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BOOK REVIEW

Earl Warren: A political biography. By Leo Katcher. New York: McGraw-Hill. 1967. Pp. 502. \$8.50.

Warren: The Man, The Court, The Era. By John D. Weaver. Boston: Little, Brown and Company. 1967. Pp. 406. \$7.95.

In confirming the well-publicized rumor that Governor Earl Warren of California would be named to the vacancy caused by the sudden death of Chief Justice Fred Vinson in 1953, President Eisenhower summed up the appointee's characteristics—relative youth, integrity, honesty, experience in government and law, and a “middle-of-the-road philosophy.” He concluded his announcement by expressing the belief that Warren would make “a great Chief Justice.”¹ Despite the disparity between the premises and the conclusion, the prediction has come true. But this gave little satisfaction to a President who came to regret the appointment and view it as a mistake. Though Eisenhower has never publicly acknowledged an estrangement, his heeding of the American Bar Association's advice that Supreme Court Justices should have prior judicial experience in the remainder of his appointments was in part a reaction against the choice of Warren. The war hero had been elected to bring a spirit of harmony to the country, to heal the fissures in American society so prominently exposed during the Truman administration. But this longed-for calm was soon disrupted by the renewed and continued activity of a Supreme Court presided over by his own appointee.

To add further to Eisenhower's ire have come comments from newspapermen such as Marquis Childs and Anthony Lewis suggesting that the appointment of Warren might well be viewed historically as the most significant act of Eisenhower's administration.² The new President in 1953 understood little of the Supreme Court's role in a changing society, the personal growth which it elicits from its members, and the man himself, Earl Warren.

Eisenhower must have come to feel that Warren's Republicanism

¹ L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 305 (1967).

² *Id.* at 468.

was a misrepresentation. The President knew little about the strange world of California politics, where conservative Republicans would gladly have read the governor out of the party were it not for his phenomenal hold upon the electorate. In California politics Earl Warren was a loner who waged successful bipartisan campaigns aimed at capturing Democratic votes. But the Earl Warren who made his entrance into national politics, first in the Republican convention of 1944, then as the vice-presidential nominee in 1948 and finally as a presidential dark horse in 1952, appeared as a safe, sometimes bland exponent of orthodox Republican views. His support of Eisenhower over Taft, and his activity in the West in behalf of the Eisenhower-Nixon ticket brought him to the President-elect's attention. When Warren did not appear in the newly-formed cabinet, speculation mounted that he was in line for the first vacancy that occurred on the Supreme Court. And in anticipation of such a position, Warren announced that he would not run again as governor in 1954.

When the vacancy occurred at the top spot, apparently the President did not consider this position as part of any bargain, but Warren seems to have thought differently. Neither Thomas E. Dewey, to whom Eisenhower owed so much, nor John Foster Dulles wanted the job. There was the possibility of elevating one of the present members of the Court to Chief Justice, but after years of Democratic control Eisenhower saw the necessity of appointing a Republican, and the only Republican on the Court was the undistinguished Harold Burton.³ Convinced that Warren was safe, the President made the appointment.

The irony of the choice has been demonstrated not only by President Eisenhower's disenchantment, but by the fact that Warren has been much closer to the Democratic Presidents Kennedy and Johnson than to their Republican challengers. In fact it was President Lyndon B. Johnson, who on the occasion of Warren's seventy-fifth birthday, went on record in inscribing a photograph to "the greatest Chief Justice of them all."⁴

This is just another episode in the strange and unpredictable history of the Supreme Court. Warren's appointment was a political one—the very type of appointment that often disturbs constitu-

³ *Id.* at 304-305.

⁴ J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 336 (1967).

tional scholars. Yet any assessment of Warren's appointment and his work on the Court should give pause to those who would seek to cleanse the process of such political factors. Either consciously or unconsciously such political appointments keep the Court abreast of change in our society. The Supreme Court *is* a political body; it is the word "court" that confuses us. The Supreme Court is a very special and unique court. If its decisions were made without some measurement of their effect upon the social, political and economic environment, its members would be irresponsible. It is political in that it is a responsible body, not in terms of submitting itself to the electorate but in the sense that it acts with an awareness of the contemporary climate. What this means is that perhaps more significant than prior judicial training, which many of our greatest justices have lacked, is some understanding of the character of society. The Supreme Court must keep abreast of society; it must work with the politics of the possible.

What we needed in a Chief Justice in 1953 was a man of broad sensibilities who recognized that beneath the veneer there were some real and substantial problems in our democracy. Someone who had considerable experience upon the bench would have accepted far more as given and been responsive to far less. The fresh mind penetrates to the heart of the matter and sees fewer of the obstacles. What we needed was the leadership of someone who would take a new look at old questions and be willing to exercise the power of the Court in the direction of reconciling the discrepancies between our democratic theory and practice. Even a full and detailed knowledge of Warren's public career prior to 1953 gave no clear indication that he was such a man.

President Eisenhower had no conception of what great change would or even could be led by the man he appointed; could he have seen into the future he would never have made the choice. History seems to have a life of its own which often resists our conscious attempts to order it rationally.

Warren could have functioned well as an associate Justice, but his influence would have been considerably reduced. As Chief Justice a man can place his stamp upon the Court. He leads the conferences and has the important task of assigning the opinion of the Court when he finds himself with a majority. Though historians have slipped into the easy habit of referring to the Court

during various periods in terms of the Chief Justice, only a few of the fourteen men who have held the post have infused it with a spirit and direction that gave their name true adjectival significance. Few could deny that the term "the Warren Court" is as descriptive as is "the Marshall Court."

The "impeach Earl Warren" movement is simply part of a larger dissatisfaction with the work of the Warren Court. Both the decisions and the members of the Court have been attacked because of our society's unfortunate tendency to seek security in something called "the law," a security being undermined by the fast moving activity of the Court. Countering the recurrent question, "should we not respect the law?" the Court has asked and answered the question, "should not the law respect the individual?" In this current era of social flux the many disturbed by change blindly strike out at the Court; it is a convenient symbol available to those tormented by their own anxiety. To them it appears that the Court is initiating change rather than, as it is in most cases, simply giving effect to long evolving changes called for by the society. Because even nine men are too many to focus upon, the Chief Justice has become the convenient target. His position and his general sympathy with the decisions of the Court have invited personal attack.

The Warren Court is acting within a constitutional tradition well-established at least since the time of John Marshall. The primary responsibility of the Court is to interpret the Constitution. The Supreme Court is permitted to be inconsistent, for an undertaking of its fundamental obligation to interpret the Constitution may well lead to a discarding of precedent, which, after all, is no more than a historical record of the Court operating in earlier periods under differing conditions. This probability of inconsistency and its corollary that there can never be a truly authoritative reading of the Constitution is disturbing to those who have come to believe the illusion that the Constitution does not change or those who believe that change should come gradually accompanied by fine legal distinctions of prior cases. The abrupt and dramatic changes that have become the hallmark of the Warren Court have undermined certain myths. For some reason the legal profession often seems to feel that it has a vested interest in the mythology or perhaps it feels that the public is still too unsophisticated to live with the reality of the situation. Much legal criticism of the Court couched in the preservative lan-

guage of the law seems like a form of special pleading: the Court is making it more difficult for its commentators to explain its decisions. And much of the criticism from laymen really fails at the threshold; it is founded upon a failure to understand what the Constitution is and what the Court is obliged to do and does. We are presented with a paradox of a fixed, written Constitution that does not bind but rather unshackles as it bends to the needs of the present. Chief Justice Warren is not uncomfortable, as for instance the late Justice Frankfurter was, with the fact that the Court is a policy-making body. In this arena Warren is at home; the right man is in the right place.

Earl Warren has thus become major national and international news, and these two new books⁵ are attempts to tap a growing popular interest in the man and in the Court. As members of the legal profession we may be seeking some enlightenment about Earl Warren the jurist and about his evolving ideas about the law. But such information is not to be found in these volumes; both authors are free-lance writers with journalistic experience who shy away from any legal analysis of Warren or the Court. But to understand Earl Warren we need to go beyond law review articles and gain some understanding of the man behind the image. What Warren thinks and feels and how he evolved through public service into the figure he is today are extremely important. Here is where both books have some value.

Generally the books are well written and, within their chosen contexts, apparently well researched. In both, personal interviews and newspaper sources are heavily relied upon. Katcher devotes about two-thirds of his volume to Warren's life prior to 1953, and it is here that his contribution is most substantial. Except for some good work on the changes in the Court's membership, his treatment of the Warren Court is not very rewarding. Weaver, on the other hand, comes closer to an even division between the pre- and post-1953 years, and, as his subtitle indicates, he has tried to go beyond Warren to give some perspective to the work of the Court. Its decisions are placed in a more meaningful legal and social context. The context is not as broad as it usefully could be, nor is Weaver's treatment interpretative or analytical, but he has

⁵L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* (1967); and J. WEAVER, *WARREN: THE MAN, THE COURT, THE ERA* (1967).

aligned the material in a workable way. Finally, both books suffer from a welter of quotations, a technique too often applied when the writer has not fully digested his material.

On balance, it is the Katcher volume that is the better biography, despite the frustrations that the reader experiences with the book. Though the author assures us in his preface that his work can be fully documented, the book contains no footnotes. Footnotes are not only scholarly impedimenta, which provide the means to hold the author responsible; they are extremely useful in adding to the knowledge of the reader. They enable the reader to make some of his own judgments in balancing the "fact" against the source. The author does add a bibliography but it alone is of little help in understanding the base upon which the book was built. In addition, Katcher has not used enough dates to keep the reader on the chronological track, and he does not clearly identify the Supreme Court cases to which he refers. In such a volume there may not be the need for legal citation but clarity demands more than Katcher has given. These are real deficiencies which detract from the book, but they do not destroy the book's value.

Earl Warren: a political biography provides an interesting, detailed and balanced account of Warren's life at least through his appointment to the Supreme Court. Katcher's biographical technique is good, as he describes issues and areas with a fullness while not losing hold of his subject. He is excellent in his treatment of the nature of California politics and in his analysis of the role played by Earl Warren. We are able to see how Warren functioned in the political arena and how, inherently suspicious and cautious, he moved slowly. We see how bland and orthodox was Warren in his exposition of Republican party philosophy and how the range of his intellect appeared limited. Katcher works well with his material and does not hesitate to interpret it for the purpose of improving our understanding of Warren. His over-all approach is one of favor and respect, but he does not allow his sympathy for Chief Justice Warren to cloud his judgment.

The author traces Warren's development from assistant district attorney in Alameda County, to district attorney, to attorney-general, to governor, to Chief Justice of the Supreme Court of the United States. After World War I Earl Warren found his home in the conservative wing of the Republican party; he was no re-

former nor radical and its values were his values. Warren would outgrow the myopia of the conservative wing while many of his former friends and associates could not. Prior to his election to the governorship in 1942 most of his adult life had been spent in the area of law enforcement, and there was some question of whether he could make the substantial shift from law-enforcer to law-initiator. He not only made the shift, but did it with such tremendous success that now both California Democrats and Republicans are willing to praise Warren's administration.

In addition to this capacity for growth, his sense of timing was an extremely important factor in his political success. Though Katcher does not extend his characterization, there is every reason to believe that as Chief Justice Earl Warren has maintained that sense of timing.

The other characteristic that is drawn out by Katcher is Warren's administrative ability. Into each new office he brought his skill as an administrator and organized and refined its practices. It is this basic administrative talent and drive that has been recently manifested in Warren's exercise of responsibility in the area of supervision of the federal courts. John P. Frank has commented that Warren has been the first holder of the office to merit his official title of Chief Justice of the United States.⁶

Except for Katcher's handling of the *Brown v. Board of Education*⁷ decision with Warren's successful quest for unanimity, the author, seeming somewhat confused by the welter of material and the complexity of the questions, is weak in his treatment of Warren as Chief Justice. We get a rather perfunctory and cursory treatment of the major opinions of the Court with too little information about Earl Warren. Little context is furnished and little perspective is provided. We get some idea of Warren's personal work habits but no understanding of the actual role Warren has played on the Court.

The Weaver book tries to accomplish a number of purposes as its title of *Warren: the Man, the Court, the Era* implies. It has less continuity in its biographical material as Weaver intersperses the past and the present in a way that impedes the narrative. The material is footnoted, which makes it a more workable book than the

⁶ L. KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 330 (1967).

⁷ 347 U.S. 483 (1954).

Katcher volume. Weaver appears far less critical and less informative in his treatment of Warren; the heroic Chief Justice casts his shadow over the author's approach. As a biography of the public man, Earl Warren, the book suffers in comparison with the Katcher volume, but it has some redeeming qualities. For instance, it deals more with the personal life of Earl Warren; we get more of a feeling of the man behind the public image. We see his position in a large family and his desire to separate his personal from his public life, and we get some conception of his personal interests.

Weaver's treatment of the Warren Commission Report is also more satisfying. We see some of what President Johnson wished to accomplish by saddling Earl Warren with the additional responsibility, and how seriously and unfalteringly Warren gave his attention to the task. Weaver also presents a balanced appraisal of both the Report and the critics of the Report.

We can assume that Warren has been growing as Chief Justice, but the dimensions of this growth and its ramifications are left only for speculation. Part of the void is due to the closeted nature of the Supreme Court's work: the inability to get at the real substantial historical source—a record of the work of the judges during their conferences. In addition there is a certain generally well-kept tradition of passing on little information about the actual process of decision-making. The quotations which both authors are able to use somewhat effectively in regard to appraisals of Warren's work in earlier years are less available, and where available, less useful in appraising the man as Chief Justice. Also as a writer deals with the contemporary period he finds resistance and reticence on the part of those who might have information to communicate.

What is then left for one who wishes to study the role of Chief Justice Warren is a more careful, analytical view of his opinions combined with his public utterances. But both authors, somewhat wary of the legal area, avoid this approach and leave us with too little understanding of Warren in his most important post. Both writers feel more confident dealing with their subject in the more familiar area of practical politics. We see a pattern of growth, but at the point when some analysis of that growth is most historically significant the analysis falters. We need some informed speculation on what factors, both inside and outside of the Court, have affected and influenced Earl Warren, along with a clearer view of how sub-

jective concepts such as fairness and justice have become operative in the decisions of Earl Warren.

Legal scholars and commentators have not generally been happy with Earl Warren, and in part this is true irrespective of their evaluation of his opinions. What has inspired this frustration is the quest for some basic concept of the law or general philosophy which lies behind the Warren approach. The picture of Earl Warren as a simple humane man interested in fairness and justice is disquieting to many. The commentators' search for order and rationality leads them to seek to categorize individuals in philosophic terms. They find it disturbing to face the fact that this man in a position of great power is working from such a simple and generalized base. Warren's recurrent question, "but is it fair?" is not only unnerving to counsel but to all those who seek to understand only in standardized terms, those who are not content until they have found the groove the individual fits. Certainly a more substantial analysis of Warren's opinions can reveal more than either Katcher or Weaver does, but we should recognize that it is an imputed philosophy, one whose articulation in all likelihood would surprise the Chief Justice who came to the office with broad sensitibilities but certainly no profound philosophical predilections.

Katcher does contend that, when the harmonizing tendency that produced unanimity in *Brown* had spent itself and a divided court reappeared, Warren was forced to chose sides. At that point he moved close to the civil libertarian views of Douglas and Black. Katcher uses Warren's public pronouncements to buttress this interpretation, but it is doubtful that the route Warren takes in reaching a decision is similar to that of Douglas or Black. Both are more philosophical in temperament and seem to work in a deductive fashion. Though few could doubt the Chief Justice's commitment to civil liberties, his generalized statements hardly add up to a clear and consistent philosophical position.

This lack of a philosophical temperament gave Earl Warren, the Chief Justice, a flexibility that made it relatively easy for him to reverse Earl Warren, the governor. Before we inspect a few dramatic instances of this activity, the issue of support for states' rights should be clarified. True to good Republican principles Warren often espoused states' rights, but it always was an intelligent and responsible advocacy designed to prod the states to responsible

action, rather than attempt to prevent federal activity and preserve state inaction. His present willingness to support federal action and federal supervision of the states should be seen as basically consistent with his earlier position. If the states would not act in vital areas, there seemed only one realistic alternative, federal action.

As governor, Warren fought redistricting attempts in California to preserve the control of the north over the more rapidly growing south. Warren could have avoided some embarrassment by assigning the opinion in the reapportionment case of *Reynolds v. Sims*⁸ to another Justice, but Warren willingly accepted the burden; no one could accuse him of a lack of courage.⁹

His twenty years in the field of law enforcement led him to support many changes in existing California law directed toward more efficient enforcement, but he uncritically accepted the law as given and repeatedly made pleas to the public to support their law enforcement officials. Presiding over a Court which has been extending protection to the accused criminal, Warren is being attacked with some of the same ammunition he used in the 1920's and 1930's. The Chief Justice has moved beyond the perspective of the policeman.

Warren exploited the Communist issue in the 1930's, but in the late 1940's and early 50's when others were riding the issue to political success Warren backed away. His recent participation in the decisions reinstating the Communist as an American citizen show how he has come full circle.

In two issues in California politics even the most devoted admirer of the Chief Justice must wince. As attorney-general, Warren with the coming of World War II became frantic in his concern for civil defense. In perspective the subject looks more like a part of Warren's campaign for the governorship, but to be fair Warren was personally caught up in an atmosphere of fear and exaggerated danger. The other area grows out of the first. The man now under attack for his civil libertarian views and decisions was an active and avid supporter of one of the grossest violations of civil liberties in our history, the evacuation of the Japanese from the west coast. Though the final decision came from the federal government, Warren publicly and forcefully supported the need for this

⁹ J. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 252 (1967).

drastic measure. He held the Californian's inherent distrust of the Japanese with their unassimilated alien traditions. While Warren was far from alone in these irrational views, he was in a position of leadership and for responsibility and caution he substituted emotionalism. This stain on the American record can never be cleansed, but Warren in giving new reality to the conception of a color-blind Constitution has done much to live down this episode of his past.

There is a pronounced stubborn streak in Earl Warren and a pride that makes it difficult for him to admit error, but always he has been his own man. He has learned slowly and expanded his horizons only when pressed by necessity. But into his seventy-seventh year when most men have long ceased their development, Earl Warren is still learning and still growing.

JOHN E. SEMONCHE

Assistant Professor of History and
Lecturer in Law
University of North Carolina at Chapel Hill