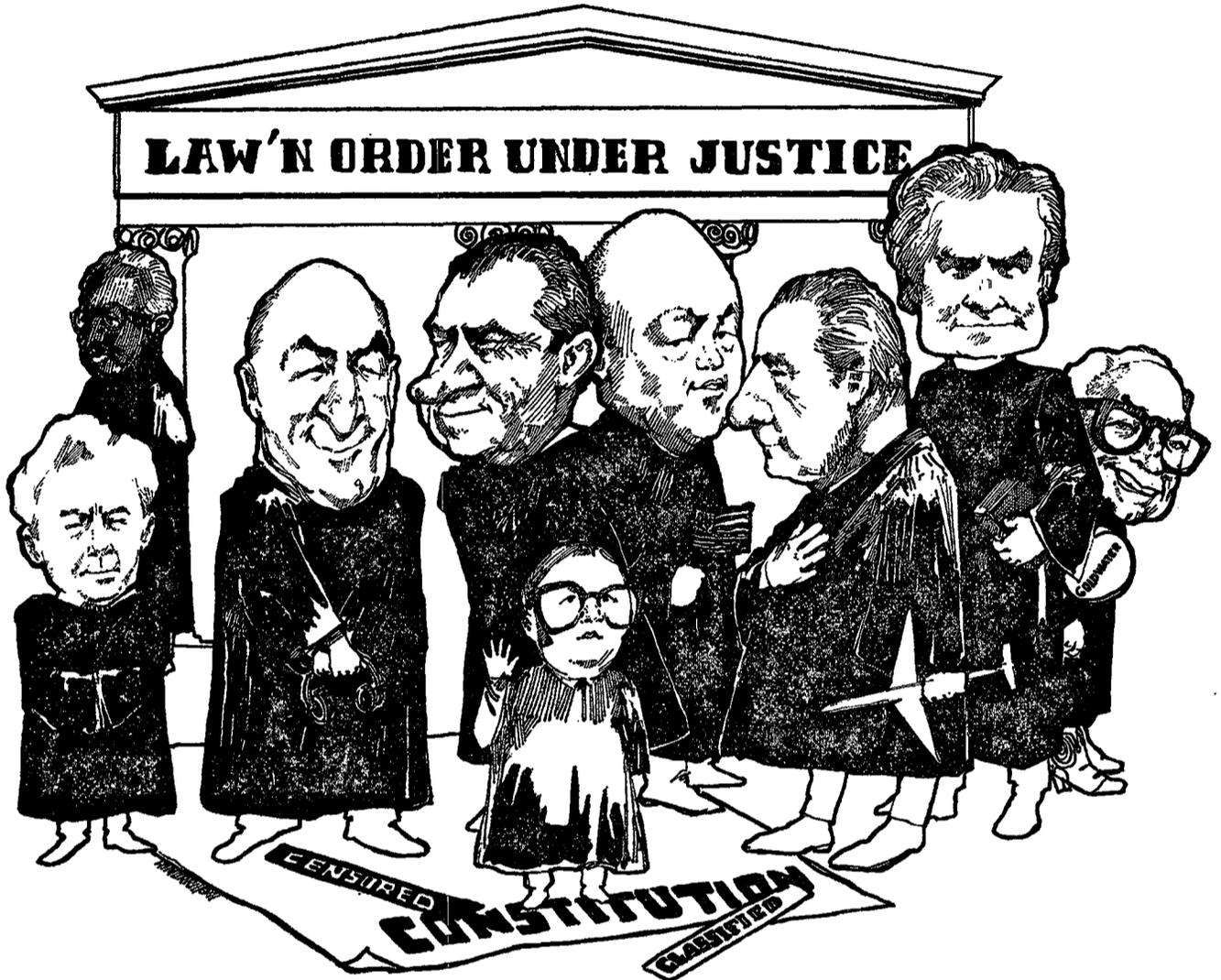


RIPON FORUM

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A Ripon Policy Analysis

The Weak Constitution of a "Legal Giant"

The Senate faces severe limitations in resisting a President determined to remake the Supreme Court. The President has the initiative, and as in nuclear strategy, the advantage is with the offense. The President can merely keep submitting names; the Senate must mobilize its somewhat cumbersome machinery and political resources to investigate, disqualify and reject each one. Now, moreover, in the age of MIRV, when the President may launch as many as six bombs at once — or fill the air with chaff and decoys — the role of the defense is further complicated. It is somewhat difficult to muster a struggle against a man like William Rehnquist when lined up behind him are men like Robert Byrd and women like Sylvia Bacon and when the President maintains his nominations have something to do with "respect for the law" or reducing crime.

Still we believe it is just as well that we know what we are doing. Approval of William Rehnquist's nomination will for the first time give credence to what has until recently seemed an alarmist fear: that we are moving into an era of repression, in which the U.S. democracy gives up its most noble enterprise — the maintenance of a free and open society.

A scenario may be envisaged. The Communist party and other political action organizations that

can be alleged to advocate revolution would be black-listed and outlawed. Wiretapping and other even more sophisticated modes of individual surveillance would be extended without judicial review. All but the most flagrant acts of discrimination and collusion against blacks would be permitted. The courts would return to the unedifying business of poring over pornography, and arbitrarily incarcerating improvident writers, photographers, and bookstore proprietors. The "third-degree" — extorted confessions and the like — would be effectively authorized. Ever larger numbers of dissenters and other nonconformists who affront the police or marginally violate the law would be imprisoned for long periods. Police brutality and lawlessness, on the other hand, would be condoned. At a time when the government provides an ever larger proportion of available jobs, the firing of dissenters from federal employment would be legitimized. And finally the Executive, in illicit tandem with the judiciary, would reduce the legislative branch to inconsequence on vital matters of war and peace and to irrelevance in the always elastic realm of "national security." And, of course, the real problems of crime and instability in our society would persist.

Such developments are not, of course, inevitable. They will occur only if the Supreme Court abandons

its role as ultimate guarantor of the Constitution and the legislative branch refuses to recognize the new responsibilities such a judicial abdication would impose on the Congress.

But the entire scenario of repression consists of measures that Rehnquist, on the record, has strongly and explicitly invited; and most of them are not strongly opposed by the other three Nixon appointees. So even if, in view of the President's determination to transform the Court, it proves tactically necessary for the Senate to accept Rehnquist, we want to register our opinion that he is Nixon's most dangerous nominee yet. Younger and smarter than the others, he will have a longer and more deleterious impact on our political and social order.

There has been much nonsense written in recent weeks on Rehnquist's good character and legal expertise, as if these qualities alone justify confirmation. In fulfilling its Constitutional responsibility for advice and consent, however, the Senate does not stand like the Bar Association's Committee on the Judiciary, as a mere judge of ethical and professional credentials. The Senate must also consider the impact of such potential appointments on the balance between the executive and legislative branches and on the direction of America over the next decades.

Powell Endorsed

Applying such standards to the current Supreme Court nominees, the Ripon Society supports, with some reservations, the confirmation of Richmond attorney Lewis Powell, a former President of the ABA. Although his writings do not display a staunch concern with preserving individual liberties, his persistent advocacy of legal services for the poor, his mediating role in Virginia school integration controversies, and his continuing reputation for fairness allay many of our fears. We are further reassured by his recent rejection of Rehnquist's view that the Executive has an inherent right to wiretap without judicial review in cases involving the national security. While Powell might strike the balance between individual liberties and governmental powers at a somewhat different point than we would prefer, he nevertheless recognizes the crucial limits on governmental authority. He is essentially a man of the law rather than a man of the Right.

William Rehnquist, on the other hand, has remorselessly allowed his political prejudices to supercede legal precedent. Unlike Lewis Powell's career of moderate judicial conservatism, Rehnquist's record does not show a consistent and scrupulous application of legal principles; rather it shows a consistent and unabashed manipulation of legal rhetoric in the service of right wing social and political objectives. His voluminous public statements and his private comments of which we are aware, show him to be a thoroughgoing authoritarian, a nearly absolute believer in executive supremacy over the legislature, and a slack reconstructionist of the constitution.

Rehnquist's authoritarian bent is not tempered by judicial conservatism. Unlike such believers in judicial restraint as the late Justice Felix Frankfurter and former Justice John Marshall Harlan, Rehnquist is a militant judicial activist, who explicitly rejects the doctrine of *stare decisis*. Writing in the *Harvard Law Record* in 1959 Rehnquist stated: "It is high time that those critical of the present Court recognize with the late Charles Hughes that for 175 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."

In a letter that he wrote in 1959 Rehnquist, then in private practice in Phoenix, made clear the "different interpretation" of the Constitution he had in mind: "a judicial philosophy which consistently applied would reach a conservative result."

The kind of "conservative" result which Rehnquist would seek is diametrically opposed to the American conservative tradition of vigorously opposing the extension of governmental powers.

To justify the Justice Department's policy of encouraging indiscriminate mass arrests of Mayday demonstrators and bystanders (with the charges against them filled in randomly by police who had often never seen the accused or the crime), and of having thousands of patently spurious cases litigated with virtually no convictions, Rehnquist invented after the fact the doctrine of "qualified martial law."

Now even if one believes the Capitol was in dire jeopardy on Mayday, the Rehnquist rationale is legally slovenly. Rehnquist would have us believe that government can commit countless violations and then sanction them by some flip post-facto improvisation.

Rehnquist was also a major strategist in the preparation of the controversial "no knock" and "preventive detention" provisions of the D.C. Crime Bill. He has strongly asserted a governmental right to fire employees, even if covered by civil service, when they question Administration War policies. Furthermore he has maintained that the executive has the right to engage in wiretapping and other electronic surveillance without court supervision as long as it claims a "national security" justification. If we contend that such unaccountable government powers might become a threat to individual liberty and privacy, Rehnquist tells us to rely on the "self restraint" of the Executive — which might be conceivable if we could forget that in recent years the Attorney General's arbiter on such matters was one William Rehnquist.

A Remarkable Fact

In only one area in all his career has Rehnquist shown any opposition to the extension of governmental powers. While an attorney in Phoenix he was a vocal and insistent opponent of legislation to outlaw racial discrimination in public accommodations. It is a truly remarkable fact, worthy of contemplation by the Senate, that nowhere in his extensive writings has he displayed a keen concern for any individual liberty except what he quaintly calls the "traditional freedom" to discriminate against blacks.

Rehnquist now says he has reconsidered his attitude toward the public accommodations ordinance of 1964; this is understandable since even Barry Goldwater endorsed it seven years ago and it has worked smoothly, contrary to Rehnquist's lugubrious expectations. Before we rejoice too readily, however, we should note that he has only endorsed the local ordinance, not the Civil Rights Bill of 1964, and that in 1965 and 1967, virtually alone among prominent Arizonans he opposed other civil rights legislation.

It would be easy to compile an equally disturbing record of Rehnquist's views on the role of the Senate in foreign policy. An exponent of what Senator Mathias calls the theory of the Optional Congress, he has seemed eager to eliminate what few powers Congress has managed to retain in this era of executive supremacy in the international realm. Suffice it to say that he has consistently and erroneously maintained that the President has the power under the Constitution to commit U.S. troops to war across national boundaries without seeking Congressional approval, and that possessing this power, the President

1971 ELECTION REPORTS

The End of the Southern Strategy

On the night after Election Day, 1971, a sheet metal worker who had come up from Arkansas many years before sat in a Northern Virginia restaurant and talked about his hero, Henry Howell.

"He's a wonderful man," said this white Virginian, telling how the members of his union local in the District of Columbia took up a collection for Howell earlier in the fall. "And you know what he did? He sent us a letter, saying he was going to bring more industry into Virginia, so we wouldn't have to go to D.C. to get work."

It was the kind of position that any Republican candidate could have taken — but across the South in 1971, others were saying and doing the things that won elections.

In Virginia, Henry Howell, talking about consumer protection, responsive government, and the "little man," reassembled the coalition that nearly won him the Democratic gubernatorial nomination in 1969 — blacks, poor whites, union members, urban liberals and young people — and was elected as an independent to the office of Lieutenant Governor.

Meanwhile, Howell's opponents — Republican George Shafran and Democrat George Kostel — alternated between talking about race and talking about nothing. Shafran, who had introduced an anti-busing bill in the last session of the state legislature, and Kostel, who had voted for it, harped on the issue that had traditionally been used to divide and distract Southern voters. But even in the year of the bus, with massive desegregation taking place in Richmond, Roanoke, Lynchburg, Petersburg, Alexandria, and his hometown of Norfolk, Howell — whose impassioned leadership had killed Shafran's bill — never wavered from his strong support for civil rights. Nevertheless, his coalition held together.

Holton Vindicated

Howell's victory thus could be viewed as a vindication of the racial moderation espoused by Republican Governor Linwood Holton, even though the Holton-backed candidate, Shafran, ran a poor third in the balloting. After all, it was essentially the Howell coalition, plus traditional Republicans, that elected Holton in 1969. But Virginia Republicans will never reclaim that

coalition if, like Shafran, they deliberately alienate the state's black voters while ignoring the real needs and interests of most of their white constituents.

Last Hope

Meanwhile, the last hope that white Southern Democrats would flee to the GOP was laid to rest in Mississippi, the only place where such a development was ever even remotely possible. Democrat William Waller, with only black independent Charles Evers for opposition, eschewed the racism that might have been expected and mounted a moderate campaign that brought him a remarkable 75 percent majority including both blacks and whites. Waller seems certain to reunite the black and white factions of the Mississippi Democratic party, perhaps before the 1972 election, leaving the Mississippi GOP more of a minority than ever.

In Florida, the voters vindicated Democratic Governor Reubin Askew's judgment that responsive government, not race, was the major concern of Floridians. Askew's proposal for a corporate income tax — the foundation of his 1970 cam-

paign and his program for the state — was tested at the polls. In an election with almost nothing else on the ballot, some 40 percent of the state's voters turned out and approved the corporate tax by more than a 2-to-1 margin. The result meant that the state of Florida might at last provide government services commensurate with its wealth.

Askew's vote of confidence, Howell's coalition, and even Waller's moderate majority might have been achieved by Republican candidates or office-holders; the opportunities have been present for some time, and seizing them would not have meant violating any traditional Republican principles, only the latter-day tenets of the Southern strategy such as racism, elitism, and extreme solicitude for the Southern business establishment. The scattered returns from the 1971 elections suggest that the GOP has totally misread the forces at work in Southern society, and that the party may have forfeited political control of the region to a new generation of leaders, mostly Democrats, who have perceived and sought to meet the real needs of its citizens.

Convention City

Wilson Wins Mayoralty

San Diego, now California's second largest city and the site for the 1972 GOP national convention, elected a new mayor November 2, as Pete Wilson, a moderate three-term Assemblyman, amassed over 60 percent of the vote against ex-City Attorney Ed Butler, a Democrat. Wilson, an ex-Marine, who is young-looking for his 38 years, appealed to voters tired of the rate fixing scandals that implicated incumbent mayor Frank Curran last year. Butler, as city attorney, had successfully defended the indicted city officials.

Wilson's victory automatically makes him a major figure in statewide Republican circles — and perhaps a threat to veteran conservative Republicans who have their eyes on the governorship and other statewide offices.

Wilson has been a rising star in the California GOP since his elec-

tion to the legislature in 1966. After graduating from Berkeley Law School, he served as a campaign aide to Richard Nixon in his bid for the California governorship. Wilson then held positions on the State and San Diego County GOP Central Committees. In the legislature, he has been a leader in environmental protection legislation — spearheading a campaign for the preservation of the California coastline by creation of a coastal commission which would act as overseer for all coastal development. Wilson serves on the President's Citizens Advisory Commission on Environmental Quality.

In addition, he served as the chairman of California's first legislative committee devoted to housing and urban affairs and introduced the Factory-Built Housing Law which now serves as the model legislation for the nation.

People in Politics

● George Romney has reiterated his commitment to an open communities policy. In responding to the October FORUM analysis of his tenure at HUD, Romney said, "The President's policies will not tolerate racial discrimination in housing direct or indirect and call for the use of housing progress to overcome the effects of past and present discrimination." Several weeks later, Romney outlined his goal to disperse federally subsidized low income housing throughout metropolitan Washington, D.C. in a speech before the area's Council of Governments.

● Long-time National Committeewoman, **Tina Harrower**, 45, intends to resign shortly. Mrs. Harrower was a Rockefeller delegate in 1968 and a leading moderate in the state of Connecticut. Connecticut Senator **Lowell Weicker's** choice for the interim appointment is **Babette Ransohoff**, 67, of Stamford, the woman Mrs. Harrower replaced in 1965. Weicker's choice surprised many Connecticut moderates since Mrs. Ransohoff was a Goldwater delegate in 1964.

● **Jack Kemp**, the freshman Republican Congressman from Buffalo, is already looking over **Jacob Javits'** Senate seat. In October, Kemp held a gala \$100 a plate dinner in his own honor. Over 1200 people attended, and it's hard to believe that the whole kitty will go into a mere Congressional campaign. Guest speaker was **Spiro Agnew**, who called Kemp "one of the brightest stars in Washington and for whom I predict an exciting and brilliant future." The future: if Javits retires in 1974, look for Kemp to be a candidate for the Senate nomination.

● **James Edwards** has replaced **Howard Cohen** in HEW as the Deputy Assistant Secretary for Legislation. Edwards will be responsible for HR 1, the Administration's welfare reform proposal. Cohen has moved over to the Environmental Protection Agency to be head of legislative liaison there.

● Senators **Kennedy** and **Jackson** and **Muskie** and even Mayor **Lindsay** came to Buffalo to campaign for the city's Democratic mayor, **Frank A. Sedita**, who was running for Erie County Executive against youthful Republican **Edward V. Regan**. The voters, however, were unimpressed with the big names and gave the election to Regan, who hopefully will give GOP moderates a power base in the western end of the state.

● Postmaster General **Winton Blount** has resigned — probably to join in a three-way GOP Senatorial primary in Alabama. The May primary (the first in recent history for the GOP) already has two entries: **James D. Martin** — elected to the House in 1964 as a Goldwater Republican, loser in a bid for the governorship in 1966 — and **Bert Nettles**, a 35-year-old moderate Republican state representative from Mobile. In a three-way race, Blount would probably occupy center ground.

● President Nixon's China policy is overwhelmingly favored by the nation's corporate executives, according to the Gallagher President's Report, except that 87.5 percent would go further than the President in liberalizing trade with China and other Communist countries. At a time when the Gallup poll for the first time shows a Democratic plurality among businessmen and professionals, foreign economic policy may be an arena where Nixon could score points with this influential segment of the electorate, if he can overcome the new mercantilist sentiments in the Treasury Department.

In this regard it is important to note that the business press, including **Fortune** and the **Wall Street Journal**, strongly advocate early removal of the 10 percent import surcharge. **Fortune's Sanford Rose** and former Kissinger aide **J. Fred Bergsten** believe that the Administration overstated the crisis in our trade balance, which was artificially exacerbated by businesses anticipating the dock strike and trade and monetary restrictions. One of the dangers, it is said, is that the Treasury analysis could become a self-fulfilling prophecy as other countries adapt to new competitive conditions while the U.S. insulates its inefficiencies.

Meanwhile, in the November 8 **Wall Street Journal**, **Hubert Humphrey** made an incisive pitch for

free trade and an understanding approach toward Japan which must have shaken some of his labor support.

● **Constance Dean Armitage**, 51, of Spartanburg, South Carolina is the new president-elect of the National Federation of Republican Women. At the 1968 national convention, Mrs. Armitage was Senator **Strom Thurmond's** floor manager and worked with **Thurmond** and Senator **John Tower** on the platform committee.

● As Congressman **Paul N. ("Pete") McCloskey** moves up in the New Hampshire polls (28 percent of Republicans now prefer him to Nixon in Manchester, compared to 3 percent name recognition just two months ago), the President's advisers are at last considering strategies of response. One close Presidential assistant declares that if McCloskey's intense campaigning succeeds in New Hampshire, Nixon will enter every primary across the country to prove his broad appeal.

● On resigning as New York City's deputy mayor, **Richard R. Aurelio** made it clear that if **John Lindsay** did not accept his predetermined recommendation to seek the presidency, he would shift and work for another Democratic presidential candidate. It would appear that for the last year, Aurelio was using **John Lindsay** to realize his own ambition.

● The former director of HEW's Office of Civil Rights, **Leon E. Panetta**, has resigned from the Lindsay administration. Panetta, who was Executive Assistant to the Mayor for Intergovernmental Relations, was unable to find his own niche in the city government, and reportedly felt that the other mayoral assistants were interested only in getting a certain Democrat into the White House by 1972. Panetta will now turn his talents to a Southern California law practice and to setting up a nationwide Children's Legal Defense Fund.

● Conservative **John Birch Society** Republican **John G. Schmitz** — President Nixon's own congressman — has suspended support of the President over the Peking visit and is working to take an unpledged California delegation to the 1972 GOP nominating convention.

Minnesota Dinner

The sponsors of Ripon's Ninth Anniversary Dinner, to be held in Minneapolis December 4 are: **Olyde Allen**, city councilor, Bloomington; **Judson Bemis**, president, Bemis Company, Inc.; **Mildred Benike**, former 2nd District chairwoman; **Rudy Boschwitz**, national committeeman; **Ben Boo**, mayor of Deluth; **Pierce Butler III**, a St. Paul attorney; **Aubrey Dirlam**, speaker of the House of Representatives; **George Dixon**, president of the First National Bank of Minneapolis; **Arlan Erdahl**, Secretary of State; **William Frenzell**, U.S. Congressman, 3rd District; **James G. Goetz**, former lieutenant governor; **Phillip Harder**, former president of the Minneapolis Urban Coalition; **Douglas Head**, former Attorney General; **Mary Hoffman**, former president of the National Republican Workshop; **Stanley Holmquist**, majority leader, State Senate; **David Krogseng**, State Republican Chairman; **Alf M. Landon**, presidential nominee, 1936; **Ernest Lindstrom**, majority leader, State House of Representatives; **Rhoda Lund**, national committeewoman; **Jeanne Luukinen**, Secretary, Minnesota Republican Party; **Malcolm Moos**, president, University of Minnesota; Senator **Robert Packwood**; State Senator **George Pillsbury**; Senator **Richard Schwelker**; **Edson W. Spencer**, executive vice president, Honeywell, Inc.; **Emily Ann Staples**, co-convenor, Minnesota Women's Political Caucus; **Lu Stocker**, chairwoman, Minnesota Republican Party and **Wheelock Whitney**, president, Dain, Kalman and Quail, stockbrokers.

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