S. to the NEWS

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JUDICIAL ACTIVISM AND OSHA

Although the U. S. Constitution says that "all" Federal legislative powers reside in the Congress, a great deal of de facto lawmaking in the last 20 years has been done by the Federal courts.

Tremendous changes in our laws have been brought about by plaintiff lawyers who devised new legal theories to evade or change existing laws as they apply to students, teachers, prisoners, criminals, mental patients, minors battling adult authority, putlic housing tenants, homosexuals, abortionists, or pornographers.

This judicial activism began with the 1954 decision of the Warren Court, Brown v. Board of Education, which ordered school desegregation. In retrospect, this decision seems to have relieved Federal judges from restraints on judicial authority, and they enthusi asti cally embarked on untested waters.

No longer do Federal judges confine themselves to ordering remedies for those who have been denied their constitutional rights. The judges create new rights which have never before existed in the Constitution or any statute, they fashion avant garde remedies, and they turn the courts into administrators as well as legislators.

Thus U.S. District Judge Arthur Garrity did not confine himself to ordering school integration; he took over the day-to-day operation of the Boston schools. U.S. District Judge Frank Johnson assumed supervision of the Alabama mental hospitals and ordered detailed standards of care.

In other decisions, Federal courts have redrawn geographic boundaries, ordered racial quotas in schools, imposed school tax rates, rewritten Social Security laws, and determined where a highway or a power plant may be built.

The Department of Health, Education and Welfare says that 357 school districts

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are now operating under Federal court orders. The prisons in nine states and some 100 cities and counties are being overhauled under court supervision.

Constitutional historian Raoul Berger, analyzing judicial activism in a new book, concludes that nothing in the U.S. Constitution empowers the courts to assume broad lawmaking or administrative powers. He asks, "How long can public respect for the Court ... survive if the people become aware that the tribunal which condemns the acts of others as unconstitutional is itself acting unconstitutionally?"

Early this year the Supreme Court heard argument in a case which will test how consistent are the proponents and opponents of judicial activism. It involves an attempt by a small businessman to protect his constitutional rights against the arbitrary actions of Federal bureaucrats.

F. G. Barlow, a plumbing and electrical contractor in Pocatello, Idaho, invoked his F0urth Amendment protection against unreasonable searches and denied admittance to his business premises by the Occupational Safety and Health Administration (OSHA) inspector.

Althoug1 the Fourth Amendment guarantees our right to be "secure" against "unreasonabl?. searches" unless a specific warrant is issued on "probable cause," the OSHA statute orders inspections without advance warning of businesses against whom there has been no complaint whatsoever.

The decision in Marshall v. Barlow's Inc. is expected this spring. Will the Supreme Court follow Raoul Berger's analysis that the people "have a right to govern themselves and make their own mistakes" (e.g., if OSHA is a mistake, the remedy is in repeal or amendment by Congress and not in the courts)?

Or will Supreme Court activists allow a mere businessman to defend his constitutional rights in the courts, as criminals, pornographers, homosexuals and others have been permitted to do?