

NOMINATIONS OF WILLIAM H. REHNQUIST AND LEWIS F. POWELL, JR.

WEDNESDAY, NOVEMBER 3, 1971

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:40 a.m., in room 1202, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Burdick, Byrd of West Virginia, Tunney, Hruska, Fong, Scott, Thurmond, Cook, Mathias, and Gurney.

Also present: John H. Holloman, chief counsel, Francis C. Rosenberger, Peter M. Stockett, Hite McLean, and Tom Hart.

The CHAIRMAN. Let us have order.

This hearing is on the nomination of William H. Rehnquist of Arizona to be associate Justice of the Supreme Court of the United States, vice Justice Harlan retired. Notice of the hearing appeared in the Congressional Record of October 27, 1971.

I am going to place in the record at this time the report of the American Bar Association on Mr. Rehnquist, and also the report of the American Bar Association on Lewis F. Powell. Copies will be made available to the members of the committee and to the press.

(The reports referred to follow.)

AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
November 2, 1971.

HON. JAMES O. EASTLAND,
*New Senate Office Building,
Washington, D.C.*

DEAR SENATOR: The Standing Committee on the Federal Judiciary of the American Bar Association submits herewith its report regarding William H. Rehnquist.

Our Committee, with respect to nominations for the Supreme Court, limits its conclusions to the professional competence, judicial temperament, and integrity of the nominee. The Committee believes that without these characteristics no person is qualified to become a Justice of the Supreme Court. We recognize, however, that in the selection of a person for the Supreme Court by the President, and the consideration of that selection by the Senate, there are involved other factors of a broad political and ideological nature. Because the Committee does not take these factors into account, it wishes to make clear that it expresses no opinion on them, even though as will appear from what follows, its investigation revealed opposition from several sources to this nomination on that score. The Committee respects opinions on these factors on both sides; it does not attempt to evaluate them, except to the extent, if any, that they appear to affect the element of judicial temperament.

The present conclusion of the Committee, limited to the area described above, is that Mr. Rehnquist meets high standards of professional competence, judicial temperament, and integrity. To the Committee, this means that from the viewpoint of professional qualifications, Mr. Rehnquist is one of the best persons available for appointment to the Supreme Court.

While the Committee is unanimous in the view that Mr. Rehnquist is qualified for the appointment, three members of the Committee believe that his qualifications do not establish his eligibility for the Committee's highest rating and would, therefore, express their conclusion as not opposed to his confirmation.

EDUCATION

Mr. Rehnquist received his B.A. from Stanford in 1948, his M.A. in Political Science from Stanford in 1949, his M.A. in Government from Harvard in 1950, and his LL.B. from Stanford in 1952.

He was first in his law school class, an editor of the Law Review, and he was highly respected by the faculty and fellow students as a gifted scholar. A classmate who is now a partner in a leading west coast firm, at our request, interviewed several other members of Mr. Rehnquist's class. Their evaluation, in part, is as follows:

"Mr. Rehnquist is of exceptional intellectual and legal ability. He was a law student among law students, * * *. From the standpoint of intellectual and legal ability, there cannot be question among reasonable men on his exceptional qualifications.

"His personal integrity is not subject to challenge. While various of the interviewees, including myself, by no means agree with some of the political and social views of Mr. Rehnquist, each of us is completely satisfied that he will approach his task with objectivity, that he will decide each case that comes before him on the thorough analysis of the applicable law and a careful study of the facts."

EXPERIENCE

Supreme Court Clerkship

Mr. Rehnquist served as the law clerk for Mr. Justice Robert H. Jackson during the year 1952-53. Others who were law clerks during this period respected his ability. He was subject to some criticism for an article which appeared in the December 13, 1957 issue of U.S. News and World Report entitled "Who Writes Decisions of the Supreme Court?"

Phoenix, Arizona

Mr. Rehnquist moved to Phoenix in 1953. There he was associated with the firm of Evans, Kitchel & Jenckes. He then formed the partnership of Ragan & Rehnquist. This firm merged with Cunningham, Carson & Messenger and he became a junior partner of the latter firm. In 1960, he withdrew from this firm and formed a new partnership, Powers & Rehnquist. All of these changes of professional relationship were made without hard feelings and were made solely because of Mr. Rehnquist's view that the change would offer him a richer professional experience.

Mr. Rehnquist's rating in Martindale-Hubbell at the time he left Phoenix was the highest — AV. He could not be said to be the leading lawyer of Phoenix, but he was clearly a person of recognized professional quality who, for his age, was highly regarded. He handled a fair amount of litigation, including a notable case in which he acted as Counsel for the Arizona House of Representatives and one of its Commissions in the impeachment proceedings before the Arizona State Senate concerning certain public officers.

Present Government Position

Mr. Rehnquist is presently an Assistant Attorney General of the United States and head of the Office of Legal Counsel in the Department of Justice. As such, he is responsible to the Attorney General for the resolution of most of the legal questions presented to the Department which do not relate to litigation. In this position he has become highly respected among his colleagues in the government and particularly in the Department of Justice.

REPUTATION

Ninth Circuit

Over 120 judges and lawyers in seven states were interviewed. In addition, 10 law school deans were invited to comment, if possible after consultation with their faculties.

In the state of Arizona, 16 judges and 21 lawyers and 2 law school deans were interviewed. The consensus is that Mr. Rehnquist possesses outstanding ability and that he is well qualified to be an Associate Justice of the Supreme Court. Among those who endorsed him were former political opponents as well as lawyers and judges who disagreed sharply with his political and philosophical views.

Those devoted to expanding concepts of civil rights regret his nomination, yet, a number of leading liberal and civil rights lawyers support the nomination because of his professional competence, intellectual ability, and character. As one of them summed it up, he had "total professional respect for Mr. Rehnquist." He had never known of any reproach to his character. He states he is "not a Bircher, not a racist, but a decent man and a good human being". Other leading lawyers speak of him as intellectually honest and intellectually objective.

Mr. Rehnquist also has substantial support from the Arizona law schools. Although within the faculties of the two law schools there are differences in political philosophy, neither of the deans believe that there was any degree of opposition to Mr. Rehnquist's appointment within their faculties.

In the states of Washington, Montana, Oregon, California, Nevada, and Idaho, 13 judges and 51 lawyers were interviewed and also the deans and faculty members of 28 law schools. Except for many of the Stanford alumni, Mr. Rehnquist was not known personally to most of those interviewed, but he was known by several and known by reputation to several more. With one exception, all comments regarding Mr. Rehnquist's professional qualifications were favorable.

One judge although not personally acquainted with Mr. Rehnquist, had reservations as to his judicial temperament because of his impression that Mr. Rehnquist had such deep convictions on social and economic problems that he might be unduly and injudiciously influenced by those views in deciding cases. He believed, however, that in balance he was qualified for appointment. Others had reservations as to Mr. Rehnquist's personal views, but did not feel that this should disqualify him from appointment.

All of the deans interviewed recognized the high quality of Mr. Rehnquist's scholarship. Some acknowledged his conservatism, but felt that it did not affect his ability to be fair and open-minded. Among those to whom he was known only by reputation, some expressed the opinion that he might be "so far out of the main stream" with respect to human rights, that his qualifications were questionable; others had reservations as to temperament, but did not feel they rose to the level of disqualification.

One professor active in the civil rights movement said that he felt Mr. Rehnquist lacked the temperament of a Supreme Court Justice; that he was totally ruthless and in that sense lacked integrity. He felt that Mr. Rehnquist did not provide a full and balanced view to the Senate on what it wanted to know when he told the Senate that the Army did not give information to the Department of Justice in connection with surveillances. He felt that Mr. Rehnquist was gifted in his ability to make persuasive arguments but that he was not intellectually honest in making some of them.

Other circuits

Circuit	Lawyers	Judges	Law schools	Circuit	Lawyers	Judges	Law schools
1.....	4	4	7	6.....	10	4	8
2.....	17	9	5	7.....	25	16	7
3.....	26	19	3	8.....	75	22	7
4.....	150	30	11	10.....	14	8	1
5.....	41	24	8	DC.....	13	4	4

Practicing lawyers and judges

Outside the Ninth Circuit, Mr. Rehnquist was known only a to relatively small fraction of the lawyers and judges interviewed, but he was known by persons of recognized standing in almost every circuit. Those who knew him personally uniformly believed him qualified for the Supreme Court. The adjectives "intelligent", "brilliant", "articulate", "rational", "forceful" recurred in their discussions. Those who knew him by reputation also spoke highly of his intellectual qualities, although some expressed reservations as to his political views. Two judges felt that his positions as to civil rights and civil liberties were too far out of step with the needs of the times.

Mr. Rehnquist is highly regarded by persons who observed his work in the National Conference of Commissioners on Uniform State Laws. He was diligent and hardworking. He advocated conservative viewpoints, but he nevertheless supported the Conference recommendations if he was outvoted.

Law schools

Of the 61 law schools surveyed, no dean, and as far as we know, no faculty member has cast doubt as to Mr. Rehnquist's brilliant intellectual qualifications. Our impression from our survey is that a strong preponderance of this group favors his confirmation, notwithstanding sharp opposition to many of his philosophical views. A significant minority would oppose his confirmation, not on grounds of professional qualifications, but on the broader question of the political desirability of so conservative an addition to the court.

A very small number suggests that his reiterated conservative views manifest a defect going to his professional qualifications. One of this group said he had no question about Rehnquist's intellectual capacity and personal characteristics, but that positions he had taken on the power of the executive to engage in surveillance of private activities, the publication of the Pentagon papers and the notion of preventive detention raise, in the aggregate, a question as to the soundness of his approach to the constitutional separation of powers.

CIVIL RIGHTS AND CIVIL LIBERTIES

Mr. Rehnquist has drawn criticism both for his public defense of various administration acts and recommendations which touch on the field of civil liberties and also for certain views he expressed before becoming a government officer which manifest an extremely conservative position as to appropriate governmental action in certain areas of racial and religious discrimination.

As to positions advocated by him in speeches and in committee hearings regarding such matters as preventive detention and government surveillance, the Committee reviewed a large number of his statements and concluded that regardless of the merits of the positions advocated, it did not appear that this defense of those positions was beyond proper limits of professional advocacy.

As to the positions he espoused before becoming a government officer, such as his opposition to proposed local and state legislation forbidding discrimination in places of public accommodation, his views were obviously conservative, but they were expressed on philosophical grounds and concerned only the merits of pending legislation. When the legislation was enacted, Mr. Rehnquist in no way attempted to frustrate or oppose the enforcement of the law and, indeed, he now acknowledges that its successful execution convinces him that his position was probably wrong on the merits.

Members of the Committee have also spoken with representatives of labor and civil rights groups concerning Mr. Rehnquist. This includes the AFL-CIO, the NAACP, the Americans for Democratic Action and the Leadership Conference on Civil Rights. The Committee has been informed that many, if not all, of these groups are opposed to the confirmation of Mr. Rehnquist. As with respect to other objections to the nominee already noted, the reasons advanced for the opposition of these groups so far as the Committee has been informed, lie outside the area with which the Committee is concerned and to which its opinion is confined.

CONCLUSION

The Committee's investigation of Mr. Rehnquist was commenced on Friday, October 22, 1971, and this report was prepared on November 2, 1971. If further facts are learned which are significant, our Committee would ask for the privilege of submitting a supplemental report to deal with them.

As we stated at the outset, our Committee expresses no view whatever as to Mr. Rehnquist's personal and philosophical views. We have concluded that they do not affect his professional qualifications, that is, his professional competence, judicial temperament and integrity. Accordingly, the Committee is unanimous in its view that he is qualified for appointment to the Supreme Court. A majority of nine is of the opinion that he is one of the best qualified available and thus meets high standards of professional competence, judicial temperament, and integrity. The minority would not oppose the nomination, but is not ready to express this high degree of support.

Respectfully submitted.

LAWRENCE E. WALSH, *Chairman.*