

that knows a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the senator thinks will make a judge whose service on the bench will hurt the country, then the senator can do right only by treating this judgment of his unencumbered by the deference to the President as a satisfactory basis in itself for a negative vote.

Whether the Chair would like the Yale Law Journal article in the record is a matter entirely for his decision. I am not asking to have it put in the record. I don't know whether you care to have these things introduced at this point, Mr. Chairman.

Senator HART. If there is no objection, let it be printed.

Mr. RAUH. Thank you, sir.

(The Yale Law Journal article follows:)

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A NOTE ON SENATORIAL CONSIDERATION OF SUPREME COURT NOMINEES

(By Charles L. Black, Jr.)

If a President should desire, and if chance should give him the opportunity, to change entirely the character of the Supreme Court, shaping it after his own political image, nothing would stand in his way except the United States Senate. Few constitutional questions are then of more moment than the question whether a Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country. It is the purpose of this piece to open discussion of this question; I shall make no pretense of exhausting that discussion, for my own researches have not proceeded far enough to enable me to make that pretense.¹ I shall, however, open the discussion by taking, strongly, the position that a Senator, voting on a presidential nomination to the Court, not only may but generally ought to vote in the negative, if he firmly believes, on reasonable grounds, that the nominee's views on the large issues of the day will make it harmful to the country for him to sit and vote on the Court, and that, on the other hand, no Senator is obligated simply to follow the President's lead in this regard, or can rightly discharge his own duty by so doing.

I will open with two prefatory observations.

First, it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time. The *loci classici* for this insight, now a platitude, are in such writers as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand. It would be hard to find a well-regarded modern thinker who asserted the contrary. The things which I contend are both proper and indispensable for a Senator's consideration, if he would fully discharge his duty, are things that have definitely to do with the performance of the judicial function. The factors I contend are for the Senator's weighing are factors that go into composing the quality of a judge. The contention that they may not properly be considered therefore amounts to the contention that some things which make a good or bad judge may be considered—unless the Senator is to consider nothing—while others may not.

Secondly, a certain paradox would be involved in a negative answer to the question I have put. For those considerations which I contend are proper for the Senator are considerations which certainly, notoriously, play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion, therefore, that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a

¹ I shall not provide this discussion with an elaborate footnote apparatus. I am sorry to say that I cannot acknowledge debt, for I am writing from my mind; experience teaches that, when one does this, one unconsciously draws on much reading consciously forgotten, for all such obligations unwittingly incurred I give thanks. I have had the benefit of discussion of many of the points made herein with students at the Yale Law School, of whom I specifically recollect Donald Paulding Lwin, I have also had the benefit of talking to him about the piece after it was written.

HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* (1953) came to my attention and hands after the present piece had gone to the printer. This excellent and full account of the entire function would doubtless have fleshed out my own thoughts, but I see nothing in the book that would make me alter the position taken here, and I hope a single-shot thesis like the present may be useful.

nomination ought not to be guided by considerations which are hugely important in the making of the nomination. One has to ask, "Why"? I am not suggesting now that there can be no answer; I only say that an answer must be given. In the normal case, he who lies under the obligation of making up his mind whether to advise and consent to a step considers the same things that go into the decision whether to take that step. In the normal case, if he does not do this, he is derelict in his duty.

I have called this a constitutional question, and it is that (though it could never reach a court), for it is a question about the allocation of power and responsibility in government. It is natural, then, for American lawyers to look first at the applicable text, for what light it may cast. What expectation seems to be projected by the words, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court . . ."?² Do these words suggest a rubber-stamp function, confined to screening out proven malefactors? I submit that they do not. I submit that the word "advice," unless its meaning has radically changed since 1787, makes next to impossible that conclusion.

Procedurally, the stage of "advice" has been short-circuited.³ Nobody could keep the President from doing that, for obvious practical reasons. But why should this procedural short-circuiting have any effect on the *substance* so strongly suggested by the word "advice"? He who merely *consents* might do so perfunctorily, though that is not a necessary but merely a possible gloss. He who *advises* gives or withholds his advice on the basis of *all* the relevant considerations bearing on decision. Am I wrong about this usage? Can you conceive of sound "advice" which is given by an advisor who has deliberately barred himself from considering some of the things that the person he is advising ought to consider, and does consider? If not, then can the Presidents, by their unreviewable short-circuiting of the "advice" stage, magically have caused to vanish the Senate's responsibility to consider what it must surely consider in "advising"? Or is it not more reasonable to say that, in deciding upon his vote at the single point now left him, every Senator ought to consider everything he would have considered if, procedurally, he were "advising"? Does not the word "advice" permanently and inescapably define the *scope* of Senatorial consideration?

It is characteristic of our legal culture both to insist upon the textural reference-point, and to be impatient when much is made of it, so I will leave what I have said about this to the reader's consideration, and pass on to ask whether there is anything else in the Constitution itself which compels or suggests a restriction of Senatorial consideration to a few rather than to all of the factors which go to making a good judge. I say there is not; I do not know what it would be. The President has to concur in legislation, unless his veto be overridden. The Senate has to concur in judicial nominations. That is the simple plan. Nothing anywhere suggests that some duty rests on the Senator to vote for a nomination he thinks unwise, any more than that a duty rests on the President to sign bills he thinks unwise.

Is there something, then, in the whole structure of the situation, something unwritten, that makes it the duty of a Senator to vote for a man whose views on great questions the Senator believes to make him dangerous as a judge? I think there is not, and I believe I can best make my point by a contrast. The Senate has to confirm—advise and consent to—nominations to posts in the executive department, including cabinet posts. Here, I think, there is a clear structural reason for a Senator's letting the President have pretty much anybody he wants, and certainly for letting him have people of any political views that appeal to him. These are his people; they are to work with him. Wisdom and fairness would give him great latitude, if strict constitutional obligation would not.

Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less. Insofar as their policy orientations are material—and, as I have said above, these can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President

² U.S. CONST. art. II, § 2, cl. 2.

³ Even this short-circuiting is not complete. First, the President's "appointment," after the Senate's action, is still voluntary (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803)), so that in a sense the action of the Senate even under settled practice may be looked on as only "advisory" with respect to a step from which the President may still withdraw. Secondly, nominations are occasionally withdrawn after public indications of Senate sentiment (and probable action) which may be thought to amount to "advice."

think them not harmful. If this is not true, why is it not? I confess here I cannot so much as anticipate a rational argument to which to address a rebuttal.

I can, however, offer one further argument tending in the same direction. The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution? He is appointed by the President (when the President is acting at his best) because the President believes his world-view will be good for the country, as reflected in his judicial performance. The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope? If not, again, why not? If so, on the other hand, then the Senator's duty is to vote on his whole estimate of the nominee, for that is what constitutes the taking of the second opinion.

Textual considerations, then, and high-political considerations, seem to me strongly to thrust toward the conclusion that a Senator both may and ought to consider the lifeview and philosophy of a nominee, before casting his vote. Is there anything definite in history tending in the contrary direction?

In the Constitutional Convention, there was much support for appointment of judges *by the Senate alone*—a mode which was approved on July 21, 1787,⁴ and was carried through into the draft of the Committee of Detail.⁵ The change to the present mode came on September 4th, in the report of the Committee of Eleven⁶ and was agreed to *nem. con.* on September 7th.⁷ This last vote must have meant that those who wanted appointment by the Senate alone—and in some cases by the whole Congress—were satisfied that a compromise had been reached, and did not think the legislative part in the process had been reduced to the minimum. The whole process, to me, suggests the very reverse of the idea that the Senate is to have a confined role.

I have not reread every word of *The Federalist* for this opening-gun piece, but I quote here what seem to be the most apposite passages, from Numbers 76 and 77:

"But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

"To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

"It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates

⁴ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (M. Farrand ed. 1911).

⁵ *Id.* at 132, 146, 155, 169, 183.

⁶ *Id.* at 498.

⁷ *Id.* at 539.

who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure."⁸

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"If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The *power* which can *originate* the disposition of honors and emoluments, is more likely to attract than to be attracted by the *power* which can merely obstruct their course. *If by influencing the President be meant restraining him, this is precisely what must have been intended* [emphasis supplied]. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the good of that of appointment, and would in a great measure avoid its evils."⁹

I cannot see, in these passages, any hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment. It is predicted, as a mere *probability*, that Presidential nominations will not often be "overruled." But "special and strong reasons," thus generally characterised, are to suffice. Is a Senator's belief that a nominee holds skewed and purblind views on social justice not a "special and strong reason"? Is it not as "special and strong" as a Senator's belief that an appointment has been made "from a view to popularity"—a reason which by clear implication *is* to suffice as support for a negative vote? If there is anything in *The Federalist Papers* neutralizing this inference, I should be glad to see it.

When we turn to history, the record is, as always, confusing and multifarious. One can say with confidence, however, that a good many nominations have been rejected by the Senate for repugnancy of the nominee's views on great issues, or for mediocrity, or for other reasons no more involving moral turpitude than these. Jeremiah Sullivan Black, an eminent lawyer and judge, seems to have been rejected in 1861 because of his views on slavery and secession.¹⁰ John J. Crittenden was refused confirmation in 1829 on strictly partisan grounds.¹¹ Wolcott was rejected partly on political grounds, and partly on grounds of competence, in 1811.¹² There is the celebrated Parker case of this century.¹³ The perusal of Warren¹⁴ will multiply instances.

I am very far from undertaking any defense of each of these actions severally. I am not writing about the wisdom, on the merits, of particular votes, but of the claim to historical authenticity of the supposed "tradition" of the Senators' refraining from taking into account a very wide range of factors, from which the nominees' views on great public questions cannot, except arbitrarily, be excluded. Such a "tradition," if it exists, exists somewhere else than in recorded history. Of course, all these instances may be dismissed as improprieties, but then one must go on and say why it *is* improper for the Senate, and each Senator, to ask himself, before he votes, *every* question which heavily bears on the issue whether the nominee's sitting on the Court will be good for the country.

I submit that this "tradition" is just a part of the twentieth-century mystique about the Presidency. That mystique, having led us into disastrous undeclared war, is surely due for reexamination. I do not suggest that it can be or should be totally rejected. I am writing here only about a little part of its consequences.

To me there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows that a man's social philosophy shapes his judicial behavior, that philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered

⁸ THE FEDERALIST No. 76, at 494-95 (Modern Library 1937) (Alexander Hamilton).

⁹ *Id.* No. 77, at 498 (Alexander Hamilton).

¹⁰ 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 364 (rev. ed. 1926).

¹¹ *Id.* at 704.

¹² *Id.* at 413.

¹³ L. PFEFFER, THIS HONORABLE COURT, A HISTORY OF THE UNITED STATES SUPREME COURT 288 (1955).

¹⁴ C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

by deference to the President's, as a satisfactory basis in itself for a negative vote I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view. Will someone please enlighten me?

Mr. RAUH. Mr. Rehnquist apparently had a similar view. Mr. Rehnquist said, writing in the *Harvard Law Record* in 1959:

Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

Then, again he says:

The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

The President seems to have a similar view, too. Apparently shifting his views from the Saxbe letter, the President went on the air to suggest that he was making his appointments on an ideological basis. Certainly if the President is making his decisions on an ideological bent, the Senate of the United States has a right to do likewise.

Let me make this point: One does not have to go as far as Professor Black's statement to reject Mr. Rehnquist. His lack of compassion for human rights and his lack of fidelity to the Bill of Rights of the Constitution is enough. In other words, while I subscribe to Professor Black's statement, I want to make it clear that Professor Black's statement is not a necessary part of our case. A review of the human rights aspects and the constitutional rights aspects of Mr. Rehnquist's career is adequate, as I shall show, to the rejection of Mr. Rehnquist.

But whether one follows the Black theory or Mr. Rehnquist's earlier theory or the President's present position, or the lack of fidelity to the Constitution, ample grounds appear for rejection of Mr. Rehnquist.

The second preliminary matter I want to present is a question raised by President Nixon when he called Mr. Rehnquist a judicial conservative and said he was appointing him for that reason, not because he was a political conservative.

I respectfully submit that President Nixon had it exactly backward. Mr. Rehnquist, if confirmed, and I hope he will not be, will be a judicial activist, not a conservative, and will use his activism to put over his views as a political conservative.

His judicial activist nature is obvious. Just look at the last page of this same *Harvard Law Record* piece in 1959. I quote:

The Supreme Court in interpreting the Constitution is the highest authority in the land. Nor is the law of the Constitution just there waiting to be applied. In the same sense that an inferior court may bemoan precedents, there are those who bemoan the absence of stare decisis in Constitutional law, but of its absence there can be no doubt.

And then Mr. Rehnquist goes on to talk about the generalities in the Constitution.

The whole life of Mr. Rehnquist is one of jumping in with his own views. You heard Mr. Mitchell explain how on civil rights he volunteered all of these anti-civil-rights positions. Mr. Rehnquist is an advocate with a sharp cutting edge. He is the antithesis of a judicial passivist—I use that word as the opposite of a judicial activist. I would like to spell it: p-a-s-s-i-v-i-s-t—not a pacifist but a passivist.

If you compare Mr. Justice Frankfurter, who Mr. Rehnquist likes to compare himself to, and Mr. Rehnquist, you get exact opposites.

The point I want to make is that they are totally 180 degrees apart. Mr. Rehnquist would be a judicial activist seeking to put over political conservatism. Justice Frankfurter was a judicial passivist who refused to try to put over his political liberalism. They are opposite both on their judicial philosophy and their political philosophy. The idea—and I say this with deep conviction for I was the first Frankfurter law clerk—the idea that Justice Frankfurter was an activist conservative just distorts history. He was a judicial passivist who was a political liberal. What you have got here is the exact opposite; and Mr. Nixon's speech to the contrary cannot wash away this fact.

While on the subject of political liberalism or conservatism, it should be noted at this point that on an absolute basis one would have to go back to President Harding to find a Supreme Court nominee as far to the right as Mr. Rehnquist; and on a relative basis, considering the times, Mr. Rehnquist is probably farther to the right than any appointee to the Supreme Court this century. I make the distinction between absolute and relative because times have changed. I have the list here of the justices and I can find none since Harding—Mr. Hoover's appointments, for example, actually were quite liberal—I find none since then that were on an absolute basis as conservative or reactionary, if you care to use the word, as Mr. Rehnquist; and on a relative basis to the times, I challenge anyone to find a more conservative nominee in this country.

Leaving the general, and turning to the specific, we oppose Mr. Rehnquist for three separate and adequate reasons:

(1) Mr. Rehnquist has opposed, rather than supported, minority rights.

(2) Mr. Rehnquist has opposed, rather than supported, constitutional liberties under the Bill of Rights.

(3) Mr. Rehnquist's testimony before this committee was wholly lacking in candor; and I intend before I am finished to demonstrate to this committee that his testimony was, as I just said, wholly lacking in candor.

Now, I would like to take each of these three grounds separately.

First, Mr. Rehnquist's opposition to civil rights: Mr. Mitchell has spoken of the true facts eloquently and I shall not repeat any of the voting matters on which Mr. Mitchell testified. I do not see how this committee can do anything but ask for an FBI investigation of Mr. Rehnquist's previous activities and seek to get the facts on the voting harassment. I support Mr. Mitchell's position 100 percent, but I certainly don't want to take the committee's time to repeat it.

Second, the Phoenix ordinance on public accommodations: I think it important to set the stage for when this was in issue. That was adverted to in a question to Mr. Mitchell. I would like to go into a little more detail on what the situation was in America on June 15, 1964, when Mr. Rehnquist testified against the Phoenix ordinance. Before doing that, may I offer for the record the statement by William Rehnquist before the city council on June 15, 1964?

Senator HART. It will be received.

(The June 15, 1964, statement follows:)