

A Response to Mr. Powell

By NORMAN DORSEN

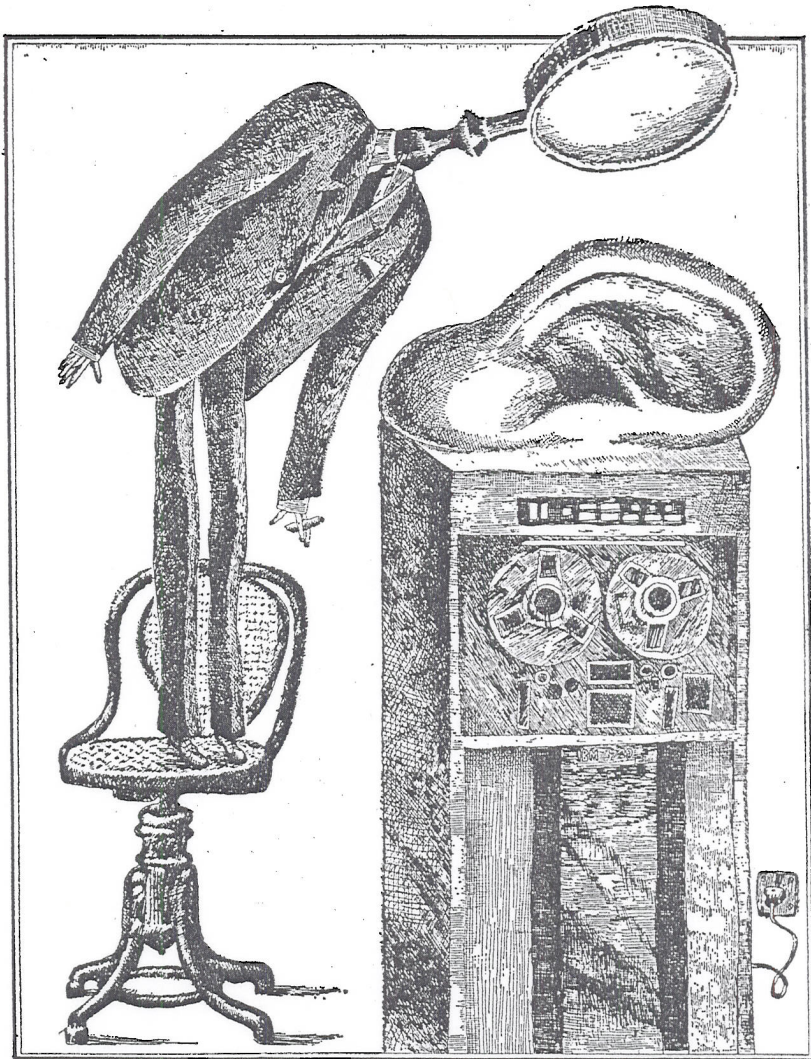
When Lewis F. Powell was nominated to the Supreme Court many civil libertarians were satisfied. Not elated or even pleased. But satisfied. Despite his mixed record in Virginia on civil rights, he was apparently a conservative lawyer who, like Justice John M. Harlan, would bring learning and professional competence along with a high sense of purpose to his new office.

I personally hoped that, as has so often happened, the donning of judicial robes would be more than ceremonial, and Justice Powell would evince a healthy concern for curbing Government excesses and safeguarding the constitutional rights of all citizens, including weak and unpopular minorities. But Mr. Powell's recent article on this page leaves me less sanguine about what to expect.

With respect, I suggest that Mr. Powell's analysis is flawed by important errors of fact, by omissions of noteworthy examples of recent "repression" by the Government, and most troubling of all, by a tone that can only be described as ominous.

Take wiretapping. Mr. Powell states that the Department of Justice employs taps in two types of cases; one, he says, includes "murder, kidnapping, extortion and narcotics offenses." In fact, the 1970 report by the department states that of 183 taps sanctioned by court order, there was not a single case of murder or kidnapping, and there were 121 cases of gambling. In addition, Mr. Powell assumes that 183 taps means 183 intrusions on privacy. Actually, these taps mean literally thousands of conversations overheard, most involving private matters unconnected to crime.

Or consider the central issue of a free press. Mr. Powell states, "There is no more open society in the world than America. No other press is as free." Perhaps. But in recent years the Vice President has unrelentingly pressured "Eastern" newspapers and network television. The Department of



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Justice has subpoenaed the confidential notes and demanded private sources of news reporters. Congress has sought the unused film clips of "The Selling of the Pentagon." And in the Pentagon Papers litigation, for the first time in the nation's history, the Federal Government tried to enjoin the publication of daily newspapers.

There is ample other evidence of

official action inimical to individual rights. There has been a return to the discredited era of loyalty-security investigations through the resurrection of the Subversive Activities Control Board and loyalty oaths on passport applications. Surveillance of private citizens engaged in lawful conduct has been intensified. Preventive detention has been blessed as a law enforce-

ment device. The Administration has proposed the limitation of Federal habeas corpus. The Justice Department defended with zeal the mass arrests in Washington on Mayday, virtually all of which were subsequently reversed by the courts. And there has been a notable absence of leadership in race relations.

These and other events suggest that Mr. Powell may erroneously assume that because dissent still flourishes in America—that is, because the repressive activities of the Federal Government have not been entirely effective—there is no repression here.

But private citizens sensitive to these issues believe otherwise. The Committee for Public Justice, comprised of eighty prominent citizens, stated in 1970 that "the country has entered a period of political repression in which the Constitution itself is being ignored by men in power." And if the committee is regarded as too liberal, recall that after full study the young lawyers section of the American Bar Association concluded in July 1971, "Ours is not by nature a repressive society; yet there is currently

an antilibertarian climate in the United States which properly can be labeled 'repressive.'"

More important, in my opinion, than Mr. Powell's conclusions regarding the extent of repression is the tone of his remarks. Again and again he speaks of "standard leftist propaganda" in rejecting the views of those who believe our rights are threatened, and he attributes much of the concern with civil liberty to the "radical left" or "a propaganda line." This style of argument has been disappearing, and I had thought it was discredited. It is both sad and frightening to contemplate the possibility that we are in a new era when those who battle for civil liberties, often at personal sacrifice, are to be accused, however indirectly, of disloyalty or naive delusion.

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