In Memoriam

Earl Warren
Chief Justice
of the
United States

On May 27, 1975 the United States Supreme Court convened in special session to receive resolutions of the Bar of the Supreme Court in tribute to the late Chief Justice Earl Warren. The special session was preceded by a memorial service participated in by family and friends from all aspects of the former Chief's long and active career. Former Senator Thomas H. Kuchel chaired the proceedings and presented an address on behalf of those close to Warren during his service to the State of California. Mr. Edward Bennett Williams spoke on behalf of friends and professional colleagues close to the former Chief during his work in Washington. Professor Francis X. Beytagh presented a tribute to Warren on behalf of those who served as law clerk to the former Chief. The editorial board and members of the California Law Review join these speakers in honoring the late Chief Justice, a 1914 alumnus of Boalt Hall Law School, and reflecting on the significant accomplishments of the Court during his tenure.

1. The resolutions of the Supreme Court Bar that were read at the memorial service by Mr. William P. Rogers and presented to the Court by Mr. Solicitor General Bork, as well as the address to the Court by Mr. Attorney General Levi and response of Mr. Chief Justice Burger, are reported in the miscellaneous proceedings of the Court. 95 S. Ct. CLXXXIV-CCV (Advance Sheet No. 18), 44 L. Ed. 2d i-xiii (Advance Sheet No. 3).
Address

by

Thomas H. Kuchel†

These proceedings are devotedly addressed to the memory of Earl Warren, late a Chief Justice of the United States. For 16 eventful years, he presided over its highest court when it confronted issues as important, and as bitterly controversial, as any in its history. They dealt with rights of the people, their individual liberties and their rights to equal opportunity, those same elemental, moral commitments to human freedom set forth in the Declaration of Independence, and enumerated in the Constitution and the Bill of Rights. The manner in which the Supreme Court of the United States, under the leadership of Chief Justice Warren, accepted its duty to judge, to come to grips with the issues, and to render its far-reaching decisions, provides an imperishable lustre to the Chief and to the Court which he served. That Court—we may most respectfully call it the Warren Court—brought this country nearer to the fulfillment of the American dream. Today, we honor the memory of this giant among Americans. We join Mrs. Warren and the family in sharing their sorrow of a great personal loss, and in sharing their solemn pride in all that the late Chief Justice did for his country and for people.

Earl Warren was an extraordinary person. He was a leader of men, and he led with high purpose. He was a disciple of the Grover Cleveland doctrine: A public office is a public trust. Where there is a wrong in our society, he devoutly believed there must be a remedy. The standards he set for others he applied equally to himself. There was but one Earl Warren. He spoke the same way in private conversation that he did in public speech. For 52 years of his long lifetime, he served the people, and he kept their faith.

In his early years, as Alameda County District Attorney and as Attorney General of California, he unwaveringly enforced the law. There were no favors. Nothing was permitted to encroach on public duty as he saw it. He was an innovative and successful prosecutor. He had a unique ability to cross-examine, and he was at home in the trial of a lawsuit. He was relentless in his pursuit of criminals, and he had a consuming contempt for officials who prostituted their trust. He believed that the administration of criminal justice rested on the need to protect society and, in the process, on the need to protect individual liberties. He

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was a pioneer in the establishment of the office of public defender in his home county and, thereafter, throughout the state.

Earl Warren was the only person to be elected California's Governor three times and he was the best chief executive our state ever had. He played no petty politics. His appointments to public positions went only to those whom he felt were honest and who were qualified to do the job. Ward heelers need not apply. His judicial appointments unerringly came from the most respected members of the bar. Many lawyers left lucrative private practice to become judges only because Warren convinced them that serving the people is the most deeply rewarding labor which one may perform.

Under Governor Warren's leadership, California improved the lot of the disadvantaged, the aged, the blind and the poor. The state penal system was overhauled, and a far-sighted program of rehabilitation of parolees instituted. Standards of education were elevated. Money was set aside for new buildings for the several campuses of the University of California so that California higher public education could keep abreast of expanding needs. Pork barrel was out. Earl Warren, in a word, gave the people clean, honest and progressive government.

His administration was color blind. He tolerated no racial discrimination. California had a Constitutional Convention in 1947, and Governor Warren gave its delegates this basic prescription: "The heart of any Constitution consists of its Bill of Rights, those provisions that secure to the people their liberty of conscience, of speech, of the press, of lawful assembly, and the right to uniform application of the laws and to due process of law. Every other provision of the Constitution should be designed in the spirit of these basic rights in order to make sure that they become not mere theoretical rights, but actual rights." When he was a candidate for the Republican presidential nomination in 1948 and in 1952, one important principle in his platform was "one law for all men and equal opportunity in life for all men."

He came to Washington to preside over our highest court with impeccable credentials as an able man, a good man, a kind man, and a strong one, with a long held public philosophy of high purpose which the people of his native state had overwhelmingly endorsed an unprecedented number of times when the name Warren was on their ballot. And in the years which followed, he and his public philosophy were to reflect themselves clearly in his actions on the bench.

State-enforced racial segregation anywhere was repugnant to Earl Warren, and his opinions as Chief Justice, speaking for a unanimous court, predictably struck it down, first, in public education, and, thereafter, in other fields.

Since 1791, the right of an accused to counsel has been a specific
constitutional guaranty, but it was the Warren Court which first ruled that an indigent defendant can assert it.

And in what the Chief thought was the most important issue in which he had participated, the Supreme Court found that the protection of people's voting rights was not "beyond judicial cognizance." "Legislatures represent people, not acres or trees," said the Chief. How elegant, how persuasive! A long endured political deception, a fraud upon the people would be a more accurate way to describe it, by which malapportionment of legislatures or no apportionment at all had remained judicially untouchable, was sheared away.

Constitutional liberties are not shibboleths, and in these three most cited examples of the many landmark opinions of the Supreme Court of the Warren time, his lifetime devotion to those liberties did, indeed, come shining through.

The law has been called "the place where order and freedom meet." That is where Earl Warren lived. Blackstone called the law "the principal and most perfect branch of ethics." That would be the Warren view. Once, he spoke of the law as floating "on a sea of ethics." His concern for evenhanded justice shows clearly in his oft-repeated question from the bench to counsel: "Is it fair?" That is what he asked, and it pretty much went to the root of the matter. Earl Warren was concerned, in the elegant phrase of Elihu Root, with "the moral quality of honor" which "underlies the whole body of Anglo-American jurisprudence."

That concern guided him all the days of his life, and when his journey ended, it could be said of him, as was said long ago of another great: "So Valiant-for-truth passed over," and all "the trumpets sounded for him on the other side."

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Address

by

Edward Bennett Williams†

On July 9 last, in the early evening, our country lost one of its greatest men, and we lost a beloved friend to the pages of history. Filled with courage, integrity, fairness, and grace, with an unfailing instinct to be right about the great issues of our time, Earl Warren had towered above the crowd as a gentle giant.

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Historians have traditionally carved the almost two hundred years of Supreme Court history into Chief Justice size units. And so we speak of "the Marshall Court," "the Taney Court," "the Hughes Court," and "the Warren Court." The decisions of the Court in any one of these conveniently packaged chronological units need not and frequently do not mirror the personal convictions and beliefs of the Chief Justice from whom it takes its name. But in the sixteen terms during which Chief Justice Warren presided there seemed always a happy confluence between the historic decisions of the Court and the deep convictions of the Chief. And so it was that racial minorities, the poor, the scorned, the uninformed, and the disenfranchised seemed as much the focal point of the Court's concern as they were of his own egalitarian constitutional philosophy.

When I first came to Washington as a young law student over 30 years ago I never failed to thrill when I saw chiseled into the portico of this building what were to me the glorious words, "Equal Justice Under Law"—"Equal," not almost the same, not similar, not comparable, but "Equal."

In those years "Equal Justice" meant something very important to me. It meant that rich or poor, old or young, friend or stranger, man or woman, red or yellow, brown or black or white would get the fair, impartial administration of the laws of the land and the evenhanded resolution of conflicting claims in our courts.

But since those days many pages of constitutional history have been written. As a nation we have realized the Old Testament prophecy of the "sins of our fathers being visited upon the third and fourth generation." We inherited the legacy of shame resulting from generations of political disenfranchisement, educational denial, economic exploitation, and social ostracism of great masses of our citizens.

At last we learned as a nation through the teachings of the Warren Court in the Chief's most enduring judicial monument, Brown v. Board of Education, 347 U.S. 483 (1954), and its multiple progeny, that we could have peace neither in our cities nor our hearts until truly equal education, equal opportunity, equal enfranchisement, and equal respect were made the patrimony of every American. By his life the Chief added to that litany of rights equal affection and equal love.

In a speech delivered at Washington University in St. Louis, Missouri, on February 19, 1955, the Chief said that if the Bill of Rights were offered as a piece of new legislation he had grave doubts that it would pass the Congress. Eight years later at New York University in the Madison Lecture on the Bill of Rights he said in what might be considered a one sentence summary of his judicial philosophy: "Today,
as always, the people, no less than their Courts, must remain vigilant to preserve the principles of our Bill of Rights, lest in our desire to be secure we lose our ability to be free.”

He worried constantly whether in our obsession with security we were developing a lassitude about liberty. And each year one of the national pollsters would publish findings that would validate his fears, because the results would regularly show that the majority of the citizens didn’t believe in the peaceable right of assembly for all Americans, particularly for extremist groups, in the privilege against self incrimination, in the principle of double jeopardy, in the right of every accused under all circumstances to confront and cross examine his accuser, or in the right of newspapers, radio, and television to report stories considered by the government to be harmful to the national interest.

It was a small biopsy of American thinking, but to the Chief, it had about it the smell of malignancy. He feared and said that an alarming number of Americans were prepared to meet the problems of crime, violence, and dissent by the abridgment of freedom. He never forgot that the American Bill of Rights is a repository for minority rights and that it is and always has been a safeguard against majoritarian oppression. No one in history was more of a stickler for the proprieties when the majesty of big government with its awesome power and resources was arrayed against the individual citizen.

The Warren Court gave new dimension to the right of the accused to remain silent, to be free from unreasonable searches and seizures, to be represented by counsel, to be treated fairly and decently while in custody, and to be accorded all aspects of due process of law. It gave recognition to the fact that these rights, not given to the people by Government but carved out by the people for themselves when they created the government, belonged not just to the affluent, the informed, and the sophisticated, but to the indigent, the ignorant, and the guileless.

The Chief had a total commitment to robust, open, unrestrained debate on public issues—to the right of the press and the people to speak freely on all subjects, to criticize, dissent, petition, assemble, and demonstrate. He recognized no principle to be so universally held as not to be subject to question, to challenge, and to debate. And so too did the Warren Court have a zest for political freedom of the individual. It recognized that informed and reasonable dissent is better for our kind of society than mindless compliance.

Earl Warren was a private person. He treasured the right to privacy for himself and for his family and for all Americans. He deplored eavesdropping and wiretapping as dangerous and wrongful methods of law enforcement. As District Attorney of Alameda County, California,
he had never used either. And in his tenure as Chief Justice the Court generally spoke to these subjects in this vein. He often said privately in recent years that if there were any vote he had cast that he could change it would be his deciding vote in *Irvine v. California*, 347 U.S. 128 (1954), which was heard in his second month on the court.

*Baker v. Carr*, 369 U.S. 186 (1962), said the Chief, was the most important opinion during his tenure. It brought into the Constitution the concept of “one man, one vote,” and gave every American the right to have his voice heard in a meaningful and equal way. He saw disenfranchisement of minorities and malapportionment as double evils foreclosing to their victims equality and dignity.

Yet it was the little case that mirrored his philosophy, his respect for the dignity of a person. When Sioux City refused burial of an Indian in a particular cemetery because it was “for Caucasians only,” it aroused deep feelings in Earl Warren’s heart. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

In *Hamilton v. Alabama*, 376 U.S. 650 (1964), the Court reversed a conviction for contempt of court in one line. Mary Hamilton, a Black, was a witness in an Alabama courtroom. When the presiding judge kept referring to her as “Mary,” she refused to answer. She thought she was entitled to be called “Miss Hamilton,” and so did the Chief Justice of the United States.

Earl Warren had many loves—the first and foremost of which was his love for his magnificent family. For his gracious and lovely wife he had the deepest devotion. His eyes would light and glisten with joy when he spoke of his children and his grandchildren and his holiday trips back to California when they would all be together. As for his love of country, nothing more can be said than that he spent his whole life in its service, as District Attorney of Alameda County, as Attorney General of California, as Governor of California, and as Chief Justice of the United States.

Before he came to the Court, he loved politics. And he so mastered that elusive art and so captured the respect, the confidence, and the affection of his fellow Californians that he won the gubernatorial nomination of both parties, a feat accomplished by no one else in modern American history. He went on to win a place on the national ticket of his party and suffered his only defeat.

Success is a hard narcotic. It drains the exhilaration from victory and deepens the despair of defeat. But Earl Warren always won with humility and when he lost he lost with grace.

He loved sports—hunting and fishing, baseball and football. For eight years we watched the Redskins together on Sunday afternoons in
the fall. He loved the game—the crowds and the cheers. But he never failed to cringe and frown when occasionally the cheers for the team would turn to boos. He hated to see anyone denigrated by a booing ugly crowd. Yet he would never speak of the angry, vitriolic invective hurled at him by the unreasoning crowd—the "Impeach Earl Warren" signs, the slanderous assaults made by the forces of hatred and bigotry. More than any man I knew he practiced the charity of Corinthians I toward all and had malice for none.

One Saturday he went to RFK Stadium to see the old Washington Senators play the Chicago White Sox. The crowd was small and the game was slow. A Chicago sportswriter spotted him in the stands and came over to him.

"Mr. Chief Justice, it's great to see you here. You must love baseball."

"I do," said the Chief.

"Is it true, sir, that you read the sports pages every morning before you read the front page?"

"It is," said the Chief.

"Would you tell me why, sir?"

"The sports pages report men's triumphs and the front page seems always to be reporting their failures. I prefer to read about men's triumphs rather than their failures."

Earl Warren was the greatest man I ever knew. His friendship was a rich and lasting treasure which I shall hold as one of my dearest possessions during life.

One of his former clerks said that he lived the American Dream. Others have done that. But he did something more. He made the American Dream possible for everyone.

In all his life
he gave and didn't count the cost,
he fought for the right and didn't
heed the wounds,
he toiled and never sought for respite,
he understood that pain was a deliverer,
he respected the conscience of others,
and for him forgiveness was easy, duty was
dear, fortune was never arrogant, and
the beyond was never visionary.

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Address
by
Francis X. Beytagh†

It is a great honor and privilege to be asked to say a few words on behalf of Chief Justice Warren's law clerks. Those of us who had the opportunity of working with "The Chief" in that capacity are forever indebted to him. We learned much from him as the result of our close personal relationships, for he was, without even trying, a great teacher.

He taught in the way that most of us who labor in the classroom think to be the most effective—by example. We learned about justice and equality and fairness and freedom as we worked with him on the Court's business. But we learned far more about life as we came to know him—about personal integrity in the face of a lack of morality in political life, about longstanding commitment to public service to the detriment of personal gain, about abiding belief in our system of government despite abounding cynicism and self-doubt in our society, about the worth and dignity of each and every human being (particularly the lowly and disadvantaged), and about the law as an effective instrument of social change, not an end in itself or a way of maintaining the status quo. His teaching was not limited to us, his law clerks, though we were the special beneficiaries of it. It was there for all who sought it.

Had the Chief not been such a great teacher and had he not lived so rich and full a life, there would be more cause for mourning his death. Not only, however, did he accomplish so very much as Attorney General and Governor of California and then as Chief Justice of the United States—most importantly, he continues to live in the life and work of those he touched and taught. So let us celebrate instead of mourn—for a life of honor and decency spent in noble pursuits and for the continuing legacy, an affirmation of life, that he left with those of us who remain.

The Chief's most distinctive quality as a jurist, as I perceived it from a law clerk's vantage point, was a passion for doing justice and for ensuring fairness in the decision of individual cases. He had a highly refined sense for the facts critical to the decision of a difficult case and used that facility effectively in getting to the heart of a matter before the Court. He had an instinct for what I once called the "rightness of

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things" that could sweep away superficialities and legalisms. He saw litigants before the Court as people, not abstractions, and he personalized the issues being resolved in a manner not ordinarily achieved in the relative austerity of an appellate tribunal.

He was a thoroughgoing humanist who exerted strong moral leadership within the Court. He was a man of courage, humility, energy and vision. He was, I think, a more complex person than some have suggested. In him there was an intermixture of the pragmatic and the idealistic. In him there was a blending of compassion and strength, of faith and reason, of hope and concern. In him there was wisdom fashioned from experience together with a vitality grounded on being forever young.

He was gentle yet firm, candid yet cautious, flexible yet decisive. He had the balance and equanimity to handle a full workload at the Court during those dark and trying days when he was also heading the commission investigating President Kennedy's assassination.

Of great significance, I think, was the fact that the Chief was a wholly consistent person, whether in public or in private, a quality rare among prominent public figures. He was first and foremost a family man, with his beloved wife and children sustaining him through times of trouble. Though he and Mrs. Warren lived in Washington for over 20 years, he never really left California. It was always "his state."

He kept close ties with his law clerks, over 60 in number, after they had left the Court. Our annual get-togethers were a highlight of the year, affairs that all of us enjoyed and will miss intensely. Though he never quite said so, I suspect he looked on us as ministers of the justice he sought. He took great pride, I know, in our accomplishments.

He cared deeply about young people and welcomed the opportunity to chat with them about their concerns and about the Court and the country he loved. When he visited Notre Dame several years ago to inaugurate our "Hesburgh Lectures" there, he spent many hours talking informally with our law students. They were enthralled and inspired, but he seemed to derive great pleasure himself from the experience. As I understand it, the same sort of thing was repeated elsewhere, wherever he went, after his retirement. He became a hero to a generation which had almost lost its capacity for having heroes.

The Chief revered the Court and regarded it as a critically important institution in our governmental scheme. Indeed, one of his last formal addresses, given at Loyola University in New Orleans, and later published in the American Bar Association Journal, was entitled "Let's Not Weaken the Supreme Court." As I construe it, he thought a Bill of Rights seeking largely to protect minorities was of little value without an effective mechanism for enforcing its provisions. In our system, almost since its beginning, that mechanism has been the Supreme Court—the
final arbiter of constitutional disputes under our unique concept of "judicial review." Access to the Court should not be restricted, the Chief maintained, lest the foundation on which that system is based be undermined.

Earl Warren was, in short, a judge—a man—for all seasons. He understood history, but was not a captive of it. He lived in the present, but was not limited to or by it. He saw into the future, and was unafraid of it. When the Chief retired I suggested that he would have been at home among the chancellors of Old England. After his death, one commentator called him "the Chief Chancellor." Somehow I think he would have liked that characterization.

The Chief wrote a book during his retirement entitled A Republic, If You Can Keep It. It is not a lengthy book, nor is it by design a very scholarly one. Rather, it is a straightforward exposition of what this experiment in self-government that we call America is all about. Its message is an important one that warrants repeating, especially in light of our country's present problems and the mood of the people. Our system is a good one, the Chief wrote, because it is grounded on sound first principles. But it is not self-operative, he told us, and can be made to work only if the people, through our institutions and through effective leadership, continue to commit themselves to this large task.

When the Chief came to the Court in 1953, a man already nearing normal retirement age, the noble inscription on this building's facade had never, it is fair to say, been given due regard by a majority of this Court. "Equal Justice under Law" was more a slogan, and less a reality, for millions of Americans. The Court over which Earl Warren presided until 1969 changed that. Brown v. Board of Education was decided during his first term as Chief Justice, and racial segregation as a legal principle was finally rejected, almost a century after the Great Conflict that had so divided the nation over the issue of slavery.

Equality of participation in the political process was sought to be assured to all citizens in a series of decisions culminating in the Court's "one man, one vote" ruling in Reynolds v. Sims. A revolution in criminal procedure, in which the Court sought to make the promise of due process a meaningful one, resulted in such controversial decisions as Miranda v. Arizona.

During these years the Court greatly strengthened the operation of the first amendment, that key provision which protects the rights of expression and association and freedom of religion. Much has already been said and written, pro and con, about these and related developments during Warren's years as Chief Justice. The dialogue about such issues should of course continue, for in constitutional matters, as the
Chief reminded us on occasion, things are not settled until they are settled right.

But the Court's decisions during the Warren years, however important they are as legal milestones, will inevitably fade with the passage of time as new and different problems challenge the genius of our institutions and our people. The Chief knew that only too well, as the essential message of his book indicates.

What would Earl Warren ask of us if he were still alive today? One can only hazard a guess, but I doubt that those of us who knew him well would be far off the mark. Don't look back, he would say, except to the extent that you can learn from history and past mistakes. Don't give up on yourselves, he would tell us, despite problems and setbacks at home and around the world. And get to work on the “unfinished business” of America—a sound education, a good job and a decent home for all citizens; governmental institutions that effectively serve the people and the public interest; equality of treatment for all in those areas of our national life where discrimination still exists. Recognize the finite character of our natural resources and use them wisely; realize the smallness of this planet and the necessary interdependence of all peoples; strive for peace at home and around the world, and be an example to those everywhere who seek freedom.

I should like to close on a personal note. I respected and admired the Chief greatly and sorely miss him. But in knowing and loving the Chief, I come away from his passing challenged and inspired to carry on, in some small way, his great work. I hope those of you here, and those elsewhere who were touched by him, share this feeling. We are the keepers of the Republic now. He showed us how to do it. The rest is up to us.