WASHINGTON REPORT:

How Rehnquist Happened

This column appears in Civil Liberties *regularly. Look to it for information on congressional actions you can influence through communication with your congressmen, the press and other groups.*

By Arlie Schardt

Unless he makes the greatest about-face in the history of jurisprudence, newly appointed Supreme Court Justice William Rehnquist is the worst news for civil libertarians in many a decade. His appointment is especially significant to ACLU members because the debate over his nomination marked the first time in the ACLU's 52-year history that the National Board of Directors, after extensive debate, departed from its policy of never endorsing or opposing candidates for public office.

The ACLU officially entered the lists in opposition to the Rehnquist nomination on Sunday, Dec. 5. The action proved too late since Rehnquist was confirmed by the Senate on Dec. 10.

For many people, the matter may simply seem a case of "too little, too late." But there is much to learn from this experience, and it is worth noting in the event that such a situation arises again.

The main point is this: Rehnquist could have been defeated and in fact very nearly *was* defeated. Furthermore, we need never see the confirmation of his like again – provided that the Board ever again decides the nation is presented with an equally dedicated anti-civil libertarian because if the ACLU had committed its considerable resources even two weeks earlier, Rehnquist would have lost.

Press

This sounds naive in view of the fact that, to the general public, the opposition to Rehnquist never really seemed to get off the ground. This feeling was the result of an odd lack of emphasis, and of hard digging, by the press, which signaled an assumption from the very start that Rehnquist was sure to win routine Senate approval. This attitude unfortunately became a self-fulfilling prophecy. The press, with few exceptions, never did treat the story as if it were a genuine contest, meaning there was less incentive for action by that part of the public which would normally work to defeat such a nominee. This in turn meant less pressure on that large middle ground of basically uncommitted senators, who therefore logically assumed that the folks back home did not regard the issue as a serious one. These senators were in turn less inclined to stir up unnecessary trouble by ringing up an

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New York Times Photo
William Rehnquist

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unnecessary political debit through "futile" opposition to a presidential nominee. In short, it was too easy to go along with the man in charge.

There were several strategic factors helping Rehnquist. One was President Nixon's extreme good fortune in being able to offer two nominees at the same time. Had either Rehnquist or Lewis Powell been "running" alone, the opposition could have concentrated its efforts. As it was, Nixon kept the two men paired as long as possible, knowing that not even the most dedicated opponents would hope to block two nominees at the same time; he also managed, until the final days, to keep Rehnquist's name tentatively scheduled to be voted on first, on the realistic assumption that psychological pressure would pile up on Rehnquist opponents to shorten the debate lest they be accused of delaying the appointment of Powell. Powell was devoid of virtually all active opposition a few weeks after his nomination, as opponents finally dropped him to concentrate on Rehnquist. Even those few weeks were costly, however, as they delayed the need to establish a sharp focus on Rehnquist.

Enough

Psychology also helped Nixon in that a whole flock of his potential nominees – whose names were leaked and/or announced to the press – had already been "rejected" even before he could nominate them, because they were known to be faring badly even in the relatively staid councils of the American Bar Association. Since there are limits to how many consecutive times a President can be denied, the loss of these early skirmishes (some mustrustful souls believe they were only trial balloons) helped Nixon's allies argue that enough was enough.

Most of all, both Rehnquist and Powell were helped by the fact that neither nomination involved issues on which the general public could easily fix, as they could over the questions of Carswell's competence and racial attitudes, or Haynsworth's conflict of interest. Here the issue was more elusive: civil liberties. It called for a much more sophisticated and painstaking examination of a man's record – and while such an examination obviously did not take place soon enough in a wide enough segment of the population, it was nevertheless a-building, and would have been Rehnquist's undoing had there been a bit more time.

The administration also introduced another tactic to good advantage. Having been burned so often by the surprise surfacing of derogatory information about previous Nixon nominees, the administration this time went first to the source of that material – namely those who had led the opposition research before – both to seek information and, apparently, to unnerve the enemy (the president of Harvard University publicly charged that FBI agents had put a series of intimidating questions to a Harvard law professor whose research had contributed to previous administration setbacks). A unique tactic was tied in with these quizzes: Whenever something negative was learned about Rehnquist, either from his friends or his opponents, the administration quickly made it public. The fact that the derogatory information came from the administration rather than the opposition apparently reduced its shock value and took the tarnish off, regardless of the fact that the truth was just as true, and just as bad, no matter its source.

Public Response

The important point for the future is that the public – despite the nonchalance of the media – *was* becoming educated and *was* beginning to respond. Contrary to the pessimism of many of us, it *is* possible these days to arouse sufficient support to win congressional votes on relatively abstract issues, such as school prayer and other civil liberties questions.

But in the Rehnquist vote, the outcome finally turned on two strategic breaks which unfortunately have nothing to do with his qualifications for the Supreme Court. One was the decision of the Senate leadership to hold firm to what it said was a promise to President Nixon to conduct the vote before the Christmas recess, and the other was the Christmas recess itself. The pressure to adjourn – the basic homing instinct of the political animal – finally carried the day.

Ironically, that particular, intangible kind of pressure broke through on the very same day – Friday, Dec. 10 – on which the momentum against Rehnquist had picked up so visibly that his ultimate defeat was in sight for the first time.

This was so because that morning the Senate had rejected a move to close debate on the issue. Opponents of Rehnquist netted 42 votes against cloture. They needed only 34 (one more than one-third of the Senate). On the day before, they were sure of only 25. The other 17 had come aboard in a period of 24 hours, generally on the strength of the argument that far too many questions about William Rehnquist had been left unanswered and should be examined in further debate. The fact that the opposition could muster so many votes in so short a time was a heartening sign.

That morning, moreover, an article by John P. MacKenzie, who covers the Supreme Court for *The Washington Post*, had raised new and serious doubts about Rehnquist's claim that a recently discovered pro-segregation memo, written by

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Rehnquist in 1952 when he was clerk to Justice Robert Jackson, was written at the request of Justice Jackson. MacKenzie interviewed Jackson's longtime secretary, Elsie Douglas, who said the memo in no way represented Justice Jackson's views and that, in so implying, Rehnquist had "smeared the reputation of a great justice."

CLU Study

A detailed study by a legal team under the direction of ACLU General Counsel Marvin Karpatkin gave further weight to the unlikelihood of Rehnquist's claims about this particular issue, but was first ready for circulation on what turned out to be the day the final vote was taken. Likewise, significant opposition was underway on law faculties around the country; again, the vote took place just as that impact was beginning. A number of national groups were also receiving their first heartening membership response at that same time. Too late by how much? A day? A week?

The final vote came about in an odd way. After the Senate rejected cloture at about noon on Dec. 10, Senator Bayh, leader of the opposition, moved that the vote be postponed until the Senate returned from vacation on Jan. 18. He did so on the reasonable ground that this delay would in no way hamper the Court, since its docket was in excellent shape, and since the Court itself would be in recess until Jan. 10 anyway.

Nixon's forces correctly sensed the danger inherent in such a delay. No telling what might turn up should the opposition have another four weeks to dig. They argued that the delay was unfair to the President, to the Court and to the nominee. The motion to postpone the vote until Jan. 18 was defeated 70-22.

It was here that that incredibly powerful pressure – the desire to adjourn – took over. The detailed research and subtle arguments required more time than the opposition could hope for if Congress were to finish its business by the next week. Result: collapse. The final vote was held later that same afternoon. With no time to broaden debate, the outcome was never in doubt. The opposition gave up. The vote for Rehnquist was 68-26. Among the 68 were several senators who would have voted no had there been a real contest, but now saw no reason to buck the President. There were others among the 68 who later gave almost apologetic reasons for their votes. It was not the Senate's finest hour.

Last Time

But it need never happen again. Defeatists should recall that at this same point in the Carswell fight – approximately seven weeks from the time the President offered the nomination – Carswell was a shoo-in. Rehnquist opponents, due to the quirks of timing mentioned above, had only about half as long to marshal their evidence as did the anti-Carswell forces.

Two days before the end, *The New York Times* editorially deplored the fact that Rehnquist has "repeatedly shown himself opposed to judicial or legislative efforts to eliminate racial discrimination" and has "relentlessly argued in favor of abridging and diminishing the liberties of the citizens and enhancing the powers of Government – to tap the citizen's phone and 'bug' his home and office, to enter his premises without knocking, to use tainted evidence against him, to arrest him in dragnet sweeps, to compel him to testify against himself, to deprive him of his right to practice if he is a radical lawyer."

These charges were also raised, at one time or another, in the Senate. They were never thoroughly rebutted. Just as the media did little to focus attention on an examination of these issues while the nomination was pending, they dropped them completely the moment the appointment was official. It is within the power of civil libertarians – given the application of enough energy – to see that an action of such historic importance is never again concluded until every question has been fully and properly answered.

School Amendment

On another subject, congressional forces seeking public school anti-busing and integration measures are multi
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