ABHANDLUNGEN

Judicial Review and "Strict Construction" of the Constitution

President Nixon and the Supreme Court of the United States

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The choice of the subject for this address was prompted by the appointments made by President Nixon to the Supreme Court, and the difficulties he encountered in completing his second appointment[1]).

In saying that my choice of subject was prompted by this highly publicized development I do not mean to suggest that I am going to consider the merits of the rejected appointments or weigh the propriety of the Senate's action in rejecting them or to analyze the reasons that were given for rejection. My concern here is not with personalities but rather with the appointment process and even more so with the standard which President Nixon has said he is following in choosing men for the Supreme Court. For it is in the choice of standard that he touches on a very vital question going to the underlying process of judicial review which is a pivotal feature of the American constitutional system. Indeed, the basic questions raised by the standard he proposes for judicial appointment are questions which go to the fundamental theory of judicial review practiced

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[1]) The appointments of Judge Clement F. Haynsworth of the United States Court of Appeals for the Fourth Circuit and of Judge George Harrold Carswell of the Court of Appeals for the Fifth Circuit were rejected by the Senate. The Senate did thereafter confirm the appointment of Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit.

in any country where a high court does presume to question the validity of actions taken by the other departments of the government when measured by the limitations and restraints of a written constitution. President Nixon insists on appointing persons he characterizes as "strict constructionists" to the Supreme Court. What I propose to discuss here is what President Nixon has in mind when he speaks about a strict construction of the Constitution and the significance of this standard in the light of our recent constitutional history as represented by the decisional developments at the hands of the Warren Court.

Before examining what President Nixon has in mind by the term "strict construction", it is worthy of note that the President has chosen a particular standard for appointment to the Supreme Court — a standard which does not limit itself to such questions as does the man have prior judicial experience, does he have a legal background and is he well regarded as a lawyer or has he won distinction at the bar, questions which perhaps might be deemed appropriate and adequate in passing upon a man's appointment to the Court. Rather the President is inquiring here as to the basic judicial philosophy of a man he proposes to appoint. To some this may appear to be improper in considering a man's qualifications for the Supreme Court.

In looking at this question, however, several considerations basic to the American constitutional system should be kept in mind. When the President in making appointments to the Supreme Court makes clear that he regards this as a particularly important responsibility and, therefore, wants to weigh carefully the general judicial philosophy of the appointee, he is simply taking into account the extraordinary and influential role occupied by the Supreme Court not only in the constitutional system but in the whole American public order. The Court by its decisions determines the course of our constitutional development, it can frustrate public policy as expressed in the decisions of the legislative and executive branches, it can itself define public policy, it can make the choice of values which it regards as central to American society, and it can serve as a principal vehicle for social reform. The Court is in the position to exercise this authority because the great critical phrases of the Constitution, such as the due process and equal protection clauses, under which the Court has done so much to shape constitutional policy, are broad and indeterminate phrasings that can be expanded or contracted at the Court's discretion to mean much or to mean little. In other words, we have here the possibilities of construction which admit of broad discretion and subjective interpretation on the part of the judges. And our history has demonstrated that neither the text, nor history, nor precedent furnish compelling considerations in the construction

of the written text. The supposition that the meaning can be derived from the four corners of the instrument is, of course, one of the great fallacies that often expresses itself in popular thinking about the Constitution. Perhaps without being cynical we can well accept Charles Evans Hughes' statement that while we live under a Constitution, the Constitution is what the judges say it is. Because of the potentials in interpretation by the Court in exercising its extraordinary powers, the appointments made to the Court do assume critical significance.

While the Supreme Court is in some respects the weakest branch of the government since it has neither the power of the sword nor the power of the purse, it is in some respects also the most powerful because it presumes in the end to determine and to limit the authority of the other branches and by its process of constitutional interpretation to define and even initiate new constitutional policy for the country. And yet this powerful tribunal is really subject to very little formal restraint. The Founding Fathers intended that the Supreme Court be an independent tribunal and they succeeded in perhaps even greater measure than they may have anticipated. Most striking perhaps is the fact that even an age limit cannot be imposed upon the justices of the United States Supreme Court. They are appointed for life subject to removal only by the impeachment process, invoked only once in the entire history of the Supreme Court, and that at an early stage of the nation's history. The Congress cannot even force a justice to retire at age 65 or 70 even though it may make it financially attractive for him to do so. The result is that we have men continuing on the Court to an extraordinary age at a time in history when it is generally recognized that younger minds should prevail after a person reaches a fixed age limit. To be sure, Congress has some authority to manipulate the size of the Court and its jurisdiction, as it has done in earlier stages of our history, but these are extreme measures which Congress has not resorted to in recent years except for President Franklin Roosevelt's abortive measure to expand the Supreme Court in his day in order to secure a tribunal more favorably disposed to the New Deal legislation.

Absent any effective formal restraints, the most effective limitations are the informal and intangible restraints inherent in the operation of any governmental organ. One is the force of public opinion. Over the long run the Supreme Court's decisions must commend themselves to the good sense and judgment of the American people. As history has demonstrated the Court is sensitive and responsive to public criticism and the Court will not long persist in interpretations which run contrary to deep-seated convictions in American thinking. The Court may lead in fashioning new con-

stitutional policy, but it cannot lead too far without sacrificing the constituency which is essential to maintain the respect and esteem which provide the moral authentication and support for the high position it has won for itself over the years. The Court cannot command respect simply by saying that this is what the Constitution "requires". The American public is becoming too sophisticated to believe any longer that the judges are simply applying the words of the Constitution in some mechanical way and that what the Supreme Court says must be correct because it is doing no more than giving effect to the constitutional text.

More and more people are realizing that the Supreme Court's decisions and interpretations are not dictated by any compelling objective considerations but rather are the product of a judgmental process whereby a tribunal gives meaning to words which have no fixed and determinate meaning and which lend themselves to interpretations in which subjective policy and value predilections play a pervasive role. The criticism of the Court and of the policy implications underlying its decisions are an important part of American public life and properly so in view of the great authority that the Court has presumed to exercise in our system.

The second informal restraint is the Court's own sense of self-restraint in the exercise of its powers so as not to create judicial dominance and supremacy at the expense either of the other branches of the government or of the people whose consent furnishes the ultimate authority for the constitutional system. Recognizing the delicate role of judicial review in a democratic society, the Court has at various times formulated its own rules of self-restraint, designed to minimize its intrusion into areas of policy determination reserved to the other organs of power. This self-restraint is manifest also in adherence to the process of reasoned opinions after hearing and in the freedom of dissent so that the Court's judgment is subject to examination and criticism by the bar, the academic community, the communication media and the public itself.

But the self-restraint exercised by the Court is a matter arising less from collective action and judgment than from the individual attitudes of the justices. For this reason it is the appointment power which assumes key importance, for in making the appointments the President has it in his power to place on the bench appointees whose underlying judicial philosophy will help shape constitutional interpretation for years to come. The appointments made by the President carry within them the seed of judicial action which may have momentous and fateful consequences with respect to the entire country. It is no wonder, then, that the matter of appointing justices to the Supreme Court is not just a matter of finding a qualified

lawyer or of engaging in the illusory process of finding the best qualified man in the country. While some may deplore the basis for selection which takes into account the basic philosophy of the judge, I regard this as highly relevant and any president who fails to do so is somewhat naïve in his understanding of the Court's role.

It is against this background that we may speak about Mr. Nixon's declared policy of appointing strict constructionists to the Supreme Court.

Although the President has used this term repeatedly, I think it is not a very felicitous term to convey the thought that he has in mind. I think I know what the President has in mind when he speaks of the kind of judge he wants for the Supreme Court, but I am not sure that the term "strict construction" adequately conveys this. Indeed, the term "strict construction" is ambiguous and misleading. If it means a construction based strictly on words used and meanings derived from the four corners of the Constitution, it is illusory, since words used admit of a variety of meanings. Several illustrations suffice. The Constitution in Article I says that Congress shall have power to declare war. A strict construction would suggest that since only Congress can declare war, therefore, the President cannot in exercise of executive powers engage in military operations at least without the authority of Congress. Yet I suggest that such a literal and strict construction of Article I to exclude presidential prerogative claimed on an autonomous basis by virtue of the President's independent powers under Article II would be resisted by some who may otherwise argue in terms of strict construction. Indeed, it would be resisted by the President himself.

The problems become even greater if we attempt to speak of a strict construction of the due process and equal protection clauses. Does the due process clause of the Fourteenth Amendment mean that all of the guarantees of the Bill of Rights are applicable to the states? Does equal protection mean one-man, one-vote in its application to the legislative apportionment problem? Whatever else may be said about these questions, it is clear that the bare words of the text yield no conclusive result.

Nor should it be supposed that when the President, himself a political conservative, speaks of a "strict constructionist" he is speaking of an appointee who is conservative in his political, social, and economic views. The use of the terms "conservative" and "liberal" in describing Supreme Court justices is also confusing and ambiguous. Justice Holmes was often looked upon as a great liberal on the bench but he was a great liberal precisely because he was conservative in the use of judicial power. Here it is extremely important to define the use of terms. Are we speaking of

the judge's own economic and social predilections, whether he is liberal or conservative, or are we speaking of his view of the judicial function in the interpretation of the Constitution? They mean entirely different things. I am satisfied that in so far as President Nixon is concerned to appoint conservative justices, whom he describes as "strict constructionists", he is looking for men who take a conservative view on the role of the Court in fashioning constitutional policy, in short, judges who will exercise self-restraint in the exercise of judicial power and who will balance the judicial activism of the Warren Court. If we may put it in terms of past personalities on the Supreme Court, I suppose that what the President has in mind are people like Holmes, Brandeis, Hughes, Frankfurter, Stone — justices who recognized the extraordinarily delicate character of judicial review in a democratic society, who conceded the responsibility and authority of other departments of the government also to respect the constitution and were willing to defer at least within broad limits to the policy judgments of these other branches of the government, who sought carefully to avoid identifying the Constitution with their own political, social, economic and moral predilections, and who sought an evenhanded interpretation of the Constitution which necessarily required the recognition of numerous values and the obligation of the Court to identify, appraise, weigh and accommodate conflicting interests. In short, a judicial policy of self-restraint means moderation and balance in the exercise of the important powers of judicial review. It means a reasoned construction which while recognizing the need of maintaining the Constitution as a living document does not claim a major role for the Court in initiating constitutional policy.

The significance of the President's insistence upon appointing strict constructionists to the Supreme Court cannot be understood except in the context of our recent constitutional history in the era of the so-called Warren Court which is best characterized in terms of an extraordinary judicial activism — an activism manifest in the resolute, vigorous and liberal use of judicial power to identify and to give support through constitutional interpretation to values which the justices regard as particularly important in today's public order. Whatever else may be said about the Warren Court, it has not been distinguished for a sense of modesty in the exercise of judicial power.

In what follows I shall attempt briefly to point up differences between judicial self-restraint and judicial activism by reference to basic developments within recent years.

1. Deference to the other branches of the government

A notable development of recent years has been a closer scrutiny by the Supreme Court of legislation impinging upon constitutional freedoms. The Court has been particularly astute to condemn legislation as violating the equal protection clause. While this is dramatically illustrated in the cases dealing with racial discrimination and legislative reapportionment, it has extended to other areas where according to dissenting justices, the Court has felt free to substitute its own judgment of wise policy for that of the legislature and to question and to disregard conceptions of public interests advanced by the legislature[2]). The difference between the judicial activist and the judge exercising self-restraint is that the latter inquires whether the legislature has reasonable ground to pursue the policy reflected in the legislation whereas the former must be personally satisfied that the grounds are adequate[3]). In short, the advocates of judicial self-restraint more readily balance against private right the competing public interests.

The same is true of the interpretations placed on the free speech and free press guarantees. Let me briefly illustrate. Although the majority of the Court has recognized that federal and state governments may pass laws directed against obscenity and against libel of public officers, they have placed close limits on this power and, indeed, some members of the Court like Justices Black and Douglas, have denied completely the legislative power to enact legislation of this kind designed to protect certain kinds of public interest[4]). What strikes me as extraordinary on the part of the position of the dissenting judges is the literalness of their interpretation of the Constitution and their refusal to concede that the legislature may appropriately have a concern both with the matter of public morality and, secondly, with the matter of protecting even a public official's reputation against defamation. What we have here is a one-sided emphasis on values which members of the Court have singled out for special protection

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[2]) See, *e.g. Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), holding invalid a state law requiring the payment of a state imposed poll tax as a qualification for voting; *Shapiro* v. *Thompson*, 394 U. S. 618 (1969), holding invalid a state law requiring a one year's residence in order to be eligible for welfare assistance.

[3]) This difference is well illustrated by the Court's recent decision in *Dandridge* v. *Williams*, 90 S. Ct. 1153 (1970). Here the Court upheld a state statute which imposed a maximum on total welfare payments to a family, with the result that large families received smaller payments per person than small families. The majority found this classification to be reasonable in view of various state interests served by the ceiling.

[4]) Justices Black and Douglas have in later cases adhered to the views expressed in their dissents in *Roth* v. *United States*, 354 U. S. 476 (1957) and their concurring opinions in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964).

without any concession to other interests which the legislature may take into account. Again, judicial activism operates to limit legislative discretion in dealing with problems of public concern.

The question of balance, characteristic of judicial self-restraint, is at stake in the developments which have extended the right of those arrested and tried on criminal charges. Mention may here be made particularly of the forging of new limitations on the states and closer surveillance of state court decisions with the result that the Court has virtually assumed the role of a high court of criminal appeals. When the Court in dealing with some of these problems laid down specific rules, it encased the whole problem in constitutional armor rather than permit a flexibility on the part of the legislative process in dealing with the underlying problems. Thus the decisions holding that the privilege against self-incrimination applies to police interrogation[5]) and that no inference may be drawn from a person's failure to take the stand[6]), when taken together produce considerable rigidity in any legislative attempt to deal with the problem of pre-trial interrogation. Moreover, it may be questioned whether the Warren Court in its zeal to assume fair treatment of the accused has not disregarded other elements of public interest in the effective enforcement of the criminal laws. This is at the heart of the constitutional aspect of the law and order issue.

2. Restraint in the application and extension of new principles

A criticism of the Warren Court is that in its vigor and enthusiasm for new principles designed to advance values it deems important in the Constitution, it pushes these to extremes in disregard of other interests. I call attention to two of the most important decisions of the Warren Court. One is the pivotal 1954 decision holding that schools segregated by law violated the equal protection clause[7]). It is worthy of note that in this decision and others which followed it the Court has been unanimous, thus indicating that all members of the Court whatever their judicial philosophy and theory of interpretation were satisfied that any form of legally required segregation was a basic violation of the whole historical purpose underlying the 13th, 14th, and 15th Amendments. With this there can be no quarrel. But it is in the application of this idea that further questions are raised now. Perhaps the most troublesome question is the one of *de facto*

[5]) *Miranda* v. *Arizona*, 384 U. S. 436 (1966).
[6]) *Griffin* v. *California*, 380 U. S. 795 (1965).
[7]) *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

segregation where racial imbalance exists in the public school system because of the pattern of residential development. Here the law does not require the schools to be segregated by race, but because the blacks and the whites live in different parts of the city and because parents send their children to the neighborhood schools, the system may and often does, result in the operation of racially segregated schools, particularly in large urban centers. Obviously, the legal rationale of the desegregation case does not apply here since there is no deliberate attempt by the state at racial segregation. On the other hand, if the concern is with the bad effects on the Negro child of segregated schools the same rules should apply except that then the legal theory becomes more attenuated. But to say that the state is now under an affirmative obligation to take such steps as are appropriate and as may be ordered by a court to put an end to *de facto* segregation is to greatly extend the jurisdiction of the federal courts, to subordinate the public school system of the states even further to federal authority and to expand the scope of the desegregation decision beyond its original rationale. There may be merit in schemes to secure racial imbalance, there may be merit in a busing scheme. But to suggest that the Supreme Court's decision requires, as a state court judge held recently, that in the great metropolitan area of Los Angeles there must be wholesale busing to large parts of the city in order to achieve the result of integration is again to push the constitutional principle to an extreme which disregards other important values. To be sure the Supreme Court has not spoken about this, but I am quite confident that at least some members of the Court are ready to impose on states the duty to take all measures which are appropriate in order to correct racial imbalance, even though it cannot be demonstrated that the state has acted in an affirmative way to deny equal protection of the laws or has failed to follow neutral principles in the administration of its school laws[8]).

A second illustration is more compelling because the whole ground for the decision as a legal proposition was dubious to begin with. I refer to the line of cases requiring legislative reapportionment on the basis of one-man, one-vote[9]). The Court squeezed all of this out of the equal protection clause although even the strongest apologists for the Court's decision do

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[8]) These questions will be considered by the Court at its next term since it has agreed to review a lower court decision holding that the general standard of reasonableness applies in determining what affirmative steps a school board may be required to take in order to achieve racial integration. *Swann* v. *Charlotte-Mechlenberg Board of Education*, 38 U. S. Law Week 3522 (1970).

[9]) *Reynolds* v. *Sims*, 377 U. S. 533 (1964), was the key decision.

not pretend that the decision has any support in law, precedent, history or established theories of apportionment. It was simply the imposition by the Supreme Court of its will on the nation in this matter by formulation of a single standard of representation in disregard of historical patterns. I realize the force of the argument that is made that it was necessary for the Court to act since the state legislatures would not move to extricate themselves from a system of malapportionment that itself threatened the integrity of the legislative process. But it is, of course, equally clear that the Court could have addressed itself more moderately to the whole question without declaring that only a single judicially created formula could solve the problem. What is even more distressing is the way in which the Court has blandly, mechanically and dogmatically applied the principle derived from the legislative apportionment cases to other types of elections where legislators are not involved. Only recently the Supreme Court has held that the principle applied to the election of trustees of a consolidated community college and thereby invalidated a system of apportionment even though the state legislature had tried carefully to deal with the problem[10]). The Court confessed that it was unable to make distinctions which dissenting members thought could appropriately be made. This kind of mechanical and dogmatic application of a new principle without regard to competing and balancing policy considerations distresses even those who generally applaud judicial activism.

3. The principle of federalism

A characteristic of the recent judicial activism has been the steady corrosion of state authority and the correlative elevation of the federal government and all of its organs at the expense of the states. It is, of course, too late to be battling the issue of state's rights and this is not the question. Rather the question is whether or not the states may still enjoy some autonomy in areas where Congress has not acted to displace or limit that autonomy. The Warren Court has shown an extraordinary readiness to intrude into matters of state criminal administration by imposing federal standards upon the states, thereby impairing considerably the freedom of the states to order their own affairs. But this intrusion is true not only

10) *Hadley* v. *The Junior College District of Metropolitan Kansas City*, Missouri, 397 U. S. 50 (1970). Here the statutory formula gave a 50% representation on the six-man board to the largest of the participating cities whereas the Court found that on the basis of respective voting populations, and by application of the one-man, one-vote principle, this city should have a 60% representation on the board.

with respect to criminal procedure. More and more the federal courts inspired by the lead of the Supreme Court are asserting a jurisdiction to deal with matters at one time believed to be within the internal administrative power of the state, such as the administration of the schools and universities and also the administration of welfare systems. Again by starting with certain constitutional presuppositions it is always possible for a court to deal with every problem in the United States and with every internal administrative matter as though it were a constitutional matter and thereby convert what otherwise would be a principle of legality into a constitutional dogma. The plain truth is that the Warren Court in its choice of constitutional values has not attached great importance to the federal principle. I suspect that a Court dominated by a policy of self-restraint will show greater respect for state authority.

4. Restraint in reaching constitutional issues

The Court has repeatedly said that the exercise of the judicial review power is a delicate matter and that the Court should be very slow and careful not to deal with constitutional questions unless actually required to do so. Our theory of judicial review is wholly that of incidental review, a power to deal with constitutional questions only in so far as they arise in the course of a case or controversy. The Court has elaborated doctrines limiting its freedom to pass on constitutional matters. A principal characteristic of the Court in recent years, however, has been a reaching out for constitutional matters rather than an attempt to avoid them and a weakening of the procedural barriers such as the party of interest limitation which has served to limit the process of constitutional adjudication[11]). The truth is I think that the Court now looks upon itself as peculiarly a court of constitutional review. When one examines the great grist of decisions by our Court one sees that more and more the Court is limiting its attention to constitutional matters and that it is facilitating the process of constitutional review. Moreover, the Court is becoming far more liberal in the use of its process and that of the federal courts to protect what it regards as important liberties by means of remedies that reach into the powers of the other branches of the government. More and more federal courts at the

[11]) See, *e.g.*, *Flast* v. *Cohen*, 392 U. S. 83 (1968), where the Court created an exception to the well established rule that federal taxpayers do not have standing to challenge the constitutionality of federal spending; *Powell* v. *McCormack*, 395 U. S. 486 (1969), where the Court undertook to review the actions of the United States House of Representatives in excluding a duly elected member from being seated in the House.

lower level, encouraged by what they regard as the directions and trends established by the Supreme Court, are ready to interfere by the injunctive process in administrative matters with the result again that we are substituting newly created federal constitutional limitations for a concept of legality enforcible by state courts in the first instance.

5. A sense of modesty in asserting the Court's role

Mr. Justice Holmes once said there was a temptation on the part of judges to play the role of God in human affairs, thereby ascribing to themselves a wisdom and a competence which are denied to other branches of the government. Judge Learned Hand put the matter in another way when he referred to the Court as a Bevy of Platonic Guardians guarding the Constitution with a superior wisdom and deciding what is good for the people. These expressions point to the basic consideration that the temptation is constantly offered to the Supreme Court in view of the enormous power it is capable of exercising to use its power to achieve what the judges think to be right, good and proper as they see it, but in so doing to invade the sphere of authority of other departments of the government and indeed the freedom of the people themselves to determine constitutional policy. It is sometimes said that the Supreme Court operates as the conscience of the nation by incorporating contemporary moral developments into constitutional interpretation and thereby giving them a constitutional validity. Again, the judge exercising judicial self-restraint may question whether it is his function to give constitutional validity to his own interpretation of current moral or social values. Reference may here be made to two situations which are presently before our Supreme Court. One involves the question of capital punishment. It had never been supposed until recently that anything in the Constitution prohibited either the federal or the state governments from imposing capital punishment for certain crimes. Indeed, the only limitation in the federal constitution which is relevant — the prohibition on cruel and unusual punishment — has never been construed to prohibit capital punishment. In view of the long history of capital punishment and its common acceptance as a punishment deemed appropriate for certain types of offenses, any other conclusion would have been surprising. Yet now we are hearing arguments that capital punishment should be held unconstitutional. Why? Because a number of states have abolished it, because other countries are abolishing it, because it offends our humane notions and because our ideas of what is cruel and unusual change. Underneath it all though I

think is simply the basic proposition that now the Supreme Court should out of respect for a growing consensus resolve this as a constitutional proposition. But it by no means follows that because members of the Supreme Court find something inhumane or objectionable according to their consciences or standards, they should therefore declare this unconstitutional. Yet there are those who say that it is the Court's business and responsibility as an independent and powerful organ of government to use its power in order to advance new constitutional policies consonant with contemporary moral standards. I am quite sure that a very substantial part of the present Supreme Court will find something in the Constitution as a basis for declaring capital punishment invalid, whether it be the cruel and unusual punishment clause or the equal protection clause or any other clause which may prove suitable for this purpose[12]).

A second area where this same tendency may be seen concerns abortion laws. A substantial movement is underway not only in this country but elsewhere to secure repeal of abortion laws and permit the matter to rest in the discretion of the woman with the advice of her doctor. If a preponderant part of the community feels that abortion laws are unwise, then certainly the law should be repealed. But the further argument is made that abortion laws are unconstitutional on one ground or another, and it is not surprising that some lower courts have declared such laws to be constitutionally defective[13]). This is part of the contemporary assertion of personal freedom — an assertion which sooner or later is clothed in constitutional garb. It seems to me that here again it is the part of wisdom for the courts to leave these matters to be determined as a matter of legislative policy and not attempt to convert their own policy predilections into constitutional imperatives.

Conclusion

One may ask what will be the result of additions to the Supreme Court of justices who take a conservative view of their role and pursue a judicial philosophy of self-restraint. How will this affect the results reached in the

[12]) The fact that cases presently pending before the Supreme Court, raising various constitutional objections to capital punishment, have been put over for reargument to the 1970/71 Term of Court, presumably in order to permit the newest appointee, Mr. Justice Blackmun, to take part in the argument and decision in these cases, suggests that the Court is closely divided in these cases.

[13]) See, *e.g.*, *Babbitz* v. *McCann* (D. C. E. D. Wis., 1970) 310 F. Supp. 293, where a lower federal court held a criminal abortion statute unconstitutional on the ground that it violated the woman's constitutional right of privacy. See also *People* v. *Belous*, (Cal. 1969) 458 P. 2d 194, and *United States* v. *Vuitch* (D. D. C. 1969) 305 F. Supp. 1032.

decisional process? It is hazardous to speculate on this or even to determine when there will be a sufficient majority on the Court who can be identified in terms of judicial self-restraint. Judges are not easily categorized and do not always fit into one role completely. A judge may defeat the expectations of the President who appointed him. I do think it quite clear that new appointments will not impair the Court's resolution to enforce the Constitution's clearly defined policy of equal rights for blacks. The Court may retreat some in the protection it has accorded to the accused. I think it may retreat some on the scope of the freedoms of speech and press and on the recently expanded use of the equal protection clause by according greater deference to expressions of legislative policy in defining public interests and policy objectives. A court exercising greater self-restraint than the Warren Court will attach greater importance to the place of the states in our federal system, keep the federal judicial process and power within closer limits and resist the temptation to convert its moral tastes and predilections into constitutional postulates.

The path of self-restraint may be a tortuous one and the destination not clearly discernible. But we can be quite sure of one thing, and this is that if the Court is controlled by what Mr. Nixon calls strict constructionists, its work will be less spectacular, it will be less dramatic, it will excite fewer headlines.

In saying what I have I have not attempted to assess the work of the Warren Court by reference to the values it has championed or to minimize the contributions it has made to securing equal rights for blacks and other minorities, the protection of the accused, and the advancement of the freedoms of expression so essential to a democratic society. What I have attempted to point out is that the vigorous use of judicial power carries its own perils and may in itself be a threat to the democratic process. The struggle between judicial activism and judicial self-restraint is inherent in the theory and practice of judicial review. Sound considerations relative to the role of the Court and the respect it commands in American life can be adduced in support of a policy of judicial self-restraint. President Nixon is not acting irrationally or in a reactionary way to suggest that in order to secure balance on the bench he is looking for judges who exercise self-restraint in asserting the power of the judicial office. Indeed, I suspect that in pointing to this goal he is voicing a view which receives substantial support not only from the public but also from the legal profession and from the academic segment of the legal order.

I think it would be an unfortunate thing if the Court consisted entirely of strict constructionists, just as I think it would be an unfortunate thing

if the Court consisted entirely of judicial activists. I think some balance here is essential and this is the point the President is making. For it is in the exposure and resolution of differences within the Court that basic issues are defined and illuminated and the public's understanding of the Court's function enhanced. The President hopes by his appointments to make a definite and recognizable impact on the future course of constitutional interpretation. History alone can be the judge of whether and to what extent his efforts prove successful.