

Doing Justice to Earl Warren

THE MEMOIRS OF EARL WARREN. By Chief Justice Earl Warren. Doubleday. 394 pp. \$12.95

By W. H. HARBAUGH

FROM 1953, when Dwight D. Eisenhower appointed Earl Warren Chief Justice of the United States because he had "integrity, honesty, [and a] middle-of-the-road philosophy," until 1969, when Warren retired, the United States underwent a social, ethical and legal revolution. On virtually every constitutional front the cause for liberty and human dignity advanced dramatically—civil rights, criminal procedure, church-state relations, legislative apportionment, and freedom of speech, press, and association.

Neither Warren, the son of a Norwegian immigrant railroad worker (the ancestral name was Varran), nor the Court he presided over created that revolution. The moral and other forces that compelled a ruling on school segregation had been gathering strength since before World War II; the shifting of population that made most state legislatures outrageously unrepresentative had been accelerating for half a century; the quickening of conscience that called for the extension of Constitution-ordained rights to criminals and radicals had been taking place since the McCarthy era. Eventually, accommodations would have been made. But it is hardly likely that they would have been so far reaching had the California governor not joined the Court.

Like most autobiographies, *The Memoirs of Earl Warren* is highly selective. It ignores some important matters, glides over others, and dwells too long on minor concerns. The prose is unpolished and the narrative only

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moderately sustaining. The section on Warren's vice-presidential campaign in 1948 is disappointing (he spoke to Thomas E. Dewey just twice), and the chapter on the investigation of the Kennedy assassination is dated, though informative on its own terms. Moreover, the proportions are frustrating: only two of eleven chapters treat Warren's 16 years as Chief Justice.

Earl Warren, who died in 1974, was a deceptively simple, sensitive, intensely private man. Though neither learned nor brilliant, he was efficient, fair-minded and a courageous administrator who displayed from the beginning many of the statesmanlike qualities that marked his later career. "I was a pragmatist, not an ideologist," he explains in a guarded section on his first campaign for governor of California in 1942.

Whatever his inner convictions, Warren's dominant strain was moralistic; for him the just result was primary, the legal process secondary. More than once as a crusading district attorney and super-patriotic attorney general he strained procedure in pursuit of ends he deemed right. "I would not recommend for today," he candidly observes, "the vigorous cross-examination we gave . . . [a group of contractors] when they exercised their right against self-incrimination." Neither was he at ease with his role in the displacement of Japanese-Americans during World War II, though he first recommended that they be removed from the coast rather than interned: "Whenever I thought of the innocent little children . . . I was conscience-stricken. It was wrong to act so impulsively, without positive evidence of disloyalty."

Yet even those years of law enforcement abound in evidence of the humane side of Warren's moralism. He put the trial calendar on a 30-day basis, helped organize a legal aid society, and was instrumental in establishing a prison farm. He advised California's State Personnel Board that it could not deprive Japanese-Americans of their Civil Service rights, and he personally took the century-old claims of California Indians to federal court.

It was Earl Warren's ten-year governorship, however, that most clearly foreshadowed the libertarian and social activist Chief Justice. As he reports with restrained pride, he established a health insurance program, reorganized the state prison system, and expanded California's higher education network. He also testified against the Mundt-Nixon bill and urged the legislature to create a state Fair Employment Practices Commission. A Democratic successor, Edmund G. (Pat) Brown, once summed up Warren's record in words not reprinted here: "He was the best governor California ever had. He faced the problems of growth and social responsibility and met them head on."

Some of Warren's most interesting passages involve President Eisenhower and the school segregation suit, *Brown v. Board of Education*. Warren describes Eisenhower's personal coolness in matter-of-fact tones, but he is unable to repress his indignation over the President's failure to give the nation moral leadership. Eisenhower, he bitterly suggests, could have eased tensions by saying "that black children were still being discriminated against long after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, that the Supreme Court of the land had now declared it unconstitutional to continue such cruel practices, and that it should be the duty of every good citizen to help rectify more than eighty years of wrongdoing by honoring the decision."

With equal fervor and no less justification, the former Chief Justice censures the American Bar Association for failing to defend the Bill of Rights and for not disapproving inflammatory attacks on the Supreme Court. The ABA, he asserts, was obligated to make an enlightened appraisal of the Court's work; instead, "it did much to discredit us" by "supporting Southern racists who accused the Court of arrogating power to itself because of its civil rights cases . . . and of being soft on crime and Communism."

Regrettably, the chapters on the Court give little insight into the Chief Justice's own leadership. Warren's ac-

count of his own role in *Brown* is so modest, in fact, that his editors produce letters by Justices Frankfurter and Burton acclaiming his harmonizing influence. The few other cases discussed in detail are cast largely in ethical terms, while sophisticated critiques of the Chief Justice's craftsmanship and judicial philosophy are testily dismissed. Warren acknowledges the high motives that prompted his fellow justices to write so many dissenting and concurring opinions which made the Warren Court the most divided in history. But he scorns their underlying assumptions. "I do not register myself," he declares, "with those who, in the political jargon of today, classify themselves as 'strict constructionists.' That is a spurious issue." So too the doctrine of neutral principles — "a fantasy . . . used more to avoid responsibilities than to meet them."

Conversely, Warren says nothing of his differences with the majority over obscenity, an issue on which his moralism triumphed over this libertarianism. Nor does he comment on his controversial sociological footnote in *Brown*. And though he is obviously uncomfortable with busing, which he calls a "false issue," he ringingly concludes that the "real heroes" of the desegregation struggle were the federal judges in the southern and border states.

It is unfortunate Earl Warren did not live to expand the section on the Court, as he had planned to do. But it is hardly unfortunate that this "decent" man, to use one of his favorite words, presided over the Supreme Court during those years of creative ferment. On almost every great issue of the era he sided firmly, and often passionately, with what became the liberal, activist majority. No Chief Justice, not even a John Marshall, could have reconciled the divergent philosophies of Justices Black and Frankfurter, let alone Douglas. What enlightened men and women of goodwill needed, granted the impossibility of unity, was a granite-like symbol of moral integrity and national ideals. That is what Chief Justice Earl Warren gave them. □