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Book Review: The Warren Court: Constitutional Decision as an Instrument of Reform

Dale A. Normington

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BOOK REVIEW

THE WARREN COURT: *Constitutional Decision as an Instrument of Reform.* By Archibald Cox. Cambridge, Massachusetts: Harvard University Press, 1968. Pp. 134.

Although Americans usually associate the significant events of their political history with the contemporaneous presidential administration, since the appointment of Earl Warren as Chief Justice of the United States Supreme Court the judiciary has wrought more significant changes in our society than have the three administrations who have served during the same period. In the fifteen years since Justice Warren's appointment the Supreme Court has profoundly altered many constitutional doctrines, including those affecting race relations, criminal procedure, and election operations. The controversy surrounding the court's decisions has been sharp.

The book under review is a thorough study of constitutional development under the Warren Court, and it is authored by a man who is well qualified to write on this subject. During the years 1961-65 Archibald Cox was Solicitor General of the United States, and represented the federal government in numerous cases before the Supreme Court. Since 1945 he has been on the faculty of the Harvard Law School, where he is Samuel Williston Professor of Law. In 1967 Cox delivered a series of lectures (at the University of Hawaii) on the accomplishments of the Supreme Court under Justice Warren, and this book is based on these lectures.

Since the work is short and seldom provides the context and legal background of the decisions discussed, the reader who has already acquired a good understanding of recent constitutional law will derive more benefit and enjoyment from the book than will the novice. Cox has selected for consideration the major cases in the three fields of civil rights, criminal procedure, and voting processes, and he dwells upon the factors that most influenced the court's decisions. The discussion stresses a dilemma constantly confronting the court—how to make the law responsive to the changing needs of society and at the same time keep the stability and continuity that are preserved by following precedent. The justices seldom have difficulty determining what result they would like to reach in a given case, but it is frequently impossible to achieve this result without emasculating,

or substantially modifying, doctrines applied in earlier cases. For example, in *Miranda v. Arizona*¹ precedent called for affirmance of the defendant's conviction, since it did not appear that his conviction had been procured by physical or psychological abuse. However, justice (as envisioned by a majority of the court) called for a rule requiring the police to provide suspects with a lawyer (or the opportunity to have one) before accepting confessions from them. The court gave its concept of justice priority over its respect for precedent.

Cox notes that in the reapportionment cases the Supreme Court faced a different kind of dilemma—how to remedy an obvious defect in the political process without encroaching upon powers heretofore deemed to belong exclusively to the legislative branch of government. Since most of the states needing reapportionment showed no inclination to reapportion upon their own initiative, and since the court considered malapportionment a serious evil, a majority of the justices thought it preferable to trespass upon traditionally legislative territory than to permit malapportionment to continue.

The author acknowledges that one can make a persuasive case in support of the criticism most commonly advanced against the Warren Court—that the justices have often permitted their judgment to be clouded by an excess of compassion and sentimentality. In the court's defense Cox submits that by giving policy precedence over strict legal correctness the court has achieved the Benthamite goal of conferring the greatest benefit upon the greatest number (of Americans). Many readers will not agree with Cox's conclusions, but most will find that his analysis has substantially improved their understanding of the Supreme Court under Justice Warren.

DALE A. NORMINGTON

¹ 384 U.S. 436, 86 S.Ct. 1602 (1966).