

Justice Harlan's Departure...

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With President Nixon still engaged in a search for a successor to Associate Justice Hugo L. Black, another aging and ailing member of the Supreme Court has decided to step down. The retirement of Justice John M. Harlan, an erudite conservative, doubles the President's task and his responsibility to history.

Like his colleague, Justice Harlan regarded himself as a strict constructionist of the Constitution, but the two men rarely read that document through the same lenses. Where Black's literalness generally led him to take a liberal view of the individual's rights, Harlan's as often as not led him to take a protective view of corporate giantism and of established governmental institutions. "Bigness," he held, "is not yet an anti-trust violation and it will be a 'sorry day' if it ever becomes one." And he looked on the Court majority's efforts to make legislatures more representative through reapportionment as "adventures . . . in the realm of political science." Yet, in the liberalist tradition of strict construction, he opposed state aid to parochial schools and held that government should bear the cost of divorces for the poor.

The Harlan replacement should pose for the President less of a problem in balance than Justice Black's, but a hard one, nonetheless, in terms of quality.

...and the Need for Distinction

After the Senate last year rejected President Nixon's appointment of G. Harrold Carswell to the Supreme Court, as it had earlier rejected Clement F. Haynsworth Jr., Mr. Nixon asserted that it was not possible to get confirmation for a strict constructionist if he happened to come from the South. To the Southerners he sent the pledge that "the day will come when men like Carswell and Haynsworth can and will sit on the High Court."

The retirement of Justices Black and Harlan has given the President his third and fourth Court vacancies to fill in less than three years. He is free to appoint Justices who share his legal philosophy and who come from the South, North, East, West or any compass point in between. But if the Senate again does its plain duty, it will scrutinize the candidates' records and make sure they are of Supreme Court caliber, no matter where they were born or how they may construe the Constitution.

With few exceptions, the Senate has always done just that, viewing its check on Supreme Court appointments as one of its gravest responsibilities. And with good reason. The Court is at once the source of flexibility in the American legal system, the preserver of that delicate balance between the letter of the law and its spirit, the guarantor that law will keep pace with social change. With good reason Winston Churchill called it "the most esteemed judicial tribunal in the world."

It is perfectly understandable for President Nixon to prefer a representative of the South on that tribunal (although regional equality could hardly have been paramount in his mind when he made two successive appointments from the single state of Minnesota). It is likewise understandable for him to want Justices on the highest court in the land whose broad philosophic outlook reflects his own. What President does not?

But such qualifications should be peripheral; they have only a shadowy significance compared with that stature, that breadth of vision, that understanding of man and society which should be the hallmarks of a prospective Associate Justice of the Supreme Court.

Judge Learned Hand, who would himself have graced the high bench, thought of a Justice as one who would bring to his interpretation of constitutional law "at least a bowing acquaintance" with the great of the earth—from Plato through Lord Acton, by way of Shakespeare, Gibbon, Hume and Kant.

That is asking more than the country is likely to get, as a rule, even with the best of good fortune. But one may hope that, through a bowing acquaintance with Judge Hand, the President will leave political tactics for lesser occasions and reach out for some measure of greatness in his nominees to the Court.