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'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. Justice Whittaker had been an eminently successful courtroom lawyer, the fact that he had been a leader in the activities of the organized bar, and the fact that he had been very highly regarded as a judge of the lower Federal courts—all of which he was—the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism.

Less than thirty years before, the Senate had made no bones about its concern with the judicial philosophy of a Supreme Court nominee. Then, too, the Supreme Court was nearing the vortex of a storm—but it was a storm raised by the very groups who are claimed to be the special wards of the Warren Court. State and Federal laws regulating minimum wages, maximum hours, and other business practices were being struck down by the Court as violative of "freedom of contract;" a freedom which, the Court said, was embodied in the phrase "due process of law." The labor injunction, the strike as a conspiracy, and the "yellow-dog" contract were in their heyday. When, in February, 1930, President Hoover sent to the Senate the name of Circuit Judge John J. Parker, he sparked one of the most remarkable battles over a judicial nomination in the history of the upper chamber.

Objections to Parker's confirmation were at once voiced by two groups: organized labor, and the National Association for the Advancement of Colored People. Labor's objection was based on Parker's opinion, as a judge of the Fourth Circuit Court of Appeals, in the so-called "Red-Jacket" case. His opinion for that court had upheld an injunction forbidding certain union organizers from attempting to organize a mine, and thereby induce the employes of the mine to breach their "yellow-dog" contracts. The objection of the N.A.A.C.P. stemmed from a campaign speech made by Parker in 1920, while running for governor of North Carolina on the Republican ticket. In his speech he had said:

"The Negro, as a class, does not desire to enter into politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development where he can share in the burdens and responsibilities of government. This being true and every intelligent man in North Carolina knows that it is true . . . the participation of the Negro in politics is a source of danger to both races."

The Battle Lines

No very definite issue developed as to the campaign speech. It seemed agreed by most of the participants in the debate that the statements were understandable in the context of North Carolina politics, but that from a hindsight born with Parker's nomination for national office they would much better have been left unsaid.

As to the labor injunction, though, precise battle lines were drawn and the issue was debated in editorial columns, in masses of letters and telegrams to the Senate Judiciary Committee, and finally on the floor of the Senate. The most surprising fact about this great debate of 1930 was that none of the protagonists on either side doubted that the question should be: What were Parker's views on labor injunctions and yellow-dog contracts? The New York World, in opposing Parker's confirmation, probably spoke for both sides when it said editorially on April 23, 1930:

". . . The Senate has every right, if it so chooses, to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion in the country as a whole, and every right on this premise to object that the presence of Judge Parker on the bench would increase, rather than lessen, the top heavily conservative bias of the Supreme Court as now constituted."

Most of the participants further agreed that the result reached by the Court of Appeals in the "Red-Jacket" case was undesirable; Parker's antagonists contended that he approved the result, or at least never batted an eye in reaching it, while his defenders claimed that he was bound by controlling decisions of the Supreme Court on the question, and as a judge of an intermediate appellate court had no choice but to follow them.

A few glittering generalities were hurled by each side, but to a remarkable degree editorial writers, members of the bar, and Senators engaged in a case-by-case analysis of the law as

Mr. Rehnquist on the Law

Communists, former Communists, and others of like political philosophy scored significant victories during the October, 1956, term of the Supreme Court of the United States, culminating in the historic decisions of June 17, 1957. In two opinions handed down in early May, 1957, the Court held that two applicants to take state bar examinations — one an admitted ex-Communist and one identified as a Communist — had been deprived of constitutional rights by the respective state bars when the latter refused to let them take the examination. . . .

A decision of any court based on a combination of charity and ideological sympathy at the expense of generally applicable rules of law is regrettable no matter whence it comes. But what could be tolerated as a warm-hearted aberration in the local trial judge becomes nothing less than a constitutional transgression when enunciated by the highest court of the land.

—AMERICAN BAR ASSOCIATION JOURNAL, MARCH, 1958.

The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict. From the time of the drafting of the Constitution it has been clear that the Commander in Chief has authority to take prompt action to protect American lives in situations involving hostilities. . . . A decision to cross the Cambodian border, with at least the tacit consent of the Cambodian Government, in order to destroy sanctuaries being utilized by North Vietnamese in violation of Cambodia's neutrality, is wholly consistent with that obligation.

—NEW YORK UNIVERSITY LAW REVIEW, JUNE, 1970.

The plain fact of the matter is that any President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the Administration. This is not peculiar to the Department of Justice, but is a common feature in the staffing of virtually all of the Cabinet departments in the executive branch of the Government. . . .

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The question of the extent to which mandatory transportation of pupils is required to achieve "integration" in school districts where de jure segregation at one time obtained is a largely open one under existing decisions of the Supreme Court. Certainly there is nothing in the language of the Constitution itself which can be said to impose such requirements. In this situation, the Department of Justice is in no sense legally required to support the imposition of desegregation plans containing massive busing requirements. . . .

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In addition to the justification for the present position of the Department in these areas based upon the adversary system of criminal law enforcement, the present position of the Department is in part responsive to the expressed will of the electorate in the area of criminal law enforcement. Not only was this an important issue in the national election of 1968, but in the case of the Omnibus Crime Bill a large majority of both Houses of Congress evidenced the view that wiretapping under certain circumstances ought to be used as a tool in the enforcement of the criminal law. These same bodies likewise evidenced the view that an effort should be made on behalf of the United States in prosecutions to seek admission of certain confessions which, under at least one view of the case, would be excluded by the rule adopted by the Supreme Court in *Miranda*.

—ARIZONA LAW REVIEW, SUMMER, 1970.

Parker found it when he had written the "Red Jacket" opinion three years previously. The Administration stood squarely behind its nominee, and Attorney General [James DeWitt] Mitchell even prepared a legal memorandum reaching the conclusion that Parker had no choice in writing the opinion that he did. On the Senate floor, the forces in favor of confirmation were nominally led by Senator Overman from the nominee's home state of North Carolina. But though Overman did a prodigious amount of work behind the scenes, he took little part in the debate on the law. The forces opposing confirmation were led by Senator William E. Borah of Idaho.

Senator Borah's principal speech began in the afternoon of one day and concluded the following day. The first part of it, before any requests to yield were made, occupies nine of the full, closely printed pages of the Congressional Record. Borah spoke to a question charged with emotion and public interest, and on which most of the demagogic fireworks were in the armory of his side. Yet his speech is anything but rabble-rousing. Instead it is a closely reasoned, masterful exposition of the role of the Supreme Court in our system, coupled with an analysis of the precedents in an attempt to show that Parker must have reached his "Red-Jacket" result by choice, since the controlling cases did not compel it.

Almost any reply to Borah would have been anticlimactic, yet Senator Gillett of Massachusetts gave the Idahoan no quarter. He did not quarrel with the propriety of the inquiry, but he took vigorous issue with Borah's interpretation of the state of the law as Parker found it. In what appears to be an even closer reading of the cases than Borah's, Gillet ably defended the proposition that Parker was doing only what the Supreme Court decisions required him to do. After extended debate, the Senate refused to confirm Parker by a vote of 41-39.

Several times during this debate Senator Borah made clear his views as to the nature and scope of the Senate's inquiry into the philosophy of a Supreme Court nominee. In his principal speech, he mentioned that the case of Hitchman Coal Company v. Mitchell, 245 U.S. 229, upholding the legality of "yellow-dog" contracts, had been decided thirteen years earlier by the Supreme Court. At this point he was interrupted by Senator Carter Glass of Virginia:

Glass: "And we have sat here all these years and permitted that to remain the law?"

Borah: "No; we have tried by an Act of Congress to repudiate that principle, but the Supreme Court of the United States said that our action was null and void. Mr. President, that is what makes this matter so very important. They pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions."

Again, during the debate on Parker's confirmation, Borah said:

"Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental policies are involved."

Surely the first part of this last quotation epitomizes the Senate's attitude, as manifested in discussion on the floor, toward the confirmation of Mr. Justice Whittaker. His integrity, his learning, his success at the bar, would be the only necessary subjects of inquiry in the case of a judge appointed to a lower court. Indeed, perhaps no further inquiry would be proper in the case of a judge of a lower court. He is not there to apply his own judicial philosophy, willy-nilly, to the litigants before him, but rather to decide the case of those litigants by application of the principles laid down by higher courts. Such a process involves the use of the same ability to reason by analogy as lawyers call on constantly, and therefore the legal ability of an appointee to a trial court is of paramount importance.

Similarly, in the case of the judge who actually tries the case, we do not expect a decision between individual litigants strictly in terms of popular sentiment. The people through their legislative representatives enact what laws they will, subject to constitutional limitations. But once a law is written, neither the people nor their representatives are further consulted as to what was meant by it; the written words, together with relevant background material, are interpreted by a presumably impartial judge. Democracy ends at the courthouse door, and Joe Doaks is not to be imprisoned simply because a majority of the people sitting in the jury box or on the courthouse steps think he should be.

The Highest Authority

These reasons suggest that the primary concern with an appointee to an inferior Federal court should be his ability to apply rules laid down by more authoritative sources, rather than his feeling as to whether this material is right or wrong. But in the case of the Supreme Court, the "something more" which Borah spoke of comes into play. I would prefer to interpret this phrase, not as meaning that it takes more ability to be a Justice of the Supreme Court than a judge of the lower Federal courts, but rather that there are additional factors which come into play in the exercise of the function of a Supreme Court Justice.

The Supreme Court, in interpreting the Constitution, is the highest authority in the land. Nor is the law of the Constitution just "there," waiting to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making—the "due process of law" and "equal protection of the laws" clauses—are about the vaguest and most general of any in the instrument. The Court, in Brown v. Board of Education, *supra,* held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the Constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."