah yield?

Senator HATCH. I would be happy to yield.

Senator DECONCINI. I just wanted to pose a question. I wonder how many of us on this committee could say that we have never owned a piece of property, either in trust or in escrow or in our names, without being completely familiar with the provisions of the deed. Maybe the Senator from Ohio can say that.

Senator METZENBAUM. That is right. I could not buy my home, according to the seller.

Senator DECONCINI. I would be glad to yield to him. I just made reference to the Senator; I did not yield.

It just seems to me that perhaps we should ask the FBI to look at all of our property——

Senator HATCH. I would like that.

Senator DECONCINI. Of everybody here, and those properties——

Senator HATCH. I do not know what is in my deed.

Senator DECONCINI [continuing]. If the Senator would just let me finish——

The CHAIRMAN. Just a minute. The Senator from Arizona has the floor.

Senator DECONCINI [continuing]. That are held in trust for our beneficial interests, to see whether or not there are any such restrictions that might have been put there years ago, because I suspect that we would find such restrictions. And if we did, that would determine absolutely nothing as to the character of anybody on this committee, or to their insensitivity, in my judgment.

Senator KENNEDY. Would the Senator yield on this point?

Senator HATCH. I would be happy to yield to my esteemed colleague.

Senator KENNEDY. I have no objection to the request. I think the point that has to be made is the real question of the sensitivity of this nominee on the issue of civil rights.

That is a major issue concerning this nomination.

Senator HATCH. It may be in your mind, Senator.

Senator KENNEDY. None of us are being nominated for the Supreme Court. The question with this nominee is the sensitivity on the issues of civil rights. And I think that these are not matters which are inconsequential for us or for the members of the Senate to draw some——

Senator HATCH. Mr. Chairman, if I could just finish on my time, Mr. Rehnquist, this matter is blown way out of proportion. It is difficult to see you getting raked over the coals about events that happened 34 or 35 years ago. I could hardly believe my eyes when I

watched the headline news this morning on television. It was as though it was really something. These types of covenants are vestiges of a very bad past. Everybody knows they are illegal. They have been illegal since *Shelly* v. *Kramer*. There is no legal reason to remove them. However, we all wish they were gone when we find out about them.

You have made it clear that now that you have found out about it, you want to purge any deeds that you and your wife hold with this type of language.

I suspect that there are a lot of sincere, decent, wonderful people in this country who are totally against discrimination. However, they probably have these covenants in their deeds because they have not read them.

Now, to blow this out of proportion as though this is something this important, with a man who has sat on the Supreme Court for 15 years, who has an excellent record in all respects and who every member of the present Supreme Court looks forward to serving with as Chief Justice, is ridiculous.

That is what you have to go through. Senator Simpson summed it up in his opening remarks.

The CHAIRMAN. The distinguished Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Justice Rehnquist, to follow up a line of questioning that Senator DeConcini had earlier, do you—and I realize this is a subjective question; you have been the lone dissenter in many, many cases—do you feel a greater independence in dissenting if you are the lone dissenter than if you were the swing vote in a 5–4 decision?

Justice REHNQUIST. Oh, very much so, Senator. If you are the swing vote in putting together a five-judge majority, you have some leverage, obviously, but so does everyone else. The opinion, if there is division among the five, is apt to be a composite; whereas if you are a sole dissenter, you are writing only for yourself.

Senator LEAHY. And do you find if you are one who may well be the swing vote or the person writing the majority opinion, especially in a 5–4 decision, that some of the expressions or—I hate to use the word "extreme" position—some of the very strong positions that you might take as a lone dissenter are no longer available to you?

I am not trying to put words in your mouth. I am just wondering how that process goes.

Justice REHNQUIST. There is no doubt that when a Justice is assigned an opinion to write where the majority has only five people in it, the Justice cannot just write the ticket the way the Justice himself sees it. You have to accommodate the views of the four other people whom you hope to join your opinion. So, there is often compromise, because it is unlikely that five people are going to see any important issue just exactly alike. And, on the other hand, as you point out, when you are writing for yourself, there are not those constraints on you.

Senator LEAHY. Mr. Chairman, while the Senator from Utah is still here—if I might have the Senator from Utah's attention just for a moment—well, even without the Senator from Utah's attention, I will continue.

The CHAIRMAN. The distinguished Senator from Utah, he wanted you to hear something if you would care to.

Senator LEAHY. I know my good friend from Utah would like to hear it. [Laughter.]

I know the Senator from Vermont has expressed the opinion that the question of restrictive deeds has been somehow blown out of proportion and is a "red herring." I would remind the Senator from Utah that I think about 90 percent of my time yesterday was talking about the *Laird* v. *Tatum* case and involvement of it.

Senator HATCH. I agree with that.

Senator LEAHY. I do feel, however, with this issue, we should have at least raised it, and I do not think Justice Rehnquist would have expected it to not be raised. I would——

Senator HATCH. Would the Senator yield on that point?

Senator LEAHY [continuing]. If I could just finish, I would be happy to—I would note that under Vermont law, it is indeed null and void—and as the only member, I think, of the Vermont Bar here on this panel, I can state that with a great deal of certitude—it would be certainly null and void under any Federal law.

And I was asked this morning by some in the press how I would determine whether you were indeed going to have it removed. I said it is very simple: You said you would. And I accept that assurance completely. I do not need any proof or followup. You have said that you will have it removed. There is a fairly simple procedure using a strong deed. I accept your assurances completely, and I think that that—to save all the telephone calls that I might be receiving in my office as we follow that. You said it; I believe it.

I would also point out that there has been nothing in my review of your statements—and I have done a very exhaustive review of your statements, cases, and your background—I find nothing in your statements or your background to suggest any anti-Semitism in that background. This was a covenant added to your deed. It was brought forward from an earlier deed. The fact that that covenant is in there, I find regrettable that it is, and I am glad you are going to remove it.

But its inclusion in no way suggests to me any kind of an anti-Semitic background. I note that just so that following the statements from the Senator from Utah, I would not want any of my questions to be misinterpreted. But I would also say that as I go through the report and see obviously a Vermont deed, and seeing something that I have never seen in my years of practice in Vermont, that probably, it should be asked.

Senator HATCH. Would the Senator yield on that point?

The CHAIRMAN. Senator Hatch asked you if you would yield.

Senator LEAHY. Of course.

Senator HATCH. I would like to just compliment my colleague from Vermont. I find no problem with raising the issue. What I find problems with is blowing it out of proportion. I know the distinguished Senator from Vermont did not. The Justice has spoken very carefully and accurately on it. The distinguished Senator from Vermont has spoken carefully, accurately and compassionately on this issue. And I appreciate it. It is time to put it to bed. To make this issue the No. 1 story on major network news this morning was reprehensible, but that is what happened. It has been blown out of

proportion. Those who made it the No. 1 news story know the law too.

I am suggesting that if there are good points, they should be brought up. However, they should not be blown out of proportion like this. I want to thank my colleague from Vermont for his fair comments.

The CHAIRMAN. The Senator from Vermont may continue.

Senator LEAHY. I think Justice Rehnquist wanted to say something, and we cut him off.

Justice REHNQUIST. Yes; I did. I completely agree with your characterization of me, and the statement that I plan to do something about it is correct, and I will see that it is done.

Senator LEAHY. Thank you.

I have no further questions, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Mr. Chairman, the Senator from Pennsylvania has asked if I would yield.

The CHAIRMAN. The distinguished Senator from Pennsylvania.

Senator SPECTER. Is that any problem for you, Senator Mathias?

Senator MATHIAS. No problem as long as we do not fall too far down the ladder.

Senator SPECTER. I thank my distinguished colleague.

The CHAIRMAN. I want to make an announcement at this time. So, Senators come here and stay for hours, and then some other Senator who normally would have ranked him comes in and gets ahead. Hereafter, I am going to go right down the line, and if any Senator is not here, then he will have to wait until the end to question. It is not fair to other Senators who have been here for hours.

The distinguished Senator from Pennsylvania.

Senator KENNEDY. Mea culpa, mea culpa.

Senator SPECTER. Thank you very much, Mr. Chairman. I think I do fall within the category of Senators who have stayed here for hours. I thank the Chair.

The CHAIRMAN. I thank you for it.

Senator SPECTER. Mr. Justice Rehnquist, just one or two questions on the issue of the restrictive covenant, which does concern this Senator. When did you first find out about it?

Justice REHNQUIST. The last couple days.

Senator SPECTER. And have you had an opportunity to do anything about it in the interim since you found out about it?

Justice REHNQUIST. I frankly have not, Senator. I have been so busy with these hearings that I simply have not devoted myself to anything else.

Senator SPECTER. When would you anticipate that you will be able to have the matter corrected?

Justice REHNQUIST. I intend to write the lawyer in Vermont who handled the transaction for me today when the hearings are over, if they are over for me today.

Senator SPECTER. Mr. Justice Rehnquist, I want to pursue the question which I had asked you about yesterday, because I think it is a very fundamental one. We started with the case of *Marbury* v. *Madison,* which you testified you had no trouble adhering to, and that is the basic authority of the Supreme Court of the United States to interpret the Constitution and to hand down rulings

which are binding on both the executive and legislative branches. And I then asked you about the question of whether that rule could be circumvented directly by a legislative enactment which would take jurisdiction from the court. And the area of concern illustratively that I posed was, could Congress legislate and say that the Supreme Court had no jurisdiction to decide cases involving freedom of speech, freedom of press, freedom of religion, taking those as the most fundamental of our rights under the first amendment.

And I do believe that it is an appropriate area of inquiry, and when my time expired, I said that I would review some of the authorities in the field; and I have found some of your own statements on the subject which support the position that I am asserting in asking the question, and I will reference them to you at this time.

There was a memorandum prepared in anticipation of the hearings of Justice O'Connor, prepared by Grover Reis, who was on the staff of Senator East, chief counsel on the Subcommittee on Courts. Mr. Reis had been assistant professor of law at the University of Texas, and then he went to work for Attorney General Meese at the Department of Justice, screening judges, and now, as I understand it, he is the chief judge of the United States-operated court system in American Samoa. And it is an extensive commentary, and I shall quote from only limited parts of it because of the limitations on time.

The basic outline is summarized by Professor Reis, or Judge Reis, as follows:

> The controversy over questioning at confirmation hearings stems from a tension between two incontrovertible propositions. First, the Senate has a duty to exercise the advice and consent function with the most careful consideration and the greatest possible knowledge of all factors that might bear on whether the nominee will be a good or bad Supreme Court Justice. Second, a Justice of the Supreme Court owes the litigants in each case his honest judgment on what the law is and such judgment would be compromised if the nominee were to promise his vote on a particular case or class of cases in an effort to facilitate his confirmation.

There are a great deal of other important matters which follow, but I am not going to go into it at this time; I may come back to it later if it is warranted.

Judge Reis then quotes from Professor Black, and then he quotes from you, Justice Rehnquist, on writings that you made in 1959, discussing the nomination of Justice Charles Whittaker.

> Mr. Rehnquist complained that the discussion had, "succeeded in adducing facts, (a) proceeds from a skunk-trapping in rural Kansas assisted him in obtaining his early education," referring to Justice Whittaker; "(b) that he was both fair and able in his decisions as a judge of the lower Federal courts, and (c) he was the first Missourian ever appointed to the Supreme court; (d) since he had been born in Kansas and now resided in Missouri, his nomination honored two States."

Judge Reis goes on to say:

> Mr. Rehnquist distinguished the Senate's duty in voting on the nomination of a judge of a lower Federal court, whose principal duty is to apply rules laid down by the Supreme Court and whose integrity, education and legal ability are the paramount factors in his qualifications from the confirmation of a Supreme Court Justice.

Then he continues to quote you:

The Supreme Court in interpreting the Constitution is the highest authority in the land; nor is the law of the Constitution just "there" waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of the judicial lawmaking, the due process of law and equal protection of the law clauses, are about the vaguest and most general of any in the instrument.

The court in *Brown* v. *Board of Education* citation held in effect that the Framers of the 14th amendment left it to the court to decide whether due process and equal protection, what they meant. Whether or not the Framers thought this, it is sufficient for this discussion that the present court thinks the Framers thought it.

Given the state of things in March 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? The only way for the Senate to learn of these views is to inquire of men on their way to the Supreme Court something of their views on these questions.

Now, I do intend to ask you some questions about due process of law and equal protection. But at this juncture, I want to make a sharp distinction between the interpretation of due process of law and equal protection, which is subject to certain vagaries, as you noted there, and the jurisdiction of the Court.

It seems to me that questions of jurisdiction are much more, infinitely more, fundamental than how you interpret due process or equal protection, because the Court cannot get to that question or those questions until the court decides it has the power to decide the case.

And it is in that context that I do press, for an answer on the issue of whether the Congress, in your view, has the authority to say the Supreme Court does not have jurisdiction on first amendment issues of freedom of speech, press and religion, because if the Congress has that authority, then it seems to me there is nothing left of *Marbury* v. *Madison.*

Justice REHNQUIST. Senator, you said yesterday that you thought Justice O'Connor in her hearings had answered a similar question. I still have considerable reservations about it, whether I ought to do it, but I am sure you are correct, if one of my colleagues has felt that that was proper, I certainly will resolve doubts and try to give you an answer.

The answer obviously is not one that comes with the benefit of reading briefs, hearing arguments, conferring. It is very much of a horseback opinion; it has to be in a situation like this.

And I think that it would be very hard to uphold a law which carved out certain provisions of the Constitution such as you are describing, the first amendment, and said the Court should have jurisdiction over everything except first amendment cases.

Senator LEAHY. Well, the statute could be enacted which would say the Court shall not have jurisdiction over first amendment cases involving freedom of speech, press, or religion. That is my area of concern, specifically stated. And I take it from your answer you think that the Congress would not have that authority.

Justice REHNQUIST. That is correct.

Senator SPECTER. Well, I am glad to hear you say that, Mr. Justice Rehnquist. When you make that statement with respect to the absence of Congress' power——

The CHAIRMAN. The Senator's time is up, but you can go ahead and ask and let it be answered, and then we will pass on.

Senator SPECTER. Well, I have more to ask, Mr. Chairman, so let me pick it up on the next round.

The CHAIRMAN. OK. The distinguished Senator from Alabama.

Senator HEFLIN. Mr. Justice Rehnquist, you have been asked about the memorandum authored when you were a law clerk with Justice Jackson, and particularly this language: "I realize that it is unpopular and an unhumanitarian position to which I have been excoriated by my liberal colleagues."

When you were a law clerk for Justice Jackson, I believe there has been testimony that each Supreme Court Justice had one law clerk each. Did the law clerks refer to themselves as colleagues?

Justice REHNQUIST. Not that I recall, Senator. I believe there were two law clerks each in most chambers at that time.

Senator HEFLIN. You do not recall whether or not the law clerks referred to themselves as one would speak of his relationship with other law clerks as being my colleagues?

Justice REHNQUIST. I honestly do not, no.

Senator HEFLIN. Do you recall whether, if that was prevalent, a law clerk would refer to his principal, to his judge, as saying that "my colleagues have said such-and-such"?

Justice REHNQUIST. Senator, it is 32 years ago, or whatever it is. I just have very great difficulty remembering whether something like that might have been said or might not. I am sorry.

Senator HEFLIN. Well, I have inquired of my staff whether the staff of the Judiciary Committee refers to other members of the staff as members of a group—as colleagues, and I am informed that they do not; but, of course, there could be a distinction between institutions and close-knit groups.

Now let me ask you about your law practice. I gather from your questionnaire, that you practiced law for 15 or 16 years in Arizona. In that law practice, did you become involved in real estate practice to any degree?

Justice REHNQUIST. I do not think you would say my practice had a large element of real estate in it. I know I handled some commercial closings on occasion, but I do not think it was a significant element.

Senator HEFLIN. Well, now, some bars write title opinions, examine abstracts; some bars in some cities rely upon a title company to do it. I, as a small-town lawyer, used to write title opinions, and I would come across clauses like Caucasian or Jewish. One would note it as an exception to the fee simple title, but universally all title opinions that I recall writing or reviewing, would recite that this is void and unenforceable.

I just wondered whether or not you might have had any experience in your law practice writing title opinions, whether or not you first did it in Phoenix, whether or not you did write title opinions, and whether or not it was written as I have recited?

Justice REHNQUIST. Senator, Arizona was pretty much of a title insurance State. That is, the title companies had taken over from the lawyers, at least by the time I left, most of the kind of title opinion work. And people who were simply handling a real estate transaction did not feel they needed lawyers.

But I think the title insurance company report followed exactly the procedure that you suggest, a notation of the covenant in question and the notation that it was void.

Senator HEFLIN. Now let me direct a little bit toward the issue of federalism, about which a good deal has been written concerning your concepts. Of course, I have a strong belief in federalism, not as an old-fashioned concept of States' rights, but as a belief in State's responsibilities and confidence in the States to govern. This belief is buttressed by the realization that State and local government is closest to the people.

We see unusual things happening on the congressional scene today. We see the left wing knee-jerk liberals and the right wing knee-jerk hardliners all embracing the concept of one Federal legislative act as the cure for any major problem. Now, these widely diverse ideological groups are soulmates on procedure as to finding a single cure.

For example, this may sound unusual for the people on the right, but we have had legislative proposals here that would in effect, by a single stroke of the legislative pen from one single legislative act, cure all of the problems dealing with abortion, gun control, tort reform, labor violence, and others.

My question is, does your belief in constitutional government include a belief that there should be a deference to the States in seeking solutions in areas that traditionally and historically have been considered to be within the jurisdiction of State governments?

Justice REHNQUIST. Yes, certainly, constitutionally, I feel that way any time the Constitution speaks to the question. I think I said yesterday in answering a question from Senator Broyhill that a lot of those decisions are really nowadays for Congress rather than for the Court, because the commerce power of the Congress is so sweeping. It is a question whether Congress leaves part of it to the States rather than whether the courts are going to set aside part of it for the States.

Senator HEFLIN. Well, does this include criminal laws dealing with the protection of life?

Justice REHNQUIST. Well, certainly Congress has never made the slightest suggestion that any State law, any State criminal law of the area you describe should be superseded. And I would be very, very reluctant to read that into anything read by Congress.

The Bill of Rights, applicable to the case, obviously limits the way a State can proceed against someone who has violated its criminal laws, but it certainly does not say that you cannot have the criminal laws.

Senator HEFLIN. Does this also include legislation dealing with the civil tort system of the country? Is your belief that there should be a deference to the States?

Justice REHNQUIST. Well, my belief in that area is certainly that the civil tort area is one of the few Congress has still left to the States, and it would be nice to see them keep it for a while.

Senator HEFLIN. You are basically considered a conservative. Would you give us your thoughts on how a conservative looks at stare decisis?

Justice REHNQUIST. Stare decisis is the principle, of course, that once a case has been decided—let us take the Supreme Court, for

example, because that is what I have been nominated as Chief Justice of—once the Supreme Court has decided a case, that that decision settles the law for the future. And I think—and I am not sure that there is a great deal of difference between conservatives and liberals here, though perhaps I am wrong—when you are looking at a statutory question—that is, let us suppose that in 1950, the Supreme Court has said that a particular act of Congress means thus-and-so, and now, 36 years later, someone is coming back and saying, "Well, the Court was wrong in 1950. If you really look at the legislative history and construe the words the way they ought to be construed, it did not mean thus-and-so." I think every responsible judge would reject that sort of an attack, except under the most extraordinary situation, because when you are talking about a statute, Congress can change the result if it does not like the conclusion the court reaches. If you turn to a similar constitutional question that perhaps was decided in 1950, and now you are urged to reverse it and overturn it in 1986, there is more flexibility, more play in the joints, but still a very strong presumption in favor of the earlier decision, it seems to me.

But nonetheless, the stare decisis principle has a more flexible application when you are talking about constitutional decisions than when you are talking about simple statutory decisions.

The CHAIRMAN. Senator, your time is up.

We will now take a 10-minute recess.

[Short recess.]

The CHAIRMAN. The committee will come to order.

The distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr. Chairman.

Justice Rehnquist, let us see if we can put this covenant question to rest. Did you personally attend the settlements for the Vermont property or the Arizona property, or did you handle that through counsel?

Justice REHNQUIST. As to the Arizona property settlement in 1969, I can answer with certainty, because I was back here in Washington by that time, and the house was sold in Arizona. In fact, my wife and kids stayed in Arizona to handle the house sale. So I did not attend that.

The Vermont settlement, I do not believe I attended, but I cannot be sure.

Since I was represented by counsel there, I have a feeling I probably did not.

Senator MATHIAS. So you simply, to the best of your recollection, provided him with a check and told him to go ahead and settle the property and record the deed?

Justice REHNQUIST. That is my recollection, and of course, signed the necessary instruments.

Senator MATHIAS. At the time of the 1969 sale of the Arizona property, you were here in Washington and your representative in Arizona forwarded you the deed to be executed?

Justice REHNQUIST. Well, we were selling at the time—the deed, yes, I would have, I think, signed it back here and sent it back to Arizona.

Senator MATHIAS. Do you recall whether the covenant was merely back in the chain of title and referred to by kind of general

language about, "being all the same property, conveyed by John Jones, and subject to the restrictions therein," or was the covenant set out in explicit words?

Justice REHNQUIST. Senator, I just do not remember.

Senator MATHIAS. Well, I assume that that is a matter of record, and we can determine that.

Justice REHNQUIST. I would think so.

Senator MATHIAS. If we could turn to the question that we addressed yesterday: the alleviation of the docket burden. It is my understanding that a committee of four Justices decides whether to grant certiorari.

Justice REHNQUIST. It only takes four Justices to grant certiorari. When you say a committee, Senator——

Senator MATHIAS. Well, that was my word.

Justice REHNQUIST. It is just nine people, basically, sitting around a conference table, and it takes four votes to grant certiorari.

Senator MATHIAS. I did not mean to imply there was any committee structure. I understand that it takes four votes for the court to grant certiorari.

Would it be more restrictive, or would there be a lesser number of certs granted, if five Justices were required?

Justice REHNQUIST. I think obviously it would be a smaller number if you require five than if you require four.

Senator MATHIAS. would that be desirable in the interest of justice?

Justice REHNQUIST. Well, I suppose it depends in a way on how you define the interest of justice. My colleague John Stevens made the suggestion several years ago that one way to help the court's docket would be to require five Justices rather than four to grant certiorari. And it would help the court's docket in a sense in that you would have fewer cases granted, or perhaps different cases granted. But it would also mean it would be more difficult to get certiorari granted; that someone who now gets a hearing in the court by virtue of getting four votes might not get that hearing if five votes were required.

Senator MATHIAS. Considering the overall interest of the administration of justice, if that would relieve the docket and provide the court with more time to be thoughtful and effective, that might promote the overall administration of justice even though fewer writs were issued.

Justice REHNQUIST. Certainly it would limit probably the number of cases the Court takes. I do not right now feel that the court is taking too many cases, but I think some of my colleagues probably do.

Senator MATHIAS. Based on your years of experience as a member of the Court, do you believe that any legislation is required to effect reforms to alleviate the court's docket? For example, would Chief Justice Rehnquist recommend to this committee that we act to abolish the court's mandatory jurisdiction?

Justice REHNQUIST. Senator, it sounds trite to say that I am glad you asked that question, but in fact I am glad that you asked that question. That is a matter upon which all nine members of the Supreme Court, I believe, have expressed agreement. And there is not

that agreement on the national court of appeals or on four versus five votes to grant certiorari. I believe all of my colleagues are of the view that the present vestigial mandatory jurisdiction of the court is not necessary for any purpose of justice, and it requires us to hear cases on the merits that we would otherwise not hear.

Senator MATHIAS. What about the Inter-Circuit Tribunal that Chief Justice Burger has been ardently advocating? I know you have written on that subject, and have predicted that a national court of appeals as I think you referred to it, would function in the future as a lower chamber of the Supreme Court.

Could you flesh out that suggestion?

Justice REHNQUIST. I would be happy to, Senator. I do feel quite strongly that we need a national court of appeals to provide us with more nationwide decisionmaking capacity. Right now, the Supreme Court is the only body in the country that has the capacity to decide a legal question on a nationwide basis. And I think a properly-constituted national court of appeals could, by taking statutory cases primarily where there is a conflict between the courts of appeals, take some of that burden off of our court so that our court could take on additional cases, perhaps in the Constitutional area.

Senator MATHIAS. One of the controversial features of the Inter-Circuit Tribunal discussed by this committee was the proposal to have judges from the circuit courts nominated by the Chief Justice. In the alternative, we considered empowering each circuit to nominate a representative for the Inter-Circuit Tribunal.

Do you have any views on how the court should be created and staffed?

Justice REHNQUIST. Yes, I do, Senator. Let me say that if it were necessary to compromise or change my views on any of the views as to how the judge should be selected, or how it should be staffed, I would cheerfully charge them in order to get the national court of appeals. To me, the other things are secondary matters.

But my own view is that appointment by the Chief Justice is unsatisfactory because it gives the Chief Justice too much authority over how this particular court should be constituted.

I think that the proposal for selection by the Circuit Councils is unsatisfactory because I think that would turn the new national court of appeals into something like the United Nations, where the judges on it are primarily loyal to where they came from, rather than to where they are coming to.

In my view, the ideal solution—and maybe Congress is not yet willing to provide this—is to frankly recognize it is a new court, it is going to be here to stay, that the judges should be appointed by the President and confirmed by the Senate—new judges.

The CHAIRMAN. Your time is up, Senator.

The distinguished Senator from Illinois.

Senator SIMON. Thank you, Mr. Chairman.

Mr. Justice, just to follow through on one question that we discussed briefly last night. If at some point in the future, you were to have serious health problems, would you be frank with the American public about those problems?

Justice REHNQUIST. Yes, I would.

Senator SIMON. I thank you.

Second, there is in the Canon of Ethics of the American Bar Association a passage which states "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired."

Do you belong to any organization that might fall in that category?

Justice REHNQUIST. I belong to an organization that I think some people might say would fall into that category, and that is the Alfalfa Club.

Senator SIMON. I confess I am not familiar with the Alfalfa Club. Do you feel that membership in that organization is proper, or do you think the Code of Ethics should be changed?

Justice REHNQUIST. I do not think the Code of Ethics should be changed, but I think when you understand what the Alfalfa Club is, that I do not believe it meets the standard.

The Alfalfa Club is something that I believe has been going on here since 1914, and its only function is to, once a year, hold a dinner. And the Alfalfa Club, as I understand it, is open to men only. And it is not a social club except in the sense that these people get together for dinner once a year, and hear some patriotic music, hear some funny political speeches, and then go their ways for the rest of the year.

Senator SIMON. I do not mean any disrespect to the Alfalfa Club; I have asked nominees for Federal court—either district court or the court of appeals—when they belong to organizations that discriminate, to let me know before I voted on their nomination, whether they would continue that membership. Again, the Alfalfa Club sounds like it is part of the old boys network, and while the tradition may go back to 1914, some traditions that go back to 1914 are not good traditions.

I would simply ask you to reflect upon it and, prior to our voting here in the Judiciary Committee on your nomination, I would appreciate your letting me know whether you wish to continue membership.

Justice REHNQUIST. Certainly. I would be happy to.

Senator SIMON. Let me pose the fundamental question for me—you have been through the confirmation process, both in the last 2 days or and in 1971, and you have reflected and written on the subject. Here is my struggle: On the positive side, we have a nominee of above-average ability, by any standard. We have a nominee who has good writing skills. Most people may not count that as an important asset; I do. We have a nominee who has shown above-average courage. Some of my colleagues view your dissents, the number of your dissents and lone dissents, as a negative; I view it as a plus. If this country to a point where there is suddenly a massive outpouring of public opinion in the wrong directions, I want a Chief Justice who has the courage to stand alone, if necessary, on the side of justice.

On the other side, particularly in the area of race relations, let's go back to the letter to the newspaper. My colleague Senator Hatch said, referring to the Bob Jones University question, that it posed

"intricate, difficult questions." The difficulty is that the decisions you have made have been, with few exceptions, on one side of the record in this area. And, as I have said before, I believe the office of Chief Justice is important as a symbol.

The other area where I come down on a different side on decisions that you would make is in that of civil liberties, particularly church-state relations. I know that you quoted Chief Justice Story and his summation of where we are favorably in one decision. With all due deference to Chief Justice Story, I do not think it is an accurate summation of church-state history.

Anyway, I come down on a different side than you would in these areas. I have great respect for you. If you were Paul Simon, faced with that dilemma, how would you vote?

Justice REHNQUIST. That is a very difficult question, Senator. May I take a moment to think before I answer?

Senator SIMON. Yes. [Pause.]

Justice REHNQUIST. Obviously, I cannot give you any very good answer. All I can perhaps give you is two or three reactions to what you have just said. I think it is for you to decide, obviously, Senator, the extent to which your differing with me about my Constitutional views is a ground for voting against me as a nominee.

I might add, just parenthetically, that my reference, I think, in the Wallace against Jaffrey dissent to Justice Story was not to adopt his view of the church-state, but to simply show that he, as a respected and contemporaneous commentator, back in the first half of the 19th century, took a view quite different than Jefferson's "wall of church and state".

I think that if it boils down to basically a difference between—in the mind of a Senator—and as I say, it would be presumptuous of me to say this to the Senators, except you have asked me to say it—what is this confirmation process all about? The President obviously has his role in it, but surely the Senate has its role, too. And the President is a sole individual. He can pick someone without—in other words, he alone nominates, whereas 100 Senators end up voting whether or not to confirm. And I suppose the question is how is the Senate's power to be exercised.

And I know a lot of people have spoken on it and written on it. I think you probably have to say that a Senator should not simply say, "This is not the person I would have appointed. I would have rather had someone who felt the religion clause of the First Amendment should be much differently. Therefore, since this nominee does not share my views, I am going to vote against his confirmation."

And yet obviously, the Senate certainly, I do not think, is limited to any particular qualifications. I think, again, putting myself in your place, which is very, very difficult, have I fairly construed the Constitution in my 15 years as an Associate Justice.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. That completes round two. Now we will start with round three if anybody cares to ask any questions on round three. I will temporarily waive my right to any questions.

The distinguished Senator from Delaware.

Senator BIDEN. I would like to follow up on two things. One, I am just curious about your answer to Senator Heflin about whether or not you referred to in your recommendations to your Justice, Justice Jackson, your coclerks as "colleagues", and Senator Heflin pointed out that that is not what Senators' staffs do. And if I understood your answer, you said you did not recall whether you referred to.

There is a certain memo that you wrote in re Stein, Cooper and Wisner, argued this day—I will have to get the date exactly for you—that you submitted to Justice Jackson, where you referred to your coclerk in the following way in the memo. You say, quote, "Mr. Justice Cronson, not having heard the argument, did not participate in the consideration of this decision and recommendation."

So you referred to your coclerk—just a point of interest—as "Mr. Justice". Did you, or do you, or do you want me to send this on down to you and see if it is the same typewriter and all that?

Justice REHNQUIST. No. I think I have seen that reference. I certainly did not call him "Mr. Justice" in the office. [Laughter.]

I think it was really kind of a form of spoof.

Senator BIDEN. That is why maybe the "colleagues".

And this same Mr. Cronson was reported in the New York—excuse me; let me get the paper right—the Washington Post on July 22, 1986 as saying that you strongly defended *Plessy* v. *Ferguson,* and that you would do that at your luncheon; you said that he was at luncheon meetings with clerks on the days before the 1954 decision, strongly defending *Plessy* v. *Ferguson.*

Is he incorrect?

Justice REHNQUIST. No, I do not think he is. Again, it is hard to remember back, but I think it probably seemed to me at the time that some of the others simply were not facing the arguments on the other side, and I thought they ought to be faced.

Senator BIDEN. So you may have—now, that kind of adds—here, we have got a memo saying, "my colleagues excoriated me", and you say that you were referring to Jackson, not to you. And then you say, well, the implication is it probably was not you, it must have been Jackson, since the word "colleague" was used. But then you have memos that you write where you not only say "colleague", you refer to your coclerk as "Mr. Justice", and then you have the—I am confused.

Justice REHNQUIST. Well, Senator, I am confused by your question, too, because you say other memos where I refer to my coclerk as a "colleague"——

Senator BIDEN. No; as "Mr. Justice."

Justice REHNQUIST. Yes.

Senator BIDEN. Yes. In other words, is it plausible to wonder whether or not you refer to your coclerks as "colleagues". Let me put it this way. If my staff referred to fellow staffpersons here as "Senators", it would seem to undermine his later assertion that he had never referred to them as "colleagues". If he bothered to call them "Senators", jest or not, he might very well refer to them as "colleagues"—I mean, at least from my perspective.

I guess it gets down to—I had not decided to pursue this line at all, quite frankly, until the Senator from Ohio raised it, and I thought you were going to indicate that, yes, it did reflect your

views and Justice Jackson's views, and you were arguing the alternative. But you categorically, as I understand it, suggest that the memo to which the Senator from Ohio was referring did not reflect your views, but it was in fact the views of Jackson, not yours at all.

And one of the points that is made is that obviously, that is the case because you referred to "colleagues", and you did not call one another "colleagues" at the time—at least that was the defense made by the Senator From Alabama.

Senator HEFLIN. Well, I think in fairness to him, he said he did not recall.

Senator BIDEN. I understand. I am trying to refresh recollection now. What I am trying to find out very simply is did you believe at the time you were a clerk for Mr. Jackson that *Plessy* v. *Ferguson* should not be overruled? Was that your view at that time?

Justice REHNQUIST. Senator, I think I answered that question when you asked it yesterday, that I had ideas on both sides, and I do not think I ever really finally settled in my own mind on that.

Senator BIDEN. Do you have any doubt that the people with whom you worked thought that you believed *Plessy* should not be overruled?

I mean, what view do you think that you communicated to other people at the time?

Justice REHNQUIST. Well, I am sure, you know, as Don Cronson says, around the lunch table I am sure I defended it for the reasons I stated to you yesterday.

Senator BIDEN. Just so you had both sides of it—not defending it because you really believed it, but defending it——

Justice REHNQUIST. Well, as I said to you yesterday, I thought there were good arguments to be made in support of it. I am sure my talks with Don Cronson were certainly a good deal more detailed than they would be around the lunch table, and I probably expressed myself more fully to him.

Senator BIDEN. On the 14th amendment, you have indicated that—well, your decisions point out that you have a more restrictive view of its application to women than you do, for example, to blacks; and I think your reason is very clear as you set it out why, and one is the rule of reason test. But let me make sure I understand why you have the view you do about the 14th amendment.

Is it because you believe that the 14th amendment was designed as you have once indicated, that it was obviously a Civil War amendment designed to deal with black codes; is that why? I mean, explain to me how you arrived at your——

Justice REHNQUIST. Senator, I have written on that subject many times in the 15 years I have been on the Court, and it is almost impossible to encapsulate or summarize.

Senator BIDEN. Well, let me encapsulate, and then maybe we can go from there.

As I understand it, one of the rationales you argue, that you use, and you have used it in both speeches you have made and in decisions that you have rendered—let me read from your speech in my home State of Delaware, I believe it was before the State Bar, but it was in 1977. You said, "The question with which the courts have had to wrestle in the ensuing 110 years since the ratification of the 14th amendment, is just how much more did the framers of the

14th amendment mean than to prohibit Southern States from having black codes." End of quote.

Now, is this the question as you see it?

Justice REHNQUIST. Is what the question? The one you just read, how much more in addition to——

Senator BIDEN. Yes, right.

Justice REHNQUIST. Yes, I think that is the question and a way of asking what the 14th amendment means.

Senator BIDEN. Do you think that the framers of the 14th amendment meant it only to apply to blacks and the black codes?

Justice REHNQUIST. I think that was whom it was primarily directed to, but I do not think they meant to limit it to them alone.

Senator BIDEN. Who else did you think they meant to encompass?

Justice REHNQUIST. Again, Senator, I have written on that for 15 years in various Court opinions. If we are simply talking generalities——

Senator BIDEN. Yes.

Justice REHNQUIST [continuing]. People who are similarly situated, probably, to be blacks at the time that the 14th amendment was adopted.

Senator BIDEN. Now, as I understand it, your theory as to what latitude a Justice has in interpreting the Constitution and provisions of this Constitution really relates to one that is much more in line with that recently enunciated by the administration of original intent, that it is very important to look back at what the original intent of the framers of the Constitution or the amendment was in order for you to know how it should be interpreted; is that correct?

Justice REHNQUIST. I am not sure it is entirely correct. I think original intent manifested in the words that the people that drafted the document used is a very important factor in deciding what the provision means.

Senator BIDEN. OK. Now——

The CHAIRMAN. Senator, your time is up.

Senator BIDEN. OK. I will come back to this.

The CHAIRMAN. The distinguished Senator from Maryland.

Senator MATHIAS. Let me pick up, Mr. Chairman, on this original intent question, because I think it is an interesting one. It is one that has engaged the attention of the country in recent months. I suppose that the debate that has been going on can be summarized in two terms that are meant to capsulize the contrasting approaches to Constitutional cases; judges who seek to apply "original intent," and those who engage in "judicial activism," one of the Chairman's favorite phrases.

It is a frequent experience for us on this committee to have nominees who come up and say that if confirmed, they would interpret the Constitution pursuant to the original intent of the framers. That is almost a matter of rote with nominees these days. And most of them are willing to take a pledge to resist judicial activism when they look at the Chairman.

The CHAIRMAN. They have good judgment, don't they? [Laughter.]

Senator MATHIAS. Well, they have prudence in any event.

But if we can get beyond those labels that I think distort the issue, as a practical matter, judges and even legislators are from time to time called to apply the Constitution to an issue that could not possibly have confronted the framers.

There were virtually no public schools in 1787. Issues of prayer in school, school integration, the rights of handicapped students—all of which present difficult Constitutional problems—flow out of the public school system, that system did not exist either physically or, I am sure, in the minds of the framers at the time.

How should the Court approach the problem of applying the words of the Constitution to problems that the Founding Fathers simply could not have foreseen?

Justice REHNQUIST. Well, there are a number of provisions in the Constitution that are sufficiently general so that they have applicability far beyond what the framers, the people who ratified the Constitution, had before them at the time.

In 1787, there was not a steamboat, there was not a railroad, there was not an airplane; yet they gave Congress no power over buggies or over post roads; they said Congress shall have power to regulate commerce among the several States. And that provision is obviously broad enough to embrace any number of things that have come after. And there is a due process clause in the fifth amendment to the Constitution and also an equal protection component in the due process clause.

The fact that there were not any public schools in 1787 does not mean that those clauses of broad general applicability would not have application where appropriate to institutions that have come after the Framers.

Senator MATHIAS. Of course, a question arises in some cases as to which branch of Government should undertake the corrective action when the Constitution is silent. That question is illustrated from time to time in problems that require the court to enter the political thicket. For example, the one-man-one-vote decision, might have been decided by State legislatures, as far as congressional districts are concerned, or might have been decided by the Congress, but ultimately had to be decided by the Court.

Is that one result which can flow from this doctrine that you have just commented on?

Justice REHNQUIST. Yes; it certainly is one result that can flow from it.

Senator MATHIAS. What in your judgment is the way to ensure that the decisions of the Court reflect the application of constitutional principles to evolving problems, and to avoid having Justices simply substitute their personal views for the principles that are embodied in the Constitution?

Justice REHNQUIST. Well, I think probably the best answer I can give is to nominate and appoint judges who sense the difficulty involved in judging; that, as Justice Frankfurter said, if putting on a robe does not make any difference to a man—and he put it as a "man" at that time; he would say "to a man or a woman" now, I suppose—then there is something wrong with that person.

Someone who thinks that they are going to be able to go on a court and apply a whole bunch of kind of horseback opinions, the kind that you form from reading the newspapers, for example—and

I remember this experience, and I daresay an awful lot of other people have had it—of simply reading in the newspapers about a court decision, when I was a lawyer, and saying, you know, "How can that be? That sounds ridiculous." And my wife sits across from me now at the breakfast table, and she will be reading something that the court—and she said, "That is ridiculous." And certainly, when you hear a lot of these decisions described, they sound ridiculous. But sometimes you get back into them, and you see that a surface absurdity really is not an absurdity, in fact, and that your initial reaction to a particular case has got to be tempered by study and that sort of thing.

I do not think taking any particular oath is going to get you a better judge.

Senator MATHIAS. Well, I suppose that that is what this nominating process is all about, to winnow out that very issue.

Do I recall correctly that you said that you had never come to any final conclusion about *Brown* v. *the Board of Education* because of the stare decisis effect of *Plessy* v. *Ferguson*?

Justice REHNQUIST. I thought the stare decisis argument in *Plessy* was a strong one.

Senator MATHIAS. Of course, the nine members of the Supreme Court, alone among all of the Federal judiciary, are the only people who can alter a precedent that is established by the Supreme Court. So, your views about precedent would become extremely important.

When you were here in 1971, you answered a question about precedent by stating that, "A precedent might not be that authoritative if it has stood for a shorter period of time, or if it were the decision of a sharply-divided court."

Is that still your view?

Justice REHNQUIST. I think it is, Senator.

Senator MATHIAS. It would follow, then, that precedents with which you have disagreed, or with which you disagreed at the time you joined the court, but which have now been the law of the land for some 15 or more years, have gained in authority?

Justice REHNQUIST. Other things being equal, I would think so, yes.

Senator MATHIAS. So, that as precedents, they are more binding because of the passage of time?

Justice REHNQUIST. Yes; again, other things being equal.

Senator MATHIAS. Is a precedent more authoritative when it is issued, let us say, over your lone dissent than when you have persuaded two or three colleagues to join in it?

Justice REHNQUIST. Yes; I think it is.

Senator MATHIAS. And these are the kinds of considerations that you would have in mind when you were confronted with the possibility of overturning a precedent?

Justice REHNQUIST. Yes.

Senator MATHIAS. I suppose——

The CHAIRMAN. Senator, your time is up.

Senator MATHIAS. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Mr. Rehnquist, just to wind up on the *Laird-Tatum* case, that was important, I believe, given our previous ex-

change. One of the important results of your vote and the majority opinion on that was the denial to the American people of the kind of discovery that might have taken place if there had been a different judgment, and in the course of discovery procedures, if that had been reversed, the American people would have probably learned a good deal more about the Huston plan and about the army surveillance of private citizens, and the CIA illegal domestic surveillance operations—all of which were going on at that time.

You were in the Office of Legal Counsel during the period that was described in the earlier discussion. I have tried to get from the Office of Legal Counsel any memoranda that you might have written about that subject matter, about either civil rights or civil liberties, or about surveillances. Do you know whether you wrote any memoranda about those subjects?

Justice REHNQUIST. I would expect over a period of 3 years I probably did.

Senator KENNEDY. Well, is there any reason that you would be reluctant to provide those memoranda to us on civil liberties or civil rights or on national security?

Justice REHNQUIST. I do not believe I have them.

Senator KENNEDY. You have not retained copies of those?

Justice REHNQUIST. I do not think so.

Senator KENNEDY. Well, would you be willing to urge the Justice Department to make those available to us?

Justice REHNQUIST. I would certainly waive any claim that I have so far as the Justice Department——

The CHAIRMAN. Senator, I might make a statement on that. The Justice Department feels that interoffice memoranda are confidential, they are privileged, and they do not intend to make them public. I concur with that opinion, because if the Attorney General cannot talk to his own staff in confidence and get their opinions and bat things back and forth, it seems the public is not well served.

Senator KENNEDY. Well, the President of the United States—and I would ask that his memorandum on this for the heads of Executive departments and agencies, subject, procedures governing response to congressional requests for information—I will ask that the entire memorandum be made a part of the record, Mr. Chairman.

May that be made a part of the record?

The CHAIRMAN. Without objection.

[Document follows:]

1106

MEMORANDUM FROM PRESIDENT RONALD REAGAN FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, ON PROCEDURES GOVERNING RESPONSES TO CONGRESSIONAL REQUESTS FOR INFORMATION, NOVEMBER 4, 1982

THE WHITE HOUSE

WASHINGTON

November 4, 1982

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A "substantial question of executive privilege" exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or

other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency ("Department Head") believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

6. If the President decides to invoke executive privilege, the Department Head shall advise the

requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

Ronald Reagan

HANDWRITTEN RECORD OF TELEPHONE CONVERSATION WITH MARY WALKER, PREPARED BY STEVE LEIFER, NOVEMBER 5, 1982

(33-2747)

Record of Phone Conversation w/ Mary Walker (DOJ)
Nov. 5, 1982
S. Leifer

- MW said that she is sending the documents up to Larry Simms.

- DOJ would like to send a letter pertaining to previous Dingell submissions over to the Subcommittee prior to sending over this material.

- Although we have the responsibility for drafting the cover memo to accompany the new material, they are in possession of the documents, and thus we need to forward the letter to them to attach to the package.

  We should let them see early drafts of the letter to avoid delays.

Senator KENNEDY. I quote:

Congressional requests for information shall be complied with as promptly and as fully as possible unless it is determined that compliance raises a substantial question of executive privilege.

And the Justice Department refuses to say whether it does. It either ought to say that it does and involves the question on executive privilege, or these memoranda ought to be available to the members of this committee when we are considering the qualifications of this nominee on the basic issues and questions involving civil rights and civil liberties, the views of this nominee. And I think we do a disservice to the consideration of this committee and to the nominee not to be able to examine those.

I have requested that. That request has been made to the chairman. We have received a response from the Justice Department refusing to make those available.

The nominee himself this morning says he is quite prepared to waive any consideration. So, I would renew my request, Mr. Chairman, given the view of the nominee that he is prepared to waive any privilege, and that we make a request of the Attorney General to receive it.

Senator BIDEN. If the Senator would yield——

The CHAIRMAN. The Attorney General is the chief legal advisor for the President and the entire executive branch. The function of the Office of Legal Counsel is to act as his delegate. Therefore, the Assistant Attorney General for the Office of Legal Counsel is the lawyer for the President's lawyer. The internal materials in the Office are confidential and represent the highest form of privileged communication. These internal documents are the manifestations of far-ranging legal and policy considerations. As a matter of principle, the release of these documents would have a devastating impact on the full and free debate and discussion which are required in the Office of Legal Counsel.

If the highest officials in the Nation are to have the sound and legal advice on which many of their important decisions depend, this debate must not be restricted out of fear that it may become public knowledge.

Additionally, I question the relevancy of materials which are over 15 years old and which I understand were not requested during the 1971 confirmation hearings.

For these reasons, I will not press any further for these internal confidental documents.

Senator KENNEDY. Mr. Chairman, I would point out that the remaining part of that paragraph I mentioned—I will read the full paragraph:

Congressional requests for information shall be complied with as promptly and as fully as possible unless it is determined that compliance raises a substantial question of executive privilege. A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security, including the conduct of foreign relations, the deliberative process of the Executive Branch, or other aspects of the performance of the Executive Branch Constitutional duties.

Now, I would just say the failure of being able to gain that information, which the nominee himself has indicated his willingness to

waive, does a disservice both to the nominee, to the committee and to the Constitution.

And what we are talking about here are civil rights issues, issues on civil liberties, in which this nominee had a very direct—anything that he would say with regard to the various domestic surveillance provisions.

I think it is a real disservice to the nominee and this committee to refuse to insist that the Attorney General provide that information.

I yield to the——

The CHAIRMAN. Although the witness might be willing to do it, the Justice Department feels that it would be improper. For instance, in my office, if I could not talk to my staff members confidentially and get their honest opinion, back and forth, and batting things back and forth, without the public knowing everything that went on, I do not see how I could well serve the public.

The Justice Department feels the same way. They want to have freedom to discuss with their staff members, to write memorandums, to get suggestions, to make recommendations, but if all of it is exposed to the public, it would jeopardize the best interests of the public in my judgment.

Senator BIDEN. Mr. Chairman, if I could just briefly comment on that, we may have much ado about nothing here. If the Justice Department does not want this to be released, all they have to do is exert executive privilege. If they do not exert executive privilege, then they should explain to us why they are changing a pattern they have kept for years and years.

Let me just point two things out. In Mr. Cooper's nomination to go over to that Department and Mr. Brad Reynolds, where we asked for internal documents, we worked out an agreement, as we always have in this committee, where staff members went down in the presence of the Justice Department. In both of those cases, in this administration, Office of Legal Counsel documents were made available; they were made available with regard to both of those instances, No. 1.

No. 2, let me point out that if the rationale which the Justice Department offers in fact has any validity, it seems to me it loses its validity as time passes. It is one thing to say that you are not going to allow contemporaneous memoranda out, and you do not want to in fact exert executive privilege. But we are talking about something that is 25 years old, as the Justice keeps pointing out to us; this is 25 years ago. What are we talking about here? How is the impairment of national security, or the impairment of the ability to do work going to be impaired by something 25 years ago?

Third, as everyone who follows this knows, since 1977 they have published memoranda from the Office of Legal Counsel. It has been the policy of the Office of Legal Counsel to publish in a book memoranda.

Now, I really do think this is a disservice to the nominee. The only implication that can be drawn from this, if executive privilege is not being exerted, is that there is something to hide. The nominee has nothing to hide, nothing at all to hide.

How can Justice possibly be harmed if in fact they are going to release memoranda that an assistant or a lawyer in that division wrote 25 years ago or more——

Senator HATCH. Mr. Chairman——

Senator BIDEN [continuing]. On civil rights, unless it is of national security interest. And if it is, tell us, and we will stop.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. You have stated it pretty well. This is the Office of Legal Counsel. You are not asking for Brad Reynolds' and Chuck Cooper's materials. You are asking for materials before this man becomes an Associate Justice of the U.S. Supreme Court.

It seems to me that we ought to be judging him from that time forward. And you are asking it from the Office of Legal Counsel which to my knowledge has never given materials to us——

Senator BIDEN. Oh, well, I have it right here.

Senator HATCH [continuing]. And the reason is—let me just say this——

Senator BIDEN. I have it right here in my mind. These are memoranda from the Office of Legal Counsel.

Senator HATCH. Let me say—not to my knowledge then.

Senator KENNEDY. Oh? [Laughter.]

Senator BIDEN. They are right here.

Senator HATCH. Those are not from the Office of Legal Counsel. And I do not think you can prove it. They are from the Office of Civil Rights. Do not misstate the law. Do not misstate where you got them.

I do not know of any case where you have been able to get materials from the Office of Legal Counsel.

Senator BIDEN. If I can help the Senator, these are from the Office of——

The CHAIRMAN. Let him finish.

Senator BIDEN. Oh, I am sorry. I was going to answer his question.

Senator HATCH. Go ahead and answer.

Senator BIDEN. They are from the Office of Legal Counsel to the House of Representatives——

Senator HATCH. They may have been delivered to you, but they come from the Civil Rights Division.

Senator BIDEN. No, no; the top one, let me just read it to you here——

Senator KENNEDY. Can we recess for lunch?

Senator HATCH. To my knowledge, never in the history of the Justice Department, whether it was under Robert F. Kennedy or under Edwin Meese, have they given up internal memoranda.

Second, this is not Brad Reynolds who is up for confirmation. This is not Chuck Cooper. This is a man who served 15 years on the U.S. Supreme Court. You are asking for memoranda from, basically, 3 or 4 years before he became a member of the Supreme Court from the Office of Legal Counsel.

Senator BIDEN. Orrin, let me ask you a question.

Senator HATCH. Now, wait. Let me just make one other point.

Senator BIDEN. I am sorry.

Senator HATCH. I understand why anybody——

The CHAIRMAN. The Senator from Utah has the floor.

Senator HATCH. I can understand why any Democrat would love to go through all the materials of the Justice Department pertaining to any Republican administration. I would like to do it pertaining to any Democratic administration. And I might even enjoy the Republican administration.

The fact of the matter is, as Senator Thurmond has stated, it is very tough for an Attorney General to get honest, candid comments, from internal people within the Justice Department if they know that everything they state is going to be subject to review by Congress in a partisan battle over somebody's nomination.

You are asking for things that you really do not have a right to.

Senator BIDEN. Orrin——

The CHAIRMAN. Senator Metzenbaum, I believe, wanted to speak.

Senator BIDEN. Excuse me.

Senator METZENBAUM. No. I am fine.

The CHAIRMAN. Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

What I do not understand here is that there seem to be two issues that the Senator from Utah raises—one is the legitimacy of an arm of the Government to deny another arm of the Government memoranda sought for; the second is whether or not it is legitimate to inquire as to what a nominee for Chief Justice wrote 25 years ago. There are two separate issues. Let us leave the latter issue aside. The argumentation given by the Justice Department for not making available these memoranda says nothing about Justice Rehnquist; it does not speak to that question. It speaks to the legitimacy of this body having access to, as a matter of principle, documents.

If we here today conclude that this body does not have the right to have access to those documents unless executive privilege is claimed, we have set a precedent.

With all due respect, Mr. Justice, I do not care about you in this; I care about the precedent. The fact is that we either are going to have a precedent set where they in fact abide by the law and say executive privilege, or they should come forward, like we always have in the past, with an agreement whereby we negotiate in good faith the access to and what documents they are given access to.

But here there is a blanket assertion made, for the first time in this administration, a blanket assertion, and in conflict with what the President says, that everything is open.

And just for the record, the memorandum I am holding here, for example, is a memorandum from Theodore Olsen to Paul McGrath, "Revised Draft of Summary Judgment Motion in United States versus House of Representatives, U.S. Department of Justice, Office of Legal Counsel," dated 7 January, 1983. Now, it is on a different matter. It was on the Burford fight. But it did not require subpoena. That is how we used to do it. We used to do it that way. And I do not know why, all of a sudden, we are changing.

It seems to me the request the Senator from Massachusetts made is in fact a reasonable one. And it has always been——

The CHAIRMAN. Senator——

Senator BIDEN [continuing]. If I could finish, Mr. Chairman—it has always been done on a confidential basis. That is how we have

done it before. That is how this committee has done it, and I do not know why it has changed.

The CHAIRMAN. Senator, isn't it a fact that those documents were not provided to the Congress, but they were provided from one Government agency to another?

Senator BIDEN. Pardon me?

The CHAIRMAN. Weren't those documents provided from one Government agency to another, and not to the Congress?

Senator HATCH. That is correct.

Senator BIDEN. No. They were provided to the Congress.

Senator HATCH. No. They come from another Government agency.

Senator BIDEN. I ask the able Counsel to tell you what you have in your hand there—and maybe I am mistaken.

Senator HATCH. You are.

Mr. SHORT. Senator, it is my understanding these documents were provided to a Government agency and not to a committee of Congress.

Senator HATCH. Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. This committee has never to my knowledge received an internal memo directly from the Department of Justice and certainly directly from the Office of Legal Counsel. I would be happy to stand corrected if I am wrong. However, I do not believe I am.

The Justice Department might have given records to other offices or other agencies or departments, but never have they given up internal memos. They have good reason for doing that because they want it to function as a Justice Department. Anybody can understand that.

I can understand why certain people want to go on a fishing expedition. But that is not what should be done.

The CHAIRMAN. Senator Hatch, I happen to see Mr. Bolton here, who is from the Office of Legislative Affairs, Assistant Attorney General, and I am going to ask him to come up right now and respond to some questions.

If you will stand up and take the oath—will the testimony you will give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God.

Mr. BOLTON. It will.

Senator MATHIAS. Mr. Chairman, shouldn't Justice Rehnquist retire from the table?

The CHAIRMAN. Justice Rehnquist, we will excuse you now until 2 o'clock. We will go back at 2 o'clock.

Justice REHNQUIST. Thank you, Mr. Chairman.

Senator BIDEN. Aren't you glad you are in the court and not the Senate, Mr. Justice?

Senator HEFLIN. It seems to me we ought to have sort of an opinion right now from the Supreme Court Justice. [Laughter.] It is pretty clear here that this is an Executive order signed by the President, and it is pretty clear as to what procedure is to be followed. It seems to me on the face of it, it says so.

The CHAIRMAN. Mr. Bolton, would you explain the policy of the Justice Department on this matter? You have heard the conversation here. Give us the theater behind it.

TESTIMONY OF JOHN R. BOLTON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

Mr. BOLTON. Yes, thank you, Mr. Chairman.

I might say, in response to a point that Senator Biden made, that after receipt of his letter dated, I believe, July 24, we did produce some documents that he had requested. Those documents contained, in every case, legal advice that had been transmitted outside the Office of Legal Counsel, in some cases, to other components of the Department of Justice, in some cases, to other Government agencies, as I recall.

Senator Hatch, however, has correctly stated that to our knowledge, there have never been provided to this committee internal deliberative documents from the Office of Legal Counsel or, I might add, by way of analogy, the Solicitor General's Office. And there are numerous precedents for that that we have followed.

Senator METZENBAUM. What about the *Brad Reynolds* case and the *Cooper* case?

The CHAIRMAN. What about these particular documents?

Mr. BOLTON. I do not know which ones you have in your hand, Mr. Chairman, but I believe one that was referred to was from the Office of Legal Counsel to Mr. McGrath, who at one point was with the Civil Division.

The CHAIRMAN. That is right; memorandum to Paul J. McGrath, Assistant Attorney General, Civil Division.

Mr. BOLTON. Yes, Mr. Chairman. That would be consistent with what I just said. It was a document transmitted from the Office of Legal Counsel to another component of the Department of Justice. We have produced that in response to Senator Biden's earlier request.

Could I say one other thing, please, Mr. Chairman? Senator Biden referred to a practice since 1977—I think it goes back before that—that some opinions of the Office of Legal Counsel are published. That is correct. In OLC's function as the President's lawyer's lawyer, there are occasions where such things are made public. The reason for that is so that the President's chief legal adviser, acting through his Assistant Attorney General, can advise other components of the executive branch and the public at large as to a particular position taken on a legal issue.

And I would submit, quite respectfully, that that is quite different from the internal deliberative documents that we are referring to here.

The CHAIRMAN. Senator Biden, do you want to ask a question?

Senator KENNEDY. May I——

Senator BIDEN. Go ahead.

Senator KENNEDY. Well, are you exerting executive privilege, then, on this request?