The original documents are located in Box D110, folder "Supreme Court" of the Gerald R. Ford Congressional Papers at the Gerald R. Ford Presidential Library.

Supreme Court

Excerpts from Remarks
by
U. S. SENATOR ROBERT P. GRIFFIN

National Press Club
July 30, 1968

President Cromley, distinguished guests and members of the Press Club.

I am grateful for the opportunity to appear in this justly-famous forum to discuss a subject of historic importance and proportions.

There are some in the country who would brush the current controversy aside on the ground that it is just petty bickering and jockeying for partisan political advantage. Those who take such a view are short-sighted.

The issues involved in this struggle reach far beyond party lines to the very core of our system of government.

At the outset, let me re-emphasize that the junior Senator from Michigan has not -- and does not now -- challenge or question the Constitutional power of this President, or of any President, to make nominations to fill vacancies on the Supreme Court.

As some of the columnists and editorial writers have been saying, with a lot of ink, any President -- even a President in the waning months of his final year in office -- has the Constitutional power (perhaps even a responsibility, when there is really a vacancy) to make such nominations -- and he continues to have that Constitutional power even through the last day of his Administration.

But, of course, that is not the point. Some have not understood, or will not recognize, that under our Constitution the power of this President -- or of any President -- to nominate, constitutes only half of the appointing process.

The other half of the appointing process lies within the jurisdiction of the Senate, which has not only the Constitutional power, but a solemn obligation, to determine whether to confirm such a nomination.

Some are suggesting that the Senate's role in this situation is merely to ascertain whether a Supreme Court nominee is "qualified," in the sense that he possesses some minimum measure of academic training or professional experience.

Any such limited view of the Senate's responsibility with respect to Supreme Court nominations is wrong, and does not square with the clear intent of those who conferred the "advice and consent" power upon the Senate.

In the Federalist papers, Alexander Hamilton wrote that the requirement of Senate approval in the appointing process would, in his words,

> " . . . be an excellent check upon a spirit of favoritism of the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachments, or from a view to popularity."

Admittedly, the Senate has moved a considerable distance away from Hamilton's ideal with respect to appointments in the Executive branch. But that is somewhat understandable. Cabinet members and other officers in the Executive branch serve at the pleasure of the President, and they are responsible to him.

The Senate has generally recognized that, unless the President is given wide latitude in selecting his Cabinet, he could not be held accountable for the Executive branch of government.

Throughout our history, only 8 nominations for Cabinet posts -- 8 out of 564 -- have failed to win Senate confirmation.

And the last such instance, of course, was the refusal in 1959 of a Senate majority, led by Senator Lyndon Johnson, to confirm the nomination of Lewis Strauss as Secretary of Commerce in President Eisenhower's cabinet.

Although it has been unusual over the years for the Senate to reject non-judicial appointments, interestingly enough, it was not so unusual for Senator Lyndon Johnson.

In 1949, President Harry Truman nominated Leland Olds -- not for a lifetime position on the Supreme Court -- but for a third term on the Federal Power Commission. Since Olds had already served on the Commission for 10 years, and had been confirmed by the Senate twice before, it was difficult for anyone to argue that he lacked qualifications.

But that did not deter the then junior Senator from Texas. Although Olds was supported by Senator Hubert Humphrey, Johnson played a key role in getting the Senate to reject the Olds nomination.

Afterwards, there was general comment in the press that the real issue had nothing to do with qualifications, but everything to do with government policy concerning the regulation of natural gas.

The recent Evans-Novak book, Lyndon Johnson: The Exercise of Power, adds this interesting footnote to the story (and I quote):

> "There seems little doubt that Ickes, nursing his old grudge against Olds, was egging on his protege (Senator Lyndon) Johnson. Abe Fortas, who had been Ickes' Under Secretary . . . although now in private law practice, was the behind-the-scenes counsel for Johnson, supplying him with material and arguments against Olds."

Although there have been a few such notable exceptions, generally speaking, the Senate has been sparing with the exercise of its "advice and consent" power in connection with appointments in the Executive branch -- to non-judicial posts.

But the reasons for a limited or nominal Senate role with respect to Executive branch appointments do not apply when it comes to nominations for lifetime positions on the Supreme Court -- the highest tribunal in the independent, third branch of government.

A distinguished former colleague, Senator Paul Douglas, put it this way:

> "The 'advice and consent' of the Senate required by the Constitution for such appointments (to the Judiciary) was intended to be real, and not nominal. A large proportion of the members of the (Constitutional) Convention were fearful that if judges owed their appointments solely to the President the Judiciary, even with life tenure, would then become dependent upon the executive and the powers of the latter would become overweening. By requiring joint action of the legislature and the executive, it was believed that the Judicary would be made more independent."

Throughout our history, there have been 125 nominations submitted for the Supreme Court. Of that number, 21, or one-sixth, have failed to win Senate approval.

Incidentally, the question of qualifications or fitness was an issue in only 4 of those 21 instances.

When debating nominations for the Supreme Court, the Senate has never hesitated to look beyond mere qualifications to consider a nominee's philosophy, his writings, his views on issues, charges of cronyism or other matters.

There have been 16 nominations for the Supreme Court submitted by Presidents during the final year of their Administration.

History records that the Senate confirmed 7 of those (including Chief Justice Marshall). But the Senate refused to confirm the other nine -- generally on the ground that the vacancy should be filled by the new President.

In almost every previous instance, when a President has had an opportunity during his last year in office to submit a Supreme Court nomination, the vacancy came about by reason of the death of a sitting justice.

Never before has there been such obvious maneuvering to create a "vacancy" for a political purpose.

Coming at a time when the people are in the process of choosing a new government, such maneuvering not only demeans the Court but it is an affront to the electorate.

It suggests a shocking lack of faith in our system.

And it may also register an astonishing vote of no confidence in Hubert Horatio -- and his chances in November.

I don't know who will be elected President in November. But I do know that this Nation is seething with unrest and is calling for change. A new generation wants to be heard and demands a voice in charting the future of America.

Particularly at this point in our history, the Senate would be unwise to put its stamp of approval on a cynical effort to thwart the orderly processes of change.

What is the reason for such haste in denying the people a voice in shaping the course of the Supreme Court for years to come?

Of course, there is no urgent reason. Indeed, there is not even a vacancy on the Supreme Court.

Incidentally, in considering the role of Chief Justice Warren in all this, I ran across an interesting commentary in The New Republic. It reads like this:

"Executive officers serve under the direction and at the pleasure of the President. It is unobjectionable, and often right, that they should make their resignation effective at his pleasure . . . But judicial officers are independent of the President. . .

"It is perhaps a small, symbolic point only, but the symbols of judicial independence are not trivial; they are an important source of judicial power and effectiveness.

"The point, moreover, goes beyond the symbolic, as Chief Justice Warren himself ingeniously emphasized at his press conference on July 5. He was still in office, said the Chief Justice, and would return to preside in the fall if the Senate fails to confirm Abe Fortas, of whom he thinks well.

"That may not have been intended as a form of pressure, but it looked like it. The pressure was in any event implicit in the manner of Chief Justice Warren's retirement. . . Retirements which are effective on a date that is certain and irrevocable, ensure that a replacement will be considered on his own merits, not as a choice between himself and his predecessor.

"The practice of retiring or resigning, as Chief Justice Warren did, effective upon the qualification of a successor, is unprecedented in the Supreme Court. It seems to have grown up among the lower federal judges. It has nothing to commend it."

Back at the beginning of this crusade, before Mr. Fortas and Mr. Thornberry were even named, I made it clear that I would vote against confirmation of any nominee by President Johnson to be Chief Justice -- whether he named a Republican or Democrat; a liberal, conservative or a moderate.

I took the position, in view of the circumstances and political purposes surrounding the resignation, that it would be in the best interest of the Court and the Nation if the next Chief Justice were named by the new President after the people have an opportunity to vote in November.

To be quite candid, I suspect that I might have been a lonely figure standing there on principle if President Johnson had not been so accommodating by submitting the particular nominations that he did.

Now, I have several additional reasons to oppose the pending nominations.

One additional reason is that I am convinced Mr. Fortas and Mr. Thornberry were selected primarily because they are close personal friends of long-standing of President Johnson, and not because they are among the best qualified in the Nation to fill the particular positions.

The charge of "cronyism" is not new to Senate confirmation debates, but it is highly unusual for any President to subject himself to that charge with respect to a nomination for the Supreme Court of the United States. And never before in history has any President been so bold as to subject himself to the charge of "cronyism" with respect to two Supreme Court nominations at the same time.

Some say that if a "crony" -- nominated because he is a "crony" -- is "qualified," he should be approved. I reject this view because it diminishes public respect for the Supreme Court -- at a time when there is a desperate need to rebuild and enhance confidence in the Court.

In the case of Mr. Thornberry, I am convinced, on the basis of the record and personal knowledge, that -- while he is a good and a fine gentleman -- he is just not (as Senator Norris Cotton put it) "Supreme Court material."

In the case of Mr. Fortas, while I am satisfied that he is a brilliant lawyer, I am not satisfied that he possesses an adequate sense of propriety and other qualities which are particularly appropriate and necessary to be Chief Justice of the United States.

When it comes to selecting the man in the United States best suited to be Chief Justice, I would prefer -- and I believe most people would prefer -- the type of lawyer who would not be asked to proposition newspaper publishers on behalf of a Baker or Jenkins; and who, if asked, would refuse.

Whatever our frailties as public servants, as lawyers, or as members of the press, I am sure most of us do not deserve the skepticism with which we are often regarded by the public. Nevertheless, we can never forget that our apparent motives, as well as our actual motives, play an important part in determining the degree of confidence which the public develops towards the institutions with which we are associated.

I am confident that the public does not approve of the admitted telephone call made by Mr. Justice Fortas to a business friend, criticizing a public statement that Vietnam war costs would run $5 billion higher than Administration estimates. Incidentally, the statement made at Hot Springs, and retracted after Mr. Fortas' phone call, turned out to be very accurate.

I am confident that the public does not condone the fact that Mr. Justice Fortas admittedly participated in the decision-making process of the Executive branch of government on such matters as the Vietnam war and the Detroit riots.

But more disturbing is the fact that Mr. Fortas stated to the Senate Judiciary Committee that he is proud of his extra-judicial activities, and that he "did not see anything wrong" with them.

Judges -- particularly Justices of the Supreme Court -- have no license to ignore the separation of powers principle which is at the core of our system of government.

In 1942, President Franklin D. Roosevelt called upon Chief Justice Stone for assistance in arriving at executive decisions in connection with wartime rubber problems. In response to the President's request Chief Justice Stone replied as follows:

"I have your letter of the 17th. . . Personal and patriotic considerations alike afford powerful incentives for my wish to comply with your request that I assist you in arriving at some solution of the pending rubber problem. But most anxious, not to say painful, reflection has led me to the conclusion that I cannot rightly yield to my desire to render for you a service which as a private citizen I should not only feel bound to do but one which I should undertake with zeal and enthusiasm. . .

"A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office.

"We must not forget that it is the judgment of history that two of my predecessors, Jay and Ellsworth, failed in the obligations of their office and impaired their legitimate influence by participation in executive action in the negotiation of treaties. True, they repaired their mistake in part by resigning their commissions before returning to their judicial duties, but it is not by mere chance that every Chief Justice since has confined his activities strictly to the performance of his judicial duties. . ."

Today, with respect for law at a low ebb, with our ability to maintain order in our cities seriously in question for the first time in our history, and with sizable groups of Americans convinced that the basic institutions of our society are a sham and a fraud, the rewarding of an "old friend" with the Chief Justiceship is uniquely inappropriate.

If ever there was a time when a "Caesar's wife" appointment would be of great value to reinforce public confidence in the Supreme Court -- this is such a time.

If there were ever a time when "cronyism" was a disservice to the Nation, this is the time.

Even before the current controversy erupted, public confidence in the Supreme Court had fallen to an all-time low in modern history. According to a Gallup survey in June, 60 per cent of the American people had an unfavorable opinion of the Supreme Court.

Undoubtedly, much of this disfavor can be attributed to widespread dissatisfaction with some of the more controversial rulings of the Court in various fields.

But the prestige of the Supreme Court does not hinge solely on the result it reaches in particular cases. I am convinced that there are other, perhaps more compelling, considerations which also influence the standing of the Court with the people.

For example, the same Gallup poll reported that 61% of the people favor a change in the method of selecting Supreme Court justices. This strongly suggests that the circumstances which surround an appointment of a justice profoundly affect the capacity of the Court to merit public confidence.

I deeply regret that President Johnson has seen fit in this campaign season to drag the Supreme Court into the political arena.

But in another sense, perhaps this debate can ultimately serve a higher and a nobler purpose. For it can serve to lift the Supreme Court, once again, above and out of politics.

If we prevail, there will be hope that future Presidents will select a Benjamin Cardozo for the Supreme Court, as Hoover did -- not because of personal or political considerations -- but because he was the most outstanding jurist available in the land.

In this battle, we are right. Because we are right, time is on our side.

And I'm confident that we are going to win.

# # # # # #

Supreme Court

BPI-49

(RELEASEAT 630 PM EDT)

(HAYNSWORTH)

WASHINGTON--THE AFL-CIO TEXTILE WORKERS UNION MADE PUBLIC TODAY A FILE OF CONFIDENTIAL CORRESPONDENCE INVOLVING THE CONNECTION BETWEEN SUPREME COURT NOMINEE CLEMENT F. HAYNSWORTH JR. AND A BOOMING VACHINE FIRM DURING A CASE HE HELPED DECIDE.

UNION PRESIDENT WILLIAM POLLOCK SAID IN A STATEMENT THAT HAYNSWORTH'S INVOLVEMENT WITH THE COMPANY INDICATED "POSSIBLE BIAS" IN HIS RULING AS A U.S. APPEALS COURT MEMBER.

IN 1963, HAYNSWORTH VOTED WITH THE 3-2 MAJORITY IN FAVOR OF THE DARLINGTON MANUFACTURING CO., AND AGAINST THE TEXTILE WORKERS UNION WHICH HAD PROTESTED THE CLOSING OF A MILL AS BEING AN ANTILABOR DEVICE.

THE UNION LATER CONTENDED THAT HAYNSWORTH HAD BEEN INFLUENCED BY THE FACT HE WAS FIRST VICE PRESIDENT OF CAROLINA VEND-A-MATIC CO., WHICH SUPPLIED VENDING MACHINES TO SEVERAL MILLS OWNED BY DARLINGTON'S PARENT COMPANY, DEERING, MILLIKEN, INC.

IN ANNOUNCING PRESIDENT NIXON'S NOMINATION OF THE SOUTH CAROLINIAN, PRESS SECRETARY RONALD ZIEGLER SAID HAYNSWORTH HAD BEEN EXONERATED OF ANY CONFLICT OF INTEREST IN THE CASE. ZIEGLER DISTRIBUTED EXCERPTS OF LETTERS FROM THEN CHIEF CIRCUIT JUDGE SIMON E. SOBOLOFF AND ATTY. GEN. ROBERT F. KENNEDY TO THAT EFFECT.

POLLOCK SAID ZIEGLER RELEASED ONLY "SELECTED EXCERPTS OF THIS CORRESPONDENCE, ALONG WITH MISLEADING CHARACTERIZATIONS THEREOF."

THE UNION HEAD SAID THAT WHILE NO WRONGDOING WAS ESTABLISHED AND THE TEXTILE WORKERS' ATTORNEY ACKNOWLEDGED THIS WITH AN APOLOGY, THE QUESTION REMAINED THAT HAYNSWORTH SHOULD HAVE DISQUALIFIED HIMSELF FROM THE DECISION.

POLLOCK CLAIMED THAT THE QUESTION RAISED BY THE UNION IN 1963 WAS WHETHER ATTEMPTED BRIBERY WAS INVOLVED, NOT CONFLICT OF INTEREST.

HE COMMENTED: "IN HIS RELEASE OF SELECTED EXCERPTS FROM LETTERS, AND HIS STATEMENTS TO THE PRESS, MR. ZIEGLER HAS ENDEAVORED TO CREATE THE IMPRESSION THAT JUDGE HAYNSWORTH WAS CLEARED OF ANY CHARGE OF CONFLICT OF INTEREST IN CONNECTION WITH THE DARLINGTON CASE. IT IS EVIDENT THAT HE WAS CLEARED OF A QUITE DIFFERENT CHARGE."

HE ADDED THAT THE UNION HAD NOT PURSUED THE CONFLICT OF INTEREST QUESTION FOR FOUR REASONS:

--THE UNION HAD RELAYED TO SOBOLOFF A MUCH MORE SERIOUS CHARGE WHICH HAD BEEN PROVEN FALSE. "IT WAS EVIDENT THAT THE JUDGES WERE NOT PLEASED WITH THE UNION; AND THE UNION WOULD INEVITABLY BE A LITIGANT BEFORE THOSE JUDGES FOR YEARS TO COME," POLLOCK OBSERVED.

--THE U. S. CODE LEAVES IT TO THE JUDGE'S OWN OPINION WHETHER IT IS IMPROPER FOR HIM TO SIT IN JUDGMENT OF A CASE.

--THE UNION DID NOT AND DOES NOT HAVE ALL THE FACTS.

--THE UNION INTENDED TO ASK THE SUPREME COURT TO REVIEW THE CASE. THE COURT UNANIMOUSLY REVERSED PART OF THE APPEALS COURT VERDICT.

8/23--TS128PED

NEW CHIEF JUSTICE

If past performance is a reliable indicator, and in this instance we believe it is, the designation of Judge Warren E. Burger as the next Chief Justice of the United States foreshadows a major change in the influence of the Supreme Court on the shape of our society.

In announcing his choice, President Nixon said history tells us that Chief Justices "have probably had more profound and lasting influence on their times and on the direction of the nation than most Presidents have had." This is not free of exaggeration. It may be true of such towering figures as Marshall, Taney, Hughes and Warren. But there have been 14 chief justices in all, and very few people could name many of the others.

There is, however, little reason to doubt that the influence of Warren Burger, if one may presume to take his confirmation for granted, will be far-reaching.

He will assume his new post in a time of trouble for the court. Some of its decisions have embroiled it in bitter controversy. It has suffered from the disclosures involving Abe Fortas, and it has not been helped by some of the activities of Justice Douglas. In saying this, we do not suggest for a moment that the integrity of the court has been impaired. It has not. But the reputation of the court, in some degree, has suffered in the public mind, and it is this that counts. For the strength of the court rests on its moral authority, which must be above any question or suspicion.

The President emphasized that Judge Burger is a man of "unquestioned integrity throughout his private and public life." This is true, and it is a fact that will be an asset to the court. The opinions he has written as a member of the United States Court of Appeals for the District since 1956 stamp him as anything but a judicial "activist." He believes that it is the function of a judge to interpret the law, not to write it, and this soon may be reflected in the modification or overruling of such questionable 5-to-4 Supreme Court rulings as that in the Miranda case. Judge Burger most emphatically does not think society should be left incapable of defending itself against the criminal element.

On civil rights he is sometimes described as a liberal, sometimes as a moderate. This is sufficiently ambiguous to suggest that it would be unwise to indulge in premature predictions as to the role he will play in this area when he becomes Chief Justice.

It can now be said with some confidence that the outlines of what may come to be known as the "Nixon court" are taking shape. The President still must fill the vacancy resulting from the Fortas resignation and in all probability he will have two or three other appointments to make during his term of office. If this proves to be the case, the Burger nomination and the appointments Mr. Nixon already has made to the U. S. Court of Appeals here plainly suggest that the "Nixon court" will be a tribunal that is conservative in the best sense of that word.

The Evening Star (Washington, D. C.)
May 22, 1969

Pictured at reception for women leaders and members of Women for Nixon-Agnew National Advisory Committee during 17th Annual Republican Women's Conference in Washington, D. C., on April 14, 1969, are (left to right): Mary Dushnyck, member of Women for Nixon-Agnew National Advisory Committee and delegate of Republican Business Women, Inc. of New York City; Mary Brooks, Director of U. S. Mint and Conference Chairman; Dr. Rita Hauser, U. S. Representative to United Nations Commission on Human Rights; Elly Peterson, Assistant Chairman, Republican National Committee; and Virginia Knauer, Presidential Assistant in Charge of Consumer Affairs.

A FREE SOCIETY IS HELD TOGETHER BY MUTUAL TRUST. ONLY BY RE-ESTABLISHING THAT TRUST CAN WE CREATE THE CONDITIONS IN WHICH PROGRESS IS POSSIBLE.

—Representative Rogers C. B. Morton (R., Maryland), Chairman, RNC

New Direction—We were especially encouraged to note that in President Nixon's "war on organized crime" and "tax reform" messages he proposes to revitalize our state and local governments. While efforts of all agencies of the Federal Government are to be coordinated and increased in the all-out fight against crime, the role of the government is secondary, except as to furnishing aid and the leadership in combatting crime. All of this means a NEW DIRECTION. Instead of the government dictating and controlling what is done in and by the States and local communities, the States and local communities can plan for themselves to meet their needs with indirect aid and a minimum of control from Washington. And instead of the Federal Government simply making grants, it is proposed that business interests be encouraged through tax credits to undertake what needs to be done.

—Representative Leslie C. Arends (R., Illinois)

Supreme Court

CQ Fact Sheet **High Court Appointment**

A NEW CHIEF JUSTICE: A NEW COURT ERA

President Nixon May 21 moved toward creation of a Nixon Court and what could well be a new Court era with his nomination of Warren Earl Burger, 61, judge of the United States Court of Appeals for the District of Columbia, as the fifteenth Chief Justice of the United States.

In accord with his campaign statements describing the qualifications of the men he would appoint to the High Court and in keeping with the law-and-order emphasis of his Administration, Mr. Nixon appointed a man known in legal circles for his conservative stance on questions of criminal law. *(See box for Nixon statements.)*

Mr. Nixon had attacked recent Supreme Court decisions on the rights of accused persons for "hamstringing" the forces of order against the criminal forces in society. Judge Burger recently criticized the same Supreme Court holdings: "This seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, subrules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these 'rules' we make it less likely that any police officer will be able to follow the guidelines we lay down."

President Nixon, in announcing his nomination of Burger, described the role of the Chief Justice as "guardian of the Constitution." Burger's reputation as a man opposed to such judicial activism as that which has characterized the Warren Court appeared to qualify him to lead the more conservative Court which Mr. Nixon envisioned.

Burger, a native of Minnesota where he worked his way through law school and practiced law for more than 20 years, was Assistant Attorney General in charge of the Civil Division of the Justice Department (1953-56) serving under Attorneys General Herbert Brownell and William P. Rogers. President Eisenhower in 1956 appointed Burger to the D.C. Court of Appeals.

In the wake of the resignation of Associate Justice Abe Fortas amid controversy concerning the propriety of his extra-judicial activities, President Nixon emphasized that Burger was a man "above all, qualified (for the post of Chief Justice) because of his unquestioned integrity throughout his private and public life."

Sen. James O. Eastland (D Miss.), chairman of the Senate Judiciary Committee, announced May 21 that the Committee would hold hearings in early June on Burger's nomination.

Senate Majority Leader Mike Mansfield (D Mont.) May 18 said that the Senate had previously been "derelict in not scrutinizing more carefully the nominations for the high court." He indicated that a more searching Senate scrutiny would be directed at the nominations for Supreme Court appointments which President Nixon sent to the Senate. He said that the Senate would make its own "extensive" investigation into the background of nominees.

Retiring Chief Justice Earl Warren has served in that seat for 16 years, five years more than any other Chief Justice appointed in the 20th century. Chief Justices appointed in this century have served an average of ten years, barely half the average 20-year term of Chief Justices appointed in the 19th century.

Presidents Taft, Harding, Hoover, Roosevelt, Truman and Eisenhower each named a Chief Justice. President Johnson sent the nomination of Associate Justice Abe Fortas to the Senate for confirmation as successor to Chief Justice Warren, but was forced by Senate opposition to withdraw the nomination. *(1968 Almanac p. 531)*

Twentieth Century Chief Justices. President Taft in 1910 elevated Associate Justice Edward D. White to the Chief Justice's seat. White thus became the first Associate Justice to ascend to the leadership of the Court. President Washington had attempted to name an Associate Justice, John Rutledge, as Chief Justice in 1795, but the Senate had rejected such a nomination.

Eleven years later Taft himself became Chief Justice, named by President Warren G. Harding in 1921. Harding's Secretary of State, Charles Evans Hughes, a former Associate Justice of the Court, had been considered for the post, but had made it plain that he would not only decline the offer but also resign as Secretary of State if it were made.

Hughes, an Associate Justice from 1910 until 1916, resigned to run unsuccessfully for President. He became Chief Justice in 1930, appointed by President Hoover to succeed Taft.

President Roosevelt, in choosing Hughes' successor in 1941, followed the precedent set by Taft in 1910, and elevated an Associate Justice, Harlan F. Stone, to the post of Chief Justice. Stone, a former Attorney General, had been appointed to the Court by President Coolidge in 1925.

Truman chose his Secretary of the Treasury, Fred M. Vinson, to become Chief Justice succeeding Stone in 1946. President Eisenhower in 1953 appointed the popular Governor of California, Earl Warren, to lead the Court.

Early Chief Justices. The Supreme Court in 1969 is quite a different institution from that described in 1789 as "the weakest of the three departments of power." That description, from *The Federalist,* was written by Alexander Hamilton, James Madison, and the man who was to become the first Chief Justice, John Jay.

Hamilton further described the Court as having "neither force nor will but merely judgment" with "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society" and unable to take any positive action.

John Jay, the first Chief Justice, served for five years —one of which he spent in England on a diplomatic mission. He resigned to become governor of New York, an

Nixon Beliefs on the Court

President Nixon over the past year or so has set forth his philosophy on Supreme Court appointments, their qualifications and the role of the Court.

Appointments. "The President cannot and should not control the decisions of the Supreme Court. On the other hand, the President does have some effect on the future of the Court because of his prerogative to appoint its members. In addition to getting an extremely qualified man, there are two important things I would consider in selecting a replacement to the Court. First, since I believe in a strict interpretation of the Supreme Court's role, I would appoint a man of similar philosophical persuasion. Second, recent Court decisions have tended to weaken the peace forces as against the criminal forces, in this country. I would, therefore, want to select a man who was thoroughly experienced and versed in the criminal laws and its problems."—*May 8, 1968.*

Qualifications. "...great knowledge in the field of criminal justice and an understanding of the role some of the decisions of the High Court have played in weakening the peace forces in our society in recent years.

"...strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social and political viewpoints upon the American people."—*November 2, 1968.*

Court's Role. "The question is whether a judge in the Supreme Court should consider it his function to interpret the law or to make the law. Now it is true that every decision to some extent makes law; however, under our Constitution the true responsibility for executing the law is with the Executive and the responsibility for interpreting the law resides in the Supreme Court. I believe in a strict interpretation of the Supreme Court's functions. In essence this means I believe we need a Court which looks upon its function as being that of interpretation rather than of breaking through into new areas that are really the prerogative of the Congress of the United States."—*July 7, 1968.*

office for which he had twice run while on the bench. He was offered the Chief Justiceship again by John Adams late in 1800. He declined, saying the Court lacked "the energy, weight and dignity" needed to play an effective role in the national government.

President Adams, rebuffed by Jay, named his Secretary of State, John Marshall, as Chief Justice. Although a man with little formal legal training, Marshall, during his 34-year term, did more than any other person in the history of the Court to make it a powerful institution and a weighty third branch of the government.

Roger Taney, former U.S. Attorney General, acting Secretary of War, and interim Secretary of the Treasury, whose nomination to that post was rejected by the Senate, was nominated by President Jackson for the post of Associate Justice in 1835. The Senate postponed approval; and late in the year, after the death of Chief Justice Marshall, Jackson sent up Taney's name for Chief Justice. The Senate confirmed the nomination, and Taney became Chief Justice for the stormy pre-Civil War and Civil War years.

Lincoln appointed Salmon P. Chase, Secretary of the Treasury and possible Republican opponent for the 1864 Presidential nomination, to the post of Chief Justice in 1864. Chase died in 1873, and President Grant sent two unsuccessful nominations to the Senate before gaining approval of a successor to Chase. The unsuccessful nominations, which Grant withdrew when Senate rejection of them was imminent, were those of George H. Williams, Attorney General, former Senator and author of the Military Reconstruction Bill, and Caleb Cushing, diplomat and former Attorney General. Morrison R. Waite, a man of some diplomatic but no judicial experience, was confirmed unanimously.

In 1888 President Cleveland named Melville W. Fuller Chief Justice. Fuller, a distinguished lawyer, had declined a high diplomatic position and the post of Solicitor General before accepting the Chief Justiceship. He served for 22 years, until his death in 1910.

Warren Court Record

The Warren Court probably has been the most activist and controversial one in the nation's history.

Liberalism and willingness to deal with questions previously untouched by the Highest Court, and traditionally the domain only of Congress or the Presidency, have made the Warren Court a target of unrelenting criticism.

The Court in recent years has ventured into the touchy areas of racial discrimination, religion, rights of the accused and political redistricting. As such, the Court has become a catalyst for social and political change.

The first year Earl Warren was Chief Justice of the United States, the Court handed down its unanimous landmark decision *(Brown v. Board of Education of Topeka, 1954)* reversing the long-held "separate but equal" doctrine and declaring that racially segregated schools were unconstitutional and "inherently unequal."

This was followed in 1955 by the second *Brown* decision which advised local school officials to proceed "with all deliberate speed" to end segregated school systems.

School segregation was only the first of a series of civil rights controversies with which the Supreme Court has dealt.

In several voting rights cases, the Court declared unconstitutional the drawing of political districts along racial lines *(Gomillion v. Lightfoot, 1960)*, the requirement that a candidate's race be noted on a ballot *(Anderson v. Martin, 1964)* and poll taxes in state elections *(Harper v. Virginia State Board of Elections, 1966)*.

The Court in 1967 struck down state antimiscegenation laws *(Loving v. Virginia)* and in 1968 held that a century-old Civil Rights Act (1866) banned all racial discrimination, public or private, in the sale or rental of property *(Jones v. Mayer)*.

Criminal Due Process. The Warren Court outlined, in a series of rulings, the rights of persons accused or suspected of crimes, and restricted law enforcement offi-

cers to what it determined to be constitutional methods of obtaining evidence against the accused.

The Court declared that states must supply indigent defendants with counsel *(Gideon v. Wainwright, 1963),* that juvenile offenders had the same basic constitutional rights as adult defendants *(In re Gault, 1967)* and that the right of jury trial extended to trials in state courts *(Duncan v. Louisiana, 1968.)*

The Court reversed the rule allowing evidence obtained by state officers in an illegal search to be admitted in federal court, holding that no evidence obtained by such search was admissible. *(Elkins v. U.S. 1960).*

The Court in 1967 overturned a rule which had stood since 1928. It held that electronic eavesdropping or wiretapping, even that involving no physical trespass, constituted "search and seizure" and must be authorized by a warrant *(Katz v. U.S.)*

In 1969 the Court held that, if illegal surveillance had occurred, defendants with standing to object must be allowed to examine the entire record of such surveillance without any preliminary screening of that record *(Alderman and Alderisio v. U.S.; Butenko v. U.S.; Ivanov v. U.S. 1969-*

Perhaps the Court's most widely controversial recent decisions were those *(Escobedo v. Illinois, 1964* and *Miranda v. Arizona, 1966)* holding that police must—before interrogating a suspect—advise him that any statement he makes might be used against him, advise him of his rights to counsel, and to remain silent.

President Nixon has spoken in criticism of these decisions as "seriously hamstringing the peace forces in our society and strengthening the criminal forces." These controversial decisions were made by a closely divided Court, with Chief Justice Warren, and Justices Black, Goldberg, Douglas and Brennan in the majority on *Escobedo,* opposed by Justices White, Stewart, Harlan and Clark; and with the *Miranda* decision placing Chief Justice Warren, Justices Black, Douglas, Brennan and Fortas in the majority, opposed by the same dissenters.

Prayers and Votes. The sensitive areas of political districting and religion also have come under the purview of the Warren Court, in both instances engendering strong reaction from Congress and the public.

The Court *(Baker v. Carr)* in 1962 reversed a statement by the Court two decades earlier—that legislative apportionment was of "a peculiarly political nature and therefore not meet for judicial determination,"—and ruled that federal courts could review that question.

A number of important decisions followed *Baker v. Carr:* the rule of "one man, one vote" was set forth *(Gray v. Sanders,* 1964; *Kirkpatrick v. Preisler* and *Wells v. Rockefeller,* 1969) and state legislative *(Reynolds v. Sims,* 1964) districts.

In the case of *Engel v. Vitale* (1962) the Court declared that state officials could not require that an official prayer be recited in public schools. This ruling was amplified the following year by the Court's decision *(Abington Township School District v. Schempp,* 1963) that the state could not order recitation of the Lord's Prayer and Bible reading in public schools without violating the "establishment of religion" clause of the 1st Amendment, applied to the states by the 14th Amendment.

Current Supreme Court

Chief Justice Earl Warren of California, 78, took his seat Oct. 5, 1953.

Associate Justices:

Hugo L. Black of Alabama, 83, took his seat Oct. 4, 1937.

William O. Douglas of Connecticut, 70, took his seat April 17, 1939.

John Marshall Harlan of New York, 70, took his seat March 28, 1955.

William J. Brennan Jr. of New Jersey, 63, took his seat Oct 16, 1956 on a recess appointment and again on March 22, 1957.

Potter Stewart of Ohio, 54, took his seat May 15, 1959.

Byron R. White of Colorado, 51, took his seat April 16, 1962.

Thurgood Marshall of New York, 60, took his seat, Oct. 2, 1967.

Landmark Warren Court Decisions

CIVIL RIGHTS

School Desegregation

Brown v. Board of Education of Topeka (1954), unanimous:

"Separate educational facilities" for white and Negro pupils were "inherently unequal" in denial of the equal protection of the laws guaranteed by the 14th Amendment.

Brown v. Board of Education (1955), unanimous:

Local school officials must move "with all deliberate speed" to end segregation in public schools.

Griffin v. Prince Edward County School Board (1964), 7-2:

There had been "entirely too much deliberation and not enough speed" in school desegregation. The closing of schools to avoid desegregation was unconstitutional in violation of the equal protection clause of the 14th Amendment.

Voting Rights

Gomillion v. Lightfoot (1960), unanimous:

Political redistricting along racial lines violated the 15th Amendment.

Anderson v. Martin (1964), unanimous:

A state requirement that candidates' race be noted on ballot violated the equal protection clause of the 14th Amendment.

Harper v. Virginia State Board of Elections (1966), 6-3:

Poll taxes in state elections were unconstitutional in violation of the 14th Amendment.

Other Rights

Burton v. Wilmington Parking Authority (1961), 6-3:

Discrimination by person leasing business property from state was unconstitutional.

Peterson v. Greenville (1963), unanimous:

Private segregation practices under a city ordinance or city executive requiring segregation constituted unconstitutional state action.

Loving v. Virginia (1967), 9-0:

State law forbidding interracial marriage violated equal protection and due process clauses of the 14th Amendment.

Jones v. Mayer (1968), 7-2:

The Civil Rights Act of 1866 prohibited all racial discrimination, private or public, in the sale or rental of property.

CRIMINAL DUE PROCESS

Elkins v. U.S. (1960), 5-4:

Evidence obtained during any illegal search was not admissible in federal courts.

Robinson v. California (1962), 6-2:

States cannot make drug addiction a crime without violating the 8th and 14th Amendments.

Gideon v. Wainwright (1963), unanimous:

States must supply defense counsel to indigent defendants, even in non-capital cases.

The Chief Justices

Chief Justice	Term	Appointed by
John Jay	1789-95	Washington
John Rutledge [1]	1795	Washington
Oliver Ellsworth	1796-1800	Washington
John Marshall	1801-35	Adams
Roger B. Taney	1836-64	Jackson
Salmon P. Chase	1864-73	Lincoln
Morrison R. Waite [2]	1874-88	Grant
Melville W. Fuller	1888-1910	Cleveland
Edward D. White [3]	1910-21	Taft
William H. Taft	1921-30	Harding
Charles E. Hughes [4]	1930-41	Hoover
Harlan F. Stone [5]	1941-46	Roosevelt
Fred M. Vinson	1946-53	Truman
Earl Warren	1953-69	Eisenhower

[1] *Rutledge, appointed one of the original Associate Justices in 1789, received a recess appointment as Chief Justice in 1795 to succeed Jay, who had resigned to become an ambassador. Late in 1795 the Senate rejected his appointment.*

[2] *Morrison R. Waite was named Chief Justice after Grant had withdrawn two previous nominations for Salmon P. Chase's successor.*

[3] *Edward D. White, appointed an Associate Justice in 1894 by Cleveland, became Chief Justice after 16 years on the Court, the first man to be so elevated from the Court bench itself and approved by the Senate.*

[4] *Charles Evans Hughes, an Associate Justice appointed in 1910 by Taft, left the Court in 1916 to run unsuccessfully for President, later became Secretary of State, and returned to the Court in 1930 as Chief Justice.*

[5] *Harlan F. Stone, appointed an Associate Justice in 1925 by Coolidge, was named Chief Justice in 1941.*

Escobedo v. Illinois (1964), 5-4:

An accusatorial investigation by police—without allowing the defendant counsel and advising defendant of his right to remain silent—was unconstitutional.

Miranda v. Arizona (1966), 5-4:

Police must advise suspect that any statement he made might be used against him, that he had the right to remain silent and to have a lawyer present before police could conduct an interrogation to obtain a statement admissible in evidence.

In Re Gault (1967), 8-1:

Basic constitutional rights under the 5th and 6th Amendments applied to juvenile, as well as adult, offenders.

Katz v. U.S. (1967), 7-1:

Conversations could be seized by a wiretap constituting a "search and seizure" referred to by the 4th Amendment. Police must obtain a warrant before using electronic surveillance, even if no physical trespass was involved.

Duncan v. Louisiana (1968), 7-2:

The 14th Amendment extended the right to trial by jury to states in all cases in which federal courts would grant the right to jury trial.

Terry v. Ohio (1968), 8-1:

On reasonable suspicion but without probable cause for arrest, police officers may detain a citizen briefly on the street and search him for weapons.

Alderman and Alderisio v. U.S.; Butenko v. U.S.; Ivanov v. U.S. (1969), 5-3:

Defendant with standing to object may examine entire record of illegal electronic surveillance without preliminary screening of record by judge.

REAPPORTIONMENT AND REDISTRICTING

Baker v. Carr (1963), 6-2:

The question of apportionment could be reviewed by federal courts. State failure to reapportion seats in state legislature to correspond to population shifts constituted denial of equal protection of the law.

Gray v. Sanders (1963), 8-1:

Political equality meant "one man, one vote."

Wesberry v. Sanders (1964), 6-3:

The "one man, one vote" rule applied to Congressional districts. States must realign Congressional districts to have "as nearly as practicable" equal populations.

Reynolds v. Simms (1964), 8-1:

The "one man, one vote" rule applied to state legislative districts.

Kirkpatrick v. Preisler; Wells v. Rockefeller (1969), 6-3:

States must strive to create Congressional districts with precisely equal populations. Any variance from the mathematical average must be justified by the state.

SCHOOL PRAYER

Engel v. Vitale (1962), 6-1:

State officials may not require that an official prayer be recited in public schools.

Abington Township School District v. Schempp (1963), 8-1:

State-ordered recitation of the Lord's Prayer and Bible reading in public schools violated the "establishment of religion" clause of the 1st Amendment which the 14th Amendment extended to the states.

Supreme Court

"Perhaps chief among these other purposes was a desire to avoid extinguishing the male line of a family by facilitating the death in action of its only surviving son," the court said.

NY TIMES, 5/27/69, Washington dateline:

The Supreme Court ruled unanimously today that states may collect sales and use taxes from servicemen, even if they are permanent residents of other states.

In an opinion by Justice Potter Stewart, the Court overturned a lower court decision that state officials had said would play havoc with state tax-collecting systems.

Thirty-five other states joined Connecticut in protesting to the Supreme Court after the United States Court of Appeals for the Second Circuit upheld a Federal District Court's ruling that Connecticut could not collect its 3.5 percent tax on sales and use of personal property.

The lower courts held that the Soldiers' and Sailors' Civil Relief Act, a Federal measure passed for the benefit of servicemen during World War II, prevented the enforcement of the tax. The relief law bars states from collecting taxes on the incomes and personal property of out-of-state servicemen, but is silent on the subject of sales and use taxes....

...

The Supreme Court reasoned that the relief act was intended to spare servicemen from double taxation, a threat that does not exist with sales taxes as it does with ad valorem taxes on personal property. Justice Stewart concluded that Congress would have specifically mentioned sales and use taxes if it had intended to include them in the reach of the law.

NY TIMES, 5/27/69, edit.:

Disclosure that the Internal Revenue Service has been conducting prolonged investigation of the financial dealings of the Parvin Foundation underscores the unwisdom of Justice William O. Douglas's original involvement in the foundation's work.

In a letter to Mr. Parvin which was described in this newspaper yesterday, Justice Douglas expressed the belief that the failure to conclude the investigation which began nearly three years ago represented an effort "to get me off the Court." Since the I.R.S. would have no bureaucratic motive of its own, this is presumably an allusion to the Nixon Administration. While his resignation as the paid president of the Parvin Foundation ends this unseemly chapter in his career, Justice Douglas, in fairness to himself, to the Supreme Court, and to the public, ought to draw the correct inferences from this episode.

Although he has many critics because of his sometimes extreme dissenting views and because of his rather cavalier style as a judge, he also has many admirers who respect his incisive mind and very considerable legal talents. Whatever may be the wishes or intentions of his enemies, the substance of Justice Douglas's work on the Court is not the issue. The issue is his unjudicial behavior in involving himself and the good name of the Court with a private businessman whose own background and associations could at best only be described as embarrassing.

The same objection would lie against his involvement with a foundation even if its source of funds were above reproach. Some highly respected and prestigious foundations can also be quite controversial because of the nature of their grants and projects. The only wise rule for Justice Douglas and his fellow judges at every level of the judiciary is to keep clear of any outside involvements....

From the Office of
REP. TOM RAILSBACK
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(202) 225-5906
Contact: John Burnett
May 26, 1969

Supreme Court

139-69

FOR IMMEDIATE RELEASE

SPEECH OF REP. TOM RAILSBACK, R-ILL., DELIVERED ON THE HOUSE FLOOR 5/26/69

Mr. Speaker, serving on the nation's highest court is not and never can be a part-time job. And yet, it apparently is considered just that by some of the men who sit on the Supreme Court. We hear a lot of talk about requiring judges to make a full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for services performed which necessarily detract from their judicial duties.

The resignation of Justice Fortas because of his financial dealings with convicted stock market manipulator Louis Wolfson; the $12,000 annual payment to Justice Willian O. Douglas by the Albert Parvin Foundation, which had dealings with the Las Vegas gambling industry; and now the revelation that President Nixon's choice for Chief Justice--Warren Burger--has been paid $6,000 by the philanthropic Mayo Foundation as a trustee, demand an urgent change in the laws on the federal judiciary.

Mr. Burger's nomination by the President is a good one. I am not commenting on the interests of this able jurist with this worthy organization--a foundation devoted exclusively to the advancement of medical technology. The President, in his nationally televised statement, said Burger was a man of "unquestioned loyalty." I concur in this.

But, the fact remains that at least two justices before him, namely Fortas and Douglas, have received substantial amounts of outside income for outside work while serving on the Supreme Court, thereby making their duties on the bench part-time responsibilities.

A few days ago, I called upon Emanuel Celler, Chairman of the Judiciary Committee on which I serve, to begin public investigations into the financial dealings

- MORE -

of not only Fortas and Douglas but of other federal judges as well.

As I said in my letter to the Chairman:

"My request is not based on wanting to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources" so that definitive legislation might result in correcting future improprieties.

The inquiry is not a witch hunt. It is to be a constructive investigation aimed at determining the need for legislation which may require federal judges to reveal outside financial interests, whether in the nature of honorariums, consultant fees or other remuneration; indeed, the result of our inquiry may be to prohibit entirely payment for work that is not directly related to a judge's responsibilities on the federal bench.

I am well aware of the meeting called June 10 of the U. S. Judicial Conference to consider financial disclosure rules. It is my opinion that not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever. They should, however, be able to receive out-of-pocket expenses for lecturing, writing, etc. The money which goes into their pockets should end there. This would take away any initiative for them to go gallavanting around the country to subsidize their judicial income.

Members of the federal judiciary and indeed members of the Congress are being looked at by the public with a critical eye. The opinion by many of many government is already jaundiced by the Fortas Affair, by the Douglas matter, and by the sometimes rather disparaging view of "those politicians in Washington."

Let us define the nebulous guidelines of judicial conduct so that there can be no opportunity for "impropriety" in the judiciary, much less any question about conflict of interests.

From the Office of
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Contact: John Burnett

140-69

May 26, 1969

FOR IMMEDIATE RELEASE

Rep. Tom Railsback, R-Ill., a member of the House Judiciary Committee, said today federal officials, including members of the Supreme Court and the Congress, should be prohibited from earning outside income while serving the government.

Railsback, in a speech on the House floor, said it was his opinion "that not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever."

The Illinois Republican May 16 wrote Emanuel Celler, Chairman of the Committee, demanding the panel investigate financial dealings of Justices Fortas and Douglas and other federal judges not "to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources."

"Serving on the nation's highest court is not and can never be a part-time job. And yet, it apparently is considered just that by some of the men who sit on the Supreme Court. We hear a lot of talk about requiring judges to make full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for services performed which necessarily detract from their judicial duties," Railsback said.

- 30 -

From the Office of
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May 28, 1969

Supreme Court (Douglas)

142-69

ADV. FOR AM's WED., JUNE 4, 1969
REP. TOM RAILSBACK, R-ILL., REPORTS FROM WASHINGTON

A few days ago, in a speech on the House floor, I spoke out against apparent judicial impropriety bordering on misconduct by some of the men who sit on the nation's highest tribunal--the Supreme Court.

Serving on the High Court is not and can never be a part-time job. And yet, it apparently is considered just that by at least two of the justices who serve on it. There has been a lot of talk about requiring judges to make full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for performing services which necessarily detract from their judicial duties.

The resignation of Justice Fortas because of his financial dealings with convicted stock market manipulator Louis Wolfson and the $12,000 annual payment to Justice William O. Douglas by the Albert Parvin Foundation, which had dealings with the Las Vegas gambling industry, demand an urgent change in the laws on the federal judiciary.

The case against these two men is clear cut. Both Fortas and Douglas, have received substantial amounts of outside income for outside work while serving on the Supreme Court, thereby making their duties on the bench part-time responsibilities.

I have called upon Emanuel Celler, Chairman of the House Judiciary Committee on which I serve, to begin public investigations into the financial dealings of not only Fortas and Douglas but of other federal judges as well.

I said in my letter to Chairman Celler:

- MORE -

"My request is not based on wanting to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources" so that definitive legislation might result in correcting future improprieties.

The investigation is not to be a witch hunt. It is to be a constructive inquiry aimed at determining the need for legislation which may require federal judges to reveal outside financial interests, whether in the nature of honorariums, consultant fees or any other remuneration. Indeed, the result of our investigation may be to prohibit entirely any payment for work that is not directly related to a judge's responsibilities on the federal bench.

Not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever. They should, however, be able to receive out-of-pocket expenses for lecturing, writing, etc.

The money which goes into their pockets should stop there.

This would take away any initiative for them to go gallavanting around the country to subsidize their judicial income.

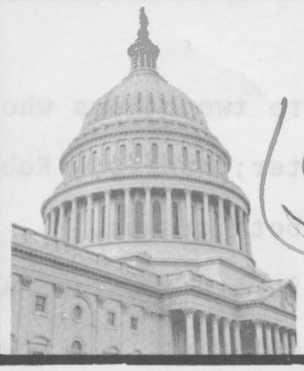
Members of the federal judiciary and indeed, members of the Congress, are being looked at by the public with a critical eye. The opinion by many of many in the government is already jaundiced by the Fortas Affair, by the Douglas matter and by the sometimes rather disparaging view of "those politicians in Washington."

We must set out immediately to define the nebulous guidelines of judicial and congressional conduct so that there can be no opportunity for impropriety in the government--much less any question about conflict of interests.

The taxpayers deserve that much.

Supreme Court

UNITED STATES SENATOR FROM SOUTH CAROLINA



STROM THURMOND reports Douglas TO THE PEOPLE

Major Committee Posts	Armed Services Subcommittees	Judiciary Subcommittees
Armed Services	Preparedness Investigating	Internal Security
Judiciary	Central Intelligence	Immigration-Naturalization
Appropriations (Defense)	NATO Status of Forces	Constitutional Rights
Republican Campaign	Military Construction	Juvenile Delinquency
		Adm. Practice & Procedure
		Constitutional Amendments
		Criminal Laws & Procedure

VOL. XV, NO. 19 JUNE 2, 1969

DOUGLAS IS NEXT

The resignation of Supreme Court Justice William O. Douglas from the Albert Parvin Foundation is only the first step. A sense of propriety demands that he resign from the bench.

In the Fortas case, the American Bar Association has declared that eight separate sections of the canons of judicial ethics were violated. The Douglas case is even more complicated. Among the facts that have a bearing on the conduct of Justice Douglas are the following:

1. Justice Douglas received a total of nearly $85,000 in fees during his tenure as President and Director of the Parvin Foundation. For 1967, the most recent year available, his fee was one-quarter of the Foundation's "charitable" disbursements.

2. The principal assets of the Foundation consisted of a mortgage on a gambling casino in Las Vegas, and stock in a company that owned three other gambling casinos.

3. The Foundation falsified its tax returns for the period 1961-1965, failing to report certain stock manipulations until its tax return for 1966, after the Internal Revenue Service started an investigation.

4. As head of the Foundation, Justice Douglas sanctioned lecture fees of $5,000 each to such politically controversial men as J. Robert Oppenheimer and Teodoro Moscoso.

In addition, we must consider Justice Douglas' political activity with the Center for the Study of Democratic Institutions in Santa Barbara.

1. Justice Douglas is Chairman and Director of the Center.

2. Justice Douglas is paid $500 a day for work with the Center, and in recent months has received $4,000 for two seminars.

3. The Parvin Foundation has given $70,000 to the Center between 1965-1967.

4. Besides Justice Douglas, there are two others who are directors of both the Parvin Foundation and the Center; namely, Robert Hutchins and Harry S. Ashmore (the most active in both groups.)

5. The Center is overtly political in its program, and was host to the founding meeting of the National Conference for New Politics, the Communist-Black Power dominated movement that made nationwide headlines for its revolutionary radicalism. The Center organized the so-called "Pacem In Terris" conferences, designed to seek detente with the Soviet Union. The Center has also been active in encouraging student radicalism, and was credited with devising "a master plan of how best to destroy the American university as it is today," according to the Santa Barbara News-Press.

Thus, for all the talk about so-called "democratic institutions" the work of Justice Douglas in the Parvin Foundation and the Center appears to be a front for gambling enterprises and persons of anti-democratic character. The salary of a Justice and his life-time appointment are supposed to insulate him from social and political movements, as well as from associations of unsavory character. The belated resignation of Justice Douglas from the Foundation does not remove the stigma which he has brought upon the bench.

The most distressing aspect of the Douglas case, as in the Fortas case, is the conviction of the principal participants that there was no impropriety in their actions. Their continued defiance of common standards of decency does not speak well for the judgment of men sitting on the highest court in the land. It is perhaps no coincidence that the Fortas and Douglas cases are intertwined. Albert Parvin, who created the Parvin Foundation, was named by the government as co-conspirator, although not indicted, in the stock manipulations of Louis Wolfson. Carolyn Agger, the wife of Mr. Fortas, was the tax expert who gave a clean bill of health to the Parvin Foundation's tax problems.

No Federal judge, or Justice of the Supreme Court, should be allowed to practice law, serve in a corporation or partnership, or as a trustee or director of a foundation, for any consideration whatsoever, cash or otherwise. Judged by these standards, Justice Douglas is the next one who must go.

Strom Thurmond

Det. News

Fortas in trouble again

A lack of sensitivity

On the basis of the facts revealed to the public to date, it would be unfair to demand that Supreme Court Justice Abe Fortas resign or be impeached because he accepted and kept for 11 months a $20,000 fee from the family of industrialist Louis E. Wolfson. But it would not be unfair to suggest that Justice Fortas provide a better explanation for the incident than he has given up to now.

Life magazine said that the Wolfson Family Foundation, a tax-free charitable organization, paid Fortas $20,000 in January, 1966, three months after he took office, and that the justice paid the money back in December, 1966, three months after Wolfson had been indicted on charges of selling unregistered stock. Wolfson, a former client of Fortas' old law firm, went to jail on the charge last month.

Fortas admitted the foundation had sent him the $20,000, but said the money was offered "in the hope that I would find time and could undertake, consistently with my court obligations, research functions, studies and writings connected with the work of the foundation."

The justice added: "Concluding that I could not undertake the assignment, I returned the fee with my thanks." He also said that at no time since he became justice had he given Wolfson, his family or his associates any legal advice or services, and at no time had he spoken or communicated with any official on Wolfson's behalf.

Well, perhaps not. Yet the magazine said Fortas was a guest at Wolfson's horse-breeding farm near Ocala, Fla., in June, 1966, when the Securities and Exchange Commission's investigation came to public attention. It quoted one former Wolfson associate as saying Fortas "had been at the horse farm to discuss the SEC matter and that it was to be taken care of," and another as stating Wolfson had said Fortas was furious because the SEC "had reneged on a pledge to give the Wolfson group another hearing."

Whether the charges are true in all details, the facts indicate a close relationship between Wolfson and Fortas even after the justice was on the bench. That raises a question as to whether Fortas' conduct was consistent with that expected of an associate justice of the Supreme Court and whether it showed a lack of sensitivity to the canons of judicial ethics of the American Bar Association.

Canon 4 says: "A judge's official conduct should be free from impropriety . . . and his personal behavior, not only upon the bench and in the performance of judicial duties but also in his everyday life, should be beyond reproach."

Canon 24 says: "A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions."

Justice Fortas seems to be in violation of both canons, just as he was in accepting $15,000 raised by a former law partner from former legal clients involved in various dealings with the government in order to conduct a law seminar at the American University Law School.

As we said at the outset, the facts made public to date do not demand his resignation or impeachment but they do call for a better explanation than the one Fortas has provided if he wants to continue on the bench.

Supreme Court

'America Is Not a Repressive Society'

By LEWIS F. POWELL

"The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear."

RICHMOND, Va.—At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit and among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the radical left.

A recent syndicated article by Associated Press writer Bernard Gavzer cited several such persons. According to Prof. Charles Reich of Yale, America "is at the brink of . . . a police state." Prof. Allan Dershowitz of Harvard decries the "contraction of our civil liberties."

The charge of repression is not a rifle shot at occasional aberrations. Rather, it is a sweeping shotgun blast at "the system," which is condemned as systematically repressive of those accused of crime, of minorities, and of the right to dissent.

Examples ritualistically cited are the "plot" against Black Panthers, the indictment of the Berrigans, the forthcoming trial of Angela Davis, and the mass arrests during the Washington Mayday riots.

The purpose of this article is to examine, necessarily in general terms, the basis for the charge of repression.

Is it fact or fiction?

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force: and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are, as charged, part of a system of countenanced repression.

The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in turn no significant threat to individual freedom in this country by law enforcement.

Solicitor General Griswold, former dean of the Harvard Law School and member of the Civil Rights Commission, recently addressed this issue in a talk at the University of Virginia. He stated that there is greater freedom and less repression in America than in any other country.

So much for the general framework of the debate about alleged repression. What are the specific charges?

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the F.B.I. and law enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows. The Department of Justice employs wiretapping in two types of situations: (1) against criminal conduct such as murder, kidnapping, a prior court order issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or F.B.I. agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such Federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted—including several top leaders of organized crime.

The Government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 act left this delicate area to the inherent power of the President.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a President should have this power with respect to internal "enemies." There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence (e.g., bombing of the Capitol) and organized attempts to overthrow the Government.

One of the current myths is that the Department of Justice is usurping new powers. The truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six Presidents.

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Foreign powers, notably the Communist ones, conduct massive espionage and subversive operations against America. They are now aided by leftist radical organizations and their sympathizers in this country. Court-authorized wiretapping requires a prior showing of probable cause and the ultimate disclosure of sources. Public disclosure of this sensitive information would seriously handicap our counterespionage and counter-subversive operations.

As Attorney General John Mitchell has stated, prohibition of electronic surveillance would leave America as the "only nation in the world" unable to engage effectively in a wide area of counterintelligence activities necessary to national security.

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Rather than "repressive criminal justice," our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens.

A corollary to the "fair trial" slander is the charge that radicals are framed and tried for political reasons. This is the worldwide Communist line with respect to Angela Davis. Many Americans repeat this charge against their own country, while raising no voice against standard practice of po-

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The answer to all of this was recently given by former California Chief Justice Roger J. Traynor, who said:

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America has its full share of problems. But significant or systematic government repression of civil liberties is not one of them.

The radical left—expert in such matters—knows the charge of repression is false. It is a cover for leftist-inspired violence and repression. It is also a propaganda line designed to undermine confidence in our free institutions, to brainwash the youth and ultimately to overthrow our democratic system.

It is unfortunate that so many non-radical Americans are taken in by this leftist line. They unwittingly weaken the very institutions of freedom they wish to sustain. They may hasten the day when the heel of repression is a reality—not from the sources now recklessly defamed but from whatever tyranny follows the overthrow of representative government.

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mainly against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit and among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the radical left.

A recent syndicated article by Associated Press writer Bernard Gavzer cited several such persons. According to Prof. Charles Reich of Yale, America "is at the brink of . . . a police state." Prof. Allan Dershowitz of Harvard decries the "contraction of our civil liberties."

The charge of repression is not a rifle shot at occasional aberrations. Rather, it is a sweeping shotgun blast at "the system," which is condemned as systematically repressive of those accused of crime, of minorities, and of the right to dissent.

Examples ritualistically cited are the "plot" against Black Panthers, the indictment of the Berrigans, the forthcoming trial of Angela Davis, and the mass arrests during the Washington Mayday riots.

The purpose of this article is to examine, necessarily in general terms, the basis for the charge of repression.

Is it fact or fiction?

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force: and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are, as charged, part of a system of countenanced repression.

The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in turn no significant threat to individual freedom in this country by law enforcement.

Solicitor General Griswold, former dean of the Harvard Law School and member of the Civil Rights Commission, recently addressed this issue in a talk at the University of Virginia. He stated that there is greater freedom and less repression in America than in any other country.

So much for the general framework of the debate about alleged repression. What are the specific charges?

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the F.B.I. and law enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows. The Department of Justice employs wiretapping in two types of situations: (1) against criminal conduct such as murder, kidnapping, extortion and narcotics offenses, and (2) in national security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be

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wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such Federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted—including several top leaders of organized crime.

The Government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 act left this delicate area to the inherent power of the President.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

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Apparently as a part of a mindless campaign against the F.B.I. several nationally known political leaders have asserted their wires were tapped or that they were otherwise subject to surveillance. These charges received the widest publicity from the news media.

The fact is that not one of these politicians has been able to prove his case. The Justice Department has branded the charges as false.

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The latest outcry against law enforcement was provoked by the mass arrests in Washington on May 3. Some 20,000 demonstrators, pursuant to carefully laid plans, sought to bring the Federal Government to a halt.

This was unlike prior demonstrations in Washington, as the avowed purpose of this one was to shut down the Government. The mob attempted to block main traffic arteries during the early morning rush hours. Violence and property destruction were not insignificant. Some 39 policemen were injured. Indeed, Deputy Attorney General Kleindienst has revealed that the leaders of this attack held prior consultations with North Vietnamese officials in Stockholm.

Yet, because thousands were arrested, the American Civil Liberties Union and other predictable voices cried repression and brutality. The vast majority of those arrested were released, as evidence adequate to convict a particular individual is almost impossible to obtain in a faceless mob.

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The only abridgment of free speech in this country is not by government. Rather, it comes from the radical left—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves.

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The radical left, with wide support from the customary camp followers, also is propagandizing the case of the Berrigans.

The guilt or innocence of these people remains to be determined by juries of their peers in public trials. But the crimes charged are hardly "political." In the Davis case a judge and three others were brutally murdered. The Berrigans, one of whom stands convicted of destroying draft records, are charged with plots to bomb and kidnap.

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Lewis F. Powell, former president of the American Bar Association and one of President Nixon's nominees to the Supreme Court, wrote this article for the Aug. 1 editions of The Times-Dispatch of Richmond, Va.

Supreme Court

Rehnquist's Statements Indicate He Would Be an Activist Pressing Conservative Views

By FRED P. GRAHAM
Special to The New York Times

WASHINGTON, Nov. 2—The writings of William H. Rehnquist, encased in two thick binders and lodged by him last weekend with the Senate Judiciary Committee, show that President Nixon's nominee to the Supreme Court is an unvarying conservative who believes that Justices invariably write their own views into the Constituion.

To those who have pored over Mr. Rehnquist's speeches, articiles and statements, it has become apparent that if Mr. Rehnquist is seated and if he follows his present philosophy, he will be an extremely conservative Justice — but in a markedly different way from the conservatives of the Court's recent past.

Hearings on Mr. Rehnquist, a 47-year-old Assistant Attorney General, and President Nixon's other nominee, Lewis F. Powell Jr., a 64-year-old Richmond lawyer, will begin tomorrow morning, with the interrogation of Mr. Rehnquist first. His nomination has drawn more criticism because of his strong conservative positions than has the nomination of Mr. Powell. But neither nomination appears to be in serious trouble.

Believing as he does that the personal philosophies of Justices will be reflected in their decisions, Mr. Rehnquist has written that the Senate should "thoroughly inform itself of the judicial philosophy of a Supreme Court nominee before voting to confirm him." Liberal Senators have already said that they agree with this view and will question him closely.

Differs From Frankfurter

In recent years, the leading lights of the Supreme Court conservatism were Felix Frankfurter and John M. Harlan.

They frequently complained that the Court headed by former Chief Justice Earl Warren was too quick to write the liberal ideas of the Justices into the Constitution.. They called for stricter adherence to *stare decisis*, the doctrine that prior decisions should be followed.

When Mr. Nixon has praised strict constructionist judges he has often cited Justice Frankfurter as the example to be followed.

By these lights, Mr. Rehnquist, according to his own statements, is far from a strict constructionist. Instead, he is the type of judicial activist that Justice Waren was—except that Mr. Rehnquist believes that it is time to read conservative rather than liberal meanings into the Constitution.

"Nor is the law of the Constitution just 'there,' waiting to be applied in the same sense that an inferior court may

Council was considering an ordinance in 1964 to make all establishments serve everyone regardless of race or national origin, Mr. Rehnquist opposed it in the name of individual liberty. Mr. Rehnquist, then a lawyer in Phoenix, wrote in a pubished letter: "To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional freedom."

¶When there was a move to eradicate "de facto" segregation in the Phoenix schools, he opposed it on the following grounds: "We are no more dedicated to an 'integrated' society than we are to a desegrated' society. We are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

¶When some Federal employes began to sign statements criticizing United States policies in iVietnam, Mr. Rehnquist told the Federal Bar Association that the employes could lose their jobs. "The Government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employes even though that same Government as a sovereign has no similar constitutionally valid claim to limit dissent on the part of its citizens," he said in a speech.

¶In a speech on young protesters' resort to civil disobedience to dramatize their opposition to Government policy, Mr. Rehnquist told the Newark Kiwanis Club, "In the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. If force or the threat of force is required to enforce the law, we must not shirk from its employment."

¶In speeches and Congressional testimony, Mr. Rehnquist argued that the courts could play no role in shielding individuals from surveillance from Government agents. He said that citizens would be protected by top officials in the executive branch or by Congress from errant or overzealous surveillance, and that allowing aggrieved subjects of surveillance to go to court "would balance the scale too far against the interests of proper law enforcement." He argued that organized criminals and subversives would abuse such court procedures to expose the Government's surveillance efforts.

¶Reacting to the criticisms that during the Mayday protests in the District of Columbia many individuals had been swept into the police mass-arrest net and held without opportunity to make bail, Mr. Rehnquist replied that an undeclared "qualified martial law" had existed. Police officials, he said, "have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges against them."

Throughout the writings there are only a few references to the Bill of Rights, and some liberals on the Judiciary Committee have served notice that they will qeustion Mr. Rehnquist closely tomorrow as to his apparent tendency to see governmental needs in sharper focus than personal rights.

Mr. Rehnquist and Mr. Powell furnished material to the committee after liberal members asked them to submit their public statements. There have been no indications of opposition to Mr. Powell by any organizations.

Today the Leadership Conference on Civil Rights, a coalition of civil rights, liberal and labor groups, announced that it would oppose Mr. Rehnquist, but not Mr. Powell.

However, most of the mail that has been received by the Judiciary Committee has been favorable to both nominees.

match precedents," Mr. Rehnquist wrote in the Harvard Law Record in 1969. He continued:

"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 judicial lawmaking—the 'due process of law' and 'equal protection of the laws' clauses—are about the vaguest and most general of any in the instrument.

"It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for 175 years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases 'due process of law' or 'equal protection of the laws,' then men sympathetic to such desires must sit upon the high court."

Critical of Newspaper

In 1959, Mr. Rehnquist wrote a letter that revealed what "different interpretation" he had in mind—"a judicial philosophy which consistently applied would reach a conservative result."

And after the Senate rejected the nomination of G. Harrold Carswell, Mr. Rehnquist wrote The Washington Post, taking issue with its editorial opinion that Mr. Carswell's conservative views on civil rights had made him unsuitable for the Supreme Court.

Mr. Rehnquist wrote: "Your editorial clearly implies that to the extent the judge [Carswell] falls short of your civil rights standards, he does so because of anti-Negro, anti-civil rights animus, rather than because of a judicial philosophy which consistently applied would reach a conservative result both in civil rights cases and other areas of the law."

What The Washington Post really wanted, Mr. Rehnquist added, was a "restoration of the Warren Court's liberal majority," which he said would have the result of "not merely further expansion of constitutional recognition of civil rights, but further expansion of the constitutional rights of criminal defendants, or pornographers and of demonstrators."

It is this threat, which runs through all of Mr. Rehnquist's writings, that has stirred the opposition of Americans for Democratic Action and various civil rights groups.

Mr. Rehnquist's judicial philosophy has twice prompted him to oppose civil rights measures, on the ground that the Government should not limit the freedom of individuals in order to promote racial integration. But when the issue at stake has been the Government's efforts to regulate society and preserve order, he has invariably concluded that individual rights must give way. For example: When the Phoenix City

REMAKING THE SUPREME COURT

Nixon Sets a Pattern

President Nixon's Court choices were a surprise in one way—their identities were unpredicted. Their judicial philosophy, however, was no surprise. Now if they clear the Senate, it will be a "Nixon Court," dominated by "conservatives."

A pattern now has been firmly set for the kind of Supreme Court that President Nixon thinks this country needs.

The President, on October 21, nominated two men he described as "judicial conservatives" to fill the two recently created vacancies on the Court.

If those nominees are confirmed by the Senate—and follow Mr. Nixon's "judicial philosophy," as he obviously expects—then the Supreme Court will have a clear "conservative" majority for the first time in many years, and probably for many years to come.

Nominated by the President were:

• Lewis F. Powell, Jr., 64, a former president of the American Bar Association who has practiced law in Richmond, Va., since 1931.

• William H. Rehnquist, 47, a former Phoenix, Ariz., lawyer who has been Assistant U. S. Attorney General since January, 1969.

Surprise choices. Both names, announced in a nationwide radio and television broadcast, came as surprises to almost everyone. Their names had not been among those sent previously to the American Bar Association for evaluation.

Both, however, were expected—on the basis of early reaction—to win Senate approval without a serious fight.

President Nixon had previously lost two battles in attempts to win Senate confirmation of Clement F. Haynsworth, Jr., and G. Harrold Carswell. And yet another confirmation battle had appeared to be shaping up.

On October 20, a report leaked out that the American Bar Association's evaluation committee had refused to endorse as "qualified" two persons who had figured most prominently in speculation about the President's likely choices. They were Herschel H. Friday, a Little Rock, Ark., lawyer, and Mrs. Mildred L. Lillie, a judge of a California court of appeals.

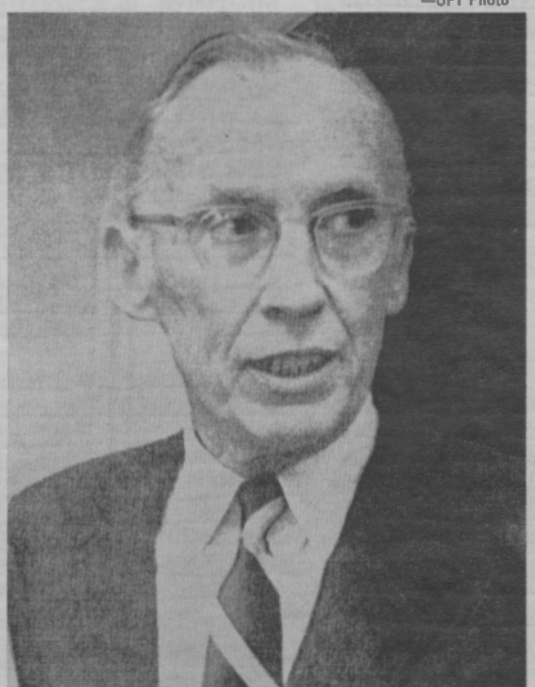
Only 24 hours after that report, Mr. Nixon not only chose two names not on the ABA list but also his Attorney Gen-

(continued on next page)

Chosen for Court: A Southern lawyer, an Assistant Attorney General

Lewis F. Powell, Jr.

—UPI Photo



William H. Rehnquist

—USN&WR Photo

REMAKING THE COURT

[continued from preceding page]

eral, John Mitchell, notified the ABA that the President was abandoning the whole procedure of seeking advance ABA clearance of prospective nominees. Wrote Mr. Mitchell:

"Premature publication of information relating to our exchanges can cause a number of unfortunate side effects, and it can be particularly unfair to a person whose name may have been referred to your committee but who may not be nominated to the Court."

And, he added, the October 20 leak made it clear that "there is no practical way to avoid" such premature and "unauthorized" disclosures.

This Administration was the first in history to make a policy of seeking advance clearance by the ABA, under an agreement made only last year. Traditionally, ABA opinion is sought later by the Senate—if at all.

The vacancies to be filled by the new nominees were caused by the September resignations of Justice Hugo L. Black, who died soon after resigning, and Justice John M. Harlan, who is ill with cancer.

Pressure on Senate. The Supreme Court was forced to open its new term in early October with only seven members, and arguments of several important cases had been postponed until the Court could be restored to its full membership.

Pressure will be put on the Senate to act swiftly on the new nominations to speed the Court's work.

When the new Justices are seated, Mr. Nixon will have named four of the nine Court members—more than any other President since George Washington has appointed in so brief a time in office. President Franklin D. Roosevelt appointed eight justices in his more than 12 years in the White House, and President Dwight Eisenhower named five in his eight-year tenure.

Mr. Powell, if confirmed, will be the only Southerner on the Court, filling the traditional "Southern seat" vacated by Mr. Black. Still empty is the traditional "Jewish seat" that was last held by Abe Fortas, who resigned in 1969.

Also still unrepresented on the Court will be women. President Nixon had hinted that he was considering nominating a woman to the Court, and names of two women had been reported among those given the ABA for evaluation. But when the showdown came, Mr. Nixon named men, as usual.

Of the men he nominated, the President said:

"In the debate over the confirmation . . . I would imagine that it may be charged that they are conservatives.

"This is true, but only in a judicial, not a political sense.

"You will recall, I am sure, that during my campaign for the Presidency, I pledged to nominate to the Supreme Court individuals who shared my judicial philosophy, which is basically a conservative philosophy."

Defining his philosophy, the President commented:

"It is my belief that it is the duty of a judge to interpret the Constitution and not to place himself above the Constitution or outside the Constitution.

"He should not twist or bend the Constitution in order to perpetuate his personal political and social views."

"Delicate balance." In another clear slap at the Supreme Court that was headed by former Chief Justice Earl Warren, President Nixon also said this:

"As a judicial conservative, I believe some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society. In maintaining, as it must be maintained, the delicate balance between the rights of society and defendants accused of crimes, I believe the peace forces must not be denied the legal tools they need to protect the innocent from criminal elements.

"And I believe we can strengthen the hand of the peace forces without compromising our precious principle that the rights of individuals accused of crimes must always be protected.

"It is with these criteria in mind that I have selected the two men whose names I will send to the Senate."

On the Court, Mr. Powell and Mr. Rehnquist would join two other "judicial conservatives" appointed by President Nixon—Chief Justice Warren E. Burger and Justice Harry A. Blackmun. Usually voting with those two in recent decisions were Justices Potter Stewart and Byron R. White.

The so-called "liberal activist" bloc which once dominated the Court is now reduced to three—Justices William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall.

What many court observers foresee as a result of the Nixon choices are these changes in the Court:

- Less tendency to act as an instrument of social change.
- A lessening of Supreme Court power in relation to the other branches of the Government, because "conservative" Courts generally defer more to the other two branches and to States—leaving them more leeway to work out their own problems.
- A somewhat harder line in criminal cases, with more emphasis on establishing guilt or innocence—and less on procedural questions.
- More firmness against those who commit violence in mass demonstrations.

Remarks on record. Those expectations are based on the nominees' records.

Mr. Powell, in a recent article which first appeared in "The Richmond Times-Dispatch," made such statements as:

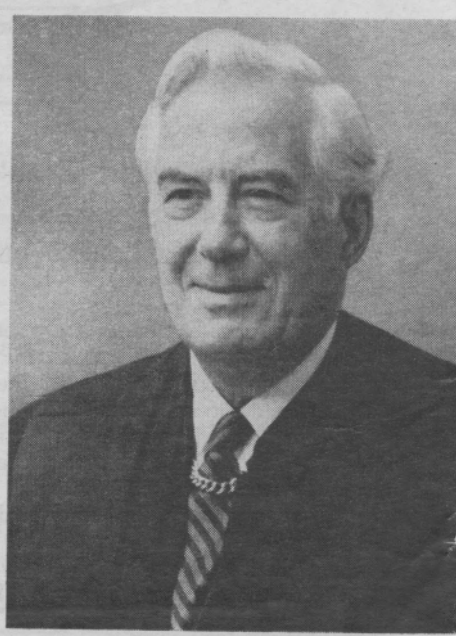
"In recent years, dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. . . .

"Rather than 'repressive criminal justice,' our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens. . . .

"The radical left—expert in such matters—knows the charge of repression is false. It is a cover for leftist-inspired violence and repression. It is also a propaganda line designed to undermine confidence in our free institutions, to brainwash the youth, and ultimately to overthrow our democratic system."

In a 1967 speech published by "U. S. News & World Report," Mr. Powell

Present court split: Justices Burger, Blackmun, Stewart and White often opposing Justices Douglas, Brennan and Marshall.



Chief Justice Warren E. Burger

William O. Douglas

William J. Brennan, Jr.

Potter Stewart

Byron R. White

Thurgood Marshall

—USN&WR Photos

Harry A. Blackmun

warned of the dangers of massive "civil disobedience" as fostering a trend "toward organized lawlessness and even rebellion."

Mr. Powell was born Sept. 19, 1907, in Suffolk, Va. He studied at Washington and Lee University and Harvard Law School, then began a practice of law in Richmond which has been interrupted only by four years of service as an Army Air Forces officer in World War II. He was president of the American Bar Association in 1964-65, and a member of the Virginia Constitutional Revision Commission in 1967-1968. He was chairman of the Richmond school board when it quietly began admitting Negroes to white schools in 1959.

Mr. Rehnquist came to Washington at the start of the Nixon Administration. In his job as Assistant Attorney General, he heads the Office of Legal Counsel and acts, in the words of President Nixon, as "the President's lawyer's lawyer . . . serving as the chief interpreter, for the whole Government, of the Constitution and the statutes of the United States."

Born in Milwaukee, Wis., on Oct. 1, 1924, Mr. Rehnquist served in the U. S. Army Air Forces in World War II, was graduated "with great distinction," and a Phi Beta Kappa, from Stanford University, won a master's degree at Harvard, and ranked first in his class in Stanford's law school in 1952.

In 1952-53, he served as law clerk to Supreme Court Justice Robert H. Jackson, then practiced law in Phoenix until called to Washington.

Mr. Rehnquist is described by acquaintances as "conservative" in both his friends and his philosophy. One of his close friends is Senator Barry M. Goldwater (Rep.), of Arizona.

Mr. Rehnquist has defended the Government's right to employ electronic surveillance against political extremists without prior court approval. He has described radical protestors as "new barbarians," and once criticized the Supreme Court as lacking "common sense" in some criminal cases.

In 1957, in an article printed by "U. S. News & World Report," Mr. Rehnquist criticized the "political and legal prejudices" of Supreme Court law clerks as being "to the 'left' of either the nation or the Court."

Text of President's address, page 62.

THE NIXON RECORD ON COURT APPOINTEES

Burger—a win

President Nixon's first appointee to the Supreme Court was Warren E. Burger, nominated May 22, 1969, to succeed the retiring Earl Warren as Chief Justice of the United States.

Mr. Burger, a Minnesotan, for 13 years had been a judge of the U. S. Court of Appeals for the District of Columbia. His nomination was confirmed by the Senate June 9 by a vote of 74 to 3, and he took his seat on June 23, 1969.

Haynsworth—a loss

On Aug. 18, 1969, President Nixon nominated Clement F. Haynsworth, Jr., to take the place of Justice Abe Fortas, who had resigned.

Mr. Haynsworth, a South Carolinian, had been a judge of the U. S. Court of Appeals for the Fourth Circuit for 17 years—chief judge for the last five of those years.

After three months of controversial hearings and debate, the Senate rejected the Haynsworth nomination on November 21, by a 55-45 vote.

The attack on Mr. Haynsworth was led by labor-union leaders and civil-rights activists, who charged that his judicial record was antilabor and antiblack and that his financial investments showed a lack of sensitivity to the ethical demands of his position as a judge.

Carswell—a loss

On Jan. 19, 1970, President Nixon tried again to fill the Fortas seat by nominating G. Harrold Carswell, a Floridian who was a judge of the U. S. Court of Appeals for the Fifth Circuit.

Mr. Carswell also ran into strong opposition. Critics accused him of "racism" and questioned his judicial qualifications. On April 8, 1970, the Senate rejected his nomination by a vote of 51 to 45.

Blackmun—a win

On April 14, 1970, President Nixon made a third attempt to fill the Supreme Court vacancy, which had then existed for 11 months.

The choice this time was Harry A. Blackmun, a Minnesotan who had been a judge of the U. S. Court of Appeals for the Eighth Circuit for almost 11 years.

Mr. Blackmun was confirmed by the Senate May 12 by a vote of 94 to 0, and took his seat on June 9, 1970.

WHAT NIXON'S COURT NOMINEES HAVE SAID ABOUT KEY ISSUES

As the Senate begins digging into the records and qualifications of the men President Nixon has nominated for the Supreme Court, attention is being focused on views they have expressed in the past. Here, from speeches and writings of Lewis F. Powell, Jr., and William H. Rehnquist, are some of their statements that are attracting interest of Senate investigators.

Views Expressed by Lewis F. Powell, Jr.

On "Civil-Liberties Repression—Fact or Fiction?"

From an article first published in "The Richmond (Va.) Times-Dispatch" on Aug. 1, 1971:

At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard "leftist" propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit and among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the "radical left." . . .

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force; and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are—as charged—part of a system of countenanced repression.

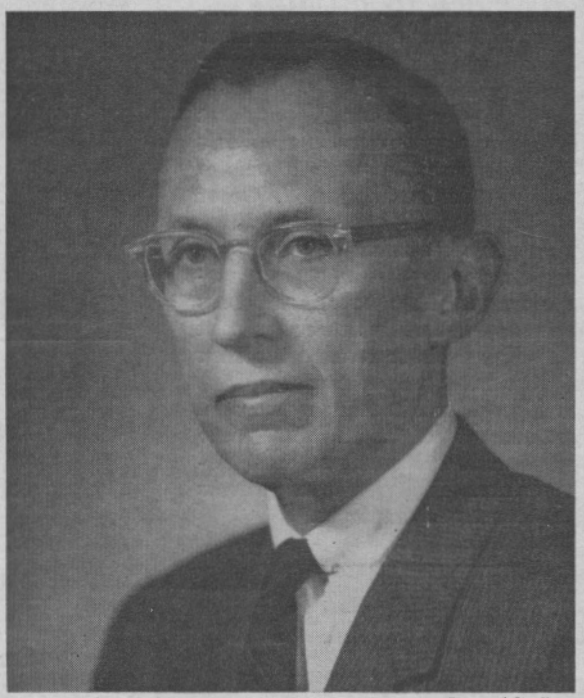
The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in fact no significant threat to individual freedom in this country by law enforcement. . . .

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the FBI and law-enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows: The Department of Justice employs wiretapping in two types of situations: (i) against criminal conduct such as murder, kidnaping, extortion and narcotics offenses; and (ii) in national-security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be a prior court order, issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or FBI agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine. During 1969 and 1970, such federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted—including several top leaders of organized crime.



—Dementi Studio

MR. POWELL

The Government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the President.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 Act, however, the attack has focused on its use in internal-security cases, and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a President should have this power with respect to internal "enemies." There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence—e.g., bombing of Capitol—and organized attempts to overthrow the Government.

One of the current myths is that the Department of Justice is usurping new powers. The truth is that wiretapping, as the most effective detection means, has been used against espionage and subversion for at least three decades under six Presidents.

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The "radical left," strongly led and with a growing base of support, is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack.

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.

In the general assault on law enforcement, charges of police repression have become a reflexive response by many civil libertarians as well as by radicals.

Examples are legion. Young people are being incited not to respect law officers but to regard them as "pigs." Black Panther literature, in the vilest language, urges the young to assault the police.

"The New York Times" and "The Washington Post" reported, as established fact, that 28 Panthers had been gunned down by police since January, 1968. Ralph Abernathy [president of the Southern Christian Leadership Conference] attributed the death of Panther leaders to a "calculated design of genocide." Julian Bond [Georgia legislator] charged that Panthers are being "decimated by police assassination arranged by the federal police apparatus." Even Whitney Young [former executive director of the National Urban League] referred to "nearly 30 Panthers murdered by law-enforcement officials."

These charges, upon investigation—by "The New Yorker" magazine, among others—turned out to be erroneous. The fact is that two—possibly four at most—Panthers may have been shot by police without clear justification. Many of the 28 Panthers were killed by other Panthers. There is no evidence whatever of a genocide conspiracy. . . .

The latest outcry against law enforcement was provoked by the mass arrests in Washington on May 3. Some 20,000 demonstrators, pursuant to carefully laid plans, sought to bring the Federal Government to a halt.

This was unlike prior demonstrations in Washington, as the avowed purpose of this one was to shut down the Government. The mob attempted to block main traffic arteries during the early-morning rush hours. Violence and property destruction were not insignificant. Some 39 policemen were injured. Indeed, Deputy Attorney General Kleindienst has revealed that the leaders of this attack held prior consultations with North Vietnamese officials in Stockholm.

Yet, because thousands were arrested, the American Civil Liberties Union and other predictable voices cried repression and brutality. The vast majority of those arrested were released, as evidence adequate to convict a particular individual is almost impossible to obtain in a faceless mob.

The alternative to making mass arrests was to surrender the Government to insurrectionaries. This would have set a precedent of incalculable danger. It also would have allowed a mob to deprive thousands of law-abiding Washington citizens of their rights to use the streets and to have access to their offices and homes.

Those who charge repression say that dissent is suppressed and free speech denied. Despite the wide credence given this assertion, it is sheer nonsense. There is no more open society in the world than America. No other press is as free. No other country accords its writers and artists such untrammeled freedom. . . .

The only abridgement of free speech in this country is not by Government. Rather, it comes from the "radical left"—and their bemused supporters—who do not tolerate in others the rights they insist upon for themselves. . . .

The rights of accused persons—without regard to race or belief—are more carefully safeguarded in America than in any other country. Under our system the accused is presumed to be innocent; the burden of proof lies on the state. Guilt must be proved beyond reasonable doubt. Public jury trial is guaranteed, and a guilty verdict must be unanimous.

In recent years, dramatic decisions of the Supreme Court have further strengthened the rights of accused persons and correspondingly limited the powers of law enforcement. There are no constitutional decisions in other countries comparable to those rendered in the cases of Escobedo and Miranda.

Rather than "repressive criminal justice," our system subordinates the safety of society to the rights of persons accused of crime. The need is for greater protection—not of criminals but of law-abiding citizens.

On Racial Balance in Schools—

From a brief submitted in behalf of the State of Virginia on Sept. 16, 1970, when the Supreme Court was considering the Charlotte-Mecklenburg, N. C., desegregation case:

Racial balance in the schools is not a constitutional imperative. No decision of this [Supreme] Court has established such a mandate. It is effective neither to accomplish integration nor to improve education. Racial balance once prescribed may be outdated by population shifts before it becomes effective.

The effort to attain racial balance promotes resegregation and movement to suburbia. These results defeat the goal of racial balancing, adversely affect education and contribute to urban deterioration.

The goal of the desegregation movement must be to achieve the highest quality of education.

On Court Rulings' Effect on Crime—

From an interview on "Crime in the Streets," published in the June, 1968, issue of "Dun's Review":

It is neither fair nor accurate, in my opinion, to say that court decisions themselves encourage crime. Our Bill of Rights affords protections to citizens that we all cherish. The courts are called upon to interpret these constitutional provisions, and lawyers differ widely—as would be expected—as to the soundness of some of these interpretations.

We have witnessed in recent years an unprecedented con-

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WHAT COURT NOMINEES SAID

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cern with the rights of accused persons. In many areas, this was overdue. But the net effect of court decisions over the past decade has been adverse to law enforcement.

It is far more difficult today to convict the guilty. The trying of criminal cases also has become interminably protracted.

Thus, in sum, I think that law enforcement has been unduly handicapped while society suffers. Unless the pendulum swings to a better balance, it may even be necessary to consider carefully drawn amendments to certain constitutional provisions.

On Civil Disobedience—

From an address on "Civil Disobedience: Prelude to Revolution?" delivered at Point Clear, Ala., on Oct. 5, 1967, published in the Oct. 30, 1967, issue of "U. S. News & World Report":

A doctrine which tolerates and justifies disobedience of law—implemented by sit-ins and street mobs—is made to order for cynical leaders promoting rebellion and other extremist causes. . . .

An ordered society governed by the rule of law must be preserved. Without law and order, none of the liberties guaranteed by the Constitution can be safeguarded—for whites or blacks, "radicals," "liberals" or "conservatives." History has demonstrated that once a society condones defiance of law and due process, the liberties of all are lost in the excesses of anarchy which follow.

With these truths in mind, and if our cherished institutions are to be preserved, Americans of good will—of both races—must act together to assure the following:

1. Toleration of civil disobedience and justification of lawlessness must end—in government, in the pulpits, among the media, and on the ivory-towered campuses.

2. Those who incite riots and rebellion should be treated as the most dangerous of criminals and relentlessly prosecuted. . . .

3. Those who participate in riots and rebellion should also be prosecuted with vigor, particularly the arsonists and the snipers.

4. Criminal laws, at all levels of government, should be reviewed and strengthened to deal specifically with the foregoing crimes in light of present conditions. Penalties should be adequate to deter criminal conduct, and justice should be swift and certain.

5. Effective gun-control laws should be adopted at State and federal levels; sniping at policemen and firemen should be made special offenses with severe penalties, and possession or use of Molotov cocktails should be serious crimes.

6. Those who incite and participate in nonviolent civil disobedience should also be subjected to criminal sanctions. Where needed, laws should be clarified and strengthened with appropriate penalties provided. This is a more difficult area, as First Amendment freedoms must be carefully safeguarded. But rights of free speech and peaceful assembly do not justify incitement to revolt or the willful violation of draft laws, income tax laws, or court decrees.

7. Laws, especially against those who engage in nonviolent civil disobedience, should be enforced uniformly and promptly. . . .

8. In summary, America needs to awaken to its peril; it needs to understand that our society and system can be destroyed. Indeed, this can and will happen here unless Americans develop a new impatience with those who incite and perpetrate civil disobedience; unless laws against violence and disorder are strengthened, and enforced with vigor and impartiality; and unless we return once more to the orderly and democratic processes which alone can preserve our freedoms.

On Rights of Criminals—

From an address to the American Bar Association in Miami Beach, Fla., on Aug. 9, 1965:

There must be no lessening of . . . concern for the constitutional rights of persons accused of crime.

But the first and foremost priority today must be a like concern for the right of citizens to be free from criminal molestation of their person and property. . . .

An ordered society cannot exist if every man may determine which laws he will obey, and if techniques of coercion supplant due process.

Views Expressed by William H. Rehnquist

On Wiretapping and Surveillance—

From an address at the American Bar Association convention in London on July 15, 1971:

Is the invasion of privacy entailed by wiretapping too high a price to pay for a successful method of attacking this [organized] and similar types of crime? I think not, given the safeguards which attend its use in the United States. The Attorney General must report to Congress the total number of federal applications for wiretapping made each year, and the report he furnished indicated that last year the Federal Government sought 183 wiretap warrants. This is not a "pervasive" use of wiretapping, using that adjective in its narrowest possible sense. It is instead a restrained and careful use of that technique which has led to a series of genuinely significant arrests and convictions in the field of organized crime in the past three years.

In the limited area of what are described for want of a better word as "national security" investigations—the executive branch in the United States for more than 30 years has asserted the right to wiretap without securing any Fourth Amendment type of warrant. This position has been

taken through the Administrations of six successive Presidents of the United States—dating from Franklin D. Roosevelt—and it is the Government's position that the practice is both consistent with the Fourth Amendment and necessary to the effective protection of the national security. . . .

To what extent may law-enforcement officials properly observe members of the citizenry in public places? It has been suggested by at least one prominent figure in the privacy debate in our country that no suspect ought to be subject to such surveillance unless there is "probable cause" to believe that he is guilty of committing a crime. The imposition of such a standard, in my view, would be a virtually fatal blow to law enforcement.

At the outset of an investigation, law-enforcement officers are confronted with the fact that a crime has been committed, and with varying numbers of "leads" which may or may not offer some hope for its ultimate solution. Every such lead must be run down if a solution is to be effected, even though the great majority of leads turn out to be dead ends.

—USN&WR Photo

MR. REHNQUIST

Frequently, in the process of running down dead-end leads, investigative attention turns to people who later prove to be entirely innocent of any offense. But their innocence can be known only in retrospect; the ultimately productive lead may look no better than the unproductive ones at the time an investigation has begun.

In view of the very nature of the investigative process, it would be highly unrealistic to require that there be "probable cause" to suspect an individual of having committed a crime in order that his activities may be inquired into in connection with the investigation of the crime. Quite the contrary, probable cause—for an arrest or specific search—is hopefully to be found at the *conclusion* of an investigation and ought not to be required as a justification for its *commencement*.

The basic limitation which may properly be placed on investigative authority is that it must be directed either to the solution or to the prevention of a crime, and that it pursue leads reasonably believed to aid in that activity. . . .

As to the merits of proposed legislative or judicial curtailment of the investigative authority of law-enforcement agencies, I simply do not believe that a limitation on the investigative activities of law-enforcement officials engaged in seeking the solution to crime would be either desirable or workable. . . .

On the other hand, restriction of the dissemination of information gathered in the process of criminal investigation is quite appropriate and desirable. . . .

We cannot allow our zeal for effective law enforcement to erode the rights essential to a free citizenry, but we must be equally certain that in our concern to preserve the right of privacy to the law-abiding, we do not unwittingly assure anonymity for the criminal.

On the President's Warmaking Powers—

From a speech on "the President's constitutional authority to order the attack on the Cambodian sanctuaries," delivered before the Association of the Bar of the City of New York on May 28, 1970:

First, may the United States lawfully engage in armed hostilities with a foreign power in the absence of a congressional declaration of war? I believe that the only supportable answer to this question is "Yes."

Second, is the constitutional designation of the President as Commander in Chief of the armed forces a grant of substantive authority, which gives him something more than just a seat of honor in a reviewing stand? Again, I believe that this question must be answered in the affirmative.

Third, what are the limits of the President's power as Commander in Chief, unsupported by congressional authorization or ratification of his acts?

It is scarcely a novel observation to state that the limits of the power are shadowy indeed. But I submit to you that one need not approach anything like the outer limits of his power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that he took in Cambodia. . . .

It has been recognized from the earliest days of the republic by the President, by Congress and by the Supreme Court that the United States may lawfully engage in armed hostilities with a foreign power without a congressional declaration of war. Our history is replete with instances of "undeclared wars," from the war with France in 1798 through 1800, to the Vietnamese war. . . .

Presidents throughout our history have sent American armed forces into conflict with foreign powers on their own initiative. They have also deployed American armed forces outside of the United States on occasion in a way which invited hostile retaliation from a foreign power. Presidents have likewise exercised the widest sort of authority in conducting armed conflict already authorized by Congress.

These activities represent three separate facets of the historical exercise of the power as Commander in Chief by various Presidents—the power to deploy armed forces outside of the United States; the power to engage United States armed forces in conflict with a foreign nation, and the power to determine how a war, once initiated, shall be conducted. . . .

The situation confronting President Nixon in Vietnam in

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WHAT COURT NOMINEES SAID

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1970 must be evaluated against almost two centuries of historical construction of the constitutional division of the war power between the President and Congress. It must also be evaluated against the events which had occurred in the preceding six years.

In August, 1964, at the request of President Johnson following an attack on American naval vessels in the Gulf of Tonkin, Congress passed the so-called Gulf of Tonkin Resolution. That resolution approved and supported the determination of the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."

It also provided that the United States is "prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." . . .

President Nixon . . . has an obligation as Commander in Chief to take what steps he deems necessary to assure the safety of American armed forces in the field. On the basis of the information available to him, he concluded that the continuing build-up of North Vietnamese troops in sanctuaries across the Cambodian border posed an increasing threat to both the safety of American forces, and to the ultimate success of the Vietnamization program. . . .

The President's determination to authorize incursion into those Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict.

On Pretrial Detention of Defendants—

From an address before the Arizona Judicial Conference in Tempe, Ariz., on Dec. 4, 1970:

I believe that society has the right to protect its citizens, for limited periods through due-process procedures, from persons who pose a serious threat to life and safety. We do not believe a free society can remain free if it is powerless to prevent wanton misconduct by dangerous recidivists during pretrial release. I believe the pretrial-detention provision of the D. C. crime bill accomplishes this result in a manner entirely consistent with the spirit and the letter of the U. S. Constitution.

On Federal Curbs Against Obscenity—

From testimony before a subcommittee of the House Judiciary Committee on Sept. 25, 1969:

Most dealers in sex-oriented materials follow a similar pattern in their mail-order operations. Consequently the problem is, by any standard, one of major proportions.

Since many purveyors of salacious advertising rely heavily on interstate mailings, the need for a federal remedy is apparent. As a practical matter, individual States are powerless to stem the flow of offensive advertisements mailed to their residents from other States. An appropriate exercise of the plenary power of Congress over the mails and interstate commerce is needed to deal with this problem.

There is ample precedent for a federal legislative response to problems of this kind.

Present laws banning interstate traffic in obscene materials and interstate transportation of women for immoral purposes instance the general "authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses."

On the "New Barbarians"—

From a "Law Day" address in Newark, Del., on May 1, 1969:

The very notion of law, and of a government of law, is presently under attack from a group of new barbarians.

They are found today on university campuses, in various public demonstrations and protests and elsewhere, though they represent only a small minority of the numbers participating in these movements.

Just as the barbarians who invaded the Roman Empire neither knew nor cared about Roman government and Roman law, these new barbarians care nothing for our system of government and law. They believe that the relatively civilized society in which they live is so totally rotten that no remedy short of the destruction of that society will suffice. . . .

I suggest to you that this attack of the new barbarians constitutes a threat to the notion of a government of law which is every bit as serious as the "crime wave" in our cities.

On "Prejudices" of Supreme Court Law Clerks—

From an article published by "U. S. News & World Report" in its issue of Dec. 13, 1957:

From my observations of two sets of Court clerks during the 1951 and 1952 terms [when Mr. Rehnquist was a law clerk to Associate Justice Robert H. Jackson], the political and legal prejudices of the clerks were by no means representative of the country as a whole nor of the Court which they served.

After conceding a wide diversity of opinion among the clerks themselves, and further conceding the difficulties and possible inaccuracies inherent in political cataloguing of people, it is nonetheless fair to say that the political cast of the clerks as a group was to the "left" of either the nation or the Court.

Some of the tenets of the "liberal" point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren.

There is the possibility of the bias of clerks affecting the Court's certiorari work. [END]