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The Senate, the Court and the Nominees—II

A few days ago, we noted that although the nomination of Lewis F. Powell Jr. to be an Associate Justice of the Supreme Court gave us no problem, the nomination of William H. Rehnquist did. It still does. Mr. Rehnquist's written response to questions submitted to him by some members of the Senate Judiciary Committee does not dispose of all the doubts that have arisen about his views on the concepts embodied in the Bill of Rights.

Those doubts are what have led us to make a distinction between Mr. Powell and Mr. Rehnquist. We believe both men to be suited intellectually and professionally for the positions to which they have been nominated, perhaps better suited in those respects than any of the four men previously selected by Mr. Nixon for the court. We are aware of no incident in the record of either man that raises the kind of questions that plagued the nominations of Judges Haynsworth and Carswell. That leaves open only (1) the matter of the views they hold of the Constitution, or to be more precise about what is troubling us, the sensitivity they have shown toward the Bill of Rights and (2) the commitment they have demonstrated to undo some of the court's recent interpretations of those amendments. It is here that the records of the two men differ.

These aspects of their constitutional philosophy are particularly relevant now because the court is narrowly divided on some issues that arise under the First, Fourth, Fifth and Sixth Amendments. Its general course in recent years has been to stress the protections for individuals provided in those amendments, a course that President Nixon has pointedly said he hopes to reverse. In judging these two men, then, the Senate has to decide how far their confirmation would move the court toward President Nixon's goal—and whether it wants to let him move the court that far.

There are, or so it seems to us, three striking themes which run through most of the writings and speeches of Mr. Rehnquist over the last 15 years. These are: (1) his lack of understanding of the problem of racial discrimination as late as 1964; (2) a somewhat cavalier attitude toward interpretations of the Bill of Rights that differ from his own; and (3) the underlying philosophy about the role of government that runs through so much of what he has had to say on these subjects.

Of the three, Mr. Rehnquist's attitude toward civil rights is the least troubling. He did oppose a public accommodations law in 1964 and he now explains his opposition on the ground that he did not understand "the strong concern that minorities have for the recognition" of their rights. We can't help wondering where he was during the years preceding 1964 when the depth of feeling about such matters was driven home so eloquently by Dr. King and others. But we accept his current statement that his horizons have broadened since then. Perhaps they will broaden more. Beyond this, however, the area of civil rights is not one in which his presence on the court is likely to make much difference one way or the other. Its course in that area seems well nigh irreversible.

The second aspect of Mr. Rehnquist's views that has been questioned is the degree of sensitivity he has shown toward the concepts underlying the Bill of Rights. It is possible to review his record and come away with the feeling that he thinks those on the other side of the constitutional argument are, almost by definition, Communists, criminals and pornographers. But it is also possible to come away with the feeling that he has merely expressed his position strongly and perhaps was carried away in his rhetoric by the zest of the struggle. On this matter we are inclined to give him the benefit of the doubt, based principally on the testimony of some of those who have known him well, that he is thoughtful and careful in his approach to constitutional questions.

The philosophy that ties his speeches and writings together is one in which property rights outrank human rights and in which the power of government to trample on the civil liberties—free speech, privacy, peaceful protest, and the rest—of its citizens outranks the restrictions placed on this

power by the Bill of Rights. In his view, a store owner's desire to select his customers outweighs a customer's desire to be served there; the government's interest in collecting information is more important than an individual's interest in being free from surveillance; the majority's interest in suppressing pornography or in convicting criminals far outweighs the individual's right to read or to be safe from self-incrimination, and so on. This is a view of the Constitution we do not share. But it is a view Mr. Nixon shares and the view he has said he will try to make dominant on the Supreme Court.

So far as Mr. Powell is concerned, we do not find in his record the first two of these three themes. He has been fully aware of the issues of our times and sympathetic toward, if not always in agreement with, interpretations of the Bill of Rights that are not his. On the third point, there may well be little difference between his views of the Constitution and those expressed by Mr. Rehnquist. But there may be a decided difference in the commitments of the two men to do something about the trend of the court. We have the distinct impression that Mr. Rehnquist is intellectually committed to the overturning of several of the court's major decisions of the last 15 years involving the Bill of Rights. Mr. Powell may or may not have such deeply held views and it is conceivable that on some key votes he will surprise the President. We doubt that Mr. Rehnquist has such flexibility. And given the balance on the court now, this is a factor the Senate must weigh. Thus, the choice before the Senate is especially difficult.

Those senators who share our perspective on the paramountcy of civil liberties questions in this matter and on the essential correctness of the course staked out on these questions by the court in recent years could in fact argue the case for voting to confirm Mr. Rehnquist on several pragmatic grounds. One is that the prediction of how a justice will vote is a chancy and accident-prone business. Justices have often turned out to be quite different (once on the court) from what their previous records might have led one to expect. President Kennedy's appointee, Justice White, and President Eisenhower's appointee, Chief Justice Warren, are recent examples. Another argument might be that the addition to the court, at this time, of a particularly strong anti-civil libertarian voice could easily have the effect of impelling some of its present members in the other direction. Finally, there would be the argument that the rejection of Mr. Rehnquist would likely only bring forth from the President another nominee of similar view and lesser professional competence—thus setting off what would be, at best, another prolonged and corrosive struggle. For all its plausibility and practical attractiveness, however, this last point deserves special comment, since it amounts to an indirect abdication of the individual senator's constitutional right and duty to exercise his judgment on the President's Supreme Court nominees: neither the likelihood of Mr. Rehnquist's confirmation (which seems real) nor the course the President might take if his nominee is rejected seems to us an adequate basis on which to determine the way a senator votes on this nomination. This would be especially true of a senator who shares the reservations and apprehensions we have spoken of in connection with Mr. Rehnquist.

For against all the pragmatic hopes and speculations set forth above that might argue for his confirmation, one must weigh another set of other possibilities, no more certain but much more dire. Which is to say, a vote to confirm Mr. Rehnquist is a vote to take a considerable risk with the future of civil liberties in this country. It is not as if Mr. Rehnquist would become the first or the second or the third justice holding his point of view. The breaks of history have given President Nixon a chance to achieve his goal of changing the court's direction with four nominations within the first three years of his term, an opportunity provided only two other Presidents—Taft and Harding—since the Civil War. Nor is there compelling evidence that Mr. Rehnquist is a flexible and moderate man who might or might not help the President reach his goal. On the contrary, on the basis of his record of articulate commitment, it would seem that his might well become the vote and the voice that tipped the balance. Those senators who believe, as we do, that the preservation of vital, court-defined civil liberties is the principal issue at stake here, have in our opinion good and sufficient reason to vote against the confirmation of Mr. Rehnquist.