

William Rehnquist: Legal Technocrat

by Arthur S. Miller

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

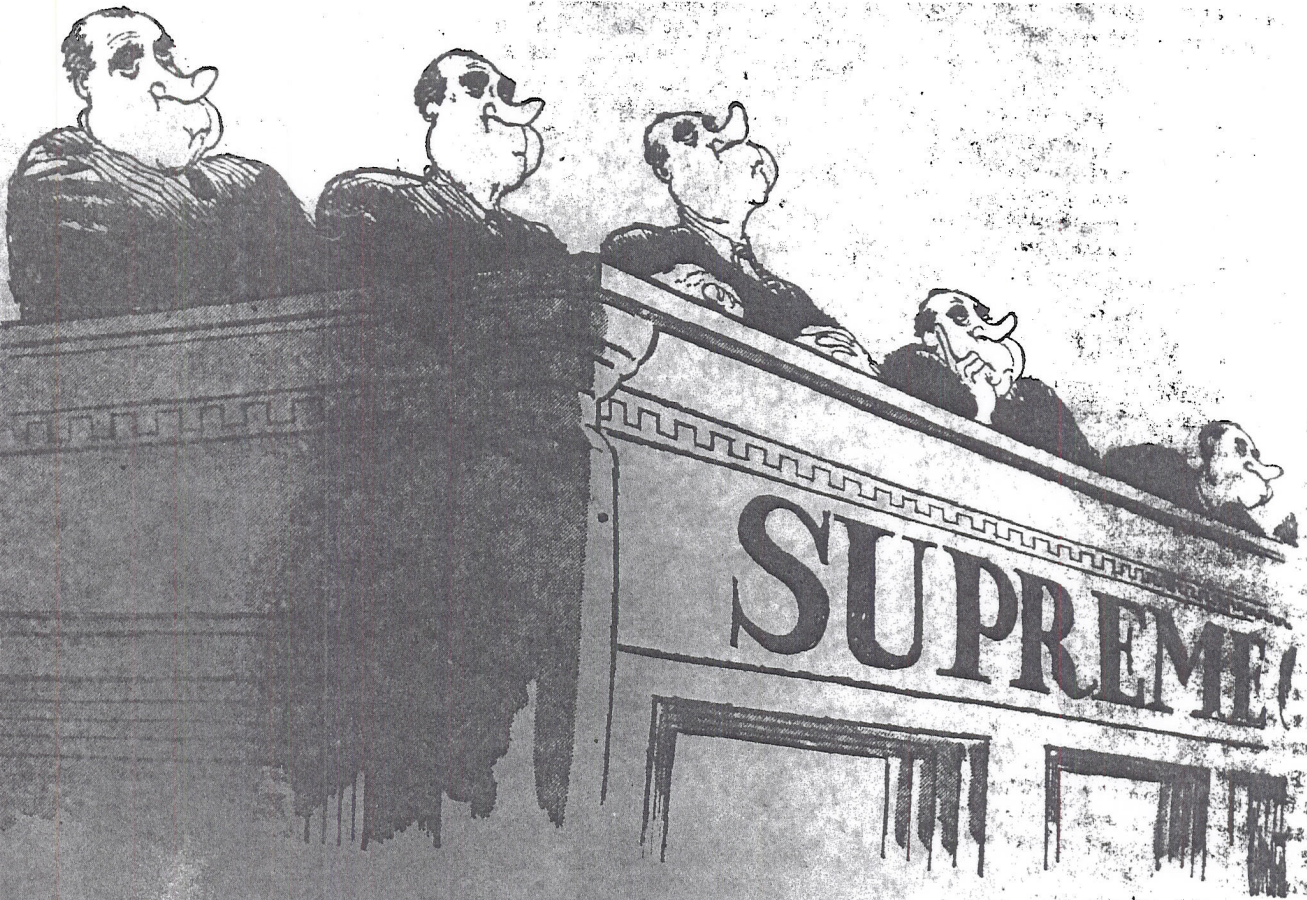
For some time the President, outwardly the most conservative chief executive since Herbert Hoover, has been able to undercut his liberal Democratic opposition in a number of breathtaking moves inconsistent with his past.

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 the key 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. Nixon, 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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whether he as... Rehnquist... "I don't can... takes a First Amendment position." (In a later speech, however, Rehnquist set forth a more dispassionate and reasonable statement of the government's right and duty to gather information).

- He has defended wiretapping, even in the face of some loss of an individual's privacy, as not too high a price to pay if it helps stop 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

**S**UCH POSITIONS hardly coincide with a tender regard for constitutional liberties in the Bill of Rights. Are they Rehnquist'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 about 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 Bench—when 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 limit 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 say 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 Rehnquist doubtless is a superior legal technocrat. Whether he will display that quality of statesmanship that Woodrow Wilson said is so necessary for Supreme 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 something 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.