SURV

NYTimes

Dissent, Instrument of Progress

JUL 30 1974

By Alan Barth

WASHINGTON—It is, of course, a postulate of democracy that majorities are usually right. But a constitutional democracy, recognizing that majorities may sometimes be wrong circumscribes their power by stipulating certain "unalienable" individual rights and by affording protection for the expression of minority or dissenting views.

Dissent is the generative force of the democratic process. It is the lever by which change is achieved. It challenges complacency and conventionality, thus making progress possible. And this is why those who regard dissenters as "enemies" are themselves, in a true sense, "un-American."

Dissent plays a particularly constructive role in the Supreme Court of the United States. Although judicial dissents are often in error and are sometimes no more than an expression of eccentric and even querulous views, they rise, on occasion, to the level of literature, expressing deeply-felt indignation and embodying passages of great force, eloquence and ardor. They require the majority to justify its decisions. And now and then they prod the Court into an eventual reversal of itself.

Chief Justice Charles Evans Hughes observed that "a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

Perhaps, then, it is not too fanciful to think of the authors of such dissents as prophets who see beyond the horizon of their contemporaries, foretelling changes in the political and economic environment and seeking adaptations to those changes in accord with advancing standards of decency, fairness and the general welfare.

There is an apt instance of this sort of prophecy in a dissent written in 1928, in the Olmstead case, by Justice Louis D. Brandeis. The case involved a test for the first time of whether evidence obtained by wiretapping ought to be excluded from a Federal court because it violated the Fourth Amendment's ban on "unreasonable searches."

The Court divided five to four, Chief Justice William Howard Taft for the majority taking a narrow, literal view of the Fourth Amendment as a ban only on physical intrusion and asserting: "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants. . . . "

Justice Brandeis, in dissent, pleaded for a broader and more imaginative conception of the Fourth Amendment as designed to safeguard a right of privacy essential to the idea of human dignity and personal integrity—the right, as he put it, "to be let alone, the most comprehensive of rights and the right most valued by civilized men."

Prophetically, he warned: "The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home. . . . " And he concluded his great opinion with this observation:

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure conviction of a private criminal — would bring terrible retribution."

Nearly 40 years later, in 1967, the Court came around to the Brandeis view and held that "the Fourth Amendment protects people—and not simply 'areas' against unreasonable searches and seizures . . ." and that electronic surveillance constituted a search that could be deemed reasonable only if conducted in conformity with a warrant or court order issued in advance by a judicial authority. Behind this ruling lay a recognition that freedom of communication, freedom from official eavesdropping, is an indispensable condition for the expression of dissent. There is not likely to be much political discussion, much criticism of the Fovernment, when Uncle Sam is known to have a hand persistently cupped to an electronically augmented ear.

A democracy, above almost everything else, needs to foster dissent, not discourage it.

Alan Barth, formerly an editorial writer for The Washington Post, is author of "Prophets With Honor."