

STATEMENT OF ROBERT L. STERN

My name is Robert L. Stern. I have been a partner in the law firm of Mayer, Brown & Platt in Chicago since 1954. For 20 years before that I was in the Department of Justice. From 1941 to 1954 I was in the Solicitor General's Office, the last 4 years as First Assistant, and for most of the last year and a half as Acting Solicitor General, during both the end of the Truman Administration and the first year of the Eisenhower Administration. The Eisenhower Administration's only contribution to my departure for Chicago was to try to persuade me not to leave the Solicitor General's Office.

Most of my work in the Department, and all of it in the Solicitor General's Office, related to cases in the Supreme Court. In addition to a number of articles on subjects relating to the Court, I have been, since 1950, a coauthor of a treatise on Supreme Court Practice with Eugene Gressman; my partner, Stephen M. Shapiro, has joined us as author of the sixth, 1986 edition. Another book describing and comparing Appellate Practice in the United States, covering both state and federal courts, was published in 1981. In order to be able to keep those books up to date, it has been necessary for me to read all the Supreme Court opinions as they come down.

That, of course, means that I have read all of Justice Rehnquist's opinions. It doesn't mean that I now remember them all, or what was said in them. And I didn't have time to refresh my recollection before coming here. But I do have

a reasonably clear general impression.

I should state at the outset, in case any of you think it relevant, that I regard myself as a moderate Democrat, which, as I have indicated, didn't prevent me from getting along well with moderate Republicans.

That may cause you to wonder why I should come here to support the nomination of Justice Rehnquist for Chief Justice. I can't say that I regard him as a moderate Republican. I might not even support him if he were running for political office. But the point is that he isn't. He has now been on the Supreme Court for 14½ years, and the question is whether he is qualified to be its Chief Justice. As to that I have no doubts.

In the first place, even though only two Justices have been promoted to the Chief Justiceship, there can be no doubt that the experience of serving on the Court for years gives a new chief a decided advantage. He knows what to do without having to learn it.

It also helps if he is able to get along personally with the other Justices. I know Justice Rehnquist, though not intimately, and am sure that he can get along with anyone. He is a likable, congenial, good-humored and unostentatious gentleman. And I understand that he has been particularly friendly with the liberal Justices--Douglas, Marshall and Brennan--even though he seldom agrees with them on anything controversial. I am sure you know that Justice Brennan has stated that Rehnquist would "be a splendid chief justice",

and that his "philosophical bent" wouldn't have "much effect."

Of greater importance is that he has had the opportunity to show that he is qualified for the job. No one has questioned that he possesses the high intelligence and competence which are essential for membership on the Supreme Court.

I had also thought there was no question as to his integrity. Certainly that is true as far as I know, and as to his conduct as a member of the Court. I have, of course, been reading the papers since this hearing was scheduled and know that questions have been raised as to what he might have said and done long before he went on the Court. I have no knowledge as to such matters, and I understand that that is a subject which is ~~and which~~^{ing} be looked into by this Committee.

As far as his work is concerned, his opinions are well-written and to the point. I understand that he works and writes rapidly, which is important for a Chief Justice. The importance of that was revealed to me in conversations I had years ago with Justices Wiley Rutledge and Tom Clark, in which each wished that he could write as rapidly as Hugo Black. And a Chief Justice must do substantially more than his colleagues, both because he customarily begins the discussion of each case in conference by summarizing what it is about, and because he must devote a substantial amount of time to his second job as chief administrator of the federal judicial system.

Of course I would not support the nomination of Justice Rehnquist if I believed his decisions as a whole were harmful to the country. I don't always agree with his opinions,

particularly on matters of race relations and some types of privacy. But I don't agree with some of the opinions of his colleagues either. How I would have decided the cases, however, is of no consequence to anyone, even to me.

The question is whether he is acting as an intelligent and conscientious judge should--giving heed to the considerations which should guide good lawyers after they become and must act as judges. Of course, judges should not be controlled by their personal predilections, as all of them recognize, and indeed as all of them on occasion charge colleagues who disagree with them with doing. And no one knowledgeable can expect judges' personal views and philosophies not to have some effect on their votes. But only within limits. And my reading of his opinions does not leave me with the impression that Justice Rehnquist disregards those limits more than do other Justices, even when I agree with the latter.

I can recall that when I began working on Supreme Court cases in the 1930s, the liberal lawyers'--and judges'--creed, as first pronounced and taught by Justices Holmes, Brandeis and Stone and then Professor Frankfurter, was that judges should not read the Due Process Clauses as embodying their own views as to what governmental conduct was undesirable and therefore unconstitutional. Justice Rehnquist, with some justification, now chides his liberal colleagues with abandoning the principles espoused by the great Justices of the 1930s although, of course, as to different subjects. As times and issues change, so does the emphasis that Supreme Court Justices, whether called liberal

or conservative, place on one doctrine or another. A historical perspective--and perhaps going back 50 years, as I do, can be regarded as resorting to history--suggests that different approaches to that very important subject do not qualify or disqualify a person of great ability and integrity from appointment to the Court.

My reading of the opinions leaves me with the impression that the cases on which the Court divides are usually close and difficult ones which could reasonably go either way. As Justice Brennan has pointed out, many of the issues the Court has to decide "have two, and sometimes many more than two, legitimate and reasonable answers." More often than not I find myself persuaded by the opinions on both sides as I read them. A Justice who is otherwise qualified to carry on the work of the Court should not be deemed disqualified because of how he or she votes in such cases.

I do not mean that a Justice should never be rejected by the Senate because of his views and the way he votes. But a president elected by the people, whether he be Franklin Roosevelt or Ronald Reagan, has the right to nominate persons of his own philosophy. And a person who is otherwise fully qualified should not be rejected unless the Senate has good reason to believe that his votes would really be out of bounds.

There is no need to define this standard--which Justice Rehnquist clearly satisfies--more explicitly here. We are not dealing with a potential newcomer to the Court. Justice Rehnquist's record is open and available. He will remain on

the Court whether he is confirmed as Chief or not. The real question is whether he is likely to be as good an administrator of the Supreme Court and the federal courts as anyone else who might be chosen. Justice Rehnquist's familiarity with the Court and his personality as well as his outstanding legal ability makes it unlikely that anyone better qualified to be Chief Justice can be found.

Accordingly, I believe his nomination should be confirmed.