

Toward a Court That Permits Erosion of Rights?

By Flora Lewis

WHATEVER happens in the confirmation of William Rehnquist to the Supreme Court, a new period in the court's history has begun. President Nixon's appointments, and he may have more, indicate a clear trend toward reinforcing the power of government and weakening the defenses of the citizens against abuse of authority.

That is not conservatism. As former Justice Arthur Goldberg has pointed out, there is little likelihood that a Nixon court will overrule what social and economic changes may be brought in for judgment. That was what the stoutly conservative court did in President Roosevelt's early years, throwing out one law after another in a frenetic burst of judicial activism.

The court as it is developing isn't likely to be one that challenges the decisions of Congress and the Executive. On the contrary, it is likely to be one which passively permits continued erosion of the individual's rights.

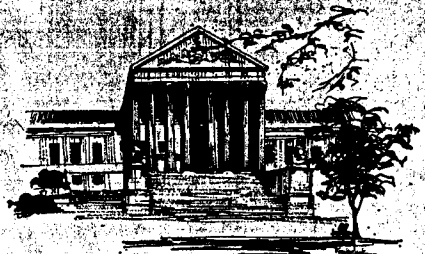
Goldberg, in a book about the court soon to be published, says the key to the most important cases in the coming era will be the Fourth Amendment, with its provision against "unreasonable search." That has not, in the past, been considered one of the most crucial constitutional guarantees. In a rural America, the right to privacy was almost self-enforcing. It took highly visible and energetic government action to violate the citizen's right to keep his affairs to himself. Technology and the sheer density of modern society have drastically changed that situation. Even as the cramped life of crowded cities makes the right to privacy increasingly precious, it is getting harder and harder to protect.

THE TWO most recent and most insidious weapons against privacy are the electronic bug, which can monitor people without even entering the building where they coo or quarrel, and the computer.

There used to be some protection for the citizen, who is any way obliged to give government masses of information about himself in the census, the income tax report, license applications and so on, in the fact that nobody was likely to take the trouble

to put it all together in a dossier unless he really drew attention to himself.

The computer's data bank now makes it possible for everything ever recorded about a person, from that wisecrack in the high school annual to the time he signed that petition because the girl who asked him was so pretty, to be collected and read in a moment. The computer makes it possible for the government to have quickly available dossiers on people it never even bothered to investigate, because cross-indexing of lists



of people who attended a meeting or wrote to the editor, can easily be compiled into individual files.

In the whole history of the Supreme Court, Justice Goldberg found, there has never yet been a time when it overruled itself on acquired personal liberties no matter how conservative its complexion. It has overruled itself on economic and social policy. Now, the direction threatens to be reversed, not because of new laws limiting personal rights but because the court will refuse to intervene to safeguard rights endangered by modern society.

REHNQUIST has made clear that he considers the government's "need to govern," that is, its right to defend its own authority, as superior to the citizen's rights protected by the Constitution. The First Amendment, he said in a speech on March 19, 1971, "does

not prohibit even foolish or unauthorized information-gathering by the government."

The sheer facts of modern life press on the individual and limit the freedoms he once took for granted. He needs more protection now from the Constitution and the court than he did in a pioneer or pastoral society when government seldom touched him directly. But the way things are going, he is likely to get less. And this is not just until the next election or the one after that. A justice may serve for 25 or 30 years.

There is some value in breaking the accumulation of burdens placed on the court in the last 15 years. It was obliged to do too many things that ought not to be the responsibility of the judiciary, because the Congress and the Executive failed to do them and the nation's needs were clear. It is preposterous, for example, that the court should have been asked to decide whether or not a nuclear test could be conducted at Amchitka.

These responsibilities should be put back in the Legislative and Executive branches where they belong. But the danger now is that a restrained court is going to restrain itself to the point of failing to fulfill its greatest function, the protection of the citizen against too intrusive government.

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