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It Is So Ordered: A Constitution Unfolds, Warren E. Burger

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A few moments after beginning to read *It Is So Ordered*, former U.S. Supreme Court Chief Justice Warren Burger will cause many readers to immediately turn to the index. He claims on the introductory page that “Every lawyer and law student knows the cases reviewed in this book, nearly all of them decided by the Supreme Court of the United States, but there are many otherwise well-educated people who are only vaguely aware of them.” A total of twenty-six cases are cited in the book. Asking a lawyer to recall the facts of each case will cause some attorneys to retrieve their old constitutional law textbook off the shelf to see if they ever even studied some of the obscure cases mentioned by Burger.

Other than the initial challenge of remembering all of the cases cited in the book, Burger has deliberately avoided writing a reference text. Burger, who died at the age of eighty-seven shortly after the book was published, intentionally focused *It Is So Ordered* on a lay audience. In the foreword he explained that “This book is in no sense intended as a serious, scholarly, or comprehensive study of constitutional law, but rather as a story for nonlawyers about some of the great cases and controversies that have shaped America’s judicial, political, and economic history.”

*It Is So Ordered* is chock-full of interesting and obscure facts. While Burger dismissed the book’s importance as a monument to legal scholarship by calling it a “story,” his details are sure to enliven any droll law school class discussing the minutiae of *The Steel Seizure Case* (overturning President Truman’s order for a government takeover of steel mills, despite a Supreme Court comprised of eighth Democrats) of the correct spelling of the parties in the notorious *Dred Scott v. Sandford* decision (the defendant was actually Sanford). Burger, in one of the few times
he is critical of the Court's work, called the 1857 *Dred Scott* decision, which legitimized slavery, as "The Great Mistake." Interestingly, he recounted that the 1796 Supreme Court case, *Ware v. Hylton*, took "six days, with interruptions and recesses, for counsel to argue" (a luxury compared with today's limit of an hour of oral argument per Supreme Court case) and that John Marshall, after tearing his buckskin breeches while horseback riding to Washington, once held court wearing his robe without keeping his trousers on.

Burger is generous with his compliments of the Founding Fathers. Frequently, he describes the early pioneers of American history in glowing terms, almost to excessive praise. John Marshall is variously described as "one of the most leading advocates of his time," "a great teacher," "a splendid teacher of law and government," "The Great Chief Justice," having a "remarkable career as Chief Justice," and possessing "sheer brilliance." Thomas Jefferson is remembered as "the creative man," "a great man," "a great libertarian and humanist," and "one of the most complex men in history." Alexander Hamilton is known as the "the economic genius of the departed." Aaron Burr is "ambitious," "a very able lawyer," "a dynamic and activist politician," and not only regarded as "one of the most puzzling figures among the Founders, he was also perhaps one of the more brilliant, albeit eccentric." Daniel Webster is also known as being "great."

Burger does not reserve his awe to strictly human potential. His patriotic flag wave at the modest and uncertain beginnings of the United States. Regarding the role of the federal government, he wrote that "it is nothing short of a miracle that America has become the nation that it is in such a short period of time"; the drafting of the Constitution was a matter of "profound debate at Philadelphia"; and the ore fields of his native Minnesota were "a true sleeping giant of enormous wealth." Even Supreme Court decisions take on the aura of greatness. The *Near v. Minnesota* decision is "the first great censorship case decided by the Supreme Court," *Dred Scott* is "The Great Mistake," and *Gibbons v. Ogden* "marked a new epoch in American history, and its impact on the economy is difficult to overstate."

Criticism of the Court and its personalities is rarely mentioned. In the chapter devoted to the *Dred Scott* decision, he
bluntly called Chief Justice Roger Taney's opinion in the case as one of "internal inconsistencies, disjointed sentences, and [a] gross misreading of history." Oliver Wendell Holmes, who retired from the Court at age ninety-one, is recalled as having gone "to sleep on the bench and in conferences years before he left the Court." When Burger does resort to denunciations, he sometimes uses a third person in slight, such as President Harry Truman's mention of North Korea as an "international bandit."

Occasionally Burger lapses into some legalese. Mention of the Contract Clause, Necessary and Proper Clause or the Commerce Clause will likely perplex anyone without a background in constitutional law study. The book's title, *It Is So Ordered*, alludes to the recitation found at the conclusion of many of the Court's decisions. His prose is limited to a lone footnote, a rarity among historical studies by an attorney. The presence of the footnote is so significant that Burger is compelled to mention it in the Foreword: "Since this is a story and not a formal history, there is but a single footnote."

The book though, is far too brief to offer a comprehensive study of the Supreme Court. The author was aware of this shortcoming and attempts to divert such criticism by emphasizing its targeted audience as lay readership. Nearly one-fourth of the book is devoted to what may be called "filler material." Reprinted are the Declaration of Independence, the Articles of Confederation, and the U.S. Constitution. With the additional addendum of the index and a list of cited cases, fifty-nine pages of the 242-page book comprise non-original material. (One minor error appears in the index. Two citations are given for Robert A. Taft. One of the textual references is actually former President and Chief Justice William Howard Taft, not his son, Robert A. Taft.)

For a story subtitled *A Constitution Unfolds*, Burger only partially opens the book on the complexities of the document and the lives of the justices interpreting the Constitution. He was reluctant in his current book to discuss any of the cases appearing before the bench during his tenure on the Court (the longest of any Chief Justice during the century). Nearly a decade passed since Burger retired from the Supreme Court in 1986 until his death this year, certainly enough time to write an extensive critique of the Burger Court rulings. His reticence on the numerous high-profile cases passing across his desk while
Chief Justice is strange, even disappointing. For a man who obviously cherished the historical significance of the Supreme Court in the development of the United States, ignoring the first-hand details behind the Burger Court’s decisions is genuinely a missed opportunity. Perhaps he was saving his own story for a future autobiography. His death leaves many questions still unanswered about his years as Chief Justice and the procedures about the inner workings of the Supreme Court. The mystique of the Supreme Court continues. It Is So Ordered.