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MR. JUSTICE WHITTAKER

*Marlin M. Volz**

As a spring blizzard raged through Kansas, one of its most gifted sons assumed his seat on the nation's highest Court and quietly subscribed to the oath:

I, Charles E. Whittaker, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

Unlike the cold wave sweeping through his boyhood town of Troy, Kansas, on this 25th day of March 1957, the weather outside the court building was moderately warm but the seat he took on the extreme right end of the bench was warmer. By the end of the term it would be hotter — much hotter. Suggestive of the angry protests still emanating from the school segregation decision were the overcast sky and the gusty wind on this March day. Visitors leaving the Court at the end of the day's session might have observed that the weather looked as though it would blow in a storm. On June 17, 1957, the gale struck with the

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announcement of the *Yates*, *Service*, *Watkins* and *Sweezy* decisions.

If the motto "Equal Justice Under Law" above the front entrance of the Supreme Court building was in keeping with its opinion in the school segregation cases, surely the words chiseled above the rear end of the structure "Justice The Guardian of Liberty" were in harmony with the Court's vigorous championship of individual rights. Since the members of the Court use the back entrance, one wonders what inspirational effect such words may have upon their determinations. In any event, by July 1st of last year no one could doubt that the Supreme Court was the guardian of the liberties of defendants in criminal or contempt proceedings.

Mr. Justice Whittaker Took No Part

With only Justice Clark dissenting, the Supreme Court in the *Jencks* case¹ in an opinion handed down on June 3, 1957, by Mr. Justice Brennan aroused a storm of criticism by holding that the defendant had a right to inspect all reports of two government witnesses in the sacrosanct F.B.I. records. Hardly had the critics of the Court regained their breath, when on Monday, June 17, 1957, the Court announced decisions which had the effect of acquitting five Los Angeles Communists and granting a new trial to nine others convicted under the Smith Act,² of reversing the loyalty-risk discharge of former diplomat John Stewart Service,³ of reversing the contempt of Congress conviction of labor organizer John Watkins,⁴ and of reversing the contempt conviction of Paul Sweezy, dismissed as lecturer at the University of New Hampshire for refusing to answer questions concerning alleged subversive activities.⁵

¹ *Jencks v. United States*, 353 U.S. 657 (1957). Justices Frankfurter, Burton, and Harlan separately concurred. Justice Whittaker did not participate.

² *Yates v. United States*, 354 U.S. 298 (1957). Majority opinion by Justice Harlan, separate concurring opinions by Justice Burton and Justices Black and Douglas, the latter two also dissenting in part. Justice Clark dissented. Justices Brennan and Whittaker did not take part.

³ *Service v. Dulles*, 354 U.S. 363 (1957). Unanimous decision written for the Court by Justice Harlan. Justice Clark did not participate.

⁴ *Watkins v. United States*, 354 U.S. 178 (1957). Majority decision by Chief Justice Warren, concurring opinion by Justice Frankfurter, dissent by Justice Clark. Justices Burton and Whittaker took no part.

⁵ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) Justices Black, Douglas and Brennan joined Chief Justice Warren in the majority opinion. Justices Frankfurter and Harlan separately concurred. Dissenting were Justices Burton and Clark. Justice Whittaker did not participate.

Without in many cases mentioning the due process considerations prompting the Court's actions, articles appeared bitterly denouncing the Court, particularly in the so-called patriotic journals. Cried the American Legion magazine in an article by J. B. Matthews,⁶ "On Red Monday, June 17, 1957, the Supreme Court handed down a batch of decisions which brought jubilation to the ranks of subversives all over the United States." Editorialized *Life* magazine,⁷ "at least two grounds [exist] on which sober friends of the Bill of Rights can refuse to join the liberal torchlight processions." And *Time* magazine commented:⁸ "Not since the nine old men shot down Franklin Roosevelt's Blue Eagle in 1935 has the Supreme Court been the center of such general commotion in newspapers and in the bar. The *New York Times* trotted out the kind of headlines usually reserved for war or disaster."

This is not to say that the critics were correct in their appraisal of the Court and its decisions; but it must be conceded that at the end of the 1956 term, they were much more vocal in their criticisms than were the friends of the Court in their support. This focused the attention of the legal world upon Mr. Justice Whittaker because he had been appointed too late to participate in the controversial decisions, except the one reinstating John Stewart Service. Remaining unanswered were the questions posed by *U.S. News and World Report*:⁹ "Down which road? In his decisions will he be 'liberal', 'conservative', 'middle of the road'?" *Life* magazine observed that "his role in the Warren court is not yet known,"¹⁰ and *Time* magazine called him "still the Court's big question mark."¹¹

The Supreme Court Justices, including Justice Whittaker, could not escape controversy even during the summer recess for they were called back for a special sitting to hear the *Girard* case.¹² After stating the facts and making a general assertion of the law, the Court in a per curiam decision reversed the lower court, held that Japan had jurisdiction to try Girard and stated that "the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches."

⁶ Oct., 1957, p. 14.

⁷ July 1, 1957, p. 30.

⁸ July 1, 1957, p. 11, col. 3.

⁹ *U.S. News and World Report*, April 5, 1957, p. 19.

¹⁰ *Life*, July 1, 1957, p. 36.

¹¹ *Time*, July 1, 1957, p. 13.

¹² *Wilson v. Girard*, 354 U.S. 524 (1957). Justice Douglas did not participate.

The Court's Techniques Are Criticized

In recent years considerable criticism has been directed at the quality of Supreme Court opinions and this naturally increases interest in Justice Whittaker's skill as a judicial craftsman. Following are the most common complaints leveled at some of the Court's judicial techniques and practices.

The per curiam opinion in the *Girard* case pointed up the increasing use which the Court was making of this device to dispose of cases without reasoning through to a conclusion. This was stressed by Professors Bickel and Wellington in their recent article in the *Harvard Law Review*.¹³

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, in opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.¹⁴

Criticism of summary per curiam opinions has also come from within the Court itself as witness Justice Clark's dissenting opinion in *Gold v. United States*.¹⁵ Such opinions do not decide the issues urged upon the Court for decision by counsel unless ruled by a cited case, and, for this reason, they are particularly distressing to the litigants as well as to the trial judge where he has been reversed without a statement of reasons. Justice Clark's dissent in the *Gold* case merits extended quotation:

I am also disturbed by the refusal of the Court to decide other important questions urged upon us by both parties and ready for disposition. Among these are It seems to me that proper judicial administration requires this Court to decide these important issues, particularly since they will again arise at the retrial. Furthermore, similar cases involving the same legal points are pending in various districts throughout the country. The refusal of the majority today to pass upon them thus deprives the federal judiciary of this Court's opinion,

¹³ Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

¹⁴ *Id.* at 3. The article continues on the same page: "This is very possibly a feature, even if not always a deliberate one, of the Court's response to today's controversy. The controversy has undoubtedly and understandably increased the pressure for unity within the Court and placed a great premium on opinions which have the vacuity characteristic of desperately negotiated documents. Moreover, the less an opinion says, the less there may be in it for critics of the Court to seize upon for their own purposes; and one wonders whether it is not for this reason also that opinions have, of late, often said very little and have carried an air of assertion, as opposed to one of deliberation and rational choice."

¹⁵ 352 U.S. 985 (1957).

which renders today's error multifold. It will cause undue hardship in the trial of all of these cases, not only on the Government but on the defendants as well. I therefore dissent.¹⁶

Another criticism, which has arisen principally from the school segregation and *Watkins*¹⁷ cases, is that the Court leans too heavily in some instances on historical, emotional and sociological considerations and insufficiently on conventional legal authorities and reasoning. This reproach is not limited to legal journals. *Time* magazine on July 1, 1957, referring to the school segregation decision, commented: "While millions cheered the result, many lawyers had an uneasy feeling that it hung on too much sociological ballooning and not enough legal ballast."¹⁸ *Life* magazine's editorial of the same day was even more severe: "Instead of precedent, it leans on sociology and public opinion; it overrules itself without making the law any clearer, let alone any more predictable."¹⁹

In advising clients, lawyers must be able intelligently to determine the present state of the law and also to prophesy with reasonable accuracy its future development. Unquestionably the Supreme Court in recent years has compounded the work of the lawyer both in ascertaining what the present law is and in predicting what it will be tomorrow and the next day. The difficulty is due largely to the multiplicity of opinions in many cases, which obscures the holding of the Court, and in the inordinate proclivity of the Court to divide.

In judging the work of the Court and in evaluating criticisms directed against it, the staggering work load and the awful responsibilities of the nine justices must be kept in mind. Most distressing was the significant rise in the business of the Court and the increase in the backlog of cases occurring during the 1956 term. In its survey of the work of the Court for this term, the *Harvard Law Review*²⁰ reported:

The most significant set of figures concerning the work of the 1956 term is the total number of cases placed on each of the various dockets. Although the number of cases disposed of by the Court increased, the number of cases remaining on the dockets at the end of the term rose significantly.

Overburdened, the members of the Court simply do not have the time for independent research and reflection and for the har-

¹⁶ *Id.* at 986.

¹⁷ *Watkins v. United States*, 354 U.S. 363 (1957).

¹⁸ *Time*, July 1, 1957, p. 12.

¹⁹ *Life*, July 1, 1957, p. 30.

²⁰ *The Supreme Court, 1956 Term*, 71 *HARV. L. REV.* 81, 95 (1957).

monizing of views through conference and discussion. It is interesting to note that hand in hand with the increase in the total number of cases before it went a marked increase in the number of its dissenting and concurring opinions. For the 1956 term only 29% of the decisions in which full opinions were written²¹ were unanimous.

A study of the dissenting opinions is particularly revealing in that it shows the customary alignments of the justices and the proclivity of individual members of the Court to dissent or concur in separate opinions. While it is dangerous to generalize, since the alignments are not hard and fast, one conclusion is inescapable: the Eisenhower appointees do not vote as a block. Another safe assumption is that Justices Black and Douglas will be together. Joining them frequently are Chief Justice Warren and Justice Brennan. Excluding Justice Whittaker, at the end of the 1956 term a strong tendency for two or three and sometimes all four of the other justices to align themselves together could be observed. Where the Court seriously divided, Justices Frankfurter, Burton, Clark and Harlan, or at least three of them, were usually found on the same side.²²

With the Court thus falling loosely into two groups of four justices each, Justice Whittaker's vote on close questions could easily be decisive. Which foursome, if either, will he most likely join? Lest we are carried away at this point in assigning an undue importance to his one vote, it must be recalled that most of the controversial decisions of recent years were not 5 to 4 holdings. The vote in the school segregation decision was 9-0, in *Jencks* 7-1, in *Yates* 7-0, in *Watkins* 6-1, in *Service* 8-0, and in *Sweezy* 6-2. This is not to minimize the importance of Justice Whittaker's vote or his influence upon the votes of other justices, for he excels in the art of persuasion and argumentation. In view also of the serious criticisms directed at the quality of some of its opinions and at some of the Court's techniques and practices, his skill as a judicial craftsman and his views on judicial administration should be of about as much interest to lawyers as whether he is a liberal, conservative, or an independent thinker.

It is time to look at his record.

²¹ *Id.*, Table IV (B) at 103. The authors of the survey also write: "This increase in business was also reflected in the total number of opinions written by the justices which increased by 27% over the number written during the 1955 term. The number of dissenting opinions showed a marked increase while the number of unanimous opinions declined." *Id.* at 95.

²² These alignments, not fast to be sure, are borne out by table IV (B) of the Harvard Supreme Court Note, *id.* at 103.

His Background

It is the strength of America that an able and willing individual as Justice Whittaker can rise to the top almost entirely through his own efforts. His parents and family, his law school, his office associates, and the smiles of fortune all contributed to his success, but essentially he is a self-made man. Born on Washington's birthday in 1901 on a 320 acre farm near Troy, Kansas, he attended a one-room, one-teacher country school and rode six miles on horseback to high school, dropping out regretfully before graduation. Loving the law from his earliest recollection, he earned \$700 from trapping and plowing and at nineteen years of age was permitted to enter the Kansas City School of Law (now the University of Kansas City School of Law), which then was an evening law school. He worked his way through the law school as a part-time office boy for a leading Kansas City law firm, Watson, Gage and Ess. At the same time he completed his high school studies by private tutoring.

Upon passing the Missouri bar examination he was admitted to practice in 1923, one year before graduation from the law school. He took a position with the law firm which he had served as office boy, becoming a junior partner in 1930 and a full partner in 1932. In 1953 he was elected President of the Missouri Bar, Integrated. On July 19, 1954, by appointment of President Eisenhower he took office as United States district judge for the Western District of Missouri. On June 22, 1956, he was elevated to the United States Court of Appeals for the Eighth Circuit; and, on March 25, 1957, he took the oath and assumed his place as an associate justice of the United States Supreme Court.

His Qualifications for the Federal Bench

During all this time he displayed a passionate, 100% devotion to the law and to the perfection of his own talents. A prominent Kansas City lawyer, and a close friend of his, recently wrote:

Charlie always was interested in oratory and especially oratory of the court room variety. He also was deeply interested in beautiful language contained in court opinions. He was particularly intrigued by the language of Judge Trimble in the case of Meredith v. Krauthoff, 177 S.W. 1112 [Missouri], a child custody case of more than passing interest. As a young lawyer, he memorized a great portion of that opinion and used to recite it with fine oratorical effect and considerable emotion.

He was interested in fine legal logic and reasoning and equally interested in seeing such fine legal logic and reasoning expressed in beautiful language.

Charlie always loved to argue. He was a born advocate. Often, I would be working on some legal problem and would state it to him, hoping to obtain agreement upon my views. He would invariably take the opposite side and point out every conceivable weakness of my position. Of course, he was more helpful to me in taking that attitude, but it shows his disposition and quick and fertile mind.²³

Justice Whittaker admired, observed and often emulated the great trial lawyers of his day. Senator James Reed was a favorite. One of his best imitations is of the Senator announcing himself ready for trial and, when he did so, added Mr. Whittaker, no one could doubt that his client was well represented. Nor was there ever any doubt about the adequacy of the representation of any of Mr. Whittaker's clients.

He has a phenomenal knowledge of law and grasp of the fundamentals, both of substance and procedure. Above all he knows how to dig deeply in researching a problem, to use effectively legal authorities and to state a proposition logically, clearly and precisely. Especially, he is adept in the use of judicial decisions. When he entered the judiciary after thirty years of his kind of law practice, he was not only well prepared for the trial bench but he thoroughly appreciated the role of the judge in the American legal system. He knew what the lawyer expected from the judge in presiding at trials and in writing opinions. He understood the functions of the written judicial opinion from the lawyer's standpoint, which, among others, are clearly to decide and dispose of the case, state the facts and the issues precisely, answer the meritorious contentions of counsel, define the limits of the holding where misinterpretation is possible, and through strong and convincing reasoning arrive at conclusions which gain a reasoned and general acceptance. On the bench he would be a lawyer's judge. His "closely reasoned, clearly stated opinions" as a district and court of appeals judge undoubtedly were a major factor in his elevation to the High Court.²⁴

But let Justice Whittaker himself state the reasons President Eisenhower gave for his selection as reported in the *New York Times*. In answering a question as to what the President had said to him, he stated:²⁵

The President said he felt my long and active experience as a trial lawyer, then as a trial judge, followed by experience as an

²³ Letter to the writer from Walter A. Raymond, Dec. 20, 1957.

²⁴ See *Time*, March 11, 1957, p. 17, col. 3.

²⁵ *N.Y. Times*, March 3, 1957, p. 58, col. 3.

appellate judge, admirably qualified me as a Supreme Court Justice.

Though a life-long Republican, he had never been active in politics. Though he ardently expressed his position on legal questions, particularly at the lawyers' table in Wolferman's Tiffin Room in Kansas City, his views on controversial public questions were not on record and were generally unknown by even his closest friends. There was no problem of being consistent with prior statements and actions. He had crusaded for no cause except the better practice of law and the administration of justice. He had no past commitments. When he took the oath on March 25, 1957, he was free to call each case as he saw it, after careful study and consideration; and no one who knew him had any doubt but that he would do so. "I read the law only for understanding of its meaning," he has said, "and apply and enforce it in accordance with my understanding."²⁶

His Appointment Is Acclaimed

That Justice Whittaker fitted the specifications held by interested persons for a Supreme Court Justice is evident by the wide and nearly universal acceptance which the announcement of his appointment received. Bernard G. Segal, Chairman of the American Bar Association's Standing Committee on the Federal Judiciary²⁷ praised the appointment: "The nomination of Judge Whittaker meets the highest standards of the American Bar Association." The Judiciary Committee and the Senate speedily approved his nomination. Of magazines and newspapers only *Nation*²⁸ seemed critical and its criticism was based on his decision as a United States district judge in the *Davis* case,²⁹ in which he dismissed Davis' complaint against the University of Kansas City. His language in that case is worthy of extensive quotation since it is likely that similar questions will be presented to the Supreme Court:

This squarely presents the question of whether plaintiff's refusal to answer the questions propounded to him by University officials at the meeting of August 4, 1953, asking whether or not he is or ever was a member of the Communist party, constitutes "adequate cause" for his dismissal.

I believe it does. Plaintiff had a lawful right, under the Fifth Amendment to the Constitution, to refuse to answer, and no

²⁶ As reported in *Life*, July 1, 1957, p. 36.

²⁷ *N.Y. Times*, March 3, 1957, p. 58, col. 4

²⁸ 184 *THE NATION* 245 (1957).

²⁹ *Davis v. University of Kansas City*, 129 F. Supp. 716 (W.D.Mo. 1955).

inference of criminality can be drawn from his failure to answer. But he did not have a Constitutional right to remain a public school teacher. And the refusal of a teacher — in a most intimate position to mould the minds of the youth of the country — to answer to the responsible officials of the school whether he is a member of a found and declared conspiracy by a godless group to overthrow our government by force, constitutes an “adequate cause” for the dismissal of such a teacher. 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 question 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 . . . had they not dismissed him.³⁰

From this language it is more logical to suppose that Justice Whittaker would have joined in the dissent in the *Sweezy* case, rather than sided with the majority, had he participated in its consideration and decision.

His Prior Judicial Experience

During his twenty-three month tenure as a United States district judge for the Western District of Missouri,³¹ forty-seven of his opinions appear to have been published: thirty-six in volumes 122 through 141 of the Federal Supplement and eleven in volumes 16 through 18 of the Federal Rules Decisions. The bulk of these concern rulings on motions; eight for summary judgment,³² seven to dismiss,³³ four to quash service,³⁴ five relating to discovery proceedings, three to modify previous orders, two for a more definite statement, and one each, to set aside a default judgment, for a bill of particulars, to intervene, and to add a party plaintiff. Three opinions involved criminal matters — two for habeas corpus and the third, a motion by the defen-

³⁰ 129 F. Supp. at 718.

³¹ He served in such capacity from July 19, 1954, to June 22, 1956.

³² The subject matter of such actions involved serviceman’s life insurance, assault and battery, treble damages for excessive rents, rescission of sale of stock, real party in interest, liability of owner of automobile, revelation of trade secrets, and accord and satisfaction.

³³ The grounds for such motions were: improper venue (2), failure to state a claim for which relief could be granted (4), and operation of statute of limitations (1).

³⁴ In each instance the main issue was the validity of service upon a foreign corporation.

dant to vacate a sentence imposed after a guilty plea. The remaining decisions concerned the following: bankruptcy (2), Clayton Act (1), refund of income tax (1), trusts (1), injunction (1), chattel mortgages (2), landlord and tenant (1), creditors' rights (1), and patents (1). While many of the matters considered in these opinions do not ordinarily reach the Supreme Court, it is significant that his first opinion as a justice of that Court involved a venue problem,³⁵ similar to those which he was accustomed to deal with as a district judge.

For nine months he was a judge on the United States Court of Appeals for the Eighth Circuit, during which time he participated in thirty-three decisions.³⁶ He wrote the opinion for the court in eleven instances and filed one dissenting opinion.³⁷ Seven of the appeals were from decisions of the Tax Court, one from the Federal Trade Commission, one from the NLRB and one from an order of the Secretary of Labor. The remaining decisions involved questions relating to bankruptcy (3), criminal law (5), contracts (1), condemnation (1), trusts (2), insurance (5), torts (3), procedure (2), and writ of prohibition (1).

During his service on the Court of Appeals, he was assigned on several occasions to hear district court matters; and, in this capacity he wrote three additional opinions, which appear in volumes 146 and 147 of the Federal Supplement. One of these, *Carpenter v. Borden*,³⁸ was a trademark case which he heard in an Iowa district court; and, in the other two instances, he wrote the opinions in *Jones Truck Lines, Inc. v. United States*³⁹ and *Arkansas Public Service Comm'n v. United States*⁴⁰ while serving as the circuit court member on two three-judge district courts sitting in Arkansas to review orders of the Interstate Commerce Commission.

What conclusions, beyond the obvious, may be drawn from his experience on the federal bench prior to assuming his seat on the Supreme Court? First, his reputation as a sure-footed, hard-working legal scholar was immensely enhanced and con-

³⁵ *Fourco Glass Co. v. Transmirra Products Co.*, 353 U.S. 222 (1957).

³⁶ Justice Whittaker served on the Eighth Circuit Court of Appeals from June 22, 1956, to March 25, 1957.

³⁷ In *Fitts' Estate v. Commissioner*, 237 F.2d 729 (8th Cir. 1956), he dissented from the majority holding that the evidence supported the Tax Court's finding of the fair market value of stock for estate tax purposes. In one other instance he dissented without opinion. *Milwaukee Insurance Co. v. Kogen*, 240 F.2d 613 (8th Cir. 1957).

³⁸ 147 F. Supp. 445 (S.D. Iowa 1956).

³⁹ 146 F. Supp. 697 (W.D. Ark. 1956).

⁴⁰ 147 F. Supp. 454 (E.D. Ark. 1956).

cretely demonstrated.⁴¹ Secondly, he assisted materially in clearing up lagging dockets, which quality should prove useful in coping with the Supreme Court's mounting backlog.⁴² Thirdly, he showed a capacity for getting on well with his judicial associates; and, as a judge of the court of appeals, he learned the fine art of the give and take of the conference table in harmonizing and reconciling differences of opinion, in recognizing the validity in the views of others while confirming those of his own and in arriving at unanimity through discussion. Fourthly, his opinions were models of orderliness, of the use of direct, exact and concise language, of logical, careful and persuasive reasoning, of the expert analysis and application of legal authorities. They were readable and to the point. There could be no doubt as to what the court had held. In short, he showed himself to be a top-flight judicial craftsman.

His Judicial Skills

His opinions are pleasing to the lawyer because they state the facts orderly and concisely, set forth the issue before the court with exactness, deal with each meritorious contention of counsel, reason convincingly to the conclusion, and announce the holding of the Court with unmistakable definiteness. His ability to cut to the heart of a proposition and reduce it to language easily understood is well demonstrated by his dissent in *Fitts' Estate v. Commissioner*:⁴³

The issue was: what was the fair market value, per share, of the stock in question at the date of Mrs. Fitts' death on February 10, 1949? As correctly said by the majority, fair market value is the price that a willing buyer would pay and a willing seller would take for the property — in other words, it is what you could get for it.

Petitioners returned this stock at \$150.00 per share. The Commissioner set it up at \$600.00 per share. The Tax Court found its value to be \$375.00 per share — an exact split of the difference between the parties. This is reminiscent of the pun about the old justice of the peace who made his decisions upon the basis that there are three sides to every lawsuit — the plaintiff's side, the defendant's side and the right side, which

⁴¹ Life, July 1, 1957, p. 36, commented: "He will likely make his decisions as a legal scholar." Time magazine wrote, on the same day, that "his opinions were lauded by the bar for their reasoning." Time, July 1, 1957, p. 13.

⁴² Time, March 11, 1957, p. 16, observed: "In both courts, hardworking, scholarly Judge Whittaker did much to clear up lagging dockets, and his closely reasoned, clearly stated opinions won favorable attention throughout the Justice Department."

⁴³ 237 F.2d at 734.

is the middle. Upon what evidence does that finding rest? I think none at all.

His unusual ability to come directly to the point and to state his own view positively by precise, pithy phraseology is illustrated by *Smith v. Christian*⁴⁴ — and this is typically Whittaker:

The question, thus, is whether defendants . . . were . . . person[s] . . . in charge of the motor vehicle . . . with the express or implied consent of the owner

Plaintiff says yes. Defendants, Stevens and Metcalf, say no.

There is no decision in Missouri precisely upon the question....

That he is capable of strong feelings and of giving forcible expression to them is apparent from a reading of *Miller v. United States*,⁴⁵ in which the government's answer challenged his jurisdiction to hear a suit by a widow for proceeds of a serviceman's life insurance policy. Wrote Judge Whittaker:

Upon first reading, this position shocks the conscience. Further study of the law has not changed my first impression. Servicemen who lose their lives in the service of our country, and the families of those men, are not the discretionary cestuis of a beneficent Veterans Administration, but, rather, are the beneficiaries of a grateful America, whose Congress, by the adoption of Subchapter II of Title 38 U.S.C.A. gave them a vested property right in the life insurance thereby afforded.⁴⁶

And feel the freshness and vivaciousness of his language when he was compelled to hold against a plaintiff in a pathetic plight:⁴⁷

The facts giving rise to these actions are indeed "story book", and are as "unbelievable" in this modern age as they are interesting. . . .

While I have great sympathy for him, and, I think rather naturally, would like to find a way to protect him even against his own folly, which may be likened to the Greek philosopher who stepped in a well while looking at the stars and from which came the maxim "He who looks sees the peril that the heedless encounter", but I have been unable to find a basis in the law that gives any right to him against this defendant.

One of the criticisms of the Supreme Court noted earlier is that it occasionally summarily disposes of a case without giving the litigants and the lower court the satisfaction of discussing their contentions. In his opinions, both as a judge on the district

⁴⁴ 124 F. Supp. 201, 202 (W.D. Mo. 1954).

⁴⁵ 124 F. Supp. 203 (W.D. Mo. 1954). The quoted language was adopted by Chief Judge Clark in *Wilkinson v. United States*, 242 F.2d 735, 736 (8th Cir. 1957): "We agree with the forceful and persuasive opinion of Judge, now Mr. Justice, Whittaker in *Miller v. United States*. . . . We shall follow it."

⁴⁶ *Id.* at 204-05.

⁴⁷ *Farm Bureau Cooperative Mills and Supply, Inc. v. Blue Star Foods, Inc.*, 137 F. Supp. 486, 488, 491 (W.D. Mo. 1956).

court and on the court of appeals, Justice Whittaker took pains carefully to consider each contention and to answer it effectively. If he thought the proposition without merit, he said so. In *Southern Kansas Greyhound Lines v. United States*,⁴⁸ he concluded, "This treats with all of the points raised by the plaintiffs and shows that they are each without merit."

If the parties had briefed and submitted an important question, he considered it even though it might have been sidestepped. In *Wessing v. American Indemnity Co.*,⁴⁹ he could have avoided the troublesome question of whether the plaintiff must first pay the judgment before suing an insurance company for bad faith in failing to settle a suit within the policy limits. But, having practiced law for thirty years, he knew the importance of a definitive answer to the problem. Stated Judge Whittaker:

But, to rest this decision, solely, upon the fact that at least nominal damages would be recoverable, if plaintiffs make a submissible case of "bad faith", would be unsatisfactory and to leave the substantive question dangling. . . .

And in *Exhibitors Service, Inc. v. Abbey Rents*,⁵⁰ he answered questions as to jurisdiction and venue upon a motion to amend a complaint to include a foreign corporation, even though such amendment would be granted "as of course" and the jurisdictional question considered on later motions. The parties had briefed the point and filed affidavits; and they urged him to decide the matter before they brought in a party as to which jurisdiction and venue might be lacking.

Sometimes counsel raised a point without supporting authorities; and, in those instances, he researched the proposition on his own and considered it. His opinion in *United States v. Harris*,⁵¹ is an example:

The District Attorney then questions, however, whether the matter of limitations is jurisdictional, or a mere procedural matter of affirmative defense which was waived by defendant through failure to assert it defensively and by his plea of guilty; and, without citation of authority, he states the latter to be his view and checks the question up to the Court for decision.

If there were danger that the scope of a decision might be misunderstood or extended beyond his intention, he included a statement defining its boundaries. Thus, in *In re McKinley*,⁵² he wrote:

⁴⁸ 134 F. Supp. 502, 511 (W.D. Mo. 1955).

⁴⁹ 127 F. Supp. 775, 780 (W.D. Mo. 1955).

⁵⁰ 135 F. Supp. 112 (W.D. Mo. 1955).

⁵¹ 133 F. Supp. 796, 798 (W.D. Mo. 1955).

⁵² 138 F. Supp. 4, 8 (W.D. Mo. 1956).

I desire to say and to make most explicit that I have here dealt only with chattel mortgages and have not considered or in any way dealt with the recording of instruments affecting real estate.

Again, it is Whittaker's experience as a lawyer speaking, because he is aware of the sensitiveness of real estate titles.

His skill in clear thinking, logical reasoning is evident in almost all of his opinions. A good example is *General Electric Co. v. Central Transit Warehouse Co.*,⁵³ in which he argued:

We recognize, of course, that venue can be waived. So can jurisdiction over the person be waived. But does such a waiver of either or both — made *after* an action has been "commenced" (by the mere filing of a complaint with the clerk *in any district . . .*) — establish that the action "might have been brought" there, in the sense of that phrase as used in Section 1404 (a), Title 28 U.S.C.A.? If it does, what, if any, meaning is left to the phrase "where it might have been brought", as adopted by Congress and used in the statute? Would not such construction be to read that phrase entirely out of the statute? Would not such construction permit transfer of the action to *any district desired by the moving defendants*, though they, or some of them, could not have been served with process there, and no statutory venue existed there, and the action could not have been *maintained* there, without their intentional waiver of venue and entry of general appearance?

His opinions give the impression of a judge who is very sure of himself and who has a strong conviction as to the correctness of his decisions. But he is humble and big enough to acknowledge his error as he did in granting a rehearing in *General Electric Co. v. Central Transit Warehouse Co.*⁵⁴

His confidence in his legal ability shows up in at least two other ways. He does not hesitate to point out to counsel that a cited case is beside the point or readily distinguishable.⁵⁵ And while he follows the law as he understands it, and has a reverence for precedent, he is quick to disregard a decision if he thinks it is wrong, unless it is binding upon him. Thus, in *Miller v. United States*,⁵⁶ he wrote:

Defendant cites and relies upon the case of *Brewer v. United States*, D.C., 117 F. Supp. 842. I am unable to agree with that decision.

⁵³ 127 F. Supp. 817; 825-26 (W.D. Mo. 1955).

⁵⁴ *Id.* at 827.

⁵⁵ Thus in *Cowley v. Auto Transports, Inc.*, 122 F. Supp. 689, 691 (W.D. Mo. 1954), he stated: "Plaintiff . . . presses . . . the case of . . . I find the case does not touch the question here." And in *Rosenfeld v. Continental Building Operating Co.*, 135 F. Supp. 465, 469 (W.D. Mo. 1955), he asserted: "Plaintiff . . . relies upon the case of . . . as controlling. But it is not at all controlling."

⁵⁶ 124 F. Supp. 203, 205 (W.D. Mo. 1954).

And again in *Southern Kansas Greyhound Lines, Inc. v. United States*,⁵⁷ he asserts:

It must be admitted that the Clarke case . . . holds. . . . But that case is out of harmony with every other case which we have been able to find upon the precise point here considered.

While his training and long experience as a lawyer is recognizable throughout his opinions, his early farm life occasionally shows through, as it did in *Miller v. Connell*:⁵⁸

This is not only opposed to the evidence, but is also opposed to the common practice — widely known in this area, even to the Court — which is that many cattle men run herds of brood cows on rented pastures in the Blue Stem area of Kansas for the production of a calf crop and that the area — even though open — is ideal for the purpose. And the notion that cows with suckling calves will gain weight on pasture is entirely erroneous. They do mighty well if they hold their own.

His Work on the Supreme Court

As an associate justice of the Supreme Court from March 25, 1957, through the end of the year, Justice Whittaker participated in fifty-nine published opinions (nineteen per curiam), writing three of the decisions for the majority and joining in dissenting opinions ten times. His first written opinion was in *Fourco Glass Co. v. Transmirra Products Corp.*,⁵⁹ involving the proper venue of a patent infringement suit. Speaking for eight of the justices (Justice Harlan dissented believing that the Reviser's Notes had been given undue weight), he held that the specific venue provisions of 28 U.S.C. § 1400(b) prevailed over the general venue statute, 28 U.S.C. § 1391(c).

The other two decisions both concerned habeas corpus proceedings by aliens facing deportation. In *Lehmann v. United States ex rel. Carson*⁶⁰ he found that the 1952 Immigration and Naturalization Act specifically provided for the deportation of an alien who had been convicted of two crimes, even though the operation of the statute of limitations in the immigration law under which he entered had given him a nondeportable status. Justices Black and Douglas dissented on the ground that the 1952 Act as so applied was invalid as ex post facto legislation.

Mulcahey v. Catalanotte,⁶¹ a companion case to *Lehmann*, involved similar questions and was similarly decided. Justices

⁵⁷ 134 F. Supp. 502, 506 (W.D. Mo. 1955).

⁵⁸ 141 F. Supp. 361, 363 (W.D. Mo. 1956).

⁵⁹ 353 U.S. 222 (1957).

⁶⁰ 353 U.S. 685 (1957).

⁶¹ 353 U.S. 690 (1957).

Black and Douglas again dissented.

It is noteworthy that in all ten of his dissents Justice Whittaker joined with justices from the foursome of Frankfurter, Burton, Harlan and Clark. He joined in dissent with Justices Frankfurter, Burton and Harlan in three federal employer liability cases;⁶² in a fourth such case he teamed with Justice Harlan;⁶³ and in a fifth was found with Justices Frankfurter, Clark and Harlan.⁶⁴ In two of his remaining five dissents he again joined the trio of Frankfurter, Harlan and Burton. One of these involved the jurisdictional problem of the realignment of parties,⁶⁵ another a stockholders derivative suit.⁶⁶ He joined in dissent with Frankfurter and Harlan in a case involving the validity of a city ordinance requiring felons to register,⁶⁷ and with Justices Burton and Harlan in another which concerned an I.C.C. order.⁶⁸ In the remaining dissent, he agreed with Justices Harlan, Burton and Clark in opposing the majority view that a card-carrying Communist was not deportable if there had been no "meaningful association" with the party.⁶⁹

In none of his ten dissents did he join with any justice in the foursome of Warren, Black, Douglas and Brennan. However, he did join with them in several instances to constitute the majority.⁷⁰ This is further illustrated by two opinions written for the majority by Mr. Justice Whittaker and handed down on January 13, 1958. In both instances, members of the foursome, which he had joined in the ten dissents, themselves dissented from his opinions.

Speaking for seven justices in *Staub v. City of Baxley*,⁷¹ he reasoned that a city ordinance was unconstitutional as placing conditions precedent upon the exercise of rights guaranteed by

⁶² *Baltimore & O. Ry. Co. v. Jackson*, 353 U.S. 325 (1957); *Arnold v. Panhandle & S. F. Ry. Co.*, 353 U.S. 360 (1957); and *Deen v. Gulf, C. & S. F. Ry. Co.*, 353 U.S. 925 (1957).

⁶³ *Thomson v. Texas & P. Ry. Co.*, 353 U.S. 926 (1957).

⁶⁴ *Ringhiser v. Chesapeake & O. Ry. Co.*, 354 U.S. 901 (1957).

⁶⁵ *Smith v. Sperling*, 354 U.S. 91 (1957).

⁶⁶ *Swanson v. Traer*, 354 U.S. 114 (1957).

⁶⁷ *Lambert v. California*, 26 U.S.L. WEEK 4059 (U.S. Dec. 16, 1957) (No. 47).

⁶⁸ *Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R. Co.*, 353 U.S. 436 (1957).

⁶⁹ *Rowoldt v. Perfetto*, 26 U.S.L. WEEK 4034 (U.S. Dec. 9, 1957) (No. 5).

⁷⁰ See *Green v. United States*, 26 U.S.L. WEEK 4062 (U.S. Dec. 16, 1957) (No. 46); *Moore v. Michigan*, 26 U.S.L. WEEK 4023 (U.S. Dec. 9, 1957) (No. 42); *Office Employees International Union, AFL-CIO v. NLRB*, 353 U.S. 313 (1957).

⁷¹ 26 U.S.L. WEEK 4079 (U.S. Jan. 13, 1958) (No. 48).

the first and fourteenth amendments by requiring a permit or license from the mayor and city council before members could be solicited for any organization which required membership dues or could assess fees against its members. Justice Frankfurter and Clark dissented on the procedural ground that defendant had failed to comply with the state's requirement that constitutional objections must be to specific sections of an ordinance rather than to the ordinance as a whole.

In the second case, that of *Lawn v. United States*,⁷² six justices, speaking through Justice Whittaker, affirmed the conviction and held, among other things, that the defendant had intentionally waived objection to certain "tainted" exhibits (photostatic copies of a check and check stub) by permitting them to be received without objection and making use of them for his own purposes. Justice Harlan, with whom Justices Frankfurter and Brennan joined, dissented believing that the government should have established that it had available untainted copies of those exhibits, as it claimed.

While in *Lawn* (and in the companion case of *Giglio v. United States*)⁷³ he found that the evidence supported the conviction, in an opinion written for a unanimous court and handed down a week earlier he decided that the evidence did not sustain the conviction.⁷⁴ Justices Frankfurter, Harlan and Brennan favored reversal in each case. Also, while he led the Court in invalidating the ordinance in *Staub*, it should be remembered that he joined the dissent in *Lambert*⁷⁵, desiring to uphold the ordinance requiring felons to register. Justices Warren, Black, Douglas and Brennan voted to strike down the ordinances in both instances.

Is there any pattern emerging from Justice Whittaker's voting record on the Supreme Court? There appears to be one, and I think it is this. He hews consistently to the law as he understands it and votes his convictions independently of any possible divisions within the Court. He is thus found on both sides. Nor may his action be predicted on the basis of any liberal or conservative bent, for he is giving evidence of being neither. He appears to be neutral in the contest between the supremacy of federal and state law. He gives expression to no prejudice in favor of or against the exercise of federal jurisdiction. In the

⁷² 26 U.S.L. WEEK 4087 (U.S. Jan. 13, 1958) (Nos. 9, 10).

⁷³ *Ibid.*

⁷⁴ *Heikkinen v. United States*, 26 U.S.L. WEEK 4075 (U.S. Jan. 6, 1958) (No. 89).

⁷⁵ *Lambert v. California* 26 U.S.L. WEEK 4059 (U.S. Dec. 16, 1957) (No. 47).

application of precedent and general principles, lawyers and judges sometimes legitimately may reach different conclusions; and the judge who follows the law uninfluenced by any liberal, conservative, or other predilection, is often harder to predict than one who does. On the basis of his decisions to date, Justice Whittaker cannot be closely identified with either of the recognizable groups within the Court; yet it is probable that his interpretation of the law will eventually be shown to be more frequently in accord with that of the conclusions listed below.

Conclusions

His opinions will be well received by the legal profession, will be well-written, scholarly, tightly reasoned, drawn almost exclusively on conventional legal authorities and materials. He will base each vote entirely on his understanding of the law after research and discussion, will call each case as he sees it, but in serious splits he usually will be found with Justices Frankfurter, Burton, Harlan and Clark, or a combination of them.

He will regret that heavy dockets prevent the members of the Court from more often reconciling their differences through more extensive discussions and conferences and thus achieving a greater degree of unanimity in their decisions.

He will be dedicated to his task and that of good judicial administration and will fully appreciate the role of the Court in giving direction to the development of the American legal system. The sound theory of legal development which he took to the Supreme Court of the United States cannot be better shown than by quoting a statement he himself made a little over a year ago.

Justice cannot be produced through any system of procedures alone. In the main it is, and must always be, the product of long hours of hard, diligent, painstaking labor by highly competent, experienced, careful and practical lawyers. . . . The practice of law is a deliberate science and must be recognized as such. Its product will not be any better, regardless of the system used, than the lawyers who do its work.⁷⁶

⁷⁶ Time, March 11, 1957, p. 17.

APPENDIX

Opinions Written By Mr. Justice Whittaker Through
January 13, 1958 — Alphabetically Arranged*UNITED STATES SUPREME COURT*

- Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957).
 Heikkinen v. United States, 26 U.S.L. WEEK 4075 (U.S. Jan. 6, 1958) (No. 89).
 Lawn v. United States, 26 U.S.L. WEEK 4087 (U.S. Jan. 13, 1958) (Nos. 9 & 10).
 Lehmann v. United States, 353 U.S. 685 (1957).
 Mulcahey v. Catalanotte, 353 U.S. 692 (1957).
 Staub v. City of Baxley, 26 U.S.L. WEEK 4079 (U.S. Jan. 13, 1958) (No. 48).

UNITED STATES COURT OF APPEALS

- Apperwhite v. Illinois Cent. R.R., 239 F.2d 306 (8th Cir. 1957).
 Fitts' Estate v. Commissioner, 237 F.2d 729 (8th Cir. 1956) (dissent).
 Hartman v. Lauchli, 238 F.2d 881 (8th Cir. 1956).
 Kleven v. United States, 240 F.2d 270 (8th Cir. 1957).
 Mesirov v. Duggan, 240 F.2d 751 (8th Cir. 1957).
 Mitchell v. Burgess, 239 F.2d 484 (8th Cir. 1956).
 Moog Industries v. FTC, 238 F.2d 43 (8th Cir. 1956).
 Raffety v. Parker, 241 F.2d 594 (8th Cir. 1957).
 Schmidt v. United States, 237 F.2d 542 (8th Cir. 1956).
 Schneider v. Kelm, 723 F.2d 721 (8th Cir. 1956).
 Soso v. Atlas Powder Co., 238 F.2d 388 (8th Cir. 1956).
 United States v. Mills, 237 F.2d 401 (8th Cir. 1956).

UNITED STATES DISTRICT COURT

- Arkansas Pub. Serv. Comm'n v. United States, 147 F. Supp. 454 (E.D. Ark. 1956).
 Baker v. Dale, 123 F. Supp. 364 (W.D. Mo. 1954).
 Carpenter v. Borden Co., 147 F. Supp. 445 (S.D. Iowa 1956).
 Collins v. Public Serv. Comm'n, 129 F. Supp. 722 (W.D. Mo. 1955).
 Cooke v. Ford Motor Co., 122 F. Supp. 644 (W.D. Mo. 1954).
 Cowley v. Auto Transports, Inc., 122 F. Supp. 689 (W.D. Mo. 1954).
 Davis v. University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955).
 Exhibitors Serv., Inc. v. Abbey Rents, 135 F. Supp. 112 (W.D. Mo. 1955).
 Farm Bureau Cooperative Mill and Supply, Inc. v. Blue Star Foods, 137 F. Supp. 486 (W.D. Mo. 1956).
 Foreman Co. v. Zachry Co., 122 F. Supp. 859 (W.D. Mo. 1954).
 Foreman Co. v. Zachry Co., 127 F. Supp. 901 (W.D. Mo. 1955).
 General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955).
 Hart v. Leihy, 122 F. Supp. 510 (W.D. Mo. 1954).
 Henley v. Panhandle Eastern Pipeline Co., 138 F. Supp. 768 (W.D. Mo. 1956).
In re Market Basket, 122 F. Supp. 321 (W.D. Mo. 1954).
In re McKinley, 138 F. Supp. 4 (W.D. Mo. 1956).
In re Patterson, 139 F. Supp. 830 (W.D. Mo. 1956).
 Jerrold-Stephens Co. v. Gustaveson, Inc., 138 F. Supp. 11 (W.D. Mo. 1956).
 Jones Truck Line v. United States, 146 F. Supp. 697 (W.D. Ark. 1956).
 Lane v. Singer Sewing Machine Co., 122 F. Supp. 694 (W.D. Mo. 1954).

Miller v. Connell, 141 F. Supp. 361 (W.D. Mo. 1956).
Miller v. United States, 124 F. Supp. 203 (W.D. Mo. 1954).
Pucci v. Blatz Brewing Co., 127 F. Supp. 747 (W.D. Mo. 1955).
Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465 (W.D. Mo. 1955).
St. Paul Fire & Marine Ins. Co. v. Continental Bldg. Operating Co., 137 F. Supp. 493 (W.D. Mo. 1956).
Smith v. Christian, 124 F. Supp. 201 (W.D. Mo. 1954).
Southern Kansas Greyhound Lines, Inc. v. United States, 134 F. Supp. 502 (W.D. Mo. 1955).
United States v. Columbia Erection Corp., 134 F. Supp. 305 (W.D. Mo. 1955).
United States v. Hockett, 123 F. Supp. 104 (W.D. Mo. 1954).
United States v. Hockett, 123 F. Supp. 106 (W.D. Mo. 1954).
United States v. Harris, 133 F. Supp. 796 (W.D. Mo. 1955).
United States v. One 1954 Cadillac, 135 F. Supp. 1 (W.D. Mo. 1955).
United States v. Sweet, 133 F. Supp. 3 (W.D. Mo. 1955).
Weldon v. Steele, 125 F. Supp. 667 (W.D. Mo. 1954).
Wessing v. American Indemnity Co., 127 F. Supp. 775 (W.D. Mo. 1955).
Western Newspaper Union v. Woodward, 133 F. Supp. 17 (W.D. Mo. 1955).
Wiles v. Union Wire Rope Corp., 134 F. Supp. 299 (W.D. Mo. 1955).
Wright v. Steele, 125 F. Supp. 1 (W.D. Mo. 1954).

FEDERAL RULES DECISIONS

Cole v. Riss & Co., 16 F.R.D. 116 (W.D. Mo. 1954).
Cole v. Riss & Co., 16 F.R.D. 263 (W.D. Mo. 1954).
Collins v. Thompson, 16 F.R.D. 194 (W.D. Mo. 1954).
Federal Enterprises, Inc. v. Allbritten Motors, Inc., 16 F.R.D. 190 (W.D. Mo. 1954).
Helverson v. Newbery Co., 16 F.R.D. 330 (W.D. Mo. 1954).
Jenkins v. Westinghouse Elec. Co., 18 F.R.D. 267 (W.D. Mo. 1955).
Perry v. Edwards, 16 F.R.D. 131 (W.D. Mo. 1955).
Robinson v. Tracy, 16 F.R.D. 113 (W.D. Mo. 1955).
Soetaert v. Kansas City Coca Cola Bottling Co., 16 F.R.D. 1 (W.D. Mo. 1954).
United States v. Bearing Distributors Co., 18 F.R.D. 228 (W.D. Mo. 1955).
United States v. Smith, 16 F.R.D. 372 (W.D. Mo. 1954).