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Mr. Justice Whittaker: A Preliminary Appraisal

Daniel M. Berman*

Charles Evans Whittaker was the fourth Justice appointed to the Supreme Court by President Eisenhower. The first three of the Eisenhower selections all performed strangely from the standpoint of those who expect Justices to reflect the political philosophy of the Chief Executive who chose them. Chief Justice Earl Warren proved to be the possessor of an ultra-libertarian view of the law and the practitioner of a policy of judicial activism well calculated to send shudders down conservative spines. William J. Brennan, Jr., too, generally augmented the strength of the Court's liberal wing, previously represented only by Hugo L. Black and William O. Douglas, two of the Justices placed on the Court by President Franklin D. Roosevelt. Even John Marshall Harlan, by far the most orthodox of the first three Eisenhower Justices, kicked over the traces in notable decisions like Cole v. Young, in which the Court held that the President had acted illegally when he extended peremptory security dismissal procedures to employees of non-sensitive Government departments, and Yates v. United States, in which the Smith Act was held inapplicable to advocacy of forcible overthrow of the Government as an abstract principle.

On the basis of Whittaker's record as a federal district judge and as a member of the eighth circuit court of appeals, it was apparent at the time of his appointment that the new Justice was most unlikely to transform the Warren-Black-Douglas-Brennan minority into a solid

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liberal majority. Nothing that has happened since March 25, 1957, when Whittaker took his seat as an Associate Justice of the Supreme Court, has made the prospect any more likely. But the junior Justice—the first member of the Court ever appointed from Missouri—has done enough to indicate that he is to be a far less reliable member of the Court’s conservative wing than Justice Stanley Reed, whom he replaced. Although it is obvious that he will become neither another Warren nor another Brennan, there are signs that he may prove at least as much of a maverick as Harlan. At a time when the vote of such an “uncommitted” member will probably prove decisive in many momentous cases, great interest attaches to the clues about Whittaker’s philosophy which his first full year as a Justice has revealed.

* * *

The Supreme Court on which Whittaker serves is one of the most controversial in American history. The case which, more than any other, made the Warren Court such a storm center was the one in which the Justices held unanimously that the maintenance of racially segregated public schools violates the equal protection clause of the fourteenth amendment. Whittaker, of course, was not a member of the Court either when the original Brown decision was handed down or when the decree implementing it was announced. The two actions, however, provoked a rash of litigation posing the question of whether in specific instances the criterion, “with all deliberate speed,” had been met. For more than three years the Supreme Court refused to review such cases or disposed of them summarily, without argument and without opinion. It was evident that none of the Justices who had been appointed after the original school cases were decided—Harlan, Brennan, or Whittaker—was going to destroy the Court’s monolithic unity on the question. But it was not until September 1958 that the new Justices were given a chance to endorse publicly—and even expand—the Brown decision.

The occasion, of course, was the Court’s special term called to consider the two-and-one-half-year stay of integration granted to the school board of Little Rock, Arkansas by Judge Harry J. Lemley. For a while, Whittaker found himself the center of attention on the issue. As

5. Id. at 301.
the Justice assigned to the eighth circuit, he was asked by the National Association for the Advancement of Colored People to vacate the court of appeals' stay of its order reversing Judge Lemley, or to stay the Lemley order, itself. Whittaker discreetly chose to avoid even giving the appearance that a case of such moment was being decided by one man. He referred the motions of the NAACP to the entire Court, and Chief Justice Warren called the special term. Probably the most significant stand Whittaker has taken as a Justice was his vote to affirm the court of appeals' reversal of Judge Lemley's order. For the action meant that unanimity on the segregation issue was preserved. The importance of this fact was underlined when the Court took the unprecedented step of naming all nine Justices as joint authors of the Little Rock opinion.\footnote{The Court emphasized the agreement of Justices Harlan, Brennan, and Whittaker with the 1954 decision in these words: "Since the first Brown opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unaimously reaffirmed." Cooper v. Aaron, 358 U.S. 1, 19 (1958).}

Aside from the segregation issue it has been the Warren Court's stand on questions involving the rights of those accused of political radicalism which has brought upon it the most violent criticism. On one phase of this problem—academic freedom—Whittaker had an opportunity to express himself when he was a district judge. What he did and said on that occasion will bring him no civil liberties awards.

The case concerned Horace B. Davis, professor of economics at the University of Kansas City. Dr. Davis, who had achieved academic tenure, could be dismissed from his position only "for adequate cause." The issue before Judge Whittaker was whether Davis' refusal to answer questions relating to his alleged support of Communism constituted "adequate cause" for dismissing him.\footnote{Davis v. University of Kansas City, 129 F. Supp. 716, 718 (W.D. Mo. 1955).}

Davis had appeared before the Senate Internal Security Subcommittee, headed by Sen. William E. Jenner, on June 9, 1953, in response to a subpoena. Questioned about his alleged membership in the Communist Party, he invoked his rights under the fifth amendment in declining to reply. The university promptly summoned him to an inquiry at which the chairman of the board of trustees posed questions similar to those put by the Senate subcommittee. Davis was asked, among other things, whether he was or had been a member of the Communist
Party, "active in the work of the Communist Party," or a supporter of "Communist activities." Denying the right of the university to propound such questions, he refused to answer. For this action, he was discharged from his position. Judge Whittaker had to decide whether the university had the power to punish the professor for remaining silent rather than furnish information which might be used against him.

Whittaker upheld the power of the university to fire Davis. He went much further, however, by adding that the trustees had a positive obligation to act as they did. They would have been remiss in their duties had they done otherwise. Whittaker admitted that the professor had a constitutional right to refuse to answer the questions. "But he did not have a constitutional right to remain a public school teacher," he added. The college was entitled to know whether its faculty members belonged to "a found and declared conspiracy by a godless group to overthrow our government by force." Whittaker showed no sympathy with Davis' conception of academic freedom. On the contrary, he implied that a teacher, because of his "most intimate position to mould the minds of the youth of the country," had a special obligation to be candid about his political views. The judge spared no adjectives to express his wholehearted endorsement of the policy followed by the university. He said:

The public will not stand, and they ought not to stand, for such reticence or refusals to answer by the teachers in their schools. And the University officials would have been derelict in their duties had they not asked plaintiff—in the light of his refusal to answer the Senate subcommittee's questions as to whether he was a Communist—whether he was or ever had been a member of the Communist Party, and, having asked him those questions, and he having refused to answer them, would have been derelict in their duties, and would have destroyed the University, had they not dismissed him.

When the nomination of Whittaker to the Supreme Court was before the Senate Judiciary Committee, Davis' attorney, Fyke Farmer, appeared in opposition to confirmation. He felt that the opinion in the Davis case

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10. Whittaker erred in calling the University of Kansas City, which is a private institution, a public school. His error is odd, since he himself attended one of the university's branches, its law school.
11. Davis v. University of Kansas City, supra note 8, at 718.
had demonstrated that Whittaker had "a personal predilection, amounting to a prejudice or bias, against fundamental principles of the Constitution and [was] opposed to human liberty." No member of the Committee demonstrated a shred of agreement with Farmer's position. Several, quite the reverse, pilloried the witness for a variety of sins ranging from his support of world government to his admitted "sympathies for international communism." Commenting on Farmer's opposition, Whittaker told the Senators that in the Davis case he had "declared no new law. I followed the adjudicated cases. They are clear."

With little delay and no disagreement, Whittaker was approved by both the Committee and the Senate for the position in which he might very well have to declare "new law" and blaze new trails in the absence of "adjudicated cases." And, as it turned out, very soon after he took his seat as Associate Justice, he had to participate in an academic freedom case reminiscent of the Davis suit.

This time the petitioner was a Philadelphia public school teacher of 22 years standing. Herman A. Beilan was dismissed from his position for declining to answer questions relating to Communist affiliations and activities. This refusal, the local board of education held, constituted "incompetency," a ground for discharge under the Pennsylvania tenure law. Whittaker cast the decisive fifth vote rejecting Beilan's contention that his discharge violated the due process clause of the fourteenth amendment. Having decided that a teacher could be labelled incompetent on the basis of unwillingness to discuss his political background, the Court majority had no trouble ruling on the same day that a New York

12. Hearings on the Nomination of Charles E. Whittaker of Missouri to be Associate Justice of the Supreme Court of the United States Before the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 7 (1957) [hereinafter cited as Hearings].
13. Id. at 6.
14. Id. at 30. Although questioning by Committee members indicated considerable knowledge of various aspects of Farmer's career, there was no sign that anyone remembered him as the attorney who persuaded Justice William O. Douglas to stay the execution of Julius and Ethel Rosenberg. Rosenberg v. United States, 346 U.S. 273, 276 (1953). Farmer was the "counsel representing one Edelman" referred to at 282-83.
15. Hearings 33.
subway conductor who remained similarly silent might be considered identically incompetent. Again Whittaker's vote was crucial.\footnote{17. Lerner v. Casey, 357 U.S. 468 (1958).}

It is thus apparent that Justice Whittaker has the same views on academic freedom as Judge Whittaker had before him. But on another aspect of civil liberties—the Justice Department's deportation policies—a little more development has been exhibited.

As a district judge, Whittaker had to decide a curious case in this category. An alien under deportation order for dealing in narcotics and for having entered the United States unlawfully claimed that he was entitled to suspension of the order. The law he cited gives the Attorney General the right to suspend deportations of aliens who have been present continuously in the United States for the ten preceding years. Here, however, the ten years had been punctuated by a visit of approximately one hour to Canada. Whittaker decided that the brevity of the Canadian stay was irrelevant; the requisite ten-year period had been broken and the discretionary relief sought by the alien was not available to him.\footnote{18. United States v. Sweet, 133 F. Supp. 3 (W.D. Mo. 1955).}

A one-day departure from the country figured in another alien case which Whittaker had to judge, this time as a member of the Supreme Court. An alien, Frank Bonetti, who entered the United States in 1923 at the age of fifteen, was a member of the Communist Party from 1932 through 1936. The following year he went abroad to fight with the Abraham Lincoln Brigade on the side of the Spanish Republic and gave up all rights of residence in this country. But in 1938 he returned as a quota immigrant and resided here continuously except for a one-day visit to Mexico in 1939. Since the Internal Security Act of 1950 provides for the deportation of any alien who "was at the time of entering the United States, or has been at any time thereafter" a member of the Communist Party, the question was: which of the three entries was the relevant one? If the "time of entering" was 1923, the alien had been a Communist "thereafter" and was, as a consequence, deportable. If, on the other hand, the "time of entering" was 1938 or 1939, the deportation statute could not be applied, since there was no accusation of Communist membership after 1936.

The Supreme Court, by a 6-3 vote, held that the later dates were
controlling and that Bonetti, therefore, was not deportable. It was Whittaker who wrote the opinion resolving the ambiguity in favor of leniency.\textsuperscript{19} He approvingly quoted an earlier case in which Justice Felix Frankfurter had said that it is "a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment."\textsuperscript{20} Whittaker's rejection of severity was especially striking coming as it did from the pen of a Justice who, three short years earlier, had ordered the deportation of Angelo Frank Bruno because of his short-lived foray across the Canadian border.\textsuperscript{21}

Six months before the \textit{Bonetti} decision, however, Whittaker had already indicated at least a slight softening of his position on alien cases. The intimation came as he spoke for a unanimous Court in reversing the conviction of Knut Heikkinen, an elderly Finnish editor, accused of willfully failing to make arrangements for his departure from the country within six months of the issuance of a final deportation order against him for having been a Communist. The Court found that the alien had demonstrated no willfulness, since he had understandably relied on an Immigration Service official who had advised him that "arrangements to effect your deportation . . . are being made and when completed you will be notified when and where to present yourself for deportation."\textsuperscript{22}

Since both \textit{Bonetti} and \textit{Heikkinen} dealt narrowly with odd and possibly unique sets of circumstances, they probably established no precedents. The \textit{Heikkinen} decision, for example, did not turn—as it might have—on the constitutionality of the McCarran Act's self-deportation requirement. Nor did \textit{Bonetti} rest on the ex post facto clause of the Constitution,\textsuperscript{23} which it can be contended is violated whenever an alien is deported for an act which was not proscribed when it was performed. There is, in fact, no intimation that Whittaker was disturbed by constitutional questions raised by the two cases. As far as \textit{Bonetti} was concerned, moreover, there is a fairly clear indication that he would have acquiesced in the deportation had it not been challengeable on narrow, technical grounds.

The hint is contained in another majority opinion which Whittaker

\begin{itemize}
  \item \textsuperscript{19} Bonetti v. Rogers, 356 U.S. 691 (1958).
  \item \textsuperscript{20} Bell v. United States, 349 U.S. 81, 83 (1955).
  \item \textsuperscript{21} United States v. Sweet, supra note 18.
  \item \textsuperscript{22} Heikkinen v. United States, 355 U.S. 273, 277 (1958).
  \item \textsuperscript{23} U.S. Const. art. 1, § 9.
\end{itemize}
wrote for the Court sustaining the right of Congress to provide for the deportation of aliens for past offenses which were not grounds for deportation when they were committed.\textsuperscript{24} Whittaker did not attempt to sugarcoat the fact that “Congress was legislating retrospectively”\textsuperscript{25} in the McCarran Act. He held, however, that it had a right to pass such legislation “to cover offenses of the kind here involved.”\textsuperscript{26} This viewpoint was in marked contrast with that of Justice Black, whom Justice Douglas joined in dissent. Black condemned as too narrow the idea that the ex post facto clause forbids only retroactive legislation providing criminal penalties. Banishment is “punishment of the most drastic kind,” he said, although it is not part of a criminal proceeding.\textsuperscript{27}

This case is not the only one which demonstrates that Whittaker’s opinions in \textit{Bonetti} and \textit{Heikkinen} should not be taken as indicating a complete turnabout on the deportation problem. For, since he took his seat on the Supreme Court, Whittaker has also voted to deport a former Communist although his membership in the party was apparently not a “meaningful association,”\textsuperscript{28} and to deport a native Chinese on the ground that since, in a technical sense, she was an alien seeking admission, she was not “within the United States” as she would have to have been to qualify for the withholding of her deportation.\textsuperscript{29}

In contrast with aliens, natural-born citizens have understandably felt that they were exempt from banishment decrees. During the Supreme Court’s 1957-58 term, however, they learned that their complacency was by no means justified. In a group of monumental cases, the Court upheld the right of the Government to expatriate citizens, even though it interpreted the right narrowly.\textsuperscript{30} In all three cases involved, Whittaker joined the Court’s liberals—Warren, Black, and Douglas—in condemning the expatriation attempts.\textsuperscript{31} But he did not expressly provide

\begin{itemize}
  \item \textsuperscript{24} Lehmann v. Carson, 353 U.S. 685 (1957).
  \item \textsuperscript{25} Id. at 690.
  \item \textsuperscript{26} \textit{Ibid}. The same holding was contained in Mulcahey v. Catalanotte, 353 U.S. 692 (1957), a companion case, decided on the same day.
  \item \textsuperscript{27} Lehmann v. Carson, \textit{supra} note 24, at 691.
  \item \textsuperscript{28} Rowoldt v. Perfetto, 355 U.S. 115, 120 (1957).
  \item \textsuperscript{31} Brennan, who is far more often than Whittaker found in the company of Warren, Black, and Douglas, deserted his usual voting partners in the Perez case, which as a consequence was decided 5–4 in favor of expatriation. The other two cases held against expatriation—\textit{Trop} by a 5–4 vote, and \textit{Nishikawa} by a 7–2 vote.
\end{itemize}
a constitutional foundation for his opposition to the expatriation efforts made in these cases. In fact, he specifically affirmed his belief that "Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs." He felt simply that the relevant statute, expatriating citizens for "voting in a political election in a foreign state," was too broadly written to be sustained on the ground that it was an attempt to avoid placing the Government in an awkward position.

There is, however, an incomprehensible inconsistency in Whittaker's attitude on the subject of expatriation. For in the Trop case, decided on the same day, he subscribed to a Warren opinion which denied precisely what Whittaker affirmed in his Perez dissent—that citizenship may be taken away by Congress. In the Chief Justice's words, "citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers."

Although Whittaker's dissenting memorandum in Perez may more accurately represent his position than his endorsement of Warren's opinion in Trop, the latter case was in one significant respect more important than the former. For in it the Supreme Court struck down a section of an act of Congress—only the 81st time in American history that the Court's ultimate power has been exercised. By supporting this action, Whittaker would seem to have rejected early in his Supreme Court career the view—represented most prominently by Justice Frankfurter—that the judicial branch should refrain, almost at all cost, from invalidating federal laws. It may prove of the utmost importance that Whittaker's first vote to declare an act of Congress unconstitutional was cast in a case in which a personal, rather than a property, right was at stake.

The cases indicate, however, that Whittaker's attachment to principles of individual freedom will have to become considerably more consistent if he is to be thought of as a libertarian Justice. His record

32. Perez v. Brownell, supra note 30, at 84. This attitude was in sharp contrast with the Warren-Black-Douglas position that Congress may not constitutionally authorize involuntary expatriation for any actions whatever. Id. at 62.
33. Id. at 84.
34. Trop v. Dulles, supra note 30, at 92.
35. E.g., see Frankfurter's dissent in Trop. Id. at 119-20, 128.
in the 1957-58 term is riddled with contradictions if devotion to—or disregard for—individual rights is used as the standard of measurement. On the one hand, for example, he voted to negate California’s attempt to deny tax exemptions to veterans or church organizations refusing to take loyalty oaths and to overturn the Army’s practice of issuing less than “honorable” discharges to soldiers because of their pre-induction activities. On the other hand, he dissented when the Court held that Congress had not authorized the Secretary of State to deny passports to individuals whose loyalty he doubted.

During Whittaker’s freshman year as a Justice, the Supreme Court was under almost as heavy attack for its pronouncements regarding the administration of criminal justice as for its rulings in political cases. Whittaker came to the Supreme Court with a record which contained only scattered intimations of what his attitude might be on this subject. Although none of the decisions he rendered in the lower federal courts lend themselves to facile extrapolation, one of the opinions betrayed a healthy disinclination to approve whatever the police consider necessary for “combatting crime.” The case concerned a man arrested under the Dyer Act. After a court had determined that he was not mentally competent to stand trial, he was committed to the custody of the Attorney General until he could intelligently assist in his defense or until it was ascertained that his incompetency was permanent. After more than a year and a half, the Attorney General had not yet certified him either as competent or as hopelessly incompetent, and the luckless victim sought a writ of habeas corpus to achieve his freedom from what had all the earmarks of indefinite detention.

Whittaker held that the Attorney General had no right to persist in holding the accused. “[C]lare must be taken,” he said,

to see that the period consumed in determining his competency or incompetency to stand trial upon those charges does not approximate, and certainly does not exceed, the probable sentence—less ‘good’ time—he would have received and served had he pleaded, or been found, guilty as charged, for that would be to turn the statutory shield into a sword.

During Whittaker's first year as a Justice, the Supreme Court decided what was to become a *cause celebre* concerning police methods. In *Mallory v. United States*, the Justices reversed a District of Columbia rape conviction—and death sentence—based upon a confession held to have been obtained in violation of rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be taken before a committing magistrate "without unnecessary delay." Whittaker went along with the opinion which Justice Frankfurter wrote for a unanimous Court. But, controversial though the *Mallory* decision proved to be, it was based on construction of a rule rather than on constitutional interpretation and Whittaker's vote for it was not necessarily a clear-cut indication that he would define broadly the constitutional protections of persons accused of crime. Considered in this sense, a later case, in which Whittaker wrote the majority opinion, was more revealing.

Like *Mallory*, the other case concerned a Negro. The charge here was first-degree murder. The accused was convicted and sentenced to death after a trial in which the court received in evidence a confession he termed coerced and false. The Supreme Court, by a 7-2 vote, reversed the conviction as violating the due process clause of the fourteenth amendment. Whittaker, who was author of the opinion, summarized the facts under which the State of Arkansas obtained the confession. Among other things, it was brought out, the accused was arrested without a warrant, not advised of his constitutional rights, held incommunicado for three days, and then told by the chief of police that a confession would probably save him from "thirty or forty people" who "wanted to get him." A confession extracted under such circumstances, said Whittaker, was coerced, even though there was no physical torture. The Justice made short shrift of the argument that, aside from the confession, there was enough evidence before the jury to sustain the verdict. "[N]o one can say," he noted, "what credit and weight the jury gave to the confession."

On the same day that Whittaker delivered this opinion, the Court announced its decision in another capital case involving a Negro who

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41. A widely-supported bill (H.R. 11477) to reverse its effect died during the closing hours of the 85th Congress, when Vice-President Nixon sustained a technical point of order against a conference report on the measure. 104 Cong. Rec. 18101 (daily ed. August 25, 1958).
claimed that his confession had been obtained through the use of methods barred by the Constitution. This time, however, Whittaker cast the deciding vote that doomed the accused. At issue was the admissibility of a confession made to an Arizona justice of the peace twenty hours after the accused, who had been placed under arrest, had been lassoed twice by local ranchers and once jerked "in the general direction of both the Sheriff's car and the nearest trees."\(^{43}\) The Supreme Court, by a 5-4 vote,\(^{44}\) sustained the conviction. Whittaker subscribed to an opinion by Justice Tom Clark holding that the confession was acceptable since it was made in a court and in the presence of a sheriff who had protected the accused during the roping episode.\(^{45}\)

Thus was the case distinguished for Whittaker from the Arkansas appeal decided the same day. This was not the only time that a Whittaker decision seems to have rested on what some might consider a relatively insignificant wrinkle in the factual setting rather than a passionate insistence that the most exacting standards be applied to police activities. There would not appear to have been much doctrinal consistency between two right-to-counsel cases on which Whittaker voted, either. In \textit{Moore v. Michigan},\(^{46}\) he cast the crucial fifth vote which granted a new trial to a Negro whose waiver of counsel was apparently induced by fear of mob violence; but in \textit{Crooker v. California}\(^{47}\) his vote was decisive in another 5-4 decision, which sent to his death a convicted murderer whose confession had been obtained after his repeated requests for counsel were denied by police.

In cases involving accusations of unreasonable searches and seizures, Whittaker's record is little more consistent. As a judge of the court of appeals, he voted for a unanimous decision holding that the Post Office had no right to open a first-class parcel which it suspected contained narcotics.\(^{48}\) And, as a Supreme Court Justice, he was on the side of the majority as it held that District of Columbia police could not lawfully make a narcotics arrest after they had broken into a home without giving notice of their authority and purpose.\(^{49}\) But when his colleagues, in still

\begin{enumerate}
\item[44.] Warren, Black, Douglas, and Brennan dissented without opinion. \textit{Id.} at 404.
\item[45.] \textit{Id.} at 400.
\item[46.] 355 U.S. 155 (1957).
\item[47.] 357 U.S. 433 (1958).
\item[48.] Oliver v. United States, 239 F.2d 818 (8th Cir. 1957)
\item[49.] Miller v. United States, 357 U.S. 301 (1958).
\end{enumerate}
another narcotics case, found that some heroin had been improperly admitted as evidence since it had been seized during an illegal arrest, he associated himself with a dissenting opinion by Clark.\textsuperscript{50} In view of Whittaker's stand in the two previous cases, it was odd that he put his name to Clark's bitter complaint that the Court had freed "another narcotics peddler,"\textsuperscript{51} for the comment indicated exasperation with precisely the kind of action that Whittaker had approved in the other cases.\textsuperscript{52}

Two other criminal appeals on which Whittaker voted as a Supreme Court Justice concerned contentions that the constitutional ban on multiple jeopardy had been violated. One of them arose in the District of Columbia and therefore directly involved the fifth amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Whittaker was in the familiar role of swingman as the Court freed a man tried twice for first-degree murder.\textsuperscript{53} In the second case, a state murder conviction was involved. The majority opinion, which Whittaker endorsed, held that a man tried and acquitted for robbery of three persons on the same occasion could be tried again—and convicted—for robbing a fourth person during the same episode.\textsuperscript{54} Two dissenting Justices—Black and Douglas—felt that the constitutional protection against double jeopardy applies to state as well as federal prosecutions. "[B]y that standard," they declared, "this judgment of conviction should be reversed."\textsuperscript{55} The majority, on the other hand, recognized the Cardozo view\textsuperscript{56} that only those safeguards of the double jeopardy clause which are "implicit in the concept of ordered liberty" are carried over by the fourteenth amendment as restrictions on the states.\textsuperscript{57}

* * *

Although Whittaker has written few opinions on economic issues, his votes demonstrate a generally conservative orientation, particularly

\textsuperscript{50} Giordenello v. United States, 357 U.S. 480 (1958).
\textsuperscript{51} Id. at 489.
\textsuperscript{52} Burton, who also dissented, was more consistent, since he had approved Clark's rejection of the majority's reasoning in Miller v. United States, supra note 49.
\textsuperscript{53} In the first trial, a jury had convicted the accused of second degree murder on an indictment charging murder in the first degree. When an appeal upset this conviction, the Government prosecuted again, this time successfully, on the first degree charge. Green v. United States, 355 U.S. 184 (1957).
\textsuperscript{55} Id. at 477.
\textsuperscript{57} Hoag v. New Jersey, supra note 54, at 466, 470.
in monopoly cases, where he has shown no sympathy for trustbusting interpretations of the laws. His position in labor cases is somewhat less predictable, since two important anti-union votes were balanced by an opinion striking down a Georgia ordinance making it illegal for labor organizers not granted a city permit to solicit union members.

It is possible that Whittaker's background as a corporation lawyer helps account for his frame of reference on economic questions. For thirty years he was with the Kansas City firm of Watson, Ess, Whittaker, Marshall, and Enggas. The firm's blue-ribbon clients included the Union Pacific and Southern Pacific railroads, Montgomery Ward, the City National Bank and Trust Company, Kansas City Public Service, Minneapolis-Moline, and the Kansas City Star. But there is far too little in the record so far to prove conclusively that on economic issues Whittaker has lined up irrevocably with the Court's conservatives. He has made decisions, but he has enunciated no doctrine; he has taken positions, but he has embraced no philosophy.

This perhaps points to the most valid thing that one can say in assessing Whittaker's early decisions: in no category of cases has he adopted so solid a position that modification would be difficult.

Whittaker's atomic approach to the cases has its advantages. It gives a freshman Justice time to get his bearings, to free himself from whatever elements of his past may have limited his vision, and to let his older colleagues vie with each other in promoting the mature philosophies they have come to live—and adjudicate—by.

On the other hand, Justice Whittaker was not a callow youth when he took his seat on the Supreme Court. Some would perhaps argue that a man of fifty-six who has no theoretical foundations for his actions is probably congenitally incapable of developing a thoroughgoing philosophy of law and government. Whittaker himself admitted—or boasted—

60. Staub v. City of Baxley, 355 U.S. 313 (1958). As an appeals court judge, Whittaker voted to uphold the extortion conviction of aunion official, Schmidt v. United States, 237 F.2d 542 (8th Cir. 1956), and he voted not to enforce an order of the National Labor Relations Board directed against a company's discriminatory actions toward union members, NLRB v. Burns, 238 F.2d 508 (8th Cir. 1956).
shortly after his appointment that he had no political philosophy. He was conscious of no leanings, he said. An astute journalist commented, "A man who is not conscious of any 'leanings' is a man who has all the conventional leanings of his time, class and calling."

Much of what has happened since indicates that the observation applied perfectly to Whittaker. During a period, however, when the judicial philosophy of the Supreme Court is becoming increasingly liberal, his "conventional leanings" may not be able to stand up against the batterings to which they will be subjected. The platitude which notes that the future is uncertain thus seems to be a gross understatement when applied to the judicial thinking of Mr. Justice Whittaker.

63. In the 1957–58 term, for example, he dissented most often in the company of Justices Harlan, Burton, and Frankfurter, who in a symbolic drama could easily be cast as Conventional Time, Conventional Class, and Conventional Calling, respectively. The pattern of his dissents appears in 27 U.S.L. Week 3022 (July 22, 1958).