

BOOK REVIEWS

Earl Warren: A Public Life. By G. Edward White. New York: Oxford University Press, 1982. Pp. x, 429. \$25.00.

Super Chief: Earl Warren and His Supreme Court — A Judicial Biography. By Bernard Schwartz. Unabridged edition. New York: New York University Press, 1983. Pp. xiii, 833. \$29.00.

*Reviewed by Edward L. Barrett, Jr.**

Earl Warren had a career so unique as to demand explanation. In California he spent twenty-two years as a public prosecutor, fifteen of those years as District Attorney of Alameda County and four as Attorney General of California. Next he spent eleven years as Governor of California. Then suddenly, at age sixty-two, without any experience as a judge or as a lawyer experienced with federal issues, he became Chief Justice of the United States. When he resigned sixteen years later, his tenure on the bench was referred to by all as the Warren Court. And, in 1983, a commentator reviewing various rankings given Supreme Court Justices throughout history suggests that Warren was one of the "all-time, all-star, all-era, Supreme Court nine."¹

The two books under review address themselves in differing ways to an examination of Warren's work as Chief Justice. Professor G. Edward White, Warren's law clerk during a retirement year, attempts to relate Warren's two careers and to establish that they were more consistent than is generally believed. He argues that Warren as a legal technician was "unorthodox rather than inept, and that his theory of judging, while uniquely his, was not without its own theoretical integrity" (p. 4).² White examines Warren's pre-Court career in detail, then

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¹ Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462, 464 (1983).

² White argues that Warren's theoretical integrity stemmed from the Chief Justice's view of the Constitution. Warren believed it was his duty to enforce the ethical imperatives of the document (p. 218). These imperatives — fairness, equality, privacy and

evaluates Warren's life as a Justice, relying largely on the public record of his published opinions.

In contrast, Professor Bernard Schwartz, also a Warren admirer, constructs a portrait of Warren by examining in great detail the behind the scenes workings of the Court during the Warren years. Only a handful of pages is devoted to Warren's pre-Court life. Instead, Schwartz obtained access to a wide variety of material, much of it unavailable to the public, which enabled him to trace most significant opinions of the Warren era from the vote to grant certiorari through the conference discussions and votes to the actual process of opinion writing. He tends to recount what went on and does not attempt an overall evaluation of Warren's performance.

EARL WARREN: A PUBLIC LIFE

In the Introduction, White gives the conventional picture of Warren:

His public persona was that of the conventional politician; he appeared to strangers and to acquaintances as genial, hearty, affable, and perhaps a bit uninteresting. His public speeches, throughout his career, tended to be ponderous and wooden; neither humor nor pithiness was his forte. Nor was his conversation vivid: He was neither a raconteur nor a wit, he did not enjoy pointed analysis or gossip. He was devoted to the preservation of his privacy and his family's autonomy, so much so that few of the details of his intimate life became a matter of public knowledge. He was not a prolific letter writer and did not tend to leave public records of his actions, either as a California public official or as Chief Justice. He seemed perfectly content to have others think of him as an unassuming, easygoing fellow, who preferred conversations about sports and pleasantries to intellectual discourse. (Pp. 3-4).

White's book is devoted to elaborating on his own conclusion that there was much more to Earl Warren than suggested by his surface characteristics. One dimension of Warren's personality is easy to see and does provide a basis for his career. Warren was an honest man who saw public life as an opportunity for service rather than as an avenue to spoils. He viewed the prosecutorial role as upholding the moral life of the community by weeding out graft and corruption.³ He

dignity — transcended conventional notions of institutional and doctrinal consistency (p. 218 n.2). Warren's approach was to decide the essence of the case and "its appropriate ethical outcome," and then to promote that outcome (p. 229).

³ Warren was known for his crusades against corrupt bail bond brokers, bunco artists, and corrupt law enforcement officials (p. 30). As California's Attorney General, Warren rejected an appointment system based on patronage; instead he selected individuals whom he believed to be best for the position (p. 49). Warren continued his struggle against graft while serving as Governor. His major targets were powerful oil

enjoyed being in charge, identifying things which needed to be done and getting at them. He set high standards for his offices.

Entering public life during the Progressive period, Warren rejected conventional political practices. In his first campaign for district attorney in 1926, he refused campaign contributions and invested a year of his own salary. When running for Attorney General, with \$35,000 raised by friends, he cross-filed and captured all three parties in the primary. When he first ran for Governor, he did not have the support of large contributors and ran his Southern California campaign on \$75,000 raised from small contributors. He received almost as many votes in the Democratic primary as the incumbent Democratic Governor and easily won both parties in the primaries in his two succeeding elections with little need for outside support.

Throughout this period he lived on his salary and did not use his office for financial gain. In 1953, at the end of 33 years in public office, he had his salary as Governor, a portion of a \$6,500 inheritance from his mother, and the equity in a house in Oakland. He was also entitled to a public pension of \$10,800 on leaving the office of Governor.⁴ In fact, there is reason to suspect that Warren became interested in national politics because he needed a salary when his term as Governor ended and he did not want to go into private law practice.

But there were other sides of Warren too. He reacted strongly to Communists and others he perceived as radicals. He had "a provincial version of patriotism that caused him to lump together indiscriminately groups he considered dangerous to America" (p. 42). Three major episodes illustrating this tendency are discussed by White. The first is the *Point Lobos* case (p. 33 n.30).

In 1936, a vocal, anti-communist engineer on the freighter *Point Lobos* was murdered on board ship. The long investigation used many tactics which today would be illegal.⁵ The defendants were supported by persons with leftist or communist leanings, persons for whom Warren had neither understanding nor sympathy. The case was controversial at the time and has remained so. White discusses it in some detail,

and water lobbies which, according to Warren, overwhelmed the capital with false propaganda (pp. 106-07).

⁴ E. WARREN, *THE MEMOIRS OF EARL WARREN* 268 (1977).

⁵ White points to a number of questionable practices used in the investigation: use of a confession in court which was obtained without the presence of counsel and by intimidation by law enforcement officials, use in court of evidence secured by surreptitious electronic eavesdropping, the prosecutor's use of adverse pretrial publicity, and the prosecution's use of extensive delay between the original arrest of one of the *Point Lobos* defendants and his formal arraignment (p. 43).

concluding that the practices used in investigating the case, while not consistent with law expounded when Warren was Chief Justice, were consistent with the law at the time.

The second episode occurred in 1940 when Professor Max Radin was nominated to the California Supreme Court. There was a long and public discussion about his nomination. Warren, who believed Radin was a Communist or close to one, worked hard to scuttle the nomination and did so by providing one of the two negative votes when the State Commission on Judicial Qualifications considered Radin's qualifications. White presents substantial evidence that Warren had strong personal feelings about Radin, relating in part to his public criticism of Warren's handling of the *Point Lobos* case. Incidentally, I often think of this case from my perspective as a law student at Berkeley. Having had Radin as a professor and seeing him in that context, I suspect he would have been a poor judge who hated his job, while Roger Traynor, a member of the same faculty who was appointed in his place, became one of our great judges. But Warren could not take credit for that result since his reasons for opposing Radin were all the wrong ones.

The third and most revealing episode involved the evacuation of the Japanese from the West Coast. White makes it clear that Warren was the leading advocate of evacuation within California and that he worked hard to get the military to set up the scheme. He demonstrates that Warren's actions were based on a racist view of Asians. Warren "thought of Orientals in general, and Japanese in particular, as foreign, not easily assimilable, inscrutable, resourceful, and, especially after Pearl Harbor, treacherous" (p. 75).

These episodes help to illustrate another aspect of Warren; his reluctance to admit mistakes. Throughout his career he wrote very little; no books of Warren letters will appear. Nor did he engage in many oral reviews of his life. His inner feelings, like his family life, were always closely guarded. He came closest to admitting error in connection with the Japanese exclusion, but even there in a diffident, reluctant way.

The major problem in evaluating Warren as a human being is in probing what lay behind his conventional facade. As one who came to California just as Warren became Attorney General and who had casual contacts with him from the late 1940's through 1969 when he delivered the dedication address for the new law school building at the University of California, Davis, I fully appreciate this difficulty. Clearly, there was a Warren behind the facade, but very few people could penetrate it.

One story illustrates that even those closest to him shared this difficulty. In 1957, I was in Washington for six months as a special assis-

tant to the Attorney General of the United States. My main job was working on achieving passage of the 1957 Civil Rights Act, but along the way I was asked to argue *Mallory v. United States*⁶ before the Supreme Court. The crime at issue occurred in circumstances which suggested that the perpetrator was one of three young men who lived in a janitor's apartment. The police arrested all three men, talked to them all, and finally charged Mallory and released the other two. At one point in the oral argument the following exchange took place. Chief Justice Warren: "Well, Mr. Barrett, if you're dealing with some crime that's obviously, or apparently obviously, a neighborhood crime, would you be justified in taking all the young men in the neighborhood who might have been suspected of this crime, taking them to the jail and holding them there under arrest until you have had an opportunity to examine them and determine whether they are guilty or not?" Mr. Barrett: "Normally I would assume that would be unreasonable. But —." Chief Justice Warren: "What is the difference fundamentally between that case and this? You knew only one person committed this crime; you arrest three persons on some theory or other and take them to the police station, and you hold them there until you're satisfied that two of them didn't do it and one of them did. Now, what is the difference between that and the one I put?"

After the argument, I rode back to the Justice Department with Warren Olney III, then Assistant Attorney General, and a close friend of Warren who had worked with him in a variety of settings since the 1930's. Olney remarked that during the argument he came close to committing contempt of Court by emitting a loud horse laugh. I asked why. He responded that when the Chief asked me the question about arresting the juveniles in the neighborhood, his mind went back to 1936 and the day word came in about the murder of the engineer on the *Point Lobos*. He could hear Earl Warren saying to him, "Warren, get down to the ship, don't let anyone off, round up all of the crew on shore, and hold them all until we have a chance to talk to them."

But the major issue for any biographer of Warren is appraising his work on the Court by trying to ascertain what made him a person who could be rated as one of the great Justices in our history. The problem is obvious. Warren came to the Court with almost none of the conventional experiences. He had not been a judge. He had not been in private practice. He was not an intellectual. In his law years, he was the head of a public office with ample staff to supervise. He enjoyed ad-

⁶ 354 U.S. 449 (1957).

ministrative work and did it superbly, but he did not work with the law in any substantial intellectual sense. White devotes about two thirds of his book to assessing Warren's work as Chief Justice. I found this aspect of the book less interesting and useful than the biographical sketch which preceded it.

Reviewing this part of the book in detail would extend this review beyond reason. Relying almost exclusively on Warren's opinions, with very little reference to the internal processes of the Court, or even of Warren's office, White elaborates his own theories. In White's view, Warren had his own notions as to what was just, honorable, and fair. He regarded his position on the Court as a means to achieve results consistent with those standards, but cared very little about the doctrinal purity of opinions. He sought results within his own framework of what the law ought to be. Perhaps the best summary is simply to quote the last paragraph of the book:

Warren's contribution, however, was not as an ideologue. He was not a consummate Progressive and not a consummate liberal. He did not act from the perspective of a considered system of thought, but from his instincts for what was fair, honorable, politically feasible and sensible at the time. Like many public figures, he embodied attitudes rather than contributing to their intellectual development. Warren's greatest strengths and his most memorable qualities were intangibles: presence, timing, capacity for growth, persuasiveness, inner conviction, decency, persistence, reasonability. In possessing those qualities he functioned as a symbol for a large inarticulate body of the American public; he pursued Everyman's instinctive ideal of fairness and justice. If he was not a sophisticated or wholly consistent thinker, he was nonetheless a great man, not only for what he embodied but also for what he accomplished. In a public world of corruptible and self-serving actors, he set a standard of incorruptibility and humanity; in a society fraught with injustices, he sought to use the power of his offices to promote decency and justice. The end of his public career may be the end of a phase of American life. (P. 369).

SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY

Professor Schwartz's book is not a biography of Earl Warren. Only a few pages discuss Warren's life before the Court and after his retirement. The focus here is entirely different: it is on the process by which the Supreme Court arrived at its opinions during the Warren years. While Warren is the focus of the book, it is primarily the story of the Court and its functioning during his years as Chief Justice.

The book could have been more accurately titled *Behind the Scenes at the Supreme Court — 1953 to 1969*. With few interruptions, the

discussion proceeds case by case, term by term, describing most of the important cases decided during those years. It is long and, after one has read a few chapters, dull. It is a book one might use to discover what happened in particular cases of interest, but I suspect few people will read it cover to cover.

What makes the book different and of substantial importance is that it is the first time that a constitutional law scholar has taken the lead suggested by journalists in *The Brethren*.⁷ Schwartz attempts to reconstruct on a case by case basis all that happened within the Court from the grant of certiorari or the hearing of an appeal to the issuance of the final opinion. Schwartz assembles a mass of material which enables him to disclose what has been mainly secret information about the Court's processes. In case after case he discloses how the Justices voted on the grant of certiorari, places statements of Justices at conference in quotation marks, discloses the votes in conference, and refers to and summarizes subsequent memoranda and oral discussions leading to the final form of the opinion. But he makes no attempt to integrate this material or to comment in any general way on what it tells us about Warren as a Chief Justice.

One example out of the hundreds of cases covered illustrates the range of information presented and how far it goes beyond mere reliance on the opinions of the Court. *Terry v. Ohio*⁸ is the leading case on the right of police to stop individuals on the street and to frisk them to determine whether they are carrying weapons. The officer in this case had seen some men apparently "casing a job" preparatory to a holdup. He approached them, asked for their names, and when they mumbled something, grabbed Terry, patted down the outside of his clothing, felt a pistol and removed it. Terry was convicted of carrying a concealed weapon. The state court rejected his claim that an illegal search and seizure had occurred.

Schwartz first notes that all Justices voted to grant certiorari (p. 685). He then describes the conference on the case, quoting from Warren's initial statement of his position on the case and summarizing Brennan's position. The Court voted unanimously to affirm the conviction on a ground given by Brennan: that probable cause to stop and frisk existed. Schwartz notes that the Chief assigned the opinion to himself "believing that . . . he should receive the criticism that would come from many of the Court's normal supporters" (p. 686).

⁷ B. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

⁸ 392 U.S. 1 (1968).

Next a typewritten draft opinion sent by Warren to Brennan for comment is quoted and discussed. It looked only to the frisk, not the stop, and gave recognition to police officers' need to protect themselves. Brennan's letter of response is also quoted. Then a printed draft by Warren was sent out, still focusing on the frisk aspects of the case and using probable cause as the standard. This evoked a letter from Douglas, which is quoted at length, questioning Warren's failure to deal with the stop issue. A draft opinion circulated by Black is briefly described. A notation by Harlan that he would file a separate opinion is mentioned and a draft circulated by White is quoted.

Harlan then circulated a draft, rejecting probable cause as a standard. Brennan wrote Warren that he had become concerned that police would take the opinion as authorizing aggressive surveillance techniques. Brennan then sent a revised opinion to Warren with a note explaining his changes. Warren is then quoted as replying that he would rethink the case as soon as he had time. Later he circulated a long opinion which, except for the first five introductory pages and the concluding paragraph, was substantially the version that Brennan had prepared. The discussion concludes with the statement that although he had written most of the opinion, Brennan was still troubled that police would get the wrong message from the case.

Most of the material in this account is not available from any public record. The votes on certiorari, the statements made in conference, and letters and draft opinions between the Justices are regarded as secret. Professor Schwartz has no footnotes substantiating his account other than the citation of the case and the citation to an account of the oral argument before the Court.

How did Professor Schwartz obtain access to all of the information necessary to this prodigious book? He tells us that the book is based on both documentary and oral sources. The documentary sources are of two kinds:

- (1) the conference lists and notes and the docket books of the Justices. The votes on granting certiorari or hearing an appeal, which were normally not made public in the Warren Court, are taken from them. The conferences themselves . . . are, of course, completely private — attended only by the Justices themselves. The secrecy of the conference is, indeed, one of the great continuing Court traditions. I have tried to reconstruct the conferences in most of the cases discussed, including all the important cases decided by the Warren Court. The conference discussions which are given in conversational form are reconstructed from notes made by at least one Justice who was present, including, but not limited to, the notes of Justices Felix Frankfurter, Harold H. Burton, Tom C. Clark and John M. Harlan; (2) the correspondence, notes, diaries, memoranda, and draft opinions of members of the Warren Court, including, but not limited to,

the papers of the same Justices and Justices Hugo L. Black and William O. Douglas. The documents used and their locations are identified in the notes, except where they were made available upon a confidential basis. In the latter case, I have tried to identify the documents, usually by title and date, in the text. I have personally examined every document to which reference is made. Most of them have never been published. (Pp. xi-xii).

He goes on to say that personal interviews constituted his oral sources. "I interviewed some thirty former law clerks of Chief Justice Warren (including at least one from each Court term during the Warren years), as well as clerks of other Justices. Chief Justice Warren E. Burger and all the living members of the Warren Court, except Justice Thurgood Marshall, spoke with me" (p. xii).

The above is all we are told about sources. No information is given on the kind of material available in the Justices' papers and its reliability as a source for reconstructing conference dialogue. In fact, the author gives us no basis for evaluating the veracity of his sources beyond his statement that he has examined all of the documents. Nowhere does he distinguish between material available to others in the papers of deceased Justices and material shown to him confidentially by existing Justices. A nice contrast is Kluger's book *Simple Justice*.⁹ Kluger, in discussing *Brown v. Board of Education*,¹⁰ has a footnote in which he mentions the difficulties in using Justice Burton's notes because of his "microscopic and sometimes indecipherable script."¹¹ He also notes the location of papers and mentions doubts about dates and other matters. None of this is given by Schwartz. His notes are just a string of blind citations, and for most items there are no notes at all.

Consider, for example, his quotations from conferences. In the first place, he recognizes that the secrecy of the conference is one of the great Court traditions and then proceeds to say, in effect, that he is breaching it. He says the discussions given in conversational form are reconstructed from the notes made by at least one of the Justices who was present. A look at his footnotes shows that Burton's conference notes were referred to until he retired in 1958. Clark's conference notes were cited fairly often during the 1958 and 1959 terms. But thereafter the quotations from conferences do not have any citations to sources, indicating, I suppose, that a current Justice has shown his notes confidentially to Schwartz to serve as the basis for the reconstruction.

Schwartz notes that he talked with thirty former clerks of Warren,

⁹ R. KLUGER, *SIMPLE JUSTICE* (1977).

¹⁰ 347 U.S. 483 (1954).

¹¹ R. KLUGER, *SIMPLE JUSTICE* 821 (1977).

and with all living Justices who sat with him, except Marshall. He does not indicate, of course, what these people told him or how he evaluated their disclosures in terms of accuracy. It is distressing to have the first elaborate account of the behind the scenes work of the Court left in a state in which the reader can do no more than trust that Professor Schwartz interpreted it all correctly.

Although the author does not describe what is to be found in the available papers of deceased Justices, he does on one occasion reveal his delight in getting a paper a Justice wanted to conceal. He refers to the fact that Black "felt strongly that details of the Court's decision process should not be made public except to the extent revealed in the published opinions" (p. 80). He reports that just before his death, Black asked his son to burn his conference notes and other private Court papers. "Although the request was honored, there were inevitably revealing documents that were overlooked" (p. 80). One was a copy of a Frankfurter memorandum on the *Brown* case on the back of which Black had pencilled in his reaction to the proposed questions, then crossed out what he had written. Schwartz surmises that the document had not been destroyed because it was not thought readable. "Despite that, a xeroxed copy of this paper brings out the underlying writing in a manner that makes it relatively easy to read the words Black had written" (p. 80). He then goes on to quote from the comments.

Of course, broader questions than those relating to sources of information are raised by this book. Is not the Court's tradition of secrecy regarding its internal workings a desirable tradition? Is it wise or useful to breach that tradition on as broad a scale as done here?

What does the book tell lawyers? So little reference is made to lawyers and their briefs that one might conclude that they make very little difference. I am convinced that good lawyering plays an important role, but that aspect of the Court's work is neglected in this book.

What does this behind the scenes tale of the Court tell the legal scholar? Is legal theory important? How concerned is the Court to fit each case into the matrix of the law? Is legal theory something to be written about in opinions but not actually used in determining how the case is to be decided? How comforting is it to know that footnotes are prepared by the law clerks and that the Justices pay little or no attention to them (p. 68)?¹²

If this material is taken as showing the way in which the Court decides cases today, it has little practical utility. How does a lawyer

¹² Warren of course always stressed it was the decision, not the citations, that was important (p. 107).

react? What can a legal scholar do about his suspicions as to what went on before the opinion was written? Will this book do no more than make people even more discouraged about the Court? Is the Court practicing law or politics? If politics, should its decisions be respected?

Regretfully, one must conclude that Professor Schwartz does not bear the major responsibility for the breach of Court secrecy. If Justices and clerks had not been willing to talk to him, enabling him to quote from materials in their files, the book probably would not exist. Only a portion of the information could have been obtained from publicly available materials.

One last item should be mentioned. I said earlier that Schwartz recounts how the Court decided its cases, and does not attempt any general evaluation of Warren as Chief. But the reader, of course, can obtain a good bit of information to assist in such an evaluation by picking up pieces here and there throughout the book.

Much can be derived about how Warren functioned as Chief Justice. First, he was an excellent administrator, with a lifetime of experience as an administrator of major enterprises. He conducted conferences well, beginning by stating his own position shortly and succinctly. He chose well when he assigned Justices to write opinions. Whenever there was special need for a unanimous or nearly unanimous opinion, he exercised skill in trying to bring the Justices to such a conclusion. After the first few months, he never let his doubts about his scholarly capacities or his knowledge of the law interfere with arriving at decisions and presiding efficiently as Chief Justice. Here, as in previous stages of his life, he did not disclose strong feelings that he may have had or otherwise act in ways which would create resentment (pp. 142-43).

Second, as a judge he made up his mind about how cases should come out without great difficulty. He seemed more concerned with results than about how the opinion sounded, and was willing to rely on his law clerks or other Justices to formulate the opinion. There is very little to suggest that he had strong points of view on most issues or that he really pulled the Court in one direction or another. To a considerable extent, it appears that the leadership in ideas in which Warren joined came from Brennan or Black, with Brennan as the Chief's strong reed. He did have a few ideas about which he felt strongly. Justice Stewart is quoted as saying: "Warren's great strength was his simple belief in the things which we now laugh at — motherhood, marriage, family, flag, and the like" (p. 139). In a general sense, he regarded his role and that of the Court as "a residual 'fountain of justice' to rectify individual instances of injustices, particularly where the victims suffered from racial, economic, or similar disabilities" (p. 267).

In criminal cases he seemed to ask whether the government was "fair" in how it conducted the case (p. 628).

Third, Warren was a complex human being who rarely revealed his personal depth in public. Schwartz does, however, give a few incidents when the real Warren showed. One example related to the Warren temper. At a cocktail party with a top level crowd, Warren was introduced to Earl Mazo, who had written a favorable biography of Nixon. He called Mazo a "damned liar" and asserted that he had written "a dishonest account" to promote Nixon's presidential candidacy. "For over twenty minutes," Schwartz notes, "Warren lashed out at the writer, becoming so intense at times that bystanders feared that he might resort to physical violence" (p. 336).

In a subsequent paragraph, Schwartz notes that Warren's bland image was deceiving. Justice White said that Warren was "rock-hard," and "firm, very firm," but he kept his feelings under control and it was "hard to rile him" (p. 336). Another Justice was quoted as saying "he was a person who had deep-seated and permanent resentments of people and dislikes of people and stubbornly so" (p. 336). Schwartz says that Warren was "quick to take umbrage when he was dealt with in ways that he considered unfair or reflected on the dignity of the Court or his office. When that happened, his temper would show" (p. 336).

We are fortunate to have two such interesting yet different books about Earl Warren and the Court. One can only wish that White had written his book with the array of information in the Schwartz book before him and that Schwartz had dealt with fewer cases but attempted a more organized view of his Super Chief.