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A case for De Tocqueville

WASHINGTON — In his study, "Democracy in America," Alexis de Tocqueville argued that lawyers were the most powerful security against the excesses of democracy. "They derive from their occupation certain habits of order," he wrote, "a taste for formalities and a kind of instinctive regard for the regular connection of ideas which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude."

If De Tocqueville had known William Rehnquist, who President Nixon has nominated for the Supreme Court, he might not have felt it necessary to devote a whole chapter to his argument. He could have pointed to Rehnquist and saved himself from the necessity of making the general argument that lawyers value legality more than freedom; are not altogether averse to tyranny and "provided the legislature undertakes of itself to deprive men of their independence, they (lawyers) are not dissatisfied."

Rehnquist is what De Tocqueville was talking about. Can police arrest thousands of people on the street and toss them into jail without so much as a specific charge? Of course, argues Rehnquist, that's nothing more than "limited martial law."

Does the government have the right to spy upon its citizens? Of course, says Rehnquist. It would be a waste of the taxpayers' money, he told Sen. Sam Ervin of North Carolina, in apparent compliment to the senator's conduct in peace and war, for the government to put him under electronic surveillance. But he saw nothing illegal about it.

Does the President have the right to put whomsoever he pleases on the Supreme Court regardless of the Constitu-

tion's express proviso, "by and with the advice and consent of the Senate"? Rehnquist says he does.

It was he who drafted President Nixon's letter to Sen. William Saxbe of Ohio at the time of the Carswell debate. The letter argued the President's power to appoint in a fashion which must have caused high school civics students to

Tom Braden

wonder whether their President could read plain English.

Rehnquist is no "strict constructionist," to use Mr. Nixon's phrase. For example, he would certainly not agree with the late Justice Black's strict construction of the First Amendment right to free speech. Nor is he a conservative in the sense that Justice White and Stewart are conservative. One of his former classmates at Stanford Law School describes him as "a bright, able, decent human being with a set of philosophical assumptions in favor of force and authority which only a few years ago we were calling 'extremist.'"

Should a man's philosophical assumptions be weighed in determining his fitness for the Supreme Court? The chances seem good that the Rehnquist record will be bereft of Haynsworth-like conflicts of interest, or Carswellian pronouncements on race, and senators will have to make a clear-cut decision as to whether they want to put an extreme conservative on the bench.

The struggle between liberal and conservative has existed in our land from long before De Tocqueville made his famous study. But the two traditions have usually been maintained and expressed by moderate men. So long as we thought of conservatives as tracing themselves to John Adams and of liberals as heirs of

Thomas Jefferson, the struggle could be maintained without the excesses which threaten reasoned debate. Rehnquist is a different breed. "The mildness of our government," John Adams once argued, repressing his desire to punish "ignorant, blundering thick-skulls who are publishing radical manifestoes is a pleasing, delightful characteristic, and though it will probably give encouragement to some disorders, it is too precious to be relinquished without absolute necessity."

On the record, Rehnquist's temperament is of no such judicial caste. Electronic surveillance might be the least he would suggest for publishers of "radical manifestoes."

To paraphrase one of Adams' descendants, that 200 years after John Adams, Rehnquist should be put forward by an American President as the embodiment of the conservative tradition, defies Darwin.



Appointee Rehnquist
Darwin is defied