SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 19 | Issue 3

1968

Warren: The Man, The Court, The Era, by John Weaver

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BOOK REVIEWS

WARREN: THE MAN, THE COURT, THE ERA. By John D. Weaver. Boston: Little Brown & Company. 1967. Pp. 406. $7.95.

Warren: the Man, the Court, the Era is a rather straightforward account of the life of the two personalities named Earl Warren and his relationship to the Supreme Court of the United States. The author presents the life of this dual personage within the context of local, State, and national politics since World War I.

The first Earl Warren was born in 1891 in Los Angeles, California. His family later moved to Bakersfield, California, where he attended Kern County High School. Subsequently, he studied 6 years at the University of California at Berkeley, earning a bachelor of laws degree in 1912, and a doctor of laws degree in 1914. After 3 years in the practice of law, first with a corporation and later with a firm, he went into the Army as a private. Discharged at the end of the war as a first lieutenant, Earl Warren obtained a job as a deputy in the Alameda County (California) District Attorney's Office. He was appointed chief deputy in 1923, and district attorney in 1925 (for the balance of an unexpired term). "[B]y meeting and talking to more voters than any other candidate had ever talked to before,"[1] he won election to that office in 1926. In 1938, he sought and won election to the post of attorney general of California and in 1942 was elected Governor of the State. He served in this latter position until 1953.

The second Earl Warren came into being on September 30, 1953, immediately after the announcement that he had been appointed Chief Justice of the United States Supreme Court. From this point in time, his life is undoubtedly well known to the readers of this review.

It is difficult to account for the apparent differences between the two public personalities. Warren the district attorney and attorney general fought criminals and Communists with every means the law allowed, but with ever an eye to the sometimes extreme mood of the electorate. Warren the Chief Justice, however, has been called the friend of the criminal because of his position on civil liberties and individual rights. He has also been the target of a half-serious attempt at impeachment by the John Birch

[1] J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 43 (1967), *quoting from* I. STONE, EARL WARREN: A GREAT AMERICAN STORY 56 (1948).

Society and has been hanged in effigy three times. Yet, throughout his entire life, Earl Warren has always had "a passionate commitment to law and order."

After reading the life of this man as reflected in his accomplishments, it is clear that Earl Warren the district attorney and attorney general would have reacted to a given situation with a response quite the opposite to that of Earl Warren the Chief Justice. But this reviewer is thoroughly convinced that the visceral reaction of both personalities is the same. For example, it is not difficult to imagine how Justice Warren would react to an order, by the President and the Congress, to evacuate all Japanese-Americans from the west coast, as was done in 1942. Here is how Earl Warren the attorney general reacted:

A few weeks after the attack on Pearl Harbor, Earl Warren stated that he had "come to the conclusion that the Japanese situation as it exists . . . today, may well be the Achilles' heel of the entire civilian defense effort."[2]

Three days later he said: "It seems to me that it is quite significant that in this great state of ours we have had no fifth-column activities and no sabotage reported. It looks very much to me as though it is a studied effort not to have any until the zero hour arrives."[3]

And later, when asked about the civil rights of the evacuees, California's attorney general replied: "I believe, sir, that in time of war every citizen must give up some of his normal rights."[4]

And during the war he stated:

> If the Japs are released no one will be able to tell a saboteur from any other Jap. We are now producing approximately half of the ships and airplanes of the country on the Pacific Coast. To cripple these industries or the facilities that serve them would be a body blow to the war effort. We don't want to have a second Pearl Harbor in California. We don't propose to have the Japs back in California during this war if there is any lawful means of preventing it.[5]

Yet, despite his earlier remarks, when the War Department announced that the internment order was rescinded as of January 2, 1945, Governor Warren was one of the first to call upon Cali-

[2] J. WEAVER, *supra* note 1, at 105, *quoting from* M. GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 94 (1949).

[3] J. WEAVER, *supra* note 1, at 105, *quoting from* M. GRODZINS, *supra* note 2, at 94.

[4] J. WEAVER, *supra* note 1, at 108 (footnote omitted).

[5] *Id.* at 109 (footnote omitted).

fornians to "join in protecting constitutional rights of the individuals involved."[6] His official statement went on to declare:

> Any public unrest that develops from provocative statements or civil disturbances that result from intemperate action will of necessity retard the flow of needed materials to our boys in the Pacific who are moving steadily but at great sacrifice toward their ultimate goal — Tokyo.
>
> . . . As civilians, it is our duty to comply with such decisions as loyally and cheerfully as they do.[7]

For its nature, the book is well done. It has all the apparatus of solid research and scholarship: over 30 pages of notes, mercifully placed in the back and not cluttering each page; a table of cases that appears to include most of the landmark decisions; and a pretty fair index. I would call this book a compilation biography; hundreds of quotations from a myriad of sources are tied together with a minimum of comment and analysis. The author, John D. Weaver, is well suited to this task, having spent 5 years on the *Kansas City (Mo.) Star.* Since 1940, he has been a freelance writer of short stories and articles for many of the leading magazines. To his literary credit are two novels, two works of nonfiction, and one juvenile book.

The book is interesting reading in small doses; the subject is important for anyone who desires to place the decisions of the Supreme Court in the context of the personalities of its members.

DAVID S. LAKE*

HUGO BLACK AND THE SUPREME COURT. Edited by Stephen P. Strickland. New York: Bobbs-Merrill 1967. Pp. xxix, 365. $10.00.

The editor of this work is a graduate of Emory University, holds a M.A. from Johns Hopkins, and is presently studying for his Ph. D. there. Professor Charles L. Black of Yale writes a foreword to the work's nine chapters, each written by a different author. In the back of the book there are notes to each chapter, a table of cases, and an index. Greatly to the credit of the editor, the topics are well

[6] *Id.* (footnote omitted).

[7] *Id.* at 109-10 (footnote omitted).

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planned and there is a minimum of repetition from chapter to chapter.

Although Hugo Black is a member of my All-American Supreme Court,[1] and although I have enjoyed reading this book, it should not surprise you that I do not think it begins to do justice to its subject. I would be less than honest were I not to say that it fails to present a balanced portrait. Granting that a symposium makes this somewhat inevitable, nevertheless, there are too many laudatory chapters that lack critical appraisal. Some of the chapters are incomplete in coverage, concentrating on the great decisions for which we all admire Mr. Justice Black, and yet omit, or merely note, the hard cases. For example, there is no mention of *Erie Railroad Co. v. Tompkins*[2] and no notice, except briefly, of *Yamashita v. Styer*[3] and *Korematsu v. United States*.[4] Further, such discussion as there is of Black's fourth amendment views is completely out of date in light of his recent dissent in *Berger v. United States*.[5]

Professor Carl Brent Swisher of Johns Hopkins, biographer of Field and Taney, writes the first chapter, "History's Panorama and Justice Black's Career." As history it is interesting. Senator Black voted against confirmation of Hughes as Chief Justice, argued that F.D.R. had a right to pack the Court, and demanded that the Court expedite decisions as to constitutionality. During the New Deal, World War II, and the McCarthy Era, he pictures Black as a loner, dissenting 16 times during the 1937 term, 12 alone, and in Stone's doghouse because of his "somewhat cavalier way of dealing with precedents and questions not fully argued . . . ."[6]

However, when Swisher comes to the modern Court, I fear there is too much of the old school tie. While Swisher admirably recognizes that, if "ours is to be a living Constitution,"[7] then the Supreme Court, sitting "as a kind of continuing Constitutional Convention"[8] must adapt the document to changing conditions. He, never-

* This book review, in a somewhat shorter version, originally appeared in 54 A.B.A.J. 293 (1968).

1 Keeffe, *Practicing Lawyers' Guide to the Current Law Magazines*, 52 A.B.A.J. 981 (1966).

2 304 U.S. 64 (1938).

3 377 U.S. 1 (1946).

4 323 U.S. 214 (1944).

5 388 U.S. 41, 71 (1967) (dissenting opinion).

6 Swisher, *History's Panorama and Justice Black's Career*, in HUGO BLACK AND THE SUPREME COURT 36 (S. Strickland ed. 1967).

7 *Id.* at 23.

8 *Id.*

theless, complains that the Court's decisions, and Black's in particular, "sometimes read like fiat determinations made without reference either to documented history or to clearly expressed principle."[9] This lets Swisher have it both ways; his reader, neither, and damns Black with faint praise.

In chapter 2, former Yale Professor John P. Frank, law clerk to Mr. Justice Black at the 1942 term, author of a book entitled *Mr. Justice Black: The Man and His Opinions*,[10] and now a practicing lawyer in Phoenix, Arizona, writes with respect to Black as a New Dealer. It is stimulating and provocative writing, especially the discussion of his former boss's attitude towards substantive due process and the application of the antitrust laws to small business and patents. Apparently when Martin Van Buren of the O.K. Democrat Club of Kinderhook, New York, appointed Peter V. Daniel to the Supreme Court, he wrote Andy Jackson "that he had made that choice because he wanted to choose a Democrat *'ab ovo'* — from the egg."[11] In Frank's opinion, when F.D.R. selected Hugo "he wanted to choose a New Dealer *ab ovo*"[12] and got one, who, after he went to the bench, was "the same man he was before he went there."[13]

Quite appropriately, the late Professor Daniel M. Berman of American University, who wrote his Ph. D. thesis at Rutgers University on Justice Black and directed the publication of a symposium issue of the *American University Law Review*[14] in honor of the Judge's 75th birthday, writes chapter 3 on "The Persistent Race Issue." His is a remarkably able and readable job that pulls no punches. Dan Berman discusses Black's membership in the Ku Klux Klan[15] and says that "[e]ven today he [Justice Black] asserts, only half-jokingly, that the only organization he regrets joining is the American Bar Association."[16] Berman also discusses Black's recent votes in civil rights cases and points out how both yesterday and today Hugo Black does not allow personal attacks from the right or left to embitter him because "he is the rare kind of person who genuinely

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[9] *Id.*

[10] J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949).

[11] Frank, *The New Court and the New Deal*, in HUGO BLACK AND THE SUPREME COURT 74 (S. Strickland ed. 1967).

[12] *Id.*

[13] *Id.*

[14] *Symposium — Mr. Justice Black*, 10 AM. U.L. REV. 1 (1961).

[15] Berman, *The Persistent Race Issue*, in HUGO BLACK AND THE SUPREME COURT 76-86 (S. Strickland ed. 1967).

[16] *Id.* at 289 n.34.

respects the opinions of others — however intemperately expressed."[17] His explanation of Justice Black's reason for voting against Negro demonstrations in public libraries[18] and in front of jails,[19] and Black's votes against sit-ins before the passage of the Civil Rights Act of 1964,[20] and in favor of them thereafter, is superbly done. With characteristic honesty, Berman concludes by saying that "those who . . . do not share Black's antipathy for the techniques of direct action" should remember that in his "fifty years in public life [Hugo Black] . . . has seen other worthy goals doomed by the very means employed to achieve them . . . . [and] [h]e does not want such a fate to befall the precious [and *worthy*] cause of civil rights."[21]

The well-known journalist, Professor Irving Dilliard of Princeton, editor of books on Learned Hand and Hugo Black, writes chapter 4 on "The Individual and the Bill of Absolute Rights." It is too bad that he wrote before Black's dissent in *Berger v. United States*,[22] but, nevertheless, Dilliard does correctly emphasize that Black's dissent in *Adamson v. California*[23] has carried the day, and for all practical purposes the Bill of Rights that we fought two wars to bring to the world has at long last been brought to the States.

In chapter 5, Professor Charles A. Reich of Yale, a former clerk for Justice Black, writes an analysis of Mr. Justice Black's constitutional theory. He emphasizes Black's habit of beginning each decision with specific provisions of the Constitution and reasoning therefrom. To me the high point in Reich's piece is his comparison of Black's decision on the rehearing in *Reid v. Covert*,[24] where Black reasons that clause 14 of section 8 of article I of the Constitution, which gives the Congress the power to make uniform rules for the land and naval services cannot apply to persons accompanying the military with the status of civilians, and Mr. Justice Harlan's approach[25] that reads the clause the same way as to civilians accused of *capital* crimes but the reverse way as to noncapital crimes.[26]

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17 *Id.* at 86.

18 *See* Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion).

19 *See* Adderley v. Florida, 385 U.S. 39 (1966).

20 42 U.S.C. § 2000e (1964).

21 Berman, *supra* note 15, at 95.

22 388 U.S. 41, 71 (1967) (dissenting opinion).

23 332 U.S. 46, 68 (1947) (dissenting opinion).

24 354 U.S. 1 (1957).

25 *Id.* at 65 (concurring opinion).

26 Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT 147-48 (S. Strickland ed. 1967).

As chapter 6, the editor reprints the article that the late Randolph Paul wrote shortly before his untimely death about Justice Black's tax decisions in 1956. Unfortunately, although he brackets his new material, the editor attempts to bring the article up to date. It does not need it.

In the tax field, Paul thinks Black's contribution greatest in his decisions subjecting government employees — State and federal — to federal taxation and his decision subjecting to taxation life estates with power of appointment.[27] It is a great tribute that so fine a tax lawyer as Randolph Paul could say as early as 1956 that Hugo Black's tax opinions maintain the "[high] standards of his other work on the Court."[28]

In chapter 7, Associate Dean W. Wallace Kirkpatrick of the George Washington Law School reviews Black's antitrust decisions. I am afraid it is even less critical than this book review. Kirkpatrick spent 20 years in the Antitrust Division and praises Black's every decision. As much as I love Hugo, this I could not do. As Swisher said: "from the perspective of coming generations of citizens and judges the antitrust movement may come to be seen as a mark of antiquity."[29]

George Kaufmann, of the District of Columbia bar, writes chapter 8 on Black's attitude towards the Federal Rules — civil and criminal. Strange as it may seem, he excuses Black's opposition to the rules but objects to Black's violent opposition to cases where a man is sent to jail because of his lawyer's neglect.[30] I would come to just the opposite conclusion.

In the last chapter, "Black on Balance," the editor, Stephen Strickland, attempts a definitive critique. He fails but I give him "A" for the effort. It is easily the most critical paper in the book. Whether he is talking about Black's balancing the war power against the first amendment as in *Korematsu v. United States*[31] or some other case, Strickland does not spare the horses. Unfortunately, his piece lacks depth. For example, in his discussion of the religious cases, Strickland omits Black's very important *McCollum*

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[27] Paul, *Federal Taxation: Questions of Power and Propriety*, in *id.* at 176-80.

[28] *Id.* at 194.

[29] Swisher, *supra* note 6, at 36.

[30] Kaufmann, *The Federal Civil Rules and the Pursuit of Justice*, in HUGO BLACK AND THE SUPREME COURT 221-44 (S. Strickland ed. 1967).

[31] 323 U.S. 214 (1944).

v. Board of Education[32] opinion. The truth is, it is still too early to give a definitive appraisal of Hugo Lafayette Black. He is still at work and does not intend to quit in the near future. No book is complete that does not deal with Black's decisions at the October 1967 Term. There he wrote approximately 11 opinions for the Court, made 13 dissents, seven alone, not to mention five concurring opinions. Professor Swisher please note.

This book falls short. As W.C. Fields was wont to say, any fellow, even Hugo, so lavishly praised by these nine authors just can't be all good. And if Madison had just a few of the faults Crosskey attributes to him, except for *New York Times v. Sullivan*,[33] it would be libel per se for Strickland to call Justice Black a Madisonian.

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[32] 333 U.S. 203 (1948).

[33] 376 U.S. 254 (1964).

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