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THE SUPREME COURT, THE PRESIDENT AND CONGRESS *

By

WILLIAM F. SWINDLER †

1. THE COURT AS PART OF THE AMERICAN POLITICAL PROCESS

WITH the selection of Richard M. Nixon as President of the United States in 1968, the role of the Supreme Court in the American political process has become a subject of discussion more fervid than at any time since the crisis of the New Deal 30 years ago. There has indeed traditionally been an elaborate and self-conscious protestation that the judicial branch of the government in the United States was by definition distinguishable from the legislative and executive branches by the fact that it was entirely non-political. As early as 1803, Chief Justice John Marshall declared: "The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."¹ The fact that Marshall in this famous case then proceeded to inquire into that very matter, did not deter his successors from compounding the fiction. "It is the province of a court to expound the law, not to make it," said Chief Justice Roger B. Taney in 1849.² As late as 1936 Justice Owen J. Roberts added:

It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . This court neither approves nor condemns any legislative policy.³

Not only has all this been a manifest case of protesting too much, but there have been at least an equal number of jurists who have taken the opposite view. In the twentieth century, these expressions

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¹ *Marbury v. Madison*, 1 Cranch 137, 170 (1803).

² *Luther v. Borden*, 7 Howard 1 (1849).

³ *United States v. Butler*, 297 U.S. 1, 62 (1936).

may be dated from Justice Oliver Wendell Holmes' well-remembered comment that the Fourteenth Amendment to the Constitution "does not enact Mr. Herbert Spencer's *Social Statics*," in cases of that date challenging the government's efforts to assert an authority to cope with some of the depredations of *laissez-faire* capitalism.⁴ Twenty years later Professor Felix Frankfurter was to observe that "when members of the Court decide [major cases] they move in the field of statesmanship."⁵ Twenty years after that, Attorney-General Robert H. Jackson was to write:

[By] 1933, by the efficacy of its words, the Court had not only established its ascendancy over the entire government as a source of constitutional doctrine, but it had also taken control of a large and rapidly expanding sphere of policy. . . .

This political role of the Court has been obscure to laymen—even to most lawyers. Its members . . . have generally abstained from party politics. It speaks only through the technical forms of the lawsuit, which are not identified with politics in its popularly accepted sense.⁶

American Presidents and presidential candidates have usually tended to follow the genteel tradition and—at least in their public statements—to preserve the fiction that the highest court in the land functioned in a political vacuum. Even the two Roosevelts, whose legislative reforms were buffeted and frequently wrecked between the Scylla and Charybdis of a narrow and literalistic interpretation of the American Constitution in the eras of the Square Deal and the New Deal—even these Presidents avoided a confrontation with the court on these terms for as long as possible. Both were conspicuously silent on the subject in the electoral campaigns of 1904 and 1936. The second Roosevelt, when he eventually felt obliged to join the issue in the great judicial battle of 1937, lost both the battle and his effective control of Congress as a result—even though he may have won the war.⁷

American Congresses, on the other hand, have frequently challenged the court on the political field. The Judiciary Act of 1801, which postponed for a year the day of reckoning in *Marbury v. Madison*, was only the first of a number of instances. One need only recall the tampering with the composition of the court in the Reconstruction Era following the American Civil War, the New Deal crisis of the 1930s and the near-revolt of political conservatives over the so-called "Fifth Amendment" cases of the late 1950s. It was, in fact, the pivotal period in the modern history of the United States,

⁴ *Lochner v. New York*, 198 U.S. 45, 74 (1905).

⁵ *New Republic*, Vol. 27, p. 231 (July 27, 1921).

⁶ Jackson, *The Struggle for Judicial Supremacy* (New York, 1941), Intro., pp. x, xi.

⁷ Cf. Baker, *Back to Back: The Duel Between FDR and the Supreme Court* (New York, 1967), *passim*.

in the years from 1933 to 1937, which may be seen now, some 35 years later, to have dispelled the illusion (to the degree that it was ever generally believed) that the judicial branch of the American Government functioned in a political vacuum. Indeed, the frequency with which ideological combinations have changed in this period of slightly more than three decades—with President and Congress first united against an excessively conservative court, then the court and the President aligned against a frequently conservative Congress in the Truman, Kennedy and Johnson Presidencies, and again a conservative President and Congress confronting a liberal court in the Eisenhower years—is the best perspective in which to view the developing issues of the Nixon administration.

To recapitulate briefly the critical issue which had developed by the mid-thirties: The first New Deal Congress, called into special session in 1933 to pass emergency legislation striving to cope with an unprecedented economic crisis, had responded with statutory enactments unprecedented in themselves—defining sweeping governmental authority to regulate private economic activities which, according to prevailing constitutional adjudication, had theretofore been beyond the reach of public regulatory processes. Hastily drafted as the legislation was, and (in the opinion of some contemporaries) ineptly argued by government counsel in test cases which challenged the constitutionality of the legislation, it was all but predictable that the first New Deal statutes of this nature would run into disaster. In essence the statutes, defining a paramount legislative authority to cope with domestic economic questions, ran directly counter to prevailing Supreme Court doctrine that legislative authority was rigidly circumscribed by the literal wordage of the Constitution, and that private enterprise in general was insulated from surveillance and regulation by public authority.

This function of judicial review—the paramount prerogative of the Supreme Court to determine the validity of legislative or executive action on the basis of the court's interpretation of the letter and spirit of the written Constitution—is now taken for granted by virtually all schools of American political thought, whether conservative or liberal. Whether or not this is a rational proposition in the view of persons living under other constitutional systems, the central fact for the present exposition is that two political consequences derive from this function: The first is a judicial interpretation of constitutional wordage (that is more often general than specific) that will inevitably vary with the constitutional philosophy of the individual members of the court. This is reflected in the continuing debate over "strict construction" v. "broad construc-

tion" of the wordage. The second is a corollary of the first: if the prevailing construction of the constitutional wordage is politically unpopular, action of the "political" branches, the executive and the legislative, may aim at inducing the "non-political" judiciary to introduce a different construction.

These were the ultimate political issues with which Franklin Roosevelt grappled in 1937, and with which President Nixon has also sought to grapple in 1969 and 1970. In both periods, the Chief Executive has shown up rather poorly, as a heavy-handed and clumsy political vandal seeking to violate the sanctuary of a constitutional palladium. For it is necessary to understand that, however unpopular the Supreme Court's political decisions may be at any given time, there is a vast emotional residuum of American public opinion which opposes even the appearance of presidential (and, to a lesser degree, Congressional) invasion of a judicial sphere which, according to the insistent stereotype, is non-political.

This public persuasion accounts for the otherwise paradoxical fact that in 1937, even though the then recent opinions of the Supreme Court had been vehemently condemned in the press and in Congressional debate, the reaction against Roosevelt's so-called "Court Packing" bill was swift and sweeping.⁸ It also explains in part (although, as it will be pointed out subsequently, only in part) the condemnation in the United States Senate and in the public press of the more manifest politico-economic motivations in Nixon's attempt to place Judges Clement F. Haynsworth and G. Harrold Carswell on the court.

Congress—or, more particularly, the Senate which must confirm Presidential nominees to the federal judiciary—has its own view of its right of action with respect to the court. The filibuster against President Lyndon B. Johnson's proposal of Justice Abe Fortas for the position of Chief Justice in the summer of 1968 was undisguisedly partisan—or, nominally, bi-partisan, since the opposition was composed of Republicans sensing a change of administration in the fall elections and Southern Democrats hostile to the constitutional doctrines of the court, of which Fortas was then a member. Yet, the *Blitzkrieg* of publicity, with which the incoming Nixon administration quickly proceeded to drive Fortas from the bench in the spring of 1969, generated a political reaction in Congress—although the first Nixon Congress was not substantially different in composition from the last Johnson Congress.

Whatever else may have denigrated Judge Haynsworth's nomination, there is rather common understanding that a definite, if not a

⁸ Cf. Swindler, *The New Legality, 1932-1968* (New York, 1970), Chap. 3.

major factor was the zeal for retaliation on the part of Senate sympathisers with a "broad constructionalist" régime on the court which they considered to be in jeopardy. Conservative or politically centrist Senators joined the so-called "liberals" in sufficient numbers to defeat the President—and they did so because it was politically essential that they not appear to condone the anti-Negro and anti-labour positions which the active opposition managed to attribute to the candidate.⁹

The same degree of palpable political motivation may be discerned in the movement in the House of Representatives—the branch of Congress which has no part in the process of "advice and consent" to judicial nominations—to institute impeachment proceedings against Justice William O. Douglas. While much had been made of the callous insensitivity of Justice Fortas in the matter of alleged retainers as private counsel while a member of the bench, the application of the same moral condemnation to some of Judge Haynsworth's alleged activities and then the application of the same to Justice Douglas's retainers has in fact been a swinging of a political pendulum in diminishing arcs of credibility. (There is, indeed, another political convention in the United States in obeisance to the concept of the "non-political" nature of the judiciary, that the impeachment power of the legislature should not be used to compromise the independence of the judicial branch.)¹⁰

The Senate, indeed, has declined to give its "advice and consent" to judicial nominations by the President in approximately one out of five cases throughout American history.¹¹ Since the constitutional formula for filling positions on the bench is a precise application of the "check and balance" principle—first, Presidential nomination, then Senate confirmation and, finally, commissioning by the executive branch—this is a virtual invitation to the application of political considerations by one or both of the "political" branches of the Government.

Whether the considerations are political in a partisan or a philosophical sense does not alter the fact that the Supreme Court is involved in the political process as a whole. Economic predilections of the court of the 1920s and early 1930s were the real target of the Senate in its rejection of President Hoover's nomination of Judge John J. Parker in 1930; they were a substantial ingredient in

⁹ Cf. 115 *Congressional Record*, 10390-97 (Sept. 4, 1969).

¹⁰ Justice Samuel Chase (1796-1811) was brought to trial under the impeachment article in 1804, but his impeachment failed by four votes of the necessary majority. Cf. Warren, *The Supreme Court in United States History* (Boston, 1922), Vol. I, pp. 279-292.

¹¹ Cf. Swindler, "The Politics of 'Advice and Consent,'" 56 *American Bar Association Journal*, 533 (June 1970).

the fight against Fortas in 1968, against Haynsworth in 1969 and against Carswell in 1970. Parker and Haynsworth were charged with anti-labour and anti-Negro bias; Fortas was castigated for his support of opinions (most of which predated his coming to the court) asserting broad rights for criminal defendants against the prosecutorial process; and Carswell was the target of a series of charges adding up to mediocrity; as Senator William B. Spong of Virginia expressed it, "The South had been patronized in that the President offered a nominee who was less than qualified."¹²

The Senate, and rather often the House of Representatives as well, does not hesitate to discuss the propriety of judicial behaviour, as well as the popular acceptability of judicial interpretation of constitutional questions. In 1958, and again a decade later, there have been vigorous Congressional attempts to override specific decisions of the Supreme Court, either by re-enactment of the judicially invalidated laws or by constitutional amendment. Under the late Senator Everett M. Dirksen, a movement was launched, and came within a hair's breadth of success, to petition Congress for a constitutional convention which might well have sought to return the United States to the status it had had under the old Articles of Confederation. For the most part, however, the Congress has served as a buffer between the court and its critics, whether from the general public or from the executive branch. Unpopular decisions have been subjected to a storm of invective in the course of legislative debate, and then the subject has been dropped; or a long list of suggested constitutional amendments have been forwarded by constituents of members of Congress, introduced *pro forma* and then forgotten.¹³

The issue of court v. Congress v. President has nevertheless remained acute throughout the mid-twentieth century. In the spring of 1937, the court began recanting its previous narrow doctrine of legislative power. The first cases in effect administered a *coup de grâce* to the Roosevelt judicial reform bill, which the Senate by then had virtually emasculated. But in the following cases, it became evident that the court had made an almost total about-face (although it saved its own face by "distinguishing" the issues in the later cases which in actuality reversed or at least nullified the earlier cases).¹⁴ The court under Chief Justice Charles Evans Hughes, in the closing years of the 1930s, rejected the first premise of the constitutional rule which had prevailed for the previous half-century—

¹² Cf. *Time Magazine*, April 20, 1970, pp. 8-11.

¹³ Cf. Swindler, *Court and Constitution in the 20th Century* (New York, 1969, 1970), Appendix B in each volume.

¹⁴ Cf. Swindler, *The New Legality*, Chap. 4.

the rule of narrowly circumscribed legislative power—and affirmed the opposite rule of broad power. Stated another way, the old *laissez-faire* court had viewed the capacity for action in Congress or state legislatures as limited to specifically permitted authority spelt out in the federal or state constitutions; the post-*laissez-faire* court had viewed the competence of legislatures as plenary, only limited by certain specific restraints set out in terms in these constitutions.

Once the first premise had been reversed, as it was in the constitutional decisions from 1937 to 1941, it followed that a long line of specific cases, which depended for their own validity upon the original premise, were now to be overturned. This was the business of the court during the Chief Justiceship of Harlan F. Stone, roughly corresponding to the period of the Second World War. The result was a violent public outcry, echoed in Congress, against what appeared to be a reign of intellectual anarchy in constitutional thought—even though the court under Stone, applying the logical consequences of the New Deal revolution under Hughes, was actually to be seen in retrospect as substantially consistent in its course.¹⁵ President Harry S. Truman, reacting to the alarmist sentiment and attempting, as Nixon today is attempting, to dampen down the volatility of the court, chose as his nominees for the bench a series of candidates who (except for Justice Tom C. Clark) were of a level of mediocrity well calculated to frustrate any innovative capability of the bench for the next several years.¹⁶

The result, by the time of Chief Justice Fred M. Vinson's death in 1953, was a pent-up zeal for what has come to be called "activism" in constitutional thought. The poles of jurisprudence on the post-1937 court, which manifested themselves during Stone's administration, were not conservative v. liberal in the old *laissez-faire* sense but rather schools of "judicial restraint" established and epitomised by Justice Frankfurter, and of aggressive construction which ultimately treated most of the provisions of the Constitution as virtually self-executing—this school led by Roosevelt's early appointees, Justices Hugo L. Black and Douglas, augmented by President Dwight D. Eisenhower's appointees like Chief Justice Earl Warren and Justice William J. Brennan, and by the appointees of Presidents John F. Kennedy and Johnson like Justices Arthur Goldberg and Fortas and Thurgood Marshall.

To say that the court, since 1937, has been committed con-

¹⁵ *Id.*, Chaps. 6, 7; Mason, *Harlan Fisk Stone, A Pillar of the Law* (New York, 1956), Chaps. 34-38.

¹⁶ *Cf.* Swindler, *The New Legality*, Chap. 8.

sistently to broad construction is only to reassert that it has been committed to a view of American political and economic life which inevitably has direct political consequences. In the cataclysmic trilogy of decisions of the Warren court—asserting a constitutional policy of racial equality in default of any legislative declaration, defining a rule of electoral equality in the face of legislative inaction, and providing a basis for equality of treatment of defendants in the face of contrary procedural tradition¹⁷—the very foundations of American political and social organisation have been shifted, as fundamentally as they were shifted in 1937, with the rejection of the old *laissez-faire* rule of law.

What gives all of this a particular significance in the administration of President Nixon is a combination of circumstances. There is, first of all, the restiveness of contemporary segments of society, not only in the United States but generally throughout the world. This has produced two poles of popular opinion, one urging ever wider-ranging action *encouraged* by the recent tenor of constitutional decision, the other demanding a curtailment of such action to overcome the instability which is *blamed* upon the recent tenor of constitutional decision. As a consequence of this dichotomy or ambivalence there is, secondly, the fact of the election of a President (by a very narrow margin) by the advocates of curtailment—with the result that Mr. Nixon has subsequently sought to consolidate his position by accommodating the viewpoint of his tenuous majority (which has not been a majority at all in the first session of the present Congress). And finally there is a fact which is overlooked by the general observer but is probably not without substantial significance—and that is, that Mr. Nixon is the first President since William Howard Taft who applies to the question of judicial selection the standards of an active and experienced member of the legal profession.

All of these factors, taken together, help to explain the position of President Nixon in respect of the Supreme Court and the current state of constitutional doctrine. They certainly go a long way toward explaining his spectacular failures in respect of the solicited “advice and consent” of the Senate, and the Congressional disregard of his views on the constitutionality of such enactments as the bill establishing the 18-year level for the voting franchise, to which later reference is made.

¹⁷ Swindler, “The Warren Court: Completion of a Constitutional Revolution,” 23 *Vanderbilt Law Review*, 205 (March 1970).

2. PRESIDENT NIXON AND CONGRESS ON COURT AND CONSTITUTION

Concerning American constitutional law and the Supreme Court of the United States, there is a certain folklore which cannot even be dignified as convention, but is pretty much mythology. The theory that judicial interpretation of the Constitution of the United States neither affects, nor is affected by, the climate of political and economic concern is one such myth. The theory that members of the court are selected by Presidents without regard to their political or economic beliefs is contradicted by an opposing theory that men, once they are appointed to the bench, often change from conservative to liberal viewpoints, or vice versa. (Both of these theories also are myths.) There is the theory that a "strict construction" or a "broad construction" of the words of the Constitution will bring about whatever state of affairs the speaker has in mind when he uses these words. More on this in a moment.

But the most obsessive myth so far as constitutional conservatives are concerned, and the theory which can seriously handicap a President like Nixon in his search for potential jurists, is epitomised in the catchphrase of "prior judicial experience." For American conservatives, this amounts virtually to a talisman; for them, it is an axiom that a man who has been seasoned by some years of experience on a lower court—an intermediate court of appeals or a trial court, usually in the federal judicial system but alternatively the high court of a state—will be a "strict constructionist" or at least will apply the Frankfurter ideal of "judicial restraint" to his work and thus will not be innovative. Such an appointee to the Supreme Court, the conservatives argue, will "confine himself to the letter of the Constitution" and by so doing will not find it possible to make "judicial amendments" to the Constitution.

In an attempt to document this argument, Senator James O. Eastland of Mississippi several years ago read into the *Congressional Record* a tabular summary of the "prior judicial experience" of all Justices of the Supreme Court up to that time. This compilation, prepared by the Legislative Reference Service of the Library of Congress, was impeccable in detail and highly informative—but its value for the conservative argument was at best minimal. In order to draw a conclusion from the data, one necessarily had first to define (at least in his own mind) criteria for the "good" jurists throughout the history of the court, and then criteria for the "conservative" and "liberal" jurists among these. When these two subjective judgments had been made, the only objective conclusion which could be drawn was that the correlation between either "strict con-

structionists" or "broad constructionists" and "prior judicial experience" was hardly 50 per cent.¹⁸

The tabulation revealed that the Chief Justices throughout the nineteenth century had been without this talisman, as had such a renowned Associate Justice as Joseph Story. Against the extended prior judicial experience of a constitutional conservative like Justice Stephen J. Field could be placed the prior experience of Justice Oliver Wendell Holmes, while one of the longest records of such judicial experience in the twentieth century belonged to the brilliant liberal, Justice Benjamin N. Cardozo. On the court, as President Nixon found it in January 1969 when he took office, only one presumed "conservative," Justice Potter Stewart, had had any significant amount of earlier experience as a judge, while two of the "liberals," Justices Brennan and Marshall, had comparable records on lower courts.

In the course of his election campaign Nixon had spoken out several times on the Supreme Court and the trend of constitutional decision. In a television interview on October 3, the candidate said bluntly that the court had "gone too far" in imputing its own "social and economic views" to the rule of decision. He then coined his oft-repeated phrase about appointees who would henceforth "interpret the Constitution strictly and fairly," and leave law-making to Congress. A month later, on the eve of the 1968 election, Nixon criticised the court at length as being dominated by Justices who were unfamiliar with criminal law and procedure, as explaining why the court had developed its sweeping doctrines of rights of criminal defendants.¹⁹

As he took office in January 1969, Mr. Nixon already had his most important opportunity for Supreme Court appointment: Chief Justice Warren, having tendered his resignation the previous summer, had been requested by the incoming President to continue in office through the 1968 term of court ending in June 1969. Thus, rather conspicuously, the new President conducted his canvass for a new Chief Justice with criteria already widely publicised. He sought a man with previous judicial experience, who would be a "strict constructionist" or at least ideologically in the "middle of the road," and one who would organise a judicial effort to strengthen the forces of "law and order."

There is a certain amount of folklore, but substantially more substance, to the choice of a Chief Justice of the United States. While it is true that a Chief Justice has only one vote out of nine

¹⁸ 111 *Congressional Record*, 1905-6 (Feb. 3, 1965).

¹⁹ *New York Times*, Oct. 3; Nov. 2, 1968.

among a group of independent-minded colleagues, he is in fact the head of the entire federal judiciary and has been since the days of Chief Justice Taft. When he elects to read the opinion of the court in seminal decisions, he tends to be accepted in the popular mind as the spokesman for the court as an institution. This image is further enhanced when he speaks on the "state of the judiciary," as he does annually before such major professional groups as the American Law Institute and the American Bar Association.

There have only been 15 Chief Justices in American history, and no President other than George Washington has appointed more than one during his tenure—even Franklin Roosevelt, who was elected to four terms. Thus the selection of Warren Earl Burger to succeed Earl Warren gave Mr. Nixon an exceptional opportunity to focus public attention on the court and the men he sought to place thereon. That the President was fully cognisant of this opportunity was reflected both in the nationally televised announcement of Chief Justice Burger's selection and in Nixon's unprecedented appearance at the bar of the court in June on the occasion of Mr. Burger's swearing-in. The President in a tribute to the retiring Chief Justice further utilised the occasion to invite the public to a calmer retrospect on the chapter in judicial history which was then ending.²⁰

Whether the President got everything he said he was seeking in his new Chief Justice remains to be seen—few Presidents have, in fact. Theodore Roosevelt, in a familiar communication to Henry Cabot Lodge in 1902, probably had a more detailed list of requirements than most Presidents, and in setting them forth he made it clear that he considered the judiciary to be an integral part of the American political machinery. Roosevelt wrote:

In the ordinary and low sense which we attach to the words "partisan" and "politician," a Justice of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman; constantly keeping in mind his adherence to the principles and policies under which this nation has been built up, and in accordance with which it must go on; and keeping in mind also his relations with his fellow statesmen who in other branches of government are striving in co-operation with him to advance the ends of government.²¹

Justice Holmes, concerning whom the Roosevelt message had been so explicit on the eve of his appointment to the court, astounded the Rough Rider President in one of his first opinions as Justice. Dissenting in one of the "trust-busting" cases, Holmes warned

²⁰ Cf. proceedings reported in 90 Sup.Ct. 1-7 (1969).

²¹ *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge* (New York, 1925), Vol. I, p. 518.

against a zeal for quick reform by judicial decision which amounted to "a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend." To ride roughshod over legal rights of those who had flouted legal rights of lesser men, said Holmes, would mean "the universal disintegration of society into single men, each at war with all the rest."²²

President Nixon was similarly astonished when, in its opening opinion in the 1969 term, the Burger court speaking through the Chief Justice in a *per curiam* opinion summarily upheld the lower courts' order for prompt racial desegregation of public schools in the state of Mississippi.²³ On the other hand, the opinion in the Mississippi case might have been handwriting on the wall for the devotees of "strict construction"—for if "strict construction" means adhering to the precedents in constitutional law as in other areas of law, the precedents to be followed in matters of racial integration are almost entirely those of the Warren court from 1953 to 1969.

In any event, in Chief Justice Burger it has been rather evident from the outset that the President has found a leader of the federal judiciary, and perhaps of the entire American bar, in the tradition of Chief Justices Taft and Hughes. Mr. Burger's earnest and repeated calls for a simplifying and modernising of the whole of the American judicial process, both federal and state, have already stimulated more searching studies of existing state and federal court systems and procedures than have been conducted in the past 30 years.²⁴

While the selection of a new Chief Justice has become in retrospect one of Mr. Nixon's more fortunate decisions, the furious struggle between the White House and the Senate over the successor to Justice Fortas squandered much of the President's political capital. Interestingly enough, all sides conceded at the outset that the executive was entitled to choose men who would presumably accommodate his somewhat right-of-centre constitutional philosophy as well as the long-frustrated hopes of many others much further to the right. In the early fall of 1969 it seemed entirely reasonable to expect that any qualified nominee whose name Nixon submitted would receive the votes of most of the Republicans and the bloc of Southern Democrats—more than enough for the simple majority required for confirmation.

²² *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1903).

²³ *Alexander v. Holmes County Board of Education*, 90 Sup.Ct. 29 (1969).

²⁴ Cf. Burger, "No Man is an Island," 56 *American Bar Association Journal*, 325 (April 1970); "Proposal: A National Conference on Correctional Problems," 33 *Federal Probation*, 3 (Dec. 1969).

The prolonged and acrimonious contest which instead took place—not over merely the first but also a second nominee for the vacant position—revealed the depth of the political and ideological passions which had been aroused. Beyond any doubt, the unhappy memory of the double-headed Fortas affair was the root of the matter in the case of Judge Haynsworth's nomination. The liberals' resentment at the filibuster, which in 1968 had denied Fortas the Chief Justiceship, was only compounded by the disaster which befell Fortas in the spring of 1969. Whatever might have been the facts involved in the charges which poured out in a torrent of invective and innuendo from the Department of Justice, the truth was that Fortas was driven from the bench by the sheer decibels of accusation. In the shock of the bludgeoning thus administered, the liberals gradually regained consciousness to the sound of self-righteous trumpeting of all the court-haters of the generations since 1937.

Under the circumstances, it would have required a nominee of the stature of a Hughes or a Holmes to mollify the Senate—and Haynsworth, although a competent judge, was not of those proportions. Nixon had made much of his intention to nominate a Southerner—too much, indeed, for it alerted the ethnic lobbies in contemporary American politics to the possibility that the nominee might be chargeable with racial bias. While such charges were in fact quickly lodged, the opposition led by Senators Joseph Tydings of Maryland and Birch Bayh of Indiana probed elsewhere for the Achilles heel, and found it in the ethic which had been so remorselessly apostrophised in the Fortas affair. If the administration through the Attorney-General (who, for Nixon as for Eisenhower, was the official charged with leading the search for judicial candidates) was going to claim the level of circumspection that it said it had set *in re* Fortas, it would have to assume the risk that its own standard could be used against it.

And so it was, in both the Haynsworth and Carswell nominations. In both instances, political and ideological considerations could readily be subsumed under a bi-partisan colloquium affirming the proposition that candidates for the high bench were to be blameless in every detail of their careers. While this might prove to be a standard considerably beyond what was required of Caesar's wife, President Nixon sensed the political opportunism which lurked beneath the surface of the Senate opposition. Having already discarded the fiction that ideology was not a consideration in the choice of Supreme Court justices, the President blurted out his pique at the Senate, not once but twice. On the first occasion, in a letter to

Senator William B. Saxton of Ohio, Nixon complained that the Senate, in opposing Carswell, was denying him his constitutional right to have jurists of his own choosing on the court—a suggestion that Senate confirmation was essentially a formality. In the aftermath of Senate reaction to this indiscretion, and with the Carswell defeat added to his record, the President unburdened himself of a petulance mixed with bravado, in a press conference in which he declared he would await the day when a Senate would be elected which would not hesitate to confirm nominees like Haynsworth and Carswell.²⁵

Whether this was the “old Nixon” of 1960, which his legion of watchful critics are always seeking, or whether the press conference was an attempt at saving face, the result has been a self-conscious reiteration of the protestation of judicial ethic by both President and Senate. In view of the political and ideological interests lying so close to the surface, one may be permitted to doubt that this protestation is actually the paramount criterion in judicial confirmation. At the same time, the protestation has given both White House and Congress an opportunity to back off from their confrontation when the final nomination for the Fortas vacancy was sent to Capitol Hill. In Judge Harry A. Blackmun all parties discerned an acceptable record of competence and balance, and his confirmation proceeded without further incident.

3. THE COURT AND THE CONSTITUTION IN THE 1970S

Changes in administration, whether of American Presidents or American Chief Justices, do not always presage changes in national direction, whatever may be said by or about the principals in the roles. Of course, the appearance on the scene, at virtually the same time, of a moderately conservative President and a presumably non-activist Chief Justice of his own choosing, appears to forecast a significant shift in emphasis—particularly when the Chief Executive has consistently made such an issue of the necessity for a shift. Mr. Nixon, being a knowledgeable lawyer (despite some of his public statements uttered, one hopes, without considered analysis), presumably is aware that no spectacular reversal of constitutional direction is likely, much less desirable.

American constitutional law in the twentieth century has been divided into two broad eras. The first, actually beginning in the 1880s and expiring in 1937, was the era of *laissez-faire* dominance in constitutional as well as in economic thought. The second,

²⁵ *New York Times*, April 2, 10, 1970.

beginning in 1937 and continuing to the present, has been an era in which a consistent majority of the court has acquiesced in the principle of untrammelled legislative authority. The fundamental division within the court in this era has been between the advocates of judicial restraint, who contend that the court has done all that should be expected of it when it has assured the legislative branch of its power to act—and the activists who contend that the Constitution lodges a power of action somewhere in cases where the legislative or executive branch neglects to exercise the power and as a consequence established constitutional rights may languish.

The bankruptcy of *laissez-faire* economics in the Great Depression of the 1930s left little doubt in the minds of most objective scholars and all but the most reactionary lawyers and politicians that the constitutional jurisprudence based upon the presumed validity of that economics was also bankrupt. In the ensuing 30 years, a whole new generation of lawyers and jurists has come into its own; for them, talk of returning to something like the state of affairs before the New Deal is irrelevant. Political memory, especially for some Congressional chauvinists, may extend back before 1937, but professional legal memory dates substantially from 1953. In other words, it is the constitutional doctrines of the Warren court which may come in for judicial reassessment in the coming years.

But what this reassessment will actually mean, in terms of a withdrawal from advanced positions taken in the heyday of activism, is likely to disappoint the extreme conservatives. Of the three great constitutional propositions enunciated during the Warren Chief Justiceship, only the third appears to be liable to any substantial degree of qualification. The first, the assertion of racial equality before the law, is not only so fundamentally sound as to be beyond serious debate, but was in effect a belated judicial implementation of constitutional enactments of a century before.²⁶ Moreover, Congress has incorporated the basic principles set out in the desegregation cases in a succession of statutes of increasingly broad scope—which in turn have been broadly interpreted by the court.²⁷ Finally, there is the basic political fact of life, that no candidate for major public office outside of the most backward rural areas of the nation can expect to win a following in active opposition to the basic principle of racial equality guaranteed by law.

²⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁷ Cf. Civil Rights Acts of Sept. 9, 1957, P.L. 85-315, 71 Stat. 634; May 6, 1960, P.L. 86-449, 74 Stat. 86; July 4, 1964, P.L. 88-352, 78 Stat. 241; and Voting Rights Act of August 6, 1965, P.L. 89-110, 79 Stat. 437.

As to the second of the great trilogy of the Warren court—the principle of reapportionment which in the short course of 20 months altered the whole frame of reference for representative government in the United States²⁸—a desperate effort to frustrate the effect of these decisions appears to have lost its momentum. Members of Congress whose local power bases were in depopulated regions somewhat analogous to the old “rotten borough” issue in Britain, naturally reacted to the outraged cries of their few but long-entrenched constituents. Vested interests in state and local government, who persuaded themselves that the court in its reapportionment decisions had invaded an area totally outside the sphere of federal interest, organised a succession of proposals for constitutional amendment to reverse the decisions. Championed though these were by the late Senator Dirksen of Illinois, the proposals consistently failed of the necessary majority in the Senate. Thereafter came the most desperate effort of all—to prevail upon the states to petition Congress under a never-used section of the Constitution²⁹ to call a national constitutional convention on the subject of a reapportionment amendment.

Time may well have settled the issue by now. With most of the state legislatures having accepted the reapportionment doctrine and made, in many instances, quite drastic changes in the distribution of electoral districts, there is unlikely to be any genuine enthusiasm for a return to an American version of the “rotten borough.” Some legislatures have rescinded their original petitions; but the petitions which were presented to Congress were so disparate—and also so suspect, coming from malapportioned legislatures which had subsequently been altered—that it would be difficult to conceive of any unanimous sense in them. Finally, there is the fact that Congressional inaction on the matter could scarcely be made the subject of judicial compulsion.

Thus the second of the great constitutional innovations of the Warren court seems likely to pass into history to a steadily declining volume of discussion. The American people, it may be said, have adjusted themselves emotionally as well as politically to the fact of reapportionment rather more speedily than they have adjusted to the question of racial integration. The practical likelihood of reversal of national direction in either of these subjects, however, is minimal.

²⁸ *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964) *Reynolds v. Sims*, 377 U.S. 533 (1965).

²⁹ Art. V of the Constitution provides in part: “The Congress, . . . on application of the legislatures of two-thirds of the states, shall call a convention for proposing amendments. . . .”

There remain, then, the most emotionally volatile questions of all, in the area of constitutional rights of individuals who are defendants in criminal proceedings. With these decisions³⁰ the Warren court's activist majority reached its zenith—and provoked the loudest of all the outcries against the court itself. In part, this is probably to be accounted for by the fact that the decisions were handed down in a period in current history when social unrest in urban areas suddenly mushroomed into spectacular dimensions. The frustrated opposition to both the desegregation and reapportionment doctrines found in this phenomenon an opportunity to vent their protests against the constitutional doctrine broadening the rights of defendants and suspects.

Much of the urban insurrections of the mid-1960s occurred in Negro ghettos; those who were embittered at the desegregation doctrine but recognised the futility of opposing it found an outlet for their bitterness in decrying the judicial decisions allegedly hampering the police forces in dealing with the rioters. Most of the uprisings took place in the decaying centres of the great cities; accordingly, those who resented the reapportionment doctrine could campaign for more stringent criminal liabilities against those whose numbers had given them at least potential control of the electoral process.

Upon careful analysis, it can persuasively be argued that the fundamental constitutional doctrines of the defendants' rights cases are distinguishable from the problems represented in the wave of violence, substantially characterised by old-fashioned cases of common law crime, which has become one of the major critical issues of American life—the "law and order" issue on which both President and Congress are fairly well united. The elemental principle in the *Gideon* case that if defendants in any criminal cases are entitled to benefit of legal counsel then the fact of indigency could not deprive some defendants of such counsel—was as fundamentally, morally correct as the doctrine in *Brown v. Board of Education*. As an elemental principle, it could equally be conceded—as it was held in *Miranda*—that the indigent's right to such counsel began as early in the accusatorial process as any other defendant's right to counsel. Finally, as the majority said in *Escobedo* that right began at the precise point where the canvass of possible suspects came into focus upon one specific suspect.³¹

These three cases rather tidily define a basic constitutional theory

³⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966).

³¹ Cf. also Kamisar, "Dissent from the *Miranda* Dissents," 65 *Michigan Law Review*, 59 (Nov. 1966).

of criminal law. The difficulty with the theory has been twofold: In the first place, the harsh practicalities of applying the theory to a succession of particular issues has placed the court's commitment to equality of fundamental constitutional immunities athwart the time-honoured practices of prosecutors in wider and wider areas of law enforcement. More importantly, the basic propositions in *Gideon*, *Escobedo* and *Miranda* have been identified in the popular mind with what are actually unrelated factors contributing to the accelerating violence in urban society. In spite of sporadic studies tending to demonstrate that the fundamental rules on right of counsel and use of confessions have not in practice reduced the effectiveness of criminal investigation, vociferous critics of the court have insisted that these principles are inseparable from the whole body of decisional law explicitly defining the rights of accused and the limits to investigative and accusatorial procedures.

It is in this area of law, then, that specific revisions and qualifications of constitutional doctrines of the Warren era may be made by the Burger court. One may expect that the fundamental principle in *Gideon* will be considered as established; indeed, Congress itself in the Criminal Justice Act of 1964 made provision for the systematic appointment of counsel in indigency cases in the federal courts.³² At the same time, the points made in the eloquent dissents of justices like John Marshall Harlan, Stewart and Byron White in the defendants' rights cases—reflected in Congress' own mood in the Safe Streets and Crime Control Act of 1968³³—may provide the ultimate limits to the principle. More extreme propositions, like the Attorney-General's proposal for "preventive detention," have run into such vigorous criticism from even the conservatives in the Senate that it seems likely that the basic guarantees of the American Bill of Rights will be adhered to.

If President Nixon does in fact get the kind of a Supreme Court he says he seeks, its fundamental characteristic—and its fundamental difference from the Warren court—is likely to be a denial of the premise that any provisions in the Constitution are self-executing. This is simply to say that the school of "judicial restraint" founded by Justices Frankfurter and Jackson will probably regain ascendancy—if it has not already done so in the persons of the Chief Justice and Justices Harlan, Stewart, White and (from Nixon's viewpoint) presumably Blackmun. With the practical likelihood that two or three more appointments will fall to Nixon's lot, the probability is that "restraint" will be the keynote of the 1970s.

³² P.L. 88-455, 78 Stat. 552.

³³ P.L. 90-351, 82 Stat. 197.

As "strict constructionists," such a court will presumably stand by the precedents represented in the fundamental holdings in the landmark cases of the Warren years—in racial equality and in voter equality, and in the most elemental sense in equality of persons before the criminal law. But this is not to say that the fundamental holdings in these cases will not be substantially, even drastically, circumscribed, at least in respect of criminal law and the right of society to its own self-preservation.

In the recent enactment of a federal law lowering the voting age to 18 years, Congress has set the stage for a test of the new court's fundamental constitutional philosophy. Although Congress rejected President Nixon's protest that the altering of the electoral franchise could only be accomplished by constitutional amendment and not by statute, the final draft of the statute offered the opportunity for an expeditious test of the question.³⁴ Aside from the involved political strategies in the bill as it was then signed by the President—tying the voting age provision to an extension of the voting rights statute of 1965—and aside from the prospect that the government will not press over-zealously for the validity of the age provision in any constitutional test, the majority in the case (if such a case is entertained) *could* turn upon the prevailing constitutional theory in the court as it is then composed.

This is not to predict the outcome of any such case if it is adjudicated; the court might adhere to Frankfurter's fundamental admonition and avoid pronouncement of a general constitutional principle even while disposing of the simple question of legality. All that can be said at this premature stage is this: The Constitution in fact being silent on the specific question, an extremely narrow and "strict" construction might hold that Congress could not act until the silence had been broken by authorising action through formal amendment. Conversely, an opposite but not necessarily "broad" construction might hold that the age of a voter, being already established by statute, could be changed by simple statutory change—it need not be considered, in other words, analogous to either the Fifteenth or Nineteenth Amendments, which defined the generality of the franchise in terms of race and sex.

Another respect in which the Burger court may shift from the emphasis of the Warren court is in the piecemeal incorporation of guarantees of the American Bill of Rights into the restraints laid upon the states by the Fourteenth Amendment.³⁵ For one thing, this process of incorporation is now substantially complete; even

³⁴ P.L. 91-285, 84 Stat. 314.

³⁵ Cf. Swindler, "The Warren Court," at pp. 238-241.

the Warren court had had little remaining to be done in this respect, unless it took up Justice Douglas' suggestion that there were "penumbras" to the Bill of Rights which might be indefinitely extended.³⁶ In view of Justice Harlan's most eloquent dissents or separate concurrences in these cases—the general tenor of which was an endorsement of Frankfurter's refutation of the "incorporation" concept—the Douglas theory is unlikely to be pursued in the immediate future.

There may, indeed, be a calculated avoidance of emphasis upon the "equal protection" clause of the Fourteenth Amendment, through which the basic principles in the Warren court trilogy and its piecemeal incorporation of the Bill of Rights were effected. For the theory of the universality and absolutism of "equal protection" as the activists developed and applied it has as its fundamental premise the superiority of the relationship between the citizen of the United States and the Government of the United States—in contrast to the prior emphasis upon the primacy of the citizen's relationship to his state government. This duality of citizenship within the American Union—a concept so often puzzling to observers from abroad—attained major significance with the great expansion of Fourteenth Amendment application in the past decade: whereas, throughout most of American history, the individual was expected to look to the government of his own state for protection of fundamental rights, the activist emphasis upon the universality of federally-guaranteed fundamental rights has increased the tendency to rely upon the federal government for this protection—as protection against the states themselves, in fact.

The concern of many persons in Congress, as well as the President, at the apparent erosion of the federal-state relationship over the past 30 years will in all likelihood be reflected in the type of domestic legislation which may be enacted in the 1970s, and hence the type of legislative questions which may come on for review before the court. The present sequence of second thoughts (or, more accurately, third thoughts) on the constitutional amendment on the electoral college is a demonstration of the ambivalence of the present. If the absolute and universal validity of the principle of "one man, one vote" were accepted, as it has been accepted up to now by the activists on the court, the simple abolition of the electoral college and direct popular election of the President would be another of those pieces of tidy logic which characterised the "universal equality" doctrine of the Warren court.

³⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

But there are various reasons for the prolonged Congressional inaction on the question. One principal reason is the fact that American political life has made a pragmatic accommodation of the technicality of the electoral college: the two-party system of national government has in effect caused the letter of the constitutional formality to correlate with the capacity of the major parties to win majorities of the vote in individual states. In other words, the majority or even a plurality of the popular vote in any state captures the entire electoral vote. Against the argument that this may nullify the effect of a close popular vote and thus might conceivably result in the election of a Presidential candidate with less than a majority of the vote as between the major parties, there is now the argument that a worse evil might arise in the form of innumerable splinter parties which would accomplish this very fact.

Another, rather inchoate reason for hesitation on the electoral amendment may be traced to the matter of national citizenship once more. Direct popular election of a President of the United States by the people of the United States means one more step in the direction of orienting the citizen permanently toward the federal government—and one more step in the deterioration of the significant role of the states in the federal system in America.

The ultimate shape of constitutional doctrine in the Burger court of the 1970s cannot, of course, be predicted with any reasonable degree of validity on the basis of isolated opinions in the court's first term. The Mississippi school case, which at the time was treated as a sign of continuing judicial vigour in the enforcement of integration, actually was a simple declaration that a lower court order based upon a valid statutory formula was to be obeyed. A Maryland case, distinguishing between the expression of unpopular ideas which could be constitutionally protected and blocking of public ways in order to express the ideas, which could not, essentially continues the line of reasoning which had already been developed by Justice Black.³⁷ This was a unanimous opinion; another Maryland case, in which a five-to-three majority rejected a special lower court finding that a state limit on the amount of relief for which an indigent family was eligible violated the "equal protection" clause,³⁸ may be a straw in the wind. Another five-to-three division, on a New York case in which the majority held that juveniles as well as adult defendants are constitutionally entitled to invoke the standard of reasonable doubt in criminal proceedings,³⁹

³⁷ *Bachellar v. Maryland*, 90 Sup.Ct. 1312 (1970); cf. *Adderley v. Florida*, 385 U.S. 39 (1966).

³⁸ *Dandridge v. Williams*, 90 Sup.Ct. 1153 (1970).

³⁹ *Re Winship*, 90 Sup.Ct. 1068 (1970). But cf. *Dickey v. Florida*, 90 Sup.Ct. 1564 (1970).

may also be cited as a sign of increasing ambivalence on the general issue of defendants' rights.

Even so casual an observation as this, on a sampling of constitutional comment in the course of the first term of the Burger court, demonstrates the accepted fact of the judiciary's impact on contemporary political and social issues. It confirms the statement made by Chief Justice Stone: "When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."⁴⁰ That comment may come more often from the legislative than from the executive branch of the government, but the readiness of either of these branches to express itself on constitutional doctrines of what Professor Alexander Bickel has called "the least dangerous branch," may be the secret to the political equilibrium which the American version of separation of powers has maintained up to now.

⁴⁰ Quoted in *Report of Senate Judiciary Subcommittee on Separation of Powers* (91st Congress, 1st Session), Sen.Rep., No. 91-549, p. 7.