'The Making of a Supreme Court Justice'

This article by Assistant Attorney General William H. Rehnquist, one of President Nixon's two nominees to the Supreme Court, originally appeared in the Harvard Law Record, Oct. 8, 1959. When Mr. Rehnquist wrote about the standards for the Supreme Court in the law school's newspaper, he was in private practice in Phoenix, and the Chief Justice was Earl Warren.

By WILLIAM H. REHNQUIST

The Supreme Court of the United States is now in the midst of one of the storms of criticism which have periodically assailed it. Bills have been introduced in Congress to limit the jurisdiction of the high court, to overrule some of its controversial nonconstitutional decisions, and to declare the sentiment of the Senate as to the necessity of judicial background on the part of a nominee to the Court. It has been urged that the "advice" of the Senate be sought by the President before any nomination to the Court is made.

Criticism of the Supreme Court can easily become frustrating to the critics, because the individual justices are not accountable in any formal sense to even the strongest current of public opinion. Nonetheless, it ill behooves the critics of the present Court to seek imposition of new curbs on it until such controls as now exist are fully tested and found wanting. Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Dearth of Inquiry

As of this writing, the most recent Supreme Court Justice to be confirmed by the Senate was Charles Evans Whittaker. Examination of the Congressional Record for debate relating to his confirmation reveals a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation. Mr. Justice Whittaker was nominated by President Eisenhower in March, 1957. Brown v. Board of Education (the Segregation Cases), 347 U. S. 483, had been decided three years before and implementing decisions had been handed down in the interim. Slochower v. Board of Higher Education, 350 U. S. 551, where the Court held by a vote of 5-4 that the New York School Board could not fire a teacher for the reason that he had invoked the Fifth Amendment before a Congressional committee, had been decided less than a year before. At the moment of Whittaker's nomination, the series of cases involving the rights of Communists to be admitted to practice law in a state and to refuse to answer questions put to them by legislative investigating committees was pending on the docket of the Supreme Court.

If any interest in the views of Mr. Justice Whittaker on these cases was manifested by the members of the Senate, it was done either in the cloakroom or in the meeting of the Judiciary Committee. The discussion of the new Justice on the floor of the Senate succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower Federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri his nomination honored two states.

Given in addition the fact that Mr.

N Y Times 11/11/71 p. 47 OP-ED PAGE