Testimony

of

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on

the nomination of

William Rehnquist

to be Chief Justice of the
Supreme Court

before

Senate Judiciary Committee

July 30, 1986

I am testifying on behalf of the 250,000 members of People for the American Way, a nonpartisan citizens' organization dedicated to preserving and promoting constitutional liberties. We are concerned that the Judiciary Committee and the Senate fulfill its constitutional duty to "advise and consent" regarding the nomination of Mr. William Rehnquist to our nation's highest judicial post.

The third co-equal branch of the federal government, our judiciary, is responsible for protecting those individual and civil rights guaranteed almost two hundred years ago by the drafters of the Constitution and the Bill of Rights. The Chief Justice of the Supreme Court is the chief guardian of the Constitution. A thorough examination of the nominee and a thorough debate of the issues raised by his nomination are required by the Constitution and demanded by the American public, which strongly believes that the Senate has a role equal to that of the President in determining who shall sit on and preside over the Supreme Court.

This instance is one in which the opinion of the American public solidly reflects our nation's historical tradition. According to a recent national public opinion survey commissioned by People For The American Way, 86% of American voters believe that the Senate should play an active role in reviewing nominees for federal judgeships and make independent decisions regarding judicial nominations. They overwhelmingly reject the proposition

that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

The fact that this nominee is a sitting Justice of the Supreme Court does not diminish the Senate's duty in any sense. The role of the chief justice is significant, not only in terms of the responsibilities it carries to administer the Court, to assign opinions, and to significantly shape the Court's docket; but also in terms of the highest moral and legal leadership it embodies for the nation.

This statement provides an historical perspective of the advise and consent process which conveys important instruction on the independent role of the Senate in building the third branch of government. It is a review of the "original intent" of the Founders and the historical role the Senate has played in judicial confirmations, as well as a summary of the thoughts of our nation's finest constitutional scholars and a selected compilation of statements on the confirmation process made by some of our nation's top policy makers, including the nominee currently under consideration. Lastly, the historical analysis is augmented by the results of a national survey of American voters conducted within the past month by Peter Hart Research Associates. We hope that all of these elements will be useful to the Judiciary Committee and ultimately to the Senate in your deliberations.

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THE IMPORTANCE OF THE SENATE'S ROLE AND THE NATURE OF ADVICE AND CONSENT

The Senate has an independent constitutional responsibility, co-equal to the President's, in the selection of Supreme Court justices. The President's nomination of candidates to the Court constitutes only half of the required procedure. The Constitution suggests that the Senate's half is to be much more than a rubber stamp function. The authority vested in the Senate provides an important check on the overreaching power of the Executive in shaping the third independent, co-equal branch of government. History confirms the significant role that the Senate has played in restraining overly zealous Presidents through its advice and consent function.

Unlike Executive Branch appointees, judges do not serve at the pleasure of the President; they are not members of the President's cabinet. They serve beyond the duration of any one presidency and are designed by the Constitution to be independent of the President and to be a check upon the power of the Chief Executive.

Because of the unusual power inherent in lifetime appointments, it is "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 the narrowest manner possible, under the Constitution." (Black, Professor Charles, "A Note on Senatorial Consideration of Supreme Court Nominees," 79 Yale Law Journal, pp. 657, 660 (1970).) The Senate brings unique

qualifications to the task. While much is made of presidential prerogative to name judges because voters elected the President, it is important to remember that the voters also elected the Senators. The Senate is just as close to the electorate as the President, perhaps more so because it reflects the will of the electorate in a series of elections over a longer period of time. In fact, Professor Donald Lively has accurately pointed out, "The Senate, because it reflects more accurately the nation's diversity, is capable of ensuring a more representative and accountable Court than than the executive." (Lively, 59 Southern California Law Review 551, 565 (1986).)

Professor Laurence Tribe expanded on this theme in his book, God Save This Honorable Court. In Tribe's words, the Senate keeps the Supreme Court from becoming "narrow, isolated and removed from the many and varied threads that make up the rich tapestry we call America." History, as documented in the debate of the First Constitutional Convention and in The Federalist Papers recognized the Senate's unique qualifications (see history below).

The Senate is obligated to give careful scrutiny to all judicial appointments, but its responsibility in the case of Supreme Court appointments is even greater. In a recent letter to the Chicago Tribune, leading constitutional scholar Philip Kurland set forth comprehensive criteria for Senate consideration:

> A federal judge should be qualified by reason of his training in the law, his experience at the bar, his commitment to community service, his breadth of vision and compassion for the human condition, even a little learning, and, perhaps most important, a judicial temperament, which means a recognition that a judge is not a partisan, that his disinterestedness is the essence of his function. And it is here that a zealot or an ideologue fails the test of judicial office. And it is up to the Senate Judiciary Committee to assure itself that a judicial candidate measures up on all scores. The question ought not to be whether a judicial nominee's ideology comports with a President's or a Senator's. It is whether such mode of thought reveals a rigidity which could make a mockery of the rule of law by placing it in the hands of one who could only use it for personal ends rather than those of the Constitution, the laws of the United States, and established judicial precedents.

Meaningful "advice and consent" must include examination of a nominee's judicial, political and social philosophy. If the President is guided by policy considerations in the choice of a nominee, the authority obligated to render advice and consent should address those same concerns.

Joseph P. Harris, in his book The Advice and Consent of the Senate published in 1953, summarized those considerations as follows:

> In making nominations to the Supreme Court, the President, as leader of his party, has necessarily taken political considerations into account, but they have been of a rather different type from those that are controlling in the appointment of judges to lower courts. Conservative Presidents have usually nominated conservatives to the Supreme Court, and liberal or progressive

> Presidents have similarly chosen persons favorable to their programs. There can be no valid criticism of this practice. The Senate, as well as the President, has given primary attention to the philosophy, outlook, attitude and record of nominees to the Supreme Court with regard to social and economic problems of society. The contests that have taken place in the last fifty years over nominations to the Supreme Court have been concerned almost wholly with such issues, though not openly so....
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> Writing in 1930, Frankfurter strongly defended the action of the Senate in considering the philosophy and outlook of a nominee to the Supreme Court. 'The meaning of "due process,"' he stated, 'and the content of terms like "liberty" are not revealed by the Constitution. It is the Justices who make the meaning. They read into the neutral language of the Constitution their own economic and social views . . . . Let us face the fact that five Justices of the Supreme Court <u>are</u> molders of policy, rather than the impersonal vehicles of revealed truth.' In an often quoted statement, Chief Justice Hughes, when he was governor of New York,. once said: "We are under a Constitution, but the Constitution is what the judges say it is.'
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> It is entirely appropriate for the Senate, as well as the President, to consider the social and economic philosophy of persons nominated to the Supreme Court. With the changed functions of the Court, considerations of this kind are more pertinent than the legal attainments and experience of nominees....

In 1970, Professor Charles L. Black premised his article on the concept that "a judge's judicial work is ... influenced and formed by his whole life view, 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." Professor Black concluded,

> [T]here 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 be treating this judgment of his, unencumbered 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.

In 1971, a legal memorandum was prepared by law professors Paul Brest, Thomas C. Grey and Arnold M. Paul on the Senate's proper role in considering Supreme Court nominees. The professors reached two general conclusions upon review of the historical precedent:

> 1. There has never been a time when a nominee's social and political viewpoints were not generally considered relevant to his suitability for appointment to the Supreme Court; and
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> 2. Those Senators who have urged considering and have considered a nominee's substantive views come from no one political camp: they span the range from Whig to Democrat, Republican to Progressive, liberal to conservative.

In conclusion they offered a well-defined standard to be invoked by the Senate:

> [T]he Senate should consider whether a nominee for the Supreme Court has a clear and demonstrated commitment to basic constitutional values. The Supreme Court has the ultimate responsibility of protecting our constitutional system of government. Underlying this system are certain fundamental values, which however changing in scope and meaning for different historical periods, have remained paramount. Among the most basic of these are the rule of law, the protection of individual liberties against arbitrary governmental action, and the equality of man.
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> Reasonable men, committed to these values, will of course differ as to their scope and as to the proper means of implementing them. This suggests that a Senator should not vote against a nominee because of bare disagreement with him on one or two narrow issues. But where a Senator believes that a nominee's views, as revealed by his past and present statements and actions, depart fundamentally from what the Senator sees as basic constitutional values, it is his constitutional responsibility to vote against confirmation on that ground alone.

More recently in God Save This Honorable Court, Professor Tribe argued that the Senate is constitutionally entitled and obligated to make its own independent judgment about whether confirmation of a Supreme Court nominee would be in the best interest of the country:

> Some constitutional landmarks are so crucial to our sense of what America is all about that their dismantling should be considered off-limits, and candidates who would be at all likely to upend them should therefore be considered unfit.
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> Such outer boundaries exist on both ends of the traditional political spectrum, and may appropriately look a bit different to each

> member of the Senate. On some boundaries, though, all should be able to agree.

Tribe included within those boundaries support for the Supreme Court's decision in Brown v. Board of Education, the incorporation doctrine, and the principle of "one person, one vote."

Professor Tribe also noted lines of inquiry that would be improper: "Litmus tests that seek out a candidate's unswerving commitment to upholding or reversing a particular legal precedent are simply not an acceptable part of the appointment process."

In summary, Tribe stated:

> Both branches owe a duty to the nation to satisfy themselves that a Supreme Court appointee's scale of constitutional values, on the full range of questions likely to come to the Court in the foreseeable future, represents a principled version of the value system envisioned by the Constitution.
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> It is by now obvious that Senators cannot intelligently fulfill their constitutional role in the appointment process without knowing where Supreme Court nominees stand on important precedents and issues. Probing questions must be asked, and responsive answers must be given.

In a review of Professor Tribe's book, Duke University law professor Walter Dellinger offered yet another view:

> In deciding whether to consent to a Supreme Court nominee's appointment, a senator certainly ought to probe for evidence of intelligence, integrity and open-mindedness -- a willingness to be persuaded by cogent argument. Whether a senator will also take philosophy into account should depend to a large degree upon whether the president has done so in making the nomination.

Many constitutional scholars, including Professor Dellinger, have argued that consideration of whether the balance of the Court will shift is also a valid consideration and one documented throughout history. According to Professor Dellinger,

> [W]hen a president does attempt to direct the Court's future course by submitting a nominee known to be committed to a particular philosophy, it should be a completely sufficient basis for a senator's negative vote that the nominee's philosophy is one the senator believes would be bad for the country. In making this judgment, a senator should consider the present composition of the Court, and how this appointment would affect the Court's overall balance and diversity. (The New Republic, December 16, 1985, p. 41.)

The debates at the Constitutional Convention and the Federalist Papers confirm that one of the Senate's fundamental functions in confirming judicial nominees is to prevent partisan, ideological court packing by a President determined on remaking the Supreme Court to mirror his views. Candidates who represent a drastic shift in the Court's equilibrium to one extreme are worthy of rejection if a Senator believes the shift would be harmful to the nation. Each Senator has the obligation to consider a nominee in the context of the President's past nominations and intentions on future nominations to fully weigh considerations of balance on the Court.

There is no tradition of Senators refraining from taking into consideration a large range of factors during the confirmation process to fulfill their duty of "advise and

consent". To claim otherwise is to reject the lessons of history.

CONSTITUTIONAL HISTORY OF ADVISE AND CONSENT

The intent of the Framers was clearly that the Senate should play an active, independent role in evaluating the Supreme Court nominees. Early in its deliberations, the Convention voted to lodge exclusive power for the appointment of the judiciary in the Senate. Attempts to confer this power on the President or to diminish the role of the Senate were soundly defeated.

Only towards the conclusion of the Convention did the Framers belatedly agree to a co-equal role for the Chief Executive in the judicial appointments process. Governor Morris described the Senate's role in the Convention's final plans as the power "to appoint judges nominated to them by the President."

The debate over ratification of the Constitution, as described in The Federalist Papers reinforces an active Senate role in the appointment of Supreme Court justices.

THE CONSTITUTIONAL CONVENTION

The proceedings of the Constitutional Convention document the Framers' intention to confer on the Senate an active role in the selection of Supreme Court justices.

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The first plan, introduced on May 29, 1787, that recommended a mechanism for appointing justices provided that "a National Judiciary be established...to be chosen by the National Legislature." The "Virginia plan" was amended by June 19 to give the Senate the power of appointment, and the provision remained in the draft version of the Constitution throughout most of the Convention.

Arguments during the Convention centered on two alternatives: one in which the power of appointment would rest with the Senate, and another in which the power of appointment would rest with the Executive.

The delegates arguing in favor of Senate appointment feared excessive power in the Executive, saying that appointment by the Executive was a "dangerous prerogative" because it might "even give him [the Executive] an influence over the Judiciary department itself." Furthermore, they were concerned that control of appointment would be "leaning too much toward Monarchy."

Delegates also believed that the legislature, "being taken from all the States" would be "best informed of characters and most capable of making a fit choice." It was argued that the Senate "would be composed of men nearly equal to the Executive, and would of course have on the whole more wisdom. They would bring into their deliberations a more diffusive knowledge of

characters. It would be less easy for candidates to intrigue with them, than with the Executive Magistrate."

Proponents for executive appointment argued that it would be advantageous to place the responsibility for appointment in one person and that the President be better informed about the qualifications of potential members of the judiciary.

The debates over the method of appointment of federal judges continued throughout the Convention. Alexander Hamilton argued for a co-equal role for the Senate and President and introduced his resolution on June 5, 1787. James Madison also voiced his concern over empowering the appointment power exclusively in either the Senate or the Executive. On the one hand, Madison said he disliked placing control in the Legislature because it would be too large a body to make appointments. He also believed it would be dangerous to give the Executive sole power. He concluded, however, that he would rather give the power to the Senate, because they would be "sufficiently stable and independent to follow their deliberate judgments." By June 19, the Convention approved a motion that the Justices be "appointed by the second branch of the National Legislature."

The issue was raised again on July 18, when a motion was made referring the appointment of judges to the Executive. This motion failed, 6-2. Another motion, that "judges be nominated and appointed by the Executive by and with the advice and consent of the Second branch" was also rejected.

On July 21, James Madison offered a motion that the Executive nominate judges. The nomination would stand unless disapproved by 2/3 of the Senate. After objections were raised over the 2/3 requirement, Madison amended his motion to "the Executive should nominate, and such nominations should become appointments unless disagreed to by the Senate." The motion failed, 6-3. The Convention then proceeded on a 6-3 vote to retain the clause "as it stands by which the Judges are to be appointed by the Second branch," effectively defeating a passive role for the Senate.

The provision was included in the August 6 draft reported by the Committee on Detail and was later referred to the Committee of Eleven, where the present compromise of co-equal roles for the Senate and President was achieved. On September 7, the Convention adopted the compromise version unanimously.

The compromise underscores the intent of the Framers to give the Senate an active role in the appointment process. Its unanimous adoption indicates that the supporters of exclusive Senate appointment powers were convinced of an equal role for the Senate with the President under the compromise.

FEDERALIST PAPERS

Although the debate over ratification of the Constitution does not provide much detail on the appointment of the judiciary, The Federalist Papers argue for an active Senate role in the

process. The Federalist Papers 76 and 77 written by Alexander Hamilton, an advocate of a powerful Executive, addressed appointment to the judiciary and confirmed that the co-equal role for the Senate and Chief Executive would have a salutary effect on the quality of judicial appointments.

In Federalist 76, Hamilton argued that the Senate would be a check on favoritism by the President and would provide stability:

> 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. And, in addition to this, it would be an efficacious source of stability in the administration.
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> It will readily be comprehended that a man who had himself the sole disposition of offices would be governed much more by his private inclination 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 and 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 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."

In Federalist Paper 77, Hamilton answered the allegation that the Senate might have undue influence over the President: "If by influencing the President be meant restraining him, this is precisely what must have been intended."

Also, in number 77, Hamilton said the Senate would check any excessive Executive power: "In the only instance in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States, would, by that plan, be subjected to the control of a branch of the legislative body."

The Framers clearly intended to give the Senate the authority and responsibility to play an active, independent role in the "advice and consent" process.

THE SENATE ROLE IN PREVIOUS CONFIRMATIONS

Throughout its history, the Senate has played the active, independent role envisioned by the Framers. Indeed, the Senate has refused to confirm nearly one out of every four nominations submitted for its "advice and consent." The Senate's reasons for refusing confirmation have ranged from competence and temperament to constitutional philosophy and political views. The historical record clearly shows that the nominees' social and constitutional viewpoints have been considered relevant to Senate review for appointment to the Supreme Court. Furthermore, these issues, as legitimate concerns in the confirmation process, have been raised by Senators whose views span the political spectrum. The process

has never been limited to questions of mere competence and ethical behavior.

As early as the second term of George Washington's administration, the Senate rejected the nomination of John Rutledge to be Chief Justice because he violently attacked the Jay Treaty which was strongly supported by the Federalists. President Madison's nomination of Alexander Wolcott was rejected by the Senate because a majority of the Senate believed that he lacked the necessary legal qualifications for a Supreme Court justice. During the 19th century, only four nominations were rejected for reasons relating to qualification, whereas 17 were rejected for political or philosophical reasons.

In 1930, President Hoover's nomination of John Parker was rejected by a Republican Senate because of his inflammatory racial statements and discredited economic views. Many Senators also were concerned that his appointment could tip the balance on the Court, making it "reactionary."

In recent history, Abe Fortas' nomination was withdrawn after a stormy Senate debate. Thirty-two Senators addressed the question of the nominee's political and constitutional views. Senator Thurmond, for example, argued during the Fortas debate that "the Senate must necessarily be concerned with the views of the prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and role of the Court in dealing with these issues."

Two of President Nixon's nominees were turned back by the Senate. Although alleged ethical improprieties were central to the Haynsworth debate, the nominee's views on labor law and race relations also figured prominently. G. Harrold Carswell, in addition to being considered unqualified, was rejected because of his lack of commitment to equal justice and racial insensitivity.

As even a cursory review of the historical record makes clear, the Senate, in applying its constitutional mandate to "advise and consent," has always acted on a broader criteria than just academic and professional credentials. The Senate's approach has been comprehensive, not restricted and perfunctory.

Because the Constitution offers no standards for Senate review, Senators historically have voted according to what they believed, in their independent judgment, to be in the best interests of the country. In so doing, they have considered the social, economic, political and judicial views of a nominee -- the very questions considered by the Chief Executive in recommending a judicial nominee. The Senate has also weighed the nominees in the context of a President's other appointments to the Supreme Court to ensure philosophical balance on the Court.

THE PERSPECTIVES OF POLICYMAKERS

During the past twenty years, the Senate has deliberated on eight nominations to the Supreme Court, one being the elevation of a sitting Justice to the post of Chief Justice. Five of those

nominees were confirmed. During the course of debate and in related comment, the role of the Senate was explored in ways that may be useful to the Senate's current consideration.

During the 1968 debate on the elevation of Justice Abe Fortas to be Chief Justice, Senator Thurmond summarized the appropriateness of careful scrutiny by the Senate:

> Mr. President, the Senate faces an historic and momentous decision in the question of whether or not to recommend the confirmation of the nomination of Justice Abe Fortas to be Chief Justice of the United States. We must each be cognizant of the consequences which are likely to flow from the action we take on this appointment. If the nomination is confirmed, we may well be effecting the policy of the Supreme Court for 20 years or more. Supreme Court Justices are not elected every 2 years -- or every 4 or 6 years. The Supreme Court is not responsive to the democratic process. It is, essentially, the most undemocratic institution in our system of government.
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> ....Even the most casual student of the Supreme Court must admit that the decisions of the Court affect the lives of Americans in most fundamental ways -- certainly as fundamentally as the decisions reached by Members of Congress or by the President, all of whom are elected by the people. When the Supreme Court makes such decisions we are perilously close to government without the consent of the governed.
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> Therefore, it is my contention that the power of the Senate to advise and consent to this appointment should be exercised fully. To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed. It further serves the end of removing the

> Supreme Court even further away from the democratic process and our system of checks and balances. For these reasons, I believe a most thorough consideration of this appointment is completely justified.

During the same debate, Senator Ernest Hollings called for an examination of the nominee's philosophy:

> The question before us today is not one of Fortas' ability as a judge or an attorney, for he is obviously a talented one...it is a question of the philosophy of the prospective Chief Justice and the philosophy of the body he aspires to lead. Let's make no mistake about it; the two are inextricably bound.

Senator Sam Ervin was an active participant in the Fortas battle. In a statement for the Judiciary Committee Report on the Fortas nomination, he wrote:

> The Senate's role in the selection of a Supreme Court Justice is plainly equal to that of the President and it is the Senate's constitutional duty to ascertain whether a Supreme Court nominee is qualified in every sense of the word.
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> The advise and consent power is not limited to academic training, experience and character but extends to the broader question of the nominee's judicial philosophy which includes his willingness to subject himself to restraint inherent in the judicial process.

Senator Ervin had enunciated those principles before. During the confirmation hearings of Justice Potter Stewart, in 1959, he questioned "why the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate" if the Senate was "not to be permitted to find out what [the nominee's] attitude is toward the

Constitution, or what his philosophy is." "Just give [the Executive] absolute power in the first place," he concluded.

Senator Fannin relied on a memo by William Rehnquist, then a private attorney, to defend ideological scrutiny of the nominee during the Fortas battle. Mr. Rehnquist's first published remarks on the confirmation process appeared in a 1959 article for the Harvard Law Record:

> 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 match precedents. There are those who bemoan the absence of stare decisis in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the Constitution which have been most productive of judicial law-making - the "due process of law" and "equal protection of the laws" clauses --- are about the vaguest and most general of any in the instrument....
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> It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws", then men sympathetic to such desires must sit upon the high court. 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."

Justice Rehnquist also commented on the Senate's role in a 1975 law review article, entitled "Political Battles for Judicial Independence": "Those on their way to the Supreme Court may be

judged by broader standards than merely moral rectitude and legal learning."

During the Senate's deliberations over the nomination of G. Harrold Carswell to the Supreme Court, President Richard Nixon wrote to the Senate attempting to define the Senate's role in the narrowest way possible:

> What is centrally at issue in this nomination is the constitutional responsibility of the President to appoint members of the Court -- and whether this responsibility can be frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment. The question arises whether I, as President of the United States, shall be accorded the same right of choice in naming Supreme Court Justices which as been freely accorded to my predecessors of both parties.
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> I respect the right of any Senator to differ with my selection. It would be extraordinary if the President and 100 Senators were to agree unanimously as to any nominee. The fact remains, under the Constitution it is the duty of the President to appoint and of the Senate to advise and consent. But if the Senate attempts to substitute its judgment as to who should be appointed the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired.
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> For this reason, the current debate transcends the wisdom of this or any other appointment. If the charges against Judge Carswell were supportable, the issue would be wholly different. But if, as I believe the charges are baseless, what is at stake is the preservation of the traditional constitutional relationships of the President and the Congress.

President Nixon's interpretation was soundly rejected by the Senate when it voted against the Carswell nomination.

One of the strongest advocates of an equal role for the Senate in the confirmation process was selected to oversee the judicial selection process at the Justice Department under Attorney General Edwin Meese and performed that function until several months ago. In 1983, Grover Rees, then an assistant professor of law at the University of Texas, wrote:

> [T]he Constitution suggests no distinction between the criteria the President should use to `nominate' judges and those the Senate should use in exercising its `advice and consent' function....Both the diction and the sentence structure suggest a process of proposal and disposal rather than a unilateral decision subject to Senate veto only in extraordinary cases....
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> The most obvious reading of the provision for appointment of Justices is that nobody should be appointed to the Court unless the President and a majority of the Senators believe he would be a good Justice. ("Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution," 17 Georgia Law Review 913, (1983).)

In an article in which he argued that the Senate should scrutinize the ideology of Supreme Court nominees, Mr. Rees concluded,

> Whether one accepts a constructionist or a nonconstructionist model of judicial review, a prospective judge's views on constitutional questions ought to be regarded by the President and the Senate as relevant to that

> prospect's qualification for judicial office....
>
> Since the responsibility of Senators to choose good Supreme Court Justices is just as great as that of the President, and since nominees' opinions on constitutional questions are relevant to their qualification, the practice of nominees' refusing to answer such questions should be changed.

In an earlier memo prepared by Rees while serving on the staff of the Senate Subcommittee on Separation of Powers, he argued:

> If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy --- and especially if, as Black and Rehnquist suggest, a Senator may have a duty to base his vote at least partly on the nominee's views --- then the Senator ought to have some way of ascertaining what these views are.

These statements reflect the view that, although it is the President's prerogative to make appointments that will shape the court according to his philosophy, it is the Senate's responsibility to reject those nominations it does not consider to be in the best interests of the country.

NATIONAL ATTITUDES REGARDING THE SENATE'S ROLE

Support for an independent judgment by the Senate was recently confirmed in a recent survey of the American electorate on this and related issues. People For The American Way recently commissioned a poll to determine public attitudes toward the American judicial system, the standards the public wants

applied in the selection of federal judges and the role the Senate ought to play in the confirmation process. The survey was conducted earlier this month by Peter D. Hart Research Associates among a representative sample of the American electorate.

The survey and a complete analysis of the results are appended to the testimony. However, we would like to highlight the key findings, particularly as they relate to the considerations of this committee in reviewing judicial nominations.

While the poll results revealed overwhelming approval of President Reagan - a 73% favorable rating - 86% of the respondents say it is very or quite important for the Senate to play an active role in reviewing nominees for federal judgeships. Only 18% believe the Senate should go along with the President's choice, if the nominee is honest and competent. It is unmistakably clear that American voters want the Senate to be an equal partner with the President in forming the third branch of government.

In describing the role of the Senate, the voters stressed active participation and independence. By a margin of 78% to 16%, they endorsed the position that "it is important for the Senate to make sure that judges on the Supreme Court represent a balanced point of view," rejecting the position that the "Senate should let a President put whomever he wants on the Supreme Court, so long as the person is honest and competent."

Voters surveyed were asked to choose factors that would be valid grounds for opposition to a president's nominee. 83% indicated that statements demonstrating racial prejudice should be disqualifying; cheating in law school (79%); the American Bar Association finding that qualifications are only the bare minimum (68%); conviction for drunk driving (59%); and a commitment to repealing the Supreme Court decision that protects a woman's right to choice on abortion (57%).

When asked to assign priorities among a series of qualities judicial candidates should possess, 74% stressed being a "fair and open-minded person who avoids personal prejudice"; 71% stressed "having a spotless record of honesty and personal integrity" and 63% placed a very high priority on "having a strong commitment to ensuring that women and minorities have equal rights under the law."

By contrast, voters put the lowest priority on ideological considerations. Only 18%, for example, put a high degree of importance on "having a very conservative philosophy on issues" and only 10% stressed the importance of "having a very liberal philosophy." Furthermore, only 22% think that "taking a strong 'pro-life' position in opposition to legalized abortion" should be a high priority.

In short, this sampling of the American electorate in 1986 validates the 200-year-old tradition of the Senate in discharging its responsibility for an independent judgment, as mandated by

the Constitution. The survey indicates that the American people, by overwhelming margins, endorse a thorough and independent evaluation of judicial nominees that puts stress on fairness, open-mindedness and a commitment to equal rights. Further, the electorate supports the position that the Senate, through its advise and consent responsibilities, must ensure that justices on the Supreme Court represent a "balanced point of view."

CONCLUSION

In considering the nomination of William Rehnquist to be Chief Justice, the Senate has a constitutional obligation to reaffirm its historic mandate to render an independent judgment, after a thorough review of the nominee's record, as to whether the nomination is in our nation's best interest. The Senate must be able to assure the American people that Justice Rehnquist is committed to equal justice under the law and committed to protecting the cherished constitutional liberties guaranteed by the Bill of Rights. For the Senate to fail to do so would dishonor the Constitution and be a disservice to the nation.