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A Call for Candor

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This is an excerpt from a letter sent to James O. Eastland, chairman of the Senate Judiciary Committee, by E. Clinton Bamberger Jr., dean; the Rev. Albert Broderick, professor of law, and twenty of the twenty-six members of the law faculty at Catholic University, Washington, D. C.

We are disturbed that one of the President's nominees — William H. Rehnquist—has resisted the Senate in the performance of its responsibility by means we regard as improper. No nominee may justify withholding from the committee, which must initially pass upon his qualifications and dispositions for handling this political power "in legal form," a frank expression of his political and legal philosophy.

The attorney-client privilege is not the attorney's. It is for the protection of, and belongs to, the client. It is peculiarly inappropriate for a Government attorney to invoke the privilege with respect to advice he has given to Government servants (whether President, Attorney General, or deputy marshal). His client is the people, not the President.

There is no such privilege which any nominee was so bold as to claim before against the Senate's right to know in fulfilling its responsibility to the same people. As Chief Justice Marshall clearly put it, "The Government of the Union is emphatically and truly a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

If the President wishes to invoke executive privilege, that is another matter, a political decision for which he will have to take the consequences, one of which should be withdrawal of the nomination. But no Senate committee, we suggest, can fulfill its responsibility and let a would-be judicial servant of the people withhold from the people's representatives the basic views that he will bring to bear in a lifetime appointment.

The political philosophy which has moved a lawyer in his professional life is all we have to go on in evaluating the qualities of a lawyer who has not served as a judge as to how he will act when appointed. Of course no lawyer can be expected to say how he would decide a concrete case which has not yet come before him in a legal context. But he can be called upon to explain counsel he gave in the past to

public officials with respect to issues that lie in the core of our constitutional democratic society.

The Constitution's design, as we see it, is that the people are entitled to learn through their responsible representatives, the Senate, the cut of constitutional jib of any nominee, and to have screened out while there is time one who is unduly predisposed against enforcement of any significant part of the Constitution. For as Justice Jackson said: "The question that the present times put into the minds of thoughtful people is to what extent Supreme Court interpretations of the Constitution will or can preserve the free Government of which the Court is a part."

The issues present here would be crucial with respect to any appointment to the Supreme Court. They are notably so when a minority President has by actual and proposed nominations over a two-year period committed himself to fastening his philosophy stubbornly and single-mindedly upon the constitutional destiny of this land for a full generation. In this context there is no way for the broad spectrum of views that people hold to be heard, save through the "advice and consent" of its elected Senate.

We ask that Mr. Rehnquist be recalled [by the Judiciary Committee] and pressed for answers to relevant questions about his political philosophy and the constitutional positions he has taken as a lawyer serving the people in the executive branch of Government. The issues that have been raised about Mr. Rehnquist's philosophy—his views about the personal liberties of citizens and the rights of all citizens to the equal protection of the laws—are of the greatest magnitude to all Americans.

We are deeply concerned as to the demoralizing effect of these developments upon our students. The remark-

able rise in law-school applications during the past two years is evidence of the dedication of young people to seek change through the legal system. But their willingness to work within the system should not be construed as a blind commitment. Credibility and integrity are minimal requirements. Members of the Senate, as well as the President and his advisers, should be alert that muffling of the hearing record and further expansion of executive privilege (under whatever guise), on top of the pre-nomination maneuverings, are invitations to cynicism and withdrawal.