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Supreme Court

Excerpts from Remarks
by
U. S. SENATOR ROBERT P. GRIFFIN

National Press Club
July 30, 1968

President Cromley, distinguished guests and members of the Press Club.

I am grateful for the opportunity to appear in this justly-famous forum to discuss a subject of historic importance and proportions.

There are some in the country who would brush the current controversy aside on the ground that it is just petty bickering and jockeying for partisan political advantage. Those who take such a view are short-sighted.

The issues involved in this struggle reach far beyond party lines to the very core of our system of government.

At the outset, let me re-emphasize that the junior Senator from Michigan has not -- and does not now -- challenge or question the Constitutional power of this President, or of any President, to make nominations to fill vacancies on the Supreme Court.

As some of the columnists and editorial writers have been saying, with a lot of ink, any President -- even a President in the waning months of his final year in office -- has the Constitutional power (perhaps even a responsibility, when there is really a vacancy) to make such nominations -- and he continues to have that Constitutional power even through the last day of his Administration.

But, of course, that is not the point. Some have not understood, or will not recognize, that under our Constitution the power of this President -- or of any President -- to nominate, constitutes only half of the appointing process.

The other half of the appointing process lies within the jurisdiction of the Senate, which has not only the Constitutional power, but a solemn obligation, to determine whether to confirm such a nomination.

Some are suggesting that the Senate's role in this situation is merely to ascertain whether a Supreme Court nominee is "qualified," in the sense that he possesses some minimum measure of academic training or professional experience.

Any such limited view of the Senate's responsibility with respect to Supreme Court nominations is wrong, and does not square with the clear intent of those who conferred the "advice and consent" power upon the Senate.

In the Federalist papers, Alexander Hamilton wrote that the requirement of Senate approval in the appointing process would, in his words,

> " . . . be an excellent check upon a spirit of favoritism of the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachments, or from a view to popularity."

Admittedly, the Senate has moved a considerable distance away from Hamilton's ideal with respect to appointments in the Executive branch. But that is somewhat understandable. Cabinet members and other officers in the Executive branch serve at the pleasure of the President, and they are responsible to him.

The Senate has generally recognized that, unless the President is given wide latitude in selecting his Cabinet, he could not be held accountable for the Executive branch of government.

Throughout our history, only 8 nominations for Cabinet posts -- 8 out of 564 -- have failed to win Senate confirmation.

And the last such instance, of course, was the refusal in 1959 of a Senate majority, led by Senator Lyndon Johnson, to confirm the nomination of Lewis Strauss as Secretary of Commerce in President Eisenhower's cabinet.

Although it has been unusual over the years for the Senate to reject non-judicial appointments, interestingly enough, it was not so unusual for Senator Lyndon Johnson.

In 1949, President Harry Truman nominated Leland Olds -- not for a lifetime position on the Supreme Court -- but for a third term on the Federal Power Commission. Since Olds had already served on the Commission for 10 years, and had been confirmed by the Senate twice before, it was difficult for anyone to argue that he lacked qualifications.

But that did not deter the then junior Senator from Texas. Although Olds was supported by Senator Hubert Humphrey, Johnson played a key role in getting the Senate to reject the Olds nomination.

Afterwards, there was general comment in the press that the real issue had nothing to do with qualifications, but everything to do with government policy concerning the regulation of natural gas.

The recent Evans-Novak book, Lyndon Johnson: The Exercise of Power, adds this interesting footnote to the story (and I quote):

> "There seems little doubt that Ickes, nursing his old grudge against Olds, was egging on his protege (Senator Lyndon) Johnson. Abe Fortas, who had been Ickes' Under Secretary . . . although now in private law practice, was the behind-the-scenes counsel for Johnson, supplying him with material and arguments against Olds."

Although there have been a few such notable exceptions, generally speaking, the Senate has been sparing with the exercise of its "advice and consent" power in connection with appointments in the Executive branch -- to non-judicial posts.

But the reasons for a limited or nominal Senate role with respect to Executive branch appointments do not apply when it comes to nominations for lifetime positions on the Supreme Court -- the highest tribunal in the independent, third branch of government.

A distinguished former colleague, Senator Paul Douglas, put it this way:

> "The 'advice and consent' of the Senate required by the Constitution for such appointments (to the Judiciary) was intended to be real, and not nominal. A large proportion of the members of the (Constitutional) Convention were fearful that if judges owed their appointments solely to the President the Judiciary, even with life tenure, would then become dependent upon the executive and the powers of the latter would become overweening. By requiring joint action of the legislature and the executive, it was believed that the Judicary would be made more independent."

Throughout our history, there have been 125 nominations submitted for the Supreme Court. Of that number, 21, or one-sixth, have failed to win Senate approval.

Incidentally, the question of qualifications or fitness was an issue in only 4 of those 21 instances.

When debating nominations for the Supreme Court, the Senate has never hesitated to look beyond mere qualifications to consider a nominee's philosophy, his writings, his views on issues, charges of cronyism or other matters.

There have been 16 nominations for the Supreme Court submitted by Presidents during the final year of their Administration.

History records that the Senate confirmed 7 of those (including Chief Justice Marshall). But the Senate refused to confirm the other nine -- generally on the ground that the vacancy should be filled by the new President.

In almost every previous instance, when a President has had an opportunity during his last year in office to submit a Supreme Court nomination, the vacancy came about by reason of the death of a sitting justice.

Never before has there been such obvious maneuvering to create a "vacancy" for a political purpose.

Coming at a time when the people are in the process of choosing a new government, such maneuvering not only demeans the Court but it is an affront to the electorate.

It suggests a shocking lack of faith in our system.

And it may also register an astonishing vote of no confidence in Hubert Horatio -- and his chances in November.

I don't know who will be elected President in November. But I do know that this Nation is seething with unrest and is calling for change. A new generation wants to be heard and demands a voice in charting the future of America.

Particularly at this point in our history, the Senate would be unwise to put its stamp of approval on a cynical effort to thwart the orderly processes of change.

What is the reason for such haste in denying the people a voice in shaping the course of the Supreme Court for years to come?

Of course, there is no urgent reason. Indeed, there is not even a vacancy on the Supreme Court.

Incidentally, in considering the role of Chief Justice Warren in all this, I ran across an interesting commentary in The New Republic. It reads like this:

"Executive officers serve under the direction and at the pleasure of the President. It is unobjectionable, and often right, that they should make their resignation effective at his pleasure . . . But judicial officers are independent of the President. . .

"It is perhaps a small, symbolic point only, but the symbols of judicial independence are not trivial; they are an important source of judicial power and effectiveness.

"The point, moreover, goes beyond the symbolic, as Chief Justice Warren himself ingeniously emphasized at his press conference on July 5. He was still in office, said the Chief Justice, and would return to preside in the fall if the Senate fails to confirm Abe Fortas, of whom he thinks well.

"That may not have been intended as a form of pressure, but it looked like it. The pressure was in any event implicit in the manner of Chief Justice Warren's retirement. . . Retirements which are effective on a date that is certain and irrevocable, ensure that a replacement will be considered on his own merits, not as a choice between himself and his predecessor.

"The practice of retiring or resigning, as Chief Justice Warren did, effective upon the qualification of a successor, is unprecedented in the Supreme Court. It seems to have grown up among the lower federal judges. It has nothing to commend it."

Back at the beginning of this crusade, before Mr. Fortas and Mr. Thornberry were even named, I made it clear that I would vote against confirmation of any nominee by President Johnson to be Chief Justice -- whether he named a Republican or Democrat; a liberal, conservative or a moderate.

I took the position, in view of the circumstances and political purposes surrounding the resignation, that it would be in the best interest of the Court and the Nation if the next Chief Justice were named by the new President after the people have an opportunity to vote in November.

To be quite candid, I suspect that I might have been a lonely figure standing there on principle if President Johnson had not been so accommodating by submitting the particular nominations that he did.

Now, I have several additional reasons to oppose the pending nominations.

One additional reason is that I am convinced Mr. Fortas and Mr. Thornberry were selected primarily because they are close personal friends of long-standing of President Johnson, and not because they are among the best qualified in the Nation to fill the particular positions.

The charge of "cronyism" is not new to Senate confirmation debates, but it is highly unusual for any President to subject himself to that charge with respect to a nomination for the Supreme Court of the United States. And never before in history has any President been so bold as to subject himself to the charge of "cronyism" with respect to two Supreme Court nominations at the same time.

Some say that if a "crony" -- nominated because he is a "crony" -- is "qualified," he should be approved. I reject this view because it diminishes public respect for the Supreme Court -- at a time when there is a desperate need to rebuild and enhance confidence in the Court.

In the case of Mr. Thornberry, I am convinced, on the basis of the record and personal knowledge, that -- while he is a good and a fine gentleman -- he is just not (as Senator Norris Cotton put it) "Supreme Court material."

In the case of Mr. Fortas, while I am satisfied that he is a brilliant lawyer, I am not satisfied that he possesses an adequate sense of propriety and other qualities which are particularly appropriate and necessary to be Chief Justice of the United States.

When it comes to selecting the man in the United States best suited to be Chief Justice, I would prefer -- and I believe most people would prefer -- the type of lawyer who would not be asked to proposition newspaper publishers on behalf of a Baker or Jenkins; and who, if asked, would refuse.

Whatever our frailties as public servants, as lawyers, or as members of the press, I am sure most of us do not deserve the skepticism with which we are often regarded by the public. Nevertheless, we can never forget that our apparent motives, as well as our actual motives, play an important part in determining the degree of confidence which the public develops towards the institutions with which we are associated.

I am confident that the public does not approve of the admitted telephone call made by Mr. Justice Fortas to a business friend, criticizing a public statement that Vietnam war costs would run $5 billion higher than Administration estimates. Incidentally, the statement made at Hot Springs, and retracted after Mr. Fortas' phone call, turned out to be very accurate.

I am confident that the public does not condone the fact that Mr. Justice Fortas admittedly participated in the decision-making process of the Executive branch of government on such matters as the Vietnam war and the Detroit riots.

But more disturbing is the fact that Mr. Fortas stated to the Senate Judiciary Committee that he is proud of his extra-judicial activities, and that he "did not see anything wrong" with them.

Judges -- particularly Justices of the Supreme Court -- have no license to ignore the separation of powers principle which is at the core of our system of government.

In 1942, President Franklin D. Roosevelt called upon Chief Justice Stone for assistance in arriving at executive decisions in connection with wartime rubber problems. In response to the President's request Chief Justice Stone replied as follows:

"I have your letter of the 17th. . . Personal and patriotic considerations alike afford powerful incentives for my wish to comply with your request that I assist you in arriving at some solution of the pending rubber problem. But most anxious, not to say painful, reflection has led me to the conclusion that I cannot rightly yield to my desire to render for you a service which as a private citizen I should not only feel bound to do but one which I should undertake with zeal and enthusiasm. . .

"A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office.

"We must not forget that it is the judgment of history that two of my predecessors, Jay and Ellsworth, failed in the obligations of their office and impaired their legitimate influence by participation in executive action in the negotiation of treaties. True, they repaired their mistake in part by resigning their commissions before returning to their judicial duties, but it is not by mere chance that every Chief Justice since has confined his activities strictly to the performance of his judicial duties. . ."

Today, with respect for law at a low ebb, with our ability to maintain order in our cities seriously in question for the first time in our history, and with sizable groups of Americans convinced that the basic institutions of our society are a sham and a fraud, the rewarding of an "old friend" with the Chief Justiceship is uniquely inappropriate.

If ever there was a time when a "Caesar's wife" appointment would be of great value to reinforce public confidence in the Supreme Court -- this is such a time.

If there were ever a time when "cronyism" was a disservice to the Nation, this is the time.

Even before the current controversy erupted, public confidence in the Supreme Court had fallen to an all-time low in modern history. According to a Gallup survey in June, 60 per cent of the American people had an unfavorable opinion of the Supreme Court.

Undoubtedly, much of this disfavor can be attributed to widespread dissatisfaction with some of the more controversial rulings of the Court in various fields.

But the prestige of the Supreme Court does not hinge solely on the result it reaches in particular cases. I am convinced that there are other, perhaps more compelling, considerations which also influence the standing of the Court with the people.

For example, the same Gallup poll reported that 61% of the people favor a change in the method of selecting Supreme Court justices. This strongly suggests that the circumstances which surround an appointment of a justice profoundly affect the capacity of the Court to merit public confidence.

I deeply regret that President Johnson has seen fit in this campaign season to drag the Supreme Court into the political arena.

But in another sense, perhaps this debate can ultimately serve a higher and a nobler purpose. For it can serve to lift the Supreme Court, once again, above and out of politics.

If we prevail, there will be hope that future Presidents will select a Benjamin Cardozo for the Supreme Court, as Hoover did -- not because of personal or political considerations -- but because he was the most outstanding jurist available in the land.

In this battle, we are right. Because we are right, time is on our side.

And I'm confident that we are going to win.

# # # # # #

Supreme Court

BPI-49

(RELEASEAT 630 PM EDT)

(HAYNSWORTH)

WASHINGTON--THE AFL-CIO TEXTILE WORKERS UNION MADE PUBLIC TODAY A FILE OF CONFIDENTIAL CORRESPONDENCE INVOLVING THE CONNECTION BETWEEN SUPREME COURT NOMINEE CLEMENT F. HAYNSWORTH JR. AND A BOOMING VACHINE FIRM DURING A CASE HE HELPED DECIDE.

UNION PRESIDENT WILLIAM POLLOCK SAID IN A STATEMENT THAT HAYNSWORTH'S INVOLVEMENT WITH THE COMPANY INDICATED "POSSIBLE BIAS" IN HIS RULING AS A U.S. APPEALS COURT MEMBER.

IN 1963, HAYNSWORTH VOTED WITH THE 3-2 MAJORITY IN FAVOR OF THE DARLINGTON MANUFACTURING CO., AND AGAINST THE TEXTILE WORKERS UNION WHICH HAD PROTESTED THE CLOSING OF A MILL AS BEING AN ANTILABOR DEVICE.

THE UNION LATER CONTENDED THAT HAYNSWORTH HAD BEEN INFLUENCED BY THE FACT HE WAS FIRST VICE PRESIDENT OF CAROLINA VEND-A-MATIC CO., WHICH SUPPLIED VENDING MACHINES TO SEVERAL MILLS OWNED BY DARLINGTON'S PARENT COMPANY, DEERING, MILLIKEN, INC.

IN ANNOUNCING PRESIDENT NIXON'S NOMINATION OF THE SOUTH CAROLINIAN, PRESS SECRETARY RONALD ZIEGLER SAID HAYNSWORTH HAD BEEN EXONERATED OF ANY CONFLICT OF INTEREST IN THE CASE. ZIEGLER DISTRIBUTED EXCERPTS OF LETTERS FROM THEN CHIEF CIRCUIT JUDGE SIMON E. SOBOLOFF AND ATTY. GEN. ROBERT F. KENNEDY TO THAT EFFECT.

POLLOCK SAID ZIEGLER RELEASED ONLY "SELECTED EXCERPTS OF THIS CORRESPONDENCE, ALONG WITH MISLEADING CHARACTERIZATIONS THEREOF."

THE UNION HEAD SAID THAT WHILE NO WRONGDOING WAS ESTABLISHED AND THE TEXTILE WORKERS' ATTORNEY ACKNOWLEDGED THIS WITH AN APOLOGY, THE QUESTION REMAINED THAT HAYNSWORTH SHOULD HAVE DISQUALIFIED HIMSELF FROM THE DECISION.

POLLOCK CLAIMED THAT THE QUESTION RAISED BY THE UNION IN 1963 WAS WHETHER ATTEMPTED BRIBERY WAS INVOLVED, NOT CONFLICT OF INTEREST.

HE COMMENTED: "IN HIS RELEASE OF SELECTED EXCERPTS FROM LETTERS, AND HIS STATEMENTS TO THE PRESS, MR. ZIEGLER HAS ENDEAVORED TO CREATE THE IMPRESSION THAT JUDGE HAYNSWORTH WAS CLEARED OF ANY CHARGE OF CONFLICT OF INTEREST IN CONNECTION WITH THE DARLINGTON CASE. IT IS EVIDENT THAT HE WAS CLEARED OF A QUITE DIFFERENT CHARGE."

HE ADDED THAT THE UNION HAD NOT PURSUED THE CONFLICT OF INTEREST QUESTION FOR FOUR REASONS:

--THE UNION HAD RELAYED TO SOBOLOFF A MUCH MORE SERIOUS CHARGE WHICH HAD BEEN PROVEN FALSE. "IT WAS EVIDENT THAT THE JUDGES WERE NOT PLEASED WITH THE UNION; AND THE UNION WOULD INEVITABLY BE A LITIGANT BEFORE THOSE JUDGES FOR YEARS TO COME," POLLOCK OBSERVED.

--THE U. S. CODE LEAVES IT TO THE JUDGE'S OWN OPINION WHETHER IT IS IMPROPER FOR HIM TO SIT IN JUDGMENT OF A CASE.

--THE UNION DID NOT AND DOES NOT HAVE ALL THE FACTS.

--THE UNION INTENDED TO ASK THE SUPREME COURT TO REVIEW THE CASE. THE COURT UNANIMOUSLY REVERSED PART OF THE APPEALS COURT VERDICT.

8/23--TS128PED

Supreme Court

NEW CHIEF JUSTICE

If past performance is a reliable indicator, and in this instance we believe it is, the designation of Judge Warren E. Burger as the next Chief Justice of the United States foreshadows a major change in the influence of the Supreme Court on the shape of our society.

above any question of suspicion.

The President emphasized that Judge Burger is a man of "unquestioned integrity throughout his private and public life." This is true, and it is a fact that will be an asset to the court. The opinions he has written as a member of the United States Court of Appeals for the District since 1956 stamp him as anything but a judicial "activist." He believes that it is the function of

The Evening Star (Washington, D. C.)
May 22, 1969

Supreme Court

CQ Fact Sheet **High Court Appointment**

A NEW CHIEF JUSTICE: A NEW COURT ERA

President Nixon May 21 moved toward creation of a Nixon Court and what could well be a new Court era with his nomination of Warren Earl Burger, 61, judge of the United States Court of Appeals for the District of Columbia, as the fifteenth Chief Justice of the United States.

In accord with his campaign statements describing the qualifications of the men he would appoint to the High Court and in keeping with the law-and-order emphasis of his Administration, Mr. Nixon appointed a man known in legal circles for his conservative stance on questions of criminal law. *(See box for Nixon statements.)*

Mr. Nixon had attacked recent Supreme Court decisions on the rights of accused persons for "hamstringing" the forces of order against the criminal forces in society. Judge Burger recently criticized the same Supreme Court holdings: "This seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, subrules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these 'rules' we make it less likely that any police officer will be able to follow the guidelines we lay down."

President Nixon, in announcing his nomination of Burger, described the role of the Chief Justice as "guardian of the Constitution." Burger's reputation as a man opposed to such judicial activism as that which has characterized the Warren Court appeared to qualify him to lead the more conservative Court which Mr. Nixon envisioned.

Burger, a native of Minnesota where he worked his way through law school and practiced law for more than 20 years, was Assistant Attorney General in charge of the Civil Division of the Justice Department (1953-56) serving under Attorneys General Herbert Brownell and William P. Rogers. President Eisenhower in 1956 appointed Burger to the D.C. Court of Appeals.

In the wake of the resignation of Associate Justice Abe Fortas amid controversy concerning the propriety of his extra-judicial activities, President Nixon emphasized that Burger was a man "above all, qualified (for the post of Chief Justice) because of his unquestioned integrity throughout his private and public life."

Sen. James O. Eastland (D Miss.), chairman of the Senate Judiciary Committee, announced May 21 that the Committee would hold hearings in early June on Burger's nomination.

Senate Majority Leader Mike Mansfield (D Mont.) May 18 said that the Senate had previously been "derelict in not scrutinizing more carefully the nominations for the high court." He indicated that a more searching Senate scrutiny would be directed at the nominations for Supreme Court appointments which President Nixon sent to the Senate. He said that the Senate would make its own "extensive" investigation into the background of nominees.

Retiring Chief Justice Earl Warren has served in that seat for 16 years, five years more than any other Chief Justice appointed in the 20th century. Chief Justices appointed in this century have served an average of ten years, barely half the average 20-year term of Chief Justices appointed in the 19th century.

Presidents Taft, Harding, Hoover, Roosevelt, Truman and Eisenhower each named a Chief Justice. President Johnson sent the nomination of Associate Justice Abe Fortas to the Senate for confirmation as successor to Chief Justice Warren, but was forced by Senate opposition to withdraw the nomination. *(1968 Almanac p. 531)*

Twentieth Century Chief Justices. President Taft in 1910 elevated Associate Justice Edward D. White to the Chief Justice's seat. White thus became the first Associate Justice to ascend to the leadership of the Court. President Washington had attempted to name an Associate Justice, John Rutledge, as Chief Justice in 1795, but the Senate had rejected such a nomination.

Eleven years later Taft himself became Chief Justice, named by President Warren G. Harding in 1921. Harding's Secretary of State, Charles Evans Hughes, a former Associate Justice of the Court, had been considered for the post, but had made it plain that he would not only decline the offer but also resign as Secretary of State if it were made.

Hughes, an Associate Justice from 1910 until 1916, resigned to run unsuccessfully for President. He became Chief Justice in 1930, appointed by President Hoover to succeed Taft.

President Roosevelt, in choosing Hughes' successor in 1941, followed the precedent set by Taft in 1910, and elevated an Associate Justice, Harlan F. Stone, to the post of Chief Justice. Stone, a former Attorney General, had been appointed to the Court by President Coolidge in 1925.

Truman chose his Secretary of the Treasury, Fred M. Vinson, to become Chief Justice succeeding Stone in 1946. President Eisenhower in 1953 appointed the popular Governor of California, Earl Warren, to lead the Court.

Early Chief Justices. The Supreme Court in 1969 is quite a different institution from that described in 1789 as "the weakest of the three departments of power." That description, from *The Federalist,* was written by Alexander Hamilton, James Madison, and the man who was to become the first Chief Justice, John Jay.

Hamilton further described the Court as having "neither force nor will but merely judgment" with "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society" and unable to take any positive action.

John Jay, the first Chief Justice, served for five years —one of which he spent in England on a diplomatic mission. He resigned to become governor of New York, an

Supreme Court

"Perhaps chief among these other purposes was a desire to avoid extinguishing the male line of a family by facilitating the death in action of its only surviving son," the court said.

NY TIMES, 5/27/69, Washington dateline:

The Supreme Court ruled unanimously today that states may collect sales and use taxes from servicemen, even if they are permanent residents of other states.

In an opinion by Justice Potter Stewart, the Court overturned a lower court decision that state officials had said would play havoc with state tax-collecting systems.

Thirty-five other states joined Connecticut in protesting to the Supreme Court after the United States Court of Appeals for the Second Circuit upheld a Federal District Court's ruling that Connecticut could not collect its 3.5 percent tax on sales and use of personal property.

The lower courts held that the Soldiers' and Sailors' Civil Relief Act, a Federal measure passed for the benefit of servicemen during World War II, prevented the enforcement of the tax. The relief law bars states from collecting taxes on the incomes and personal property of out-of-state servicemen, but is silent on the subject of sales and use taxes....

...

The Supreme Court reasoned that the relief act was intended to spare servicemen from double taxation, a threat that does not exist with sales taxes as it does with ad valorem taxes on personal property. Justice Stewart concluded that Congress would have specifically mentioned sales and use taxes if it had intended to include them in the reach of the law.

NY TIMES, 5/27/69, edit.:

Disclosure that the Internal Revenue Service has been conducting prolonged investigation of the financial dealings of the Parvin Foundation underscores the unwisdom of Justice William O. Douglas's original involvement in the foundation's work.

In a letter to Mr. Parvin which was described in this newspaper yesterday, Justice Douglas expressed the belief that the failure to conclude the investigation which began nearly three years ago represented an effort "to get me off the Court." Since the I.R.S. would have no bureaucratic motive of its own, this is presumably an allusion to the Nixon Administration. While his resignation as the paid president of the Parvin Foundation ends this unseemly chapter in his career, Justice Douglas, in fairness to himself, to the Supreme Court, and to the public, ought to draw the correct inferences from this episode.

Although he has many critics because of his sometimes extreme dissenting views and because of his rather cavalier style as a judge, he also has many admirers who respect his incisive mind and very considerable legal talents. Whatever may be the wishes or intentions of his enemies, the substance of Justice Douglas's work on the Court is not the issue. The issue is his unjudicial behavior in involving himself and the good name of the Court with a private businessman whose own background and associations could at best only be described as embarrassing.

The same objection would lie against his involvement with a foundation even if its source of funds were above reproach. Some highly respected and prestigious foundations can also be quite controversial because of the nature of their grants and projects. The only wise rule for Justice Douglas and his fellow judges at every level of the judiciary is to keep clear of any outside involvements....

From the Office of
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May 26, 1969

Supreme Court

139-69

FOR IMMEDIATE RELEASE

SPEECH OF REP. TOM RAILSBACK, R-ILL., DELIVERED ON THE HOUSE FLOOR 5/26/69

Mr. Speaker, serving on the nation's highest court is not and never can be a part-time job. And yet, it apparently is considered just that by some of the men who sit on the Supreme Court. We hear a lot of talk about requiring judges to make a full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for services performed which necessarily detract from their judicial duties.

The resignation of Justice Fortas because of his financial dealings with convicted stock market manipulator Louis Wolfson; the $12,000 annual payment to Justice Willian O. Douglas by the Albert Parvin Foundation, which had dealings with the Las Vegas gambling industry; and now the revelation that President Nixon's choice for Chief Justice--Warren Burger--has been paid $6,000 by the philanthropic Mayo Foundation as a trustee, demand an urgent change in the laws on the federal judiciary.

Mr. Burger's nomination by the President is a good one. I am not commenting on the interests of this able jurist with this worthy organization--a foundation devoted exclusively to the advancement of medical technology. The President, in his nationally televised statement, said Burger was a man of "unquestioned loyalty." I concur in this.

But, the fact remains that at least two justices before him, namely Fortas and Douglas, have received substantial amounts of outside income for outside work while serving on the Supreme Court, thereby making their duties on the bench part-time responsibilities.

A few days ago, I called upon Emanuel Celler, Chairman of the Judiciary Committee on which I serve, to begin public investigations into the financial dealings

- MORE -

of not only Fortas and Douglas but of other federal judges as well.

As I said in my letter to the Chairman:

"My request is not based on wanting to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources" so that definitive legislation might result in correcting future improprieties.

The inquiry is not a witch hunt. It is to be a constructive investigation aimed at determining the need for legislation which may require federal judges to reveal outside financial interests, whether in the nature of honorariums, consultant fees or other remuneration; indeed, the result of our inquiry may be to prohibit entirely payment for work that is not directly related to a judge's responsibilities on the federal bench.

I am well aware of the meeting called June 10 of the U. S. Judicial Conference to consider financial disclosure rules. It is my opinion that not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever. They should, however, be able to receive out-of-pocket expenses for lecturing, writing, etc. The money which goes into their pockets should end there. This would take away any initiative for them to go gallavanting around the country to subsidize their judicial income.

Members of the federal judiciary and indeed members of the Congress are being looked at by the public with a critical eye. The opinion by many of many government is already jaundiced by the Fortas Affair, by the Douglas matter, and by the sometimes rather disparaging view of "those politicians in Washington."

Let us define the nebulous guidelines of judicial conduct so that there can be no opportunity for "impropriety" in the judiciary, much less any question about conflict of interests.

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140-69

May 26, 1969

FOR IMMEDIATE RELEASE

Rep. Tom Railsback, R-Ill., a member of the House Judiciary Committee, said today federal officials, including members of the Supreme Court and the Congress, should be prohibited from earning outside income while serving the government.

Railsback, in a speech on the House floor, said it was his opinion "that not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever."

The Illinois Republican May 16 wrote Emanuel Celler, Chairman of the Committee, demanding the panel investigate financial dealings of Justices Fortas and Douglas and other federal judges not "to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources."

"Serving on the nation's highest court is not and can never be a part-time job. And yet, it apparently is considered just that by some of the men who sit on the Supreme Court. We hear a lot of talk about requiring judges to make full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for services performed which necessarily detract from their judicial duties," Railsback said.

- 30 -

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May 28, 1969

Supreme Court (Douglas)

142-69

ADV. FOR AM's WED., JUNE 4, 1969
REP. TOM RAILSBACK, R-ILL., REPORTS FROM WASHINGTON

A few days ago, in a speech on the House floor, I spoke out against apparent judicial impropriety bordering on misconduct by some of the men who sit on the nation's highest tribunal--the Supreme Court.

Serving on the High Court is not and can never be a part-time job. And yet, it apparently is considered just that by at least two of the justices who serve on it. There has been a lot of talk about requiring judges to make full disclosure of their income. We should prohibit our federal judges who are paid as much as $60,000 per year from receiving outside earned income for performing services which necessarily detract from their judicial duties.

The resignation of Justice Fortas because of his financial dealings with convicted stock market manipulator Louis Wolfson and the $12,000 annual payment to Justice William O. Douglas by the Albert Parvin Foundation, which had dealings with the Las Vegas gambling industry, demand an urgent change in the laws on the federal judiciary.

The case against these two men is clear cut. Both Fortas and Douglas, have received substantial amounts of outside income for outside work while serving on the Supreme Court, thereby making their duties on the bench part-time responsibilities.

I have called upon Emanuel Celler, Chairman of the House Judiciary Committee on which I serve, to begin public investigations into the financial dealings of not only Fortas and Douglas but of other federal judges as well.

I said in my letter to Chairman Celler:

- MORE -

"My request is not based on wanting to impeach or punish any federal judge, but rather to determine to what extent judges are receiving income from outside sources" so that definitive legislation might result in correcting future improprieties.

The investigation is not to be a witch hunt. It is to be a constructive inquiry aimed at determining the need for legislation which may require federal judges to reveal outside financial interests, whether in the nature of honorariums, consultant fees or any other remuneration. Indeed, the result of our investigation may be to prohibit entirely any payment for work that is not directly related to a judge's responsibilities on the federal bench.

Not only federal judges but congressmen as well should disclose all income earned while not performing their federal duties and should be prohibited from earning any outside income whatsoever. They should, however, be able to receive out-of-pocket expenses for lecturing, writing, etc.

The money which goes into their pockets should stop there.

This would take away any initiative for them to go gallavanting around the country to subsidize their judicial income.

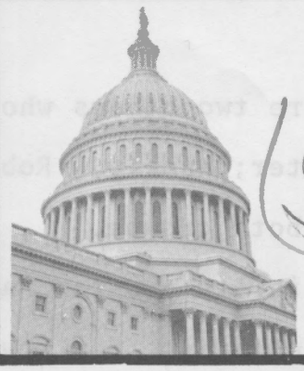
Members of the federal judiciary and indeed, members of the Congress, are being looked at by the public with a critical eye. The opinion by many of many in the government is already jaundiced by the Fortas Affair, by the Douglas matter and by the sometimes rather disparaging view of "those politicians in Washington."

We must set out immediately to define the nebulous guidelines of judicial and congressional conduct so that there can be no opportunity for impropriety in the government--much less any question about conflict of interests.

The taxpayers deserve that much.

Supreme Court

UNITED STATES SENATOR FROM SOUTH CAROLINA



STROM THURMOND reports Douglas TO THE PEOPLE

Major Committee Posts	Armed Services Subcommittees	Judiciary Subcommittees
Armed Services	Preparedness Investigating	Internal Security
Judiciary	Central Intelligence	Immigration-Naturalization
Appropriations (Defense)	NATO Status of Forces	Constitutional Rights
Republican Campaign	Military Construction	Juvenile Delinquency
		Adm. Practice & Procedure
		Constitutional Amendments
		Criminal Laws & Procedure

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DOUGLAS IS NEXT

The resignation of Supreme Court Justice William O. Douglas from the Albert Parvin Foundation is only the first step. A sense of propriety demands that he resign from the bench.

In the Fortas case, the American Bar Association has declared that eight separate sections of the canons of judicial ethics were violated. The Douglas case is even more complicated. Among the facts that have a bearing on the conduct of Justice Douglas are the following:

1. Justice Douglas received a total of nearly $85,000 in fees during his tenure as President and Director of the Parvin Foundation. For 1967, the most recent year available, his fee was one-quarter of the Foundation's "charitable" disbursements.

2. The principal assets of the Foundation consisted of a mortgage on a gambling casino in Las Vegas, and stock in a company that owned three other gambling casinos.

3. The Foundation falsified its tax returns for the period 1961-1965, failing to report certain stock manipulations until its tax return for 1966, after the Internal Revenue Service started an investigation.

4. As head of the Foundation, Justice Douglas sanctioned lecture fees of $5,000 each to such politically controversial men as J. Robert Oppenheimer and Teodoro Moscoso.

In addition, we must consider Justice Douglas' political activity with the Center for the Study of Democratic Institutions in Santa Barbara.

1. Justice Douglas is Chairman and Director of the Center.

2. Justice Douglas is paid $500 a day for work with the Center, and in recent months has received $4,000 for two seminars.

3. The Parvin Foundation has given $70,000 to the Center between 1965-1967.

4. Besides Justice Douglas, there are two others who are directors of both the Parvin Foundation and the Center; namely, Robert Hutchins and Harry S. Ashmore (the most active in both groups.)

5. The Center is overtly political in its program, and was host to the founding meeting of the National Conference for New Politics, the Communist-Black Power dominated movement that made nationwide headlines for its revolutionary radicalism. The Center organized the so-called "Pacem In Terris" conferences, designed to seek detente with the Soviet Union. The Center has also been active in encouraging student radicalism, and was credited with devising "a master plan of how best to destroy the American university as it is today," according to the Santa Barbara News-Press.

Thus, for all the talk about so-called "democratic institutions" the work of Justice Douglas in the Parvin Foundation and the Center appears to be a front for gambling enterprises and persons of anti-democratic character. The salary of a Justice and his life-time appointment are supposed to insulate him from social and political movements, as well as from associations of unsavory character. The belated resignation of Justice Douglas from the Foundation does not remove the stigma which he has brought upon the bench.

The most distressing aspect of the Douglas case, as in the Fortas case, is the conviction of the principal participants that there was no impropriety in their actions. Their continued defiance of common standards of decency does not speak well for the judgment of men sitting on the highest court in the land. It is perhaps no coincidence that the Fortas and Douglas cases are intertwined. Albert Parvin, who created the Parvin Foundation, was named by the government as co-conspirator, although not indicted, in the stock manipulations of Louis Wolfson. Carolyn Agger, the wife of Mr. Fortas, was the tax expert who gave a clean bill of health to the Parvin Foundation's tax problems.

No Federal judge, or Justice of the Supreme Court, should be allowed to practice law, serve in a corporation or partnership, or as a trustee or director of a foundation, for any consideration whatsoever, cash or otherwise. Judged by these standards, Justice Douglas is the next one who must go.

Strom Thurmond

Det. News

Fortas in trouble again

A lack of sensitivity

On the basis of the facts revealed to the public to date, it would be unfair to demand that Supreme Court Justice Abe Fortas resign or be impeached because he accepted and kept for 11 months a $20,000 fee from the family of industrialist Louis E. Wolfson. But it would not be unfair to suggest that Justice Fortas provide a better explanation for the incident than he has given up to now.

"had been at the horse farm to discuss the SEC matter and that it was to be taken care of," and another as stating Wolfson had said Fortas was furious because the SEC "had reneged on a pledge to give the Wolfson group another hearing."

Whether the charges are true in all details, the facts indicate a close relationship between Wolfson and Fortas even after the justice was on the bench. That raises a question

Supreme Court

'America Is Not a Repressive Society'

By LEWIS F. POWELL

RICHMOND, Va.—At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard leftist propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit and among some of the media. Many persons genuinely concerned

a prior court order issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or F.B.I. agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine.

During 1969 and 1970, such Federal wiretaps were employed in only 309 cases. More than 900 arrests re-

"The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a

Supreme Court

Rehnquist's Statements Indicate He Would Be an Activist Pressing Conservative Views

By FRED P. GRAHAM
Special to The New York Times

WASHINGTON, Nov. 2—The writings of William H. Rehnquist, encased in two thick binders and lodged by him last weekend with the Senate Judiciary Committee, show that President Nixon's nominee to the Supreme Court is an unvarying conservative who believes that Justices invariably write their own views into the Constituion.

Council was considering an ordinance in 1964 to make all establishments serve everyone regardless of race or national origin, Mr. Rehnquist opposed it in the name of individual liberty. Mr. Rehnquist, then a lawyer in Phoenix, wrote in a pubished letter: "To the extent that we substitute, for the decision of each businessman as to how he shall select his customers, the command of the government telling him how he must select them, we give up a measure of our traditional

eradicate "de facto" segregation in the Phoenix schools, he opposed it on the following grounds: "We are no more dedicated to an 'integrated' society than we are to a desegrated' society. We are instead dedicated to a free society, in which each man is equal before the law, but in which each man is accorded a maximum amount of freedom of choice in his individual activities."

¶When some Federal employes began to sign statements criticizing United States polic-

tion that the employes could lose their jobs. "The Government as an employer has a legitimate and constitutionally recognized interest in limiting public criticism on the part of its employes even though that same Government as a sovereign has no similar constitutionally valid claim to limit dissent on the part of its citizens," he said in a speech.

¶In a speech on young protesters' resort to civil disobedience to dramatize their opposition to Government policy,

blic law that disobedience nnot be tolerated, whether it b violent or nonviolent disedience. If force or the threat force is required to enforce te law, we must not shirk m its employment."

¶In speeches and Congressnal testimony, Mr. Rehnqist argued that the courts ould play no role in shieldig individuals from surveilnce from Government agents. He said that citizens would be otected by top officials in the ecutive branch or by Con-

lowing aggrieved subjects of surveillance to go to court "would balance the scale too far against the interests of proper law enforcement." He argued that organized criminals and subversives would abuse such court procedures to expose the Government's surveillance efforts.

¶Reacting to the criticisms that during the Mayday protests in the District of Columbia many individuals had been swept into the police mass-arrest net and held without op-

declared "qualified martial law" had existed. Police officials, he said, "have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges against them."

Throughout the writings there are only a few references to the Bill of Rights, and some liberals on the Judiciary Committee have served notice that they will qeustion Mr. Rehnquist closely tomorrow as to his apparent tendency to see

Mr. Rehnquist and Mr. Powell furnished material to the committee after liberal members asked them to submit their public statements. There have been no indications of opposition to Mr. Powell by any organizations.

Today the Leadership Conference on Civil Rights, a coalition of civil rights, liberal and labor groups, announced that it would oppose Mr. Rehnquist, but not Mr. Powell.

However, most of the mail that has been received by the

REMAKING THE SUPREME COURT

Nixon Sets a Pattern

President Nixon's Court choices were a surprise in one way—their identities were unpredicted. Their judicial philosophy, however, was no surprise. Now if they clear the Senate, it will be a "Nixon Court," dominated by "conservatives."

A pattern now has been firmly set for the kind of Supreme Court that President Nixon thinks this country needs.

The President, on October 21, nominated two men he described as "judicial conservatives" to fill the two recently created vacancies on the Court.

If those nominees are confirmed by the Senate—and follow Mr. Nixon's "judicial philosophy," as he obviously expects—then the Supreme Court will have a clear "conservative" majority for the first time in many years, and probably for many years to come.

Nominated by the President were:

• Lewis F. Powell, Jr., 64, a former president of the American Bar Association who has practiced law in Richmond, Va., since 1931.

• William H. Rehnquist, 47, a former Phoenix, Ariz., lawyer who has been Assistant U. S. Attorney General since January, 1969.

Surprise choices. Both names, announced in a nationwide radio and television broadcast, came as surprises to almost everyone. Their names had not been among those sent previously to the American Bar Association for evaluation.

Both, however, were expected—on the basis of early reaction—to win Senate approval without a serious fight.

President Nixon had previously lost two battles in attempts to win Senate confirmation of Clement F. Haynsworth, Jr., and G. Harrold Carswell. And yet another confirmation battle had appeared to be shaping up.

On October 20, a report leaked out that the American Bar Association's evaluation committee had refused to endorse as "qualified" two persons who had figured most prominently in speculation about the President's likely choices. They were Herschel H. Friday, a Little Rock, Ark., lawyer, and Mrs. Mildred L. Lillie, a judge of a California court of appeals.

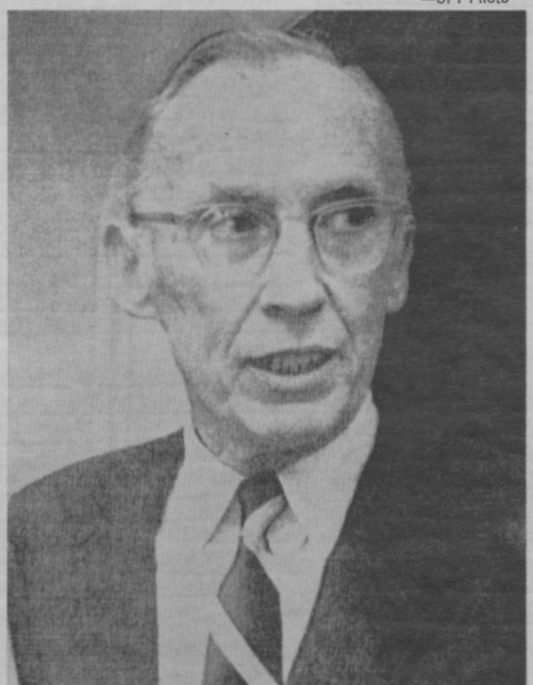
Only 24 hours after that report, Mr. Nixon not only chose two names not on the ABA list but also his Attorney Gen-

(continued on next page)

Chosen for Court: A Southern lawyer, an Assistant Attorney General

Lewis F. Powell, Jr.

—UPI Photo



William H. Rehnquist

—USN&WR Photo

WHAT NIXON'S COURT NOMINEES HAVE SAID ABOUT KEY ISSUES

As the Senate begins digging into the records and qualifications of the men President Nixon has nominated for the Supreme Court, attention is being focused on views they have expressed in the past. Here, from speeches and writings of Lewis F. Powell, Jr., and William H. Rehnquist, are some of their statements that are attracting interest of Senate investigators.

Views Expressed by Lewis F. Powell, Jr.

On "Civil-Liberties Repression—Fact or Fiction?"

From an article first published in "The Richmond (Va.) Times-Dispatch" on Aug. 1, 1971:

At a time when slogans often substitute for rational thought, it is fashionable to charge that "repression" of civil liberties is widespread. This charge—directed primarily against law enforcement—is standard "leftist" propaganda. It is also made and widely believed on the campus, in the arts and theater, in the pulpit and among some of the media. Many persons genuinely concerned about civil liberties thus join in promoting or accepting the propaganda of the "radical left." . . .

There are, of course, some instances of repressive action. Officials are sometimes overzealous; police do employ unlawful means or excess force; and injustices do occur even in the courts. Such miscarriages occur in every society. The real test is whether these are episodic departures from the norm, or whether they are—as charged—part of a system of countenanced repression.

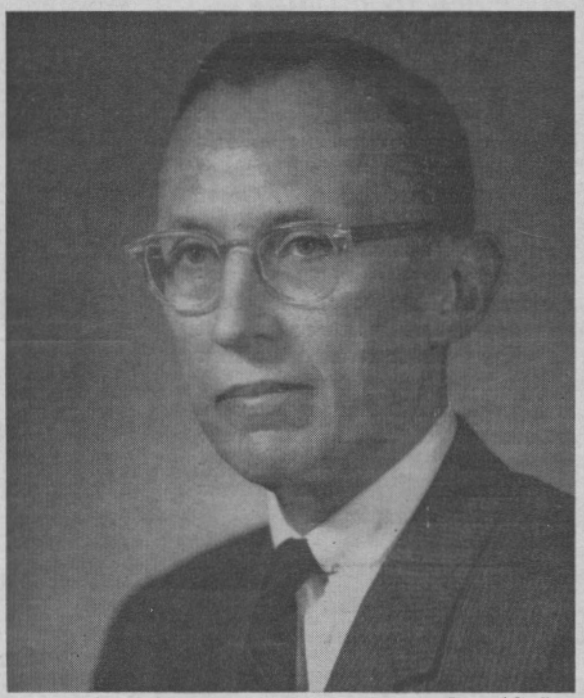
The evidence is clear that the charge is a false one. America is not a repressive society. The Bill of Rights is widely revered and zealously safeguarded by the courts. There is in fact no significant threat to individual freedom in this country by law enforcement. . . .

The attack has focused on wiretapping. There seems almost to be a conspiracy to confuse the public. The impression studiously cultivated is of massive eavesdropping and snooping by the FBI and law-enforcement agencies. The right of privacy, cherished by all, is said to be widely threatened.

Some politicians have joined in the chorus of unsubstantiated charges. Little effort is made to delineate the purposes or the actual extent of electronic surveillance.

The facts, in summary, are as follows: The Department of Justice employs wiretapping in two types of situations: (i) against criminal conduct such as murder, kidnaping, extortion and narcotics offenses; and (ii) in national-security cases.

Wiretapping against crime was expressly authorized by Congress in 1968. But the rights of suspects are carefully safeguarded. There must be a prior court order, issued only upon a showing of probable cause. The place and duration are strictly controlled. Ultimate disclosure of the taps is required. There are heavy penalties for unauthorized surveillance. Any official or FBI agent who employs a wiretap without a court order in a criminal case is subject to imprisonment and fine. During 1969 and 1970, such federal wiretaps were employed in only 309 cases. More than 900 arrests resulted, with some 500 persons being indicted—including several top leaders of organized crime.



—Dementi Studio

MR. POWELL

The Government also employs wiretaps in counterintelligence activities involving national defense and internal security. The 1968 Act left this delicate area to the inherent power of the President.

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since the 1968 Act, however, the attack has focused on its use in internal-security cases, and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.