William Rehnquist: Legal Technocrat

by Arthur S. Miller

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By nominating William H. Rehnquist for the Supreme Court, President Mixon succeeded in compounding a paradox.

For some time the President, outwardly the most conservative chief executive since Herbert Hoover, has been able to undercut his liberal Democratic opposition in a number of breathtaking moves inconsistent with his past.

In much of this the President has had the political counsel of his conservative Attorney General, John Mitchell, and of the always helpful legal advice of the equally conservative Rehnquist. The new nominee has taken what normally is a rather obscure office - assistant attorney general, Office of Legal Counsel - and molded it into one of thekey positions of the administration. He is the legal fireman who has dutifully trekked to Capitol Hill to face often hostile questioning by congressional committees. And he has sped around the country making speeches defending administration action.

Running through many of those legal opinions and statements is a common theme of expanded governmental powers, centered in the executive, vis-a-vis both Congress and the individual. The history of the American presidency, constitutional historian Edward Corwin said in 1957, has been one of gradual aggrandizement of power in that branch of government - at the expense of Congress and the judiciary and also of the states. Under Mr. Mixon, in less than three years that slow development has significantly increased. William Rehnquist is the resident theorist who finds within the crevices of constitutional law ample justification for whatever the President has wanted to do. His innate legal ability, coupled with a low-key manner and unflappable approach, made him particularly effective both before Congress and on the lecture platform.

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Rehnquist: A Legal Technocrat

REHNQUIST, From Page B1

Does the "President's lawyer's lawyer" find any irony or paradox in a situation where he a Goldwater Republican, supports more governmental power over the individual and over the economy? The answer is not apparent now. Outwardly, at hast tehn ast entirely screece, as to those who must him with a must republicant the an exterior most of the same exterior and the same exteriors are contrasted.

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An example of the tarmer is ma lest timony last July before \$50. San a livin's Subcommittee on Separation of Powers on the controversial issue of "executive privilege." As part of a continuing campain to retrieve some lost powers, Congress for some time has been restive over the refusal of executive officials to testify and to produce documents. The problem did not originate with President Nixon (and doubtless his successors will also have to face it). During those hearings Reinquist produced a thoughtful, carefully reasoned defense of executive privilege, tracing its origins back to Washington. Among a panel of witnesses that included Dean Acheson, Averell Harriman and William Bundy. Reinquist came through as well as any and better than most. He did a workmanlike job, whether or not one agrees with his conclusion (that the President could assert the privilege).

On the other hand, in his last appearance before the same subcommit-

tee, on Oct. 5, he tried to defend allocation of new powers to the Subversive Activities Control Board in a prepared statement that was woefully inadequale. At issue was Executive Order 11605 (which Rehnquist had approved as assistant altorney general), by which the President gave the all but control of the same of the sam and Lisenhouse. Reiniquist struck on this specifical. He convinced are ones than Sea. Edward Correct Economics and member of the submittee, the statement did not even the post of meet head on Ervill's object that has now to CPB action would unchast bloomade ander the First Medianent satisfacts he did try to that has executive order did not become in the power of Congress. and Elsenhower, Reinquist struck the record, then one can render coutlish verdict of "not proven" to exidents assertion that Rehn-landaria and the he has one of their each made within white nation today. If would be more accuare to say that he does todeed days a good mind and that he appears capable of producing comprehensive and sys-tematic dismissions of complicated legal matters

More Than a Lawver

contribute is merely that of being a good lawver But it asn't. To be a justice one should have a breadth of vision and a sensitivity to the subtleties, not only of legal technicalities, but also to the larger problems facing society literry Steele Commager put it succincily. Great questions of constitutional law are great not because they are complicated legal or technical declins, but because they embody issues of high policy, of puping good, of morality."

That Rehnquist is very "conservative" cannot be doubted. But he is hardly a "strict constructionist". His judicial cosmology has enabled him to give awesome expansions of presidential power, while at the same time criticizing Supreme Court decisions protective of the rights of suspected criminals. The Court is engaged in endless balancing of the many interests of a di-

verse-now sadly splintered-society. Decisions in cases brought to the justices cannot be attained by reference to the Constitution itself, or to logical derivations from its text. Judges have to exercise what Oliver Wendell Holmes called "the sovereign prerogative of choice" between conflicting principles that often both carry at least outward persuasiveness. How well a given person fulfills his task of making those choices is the mark of a great justice. There is no vade mecum or table of logarithms by which he can plot his course. He must, of necessity, weigh those conflicting interests and produce decisions that display, as that great judicial conservative Felix Frankfurter once said, both "logical unfolding" and "sociological wisdom." There can be little doubt about Reinquist's ability as a logician; what is not known is the other half of Frankiurier's formulation.

It is really idle to speak, as people so often do, of "liberals" or "conservatives" on the Court. In this topsy turvy world, those words have lost all meaning — save, penhaps, on some specific seasons what a conserve wants to pronserve." For any nominee, in other words, what are the values has he considers worth preserving as furthering?

For Reinquist, the record provides a rather clear picture, based on his public positions as assistant attorney general. If those opinions display both his opinion and that of his client (the President), his judicial universe is one of expanded power of government (equated mainly with presidential power) coupled with a strict law-and-order philosophy. Several examples show the pattern:

When last May mass arrests were made by Washington police in the Mayday demonstrations, Rehnquist espoused a doctrine of "qualified martial law." In so doing, he adapted a legal notion that had some currency in the past in the definition of made it applicable to antiwar activity. His position was recently knocked down by the U.S. Court of Apeals, which invalidated most of the arrests.

• During testimony before Sen. Ervin's Subcommittee on Constitutional Rights, he flatly maintained—to the consternation of many—that even senators could be put under surveillance if the executive thought it necessary. In reply to Ervin's question of

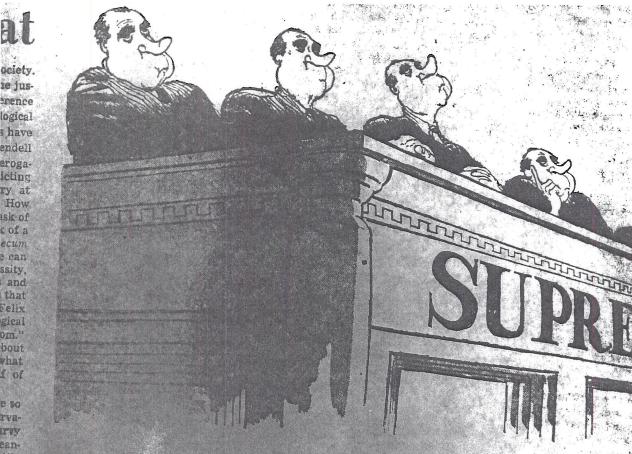
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whether he as upon, Rebnquis in parts "I don't tarm a rakana a First Amendment on." (In a later speech, however, Behinquist set forth a more dispassionale and reasonable statement of the approximent's right and duty to gather alternation).

• He has defended wiretapping, even in the face of some loss of an individ-ual's privacy, as not too high a price to pay if it helps slop major crime.

. In criminal law matters, he has been both a strict and a loose constructionist—strict as against the suspect, loose insofar as the government's ability to deal with him is concerned,

An Executive Activist

SUCH POSITIONS hardly coincide with a tender regard for constitutional liberties in the Bill of Rights. Are they Rebnquist's personal views as well as those of his client? On the record, again, the answer seems to be yes. None of those positions can be said to be that of a strict constructionist. A fair judgment, then, would be that as assistant attorney general, Rehnquist has been an "activist," one who assiduously sought ways to aggrandize presidential (and governmental) power.

Perhaps that is why Mr. Nixon ended his nominating speech of Lewis

Powell and Rehnquist with a homily shout the need to respect the Court as an institution. Now that he has succeeded in packing the Court with his brand of activist justices, the President can neatly reverse his field and call for applause for the High Beachwhen only recently he was speaking in highly critical terms about it.

The President, of course, is entitled to ask a person's philosophy before naming him to the Supreme Court. Nor is there any requirement that nominees be of different philosophies. Nothing in the Constitution or in past practices of Presidents would lmit President Nixon in either respect. Nor is there anything in the Constitution to prevent the Senate from deeply inquiring into a nominee's predilections.

For anyone, including the President, to speak of "strict construction" or to that the task of a judge is merely to "interpret" the Constitution is to play with words. The important questions are: "Strict about what?" and "What does 'interpret' mean?" Even the most "activist" judge can validly say that he, too, is only interpreting the Constitution. Any casual student of constitutional law can soon produce numerous instances where allegedly "conservative" justices, such as Chief Justice Burger and Justice Blackmun

(Mr. Nixon's first two appointments), have loosely construed (interpreted). the Constitution.

In sum, William Hubbs Rebuguist doubtless is a superior legal techno. crat. Whether he will display that quality of statesmanship that Woodrow Wilson said is so necessary for Su-preme Court Justices, is still unknown. He has the mind for it; the question is whether he has the spirit. There is some precedent for thinking he may, however forlorn that hope might be Lord Coke, so the story goes, was an assiduous, even vicious prosecutor for the Crown, but when he was called to the bench he held that even the King himself was subject to the "artificial reason of the law." Rehnquist, since arriving in Washington, has shown at least a limited capacity for growth.

That he will view problems differently when his "client" is all the people, rather than just the President, is some thing for which we can all fervently hope.

But by and large, despite the myth to the contrary, the Supreme Court (as with the presidency) has never been a place where men can or will grow "larger." People in high public office tend to be essentially the same as they were before election or appointment. We don't like to believe this, but it is the lesson of history.

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