The Court's Nine Lives

IN HIS OWN IMAGE: The Supreme Court in Richard Nixon's America. By James F. Simon. McKay. 310 pp. $7.95

By LOUIS H. POLLAK

THE RITUAL INCANTATION with which President Nixon has been wont to enliven the process of filling Supreme Court vacancies—that the selection of a justice is one of the most important decisions a president is called upon to make—is not hyperbolic. Given the place of the Supreme Court in our political structure, and given the life tenure of the members of the court, it has been apparent since the early days of the Republic that the selection of justices is public business of great importance. Indeed, it is arguable that, in a handful of instances, the presidential choice of a particular justice—John Adams's nomination of John Marshall, for example, and Andrew Jackson's of Roger B. Taney, Theodore Roosevelt's of Oliver Wendell Holmes and, perhaps, in our own day, Dwight Eisenhower's nomination of Earl Warren—did as much as any other decision taken by that president to shape the attitudes and events of later decades.

But—save Marshall—no single justice has ever gained decisive and comprehensive intellectual dominion over the court as a whole. So to accomplish a fundamental change in the court's direction requires the concurrence, sustained over time, of several justices. Since Washington first staffed the court in 1789, the only presidents who have had the will *and*, through the happenstance of multiple judicial retirements and deaths, the opportunity to move the court in a significantly new direction, have been Lincoln and Franklin Roosevelt—and now Richard Nixon.

Lincoln rose to national prominence as an intrepid detractor of Taney's court, the court of the Dred Scott decision. And Franklin Roosevelt campaigned for reelection against the obdurate justices who had emasculated much of the New Deal. When it fell to Lincoln and Roosevelt to nominate several new justices, each made the most of his opportunity. And the court—and hence the Constitution—changed.

James Simon's book is a perceptive study of how Richard Nixon, in his turn, campaigned against the court and then, within three years, named four new justices. With good insight into the dominant legal issues, Simon recapitulates the pioneering advances of the Warren Court—especially in the fields of racial discrimination, fair trials, reapportionment and free speech and press (including "obscenity"). Then Simon appraises the mounting public hostility, in the closing years of the '60s, to what white middle-class America was led to see as an excessive judicial solicitude for people too dark or dirty or lazy to swim in the American mainstream. By 1968, candidate Nixon saw that votes were to be garnered—not just in the white South, but across suburban and blue-collar America—by calling for "strict construction" of the Constitution and by charging that "decisions of the High Court have had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces."

Once elected, the new President devoted great energy to filling court vacancies with appointees who would seem—especially in the beckoning Southern precincts of the "emerging Republican majority"—to symbolize those sober values of judicial inactivity which would give comfort to bemused middle-America. By 1972, Maurice Stans, as chairman of the Finance Committee for the Reelection of the

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President, felt it appropriate to embroider his fund-solicitation mailings with prideful reference to the President's four justices—Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist—"who can be expected to give a strict interpretation of the Constitution, and protect the interests of the average law-abiding American." (Stans, whether he knew it or not, was building on the hallowed precedent of Vice President Nixon, who, in 1956, sought to take partisan credit for the school segregation cases by speechifying about "the *Republican* Chief Justice," Earl Warren.) But to reach the point at which his chief money-raiser could point to the court with unseemingly proprietary pride, President Nixon had to go through the travail of the rejected Haynesworth and Carswell nominations and the chicanery of the Herschel Friday and Mildred Lillie trial balloons. Small wonder that, as Simon reports, Assistant Attorney General Rehnquist, in October 1971, could turn aside rumors that he might be named to the court by observing, "I'm not a woman, I'm not a Southerner and I'm not a mediocre."

A major value of Simon's book is that it lays the groundwork for asking —and refrains from the arrogance of purporting confidently to answer—the question of whether Richard Nixon has radically changed the court. It is, of course, already clear that the four new members of the court tend to agree with each other on many (but by no means all) issues; that they tend to differ with Justices Douglas, Brennan and Marshall on many (but by no means all) issues; and that Justices Stewart and White are frequently the decisive voices, arithmetically and also jurisprudentially. It is easy to show that, in consequence, the momentum of the Warren Court has been slowed. On the other hand, it cannot be shown that the major judicial outposts of the '50s and '60s have been abandoned, or that they are likely to be. Moreover, in such areas as abortion and capital punishment the newly reconstituted court has taken dramatic initiatives of its own.

Liberal doomsayers have professed to fear—and some Nixon adherents have probably hoped—that the new justices would undertake to dismantle major elements of the constitutional structure erected during Earl Warren's chief justiceship. This seems unlikely. The new justices have already demonstrated that they are not captives of their appointer. They are independent of the President, as they should be. Moreover, it is to be expected that their initial cohesion will erode as each becomes more confident of his own place and of his membership in a collegial tribunal that includes not only his eight brethren but the 91 other justices who, starting in 1789, have been trustees of the Constitution. Finally, it must already be apparent to the new justices that there is no coherent intellectual ground for remaking the Constitution in President Nixon's image: President Nixon's constitutional rhetoric—"strict construction," "strengthen the hand of the peace forces," etc.—is political cant, and not, as lawyer Nixon must know, a constitutional philosophy. As actual constitutional issues have presented themselves before the court, the new justices have already had occasion to recognize that their primary and enduring responsibility is to give present content to the enduring values of this democratic society.

That this process continues to function, and to function well, is suggested by the firmness with which the court (unanimously, with Justice Rehnquist not participating) just over a year ago in *United States v. United States District Court* rejected the contention, advanced by former Attorney General John Mitchell and former Assistant Attorney General Robert Mardian, that the attorney general could authorize warrantless wiretaps in aid of the president's responsibility to maintain domestic security. In current retrospect, it is tempting to find in the court's words (written by Justice Powell) a special relevance for the reason that the decision was announced just two days after the break-in at Watergate. But, of course, the preparation of the court's opinion antedated, and transcended, that shabby and transient episode. It is the opinion that will endure:

> These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and

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the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of world-wide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods in our history. There is, no doubt, pragmatic force to the government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or on-going intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillance to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance . . .

Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values . . .