FROM WARREN TO BURGER: ACTIVISM AND RESTRAINT

by A. E. Dick Howard

When Earl Warren stepped down as Chief Justice of the United States in 1969, an era ended. Anthony Lewis of the *New York Times* referred to the 16 years of Warren's tenure as years of legal revolution. "In that time," he wrote, "the Supreme Court has brought about more social change than most Congresses and most Presidents."

Appraisals of the work of the Warren Court varied sharply. Harvard's Archibald Cox was confident that historians would find the decisions of the Warren Court "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."

Alex Bickel and Harry Wellington, of the Yale Law School were more critical. They were disturbed by the many instances in Warren Court opinions "of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree."

Historian Alfred H. Kelly of Wayne State University approved the liberal thrust of the Court's opinions, but was made uneasy by what he called the Court's Marxist-flavored assumptions that "history can be written to serve the interests of libertarian idealism." Conservative newspaper columnist Jack Kilpatrick was

especially acerbic. He referred to the Warren years as "a trail of abuses, usurpations, and invasions of power. One pursues the departed Chief Justice along a littered road of fallen landmarks and abandoned precedents. Here every principle of jurisprudence lies discarded. It is as if gypsies had passed through, leaving a bad picnic behind."

The era of the Warren Court began in 1953 when the former Governor of California was appointed to the bench by President Eisenhower—who later called the appointment "the biggest damnfool mistake I ever made." Warren came to a Court characterized by self-imposed restraints. Having reversed its opposition to Roosevelt's New Deal measures, the Court showed little disposition to stand in the way of decisions made by other branches of the government. The Vinson Court, it is true, had ruled against Truman in *Youngstown Sheet & Tube Company* v. *Sawyer* (1952), when the President had sought to settle a strike by seizing the steel mills during the Korean War, and it had suppressed some of the manifestations of a racially segregated America, such as the white primary; but, for the most part, it had not seen fit to challenge the evils of McCarthyism. In the early 1950s a majority of the Justices were not disposed to challenge the prevailing passion for loyalty, security, and the persecution of persons accused of seditious speech and guilt by association.

The Court did not change overnight when Warren became Chief Justice. The balance of power on the bench did not tip toward activism until 1962, when Arthur Goldberg, a former labor lawyer and Secretary of Labor, replaced Felix Frankfurter, the great champion of judicial restraint. Goldberg's vote proved decisive. In his first term on the Court, the Justices split 5 to 4 in ten civil rights or civil liberties cases. One such case, for instance, reversed the contempt conviction of the president of a local chap-

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ter of the NAACP who had refused to surrender the chapter's membership list to a Florida state legislative investigating committee.

The Warren revolution began well before 1962 in one area. In 1954 a unanimous Court ruled against racial segregation in the nation's public schools in *Brown* v. *Board of Education.* That landmark decision constituted a testament to Warren's leadership. It was followed by a series of other rulings, frequently in brief per curiam opinions, applying the principle of *Brown* to other areas, such as public buildings and facilities.

The Warren Court at Full Tide

The legal revolution of the Warren Court reached full tide in the 1960s. Over the impassioned protest of Justice Frankfurter, the Court decided in 1962 that judicial relief was available to voters who claimed their vote was diluted by the malapportionment of America's state legislatures. Two years later, Warren wrote the Court's decision requiring that state legislatures be apportioned on the basis of population—one man, one vote.

Criminal defendants were also the beneficiaries of the Warren Court's rulings. Ever since 1947, Justice Hugo L. Black—in many ways the intellectual leader of the Court—had argued that the Fourteenth Amendment, which guarantees all persons due process of law against actions of the several states, should be interpreted by the Court so as to enforce against actions of the states all of the guarantees that the Bill of Rights provides against actions of the federal government. Black was never able to secure his colleagues' approval of his notion for incorporating the provisions of the Bill of Rights, wholesale, into the Fourteenth Amendment. After 1962, however, the Court embraced a process whereby individual rights were made binding upon the states on a selective basis.

A notable case in point was that of Clarence Earl Gideon, charged with breaking into a poolhall in 1961. In *Gideon* v. *Wainwright* (1963), the Supreme Court affirmed the right of an indigent defendant in a felony case to have counsel appointed for him if he could not afford to hire a lawyer. Much more controversial was *Miranda* v. *Arizona* (1966), which requires the police to warn a suspect, prior to his interrogation: that he has the right to remain silent; that what he says may be used against him; that he has the right to the presence of a lawyer; and that a lawyer will be appointed for him if he cannot afford one.

The Warren Court moved also to expand the protection

afforded free speech. Justice Black had long been a stout advocate of such protection. Sophisticated observers ridiculed him as an "absolutist." Other Justices were more inclined to balance First Amendment values against competing interests, such as keeping order, but with the emergence of the Warren Court came clear evidence of what Justice William J. Brennan, Jr. called "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Court handed down a number of First Amendment decisions, limiting the scope of obscenity prosecutions and libel judgments, giving more protection to speech in public places (the public forum concept), striking down vague or overbroad laws that tended to inhibit free speech, and otherwise giving greater breathing space to freedom of expression.

A Trend Toward Activism

These decisions—in regard to racial segregation, legislative apportionment, criminal procedure, freedom of expression—are by no means a complete representation of the innovative work of the Warren Court, but they serve to suggest some of the principal themes reflected in that tribunal's opinions. To begin with, there was a trend toward activism. Where Justice Frankfurter had counseled against the notion that every social ill has a judicial remedy, the Warren Court was less willing to defer to legislative judgments and to the political process and more ready to be an engine of reform. It had what University of Chicago law professor Harry Kalven, Jr. called an "appetite for action." As Chicago's Philip B. Kurland put it: "If, as has been suggested, the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time."

Professor Kurland identified another theme of the Warren Court: its tendency to favor an "egalitarian society." The Court's predilection for egalitarianism was evident not only in race and reapportionment decisions but in cases where the equal protection clause was applied to economic inequalities. Many of the Court's most significant criminal justice opinions rested on a premise articulated by Justice Black in his 1956 opinion in *Griffin* v. *Illinois*—that in criminal trials "a state can no more discriminate on account of poverty than on account of religion, race, or color." In *Griffin,* the Court ruled, a state must provide a trial transcript or its equivalent to any indigent criminal defendant who appeals his conviction.

Another characteristic of the Warren era was a mistrust of

those wielding official power, such as police and prosecutors. As a result, the Justices created prophylactic rules, as in *Miranda,* based on the underlying assumption that wherever power can be abused, it will be.

A Court as activist as the Warren Court could not help but play to mixed reviews. Law professors and journalists were by no means the only critics. Politicians wounded by the one man–one vote rulings or sensitive to constituents' reactions to the outlawing of prayers in public schools tried to amend the Constitution, but without success. At the 1958 Conference of State Chief Justices, a committee report complained that "the Supreme Court too often has tended to adopt the role of policymaker without proper judicial restraint."

Richard Nixon made the Warren Court a political issue in his 1968 bid for the presidency. His response to outcries over rising crime rates was a "law and order" campaign. In accepting his party's nomination, Nixon declared that judicial decisions had "gone too far in weakening the peace forces as against the criminal forces in this country." A Gallup poll found that a majority of those questioned thought the Court too soft on criminals, a finding exploited by Nixon, who said, "Today, all across the land guilty men walk free from hundreds of courtrooms. Something has gone terribly wrong in America."

A Change of Direction

As President, Nixon sought to change the complexion of the Court through his choice of nominees. "I happen to believe that the Constitution should be strictly interpreted," he stated and expressed the hope that his first appointment, Warren Burger as Chief Justice, would affect the direction of the Court. After Justice Abe Fortas resigned, Nixon's efforts to fill that seat foundered when the Senate rejected two of his nominees in turn—Clement F. Haynsworth, Jr. in 1969 and G. Harrold Carswell in 1970. The latter was thought by many to be both incompetent and a racist. Nixon then nominated Harry A. Blackmun, a judge of the Eighth Circuit Court of Appeals, who won easy confirmation in the spring of 1970.

Before Nixon's first term had run its course, a third and fourth vacancy occurred on the Court. In the summer of 1971 both Hugo Black, who died shortly thereafter at the age of 85, and John Marshall Harlan retired. In nominating Lewis F. Powell, Jr. and William H. Rehnquist in November 1971, Nixon once again recalled his campaign pledge "to nominate to the Supreme Court

THE SUPREME COURT

WARREN E. BURGER, 69, appointed Chief Justice by President Nixon (1969). A native of St. Paul, Minnesota, Burger has been a law professor, assistant U.S. attorney general, a federal appeals court judge, and a persistent advocate of court reform. He is also a talented amateur sculptor.

WILLIAM J. BRENNAN, JR., 70, an Eisenhower appointee (1956). Brennan was a brilliant student at the University of Pennsylvania and Harvard Law School, later serving as a New Jersey superior court judge and state supreme court justice. He is an Irish Catholic from Newark, a Democrat, and a moderate.

POTTER STEWART, 61, an Eisenhower appointee (1958). A graduate of Yale (1937) and Yale Law School (1941), Stewart is a native of Cincinnati, where he served two terms as city councilman during the early 1950s. A Republican, he was a federal appeals court judge before joining the Supreme Court.

BYRON R. WHITE, 59, a Kennedy appointee (1962). A native of Colorado and a former college and pro football star, White excelled academically at the University of Colorado, at Oxford, and at Yale Law School. He practiced corporate law in Denver, campaigned nationally for Kennedy in 1960, and served as deputy attorney general under Robert F. Kennedy.

THURGOOD MARSHALL, 68, a Johnson appointee (1967). As chief counsel for the NAACP, Marshall argued 32 civil rights cases before the Supreme Court and won 29. A native of Baltimore, he graduated from Lincoln University (1930) and Howard

individuals who shared my judicial philosophy, which is basically a conservative philosophy."

Since George Washington appointed the original members of the high court, only four Presidents had had Nixon's opportunity to change the face of the Court (Taft nominated six Justices, Lincoln five, and Harrison and Harding, four each). With the Nixon appointments, pundits expected a dramatic shift in the Court's direction. They were soon talking about a "Nixon Court" —a break with the traditional practice of referring to a Court by the name of its Chief Justice. In the 1970s, as in New Deal days, the Court was amply provided with opportunities to indicate

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University Law School (1933). He served four years as a federal appeals court judge and was the first black U.S. solicitor general and the first black Supreme Court Justice.

HARRY A. BLACKMUN, 68, a Nixon appointee (1970). He was born in Nashville, Illinois, but has lived most of his life in Rochester, Minnesota. A lifelong friend of Chief Justice Burger, Blackmun was a scholarship student at Harvard (1929) and Harvard Law School (1932), a practicing attorney specializing in tax and estate work, and a U.S. circuit court judge.

LEWIS F. POWELL, JR., 69, a Nixon appointee (1971). After receiving his B.A. and LL.B. from Washington and Lee (1929, 1931) and his LL.M. from Harvard (1932), he became an attorney in Richmond, Virginia. As a member of President Johnson's national crime commission, he sought to redress the imbalance between "rights of the accused" and "rights of citizens."

WILLIAM H. REHNQUIST, 52, a Nixon appointee (1971). A native of Phoenix, Arizona, he received his B.A. and M.A. from Stanford (1948), an M.A. from Harvard (1949), and his LL.B. from Stanford (1952). He served as law clerk to Supreme Court Justice Robert H. Jackson and gained a reputation for legal brilliance as assistant U.S. attorney general.

JOHN PAUL STEVENS, 56, a Ford appointee (1975). A former federal appeals court judge in his native Chicago, Stevens is a graduate of the University of Chicago (1941) and Northwestern Law School (1947). He served as law clerk to Supreme Court Justice Wiley B. Rutledge and is an antitrust specialist.

its direction. Would it preserve the Warren legacy or break new ground?

By January 1977, the four Nixon appointees had been together on the Court for five years. They had been joined in 1975 by John Paul Stevens, appointed by President Ford to replace William O. Douglas, the most "liberal" Justice. Although classifying the Court into ideological blocs can be highly misleading, it is fair to say that the number of "liberals," who had called the tune in the 1960s, had dwindled to two: William J. Brennan, Jr. and Thurgood Marshall.

Those who once talked of a "Nixon Court" now speak of a

"Burger Court." The dire predictions heard at the outset of the Burger era, of a wholesale dismantling of the Warren Court's decisions, are more muted. It is now clear that the landmarks of the Warren years—racial desegregation, legislative reapportionment, expanded rights for criminal defendants—while not untouched, remain fundamentally intact. There is much continuity between the Warren and Burger Courts, especially in matters of race. The new majority seems as generous in its interpretation of Congress's power to enact civil rights statutes as was the Court in the 1960s. At the same time, the Burger Court has begun to set its distinctive stamp on constitutional interpretation.

Drawing Lines, Relaxing Standards

The present Court has called a halt to much that the Warren Court began, but without squarely overruling Warren precedents. There have been occasional exceptions, as in *Hudgens* v. *NLRB* in 1976, when the Burger Court overturned the Warren Court's ruling (in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 1968) that pamphleteers have First Amendment rights in privately owned shopping centers. More often, the Court's technique has been to distinguish, to limit, to confine. For example, in 1961 the Warren Court held in *Mapp* v. *Ohio* that state judges trying criminal cases must exclude evidence produced by unreasonable search or seizure. Soon after he came to the Court, Chief Justice Burger lamented the price society pays for this exclusionary rule, which can be instrumental in overturning otherwise valid convictions. Other Justices have joined in the chorus. Without throwing out the rule, they have found ways to limit its impact. For example, the Court has ruled that state prisoners who have had a fair opportunity to raise Fourth Amendment claims in a state court may not have those claims reexamined by a federal court. The Court has found even more ways to limit the reach of the Fourth Amendment itself, sometimes by holding that there was simply no search or seizure in the first place, more often by widening exceptions to the requirement for a search warrant, as when the search is incident to a lawful arrest. The cumulative effect is such that the Fourth Amendment appears to be quite a different amendment now than when Warren left the bench.

Sometimes, the Burger majority will interpret a Warren precedent narrowly, refusing to extend its essential premise. For instance, while *Miranda* (which so far has not been overruled) could easily be read as barring the admission for any purpose of

a statement obtained without the requisite warnings, Chief Justice Burger, in a 1971 opinion, ruled that a statement inadmissible under *Miranda* may nevertheless be used to impeach the credibility of a defendant's trial testimony. Technically *Miranda* was upheld, but the animating philosophies of the 1971 ruling and the original *Miranda* decision are obviously at odds. Another example is the new majority's handling of 1967 Warren Court precedents (*U.S.* v. *Wade* and *Gilbert* v. *California*) holding that a post-indictment, pretrial lineup at which an accused is exhibited to identifying witnesses is a critical stage of the criminal proceedings at which the defendant is entitled to have counsel present. Showing its ability to draw a fine line, the Burger Court (*Kirby* v. *Illinois*, 1972) refused to apply that ruling to a situation where a police station lineup had been conducted *before* the defendant had been indicted or otherwise formally charged.

Waning Egalitarianism

In like fashion, with respect to the Fourteenth Amendment, the Burger Court by and large has refused to add to the applications of the equal protection clause that characterized the Court in the 1960s. The Warren Court embarked on strict judicial scrutiny of a statute whenever it decided the statute embodied a "suspect" classification, such as race, or impinged upon a "fundamental" right, such as the vote. Traditionally, the equal protection clause has been held to require only that a statutory classification rest on some "rational" or "reasonable" basis—an easy requirement to satisfy. But when the Warren Court began to talk about suspect classifications and fundamental rights, few statutes were able to pass muster under the demanding standards of the strict scrutiny cases.

The Burger Court, by contrast, has generally declined to recognize additional suspect classifications or fundamental rights for the purposes of Fourteenth Amendment litigation. It has been impossible, for example, to find five Justices who will agree to treat sex-based classifications as inherently suspect. In an opinion by Justice Powell, the Burger Court likewise refused to classify education as fundamental under the Fourteenth Amendment, with the result that the Court rejected a challenge to the Texas system for financing public schools—a system that created a wide disparity between wealthier and poorer school districts by relying heavily on local property taxes (*San Antonio Independent School District* v. *Rodriguez*, 1973).

Frequently the Burger Court, while reaffirming a Warren prin-

ciple, has relaxed the governing standards. Thus, seats in state legislatures must still be apportioned on the basis of population, but the Burger Court has approved deviations of up to 16.4 percent from perfect apportionment. Similarly, standards applied to First Amendment cases have been relaxed, so that obscenity prosecutions are easier to maintain and libel suits are less likely to be aborted by a First Amendment objection.

Underlying these shifts in doctrine are important value judgments and attitudes that distinguish the Court's new majority. The Burger Court is markedly less egalitarian. At one time it appeared as though an indigent's right to appointed counsel, established by the Warren Court in criminal cases, might be extended to civil cases, but the Burger Court stopped that development cold. An eloquent contrast between attitudes of the two Courts toward egalitarianism is demonstrated by a 1971 decision in which a five-man majority headed by Justice Blackmun rejected an indigent petitioner's argument that he should be allowed to file for bankruptcy without paying $50 in filing fees. Blackmun noted that the $50 fee could be paid in weekly installments which would be "less than the price of a movie and little more than the cost of a pack or two of cigarettes." Justice Thurgood Marshall, dissenting, considered that remark the height of insensitivity toward the poor. "A pack or two of cigarettes," he wrote, "may be, for them, not a routine purchase but a luxury indulged in only rarely." The dissenters found it outrageous that Congress should be permitted to decide that some of the poor were, in the words of the dissenters, "too poor even to go bankrupt."

A Less Interventionist Court

The Justices of the Burger Court are more apt to defer to the legislative process than their predecessors and to leave the solving of social problems to the political process. In 1976 when a majority of the Justices rejected the argument that capital punishment was necessarily cruel and unusual punishment, Justices Brennan and Marshall dissented. They were unmoved by the fact that most state legislatures had re-enacted capital punishment statutes in the wake of the Court's 1973 decision to invalidate the death penalty as it was then being imposed, and they displayed a Warrenesque willingness to abolish it on the grounds of "evolving standards." The majority, on the other hand, were more willing to defer to the judgments of the state legislatures. Burger argued that "in a democracy the legislative judgment is presumed to embody the basic standards of decency in the society." Rehnquist,

in agreement, thought that the fundamental issue in the death penalty cases was that the Supreme Court in a democratic society should not exercise too freely its power to strike down legislative acts.

A recurring, closely related theme in Burger Court opinions is the notion that judges should limit themselves to doing what they are competent and have a warrant to do. Justice Powell, in the *Rodriguez* school financing case, argued that judges should not try to make judgments about educational policy that are better made by school boards and educators.

In the 1973 capital punishment case (*Furman* v. *Georgia*), Powell placed himself squarely in the tradition of judicial self-restraint by citing Frankfurter's admonition that Oliver Wendell Holmes's 30 years on the Court should serve as a constant reminder against the misuse of the Court's "power to invalidate legislation as if . . . it stood as the sole bulwark against unwisdom or excesses of the moment." This is not to say that the Burger Court never second guesses legislatures and never acts like a legislative body itself. The Blackmun opinions in the 1973 abortion cases *Roe* v. *Wade* and *Doe* v. *Bolton* make clear that this is not always so. Still, a sense of judicial intervention as the exception, rather than the norm, is more characteristic of the Court in the 1970s than in the Warren years.

Federalism, a stepchild in the Warren era, is again in favor. The Tenth Amendment, which reserves to the states—or to the people—powers not delegated to the federal government, had lain dormant since the 1930s. It came to life in 1976, when Justice Rehnquist wrote the majority opinion in *National League of Cities* v. *Usery*. By placing state and local government employees under the minimum wage and maximum hour requirements of federal law, Rehnquist concluded, Congress had exceeded its powers under the clause of the Constitution authorizing it to regulate interstate commerce. Not since 1937 had the Court ruled against congressional misuse of the commerce power.

Trusting the System

Whereas the Warren Justices tended to be suspicious of government power, the Burger Court is more willing to trust the system to work with fairness and regularity and to assume that policemen and other officials try most of the time to observe the Constitution in the execution of their duties. In 1972 when the Court, in *Apodaca* v. *Oregon*, upheld a state law permitting juries to convict in certain cases by a less than unanimous vote, Justice

Byron R. White was unwilling to assume that a jury's majority would simply override the views of the other jurors. The dissenters, in the tradition of the Warren Court, were more concerned with "serious risks of jury misbehavior" and labeled the majority's assumptions of regularity as facile. Similarly, in cases involving grand juries, prosecutors, policemen, and trial judges, the Burger majority is apt to be less skeptical about the workings of government systems than the Warren Court.

Continuity and Change

A comparison of the Warren and Burger Courts, therefore, yields evidence of both continuity and change. Where the Warren opinions were more at odds with the national consensus, as in the criminal justice cases, the Burger Court has felt free to strike out on its own. Hence we see the marked shift of direction in search and seizure cases. In areas such as the dismantling of racial segregation in the public schools, the Warren legacy is more enduring. Although the new majority has been unwilling to sanction a judicial remedy for de facto segregation, as in racial imbalance arising from housing or other demographic patterns, the Justices continue to give the lower courts ample power to put an end to vestiges of racial segregation arising from official acts.

The Supreme Court, in some measure, both induces and reflects changes in social values. During the 1960s, the Warren Court took the lead in furthering racial equality, in reapportioning political power, and in broadening the rights of criminal defendants. In the first two instances, the country—and Congress—agreed with the Court. In the Civil Rights Act of 1964 and the Voting Rights Act of 1965, Congress enacted the first major civil rights legislation since Reconstruction. As to reapportionment, politicians who objected to legislative redistricting were unable to convince the man in the street that the old system of malapportionment was best. Broadening the rights of criminals, however, was another matter. The lack of a national consensus supporting decisions like *Miranda* made it possible for Nixon to make a campaign issue of such rulings in 1968, and the Court's criminal-justice opinions have subsequently moved in new directions.

Does this mean that the Supreme Court, as it is only too easy to assume, follows the election returns? The evidence simply does not support a positive answer. It is closer to the mark to recall the comment of Harvard law professor Paul A. Freund—that the Supreme Court is attuned, not to the weather of the day, but to the climate of the age. Thus a President, through his appoint-

ments, can have a significant effect on the Court's direction, as Nixon clearly did in making four appointments to the bench. Yet a President's subsequent influence is greatly limited, as was revealed when the "Nixon Court" took positions in important cases markedly different from those of the President. Examples must include the Burger Court's striking down of state laws infringing the right of a woman to an abortion and the series of decisions invalidating legislative efforts to channel public funds to parochial schools. Nor should one overlook the unanimous decision rejecting Nixon's claim of executive privilege in the case of the Watergate tapes—an opinion written by Nixon's own appointee to the nation's highest judicial office.

There is an inner integrity to the workings of the Supreme Court that defies all efforts of behaviorists to reduce the Court's decisions to the attitudes and prejudices of those who sit on the bench. The Justices, like other people, are conditioned by experience, but they operate within powerful constraints. Court watchers are often so bemused by points of contention—call it the "fuss fallacy"—that they overlook the vast areas of agreement that survive changes in personnel. A new majority rarely sets out to build a new temple of justice, though it may do extensive redecorating.

Charles Evans Hughes once said that "the Constitution is what the judges say it is." His remark was not made cynically, as is popularly supposed, but it is true that one of the most important functions of judges is to pour new life and meaning into words and phrases—such as "due process of law" and "equal protection of the laws"—whose meaning is often far from self-revealing. To that continuing task the Justices of the Burger Court have brought insights markedly different from those of the men who preceded them.