Advising and Consenting

By BIRCH BAYH

WASHINGTON—The twentieth century has witnessed an unfortunate shift in the balance of power in the Federal Government. For the most part, power has flowed down Pennsylvania Avenue from the Capitol to the White House. In recent years, the Congress has attempted to reassert many of its constitutional powers. And one of the most important is the power to advise and consent to nominations of Supreme Court justices.

All agree that the Senate must consider the legal competence, personal integrity and judicial temperament of the nominee. But not every one agrees that the Senate should inquire into the personal and judicial philosophy of the nominee. In my view there is abundant justification in constitutional history, in Senate precedent and in public policy for the most wide-ranging inquiry into and consideration of a nominee's philosophy.

The proceedings of the Constitutional Convention make plain that the Senate role in Supreme Court nominations is to be an active one. Indeed, the power to appoint justices was given exclusive to the Senate at one point in the proceedings. Only after further debate was a compromise reached which allowed the President to "nominate, and by and with the advice and consent of the Senate . . . appoint" the members of the Supreme Court. Nothing in the records of the convention indicates that there is any limitation of the factors the Senate may consider in advising and consenting to Supreme Court justices.

In fact, Alexander Hamilton spent much of Federalist Papers 76 and 77 explaining that the Senate was to play a major, unconstrained role in weighing Presidential nominations. Hamilton wrote that confirmation should be denied in the presence of "special and strong reasons for the refusal" without placing any limitation on the type of reason which would be the basis for refusal.

The Senate has used its constitutional power to the fullest extent, often rejecting nominees on philosophical grounds. In 1795, for example, the Senate rejected President George Washington's nomination of John Rutledge to be the Chief Justice because of his outspoken opposition to the Jay Treaty. In this century the Senate rejected the nomination of Judge John J. Parker largely because of his approval of the "yellow-dog" contract and his opposition to black participation in the electoral process. Indeed, it was during the debate over Judge Parker that Senator George Norris of Nebraska made the eloquent statement that is as applicable today as it was then:

"When we are passing on a judge, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of these qualifications—but we ought to know how he approaches the great questions of human liberty."

Senators cannot ignore the fact that each nominee to the high court, if confirmed, will be called upon to bring life to the most difficult and fundamental concepts of the Constitution: the scope of executive power vested in the President; the privileges and immunities of citizens; unreasonable searches and seizures; probable cause for arrest; cruel and unusual punishments; and the great guarantees of fundamental fairness and equality, due process and equal protection of the laws. It is no answer for a nominee to say he will follow precedent and the intent of the framers in deciding cases. If the answers were that easy, the questions would not reach the high court. The delicate art of being a Supreme Court justice requires the most sensitive weighing of competing, valid constitutional interests. Try as he might to avoid it, the justice's view of the world, his heart, his soul must become involved.

If the Senate does not delve deeply into a nominee's personal and judicial philosophy, it abdicates its constitutional and historic role in determining the membership of the court. Prof. Charles Black of Yale put it well when he wrote: "A Senator, voting on a Presidential nomination to the Court, not only may but generally ought to vote in the negative if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful for the country for him to sit and vote on the Court."

Obviously, it would be harmful for the country if a justice's view were hostile toward fundamental human rights of privacy and free speech, equal justice for all and essential limitations on government power. These are precisely the substantive charges that remain unanswered concerning the nomination of William H. Rehnquist. And no more serious question faces the Senate today.

Senator Birch Bayh, Democrat of Indiana, led the battles against the Supreme Court nominations of Clement Haynsworth and G. Harrold Carswell.