The Warren Court and procedural rights.

Ronald J. Goletski

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THE WARREN COURT AND PROCEDURAL RIGHTS

Submitted to the Department of Political Science of the University of Windsor in partial fulfillment of the requirements for the degree of Master of Arts.

by

Ronald J. Golotski, B.A.

Faculty of Graduate Studies
1967
ABSTRACT

The degree to which the civil rights of the citizens of the United States, as guaranteed by the first Ten Amendments to the Constitution (more particularly the rights guaranteed by the Fourth, Fifth, and Sixth Amendments) are defended, protected, or brought to the forefront of judicial concern, depends upon (1) the times - the people and the political events of the day, and (2) the particular Supreme Court of that era.

An analysis of the various Supreme Courts and their business throughout the Constitutional history of the United States, shows that there has been generally speaking, two distinct Courts. The business of the 'new' Court has dealt predominately with cases of a civil rights nature.

A study of the 'Warren Court' and its record in cases involving procedural rights guaranteed by the Fourth, Fifth, and Sixth Amendments, indicates that it has shown more concern for preserving these rights than previous Courts.

The business of the 'new' Court has changed dramatically from that of the 'old' Court. It is the aim of this paper to show that the changing times and the basic trends of the 'Warren Court' have made the Court and its
role what it is. The 'Warren Court' (with respect to the
procedural rights) is what may be termed an 'activistic'
Court.
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# Table of Contents

## Abstract

**TABLE OF CONTENTS**

### ACKNOWLEDGEMENTS

Chapter

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Introduction: The Supreme Court and the Procedural Rights</td>
<td>1</td>
</tr>
<tr>
<td>II</td>
<td>The Changing Role of the Supreme Court</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>1. The 'two' Courts</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>2. The basic role of the Supreme Court</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>3. The era of Marshall and Taney</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>4. The post-Civil War Court</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>5. The era of Holmes - The division between the economic and non-economic freedom</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>6. The New Deal era</td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>7. The basis for the changes</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>8. Shift toward civil rights</td>
<td>39</td>
</tr>
<tr>
<td>III</td>
<td>The 'Warren Court' - The Justices</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>1. Judicial philosophy of the justices involved</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>2. The business of the 'Warren Court'</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>3. The two wings of the 'Warren Court'</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>4. 'Activism' versus 'self-restraint'</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>5. The members of the 'Warren Court'</td>
<td>46</td>
</tr>
<tr>
<td>IV</td>
<td>The 'Warren Court' - The Cases</td>
<td>56</td>
</tr>
<tr>
<td></td>
<td>1. The era of the 'Warren Court'</td>
<td>56</td>
</tr>
<tr>
<td></td>
<td>2. Decisions of the 'Warren Court' with respect to procedural rights cases</td>
<td>72</td>
</tr>
<tr>
<td></td>
<td>(a) Fourth Amendment cases</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>(b) Fifth Amendment cases</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>(c) Sixth Amendment cases</td>
<td>92</td>
</tr>
<tr>
<td>V</td>
<td>Conclusion: The 'Activistic' Warren Court</td>
<td>102</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td></td>
<td>105</td>
</tr>
<tr>
<td>VITA AUTORIS</td>
<td></td>
<td>vi</td>
</tr>
</tbody>
</table>
CHAPTER I  
INTRODUCTION  
THE SUPREME COURT AND THE PROCEDURAL RIGHTS

The Constitution of the United States is the basic instrument of government and the supreme law of the United States. It is a system of law established by a sovereign state for its own guidance. It fixes the limits and defines the relations of the legislative, the executive, and the judicial powers of the state, both among themselves and with the citizens of the state, thus setting up the basis for government.

The intent of the Framers of the Constitution was to establish a 'balanced government'; a system of checks and balances they thought would compel various interests to check and control one another. The Founding Fathers felt that the liberty they were most interested in was linked with property, and consequently they were largely interested in economic rights and safeguards.¹ The Convention had omitted procedural rights or guarantees in the original document. It was the opponents of the

¹ See Charles Beard, An Economic Interpretation of the Constitution of the United States (New York, 1913).
Constitution who forced the adoption of the first Ten Amendments to the Constitution in 1791. The Constitution was ratified only after a bitter struggle. Some opponents of the Constitution condemned the establishment of a strong national government, and urged instead the establishment of a confederation of sovereign States. Others objected to the lack of adequate constitutional safeguards of fundamental rights.

The necessity for protecting the basic rights of individuals against the desires, the convenience or even the need of a central government permeated the deliberations of the opponents of the first draft of the Constitution. The basic concept was that man, being created in God's image, was innately infused with worth and dignity. Man's rights, it was thought, were received from God. The Lockean end of law as implying a preservation and enlargement of freedom, was inherent and basic to the minds of the opponents. The essential relationship between law and liberty was then recognized, but it had not been transformed into a complete political reality. Attempts at translation of these principles had previously occurred, but not to the extent that would consolidate them into a meaningful political actuality.

Perhaps the most indicative of such attempts was made by the Levelers. In the midst of the English civil war of the 17th century in which both the King and
Parliament were struggling for supremacy, the Levelers asserted that neither was supreme. Supremacy, according to their doctrine, was not bestowed on the people, but was inherent in the people. A government could only exercise delegated powers. Their principle shaped American politics both ideologically and institutionally. In order to ensure the rights of the individual, the Levelers maintained that governmental powers should be listed in a basic charter. This idea of a written code which would direct and control governmental power, was not adopted in England; but in America, when the Constitution was proposed and adopted, the people who because of either personal experience or through the knowledge of others who had lived under similar circumstances, were keenly cognizant of the need to safeguard their rights. The written Constitution, enumerating the intention and scope of governmental powers was the immediate outgrowth of that concern. But because of the awareness of possible tyranny by an extremely powerful government, the major opponents of this drafted Constitution felt that protection of individual rights had to be further magnified in the dictates of the Constitution. They were familiar with the practice of English persecutions of people because of religious or political beliefs, and they knew that the accused stood helpless to defend himself in the face of biased legislators and judges. Because of this, the opponents of the first draft of the
Constitution clamored for specific provisions to safeguard cherished individual rights from invasion by the legislative, executive and judicial branches of the national government. The widespread demand for the inclusion of a bill of rights in the Constitution was then based on a common fear of political and religious persecution by an unrestrained national government. Accordingly, the Bill of Rights specifying limitations on the federal government and protecting the inalienable rights of the people, was added to the Constitution. By 1791 then, the political reality of transforming fundamental God-given rights into a meaningful written doctrine, had been achieved. The first Ten Amendments were essentially sweeping prohibitions against governmental abridgment or destruction of fundamental rights.

Included among these rights were the following:

**The Fourth Amendment** - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**The Fifth Amendment** - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases
arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have the compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence.

Thus, at the very beginning of United States Constitutional history, the limitations on majority rule with respect to the Fourth, Fifth, and Sixth Amendments had been elucidated. Since the Constitution was not self-enforcing, a detached and impartial body, the Supreme Court, was entrusted as its guardian and interpreter.

The effective translation of these Constitutionally guaranteed rights into a complete political reality came only after national and hence judicial concern had focused on them. As can be seen
through an historical analysis of the role of the Supreme Court, it was not until the advent of the Warren Court that a great deal of time was devoted to safeguarding procedural rights. The members of the Warren Court chose to focus their attention on cases involving Fourth, Fifth, and Sixth Amendment rights, and in so doing gave real meaning and importance to them.

The rights guaranteed by the Fourth, Fifth, and Sixth Amendments are procedural rights "designed to protect the citizen against arbitrary police action, and to ensure fair judicial procedures in any action of an official nature by which a person might lose his liberty or property."^2

The United States Constitution and the state constitutions as well contain certain fundamentally similar provisions to protect the citizens against police invasions of private homes and offices. The Federal Constitution, in the Fourth Amendment, reflects the general tone. The people, the Constitution states, are to be secure "against unreasonable searches and seizures" of their "persons, houses, papers and effects." Warrants to authorize a search are to be issued only "upon probable cause," and they must particularly describe "the place to

be searched, and the persons or things to be seized." The purpose of this Amendment was not to guard criminals, or to make the house a safe haven for illegal activities, but to enable an objective mind to weigh the need to invade that privacy in order to enforce the law. "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."³ "Only information that can be objectively verified should be the reason for the search."⁴

Prosecutions of alleged criminal offenders have often been founded on the defendants' own confessions, extorted from them during prolonged interrogations before trial. With regard to the rights guaranteed by the Fifth Amendment, "Two intellectual currents have combined to discourage the open use of torture as an instrument of law administration".⁵ In the first place, physical brutality has been made repugnant because of the humanist belief in the worth and dignity of the individual. In the second place, skepticism about the reliability of confessions has replaced the former conclusion that they were worthy of credence no matter how shockingly they might have been obtained. "Forced confessions, it is now thought, are as

⁴ Ibid., p. 29.
⁵ Ibid., p. 24.
likely to be false as true, and even when they can be confirmed by extrinsic evidence, confessions obtained by oppressive methods are a danger to society.\(^6\)

Americans are brought up to believe that 'every man is entitled to his day in court.' Courts being what they are, this conjures up a picture of representation by a trained legal advisor, who can surefootedly guide his client through the maze of technicalities in which he might otherwise become lost. The question remains, however about who is to pay for the guide when the client himself cannot afford to engage one. The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Comparatively speaking, the national government has been more concerned with the safeguarding of procedural rights than have the state governments. The exceeding of Constitutional limits on the part of law enforcement officials has led to numerous reversals by the Warren Court of previous rulings of lower courts as to the convictions of persons who contended that an error of constitutional significance had been committed. In protecting the procedural rights of individuals, the Court has stirred bitter

\(^6\) Ibid., p. 24-25.
controversy. The social undesirability of the Constitutional guarantees has been voiced by many national and state officials. The main contention has been that the scope of the Amendments, as they were originally drafted, is too large, and that it should be narrowed in the best interests of the American people. As manifested by the volume of their decisions on such matters, the response of the Warren Court to such criticism has been that, if the scope were narrowed, the protection of the best interests of the people through the safeguarding of their constitutional rights would be considerably lessened. The crux of the issue is that it is generally left to the Supreme Court to discern the amount of protection that can be given to an individual without unduly impeding the efforts of government to maintain the peace and order without which freedom is meaningless. The difficulty of this balancing function is essentially the reason for the considerable amount of attention that is given to the procedural rights in the Constitution and as a result to the Supreme Court, whose duty it is to focus on these rights.

My thesis is that the rights guaranteed by the Fourth, Fifth, and Sixth Amendments have been brought to the forefront of judicial concern through the work of the Warren Court. Furthermore, an examination of the manner in which the Warren Court has dealt with procedural rights cases encourages one to label it an 'activistic' Court.

In support of this thesis I propose to show that
the work of the Warren Court, which is carrying out the function and extending the judicial concern of what is termed the 'new Court', has differed substantially from that of the 'old' Court. I also propose to show that the extent to which the procedural rights of individuals are guaranteed, depends on historical circumstance and social environment and on the reaction of the Supreme Court to those factors.

This thesis consists of three parts. The object of the second chapter is to reveal that there have been two distinct Courts in American Constitutional history. It has been the function of the second Court to deal with or express judicial concern over the rights of individuals as guaranteed by the first Ten Amendments to the Constitution. The analysis of the changing role of the Supreme Court is the concern of Chapter II.

The purpose of the third chapter is to discuss the composition of the Warren Court. The main trends of the Court with respect to procedural rights, and the positioning of the individual justices of the Court within those trends are discussed in this chapter through an examination of their legal theories and philosophies or attitudes.

The fourth chapter consists of an analysis of the cases heard and the decisions delivered by the Warren Court in the area of procedural rights. Through the
consideration of the cases and their decisions, it is possible to show that the Court has dealt extensively with cases of a civil rights nature, and has completely overshadowed the work of any previous Court in the abundance and worth of such decisions.

The Conclusion emphasizes the fact that the work of the 'new' Court has changed significantly from that of the 'old' Court. The political events of the day, and the individual personalities and judicial philosophies of the justices of the Warren Court, as shown by its trends, have made the Court and its role what it is. The Warren Court has focused its attention on cases of a civil rights nature and has shown tremendous concern in the area of criminal procedures. Through such an analysis, the Warren Court may be termed an 'activistic' Court.
CHAPTER II
THE CHANGING ROLE OF THE SUPREME COURT

THE 'TWO' COURTS

The prominence of the rights guaranteed by the Fourth, Fifth and Sixth Amendments to the Constitution has just been brought to the forefront during the post quarter century. They belong to what may be termed 'the new Court's business'. The 'old Court', which came to an end in 1936, had as its architects John Marshall and Roger Taney. It was fashioned by them to be the supreme protector of property rights and to safeguard commerce, industry and finance from hostile legislatures, state and Federal. The 'new' Court, which has developed in the last twenty-five years, has abandoned this role and has become more concerned with the protection of individual rights.

It has only been within the past decade or so that the Court has focused its attention on civil rights because in the first century and a half of United States history, problems of the respective domains of Federal and state power incident to territorial expansion and economic growth rather than problems of individual rights came to the surface of national concern and attention.
Any Federal System requires an institution to determine conflicts of authority between the nation and the states comprising it. In the four most important modern federal states, Australia, Canada, West Germany and the United States, such authority has been lodged in a judicial body. The highest judicial institution of the last, the Supreme Court of the United States, in many respects served as a prototype for application of the judicial arbiter principle in the federal systems of Australia, Canada, and West Germany. Within the United States itself, the influence of Supreme Court decisions upon the American federal system is generally recognized as determinative.  

The Basic Role Of The Supreme Court

From the era of James Bryce to the present, there has been constant wonder and amazement at the independence and power vested in the United States judiciary. Its judges are appointed for life during good behavior. They cannot be removed without cause either by the executive or the legislative branch of government. The judges of the Supreme Court can void acts of the state legislatures and of Congress through their power to interpret the Constitution. This power established in the most significant

7 John R. Schmidhauser, The Supreme Court As Final Arbiter In Federal-State Relations 1789-1957. (Chapel Hill, North Carolina, 1958), p. 3. An examination of the manner in which the Supreme Court fulfilled its responsibilities as arbiter of American federalism is the primary purpose of this study.

8 See James Bryce, The American Commonwealth. (New York, 1869).
decision of John Marshall's Court, had been given to the Court by the Founding Fathers in the express garb of the Constitution - which the justices were to interpret as the supreme law of the land.

The Court was designed to keep the States, the Congress and the President within the bounds of their stated powers in order to preserve the Constitution. The Founding Fathers made the Constitution difficult to amend because it was there that they stated the broad principles which they intended to protect the common citizen from tyranny by either the Government or the majority of the people. It was the Court's function or trust from the start to ensure the non-violation of these principles of liberty and justice for all.

The occupants of the highest bench, from the Court of Chief Justice Marshall through to the Court of Chief Justice Earl Warren, have sought to carry out the spirit of the Constitution and to make that charter respond to the changing needs of American society. "As it controls neither the Government's purse nor its sword, it relies mostly on the force of its moral judgement, its legal and traditional prestige, and the educational

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9 Marbury v. Madison, 1 Cranch 137 (1803).
impact of its words to compel obedience to its dictates."\(^{10}\)

The Supreme Court makes its decisions on specific lawsuits brought before it. The origin of the lawsuits results from the various conflicts peculiar to the times of the general citizenry of the United States. The Supreme Court, if possible, settles the controversy by stating what an ordinary law means or how it applies. Only when absolutely necessary do the justices hand down a new interpretation of the Constitution. But on these momentous occasions when the court does add to the volume of judicial decisions on the meaning of the Constitution, it thereby alters the ways of Government and of the people. "The Supreme Court interprets the Constitution in order to render justice and in so doing shapes the government of the day."\(^{11}\) The extent to which the work of the Supreme Court shapes the government of the day is open to debate. A Senator from the state of Nebraska, George Norris, once remarked:

> We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than a hundred men. We have in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others.

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\(^{11}\) Ibid., p. 10.
Through an historical analysis of the work of the various Supreme Courts from that of Chief Justice Marshall to that of Chief Justice Warren, it can be shown that such an inference cannot be conclusively proven.

The task of the United States Supreme Court is clear. Decisions and precedents with regard to the rights established by the Fourth, Fifth, and Sixth Amendments have never enjoyed judicial scrutiny to the extent that they have since 1936 or more predominantly during the tenure of Chief Justice Warren, simply because these rights, as do other rights, owe their national predominance to the particular Court of a particular era. The era and the Court 'make these rights', or effectively bring these rights to the national spotlight. The various Supreme Courts owe their existence to and extend the spirit of the Constitution for any particular moment in American governmental history. The political events and circumstances of the day make the Supreme Court what it is, and in turn, the various justices decide and interpret the law that is to be the basis for the system of government of that day.

It is possible to briefly trace in general the political events and the judicial philosophies of the justices throughout United States Constitutional history, and in so doing, establish why the rights of the Fourth, Fifth, and Sixth Amendments have never been manifested to the degree that they have by the work of the Warren Court. The idea that the present is illuminated by the past has always attracted historians. The work of the Warren Court can be better understood and evaluated in the light of what has gone before it.

The Era Of Marshall And Taney

The Supreme Court under Chief Justice John Marshall failed to substantiate any of the great democratic freedoms listed in the Bill of Rights. In fact, it was only by its most famous decision (Marbury v. Madison), that the Marshall Court asserted the supremacy of the judiciary vis-a-vis the politically responsible branches of government. As such, the Marshall Court was an 'activistic' Court, 'activistic' in the manner that it chose to deal with the case. It asserted the right and duty of the Supreme Court to exercise judicial review over the acts of the other two branches of government. "At one fell swoop, Marshall rejected the claims in behalf of Executive and Legislative power, and asserted in classic form the justification of ultimate judicial supremacy over the political branches of government, casting the Supreme Court in..."
the role of the protector of the legal rights of citizens in the face of Executive usurpation and tyranny."\(^{13}\)

Marshall's judicial activism involved the assertion of the power of the Supreme Court over that of the executive and legislative components of government. The activism that is exhibited by the Warren Court, as described in Chapter III, is of a somewhat different order. It is similar to Marshall's activism in that it does restrain the politically responsible branches of government from a wide area of legislative mobility or freedom. But, it differs from that shown by Marshall in that it is primarily construed to be a literal, or absolute reading or translation of the dictates of the Bill of Rights, and essentially applies to cases involving these rights. 

"Excepting Marbury v. Madison, all of the classic decisions of Marshall's Court were thrusts against States-rights localism."\(^{14}\) Marshall's nationalism manifested itself in such cases as Brown v. Maryland,\(^ {15}\) Gibbons v. Ogden,\(^ {16}\) McCulloch v. Maryland,\(^ {17}\) and Dartmouth College v. Woodward.\(^ {18}\)


\(^{14}\)Wallace Mendelson, Capitalism, Democracy, And The Supreme Court (New York, 1960), p. 21.

\(^{15}\)12 Wheat. 419, 6 L. Ed. 679 (1827).

\(^{16}\)9 Wheat. 1, 6 L. Ed. 23 (1824).

\(^{17}\)4 Wheat. 316, 4 L. Ed. 579 (1819).

\(^{18}\)4 Wheat. 518, 4 L. Ed. 629 (1819).
In general, Marshall's decisions were a direct outgrowth of administrative policy as formulated by Alexander Hamilton. "In the age of Jeffersonian laissez-faire and agrarian States' rights, his opinions vindicated mercantilism and subserved the claims of democracy to vested business interests."\(^{19}\) "Fletcher v. Peck\(^{20}\) and Dartmouth are the foundation of what has been called the first doctrine of American constitutional law: the doctrine of vested interests."\(^{21}\) This doctrine of vested interests was probably the most significant of the issues that the Marshall Court faced. Marshall's decisions embodied the conservative interests of his times, and he saw to it "that the national power was exercised in the national interest as the Constitution intended."\(^{22}\)

Throughout the history of the United States, the function of law and hence the role of the Supreme Court has been to legally explain the political policies of the government and the social ideas and interests of the citizen. The Court of Chief Justice Roger Taney reflected the age of Jackson just as Marshall's Court had reflected that of Hamilton.

\(^{19}\) Mendelson, op. cit., p. 27.
\(^{20}\) 6 Cranch 87 (1810).
\(^{21}\) Mendelson, op. cit., p. 25.
\(^{22}\) Fribourg, op. cit., p. 5.
The animadversions against economic privilege and a corresponding faith in the democratic processes are a key to the understanding of Chief Justice Taney and his Court. Perhaps ultimately Marshall's chief contribution was the principle of vigorous judicial intrusion upon the political processes. This followed inevitably from the Federalist premise of distrust for democracy. Jacksonian respect for popular government finds expression in Taney's chief legacy—the concept of judicial self-restraint.23 Cases such as Pennsylvania v. The Wheeling and Belmont Bridge Co.,24 Milnor v. New Jersey Railway,25 Luther v. Borden,26 Kentucky v. Dennison,27 embody an attitude of judicial self-restraint and established the difference between cases of a 'political' nature and cases that required a strict 'judicial interpretation'.

The distinction between cases of a 'political' nature and those requiring 'judicial interpretation', depends upon the resolution of whether conflicts of interests, according to the Constitution as interpreted by the Supreme Court, are to be decided by congressional action i.e. the legislative or 'political' branch of government or whether they are to be left for decision through judicial action.

The Court from 1836 until 1857 was pursuing a non-doctrinaire course to which only the loosest kind of descriptive generalization can apply. "The Court was

23 Mendelson, op. cit., p. 36.
24 18 Howard 421 (1856).
25 70 U.S. 782, 793 (1857).
26 17 Howard 1,12L Ed. 581 (1849).
27 24 Howard 26 (1861)
adjusting itself to the contours of a changing America, relaxing the rigidities of Marshallian dogmas when that seemed desirable, retaining or strengthening others, and fashioning some new dogmas of its own, producing a constitutional jurisprudence that had been pragmatically fitted to the notion of the day.\(^1\) This adjustment process created an atmosphere of public acceptance of the Supreme Court and led to a strengthening of judicial power. Although judicial power was slowly being strengthened, little or no emphasis was placed in the general area of civil rights through the eras of Marshall and Taney, save one notable exception. The Ex parte Merryman case\(^2\) "struck the first great blow for civil liberty in federal court history.\(^3\) A military officer, residing in Pennsylvania, issued an order to arrest a citizen of Maryland, upon vague and indefinite charges without any proof. His house was entered in the night and he was seized as a prisoner and taken to Fort McHenry. When a habeas corpus was served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court for an examination into the legality of the imprisonment, the officer stated that he was authorized by the President to

\(^1\) Robert G. McCloskey, The American Supreme Court (Chicago, 1960) p. 36.

\(^2\) Fed. Cas. 144, No. 9437 (O.C.D. Md. 1861). The power of the President and the militia to suspend the writ of habeas corpus and hence deny an accused the right to trial by jury was denied by the Court under Taney. Another important civil liberty case was Ex Parte Milligan (4 Wallace 2 (1866)), in which Chief Justice Morrison Waite's Court upheld a civilian right to trial by jury even for an essentially military offense.

\(^3\) Mendelson, op. cit., p. 44.
suspend the writ of habeas corpus at his discretion. In the exercise of that discretion, the writ was suspended and on that ground he refused obedience to the writ.

Taney, stating the case, understood that the President not only claimed the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey a judicial process that may be administered upon him. Taney stated that the military authority in this case had gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It had, by force of arms, thrust aside the judicial authorities and officers to whom the Constitution had confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. In the deliverance of his decision, Taney thus reiterated the fundamental principles of civilian freedom from military usurpation. This case did not set any precedent of tremendous importance in the civil rights area insofar as later Courts did not make use of the decision rendered in it or even choose to dwell at any further length on cases of this nature. What is important about this case, is that it does show, a century later, the extent to which the Supreme Court's business has changed.

Where, one hundred years later, cases of this type are most common and very significant to the work of the Warren Court, in the era of the Taney Court, the selection and
decision of such a case proved to be a great risk both to the Chief Justice, and to the Court itself. 31

The Post Civil War Court

The post-Civil War period and the industrial revolution provoked conflicts from which evolved an abundance of new legislation. The legislation raised new legal issues. It has often been remarked that the Civil War marked the close of one period of judicial review, and the advent of another. The War brought basic internal and external changes for the Court and the individual justices. "Their constitutional universe had been transfigured." 32

The federal nation-state problem had changed its nature dramatically. Its importance in the judicial order of things declined because the greater issue of economic control had arisen to dominate the political scene.

... capitalism, developing at a rapid but relatively moderate tempo in prewar years, had been given an enormous accelerating thrust by the war and was now proceeding at a pace of headlong expansion that was unexampled in the nation's history. The agrarian nation Jefferson and Marshall had known was now the industrial-mercantile nation that Hamilton had envisioned. 33

The judges were faced with what was in effect a new judicial

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31 See Mendelson, op. cit., p. 44. Taney believed that this decision could have easily ended his public career.


33 Ibid., p. 102.
environment. Capitalism infringed upon the lives of Americans as it had never done before. It became the most important and most troublesome fact in American life. The basic conflict was whether the power of the government should be used to control expanding capitalism, or whether unhindered capitalism through the use of economic laissez-faire would best serve the American community. "The question of whether government should control capitalism, and how much it should control it, moved to the center of the American political arena and was never very far from that center for the next seventy years." The Court's focus of interest had been radically modified. Since the greatest problem facing America was government regulation of business, that problem gradually became the major interest of the Supreme Court.

The major interest of the Supreme Court as a molder of governmental policy became the relationship between government and business; and the major value of the Court was the protection of the business community against government. The nation-state relationship, once salient, was now subordinate.

The question of private versus public control of business was brought to the forefront. Two traditions were available to meet this problem. The first was the judicial self-restraint of Chief Justice Taney which

34 Ibid., p. 103.
"assumed the social conflicts in a democracy are best solved by the political processes." 36 The second was Marshall's doctrine of judicial supremacy which "seemed to suppose that ultimately only the judiciary can be assumed to have the capacity to govern." 37 Both of these traditions were represented in Chief Justice Morrison Waite's Court. Waite's views embodied Taney's doctrine, while Mr. Justice Field represented Marshall's doctrine. "By the end of Field's career, the legal foundations of laissez-faire capitalism 38 were firmly entrenched in the Constitution." 39 The old rival plantation economy had given way to an industrially oriented economy . . . .

Emasculation of the Interstate Commerce Commission left railroads free to continue their old practices without state or national interference. Trusts had substantial immunity from prosecution, and their ill-got profits were tax-exempt. Elimination of the income tax as an alternate source of federal revenue destroyed hope for tariff reform . . . such was the practical socio-economic result of the judicial revolution which Field led. 40

36 Mendelson, op. cit., p. 56.

37 Ibid., p. 56.

38 Justice Field wanted the Court to favor business through its decisions, while the Waite position would allow conflicts to be solved by the executive and legislative branches of government. Field's position directed the subsequent decisions of the Court.

39 Mendelson, op. cit., p. 69.

40 Ibid., p. 69-70.
Judicial supremacy became the order of the day. The dissents of Chief Justice Field became the legal principles or maxims upon which the law of the land was grounded.

Examples of the significant issues of the day and how the Court chose to deal with them were the 'trusts' and the Granger Movement. Large-scale organization in the form of trusts had completely overturned business methods. The Jeffersonian ideal of an agricultural nation with its individualistic overtones had given way to the Hamiltonian ideology of mass combination or trusts. The old conflict of the farmer versus the businessman manifested itself and resolved itself through the Supreme Court's decisions on the crucial economic issues. Granger legislation was an outgrowth of state government. It was basically a form of relief for the farmers or the agrarian section of the nation who had become subjected to unfair freight rates. "This 'hayseed socialism' raised for the first time in modern terms the classic problem of community 'interference' with private enterprise deemed harmful to the public."^41 Chief Justice Waite felt that matters such as this should be left to the 'political processes' for settlement, but Justice Field, dissenting, "voiced the old tradition that sprang from Hamilton, Marshall and

^41 See Mendelson, p. 57.
Webster. He felt that the principle upon which Waite's majority opinion proceeded was subversive of the rights of private property. His dissent became a legal principle which enabled 'big business' to achieve its historic growth.

Thus in the era of Waite and Field just as in that of Marshall and of Taney, the Court's concern was with the significant issues of the day and hence no emphasis was placed on Constitutional civil rights. Other concerns and problems occupied the minds of American citizens and their government and as a result the minds of the Justices of their Constitutional court.

The Era Of Holmes - The Division Between Economic And Non-Economic Freedom

The rights of property and the rights of man are continually contrasted, but even if in some sense such a contrast is valid, too sharp a division between the two largely falsifies reality. "A good deal of the history of the United States may fairly be summarized as the process, complicated and confused, of bringing to the masses economic freedom commensurate with political freedom." There is a hierarchy of values permeating the various disparate interests of the human personality. "Mr. Justice

42 ibid., p. 57.

43 Felix Frankfurter, Mr. Justice Holmes And The Supreme Court (Cambridge, Massachusetts, 1961), p. 74.
Oliver Wendell Holmes, "whose tenure on the bench of the Supreme Court followed the era of Waite and Field, " accorded to some claims the protection of the Constitution which he denied to others, although all claimed the shelter of the 'liberty' which it protects."44 Holmes was hesitant to oppose his opinion to the economic views of the legislature. His hesitancy, however, did not resolve itself in complete judicial restraint. What must be understood about the judicial philosophy of Justice Holmes is that since he believed that social development is a process of trial and error, the fullest possible opportunity for the free play of the human mind was an indispensable prerequisite. As a result, Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements. The enduring liberties of the individual were embodied in the Bill of Rights and "since these civil liberties were explicitly safeguarded in the Constitution, or conceived to be basic to any notion of the liberty guaranteed by the Fourteenth Amendment, Holmes was far more ready to find legislative invasion in this field than in the area of debatable economic reform."45 This individual judicial

44 Ibid., p. 75.
45 Ibid., p. 76.
philosophy of Holmes was for all intents and purposes the general root that developed the division of the 'new' from the 'old' Court. The emphasis of the so-called 'new' Court is on the protection of Constitutional civil rights and this new emphasis or change in judicial philosophy has derived its basis from the Holmesian division.

During Holmes' tenure of office, the majority of the Court was utilizing the newly discovered 'due process' clause to nullify statutes designed to curb the evils of economic laissez-faire. Individual as well as corporate rights of property and of contract prevailed over social interests. "The Supreme Court substituted its economic and political theories for those of the legislatures and destroyed the legislation." Against such theories, Holmes wrote his dissents. As seen, "his action was not due to any tenderness for the personal element, but to his doctrine that social policy was for the legislatures, not the courts." Holmes' dissents tended to fix the boundaries of judicial action. The great importance of Holmes' judicial philosophy, decisions and actions lay in the fact that he held for a definite division between laissez-faire economic freedom and laissez-faire political


47 Ibid., p. 171.
freedom, and emphasized judicial interpretation and action with respect to the latter.

The typical situation which Justice Holmes faced was a legislative exercise of police power, sometimes by Congress, usually by a state. His doctrine was that the legislature could in effect do anything that was not expressly prohibited by the Constitution. "The question presented to the Court was whether the regulation was a valid exercise of police power or whether it deprived a person of 'life, liberty, or property', without due process of law."45 Although the Courts recognized the power of the states to enact measures limiting freedom of activity and the rights of property when such limitation was necessary to the health, morals, safety and welfare of the people, the Due Process Clause of the Fourteenth Amendment was used to insure a broad area of freedom. The clause, in other words, became an instrument of laissez-faire economic doctrine. An important example was the Supreme Court's decision in Lockner v. New York,49 and the dissenting opinion of Justice Holmes.

48 Ibid., p. 168.

49 193 U. S. 45 (1905) The Supreme Court, stating that the right of a person to make contracts in relation to his business was part of the liberty of the individual protected by the Fourteenth Amendment, found the statute unconstitutional as a violation of the freedom of contract.
The New Deal Era

The Hamiltonianism mentioned in the previous section, preoccupied itself with production for monetary gain and neglected the problem of distribution. The result was the Great Depression of the 1930's. It involved the curtailment of production, falling prices and profits, and general unemployment. Widespread economic stagnation had set in. This economic calamity revitalized the political party system. The new party politics involved a shift to urban interests and outlooks and the switch from agrarianism to urban industrial complexes resulted in a breakdown of sectional alliances and the formation of politics that incorporated class divisions. Organized labor had replaced the agrarian section as the chief threat to the business and industrial communities.

Franklin Delano Roosevelt during his first two terms as President of the United States, instituted a program termed the 'New Deal' to combat the Depression. The 'New Deal' consisted of two main parts. The first included temporary measures designed to provide relief and to counteract the effects of the economic depression which had begun in 1929. The second included permanent measures designed to rehabilitate and stabilize the national economy so as to prevent the recurrence of severe economic dislocations.
Among the temporary measures adopted, were the passage of the Emergency Bank Relief Act; the creation of the Federal Emergency Relief Administration; the creation of the Civilian Conservation Corps; and the establishment of the Federal Civil Works Administration which was later replaced by the Works Progress Administration.

The 'New Deal' measures intended to be permanent included the National Industrial Recovery Act passed in June, 1933, and invalidated by the Supreme Court in 1935; the Agricultural Adjustment Act passed in May, 1933, and invalidated by the Supreme Court in 1936; the Securities Act of 1933 and the Securities and Exchange Act of 1934; the Tennessee Valley Authority, created in May, 1933; the Rural Electrification Act of 1936; the National Labor Relations Act of 1935, the Fair Labor Standards Act, passed in June, 1938; the Social Security Act of 1935; and the National Housing Act of 1934.

Hugo Black, appointed associate justice of the Supreme Court in 1937 by Roosevelt, had sponsored a number of progressive legislative measures, including the Fair Labor Standards Act of 1938 while he was a United States senator (Democratic) from Alabama. Felix Frankfurter, after Roosevelt's election in 1932, became one of the President's closest advisers, contributing to the drafting of much New Deal legislation. In 1939 he was named by
Roosevelt to succeed Benjamin N. Cardozo as associate justice of the Supreme Court. Although he had previously acquired the reputation of a militant liberal and social reformer, his opinions on matters before the Supreme Court gradually caused him to become identified with the conservative element of the Court on some issues, primarily that of re-apportionment.

Since the inception of the 'New Deal', the Court had held unconstitutional a number of administration measures, including the National Industrial Recovery Act, the Farm Mortgage Act, and the Agricultural Adjustment Act. In cases such as Schechter v. United States, United States v. Butler, and Carter v. Carter Coal Co., the Court "struck down virtually the whole New Deal recovery program." Roosevelt, impatient with the

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50 The 'New Deal' was attacked by conservatives as destructive of private enterprise and individual initiative; it was defended by its partisans as a balancing mechanism which would eliminate the recurrent economic booms and depressions of capitalist production and insure an equitable distribution of wealth and opportunity. The general consensus now is that the 'New Deal' helped to introduce into the United States a widespread attitude that governmental regulations of free economy was justified to whatever extent necessary to satisfy the minimum needs of public welfare and continuous employment.

51 295 U.S. 495 (1935).
52 297 U.S. 1 (1936).
53 298 U.S. 233 (1936).
54 Mendelson, op. cit., p. 96.
conservative members of the Court for their opposition to the extension of Congressional power over social and economic matters, proposed to appoint to the Court six additional members (one for each justice over seventy years of age) with more forward-looking social and economic principles; but due to Senate opposition to the proposed bill, the administration was finally forced to abandon it. However, between 1937 and 1941 eight members of the Court either resigned or died; and in the vacancies left by them the President appointed judges more favorable to the 'New Deal'.

The division between economic and non-economic freedoms that was effected by Holmes, set the stage for the vast majority of the civil rights decisions which became the business of the 'new' Court and the main work of the Warren Court. "Ever since the advent of the 'New Deal Court' in 1937 . . . the Court's preoccupation with, and in, the basic freedoms has been with the 'non-economic'." Judicial vetoes imposed both upon the states and the national government "have been invoked because they infringed personal liberties other-than-economic safeguarded under the federal Constitution." Economic policies

55 President Roosevelt's 'court-packing' scheme came after his overwhelming victory in 1936 over Governor Alfred M. Landon, the Republican nominee for President of the United States, from Kansas.


57 Ibid., p. 39.
have become relatively free from judicial interference and as such the Court's role can be interpreted as judicial 'laissez-faire'. Any attempt by Congress at legislating policies of a 'cultural' or 'noneconomic' nature however, can and has been deemed ripe for the judicial axe. It is here that the 'activistic' role of the Court is best evidenced, and it is here that the break between the 'old' and the 'new' Court can best be shown. "Judges deeply respectful of democracy hesitate to intrude upon the political processes, except to protect the most basic human freedoms or to resolve conflicts in the political interregnum between the fifty-one state and national democratic systems . . . this is the essence of the new constitutional law."

The Basis For The Changes

This very brief and general history of the Supreme Court's role since its inception seems to suggest that the question of the Court's proper role is not susceptible of any single final answer. The main conclusion to be drawn is that the interests and values, and hence the role of the Court have shifted fundamentally and often in the presence of shifting national conditions and in the presence of shifting conditions within the

58 Ibid., p. 98.
various geographic sections of the nation.

Changing national conditions that have initiated significant issues which in turn were faced by the 'old' Court have been, as previously mentioned, the doctrine of vested interests, the growth of business, the Granger Movement, the creation of trusts and the Great Depression. Other significant movements and events such as Theodore Roosevelt's progressivism (1901-12), the two World Wars, and the 'Red scare' have all played their part in the shaping of judicial policy. Shifting conditions within the different parts of the nation at particular times e.g. the Dred Scott Decision, have also shaped judicial policy.

59 The fundamental objectives proclaimed by the first Progressive Party, colloquially known as the "Bull Moose Party" were the elimination of the control of the Federal government by conservative business interests, and the enactment of reforms favouring the farmers and workers. Theodore Roosevelt, like Jackson and Lincoln, believed that it was the duty of the President to initiate, and cause to be implemented by Congress, a policy of social and economic benefit to the people at large. See Richard Hofstadter, The American Political Tradition (New York, 1948), Chapter X.

60 See Mendelson, p. 117.

61 19 Howard 393, 15 L. Ed. 691 (1857). The Dred Scott Case is important because it was decided in such a manner as to pass upon the question of constitutional power, and because it rekindled the fires of sectional hatred. The opinion of Chief Justice Taney revealed the strategy by which the Court hoped to lessen slavery agitation, but which had the unintentional effect of further inflaming public sentiment and increasing the threat of war. The Court held, among other things, that Congress had no power to make Dred Scott a free man by virtue of his residence in free territory.
The concept of the judicial function that is reflected in one era could not hold sway in another era. The judicial function is a peculiar function - peculiar to an era. "The facts of the Court's history impellingly suggest a flexible and non-dogmatic institution fully alive to such realities as the drift of public opinion and the distribution of power in the American republic." 62

The role of the Court varies directly with public demand.

It is not to suggest that the historical Court has slavishly counted the public pulse, assessed the power relationships that confronted it, and shaped its decisions accordingly. The process in question is a good deal more subtle than that. We might come closer to the truth if we said that the judges have often agreed with the main current of public sentiment because they were themselves part of that current, and not because they feared to disagree with it . . . but the salient fact, whatever the explanation, is that the Court has seldom lagged far behind or forged far ahead of America. 63

The dualism 64 implied in the conception of the Supreme

that even if he had been free at some time while outside Missouri, he was now a slave by virtue of Missouri laws; and that, in any event, as a Negro he could not be a citizen of the United States within the meaning of the Constitution and therefore could not sue for his freedom in a federal court. For a résumé of the Dred Scott decision see Mason and Beany op. cit., pp 32-35.

62 McCloskey, op. cit., p. 223.

63 Ibid., p. 224.

64 The two ideals of American government are popular sovereignty and fundamental law. The logical conflict between these two ideals was left unresolved and the task of coordinating them was placed upon the Supreme Court in the concept of judicial review.
Court directed the Court not to shape its policies without regard to popular sentiment.

The Supreme Court is a political institution and must always act as one. It possesses the power of public opinion or the power of the 'times' as both a leader and a register of it. The vital link of the Court to the legal political and governmental processes of the day is absolutely necessary. To be 'a-political' would render it useless. A broad and yet relatively concise definition of 'politics' is 'that activity which gives shares of power to persons or groups within society commensurate with their importance or worth in that society'. As such, the Court would seem to merit the power thrust in its hands, as a group, or more precisely as individual justices within the group. The Court is a distinct, politically active component in the American system of government which is the direct outgrowth of a particular or unique society. "The Court never departs drastically from the policy of the lawmaking majority in the long-run." Short-run 'junkets' from the dictates laid down by the lawmaking majority are commonplace, but generally speaking they are quantitatively no more than that. In line with the times, therefore, it is, true to the often recited phrase, a chamber for

'sober-second thought'. But, it is important to realize that a chamber such as this with a function as apparent as this, must nevertheless, be 'political', and consequently subject itself and align itself with the social pressures of the day.

Shift Towards Civil Rights

The Court's modern shift away from concern with economic rights toward concern with civil rights can be properly evaluated only when it is seen in historical perspective. For example, until 1860, America was undecided on the federal question; until 1932, America was undecided about the question of economic control versus laissez-faire. Until these dates, the Court could still help the nation choose. Once national judgment had crystallized, it would have been useless for the Court not to act accordingly. The Court has always focused on the

66 The usual notion implied by the use of the terminology 'a chamber for sober second thoughts', is a non-democratic group like Plato's Nocturnal Council or an aristocratic upper house, but this terminology may also be used to describe the Supreme Court's role in the American system of government. It is an appointed, select, detached and impartial third branch of government and its sphere of action is 'judicial review' or the process whereby an alternate body other than the lawmaking branch of government can and does pass on the legitimacy or constitutionality of policy formulated by that lawmaking branch. As such, it is a 'chamber' and it does provide 'fair-minded criticism' of policy in the form of a 'second' examination. The Supreme Court's role does necessarily fall within the democratic method of political action (unlike the two aforementioned examples), but being democratic does not, I feel, diminish the value of labelling it in this manner. Even though it is a democratic group, it does have the elitist overtones of Plato's Nocturnal Council or an aristocratic upper house.
issues of the day. Since 1937, the Court has attempted to evolve a civil rights doctrine that will respect the commitment of the American libertarian tradition, yet not stray from the exigent American political reality. The Court "has evidently stepped into the vacuum created by the failure - some would contend deliberate default - of Congress and, to a considerably lesser extent, the Executive, to discharge the responsibilities imposed or implied by the Constitution of the United States of America."67

Within the limits of what it regards as its capacities, the Court can be expected to preoccupy itself with the issues that most prooccupy America. And civil rights is just such an issue . . . still undecided in spite of what partisans on either side would like to think, and not by its nature inappropriate for some form of judicial intervention. In turning its attention to this subject, the Court was acting in perfect historical character.68

The emergence then of the Supreme Court as the guardian and protector of the civil rights of the American people reflects "the growing concern of the people, both as individuals and as members of interest groups, with these freedoms and the problems that inevitably attend them."69

The work of the Warren Court, as has been the case with all the Supreme Courts that have preceded it,

67 Abraham, op. cit., p. 37.
68 McCloskey, op. cit., p. 226.
69 Abraham, op. cit., p. 37.
is directly related to the political events and circumstances peculiar to its era. The events and circumstances of the years immediately preceding its inception, and also during its tenure, have been responsible for the Warren Court's concern with the civil rights area. A discussion of this era is given in Chapter IV as background to the analysis of the decisions it has delivered with respect to procedural rights cases.
CHAPTER III
THE 'WARREN COURT' - THE JUSTICES
JUDICIAL PHILOSOPHY OF THE JUSTICES INVOLVED

Through the historical analysis of the business of the Supreme Court relevant to this paper, it has been possible to trace the various kinds of cases the Courts have chosen to hear and the decisions that they have rendered. The cases heard, and the decisions reached have varied directly with the individual personalities and judicial philosophies of the justices involved. The most important fact to consider, with regard to the Supreme Court judicial practice is that although theoretically the Court has the 'last say', it has the 'last say' only for a time. Judicial decisions are susceptible to reversal and no adherence to any precedent can be guaranteed. This is true, because each justice of each Court contributes something different by way of modification, revision or revocation, to the judicial process. Complementing social pressures and standards as a factor necessary in understanding and interpreting the different Courts, is the all-important factor of particular individual judicial philosophies.

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The Business Of The 'Warren Court'

The Supreme Court has never been concerned with the protection of civil rights to the extent that it has during the tenure of the Warren Court. The protection of the constitutional civil rights of the individual can accurately be described as the most important business of the Court. Despite the somewhat awesome position of the nine justices, they are decidedly human men, and the interplay of their differing backgrounds and temperaments effects what becomes the law of the land.

The Two Wings Of The 'Warren Court'

The Court, with respect to the types of decisions rendered in procedural rights cases, is divided into two major wings which can be labelled - 'activistic' and 'self-restraintive'. These two wings represent substantially differing judicial philosophies. Before reviewing the main trends in the Warren Court with respect to procedural rights cases, and secondly, placing the individual justices in those trends, it is necessary to define the two 'labels' and note their differences and similarities since some justices cannot be easily placed in either wing.

Their much advertised differences are confined to the limited area of civil liberty . . . more particularly the issue has been this: how far shall a Court go in overriding the political processes for the protection of personal freedom . . . or conversely, to what extent should such
matters be left for solution by the political processes themselves?70

Activism' Versus 'Self-Restraint'

The executive and legislative branches of government are given a wide range of action by the judicial self-restraineders as long as such actions are not a direct violation of the basic tenets of the Constitution as interpreted by the justices. The judicial activists on the other hand, are not as willing to grant to the politically responsible branches of government such a wide area of legislative mobility or freedom. Comparatively speaking, 'activists' are more wary of legislative interference in the dictates of the Constitution than are the 'self-restraineders'. 'Activists are more prone to legislate (contradict legislation in the form of judicial interpretation of the Constitution) than are the less affirmative or aggressive self-restraineders. Basically then, the dichotomy between 'activism' and 'self-restraint' hinges on the "position of the justices on the question of when the Court should enter the field to say 'no'."71 In the final analysis, "it comes down to a basic difference of reading constitutional commands in the light of the judicial function."72

70 Mendelson, op. cit., p. 98
71 Ibid., p. 114.
72 Ibid., p. 114.
The terms 'activism' and 'self-restraint' when applied to the actions of Supreme Court justices offer a much more concise frame of reference than does the somewhat commonplace vernacular of 'liberal' versus 'conservative'. The judicial philosophy implied by the casting of certain justices as 'liberals', meant that "they (since the Court of the 1930's) have been willing to give a generous interpretation to the Bill of Rights, on the one hand, and have consistently upheld government legislation in the economic realm, on the other." 73 The 'conservative' position meant that the justices involved have given less generous interpretations either in one or in both of these areas. This method of describing opposing judicial philosophies proved extremely vague and inconsistent. "A more monstrous oversimplification and indeed incorrectness is hardly imaginable." 74

Despite the advantage gained in applying the terms 'activist' and 'self-restrainer' instead of the traditional 'liberal' and 'conservative', there is no classification that completely and effectively denotes the difference in judicial philosophy that exists among the Court members. It is relatively difficult to place the various justices rigidly on either side. For purposes of

73 Ibid., p. 112.
74 Ibid., p. 112.
this paper, however, a loose classification is helpful, because at best it establishes, numerically speaking, the Warren Court as an 'activist' one. This pronouncement is subject to verification through the analysis of the actual cases heard and the decisions delivered by the Court in the particular area relevant to this paper.

The Members Of The 'Warren Court'

Chief Justice Earl Warren, an Eisenhower appointee in 1953, heads the Court. The other members as of June, 1967, were Hugo L. Black, a Roosevelt appointee in 1939, Tom Clark,75 a Truman appointee in 1949, John Marshall Harlan, an Eisenhower appointee in 1955, William J. Brennan an Eisenhower appointee in 1956, Potter Stewart, also an Eisenhower appointee, in 1968, Byron White, a Kennedy appointee in 1962, and Abe Fortas, a Johnson appointee in 1965.76

In placing the individual justices within the two main trends of judicial philosophy exhibited in the Warren Court with regard to the procedural rights, it is necessary to further examine the two trends. Justices

75 Justice Tom Clark resigned from the Supreme Court in 1967. President Johnson appointed Thurgood Marshall to take his place as an associate justice.

76 Justices Frankfurter, Minton, Reed, Burton, Jackson, Whittaker and Goldberg have also served on the Court since the appointment of Chief Justice Warren.
Yi'arren, Black, Douglas, Brennan and of late Fortas,\textsuperscript{77} are often labelled judicial 'activists' because of their decisions in respect to cases involving the Fourth, Fifth and Sixth Amendments.\textsuperscript{78} This label is applied favorably by those who feel that the Court should actively develop solutions to all social problems, or in the pejorative sense by those who think that the Court should in the name of judicial 'restraint', ignore all but the most glaring of Constitutional infractions. The simplicity of the 'activist' label lies in the fact that the position of the justices who come under this heading is that the Constitution is to be enforced according to its precise terms. The procedural rights stated in categorical terms in the Constitution are 'absolute' and therefore must be observed by the Government and enforced by the Court under all circumstances. The justices who are labelled 'activists' assume that the very minimum requirements of the Constitution have yet to be completely applied to American life. The 'activists', with respect to the guarantees of the

\begin{itemize}
  \item \textsuperscript{77} Since Fortas joined the Court in 1965 it is probably much too early to predict with certainty his judicial views, but chances are good that he will align himself with the 'activist' bloc.
  \item \textsuperscript{78} 'Activism' with regard to procedural rights usually entails censoring executive actions, e.g. unlawful search, non-provision of counsel, etc., or the conduct of trials in lower courts. It does not usually involve the reversal of government legislation. Therefore the distinction between 'activism' in procedural rights and 'activism' regarding 'political questions' e.g. re-apportionment, are unrelated, and the justices usually will vary their attitudes on these questions.
\end{itemize}
Fourth, Fifth and Sixth Amendments, hold to the position that the Court has no power to impose social solutions beyond its obligation to protect the particular procedural rights enumerated in the Constitution. They also hold to the position that the Court has no more justification to avoid the duty of enforcing the Constitutional dictates of the procedural rights than it would have to make up provisions that were not specifically listed by the Founding Fathers in the original draft of the Bill of Rights.

Justices Harlan, Clark, White and Stewart are labelled judicial self-restrain ters because of their decisions in respect to cases involving the Fourth, Fifth and Sixth Amendments. The judicial philosophy of the self-restraint wing of the Court manifests itself in the attitude that the Court must be cautious in the range and extent of its decisions, regardless of the literal language of the Constitution. Accordingly, judicial claims are balanced with what is regarded as the legitimate interests of society and hence limitations on Government are minimal. The rights of the American citizen, according to this wing of the Court, must be balanced against the needs of the Government.

Justice Felix Frankfurter, appointed to the Supreme Court in 1939, and a member of the Warren Court

79 Although he is classified as a judicial self-restraintor in cases involving procedural rights, he often sides with the activist wing of the Court, if he can justify his vote on some narrower ground than the constitutional right asserted.
from 1953 to 1961 was the Court's chief spokesman for judicial self-restraint. His judicial philosophy embodied an assertion that judicial self-restraint was necessary for the maintenance and development of a sound spirit of democracy. He felt that the Courts were not the only protector of the rights of the people and that the justices did not possess any wisdom superior to that of the legislators. The executive and legislative components of American democratic government, according to Frankfurter, represented the forum which should deal with the people's rights. In denying the function of the Court as sole protector of individual rights, he stressed the fact that the other two branches of government shared equal responsibility with the Court for such a protection. Once such a responsibility was given solely to the Court, concession and compromise, the essence of democratic political behavior, would cease to exist. Since the Court's function does not allow for any modification or qualification, and since it can make no exceptions to the general rule, but only sustain or revoke, Frankfurter pointed out that the only way to ensure the continuation of democratic principles in the mechanism of government was to allow for executive and legislative responsibility in the area of civil rights. "It was Frankfurter's feeling that the Court should be very diffident in setting its judgment against that of the state or
the nation in determining what is or what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables." Frankfurter's theory of judicial 'self-restraint' is the very core or basis for the judicial 'self-restraint' philosophy of Justices Harlan, Clark and White.

Each justice, of course, presents a completely unique personality and a different judicial philosophy, but it is possible with respect to decisions delivered in procedural rights cases to place them into either of the two main trends of the Court. Harlan, Clark and White then represent the judicial 'self-restraint' wing of the Court. They are in the minority with respect to the two prevailing judicial philosophies of the Court. With Warren, Black, Douglas and Brennan outnumbering the 'self-restraint' wing, the 'activistic' nature of the Court is numerically consolidated but the onus for majority decisions is often left to the swing of the opinions of Stewart and Fortas.

Although numerical proof of the 'activistic' nature of the Warren Court is important, another factor is necessary in an attempt to categorize it, or any other Court for that matter. The influence of the particular judicial philosophy of the Chief Justice on the work of the Court should not be underestimated. The Chief Justice

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has two broad functions. First, he chairs the Court's own conference, and second, he assigns the writing of opinions to the other members of the Court, if he does not choose to write one himself. In both of these functions, the Chief Justice can wield a tremendous amount of influence over the other members.

The Chief Justice opens the discussion by giving his own views on the questions at issue. He states the case, and indicates the questions to be decided. It is here that the Chief Justice exhibits his real power. In any discussion, the first analysis of a problem will usually affect the analysis of everyone else. The person who selects the issues to be talked about frequently dominates the end result. Chief Justice Warren's 'activistic' judicial philosophy as such then, can be assumed to direct or play an important part in any eventual majority or unanimous ('activistic') decision of the Court.

The prominence of an 'activist' 'bloc' within the Warren Court is clearly evident. In some instances, the behavior of the members of the Court would tend to indicate that a 'group' rather than a 'bloc' existed. A 'group' differs from a 'bloc' in that its appearance is less persistent and consistent than a 'bloc' and manifests itself

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81 "A bloc on the Court consists of three or more justices who manifest a relatively high degree of interagreement in their voting, whether in the majority or in the dissent, over a period of at least a term." Schubert, op. cit. p. 155.
in a temporary alignment of justices who vote together in a particular case or set of cases. On most occasions, however, the activist members of the Warren Court function as a bloc rather than as groups, in cases of a civil rights nature. The activist bloc was formed in 1953 when Warren joined the Court and affiliated with Black and Douglas, and was increased to four when Brennan was appointed in 1956. This bloc of four justices has functioned with high interagreement since that time. With Fortas and sometimes Stewart tending to the activist wing of the Court, majority decisions and many unanimous decisions in procedural rights cases have occurred.

It is important to note that there has been two different self-restraint blocs that have operated in the Warren Court. The bloc of Justices Frankfurter, Minton, Reed and Burton was active in the 1953-1955 terms, and ended only with the retirement of Minton and Reed. The second self-restraint bloc was formed in 1955 with its representatives being Justices Frankfurter, Burton and Harlan. Justice Whittaker became affiliated with this bloc when he was appointed to the Court in 1956.

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32 A typical 'group' of the Warren Court would evolve for example in regard to cases of an economic nature where Justice Stewart would usually side with Justices Harlan, Clark and White. In the civil rights area though, Stewart would usually ally himself with the activist side of the Court and another 'group' behavior would ensue.
Thus, in the 1957 term the Court was counter-balanced with four 'activists' (Warren, Black, Douglas and Brennan) and four 'self-restrainters' (Frankfurter, Burton, Harlan and Whittaker). Justice Clark, a member of the Court since 1949, remained more of a center justice, and although, in some of his opinions he showed leanings toward the bloc of 'self-restrainters', he was never considered a member of that bloc. Only after Brennan was appointed to the Court, did Clark begin to affiliate himself with the 'self-restraint' bloc.

Over and above the fact that groups and blocs and the now present 'activistic' wing or trend of the Court have been formed, the fact remains that the justices are men of their times and not simply the clear-cut objective thinkers that one imagines would easily fall into one division or another or would be typical of an impartial, unbiased third branch of government. Friction among the justices is natural, but the common tie that envelopes all of them is a sincere and continuing effort to arrive at truth - at justice. Justice Clark, speaking of the late Felix Frankfurter, has noted the distinct Frankfurter emphasis of

...What is essential in judging is...first and foremost, humility and an understanding of the range of the problems and (one's, own inadequacy in dealing with them; disinterestedness, allegiance to nothing except the search, amid tangled words, amid limited insights; loyalty and allegiance to
THE WARREN COURT AND PROCEDURAL RIGHTS

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by

Ronald J. Goletski, B.A.

Faculty of Graduate Studies
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and legislative component of government, and that no public interest is great enough to justify the abridgment of the rights preserved in the Bill. To the activists on the Court, the history and language of the Bill of Rights make it evident that the primary purpose of the Bill was to withdraw from the government all power to act in certain areas - whatever the scope of those areas may be.

Through the consideration of the cases heard and the decisions rendered by the Warren Court from 1953 on in the area of the procedural rights, it is possible to see how the translation of the 'absolutes' protected by the first Ten Amendments have been exposed, consolidated and confirmed. Only an activist Court swayed by the social pressures of the day and enlarged by the particular judicial tendencies of the majority of that Court, could have brought these procedural rights to the forefront of judicial concern. The Warren Court has been such a Court, and the attention focused on it and on its decisions would seem to merit such a conclusion.
CHAPTER IV

THE "WARREN COURT" - THE CASES

THE ERA OF THE "WARREN COURT"

The work of the Warren Court has been shaped by

(1) the times - the people and political events of a particular era, and (2) by the attitudes and beliefs or judicial philosophies of the individual justices comprising the Court. The latter factor has been examined with the specific intent and purpose of establishing the main trends of that Court. It is necessary to now outline the former by examining the peculiarities of the present era. Although many events of the last decade can be held responsible for the role of the Warren Court, perhaps three major events viz. (1) the Cold War, (2) McCarthyism, and (3) the growing crime rate in the United States, have paved the way for concentrated Supreme Court attention within the procedural rights area.

When we come to know and understand our basic liberties, we recognize that they are not eternal and absolute truths, which must exist in equal degree in any and all circumstances. Even in ordinary times, they are necessarily limited by the equal rights of others and the general interests of the community. In time of war, or threat of war, the demands of national safety place exceptionally
serious strains on our civil liberties. . . we have learned that the exigencies of warfare make it necessary to prevent people from saying and doing many things which would be regarded as harmless, if not proper, in time of peace.85

With the emergence of the Cold War in 1948, the Court's attitude to the basic rights of the American citizen with respect to subversion changed dramatically. In the years that followed, the constitutionally guaranteed civil rights were seriously threatened. A general fear of the growth of communism in the United States was the factor responsible for such a threat. "The tension of the Cold war coupled with the revelations - some true, others false - of Communist infiltration in government, education, and other sensitive fields, made it rather difficult for both the people and their representatives to maintain a balanced judgment between their traditional liberties and the eroding effects of Communism."86 Postwar suspicion of government in general became evident in the minds of millions of Americans, and this suspicion was transformed and translated in the thoughts and actions of representatives in both state and national governments. "Some of the attitudes toward these dangers and the methods of combating them in turn created other dangers


86 North, op. cit., p. 184.
and threats to the security of our basic civil liberties.®7

Certainly no thoughtful citizen would deny that military and industrial information and equipment must be protected from espionage and sabotage and that persons in our midst who are committed to furthering the revolutionary objectives of a foreign power should be barred from positions of influence and power in the government. It is, however, equally important that, in the process, our basic liberties not be destroyed or seriously impaired. Otherwise a program for the control of subversion will become self-defeating. The highest purpose of national security is to preserve individual freedom.®8

The uneasiness concerning the precarious position of democracy in many parts of the world was transmitted to the American domestic scene in 1947-48. An investigation of persons belonging to organizations advocating or pursuing the overthrow of the government by unconstitutional means, including both communists and fascists, was launched among federal government personnel in several agencies in 1947. The Supreme Court's response to such programs laid the foundation and was responsible for what was later to become the Warren Court's main concern.

The Loyalty Order of March 21, 1947 was essentially a presidential scheme to rid the Executive branch of government of disloyal employees. A number of employees accused of belonging to groups termed 'subversive',

87 Spicer, op. cit., p. 119.
88 Ibid., p. 119-120.
resigned in that year from the State Department. This loyalty program seriously threatened the protection of the employees' civil rights. No allowance was made for personal defense. The employees were not told who had accused them and were not granted an opportunity for cross-examination. An Internal Security and Loyalty Program for all governmental employees was later introduced. The Supreme Court dealt with four cases concerning the constitutionality of this program, but none of the cases substantiated any of the constitutionally guaranteed rights. In Bailey v. Richardson 89 the Court sustained the loyalty order. In United States v. Lovett 90 and Joint Anti-Fascist Refugee Committee v. McGrath 91 the Court's rulings were "inconclusive and unsatisfactory." 92 The decision delivered by the Court in Peters v. Hobby 93 was typical of the manner in which it chose to deal with the aforementioned cases. In essence, it failed to resolve the uncertain constitutional situation with respect to the loyalty-security program, preferring to decide the case on a narrow procedural point and not facing up to the constitutional issue present in the case.

90 328 U.S., 303 (1946).
92 Spicer, op. cit., p. 122.
Loyalty oaths in the states for state governmental officials became the order of the day. "The favorite method of the states for combatting Communist subversion among employees during the Cold War has been the requirement of a loyalty oath and non-Communist affidavits."94 In the state loyalty programs, and cases resulting from such programs, the Supreme Court acted in the same manner as it had in cases involving federal loyalty programs. All of the requirements of a loyalty oath in the states were held valid by the Court except in the case of Weinman v. Updegraff95 where the Court condemned guilt by association and held unconstitutional an Oklahoma loyalty oath act. This one case was the only exception to the rule, and in cases such as Garner v. Board of Public Works,96 Adler v. Board of Education,97 and Gerende v. Board of Supervisors of Elections98 the Court "in no way challenged the power of the states to impose loyalty tests upon their employees."99

In 1947-48 the House Un-American Activities

94 Spicer, op. cit., p. 126.
95 344 U.S., 183 (1952).
99 Spicer, op. cit., p. 129.
Committee devoted much of its energy to the investigation of Communist Party activity. The activities of this Committee were challenged in five cases. Once again the Supreme Court dodged any constitutional issue by refusing to review all but one of the cases. The cases of United States v. Josephson,100 Barsky v. United States,101 Lawson v. United States,102 and Marshall v. United States,103 all resulted in decisions by the Court of Appeals in favor of the Committee. Only in Eisler v. United States104 did the Supreme Court choose to render a decision, but was prevented from doing so because the defendant left the United States.

"Investigations are initiated and laws enacted, sometimes with too much haste, to check the progress of the threatening evil."105 The Internal Security Act of 1950 renewed interest in and embodied the Alien Registration Act of 1940. Other regulations such as the Immigration and Nationality Act of 1952, and the Communist Control Act of 1954 followed. "The implementation of the national and state loyalty programs, the Smith and the

100 165 F. 2d. 82 (1947), cert. denied 333 U.S. 838 (1948).
104 170 F. 2d. 273 (1948), cert. granted 335 U.S. 857 (1948).
105 North, op. cit., p. 184.
McCarran Acts, and other national legislation soon produced a counter-reaction in the name of freedom of speech, immunity from self-incrimination, and the right to remain silent.\textsuperscript{106} This counter-reaction manifested itself in the amount of cases brought before the Vinson Court, whose tendency was to support governmental action. Eleven leaders of the Communist Party in the United States were convicted of criminal conspiracy, following a ten-months trial in New York City, on charges of conspiring to 'organize a' society, group, and assembly of persons who teach and advocate the overthrow and destruction of the United States Government by force and violence'. In 1951, the constitutionality of the Smith Act was upheld in the conviction of these Communist leaders in Dennis v. United States.\textsuperscript{107}

Despite such a counter-reaction, it became apparent that the Supreme Court "had no desire to become involved in the problem of determining the boundaries of legislative inquiry".\textsuperscript{108} None of the committees investigating Communist activity were restrained by the Court.

In 1955, however, the redrawing of boundaries with regard to the scope of legislative investigation, ensued. The conflict in Korea had produced profound

\begin{enumerate}
\item \textsuperscript{106} \textit{Ibid.}, p. 185.
\item \textsuperscript{107} 341 U.S., 494 (1951).
\item \textsuperscript{108} Spicer, \textit{op. cit.}, p. 139.
\end{enumerate}
repercussions on the United States domestic scene. The attitude of the Warren Court changed considerably from that of the Vinson Court. The Warren Court rendered decisions in a vast amount of cases dealing with Communism and internal security. The Warren Court, through its decision in Watkins v. United States, questioned the authority and procedures of the Committee on Un-American Activities through a reversal of a previous conviction for contempt of Congress and went on to deny that the Committee had any general authority under its investigatory powers to expose the private affairs of individuals, to expose for exposure's sake, or to conduct investigations for personal aggrandizement of the investigators.\footnote{109} This case showed the great degree to which the Supreme Court could go in criticizing another branch of government, and in Yates v. United States,\footnote{111} the Warren Court went even further when it reversed a previous conviction of Communist Party leaders, through the adoption of a narrow meaning of the Smith Act, and hence reduced to a large extent the applicability of the Act.

In general, beginning with cases heard in the 1955 term, "the Court recognized the privilege against

\footnote{109} 354 U.S., 178 (1957).
\footnote{110} North, \textit{op. cit.}, p. 186.
\footnote{111} 354 U.S., 298 (1957).
self-incrimination as a legal limitation on the powers of Congressional investigating committees. In Quinn v. United States, Bart v. United States, and Emspak v. United States the Warren Court reversed the convictions of defendants who had been previously convicted of contempt of Congress because of a refusal to answer questions asked of them by the Committee on Un-American Activities. These three cases marked the first time that the Supreme Court had ruled that the privilege against self-incrimination, constitutionally guaranteed by the Fifth Amendment, could be used by witnesses called before Congressional investigating committees. The attitude of the Warren Court to such cases was that the Bill of Rights limits the power of investigation in the same manner and with the same force that it limits the exercise of all other governmental powers. In any investigation of this sort, the purpose of an inquiry must clearly be stated in the authorizing resolutions, and questions posed must be relevant to the nature of the inquiry, and hence in no way encroach upon a person's privilege against self-incrimination.

What, in fact, the Court was able to do was to

112 Ibid., p. 140.
reassert its judicial power. The Court declared that if public officials wished to prosecute Communists, such prosecutions would have to be based on defendants' acts or planned acts, not on their political beliefs. It also declared that if congressional and state investigators were to delve into private affairs, their probes would have to be justified by valid legislative purpose and specific authorization. If federal and state governments questioned the loyalty of one of its employees, it had to do so in a manner that would not infringe upon the employee's procedural rights.

The Justices had refused to admit that Congress, if not the states, had intended to push the hunt for Communists and security risks to the extreme of dispensing with normal procedural regularities of American law. The opinions of the Warren Court admonished the other branches of government to use their authority calmly, wisely, and justly; the Court did not forbid the use of political power to cope with problems of internal subversion. 116

In general, the Warren Court's attitude has been one of reluctance to stand in the way of the government's hiring and dismissal procedure. It did condemn the listing of organizations by the Attorney General as subversive without a hearing and has restricted the Loyalty Review Board's authority to review cases on its own motion. It has similarly condemned state loyalty statutes. "The

116 Walter F. Murphy, Congress and the Court (Chicago, 1962) p. 111.
Court has held that no state employee may be automatically dismissed, without charges, notice, hearing, or the right of appeal, merely because he invokes the privilege against self-incrimination in a federal investigation."117 The Court has been reluctant to interfere with congressional power in subversive control programs relating to aliens and has also ruled that strict procedural safeguards do not necessarily have to be observed in denaturalization cases. The establishment through the Court's decisions, however, of limitations on the power of investigating committees has been firm and this has been a most important result of all the Cold War controversy.

The investigation must be clearly in aid of a valid legislative function. The questions asked of witnesses must be pertinent to the subject of inquiry. The valid purpose of the inquiry must be clearly stated in the authorizing resolution. Witnesses may not be compelled to give evidence against themselves, unless they are protected from the danger of criminal prosecution by an immunity statute; nor may a witness be subjected to unreasonable search and seizure. True, the privilege against self-incrimination must be claimed by the witness, but no special formula of words is required so long as his intention is made reasonably clear. Moreover, criminal intent on the part of the witness must be shown by a clear disposition of his objection to questions, before he can be cited for contempt. There can be no investigation into the private affairs of a person for the sole purpose of exposure.118

118 Ibid., p. 164.
An extreme example of the abuse of power of investigation, and how it was used to gain personal publicity in the activities in the 1950's of Republican Joseph McCarthy of Wisconsin, chairman of the Senate Committee on Government Operations and of its Subcommittee on Permanent Investigations. The McCarthy era can be held responsible for the concern of the Warren Court in the area of civil rights; and presents an important factor which is linked to the events of the Cold War that precipitated judicial concern in this area. Public attention centered increasingly on the activities of McCarthy. He invaded the executive field, and was a leading exponent of the 'conspiracy theory' which accused the opposition party of treason. He attributed the spread of communism to American officials who he accused of being 'soft' on communism.

The Senator had, in his capacity as chairman of the Senate's Subcommittee on Permanent Investigations, conducted numerous inquiries into alleged communist infiltration into government agencies, and because of his roughshod methods of dealing with suspects, had become a highly controversial figure. In October, 1953, he had initiated an investigation of communism in the United States Army. This investigation reached a climax when, in March, 1954, the Secretary of the Army accused the senator and members of the subcommittees of abusing their
powers in attempting to obtain preferential treatment for a former unpaid consultant of the subcommittee who had been drafted into the Army. In turn, McCarthy charged that the Army was using the consultant as a hostage in an effort to have the subcommittee and its investigation of the Army. On March 16 the Subcommittee on Permanent Investigations voted to conduct a thorough inquiry into the conflicting accusations. The open hearings which received national attention, were marked by bitter quarrels and flatly contradictory testimony. The Republican majority on the subcommittee absolved McCarthy of wrongdoing, but found that he should have prevented his staff from seeking favored treatment for the Army draftee in question. After a long investigation of censure charges subsequently brought against McCarthy, the Senate voted to censure him.

McCarthy had used his investigatory power to publicly accuse individuals of guilt, and in so doing destroyed their reputations. Under the pretense of the congressional power of investigation, 'McCarthyism' symbolized irresponsible self-aggrandizement, suspicion, perversion of power, insubordination in the civil and military services, harassment of citizens and guilt by association.

McCarthyism as a factor in the political events and circumstances of the Cold War, and the Cold War in
general were great contributors or contributing factors
to the subsequent conduct and work of the Supreme Court.
Although the Vinson Court and the Warren Court seemed to
hold opposing views and attitudes, as proven by the deci-
sions rendered in cases of an internal security or
Communist threat nature, and although the latter Court
did in its decisions incur tremendous criticism from
various segments of the American populace, the important
thing to note is that through the censure and condemnation
of McCarthy, and because of the infringement on the civil
rights of the people generated by Cold War legislation
and regulations, it is apparent that public attention and
concern had focused on these rights. As a result, true
to the historical nature of the Supreme Court's function,
it in turn, focused on them. Later consideration of
cases having to do with procedural rights will show to
just what extent the Court chose to deal with civil rights
cases. It is sufficient here to note that factors such
as the ones given did have a direct bearing on the work
of the Warren Court.

A third aspect which has caused concentrated
Supreme Court attention in the civil rights and more
particularly, procedural rights area, viz. the growing
crime rate in the United States, must be dealt with be-
cause like the events of the Cold War, it too is largely
responsible for the Warren Court's preoccupation in this
area.
Acts of violence have increased to such an extent that the Republican nominee for President of the United States in 1964, Barry Goldwater, tried to exploit politically the popular fears aroused by the issue of violence on the streets. It was a persistent issue throughout his campaign. An issue such as this is not new, but has captured the national spotlight as never before. The killing of an American President, the wave of terror on the streets and in the dark surroundings of the big cities, the racial clashes, and teenage gang violence have all hastened popular concern with the growing crime rate in the United States. Many reasons can be listed as the cause of this accelerated crime rate, but they have no relevance to this paper. The only purpose that is intended by the consideration of this problem, is to make evident the correlation between the increasing crime rate and the increasing concern of the Warren Court with the protection of citizens accused of crime. When an issue is incorporated in the platform of a prospective President, that issue must have attained national importance and be of great proportion and magnitude. Because of the increasing crime rate, there has been increasing public and hence judicial concern with the rights of individuals accused of crime.

The Cold War and the events directly related to it necessarily brought judicial concern to a wide
variety of the rights guaranteed by the first Ten Amendments. The increasing crime rate has resulted in judicial attention being focused on criminal cases - cases dealing more particularly with the procedural rights. The work of the Warren Court certainly has not helped to ease the growth of crime in the United States. It is speculative whether it has acted as a deterrent factor in crime prevention. But, its concern has not been with crime prevention; it has been with the protection of the rights of individuals accused of crime. The national concern over criminal acts has brought the Supreme Court once again to the centre of the stage. The protective function of the Warren Court has brought wide and varied criticism of the Court, but the activist nature of the Court has repeatedly maintained its literal translation of the procedural rights. Judgments involving arbitrary police methods and police brutality have constantly been the basis for Supreme Court reversals of previous convictions. Defenders of the Court's decisions assert that whatever merit the criticism may have, it appears to ignore the explicit commands of the procedural rights condemning unfair methods in dealing with persons accused of crime. The increase in the crime rate has naturally increased the amount of criminal cases, and the Warren Court has consistently selected such cases for hearing.

Thus, the Cold War and its related events which
brought Supreme Court concern with possible infringement of an individual's rights, the censure and condemnation of McCarthy which exemplified the results of popular and political suspicion, and the increasing crime rate which directed Supreme Court attention to the procedural rights, all have been events that precipitated Court action in the area of the civil rights of the American citizen.

Decisions Of The 'Warren Court' With Respect To The Procedural Rights

A study of the Warren Court with respect to the procedural rights, through the actual cases heard and the decisions rendered, proves that no Court has ever been concerned with the defense of the basic freedoms of the American citizen to the extent that the Warren Court has. The Warren Court, after such an analysis, may be termed an 'activistic' Court.

There has been growing concern over the fact that the recent Warren Court decisions in the area of procedural rights may change the face of legal justice. It has been contended that the Court's decisions in this area has given the criminal suspect a two-edged sword. The first edge is 'procedural'. The suspect, upon arrest, must be taken forthwith before a magistrate. He must be advised of his rights, and he must be given counsel if he requires it. The other edge is directed against the police
in gathering and presenting evidence. The police are unable
to search a place without first having evidence of a crime.
If they proceed to make a search without reasonable grounds
and uncover evidence, they would still be unable to do
anything because the evidence would not be admissible in
court. The further contention of this edge of the sword
is that it is of very little value in the protection of the
innocent, but is extremely useful to the guilty.

The opponents of the activist nature of the
Court feel that the procedural rights cannot possibly pro-
tect the innocent, but are being used to thwart police
action in collecting and presenting evidence. Those who
favor the activist translation of the procedural rights
as well as the activist justices themselves, believe that
regardless of the consequence involved in the safeguarding
of procedural rights, they must at any cost be adhered to
and given an 'absolute' translation. The rationale

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119 An 'absolute' translation of the Bill of Rights
takes the position that the rights are to be enforced
according to their precise terms - no more and no less.
Justice Black has often used the verbiage (with respect to
the language of the First Amendment, for example), "Congress
shall make no law . . .", "by 'no law', I understand the
First Amendment to mean 'no' law". "No to me means no," as
he has said so often. Using this same literal approach,
such a translation of all the other rights stated in
categorical terms is an 'absolute' translation. The
rights must be observed by the Government and enforced
by the Court under 'all' circumstances.
behind such a doctrine is given by Justice Black . . .

The historical and practical purposes of a bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except in the manner prescribed.120

The question at hand is essentially this. Which is the greater value, arbitrary police methods which, although constitutionally forbidden, result in the arrest and conviction of guilty persons but which could also result in the arrest and conviction of innocent persons, or, restrained police methods which result in the possible protection of all persons, including the guilty? Which is better? Which serves better the interests of American society? Which ensures more effectively the rights of the people? Do the people, first and foremost, have or want the right of protection against criminals, or do they have or want self-protection - protection against arbitrary police action that might some day result in their arrest and conviction? According to the Warren Court's activistic translation of the procedural rights, the main purpose of the rights is with the latter, but the self-restraint or those who favor or at least condone

arbitrary police action, would claim the former. The question or questions seem unanswerable. There is basic controversy, but the Warren Court has stepped into the middle of this controversy and has attempted to give an answer.

Fourth Amendment Cases

Fourth Amendment - The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

With regard to the rights guaranteed by the Fourth Amendment, the Warren Court has with great consistency overturned previous convictions of lower courts because evidence upon which the conviction was based was obtained by an illegal search and seizure. In the majority opinions written in such cases, the justices stressed the literal translation of the dictates of the Fourth Amendment. In the opinions, the justices stressed the fact that the arresting officers had to first state their authority and purpose prior to demanding admission to a private place. The officers must have also had a warrant listing the exact premises to be searched, and the persons or things to be seized. Search merely on 'probable cause'
was ruled as an infringement on the accused's right to privacy.

The Warren Court has chosen to hear a great many cases having to do with the Fourth Amendment's rights and the cases that I list are perhaps the most indicative of the types of decisions that it has rendered.

In Kremen v. United States the United States Court of Appeals for the Ninth circuit, the Warren Court overturned verdicts against the petitioners because some of the evidence on which the verdicts were based had been obtained by an illegal search and seizure by agents of the Federal Bureau of Investigation. The indictment charged the petitioners with relieving, comforting and assisting a fugitive from justice and with conspiring to commit that offense. In addition, two of the petitioners were charged with harbouring another fugitive from justice, and with conspiring to commit that offense. The petitioners were found guilty and their convictions were sustained by the Supreme Court of the State.

The petitioners were arrested in a cabin in a secluded village in California. The F.B.I. agents making the arrests had warrants for the two fugitives but not for the others. A thorough search of the cabin was made and its entire contents seized. The agents had no search

121 353 U.S., 1L ed. (1957).
warrant that listed the place to be searched or the articles to be seized.

The Warren Court reversed the convictions declaring that the seizure of the entire contents of the house and its removal some two hundred miles away to the F.B.I. offices for the purpose of examination was beyond legal sanction. Justices Burton and Clark dissented on the ground that the items were legally seized. Validity of the seizure did not depend upon the quantity of the items seized, they stated, but upon the circumstances of the seizure. The majority of the Court, however, did decide that the rights of the Fourth Amendment had been violated and delivered their opinion accordingly.

In another case dealing with police methods of gathering evidence, arresting suspects and questioning them prior to trial, that of Mallory v. United States, the Warren Court unanimously reversed a previous conviction. A young married woman had been raped by a masked man in the basement of an apartment building. The victim could give no description of her assailant, except that he was a Negro. The police quickly arrested three Negroes who lived in the same apartment building, took them to police headquarters and interrogated them intensively for hours, notwithstanding an explicit District

\[^{122}\text{362 U.S., 499, 1L ed. (1957).}\]
of Columbus procedural requirement that an arrested person be taken before a judicial officer without delay. Finally, one of the suspects confessed to the crime. He was subsequently convicted of rape and sentenced to death.

The unanimous opinion of the Court was written by Justice Frankfurter who stated that the police may not arrest upon mere suspicion but only on probable cause. The Court stated that an accused is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

In Miller v. United States,123 the Warren Court once again overturned a conviction of violation of the federal narcotics laws on the ground that marked money admitted in evidence had been illegally obtained by the arresting officers.

The officers appeared at the apartment occupied by the petitioner in Washington at 3:45 A.M. One of the officers knocked on the door, and in reply to the question "Who's there?" replied "Police". The door was opened on an attached chain and the petitioner asked what was wanted, then attempted to close the door. Thereupon, the police put their hands inside the door and ripped the

chain off. A search of the apartment turned up $100 in marked money used earlier in the evening to purchase narcotics from an alleged accomplice of the petitioner. The police had no warrant and did not expressly demand admission or place the petitioner under arrest until after they had entered the apartment. The District Court convicted the petitioner and the Court of Appeals affirmed the conviction.

Justice Brennan delivered the Court's majority opinion reversing the previous conviction. The majority of the Court held that the entry was unlawful because they failed first to state their authority and purpose for demanding admission. From this it followed that the arrest was unlawful and that the evidence was improperly seized. The Court cited 18 U.S.C. § 3109, which provides that an officer executing a search warrant may break open a door only if after notice of his authority and purpose, he is denied admission. Justice Harlan concurred with the opinion. Once again Justices Burton and Clark dissented arguing that the record showed that the petitioner was fully aware of who the officers were and why they had come, and that 'split second' action on the part of the police was necessary or the arrest would have been thwarted.

In Jones v. United States, the Warren Court

reversed another previous conviction of the federal liquor laws stemming from and including the possession of an unregistered still. The reversal was based upon a holding that the federal officers who made the arrest obtained their evidence by an unlawful search and seizure.

Justice Harlan delivered the Court's majority opinion stating that a violation of the Fourth Amendment had occurred. The opinion argued that were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords, largely nullified. The self-restraintive attitude of Justices Burton and Clark was once more exemplified as they dissented, arguing that the agents had good reason to believe that the petitioner was in the house and that they had the authority to enter and make the arrest. The dissent in this case was drawn along the same lines and argued with the same justifications as the preceding cases, and in all of them strong majority opinion of an activist nature prevailed in the decision rendered.

The Warren Court, it cannot be supposed, delivered activist reversals in every case of a Fourth Amendment nature brought before it, but when in isolated cases, it did affirm a previous conviction or decision, the grounds or basis for doing so were evident. Even
in such cases the activist bloc of Chief Justice Warren and Justices Black, Douglas, and Brennan displayed remarkable cohesion. Such was the case in Frank v. Maryland, where the Warren Court's decision upheld the right of a Baltimore health inspector to enter a private home to conduct an inspection without a search warrant. Justice Frankfurter delivered the majority opinion stating that the search was reasonable since the sole purpose of attempting to locate the habitat of disease-carrying rodents was not a request to make an unreasonable search. Justices Warren, Black, Douglas, and Brennan dissented, as mentioned previously, in an opinion written by Chief Justice Warren who stated that the right of privacy was greatly diluted and that there was no excuse for not obtaining a search warrant here, since a whole day elapsed in the carrying out of the inspector's work.

In a more significant case of Mapp v. Ohio, the Warren Court exhibited its activist nature to the greatest possible extent in overturning a previous ruling that the Fourth Amendment did not apply to the states.

127 In Betts v. Brady, 316 U.S. 455 (1942), the Court ruled that the Sixth Amendment did not apply to the states, and in 1947 and 1949 it ruled that the same was true for the Fifth Amendment and Fourth Amendment.
Cleveland police had broken into the home of a woman on the basis of a tip that her residence contained paraphernalia relevant to the "policy racket" and a bombing suspect. They found neither but searched the house until they uncovered erotic pictures and pamphlets. Even though the police had neither a warrant nor probable cause to conduct such a search, the woman was convicted of possessing obscene literature and sentenced to prison.

In reversing her conviction and holding that the states, as well as the Federal Government, are bound by the Fourth Amendment, the Court rendered all evidence obtained by searches and seizures in violation of the Constitution inadmissible in a state court. The decision in this case removed one of the principal incentives for police to violate search and seizure rights and since illegally obtained evidence could no longer be admitted in state courts, law-enforcement procedures throughout the nation were transformed and revolutionized.

It is easily seen then, by an example such as this case, how the Warren Court has chosen to deal with Fourth Amendment rights cases. Reversal after reversal has verified the Warren Court's true activist role in this area, and has significantly shaped police policies and practices throughout the United States.

In the six cases listed having to do with Fourth Amendment rights, all but one Court decision were reversals.
of previous convictions. This proportion represents over 80% of the decisions. Although there have been more affirmations than the one listed, the total number of reversals far outnumber the affirmations. In every decision listed, Chief Justice Warren, and Justices Black, Douglas and Brennan displayed activist bloc behavior, and in over 80% of the decisions, their activist behavior resulted in majority Court decision in favor of the defendant, with one of the cases listed resulting in a unanimous reversal. The activist nature of the Court is also shown by the fact that in two of the cases, the majority activist opinion of the Court was written by Justices Frankfurter and Harlan, who are usually categorized as self-restrainters. This behavior would seem to indicate that the members of the Court, including those who usually vote in a 'self-restraint' manner, are wary of possible infringement of the defendant's Fourth Amendment rights.

123 Justice Frankfurter is usually classified as a self-restraint in civil rights cases. At the time of his appointment to the Supreme Court in 1939, the Court's main concern was with the effects of the New Deal legislation. Frankfurter's opinions and votes upheld government legislation in the economic realm and hence he can be termed a 'liberal', but not in the sense that the term is used in civil rights cases. Since then, the Court's role has changed. He has not usually upheld or given a generous interpretation to the Bill of Rights (as activists do), and hence he is classified as a self-restraint or what may be termed 'conservative'. The important thing to note is that Frankfurter is not a 'conservative' in the sense that the term is used in the economic realm where it has been applied to label justices who have struck down government legislation. The role of the Court has changed and this has resulted in difficulty and confusion in the classification of Frankfurter's attitudes.
and cast their votes accordingly. The self-restraint group behavior of Justices Burton and Clark is clearly evident by their dissenting opinions in many of the cases.

There are several important facts to consider when analyzing the aforementioned cases. The mere fact of an arrest does not legalize any subsequent search. Such was the decision of the Court in Kremen v. United States. If an arrest did legalize a search, then it would be very easy for the police to enter premises in order to make an arrest for any offense, and at the same time confer upon themselves the right to rummage through the arrested person's papers and possessions. This, according to the Court, is what the constitutional provisions were intended to prevent. In order to prevent the police from making an illegal search, the Court has ruled that illegally seized evidence must be excluded from trial.

The police, according to the Court's decision in Mallory v. United States, may not arrest upon mere suspicion, but only on probable cause. This decision and decisions of its kind have prevented police from arbitrarily arresting a person simply because they are suspicious of his character or actions. Police authority and purpose must be stated in demanding admission to premises with the intent of carrying on a search. If this is not done, as stated in Miller v. United States, any subsequent arrest and seizure of evidence is unlawful.
The opinions of the dissenting justices in these cases centered about the fact that there had been possible procedural rights infringement in the convictions of the defendants, but the defendants were 'obviously' guilty and so subsequent infringement on the constitutional guarantees of the Fourth Amendment were not important in a judgment. Justice Frankfurter countered such a dissenting attitude best, when in United States v. Rabinowitz\(^{129}\) he stated,

> History teaches us that the safeguards of liberty have very frequently been outgrowths of "controversies involving not very nice people." We cannot allow our vision to be clouded by the identity of a particular defendant; we have to deal with the great themes expressed by the Constitution, rather than with the man whose case has presented the occasion for thinking about these themes.

The activistic decisions of the Court in the area of procedural rights have constantly upheld such a view.

**Fifth Amendment Cases**

**Fifth Amendment** - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

\(^{129}\) 339 U.S., 56 (1950).

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without due process of law; nor shall private property be taken for public use, without just compensation.

The extent to which the Warren Court is a more activistic Court in rendering decisions with regard to Fifth Amendment rights, than any preceding Court, can be shown by examining a series of cases that it chose to hear in the late 1950's and early 1960's. In the series of recent double jeopardy cases certain rules of constitutional policy were established. 130

The Fifth Amendment, according to the decision rendered in Green v. United States, 131 prohibits a federal court from retrying under a first-degree murder charge a defendant who was acquitted of the charge at an earlier trial.

In Hoag v. New Jersey, 132 the Warren Court ruled that the Fourteenth Amendment 133 does not prevent a state from subjecting a defendant, who had been acquitted in a single trial of the offenses charged in three indictments,

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133 (Section 1) All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Sections 2, 3, 4, and 5 do not have any direct relevance to cases involving criminal procedure.)
to a second trial resulting in conviction, under a fourth and subsequent indictment based upon the same event.

In Giucci v. Illinois,\textsuperscript{134} the Court ruled that the Fourteenth Amendment does not prevent a state from subjecting a defendant, who has been convicted and sentenced to imprisonment in two previous trials for first-degree murder, to a third trial resulting in a sentence of the death penalty.

In gore v. United States,\textsuperscript{135} the Court ruled that the Fifth Amendment does not prevent the trial and conviction of a federal defendant under three different statutes defining various crimes, to arise as the consequence of a single event.

The Court ruled in Bartkus v. Illinois,\textsuperscript{136} that neither the Fifth nor the Fourteenth Amendments prevent cooperation between the law-enforcement officials of the nation and of the states, or the conviction of a defendant in a state court through the use of the same evidence on the basis of which he previously had been acquitted in a federal court trial for an analogous offense.

The Fifth Amendment, as stated in Abbate v. United States,\textsuperscript{137} does not prevent the trial and conviction

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{134} 356 U.S., 571 (1968).
\item \textsuperscript{135} 357 U.S., 386 (1958).
\item \textsuperscript{136} 359 U.S., 121 (1959).
\item \textsuperscript{137} 359 U.S., 187 (1959).
\end{enumerate}
\end{footnotesize}
of a federal defendant for an offense flowing from the same acts for which he had been previously tried and convicted in a state court for a violation of state law.

The Fourteenth Amendment does not prevent a state from inflicting capital punishment upon a defendant who pleaded guilty to kidnapping, if the defendant had previously been sentenced to life imprisonment upon his plea of guilty to a charge of murder, when the kidnapping and murder related to the same victim. The Warren Court ruled in this manner in Williams v. Oklahoma.133

The activism of the Warren Court, in reviewing these cases, is not shown, as in cases involving Fourth Amendment rights, by the types of decisions delivered, because in only one of the seven cases outlined did the activist bloc of Chief Justice Warren and Justices Black, Douglas, Brennan and Whittaker reach majority decision in favor of the defendant. It is shown by virtue of the fact that the Court did choose to hear such cases involving Fifth Amendment rights. A review of these cases also reveals the distinct self-restraint bloc of voting that is present on the Warren Court. Justices Frankfurter, Clark and Harlan voted against all of the defendants, as did Burton before he retired. The activist bloc of Warren, Black, Douglas and Brennan manifested itself once again

by voting together in five of the seven cases and lost in narrow five-to-four decisions. In other cases such as Brown v. United States,139 and Gari v. United States,140 although affirmations of previous convictions resulted, the activist bloc of Warren, Black, Douglas and Brennan dissented again.

Many other double jeopardy or self-incrimination cases resulted in majority activist decisions being reached, so by no means can it be inferred that the activist bloc was always in dissent with regard to Fifth Amendment rights. In cases such as Slochower v. Board of Higher Education of the City of New York,141 and Pawnum v. United States,142 the Warren Court's activistic majority opinion is exemplified. In the former case, a previous decision was held unconstitutional, as a denial of due process, a clause in the Charter of the City of New York which requires the discharge of any city employee who pleads the protection of the privilege against self-incrimination to avoid answering a question about his official conduct. In the latter case, the Warren Court reversed a previous conviction for stealing and forging government cheques because of double jeopardy. In both cases the activist

bloc wrote the majority decision, and Justices Clark, Harlan and White dissented in the Pawnum case, while Justices Minton, Reed, Burton and Harlan dissented in the Slochower case.

Even though a rather strong self-restraintive bloc dissent was voiced in some cases and a self-restraintive bloc majority opinion asserted in others, the activist nature of the Warren Court with respect to Fifth Amendment rights was shown in both the activist voting of Justices Warren, Black, Douglas and Brennan, and in the volume of cases the Court chose to hear with the intent of discerning whether any Fifth Amendment rights had been violated in previous decisions.

A general argument used against police methods involving coerced confessions has been that such methods have tended to make the police lazy. The old maxim that the end justifies the means is the counter argument voiced by the police. When the end involved gaining a conviction, police have been willing more often than not to employ the means of extracting a confession from the accused instead of the more laborious and difficult means of discovering evidence to be used against the accused. This problem of police laziness has been a common one, and not until the advent of the Warren Court has there been an attempt made to solve it. A general revolt against police brutality by the Court has ensued. The Court has repeatedly stated
that convictions based on confessions gained by coercive methods are unconstitutional. Not even a display of violence on the part of the police is necessary in order for a reversal to occur in the Court's decision.

Delay in taking an arrested person before a judicial authority has also been cited by the Court to be sufficient cause for the invalidation of any confession made during that delay.

The requirement that arrested persons be taken before a magistrate without delay is intended to check the reprehensible practice called "the third degree" - police aggression or intimidation against a person in custody. If the requirement is disregarded there is an opportunity for third-degree methods before the accused is fully informed concerning his rights.143

The position taken by the Court with regard to such circumstances is that an accused may be robbed of his will even though he has not been physically coerced or attacked.

In cases such as Fikes v. Alabama,144 Payne v. Arkansas,145 Rogers v. Richmond,146 and Lynumn v. Illinois,147 previous convictions were overturned by the Court because of improper admission of confessions.

In all of these cases, the main attitude of the Warren Court has been that in terms of both efficiency in dealing with suspects, and justice being done, police methods should be such that they do not rely to any great extent on confessions of any type, but rather involve more tedious investigative procedures. This is the only way that the Court has been able to ensure the protection of an accused's Fifth Amendment's rights.

**Sixth Amendment Cases**

**Sixth Amendment** - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In the area of Constitutional rights of criminals guaranteed by the Sixth Amendment, the Warren Court once again has shown its activist nature in giving a very literal translation of the Amendment. With regard to Sixth Amendment rights, the Court has consistently delivered majority opinions reversing previous convictions, and the volume of cases in this area over the past decade is greater than that of the other two procedural rights. The right
to a speedy and public trial has been asserted by the Court in many of its decisions. The right to an impartial jury trial has also been the basis for the reversal of previous decisions. The Warren Court has repeatedly stated the right that the accused has of being informed of the nature and cause of the accusation in its decisions. The accused's right to have the assistance of counsel for his defense has often been the cause of reversal of previous convictions.

Since there is a great volume of cases in this area, I choose to present exemplary cases to show how the Warren Court has acted in this area. Although the leading facts in all of the cases vary, some to a greater and some to a lesser extent, the decisions on the whole bear much resemblance to one another as can readily be seen through the examination of them.

In Herman v. Cloudy, the Warren Court reversed a previous conviction. In 1945, Herman pleaded guilty to twenty-seven counts carrying penalties that could have run as high as three hundred and fifteen years imprisonment. In 1953, he filed petition for writ of habeas corpus asking that his conviction be held invalid as a violation of due process. He contended that his pleas of guilty were the result of coercion and threats by police, and that at no stage of the proceedings was he advised of

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his right to counsel. A Pennsylvania Court dismissed the petition. A Superior Court affirmed the dismissal without opinion, and the Supreme Court of the State denied leave to appeal.

The Warren Court reversed the conviction in an opinion written by Justice Black. It summarized the contentions on both sides. The petitioner was twenty-one years of age at the time of his conviction. His only prior experience with criminal procedure was two years earlier when he had pleaded guilty, again without advice of counsel. The petitioner finally confessed after seventy-two hours of questioning. A state trooper had threatened to choke him, and threats were made against the safety of his wife and daughter. The Warren Court reversed the previous decision declaring that sharp dispute as to facts presented the very kind of dispute that should have been decided only after a hearing. The reversal was in the form of a unanimous Supreme Court decision.

In Moore v. Michigan, another decision was overturned on the basis of infringement of the defendant's right to counsel. The decision overturned a nineteen year old conviction and awarded a new trial for a prisoner who had pleaded guilty to murder. The Court held that the petitioner had not intelligently waived his right to counsel. The petitioner, serving a life sentence, filed

a motion for new trial in 1950 basing his plea on the fact that he did not have the assistance of counsel in 1938 when he pleaded guilty. At the time of the murder, he was seventeen years of age, had a grade seven education, and was a Negro. The Michigan Circuit Court denied his motion for a new trial and the State Supreme Court affirmed.

Justice Brennan delivered the Court's majority opinion. He concluded that the petitioner had met the burden of proving that his plea of guilty was invalidly accepted since it had been obtained without the benefit of counsel to which he was constitutionally entitled. Justices Frankfurter, Burton, Clark and Harlan dissented reading the record as showing the petitioner, in refusing counsel, had acted freely, intelligently, and understandingly.

In the case of Cash v. Culver, 150 the Warren Court similarly reversed a previous conviction on the declaration that the lack of counsel was prejudicial. The petitioner had been represented by counsel in the first trial, but the jury was unable to agree on a verdict and a mistrial was declared. At the opening of the second trial, the petitioner asked for a continuance so that he could have time to obtain a new lawyer, or that the Court appoint counsel. Both requests were denied and the petitioner as a result conducted his own defence and was convicted. The Warren

Court unanimously reversed the previous conviction.

The McNeal v. Culver case followed similar lines. Here again the Warren Court reversed a previous conviction because the petitioner was denied the assistance of counsel. The decision reversed the petitioner's conviction for 'assault to murder in the second degree', on the ground that the petitioner was incapable of questioning witnesses and otherwise conduct his defense. The Court agreed that the petitioner suffered a heavy burden, especially for an accused who had no lawyer and could not afford to hire one.

In Culombe v. Connecticut, another conviction was overturned by the Warren Court. It reversed a first-degree murder conviction because of the admission of oral and written confessions obtained from an accused with a mental age of nine years who was held in effective police custody and repeatedly interrogated for four nights and a substantial part of five days. The Court's judgment was announced in an opinion written by Justice Frankfurter with Justices Douglas and Brennan, and Chief Justice Warren concurring in separate opinions. Justices Harlan, Clark and Whittaker wrote dissents, but it should be emphasized that this case resulted in such majority reversal that Justice Frankfurter, who usually sided with the self-restraint bloc or groups of the Court, wrote the majority

In another case involving a coerced and involuntary confession, the Warren Court once again reversed a previous conviction. In Gallegos v. Colorado, the Court overturned the previous conviction of a fourteen year old boy for murder. Justice Douglas wrote the majority opinion which emphasized and relied on the youth of the defendant when he made the confession. Although there was no prolonged questioning, and the boy was advised of his right to counsel, Douglas stated that the boy's position was substantially inferior to that of the questioners. Once again Justices Harlan and Clark dissented, stating that the totality of circumstances surrounding the defendant's confession showed that it was voluntary and knowingly made.

In Gideon v. Wainwright, the Warren Court declared that the state courts, like Federal courts, must appoint a lawyer whenever a defendant in a serious criminal case asks for one. The petitioner had broken into a poolroom and had received a five year jail sentence. At his trial, the Court had declined to furnish him with counsel, and he subsequently served as his own lawyer. In a unanimous decision written by Justice Black,

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the Warren Court reversed Gideon's conviction, stating that any person who is too poor to hire counsel, cannot be assured a fair trial unless one is provided.

In all of those cases the Warren Court wrote decisions favoring the petitioner. In cases such as Crooker v. California,155 and in Anonymous Nos. 6 and 7 v. Baker,156 the activist bloc of the Court did not reach majority decision, but in both cases, and this is typical of activist dissenting opinions, Chief Justice Warren, and Justices Black, Douglas and Brennan all concurred in opinions favoring the petitioner.

The main conclusion to draw from all of the cases involving Sixth Amendment rights is that the Court consistently concluded in its decisions that a defendant must either have the assistance of counsel or must understandingly waive his right to such assistance.

Through this analysis of the work of the Warren Court in the area of procedural rights, several conclusions can be drawn.

Bloc behavior predominantly on the activist side and occasionally (with the exceptions mentioned in the area of Fifth Amendment rights) on the self-restraint side, held sway throughout the majority of decisions. The strong

activist bloc of Warren, Black, Douglas and Brennan proved to be the most frequently appearing of the two blocs. The self-restraint bloc of Frankfurter, Harlan, Clark and Burton did appear often, but mostly in the form of dissenting opinion. When it did appear and hold the majority opinion, that opinion usually took the form of a narrow five-to-four decision.

Various 'group' behavior also took place in the decisions of the Warren Court in the procedural rights area but for the most part the main trends of the Court were established and solidified. The literal approach of the activists developed into the main trend of the Court. Over eighty per cent of the cases listed resulted in distinct activist behavior and in strong majority reversals that favored petitioners.

Two important points must be noted and emphasized in any conclusions drawn from the work of the Warren Court in the area of procedural rights. First, the fact that the Warren Court even bothered to hear and render decisions in this area is proof enough as to the attitudes of the Justices involved with the importance of such rights. Second, once the cases had been selected for hearing, the overwhelming attitude of the Justices was for a very literal approach to the express wording of the rights. Where and if they were able to, the Justices found constitutional violations inherent in the previous
convictions. Through the strict interpretation of the procedural rights, criminal suspects were so to speak 'given benefit of the doubt' as to guilt, because to do otherwise would mean infringement on a person's constitutionally guaranteed rights. This was and is the attitude of the Warren Court with respect to procedural rights, and their decisions bear out their attitude.

The Warren Court has unfailingly shown concern for the rights of persons accused of crime. Because of the events mentioned at the beginning of this chapter, the Supreme Court necessarily entered the arena, but it was left to the particular justices of this particular Warren Court to decide their behavioral trends; and with their decisions, this activist Court solidified and gave real meaning to the rights of the criminally accused.

The second Court, or the Court that emerged in the late 1930's and early 1940's, began the drive toward attention and concern with the civil rights area. As seen, the political events and circumstances of the 1940's and 1950's directed the Court to such a role. Before this period there had been no wealth of civil rights cases. The events described slowly produced a number of cases having to do with individual rights, but not an amount sufficient to label any of the Courts as activist.

157 The other three Courts of this period had Justices Hughes (1930-1940), Stone (1941-1945), and Vinson (1946-1952) as their respective Chief Justices.
with respect to procedural rights cases. The work of the Warren Court has brought this drive to a new dimension. It is not to be supposed that the Warren Court could have ignored its duty or responsibility to deal with civil rights cases, but it could very well have developed into a restraintive Court. Because of the individual justices of the Court and the main trends developed by them, such a role was rejected and an activistic attitude prevailed. The cases listed are examples of the types of cases that the Warren Court has chosen to hear and the distinct pattern of decisions it has chosen to render. No Court has ever delivered such activistic decisions with regard to procedural rights cases; no Court has ever dealt to such an extent with this area. The Warren Court rests its own case.
CHAPTER V
CONCLUSION: THE 'ACTIVISTIC' WARREN COURT

Since the opponents of the original draft of the Constitution first stressed the desire for a bill of rights to be included in the Constitution, there has been a continuing emphasis placed on these rights by every individual of American society. In some form or another, recognition of his rights by an individual citizen has occurred, but not until the advent of the 'new' Court have the rights been brought to their esteemed position as part of the law that governs the nation.

The enforcer of the dictates of the Constitution - the Supreme Court, was left the task of 'championing' the rights. The Courts in the early part of American Constitutional history neglected these rights simply because no national attention had been focused on them. Other matters of national concern had dictated the policies and function of the early Supreme Courts. The times - the people and the political events of the day affect the business of the Supreme Court and hence the decrees of the first Ten Amendments were largely stagnant. Only when national attention and concern focused on the rights were they made prolific by their defender.

The role of the Supreme Court has continually
changed with the shifting national conditions, and when these conditions ripened, the Bill of Rights, the Supreme Court of the day, which was to be the Warren Court, solidified them. Once this solidification process had set in, it was left to the individual justices of the Supreme Court to qualify them. Two basic trends manifested themselves in the decisions of the justices. The first trend, or what is referred to as the 'activist' trend, held that the Bill of Rights was to be enforced according to its precise terms - no more and no less. The second trend, termed 'self-restraint', declared that the Court must be cautious in the scope that it gives to the Bill, regardless of the literal, verbal meaning. The qualification of the rights took the form of the former position, and as a result were protected or safeguarded to the highest possible degree.

As such, the individual justices of the Warren Court carried on the crystallization process started by the national concern that was levied on the rights, and made or shaped the rights into a valuable and meaningful form.

Only a Supreme Court, like the 'activistic' Warren Court could have accomplished its original end. The nation was founded on ideals - the ideals of the Bill of Rights. In order to convert the ideals into meaningful realities, the Warren Court actively seized its opportunity to do so. The Supreme Court had always been, in
theory, the ultimate protector of American Constitutional rights and liberties; but through the efforts of the Warren Court the theory was put to the test, proved, and practiced. Time after time, in delivering opinions with regard to cases of a procedural rights nature, the Warren Court upheld individual rights, and established itself as a uniquely 'activistic' Court.

The Bill of Rights has been in existence now for almost two hundred years. Many different Supreme Courts have existed for considerably lesser periods of time. No two Courts have ever been completely alike, changing roles being the essence of their existence. Once dogma, however, characterized the existence of all of them and was responsible for the role of the Warren Court. Justice Hugo L. Black, perhaps the greatest disciple of the 'new' Court, the Warren Court or any Court for that matter, summed up the doctrine in these words:

The Framers balanced the freedoms of the Bill of Rights against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security. They were not afraid for men to be free. We should not be . . . . 158

158 Westin, op. cit., p. 190.
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VITA DUCTORIS

Family
Ronald James Goletski, son of Mrs. N. Goletski and the late John Goletski of Windsor, Ontario; born October 13, 1942, at Windsor, Ontario.

Education
1948-1962
Received elementary and secondary education at King George Public School and Walkerville Collegiate Institute, Windsor, Ontario. Senior Matriculation received in 1962.

1962-1965
Registered as an undergraduate in the Faculty of Arts and Science at Assumption University of Windsor. Received Bachelor of Arts degree in October, 1965.

1965-1967
Registered as a post-graduate student at University of Windsor, September 1965. Admitted to the Faculty of Graduate Studies and candidate for the degree of Master of Arts in Political Science, 1966. Thesis submitted October, 1967.
Other Activities

1966-1967 Received Ontario Graduate Fellowship.