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A TRIBUTE TO WARREN E. BURGER

The Honorable Byron R. White†

Before he came to the Supreme Court, I had met Warren Burger only once or twice. But I was aware of his fine reputation as a Judge on the Court of Appeals for the District of Columbia Circuit, his differences with certain of his colleagues in criminal cases, and his intense interest in prison systems here and abroad. There was no doubt that the President had nominated a very substantial person to succeed Earl Warren.

But I was not prepared for the major presence he proved to be. His personal qualities and how he mastered the many tasks of the Chief Justice’s position were a revelation to me. I became convinced long before his retirement that he was a great man and a great Chief Justice.

The new Chief Justice had a strong personality and boundless energy. Furthermore, he was creative, in some ways a visionary. It was not long before he fundamentally changed the manner in which the increasing number of in forma pauperis petitions were processed. Neither was it long before he proposed, and the Conference agreed, that the normal argument time be reduced from one hour on a side to one-half hour. This development allowed us to hear twelve cases in three days rather than eight cases in four days, as was the case under the prior arrangement. Of course, we would consider motions for more time, but there were amazingly few such requests. Lawyers apparently soon learned to cover the ground in half the former argument time. Some of us thought at one time or another that in some cases more argument time should have been granted on our own motion, but the change was a major one and permitted us to face up to the rapidly expanding case load. The average number of signed opinions that the Court issued between 1950 and 1970 was around 100. After cutting the argument time in half, it was not many years until we were issuing 140 to 150 such opinions.

There is no doubt that the Chief Justice was very interested

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in making the Court's procedures effective, but this is not to say that he was anything but a very competent manager of and contributor to the Court's substantive work. He was an effective Chairman of the Conference, kept the discussion under control, allotted opinion writing fairly, and at times successfully suggested that a particularly difficult case not be finally assigned until addressed by informal memoranda by two Justices who had at least tentatively expressed opposite views. This was one way to assure that the Conference did not rush to judgment in major cases. It did, however, consume much time, and the system was only occasionally used.

The Chief Justice also did his fair share of opinion writing. During his tenure on the Court he wrote over 250 opinions for the Court, many of them quite important cases in the development of the constitutional and statutory law as the following examples indicate.

Griggs v. Duke Power Co. construed the Civil Rights Act of 1964, which barred discrimination in employment practices, to forbid not only intentional discrimination but also practices that had a discriminatory effect. Reed v. Reed struck down an Idaho law granting a preference to males in the selection of estate administrators as violative of the Equal Protection Clause. This was the first constitutional decision of the Court barring arbitrary classifications based on gender. Wisconsin v. Yoder held that the Wisconsin compulsory school attendance law could not require the children of Amish parents to attend the state's secondary schools. The parents' right to free exercise of their sincere religious beliefs outweighed the state's interests in requiring the state-provided secondary education for Amish children. Miami Herald v. Tornillo declared invalid under the First Amendment a Florida law requiring a newspaper to offer space for a response from a political candidate who had been attacked in the pages of the paper. United States v. Nixon announced that the President of the United States did not enjoy an absolute executive privilege to refuse to respond to a subpoena for certain tape-recorded conversations requested by a special prosecutor. Neither did his qualified privilege to withhold disclosure, supported only by general objections, outweigh the demonstrated specific need for evidence in a pending criminal trial. The Nebraska Press Associa-
A case announced that a district court order forbidding publication of certain facts concerning a notorious murder case was unconstitutional as a prior restraint under the First Amendment. Although the First Amendment was not an absolute bar in such cases, it was not overridden by the facts of record. Four Justices concurred in the judgment, stating that prior restraints were per se invalid. *INS v. Chadha*, undoubtedly a major separation of powers decision, struck down the long-standing practice of Congress empowering itself to invalidate agency decisions and regulations.

The Chief Justice was also very fond of beautiful things, including buildings such as the Supreme Court. But he felt the building, which was then thirty-five years old or so, had been neglected and needed restoration. Congress appropriated the necessary money and a great deal was accomplished. The Chief Justice also thought that the building could stand much improvement as an inspirational and friendly place to work. The walls of the main halls of the building, for example, were practically bare. One could hear his heels echo as he walked those halls. There was surely ample opportunity to add interest and luster to the building, and the Chief did so.

He discovered that oil paintings of former Justices were available or could be painted, and these were soon hung, along with brief biographies. What a difference this made.

The four courtyards on the first floor were practically barren. But soon they were beautifully decorated with flowers, and tables and chairs were provided for lunching and talking during suitable weather.

The Chief Justice also had a consuming interest in history, and it occurred to him that there should be an office created in the Court to collect memorabilia and materials of historical interest to the Court. The Curator’s Office, headed by Gail Galloway, soon came to be. There followed many displays in the halls containing documents and other objects of interest to the history of the Court. The Curator also planned and periodically displayed in the lower great hall exhibits taken from the Court’s history, including the present one dealing with the actions by the Court and its Justices during World War II. It is a wonderful exhibit.

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Two fine additions to the ground floor's principal hall deserve special mention. First, the impressive statue of John Marshall, which Congress permitted to be transferred to the Court from the west side of the Capitol, was placed on a marble base at the center of the hall. It was backed by a marble wall with a few quotations from the former Chief Justice's major opinions.

Second, at the south end of the hall, there was created a facility in which interested people could sit and watch videotaped informal discussions by the sitting Justices, explaining how the Court worked and the nature of its tasks.

Also indicative of the Chief's interest in the Court's history was an arrangement with the Pittsburgh Public Television Station to make movies of four famous early cases decided by the Court. These very informative works are available to the public.

The Supreme Court Historical Society, a private organization, was also founded by the Chief Justice in order to further interest in the history of the Supreme Court by issuing publications, providing lectures, and engaging in other functions, including making possible the acquisition by the Supreme Court of historically significant items, including decorative items that considerably brightened and made more interesting certain areas of the Court.

The Chief Justice of the United States has duties well beyond the work of the Supreme Court. He chairs the Judicial Conference of the United States, the body that governs the operating procedures of the federal courts. Warren Burger took this job very seriously. He wanted to make the system work better and to be able to handle the ever-mounting caseload. Not only did he lend his great talent for recognizing problems and devising a solution for them, but also using his enormous energy to put those solutions to work. The Chief Justice also supervises the Administrative Office of the United States Courts, which is the large and important organization that services the district courts and the courts of appeals in the federal system.

The Chief Justice was especially convinced that it was essential to have training facilities for a growing federal judiciary. The Federal Judicial Center, very much into educating new judges and court staff, he had a large hand in expanding. He also founded the Institute for Court Management. Furthermore, he realized that the proper functioning of the state courts was
critical to the work of the federal courts and to the system of justice in the United States. The result was the founding of the National Center for State Courts, which has proved to be of great service to the state court systems, systems that of course many times outsize the federal system. The Center is now planning a much-needed new building, and it is indeed fitting that this addition will carry the name of Warren Burger. The Chief Justice also founded and organized the State Federal Judicial Council which sought to minimize any possible friction between state and federal courts.

Neither should it be overlooked that the Chief Justice of the United States, whoever he is, is ex officio chancellor of the Smithsonian Institution. How these men managed to discharge all of their duties has always been a mystery to me, especially if they do their jobs well. And I am sure that it was Warren Burger’s driving energy that permitted him to be such a force in performing his various duties.

Warren Burger’s extraordinary talents were clearly shown by his performance as Chief Justice; but wholly aside from that work, the Chief Justice had an astonishing array of personal interests and talents that made him an admirable and enjoyable person. He was an expert gardener, as his home and grounds always demonstrated. He collected antiques, his good taste in this respect evidenced by his home as well as by some of the rooms of the Supreme Court. He was also a well-known connoisseur of wines; and, perhaps to increase the congeniality of the Justices, he began the practice of celebrating the birthday of one of us by gathering all of us for a glass of wine at noon and singing the happy birthday song. That practice had become a tradition by the time he retired, and it is still observed at the Court.

There is more to be said about the Chief’s personal attributes. He had the talents of an artist and a sculptor, and easily could have been a professional interior decorator. Travelling was one of his great loves, and his acquaintances and friends in legal circles around the world were many indeed, especially in England.

Typical of Warren Burger’s inexhaustible energies was the fact that when he retired he became the Chairman of the Bicentennial Commission which was to celebrate our Constitution. It seemed a thankless job, but the Chief Justice with his
vision and perpetual motion, made it work. Many observers were astonished that the Constitution could be so widely implanted in the minds of the people, young and old. Of course, the Chief Justice was in love with the Constitution, and this assignment he really relished. All of us, especially lawyers, owe him a great debt of gratitude for the work that he did as chairman of that commission.

Warren Burger was a man of great character and integrity. Furthermore, he was a firm believer in the traditional family values. He cherished his wife, Vera, and his two children, Wade and Margaret Mary. I found him to be a wonderful friend to have all of those years, and I appreciate the opportunity to say so in this Law Review.