

Character Assassination

With the debate over and President Nixon's Supreme Court nominees confirmed, it seems to us a few words ought to be said about the tactics used in the attempt to defeat William Rehnquist.

By the end of the debate it was clear the critics had failed to make a persuasive case, or even a respectable one. The Senate that had defeated two of Mr. Nixon's previous nominees approved Mr. Rehnquist by a vote of 68 to 26. One reason the critics came up with such a bad case is that instead of sticking to the true reasons for their opposition they offered a series of expedient arguments that quickly collapsed.

The chief counts against Mr. Rehnquist were that he is not only conservative but young and able. Thus he is likely to help lead the court in directions other than those favored by his critics. Beyond this particularly brazen consideration, though, there were honest feelings against Mr. Rehnquist that could have been forged into respectable arguments.

To the critics, Mr. Rehnquist seemed ideological in a way that Lewis Powell, his companion nominee, was not. They felt that while Mr. Powell had conservative instincts there were enough deviations in this pattern to suggest independence of judgment. Since Mr. Rehnquist's issue positions were uniformly on the conservative side, and since he has been associated with the Mitchell-Kleindienst regime at the Justice Department, his critics felt he would treat issues reaching the court not with independent judgment but by mechanically applying an ideology.

This was the responsible case against Mr. Rehnquist, but it was not a persuasive enough case for his critics' purposes. There is, to begin with, a fundamental implausibility in first admitting his intellectual brilliance and then arguing he's a man without a mind of his own. A demonstrated history of ideological deviations is not a test nominees have been put to in the past, nor one all of the sitting Justices would pass. Mechanically ideological thinking is far easier to detect in your foes than in your friends, and each of Mr. Rehnquist's positions was in itself defensible.

So if Mr. Rehnquist was to be defeated, something more had to be found, and the search for scandal was on. People who have spent their lives climbing a wall every time the House Un-American Activities Committee published a list were suddenly alarmed because Mr. Rehnquist's name appeared on someone's list of an organi-

zation said to be a predecessor of the John Birch Society.

Mr. Rehnquist was said one day to have fought with demonstrators on the steps of the Arizona capitol, but the next day the fight evaporated into a decorous disagreement. Affidavits were sworn that Mr. Rehnquist, or someone who looked like him only without the glasses, harassed voters in Arizona during the 1964 election. A judge who was Mr. Rehnquist's Democratic opposite among Arizona poll-watchers wrote that the incident described occurred not in 1964 but in 1962, and that far from committing it Mr. Rehnquist deplored it. The critics objected that there may have been another incident in 1964 as well.

Finally a memo appeared arguing against overturning school segregation, initialed by Mr. Rehnquist when he was a clerk to Justice Robert Jackson back in 1952. Mr. Rehnquist said the views were not his own, but the tentative views of Justice Jackson himself. His opponents argued that's not what the text of the memo sounded like to them.

Justice Jackson's other clerk of the period volunteered that the memo had been requested by the Justice to balance an earlier anti-segregation one, and that at the time Mr. Rehnquist personally favored the precedent-making ruling against segregation. On the basis of the differences in these two accounts of what happened 19 years ago, Senator Bayh argued that the Senate should delay confirmation and inquire into Mr. Rehnquist's honesty.

Now, obviously the Senate has a duty to examine the backgrounds and views of Supreme Court nominees, and those who oppose a nominee have every right to press what they consider searching questions. Still, if we care about maintaining some respect for American institutions and those who run them, and if we care about maintaining a civilized public discourse, then there are certain standards of propriety and responsibility a man's critics ought to observe. If they are to charge a scandal, for example, they ought to be sure enough of their grounds that the charge will have a half-life of more than 24 hours.

Rummaging through a man's background searching for episodes that can be wrenched out of all context and blown out of all proportion, presuming him guilty until proven innocent of any accusation from any quarter, trying to create an atmosphere in which a corroboration of his account can be seen as an indictment—these are not unfamiliar tactics. Indeed, in the past they have been given a name, to wit, character assassination.