THE LEGAL PHILOSOPHY OF CHIEF JUSTICE EARL WARREN OF THE UNITED STATES SUPREME COURT

With the end of the 1959-60 term, Chief Justice Earl Warren completed his seventh year as head of the United States' highest court. The years have been marked with striking constitutional developments and marred somewhat by strong and persistent criticism of the court, its members, and particularly of the Chief Justice. The court is, of course, no stranger to attack both against itself as an institution of United States government[1] and against its members,[2] who collectively are perhaps the most powerful officers of government. For in a system where the court determines, by constitutional test, the validity of legislation and of executive action, of both the central government and its component states, it is inevitable that it must withstand the objections of the great forces which are, from time to time, displeased by its decisions.

The post of Chief Justice in such a system is obviously of prime importance, for though the Chief Justice is simply first among equals on the bench, his position gives him considerable influence. It is he, for example, who assigns the writing of the opinion when he is with the majority. His own force of personality, or lack of it, greatly affects the course of decision. His administrative skill will contribute directly to the volume of court business.

Therefore, while every appointment to the United States Supreme Court is a subject of intense interest throughout the country, that to the position of Chief Justice is of maximum concern, a situation heightened perhaps by the fact that the post (as do all federal court appointments) carries permanent tenure and that there have been only fourteen chief justices in the 171 years of the court's history. The constitution gives to the president of the United States the power of appointment of judges of the Supreme Court; but the exercise of the power requires the consent

1. *E.g.,* the very vigorous attack made on the court by President Franklin D. Roosevelt, who proposed — unsuccessfully — an increase in the court's membership in an attempt to overcome the court's persistent holdings of unconstitutionality of the legislation designed to effect economic recovery from the depression of the 1930's.

2. It is often the Chief Justice who takes the heavy brunt of personal attack on the court. For example, though a unanimous court rendered the decision in *Marbury* v. *Madison,* Chief Justice Marshall was especially attacked by the Jeffersonians. Similarly, the attack on the *Dred Scott* decision was much more directed to Chief Justice Taney than to the majority for which he wrote.

of the Senate.[3] Senate hearings on the appointments of Supreme Court judges occasionally result in a very full airing of the appointee's legal and political philosophy,[4] but normally the appointee is so well known, so fully acceptable to the American public of both major parties that the Senate hearings are brief, if not perfunctory. The appointment of Chief Justice Warren was within the pattern of wide general acceptance and assured senatorial confirmation, even though rather exceptional circumstances did attend his selection.

Perhaps the most striking feature of Warren's nomination was the fact that he had acquired no previous judicial experience whatever, nor had he any federal legislative or executive service. Neither had he any teaching background or any significant experience in private practice — the customary background factors, or combination of them, which have almost always characterized the appointees to the Supreme Court.[5] It has been said that his appointment was the first for admittedly political reasons and services, [6] although it is common knowledge and is fully accepted practice that political considerations normally do enter into the selection of Supreme Court judges. It would, however, be difficult to support the proposition that political considerations often control such appointments. President Eisenhower was perhaps more frank than most presidents when he stated that his appointment of Warren was influenced in part by the nominee's political philosophy.[7]

Justice Warren was born in Los Angeles, California, March 19, 1891. His father was a Norwegian immigrant, who had worked as a coachbuilder for the Southern Pacific Railroad and was a pioneer member of the American Railway Union, founded by Eugene Debs. He was also sufficiently successful in real estate ventures to send his son through three years of political science and the law school of the University of California.[8]

3. U.S. Constitution, article II.

4. Only rarely has the Senate denied its consent to a presidential appointment; one such striking instance was its failure to confirm President Hoover's appointment of the late Judge John J. Parker, who served for many distinguished years in the lower federal courts.

5. There are no constitutional or statutory limitations imposing any requirements whatsoever for federal judicial appointments; but by custom such appointees are trained in the law and only rarely have those appointed to the position of Chief Justice been without prior judicial experience, on the Supreme Court itself or elsewhere.

6. "Son of the Golden West," *New Statesman* vol. 54, no. 1376 (July 27, 1957) p. 107.

7. John Hanna, "Our Highest Court," *The Freeman,* vol. 4, no. 3 (November 2, 1953), p. 88.

8. *New Statesman, op. cit.,* note 6, at p. 107.

Justice Warren was admitted to the Californian bar in 1914. His first job was in the law offices of the Associated Oil Company in San Francisco. A year later he moved across San Francisco Bay to Oakland, as a clerk in a law firm. In neither position did he perform any significant legal work. He never wrote an opinion, went into court or effected a compromise between disputing litigants.[9] From 1917 to 1919 he served as a lieutenant with the United States infantry, but did not get overseas.[10]

In 1919 he began the career of public service which led directly to the Chief Justice appointment. He started as clerk of the judiciary committee of the California State senate. This appointment was quickly followed by one as deputy city attorney of Oakland, California. In 1920 he was made deputy district attorney of Alameda County (of which Oakland is the county seat). And in 1925 he began the first of three terms, extending until 1938, in the elective office of district attorney of Alameda County. [11] Beyond question, Justice Warren was exceedingly successful in these posts. In most counties in California, as in most of the States of the United States, the district attorney is the county's chief prosecutor of criminal offences. This was true of Alameda County, but also in this county the district attorney was the county's chief law officer in civil cases. Justice Warren achieved a reputation as a prosecutor of crime. It is said that of the thousands of cases he prosecuted no conviction that he secured was ever reversed by a higher court.[12] A great deal of his work, at the same time, was in civil law, including State and federal constitutional matters.[13]

In 1939 he moved to the elected post of Attorney General of California. Here, though the office was concerned with criminal issues, the Attorney General's primary concern was with civil matters, including constitutional questions. This post he held until 1943, when he was elected governor of California. He was the first California governor to be re-elected for two additional terms; and, strikingly, by an exceptional provision of California law, he was the first candidate to be nominated for governor by both major political parties. He was an outstandingly successful politician and an exceedingly skilled administrator. In 1948, while governor of California, he was the Republican vice-presidential candidate on the unsuccessful ticket with governor Dewey of New York.

9. Irving Stone, *Earl Warren: A Great American Story* (1948), at p. 24.

10. Thomas S. Barclay "Earl Warren," in *Public Men In and Out of Office,* edited by J. T. Salter (1946), at p. 430.

11. (1960) 31 *Who's Who in America* 3034.

12. *New Statesman, op. cit.,* note 6, at p. 107.

13. Beverly Smith, "Earl Warren's Greatest Moment," *Saturday Evening Post,* vol. 227, no. 4 (July 24, 1954), at p. 48.

The sources from which a man's philosophy may be determined are three: his acts, his speeches, his writings. Before his appointment to the United States Supreme Court, governor Warren seemed difficult to "place" politically. Indeed, as stated above, he had won the California gubernatorial nomination as the candidate of both Republicans and Democrats. It was in large measure this political ambivalence that President Eisenhower praised in what was called the governor's "middle-of-the-road" philosophy.[14] Perhaps it would be more accurate to say that he only seemed to travel in the middle of the road because sometimes his position was right and sometimes left. He had, for example, as a candidate for Attorney General in 1938 been supported by some of the largest newspapers, by business interests, both industrial and agricultural (although he also received support from a limited number of labor organizations).[15] As Attorney General he barred the California State Personnel Board from discriminating against American born children of Japanese parents in civil-service jobs. Yet he later actively supported the evacuation of Japanese and Japanese-Americans from the West Coast. He made a clear distinction between what he assumed to be the loyalty of those of Japanese ancestry from that of those of German or Italian ancestry.[16] After becoming governor, he at first strongly resisted the return of the Japanese to the West Coast. But later he came to change his mind, recognizing that an injustice had been done, and he actively aided the return and re-establishment of the evacuees.[17] The stand he took on the imposition of a special loyalty oath on the teachers at the University of California was considered equivocal. On one hand, he joined the minority of the controlling board in voting against the dismissal of professors who refused to sign the special loyalty pledge. But he approved a bill of the legislature which imposed a similar oath for all state employees, including teachers.[18] He sponsored legislation increasing old age pensions;[19] and he sought, although unsuccessfully, to persuade the legislature to establish compulsory medical insurance.[20] He appointed a negro, Walter A. Gordon, as chairman of the powerful Adult Authority of the State of California, the State's pardon and parole

14. " 'Firsts' in Choice of Warren," *U.S. News & World Report,* vol. 35, no. 15 (October 9, 1953), at p. 23.

15. Barclay, *op. cit.,* note 10, at p. 432.

16. "Education of Earl Warren," *The Nation,* vol. 187, no. 11 (October 11, 1958), at pp. 206-07.

17. *Id.,* at p. 208.

18. James Bassett " 'Unpartisan' Chief Justice of the U.S.," *New York Times Magazine* (October 11, 1953), p. 10.

19. Barclay, *op. cit.,* note 10, at pp. 434-35.

20. John P. Frank, "Affirmative Opinion on Justice Warren," *New York Times Magazine* (October 3, 1954), p. 17.

authority.[21] He resisted communist infiltration in California as early as 1936; but he also deplored the witch-hunting methods of Senator McCarthy.[22] By whatever criteria used, it is unquestionable that the nation, as a whole, agreed with President Eisenhower's evaluation of governor Warren as a man who sought the "middle way."[23]

As groups, neither lawyers nor politicians in the United States are normally classed as philosophers. The legal profession in the United States is an exceedingly practical one.[24] But from his pre-judicial statements, speeches and writings, elements of Justice Warren's philosophy may be seen.

(a) On Education

In 1951 he praised the National Education Association for its insistence that all children be afforded the same opportunity for a sound, basic education.[25] In this same speech he expressed his own "middle-of-the-road" philosophy. Speaking of the work of the association, he said, "... I know you are harassed on both sides — on the one hand by those who would resist all change even though we are living in a fast-changing world, on the other hand by those who are contemptuous of the past and would have you cut loose from your moorings and pursue some will-o'-the-wisp ideology just because it is different.

"It is difficult to remain somewhere between these two . . . Yet it must be done, because it is in this way that true progress is made . . ."[26]

In 1952 he stated that he believed in federal aid to education and reiterated his belief that every child had the right to a sound basic education.[27]

21. (1960-61) 31 *Who's Who in America,* 1112.

22. Smith, *op. cit.,* note 13, at p. 48.

23. *E.g.,* Gordon Harrison, "Warren of California," *Harper's Magazine,* vol. 204, no. 1225 (June, 1952), at p. 27.

24. An outstanding exception of a successful lawyer and state politician who is also regarded as an intellectual is perhaps Adlai Stevenson, former governor of Illinois and twice unsuccessful candidate for the presidency, whose articulateness and intellectualism are widely regarded as his primary political liabilities on the national level.

25. (1959) *The Public Papers of Chief Justice Earl Warren,* edited by Henry M. Christman, at pp. 11-13.

26. *Id.,* at p. 13.

27. "Quizzing Warren: interview," *U.S. News & World Report,* vol. 32, no. 18 (May 2, 1952), p. 45.

(b) On Racial Discrimination

When, during his term as governor, white householders in a certain neighbourhood objected to a Chinese living among them, he wrote the Chinese expressing his distress at the attitude of the neighbourhood.[28] In 1948 he said : "To say that there has been no intolerance in our country would be less than frank. And to the extent that it has been manifested, it has retarded the progress of our country and has diminished our standing before the people of the world. But we can thank God that most Americans . . . are trying to eradicate it from our national life." [29]

(c) On Communism

" While the principle of trying to rid the Government of Communists is highly commendable, I'm sure that all Americans must at some time or other have blushed at the practices that were indulged in [by the Un-American Affairs Committees of Congress]."[30]

(d) On Individual Rights

" It is my belief that a man's reputation is just as valuable to him and perhaps more valuable to him than his property, and that he ought to have an opportunity to defend it with equal vigor under rules that are fair. To the extent that anyone indiscriminately charges individuals or groups of individuals with dishonesty or subversion, or whatever it might be that would destroy reputation, that is in my opinion not in the American tradition and should not be encouraged." [31]

In 1947 he had said: " The heart of any constitution consists of its bill of rights, those provisions that secure to the people their liberty of conscience, of speech, of the press, of lawful assembly, and the right to uniform application of the laws and to due process of law.

" Every other provision of the constitution should be designed in the spirit of these basic rights in order to make sure that they become not theoretical rights, but actual rights that can be translated by our people into practical opportunities for self-development . . ." [32]

(e) On Social Progress

In 1952, in a Lincoln Day Address, governor Warren said: "It must be apparent to everyone that we have not yet achieved perfection, and that as long as there are inequalities to be adjusted, unfortunates to be

28. Frank, *op. cit.,* note 20, at p. 17.

29. Christman, *op. cit.,* note 25, at p. 15.

30. *U.S. News & World Report, op. cit.,* note 27, at p. 44.

31. *Ibid.*

32. Christman, *op. cit.,* note 25, at p. 8.

helped, we must maintain our faith in being able to use our institutions for improving the conditions of our citizens.

"... Should America ever grow overly cautious and fail to live boldly in her effort to achieve an ever richer life, she will have entered upon her decay.

"... In the cause of our marvelous growth industry has not hesitated to destroy great works that it might erect new ones at great cost . . . That policy has given us the industrial leadership of the world. Government must not lack the courage and the wisdom of industry nor fear to grasp the conditions of a more nearly perfect life." [33]

(f) On the Federal System

" We can't keep centralizing power in Washington without diminishing the importance of the States and of their local communities, and of the participation of the individual citizen in his government." [34]

Governor Warren opposed the grant of power to President Truman to seize the steel industry.[35]

Of course when a man becomes a member of a court the opinions of which are printed, the place to look for his philosophy is in his opinions. In the United States there is some danger in employing a majority opinion for this purpose, because the majority opinion, while normally carrying the name of only one author,[36] is in fact a group production. Opinions are not only modified in discussions, but the text is circulated and changes in it may be accepted before final announcement. On this subject Justice Frankfurter has said that as a "map to the minds of Justices . . . the opinions of the Court . . . [are] deceptive precisely because they are the opinions of the Court. They are symphonies not solos. Inferences from opinions to the distinctive characteristics of individual Justices are treacherous . . ." [37] But the individual justice's philosophy does appear unmistakably in his separate concurring opinions and in his dissenting opinions. In neither is he obliged to temper his views or his language to the ideas of his fellows. Moreover, in the case of the Chief Justice, particularly, his selection of the cases in which

33. *Id.,* at p. 44.

34. *U.S. News & World Report, op. cit.,* note 27, at p. 40.

35. Bassett, *op. cit.,* note 18, at p. 20

36. A very striking exception has been seen in some of the opinions involving segregated education, in which the court to emphasize its unanimity has appended the signature of each member to the opinion. See, for example, *Cooper* v. *Aaron* (1958) 3 L.Ed.2d *5.*

37. Felix Frankfurter, "Justice Holmes Defines the Constitution," *The Atlantic* (October 1938), p. 485.

he writes the majority opinion is especially instructive. In the procedure followed by the United States Supreme Court, the Chief Justice, if he is with the majority, assigns the opinion for writing to the justice of his choice. Many factors may enter into the selection, such as the justice's particular area of specialized knowledge or interest. Since the Chief Justice is himself entirely free to choose the cases on which his name will appear as author of the majority opinion, the choice he actually makes is a leading indication of his interests and legal objectives and philosophy. Since taking his place on the court, Chief Justice Warren's name has appeared as author of more than seventy majority opinions. Of this number at least thirty-one have dealt with some problem of civil rights or civil liberties. In all but two the Warren opinion has sustained the individual's claim of a deprivation of a constitutionally protected right. Some ten Warren opinions have dealt with a conflict between employers and employees or their unions. In only one did the opinion by the Chief Justice hold against the employee or union. In no less than sixteen of the opinions written by the Chief Justice the court has been called upon to resolve a conflict, often jurisdictional, involving an administrative agency of government. In only two of these did the Warren opinion hold against the government. Admittedly, such categorization, as the above, is somewhat arbitrary. Many of the cases, being complex, would lend themselves to a different grouping. A further breakdown of the cases may be instructive.

I. Civil Rights and Civil Liberties

Beyond question, Chief Justice Warren conceives of the court as the champion of the individual's civil rights and civil liberties, sometimes called in other societies "fundamental rights."

A. *Racial Discrimination*

The case which plunged the Chief Justice and the entire Warren court into the maelstrom of continuing public controversy [38] was *Brown* v. *Board of Education.*[39] As is well known, this case required the States to cease discriminating against negro children in admission to public schools. Its companion case, *Bolling* v. *Sharpe,*[40] applied the same holding to schools in the District of Columbia, where somewhat different constitutional principles were involved because the Fourteenth Amendment, applicable to the States, is not held to be directly applicable to the federal government, which administers the schools of the District of Columbia. Many things about the epoch-making *Brown* decision were

38. See, *e.g.,* "Turmoil in Washington," *U.S. News & World Report,* vol. 42, no. 26, pp. 25-32 (June 28, 1957).

39. (1954) 347 U.S. 483.

40. (1954) 347 U.S. 497.

remarkable, not the least of which was the court's unanimity, unmarred by even a concurring opinion. Warren's achievement of this result is reminiscent of the great Chief Justice Marshall, who also sought unanimity at a time of strong feeling against the court.[41] In cases since the first *Brown* opinion seeking implementation of the principle of racial equality in education, the Chief Justice has maintained a consistent position. He wrote the opinion in the second *Brown* case,[42] which held that desegregation must proceed with all deliberate speed. And in *Cooper* v. *Aaron*[43] he announced the unanimous opinion of the court upholding the 8th Circuit Court's refusal to permit a delay in the integration of the schools in Little Rock, Arkansas, despite the very real, although State-inspired, local hostility.

In a case[44] involving another aspect of racial discrimination, the Chief Justice, speaking for a unanimous court, reversed the criminal conviction of one of Mexican descent because of the State's systematic exclusion of Mexican-Americans from jury service.

In the recently decided case of *Wolfe* v. *North Carolina*[45] the conviction of negroes for trespassing on a publicly owned golf course contrary to State segregation law was upheld by a majority of the United States Supreme Court because of the procedural failure of the petitioners to present in the State criminal action the fact findings and judgment of a prior federal civil action in accordance with the requirements of the rules of the State's procedural law. The Chief Justice, in a dissenting opinion which expresses his impatience when narrow adherence to procedural rules results in an obvious denial of constitutional rights, stated, "I do not agree that the decision below rests on adequate non-federal grounds. And — whether it does or not — it seems to me that the case should not be dismissed in view of the developments since the argument.

" In view of the federal court finding that the appellants were excluded from Gillespie Park because of their race, these convictions give rise to serious constitutional doubts. Unless dismissal cannot be avoided, the appellants should not be deprived of their liberty without being heard on their federal question." [46]

41. See Swisher, "Chief Justice John Marshall," 1 *Marshall College Bulletin* 3, 6 (July, 1959).
42. *Brown* v. *Board of Education* (1955) 99 L.Ed. 1083.
43. (1958) 3 L.Ed.2d 5.
44. *Hernandez* v. *Texas* (1954) 347 U.S. 475.
45. (1960) 80 S. Ct. 1482.
46. *Id,,* at pp. 1493-97.

Perhaps the most significant civil rights case of the 1959-60 judicial year is *Hannah* v. *Larche.* [47] In this case, in an opinion by the Chief Justice, the court upheld the constitutionality of the Civil Rights Act of 1957.

B. *Privileges of Citizenship and Rights of Aliens*

The Chief Justice has also taken a leading role in cases concerning the rights of aliens, and he has been especially outspoken against depriving criminal defendants of citizenship rights as a form of punishment. In *Barber* v. *Gonzales*[48] a Warren opinion denied the government the right to deport a Filipino who, although born a national of the United States in the Philippines and a resident of the United States from a time prior to the Philippine Independence Act of 1934, was by the terms of that Act an alien. The government sought to deport him because he had been convicted of crimes involving moral turpitude. The court found, however, that he had not made an "entry" into the United States within the terms of the deportation requirements, since at the time of his coming to the United States the Philippines were not a foreign country.

In *United States* v. *Zucca,* [49] a Warren opinion held for the defendant in denaturalization proceedings on the jurisdictional ground that section 340 (a) of the Immigration and Naturalization Act of 1952 required United States attorneys to file an affidavit showing good cause for the proceedings rather than a verified complaint with which the government began the instant action.

In *Trop* v. *Dulles* [50] the court, through Warren, held that a court-martial for wartime desertion could not divest the defendant of his citizenship.

In *Nishigawa* v. *Dulles* [51] the petitioner was a native-born American who also had Japanese nationality under Japanese law. He had been inducted into the Japanese army. In his expatriation trial he testified that his conscription had been compulsory. The trial court rejected this testimony. Finding in favour of the petitioner, the court, by the Chief Justice, held that the government had not here met its burden of proving the voluntariness of the expatriating act by unequivocal evidence.

Two dissenting opinions by Chief Justice Warren make quite clear his individual views on the rights of aliens and the privileges of citizenship. In *Jay* v. *Boyd* [52] a majority of the court upheld the deportation

47. (1960) 80 S. Ct. 1502.
48. (1954) 347 U.S. 637.
49. (1956) 100 L.Ed. 964.
50. (1958) 2 L.Ed.2d 630.
51. (1958) 2 L.Ed.2d 659.
52. (1956) 100 L.Ed. 1243.

of an alien who had been a member of the Communist Party from 1935-40. Although he met the prerequisites for the granting of relief under section 244(a) of the Immigration and Nationality Act of 1952, his application for suspension of deportation was denied by the immigration authorities on the basis of information never supplied to the alien. Chief Justice Warren, dissenting, said: "In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play[53] in both our judicial and administrative process.

"... Petitioner is not a citizen of the United States, but the Due Process Clause protects 'persons'. To me, this is not due process. If sanction of this use and effect of 'confidential' information is confirmed against this petitioner by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways." [54]

And in *Perez* v. *Brownell,*[55] in which the majority upheld a construction of section 401(e) of the Nationality Act of 1940 to the effect that the petitioner, a natural-born citizen, having voted in a foreign election, thereby lost his citizenship, Warren, in dissent, wrote: "... The Government is without power to take citizenship away from a native-born or lawfully naturalized American . . . The citizen may elect to renounce his citizenship . . . The mere act of voting in a foreign election, however, without regard to the circumstances attending the participation, is not sufficient to show a voluntary abandonment of citizenship."[56]

C. *Legal Rights of Communists and Communist Sympathizers*

In the current political climate of the United States the defence of the legal rights of a Communist or Communist sympathizer is perhaps the least popular of all causes. Demogogues insist on confusing a defence of the basic rights, such as the right to due process of law, which all persons in the United States possess, with a defence of the Communist ideology, when those basic rights are asserted by Communists. Although he and his court have been subjected to unremitting extremist complaint for doing so,[57] the Warren opinions have consistently preserved the civil rights and liberties — even of Communists. Indeed, the Warren opinions have shown that the court will hold the legislative and executive branches,

53. Principles of natural law will be seen to echo throughout the opinions of the Chief Justice, often in such terms as "fair play."

54. *Op. cit.,* note 52, at p. 1256.

55. (1958) 2 L.Ed.2d 603.

56. *Id.,* at pp. 624-25.

57. See, *e.g.,* "Earl Warren: Chief Justice of a Court under Fire," U.S. *News & World Report,* vol. 45, no. 11, pp. 38-40 (September 12, 1958).

State and federal, to a firm standard of justice to prevent the atmosphere of persecution which has tended to characterize many of the loyalty enquiries.

Peters v. *Hobby*[58] held against the dismissal of a government worker for disloyalty on the grounds that the Loyalty Review Board had exceeded the powers conferred upon it.

In *Watkins* v. *United States*[59] a union officer, appearing as a witness before a sub-committee of the House Committee on Un-American Activities, refused to answer questions as to past Communist Party membership of certain persons on the grounds of lack of pertinency. A Warren opinion reversed his conviction for contempt and held that a congressional investigating committee must, upon objection of a witness on the grounds of pertinency, state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent.

In *Sweezy* v. *New Hampshire*[60] the petitioner had refused to answer questions asked him by the State Attorney General, who was acting as a one man loyalty investigating committee, pursuant to a resolution of the State legislature authorizing him to look into violations of the State Subversive Activities Act. He had asked the petitioner questions about a lecture given by him at the State university and about the Progressive Party and its adherents. In reversing the petitioner's contempt conviction, the court held that the failure of the legislature to specify in its authorizing resolution that it desired the Attorney General to obtain the information to which his questions related was equivalent to a lack of authority in the Attorney General to ask the specific questions.

In *Greene* v. *McElroy*[61] the petitioner had been discharged by a private employer following the revocation of his security clearance by the government in a proceeding in which he had no opportunity to confront and cross-examine either the witnesses against him or the government agent who took their statements. The court held, in an opinion by Warren, that such proceedings were not authorized by either Congress or the president and that the authority to hold such proceedings would not be inferred. In ruling for the petitioner the court left open the view it would take if such proceedings had been authorized.

In the same category, Warren opinions have upheld the right of witnesses to claim the privilege against self-incrimination in loyalty investigations.[62]

58. (1955) 99 L.Ed. 1129.
59. (1957) 1 L.Ed.2d 1273.
60. (1957) 1 L.Ed. 2d 1311.
61. (1959) 3 L.Ed.2d 1377.
62. *Quinn* v. *United States* (1955) 99 L.Ed. 964; *Emspak* v. *United States* (1955) 99 L.Ed. 997; *Bart* v. *United States* (1955) 99 L.Ed. 1016.

D. *Rights of those Accused of Crime*

Many of the Warren civil rights decisions have been written to protect the person accused of crime. Three opinions have overturned convictions which were based on coerced confessions;[63] One reversed a conviction in a case in which the defendant was denied counsel.[64] In one case a resentence was ordered because of an unwarranted multiplication of charges.[65] Two prosecutions were reversed because of the subsequently demonstrated [66] or admitted [67] untruthfulness of prosecution witnesses. One case reversed a conviction because the evidence was secured by illegal wire tapping.[68] In *Sherman* v. *United States*[69] a conviction for unlawful sale of narcotics was reversed on the ground that the defence of entrapment had been established as a matter of law.[70] In *Smith* v. *United States* [71] a kidnapping conviction was upset on the grounds that an indictment rather than an information was required. *Burns* v. *Ohio* [72] held that a State may not require an indigent defendant in a criminal case to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts. A noteworthy feature of this case is that to be able to consider the case the Supreme Court treated a letter from the clerk of the Ohio Supreme Court to the defendant returning his notice of appeal and advising the defendant of the necessity of paying the filing fee, as a final judgment of the Supreme Court of Ohio within the meaning of 28 United States Code, Section 1257, which requires a final judgment as a prerequisite of review by the United States Supreme Court. Not every member of the court would have stretched the rules so far to seek to do justice in the individual case.[73] The Chief Justice's

63. *Fikes* v. *Alabama* (1957) 1 L.Ed.2d 246; *Spano* v. *New York* (1959) 3 L.Ed.2d 1265; *Blackburn* v. *Alabama* (1960) 4 L.Ed.2d 242.

64. *Chandler* v. *Fretag* (1954) 99 L.Ed. 4.

65. *Prince* v. *United States* (1957) 1 L.Ed.2d 370.

66. *Napue* v. *Illinois* (1958) 3 L.Ed.2d 1217.

67. *Mesarosh* v. *United States* (1956) 1 L.Ed.2d 1.

68. *Benanti* v. *United States* (1957) 2 L.Ed.2d 126. But Justice Warren wrote the opinion in *Rathburn* v. *United States* (1957) 2 L.Ed.2d 134, upholding a conviction based on the contents of a communication overheard on a regularly used telephone extension where the permission of one party to the conversation had been secured.

69. (1958) 2 L.Ed.2d 848.

70. But a companion case, *Masciale* v. *United States* (1959) 2 L.Ed.2d 859, sustained a conviction under similar challenge and for the same offence on the grounds that the issue of entrapment had been properly submitted to the jury, which had found against the defendant.

71. (1959) 3 L.Ed.2d 1041.

72. (1959) 3 L.Ed.2d 1209.

73. See the dissenting opinion of Justice Frankfurter at pp. 1214-16.

concern that the criminally accused receive the fullest measure of constitutional protection may be seen in the language of dissenting opinions.

In *Pollard* v. *United States*[74] the defendant had received a judgment of probation, suspending the imposition of the sentence. This judgment was entered in the absence of the defendant and was void for that reason. Two years later, after he had violated the terms of his probation, a judgment sentencing him to prison and setting aside the judgment of probation was entered. A majority upheld this sentence against attacks of double jeopardy, the denial of the right to a speedy trial and the denial of due process. Chief Justice Warren, in dissent, said: "Our duty to supervise the administration of justice in the federal courts calls for a reversal here because of disregard shown for the procedural rights of petitioner — rights with which the law surrounds every person charged with crime.

" . . . These are not mere ceremonials to be neglected at will in the interests of a crowded calendar or other expediencies. They are basic rights."[75]

Chief Justice Warren's dissenting opinion in *Parker* v. *Ellis*[76] especially reveals his essential humanism and judicial pragmatism. In this case the petitioner had been convicted in a State court of forgery. His application for a writ of habeas corpus, alleging a denial of due process of law, was dismissed by a United States District Court, which dismissal was affirmed by the Court of Appeals. The United States Supreme Court granted certiorari, but before the case could be heard the petitioner had served his full sentence and had been released. The court thereupon dismissed the writ of certiorari for want of jurisdiction on the grounds that the case had become moot. The Chief Justice disagreed, stating: " . . . Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities . . . Furthermore, there is an important public interest involved in declaring the invalidity of a conviction obtained in violation of the Constitution . . .

" In sum I cannot agree with the Court that George Parker's case comes to us too late. It is too late, much too late, to undo entirely the wrong that has been inflicted upon him; but it is not too late to keep the constitutional balance true. I dissent from the notion that because we cannot do more, we should do nothing at all." [77]

74. (1957) 1 L.Ed.2d 393.

75. *Id.,* at pp. 400-01.

76. (1960) 80 S. Ct. 909.

77. *Id.,* at pp. 920-21.

In *Reid* v. *Covert*[78] the majority had upheld the right of a court-martial to try a civilian, wife of a serviceman, for a capital offence. The Chief Justice, dissenting, preferred to surround the civilian defendant with the greater procedural safeguards of civil, rather than military, jurisdiction. On rehearing,[79] the majority reversed its earlier holding and agreed with the Chief Justice.

Breithaupt v. *Abram*[80] upheld a conviction based on evidence of a blood test in which the blood had been extracted while the defendant was unconscious. Dissenting from the majority opinion, Justice Warren stated, "... We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or stealth."[81]

In *Brown* v. *United States*[82] the majority upheld the conviction of the petitioner under rule 42 (a) of the Federal Rules of Criminal Procedure for his refusal to answer a question propounded by the judge, after refusing to answer the same question before a federal grand jury, although offered immunity from prosecution. Chief Justice Warren said: "I find myself in disagreement with the majority opinion . . . because it sanctions the procedure used below to convict petitioner summarily of criminal contempt . . . under Rule 42 (a) when the proceeding should have been in accordance with Rule 42 (b). The denial of even the minimal protections accorded by Rule 42 (b) deprived petitioner of an opportunity to prepare a legal defense or to demonstrate extenuating circumstances, and satisfied neither the plain intent of Rule 42 nor the principle of fair play.

"Shortcuts in criminal procedure are always . . . dangerous . . . The contempt power had traditionally been utilized sparingly and only when necessary to uphold the dignity of the courts."[83]

In *Mills* v. *Louisiana*[84] the petitioner, a witness before a State grand jury investigating bribery of police officials, was offered immunity from State prosecution. He nevertheless refused to testify, claiming his federal privilege against self-incrimination. Federal officers had participated in the investigation on the aspect of possible federal income

78. (1956) 100 L.Ed. 1352.

79. *Reid* v. *Covert* (1957) 1 L.Ed.2d 1148.

80. (1957) 1 L.Ed.2d 448.

81. *Id.*, at pp. 454-55.

82. (1959) 3 L.Ed.2d 609.

83. *Id.*, at pp. 618-22.

84. (1959) 3 L.Ed.2d 1193.

tax evasion in not reporting as income the bribes alleged to have been received. The majority upheld his contempt conviction. Warren dissented, saying: "The *Knapp* decision[85] when taken in conjunction with *Feldman* v. *United States* [86] . . . means that a person can be convicted of a federal crime on the basis of testimony which he is compelled to give in a state investigation. This opens vast opportunities for calculated efforts by state and federal officials working together to force a disclosure in a state proceeding and to convict on the basis of that disclosure in a federal proceeding.

"... In my view, petitioners properly invoked their federal privilege against self-incrimination in the present proceeding . . ." [87]

As many of the above cited cases illustrate, the Chief Justice has often found himself with the minority in pleading for the rights of the criminally accused. In the recent case of *Gonzales* v. *United States* [88] the conviction of the defendant for wilfully refusing to submit to induction into the armed forces was upheld. The trial court had rejected the defense of religious conviction. The defendant alleged a denial of rights in not permitting him to inspect the Federal Bureau of Investigation's adverse report. The Chief Justice said : "... I am unwilling to attribute to Congress any intent other than one which would guarantee to persons like petitioner every procedural safeguard which appears reasonably designed to insure a fair determination of their claim ... As Congress has recognized, one of the most fundamental aspects of our national ethic is a recognition of the worth of the person, acting according to the dictates of his own conscience . . . Congress refrained from impressing into military service those who by religious conviction find war an affront to God and morality ... I am unwilling to give to a statute conceived in such a context a construction which results in a young man of unblemished reputation, who claims religious scruples, being sent to prison ... without having received a full and fair consideration of his case. I say this with assurance that Congress did not intend that these humanitarian benefits of the Act be accorded grudgingly." [89]

The cited cases make it manifestly clear that the Chief Justice, though for many years one of America's most successful public prosecutors, is by no means "prosecution-minded." Perhaps this fact is most succinctly summed up in his dissenting language in *United States* v. *Dege.* [90] In that case the majority of the court held that a husband and

85. *Knapp* v. *Schweitzer* (1958) 2 L.Ed.2d 1393.

86. (1943) 88 L.Ed. 1408.

87. (1959) 3 L.Ed.2d 1193, 1196-97.

88. (1960) 80 S. Ct. 1554.

89. *Id.*, at pp. 1562-63.

90. (1960) 80 S. Ct. 1589.

wife are legally capable of conspiring within the terms of a statute making it an offence for two persons to conspire. Chief Justice Warren said: "One need not waver in his belief in virile law enforcement to insist that there are other things in American life which are also of great importance, and to which even law enforcement must accommodate itself. One of these is the solidarity and the confidential relationship of marriage." [91]

II. EMPLOYER – EMPLOYEE CONFLICTS

When the Chief Justice has chosen to write the majority opinion in cases of industrial or labor disputes, he has almost invariably supported the position of labor.

Voris v. *Eikel* [92] found in favour of an injured seaman who had failed to give his employer the notice of his injury required by statute. The grounds for the court's decision were that the employer had actual notice. *McAllister* v. *Magnolia Petroleum Company* [93] gave the injured seaman the benefit of the longer statute of limitations of the Jones Act for the whole of his action where he had joined an action for unseaworthiness with one under the Jones Act. *Mitchell* v. *Lublin, McGaughy & Associates* [94] held that the activities of the employees and not the employer are controlling in determining whether the activity is interstate and therefore covered by the Fair Labor Standards Act. *Steiner* v. *Mitchell* [95] affirmed a decision enjoining employers from violating the Fair Labor Standards Act.

National Labor Relations Board v. *Warren Company, Inc.* [96] upheld the contempt conviction of an employer for his refusal to bargain with the union as ordered. *Mitchell* v. *King Packing Co.* [97] held in favour of the employees' "portal to portal" compensation under the provisions of the Fair Labor Standards Act. While *Arnold* v. *Ben Kanowsky, Inc.* [98] upheld the employees' action for overtime wages under the Fair Labor Standards Act on a finding that the employer had failed to prove its exemption.

National Labor Relations Board v. *Lion Oil Company* [99] held against the employer and for the union in its interpretation of section 8 (d) of the

91. *Id.,* at pp. 1593-94.
92. (1953) 98 L.Ed. 5.
93. (1958) 2 L.Ed.2d 1272.
94. (1959) 3 L.Ed.2d 243.
95. (1956) 100 L.Ed. 267.
96. (1955) 100 L.Ed. 96.
97. (1956) 100 L.Ed. 282.
98. (1960) 4 L.Ed.2d 393.
99. (1957) 1 L.Ed.2d 331.

amended National Labor Relations Act that a strike was not barred prior to the expiration date of an existing collective bargaining contract. The court further held that the strike was not a breach of the collective bargaining contract. [1]

Brotherhood of Locomotive Engineers v. *Missouri – Kansas – Texas R. Co.,*[2] a recently decided case, upheld the power of a United States District Court to grant an injunction in a labor dispute which preserved the status quo between the parties pending the decision of the dispute by the National Railroad Adjustment Board. In so holding, the opinion sustained the position urged by the union.

In none of the categories or sub-categories of cases heretofore discussed may it properly be said that the philosophy of the Chief Justice underwent any pronounced change after he assumed the robes of his present office. He may certainly be said to be a champion of the rights of racial minorities and a defender of the constitutional rights of aliens. But except for his initial attitude toward the expulsion of the Japanese from the West Coast, which he subsequently regretted, he had never stood with the racial or national bigots. He had long been a very successful prosecutor of crime. But that his success was not based on overriding the rights of criminal defendants is attested to by the fact that no conviction which he secured was overturned by an appellate court. He did not have a reputation of being soft on Communism; but he had publicly deplored the atmosphere of the Communist witch hunt. There had been little occasion for him to take a public stand on issues of labor. In the category which follows, however, it may be possible to state that the Chief Justice has undergone a charge of view since being elevated to the court. As a State politician, he had on more than one occasion deplored the concentration of power in the federal government at the expense of the States. And yet it will be clearly seen that whatever the basis for the holding may be in the following series of cases, one significant result of all of them is the increased power of the central government. This aspect of the Warren decisions has, of course, not escaped the court's detractors.[3]

1. But in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad Company,* (1957) 1 L.Ed.2d 622, in which the union had issued a strike call effective four days after the employers had submitted the minor dispute to the National Railroad Adjustment Board under section 3, First, of the Railway Labor Act, a Warren opinion held that a United States District Court had jurisdiction to issue an injunction against the union to compel compliance with the Railway Labor Act.

2. (1960) 80 S. Ct. 1326.

3. See, *e.g.,* "Where Warren Is Leading the Supreme Court," *U.S. News & World Report,* vol. 40, no. 25, pp. 35-40 (June 22, 1956).

III. THE FEDERAL SYSTEM

Cases dealing with the federal government's control of labor relations through the agency of the National Labor Relations Board[4] or the office of the Secretary of Labor[5] have already been discussed above. In all of them the employee's rights were being urged by the agency of government, and the holdings obviously strengthen the positions of those agencies, although it would be fatuous reasoning to argue that such a result was the basis for the holdings.

But the following cases sharply show the court favoring the central government, as opposed to the agencies of the state for the settlement of labor disputes.

Guss v. *Utah Labor Relations Board* [6] held that a State has no power to deal with matters which are within the jurisdiction of the National Labor Relations Board where that board, although it declines to exercise its jurisdiction in the specific case, has not ceded its jurisdiction pursuant to section 10(a) of the National Labor Relations Act, empowering the board to cede jurisdiction to state agencies.[7] A companion case, *Amalgamated Meat Cutters & Butcher Workmen of North America* v. *Fairlawn Meats, Inc.,*[8] went further and held that even assuming the National Labor Relations Board would obviously decline jurisdiction, the State court had no power to enjoin a union not representing a majority of the employees from picketing the employer to force him to agree to a union shop contract.[9] In three additional cases, when the majority held to the contrary, the Chief Justice dissented on the grounds that the relief afforded by the National Labor Relations Act should exclude the sustained State action.[10]

In a case involving the Interstate Commerce Commission [11] a Warren opinion upheld the right of the commission to reopen proceedings and modify its originally granted certificate to the trucking company by the

4. See notes 96 and 98, above.

5. See notes 94, 95 and 97, above.

6. (1957) 1 L.Ed.2d 601.

7. The narrow immediate result of this decision was against the position taken by the union.

8. (1957) 1 L.Ed.2d 613.

9. *San Diego Building Trades Council* v. *Garmon* (1957) 1 L.Ed.2d 618, decided with *Amalgamated,* reached a similar conclusion.

10. *Youngdahl* v. *Rainfair, Inc.* (1957) 2 L.Ed.2d 151; *International Association of Machinists* v. *Gonzales* (1958) 2 L.Ed.2d 1018; *United Automobile Workers* v. *Russell* (*1958*) *2* L.Ed.2d 1030.

11. *American Trucking Associations, Inc.* v. *Frisco Transportation Company* (1958) 3 L.Ed.2d 172.

insertion of an inadvertently omitted limiting provision.[12] But in *American Trucking Association, Inc.,* v. *United States*[13] the court found insufficient justification for the action of the Interstate Commerce Commission's grant of motor carrier permits to a trucking company which was a subsidiary of a railroad.

The Chief Justice has written a substantial number of opinions involving anti-trust prosecutions under the Sherman Act.[14] In all of them he has upheld the position of the federal government.

Two cases decided the preliminary procedural issue that the government had stated a cause of action, in the one case against a theater chain,[15] and in the other against a boxing combine.[16] *United States* v. *McKesson & Robins, Inc.,*[17] upheld a violation of price-fixing by a wholesaler-manufacturer of drug products. In a striking case a Warren opinion permitted the federal government to attack as a violation of the anti-trust laws an application by broadcasting companies to exchange television stations, which application had been approved by another agency of the federal government, the Federal Communications Commission. [18]

And in the recently decided *Federal Trade Commission* v. *Anheuser-Busch, Inc.*[19] a Warren opinion upheld the commission's interpretation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, finding that a reduction of the price of the product by the producer to all distributors within a marketing area but the maintenance of higher prices to those outside this area constituted forbidden price discrimination where the effect may be substantially to lessen competition or to tend to create a monopoly.

In federal income tax litigation the effect of the Warren opinions has been to increase the taxing authority of the federal government. While income tax litigation does not necessarily involve federal-state conflict, it is generally conceded that the net result of increased federal

12. See also *Schaffer Transport Company* v. *United States* (1957) 2 L.Ed.2d 117, a decision against the Interstate Commerce Commission, which, however, held that the ICC was violating the national transportation policy as formulated by Congress by failing in the case to evaluate the benefit that the proposed motor service might bring the public when it denied the petitioner's application for a certificate of public convenience and necessity.

13. (1960) 80 S. Ct. 1570.

14. 15 U.S.C. sec. 1 and following.

15. *United States* v. *Schubert* (1955) 99 L.Ed. 279.

16. *United States* v. *International Boxing Club* (1955) 99 L.Ed. 290.

17. (1956) 100 L.Ed. 1209.

18. *United States* v. *Radio Corporation of America* (1959) 3 L.Ed.2d 354.

19. (1960) 80 S. Ct. 1267.

taxation is a reduction in the potential taxable sources available to the State and therefore an increase in the power of the central government. For example, *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*,[20] upheld as taxable gross income sums received by the taxpayer as exemplary damages for fraud and as punitive damages in an anti-trust action. Similarly, *General American Investors Company* v. *Commissioner of Internal Revenue*[21] held that profits recovered by a corporation from its officers for dealing in the corporation's own securities were taxable as gross income. *Flora* v. *United States*[22] upheld the government's interpretation of the Internal Revenue Code to the effect that a taxpayer must pay the full amount of a tax deficiency before he may challenge its correctness by a suit for refund in a United States District Court.[23] In the same category of cases *Phillip's Chemical Company* v. *Dumas Independent School District*[24] struck down a State tax for being discriminatorily levied on a lessee of property owned by the United States.

The recent case of *United States* v. *Manufacturers National Bank of Detroit*[25] upheld the inclusion in the gross estate for the imposition of the federal estate tax of insurance proceeds receivable by beneficiaries other than the executor but attributable to premiums paid by the insured even though the insured had divested himself of all interest in the policies.

It may be remarked that the Chief Justice follows the accepted theory that before a federal tax lien attaches to property, it is State law which determines whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach.[26]

Even the much attacked decision of *Pennsylvania* v. *Nelson*[27] involved less a question of subversion than it did a question of federal-state relations. For the case was decided on the familiar, "occupation of the field" doctrine, affirming a decision of the Pennsylvania Supreme Court holding that the Smith Act, which prohibits the knowing advocacy

20. (1955) 99 L.Ed. 483.

21. (1955) 99 L.Ed. 504.

22. (1958) 2 L.Ed.2d 1165.

23. Upon rehearing, *Flora* v. *United States* (1960) 4 L.Ed.2d 623, the court adhered to its original decision.

24. (1960) 4 L.Ed.2d 384.

25. (1960) 80 S. Ct. 1103.

26. *Aquilino* v. *United States* (1960) 80 S. Ct. 1277. See also *United States* v. *Durham Lumber Company* (1960) 80 S. Ct. 1282.

27. (1956) 100 L.Ed. 640.

of the overthrow of the government of the United States by force and violence, had superseded the enforcement of the Pennsylvania Sedition Act, proscribing the same conduct and under which the defendant, a member of the Communist Party, had been convicted in the State trial court. From these cases it can scarcely be denied that Warren, the jurist, unlike Warren, the State politician, is a firm advocate of strong central government.[28]

One cannot, of course, say what effect additional years and additional cases will have on the philosophy of the Chief Justice. But it is submitted that his choice of the cases in which he has spoken for the majority, together with his separate opinions, map the mind of a humanist, of one committed to the principles of the natural law, of a pragmatist who will not see society's changing goals lost to the law's more slowly evolving rules.

Perhaps it is not inappropriate to sum up this brief excursion into the revealed legal philosophy of Chief Justice Warren by quoting from his own reflections, following the memorable school decisions and the early controversy that swirled around them. Writing on the subject "The Law and the Future" the Chief Justice said: "... In all times and places he [man] has had a sense of justice and a desire for justice. Any child expresses this fact of nature with his first judgment that this or that 'isn't fair.' A legal system is simply a mature and sophisticated attempt, never perfected but always capable of improvement, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force.

"... Our system faces no theoretical dilemma but a single continuous problem: how to apply to ever changing conditions the never changing principles of freedom.

28. This article has been faithful to Justice Frankfurter's cited admonition not to use a majority opinion as a "map" to the Chief Justice's mind. For that reason opinions written by other justices in which the Chief Justice joined have been ignored, even though they have included some of the most significant constitutional opinions of this era. A fuller understanding of the work of the court as a whole can only be secured by a study of all cases. For a worthwhile publication on one aspect of the whole court's work, as opposed to the separate position of one justice, see Pritchett, *The Political Offender and the Warren Court,* 1958. Nor has any language been cited from the Chief Justice's majority opinions for the reason already stated that it is not possible to know precisely how much of such an opinion is exclusively that of the one whose name it carries.

" The American legal system was nurtured in this ideal of justice and could not last without it. We have in fact accepted not only the rule of law but, through our unique practice of judicial review of legislation, the reign of law. We have done so in the full knowledge that judges are fallible, procedures slow, and the Constitution itself a product of compromise; but in the faith that it is better to make our final decisions in the name of an eternal ideal." [29]

HARRY E. GROVES. *

29. *Fortune Magazine* (November, 1955), pp. 223-27.

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