

JUSTICE HOLMES, on being asked what he thought of the intellectual abilities of another Judge, once replied: "I never thought of him in that connection." And there lies the nub of the powerful, positive case that can be made for Senate confirmation of President Nixon's latest nominee for the Supreme Court, William Rehnquist.

For years now hardly anybody has thought of the Supreme Court as performing an intellectual function. Mr. Rehnquist, far more than any other recent nominee, has the calibre to restore intellectual distinction to the Court.

To understand why, it is necessary to say a word about the role of the Court in the country. The country is dominated by the million and one daily actions of an energetic population largely unconstrained in its capacity to buy and sell, move and dream, educate and obscure, build and tear down.

Given the nearly universal disposition toward almost constant action, it is ludicrous to think of tyranny being imposed on this country from above by some establishment eager to freeze the status quo or turn back the clock.

THE CENTRAL political problem of a populist country is to preserve some modicum of elite values — respect for achievement; toleration for difference of outlook; regularity of procedure. Partly by original design, but even more by the chance accretions of history, the Supreme Court has come to be the defender of those values — the elitist institution in a populist country.

Unfortunately for the Court, certain political decisions were thrust upon it by the deadlock that developed between Executive and Legislature during the post-war period. In the fields of civil rights and legislative reapportionment, the Court felt obliged — understandably considering that all other avenues seemed closed — to make rulings that might much more appropriately been the work of the President and the Congress.

In the heady atmosphere engendered by those decisions, the Court headed by Chief Justice Earl Warren

became result-oriented. In case after case, it was increasingly hard to discover the inner logic of decision-making. Blacks seemed to be favored because they were blacks, baseball because it was a good clean American sport, anti-trust plaintiffs because they were against economic monsters.

President Nixon's efforts to correct the imbalance have been fumbling to the point of casting doubt on the sincerity of his claim to want "strict constructionists." His preferred candidates have been right-wingers, so little distinguished that the Senate and the American Bar Association have constrained him to throw them back in the pond.

MR. REHNQUIST is something else. He has not shown sensitivity to the needs of people in trouble, and he has said some hard-line — and to me silly-sounding — things about the influence of Supreme Court clerks and the softness of judges towards communism. Some of these comments may be what ambitious juniors are required to say in order to get ahead in the Republican Party of Barry Goldwater and the Justice Department of John Mitchell. Still, I suppose they represent a genuine right-wing conviction.

But Mr. Rehnquist also has a mind of the highest calibre. His comments in the Judiciary Committee hearings have been unfailingly lucid and discriminating. He has been "hesitant" — a favorite word — when unsure of the fine details of a problem.

Even one of his staunchest opponents, Sen. Edward Kennedy, described him as "a man with a quick, sharp intellect, who quotes Byron, Burke, and Tennyson, who never splits an infinitive, who uses the subjunctive at least once in every speech, who cringes when he sees an English word created from a Greek prefix and a Latin suffix."

Only it happens that the qualities that Senator Kennedy is pleased to dismiss so crudely express a critical as-

pect of the Court's present work. The Court does not now need more liberals, more conservatives, or more middle-of-the-roaders. There are enough of those to assure that nothing drastic is going to happen in civil rights or criminal law.

What the Court needs in more brains, Mr. Rehnquist has them — more abundantly perhaps than any present member. And by uplifting the quality of the Court in general, he will do far more than any particular decision in any particular case can do to advance the values thoughtful men hold dear.

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Rehnquist

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