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Letters To The Editor

Senator Fannin Rebuts an Editorial on Mr. Rehnquist's Nomination

I find myself in disagreement with the conclusion of The Washington Post's thoughful editorial on the President's Supreme Court nominees in that Mr. Rehnquist is committed to a philosophy that consistently subordinates individual rights to governmental powers. My own review of Mr. Rehnquist's record convinces me that he both understands and believes in the rights and liberties guaranteed to individuals by our Constitution, and that he will devote his very considerable talents to assuring that those rights and liberties are meaningful—that the Constitution continues to be, as he said at the hearings, a living document.

The best way to support my conclusions is to let the nominee speak for himself. I have assembled some of the passages from Mr. Rehnquist's testimony and earlier statements that make me confident of his devotion to civil liberties as embodied in our Constitution.

It has been said that Mr. Rehnquist does not understand the Bill of Rights and would like to do away with it. At the hearings, Mr. Rehnquist said it was certainly the purpose of the Bill of Rights to put restraints on government:

"I think specifically the Bill of Rights was designed to prevent . . . a majority, perhaps an ephemeral majority, from restricting or unduly impinging on the rights of unpopular minorities."

In a speech given in December of 1970 entitled "Official Detention, Bail, and the Constitution," Mr. Rehnquist said:

"Our most basic freedoms, those found in the Bill of Rights, are determined from events and conflicts arising out of the familiar contacts between individuals and the public authorities . . .

"We assume that under our philosophy of government the individual is guaranteed the freedom or sanctity of his person —in short, the 'right to be let alone . . .'

"Freedom of the person does not appear as a single constitutional right, but is embodied in the ideas of the Fourth, Fifth, and Eighth Amendments . . .

"These provisions, taken together, clearly express a constitutional right to be let alone, and as we all know this right has been vigorously protected by the Supreme Court."

On the subject of freedom of the press, Mr. Rehnquist stated at the hearings:

"Well, I think it would be inconceivable for a democracy to function effectively without a free press, because I think that the democracy depends in an extraordinarily large degree on an informed public opinion. And that the only chance that the 'outs,' or those who do not presently control the government, have to prevail at the next election is to make their views known and that the press is one of the principal, probably the principal, media in the country through which that can be accomplished.

"I believe it is a fundamental underpinning of a democratic society."

It has been suggested that Mr. Rehnquist has taken the position that the only restraint on executive branch wiretapping and surveillance should be self restraint. A brief review of his testimony and earlier statements shows this to be utterly unfounded.

Speaking of the executive power to maintain surveillance, Mr. Rehnquist testified:

"Well, I certainly perceive limits in the First Amendment, in the Fourth Amendment, and without reading a catalog, I suspect there are other limits."

And further:

"the only legitimate use of surveillance is either in the effort to apprehend or solve a crime or prevent the commission of a crime . . . surveillance has no proper role whatsoever in the area where it is simply dissent rather than an effort to apprehend a criminal."

Although he stated that under present law observation of persons in public places is not per se unconstitutional, he indicated that any element of harassment or chilling effect on free expression presents a question of fact to be considered in the context of individual cases.

At hearings before Senator Ervin's Subcommittee on Surveillance, Mr. Rehnquist said:

"I do not conceive it to be any part of the function of the Department of Justice or of any other governmental agencies to surveil or otherwise observe people who are simply exercising their First Amendment rights."

When asked how he would balance the interest of the individual in privacy against society's interest in law enforcement in the area of wiretapping, Mr. Rehnquist replied:

"I think a good example of a line that has been drawn by Congress is the Act of 1968 which outlawed all private wiretapping and which required, except in a national security situation, prior authorization from a court before wires could be tapped."

And later in the hearings, he said:

"I doubt that you can find any statement, Senator, in which I have suggested that the government should be given carte blanche authority to bug or wiretap. I recently made a statement at a forum in the

New York School for Social Research in New York, attended by Mr. Meier of the Civil Liberties Union and Mr. Katzenbach, that I thought the government had every reason to be satisfied with the limitations in the Omnibus Crime Act of 1968."

And further:

"certainly, the government cannot simply go out on a fishing expedition, promiscuously bugging people's phones."

Later he noted that:

"Congress has it within its power anytime it chooses to regulate the use of investigatory personnel on the part of the Executive Branch. It has the power as it did in the Omnibus Crime Act of 1968 of saying that federal personnel shall wiretap only under certain rather strictly defined standards."

Finally, Mr. Rehnquist has been said to be insensitive to the rights of the accused. Yet a reading of the many statements he has made on this subject shows that he has been consistently aware of the considerations on both sides of these very difficult issues.

It is significant that Mr. Rehnquist was instrumental in formulating the department's position favoring the Speedy Trial Act of 1971. "The goal of the system," said Mr. Rehnquist, "should be the administration of criminal justice in such a manner that the defendant is afforded a fair and prompt trial, that the innocent are acquitted, that the guilty are convicted, and that the process for making this determination is one which begins and ends within reasonable time limits."

In a May 1971 speech entitled "Conflicting Values in the Administration of Justice," Mr. Rehnquist concluded a long exposition of the law in the area of the Fourth Amendment as follows:

"Finally, I hope you can see from some of this discussion that no reasoned opinion can invariably insist that courts resolve all of these (Fourth Amendment) issues in favor of the criminal defendant. The issues are so complex and so important to all of us that it is wrong to think that either side invariably has white hats. Ultimately, decision is made by the balancing of the need of society for protection against crime against the need of the accused defendant for a fair trial and just results. Both of these values stand so high in the scale of most of us that none would want to say that one should automatically prevail at the expense of the other."

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