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A Practical Court

WHEN THE Supreme Court closed off its spring term last week, it at last became possible to make serious comparisons between the old court under former Chief Justice Earl Warren and the present court under Chief Justice Warren Burger. As it turns out, the difference is subtle.

It is not a difference between liberal and conservative, still less between day and night. The Burger court is more disposed to leave practical issues of law enforcement up to local and elected authorities. But it is far from being a handmaiden to the authoritarian instincts that sometimes run so rankly through the Nixon administration.

Probably the best case in point is the recent decision against the death penalty. The logic there is that capital punishment has become in practice an exceedingly unusual form of punishment—a punishment so rare as to be comparable to being hit by lightning.

The court majority found that so unusual a penalty could not be sustained merely by force of tradition. There was a need for reinforcement by a positive act of the state legislatures or the Congress. In the absence of such action, the death penalty is now out.

A SECOND example of the same practical approach involves the decision that sustained the right of a private club not to serve a black man because of his race. The issue in that case—the Moose Lodge case—was not whether discrimination was legal or illegal. The issue was whether the state of Pennsylvania, by issuing a liquor license to a private club, participated in the club's exclusionary policy.

The majority of the court, including all four Nixon appointees plus Justices Potter Stewart and Byron White, found that the issuance of liquor licenses was a purely routine administrative act appropriately left to the states. The implication was that if the state of Pennsylvania could not manage liquor licenses without constitutional conflict, it could not manage anything on its own.

As Justice William Rehnquist wrote: "The operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of the Moose Lodge so as to (fall) within the ambit of the equal-protection clause of the Fourteenth Amendment."

A third example of the practical - minded approach involved a decision that upheld the right of the states to have juries decide certain cases by less than unanimous verdicts. In the case of Apodaca v. Oregon, the majority, which included the Nixon appointees plus Justice White, were obviously sensitive to the clogging of court calendars by prolonged deliberations and hung juries. Justice White wrote: "Requiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit."

THE LAST two decisions I have cited work against blacks who would like to have special protection against discrimination in clubs and against white majorities on juries. But deference to the states in these areas does not prevent the Burger court from speaking out very clearly on questions with no uncertain constitutional implications. The Burger court sustained the judgment of the Warren court that the indigent and helpless were entitled to counsel, except in very sharply defined circumstances. The Burger court broke new ground in denying to the Attorney General the right to order, without prior court order, bugging in cases of "domestic subversion."

In a truly eloquent decision, Justice Lewis Powell, speaking for a court with no dissenters, wrote: "History abundantly documents the tendency of the government — however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies . . . The danger to political dissent is acute where the government attempts to act under so vague a concept as the power to protect 'domestic security' . . . Private dissent, no less than open public discourse, is essential to our free society."

As that opinion makes plain, the Burger court is not about to become an instrument of tyranny. Whatever changes it may approve in practical issues of law enforcement, the Supreme Court remains a guarantee that oppression is not part of the American way.

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