

Mr. Justice Haynsworth

The choice of Court of Appeals Judge Clement Haynsworth for the Supreme Court is disappointing. With candidates of great distinction available, both conservative and liberal, President Nixon has sought out an obscure judge with little reputation for the kind of depth, social sensitivity and philosophic insight that ought to be considered the prime qualifications for a justice of the nation's highest court.

Since the President's intention was a badly kept secret, he had ample advance indication of how poorly the appointment would sit with champions of civil rights and others who believe the road to national unity lies in effective enforcement of constitutional guarantees of equal opportunity. While Judge Haynsworth's record does not seem to us quite as consistently or truculently unsympathetic to the cause of civil rights as some of his critics suggest, it has surely been marked by an extremely cautious reluctance to interpret the Constitution in the light of changing conditions.

In his campaign, and following his appointment of Chief Justice Burger, Mr. Nixon indicated a preference for potential justices who had a record of experience on the bench, who would not be likely to stir up controversy in the Senate and who, above all, shared his view that the Constitution should be rigorously interpreted. Now that he has indulged that preference in nominating Justice Haynsworth, we can only hope that the newest member of the Court will come in time to feel that "strict construction" is an artificial concept which, if freely indulged, could invite national stagnation.

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The real and more subtle line is drawn between the concepts of justices who favor "judicial restraint," as Felix Frankfurter did, and those who, like William O. Douglas, are thought of as "activists." It is an old and honorable difference. But judicial restraint does not mean a mechanical application of the Constitution's words. Certainly it did not mean that in Frankfurter's case. Judge Learned Hand, who would have graced the Supreme Court in any age, urged that justices "be aware of the changing social tensions in every society which make it an organism [and] which will disrupt it, if rigidly confined."

It is not at all unprecedented for judges to change their views, confounding their critics and their admirers alike. By way of example, those who led the successful campaign against the confirmation of Judge John J. Parker were to observe regretfully as time went on that his record in the Circuit Court was far more to their liberal taste than that of Justice Owen J. Roberts, who was confirmed for the Supreme Court in his place.

If Justice Haynsworth approaches his work in the Learned Hand spirit he may surprise the President who appointed him, as other justices have done in the past, by invoking his very conservatism to preserve the spirit of the Constitution rather than its letter.