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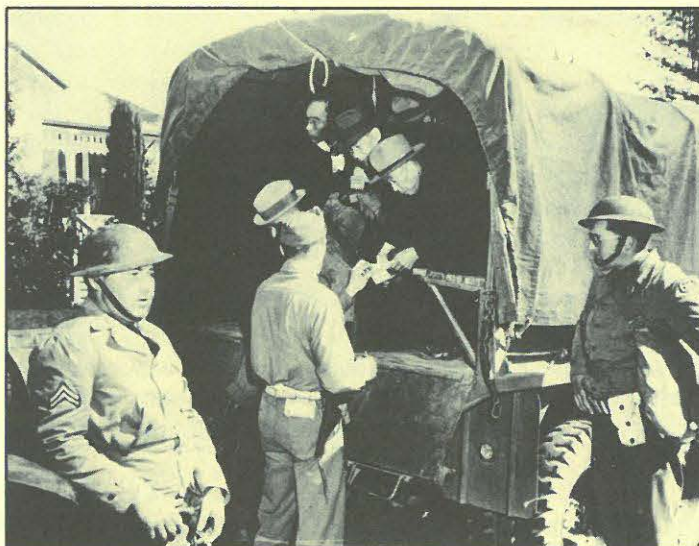
## The Court Goes To War, And The War Goes To The Court The Supreme Court Of The United States And World War II

The Society will present its first program in a six-part lecture series on the Supreme Court in World War II on Wednesday, January 25, 1995. Following the successful pattern established in two prior lecture series, each lecture will feature a nationally prominent speaker introduced by a sitting or retired Justice. Three of the lectures will take place in the Supreme Court Chamber and three in the Jefferson Building of the Library of Congress. All six programs will include receptions where guests can meet and talk with the program participants. In addition to the Chief Justice, Justices Stephen G. Breyer, Anthony M. Kennedy, Sandra Day O'Connor, David H. Souter, and Retired Justice Byron R. White have graciously agreed to introduce speakers. The Supreme Court in World War II is cosponsored by the Friends of the Law Library of Congress, and is made possible, in part, through a generous grant by West Publishing Company.

The schedule of dates, locations, and speakers follows:

**January 25, 1995—The Court Goes to War and the War Goes to the Court by Professor Melvin Urofsky, Virginia Commonwealth University Introduction by Chief Justice Rehnquist.** This lecture will focus on the personalities serving on the Court at the time of the War, and the issues which it faced at the outset of the war. The Court was populated by many outstanding jurists of strong personality during this time period including Frank Murphy, Hugo L. Black, Felix Frankfurter, William O. Douglas and Robert H. Jackson. Held in the Supreme Court Chamber.

**February 9, 1995—Government vs. Private Property by Professor James W. Ely, Vanderbilt University. Introduction by Retired Associate Justice Byron R. White.** Prof. Ely will consider the Court's treatment of Federal Property seizures as part of the overall mobilization for war. Under the Second War Powers Act of 1942, the president was granted authority to requisition plants and to control overseas communications, alien property and defense contracts. Such broad sweeping powers provided the basis of many lawsuits. Held in the Library of Congress.



Fried World Photos

Reacting to the attack of Pearl Harbor, the federal government ordered the evacuation of persons of Japanese ancestry from west coast military zones. The government shipped the civilians to detention centers where more than 110,000 Japanese-Americans endured a bleak life for the duration of the War. Although the laws were challenged in the Supreme Court, the Court initially ruled that the threat of invasion justified the restriction of constitutional rights.

**March 9, 1995—The Court and Racial Classification by Professor Mary Dudziak, University of Iowa Law School. Introduction by Justice David H. Souter.** The speaker will consider the wartime measures taken in which Japanese-Americans were subject to curfews and eventually internment, the Hawaiian cases and other civil rights decisions peculiar to the situation. Held in the Supreme Court Chamber.

**March 23, 1995—Sabotage and Treason, Quirin and Cramer by Professor J. Woodford Howard, Johns Hopkins University and Professor Emeritus David J. Danlski, Stanford University. Introduction by Associate Justice Stephen G. Breyer.** An anomaly in American history, this two-part lecture deals with the treatment of foreign nationals sent to American soil to

—continued on page three



## A Letter From the President



Leon Silverman

At times, while rattling my begging bowl on the Society's behalf, an occasional skeptic will ask "What do I get for joining the Society?" And fortunately, because of the prodigious work of the Society's many volunteer supporters, I am rarely at a loss for an answer. I can enumerate the Society's publications, lecture programs and research

projects—all in the plural form.

January, for example, is a very good month to be a member of the Supreme Court Historical Society. Within days you will be receiving the next issue of the *Journal of Supreme Court History* and your *1994 Annual Report*. You should have already received our first special edition of the *Journal*—a published collection of the papers delivered at the 1993 lecture series entitled *The Jewish Justices of the Supreme Court: Brandeis to Fortas*. This outstanding volume includes a Foreword by Justice Ruth Bader Ginsburg, and a Preface by Justice Stephen G. Breyer—the two Jewish Justices who joined the Court after the lecture series had been completed.

I should here note that the papers from the 1994 lecture series on the Supreme Court and the Civil War will be published in the Summer of 1995, marking the second special edition of the *Journal*. This collection of papers will include all six of the highly popular lectures and panel discussions.

January also marks the commencement of the Society's new six-part lecture series on the Supreme Court in World War II. On January 25, 1995, the Chief Justice will introduce Professor Melvin Urofsky of Virginia Commonwealth University, who will deliver a talk entitled "The Court Goes to War and the War Goes to the Court."

Subsequent lectures in the series will take place every few weeks through May and each will feature distinguished scholars from around the country and be introduced by a sitting or retired Justice.

Topics will include the First Amendment and civil liberties issues, the Nazi Saboteurs case, the infamous Japanese-American internments, the Court's handling of private property seizures for the war effort and Justice Jackson's involvement in the Nuremberg Trials. Three of the lectures will be held in the Supreme Court chamber and three in the Jefferson Building of the Library of Congress—hosted by our cosponsor, the Friends of the Law Library of Congress.

The program, as you can see in the schedule which appears elsewhere in this issue of the *Quarterly*, is truly outstanding. The locations in the Supreme Court Chamber and the Library of

Congress are, arguably, two of the most architecturally impressive buildings in Washington. And, attendees are invited to meet and talk with the program participants at receptions following each event.

These factors, along with the high quality of the speakers, will undoubtedly result in an oversubscription of the series. I thus urge each of you who is interested in attending this program to reserve your seats promptly. Due to the size of the Court Chamber we are limited to 250 seats in each lecture, and series subscribers will be given preference in making reservations. I might add, that the Society is grateful to Dwight Opperman and West Publishing Company for helping to underwrite the lecture series. As a result of West Publishing's generous support we are able to offer series subscriptions for \$125 and individual lectures for \$25 per guest. Reservations can be made by calling the Society at (202) 543-0400. I recommend making reservations with alacrity, as both previous lectures series have sold out.

Leon Silverman

## In Memoriam



President's Note: It saddens me to report that the Society suffered a major loss this year, with the passing of its respected Chairman, Erwin N. Griswold. Within the Society he was fondly and reverently referred to as "The Dean"—an honorific title used by many within the legal community when they spoke of Erwin. Although it undoubtedly sprang from his

twenty-one years of service as Dean of the Harvard Law School, the title came to encompass many aspects of his prominent career in the law—his tenure as Solicitor General, his frequent appearances before the Supreme Court, numerous publications in the field, and perhaps most of all, his devotion to public service in the law. He became to many, not simply the Dean of Harvard Law, but the Dean of American law, and we were honored to have had him serve nearly two full terms as Chairman of the Supreme Court Historical Society.



## World War Two *(continued from page one)*

perpetrate acts of guerilla warfare against the United States, and the fate of Americans who came to their aid. Held in the Library of Congress.

April 27, 1995—**First Amendment and Civil Liberties** by **Professor Anthony Freyer**, University of Alabama. **Introduction by Associate Justice Anthony M. Kennedy.** Professor Freyer will discuss the flag salute cases brought before the Courts by individuals who objected to saluting the flag for religious reasons. As national pride and security were of paramount interest to the country during the war, the refusal to pledge the flag was considered nearly treasonous and aroused feelings of hostility in many Americans. Other cases discussed in the lecture questioned the legality of distributing printed matter that was considered to be propaganda. These cases aroused the issues of whether the right of free speech took precedence over the need for national security. Held in the Supreme Court Chamber.

May 10, 1995—**The Nuremberg Trials** by **Professor Dennis Hutchinson**, University of Chicago Law School. **Introduction by Associate Justice Sandra Day O'Connor.** This lecture will examine Justice Robert Jackson's extra-judicial role in the trials in which Nazi officers were tried for war crimes committed in the war. Held in the Supreme Court Chamber.

Tickets for the lectures may be purchased on a series basis, or on an individual lecture basis. The series price will be \$125 for all six lectures, or \$25 per individual lecture and series subscribers will be given preference in reserving space. All current Society members will receive a formal



Library of Congress

Robert Houghout Jackson was appointed to the Supreme Court in 1941 after having served in several key positions in the Roosevelt administration. In an unusual departure from the tradition of Supreme Court Justices, he also served as the chief U.S. prosecutor at the Nuremberg war crimes trial in 1945-1946. He originated the concept upon which the successful prosecution of the Nazi leaders was based: that it is a crime against international society to plan and wage an aggressive war.

invitation in the mail announcing the program and containing a response form for ordering lecture tickets. Please telephone the Society's office at (202) 543-0400 if you have any questions. If you prefer to order tickets directly, reservations can be taken by telephoning the office at the number noted above. Payment for telephone orders can be made by MasterCard or Visa. It is anticipated that space will fill up quickly, so it is advisable to make reservations as early as possible.

### The Supreme Court Historical Society **Quarterly**

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During the summer of 1942, the Supreme Court heard a case which dealt with Nazi agents. The defendants were eight German agents, two of whom are shown above. All eight of the Germans were former residents of the United States who returned to the United States on a sabotage mission. Two of them soon betrayed the others, and they were rounded up by the FBI before they were able to perpetrate any acts of violence. In a dramatic special session held July 30-31, the Court heard oral argument in the case.



## **Amicus Curiae**

**George R. Adams, Esquire**

*Editor's Note: Mr. Adams is a practicing estate planning attorney in the Washington, D.C. area, and Chair of the Supreme Court Historical Society's Development Committee.*

Did you know that. . .

**An estimated transfer of 10 trillion dollars of wealth will pass from the older population to the "baby boomer" generation within the next few decades?**

**More than fifty per cent of Americans die without a will?**

**More than half of the people making planned gifts to charity do so via their wills?**

**Donors can often make substantially larger gifts through their will than they are able to contribute during their lifetimes?**

Of these four statements, the last may be the most meaningful to you and the Supreme Court Historical Society.

Because of the pressing commitments of your everyday life, you may find that you are not able to give as much to your favorite non-profit organization as you would otherwise like to. This situation may be very different when it comes to gifts under your will.

For very good reasons, you may be unable to make the size of

gift that you would like to during your lifetime, yet you may be in a position to make a substantial bequest to charity under your will without taking away significantly from the other legatees for whom you wish to provide. This may be due in part to the existence of a charitable deduction for your estate or because your estate will be large enough to warrant the bequest and still provide for your other beneficiaries.

Bequests under will provide a flexible, controllable, convenient, and relatively simple way to express your charitable intent. A will is flexible because it can be changed or amended at any time during your lifetime. A will allows you complete control during your lifetime because only you can modify your will. A will is a convenient vehicle for supporting the mission of your favorite non-profit organization and can be drawn with a simple charitable bequest of cash, real estate or other property, or it can encompass more sophisticated charitable planning such as the use of charitable remainder or charitable lead trusts.

Before making a bequest to charity, you should first have a sincere identification with the goals of your favorite charity or non-profit organization. Should you have such a regard for the mission and purpose of The Supreme Court Historical Society, I recommend that you consult with your attorney and discuss whether a bequest under your will is the best option for you.

For more information on planned giving, or other aspects of The Supreme Court Historical Society, please contact Charlotte Sadel, Director of Development, at 202/543-0400.

**Note:** This article is for information purposes only. Before finalizing a planned gift or otherwise relying on information contained in this article, the donor should consult with his or her attorney or other tax advisor.

## **Supreme Court Trivia**

**Bernard Schwartz**

1. Who was the first to wear trousers beneath his Supreme Court robe?
2. Who was the first Justice to hire a law clerk?
3. Who was the only descendant of a Justice to become one himself?
4. What Justice wrote the first dissenting opinion?
5. Who was the first Associate Justice to be confirmed as Chief Justice?
6. Who was the first Justice who had held no prior public office?
7. Who was the only Justice who served with a relative on the Court?
8. Who was the first former law clerk to become a Justice?

**Answers appear on page fourteen.**



# The Warren Court: A Personal Remembrance

William J. Brennan, Jr.

*The court that issued the landmark decision in Brown v. Board of Education was the subject of an important conference held October 10-13, 1994 at The University of Tulsa College of Law. The conference was entitled "The Warren Court: A 25-Year Retrospective," and was the first international gathering of legal scholars and historians to examine the Supreme Court led by Chief Justice Earl Warren. The conference was organized by Bernard Schwartz, the Chapman Distinguished Professor of Law at The University of Tulsa College of Law. The program brought together twenty-five speakers including Anthony Lewis, David Halberstam, David Garrow, Kenneth W. Starr, Richard Arnold, Floyd Abrams and Julius Chambers.*

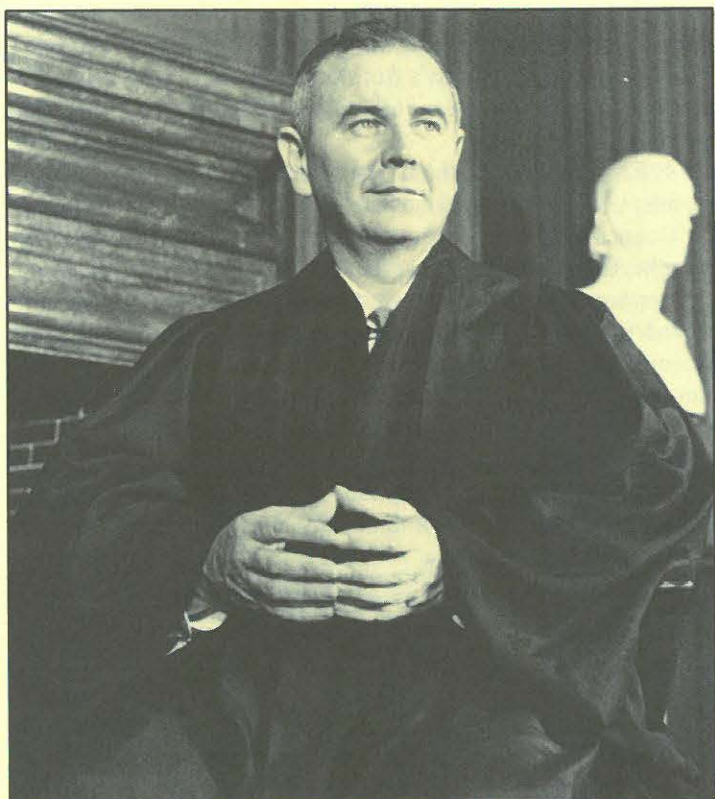
*The conference concluded with the reading of the following paper written by retired Justice William J. Brennan, Jr. The Justice's personal reminiscences of his service on one of the greatest Courts in our history should be of particular interest to members of the Society.*

I am delighted that Bernard Schwartz has asked me to join this illustrious group in its retrospective assessment of the Supreme Court during the tenure of Chief Justice Earl Warren. In a 1970 tribute to the Chief Justice, Senator Edward Kennedy observed that when Earl Warren took his seat on the Court in 1953, our Nation stood at a crossroads in its history. The great struggle to define ourselves in the rapidly changing post-War world was beginning in earnest, as was the struggle to keep our founding fathers' promises of freedom and equality. Any thorough study of this period of our Nation's history must include some consideration of the cases decided by the Supreme Court in those years. Professor Schwartz has held the laboring oar in this endeavor, and he deserves our commendation for it.

It is unfortunate that I was unable to make the journey to Oklahoma to be with you for this conference, but I am pleased that I am able to participate in this limited manner. It is a particular disappointment to me that I was not able to see my former law clerk, Chief Judge Arnold, and hear his presentation. As Richard's former boss, I know him to be quite a dynamic speaker, and I daresay I would have enjoyed watching him lull all of you to sleep with the rather boring subject matter of his talk—my role on the Warren Court.

Incidentally, I notice my paper follows a presentation by Anthony Lewis. For those of you that may not know, Mr. Lewis has written an excellent book entitled *Make No Law* about an obscure First Amendment case called *New York Times v. Sullivan*. I recommend that book very highly.

In recent years, I have been tempted to write or speak about some of the more familiar cases decided by the Supreme Court during Earl Warren's sixteen-year tenure. I also have thought it might be useful to attempt some comparative study between that period and the remainder of the two-hundred-and-five-year history of the Court. After some consideration, however, I have decided that this is a task best left to others. To my chagrin, I have found that my role as a participant on the Court



Collection of the Supreme Court of the United States

William J. Brennan, Jr., was appointed to the Supreme Court in 1956 by President Eisenhower, who had appointed Earl Warren Chief Justice just three years earlier, in 1953. Brennan served with Warren until his retirement in 1969, finally retiring himself in 1990. Brennan affectionately refers to Warren as "Super Chief"—a tribute to his admiration for Warren's abilities, particularly as a leader.

has made it impossible for me to maintain the objectivity that is required for meaningful discourse. In any event, I have few doubts that there is little I could add to the rather exhaustive treatment that you already have given these matters during this four-day conference. Accordingly, I thought I might just give you a few words about the human side of some of the members of the Warren Court, including the Chief Justice himself.

The Supreme Court I joined in 1956 was a Court of giants. Consider this: when I joined the Court, Bill Douglas had already been on the Court for seventeen years. This was, at that time, longer than half of the seventy-eight justices that had come before him. Yet even after my appointment to the Court, Bill Douglas did not have the seniority to assign a majority opinion. By tradition at the Supreme Court, the power of assignment goes either to the Chief Justice or to the senior Associate Justice in any majority. With the Chief Justice, Hugo Black, Stanley Reed, and Felix Frankfurter on the Court at that time, it was certain that in any configuration of at least five Justices, there would be someone with more seniority than Bill Douglas.

Even the relatively newer Justices on the Court were quite distinguished. Harold Burton had served with distinction on the

—continued on next page



## Brennan (continued from previous page)

Court for eleven years before I arrived, and for six years in the United States Senate before that. Tom Clark, the spindly Texan, was a relative newcomer to the Court, but, of course, he had received a great deal of attention as the Attorney General. And John Marshall Harlan, the Court's freshman before I joined, had developed quite a reputation as one of the finest practicing lawyers in the Nation.

My first meeting with these giants came in 1956, a few days after President Eisenhower told me that he was going to nominate me to the Court. Earl Warren brought me to one of the rooms in the Supreme Court building where the Justices all were assembled, and I remember that the lights were turned off. As I was introduced around the room, it became clear that my new colleagues were becoming increasingly agitated. Finally, one of them—I do not remember whom—told me to get out of the way because I was blocking the television set on which they were all watching the first game of the World Series.

It became clear to me on that day that no one was more pleased by my appointment than John Harlan. He too had been



Library of Congress

John Harlan (officially known as John Marshall Harlan—and frequently referred to as John Marshall Harlan II to distinguish him from his grandfather and predecessor on the Supreme Court), was one of the first members of the Supreme Court to befriend Justice Brennan when he came to the Court in 1956. Gentle and with a patrician bearing, Harlan was very socially correct. Brennan could not resist teasing him occasionally by calling him “Johnny.”

appointed by President Eisenhower, but one year earlier. My arrival at the Court meant that he would no longer be required to assume a few of the thankless administrative duties traditionally assigned to the Junior Justice. [As an aside, I should disclose that my tenure as Junior Justice was rendered mercifully short by the arrival of Charles Whittaker to the Court one year later.] John and I formed what would become a fast friendship on that first day when I visited the Court. During a break in the baseball game, John asked if I smoked. When I said I did, which was the case in those days, he invited me to his office for a smoke, relieved to finally have an ally.

John Harlan was a true scholar, perhaps, more than anyone else with whom I've served, even Felix Frankfurter. He had a very proper, patrician bearing, and every so often I'd greet him as “Johnny,” and you could just see the color drain from his face.

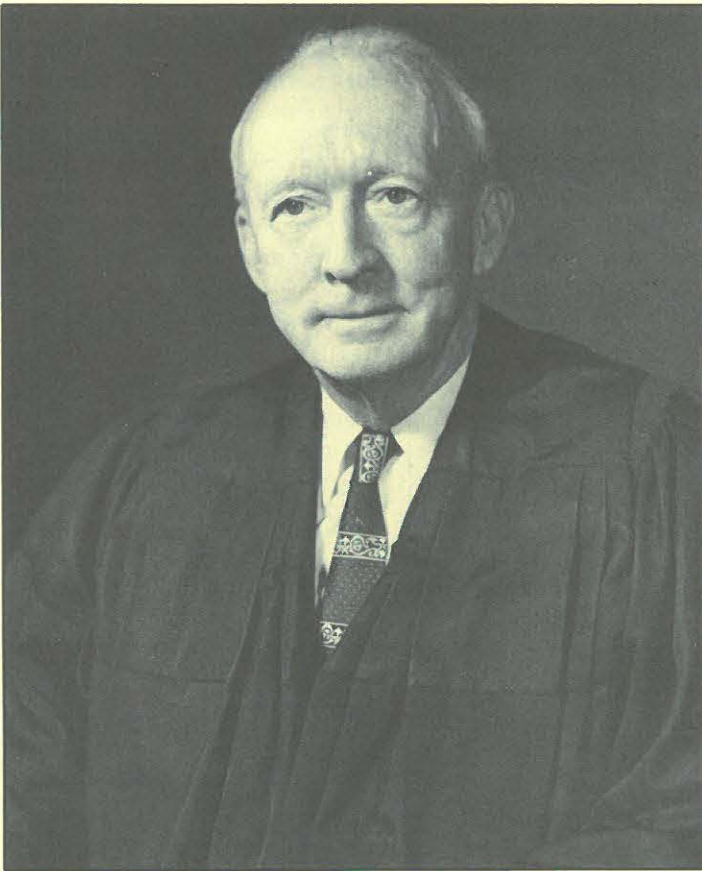
Of course, he and I disagreed more often than we agreed on important matters. That began, I recall, with my very first opinion. There was and still is a tradition on the Court that a new Justice tries to select as a first case one that may produce a unanimous court, and that everyone else tries hard to join that first opinion. I will never forget how anguished he was when he came in to see me to tell me that he would have to dissent in my first decision, *Putnam v. Commissioner*, a tax case. Sure enough the opinion came down 8-1.

Perhaps the strongest disagreements on the Warren Court were the personal clashes of wills between Felix Frankfurter and Bill Douglas. Felix would engage in these long monologues, discussing cases at the Court's conferences—it is often said you could set your watch to them, they lasted precisely as long as lectures at Harvard Law School, where he had been a professor. He would sometimes get up and pace about the room, pulling cases out to cite passages. From time to time, Bill Douglas would announce that he could take no more, would get up and leave, and vow to return only when Felix was finished. To his credit, Earl Warren would never get in the middle, but would just lean back, smile, and continue pushing us through our business.

As I began to develop a stronger relationship with the Chief, Felix became more determined to bring me under his wing. He always enjoyed attempting to persuade his colleagues about important matters, and since I had been a student of his at Harvard, I suppose he saw me as a special project. In those days, I took all of my clerks from Harvard, where Felix Frankfurter was a revered name. He would routinely visit my chambers to try to persuade me about a case, making sure to stop in to see the “boys” from Harvard in the back room first, trying to win them over, as well. But after a while, he just gave up on me. At a dinner one night, after I had been on the Court for several years, he finally proclaimed that while he had always encouraged his students to think for themselves, “Brennan goes too far.”

Bill Douglas was, perhaps, one of the most interesting characters the Court has ever known. When I arrived at the Court, Bill had so many diverse interests that his attention was never fully focused on the Court. Occasionally, this made it difficult for the Court to resolve its business as the end of a Term drew near and he left for his home in Goose Prairie, Washington. I recall many occasions when he would leave me with a list of votes and I would cast them for him at conference in his absence. Once, I cast his vote to affirm in a case, and, without





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in the majority, the dissent, or somewhere in between, feel slighted.

He was a man of integrity and fairness, and no one ever brought more of a sense of humanity and quiet wisdom to the Court than he did. His great opinions, from *Brown v. Board of Education* to *Miranda v. Arizona*, display his greatest gift to our Nation's jurisprudence; his belief that human dignity is perhaps the primary value fostered by the Constitution. He expressed his great vision on the occasion of his retirement thusly,

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence, we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved, we should add them permanently to our storehouse of treasure.

Earl Warren was a great friend to me, and I shall treasure his friendship always. But the greatest gift he has given me is a gift he has given to all of you as well; he made our country a better place. As I said at the outset, I am disappointed that I was not able to attend this conference and explore his legacy with you. But I did not need to attend to be certain of the way that history will remember Earl Warren. He was one of the greatest Judges and men our Nation has ever known.

In referring to Justice Hugo L. Black, Brennan called him "the biggest giant of them all," and stated his opinion that Black provided "the Warren Court with the early vision that carried it through the 1960s." Appointed to the Supreme Court in 1937 by President Franklin Roosevelt, Black served until September 17, 1971.

ever discussing the matter with me or anyone else, he later mailed in a vote to reverse, complete with a dissent.

Bill had a rather strong personality and was not afraid of confrontation. It was not unusual for his law clerks to wander over to my chambers to seek shelter after discussing a case, or some other matter, with him. But despite his ways, his staunch defense of individual rights and his love for the environment have left a lasting legacy.

The biggest giant of them all, of course, was Hugo Black. His dissent in 1947 in *Adamson v. California*, which proposed total incorporation of the Bill of Rights within the Fourteenth Amendment to be applied to the states, moved him to the forefront of constitutional innovation and debate. Hugo Black, more than anyone, provided the Warren Court with the early vision that carried it through the 1960s.

This brings me at long last to Earl Warren himself, or, as I have come to refer to him since 1969, "Super Chief." I have often remarked that the term "the Warren Court" is a fitting tribute to his effective leadership during a period that brought to the Court some of the most troublesome and controversial questions in its history. His great gift was his sensitivity to the diverse and conflicting opinions held by his brethren. He had about him a grace and courtesy that we all respected deeply, and he set a tone that ensured that even the most heated discussions would be conducted with decorum and consideration. Thanks to him, our decisions always were the product of robust debate; rarely did any of the great Justices with whom I served during Earl Warren's tenure, whether they were



Library of Congress

Earl Warren, Chief Justice of the United States from 1953-1969. The Warren Court was the subject of a special conference held in Tulsa in October, 1994. This photograph was taken at the time Warren announced his intention to retire from the Supreme Court. Although he first announced his plans to retire from the Court in 1968, he did not actually retire until June 1969.



# The Warren Court Revisited: The Tulsa Conference

James B. O'Hara

The University of Tulsa College of Law was host to an epic symposium entitled *The Warren Court: A Twenty-five Year Retrospective*, held in Tulsa October 10-13, 1994. The sessions marked the twenty-fifth anniversary of Earl Warren's retirement as Chief Justice in 1969, and culminated the University's own centennial celebration.

The conference was organized by Bernard Schwartz, Chapman Distinguished Professor of Law at Tulsa, an internationally recognized authority on constitutional and administrative law, and author of more than fifty books, including *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (1983). Schwartz has placed Warren second only to John Marshall in importance as Chief Justice, and attributes almost revolutionary significance to the role of the Court in extending the jurisprudence of civil rights, equal protection and freedom of speech during

Warren's sixteen years of leadership.

The conference began with an overview by Kenneth W. Starr, former Solicitor General and federal appellate judge and currently serving as Whitewater Special Prosecutor. After this keynote presentation, the remaining papers were grouped under three main headings: 1) The Constitutional Corpus—an in-depth analyses of the substantive contributions of the Warren Court in key legal areas; 2) The Justices—analytical appraisals of six of the towering figures of that court; and 3) A Broader Perspective—an effort to see the Warren Court in an appropriate historical and legal focus.

The speakers were chosen from a wide range of backgrounds—historians, political scientists, judges, lawyers—and their papers were delivered to an audience which itself was distinguished and drawn from over twenty-five states.

The introductory overview by Judge Starr traced the Warren



Library of Congress

The Warren Court members meet with President Dwight D. Eisenhower and high ranking officials of the Justice Department at the White House in 1957. On the front row from left to right are: Associate Justices William O. Douglas, Felix Frankfurter, Hugo L. Black, President Eisenhower, and Chief Justice Earl Warren. The remaining members of the Court as it was constituted in 1957 appear on the second row: second from the left Justices William J. Brennan, Jr., Tom C. Clark, John Marshall Harlan, Sherman Minton and Harold H. Burton.



Court through its first period dominated by the epic *Brown v. Board of Education* and its sister segregation case, but later marked by a struggle for dominance between the Justices like Warren, Black and Douglas who espoused an activism promoting government as a benign force for good, and the proponents of restraint, led by Frankfurter and Harlan, who saw the Court in a more restricted role. Only after Frankfurter was replaced by Arthur Goldberg in 1961 did Warren actually have a clear liberal majority to lead. Goldberg's accession ushered in a second distinct period, one of liberal activism, particularly in criminal procedure and reapportionment.

Judge Starr noted that only toward the end of Warren's tenure, as congressional opposition grew and "Impeach Earl Warren" billboards appeared, did the activism begin to abate. Black and Douglas began, at least on occasion, to call for a return to fundamental principles, and Warren himself dissented more frequently.

Perhaps, Judge Starr noted, there was a feeling that even peaceful revolutions can go too far. But Warren ended his days on the Court with a "profound sense of accomplishment" as he looked back on a legacy of enduring accomplishment: desegregation, reapportionment, protection of expression, and expansion of rights to those accused of crime.

Judge Starr's opening remarks set the stage for the first great theme of the conference: The Constitutional Corpus—a look at the substantive jurisprudence of the Warren Court in eight key areas: Freedom of Speech; Federalism; Freedom of the Press; Church and State; Criminal Law; Equal Protection; Sentencing; and Economic Rights.

The speakers—all distinguished lawyers, judges and academics—were extremely balanced in their approaches. Sometimes the Warren Court was praised; sometimes it was sharply criticized. Nadine Strossen, president of the American Civil Liberties Union lauded the Warren Court as "the most speech-protective Court in history," which brought a refreshing "attitude" toward speech cases. But she noted a "downside" in the Warren era jurisprudence: no specific doctrinal rationale to provide a guideline to future courts. Professor Ronald Rotunda, constitutional scholar from the University of Illinois spoke on Freedom of the Press, noting the difficulty the Court had in distinguishing "press" free speech from "ordinary" free speech, but applauding Warren and his colleagues for the significant change in attitude they brought to speech and press issues.

John Sexton, Dean of New York University Law School, admitted that the Warren Court added little to Church/State jurisprudence. In Warren's sixteen years as Chief Justice, the Court only addressed ten cases on this topic. Sexton complained that the work of the Warren court on the religion clauses was not "pathmaking," since it lacked "substantive majesty."

Justice Richard Neely of the Supreme Court of West Virginia has acquired a reputation as a challenging, salty, humorous speaker, an intellectual gadfly whose colorful regional speech forces his audience to look at legal problems in a new light. He did not disappoint, calling for "bright-line" rules which can only come from the Supreme Court. Justice Neely asserted that product liability law is now in the same crisis that criminal law was in Warren's day. Plaintiff-based judges in state courts tend to follow the latest and most irresponsible decision from other state courts in a "race to the bottom." Justice Neely, speaking in the context of federalism, reminded his audience that the common law in England

was "common" because it was everywhere observed, while in the United States there are fifty-four bodies of law; federal law, the laws of fifty states, the laws of Puerto Rico, Guam and the Virgin Islands. At least in the area of product liability, the fragmentation of law has become critical, and the Justice challenged the Supreme Court to address product liability issues with the same pragmatic insight that characterized the Warren era.

Yale Kamisar of the University of Michigan Law School dealt with the Warren Court and Criminal Law, with a careful analysis of four cases of towering importance: *Mapp v. Ohio* which established the exclusionary rule; *Escobedo v. Illinois* on right to counsel; *Miranda v. Arizona*, requiring that a suspect must be advised of rights before questioning begins; and *Gideon v. Wainwright*, which guaranteed legal representation even to indigents if the charges against them could lead to imprisonment.

Kamisar noted that for the most part, the Warren court was not as revolutionary as its critics charged. *Escobedo* seemed to say more than it really did, and *Miranda*, while later somewhat watered down, has never been overruled.

Julius L. Chambers, present Chancellor of North Carolina Central University and former Director of the NAACP Legal Defense and Educational Fund, spoke on equal protection. Chambers had warm praise for the work of the Warren Court, which saw the Fourteenth Amendment as "more than a last resort." *Brown v. Board of Education* was the high point of the Warren era equal protection jurisprudence, but there were other major milestones as well: *McLaughlin v. Florida*, which established that racial classifications are always constitutionally dubious and require the Court's careful attention; *Loving v. Virginia* which struck down state miscegenation laws; *Evans v. Newton* which forbade the city of Macon, Georgia, to maintain a segregated park; *Swain v. Alabama*, forbidding peremptory challenges based on race in selecting juries; and finally *Baker v. Carr*, the "one-man, one vote" decision.

Chambers has personally argued many cases before the Burger and Rehnquist courts, but he was sharply critical of the "more restrictive" approach of the post-Warren era, although he cautioned that all is not suddenly "bleak." The Warren influence and the Warren precedents continue to have a major impact on current decisions.

Norval Morris and Richard Epstein, both of the University of Chicago Law School, spoke, respectively, about sentencing and economic rights. Morris noted that the Warren court had no major cases in the area of sentencing. His calm and thoughtful analysis of the purposes and conditions of incarceration provided a distinct focus to later comments by other speakers on the Warren Court and criminal law.

Professor Epstein concluded the "Constitutional Corpus" segment of the conference with a brilliant, closely researched, and sometimes humorous critique, noting that the Warren Court practiced a "Jurisprudence of Avoidance" on economic rights, resulting in a "glorification of mishmash" in its approach to water rights, lien rights and takings.

The second segment "The Justices" was a fascinating, and often deeply moving, segment. The speakers were biographers or former clerks to six of the great justices of the Warren Era: Brennan, Douglas, Black, Frankfurter, Harlan and Warren himself. Richard

—continued page twelve



# Membership Update

The following members joined the Society between September 16, 1994 and November 30, 1994.

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Martin S. Ryan, Fond Du Lac



## Reception Honors Publication Of Fifth Volume Of Documentary History

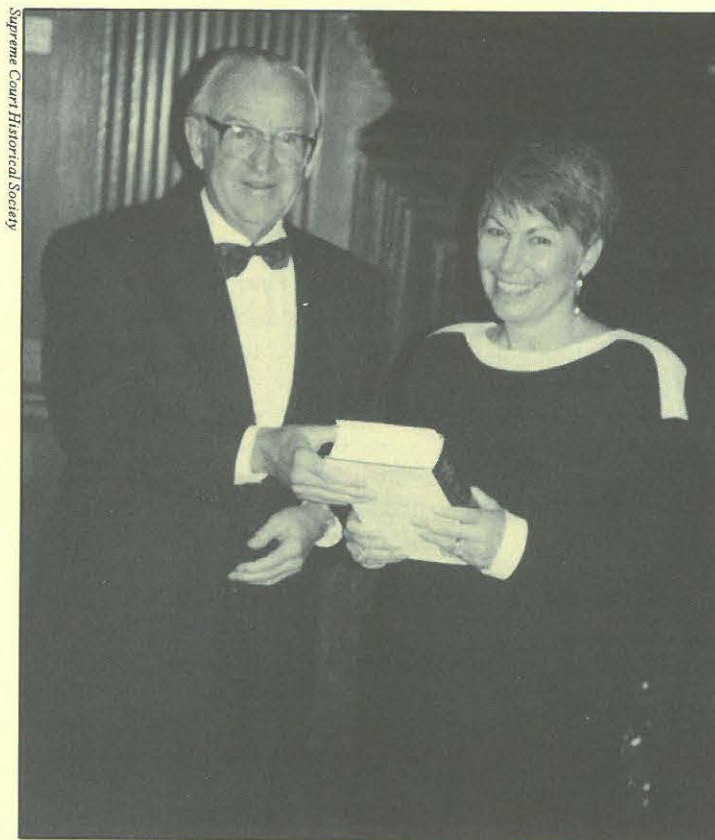
A large group assembled on Friday, October 21, 1994 in the East and West Conference Rooms of the Supreme Court for a reception honoring the publication of Volume 5 of the *Documentary History of the Supreme Court of the United States: 1789-1800*. This project has been one of the main areas of focus for the Supreme Court Historical Society over the past seventeen years, and the Society joined with the American Society for Legal History to cosponsor the reception. Held at the time of the annual meeting of the American Society for Legal History, the reception was attended by noted legal historians from throughout the world and by special guests, Associate Justices John Paul Stevens and David H. Souter, and Retired Justices William J. Brennan, Jr. and Lewis F. Powell. Society President, Leon Silverman, and Vice Presidents S. Howard Goldman and E. Barrett Prettyman, Jr. along with Secretary Virginia Warren Daly, joined in celebrating the new addition to this series.

To open the event, Mr. Silverman gave a brief overview of the Project's history, summarizing the years of hard work that went into the production of the volume. Major financial support for the Project during its first seventeen years came from the National Historical Publications and Records Commission, the Supreme Court, the William Nelson Cromwell Foundation, West Publishing Company, the Andrew W. Mellon Foundation, and the Clark-Winchcole Foundation, as well as the Society. In addition, other foundations and institutions have made financial contributions to the Project's success over the years, including the Charles Evans Hughes Memorial Foundation and the law firm of Wilmer, Cutler & Pickering. Recently, Society members have given generously and often. Last year, 23% of the Society's members made voluntary donations over and above their dues to help ensure the Project's future.

"We have been inspired by the fervency with which the legal and academic communities have embraced the work of Dr. Marcus and her talented and hard-working staff," Mr. Silverman commented. We believe, as many of you have stated in reviews, letters and by other means, that the *Documentary History* offers a unique and invaluable opportunity to reconstruct the Court's history in its first formative decade. The vestiges of this history are captured in over 20,000 documents the Project has collected to date, many of which have been annotated and published in the first four volumes, and now in the fifth volume.

"Although we yet lack adequate funds to guarantee the Project's successful completion of all eight volumes, the Society is hopeful, and will be faithful to its commitment. The documents are in hand. A staff of fine scholars has been assembled to do the work. And the project's completion is within sight. With an anticipated completion deadline in the year 2000, much remains to be done to ensure that adequate funding is available, but the Society is committed to support the Project until its completion."

Mr. Silverman asked Dr. Marcus to address the group. She expressed appreciation for the warm reception the volumes have received and thanked many individuals who have aided the Project's staff in its work. Particularly, Dr. Marcus noted the contributions of the National Historical Publications and Records Commission,



Justice John Paul Stevens receives a copy of Volume 5 of the *Documentary History of the Supreme Court of the United States: 1789-1800* from Dr. Maeva Marcus, the Editor and project director of the *Documentary History*.

which has provided economic support for the Project since its inception, and the assistance of the research librarians of the Supreme Court of the United States. She also acknowledged the encouragement given the Project by current members of its Editorial Advisory Board, Justices Sandra Day O'Connor and David H. Souter. Dr. Marcus then turned to another member of the Editorial Advisory Board, Retired Justice William J. Brennan, Jr., to whom Volume 5 is dedicated, and recognized his extraordinary efforts in behalf of the Project.

At the conclusion of the formal remarks, Mr. Silverman called upon Associate Justice John Paul Stevens, as the representative of the Supreme Court, to receive a copy of the volume. The Justice expressed thanks and complimented the members of the Project's staff, Dr. Maeva Marcus, James Brandow, Robert Frankel, Bruce Rolleston-Daines, Stephen Tull, and Natalie Wexler on their fine work. At the same time, he commended the Historical Society for its many contributions and for its part in sponsoring this important project.

Volume six is already well underway, and it is anticipated that the sixth volume will be printed in 1996. The seventh and eighth volumes will complete the series. The volumes provide essential information about the early years of the Court's history and will prove to be of great significance to future generations of scholars and students of the Supreme Court of the United States.



## Tulsa Conference *(continued from page nine)*

Arnold, Chief Judge of the Eighth Circuit, spoke of his year clerking for Justice Brennan as "the best job I ever had." Judge Arnold's remarks were amiable, gracious and perceptive as he traced Justice Brennan's prudent use of history in his approach to issues like capital punishment, school prayer, tax exemption for church property, and state promotion or display of religious symbols. But the real highlight of the Judge's comments was the appreciation he so obviously felt for the "warm and attractive presence" of William J. Brennan, Jr.

James Simon of the New York Law School began by noting that his own task was difficult, because his subject, Justice William O. Douglas, was "not nice." Simon, author of the standard Douglas biography, traced the career of the always larger-than-life Justice, beginning with his sickly childhood through his days as an outstanding law professor, Chairman of the S.E.C., and finally, his thirty-six years on the Court as an "injudicious" judge who flouted conventional norms both personally and professionally. Douglas' original and often brilliant mind made it possible for him to realize his own philosophy that he would rather make a precedent than follow one.

Gerald T. Dunne of St. Louis University Law School was unable to travel to the conference because of illness. In a brief videotape, he told the story of a 1962 misunderstanding between Justice Hugo Black and Chief Justice Warren when a press misquotation of Black irked Warren and caused a brief break in the otherwise harmonious relationship. Professor Schwartz, the conference organizer, unwilling to neglect the contributions of Hugo Black, spoke extemporaneously of the Justice's "inner firmness", of his literal interpretation of the Constitutional text, of his efforts to extend the Bill of Rights to the states, and finally of his greatest contribution: changing the way Americans think about law.

Philip B. Kurland of the University of Chicago, former clerk to Felix Frankfurter and an admitted stalwart partisan of Frankfurter, remembered the late Justice as humane and erudite. A high point of his lecture was his reading of previously unpublished letters from Frankfurter correspondents as varied as Dean Acheson, Groucho Marx and Learned Hand. Norman Dorsen, Stokes Professor at New York University Law School, spoke warmly of Justice John Marshall Harlan, for whom he had clerked. Contrasting Harlan with Frankfurter, Dorsen called the latter a "ball of fire," while the former was "boring." There are no anecdotes for Harlan, he said. But for all his self-effacement, Harlan was an indispensable part of the Warren Court—"intelligent, professional, principled." For most of his time on the high court, Harlan moved against the tide. He was not a reactionary; indeed, he avoided extremes. He was deeply committed to the principles of federalism and judicial restraint, deference to lower courts and to the legislative will. He looked for justice in procedure, and was no friend of egalitarianism. Prior to 1967, Harlan dissented an average of sixty-seven times a year! But in his last two years, 1969 to 1971, as President Nixon's appointments joined the Court, Harlan found himself leading rather than attacking, and his dissents dropped to a trickle. All in all, Dorsen's portrait of Harlan shows a Justice committed to balance, to "keeping things on an even keel."

Bernard Schwartz spoke about Earl Warren, whom he called a



Clarence Earl Gideon shown signing copies of Anthony Lewis' book, *Gideon's Trumpet*, the story of Gideon's struggle to obtain appropriate legal representation. Considered one of the landmark cases of the Warren Court, it concerned Gideon's case which came before the Court based on a handwritten petition he had written himself after hours of study in a prison library. Gideon, impoverished at the time of his arrest and conviction, maintained that he had been denied justice because a Florida state judge had refused to provide him legal counsel. The Supreme Court accepted the case and appointed Abe Fortas to represent Gideon.

"character out of Sinclair Lewis," a middle-America believer in the sanctity of motherhood, flag and family. Tracing Warren's career, Schwartz found that Warren's earlier political offices, particularly as Governor of California, gave him experienced executive competence. He was a real leader who knew how to run things.

His jurisprudence was pragmatic; he saw law as an instrument to obtain the right result; indeed, he was the paradigm of the result-oriented judge, a sort of modern day Chancellor, dispensing equity, and searching for fairness.

But Schwartz noted that Warren's jurisprudence worked best when the political institutions had defaulted their responsibility to try and address problems, such as segregation, reapportionment, and in cases where the constitutional rights of defendants were abused. In summary, for the matching of his human qualities to the legal requirements of the day, Warren was second only to the great John Marshall in his impact on American law.

Perhaps the most moving of all the presentations in the conference was the talk "Clerking for the Chief Justice," given by Washington attorney Tyrone Brown, a former Commissioner of the F.C.C. Calling Warren "a priest at the altar of racial justice," Brown recounted the story of his own mother's meeting with the Chief Justice. He told of the time when Warren was outraged at the Court's initial refusal to hear a case involving prison inmates who had been mistreated in a Florida jail. Warren expressed great moral indignation over the attitude of his brethren—"Put it in the books and let history decide if we should have heard this case." Refusing to let the matter stand, Warren eventually led the other Justices, one by one, to change their votes.

The final segment, "A Broader Perspective" presented the



insights of various practitioners and scholars who evaluated the Warren Court's place in history. Kermit Hall of Ohio State University contrasted the "received wisdom" about the Warren era with a series of revisionist theories, with obvious admiration for the courage of the Warren majority for the "constructive dialogue" it initiated with the country and with earlier courts.

George Bushnell, Jr., president of the American Bar Association, also praised the Warren Court for its boldness in settling issues left unsolved by the political process, but decried the present-day temptation to use litigation and the justice system as a "black box" into which social problems can be placed for judicial solution. The judicial system has become the first resort, rather than the last resort, and that, Bushnell said, tarnishes the legacy of Warren. He called on the profession to defend the justice system from the politicians and the demagogues who would abuse it.

Chief Justice James G. Exum, Jr., of the North Carolina Supreme Court examined the development of state constitutional law in the period since Warren, noting that many of the states had a Bill of Rights before the Federal constitution was even written, and that state courts have often gone beyond the Supreme court in safeguarding the rights of citizens.

Professor Stephen M. Feldman of the University of Tulsa School of Law offered a brilliant analysis of the jurisprudence of the Warren Court in an essay entitled "From Modernism to Post-modernism in American Legal Thought." In the essay, Professor Feldman argued that the Warren Court helped terminate one era of legal scholarship, and ushered in a new one.

Lord Woolf, a Lord of Appeal in the House of Lords, and thus, roughly the equivalent of an American Supreme Court Justice, contrasted the purpose and methodology of the high courts of Great Britain and the United States. Noting that the Warren Court did have impact on legislation in Great Britain, Lord Woolf explained that fundamental differences in the structure and purposes of the courts in the two countries made direct influences on the courts of the House of Lords improbable.

Judge Alex Kozinski of the Ninth Circuit was charged to critique the Warren Court. While praising the vision and courage behind *Brown*, Judge Kozinski noted that the Court seemed to reason that if judicial power could reverse the pattern of segregation, judicial power could be a force for justice in other areas also. *Baker v. Carr*, the reapportionment case overturned over a hundred years of constitutional history with the slogan: "One man, one vote." Judge Kozinski argued that equally weighted votes might even impede real equality, and that in actuality, slogans usually make for bad law.

Similarly, the Warren Court protections for those accused of crime are often artificial, masking the real problems with police procedures and behavior. And since the Warren Court decisions in this area often lacked substantial jurisprudential underpinnings, later Courts have chipped away at the Warren results.

The Judge was similarly critical of the Warren Court's work in other areas. The Court neglected copyright and trademark law and was quiescent in economic areas, except for labor and antitrust law, where it evidenced a strong antibusiness bias. Judge Kozinski complained that the Warren Court was only selectively activist, and finally predicted that history would ultimately judge Warren as a kind of legal Icarus, flying too close to the sun to have any permanent life.

David Garrow, Pulitzer Prize historian from the City College of New York, summarized the contributions of the Warren Court under four headings: racial equality (*Brown*); political equality (*Baker v. Carr*); sexual liberty and gender equality (*Griswold*); judicial courage and judicial authority (*Cooper v. Aaron*). Treating each to careful analysis, Garrow was able to offer especially interesting insights into the background of the *Griswold* case, where powerful religious forces had pressed to keep an antiquated Connecticut anti-birth control law in place, thereby forcing the test case which not only overturned the law, but which provided the legal basis for *Roe v. Wade*.

David Halberstam, journalist and author of *The Fifties*, placed the Warren Court in historical context. With the deft attention to detail for which he is noted, Halberstam told Warren's life story, concluding that he was "the least abstract of men," optimistic by nature, not flashy, something of a "square," and thus, easy to underestimate. Yet Warren was the right man for his place and time, who gave his country a "beginning" in some of the most complex problems of the era.

Pulitzer journalist Anthony Lewis summarized the Warren legacy. Taking issue with Judge Kozinski, Lewis enumerated what were in his estimation, the greatest contributions of the Warren Court: *Baker*, *Brown*, *N.Y. Times v. Sullivan*, *Griswold*, *Gideon*, *Mapp* and *Miranda*. "This was the age of judicial heroism," he concluded.

The final paper of the conference, a brief, personal statement prepared by retired Associate Justice William J. Brennan, Jr. was read by Professor David Cook of the University of Tulsa. [This tribute is printed in its entirety beginning on page five]

The Tulsa Conference was a great success; indeed a high standard was set by which future conferences on Supreme Court history will be measured. Professor Schwartz has promised publication of the proceedings and surely no forthcoming study of Earl Warren and his era will ever be complete without consulting these lectures.

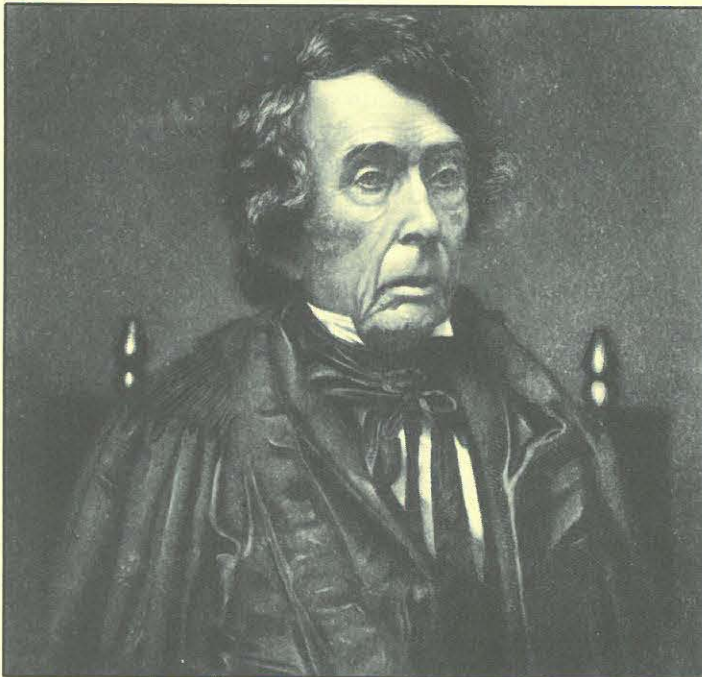


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Chief Justice Earl Warren salutes reporters from the back steps of the Supreme Court building. Professor Schwartz commented during the conference that Warren "saw the law as an instrument to obtain the right result . . . dispensing equity, and searching for fairness."

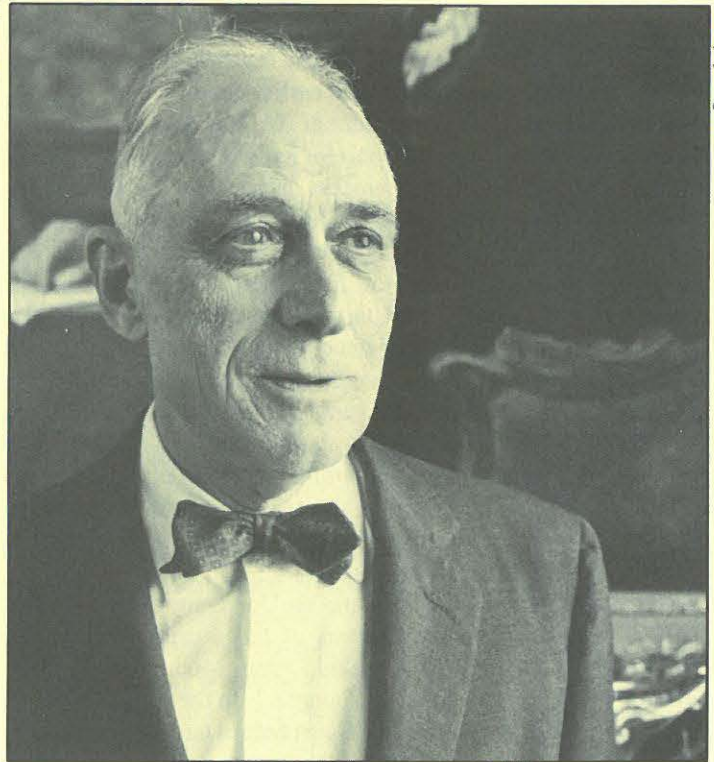


## Trivia Answers



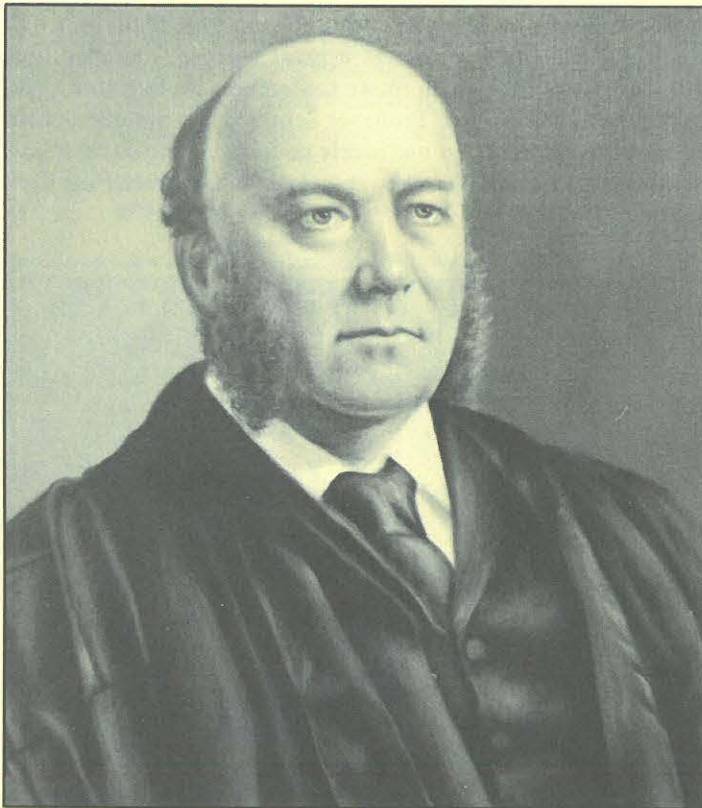
Library of Congress

1. Chief Justice Roger B. Taney. His predecessors had always given judgment in knee breeches. Swisher, *Roger B. Taney* 359 (1935).



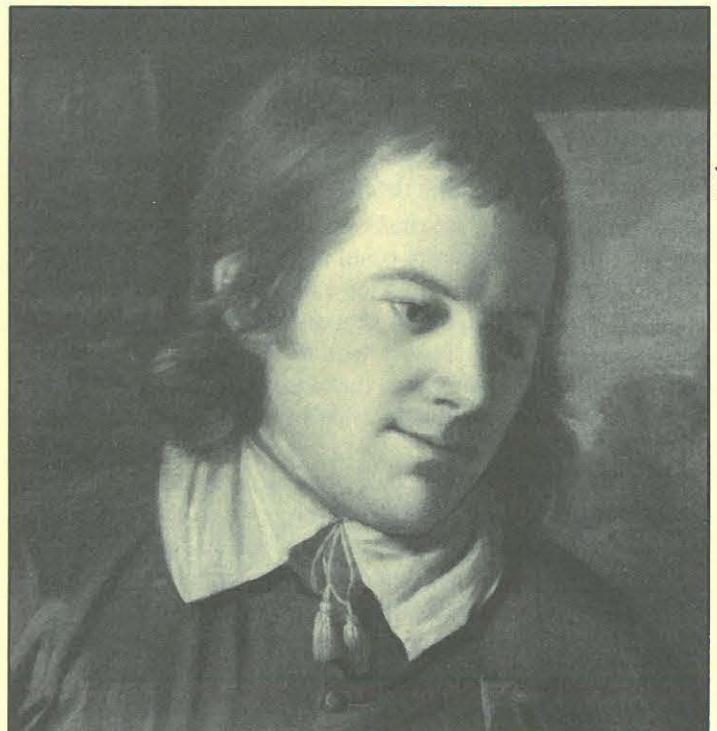
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3. The second Justice John Marshall Harlan, the grandson of the Justice with the same name, who wrote the famous dissent in *Plessy v. Ferguson*. 163 U.S. 537 (1896).



Collection of the Supreme Court of the United States

2. Justice Horace Gray began the practice of employing a young law school graduate to aid him. At first, he paid the expense himself until, in 1886, Congress provided \$2,000 a year for the purpose. *Great American Lawyers*, Volume 8, 157 (Lewis ed. 1909).



The Baltimore Museum of Art

4. Justice Thomas Johnson who delivered the first opinion in *Georgia v. Brailsford*, 2 Dall. 419 (U.S. 1793). This dissent, in the first Supreme Court case in which opinions were delivered, established at the outset the right of Justices to express their disagreement with the result reached by the Court.





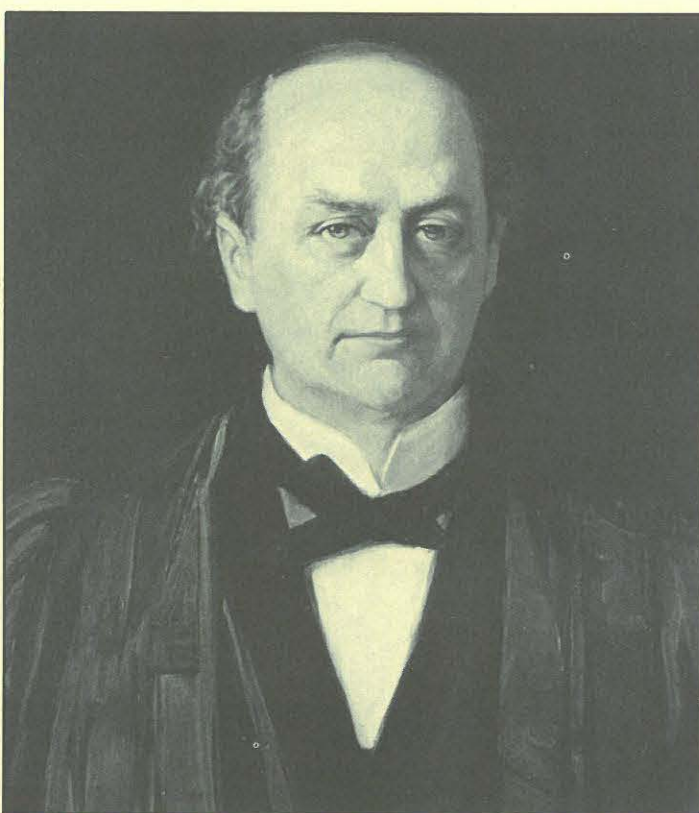
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5. Edward D. White, who was an Associate Justice when he was appointed Chief Justice in 1910.



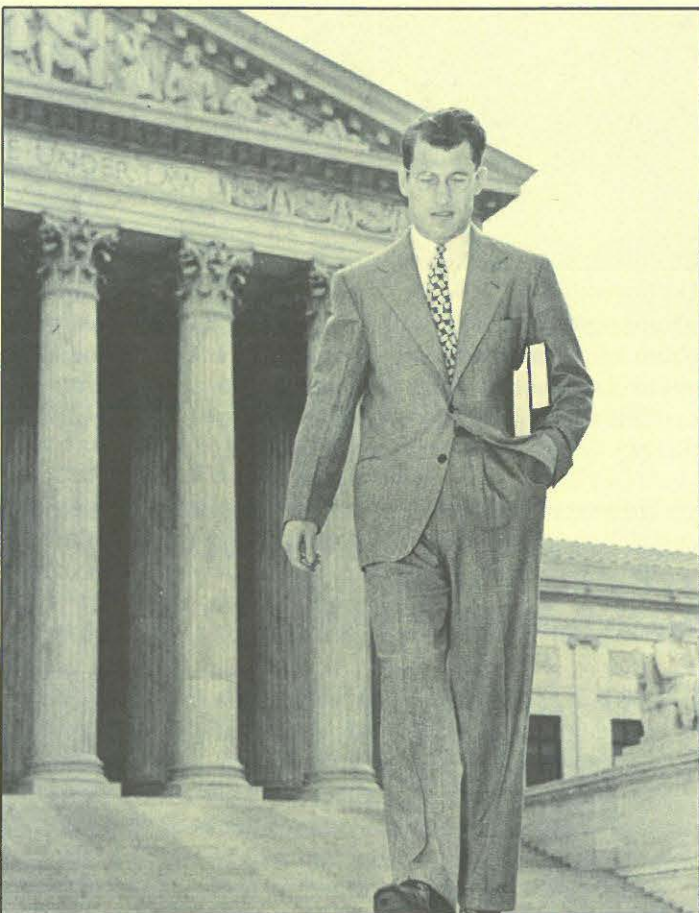
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6. Justice Joseph P. Bradley, whose prior career had been entirely at the Bar; he had been an eminent attorney in New Jersey before his appointment to the Court.



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7. Justice David J. Brewer, when he was appointed in 1889. His uncle, Justice Stephen J. Field, was then a member of the Court.



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8. Justice Byron R. White, who had been a law clerk to Chief Justice Fred M. Vinson in 1946.





On November 10, 1994, the Court posed for the traditional group photo. Richard Strauss of the Smithsonian Institution was the photographer. Standing (from left): Ruth Bader Ginsburg, David H. Souter, Clarence Thomas, and Stephen G. Breyer. Seated (from left): Antonin Scalia, John Paul Stevens, William H. Rehnquist, Sandra Day O'Connor and Anthony M. Kennedy. This photo is available through the Supreme Court Historical Society Gift Shop. 11 x 14 color prints are \$18.99 unmatted and \$22.95 matted. 8 x 10 prints are available unmatted in color for \$15 or unmatted in black and white for \$11. Please call the Gift Shop directly at 202-554-8300 to place an order.

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