# Department of Justice

STATEMENT BY

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before the

SENATE JUDICIARY COMMITTEE

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From the earliest years of the Union, Presidents have nominated and the Senate has confirmed persons to high office where no vacancy existed at the time. Now these powers of the President and the Senate have been questioned.

The Constitution, the laws made in pursuance thereof, the decisions of courts construing both, the time honored practice of virtually every President and the Senate then serving and the basic needs of effective government demonstrate beyond question the power does exist.

Article II, Section 2, Clause 2 of the Constitution provides the President

> "... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers

of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; ..."

Since ratification of the Constitution, Presidents have frequently and as a preferred method in the interest of continuity in government nominated persons to every position so defined in the Constitution while an incumbent served until his successor could relieve him of the duties of office. The Senate has not questioned its power to confirm.

Every sound principle of political science compels the conclusion that interuption of government is wrong and inimical to the public interest. It was never moreso than in our time. Is the post of Ambassador to a major power so insignificant that our system should inflict upon itself the necessity of periods perhaps months in duration without presidential representation? And what of the Chief Justice of the United States? What theory of government would require vacancies in that high post and for what purpose? Is justice of so little value that we force ourselves to wait longer than nature ordains? Senator Hruska is right, "There must always be a Chief Justice."

The Congress has provided methods by which justices and judges of federal courts may elect to retire. By letter dated June 13, 1968, Chief Justice Warren notified the President:

> "Pursuant to the provisions of 28 U.S.C., Section 371(b), I hereby advise you of my intention to retire as Chief Justice of the United States effective at your pleasure."

The Chief Justice chose as a matter of right thus to retire. The statute creating this right provides:

> "The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires."

President Johnson, noting his deep regret, advised the Chief Justice by letter of June 26, 1968.

> "With your agreement, I will accept your decision to retire effective at such time as a successor is qualified."

By return telegram, the Chief Justice acknowledged the President's "letter of acceptance of my retirement," expressing his appreciation of the President's warm words.

The same day the President sent to the Senate the nominations of Associate Justice Abe Fortas to be Chief Justice of the United States vice Chief Justice Warren and of Judge Homer Thornberry to be Associate Justice of the Supreme Court vice Justice Fortas.

A major part of all the actions of our government through its history in both the executive and judicial branches have been under the authority of persons nominated and confirmed for offices still occupied by their predecessors. Scores of judges have ruled on the rights of our citizens, affecting their life, liberty and property, who were confirmed by the Senate for judicial position held by another at the time. Will anyone be heard to say all of these acts are void?

The most recent, as illustration, is the honorable James McMillan, United States District Judge for the Western District of North Carolina. Judge Wilson Warlick of that District advised the President by letter of February 24, 1968 of his election to retire

upon the appointment and qualification of his successor. With the strong recommendation of Senator Ervin, President Johnson nominated James McMillan to succeed Judge Warlick on April 25, 1968. The Senate duly confirmed and President Johnson appointed Mr. McMillan on June 7. Judge Warlick continued to serve as the active United States District Judge until his successor qualified by taking the oaths of office on June 24, 1968.

This procedure has been clearly understood and practiced throughout our history as a nation. In Marbury v. Madison, 1 Cranch 137, 155-157 (1803) the Constitutional appointment process was explained as consisting of three major steps:

> The nomination by the President.
>
> The Senatorial Advise and Consent and;
>
> The appointment by the President, of which the Commission is merely the evidence.

Each is essential to assumption of authority as is the final step to qualification, taking the oath of office.

The first volume of the Executive Journal of the Senate which covers the years 1789 through 1805 contains a variety of

instances in which the Senate confirmed nominees to positions where no vacancy existed at the time. Surely we would not repudiate so wise and beneficial a method in 1968.

The Supreme Court has on a number of occasions approved this interpretation of the Constitution so consistently followed by Presidents and the Senate. There is a series of cases where the President has nominated and the Senate confirmed executive appointments to positions occupied by others which hold the office to be automatically vacated upon the qualification of the successor. McElrath v. United States, 102 U.S. 426; Blake v. United States, 107 U.S. 227; Mullan v. United States, 140 U.S. 240.

Recently, in connection with a nomination elevating a judge to a higher court and a simultaneously submitted nomination designed to fill the vacancy caused by that elevation, the Senate confirmed the nomination to the lower court before that of the judge who was to be elevated. These were the nominations, dated October 6, 1966, of John Lewis Smith, Jr., Chief Judge for the District of Columbia Court of General Sessions, to the United States District Court for the District of Columbia, and of Harold H. Greene, vice John Lewis Smith. 112 Cong. Rec. 25524. The confirmation of Judge Greene

occurred on October 18, and that of Judge Smith on October 20. 112 Cong. Rec. 27397, 28086.

Another interesting illustration of the desired flexibility provided by this historic practice occurred in connection with the retirement of Circuit Judge Barrett Prettyman. The original letter of retirement, dated December 14, 1961, merely stated

> "I simply hereby retire from regular active service, retaining my office."

President Kennedy "accepted that decision" on December 19. On December 26, however, the President expressed the hope to Judge Prettyman that he would

> "continue in regular active service on the Court of Appeals for the District of Columbia until your successor assumes the duties of office."

On January 2, 1962, Judge Prettyman advised the President that he was "glad to comply with your preference in respect to the date upon which my retirement takes effect. My notice to you was purposely indefinite."

The history of the Supreme Court includes a number of examples in which Justices and Chief Justices were nominated and confirmed for positions on the Court which were not as yet vacant.

Mr. Justice Grier submitted his resignation on December 15, 1869, to take effect on February 1, 1870. President Grant nominated Edwin M. Stanton in his place on December 20, 1869. Stanton was confirmed and appointed the same day, and his commission read to take effect on or after February 1, 1870. However, due to his death on December 24, Stanton never ascended to the Bench.

Mr. Justice Shiras submitted his resignation to take effect on February 24, 1903. On February 19, President Roosevelt nominated (a) Circuit Judge Day to Associate Justice of the Supreme Court, vice Mr. Justice Shiras; (b) Solicitor General Richards to be Circuit Judge, vice Circuit Judge Day; and (c) Assistant Attorney General Hoyt to be Solicitor General, vice Solicitor General Richards. All three nominations were confirmed on February 23, one day prior to the effective date of Justice Shiras' resignation.

On September 1, 1922, Associate Justice Clarke tendered his resignation as of September 18. On September 5, President Harding nominated George Sutherland to succeed Mr. Justice Clarke. The Senate confirmed his nomination on the same day. The records of the Department of Justice indicate that Justice Sutherland's commission was dated September 5, 1922, "commencing September 18, 1922."

On June 2, 1941, Chief Justice Hughes announced that he would retire from active service on July 1. On June 12, President Roosevelt nominated Associate Justice Stone to be Chief Justice, and Robert H. Jackson "to be an Associate Justice of the Supreme Court, in place of Harlan F. Stone, this day nominated to be Chief Justice of the United States." The Senate confirmed Chief Justice Stone's nomination on June 27, and Associate Justice Jackson's nomination on July 7.

Mr. Justice Gray notified President Theodore Roosevelt on July 9, 1902, that he had decided to avail himself of the right to resign at full pay, and added:

"***I should resign to take effect immediately,

but for a doubt whether a resignation to take

> effect at a future day, or on the appointment of my successor, may be more agreeable to you."

In accepting the resignation on July 11, 1902, President Roosevelt stated:

> "If agreeable to you, I will ask that the resignation take effect on the appointment of your successor."

On August 11, 1902, President Roosevelt appointed Oliver Wendell Holmes, Jr., to succeed Justice Gray. The Congress was in recess. Holmes chose not to serve under the circumstance. Justice Gray died in September and the President nominated Holmes on December 2, 1902, the day after the Senate reconvened. He was confirmed December 4.

The manner in which retirement has been effected has varied. Many, perhaps most in recent years, have provided the important opportunity for continuity in office. The method which best serves the public interest is retirement at the pleasure of the President. The different phrases used to accomplish this are as many as the scores of judicial positions which have been filled this way. No problem has ever arisen over the language chosen.

We should encourage retirements which offer continuous service in the judiciary. Justice is served. Our Constitution, our statutes, our historic practice and effective justice all commend it.