U.S.A.

FROM D.A. TO CHIEF JUSTICE

JOHN D. WEAVER: *Warren: The Man, The Court, The Era.* 406pp. Gollancz. £2 5s.

Professor Fred Rodell of the Yale Law School, no respecter of any establishment, legal or political, has told us that Chief Justice Warren is the greatest Chief Justice in American history, a view which, Mr. Weaver asserts, is shared by President Johnson. It is unlikely that history will ratify that judgment. Chief Justice Warren is not a learned lawyer, but John Marshall was even less learned. But it is not only that Chief Justice Warren's opinions lack what may be called Marshall's gift for lapidary sophistry, but that Marshall was there before him. So much of the Court's history has been the development and occasionally the reversal of Marshallian opinions—or dicta—that no successor, however brilliant, can eclipse him. Nor is it likely that professional lawyers or students of the Court will put Chief Justice Warren above Taney or Hughes. But no Chief Justice since Marshall has been more "activist" than Earl Warren, and in no era of the Court's history has it been so powerful a force on the edge—or over the edge—of political action. Oliver Wendell Holmes once described the calm of the Court as "the calm in the eye of the storm". But the Warren Court has been, in many cases, the storm, and calm has been notably absent. Republicans prayed for the death of Taney but did not plan impeachment, but "Impeach Warren" (or "Fluoridate Warren") has been a battle cry of the Rabid Right. And if it be said that this is merely the nonsense of the lunatic fringe, it must be noted that, in the United States, fringes are worn wide.

Then to the anger aroused by the initiative taken by the Warren Court in face of torpor in the White House and calculated inertia in Congress, must be added the backlash from the unending controversy over "the Warren Commission" which, Mr. Weaver tells us, the Chief Justice insists on calling "the Kennedy Commission". The villain of the extreme Right is often also the villain of the Left, the typical Establishment figure concerned to cover up a great crime, the peddler of "political justice", the jurist who sought not the truth but a "consensus", if only a consensus in error or worse.

There was nothing in the early career of Earl Warren to give any indication of his later career. He had been a very successful District Attorney in Alameda County and later Attorney-General of California; that is to say, he got a great many convictions and was a master of presenting a tied-up prosecution case. The congenital disorder of the Democratic Party of California combined with the extremely odd primary and election laws, enabled the "progressive" Republican to be elected Governor of California three times and ultimately to be nominated—and elected—by a majority of both parties. Governor Warren was a living example of consensus, and it could be argued that he sought it too vigorously in the report on the Kennedy assassination. He had also a prosecutor's attitude, so Mr. Weaver admits, and whatever the formal character of the inquiry, it became a prosecution of the dead Lee Harvey Oswald. And, a point that Mr. Weaver makes and which is usually ignored, the Chief Justice's father had been murdered and, although there was a suspect, there was no prosecution or conviction or visible motive for the crime. But as Michael Finsbury put it, what gets most murderers convicted is the awkward fact of being guilty, as Mr. Weaver and the Chief Justice and the rest of the Commission were and are convinced Lee Harvey Oswald was.

But it is unfortunate that so much attention has been focused on Dallas (or New Orleans) and not enough on Sacramento and Washington. Swimming against a radical tide, the young Warren had to be an orthodox heir of Hiram Johnson "Progressivism" and the later career of Senator Johnson showed that "progressive" was as ambiguous an adjective as it is, for example, in communist classifications of a state like Albania.

As the greatest blot on Governor Warren's political career was his attitude to the infamous plunder and exile of the Nisei (Americans of Japanese ancestry) in 1942, Mr. Weaver might have noted that the Johnson tradition was highly racialist (that solitary beacon of California liberalism in the Warren years, the three "Bee" papers, were even more panic-stricken than the Hearst papers, more convinced of the devilish character of the California Japanese than the *San Francisco Chronicle*). And, in what Mr. Weaver candidly admits was the greatest gaffe of his life, Attorney-General Warren argued that the Japanese were *especially* dangerous because they had committed no acts of sabotage! True, the morale of California in the spring of 1942 was not very high, but as Mr. Weaver admits, many Californians were not scared; they were greedy. The deportations were the equivalent, *mutatis mutandis*, of the German *Kristallnacht* of 1938—and not all things in the comparison have to be changed. However, the Supreme Court and the United States Attorney-General were as guilty or more guilty, in what Professor E. V. Rostow early pronounced the greatest outrage on the Constitution ever sanctioned by the Courts.

Governor Warren was not only in a bigger office than Attorney-General Warren, he grew into the bigger office. His reputation as a liberal began to spread (despite protests that he was merely a "faux bonhomme") and he was seen as a political "comer", worth cultivating. Mr. Weaver does not stress the degree to which Governor Dewey in 1944 did not succeed in winning any warm support from Governor Warren, nor does he discuss in adequate detail the circumstances in which Governor

Warren, in 1948, agreed to run on the ticket with Governor Dewey, in what was universally assumed to be a "shoo in" election. In all probability, the victory of President Truman was a godsend for Governor Warren, whose reputation as a vote-getter was by then national. In 1952, Governor Warren was a "favourite son" whom the lightning *might* strike, but the lightning was under the control of the Eastern Establishment which had chosen General Eisenhower. And one result of the Eisenhower victory was a feud between the Governor and young Senator Nixon who had suddenly appeared as Ike's running mate. The Governor suspected a sell-out and he has, so the report goes, never forgiven Mr. Nixon. But he had his own reward. He refused a nomination to the Court as an Associate Justice, and had his reward when the death of Chief Justice Vinson left the highest legal office of all vacant.

General Eisenhower is reported to have said that the nomination was his greatest mistake. And it is certainly unlikely that he got what he expected. There was some criticism of the nomination on the ground that Governor Warren had no judicial experience but, as Mr. Weaver points out, other Chief Justices had gone to the top of what it is the fashion to call the High Bench without judicial experience, and one of them, Taney, ranks among the greatest holders of the great office. Critics had soon more to complain of. The Warren Court began to define, declare—or make—law. The most dramatic decision, Brown v. School Board of Topeka, which outlawed school segregation, attracted world attention and possibly caused the coolness (to risk a meiosis) between the President and the Chief Justice, for the President thought that only changes brought about by anonymous forces of righteousness counted, and the Chief Justice thought that it was the President's duty not only to enforce the law but also to preach acceptance and not merely obedience.

But legal historians are more likely to make Baker v. Carr the great case of the Warren Court. For by imposing on Tennessee and on other states redistricting of legislative and, later, of congressional seats, the Court passed and imposed a revolutionary Reform Bill. Congress and the Legislatures liked the system that put them and kept them where they were in face of state and federal constitutions. Baker v. Carr was the equivalent of a French *lit de justice* with Chief Justice Warren as Louis XIV or XV. Its effects are spreading with each election, desperate efforts to reverse the decision by constitutional amendment have failed, and if Congress and the state legislatures have any hope of standing up to the White House, it will be because they have had moral authority forced upon them.

This decision produced a famous clash between the Chief Justice and Justice Frankfurter. Clinging to the letter if not to the spirit of the Holmesian system of constitutional law, Frankfurter left the remedy to the people who were effectually as much denied their rights of equal protection of the laws as Manchester before 1832 was denied representation. Rights of the kind that Frankfurter praised were, to use a happy phrase of Mr. Weaver's, as "useful as one bookend". Chief Justice Warren knew a Gordian knot when he saw one. And in a series of decisions putting teeth and meaning into the Bill of Rights, the Warren Court has been like a permanent constitutional convention. In face of constitutional purity preached by some excellent lawyers, the Chief Justice might have said *de minimis non curat praetor*—but many admirers think he could have said it more briefly and more pungently. As Mr. Weaver makes plain, the clash between the large, apparently phlegmatic Swede and the tiny, mercurial Jew was temperamental as well as doctrinal. As he says, no one would have expected to see *The Times Literary Supplement* sticking out of the pocket of the Chief Justice, as it often did out of the pocket of Justice Frankfurter.

On the running sore of the Dallas controversy, Mr. Weaver is sensible. He quotes British authorities like Lord Devlin and the Warden of All Souls; he is unkind to some critics like young Mr. Epstein; he doubts the total objectivity of Mr. Mark Lane. But he admits weaknesses. He refutes the charge that the Chief Justice passed the buck and did not work on the case. He accepts the view that from the beginning it would have been better if Oswald, dead though he was, had been allocated a first-class defender. He does not discuss the criticism made by Dean Rostow that the secrecy of the hearings was harmful and unnecessary. But he finds for the Commission.

Chief Justice Warren is still robust and hale, and few members of the Court retire unless very pressed. But when he leaves his place, Earl Warren will have done more than any predecessor to give meaning to the noble aspiration engraved on the front of the Court building, "Equal Justice Under Law".