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Floor Statement by Senator Edmund S. Muskie Opposing the Nomination of William Rehnquist to the Supreme Court

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Senate

Mr. MUSKIE. Mr. President, one of the Senate's most important constitutional obligations is to approve or reject nominations to the Supreme Court. The Supreme Court protects our liberties and the principles of due process of law. It has the ultimate responsibility for preserving and defending the Constitution. Our entire constitutional form of government depends upon a sensitive and wise Supreme Court. And the Court can only be as sensitive and wise as the Justices who are appointed to it.

Like the President, the Senate, as part of its assigned role in the selection process of Justices, must act to insure that each appointment to the Court will not weaken our constitutional system. Careful scrutiny of each nominee is vitally important, for a Justice may serve for decades and exercise a cumulative influence over the course of public affairs comparable to that of a President.

In considering nominations to the Court, it is proper for a Senator—and indeed absolutely necessary—to evaluate the judicial philosophy of the nominee. There is no other way to assess whether the proposed Justice will be equal to the task of preserving our constitutional system. A Law Review article by Prof. Charles Black of the Yale Law School—79 Yale Law Journal 657 (1970)—and a lengthier study done by professors at Stanford and Michigan Universities—CONGRESSIONAL RECORD, November 8, page S17671—both indicate that the Senate evaluation of a Supreme Court nominee's judicial philosophy was intended by the Founding Fathers and has been practiced by the Senate for nearly 200 years.

I now reaffirm what I said during the debates on the President's nomination of Judge Haynsworth:

It is the prerogative of the President, of course, to try to shift the direction and the thrust of the Court's opinions in this field by appointments to the Supreme Court. It is my prerogative and my responsibility to disagree with him when I believe . . . that such a change would not be in the best interests of the country. 115 Cong. Rec. 35368

This standard was also urged upon the Senate by one of the nominees now before the Senate. In an article in the October 8, 1959, Harvard Law Record, William Rehnquist called upon the Senate to restore "its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."

We must remember that when we decide, we are determining the shape of the Court and the direction of the country for years beyond our own terms in office or perhaps even our own lifetime. One Justice still sits on the Supreme Court who was confirmed by a Senate, only one of whose members still serves in this Chamber. So let no one tell us that we cannot examine a nominee's judicial philosophy. Once we confirm a nominee, history will praise or blame us no less than the President for the resulting impact on the future of our law and our national life. With this in mind, I have examined the record of Mr. Rehnquist.

When President Nixon nominated William H. Rehnquist to the Supreme Court, the President said that Mr. Rehnquist is a judicial conservative who would restore balance to the Supreme Court. There is an old and honored tradition of judicial conservatism in American law and on the Supreme Court, a tradition which can be traced back to the time of John Adams. Many distinguished judicial conservatives have served on our highest court. Although I personally disagree with many of their conclusions, I believe that their tradition should continue to be represented. It was represented at its best for many years by Justice John Marshall Harlan, whom Mr. Rehnquist has been nominated to succeed.

My examination of Mr. Rehnquist's record convinces me that Mr. Rehnquist is not a judicial conservative at all, in the time-honored meaning of the term. Rather than being the views of a judicial conservative, they are those of a statist and authoritarian. Mr. Rehnquist exalts the powers of government over the rights and liberties of the individual. He exalts the executive branch over the coordinate branches of the Federal Government. He rejects some of the basic values that have characterized the conservative legal tradition in America. Far from bringing "balance" to the Supreme Court, Mr. Rehnquist would threaten to unbalance the Court.

Examine Mr. Rehnquist's views in detail and compare them to the authentic tradition of judicial conservatism in this country. His views drastically depart in major areas of constitutional law from that tradition.

First, true judicial conservatives in the United States have always given the highest value to the right of privacy—to what Mr. Justice Brandeis called "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (*Olmstead* v. *United States*, 277 U.S. 438, 485 (1928)).

It was Mr. Justice Butler—one of the most conservative men who sat on the Supreme Court in this century—who summed up the traditional conservative attitude toward privacy in these strong words:

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy . . . its protection extends to offenders as well as to the law abiding . . . the Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. (*United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932)); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931)).

It was this belief in the value of privacy that led a genuine conservative like Justice Butler to give a resounding "No" to the Federal Government's claim to the right to wiretap without constitutional limitations in the famous Olmstead decision. Likewise, privacy received the greatest priority and protection from Mr. Justice Harlan, who, as he wrote in one of his last opinions before his retirement, was deeply concerned to preserve "that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society." (United States against White, decided Apr. 5, 1971.)

Yet I find only the most perfunctory recognition of this essential constitutional value in Mr. Rehnquist's public record. Far from valuing the right of privacy as authentic conservatives have, he has subordinated it to the powers of Government.

For example, Mr. Rehnquist believes that traditional judicial control over Government wiretapping is unnecessary whenever the executive chooses to label it a matter of national security. Wiretapping has been held by the Supreme Court to be subject to the fourth amendment's provisions requiring judicial supervision of searches and seizures. This requirement of a warrant for a wiretap, like a search warrant for a home, is designed to insure that invasions of privacy are limited by an independent tribunal to cases of demonstrated need. Yet during this administration, the Justice Department has claimed that the fourth amendment requirement of a judicially approved warrant does not apply to domestic cases involving alleged domestic subversion. In these instances, the Department claims the executive can wiretap without court authorization.

In a speech in London last July, Mr. Rehnquist supported this Justice Department attempt to downgrade the protections of the fourth amendment. Mr. Rehnquist said that judicial review could only serve to delay and to hamper criminal investigations. He did not even mention the purpose of the warrant procedure—to protect citizens from unreasonable search and seizure by interposing an impartial magistrate between them and Government. This fall, Mr. Rehnquist refused to retreat from his opposition to judicial review of domestic national security wiretaps during his testimony before the Senate Judiciary Committee. He admitted that the fourth amendment did apply—but he contends that its test of reasonableness should be applied by the Attorney General alone.

A second area in which Mr. Rehnquist rejects traditional judicial control over Government activities is surveillance. In a speech, "Privacy, Surveillance and the Law," given on March 19 of this year, and in testimony before the Senate Subcommittee on Constitutional Rights, Mr. Rehnquist stated that he believed that there were no constitutional limits upon Government surveillance in public places as long as it did not involve the threat of criminal sanctions. He argued that nothing in the Constitution would prohibit an agent of the Justice Department or a soldier of the Army from following an ordinary citizen, recording everything he did in public, and compiling dossiers from that information—even though the individual had no connection with any criminal activity.

In justifying such surveillance, Mr. Rehnquist draws a very fine distinction between surveillance with the threat of criminal sanction—which he concedes raises constitutional questions—and surveillance without that threat—which he feels is constitutional. This distinction ignores the constitutional right of privacy and the first amendment right to free speech, free association, and free petition for redress of grievances without the fear of surveillance or possible future sanction. And it denies the heart of key Supreme Court decisions, such as *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); and *NAACP* v. *Alabama ex. rel. Patterson*, 354 U.S. 449 (1958).

The most disturbing part of Mr. Rehnquist's disregard for first amendment rights in this area is his rejection of their relevance. When asked at Senator Ervin's hearings if Government surveillance and the fear caused by that surveillance raised any serious threat of a chilling effect on constitutionally protected activities and rights, the nominee answered with an unqualified "No." Later Mr. Rehnquist testified that first amendment questions were not raised until citizens were actually deterred from speaking out—an alarming threshold for the protection of precious rights.

And Mr. Rehnquist not only downgrades constitutional protections, he also sees little reason for the independent judicial supervision mandated by the fourth amendment to enforce these protections. He argued that "no legitimate interest" is served by such judicial supervision. And he is unwilling even to test available procedures to minimize the difficulties of judicial safeguards while preserving their vitality. He asserts that the "self-restraint" of government officials is sufficient protection—and that assertion is nothing less than an outright rejection of our historic commitment to a governmental system of checks and balances.

Second, a vital part of the conservative legal tradition in this country is an insistence on governmental adherence to established procedure, especially in the enforcement of criminal law. Recall Justice Frankfurter's famous statement:

The history of American freedom is, in no small measure, the history of procedure. (*Malinski v. New York*, 324 U.S. 401, 414 (1945)).

Justice Frankfurter amplified this view in these words:

(We) must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people. Id.

Mr. Rehnquist's record shows no similar faith in the procedural safeguards of our law. In the last 3 years, the Nixon administration has tried to revise traditional constitutional procedures in the field of criminal law. The administration has virtually done battle with the Bill of Rights, claiming that constitutionally dubious measures were essential to the fight against crime. In recommending preventive detention and no-knock searches, the administration has made unwise and unnecessary infringements upon fundamental ideals of justice in order to fashion law enforcement tools that are ineffective and unreasonable. As I said in the Senate over a year ago, preventive detention and no-knock searches are "instruments of fear" and "tools of repression."

During the protracted controversy about these new procedures, Mr. Rehnquist indicated that he felt no constitutional qualms about the denigration of traditional rights. In a December 4, 1970, speech, he called the administration's preventive detention proposals "entirely consistent with the spirit and the letter of the U.S. Constitution."

And in September of this year, testifying before the Senate Subcommittee on Constitutional Rights on Senator Ervin's speedy trial bill, Mr. Rehnquist urged the committee to consider new limits on other traditional procedural safeguards such as the right of habeas corpus and the fourth amendment's exclusionary rule. With respect to habeas corpus, Mr. Rehnquist suggested the most far-reaching revision in over 100 years of the availability of that writ in the Federal courts. Habeas corpus—often called the "great writ"—is at the center of our system of criminal procedure. Indeed, Winston Churchill, a great conservative in the Anglo-American tradition, once said that the difference between civilization and tyranny may be summed up in two words—habeas corpus.

Mr. Rehnquist has acknowledged that over a century ago, in the Habeas Corpus Act of 1867, Congress decided that "any constitutional violation could be the basis for the exercise by the Federal courts of habeas corpus jurisdiction." The Federal courts have increasingly exercised this jurisdiction in behalf of personal liberty. To Mr. Rehnquist, that constitutes "the present expansive use" of habeas corpus, and he has urged basic restrictions on the availability of the writ.

Thus, in criminal law, the most dramatic changes in constitutional protections are easily embraced by Mr. Rehnquist. He is willing to accept extreme and unprecedented constitutional interpretations without protest. It is clear that individual rights and the Bill of Rights would be weakened by Mr. Rehnquist's judicial philosophy. Instead of being a conservative committed to conserving the most vital procedures of our legal system, Mr. Rehnquist would modify them to reduce the basic rights of our citizens.

Third, the authentic conservative tradition in this country has always stood for the liberties of the individual as against the overreaching claims of Government. America had its origins in a revolution against government abuse of power, and it is fair to state that every major conservative figure in the history of the Court has spoken up on one occasion or another in behalf of private rights and against excessive public authority. This conservative judicial philosophy was eloquently expressed by Mr. Justice Sutherland—for many years the intellectual leader of the conservatives on the Supreme Court—in the following words about the Bill of Rights:

No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight . . . A little water trickling here and there through a dam is a small matter in itself, but it may be a sinister menace to the security of the dam, which those living in the valley below will do well to heed. (*Associated Press v. NLRB*, 301 U.S. 58, 135–136 (1937)).

It was this spirit which led a conservative like Justice Sutherland to uphold the rights of the press against prior restraint in *Grosjean v. American Press Co.*, (297 U.S. 233, 250 (1936)), and to uphold and extend the right to counsel for all criminal defendants in *Powell v. Alabama*, (287 U.S. 45 (1932)). These are among the great libertarian decisions in the history of the Court, and libertarianism has been a powerful component in the conservative legal tradition.

I find in the record of Mr. Rehnquist none of this spirit, none of this conservative reverence for the Bill of Rights, none of this willingness to draw the line and say to government: "Thus far and no farther." He interprets the Constitution as giving the executive wide powers to tap telephones and to conduct surveillance. He argues that the decision to invade Cambodia was merely a tactical decision clearly within the constitutional powers of the Commander-in-Chief. In testimony before the House of Representatives, he has defended a sweeping interpretation of executive privilege, granting the President broad powers of secrecy. And he has included in the "inherent powers" of the Presidency the authority to grant to the Subversive Activities Control Board responsibilities that Congress did not grant by statute.

The one notable exception to this in his record—and it points up the spurious nature of his "judicial conservatism"—is his reliance on the claim of individual freedom in opposing the open accommodations law of Phoenix, Ariz. It is revealing and disquieting that this purported exponent of "judicial conservatism" should have given lip service to the principle of individual rights only in an effort to deny non-white citizens the free right of access to public places.

Fourth, another essential element of the conservative tradition in American law has been a commitment to the separation of powers in the Federal Government and a particular distrust for the assertion of unchecked executive power.

It was Mr. Justice McReynolds—perhaps the single most conservative justice since 1900—who wrote:

If the phrase "executive power" enfolds the one now claimed, many others heretofore totally unsuspected may lie there awaiting future supposed necessity; and no human intelligence can define the field of the President's permissible activities. "A masked battery of constructive powers would complete the destruction of liberty." (*Myers v. United States*, 272 U.S. 160, 183 (1925)).

I find none of this adherence to separation-of-powers principle in the record of Mr. Rehnquist.

Mr. Rehnquist elevates executive power not only above the liberties of the individual but above the powers of the judiciary and the Congress. For example, he has said:

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 these investigative activities of law enforcement officials engaged in seeking the solution to crime would be either desirable or workable. ("Law Enforcement and Privacy," July 15, 1971).

Mr. Rehnquist's conception of executive power is so broad that he rejects the traditional checks and balances provided by the three branches of government. For him, executive "self-restraint" plus the popular election of the President adds up to a sufficient safeguard against government overreaching.

This reflects a fundamental misunderstanding of our constitutional system. The check of the judiciary upon executive actions is crucial to the preservation of our liberties. Nor are general elections a sufficient safeguard against unconstitutional abuses of power. Our constitutional system rests upon fundamental rules that are unwaveringly enforced by the judiciary.

For Mr. Rehnquist, the efficiency of the executive branch is a transcendent value. He has opposed "any legislation which, whether by opening the door to unnecessary and unmanageable judicial supervision of such activities—executive investigative authority—or otherwise, would effectively impair this extraordinarily important function of the Federal Government." (Quoted in CONGRESSIONAL RECORD E12388.)

In his zeal for enhancing executive power, Mr. Rehnquist seems unmindful of the basic purpose of the separation of powers, as it has been understood by judicial conservatives and liberals alike:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. (*Myers v. United States, supra*, 272 U.S. at 293) (Opinion of Justice Brandeis).

Some have argued that Mr. Rehnquist's views on many questions involving the Bill of Rights were presented when he was the advocate of the administration and that they do not represent his own judicial philosophy. Mr. Rehnquist was repeatedly given a chance to differentiate his own views from those of the administration, but he declined in all but one instance, invoking the attorney-client privilege in an unprecedented manner. Both at the hearings and in previous writings, he stressed the compatibility of his personal views with those he has advocated in office. And Mr. Rehnquist at times relied upon his official statements as accurate reflections of his own beliefs.

What emerges from this analysis of Mr. Rehnquist's legal views is the picture of a nominee to the Supreme Court with a wholly unacceptable approach to interpreting the Constitution. In broad areas of the law, Mr. Rehnquist has repeatedly argued that constitutional protections for individual rights and liberties must be subordinated or limited. In some areas of surveillance and wiretapping, he has concluded that constitutional protections do not apply at all. Whenever executive power is balanced by Mr. Rehnquist against individual liberties, those liberties are found to be less important, and the reasons given to support those liberties are often abruptly dismissed.

To me, these are not the hallmarks of a judicial conservative who would bring balance to the Supreme Court. This is the record of a man who would reshape the American constitutional system in the name of Government efficiency, despite the cost in personal freedom to his fellow citizens.

In addition to Mr. Rehnquist's failure to respect and support basic constitutional protections—even when interpreted in the Supreme Court's most conservative tradition—he has also failed to demonstrate a commitment to fundamental principles of equal protection. During the past 2 decades, one of the most far-reaching changes in this Nation has been the movement toward racial equality. Equality in social justice and the constitutional law have expanded in ways that must never be undone. As all Americans know, the Supreme Court has played a central role in that effort. But Mr. Rehnquist, judged by his statements as a private citizen, did not believe that the law should have been used to secure racial justice.

In 1964, on his own initiative, he testified before the Phoenix City Council and wrote a letter to the Arizona Republic protesting a proposed public accommodations bill, a local version of the public accommodations section of the historic Civil Rights Act of 1964. He argued that the property right of a store owner to serve customers of his own choice was more important that the right of an individual regardless of race to patronize any store open to the public. Although the subordination of a storeowner's property rights for the purposes of health and safety regulations or even zoning was quite understandable to Mr. Rehnquist, it was for him "impossible to justify the sacrifice of even a portion of our historic freedom for a purpose such as this."

In testimony before the Judiciary Committee, Mr. Rehnquist said that he would no longer oppose an open accommodation ordinance. He attributed his change of heart to a realization of "the strong concern that minorities have for the recognition of these rights". In other words, his appreciation of the constitutional rights of individuals depends upon his perception of the strength of their feelings.

In 1966, Mr. Rehnquist represented Arizona at a National Conference of Commissioners on Uniform State Laws which considered a proposed model State Anti-Discrimination Act. At the conference, Mr. Rehnquist made a motion which, in effect, removed the section of the proposed act that would have permitted employers to adopt voluntary plans to reduce racial, religious or sex imbalances in their work forces. He also

opposed a section of the model law which would have prohibited "block-busting"—the vicious use of racial fears to destroy neighborhoods and reap enormous profits.

And in 1967, only 4 years ago, Mr. Rehnquist wrote a letter to the editor of the Arizona Republic opposing modest steps toward voluntary school integration. In that letter he took issue with those who wanted to achieve an integrated society and concluded:

> We are no more dedicated to an "integrated" society than we are to "segregated" society.

That is a stunning and categorical rejection of the whole thrust of the civil rights movement.

The record before us contains no pattern of action or statement that refutes the evidence before us or validates Mr. Rehnquist's claim to a strong commitment to racial justice.

These clear indications of Mr. Rehnquist's rejection of the use of law to guarantee racial equality are from a period of years during his mature life. They are not the rhetoric of a campaigner or the opinions of a young man. Even worse, they demonstrate that each time Mr. Rehnquist weighed the social and constitutional values of a proposal for racial justice, he decided against the proposal. As America moved to change its laws and its national life to end racial discrimination, Mr. Rehnquist's constellation of values put equality below superficial property rights and included no commitment to publicly enforced integration. I find this lack of adherence to one of our Constitution's most vital concepts—equal protection—unacceptable in a Justice of the Supreme Court.

For me, the ultimate standard for judging a nominee to the Court is whether he will fulfill the responsibility outlined by James Madison, the Father of our Constitution:

> If they (the Bills of Rights) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against any assumption of powers in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights. (1 Annals of Congress 439).

A careful consideration of Mr. Rehnquist's judicial philosophy reveals a consistent lack of regard for individual liberties, an enthusiasm for unrestrained executive power, and a willingness to embrace drastic changes in our Constitution. This is the consistent record of many years, and it remains uncontradicted by evidence from the nominee or from others.

I am not satisfied that as a Supreme Court Justice, William Rehnquist would consider himself a guardian of the Bill of Rights, that he would be a bulwark against abuse or overreaching by the executive and legislative branches or that he would resist encroachments on the liberties guaranteed to all of us by the Constitution. Therefore, I shall vote against the confirmation of his nomination as an Associate Justice of the Supreme Court.