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### In Memoriam: Warren E. Burger

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one could. We saw the wine connoisseur, the chef (whose bean soup and orange marmalade were nationally known — at least among his law clerks), the artist, the sculptor, the naturist (who delighted that the same birds that nested in his holly tree on Rochester Street found their way to his new home on Wakefield), the antique buff, the humorist, and the political observer. We saw much more than that, because of his Office, was regrettably hard for others to see. And as we watched, we caught his contagious enthusiasm for life.

In a word, if only briefly, we who had the privilege of serving the Chief Justice were able to see the law — and life — through the eyes of an elegant, graceful patriot. And what an inspirational perspective it was! He has now passed this life. But there is no doubt that he lives on through the institutions he shaped and so very much cherished, and through the countless lives he touched. A richer legacy than his, none of us could hope for. If ever there was a life to be celebrated, then his.

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*Kenneth F. Ripple\**

It has happened on only fourteen other occasions in the history of the Republic. The Country has laid to rest a Chief Justice of the United States.

The affairs of Washington paused, or at least slowed down, long enough to observe the milestone with respectful but restrained formality. Washington does not expend a great deal of time or energy in reflecting on the contributions of those who once were at the heart of the process of governing. With the exception of our presidents, most public figures leave the scene and are soon forgotten as the tide of new issues and new faces erases much of what occurred on their watch. A Chief Justice presents, moreover, a particular challenge to the collective memory of the body politic. The legacy left by an incumbent of that office is a particularly complex and subtle heritage. During his life, he occupies an office whose powers and responsibilities, although great, are also ambiguous.<sup>1</sup> The title "Chief Justice" appears but once in our Constitution. Notably, that mention is not in Article III, the

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<sup>1</sup> See Peter G. Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade*, in *THE OFFICE OF CHIEF JUSTICE* 1, 7-9 (White Burkett Miller Ctr. of Pub. Affairs 1984); KENNETH F. RIPPLE, *CONSTITUTIONAL LITIGATION* § 11-5(A), at 440-42 (1984); Kenneth F. Ripple, *The Role of the Chief Justice*, in 1 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 242, 242-45 (Leonard W. Levy ed., 1986); Kenneth W. Thompson, *Comments on*

judicial article, but in the description of the procedures to be followed in a trial of the President of the United States on articles of impeachment.<sup>2</sup> With little in the way of a specific mandate to fulfill, each Chief Justice has molded somewhat differently the Nation's highest judicial office. Each has left a unique legacy upon his departure.<sup>3</sup>

For Warren Burger, the end came gently as the Nation's capital began to stir on a quiet early summer morning. He had been retired for almost a decade and, although in the public spotlight throughout his tenure as Chairman of the Bicentennial of the Constitution, even that project's afterglow had waned. The immediate media commentary was swift and predictable. Networks prepare for these events and, given the Chief Justice's age, the news of that Sunday morning was hardly unexpected; obituaries were no doubt already in the file. The "most important cases" of his tenure as Chief Justice, especially those that came from his own pen, were analyzed and reanalyzed. His contributions to improvements in the administration of justice were enumerated. It all seemed predictable, superficial, and incomplete, but also entirely understandable. This complex, multifaceted man had left behind a legacy that even those who knew him well will need time to appreciate fully. Indeed, those of us who were privileged to share, to some degree, the burden of his work must leave to historians not yet born a definitive assessment of his contribution to our jurisprudence and to our judicial system. We can, however, provide a glimpse of the man and his perspective that may aid in that assessment.

For five years, I had the privilege of working by Warren Burger's side; for a quarter of a century, he was a mentor and a friend. Together, we saw the tragedy of Watergate, the resulting tapes case,<sup>4</sup> and the possible impeachment of a President. Together, we walked Washington, ate together, shopped together, and spoke of every possible subject. This past June, I stood beside him for the last time as he lay in state in the Great Hall of the Supreme Court of the United States. As I stood that watch with my fellow clerks, a flood of memories rushed over me. I remembered our very first meeting in the conference room of the Court. He had entered the room from his adjoining

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*the Death of a Chief Justice*, MILLER CENTER REPORT (Miller Ctr. of Pub. Affairs, Univ. of Va.), Summer 1995, at 1.

<sup>2</sup> See U.S. CONST. art. I, § 3, cl. 6.

<sup>3</sup> See Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883 *passim* (1953); Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4 *passim* (1967); William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637 *passim* (1976); see also William F. Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 SUP. CT. REV. 241 *passim* (noting that Chief Justice Burger's judicial reform efforts made state and federal courts nationwide more modern and efficient). See generally Walter F. Murphy, *Marshaling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640 *passim* (1962) (arguing that the nature of small group decisionmaking gives an astute Chief Justice the opportunity to broker coalitions and mold the factions of the Court to achieve his goals).

<sup>4</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

private office, looked at me, appeared somewhat startled, and said, "Oh — I expected a much older man." He then laughed and, walking toward me, said, "But I learned a long time ago never to hold age for or against anyone." I also remembered the day he administered the judicial oath to me, removed his judicial robe, and placed it over my shoulders. On that occasion, he had some blunt advice for the Third Article's newest judge: If you are any good, no one will remember who appointed you.

As I stood that last watch, however, my most vivid memory was of July 1974, when another Chief Justice of the United States lay on the same catafalque. Chief Justice Burger was, at that time, writing the opinion in the tapes case. At one point, he left his chambers, walked to the Great Hall, and stood behind a pillar out of sight of the public but within view of the flag-draped casket of his predecessor. I never dared to ask him to share his thoughts from that occasion. Certain matters ought to remain between Chief Justices of the United States.

As my watch continued and I reflected on all these memories, one point assumed prominence among all others: Warren Burger believed that the United States had a soul; he believed that the values of that soul were embodied in the Constitution. Although the words of the Constitution were his usual starting point, there was a distinctive teleological quality to his thinking about the values that he believed animate our Constitution. He accepted as a given the inevitable societal change that comes with time. He viewed the United States as a vibrant society on a journey. The values originally embodied in the Constitution were not anachronisms to be jettisoned along the way, but ideals to fuel that journey. For him, therefore, the best way to go forward was first to look back. Careful study and contemplation of the values embodied in the Constitution were the first steps in interpreting the Constitution. Identifying and understanding those seminal constitutional values was not an exercise in abstract political theory. The Constitution, as he viewed it, was rooted in the history of our people. Only when he had an understanding of those roots did he feel comfortable looking forward. Then, with the discipline of common law methodology to guide him, he would attempt to apply that experience of the past to the present. What earlier judges had said weighed heavily because, for him, the essence of the discipline of the common law was to accept, respectfully but critically, the wisdom of those who had gone before.

The future, however, always remained the primary focus of his work and his daily perspective. He approached it with great care and circumspection; his study and discussion exhibited a tentativeness grounded in a realistic humility for what he could perceive, and what he could not perceive, in that future. He was acutely aware that his commission as Chief Justice did not provide him with a crystal ball

that permitted him to see clearly a future that others could perceive only in its barest contours. Deeply committed to democratic governance and instinctively suspicious of mortmain control, he believed that the future belonged to those who would live in it and that those individuals, not he, ought to resolve the problems of their own time. His task was to apply the received tradition of our constitutional values to his day and to leave a judicial system in place that would allow his children's and grandchildren's generations to take care of their own times. Responsibility for the future, like the "letting go" of one's children, often involves, primarily, ensuring that the received tradition is understood and applied correctly today. With such a firm foundation, the future is able to take care of itself. For Warren Burger, the quality of our governance today set the stage for our children's tomorrow.

This preoccupation with leaving the Constitution and its values intact for the next generation was at the root of the great care and attention he gave, whether in his judicial writings or in his innovations in judicial administration,<sup>5</sup> to preserving the vitality of the institutions of government. He was awed by the genius of the Founding Fathers<sup>6</sup> and convinced that, to preserve the rights of individuals, our institutions of government, especially the Article III judiciary, must remain up to the job of responsive governance. This same concern for the future was the motivation for his decision to undertake the chairmanship of the bicentennial celebration of the Constitution.

For those of us who worked in his chambers, however, his preoccupation with the future was best seen, not in the pages of the United States Reports, but in his approach to our own children. During my early days with him, my eldest son became ill and my wife and I, like any new parents, were very concerned. The week was filled with trips to the pediatrician. The Chief Justice asked about his progress and, in thanking him for his concern, I added that it was not every one-year-old who had the Chief Justice of the United States inquire as to his health. Without a moment for a studied reply, the Chief simply remarked: "Ken, at this point, his life is a great deal more important to this Country than yours or mine."

As I ended my watch by his side and made way for a colleague to have some private time with the Chief, I became aware that a significant number of young people had filed by. Some were secondary school and college students engaged in government internships for the summer who, in all probability, had benefitted from the educational materials developed by the bicentennial celebration of the Constitu-

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<sup>5</sup> See WARREN E. BURGER, *DELIVERY OF JUSTICE* (1990); see also Russell Wheeler, *Warren Burger: A Man of "Common Sense and Practical Ideas,"* JUDICATURE, July-Aug. 1995, at 8, 8 (attributing the Chief Justice's interest in judicial administrative reform to his roots in "the more conservative wing of the Progressive movement").

<sup>6</sup> See Warren E. Burger, *Foreword* to JEFFREY ST. JOHN, *CONSTITUTIONAL JOURNAL* (1987).

tion. Others were young parents who wanted their children to have a memory of the Chief Justice. The Chief would have appreciated their coming — although he no doubt also would have advised that the children see the museum on the floor below before leaving the building. Taking care of the Constitution was now their job. For Warren Burger, the best way to take care of the future was to ensure that those who were to inhabit that future had the personal and institutional capacity to govern themselves.