

The Rehnquist Dilemma

By TOM WICKER

The spectacle of Senator Edward Kennedy defending the reputation of William Rehnquist against allegations by Joseph Rauh of the A.D.A. suggests the painful dilemma in which liberals and civil libertarians have been placed by Mr. Rehnquist's nomination to the Supreme Court.

This nomination is not like that of Clement Haynsworth, whom President Nixon earlier tried to put on the Court. Judge Haynsworth was not confirmed by the Senate on the ostensible ground that his record on the bench showed a lack of perception of possible conflict-of-interest situations.

Nor is the Rehnquist case similar to that of Mr. Nixon's other rejected nominee, G. Harrold Carswell. Judge Carswell was found to have made misstatements to a Senate committee, and his confirmation hearings disclosed a glaring lack of qualification for the Supreme Court.

The Rehnquist matter is not even like that of Lewis Powell, whom Mr. Nixon has also named to the Court.

Mr. Powell is a pillar of the Southern establishment, a good credential in the Senate; he is 64 years old and his tenure on the Court will be limited by that; he is not expected by most observers to become a powerful leader within the Court.

Mr. Rehnquist is a horse of a very different color. At 47, he can look forward to a long and active tenure on the bench. Moreover, his record is that of a hard-working and vigorous champion of conservative political causes, both in Arizona and within the Nixon Administration. Persons in and out of the Administration who know his work credit him with superior intellect and skill in the law.

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Thus Mr. Rehnquist on the Court is altogether likely to become a driving force for the principles he espouses. There are those who believe that as the years go along he will be a more formidable leader than Chief Justice Burger in the conservative wing of the Court—a wing that may already be in the majority on some issues and will almost surely become dominant if Mr. Nixon wins another term in the White House.

It is no wonder, then, that liberals and libertarians are desperately casting about for means of defeating the Rehnquist nomination in the Senate. Mr. Rehnquist's record of opposition to civil rights measures, his strong advocacy of state powers that would threaten Bill of Rights guarantees—at least what many people passionately believe to be guarantees—his youth and his obvious leadership qualities might alter the course of the Supreme Court for decades to come.

But the hard fact is that no one has as yet produced any evidence of the kind of ethical tangles that ruined Judge Haynsworth's chances—and before that led to the resignation of Abe Fortas from the Court; nor has anyone been able to identify misstatements like those that sank Judge Carswell, let alone a lack of legal or intellectual qualifications.

It was, in fact, on the matter of Mr. Rehnquist's integrity that Senator Kennedy rebuked Mr. Rauh. The latter had suggested that the nominee had been less than candid in denying ever having been a member of the John Birch Society. The Senator could hardly be sympathetic to a man of

Mr. Rehnquist's views, but he insisted that the nominee's basic integrity was unchallenged.

So the real question before the Senate is whether it can, or should, reject Mr. Rehnquist solely because of his political views. On the one hand, the writers of the Constitution, in giving the Senate the power to confirm or reject Presidential nominees to the judiciary, clearly meant the legislative branch to play a substantive role with the executive branch in this process. The Senate has the right, therefore, to judge for itself the qualifications of a man to sit on the Supreme Court.

On the other hand, to make that judgment solely on the basis of his political views (which, after all, may change) is dangerous business. It presumes some kind of rightful political orthodoxy; it would tend to politicize the courts according to the temporary political coloration of Congress; it could punish some individuals for their ideas and frighten others out of having any.

Moreover, it is bound to lead to retaliation, as it did when Republicans and conservatives defeated President Johnson's nomination of Justice Fortas to be Chief Justice, at least partially on political grounds. Paying off that score had a good deal to do with Judge Haynsworth's subsequent rejection.

It may be argued that Mr. Nixon should not have handed Senators this dilemma by appointing an activist political figure to a nonpolitical court; but the precedents are ample, and the Senate is likely to compound the damage if it denies Mr. Rehnquist his Court seat solely because of his political views.