

Book Review of The Warren Court

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THE WARREN COURT. By ARCHIBALD COX.¹ Cambridge: Harvard University Press, 1968. Pp. 142. \$4.95.

With the prospective completion of Chief Justice Warren's administration on the Supreme Court of the United States, the summary view of the past fifteen years presented here by Professor Cox is particularly timely. It is the most recent in a list² which will almost certainly proliferate in the immediate future, but for a succinct and intelligent summary of the major constitutional decisions of the Warren period there will be few commentaries now or later which will be its peer.

Although it is almost endemic in American public affairs to subject the Supreme Court to a running fire of criticism—some of the commentary of the New Deal period³ was virulent enough to leave still-smouldering embers—the abuse which has been heaped on Earl Warren has only been exceeded by that suffered by John Marshall. While this reviewer has no doubt that history will rank these two men as the greatest Chief Justices to date, it is a poor commentary on American life that the ultimate value of their services must be stated in inverse proportion to the invective they have incurred.

As Professor Cox points out, much of the excoriation of Warren has come from an extremist fringe while "the plan to impeach Chief Justice Marshall was a plank in the political program of the Jeffersonian Democrats." The highway posters, bumper stickers, matchbook covers and other media of propaganda against the Warren Court have been a shameful manifestation of extremism which has unfortunately

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1. Solicitor-General of the United States, 1961-1965; Samuel Williston Professor of Law, Harvard Law School.

2. Cf. BICKEL, *POLITICS AND THE WARREN COURT* (1965); BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); KATCHER, *WARREN: A POLITICAL BIOGRAPHY* (1968); WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* (1968).

3. Cf. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); PEARSON AND ALLEN, *THE NINE OLD MEN* (1937).

tarred many a sincere and fair-minded conservative in the process. For rational conservative criticism of the activist program of the Warren Court has served the valuable function of a catalyst in our maturing political philosophy, and to have it smirched by the work of anonymous rightists is to dilute the effectiveness of the catalytic agent.

With the projected retirement of Chief Justice Warren, the attack on the nomination of his successor in the United States Senate has provided another unattractive episode in the history of the Court. Here, where rational conservatives have their most legitimate opportunity to express their dissatisfaction with the constitutional jurisprudence of the present, a clique of purely partisan politicians has compromised the integrity of the conservative critique almost as much as the ranting propagandists of the hinterland. At the same time, however, the rational conservatives have introduced a degree of irrationality into their own arguments; their demands for "law and order" directed at the nomination of Mr. Justice Fortas are of a tenor to suggest that they have not even been aware of his advocacy of substantially the same thing.⁴

The legitimate criticism of the Warren Court's activism is a restatement of the age-old question in American political history: Should the judiciary (or *can* the judiciary) abstain from participating in the policy-implementing processes of national affairs? The answer is suggested by the fact that throughout most of its history the Court did not, and probably could not, do so; whereupon its critics charge it with "judicial lawmaking" and its supporters with responsibility for "judicial statesmanship." This is the fundamental issue in the Warren Court's jurisprudence; yet, as Professor Cox points out:

(1) The Court's most creative role has been played either in areas which have always been the special prerogative of the judiciary, such as criminal procedure and libel, or else in areas which the legislative branch has neglected, such as school desegregation and reapportionment.

(2) The legislative measures invalidated by the Warren Court were rarely based upon careful study of social and economic needs of the community, and, except in the case of massive resistance to desegregation, were rarely supported by much long-range popular sentiment.

(3) The Court has been noticeably careful to avoid square conflicts, if it can, even in the area of the First Amendment. . . .

4. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).

A similar note runs through some of the cases voiding convictions for contempt of Congress and even of State legislatures: the primary effort has been to make the investigating committees comply with their own rules. . . .⁵

Much myth has grown up around the motivations and objectives of the Warren Court; *Brown v. Board of Education*,⁶ from the first term of the Court, has been cited as evidence of a conscious plan to reshape the national social structure. Few bother to recall that the case was fully argued under the Vinson Court⁷—or that, in the opinion in *Brown* and other major cases of that period, the Court was unanimous.⁸ In the same manner, *Baker v. Carr*⁹ and its successor cases had been substantially anticipated in the jurisprudence of the past dozen terms of the Court.¹⁰

Yet there can be no denying that the judicial decisions had the effect of filling a political vacuum; if this is intrusion into the independent powers of other branches of government, the question may fairly be asked, Is this the fault of the judiciary, or of the other branches which have defaulted on their responsibilities? Professor Cox (and this reviewer) are persuaded that it is not activism on the part of the Court, but inactivity on the part of the legislative and perhaps executive branches, which has magnified these issues into a conservative crisis.

If one may measure "activism" by the overruling of settled precedents and the establishment of new constitutional doctrines [says Professor Cox], the Warren Court has been extraordinarily "activist" in the field of criminal procedure. . . . There is room for honest debate as to whether such decisions as *Miranda*¹¹ go too far in correcting the acknowledged evil. . . . Despite occasional excesses, the net effect has been extraordinarily important reform

5. COX, *THE WARREN COURT*, 15f.

6. 347 U. S. 483 (1954).

7. Argument first set for week of October 13, 1952; 97 L. Ed. 3 (1952); appellees invited to present oral argument, November 24, 1952, 97 L. Ed. 152; argued December 8-11, 1952; restored to docket with detailed list of questions for reargument, June 8, 1953, 97 L. Ed. 1388; reargued December 7-9, 1953; decided May 17, 1954; 98 L. Ed. 873.

8. Cf. *Cooper v. Aaron*, 358 U. S. 1 (1958).

9. 369 U. S. 186 (1962).

10. Cf. Swindler, *Reapportionment: Revolution or Revisionism?*, 43 N. C. L. Rev. 54 (1964).

11. 384 U. S. 436 (1966).

in the administration of criminal justice, in the States where reform was most needed, within an unusually short span of time.¹²

"The costs of the Court's activism must be reckoned in long-range institutional terms," Professor Cox concedes. "The rapidity of the doctrinal changes and the readiness of a bare numerical majority of the Justices to overturn recent precedents immediately upon a change in the membership of the Court do no service to the ideal of law as something distinct from the arbitrary preferences of individuals." Yet, as the author might have pointed out, this process of rapid reversal or overruling was something that had actually reached its zenith in the Stone Court,¹³ and was a product of the pent-up intellectual energies which had been massing for the past half-century.

"Only history will know whether the Warren Court has struck the balance right," the author concludes. For himself, he adds, "I am confident that historians will write that the trend of decisions during the 1950's and 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic—in short, in keeping with the true genius of our institutions."¹⁴ This reviewer heartily concurs.

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12. Cox, *op. cit.*, 87-88.

13. Cf. MASON, HARLAN FISKE STONE, *PILLAR OF THE LAW*, chs. 37, 38, (1956).

14. Cox, *op. cit.*, 133-134.

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