FROM: THE OFFICE OF U.S. SENATOR BOB DOLE
NEW SENATE OFFICE BUILDING
WASHINGTON, D.C. 20510
(202) 225-8946

449

STATEMENT ON SENATE FLOOR

FOR RELEASE - THURSDAY, DECEMBER 8, 1971 P.M.'S

WILLIAM H. REHNQUIST, A JUDICIAL CONSERVATIVE

In his television address to the Nation announcing the Supreme Court nominations of William H. Rehnquist and Lewis F. Powell, Jr., President Nixon described his nominees as judicial conservatives. The meaning of this term has since been the subject of some debate and considerable misunderstanding, particularly with regard to Mr. Rehnquist. Indeed, in some quarters there seems to have been an effort to put the nominee on the defensive about his philosophy, as if there were something sinister or at least out of date in being a judicial conservative.

As a lawyer and citizen who has looked with apprehension and concern on some of the Supreme Court's decisions over the past ten to twenty years, I have been hopeful that the Court's activist-interventionist phase would be ended some day by the seating of justices who would swing the Court away from the role of a super-legislative, policy-making body and back to its proper function as an arbiter of cases and controversies in line with the intent of the Constitution's framers.

As a Senator who supports the President in his efforts to provide the Supreme Court with a new philosophical orientation and a shifted emphasis in the trend of its decisions, I have never felt the need to defend, excuse or apologize for a conservative judicial approach.

VALUABLE HEARINGS

Thus, I welcomed the nominations of Mr. Powell and Mr. Rehnquist, because these men promise to become important influences for change within the Court and because the hearings on their nominations offered an exceptional opportunity to explore and illuminate the meaning of the term "judicial conservative."

To my view, those hearings demonstrate convincingly that the Senate, far from being defensive or reluctant about confirming persons with this philosophy, should welcome their appointment and the opportunity to join in placing them on the Court. As I understand Mr. Rehnquist's views - confirmation of his nomination -- like that of Mr. Powell earlier -- will serve the best interests of all three branches of the Federal government and thereby the best interests of the American people. It will serve the interests of the Court by giving it another extremely able and vigorous Justice. It will benefit the Executive branch by providing a Justice who will view the enforcement and execution of the laws fairly, impartially and with an effective understanding of the Executive branch's operation. The best interests of the Legislative branch will be served by putting on the Court a Justice whose belief in the principle of judicial restraint and whose recognition of the Court's strictly adjudicative character will enhance the prestige and powers of the Congress as the proper source of the laws the Court is bound to interpret.

PRINCIPLES OF JUDICIAL CONSERVATISM

To call one person a judicial conservative and another a judicial activist or liberal in the context of the Supreme Court decisions on Constitutional law is to attempt a distinction between general attitudes or approaches that those who sit on the Court may take in deciding issues before them. Of course, these terms are not precise, and Justices can fall anywhere along the broad spectum between extremes of conservative and liberal judicial behavior. Generally, however, a judicially conservative Justice observes two primary principles. First, he refuses to make decisions on the basis of his personal views of what he believes the law should be. Second, he believes the proper judicial function lies solely in interpreting the law and that public policy decisions on the

(more)

formulation and execution of the law should be left entirely to the political branches of government.

Mr. Rehnquist's testimony amply demonstrates that he subscribes to both of these principles. In response to a question from the Senator from Maryland (Mr. Mathias) concerning the liberal-conservative distinction, the nominee stated:

> "It is so difficult to pin down the terms 'liberal' and conservative' and I suspect they may meand something different when one is talking about a political alignment as opposed to a judicial philosophy on the Supreme Court. I think to an extent, in discussion about the Court, there has been a tendency to ezuate conservatism of judical philosophy not with a conservative bias, but with a tendency to want to assure one's self that the Constitution does indeed require a particular result before saying so, and to equate liberalism with a feeling that, at least on the part of the person making the observation, that the person tends to read his own views into the Constitution."

These views comport with those expressed by a long line of judicially conservative jurists including, notably, Justices Holmes, Frankfurter, and in recent years, Mr. Justice Black.

I think we might better understand judicial conservatism and its importance to the good functioning of our government by looking at some decisions by those Justices.

DISTINGUISH POLITICAL CONSERVATIVE AND LOWER COURT JUDGE

At the ourset, however, I think we need to understand what a judicial conservative is not. First of all, as Mr. Rehnquist in his response to Senator Mathias, a judicial conservative is not the same thing as a political conservative. His political philosophy may be conservative or it may be liberal, experience showing a wide variation on this score, but there is no real correlation. The pre-Roosevelt Court of the nine old men, it will be recalled, was politically conservative, but from the standpoint of economic regulation it can fairly be termed judicially liberal and active. That Court sought to read its own notions of public policy into the Constitution with the result that freedom of contract was given Constitutional sanctity to the detriment of Executive and Legislative view on economic policy. On the other hand, the liberal-activist Warren Court did demonstrate a fairly close relationship between political and judicial philosophies.

It also seems to me that judicial conservatism as observed in Supreme Court Justices does not relate to methods employed by lower court Judges to interpret decisions of higher courts. Judges in trial and mid-level appellate courts are generally in the position of applying a decision of a higher court to a situation that is distinguishable from the one that gave rise to the original case. The Judge must determine how to construe the earlier decision; he may do so either narrowly, to make it inapplicable to the case under consideration, or broadly, to cover the new situation. The role of the Judge in this instance is not to state of define the law but to predict what the higher court would do in the situation at hand. Thus, a Judge might be liberal in constuing decisions of higher courts, yet, were he promoted to a higher bench, he might be conservative in his statements of legal principles to be followed by lower courts. On the Supreme Court, the Justices do not predict the law; rather, they determine what it is in an absolute sense. There is a significant difference in these judicial roles.

I would like to focus now on the sort of Supreme Court jurist I believe the President had in mind when he chose to term William Rehnquist a judicial conservative. As I indicated earlier we may be able to get a better understanding of what a judicial conservative is by examining the statements of past Justices who exemplified this philosophy. Several individuals fit this mold, although I suspect that Oliver Wendell Holmes,

(more)

and Felix Frankfurter and Hugo Black are the best examples.

JUSTICE HOLMES REJECTED PERSONAL VIEWS

Mr. Justice Holmes sat on the Court at a time when its political conservatives had adopted a policy of judicial activism with respect to economic matters. A majority of the Court had used the doctrine of substantive due process to read into the Constitution its own notion of freedom of contract. Consequently, for many years, they prohibited the states and the Federal government from regulating property rights to any significant extent.

One of the more significant cases in this area was Lochner v New York (1198 U.S. 45 -1903), a case involving a New York state statute which provided that no bakery employee be required to work more than 60 hours a week or ten hours a day. The Court held that the statute was an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract and thus void as a matter of Constitutional law. Holmes viewed the case as an attempt by the Court to decide public policy and impose its desires on the political branches of government under the guise of Constitutional interpretation. His dissent is a classic statement of judicial conservatism:

> "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement of disagreement has nothing to do with the right of a majority to embody their opinion in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract....The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.... (A) constitution is not intended to embody a particualr economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding cerain opinions natural and familiar or novel and even shocking ought not to conclude our judgement upon the question whether statutes embodying them conflict with the Constitution of the United States."

It seems to me, that it is difficult for any student of government or the Constitution who sits in the Senate to quarrel with this position. In fact, we should be enthusiastic in our reception of nominees sent to us for confirmation who embrace it and regardless of their personal feelings, believe that the Supreme Court ought not substitute its judgement on the formulation of the laws for that of the Congress.

JUSTICE FRANKFURTER ADVOCATED JUDICIAL RESTRAINT

Felix Frankfurter is a second outstanding example of a judicial conservative, and in the record of the hearings it can be seen that Mr. Rehnquist believes his philosophy to be similar to Justice Frankfurter's.

The nominee described Frankfurter's philosophy to the Judiciary Committee as follows:

> "(He) came on the Court at a time when I think it was clear to most observers that the old Court of the nine old men of the 20's and 30's was indeed, on any objective analysis, reading its own views into the Constitution, and Justice Frankfurter, of course, prior to his ascent to the bench had been critical of this, and as a Justice he helped demolish the notion that there eas some sort of freedom of contract written into the Constitution which protected businessmen from economic

(more)

regulation. And yet, when other doctrines were tested later in the Court, it proved that he was not simply an exponent of the current politically liberal ideology and reading that into the Constitution. He was careful to try to read neither the doctrine of the preceding Court nor perhaps his own personal views at a later time into the Constitution, but to simply read it as he saw it."

As we all know, Frankfurter was one of the foremost advocates of judicial restraint as a principle of constutional law. He was also by most accounts a political liberal. In speaking of Franfurter during the hearings Mr. Rehnquist stated again and again that he approved of his philosophy. For example, he said:

"I subscribe unreservedly to that philosophy, that when you put on the robe, you are not there to endorce your own notions as to what is desirable public policy. You are there to construe as objectively as you possibly can the Constitution of the United States, the statutes of Congress and whatever relevant legal materials there may be in the case before you."

JUSTICE BLACK SAW COURT'S LIMITS

In addition to Holmes and Frankfurter, I think the later opinions of Mr. Justice Black demonstrated that he too believed the proper role of the Court was defined by the tenet of judicial conservatism. In recent years, there have been several examples of divisions on the Court between judicial conservatives and judicial activists. One example, is found in the Poll Tax Case, Harper v Virginia Board of Elections (383 U.S. 663 - 1966), and a split in this case developed between Justices Black and Dourglas, two generally acknowledged political liberals, over the constitutionality of Virginia's Poll Tax. An earlier Supreme Court case had upheld the constitutionality of the Poll Tax as a prerequisite to voting, and on the strength of this earlier case a lower federal court had refused to strike down Virginia's tax. Douglas, for a majority of the Court, said that, notwithstanding the earlier precedent, the Poll Tax violated the equal protection clause. In the course of his opinion he stated, "Notions of what constitutes equal treatment for purposes of Equal Protection Clause do change (383 U.S. at 669 - 1966)."

This attempt by the majority to update the Constitution in accordance with its opinions as to the best public policy, prompted Black to write a strong dissent in which he stated:

"I can only conclude that the primary, controlling, predominate, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be 'shackled to the political theory of a particular era,' and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written Constitution whcih is to survive through the years as originally

(more)

> written unless changed through the amendment process which the Framers wisely provided (383 U.S. at 677-678)."

Black alternatively concluded that, since Congress had the constitutional authority to abolish the Poll Tax, the decision should be left to it and not be made by the Court. The important aspect of his dissent is that, although he clearly believed that as a matter of policy the Poll Tax should be abolished, he declinced to require it on the basis of a twisted interpretation of the Constitution.

During the hearings, the Senator from Arkansas (Mr. McClellan) quoted several passages from opinions written by Black in two other cases, Lee v Florida (392 U.S. 378 - 1968) and Katz v United States (389 U.S. 347 - 1967), all were similar in import to the passage from the Harper case. One as follows:

> "In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have, and which they certainly do not have in common with ordinary usage. I will not distort the words of the (fourth) amendment in order to keep the Constitution up to date or to bring it into harmony with the times. It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention."

When asked if he agreed with this statement, the nominee replied, "I subscribe to the statement read unequivocally."

CLEARLY STATED BELIEFS

I have cited only a few instances in the hearings when Mr. Rehnquist illuminated his judicial philosophy. There are many other examples in the record, and they all have the same thrust. First, he believes that personal views are irrevevant to the decision-making role of a Supreme Court Justice. Second, he believes the Court's proper role is constitutional interpretation and that decisions of policy must be reserved to the political branches of government, the Congress and the Executive.

THE VALUE OF JUDICIAL CONSERVATIVES

I said at the outset, I believe it is in the best interests of the Senate to confirm the nomination of William Rehnquist precisely becasue he has embraced this philosophy. Regardless of our political philosophies, we in the Senate should appreciate that the presence on the Supreme Court of the Judicial conservatives in the tradition of Holmes, Frankfurter and Black, is a firm cement for the foundation of our governmental system.

Judicial conservaties respect the boundaries and lines of demarcation established by the Constitution between the separate branches of government. They recognize the necessity of upholding the Constitution and requiring conformity with it of legislative acts and executive undertakings, but they also seek to avoid the temptation to translate their personal opinions and preferences into fundamental law. Judicial supemecy in constitutional interpretation is one thing; judicial law making and policy setting is quite another.

Judicial conservatives know the distinction and observe it in the fulfillment of their offices.

REHNQUIST SHOULD BE CONFIRMED

Because William Rehnquist is a judicial conservative and unquestionably possesses other qualifications which meet the Senate's necessarily high standards for professional competence and unimpeachable integrity, he should be speedily confirmed.