Week Ending Friday, August 15, 1986

United States Supreme Court Nominations

Radio Address to the Nation.
August 9, 1986

My fellow Americans:

Shakespeare's reminder that "the world is full of ornament" and the "outward shows" are "least themselves" has always had a special relevance for the political world, but it was especially so last week here in Washington.

The United States Senate began hearings on the nominations of William Rehnquist and Antonin Scalia, men I've named to the position of Chief Justice of the Supreme Court and Associate Justice of the Court. These hearings are a healthy process, mandated by the Constitution. Even though they produce a lot of outward show and ornament, they provide the American people with an opportunity to evaluate for themselves the quality of a President's appointments.

To be sure, there were many serious allegations by political opponents of Justice Rehnquist and Judge Scalia. One Democratic Senator announced he would vote against Justice Rehnquist even before the hearings started. There were dark hints about what might be found in documents Judge Rehnquist wrote while a Justice Department official many years ago. To deal with these unfounded charges, I took the unusual step of permitting the Senate committee to see the documents themselves. Of course, there was nothing there but legal analyses and other routine communications. The hysterical charges of coverup and stonewalling were revealed for what they were: political posturing. I was sorry to have to release these documents, but Supreme Court nominations are so important that I did not want my nominees to enter upon their responsibilities under any cloud. And so, I was delighted that when all was said and done our nominees emerged unscathed from last week's hearings.

Justice Rehnquist, recognized even during his early years as a brilliant mind, graduated first in his class from Stanford Law School. He clerked for the Supreme Court, an early mark of distinction in any legal career. He then returned to Arizona to practice law, coming back to Washington some years later to serve as an Assistant Attorney General in the Department of Justice. Most important, for the past 15 years he has served as a Justice of the Supreme Court with extraordinary diligence and craftsmanship. His opinions are renowned for their clarity of reasoning and precision of expression. And when his colleagues on the Supreme Court learned that I would nominate Justice Rehnquist to preside as Chief Justice, they were unanimous in expressing pleasure and approval. It's hard to imagine higher praise for anyone in the legal profession than that.

Turning to Judge Antonin Scalia, he's regarded in the legal profession as a superb jurist, a first-class intellect, and a warm and persuasive person. He has served in the Department of Justice, taught law at the University of Chicago and the University of Virginia, and served since 1982 as a judge on the U.S. Court of Appeals here in the District of Columbia. The American Bar Association gave Judge Scalia, as they gave Justice Rehnquist, their highest rating. I might add that as the father of nine children Judge Scalia holds family values in high esteem. And I was especially delighted with his nomination, because Judge Scalia is the first Italian-American in history to be named to the Supreme Court.

Beyond their undoubted legal qualifications, Justice Rehnquist and Judge Scalia embody a certain approach to the law, an approach that as your President I consider it my duty to endorse, indeed to insist upon.

The background here is important. You see, during the last few election campaigns,

one of the principal points I made to the American people was the need for a real change in the makeup of the Federal judiciary. I pointed out that too many judges were taking upon themselves the prerogatives of elected officials. Instead of interpreting the law according to the intent of the Constitution and the Congress, they were simply using the courts to strike down laws that displeased them politically or philosophically. I argued the need for judges who would interpret law, not make it. The people, through their elected representatives, make our laws; and the people deserve to have these laws enforced as they were written.

Of course this upsets those who disagree with me politically, and I have a lurking suspicion that politics had more than a little to do with some of the tactics used against Justice Rehnquist. But I'm confident that, mindful of their superb legal qualifications, the Senate will confirm Justice Rehnquist and Judge Scalia. And I can assure you: We will appoint more judges like them to the Federal bench. If I may quote Shakespeare again now that the political commotion of the confirmation hearings is over: "All's well that ends well."

Until next week, thanks for listening, and God bless you.

Note: The President spoke at 12:06 p.m. from the Oval Office at the White House.

International Issues

Responses to Questions Submitted by Bild-Zeitung of the Federal Republic of Germany. August 7, 1986

Q. On August 13, 1961, the East Germans erected the wall that has been separating the city of Berlin. Twenty-five years later it is still there, and 74 people have been killed trying to escape to the West. What does this mean for East-West relations?

The President. The Berlin Wall is an affront to the human spirit. It symbolizes the failings of totalitarian regimes and their inability to crush the innate human striving for freedom. Its very existence reminds us of the need to defend our democratic way of life and to continue our work for freedom and peace. The wall also reminds us of the continued, forced division of Europe, of Germany, and of Berlin. Dismantling the wall would be a major step towards improvement of East-West relations. Its continued existence will remain a burden on our relations with those regimes responsible for it.

Q. When do you believe the wall can be torn down?

The President. I would like to see the wall come down today, and I call upon those responsible to dismantle it. No regime can attain genuine legitimacy in the eyes of its own people if those people are treated as prisoners by their own government.

Arms Reduction

Q. Soviet Secretary Gorbachev has made a series of proposals for arms reduction. Will there soon be fewer nuclear weapons and conventional arms in Europe?

The President. We welcomed the recent Soviet proposals as a signal that the Soviets have begun to make a serious effort. I have responded in a constructive spirit. The arms control process is gaining momentum. The ball is now in their court. If they respond constructively, we can make important progress.

My highest priority is reaching a balanced and verifiable agreement on deep, stabilizing reductions of nuclear arms. This is an attainable goal. I am ready to work with the Soviets and Mr. Gorbachev to achieve this.

Separately, NATO, through the decision readied at Montebello in October 1983, is proceeding to unilaterally reduce its nuclear inventory to reach the lowest inventory consistent with credible deterrence.

We continue to work for progress in negotiations on conventional weapons as well. In the CDE [1] negotiations in Stockholm, we seek to negotiate verifiable confidence and security building measures. In MBFR,[2]

[1] *Conference on Confidence and Security Building Measures and Disarmament in Europe.*

[2] *Mutual and balanced force reduction negotiations.*

to the House Judiciary Committee a "massive body of evidence" which would establish the truth of the Watergate affair.

When, in May, the White House finally released edited transcripts of the Watergate tapes, Burch defended their tone and content to a public appalled by the revelation of the inner workings of the White House. In a letter to the *Chicago Tribune* Burch argued that the transcripts showed "life as it is" in "government, politics, industry and business." He continued to denounce the deliberations of the House Judiciary Committee as a "black spot on jurisprudence," even as it became clear that both Democrats and Republicans believed Nixon guilty of impeachable offenses.

After Nixon's resignation in August 1974, Burch remained on the White House staff as President Gerald R. Ford's campaign coordinator for the 1974 elections. Although Burch left the President's staff in 1975, he filed the organizing papers for the President Ford Committee with the Federal Elections Commission in June 1976. His major role during the 1976 Ford presidential campaign consisted of his efforts to dissuade his former boss, Sen. Goldwater, from supporting California Gov. Ronald Reagan [*q.v.*] for the Republican presidential nomination. From 1975 Burch worked for the Washington law firm of Pierson, Ball and Dowd, which specialized in communications.

[DAE]

BURGER, WARREN E(ARL)

b. Sept. 17, 1907; St. Paul, Minn.
Judge, U.S. Court of Appeals for the District of Columbia, 1956-69; Chief Justice of the United States, 1969-.

Warren Burger worked his way through the St. Paul College of Law, graduating third in his class in 1931. A partner in a St. Paul law firm from 1935 to 1953, he maintained a varied general practice while teaching part-time at his alma mater. Burger, a Republican, worked to elect Harold Stassen governor of Minnesota in 1938. He was floor manager for Stassen's unsuccessful presidential bids at the 1948 and 1952 Republican National conventions and shifted his support to Dwight D. Eisenhower at an important moment during the 1952 gathering. Burger was named assistant attorney general in charge of the Civil Division of the Justice Department in 1953. In June 1955 Eisenhower nominated him to a judgeship on the U.S. Court of Appeals for the District of Columbia. Burger was sworn into office in April 1956.

In his 13 years as a circuit judge, Burger developed a reputation as a conservative, particularly in criminal cases. In often articulate, quotable opinions, he opposed the reversal of convictions for what he considered legal technicalities and was a critic of the *Durham* rule which broadened the definition of criminal insanity. Off the bench Burger challenged various aspects of the American criminal justice system, criticized the Warren Court's approach in criminal rights cases and urged reform of the penal system. Active in the American Bar Association (ABA), he was a leader in efforts to improve the management and efficiency of the courts.

On May 21, 1969 President Richard Nixon nominated Burger as Chief Justice to replace the retiring Earl Warren. Nixon had made the Warren Court's criminal rights rulings a target during his 1968 campaign and had promised to appoint "strict constructionists" to the bench. He selected Burger for the Court largely because the Judge's record demonstrated a philosophy of judicial conservatism, especially on criminal issues. Burger's appointment was confirmed by the Senate on June 9 by a 74-3 vote. He was sworn in on June 23, 1969, at the end of the Court term.

In criminal cases Chief Justice Burger usually took a conservative stance. He voted to uphold searches and arrests made without a warrant and vigorously attacked the exclusionary rule that prohibited the use of illegally seized evidence at trial. He took a narrow view of the Fifth Amendment's privilege against

self-incrimination and joined in several decisions limiting the scope of the 1966 *Miranda* ruling. Although he voted to guarantee indigent defendants free counsel in certain misdemeanor cases, Burger opposed extending the right to counsel to preliminary hearings, pre-indictment lineups and displays of photographs of a suspect to witnesses. He supported the use of six-member juries and non-unanimous jury verdicts and voted repeatedly to uphold the death penalty against constitutional challenge. In December 1971, however, Burger ruled that prosecutors must adhere to their part of plea bargaining agreements. He joined in several decisions banning the imposition of jail terms on convicts solely because they could not pay fines.

In July 1974 Burger spoke for the Court in the celebrated case of *U.S. v. Nixon*. He ordered the President to surrender the tapes and documents subpoenaed by special prosecutor Leon Jaworski [*q.v.*] for the pending Watergate cover-up trial of six former presidential aides. Nixon's claim of executive privilege, Burger ruled, had to yield in this case to the demonstrated need for evidence in a pending criminal trial. Conversations recorded on several of the tapes that Nixon surrendered in response to the Court's order led directly to his resignation from office on Aug. 9, 1974.

In free speech cases the Chief Justice generally sustained government action against individual rights claims. For a five man majority in June 1973, he reversed a 16-year Court trend lowering restrictions on pornography and set new guidelines for obscenity laws that gave the states greater leeway to regulate pornographic materials. He dissented in June 1971 when the Court denied the government's request for an injuction to halt newspaper publication of the *Pentagon Papers*. Burger joined the majority a year later in holding that journalists had no First Amendment right to refuse to testify before grand juries about information obtained from confidential sources. However, he spoke for the Court in June 1974, to invalidate as an infringement on freedom of the press, a Florida law requiring newspapers to print replies from political candidates whom they criticized. He also overturned a judicial "gag" order restricting pretrial news coverage of a Nebraska mass murder case in June 1976 as an unjustified prior restraint on the press.

Burger wrote several significant opinions on government and religion. In May 1972 he ruled that the application of a state law for compulsory secondary education to the Amish denied the sect their right to free exercise of religion. His May 1970 majority opinion held that tax exemptions for church property used solely for religious purposes did not violate the First Amendment's ban on government establishment of religion. However, Burger overturned several programs for direct state aid to parochial schools in June 1971, because they would result in excessive government entanglement with religion. In later cases he voted to sustain state aid programs in which the benefits went to the individual parents or children rather than directly to the religious schools.

In a widely publicized April 1971 case, Burger spoke for a unanimous Court to uphold court-ordered busing as one means of eliminating state-imposed school segregation. In July 1974, however, he overturned a plan to remedy segregation in Detroit's school system by merging it with suburban districts. For a five man majority, Burger held such an interdistrict plan inappropriate when segregation had been established only in one district and there was no evidence showing that school district lines had been drawn in a discriminatory way. In other racial discrimination cases, Burger followed a moderately conservative course.

The Chief Justice applied the constitutional guarantee of equal protection of the laws to women for the first time in November 1971, when he invalidated an Idaho law favoring men over women in the administration of estates. In later sex discrimination suits and other equal protection cases, however, Burger again took moderate to conservative positions. He

concurred in January 1973 when the Court upset state laws prohibiting abortions within the first six months of pregnancy as a denial of due process. However, he was otherwise wary of invalidating government action on due process grounds. Burger usually upheld the states' power to establish voting requirements. Nevertheless for a unanimous Court in March 1974, he ruled that states requiring political candidates to pay a filing fee had to provide some alternative means of access to the ballot for individuals too poor to pay the charge. The Chief Justice joined in numerous rulings limiting the Court's jurisdiction to hear cases. He voted, for example, to set restrictive requirements for bringing federal class action suits, to tighten standing requirements and to limit state prisoners' right of appeal in federal courts in certain instances.

As Chief Justice, Burger took a leading role in promoting administrative efficiency and reform in the courts. He publicized the problems of the courts through annual State of the Judiciary addresses given before the ABA, press interviews and public speeches. He suggested a variety of administrative improvements and successfully urged establishment of state-federal judicial councils, a national center for state courts and an institute to train court managers. Burger devoted special attention to what he considered an excessive workload in all of the federal courts. To remedy it, he urged Congress to remove certain cases from federal jurisdiction and to consider the impact of all new legislation on the courts before passage. He also favored studying the possibility of limiting the right of appeal and of having certain types of cases, such as family law problems or prisoner complaints, settled in some other forum than the courts. Burger appointed a seven man committee in the fall of 1971 to study the Supreme Court's caseload. In a controversial December 1972 report, the committee recommended establishment of a new national appeals court to screen all the petitions for review of cases currently filed in the Supreme Court. Burger also promoted penal reform and proposed special training and certification for trial attorneys.

Assessments of Burger varied, depending in part on commentators' agreement with his judicial views. It was generally accepted, however, that the Chief Justice did not dominate his colleagues on the bench but was an articulate, sometimes pungent, advocate of restraint by the Court. He maintained a high level of agreement with Nixon's other Court appointees and argued that judicial decisions should not play a major role in promoting reform. A hardworking man with a pragmatic mind, Burger may make a more lasting impact, according to some observers, as a judicial administrator rather than as a jurist.

[CAB]

For further information:
John P. MacKenzie, "Warren E. Burger," in Leon Friedman and Fred L. Israel, eds., *The Justices of the U.S. Supreme Court, 1789-1968* (New York, 1969), Vol 4.

BURNS, ARTHUR F(RANK)

b. April 27, 1904; Stanislau, Austria. Counselor to the President, January 1969-January 1970; Chairman, Board of Governors, Federal Reserve System, January 1970–January 1978.

Arthur Burns was born in Austria and immigrated to the United States with his parents prior to World War I. After growing up in Bayonne, N.J., he attended Columbia University, where he took his B.A., his M.A. and finally, in 1934, his Ph.D. in economics. While still a graduate student, Burns began teaching at Rutgers University, and in 1930 he was hired as a research associate at the National Bureau of Economic Research (NBER), a private institute established for the study of business cycles. In 1941 Burns returned to Columbia as a visiting professor, becoming a full professor in 1944. The following year he was appointed director of research at the NBER, and became NBER president in 1957.

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America's Agenda for the Future

Message to the Congress.

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... recent years. To ensure fairness and consistency in the administration of justice, our Administration will continue to appoint highly qualified judges who support the limited policy making role of the Federal courts envisioned by the Constitution. The Founding Fathers did not want our judiciary system to be first among equals. They wanted it to be one of the coequal branches of government.

Our Administration considers improvements to the Federal drug law enforcement program to be one of its top domestic priorities. Thus, we will continue efforts to ...

(Embargoed)
September 17, 1986
5:30 p.m. RR

PRESIDENTIAL STATEMENT: SENATE CONFIRMATION OF JUSTICE WILLIAM REHNQUIST AND JUDGE ANTONIN SCALIA
WEDNESDAY, SEPTEMBER 17, 1986

I am very pleased that the Senate has voted to confirm my nominations of William Rehnquist to be Chief Justice of the United States, and Antonin Scalia as Associate Justice of the Supreme Court. William Rehnquist has served with great distinction as an Associate Justice of the Supreme Court for the last 15 years. Known as an extraordinary legal mind from his early years in law, Justice Rehnquist earned renown in the Court for the brilliance of his reason and the clarity and craftsmanship of his opinions. I have no doubt that William Rehnquist will prove to be a Chief Justice of historic stature.

Judge Scalia is also widely regarded in his profession as a first class intellect, a persuasive jurist, and a warm, caring person. He will make a superb addition to the Court.

This vote in the full Senate is a bi-partisan rejection of the political posturing that marred the confirmation hearings. It's clear to all now that the extraordinary controversy surrounding the hearings had little to do with Justice Rehnquist's record or character -- both are unassailable and unimpeachable. The attacks came from those whose ideology runs contrary to his profound and unshakeable belief in the proper constitutional role of the judiciary in this country. Justice Rehnquist believes, as I do, that our Founding Fathers did not create the Supreme Court as a kind of supra-legislature; that judges should interpret the law, not make it; and that victims of

crime are due at least as much consideration from our judicial system as criminal offenders.

Both Chief Justice Rehnquist and Associate Justice Scalia will be strong and eloquent voices for the proper role of the judiciary and the rights of victims; and I am confident that they will both serve the Court and their country very well indeed.

dent of the Key Biscayne Bank and Trust Co. and held the presidencies of several real estate firms. A friend of Richard Nixon, Rebozo loaned money to the President in 1969 for the purchase of his San Clemente home and gave the Nixon family personal gifts. Rebozo was a frequent White House guest during the last two years of Nixon's presidency, and the President and his friend often relaxed together on the yacht *Sequoia* during evening cruises down the Potomac River. They talked over strategies in the Oval Office and visited one another in Florida and at Robert H. Abplanalp's [*q.v.*] home in the Bahamas.

During the 1973 Watergate investigation it was revealed that Rebozo played a role in soliciting contributions to a private campaign fund set up by Nixon. One contribution came from billionaire recluse Howard Hughes [*q.v.*] in the form of $100,000 cash, received in July and August of 1970. The Hughes contribution was considered, by critics, a possible payment in return for a favorable Justice Department action on an antitrust suit involving Hughes. Rebozo told the Senate Watergate Committee that the money had not been spent for any purpose and had, instead, been returned to Hughes. Rebozo was also alleged to have paid $50,000 out of the fund for personal gifts to Nixon. Money funneled through various trust accounts, the Watergate Committee revealed, paid for $46,000 in improvements for Nixon's Key Biscayne home and another $4,562 paid for a pair of diamond earrings Rebozo had given Mrs. Nixon. The Committee noted, however, that Rebozo made these gifts on his own initiative. The fund was again discussed at the Watergate cover-up trial when Assistant Special Prosecutor Richard Ben-Veniste [*q.v.*] said it was intended to be used to pay $200,000 to $300,000 in legal fees for H.R. Haldeman [*q.v.*] and John D. Ehrlichman [*q.v.*]. No charges were brought against Rebozo as a result of his involvement in the fund.

Questions were also raised regarding presidential influence peddling when a possible competitor to Rebozo's Key Biscayne bank was denied a charter in 1973. Rep. Wright Patman (D, Tex.) [*q.v.*] sought an investigation of the matter, but after a White House spokesman said there had been no involvement by the President, the matter was dropped.

Rebozo continued his banking and real estate ventures in Florida throughout the 1970s.

[BO]

REHNQUIST, WILLIAM H(UBBS)

b. Oct. 1, 1924; Milwaukee, Wisc.
Assistant Attorney General, 1969-72; Associate Justice, U.S. Supreme Court, 1972-.

Rehnquist received a B.A. from Stanford University in 1948 and graduated first in his class from Stanford Law School in 1952. He served as a law clerk to Supreme Court Justice Robert H. Jackson in 1952 and 1953 and then moved to Phoenix, Ariz., where he practiced privately from 1953 to 1969. Rehnquist also became active in the conservative wing of Arizona's Republican Party and supported Sen. Barry Goldwater (R, Ariz.) [*q.v.*] for the presidency in 1964. On the recommendation of Deputy Attorney General Richard G. Kleindienst [*q.v.*], Rehnquist was appointed assistant attorney general in charge of the office of legal counsel in January 1969.

In that post Rehnquist gave legal advice to the Attorney General and the President and to other departments of government. Considered a brilliant attorney, Rehnquist also served as an articulate and well-informed spokesman for the Nixon Administration in Congress on a variety of controversial issues. He promoted the unsuccessful nominations of Clement F. Haynsworth, Jr. [*q.v.*] and G. Harrold Carswell [*q.v.*] to the Supreme Court. He defended the President's power to invade Cambodia, the mass arrests of anti-war demonstrators in Washington and the executive's privilege to withhold information from Congress. Rehnquist supported the Administration's criminal

law proposals including authorization of wiretapping and electronic surveillance, preventive detention and "no-knock" entry. He aroused some controversy in March 1971, when he told a Senate subcommittee that the Justice Department opposed any legislation impairing the government's ability to collect information on citizens. He also said he saw no violation of the First Amendment in the Army's surveillance of civilian demonstrators.

On Oct. 21, 1971 President Nixon unexpectedly nominated Rehnquist and Lewis F. Powell, Jr. [*q.v.*] to the Supreme Court. Opposition to Rehnquist's appointment soon developed among civil rights, civil liberties and labor groups who criticized his conservative record on issues of individual and minority rights. Nonetheless, the Senate Judiciary Committee approved Rehnquist's nomination by a 12 to 4 vote on Nov. 23. After several days of debate, the Senate confirmed his appointment, 68 to 26. Rehnquist was sworn in as associate justice on Jan. 7, 1972.

The youngest justice at the time of his appointment, Rehnquist soon established himself as the most conservative member of the Court. He advanced a narrow conception of judicial review and insisted that policymaking was the function of the political branches of government. He argued that the Court should defer to the judgments of legislatures unless their actions were clearly unconstitutional, and he opposed expansive constitutional interpretations, which he thought allowed the justices to impose their own values on society.

Rehnquist objected, for example, to the Court's extension of the due process clause to a variety of new interests. In cases decided in 1974 and 1975, he voted against granting a right to a notice and a hearing to a federal civil service employe prior to his dismissal, to debtors prior to the seizure of their goods by creditors, and to public school students prior to a disciplinary suspension. He dissented in January 1973 when the Court overturned state laws restricting abortions during the first six months of pregnancy as a violation of the due process right to privacy. In a March 1976 majority opinion, Rehnquist stated that police did not deny due process when they identified an individual in a notice to shopkeepers as an "active shoplifter," even though he had never been convicted of theft.

Similarly, Justice Rehnquist took a limited view of the equal protection clause. It was intended, he argued, to protect blacks from racial discrimination by the state and should not be used to overturn other forms of alleged discrimination unless there was no rational basis for the government's action. As a result of this view, Rehnquist voted, often alone, to uphold laws that established different treatment for illegitimate children, aliens and women. He was the sole dissenter, for example, in May 1973, when the majority invalidated different eligibility requirements for dependency benefits for men and women in the military. He stood alone again in April 1975 when the Court overturned state laws setting a different age of majority for the sexes. Rehnquist spoke for the Court, however, in December 1976 when he ruled that an employer did not violate the 1964 Civil Rights Act, which prohibited sex discrimination in employment, by excluding pregnancy and childbirth from coverage in a disability benefit plan.

The Justice also used a rationality test to decide apportionment cases, and he wrote several significant opinions for the Court based on this standard. In February 1973 he upheld a state legislative districting plan that departed from a strict one-person, one-vote rule because the deviations helped the state achieve the goal of providing representation for local communities. For a six-man majority Rehnquist ruled in March 1973 that the one-man, one-vote standard was not required for the election of officials to a special purpose governmental body, such as the board of directors of a state water storage district.

In racial discrimination cases Rehnquist spoke for a unanimous Court in January 1973 to hold that a defendant must

be allowed to question potential jurors about possible racial prejudice. However, his majority opinion in a June 1972 case ruled that racial discrimination by a private club did not violate the Constitution, even though the club received a liquor license from the state. In June 1976, for a six-man majority, the Justice declared that once school officials had complied with a desegregation order by establishing a racially neutral pupil assignment system, they could not be required to readjust attendance zones later on when population shifts caused resegregation.

Justice Rehnquist generally voted to sustain governmental actions against individual rights claims, especially in criminal cases. On Fourth Amendment issues, where he was often the Court's spokesman, Rehnquist persistently upheld police searches and seizures against challenge. In a June 1972 decision he ruled that a policeman could stop and frisk a suspect for a weapon on the basis of an informant's tip and then, after arresting him for illegal possession of a handgun, could search the suspect's car without a warrant. His opinion for the Court in a December 1973 case upheld the authority of the police to make a full personal search following a lawful custodial arrest, even for a minor offense such as a traffic violation. In two decisions in April 1973 and April 1976, Rehnquist stated that a defendant could not claim entrapment into a crime, no matter what the extent of government involvement, if he had shown a predisposition to violate the law. The Justice also voted repeatedly to sustain state laws imposing capital punishment.

In First Amendment cases Rehnquist also tended to give greater weight to society's interests than to individual free expression. He joined the majority in several June 1973 cases, for example, to set new guidelines for obscenity laws which allowed greater government control over pornography. The Justice generally resolved federal-state conflicts in favor of the states. In a June 1976 majority opinion, he overturned a 1968 precedent and held federal minimum wage laws inapplicable to state and local governments. Rehnquist also favored cutbacks in federal court jurisdiction. His opinion for a five-man majority in January 1976 ruled that a federal district judge exceeded his jurisdiction when he ordered Philadelphia officials to establish new procedures for handling complaints of police misconduct.

Off the bench Justice Rehnquist was a frequent public speaker who agreed with Chief Justice Warren Burger [*q.v.*] that the Court's caseload was too heavy. On the Court he impressed all observers with his powerful intellectual ability and with opinions that were generally well-organized, able and articulate. Rehnquist's influence on the rest of the Court was a matter of debate. Some commentators believed him too dogmatically conservative in his views to sway other justices. One analyst, David Shapiro, labeled Rehnquist's judicial performance "markedly below" his "substantial capabilities," partly because of "the inflexibility of his ideological commitments." Other observers, however, suggested that the Justice's brilliance, self-confidence and persuasiveness, combined with the prospect of a lengthy tenure, made it likely that he would have a significant impact on the Court over the long run.

[CAB]

For further information:
John R. Rydell II, "Mr. Justice Rehnquist and Judicial Self-Restraint," *Hastings Law Journal*, 26 (Febuary 1975), pp.875-915.
David L. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," *Harvard Law Review*, 90 (December 1976), pp. 293-357.

REID, OGDEN R(OGERS)

b. June 24, 1925, New York, N.Y.
Republican Representative, N.Y., 1963-72; Democratic Representative, N.Y., 1972-75.

Born into the wealthy and politically influential family that owned and operated the New York *Herald Tribune*, Reid served in the Army during World War II,

(Judge)
September 24, 1986
10:00 a.m.

PRESIDENTIAL REMARKS: SWEARING IN OF CHIEF JUSTICE WILLIAM REHNQUIST AND JUSTICE ANTONIN SCALIA
FRIDAY, SEPTEMBER 26, 1986

Mr. Chief Justice and Mr. Chief Justice, Members of the Court, Ladies and Gentlemen: Almost 200 years ago a small group of patriots met in Philadelphia to write one of the greatest plans for self-government in the history of man -- our Constitution. Through the hot summer of 1787 they worked and when they were done, as they were leaving Independence Hall, someone in the crowd gathered outside asked Benjamin Franklin what kind of a Government they had created. "A republic," he replied, "if you can keep it."

Well, today we mark one of those moments of passage and renewal that has kept our republic alive and strong, the last best hope of man on Earth, for all the years since then. One chief justice of our Supreme Court has stepped down. And together with a new associate justice, another has taken his place. As the Constitution requires, he has been nominated by the President, confirmed by the Senate and he has taken the oath that is written into the Constitution itself -- the oath, as it says, "to preserve, protect and defend the Constitution of the United States... so help me God."

In marking this moment of transition, let me first say, on behalf of all Americans, how grateful we are to Chief Justice Burger. For 15 years on the Supreme Court and for 13 years before that on the Court of Appeals for the D.C. Circuit, the Chief Justice's service to our Nation has been a monument of

integrity and of dedication to principle and to the judiciary itself. But Mr. Chief Justice, we know your service isn't ending today. You'll be guiding the bicentennial celebration of that Constitution that you have served with such distiction over the years. Because of the work you'll be doing, Americans in all walks of life will come to have an even more profound knowledge of the foundation on which our great Nation is built. And so, although your service has already been outstanding, if you'll excuse me borrowing an old phrase, I have a feeling that we ain't seen nothin' yet.

Our new Chief Justice is one of America's most brilliant jurists. From his days in law school, where he graduated first in his class, he has been recognized for his extraordinary legal insight. On the Court he has distinguished himself through the brilliance of his reason and the clarity and craftsmanship of his opinions. I nominated William Rehnquist because I believe he will be a Chief Justice of historic stature. And besides, I just figured that a promotion was the best way to hold onto a bright, energetic young fellow like that.

Associate justice Antonin Scalia is also a brilliant judge. Like the Chief Justice, he was first in his law school class. He had a distinguished career as a lawyer and as a professor of law before joining the D.C. Court of Appeals four years ago. There he became known for his integrity and independence and for the force of his intellect. Chief Justice Rehnquist and Justice Scalia, congratulations to both of you.

With these two outstanding men taking their new positions, this is, as I said, a time of renewal in the great Constitutional system that our forefathers gave us -- a good time to reflect on the inspired wisdom that is in our Constitution.

Our Founding Fathers recognized the central role the Supreme Court would play in maintaining the delicate checks and balances that they were arranging. In that small room in Philadelphia, they debated whether the justices should have life terms or not, whether they should be part of one of the other branches or not and whether they should have the right to declare acts of the other branches of government unconstitutional or not. They settled on a judiciary that would be independent and strong, but one that would also, they believed, be restrained.

In the Convention and during the debates on ratification, some said that there was a danger of the courts making laws rather than interpreting them. They remembered the warning of the French constitutional philosopher Montesquieu, who said, "There is no liberty if the power of judging be not separated from the legislative... powers." But the Framers of our Constitution believed that the judiciary was "the least dangerous" branch of the government, because, as Alexander Hamilton wrote in the Federalist Papers, it had "neither force nor will but merely judgment" and its judgments would be strictly limited to the construction of the Constitution.

Hamilton and Thomas Jefferson (who was not at the Convention) disagreed in their day just about as much as some of us disagree today. They helped begin our long tradition of loyal

opposition, of standing on opposite side of almost everything and yet still working together for the good of the country. But one thing they both agreed on was the importance of the courts exercising restraint in interpreting the Constitution. "Our peculiar security," Jefferson warned, "is in the possession of a written Constitution." And he made this appeal: "Let us not make a blank page [of it] by construction."

Hamilton, Jefferson and all the Founding Fathers recognized that the Constitution is the supreme and ultimate expression of the will of the American people. They saw that no one in office could remain above it, if freedom was to survive through the ages. They understood that, in the words of James Madison, if "the sense in which the Constitution was accepted and ratified by the nation... [is] not a guide for expounding it, there can be no security for... a faithful exercise of its powers."

The Founding Fathers were clear and specific on this issue. For them, the question involved in judicial restraint was not -- as it is not -- will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have a government by the people or a government by a tiny judicial ruling class that is responsible to no one and that dresses up its decrees in Constitutional costumes?

Like the Founding Fathers, some of our most distinguished liberal judges have understood the importance of judicial self-restraint -- Justice Holmes, for example, and Justice Felix Frankfurter, who once said, "[T]he highest exercise of judicial

duty is to subordinate one's personal pulls and one's private views to the law... [to] those impersonal convictions that make a society a civilized community, and not the victims of personal rule."

I nominated Chief Justice Rehnquist and Justice Scalia because, like Holmes and Frankfurter, they understand that the genius of our Consitution is in its first words, "We, the People." We the people created the government. Its powers come from we the people. To keep government in the hands of we the people and out of the hands of passing factions, the Founding Fathers designed a system of checks and balances, of limited government and of federalism. For they knew that the great preserver of our freedoms would never be the courts or either of the other branches. It would not be the states. And it would not be the bill of rights or any particular law. They believed great preserver of our freedoms would always be the total Constitutional system itself, with no part getting the upper hand. This is why the judiciary must be independent. And this is why it must exercise restraint.

So our protection is in the Constitutional system... and one other place as well. Lincoln asked, "What constitutes the bulwark of our own liberty?" And he answered, "It is in the love of liberty which God has planted in us." We the people are the ultimate defenders of freedom. Our love of liberty, our spiritual strength, our dedication to the Constitution are what preserves our great Nation and this great hope for all mankind. All of us, as Americans, are joined in a great common enterprise

to write the story of freedom -- the greatest adventure mankind has ever known and one we must pass onto our children and their children -- remembering that freedom is never more than one generation away from extinction.

The warning, more than a century ago, attributed to Daniel Webster, remains as timeless as the document he revered. He said, "Hold onto the Constitution of the United States of America and to the Republic for which it stands. Miracles do not cluster -- what happened once in 6,000 years may never happen again. Hold onto your Consitution, for if the American Consitution shall fall there will be anarchy throughout the world."

Thank you and God bless you.

MIKE

SEPTEMBER 26, 1986

OPENING REMARKS FOR SWEARING IN CEREMONY

MEMBERS OF THE COURT, LADIES & GENTLEMEN:

WELCOME TO THE WHITE HOUSE AND THANK YOU FOR COMING TO WITNESS THIS HISTORIC OCCASION. THIS CEREMONY IS THE CULMINATION OF OUR CONSTITUTIONAL PROCESS THAT INVOLVES EACH OF THE THREE BRANCHES OF GOVERNMENT. I HAVE HAD THE HONOR OF NOMINATING JUSTICE REHNQUIST TO BE THE NEXT CHIEF JUSTICE OF THE UNITED STATES AND JUDGE SCALIA TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT. THE SENATE HAS CONFIRMED MY NOMINATIONS AND I NOW ASK THAT CHIEF JUSTICE WARREN BURGER ADMINISTER THE CONSTITUTIONAL OATH OF OFFICE TO JUSTICE REHNQUIST AND JUDGE SCALIA...

MR. CHIEF JUSTICE...

THE WHITE HOUSE

WASHINGTON

9/18/86

MEMORANDUM

TO: PETER WALLISON (Coordinate with Jack Courtemanche)

FROM: FREDERICK J. RYAN, JR.

SUBJECT: APPROVED PRESIDENTIAL ACTIVITY

MEETING: Swearing-in Ceremony for Chief Justice Rehnquist and Associate Justice Scalia

DATE: September 26, 1986

TIME: 11:00 am

DURATION: 15 minutes

LOCATION: East Room

BACKUP LOCATION:

REMARKS REQUIRED: Yes

MEDIA COVERAGE: Coordinate with Press Office

FIRST LADY PARTICIPATION: Yes

CJ + all SC + spouse
all the Cabinet
~~partners~~ families of RT
100 VIP's
little over 200
Cathy Fey Tue
7064

NOTE: PROJECT OFFICER, SEE ATTACHED CHECKLIST

W. Ball
K. Barun
P. Buchanan
D. Chew
J. Courtemanche
M. Coyne
E. Crispen
M. Daniels
T. Dawson
D. Dellinger
A. Dolan
J. Erkenbeck
L. Faulkner
C. Fuller
W. Henkel
J. Hooley
A. Kingon
J. Kuhn
C. McCain
J. Miller
R. Riley
R. Shaddick
B. Shaddix
L. Speakes
G. Walters
WHCA Audio/Visual
WHCA Operations

MIKE

(JUDGE) SEPTEMBER 26, 1986

SWEARING IN OF CHIEF JUSTICE WILLIAM REHNQUIST AND JUSTICE ANTONIN SCALIA

MR. CHIEF JUSTICE BURGER, MR. CHIEF JUSTICE REHNQUIST, MEMBERS OF THE COURT, LADIES AND GENTLEMEN: TODAY WE MARK ONE OF THOSE MOMENTS OF PASSAGE AND RENEWAL THAT HAS KEPT OUR REPUBLIC ALIVE AND STRONG -- AS LINCOLN CALLED IT THIS LAST BEST HOPE OF MAN ON EARTH -- FOR ALL THE YEARS SINCE ITS FOUNDING. ONE CHIEF JUSTICE OF OUR SUPREME COURT HAS STEPPED DOWN. AND TOGETHER WITH A NEW ASSOCIATE JUSTICE, ANOTHER HAS TAKEN HIS PLACE. AS THE CONSTITUTION REQUIRES, THEY HAVE BEEN NOMINATED BY THE PRESIDENT, CONFIRMED BY THE SENATE AND THEY HAVE TAKEN THE OATH THAT IS REQUIRED BY THE CONSTITUTION ITSELF -- THE OATH "TO SUPPORT AND DEFEND THE CONSTITUTION OF THE UNITED STATES... SO HELP ME GOD."

IN MARKING THIS MOMENT OF TRANSITION, LET ME FIRST SAY, ON BEHALF OF ALL AMERICANS, HOW GRATEFUL WE ARE TO CHIEF JUSTICE BURGER. FOR 17 YEARS ON THE SUPREME COURT AND FOR 13 YEARS BEFORE THAT ON THE COURT OF APPEALS FOR THE D.C. CIRCUIT, THE CHIEF JUSTICE's SERVICE TO THE NATION HAS BEEN A MONUMENT OF INTEGRITY AND OF DEDICATION TO PRINCIPLE -- AND ESPECIALLY TO THE JUDICIARY ITSELF. BUT, MR. CHIEF JUSTICE, WE KNOW YOUR SERVICE ISN'T ENDING TODAY. HOW APPROPRIATE IT IS THAT YOU WILL BE GUIDING THE BICENTENNIAL CELEBRATION OF THAT CONSTITUTION THAT YOU HAVE SERVED WITH SUCH DISTINCTION OVER THE YEARS. AND WHAT A LASTING CONTRIBUTION THIS WILL BE. BECAUSE OF YOUR WORK, AMERICANS IN ALL WALKS OF LIFE WILL COME TO HAVE AN EVEN MORE PROFOUND KNOWLEDGE OF THE RULE OF LAW AND THE SACRED DOCUMENT UPON WHICH IT RESTS.

YOUR SERVICE AS CHIEF JUSTICE HAS BEEN OUTSTANDING AND IT IS A MARK OF YOUR GENEROSITY THAT YOU HAVE AGREED TO OFFER YOURSELF FOR ADDITIONAL SERVICE TO YOUR COUNTRY AND THE LAW.

OUR NEW CHIEF JUSTICE IS ONE OF AMERICA's MOST BRILLIANT JURISTS. FROM HIS DAYS IN LAW SCHOOL, WHERE HE GRADUATED FIRST IN HIS CLASS, HE HAS BEEN RECOGNIZED FOR HIS EXTRAORDINARY LEGAL INSIGHT. ON THE COURT HE HAS DISTINGUISHED HIMSELF THROUGH THE BRILLIANCE OF HIS REASON AND THE CLARITY, THE CRAFTSMANSHIP OF HIS OPINIONS. I NOMINATED WILLIAM REHNQUIST BECAUSE I BELIEVE HE WILL BE A CHIEF JUSTICE OF HISTORIC STATURE.

ASSOCIATE JUSTICE ANTONIN SCALIA IS ALSO A BRILLIANT JUDGE. HE HAD A DISTINGUISHED CAREER AS A LAWYER AND AS A PROFESSOR OF LAW BEFORE JOINING THE COURT OF APPEALS 4 YEARS AGO.

THERE HE BECAME KNOWN FOR HIS INTEGRITY AND INDEPENDENCE AND FOR THE FORCE OF HIS INTELLECT. CHIEF JUSTICE REHNQUIST AND JUSTICE SCALIA, CONGRATULATIONS TO BOTH OF YOU.

WITH THESE TWO OUTSTANDING MEN TAKING THEIR NEW POSITIONS, THIS IS, AS I SAID, A TIME OF RENEWAL IN THE GREAT CONSTITUTIONAL SYSTEM THAT OUR FOREFATHERS GAVE US -- A GOOD TIME TO REFLECT ON THE INSPIRED WISDOM WE CALL OUR CONSTITUTION, A TIME TO REMEMBER THAT THE FOUNDING FATHERS GAVE CAREFUL THOUGHT TO THE ROLE OF THE SUPREME COURT. IN A SMALL ROOM IN PHILADELPHIA IN THE SUMMER OF 1787, THEY DEBATED WHETHER THE JUSTICES SHOULD HAVE LIFE TERMS OR NOT, WHETHER THEY SHOULD BE PART OF ONE OF THE OTHER BRANCHES OR NOT AND WHETHER THEY SHOULD HAVE THE RIGHT TO DECLARE ACTS OF THE OTHER BRANCHES OF GOVERNMENT UNCONSTITUTIONAL OR NOT.

THEY SETTLED ON A JUDICIARY THAT WOULD BE INDEPENDENT AND STRONG, BUT ONE WHOSE POWER WOULD ALSO, THEY BELIEVED, BE CONFINED WITHIN THE BOUNDARIES OF A WRITTEN CONSTITUTION AND LAWS. IN THE CONVENTION AND DURING THE DEBATES ON RATIFICATION, SOME SAID THAT THERE WAS A DANGER OF THE COURTS MAKING LAWS RATHER THAN INTERPRETING THEM. THE FRAMERS OF OUR CONSTITUTION BELIEVED, HOWEVER, THAT THE JUDICIARY THEY ENVISIONED WOULD BE "THE LEAST DANGEROUS" BRANCH OF THE GOVERNMENT, BECAUSE, AS ALEXANDER HAMILTON WROTE IN THE FEDERALIST PAPERS, IT HAD "NEITHER FORCE NOR WILL, BUT MERELY JUDGMENT." THE JUDICIAL BRANCH INTERPRETS THE LAWS, WHILE THE POWER TO MAKE AND EXECUTE THOSE LAWS IS BALANCED IN THE TWO ELECTED BRANCHES. AND THIS WAS ONE THING THAT AMERICANS OF ALL PERSUASIONS SUPPORTED.

HAMILTON AND THOMAS JEFFERSON, FOR EXAMPLE, DISAGREED ON MOST OF THE GREAT ISSUES OF THEIR DAY, JUST AS MANY OF US HAVE DISAGREED IN OURS. THEY HELPED BEGIN OUR LONG TRADITION OF LOYAL OPPOSITION, OF STANDING ON OPPOSITE SIDES OF ALMOST EVERY QUESTION WHILE STILL WORKING TOGETHER FOR THE GOOD OF THE COUNTRY. YET FOR ALL THEIR DIFFERENCES THEY BOTH AGREED -- AS SHOULD WE -- ON THE IMPORTANCE OF JUDICIAL RESTRAINT. "OUR PECULIAR SECURITY," JEFFERSON WARNED, "IS IN THE POSSESSION OF A WRITTEN CONSTITUTION." AND HE MADE THIS APPEAL: "LET US NOT MAKE IT A BLANK PAPER BY CONSTRUCTION."

HAMILTON, JEFFERSON AND ALL THE FOUNDING FATHERS RECOGNIZED THAT THE CONSTITUTION IS THE SUPREME AND ULTIMATE EXPRESSION OF THE WILL OF THE AMERICAN PEOPLE.

THEY SAW THAT NO ONE IN OFFICE COULD REMAIN ABOVE IT, IF FREEDOM WERE TO SURVIVE THROUGH THE AGES. THEY UNDERSTOOD THAT, IN THE WORDS OF JAMES MADISON, IF "THE SENSE IN WHICH THE CONSTITUTION WAS ACCEPTED AND RATIFIED BY THE NATION... [IS] NOT THE GUIDE TO EXPOUNDING IT, THERE CAN BE NO SECURITY FOR... A FAITHFUL EXERCISE OF ITS POWERS."

THE FOUNDING FATHERS WERE CLEAR ON THIS ISSUE. FOR THEM, THE QUESTION INVOLVED IN JUDICIAL RESTRAINT WAS NOT -- AS IT IS NOT -- WILL WE HAVE LIBERAL OR CONSERVATIVE COURTS? THEY KNEW THAT THE COURTS, LIKE THE CONSTITUTION ITSELF, MUST NOT BE LIBERAL OR CONSERVATIVE. THE QUESTION WAS AND IS, WILL WE HAVE A GOVERNMENT BY THE PEOPLE.

AND THIS IS WHY THE PRINCIPLE OF JUDICIAL RESTRAINT HAS HAD AN HONORED PLACE IN OUR TRADITION.

PROGRESSIVE AS WELL AS CONSERVATIVE JUDGES HAVE INSISTED ON ITS IMPORTANCE -- JUSTICE HOLMES, FOR EXAMPLE, AND JUSTICE FELIX FRANKFURTER, WHO ONCE SAID, "THE HIGHEST EXERCISE OF JUDICIAL DUTY IS TO SUBORDINATE ONE's PERSONAL PULLS AND ONE's PRIVATE VIEWS TO THE LAW...."

CHIEF JUSTICE REHNQUIST AND JUSTICE SCALIA HAVE DEMONSTRATED IN THEIR OPINIONS THAT THEY STAND WITH HOLMES AND FRANKFURTER ON THIS QUESTION. I NOMINATED THEM WITH THIS PRINCIPLE VERY MUCH IN MIND. AND CHIEF JUSTICE BURGER, IN HIS OPINIONS, WAS ALSO A CHAMPION OF RESTRAINT. ALL THREE MEN UNDERSTAND THAT THE FOUNDING FATHERS DESIGNED A SYSTEM OF CHECKS AND BALANCES, AND OF LIMITED GOVERNMENT, BECAUSE THEY KNEW THAT THE GREAT PRESERVER OF OUR FREEDOMS WOULD NEVER BE THE COURTS OR EITHER OF THE OTHER BRANCHES ALONE.

IT WOULD ALWAYS BE THE TOTALITY OF OUR CONSTITUTIONAL SYSTEM, WITH NO ONE PART GETTING THE UPPER HAND. THAT IS WHY THE JUDICIARY MUST BE INDEPENDENT. AND THAT IS ALSO WHY IT MUST EXERCISE RESTRAINT.

SO OUR PROTECTION IS IN THE CONSTITUTIONAL SYSTEM... AND ONE OTHER PLACE AS WELL. LINCOLN ASKED, "WHAT CONSTITUTES THE BULWARK OF OUR OWN LIBERTY?" AND HE ANSWERED, "IT IS IN THE LOVE OF LIBERTY WHICH GOD HAS PLANTED IN US." YES, WE THE PEOPLE ARE THE ULTIMATE DEFENDERS OF FREEDOM. WE THE PEOPLE CREATED THE GOVERNMENT AND GAVE IT ITS POWERS. AND OUR LOVE OF LIBERTY, OUR SPIRITUAL STRENGTH, OUR DEDICATION TO THE CONSTITUTION ARE WHAT, IN THE END, PRESERVES OUR GREAT NATION AND THIS GREAT HOPE FOR ALL MANKIND.

ALL OF US, AS AMERICANS, ARE JOINED IN A GREAT COMMON ENTERPRISE TO WRITE THE STORY OF FREEDOM -- THE GREATEST ADVENTURE MANKIND HAS EVER KNOWN AND ONE WE MUST PASS ONTO OUR CHILDREN AND THEIR CHILDREN -- REMEMBERING THAT FREEDOM IS NEVER MORE THAN ONE GENERATION AWAY FROM EXTINCTION.

THE WARNING, MORE THAN A CENTURY AGO, ATTRIBUTED TO DANIEL WEBSTER, REMAINS AS TIMELESS AS THE DOCUMENT HE REVERED. "MIRACLES DO NOT CLUSTER," HE SAID, "HOLD ONTO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND TO THE REPUBLIC FOR WHICH IT STANDS -- WHAT HAS HAPPENED ONCE IN 6,000 YEARS MAY NEVER HAPPEN AGAIN. HOLD ONTO YOUR CONSTITUTION, FOR IF THE AMERICAN CONSTITUTION SHALL FALL THERE WILL BE ANARCHY THROUGHOUT THE WORLD."

HOLDING ONTO THE CONSTITUTION -- THIS HAS BEEN THE SERVICE OF CHIEF JUSTICE BURGER, AND A GRATEFUL NATION HONORS HIM TODAY. SO, TOO, I CAN THINK OF NO TWO BETTER PUBLIC SERVANTS TO CONTINUE THAT WORK THAN CHIEF JUSTICE REHNQUIST AND JUSTICE SCALIA. YOU BOTH HAVE OUR NATION's HEARTFELT WISHES FOR SUCCESS AND HAPPINESS.

THANK YOU ALL FOR JOINING IN THIS IMPORTANT CEREMONY. I KNOW THAT, IN A FEW MOMENTS, OUR NEW CHIEF JUSTICE AND ASSOCIATE JUSTICE LOOK FORWARD TO GREETING EACH OF YOU IN THE MAIN HALL.

# # #

to safety, in the republican sense—a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; the election of the President once in four years by persons immediately chosen by the people for that purpose, and his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body. What more can an enlightened and reasonable people desire? PUBLIUS

No. 78: Hamilton

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2nd. The tenure by which they are to hold their places. 3rd. The partition of the judiciary authority between different courts and their relations to each other.

First. As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general and has been so fully discussed in the two last numbers that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: this chiefly concerns their duration in office, the provisions for their support, the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices *during good behavior;* which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three

departments of power;* that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers." † And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the

* The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the JUDICIARY is next to nothing." —*Spirit of Laws*, Vol. I, page 186.

† *Idem*, page 181.

Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a su-

periority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that between the interfering acts of an *equal* authority that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure

to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies* in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from

*Vide Protest of the Minority of the Convention of Pennsylvania, Martin's speech, etc.

the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them, who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights

of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well

qualified to conduct it with utility and dignity. In the present circumstances of this country and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS

No. 79: Hamilton

NEXT to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent** salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasion. Something still more positive and unequivocal has been

* *Vide Constitution of Massachusetts,* Chapter 2, Section 1, Article 13.

evinced to be requisite. The plan of the convention accordingly has provided that the judges of the United States "shall at *stated times* receive for their services a compensation which shall not be *diminished* during their continuance in office."

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the President and of the judges. That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to the end of it. But with regard to the judges who, if they behave properly, will be secured in the places for life, it may well happen, especially in the early stages of the government, that a stipend which would be very sufficient at their first appointment would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of