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ADDRESS BY SENATOR KENNEDY ON FORMER CHIEF JUSTICE WARREN AND THE CURRENT CRISIS IN CIVIL LIBERTIES

Mr. HART. Mr. President, for the past 5 years, the J.F.K. Lodge of B'nai B'rith has honored great Americans by presenting them with its Profiles in Courage Award. On April 28, the sixth of these awards, the award for 1970, was made to former Chief Justice Earl Warren. I believe that the lodge honors itself by having made this choice, and its action should be noted in this RECORD.

Further, Mr. President, I believe the RECORD should contain the address given on that occasion by the able senior Senator from Massachusetts (Mr. KENNEDY). It is a moving eulogy to a magnificent Chief Justice. I believe that the widest possible circulation of this address is desirable, both for those who admire the Chief Justice and those who seek even greater respect for the Supreme Court.

Therefore, Mr. President, I ask unanimous consent that the speech of Senator KENNEDY be printed in the RECORD at this point.

There being no objection, the speech was ordered to be printed in the RECORD, as follows:

REMARKS OF SENATOR EDWARD M. KENNEDY

Just five years ago I was pleased to be with you to honor the memory of the first recipient of the Profiles in Courage award, Edward R. Morrow. In the four years since then, the winners have been giants in American life and American liberty, Judge Simon Sobeloff, Charles Weltner, Paul Douglas, and Ramsey Clark. And today that proud tradition continues as we pay tribute to Chief Justice Earl Warren.

I feel a deep sense of privilege and awe in performing my role tonight. For the life of the Warren Court spanned my entire adult life. I was 21 when Earl Warren became Chief Justice, and perhaps my generation will be the last to understand from personal experience why the Warren Court was the subject of so much controversy and so much emotion.

Indeed, for many of us, the key rulings of the Warren Court have already come to seem in retrospect merely the necessary articulation of self-evident constitutional percepts. It hardly seems radical to have decided nearly 90 years after the 13th, 14th and 15th Amendments, that officially forced separation of citizens by skin color was unacceptable. It is not surprising that after 175 years of increasingly irrational legislative apportionment, the Court decided that "Legislators represent people, not acres or trees." It certainly does not shock us now to hear that poor defendants are entitled to the same Constitutional protections as rich ones, that those protections accrue as soon as a suspect is deprived of his liberty, and that the suspect must be told of his rights before he can be assumed to have waived them.

These, stripped to their essentials, are the three major, and most controversial, decisional lines of the court which Earl Warren led for 16 years, and it is a sign of that Court's impact on national life that today most of us take them for granted.

Yet the fact is that each of these developments in the law was earthshaking in its day, and reflected the courage and confidence of Chief Justice Warren and his fellow justices.

For in those days the constitutional promises of equality and liberty and justice were often shams in the courts, in the legislatures, in the precinct houses, and in the schools and public facilities. And few with the power to act had been willing to recognize those shams, to mark them for what they were, to destroy them, and to replace them. The legislative branch would not. The executive branch could not. And the judicial branch had failed to appreciate that by refusing to decide cases, or by deciding to acquiesce in the status quo, it was exercising its power as fully as if it took cases and altered the status quo. It would not admit that by choosing not to address problems which it could have addressed, it assumed a share of the responsibility for those problems. There appeared to be a judicial code of silence on many great issues and hard issues, a code which said if the problem is difficult and complex and the correct judicial solution would raise its own difficulties, then the courts had better abstain from seeking a solution, no matter how pressing the need for change. The theme seemed to be that only easy problems with easy answers were fit for judicial solution, and that drastic problems with difficult answers should remain unsolved. Judicial restraint became judicial abdication, and since there were no other sources of relief, judicial abdication became the last step in America's toleration of constitutional hypocrisy.

But within a year after he joined the Court, Earl Warren changed all that. With the Chief Justice as catalyst and spokesman, the Court's unanimous opinion in *Brown* showed forcefully that the Court was prepared to address large issues and hard issues, and to tear away the Constitutional facade behind which we had been living.

The first years of the Warren Court were historic not merely for the advances in judicial responsiveness which they marked, but perhaps more strikingly for the political context in which they occurred. In Congress, where an effective combination of political forces was resisting all social progress and generating novel legislative dilutions of liberty, there had developed a pattern of individual demogoguery and fear-mongering that threatened to destroy any person or any institution working in the public interest, and especially those who sought to strengthen and promote and avail themselves of Constitutional liberties and individual freedoms. In the Executive, there was not just a benign neglect of pressing national challenges, but a benighted preference for low profile government which would not make waves—even when it saw that the waters were already troubled. And the public quietly accepted this attitude. Tired from two wars, cowed by McCarthyism, worried by the first time since World War II about their pocketbooks, the nation did not have the emotion or inclination for social activism. Even those who suffered most, and most directly, from the system's failures—the black, the city dwellers, the poor, the ignorant—suffered in comparative silence—without demonstrations, without violence, without rebellion, with just an occasional lawsuit seeking to test the honesty and validity of the system.

So it was left to the courts, and with Earl Warren at their apex, the courts responded. They responded carefully and judiciously, step-by-step, and with attention to pragmatics. The reach of *Brown* was expanded cautiously in a logical series of holdings that has not yet reached its end. *Mallory* merely elaborated on *McNabb* and *Upshaw*. *Miranda*, as the dissents in earlier cases pointed out, was only the inescapable application of the careful progression of *Gideon*, *Hamilton*, *White*, *Massiah*, and *Escobedo*. And even *Baker* v. *Carr* was written with enough restraint so that its strongest critic could opine that the Court had merely "opened a colloquy, posing to the political institutions of Tennessee the question of apportionment, not answering it for them."

Earl Warren had been a great and successful politician. He had been elected district attorney, attorney general, and 3 times, Governor of California. He knew the Nation and its people. He knew what they wanted and what they needed, and what they would accept. He knew that politics was the art of the possible, but he also recognized, in the words of a quote which Congressman John F. Kennedy saved and used, that "the best politics is to do the right thing." Earl Warren's vision of "the right thing" changed over time. What seemed necessary to him in 1941, probably seemed inconceivable in 1961. But it was this growth and perspective which gave him strength.

He knew what he wanted the Supreme Court to be. While he did not find it necessary to articulate a comprehensive theory of how the Court should go about deciding cases, his record on the Court spoke deep and thoughtful messages about his philosophy of judicial behavior. Jim Clayton has summarized the Frankfurter and Warren philosophies this way: "Frankfurter saw it as a Court in which only principles were established; Warren often sees it as a place where justice is done." But I think that contrast does not stand up, and does not fairly reflect the meaning and importance of the Warren philosophy. For when a supreme instrument of government does justice, it also establishes principles. It demonstrates that the government, the institutions of organized life, the Establishment, if you will, is alive and well, is responsive and responsible, is vital and functioning. It restates the principle that justice can be done and should be done and must be done by all instruments of government. It keeps alive the faith of the people in the system, stimulates them to seek more justice from the system, shows them how the system should operate so that they will recognize its malfunctions.

It broadcasts the clear lesson that the Constitution is not just a piece of parchment to be kept in helium at the Archives for schoolchildren to look at, and for lawyers to genuflect to, but that the Constitution is a living force, a guide for finding contemporary answers to contemporary questions, a working tool for every citizen, meant to be used, and strengthened by use.

And when the instrument which establishes these principles is the Supreme Court, they have special meaning. For when the Supreme Court finds it necessary to intervene, that is a strong warning to other institutions of government that they may be failing in their own responsibilities.

Of course, that warning came through loud and clear from the Warren Court, first to the Executive Branch, and then to the Congress. The first change of Administrations during the Warren era found a new commitment to social justice. The Executive worked in tandem with the judiciary, taking strong initiatives in civil rights, and laying the groundwork for an upheaval in criminal and civil justice by focussing on the problems, ventilating them, and proposing administrative and legislative reforms. By the end of the first decade of the Warren Court, Congress also began to complete what the Court had started. The civil rights acts of 1960, 1964, and 1965, provided massive legislative solutions which facilitated or replaced the excruciating case-by-case pursuit of equality. The Criminal Justice Act, Narcotics Addict Rehabilitation Act, Bail Reform Act, the Law Enforcement

Assistance Act, and others recognized the need for overhauling the machinery of justice. With OEC, education, health, and manpower legislation the Congress assumed even broader responsibilities for social progress. A misguided effort in Congress to turn the clock back on *Baker* v. *Carr* was rebuffed not once but twice, and the Court's demand for equality of representation remained intact.

And so, as the Warren era drew to its close, our national government was strong enough to withstand the twin challenges of urban violence and political dissent. By and large the institutions of order, especially at the Federal level were able to respond firmly when necessary, but with flexibility, compassion, and due respect for legitimate rights. I think it is a mark of the contribution of the Warren Court that we were able to get through the last half of the decade of the Sixties with our liberties and our institutions intact.

Now I fear that we are entering another era of crisis, an era of inaction and retrogression and repression easily matching that which faced Chief Justice Warren when he arrived in Washington, an era which will demand frequent profiles in courage if we are to survive as a free people. Many of the signs are small, but they are ominous. Taken separately, some may not seem unbearable or worth fighting about. But taken together they suggest a trend and a pattern which could lead to an ever faster circle of repression and reaction with no conceivable end. They are gnawing at the precious foundations of our freedom, chipping away piece by piece the barriers against tyranny and oppression which the framers of the Constitution erected.

Even to recite calmly a list of the symptoms is to give the impression that 1984 may be less than 14 years away, and that "Z" could happen here:

More wiretapping in more kinds of cases, and assertion of the absolute power to bug dissenters without court orders.

Pressures for no-knock searchers and for detention without bail.

The use of scare tactics to discourage attendance at protest gatherings, and the obsessive focus on the few lawbreakers in peacefull crowds of tens of thousands.

Growing use of domestic spys—in schools, in political groups, at public meetings, of informants who sometimes help to foment the very acts they are supposed to be investigating.

Verbal harrassment of dissenters by political leaders, not on the merits of the issues involved, but through guilt by association and exaggerated codewords.

Total lack of sensitivity by those leaders to the issues involved—the Attorney General trying to tell jokes about his wiretapping to an audience that is quite seriously concerned about his wiretapping; the Vice President and the President making light of their affinity to "Dixie" at a time when the nation's stability may depend on whether that affinity outweighs their affinity to justice.

The new application form for Washington demonstration permits with blanks for everything from philosophy to arrest records.

A new attempt to prevent disagreeable protests near the White House altogether.

The installation in the White House of a journalist with carte blanche to fish through federal tax files and other confidential materials.

Executive resistance to a bill to eliminate an anachronistic and frightening provision for federal detention camps, resistance which melted only when it became publically embarrassing.

Serious consideration being given to a proposal to remove 5 and 6 year old children from their homes into correctional camps on the basis of tests of their potential for later criminality.

Federal stockpiling of huge amounts of teargas, and equipping of federal marshals with shotguns that they do not need or want.

Sharp curtailment of the availability of federal parole, the best incentive known to give prisoners hope and a goal as they are rehabilitated.

Refusal to support extension of the Voting Rights Act of 1965, the most successful contribution to universal suffrage since the 19th Amendment.

Federal encouragement of continued resistance to Constitutionally required school desegregation.

Court nominees chosen for their willingness to resist Constitutional mandates, rather than for eminence or leadership.

Official solicitation of letters of endorsement of a Court nominee from federal employees and judges, but investigating and threatening of government funded lawyers who write letters opposing the nominee.

Attempts to ease non-conformist employees out of the civil service by applying political tests and by reinvestigating their backgrounds for past participation in protest activities.

Inspection of incoming foreign mail by federal authorities.

A concerted effort to interfere with the freedom of the press, led by the Number Two man in the Administration.

Harassing calls to the networks by the Chairman of the Federal Communications Commission, and to local media by a member of the Subversive Activities Control Board and by our nation's first information czar.

Harassment of the national educational T.V. network by the Internal Revenue Service.

A constant effort to blame the nation's ills on scapegoats such as the previous Attorney General.

Each of you can probably add to that list, from your own knowledge, items which the public is not yet aware of, and there are others I have omitted.

Nevertheless, it is a shocking and terrifying list. It betrays a total lack of respect for our heritage of freedom and constitutes an immediate threat to our system. The most disturbing element is perhaps the rhetoric which accompanies these symptoms of incipient Contitutional retrograde. The innuendoes are those of the '50's. The implication is that anyone who believes in the principles of the Bill of Rights or the 14th Amendment is somehow unpatriotic, that the Twentieth Century cannot afford the luxury of liberty, that we should go on a diet that dispenses with the frosting of freedom on America's cake. And the results of such rhetoric are unmistakable. A reporter walks the street with the text of the Declaration of Independence on July 4th and has a hard time finding anyone willing to sign it. A network poll shows a substatial proportion of Americans willing to have their constitutional protections taken away.

The Constitution protects us, but we sometimes forget that it does not and cannot protect itself. It will atrophy if it remains unused. It will be eroded if it is not defended at every opportunity. It will come into public disrepute if politicians are allowed to go unchallenged as they pander to, and exploit, and act out, the basest instincts of human character, playing man against man, group against group, region against region, and generation against generation.

And if the Constitution withers away the nation will wither away—or will disappear in an orgy of violence. For the Constitution is the hope and strength of all Americans of all philosophies. Today those of one ideology may feel they can do without Constitutional protection because they have political protection. But the political shoe changes quickly from foot to foot, and on the next go around they may be the ones who need the Constitution most.

And so all of must speak up for freedom All of us must be advocates for justice. All of us must be executors and conservators of the valuable estate left to us by Thomas Jefferson and Alexander Hamilton and Benjamin Franklin and their associates. They were men of courage and foresight. And if their testament to us is to be preserved, our times will have to produce citizens of courage and foresight.

There was ample proof this month that courage still abounds in the land. Just when the outlook for government responsiveness looked bleakest, the U.S. Senate responded to the national need by rejecting a Supreme Court nominee who would have been an insult to the Constitution and the Court which enforces the Constitution. That response was possible only because citizens and lawyers and Senators had the courage to place conscience above convenience. Thus, there is hope. There are Americans who can carry on the fight for justice which Earl Warren led so bravely. But they must step forward now, for it is late in the game.

When Earl Warren stepped down from the Bench, he said, "We serve only the public interest as we see it, guided only by the Constitution and our own consciences, and conscience is a very severe task master." And so we have seen his courage not just in profile but in full face, for he has devoted his whole being to liberty and to justice, for all and forever. There was always something very special about the Chief's courage. Archie Cox described it this way: "not merely the will to decide and decide according to his convictions but the courage that preserves equanimity, tolerance, and good nature in the face of provocation." That kind of courage is welcome in any man, vital for a good Justice, and absolutely essential in a great Chief Justice. Earl Warren had it and that is why we are proud to honor him today.