'Two Distinguished Nominations'

By JOHN L. McCLELLAN

WASHINGTON—The Senate is now considering William H. Rehnquist and Lewis F. Powell Jr. for the Supreme Court. A special genius of the American people has been a commitment to the rule of law, not of men; the Senate fulfills a sacred duty in advising and consenting to the nominations submitted by the President.

Three issues face the Senate: (1) Do these nominees have personal integrity? (2) do they possess professional competency? and (3) do they have an abiding fidelity to the Constitution? No Senator has a duty to vote to confirm any nomination forwarded by the President that cannot pass this test. In my judgment, that is what the decision is all about—not about the so-called "Warren Court" or the "Burger Court" or even the "Nixon Court." Those labels are the stuff of journalism, not constitutional law.

Since these nominations were announced, I have examined the public record of these two men without prejudgment. I would note that I have found nothing in the public record of either man that raises any question whatsoever of lack of integrity or competency. I am convinced that any challenge on either of those grounds will utterly fail.

There is room on the United States Supreme Court for liberals and conservatives, Democrats and Republicans, Northerners and Southerners, Westerners and Easterners, blacks and whites, men and women—these and other similar factors neither qualify nor disqualify a nominee. After personal integrity and professional competency, what is crucial, in my judgment, is the nominee's fidelity to the Constitution.

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In recent years a majority of the Supreme Court—no doubt in good faith but nonetheless with mistaken judgment—began to impose new standards on the administration of criminal justice in the United States on both the Federal and state levels. These decisions have not enforced the simple rule that law enforcement agents must "live up to the Constitution" in the administration of justice. Instead, these cases have, to a significant degree, created and imposed on a helpless society new rights for the criminal defendants. Some of these new rights have been carved out of society's due measure of personal safety and protection from crime.

Indeed, since 1960, in the criminal justice area alone, the Supreme Court has specifically overruled or explicitly rejected the reasoning of no less than 29 of its own precedents, often by the narrowest of five-to-four margins. In 1967, the high watermark of this tendency to set aside precedent, the Court overturned no less than eleven prior decisions. Twenty-one of the twenty-nine decisions the Court overruled involved a change in constitutional doctrine—accomplished without invoking the prescribed procedures for the adoption of a constitutional amendment. Seven of these represented a new reading of old statutory language—accomplished without the intervening of Congressional action and Presidential approval. And this is the significant point: 26 of these 29 decisions were handed down in favor of a criminal defendant, usually one conceded to be guilty on the facts.

The pursuit by some jurists of abstract individual rights defined by ideology, not law, has threatened to alter the nature of the criminal trial from a test of the defendant's guilt or innocence into an inquiry into the propriety of the policeman's conduct. In my judgment, these decisions, however well-intentioned, have come at a most critical juncture of our nation's history and have had an adverse impact on the administration of justice. Our system of criminal justice, state and Federal, is increasingly being rendered more impotent in the face of an ever-rising tide of crime and disorder.

It is for these reasons that I, for one, welcome these two distinguished nominations.

I recognize, of course, that there are some who challenge these nominations, arguing that the Senate should reject them because of the nominees' positions on such issues as confessions or wiretapping. Yet I have seen nothing that either nominee has said that is more critical of the work of the Supreme Court in these areas than that which Justices Black and Harlan themselves have repeatedly voiced in dissent. I know, too, that the Senate, in processing the 1968 Crime Act, voted 55 to 29 to limit the impact of the Miranda rule on confessions, and 68-to-12 to authorize the use of court-supervised wiretapping in major investigations. I cannot believe that these nominations should or will fail of confirmation for these reasons.

The people of the United States ratified the Constitution to establish justice, to insure domestic tranquillity and to secure the blessings of liberty. We must not emphasize one aspect of the Constitution to the exclusion of another. It not only wrongs the Constitution but it will also ultimately jeopardize both the safety and the liberty of our people.

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