

Books of The Times

New Order in the Court

By HERBERT MITGANG

IN HIS OWN IMAGE. *The Supreme Court Richard Nixon's America.* By James F. Simon. 310 Pages. David McKay. \$7.95.

"The President has already been so successful in dealing with the Supreme Court on his terms," writes James F. Simon, "almost anything he does in his second four years in office will almost seem anticlimactical. If Nixon has additional opportunities to appoint members to the Court in the next four years, he undoubtedly will keep his formula of the first term. His appointees will again boast conservative positions—tough on law and order issues, deferential to the other branches of government in policy-making areas and generally modest in their aspirations for the Court."

Mr. Simon's book, "In His Own Image," is subtitled "The Supreme Court in Richard Nixon's America," and it is a lucid and documented work that is refreshingly objective. There may be a few too many quotes from Yale Law School professors—the author is one of the new breed of journalists who learned his law in school instead of off a police blotter in the district boondocks—but he succeeds in allowing the reader to become the advocate.

Balance Favors Prosecutors

The Court of Chief Justice Warren E. Burger, he finds, has shifted the balance in the prosecutor's favor. The four Nixon appointees voted together in 53 out of 70 cases in which all nine justices participated during the 1972 term; moreover, they joined in one opinion in 45 of those 53 decisions. In criminal cases, these conservative justices were "less than generous"—one of the quiet phrases the author has in his typewriter—in interpreting the constitutional rights of defendants. Mr. Simon posits an algebraic equation to explain the Court's performance in the criminal field: $4N$ (four Nixon appointees) + X (the unknown being Justices White and Stewart) = LAO (law and order decisions favoring the prosecutor or the police rather than the criminal suspect).

It is the swing men in the center of today's Court who emerge as the justices to watch. In the cases and opinions cited and interpreted, President John F. Kennedy's appointee, Justice Byron R. White, seems uncomfortable when siding with the three liberals, Justices William O. Douglas, William J. Brennan Jr. and Thurgood Marshall. The more interesting to read about is Justice Potter Stewart when he comes out on the liberal side. The author admires his fairness, federalism and Yale background.

Mr. Simon contrasts the views of the swing justices on the matter of testimony by newsmen to illustrate how wide a range there can be in the judicial center. In a majority opinion, Justice White held, "We cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source on the theory that it is better to write about crime than to do something about it." Partisans of the

First Amendment, onward from Thomas Jefferson, might have admired the epigram more than the *non sequitur*. In response to Justice White, Justice Stewart warmed up his *sang-froid*, writing that the Court's decision "invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." In the related area of journalistic investigation and privilege, the author also mentions the Pentagon Papers case in some detail, giving due credit to the reporting in Sanford Ungar's book, "The Papers and the Papers."

In describing the new balance in the Court, Mr. Simon covers decisions affecting large numbers of Americans not involved in criminal cases. He says that the Burger Court is "a little tired" of school desegregation, quoting the Burger contention that "the goal is to dismantle dual school systems rather than to reproduce in each classroom a microscopic reflection of the racial proportions of a given geographical area." From this and other cases, Mr. Simon concludes that the Nixon bloc is willing to let local school boards settle their own problems "without the help of the Supreme Court." He also finds that the Burger Court decisions provide no comfort for the poor as a class and for the blacks who make up a large segment of the poor. In another area of Warren Court strength, civil liberties, the Burger Court has shown itself to be (another gentle phrase by the author) "less than steadfast."

'Reluctant' to Identify the Problems

Under Chief Justice Earl Warren, the Supreme Court served as the nation's ombudsman. Under Chief Justice Burger and his allies appointed by Mr. Nixon, the author maintains that the Court is not helping to solve America's most pressing problems and, more, is "even reluctant to identify them for others to work on." He finds the Burger Court unwilling to run with the new causes of the nineteen-seventies—including antiwar protestors exercising rights of petition and assembly and even such presumably impartial concerns as environmental protection.

President Dwight D. Eisenhower was once asked if he had made any major mistakes in the White House. The story goes that he replied, "Two of them are sitting on the Supreme Court." President Nixon does not have to consider his appointees "mistakes" for they are (with an occasional surprise) in line with his political philosophy. No Warrens or Brennans are in a Nixon future book, if the occasion arises. Judicial precedent will not be trampled upon but could be circumvented by exceptions and delays. That has already happened with some of the major decisions by the Warren Court in the area of criminal law.

If the Burger Court trend continues—so I gather from reading this valuable book—the day may come when the phrase over the Supreme Court would have to be re-chiseled symbolically to read: "Equal Justice Under Law and Order."