

say, "and may hold such adjourned or special terms as may be necessary." It is the Court that "may hold" such special terms, not the Chief Justice.

There are of course tensions in every group dealing with critical decisions in controversial areas. My own experience with diverse groups over long years on the Court made me smile as I read Justice Holmes's comment:

I am on most friendly terms with all the judges, but I suspect that if I should be gathered to Abraham's bosom some of them would think it an advantage to the law, even if they missed a friend.\*

Earl Warren died at eight o'clock in the evening at Georgetown Hospital on July 9, 1974. I went to see him at four-thirty and one look satisfied me that he would not be with us long. I talked with W. Proctor Harvey, our leading cardiologist, who was leaving Room 6103 as I entered and he said, "He's a very sick man." But though low in energy, the Chief was bright in spirit and very lucid. He held my hand, pulling me to the bed and asking me to be seated. He wanted to talk. He wanted to talk about the Big Case, the one argued July 8 involving Nixon's refusal to deliver tapes to Judge Sirica. He had no questions to ask, only views to espouse. I would not, of course, listen to an outsider, a volunteer who was seeking to trap me. But Earl Warren and I were long associated and he was still in the inner circle of the Justices. He plainly was dying and he wanted his views known. What he said was this:

"If Nixon is not forced to turn over tapes of his conversations with the ring of men who were conversing on their violations of the law, then liberty will soon be dead in this nation. If Nixon gets away with that, then Nixon makes the law as he goes along—not the Congress nor the Courts. The old Court you and I served so long will not be worthy of its traditions if Nixon can twist, turn, and fashion the law as he sees fit.

"As to you, Bill Douglas, if you are not perfectly satisfied with what is written, speak up. They are afraid of you because you are the conscience. Speak up. Do not fail. Then all will be well."

This speech exhausted him and he fell back on his pillow, breathing heavily.

\*Holmes-Pollock Letters, Vol. II, p. 268.

I tiptoed out, not realizing I would never see him alive again. I had promised to return in the morning; soon he was gone.

He was in Georgetown Hospital because Nixon, as Commander in Chief, had denied him access to the superior facilities of Walter Reed Hospital, which he wanted to go to. The day he told me of the way Nixon had blackballed him at Walter Reed brought tears to his eyes. Not having any guile himself, he could not attribute guile to others. He had charity as well as integrity. He represented the America that was wholesome, not the America of the adventurers who used White House power for personal ends.

After Earl Warren's death, Warren Burger did a most gracious thing. He came to my office and proposed that we arrange for Warren to lie in state in our Great Hall foyer. I heartily approved and helped persuade the family. Technically it was not "lying in state," which could be done only for three days and with the assignment of four thousand troops. He would lie in state for thirty-six hours; and four guards would always be on duty.

On July 11 his casket was brought up the long front steps by nine husky police from our force, draped in the flag he dearly loved. The Court stood on one side, the family on the other. And after the prayers were read, we walked over to the family to express our grief. I put my arms around his wife, Nina, who burst into tears crying like a little girl; she was so crushed, so lonely, so frightened.

And then the public came to pay their respects—about ten thousand in the day and a half. This had never been done before for any Chief Justice, but Burger thought it was most appropriate not only for Chief Justices but for ordinary Associate Justices. He was indeed a man with a keen sense of the proprieties and with pride in the institution.

Four of Warren's former law clerks took turns standing by the bier with the guards. Flags were of course at half-mast. The weather was perfect—clear skies, mild temperature, a relatively low pollution count in the air.

The services were in the Washington National Cathedral at one o'clock on July 12. The members of the Court were honorary pall bearers. It was a tripartite religious service—Rabbi Alvin I. Fine, Archbishop Phillip M. Hannan, Bishop John T. Walker, Rev. Canon Jeffrey Cave and Rev. Canon C. Leslie Glenn.

Burial was in Arlington National Cemetery, the Court again serving as honorary pallbearers. Burger was presented with the flag from the

casket, neatly folded by the Army pallbearers at the cemetery. Burger presented it to Mrs. Warren.

Warren clearly ranked with John Marshall and Charles Evans Hughes as our three greatest Chief Justices. He did not have the erudition in the law that the other two had, but he had an understanding of the needs of the common man as opposed to those in corporate and other high hierarchies. Earl Warren had a passion for justice, for "constitutional law and order." He was a man of great integrity. In his youth he had been a brakeman on freight trains in and out of Bakersfield, California. He had come up the hard way. His father, even in later years, was in charge of the huge heating unit in the Coronado Hotel in San Diego.

When he was governor, Warren had fervently espoused the program of evacuating and locking up the Japanese on the West Coast during World War II—an advocacy that he later regretted. As governor, he opposed reapportionment of the legislature, a measure he endorsed in the "one man, one vote" line of decisions by our Court (*Reynolds v. Sims*, 377 U.S. 533). As governor, he was a member of the three-man council filling vacancies on the Supreme Court and opposed the naming of Max Radin, my dear friend. I was shocked at the time and never discussed the matter then or later with Earl Warren. Reasons that appeal to governors do not always stand up under the pitiless scrutiny a man must give a problem when he takes the judicial oath.

Earl Warren had a capacity for growth, and under the impetus of the judicial oath he grew and grew. Two little—some would say picayune—cases illustrate his intense sense of justice. One came from Iowa, where burial in a "caucasian" cemetery was denied an Indian (*Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70). Another case was *Hamilton v. Alabama* (376 U.S. 650). A black woman, Mary Hamilton, was on the witness stand. The judge kept addressing her as Mary. She refused to answer unless she was addressed as Mrs. Hamilton. So the judge held her in contempt and sent her off to jail. These rulings aroused in Earl Warren a deep protest.

He had a keen sense of proprieties; he never spoke ill of anyone; he loved his family. When Nelson Rockefeller was divorced he was outraged because of the impact this would have on the young children of the new Mrs. Rockefeller. He voted with disgust on cases involving obscenity. Hugo Black and I never liked obscenity either, but we believed that all utterances and all publications were protected by the First Amendment. Whether Earl Warren would in time have come to

that conclusion no one knows. But "the sea of ethics," on which he believed the Constitution rested, in his view gave no sanctuary to any indecencies. That leaves room for highly subjective constitutional decisions. I say this not in criticism of Earl Warren but only to present his approach to problems that had been conditioned by his long life in American politics.

Earl Warren was a regular visitor to the Bohemian Grove, an exclusive club in California. I had been invited many times but always declined, for I knew I would chafe as a captive of an elitist group of men, most of whom I did not admire. Earl Warren always came back from these visits with a supply of good stories.

On one occasion Herbert Hoover, who was then over eighty, was there. He was asked why the public attitude toward him had changed. In the thirties he was the engineer who had "damned, drained, and ditched the nation"; now he was greatly honored.

"How come this great change?" he was asked.

Hoover's answer was, "I outlived the bastards."

That story came back to me as I left Room 6103, where Earl Warren lay dying. I recalled the huge billboard outside Odessa, Texas, that read: "Impeach Earl Warren." Those billboards were down; the public mind had changed; Earl Warren, a man of high principle and great integrity had also "outlived the bastards."

I had an interesting experience as the Chief's casket came down the steps of the courthouse and reached the flat plaza. At that instance a flight of pigeons flew low over it, and my mind returned to the Ganges in India when a funeral pyre started its float down the holy waters. At that instant a flight of birds swooped low over the scene, my Indian companion reminding me that that was the flight of the spirit of the deceased. I like to think that the spirit of Earl Warren is abroad in this land, quickening the conscience of our people.