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The Senate, the Court and the Nominee: I

The hearings on the nominations of Lewis F. Powell Jr. and William H. Rehnquist to be members of the Supreme Court have been most notable, it seems to us, for their failure to produce any spectacular revelations. The two men have emerged with their intellectual and ethical credentials unscathed. Despite some ugly and unfortunate broadside attacks, neither man has been faulted on the grounds that were crucial in the rejections of Judges Haynsworth and Carswell. As a result, the Senate debate over these nominations comes down to a question that was inevitable in light of President Nixon's frequently announced intention to change the dominant philosophy on the Court. It is the extent and the degree to which the Senate should let him reach that goal.

The President's view of this question is, of course, clear. He argued during the Carswell debate that the Senate has a duty to confirm the justices of his choice. As we pointed out at the time, this is a position that ignores both the intent of the men who wrote the Constitution and the practice of the Senate during the last 180 years. Indeed, it turns out that this very assertion of the President's was refuted by Mr. Rehnquist himself a dozen years ago. In a commentary in the Harvard Law Record after the confirmation of Justice Whittaker, Mr. Rehnquist wrote:

> . . . What could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for 175 years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

It is worth recalling that some of those in the Senate who are most eager now to get Mr. Powell and Mr. Rehnquist on the bench have had no qualms in the past about opposing other nominees on philosophical grounds. Seventeen senators, all from Southern or border states, voted against Justice Stewart's confirmation after he was rigorously questioned on school desegregation and made it clear that he wasn't interested in overturning the *Brown* decision. Four members of the present Judiciary Committee—Sens. Eastland, Ervin, McClellan and Thurmond—opposed not only Justice Stewart but also Justices Harlan and Marshall.

Once the Senate's prerogative is put in this perspective, the hard question is reached. How far should that body let the President go in his effort to put men of his own judicial philosophy on the Court? This question did not really arise at the time of the confirmation of Justices Burger and Blackmun for two reasons. One was that their addition to the Court did not portend a drastic swing in a new direction. The other was that neither man was so stamped with a commitment to a particular view as to guarantee the kind of swing the President has sought. Chief Justice Burger and Justice Blackmun, to be sure, have views of the Constitution quite unlike those of Chief Justice Warren and Justice Fortas. But neither man was committed to try to wield a completely new broom through the Court's work.

The situation is different now. The Court is close to being in balance on several controversial issues so that the views of nominees on those very subjects suggested by Mr. Rehnquist a dozen years ago become particularly relevant. Missing from these issues, we should note, are desegregation of the schools and prayer in the schools, subjects that some recent commentary might lead you to believe are still up for grabs but on which the Court has been unambiguous and remarkably united. But the other issues—most of them growing out of the Bill of Rights and its application to the states under the 14th Amendment—are in a state of flux. The pendulum on these matters can swing and the Senate ought to be fully aware that it plays a role in determining how severe that swing is going to be. We put it that way because it seems most unlikely that Mr. Nixon would ever nominate a person whom he did not believe would help the swing to the right. The question, then, is twofold: How far will these nominations move the Court? And is the Senate prepared to have it moved whatever that distance may be?

These are questions to which we will return in detail. At the moment, it is sufficient to say that the nomination of Mr. Powell raises no problems as far as we can see when judged by that measure but that the nomination of Mr. Rehnquist does. The difference between them, to us, arises principally out of the degree in which each has demonstrated an awareness of the great issues of our times and a sensitivity to views of the Constitution that others hold as seriously as they hold theirs.