Nixon or McGovern?

(III) In the Matter of Freedom and Justice

The Constitution of the United States is the American peoples' most precious asset. It is also extraordinarily vulnerable, at least to persistent and calculated attack. It is not a self-enforcing document, and most Americans have only the vaguest notions of its contents and its protections. What they do know, however, is both basic and correct: that the Constitution contains the rules of the American game. Over the past three and a half years, Richard Nixon has attempted with a certain unhappy consistency to change the rules of that game and in ways that have done great harm to the country. So while in ordinary elections, the candidate's approach to constitutional values does not become an issue, we would argue that this year the administration's record has made concern for these values central to the choice confronting the electorate.

There is nothing in Senator McGovern's record to raise doubts about him in this regard. This is, uniquely, Mr. Nixon's issue, for it was he who raised the so-called law and order issue in the first place, and in the end it has been he who has departed so sharply from constitutional norms and has done such violence to the fundamental concept of law and order by way of his persistent assaults on the federal judiciary, his derogation of the Supreme Court, his attempt to deny black people legal remedies for court-determined violations of their rights and his politicization of the processes of justice in general.

All this could seem fairly distant or abstract to a lot of people or, to those who are inclined to the President's particular view of things in political and ideological terms, it could appear to represent nothing but the ascendance of right thinking in high places. But we would maintain that this tampering with the rules of the game, with the basic concepts of American justice puts the rights and well being of every American—whatever his political views—in danger. The assault on justice we have in mind has been twofold: It has encompassed, first, an assault on the freedoms of ordinary citizens outside the administration's privileged circle, and, second, an assault on the traditional concept of the processes of justice as being equally applicable to all. By that we mean, specifically, that in the second of these departures, the administration has perverted and politicized the process of justice to serve its own short term interests and ends.

It has been accepted doctrine in this country, from its inception, that the rule of law is paramount, not the rule of the particular man or of passion or of temporary political vogue. A flexible, but constant constitution is crucial to this, as is the confidence of the people that the rule of law is beyond the reach of momentary whim or temporarily held political power. Mr. Nixon gave us a hint of what was in store in this regard when he promised, fatuously and gratuitously, in his Miami acceptance speech in 1968 that he would give us a new Attorney General. (He certainly did that). He gave more hints of his willingness to sacrifice justice to expediency by the tone he took in the ensuing campaign, playing to the overcharged atmosphere of racial hostilities that had developed in the late 1960s.

And Mr. Nixon, once elected, was true to his word. In the area of crime prevention, we got placebos and rhetoric, but little that went to the heart of the crime problem in the country, and little that offered relief to crime's victims. The various foreshortenings of individual constitutional rights that were the hallmark of his assorted "anti-crime" bills may have sounded like a hardline on crime to the frightened or the uninformed, but they in fact told us more about the administration's disregard for traditional justice than they did about effective ways of coping with a level of crime which, for all the President's emphasis on it, continues to rise. Later came the startling assertion that the government had the right to tap telephones and bug conversations—without court order—of any domestic group which the administration in power happened to consider a threat to national security. Fortunately, this unprecedented attack on the fundamental right of privacy was turned back by a unanimous Supreme Court.

All of this, of course was done in the name of the peoples' rights to be free of crime and safe from revolution. There was a terrible irony to it all as, in the name of protecting and preserving the American system, the administration acted in ways that undermined and subverted its basic structure. Thus, in the name of freedom from violent overthrow of government, the administration moved on to attack dissent and fair comment. Dissent, no matter how carefully protected by the laws and the Constitution, soon was projected as a threat in itself and, accordingly, as a legitimate target of governmental restraint. People exercising their rights to protest the war were called "bums" and "radic-libs." The Internal Security Division of the Department of Justice—a dormant and discredited operation in earlier days—was expanded in manpower and jurisdiction and it sent roving teams of prosecutors around the country. Conspiracy statutes were promiscuously interpreted and used to hound people who were political dissenters but not (as juries subsequently held in acquitting them) criminals.

Long haired protesters were not the only targets of the administration's remorseless quest for conformity. In the fall of 1969, Mr. Agnew opened his famous attack on the news media. "Instant analysis" of the President's speeches and the alleged bias of the eastern press against Mr. Nixon, his administration and their values were the immediate targets—and, once again, the First Amendment was not far behind. The intent was plain: to discredit the news media by way of undermining confidence in what the media reported.

In the same spirit, the administration forged on to give us, for a few brief weeks, the first prior restraint of the right to publish in some 200 years. In the case of the Pentagon Papers, the government acted, as had become its custom, in the name of a threat to national security. But not one of the 19 federal judges hearing the case could establish a clear instance of the existence of such a threat. In a number of other ways, the administration has sought systematically over the past several years, to inhibit and undermine the free functioning of the American press and to entangle it in the law enforcement process by, for example, threatening its traditional privilege of protecting confidential sources and material.

All of these policies—the appeal to the peoples' fears, the enactment of tough-sounding, but generally ineffective criminal laws, the chilling of dissent, the assaults on a free press, the refusal to move forward in establishing the constitutional rights of minorities—have had their effect in shriveling the spirit of a free people. And so has the assault on the Supreme Court and the Department of Justice. In what the administration has done about the Supreme Court, one can only conclude that the effect—if indeed it was not Mr. Nixon's purpose—has been to demean it. Leaving aside the President's successful appointees, one can only conclude from his numerous suggestions as well as unsuccessful nominees, such as the utterly unqualified Judge Carswell, that his consideration for the institution can only be measured by the strength of his desire to diminish it.

The one area where the Nixon administration has been scrupulous, not to say indulgent, on the matter of constitutional protections and rights is that concerning wrongdoing of which its own members and associates have been accused. This sudden concern for the rights of the accused (in the Watergate trial), the right of privacy (in the Common Cause case seeking to open the lists of contributors to Mr. Nixon's campaign) and the rest, must strike the observer as cynical in the extreme and—beyond that—as evidence of the way in which the Nixon administration has bent the rules to serve its own immediate ends. For there can be no disputing that a double standard concerning the requirements of law and order is alive and well in Richard Nixon's Washington where, at the moment, those accused of a variety of political malpractices are blithely investigating themselves and announcing the happy news that they don't find all that much to worry about.

It was characteristic of this administration that in the last mentioned of these episodes, that involving the improprieties of a U.S. Attorney, the Justice Department explained that the reason for its covering up his conduct—which was conceded to have been "highly improper"—was that to do otherwise would have undermined peoples' confidence in law and order. Ponder that for a moment. It will give you a key to what is so profoundly wrong with the attitude of the President and his associates to the elementary requirements of providing justice. For in the end, the spirit of a free people is not nurtured by illusion or cover-up or imagery or tough talk about law and order. It is nurtured by a belief based in actuality that the system is fair and open, that the rules are durable and universally applicable and can be made fairer—and that justice, if not at hand, will always be sought. Nothing diminishes a man more than loss of faith in himself and nothing diminishes a people more than a sense that its freedoms are ephemeral. The ultimate trustees of a nation's freedoms are the men at the top of the government and the enduring values they bring to office. Mr. McGovern's values in this connection seem to be rooted in the history of our people and their aspirations for the future. Mr. Nixon's seems to rest largely on the latest public opinion polls.