FOREWORD

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CONTINUOUS REEVALUATION and reassessment of all legal institutions, processes, and principles, are required if effective legal strategies are to be employed against inequality, injustice, and racism.

In 1968, Chief Justice Earl Warren resigned from the Court. Since then, there have been three other vacancies on the Court which have now been filled by the President. The latest two appointees, Powell and Rehnquist, were only recently seated. Since the President, in his 1968 election campaign, bitterly assailed the Warren Court and vowed to remold the Court in his image as rapidly as possible, it is especially appropriate that we try to determine the directions in which the reconstituted Court will move so that we can prepare to fashion new remedies and theories.

The attack on the Warren Court was largely based upon its so-called "activism" or "humanism." Even a cursory glance at the Warren Court indicates the reason for many of these attacks. The Warren Court, in the area of race relations and civil rights, achieved a great breakthrough. First and foremost, it struck down the legal underpinnings of the segregated and discriminating legal order in its decision in the school segregation cases. Secondly, it expanded "due process" to improve fairness and assure some measure of equality in criminal cases. This is of primary import ot Blacks since the economic and cultural system assures that they contribute undue numbers to those charged with criminal activity. Moreover, the Court gave new emphasis to the civil rights acts of the sixties.

In short, the Warren Court made more effective the Constitutional guarantees of "equal protection of the laws" as well as the "due process" clause of the 14th Amendment. At times, it did this against the loud outcries of what has been termed the "radical right."

In analysis of judicial trends, the terms "liberal" and "conservative" have limited use. We are concerned with whether the courts are serving as instruments of justice, with proper regard for human values, or whether they are imprisoned by a rigid framework of rules; rules which tend to glorify form over substance.

It is appropriate that an assessment be made at this particular time because the decisions during the 1971-72 terms by the Burger Court are probably for the first time sufficiently numerous to provide a clue to the future. Four Nixon Justices are now sitting and, hopefully, we have a breathing space before there is a new vacancy on the Court. Professor Philip Kurland,

in *The Supreme Court Review* of 1970 and 1971, made a very perceptive forecast of future decisions of the Burger Court. Unfortunately, his prophecy was based upon the business of the Supreme Court in its October 1969 and 1970 terms when there was but scant evidence of judicial trends. Moreover, no one could possibly characterize that erudite professor as sympathetic to individual or human rights. He is essentially a law and order man, guided by Frankfurtian notions of formal equality.

To the inveterate Court watcher, the decisions of the Burger Court represent a mixed bag. Some were not only eminently satisfactory and in accord with the highest traditions of the Court, but also given the temper of the times, indicative of a high degree of courage.[1] On the other hand, some Burger Court decisions were shocking to the civil libertarian.[2] These and other cases have confirmed the apprehensive anticipation caused by the nomination hearings and engendered a nagging fear that the Court has indeed been "turned around."

Melvin Wulf, legal director of ACLU, a perceptive critic of the Court, has recently tempered his unexpected optimism, the result of the 1971 term crop of decisions, by noting:[3]

> "I would be the first to admit that this Term could just as easily have been assessed from a wholly different perspective. The good decisions could be seen as only temporary aberrations which will predictably decrease as time goes on and as the new Justices work their way more confidently into their roles. If Nixon has another four-year term, and if he persists in his effort to conservatise the Court (and I know of no reason now why he should not), I may have to change my tune."

Hopefully, the incisive analyses of Professors Kenneth Tollett and Henry McGee, erudite legal scholars, will provide us with at least some tentative and useful answers.

1. *Furman v. Georgia*, 408 U.S. 238 (1972); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
2. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Kirby v. Illinois*, 406 U.S. 682 (1972; *Younger v. Harris*, 401 U.S. 37 (1971).
3. *1972 A.C.L.U. Report.*