

## The Nixon Court: How Will He Decide?

By JAMES RESTON

In the first four months of his Administration, President Nixon has been faced with the tremendous challenges and opportunities of ending a war, tempering the conflicts between the races and the generations and choosing a Chief Justice and an Associate Justice of the United States. And in the perspective of history, his decisions about the Supreme Court may be more important than anything else he does—and will clearly be his sole responsibility.

He is a moderate man, faced with radical problems at home and abroad, and there is no evidence yet—either in his Vietnam speech or his reaction to the turmoil of the cities or the universities—that he has the daring or imagination to introduce the radical policies equal to his radical problems. And even if he did, his decisions about the war and the cities would depend in large measure on the reactions of many other men in Hanoi, Saigon, Chicago, New York and many other places.

But the Court decisions are quite different. Here, too, he is under great pressures, but in this field the pressures are clearly under his control. Here

his power and philosophy will preside, and his chance to influence the future by the men he selects is not only immense but may in the end prove more significant than most of the other decisions he has to make in the years ahead.

For just as Roosevelt's appointees on the Court are still exercising great power a generation after his death, so Mr. Nixon's appointees will probably be sitting in judgment on the relations between the individual and the state, between the states and the Federal Government and between the Federal executive and the Federal legislature long after he has gone. And his replacements for Chief Justice Warren and Associate Justice Fortas may be only the first of several other decisions which could change the character of the Court.

### The Decision Process

For Mr. Justice Black is 83, Mr. Justice Douglas and Mr. Justice Harlan are 70, and Justice Harlan's sight is now grievously impaired. Accordingly, by the accident of life, President Nixon may very well be faced with choosing more members of the Court in his first term than any President since Franklin Roosevelt.

How will he decide? This is

the interesting question. When President Johnson was faced with it, he was urged by some of his friends to appoint distinguished judges and lawyers—specifically, Henry Friendly and Warren Burger, among others—and he replied that he wanted "a pragmatic fellow like Fortas."

Every other President has been up against the same question, President Johnson was partly personal and political—he chose Mr. Fortas and Thurgood Marshall. President Kennedy chose two men he knew personally: Justice White and Justice Goldberg.

The choice is usually the President's, and the result is often quite different from what the President expects. For the Court has a power and a majesty of its own, and has a way of turning liberals into conservatives, and vice versa. But President Nixon might surprise his supporters and his critics.

The very quality that makes him careful and conservative in changing policy in Vietnam and the cities—and may be his downfall in the process—may serve him well in picking successors to Mr. Warren and Mr. Fortas.

He has not been partisan or ideological in his use of the appointive power of the Presi-

dency so far. He has chosen undramatic men whom he felt he could trust, but not on political or ideological grounds. And the chances are that he will do the same in appointing men to the Court. That is to say, he will probably compromise. He was very careful about putting progressive Middle Westerners in the Treasury, the Bureau of the Budget and the chairmanship of the Council of Economic Advisers; a friend in State; a politician in Defense, and foreign service officers in Moscow and the U.N.

### Thurmond's Claim

He was very canny about his big appointments in the Executive branch and is likely to be the same about the Court. He knows it is in trouble now and is tainted by cronyism and politics. Accordingly, the people who want him to appoint symbols of conservatism, or pay off old political debts to Strom Thurmond, may very well be surprised. For he has a sense of history and is not likely to miss the significance.

The integrity of the Court and his own personal judgment are now being tested, and it will be surprising if his sense of responsibility does not turn him in the end to appoint at least one distinguished judge.