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Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Eastland:

Mr. William F. Rehnquist, whose nomination to the Supreme Court is now before your Committee, has been described as a strict constructionist and a conservative. Moreover, he is said to be a legal scholar -- in sum, highly qualified, even brilliant, in his knowledge and interpretation of the law.

The term "strict construction" is defined in Webster's Unabridged as "the construction of a writing or instrument according to its literal meaning". A "strict constructionist", it follows, is one who favors literal interpretations of the Constitution and the Acts of Congress. The term "conservative", similarly, is supposed to mean "moderate; adhering to sound principles; not speculative". Such qualities are clearly desirable in Justices of any court. Anyone who has honestly studied the written opinions of Justices Harlan and Black would have to agree that both these men possessed these qualities to an extraordinary degree, notwithstanding that they may occasionally have differed, from themselves or from us, on particular applications.

But how well do such characterizations really apply to Mr. Rehnquist? To illuminate this question, I have set out a number of examples of quotations from Mr. Rehnquist's statements in recent hearings before a Subcommittee of the House Government Operations Committee. Despite the length of this material, I would hope that Members of your Committee and of the Senate as a whole might find time to examine these quotations to determine for themselves whether Mr. Rehnquist meets the standards for being rated as a highly qualified, conservative, strict constructionist, or whether the facts suggest that he has not yet attained those qualities.

Please bear in mind that none of these quotations is from the period of Mr. Rehnquist's youthful advocacy of segregation, which he now claims to have abandoned. Every citation in what follows is from his testimony on June 29-30, 1971, before the House Subcommittee on Foreign Operations and Government Information. That testimony was given less than six months ago at a time when, as now, he was functioning as Assistant Attorney General in the Office of Legal Counsel. He was then and is now giving counsel to the highest legal officer in the Government and, through the latter, to the President himself.

By his own assertions to the Subcommittee, Mr. Rehnquist was then "almost solely responsible" in the area of questions concerning executive privilege and the Freedom of Information Act, including "the case-by-case application of the constitutional principles involved". We are therefore entitled to assume that his intellectual and legal powers were fully developed at the time, and that excuses in the name of youth or limited experience will not be forthcoming.

REHNQUIST AS A STRICT CONSTRUCTIONIST

Recalling that a strict constructionist is one who favors literal interpretations of the Constitution and statutes, as opposed to construction by implication or mere inference, consider the following statements by Mr. Rehnquist on the subject of executive privilege and the Constitution:

> "The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government. This doctrine is implicit in the separation of powers established by the Constitution." (emphasis added)

How does Mr. Rehnquist draw this implication? Observe:

> "... I think most would agree that the doctrine itself is an absolutely essential condition for the faithful discharge by the Executive of his constitutional duties. It is, therefore, as surely implied in the Constitution as is the power of Congress to compel testimony." (emphasis added)

Mr. Rehnquist's glib equation of the Congressional power to obtain information with the executive power to withhold it drew a comment from Congressman Moss about the "gray area" of unresolved division of authority between the branches of the Government, followed by a question as to whether executive privilege could be called a constitutional granting of authority. Mr. Rehnquist replied:

> "I don't agree with that statement, Mr. Moss. I agree it is a gray area, but I think that the doctrine of executive privilege is just as much implied from the Constitution as is the power of Congress to investigate." (emphasis supplied)

Having construed the Constitution as granting the Executive the power to withhold information by implication, Mr. Rehnquist then enlarged the doctrine of executive privilege to cover all recommendations to the President by his advisors, even reports on matters of concern to Congress because of pending legislation. Congressman McCloskey inquired as to whether that wasn't a "broad definition of executive privilege", to which Mr. Rehnquist replied:

> "I don't think that is a broad construction. I think that is one of the classical areas where most people have agreed that the doctrine applies."

Mr. Rehnquist's propensity for strict constructionism was further illustrated in his discussion of the meaning of a statute, 5 USC 2954, under which the House Committee on Government Operations had sought, in May, 1970, to obtain the so-called Garwin Report on the SST from the Office of Science and Technology. The White House refused the request, claiming that the report did not fall within the meaning of the statute and citing legislative history, despite plain language in the statute that "An Executive agency, on request * * * shall submit information requested of it relating to any matter within the jurisdiction of the committee". (The committee subsequently obtained the report after the D.C. Court of Appeals ruled that the Garwin Report was not a Presidential document but merely an agency report subject to the Freedom of Information Act, but this meant almost a one-year delay because of the White House/Justice Department obstructionism.)

Asked about his part in all this, Mr. Rehnquist first denied any role in it whatsoever. His office, he said, "had no part in the administration of that statute" (i.e., 5 USC 2954) and he personally had "no opportunity to study it and the legislative history".

But on the next day of his testimony he reported that after returning to his office he had "discovered that we had given an opinion to the White House in connection with the construction of that statute", and apologized for his forgetfulness. His subsequent colloquy with Congressman McCloskey is a revealing illustration of Mr. Rehnquist's powers of construction, not only of statutes themselves but also of the rules for statutory construction:

> "Mr. McCloskey. Mr. Rehnquist, the rule that permits you to look at the legislative history applies only when the wording of the statute is ambiguous, is that correct?
> Mr. Rehnquist. It's a rule, but it has its exceptions.
> Mr. McCloskey. Do you know of any legal exception in your experience which justifies looking behind the clear language of section 2954, by the executive branch?
> Mr. Rehnquist. Yes sir. Well, the executive branch is simply trying to forecast what a court would say in interpreting it.
> Mr. McCloskey. Is there any ambiguity in that statute? This is exceptionally clear language. Can you point to me any ambiguity in that statutory section which would justify seeking explanation of that ambiguity?
> Mr. Rehnquist. I don't think it's that clear.
> Mr. McCloskey. Is there any ambiguity in the section that you could find? Can you read the law specifically so the subcommittee at this point can be aware of the ambiguity, which in your judgment, would require going to the legislative history of the statute?
> Mr. Rehnquist. * * * (Reads statute)
> Mr. McCloskey. Is there any ambiguity there, Mr. Rehnquist?
> Mr. Rehnquist. I don't think the words "any information" are necessarily that sweeping.

REHNQUIST AS A CONSERVATIVE

Conservatives are supposed to be moderate, sound-principled, not given to wild speculation. Previous quotations show to some extent how well Mr. Rehnquist can fairly be thus described, particularly in his construction of the Constitution and some statutes. The soundness of his approach to the question of the prerogatives of the Judiciary may be seen in the following:

> "Mr. Moss. Well, the President has a very real constitutional responsibility imposed on him to take care that the laws are faithfully executed, and if that was a law he would have just as much of a mandate to take care that it did be faithfully executed as he would to enforce the Internal Revenue laws, wouldn't he?
> Mr. Rehnquist. Unless he felt that the law were unconstitutional.
> Mr. Moss. You mean he is going to act as a separate Supreme Court and determine that a law is unconstitutional? Wouldn't he follow the processes of law to determine whether or not that law was unconstitutional?

Mr. Rehnquist. Well, I think the processes of law in that case would be to somehow submit the matter to the courts.

* * * * *

Mr. Moss. Then he would be bound to take care, unless and until the courts determined that the law exceeded the constitutional authorities of the Congress?

Mr. Rehnquist. I don't believe necessarily that in the interim he would be obligated in the manner you indicate. I think he would have a right to take appropriate steps to have the law tested.

If such testimony does not raise goosebumps on the hides of all true conservatives, perhaps the following will, illustrating Mr. Rehnquist's views on the Government's appropriations process and the Congressional need for adequate information before authorizing huge sums for uncertain projects:

"Mr. McCloskey. If I recall correctly, the administration, at that time, was proposing to the Congress in its budget message, that both the House and Senate approve an expenditure of $290 million in 1970 for the SST.

Now this brings squarely into focus the question of the lawmaking power of Congress when we are asked to vote for or against the SST, and the right of the Executive to withhold a report prepared at taxpayer expense relating to that issue affecting whether we should or should not fund the SST. * * * In your judgment, does that right of the Executive to receive impartial and disinterested advice entitle the Executive to refrain from giving to Congress a memorandum on the very subject which the Congress is to legislate?

Mr. Rehnquist. Certainly, in many situations, I think it would. (emphasis added)

REHNQUIST AS A LEGAL SCHOLAR

Mr. Rehnquist's legal scholarship seems to be regarded as his strongest point. The depth of his knowledge may be seen in the following:

"Mr. Moss. * * * I would like to illustrate that the Congress does have, of all the branches of government, it can withhold funds from the courts. It has the power of impeachment. It has powers given to neither of the other branches.

If there is a doctrine inherent in the Constitution, we in the Congress have the doctrine of oversight. We exercise the residual powers of the people, unless they expressly exercise them.

Mr. Rehnquist. Well, I have some trouble with the idea that the Congress has a sort of residual power from the people and the President has none.

* * * *

Mr. Reid. Section 8 of the Constitution, as I read it, says: 'The Congress shall have power to make all laws that shall be necessary and proper in carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.'

In Mr. Rehnquist's capacity as counsel to the Attorney General and as principal Justice Department expert on executive privilege and the Freedom of Information Act, one might expect some familiarity on his part with details of specific cases and problems that had come up in these areas. Alas, we find this:

"Mr. McCloskey. What about the SST could possibly justify claiming executive privilege for a memorandum prepared by the committee for the President?
Mr. Rehnquist. I am not familiar with the memorandum itself, nor am I intimately familiar with the questions that are involved --

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Mr. McCloskey. Well, I don't think Mr. Garwin's report was directed to anyone other than the Secretary of Transportation, was it?
Mr. Rehnquist. I am not familiar with the circumstances.

Congressman Alexander asked Mr. Rehnquist whether private contractors can be required by the Government to classify scientific and technical information generated by them. This question was not unfair, inasmuch as Mr. Rehnquist was then serving, in addition to his other duties, as chairman of an ad hoc committee to review security classifications under Executive Order 10501 and to recommend revisions in that order. But in answer to Mr. Alexander, Mr. Rehnquist revealed a total blank:

"The answer to that question either involves a detailed knowledge of the facts, which I just don't have, or a detailed knowledge of the law of government contracting, which I don't have. I am simply not able to answer either of them."

In a letter to the Subcommittee almost three months later (and which held up the publication of these hearings by that length of time), Mr. Rehnquist had still not been able to find an answer, suggesting only that Mr. Alexander take up the matter with the Defense Department.

As to case law and the interpretation of court decisions, Mr. Rehnquist appears to rely very heavily on his staff for preparation of speech material and not to take the time necessary to understand the court opinions he cites. In his prepared statement to the Subcommittee, he cited two cases allegedly in support of the doctrine of executive privilege:

"The right of the Executive to withhold certain types of information from the other coordinate branches has been equally well recognized. In Reynolds v. United States, 345 U.S. 1, the Supreme Court upheld the applicability of such a privilege against judicial subpena."

* * * * *

"The Supreme Court, in United States v. Curtiss-Wright Corp., decided in 1936, 299 U.S. 304, 319-321, based its decision in part on the authority of the President to withhold information in the field of foreign relations from Congress, and refers to some of the instances when Congress acknowledged this authority in the President."

Subsequently, the Subcommittee staff examined both of these cases in some detail and found that neither one really supported Mr. Rehnquist's assertions. The Court opinion in the Reynolds case was found to have avoided deciding whether the claim of executive privilege was valid, instead determining only that the case made in favor of disclosure of the information sought had been insufficient on the grounds of necessity. Along the way to this opinion, the Court dropped a dictum which Mr. Rehnquist or his staff failed to note: "Judicial control over the evidence in the case cannot be abdicated to the caprice of executive officers." As for the Curtiss-Wright case, the Subcommittee staff was surprised to learn that it involved issues

entirely unrelated to executive privilege, the Court adverting to that subject only by way of illustrating a distinction between foreign and domestic affairs in the relations between Congress and the Executive. Thus the interpretations given to these cases by Mr. Rehnquist (more accurately, by his staff) were found to be altogether off the point.

REHNQUIST AS SUPREME COURT JUSTICE?

Do these examples of Mr. Rehnquist's recent statements and performance meet the standards of the United States Senate for a Justice of the Supreme Court?

Are the American people being asked to believe that "strict constructionism" means that you can bend the words of our Constitution (if you can remember them, that is) in any direction to suit the fancies of those in power at any given time?

Does "conservatism" mean that the President may substitute his legal views for those of the Supreme Court, and that his whims for expensive gadgetry may replace the considered judgment of the Congress in the appropriations process?

Should the taxpaying public be expected to finance the legal education of its judges while they get on-the-job training in the highest court of the nation, rendering decisions that affect human lives and world economy?

Personally, I am astonished to think so. If this man is approved for the United States Supreme Court, I could only conclude that this Government is a total fraud, and that there must be some magical gnomes behind the scenes who actually run the Government and keep it from falling apart, unbeknownst to the rest of us.

I have avoided any comment on Mr. Rehnquist's personal and philosophical views, which I honestly believe he is entitled to keep to himself, in favor of an examination of his judicial qualifications as demonstrated by his statements and actions.

I urge that every member of this Committee, regardless of his own personal views (which should also be irrelevant), undertake to review Mr. Rehnquist's statements to see if he does not agree that Mr. Rehnquist is not yet ready for this kind of responsibility.

Respectfully yours,

Robert P. Smith

Copies to: Members of the Senate Committee on the Judiciary