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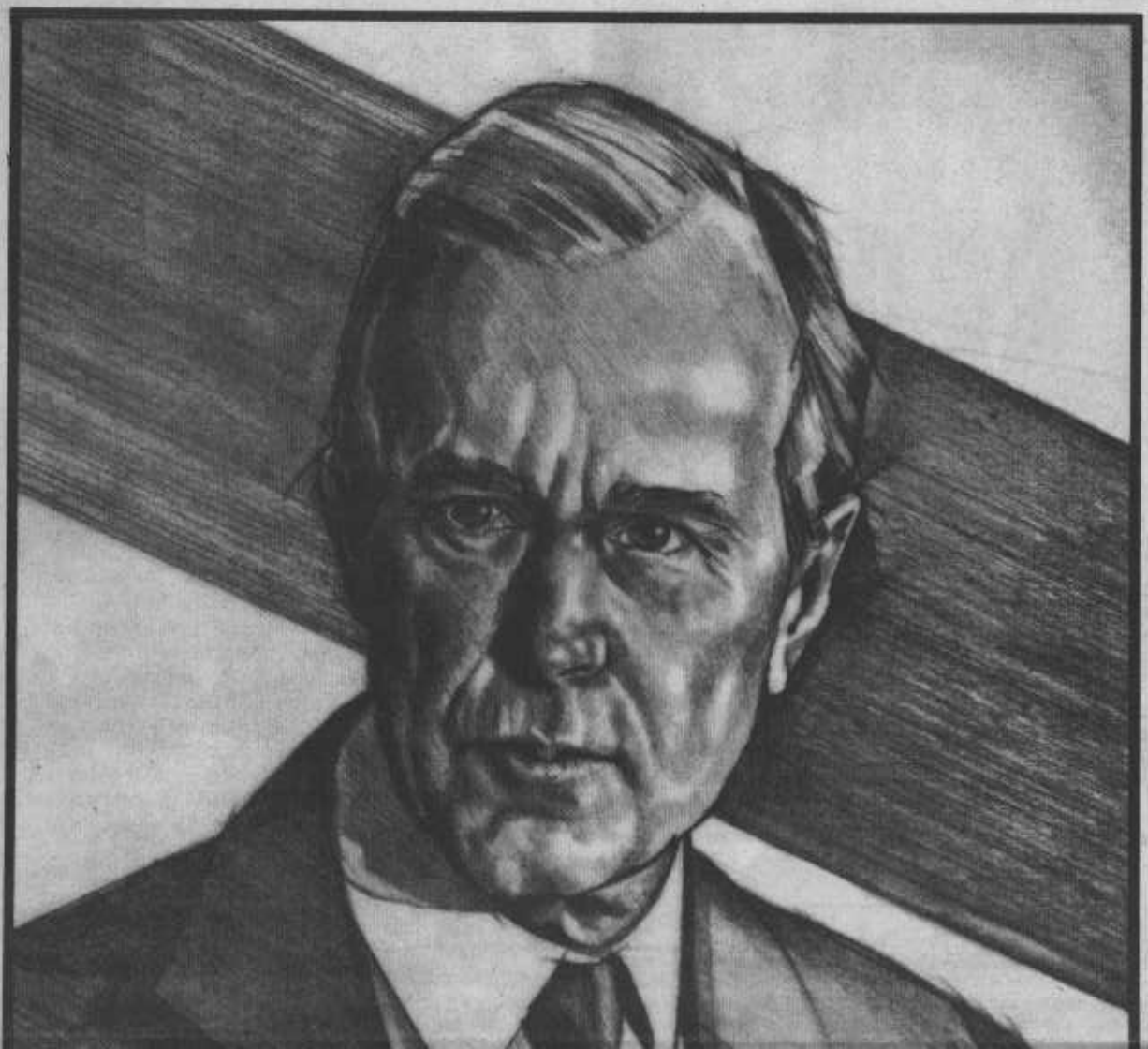


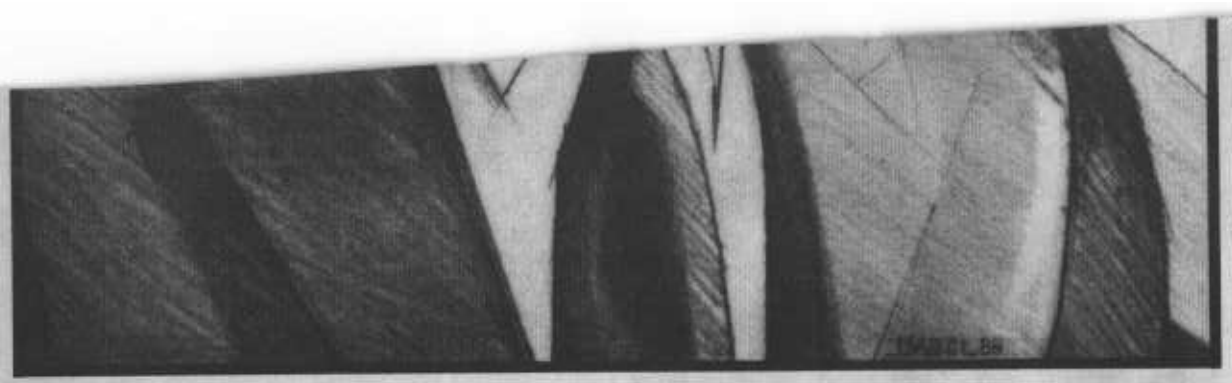
BRIEF CASES

Courting disaster

by Harvey Silverglate

It has largely been ignored as a campaign issue this year, but a George Bush Supreme Court would complete a process that has been gradually picking up steam ever since Richard Nixon appointed Warren Burger and William Rehnquist to the Court. Such a resolution would result in a frightening scenario:

- The president would be able to hide from Congress much of what he and his underlings do, and would be able to bully Congress and generally exert executive-branch supremacy — precisely what the Founding Fathers, recalling the tyrannical King George III, meant the Constitution to protect against.
- The press would be intimidated, particularly when it came to reporting important stories about the type of secret-government and covert actions responsible for some of the more spectacular foreign-policy disasters, such as the abortive Bay of Pigs invasion under President John Kennedy and the Iran-contra affair under Ronald Reagan.
- The rights of citizens to live their own lives and make their own private decisions would be severely restricted by a government no longer restrained by the provisions of the Bill of Rights.
- The national commitment to equality of citizenship and equal opportunity, which became serious only after the advent of the civil-rights movement led by Martin Luther King Jr., would become a historical relic.



The hate brigade

by Chip Berlet

George Bush's plan for a kinder, gentler America apparently will be implemented with the help of persons who think the Holocaust is a hoax. When the Bush campaign was revealed as having recruited an ethnic-support coalition that included racists, fascists, anti-Semites, Nazi apologists, and even aging Nazi collaborators, it responded with a typical and ironically appropriate damage-control technique — the Big Lie.

The charges primarily came from two sources: a report by Detroit-based freelancer Russ Bellant, and a series of articles by reporters Larry Cohler and Walter Ruby appearing in *Washington Jewish Week*. Both sources focused on the Bush campaign's recruitment of Eastern European nationalists who had emigrated to the US after World War II. These ethnic activists had gravitated toward the Republican Party because of a shared emphasis on rolling back communism and gaining independence for the nations near the Baltic coast and the Balkans that now are under Soviet domination.

Some of these ethnic émigrés, who champion "liberation" for these "Captive Nations," had fled their homelands because of their allegiance to Nazi Germany. Their continued support for fascism and anti-Semitic views were aspects of their political work kept hidden while they toiled on behalf of George Bush and the Republican Party. A chronological look at the controversy shows how artfully the Bush campaign sidestepped the charges.

September 8, 1988: Washington Jewish Week charges that several Bush ethnic-advisory-committee members are well-known anti-Semites and pro-fascists, including persons who opposed the Justice Department's Office of Special Investigation (OSI) probe into émigré-Nazi collaborators in the US. The article focuses on Jerome Brentar, Florian Galdau, and Philip Guarino. Brentar has suggested the OSI search for Nazi war criminals is a communist plot, and worked with groups claiming the Holocaust is a Jewish hoax. Galdau is described by Nazi hunter Simon Wiesenthal as the leader of the Romanian pro-Nazi and anti-Semitic movement in New York City. Guarino is linked in published accounts to the fascist-oriented P-2 Masonic lodge in Italy.

Mark Goodin, spokesperson for the Bush campaign, announces "George Bush will support OSI as president," and pledges the campaign will look into the allegations. "If there is anything to them, we'll take action," says Goodin.

Henry Siegman, executive director of the American Jewish Congress, says the charges are a "shocking revelation. It suggests a high degree of either insensitivity or incompetence on the part of George Bush's staff. I'm sure George Bush is personally unaware of the sordid personal history of these people. But now that he has been made aware of them we have every right to expect him not only to remove these people but to repudiate what they stand for."

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Chip Berlet is an analyst for Political Research Associates of Cambridge, which published Russ Bellant's report on the far-right elements working for the Republican Party.

Surely, you say, the Supreme Court alone cannot effect such a radical change in the American landscape. Well, of course that's true. But what the Supreme Court is supposed to do is act as a brake against efforts by the other two branches of government, the executive and the legislative, when they are tempted to invade each other's turf or the turf of individual citizens. Under a theory of "strict construction" of the Constitution, especially the Bill of Rights (which holds that it is the courts' obligation to adhere to the clear text of the Constitution and not to read unintended rights and obligations into the Founders' language) that is currently enjoying a revival in so-called conservative legal circles, the Supreme Court (and ultimately the entire federal judiciary) is likely to surrender this traditional role.

A case in point is the move toward judicial abdication of the Supreme Court's function to guard minorities against the abuse of power by the government or by majoritarian rule, which began in a relatively mild way with the ascension of Warren Burger as chief justice of the United States during the Nixon administration. It became progressively worse with the passage of time, particularly because of President Reagan's additions to the Court. (He elevated William Rehnquist to the chief justiceship and added Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy to the bench.) With the addition of Reagan's latest selection, Kennedy, strict construction's crabby and narrow view of the proper role of the courts, and of the proper relationship between the branches of government and between the government and its citizens, has probably gained consistent majority support on the nine-member Court.

Right now, the only justices who can be counted on to vote to preserve constitutional liberty in this country are William Brennan, Thurgood Marshall, Harry Blackmun, and John Paul Stevens. Once in a while a fifth vote can be garnered from either Justice Byron White or Justice O'Connor, both of whom can at times be inconsistent in their liberty-bashing.

But with the all-but-certain retirement or death of Justices Brennan, Marshall, and Blackmun during the administration of the next president (and even Justice White has talked privately about retiring), the extreme right-wing crowd remaining on bench, once bolstered by three or four Bush appointees, would have absolute control of the Supreme Court for a long, long time.

The failure of this issue to take center stage during this depressing presidential campaign is not surprising. Many people probably don't care what happens to the Supreme Court. Others don't understand or grossly underestimate the degree to which the Court's actions trickle down and seriously affect the nature of life in the United States. In fact, looking at any single case decided by the Court, or even at the cases decided in any single term, does not make sufficiently clear its enormous influence. Looking back, however, to the start of the Burger Court after the retirement of the late and great

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no plans to investigate the backgrounds of any of the ethnic-group members cited in the Bellant report. Incredibly, four of the ethnic-panel members who resigned from the Bush campaign — Guarino, Slavoff, Galdau, and Fasztor — are still active in the RNC's Heritage Groups Council.

September 29, 1988: Ron Kaufman, Northeast political director for the Bush campaign tells the *Jewish Advocate* newspaper the Bellant report is "totally outrageous." Goodin denounces Bellant's report and says people who voluntarily resigned from the campaign "vigorously defended" themselves against the charges. "We were not able to substantiate any of the allegations. . . . These individuals maintain fierce opposition to the charges. We certainly accept that explanation."

So the Bush campaign has come full circle to a whitewash of the allegations against everyone except Brentar — whose outspoken anti-Semitism couldn't be ignored. Just last week author Charles R. Allen Jr., an expert on the emigre-Nazi networks, wrote an article in the *Village Voice* wondering how Bush could not have known of the "pro-Nazi backgrounds" of the ethnic-campaign supporters. Allen produced a 1983 photograph of George Bush shaking hands with Yaroslav Stetsko, then leader of the pro-Nazi Anti-Bolshevik Bloc of Nations. The photo was taken at a White House reception. Bush signed the photo: "To the Honorable Yaroslav Stetsko with best wishes — George Bush." Allen also produced a 1976 RNC memo in which Bush, as RNC chair, is reported to have reviewed the past work of the Republican Heritage Groups Council and set goals for the coming year.

This is a story that has been widely ignored. Other than the *Boston Globe* and *Philadelphia Inquirer*, no major newspaper or electronic news organization has covered the story in depth. Anti-Defamation League Boston director Leonard Zakim is concerned about the situation. "The ADL is very clear in demanding a full explanation take place; these charges are extremely serious and we expect the response to be equally serious," says Zakim. "We are very disturbed that spokespersons for the Bush camp did not see fit to repudiate in full those individuals whose stated views are offensive. We don't see this as a Jewish issue. When charges like these are raised, all people should be concerned. It shouldn't only be Jewish organizations calling on the political campaigns to deal with issues of racism and anti-Semitism, but all persons of good conscience." □

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chief justice Earl Warren, in 1969, and examining the sweep of Supreme Court decisionmaking from then until today, one is struck by just how much damage has already been wrought, and how much more is likely to come.

One of the most worrisome developments is the Court's preference for executive power over legislative authority in nearly any situation in which those two branches have a serious clash. Although some of the higher-profile executive-legislative clashes in recent years have made it appear that the Court is somewhat sensitive to legislative prerogatives (the Court's partial but in fact quite minor invalidation of a portion of the Gramm-Rudman-Hollings budget-cutting law is an example), when it has really counted, the Court has shown its true preference for executive power unhampered by pesky legislative oversight.

For example, the Constitution contains a provision — the so-called Speech or Debate Clause — that gives protection from harassment to members of Congress from either the executive or the judicial branches, or from a citizen seeking to harass a congressman or senator by, say, bringing a lawsuit. The clause provides that if any member of Congress commits an improper act in connection with his or her legislative activities, he or she may be disciplined only by the House or the Senate and may not be called on the carpet, investigated, sued, or prosecuted by any other branch. (Congress itself has made an exception to this immunity by passing legislation that allows its members to be indicted and tried in the courts for certain legislative-related infractions, such as official corruption.)

Yet under the Burger and Rehnquist Courts, the justices have allowed an extraordinary amount of bullying of Congress, despite the Speech or Debate Clause immunity afforded it by the text of the Constitution. Back in 1972, during the Nixon administration, a majority of the justices allowed a federal grand jury to subpoena aides to Senator Mike Gravel (D-Alaska) in order to find out how Gravel had gotten his hands on a copy of the Pentagon Papers. As a result, Gravel and his aides were threatened with criminal prosecution, even though Gravel had acquired the papers in connection with his work on a Senate subcommittee that he chaired at the time and, indeed, had read from the papers during a late-night special subcommittee meeting that he'd called.

Equally egregious was the case of Senator William Proxmire (D-Wisconsin), who in 1979 was successfully sued for libel by a social scientist whom the notoriously frugal senator had ridiculed for taking government research money in order to investigate why monkeys clench their jaws when they are aggravated by various stimuli. Proxmire was surely pursuing a legislative activity when he awarded the professor one of his celebrated Golden Fleece Awards for this dubious use of government funds, but the Supreme Court allowed the harassing lawsuit anyway, and Proxmire ultimately had to settle the case or else spend years of time and scads of money litigating.

Indeed, one of the few Speech or Debate Clause cases won by a congressman was brought by an aggrieved citizen seeking to vindicate his civil rights. In that case, *Doe v. McMillan*, the Court decided in 1973 that a segregationist member of Congress was protected from suit by black students whom he'd defamed in a committee report.

Thus, a pattern has emerged of members of Congress being virtually immune in Speech or Debate cases from the complaints of citizens whose rights have been violated.

Moreover, they have been essentially terrorized by executive power seeking to keep them from finding out what the executive has been up to or from expressing certain forms of embarrassing criticism of executive conduct. The Supreme Court has managed to grant the executive branch a form of executive privilege, which has made it difficult for Congress to question or interfere with presidential prerogatives or to force the president to reveal certain secrets to Congress. This has been done despite the fact that the Constitution, in contrast to its specification of a Speech or Debate immunity for members of Congress, nowhere so much as makes mention of any sort of privilege for the executive branch. So much for the conservative doctrine of strict constructionism, championed by Edwin Meese, Robert Bork, and their ilk.

This term the Court will be dealing with the issue of whether Congress can block the administration's effort to require federal employees to pledge never to disclose classified information, not even to Congress. And it is likely that at some point in the near future there will be a constitutional test of Congress's power to stop the president from committing the use of American military force without seeking a congressional declaration of war. In these crucial clashes, Bush, were he to become president, is almost certain to win, particularly with the addition of one or more of his own appointees.

This ability of the executive and judicial branches to dominate Congress is matched by the increasingly draconian controls being imposed on the press when reporters try to investigate the secret operations of the executive branch. For example, a few years ago Samuel Loring Morison, a military-intelligence employee who provided reconnaissance photographs of a Soviet ship to a British publication, was tried and convicted for espionage. It was undisputed that Morison did not seek to injure American national security in any way. This was the first case in American history in which an American was convicted of espionage for an act of public disclosure — instead of covert spying, intended to give

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aid and comfort to the enemy. His conviction was affirmed by a court of appeals earlier this year, and the Supreme Court refused even to review the case, which constitutes a deadly threat not only to government leakers but also to the press that publishes such information.

The refusal to review the Morison conviction was no surprise, however, in light of an infamous 1980 case involving former CIA operative Frank Snepp. Snepp is the author of *Indecent Interval*, which documents CIA misconduct in Indochina. The CIA received a court order allowing it to confiscate all income from the book and declaring that Snepp did not have the authority to publish a book about his CIA activities without first submitting it to the agency for censorship. The Supreme Court, which reviewed the case, did not even allow Snepp any opportunity to argue before it and issued an opinion that was harsher on Snepp than the lower court's decision.

Moreover, the Supreme Court has been frightfully willing to sacrifice the liberties of citizens in the face of governmental claims of power and authority. The litany of cases in which the Bill of Rights has been at the losing end is depressingly long. American citizens, in 20 short years, have virtually lost any substantial degree of protection against unreasonable searches and seizures by police while driving, while walking down the street, and to some extent even while sitting in their own homes. The right to privacy has been eroded not just in the area of search and seizure but also in the area of conduct involving no harm to anyone else. The most notorious such

case involved a 5-4 vote by the Court in 1986 upholding the constitutionality of Georgia's sodomy statute. In that case, police walked into a bedroom where two consenting adult gay men were engaged in sex. The Court ruled that even under such circumstances, the state had an interest in prosecuting, and the power to do so.

Equally outrageous was the Court's 5-4 opinion last year holding that the death penalty may be imposed even where it is shown that the process by which certain defendants were sentenced to death was riddled with racial bias. And Justice Harry Blackmun recently told an audience that he fears that this very term will be marked by the Court's reversal of its landmark 1973 opinion in *Roe v. Wade*, which gives a pregnant woman the right to decide for herself, without governmental interference, whether to have an abortion or bear a child.

Nor is the current Supreme Court likely to be overly sympathetic to laws aimed at rooting out discrimination. Indeed, this very term the Court heard a case in which the Court itself took the highly unusual step of asking the parties to argue a question that neither party to the litigation had raised. The case, *Patterson v. McLean Credit Union*, is perhaps the most important civil-rights case to arise in a decade; it asks whether a much-used federal civil-rights statute, passed just after the Civil War, in fact prohibits a broad range of discriminatory acts committed in the course of ordinary commerce. The applicability of this particular statute to the private sector was widely thought to be no longer subject to serious debate in view of the clear national policy against racial discrimination. The Supreme Court has now thrown that consensus into doubt by asking that the scope of the statute be re-argued.

Given the enormous damage

MARJORIE SIEGEL

Will there be no choice?

done by the Supreme Court in recent years to our conception of what kind of society ours really is, the addition of even one Bush justice, let alone four, would have enormous implications. Many of the rights of our citizens, as well as our historic conception of the limited role of executive and police authority, over which Americans fought the War of Independence and many subsequent battles, are now being eroded. The national commitment to end racial discrimination, started after the Civil War and substantially enlarged after World War II and the Korean conflict, and again during the Warren Court era, is in question. The rights of Americans to make decisions concerning their own bodies and to arrange their love lives without government interference are in retreat.

A society that has long considered itself to be the freest in the world is now threatened with a massive re-ordering of private rights and public powers. This is being accomplished by a determined administration in Washington supported by a zealous right-wing cadre of extremists meeting little resistance from an overly complacent and often dispirited public. And the United States Supreme Court is in the process of completing its own abdication of responsibility for keeping our scheme of constitutional and limited government in balance. By the time the Reagan-Bush counter-revolution is over, King George III might seem tame by comparison. □