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A Peculiar Sense of Justice

When Warren Burger speaks, felons quake and the faithful praise the Lord

by Nathan Lewin

WHEN Warren Burger came before the Senate for confirmation as Chief Justice in June 1969, the late Everett Dirksen said of him that "he looks like a Chief Justice, he speaks like a Chief Justice, and he acts like a Chief Justice." Appearance and impression probably expedited the Senate's approval (which was granted in less than three weeks), but the nominee was far from a closed book to the Congress. Burger had served for more than 13 years on the United States Court of Appeals for the District of Columbia —a unique federal appellate court because it then had jurisdiction over all serious criminal offenses committed in Washington, D. C. A separate local court system has, by this date, been given the exclusive authority to try local crimes. But when Warren Burger was judge, every armed robbery, serious assault, or auto theft committed in the nation's capital was tried in a United States district court, and appeals would be taken to the court on which the future Chief Justice sat. The Senate knew where he stood, particularly on the law-and-order controversies that had engulfed the Warren Court and had become issues in the presidential campaign of 1968. Senator Strom Thurmond observed thankfully that the nominee did not show "excessive concern for the rights of criminals," and only three senators opposed his nomination.

In the seven terms of the Court since he was sworn in as Chief Justice, Warren Burger has continued to look, speak, and act like a Chief Justice. He presides over Court sessions like a stern schoolmaster, with an air that is both regal and solemn. In this respect, Burger reminds an observer of his predecessor, Earl Warren, who also seemed taller and more erect than the eight Associate Justices who surrounded him and who was able, with silver hair and judicious demeanor like Burger's, to command respect from all in the courtroom.

Warren Burger has taken more pains than did Earl Warren, however, to improve the Court's appearance so as to make it look, speak, and act like the highest judicial body in the land. The Supreme Court Building has been given a thorough overhaul. The Justices' chambers have been enlarged to take up virtually the whole first floor; the Justices' bench has been reshaped to eliminate the row of privileged correspondents that separated the Court from the advocates who appeared before it; the courtroom's lofty ceiling has finally been repainted and regilded; and the previously bare halls have been stocked with Supreme Court memorabilia and exhibits to inspire and educate visiting tourists. There is almost no part of the physical plant that has escaped the improver's touch. The public cafeteria has been modernized and augmented with a snack bar; the Court clerk's office has been moved, reorganized, and expanded; and even the underutilized fourth-floor library—surely one of the world's most silent retreats—is now undergoing renovation and rearrangement. All that remains secure are the oversize public lavatories and the enormous telephone booths with sliding wood-and-glass doors, hidden away at the rear of the building's ground floor.

There was a good-natured flabbiness to the procedures of Earl Warren's Court that is not tolerated in Warren Burger's. Time was wasted by the old Court on ceremony that was meaningless to anyone but the participants. Earl Warren enjoyed greeting new members of the Supreme Court bar who were sponsored for admission by senators or congressmen or other elder attorneys, and between five and fifty minutes might be spent during each of the Court's public sessions on this courtly practice. Soon after Chief Justice Burger took over, the routine was changed, and most lawyers now receive their licenses by mail.

The Warren Court also frittered away its time in public announcements of decisions and dissents by the individual Justices. Since there is no advance word that any particular case will be decided on any particular day, the announce-

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Justice Rehnquist's "Unappealing Guides to Action"

The following is taken from a Harvard Law Review *article by David L. Shapiro of the Harvard Law School faculty.*

A REVIEW of all the cases in which Justice Rehnquist has taken part indicates that his votes are guided by three basic propositions:

(1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;

(2) Conflicts between state and federal authority, whether on an executive, legislative, or judicial level, should, whenever possible, be resolved in favor of the states; and

(3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court, or Supreme Court level, should, whenever possible, be resolved against such exercise. . . .

I find [these propositions] unappealing guides to action: the first because I see as critical the role of the Supreme Court as guardian of the individual against encroachments by government; the second because many federal–state conflicts are best left to the political arena, where the contestants are well-matched, and because many present-day problems cry out for national solutions; and the third because both the authority granted by the Constitution and the jurisdiction conferred by post-Civil War acts of Congress vest the federal courts with responsibility for the resolution of federal questions and the vindication of federal rights. I do not for a moment suggest disagreement with all of Justice Rehnquist's votes that accord with the three propositions; I simply would not adopt those propositions as decisive guides were I sitting on the federal bench. . . .

My major purpose here is to consider the impact of Justice Rehnquist's adherence to these propositions on his work as a judge. At the outset, I should emphasize that many of his opinions that are consistent with the propositions seem to me extremely able, articulate, careful, and persuasive, whether one ultimately agrees with them or not. Too often, though, unyielding insistence on a particular result appears to have contributed to a wide discrepancy between theory and practice in matters of constitutional interpretation, to unwarranted relinquishment of federal responsibilities and deference to state law and institutions, to tacit abandonment of evolving protections of liberty and property, to sacrifice of craftsmanship, and to distortion of precedent.

It is important to note that other Justices whose place in the history of the Court is generally recognized and secure may be subject to criticisms similar to those made here. But I am persuaded that in the respects described, Justice Rehnquist's performance has been markedly below his own substantial capabilities and has in large part been attributable to the inflexibility of his ideological commitments. ◉

ment of results in open court is made to the audience that has fortuitously shown up on that occasion to hear whatever the Court may have to say. The Warren Court's Justices appeared to enjoy debating with each other—sometimes with sharp extemporaneous exchange—to this accidental conglomeration of listeners. Chief Justice Burger instituted the practice of perfunctory oral announcements, which leaves the press with the job of reading, and trying to comprehend, the Court's decisions. To make the rulings understandable, however, the Burger Court begins each published decision with a brief explanatory summary, called a "syllabus," prepared by the official Court reporter for the edification of the unlearned and impatient. And the Court's past is studied, analyzed, and publicized under the auspices of the Supreme Court Historical Society—a body that owes its existence to the organizational talents of the present Chief Justice.

WARREN BURGER has also taken much more seriously than his predecessor his role as Chief Justice of the *United States*. In 1970, he initiated an annual "State of the Judiciary" message, which he delivers to the American Bar Association's convention each spring. These reports now consist principally of a catalog of administrative accomplishments—such as statistics proving that the efficiency of the federal courts has been improved by new management techniques attributable to the Institute for Court Management, which Burger proposed and developed—and exhortations for legislation that will enable the courts to do even better. Last year, for example, the Chief Justice urged that laws assigning special three-judge courts for certain cases and granting immediate appeal to the Supreme Court be amended to reduce the burden on the lower courts and on the Supreme Court. By the end of 1976, the requested changes had been made. Other amendments he has suggested—among which is the perennial request for more federal judges—are slower in coming, but the Chief Justice is not reluctant to let his views on these subjects be known. He has loudly stated his support for various proposals that would establish an intermediate federal appellate court immediately below the Supreme Court, and he has vigorously advocated that the federal courts be relieved of having to hear cases where the only federal interest is that they involve citizens of different states.

The Chief Justice's judicial philosophy is related to these organizational interests. Since he believes that the courts are overworked, he is unwilling to expand their jurisdiction into new areas or to enlarge, beyond what is absolutely necessary, the number of groups that may demand the aid of a court. Lawyers' concepts such as "standing" or "ripeness" or "mootness" are invoked to limit or deny access to the judicial system. The single dominant chord struck by the Burger Court in recent years has been the diminished availability of courts, and the American Civil Liberties Union's overriding objection to the record of the Burger Court pertains to this aspect of its work.

With a few exceptions, however, the decisions closing the doors of federal courts to litigants who might raise new questions of individual liberty have not been written by Chief Justice Burger. It is hard to know how influential he has been in moving the rest of the Court in that direction—although his administrative pronouncements disclose that