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# Justice Warren Goes Out With a Bang

By JAMES RESTON

The argument against the Warren Supreme Court was that it was too eager to intervene, that it had lost the art of judicial restraint, and was too inclined to reach out for supremacy over the other two co-equal branches of the Federal Government.

In his farewell opinions after a remarkable and historic career as the nation's foremost judge, Chief Justice Warren almost seemed to go out of his way to provide evidence for the charge.

There was a strong argument in both the Adam Clayton Powell case and in the El Paso Natural Gas case for what Kipling once called "the art of judicial leaving alone," but that has never been Mr. Justice Warren's most prominent characteristic. His tendency has been to insist on saying a thing is right or wrong, even if he had to pass what others regarded as the bounds of judicial restraint, and this is clearly what he did in these two cases.

Warren Burger, who will be Mr. Warren's successor, had refused to pass judgment on the House of Representatives in the Powell case "because of the inappropriateness of the subject matter for judicial consideration," and he deplored "the blow to representative government were judges either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances."

Chief Justice Warren, dramatizing the difference between his philosophy and his successor's, regarded a decision against the House not as an improper intrusion into the affairs of Congress, but a duty.

"Our system of government," he wrote in the Powell case, "requires that Federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts avoiding constitutional responsibility."

## The El Paso Case

Justice Warren's opinion in the El Paso case is even more eloquent of his interventionist philosophy. This was an antitrust case in which all the parties had agreed to abide by the lower court's decision. There was no appellant. The Supreme Court did not hear oral argument in the case or debate on the merits. Nevertheless, the majority opinion by Chief Justice Warren said that, regardless of the agreement by the parties, the Supreme Court had a right to look and see whether its instructions had been carried out, and it found they had not.

This, said Justices John Marshall Harlan and Potter Stewart, "discarded . . . all semblance of judicial procedure . . . in the headstrong effort to reach a result that four members of this Court believe desirable."

## The Moderate Approach

Judge Burger's view in the Powell case was that "courts encounter some problems for which they can supply no solution," and that this is not necessarily a cause for regret or concern. The framers of the Constitution, he pointed out, had many hard choices and willingly took many risks.

"To allow, for example, total immunity for speech, debate and votes in the Congress," he noted, "risked irreparable injury to innocent persons if false or scurrilous charges were made on the floor of a Chamber; to allow the Executive exclusive power of foreign relations risked unwise decisions which might lead to war; to tolerate the essential supremacy of constitutional interpretation in a Supreme Court meant the risk of unwise decisions by a transient majority. But that is the way our system is constructed. . . ."

Judge Burger's way in the Powell case was to avoid decisions that would show lack of respect for another branch of the Government, bring about a confrontation between that branch and the Court, and "at best be a gesture hardly comporting with our ideas of separate co-equal branches of the federal establishment." Judge Warren's way was the opposite. He believed Powell was punished unconstitutionally, in part, perhaps, because Powell was uppity and black, so he intervened and left the bench with a bang.

What is even more interesting than the rightness or wrongness of the decisions in the Powell and El Paso cases is that they may mark the high tide of the Warren Court's philosophy and the beginning of a more cautious Court under Judge Burger.

For ironically, these two decisions are bound to give greater force to those who are now arguing to President Nixon that the Warren Court had strayed too far beyond proper judicial boundaries, and appealing to him to appoint another justice of Judge Burger's judicial temperament to the seat vacated by the liberal Justice Fortas.