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This article investigates the impact of personnel change in the Supreme Court by examining the transition from the Warren Court to the Burger Court (1969-1972). Each change in the membership of the Court during this period changed the Court's internal voting patterns. President Nixon, in short, was successful in appointing Justices to slow the libertarian drive of the late Warren Court. This finding suggests that a president blessed with sufficient vacancies has substantial—but hardly unlimited—capacity to reshape the Court through exercise of the appointment power.

Every change in the membership of the Supreme Court creates possibilities for reshaping the Court's voting patterns and policy outputs. The effects of personnel change are particularly significant when a President seeks to redirect the Court by appointing Justices who share his views on salient policy issues. Such was the situation when Richard M. Nixon assumed the presidency in 1969.

The period of transition from the Warren Court to the Burger

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Court (1969-72) affords an unusual opportunity for in-depth examination of the impact of personnel change. Retirements, a resignation, deaths, new appointments, and rejected nominations—all occurring in a politically charged atmosphere—were responsible for unusually rapid fluctuation in the membership of the Court between June 1969 and January 1972.

This paper focuses on the question of how voting patterns and opinion content changed in response to shifts in the makeup of the Court. This investigation of the impact of personnel change should shed light on more general questions about the nature of change in the Court and on the relationship between the Court and the broader political system.

ELECTORAL POLITICS AND THE COURT: 1968-72

Without a doubt, the central figure in the series of events that in time transformed the "Warren Court" into the "Burger Court" was President Richard Nixon. Chief Justice Earl Warren's fears that Nixon—an old adversary from California politics—might have the opportunity to choose his successor seems to have prompted the Chief Justice's conditional retirement in June 1968.[1] If the policies of the Warren Court were to be preserved, it seemed essential that Warren move quickly to allow President Lyndon B. Johnson to name a new Chief Justice. Johnson had secured the libertarian activism of the late 1960's with the appointments of Justices Fortas and Marshall.[2]

Johnson's nominations of Fortas as Chief Justice and Texan Homer Thornberry as an associate Justice were hardly astute choices for a skilled political manipulator, particularly in light of the historical difficulties encountered by "lame duck" Presidents seeking to fill Supreme Court vacancies.[3] As hearings on the Fortas nomination dragged through the summer of 1968 and into the fall, the points of opposition multiplied—"cronyism," disregard for separation of powers, conflict of interest, and simple senatorial opposition to Warren Court decisions on such issues as obscenity, capital punishment, internal security, and the rights of the accused.[4] With a filibuster in the offing after defeat of a cloture mo-

1. Warren announced his intention to retire in a letter to the President. Letter from Earl Warren to Lyndon B. Johnson (June 13, 1968), *reprinted in* 1968-69 PUB. PAPERS 746. Johnson responded that he would accept Warren's retirement "at such time as a successor is qualified." Letter from Lyndon B. Johnson to Earl Warren (June 26, 1978), *reprinted in* 1968-69 PUB. PAPERS 747.

2. *See also* J. POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 275-78 (1979).

3. R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 97-100 (1971).

4. On the Fortas nomination, see letter from Senator Ervin to the *Washington*

tion, Fortas had little choice but to request that his nomination be withdrawn.[5] Thus, the Warren Court remained intact for its final Term (1968-69). With both Fortas and Warren still on the bench, supporters of the Warren Court labelled the campaign to block his nomination a "pyrrhic victory."[6]

Within a year, however, the Warren Court's enemies regrouped and won a real victory. During the 1968 campaign Nixon had openly attacked the Warren Court, promising to fill vacancies with "strict constructionists" if he were elected.[7] The "strict constructionist" label was, of course, pure rhetoric. What Nixon clearly wanted were Justices who would favor the needs of law enforcement over the constitutional claims of those accused of crime—the "peace forces" over the "criminal forces."[8]

Despite Nixon's presence in the White House, Warren's actual retirement was set for the final day of the 1968-69 Term. On that day, President Nixon—as a member of the Supreme Court bar—appeared before the Court to celebrate his triumph and witness the swearing in of Warren E. Burger as Chief Justice of the United States.[9]

The departure of Warren and the appointment of Burger marked the beginning of the transition to a new "era" in Supreme Court decisionmaking. Clearly the new Chief Justice was a man after Nixon's own heart on the policy issues central to Nixon's campaign against the Warren Court—an outspoken foe of *Miranda v. Arizona*[10] and a firm supporter of "law and order."[11] Nor was Nixon content with a single appointment in his drive to reconstruct the Court "in his own image." A month before the Chief Justice's retirement took effect, Justice Fortas quietly stepped aside amidst none-too-subtle threats of possible criminal

Post (Aug. 9, 1968). 114 CONG. REC. 28153 (1968) (remarks of Sen. Hollings); *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 359 (1968) (remarks of Sen. Thurmond); 114 CONG. REC. 28928 (1968) (remarks of Sen. Lausche); *Id.* at 28932 (remarks of Sen. Dirksen). *See also* R. SHOGAN, A QUESTION OF JUDGMENT (1972).

5. 1968-69 PUB. PAPERS 1000.

6. Mason, *Pyrrhic Victory: The Defeat of Abe Fortas*, 45 VA. Q. REV. 28 (1969).

7. J. SIMON, IN HIS OWN IMAGE 5 (1973); S. WASBY, CONTINUITY AND CHANGE 12 (1976).

8. J. SIMON, *supra* note 7, at 7.

9. RETIREMENT OF MR. CHIEF JUSTICE WARREN, 395 U.S. vii (1969); J. SIMON, *supra* note 7, at 1-2.

10. 384 U.S. 436 (1966).

11. J. SIMON, *supra* note 7, at 74-96.

prosecution emanating from John Mitchell's Justice Department.[12]

Although Nixon's goal of placing a southerner on the Supreme Court was denied when the Senate refused to confirm, in turn, Judges Haynsworth and Carswell, the appointment of Judge Harry F. Blackmun in June 1970 marked the second step toward fulfillment of the President's campaign pledge to overhaul the Court. With the appointment of Justices Powell and Rehnquist to replace departed Justices Black and Harlan, the "Nixon Court" was in place.

Between Burger's appointment in June 1969 and the swearing in of Nixon appointees Powell and Rehnquist in January 1972 there were three distinct "Courts" of varying composition.[13] During most of the 1969-70 Term, Burger presided over a Court of eight Justices (Court 80).[14] The seating of Blackmun reconstituted a nine-member Court (Court 81), which continued through the 1970-71 Term. After the departure of Black and Harlan, a court of seven Justices (Court 82) decided all cases argued in the 1971-72 Term prior to the seating of Powell and Rehnquist.

In this article, votes and opinions in each of these "natural Courts" will be examined in an effort to isolate the effect of personnel change on the Court's decisions. At the same time the question of how rapidly the libertarian Warren Court was being transformed into a Court that would render decisions more in keeping with President Nixon's policy preferences will be considered. Before analyzing the three Courts of the transitional period, voting patterns in the last years of the Warren Court (Court 79: 1967-69) will be summarized. Using this period as a baseline, it will be possible to measure in a rough way how the internal balance of power shifted in each Court. By comparing the dissent rates and majority participation scores of Justices Brennan and Marshall (the holdovers from the liberal mainstream of the Warren Court) with those of Chief Justice Burger (probably the

12. Letter from Abe Fortas to President Richard M. Nixon (May 14, 1969), *reprinted in* 1969 PUB. PAPERS 375. *See also* L. KOHLMEIR, GOD SAVE THIS HONORABLE COURT! 100-02 (1972).

13. John Sprague proposed the use of "natural Courts" to analyze Supreme Court voting data. He defined a "natural Court" as a period during which there was no change in personnel. His approach is widely accepted by political scientists. J. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 6 (1968).

14. The numerical designation for each Court is based on the Courts listed in H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 1357-60 (1974). Chase and Ducat, however, erroneously list a Court that included both Fortas and Burger in 1969. Since Fortas and Burger were never members of the Supreme Court at the same time, that Court has been excluded from the count.

Nixon appointee who most fully reflected the President's policy positions), we should be able to chart the progress of Nixon's efforts to reshape the Court through the appointment process. When the Court's decisions shift in the direction of Nixon's preferences, we should note a rise in Burger's majority participation score, accompanied by a decline in the majority participation scores of Justices Brennan and Marshall and a corresponding increase in their dissent rates.

THE LAST YEARS OF THE WARREN COURT: A BASELINE

Although the Supreme Court was engulfed in political controversy throughout Earl Warren's final year on the Court, Court 79 (1967-69) was characterized by a continuation of the pragmatic libertarian policy trend of the Warren era. The "constitutional revolution" continued unabated as the majority extended libertarian principles in such traditional areas as school desegregation, criminal justice, and reapportionment and opened the field of poverty law to constitutional adjudication for the first time.[15] Moreover, the Justices did not shy away from conflict with a coordinate branch of government, asserting power to review congressional decisions on the seating of members of the House of Representatives in *Powell v. McCormack*.[16]

Firmly in the mainstream of this Court were Justice Brennan, long the "glue of the liberal majority,"[17] and Justice Marshall, whose appointment in 1967 had provided a reliable vote to assure libertarian majorities despite increasingly frequent defections to the conservative side by Justice Black. With only 6 dissents in 378 cases,[18] Brennan was in the majority in 98.4% of the cases decided during this two-year period (see Table 1). Close behind was Marshall, whose 9 dissents in 248 cases gave him a majority

15. *See* notes 22-33 *infra*.

16. 395 U.S. 486 (1969).

17. Totenberg, *Conflict at the Court*, WASHINGTONIAN, Feb. 1974, *reprinted in* READINGS IN AMERICAN GOVERNMENT 75-76, 162 (1975).

18. David Rohde and Harold Spaeth have pointed out that: "Although there is no inherent superiority in counting cases and votes one way rather than another, the matter of method is sufficiently important to require specification." D. ROHDE & H. SPAETH, SUPREME COURT DECISION MAKING 134 (1976). I have included all cases decided with full opinion (unanimous or not), plus all cases decided with *per curiam* opinions that evoked dissent on the merits by one or more Justices. When several cases are decided with a single opinion, each case has been counted separately. These rules are essentially the same as those followed by Rohde and Spaeth. *Id.* at 135-37.

participation score of 96.4%. Not even the Chief Justice, with 22 dissents, or Fortas, with 25 dissents, could match these figures. Frequently, voting as a bloc,[19] these four Justices controlled the Court's decisions by forming temporary alliances with such Justices as Douglas, Stewart, White, and (on first and fifth amendment issues in particular) Black.

Table 1

Dissents and Majority Participation
Court 79 (1967-69)

Justice	Number of Cases	Majority Number	Participation Percentage	Dissents Number	Dissents Percentage
Brennan	378	372	98.4%	6	1.6%
Marshall	248	239	96.4%	9	3.6%
Warren	374	352	94.1%	22	5.9%
Fortas	328	303	92.4%	25	7.6%
Stewart	377	311	82.5%	66	17.5%
White	376	302	80.3%	74	19.7%
Douglas	370	279	75.4%	91	24.6%
Black	377	258	68.4%	119	31.6%
Harlan	376	255	67.8%	121	32.2%

Even more complete was the dominance of the Brennan-Marshall view in cases involving civil liberties claims.[20] Dissenting only three times in two years, Brennan voted with the majority in 98.5% of civil liberties cases, while Marshall filed only six dissents. Moreover, Justice Douglas frequently voted with the Fortas-Marshall-Warren-Brennan bloc in civil liberties cases. Not only could these five Justices control the outcome whenever they voted together, but they also were able to gain the support of one or more of the relatively conservative Justices in many cases. Overall, civil liberties claimants prevailed in 141 (83.9%) of 168 nonunanimous cases, usually with votes to spare. Never had the Supreme Court been as hospitable to libertarian claims as in these two years.

Analyzing doctrinal developments in this period, Louis Henkin suggests that the civil liberties decisions of this Court repre-

19. The average interagreement score for these four Justices was 92.2%—far above normal criteria for identification as a bloc. *See* J. SPRAGUE, *supra* note 13, at 56.

20. A "civil liberties case" is defined as one in which the Court's decision turns on a claim of personal right involving the Bill of Rights or the fourteenth amendment, or one turning on *analogous* claims under federal statutes. Included are claims arising under the Federal Rules of Criminal Procedure and the various civil rights statutes. *See* G. SCHUBERT, THE JUDICIAL MIND 102 (1965).

sented two major operations in the Warren Court's final campaign for civil liberties.[21] On the one hand, there was a great deal of "mopping up" as the Justices attempted to deal with new twists on the civil liberties issues that had occupied the Justices throughout the Warren era. On the other hand, the dominant majority (excepting Douglas) also on occasion engaged in "withdrawing from too-advanced positions."[22] Henkin's categorization summarizes much of this Court's civil liberties policy making. Yet, it tends to overlook the cases in which the Justices struck out in new directions, particularly in the field of poverty law. Moreover, Henkin does not recognize the extent to which the "mopping up" operation in such areas as reapportionment and school desegregation involved the formulation of new approaches to constitutional interpretation. Thus, a full acount of decision-making trends in the final years of the Warren Court would include: (1) "mopping up" or consolidation, including the formulation of new hard-line libertarian doctrines; (2) movement into new policy arenas; and (3) "withdrawing from too-advanced positions."

Given the number and significance of innovative decisions handed down between 1962 and 1967, it is hardly surprising that the final two years of the Warren Court involved a great deal of "mopping up." No case better illustrates the nature of this process than *United States v. Robel*,[23] in which the majority, after years of undermining antisubversive legislation by construction, finally invalidated the heart of the statutory scheme on first amendment grounds. In criminal justice cases, the majority largely completed the process of "selective incorporation," holding that the right to a jury trial[24] and freedom from double jeopardy[25] were fully binding on the states. In *Katz v. United States*[26] a seven to one majority extended the warrant and probable cause requirements of the fourth amendment to all cases involving electronic eavesdropping, and in *Kaufman v. United States*[27] the Justices ruled that illegal search and seizure claims could be raised in a federal habeas corpus petition. Leading race relations cases

21. Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 65 (1968).
22. *Id.*
23. 389 U.S. 258 (1967).
24. Duncan v. Louisiana, 391 U.S. 145 (1968).
25. Benton v. Maryland, 395 U.S. 784 (1969).
26. 389 U.S. 347 (1967).
27. 394 U.S. 217 (1969). *Kaufman* was explicitly overruled by the Burger Court in Stone v. Powell, 428 U.S. 465 (1976).

were *Jones v. Mayer*,[28] in which the Justices construed the 1868 Civil Rights Act as an open housing law, and *Green v. New Kent County*,[29] in which the Justices at last announced that token desegregation no longer satisfied the mandate of *Brown v. Board of Education*.[30] The tendency to adopt a hard-line approach while "mopping up" old problems was nowhere more apparent than in reapportionment cases, in which a five-member majority adopted "precise mathematical equality" as the standard for congressional districting.[31] Even in the well-ploughed fields of racial discrimination and reapportionment, then, this Court continued to break new ground.

At the same time, the Justices were moving, none too hesitantly, into new constitutional fields. In *Flast v. Cohen*[32] the Justices relaxed rules of standing for those seeking to invoke the judicial process to enforce the first amendment's establishment of religion clause, and in *Powell v. McCormack*[33] the Justices expanded the scope of judicial supervisory power over Congress. Perhaps the most significant of these new departures came in *Shapiro v. Thompson*.[34] Justice Brennan's opinion in this landmark case not only signalled that the Court was receptive to cases asserting the rights of the poor, but also established a framework for future analysis of such equal protection issues as sex discrimination and state school financing.

Less common were cases illustrating retreat from libertarian positions. Yet, the twenty-seven cases in which the Court rejected civil liberties claims demonstrate that even this most libertarian of Supreme Courts remained responsive to pragmatic considerations which might temper libertarian ardor. Most notable of these cases is *Terry v. Ohio*,[35] in which eight Justices joined Chief Justice Warren's opinion explicitly recognizing society's interest in effective law enforcement. Over the protests of Justices Black and Douglas, the majority also refused to apply prior libertarian rulings retroactively.[36]

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28. 392 U.S. 409 (1968).
29. 391 U.S. 430 (1968).
30. 347 U.S. 483 (1954).
31. Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).
32. 392 U.S. 83 (1968).
33. 395 U.S. 486 (1969).
34. 394 U.S. 618 (1969).
35. 392 U.S. 1 (1968).
36. Jenkins v. Delaware, 395 U.S. 213 (1969); Halliday v. United States, 394 U.S. 831 (1969); Kaiser v. New York, 394 U.S. 280 (1969); Desist v. United States, 394 U.S. 244 (1969); Fuller v. Alaska, 393 U.S. 80 (1968); DeStefano v. Woods, 392 U.S. 631 (1968). For an analysis of retroactivity cases, see Fahlund, *Retroactivity and the*

The Court that President Nixon sought to reshape in his own image, then, was a Court strongly, but not absolutely, committed to libertarian policies. Civil liberties claimants prevailed nearly eighty-four percent of the time, usually by votes of six to three or better. Almost without exception this Court reflected the views of Justices Brennan and Marshall. With Fortas and Warren as firm allies and Douglas even *more* strongly committed to libertarian claims, Court 79 offered a tough challenge to a President bent on curtailing the libertarian activism of the previous seven years.

THE FRESHMAN YEAR OF THE BURGER COURT

A necessary condition for successful exercise of presidential appointment power to change the policy direction of the Supreme Court is the existence of vacancies. However, not just any vacancy will do. If the President can only replace Justices who already agree with his positions, the appointment is not likely to affect the Court's voting patterns. If his influence is to be felt, the President must replace Justices who adhere to the policies the President wishes to change. For Nixon the situation could hardly have been more promising. Not only was he presented with two vacancies within his first year in office, but he also had the opportunity to replace two crucial members of the voting coalition whose policies Nixon had promised to change.

Table 2

Dissents and Majority Participation
Court 81 (1969-70)

Justice	Number of Cases	Majority Number	Participation Percentage	Dissents Number	Dissents Percentage
Marshall	107	99	92.5%	8	7.5%
White	131	116	88.5%	15	11.5%
Brennan	132	115	87.1%	17	12.9%
Stewart	131	106	80.9%	25	19.1%
Harlan	130	104	80.0%	26	20.0%
Douglas	120	86	71.7%	34	28.3%
Burger	129	90	69.8%	39	30.2%
Black	130	84	64.6%	46	35.4%

With the departure of Fortas and Warren, the dominant coali-

Warren Court, 35 J. POL. 570 (1973) and R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 211-34 (1977).

tion of Court 79 (1967-69) was shattered almost overnight. Nixon in effect registered a net gain of three votes likely to favor presidential policy goals with the appointment of Burger. Yet, the refusal of the Senate to confirm Carswell and Haynsworth meant that Burger would spend his first year as Chief Justice as the sole Nixon appointee on a Court still dominated by Warren Court holdovers. Marshall, White, and Brennan proved to be the Justices closest to the new Court's center of gravity.[37] Marshall, with only eight dissents, participated in 92.5% of the Court's majority voting coalitions, while White was with the majority 88.5% of the time and Brennan 87.1% (see Table 2).

Chief Justice Burger's thirty-nine dissents—second only to Justice Black—and his majority participation score of less than seventy percent clearly demonstrate that Court 80 (1969-70) was not a Burger Court in terms of voting strength. At the same time, these figures show that the personnel changes of the preceding year had already eroded the predominant position of Brennan and Marshall within the Court. Despite his location at the Court's center of gravity, Marshall's dissent rate had clearly increased. More noticeable was the decline of Justice Brennan's majority participation score from the high nineties range in the late Warren Court to eighty-seven percent in the first year of the transition. The heyday of the Warren Court, in short, was past.

A focus on civil liberties cases clearly highlights the transitional nature of this Court.[38] Most out-of-step with the majority was the new Chief Justice who supported only two civil liberties claimants in nonunanimous cases, and cast twenty-four dissenting votes in cases in which the majority supported libertarian claims. On the other hand, only three of the eight Justices—Douglas, Marshall, and Brennan—supported a majority of the claimants in nonunanimous cases. Only by attracting the support of two or more "swing" votes—White, Harlan, Black, and Stewart—could the libertarian stalwarts of the Warren era prevail on the merits. In ten cases, many involving procedural due process claims of the poor,[39] White and Harlan joined the Douglas-Brennan-Marshall trio to record a five to three victory for the civil liberties claimant, while other combinations provided the victory margin in five additional cases. The success of the libertarians can be measured by the Court's overall record of support for civil liberties claims—twenty-six accepted, twenty-one rejected in the

37. "Center of gravity" refers simply to the Justice who is most frequently on the winning side. *See* G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 120-21 (1959).

38. *See* S. WASBY, *supra* note 7, at 1-6, 206-08.

39. The leading case is Goldberg v. Kelly, 397 U.S. 254 (1970).

forty-seven nonunamimous civil liberties cases (55.3%). Even though the Court accepted a majority of civil liberties claims, the days of overwhelming support for civil liberties claimants were gone.

Although civil liberties claimants frequently prevailed over the dissent of the new Chief Justice, Burger was able in his first term to block other innovative libertarian decisions by joining with the four swing Justices in opposition to Douglas, Brennan, and Marshall. In *Dandridge v. Williams*[40] a five to three majority struck a major blow against further expansion of the constitutional rights of the poor by applying the traditional "rational basis" test to reject a claim that limitation of the amount of welfare payments to large families violated the equal protection clause. By the same five to three vote, the Court rejected claims that seemed to challenge the entire system of plea bargaining in criminal cases, holding that the Court would not permit challenges to any plea that could be construed as voluntary, even if motivated by a desire to avoid the death penalty[41] or by an earlier coerced confession.[42] Permeating Justice White's opinion for the Court in a companion case is the attitude that plea bargaining is necessary to assure continued functioning of the criminal justice system.[43] Although Brennan and Marshall were also unwilling to question the plea bargaining system itself, they joined Douglas in insisting that the Court must take action to prevent improper prosecutorial behavior in the plea bargaining process.

It is these cases, in which civil liberties claims were rejected on five to three votes, that best indicate the degree of change in the Court brought about by the replacement of Fortas and Warren by Burger. Other cases decided against civil liberties claims in the first year of the Burger Court—notably fifth amendment claims in federal regulatory statutes[44] and the six-member-jury issue[45]—would most likely have received the same treatment from the late Warren Court, though probably by margins somewhat closer than the two to six and one to seven votes by which these claims were

40. 397 U.S. 471 (1970).
41. Parker v. North Carolina, 397 U.S. 790 (1970).
42. McMann v. Richardson, 397 U.S. 759 (1970).
43. Brady v. United States, 397 U.S. 742, 751-53 (1970).
44. United States v. Knox, 396 U.S. 77 (1969) (wagering tax); Minor v. United States, 396 U.S. 87 (1969) (Marijuana Tax Act).
45. Williams v. Florida, 399 U.S. 78 (1970).

rejected. Although we cannot be certain how *Dandridge v. Williams* might have been decided by the late Warren Court, the voting patterns of Justices Fortas and Warren strongly suggest that the outcome of the plea bargaining cases would have been different.[46]

In his first year, then, the new Chief Justice was able to effect at most an incremental shift away from expansive interpretation of constitutional guarantees. While no libertarian decisions of the Warren Court were reversed, reluctance to build further on Warren Court precedents was evident.[47] Even when the liberal Warren Court holdovers prevailed on the merits, they often suggested in concurring opinions that the majority had not gone far enough in protecting constitutional rights.[48] More than once they urged the majority not to "slam the courthouse door" in the face of those seeking to vindicate constitutional rights.[49] Sensing ominous signs in the prevalence of five to three votes and the vociferous dissents of the new Chief Justice in cases upholding civil liberties claims, the libertarian trio reaffirmed their commitment to the use of the courts to right perceived social wrongs.

An Emerging Burger Court?

President Nixon, of course, had other ideas. Frustrated by the Senate's rejection of the Haynsworth and Carswell nominations, the President turned to a northern circuit judge likely to be accepted by the Senate with little opposition. If Nixon's goal was to change the Court along the lines favored by Chief Justice Burger, he could hardly have done better than Blackmun. The two Minnesota natives had long been friends, and there is little doubt that Burger himself lobbied for Blackmun's appointment.[50] In Blackmun's initial years on the Court, his voting patterns closely resembled those of the Chief Justice. The Burger-Blackmun interagreement rate of 95.9% seems more than adequate to justify

46. This analysis turns on the probable votes of Fortas and Warren if they had been members of the Court in 1970. Since they were somewhat more likely than Justice Brennan to support claims of criminal defendants, it may be assumed that they would have joined Douglas, Brennan, and Marshall in voting to set aside the convictions upheld by the Burger Court in *McMann* and *Parker*. However, given Warren's dissent in Shapiro v. Thompson, 394 U.S. 618 (1969), it would not be plausible to assert that he would have voted to strike down the state welfare regulations upheld in *Dandridge*.

47. R. Funston, *supra* note 36, at 328-33.

48. Dickey v. Florida, 398 U.S. 30, 39 (1970) (Brennan, J., concurring); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J. concurring).

49. McMann v. Richardson, 397 U.S. 759, 786 (Brennan, J., dissenting); Barlow v. Collins, 397 U.S. 159, 178 (1970) (Brennan, J., concurring).

50. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 Sup. Ct. Rev. 271; Totenberg, *supra* note 17, at 162.

the inevitable label, "Minnesota Twins." Although Philip B. Kurland's assertion that there were other sets of twins on the Court[51] may be a bit too strong, Marshall and Brennan's interagreement rate also remained high (89.1%).

The Burger-Blackmun and Marshall-Brennan pairs, then, are a logical starting point for the analysis of voting patterns of Court 81 (1970-71). The pair that was more successful in persuading other Justices to join them would dominate the Court's decision making. Despite the propensity of Douglas to join the Marshall-Brennan pair in civil liberties cases, the data show that Burger and Blackmun were more successful in securing majority voting coalitions. Although there were a number of cases where the two wings of the Court joined forces for unanimous or eight to one decisions favorable to civil liberties, Douglas, Marshall, and Brennan formed relatively few alliances with the four center Justices (Black, Stewart, White, and Harlan) in closely divided cases. Blackmun and Burger, on the other hand, frequently persuaded three and often four of the "swing" voters to join them in four to five or three to six decisions against a civil liberties claimant. In the thirty-five civil liberties cases dividing a unified left bloc of three against a united front of Burger and Blackmun, the Nixon appointees won twenty-one and the liberals only fourteen, even though the Douglas-Marshall-Brennan bloc needed only two additional votes to prevail.

Table 3

Dissents and Majority Participation
Court 81 (1970-71)

Justice	Number of Cases	Majority Number	Participation Percentage	Dissents Number	Dissents Percentage
Stewart	152	134	88.2%	18	11.8%
Burger	150	129	86.0%	21	14.0%
White	151	129	85.4%	22	14.6%
Blackmun	150	127	84.7%	23	15.3%
Harlan	152	124	81.6%	28	18.4%
Black	152	117	77.0%	35	23.0%
Brennan	152	117	77.0%	35	23.0%
Marshall	148	113	76.4%	35	23.6%
Douglas	144	88	61.1%	56	38.9%

The shift of the center of gravity away from the "core of the old

51. Kurland, *supra* note 50, at 268.

Warren Court"[52] (Douglas, Brennan, and Marshall) is also apparent in the data on majority participation and dissents in Court 81 (see Table 3). The most frequent dissenters were Black, Brennan, Marshall, and Douglas. On the other hand Chief Justice Burger's dissent rate dropped from more than thirty percent of the cases in his first year to fourteen percent in the year after Blackmun's appointment. Although the "Minnesota Twins" shared the "center of gravity" with Stewart and White, they achieved considerable success in displacing the Warren Court liberals from the mainstream. In 1970-71 the Burger Court was still a Court in transition, but one beginning to tilt toward the side of the Nixon appointees.

These voting patterns are reflected in the policy decisions rendered during the first year "with a fully manned Court under a new Chief Justice."[53] As the "core of the old Warren Court," Douglas, Marshall, and Brennan bore the responsibility for persuading their colleagues to build on the framework established between 1962 and 1969. When they were successful, the results were what Harry Kalven has classified as decisions affirming old values and principles.[54]

Despite alarms sounded by liberal critics of the emerging Burger Court, many of the most significant decisions of 1970-71 not only reaffirmed Warren Court precedents, but also expanded them. Most notable was *Swann v. Charlotte-Mecklenberg School Board*,[55] a unanimous decision approving busing as a permissible tool for removing the vestiges of *de jure* segregation. In *Bivens v. Six Unknown Agents*[56] Justice Brennan created, almost out of thin air, an action for damages against federal officers violating fourth amendment rights, building on *Katz v. United States*[57] and other Warren Court decisions emphasizing the fundamental nature of the protection against unreasonable searches and seizures. Also reaffirmed were earlier decisions upholding a broad reading of the coverage of the Voting Rights Act of 1965[58] and assuring procedural due process for the poor.[59]

More often, though, the new Court pointedly refused to expand

52. Kalven, *Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 7 (1971).
53. *Id.* at 4.
54. *Id.* at 10.
55. 402 U.S. 1 (1971).
56. 403 U.S. 388 (1971).
57. 389 U.S. 347 (1967).
58. Perkins v. Matthews, 400 U.S. 379 (1971), *extending* Allen v. Bd. of Elections, 393 U.S. 544 (1969).
59. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971), *extending* Goldberg v. Kelly, 397 U.S. 254 (1970).

Warren Court holdings or take what Douglas, Marshall, and Brennan regarded as the logical next step. The "actual malice" test of *New York Times v. Sullivan*[60]—the Warren Court's landmark effort to protect the press against libel suits—survived, but a majority of the Justices balked at Brennan's effort to extend the test to suits by private persons involved in newsworthy events.[61] In cases such as *Palmer v. Thompson*[62] in the area of race relations, *Abate v. Mundt*[63] in the reapportionment field, and *Harris v. New York*[64] and *McGautha v. California*[65] in criminal justice, the liberals filed extensive and strongly worded dissents against what they perceived as attacks on the accomplishments of the Warren Court.

Overall, Court 81 was distinctly hostile to libertarian claims, ruling against the claimant in fifty of seventy-nine nonunanimous civil liberties cases. This 36.7% rate of support contrasts sharply with the 83.9% libertarian voting of Court 79 and the 53.3% favorable record even in Court 80. Perhaps some of this falloff in libertarian voting can be attributed to a change in the makeup of the Court's docket as litigants pressed for extensions of rights recognized in the Warren Court years. Yet, it is clear that personnel change accounts for the outcome in many of the civil liberties cases decided by close votes. In fifteen cases decided against a civil liberties claimant by a five to four margin, newcomer Blackmun provided the fifth vote. In each of these decisions—and in ten cases in which civil liberties claims were rejected by six to three votes—the Warren Court liberals protested in vain about the emasculation of libertarian policies.

Three cases in particular illustrate how a majority at odds with the Warren Court majority could be formed simply by combining the votes of the two Nixon appointees with the votes of three holdovers who had earlier dissented (see Figure 1). In *Labine v. Vincent*[66] the new majority "distinguished" an estate case from the tort case of *Levy v. Louisiana*,[67] in which the Warren Court had announced a constitutional principle of equal treatment for

60. 376 U.S. 254 (1964).
61. Rosenbloom v. Metromedia, 403 U.S. 29 (1971).
62. 403 U.S. 217 (1971).
63. 403 U.S. 182 (1971).
64. 401 U.S. 222 (1971).
65. 402 U.S. 183 (1971).
66. 401 U.S. 532 (1971).
67. 391 U.S. 68 (1967).

Figure 1

Changing Majorities in a Changing Supreme Court

Equal Protection		Criminal Justice		Citizenship	
Levy (1968)	*Labine* (1971)	*Miranda* (1966)	*Harris* (1971)	*Afroyim* (1967)	*Bellei* (1971)
MAJORITY	DISSENTERS	MAJORITY	DISSENTERS	MAJORITY	DISSENTERS
Douglas Brennan Marshall White (Fortas) (Warren)	Douglas Brennan Marshall White	Douglas Brennan Black (Warren) (Fortas)	Douglas Brennan Black (Marshall)	Douglas Brennan Black (Warren) (Fortas)	Douglas Brennan Black (Marshall)
DISSENTERS	MAJORITY	DISSENTERS	MAJORITY	DISSENTERS	MAJORITY
Black Stewart Harlan	Black Stewart Harlan (Burger) (Blackmun)	White Stewart Harlan (Clark)	White Stewart Harlan (Burger) (Blackmun)	White Stewart Harlan (Clark)	White Stewart Harlan (Burger) (Blackmun)
(6-3)	(4-5)	(5-4)	(4-5)	(5-4)	(4-5)

illegitimates. In the much-discussed decision of *Harris v. New York*,[68] Chief Justice Burger wrote that statements obtained in violation of *Miranda v. Arizona*[69] could be used to impeach the credibility of a defendant who took the stand in his own defense, in spite of language implying the contrary in *Miranda*. Finally, in *Rogers v. Bellei*[70] Justice Blackmun upheld a section of the Immigration and Nationality Act which subjected a person born abroad of one American parent to loss of citizenship for failure to meet a congressionally-imposed residency requirement. In order to "distinguish" this case from *Afroyim v. Rusk*[71]—in which a five to four Warren Court majority had ruled that citizenship could not be lost unless voluntarily relinquished—Blackmun asserted that citizenship bestowed by act of Congress was not citizenship within the meaning of the fourteenth amendment. More realistic, however, is Black's claim in dissent that *Afroyim* had been overruled simply because of the change in the composition of the court.[72]

Whether Warren Court decisions were actually overruled or merely distinguished in these cases is somewhat beside the point. What is significant is that the Court's policy had changed because the Justices who had dissented in the earlier cases had become a majority through the appointment of new Justices who shared their opposition to the Warren Court's libertarian decisions.

By the end of the 1970-71 Term, then, a new court was beginning to emerge. With Justice Blackmun as an ally, Chief Justice Burger prevailed far more frequently than in the first year of the Burger Court. When the second term of the Burger era ended in June 1971, major Warren Court decisions remained intact, yet under attack. Even though no major precedents were openly overruled, many were in the process of being whittled away through "techniques of subtle erosion."[73] In civil liberties cases the bloc of Douglas, Marshall, and Brennan lost more often than it won. More and more frequently, they found themselves advancing in dissenting opinions the same positions they had once championed for the majority. Since their views had changed lit-

68. 401 U.S. 222 (1971).
69. 384 U.S. 436 (1966).
70. 401 U.S. 815 (1971).
71. 387 U.S. 253 (1967).
72. Rogers v. Bellei, 401 U.S. 815, 844-45 (1971) (Black, J., dissenting).
73. Bender, *The Techniques of Subtle Erosion*, HARPER'S, Dec. 1972, at 18.

tle, if any, it seems clear that the Court's change in direction may be attributed in substantial part to changing personnel.

Such changes were by no means at an end. In less than a month, both Justices Harlan and Black suffered disabling illnesses, retired, and then died, reducing the Court's membership to seven. In the four months required for the nomination and confirmation by the Senate of Justices Powell and Rehnquist, the remaining seven Justices carried on the work of the Court. Since the departure of Black and Harlan, with their unique and divergent judicial philosophies,[74] had an immediate impact on the Court's voting patterns, this interim period must be treated as a separate Court (Court 82).

AN INTERIM COURT

With only seven Justices, Court 82 (covering all cases *argued* or decided before Justices Powell and Rehnquist took their seats in January 1972) may properly be labelled an "interim" court.[75] That is not to say it was a time of stagnation, however, as the Justices once again carried on, though short-handed. It was during this brief period that sex discrimination first attracted the attention of the Justices as a constitutional issue under the fourteenth amendment. In other decisions the Justices recognized the rights of the Amish under the free exercise clause of the first amendment, swept away extremely strict residency barriers to voting, and hesitantly recognized the constitutional rights of single persons.[76]

In addition, this Court was characterized by distinctive voting patterns. The Burger-Blackmun interagreement rate dropped off slightly to 91.8%, but Justice White frequently joined the "Minnesota Twins" to form a three-member bloc. Justice Stewart was frequently an ally of Justices Brennan and Marshall. Although Philip B. Kurland labelled the 1971-72 Term the year of the Stewart-White Court,[77] Table 4 reveals that Justice Marshall was in the majority more frequently than White and almost as often as Stewart. Justice Brennan's majority participation score (80.8%) increased slightly over Court 81 (1970-71), while the dissent rates of

74. *See* Redlich, *A Black-Harlan Dialogue on Due Process and Equal Protection: Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U. L. REV. 20 (1975).

75. The term was first used in Winter, *The Changing Parameters of Substantive Equal Protection: From the Warren to the Burger Era*, 23 EMORY L. REV. 657 (1974). Winter's definition of his "interim project court" differs slightly from Court 82 because I have included cases *argued* prior to January 1972, even if decided after March 1972—Winter's rather arbitrary cutoff date.

76. *See* notes 78-83 *infra*.

77. Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181.

Blackmun and Burger jumped significantly. Only Justice Douglas was more prone to dissent than the two Nixon appointees.

Table 4

Dissents and Majority Participation
Court 82 (1971-72)

Justice	Number of Cases	Majority Number	Participation Percentage	Dissents Number	Dissents Percentage
Stewart	72	68	94.4%	4	5.6%
Marshall	73	67	91.8%	6	8.2%
White	73	64	87.7%	9	12.3%
Brennan	73	59	80.8%	14	19.2%
Blackmun	73	58	79.5%	15	20.5%
Burger	73	54	74.0%	19	26.0%
Douglas	73	47	64.4%	26	35.6%

Analysis of votes in civil liberties cases further reveals that this short period between the year of the Burger-Blackmun Court and the advent of the mature Burger Court in early 1972 was marked by a shift toward libertarian outcomes. Overall, the Court supported libertarian claims in fifteen of twenty-eight nonunanimous civil liberties cases (53.5%). In addition, several landmark decisions supporting civil liberties claims were unanimous. Even the Chief Justice, who wrote opinions for a unanimous Court in the sex discrimination[78] and Amish school attendance cases,[79] had a hand in this movement. More often, though, libertarian outcomes were attained when Douglas, Marshall, and Brennan voted together and won the support of one or more additional Justices. Six times "swing man" Stewart provided that vote and in an additional six cases both White and Stewart joined the libertarian coalition. When the Court struck down state durational residency requirements for voting in *Dunn v. Blumstein*[80] and implicitly recognized a right to personal privacy for single persons in *Eisenstadt v. Baird*,[81] Justice Blackmun also joined the libertarian majority.

What is noteworthy about Court 81 is that the temporary reduction of the Court to seven members made it easier to form majorities favorable to civil liberties claims and the claims of poor litigants. Decisions such as *Blumstein*, *Reed*, and *Eisenstadt* contained at least the potential for continued development of "sub-

78. Reed v. Reed, 404 U.S. 71 (1971).
79. Wisconsin v. Yoder, 406 U.S. 205 (1972).
80. 405 U.S. 330 (1972).
81. 405 U.S. 438 (1972).

stantive equal protection."[82] In addition decisions such as *Fuentes v. Shevin*[83] raised hopes for a reversal of the Burger Court's trend against recognizing new rights for the poor. Yet, the promise of these decisions was never completely fulfilled. Although *Blumstein* stands with only minor modifications today, *Reed* did not lead to a majority decision declaring sex a suspect classification. *Fuentes* did not survive a change in the personnel of the Court, and *Eisenstadt* has not led to a body of constitutional doctrine establishing the rights of single persons.[84]

In retrospect Court 82 may be significant not so much for its civil liberties decisions as for the beginnings of serious debate within the Court about easing access to the courts for organized plaintiffs seeking to vindicate broad social and economic claims. In both *Sierra Club v. Morton*[85] and *Hawaii v. Standard Oil Company*[86] the Burger Court majority rejected what amounted to interest group litigation.[87] At the same time, *Sierra Club* in particular indicated that the majority was ready to continue its modification of traditional concepts of standing and causes of action. Writing for a four to three majority, Justice Stewart declared that an organized group could obtain judicial review under the Administrative Procedure Act only if it alleged direct harm to the interest of the organization or its members.[88] Yet, with proper al-

82. Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection*, 66 AM. POL. SCI. REV. 1226 (1972).

83. 407 U.S. 67 (1972). *See also* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

84. On the current status of *Dunn v. Blumstein*, see Burns v. Fortson, 410 U.S. 686 (1973), and Marston v. Lewis, 410 U.S. 679 (1973), in which the Court upheld state laws allowing registration books to be closed fifty days before an election. In *Frontiero v. Richardson*, Justice Brennan wrote:

> At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subject to close judicial scrutiny. We agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in Reed v. Reed.

411 U.S. 677, 682 (1973). However, only four Justices agreed, and sex has never been held to be a suspect classification. *Fuentes* was "distinguished" in *Mitchell v. W.T. Grant Company*, provoking from Justice Stewart a dissent that closed with these words:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

410 U.S. 600, 636 (1974).

85. 405 U.S. 727 (1972).

86. 405 U.S. 251 (1972).

87. For a provocative analysis of trends toward relaxation of traditional rules of standing for organized plaintiffs, see Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723 (1976).

88. 405 U.S. at 741.

legations an organization could use an action against a public official as a means of vindicating its interests vis-à-vis another private party it could not challenge directly.[89]

SUMMARY AND CONCLUSIONS: PERSONNEL CHANGE AND THE TRANSITION

The transition from the Warren Court to the Burger Court was not a straightforward march from the libertarianism of the late Warren Court to the relatively antilibertarian position of the Court in the latter half of the 1970's. The transition was not wholesale, but incremental. Every change in personnel between 1969 and 1972 resulted in a change in direction for the Court. Each of the three Courts of the transition period was unique. The changing pattern of overall Court support for civil liberties claims in nonunanimous cases (Table 5) illustrates how small changes in personnel could affect the direction of policy outcomes. Similarly, comparison of the majority participation scores of Justices Brennan and Marshall (the mainstays of the late Warren Court) with the scores of Chief Justice Burger in each natural Court highlights shifts in the internal balance of power (see Table 6).

Table 5

Changing Support for Civil Liberties in Nonunanimous Cases

	Claims Accepted	Claims Rejected	Percent Accepted
Court 79 (1967-69)	141	27	83.9%
Court 80 (1969-70)	26	21	55.3%
Court 81 (1970-71)	29	50	36.7%
Court 82 (1971-72)	15	13	53.5%
Court 83 (1972-75)	88	164	34.9%
Court 84 (1975-78)	75	133	36.0%

The final years of the Warren Court (Court 79: 1967-69) mark a high point in support for libertarian claims in the Supreme Court. In 83.9% of the nonunanimous civil liberties cases, a majority of the Justices favored a libertarian claim. Almost invariably members of the majority in this Court were Justices Brennan and Marshall, whose majority participation scores of 98.4% and 96.4%, respectively, placed them one and two in voting on the winning side. Not only did this Court reaffirm the libertarian doctrines of

89. Orren, *supra* note 87, at 725, 733.

Table 6

Majority Participation Scores on a Court in Transition

	Brennan		Marshall		Burger	
	Majority Participation Percentage	Rank	Majority Participation Percentage	Rank	Majority Participation Percentage	Rank
Court 79 (1967-69)	98.4%	1	96.4%	2	—	—
Court 80 (1969-70)	87.1%	3	92.5%	1	69.8%	7
Court 81 (1970-71)	77.0%	6 (tie)	76.4%	8	86.0%	2
Court 82 (1971-72)	80.8%	4	91.8%	2	74.0%	6
Court 83 (1972-75)	67.2%	8	69.3%	7	84.8%	4
Court 84 (1975-78)	66.1%	9	69.6%	8	85.4%	4

the previous fourteen years under Earl Warren, but it also moved out into new frontiers of civil liberties.

The resignation of Justice Fortas, the retirement of Chief Justice Warren, and the appointment of Chief Justice Burger slowed the expansion of rights valued by the Warren Court majority, but did not result in wholesale adoption of values and policies favored by the new Chief Justice and the President who appointed him. While Court 80 (1969-70) voted to uphold civil liberties claims in a clear majority of nonunanimous cases, the decline in pro-civil liberties voting from the baseline years of 1967-69 was sharp enough to indicate a trend. Yet, this was not a Burger Court, as the new Chief Justice ranked seventh in majority participation score, dissenting in more than thirty percent of the cases decided in his first Term. Although Justice Marshall ranked first in majority participation percentage, and Brennan third, their scores dropped noticeably from the high levels of Court 79.

The libertarian Justices' fears of loss of control were realized when a second Nixon appointee took his seat on the Court in 1970. With Blackmun as a firm ally, Burger was increasingly able to pick up the additional votes necessary for his position to prevail. His majority participation score jumped from 69.8% in Court 80 to 86% (second among the Justices) in Court 81 (1970-71). The majority participation scores of Brennan and Marshall again dropped—this time rather precipitously—to ranks of sixth (tied with Black) and eighth within the Court. In several cases the new conservative majority severely limited libertarian Warren Court precedents by combining the votes of the "Minnesota Twins" with those of holdover dissenters from the Warren Court. Overall the Court's support for civil liberties claims fell to a new low of 36.7% of the nonunanimous cases.

However, the emergence of the new majority was interrupted by the departure of Harlan and Black in the fall of 1971. In a Court of seven Justices the trio of Douglas, Brennan, and Marshall needed only one additional vote to prevail when they voted as a bloc. Overall, Court support for civil liberties claims edged back over the fifty percent mark, while the majority participation scores of Brennan and Marshall rose slightly, though not to the level of 1969-70. Burger's majority participation score, on the other hand, dropped to seventy-four percent, sixth on a Court of seven Justices. Several landmark decisions recalled the libertarian heyday of the Warren Court.

The libertarian gains of Court 82 proved transitory. With the appointment of Justices Rehnquist and Powell, Chief Justice Burger at last gained the allies needed to redirect the Court into less libertarian paths.[90] Thus, it was the voting patterns of the year after Blackmun's appointment that reemerged in the mature Burger Court. In the three and one-half years of Court 83 (1972-75), the Court rejected the civil liberties claim in more than sixty-five percent of nonunanimous cases. The Chief Justice's majority participation score stabilized at about eighty-five percent, fourth among the Justices. Meanwhile the majority voting records of Brennan and Marshall fell to new lows. The replacement of Douglas by Stevens in 1975 made little difference overall, with support for civil liberties claims remaining at the thirty-six percent level in the first three years of Court 84 (October 1975-July 1978). However, with the retirement of Douglas, Marshall and Brennan dropped into the bottom two positions in majority voting percentage.

By tracing these measures of support for civil liberties claims and majority participation over the several natural Courts of the Burger era, we obtain rough measures of the progress of President Nixon's efforts to transform the Court. In the final analysis it appears that Nixon was quite successful in appointing Justices who would slow, if not halt, the libertarian drive of the late Warren Court. This is not to say that the Burger Court was always a "Nixon Court" after 1972. Clearly it was not, particularly in its highly-publicized decisions in cases in which the principle of checks and balances was at stake.[91] Nonetheless, the contrasts between the late Warren Court and today's Court are sharp. Today the Burger Court consistently rejects a substantial majority of civil liberties claims. Several of the Warren Court's most noted libertarian precedents have been reversed, modified, undermined, or eroded.[92] Justices Brennan and Marshall—once the occupants

90. By "less libertarian," I mean only that the Court under Burger was more likely to reject libertarian claims than under Warren. *See* C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 227 (1954). As Henry J. Abraham has pointed out, the Burger Court has rendered some significant decisions favorable to libertarian claims. *See* Abraham, *Of Myths, Motives, Motivations, and Morality: Some Observations on the Burger Court's Record on Civil Rights and Liberties*, 52 NOTRE DAME LAW. 77 (1976).

91. United States v. Nixon, 418 U.S. 683 (1974); United States v. United States District Court, 407 U.S. 297 (1972). For an earlier analysis, see Howard, *Is the Burger Court a Nixon Court?*, 23 EMORY L.J. 745 (1974).

92. *E.g.* Stone v. Powell, 428 U.S. 465 (1976), *rev'g* Kaufman v. United States, 394 U.S. 217 (1969); Hudgens v. NLRB, 424 U.S. 507 (1975); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), *overruling* Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Labine v. Vincent, 401 U.S. 532 (1971), *distinguishing* Levy v. Louisiana, 391 U.S. 68 (1968); Harris v. New York, 401 U.S. 222 (1971), *distinguishing* Miranda v. Arizona, 384 U.S. 436 (1966).

of the "center of gravity" in the Warren Court—have become the Burger Court's most frequent and most vocal dissenters. The trend is clear. The transformation of the Court may be attributed in substantial part to changes in personnel—changes that flowed directly from Nixon's campaign attacks on the Warren Court.

More generally, this analysis of changing voting patterns in the years of transition from the Warren to the Burger Court points to several situational factors that affect the ability of a President to alter the course of judicial decisions through exercise of the appointment power. A President who seeks to change the Court—as Nixon did—can succeed only if there are vacancies to fill. Vacancies alone are not enough; the vacancies must occur among Justices whose views differ from the position of the appointing President. Particularly crucial are the voting patterns of the sitting Justices. A President with allies already on the Court will be able to effect changes much more rapidly than one who must overcome a Court staffed entirely by opponents of his policies.

All of these factors worked in Nixon's favor to some degree. With two vacancies in six months and four in his first term, Nixon's opportunities to select Justices exceeded those afforded all but a handful of previous Presidents.[93] Moreover, the first two vacancies were in seats previously held by Justices in the forefront of the judicial revolution Nixon had opposed in his campaign. Finally, Nixon had the advantage of allies already on the Court, as many of the decisions opposed by Nixon—most notably *Miranda*[94]—had been rendered by a divided Court over impassioned dissents.

Even with these advantages Nixon was not able to bring about an *immediate* turnaround in the direction of the Court's policy. Senate refusal to confirm southern nominees Haynsworth and Carswell left Burger a sometimes lonely dissenter in his first year on the Court. Even with the confirmation of a second Nixon appointee, the reaction against Warren Court libertarianism remained cautious. Only after Nixon had filled all four vacancies did the Burger Court begin to make serious inroads on the work of the Warren Court. And even in the mature Burger Court the change has been relative, not absolute.[95] Nixon's appointees have

93. R. SCIGLIANO, *supra* note 3, at 86.
94. 384 U.S. 436 (1966).
95. R. FUNSTON, *supra* note 36, at 372.

not always followed the President's wishes, and in a number of significant decisions Burger Court majorities have moved out in new directions to support civil liberties claims.[96]

What then of future prospects? Might President Carter or another Democratic President use the appointment process to reestablish a court more favorable to civil liberties claims? Clearly, the 1980 presidential election will be crucial in determining *opportunities* for such change. The lesson of Carter's first three and one-half years is that most Presidents are not as fortunate as Nixon as far as vacancies on the Court are concerned. Moreover, it must be noted that more cases have been decided against civil liberties claimants with votes to spare than by close margins. In short, if changes comparable in magnitude to those observed in the transitional years of the Burger Court are to occur again, it will require election for more than a single term of a President as dedicated to the goal of reversing the Court's trend as was Nixon.

96. *See* Abraham, *supra* note 90, at 77-80.