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John A. Sibley Lecture

Earl Warren
U.S. Supreme Court Chief Justice, Retired

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JOHN A. SIBLEY LECTURE*

*Honorable Earl Warren***

INTRODUCTION BY DEAN J. RALPH BEAIRD***

OUR speaker was born in Los Angeles and obtained his undergraduate and legal education at the University of California. It is reported by Leo Katcher in a political biography of Earl Warren that while in law school he never volunteered to recite a case, because, in his own words, "The law school made a fetish of discouraging the acquisition of practical knowledge, and the professors were so committed to the case system they denied you the opportunity of seeing things in perspective."[1] As a result he was told by the dean at the end of his first year that he should be prepared not to graduate. I am happy to report for the Chief Justice that today clinical education plays an important role in legal education. As a law student he also risked automatic expulsion by committing the grievous offense of working part-time for a lawyer. Despite these problems he was graduated from Boalt Hall and admitted to the California Bar in 1914. Following graduation he engaged in the private practice of law until he enlisted for military service in World War I.

After the war he began his long career of public service—serving briefly as clerk to the Judiciary Committee of the California Assembly, then joining the staff of the City Attorney of Oakland. A year later he moved to the staff of the District Attorney of Alameda County, where he remained for the next nineteen years. In 1925 he was appointed to the vacant office of District Attorney, and the following year was elected to a full term. He was twice re-elected. From the inception of his tenure as District Attorney, Earl Warren placed the enforcement of laws above short-term political considera-

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[1] L. KATCHER, EARL WARREN—A POLITICAL BIOGRAPHY 27 (1967).

tions. He vigorously investigated and prosecuted local officials who were politically well-entrenched in an effort to end a long-established pattern of corruption in the police and justice courts. In so doing, he courageously risked his young and politically vulnerable career. His other targets included county law enforcement agencies, fraudulent stock issuers, organized crime, and labor leaders engaging in violent tactics. Professor Arthur Sherry, who served with him in the D.A.'s office has commented that

> "[h]is attacks on corrupt local government and on organized criminality were more than unique—they were audacious. Because of this, they attracted an enormous amount of public attention, stimulated parallel efforts in other parts of [California] and initiated an era of legal and governmental reform whose influence remains important to this day."[2]

During his fourteen years as District Attorney, he earned a wide reputation as a crusading but fair prosecutor. He holds the unusual distinction of never having had a single conviction reversed for unfair treatment of a defendant, and one federal judge concluded that he was the only county prosecutor at that time who stayed within the rules on illegally seized evidence. Moreover he not only was a skilled prosecutor but also an effective administrator. He pressed for consolidation of law enforcement agencies, pooling of information, and greater efficiency in the criminal justice system. He was instrumental in the adoption of much legislation to make law enforcement more effective, among them a state constitutional amendment allowing the prosecutor to comment unfavorably on the defendant's refusal to testify. Interestingly, the Supreme Court later pronounced this practice unconstitutional in *Griffin v. California*.[3] Presiding as Chief Justice he characteristically declined to participate in this case.

In 1938 Earl Warren successfully campaigned for the office of Attorney General of California, winning nomination on both the Republican and Democratic tickets. Four years later he was elected to the first of his three terms as Governor of California. His nonpartisan approach to government, which had characterized his career from its inception, coupled with his immense personal popularity, swept him into office for a second term—again with the unprecedented nomination of both major parties. In 1948 he was chosen by

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[2] Sherry, in *Earl Warren—A Tribute*, 58 CALIF. L. REV. 3, 39 (1970).

[3] 380 U.S. 609 (1965).

the Republican Party as its vice-presidential candidate on the ticket with New York Governor Thomas Dewey. Though engaged in a desperate campaign for re-election, President Truman thought so highly of Earl Warren that he steadfastly refused to attack him. As the President declared, "Governor Warren is a good man and an excellent public servant. I cannot, and will not, hurt him to gain the Presidency."[4] After the unsuccessful campaign, he returned to the Governor's office and was elected again.

He, however, did not finish his third term, for in 1953 President Eisenhower appointed him the fourteenth Chief Justice of the United States. It is said that in his first few months on the Court, he impressed his new colleagues with his "ability to concentrate on the concrete; a capability to do his homework; a sensible, friendly manner, wholly devoid of pretense, and a self-command and natural dignity useful in presiding over the Court."[5] These qualities helped him restore amity to the Court, which had been bitterly divided. It was not long before the label, "The Warren Court," came into general use and a new era was begun. The focus for this era was best described by the Chief Justice himself when in a 1968 speech, he said the following:

> "Justice in individual cases is the basis of justice for everyone. A failure to protect and further anyone's individual rights leads to justice for no one.
>
> Many countries have provisions in their own constitutions similar to our own. In only a few countries do these provisions find effect in the actual operation of the law. The failure of these Constitutions is not in the concepts of their draftsmen but rather in the absence of an independent Judiciary to uphold these rights or a professionally independent bar to assert and defend them."[6]

The significance of the Warren era, therefore, was in giving, for the first time, real meaning to many principles that had long been a part of our national rhetoric.

First, the court tackled a problem which others had ignored—racial discrimination. In his first term, Chief Justice Warren

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[4] Truman, in *Earl Warren—A Tribute*, 58 CALIF. L. REV. 3 (1970).

[5] N.Y. TIMES, Mar. 5, 1954, at 5, col. 6.

[6] Warren, Address at the cornerstone-laying ceremonies of the Roscoe Pound-American Trial Lawyers Law Center, Cambridge, Mass., Sept. 28, 1968, *quoted in The Warren Court: An Editorial Preface*, 67 MICH. L. REV. 219, 221 (1968).

authored the Court's opinion in *Brown v. Board of Education*,[7] which held that racial segregation in the nation's public schools was a denial of equal protection. In this and other decisions the Warren Court fulfilled the central theme of *Marbury v. Madison*[8]—that the judiciary must have concern for those whom the other branches of government have neglected. It was not until ten years later that Congress and the President combined to enact the Civil Rights Act of 1964.

In the reapportionment decision of *Baker v. Carr*,[9] the Warren Court gave real meaning to the proposition which prompted the American Revolution—that only a representative government is entitled to govern.

In order to assure thoughtful participation in representative government and meaningful decision-making, the people must be fully informed. This assurance was provided in *New York Times Co. v. Sullivan*[10] when the Warren Court expressed its "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open."[11]

Real content was given to the "due process" clause of the fourteenth amendment by the Warren Court in numerous cases involving criminal procedure. For example, the right to be heard—so essential to fairness—was held to comprehend the right to be heard by counsel in *Gideon v. Wainwright*.[12] The Court observed that "in our adversary system of criminal justice any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[13]

It is true that a Chief Justice is only one of nine and that his administrative duties and role as presiding officer carry little power in the process of decision. Yet as a former Solicitor General has noted, "In the small, tightly-knit and in many ways isolated circle" the leadership of the Chief Justice "has vastly more significance for the character and direction of the Court's work than can be discerned from purely intellectual analysis of the opinions."[14] This, I am sure, is what prompted Justice Clark to comment that the devel-

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[7] 347 U.S. 483 (1954).
[8] 5 U.S. (1 Cranch) 137 (1803).
[9] 369 U.S. 186 (1962).
[10] 376 U.S. 254 (1964).
[11] *Id.* at 270.
[12] 372 U.S. 335 (1963).
[13] *Id.* at 344.
[14] Cox, *Chief Justice Earl Warren*, 83 HARV. L. REV. 1, 4 (1969).

opments in human rights between 1954 and 1969 might well never have been done without Earl Warren.[15]

Ladies and gentlemen, it is a great personal privilege for me to present the Honorable Earl Warren.

THE SIBLEY LECTURE

Dean Beaird, Dean Rusk, other faculty members, and law students. I want to tell you that whenever I'm in the company of Dean Rusk I always think first of just introducing him or speaking of him as "Dean" Rusk; and I suppose the first time I ever thought of that was when I was told the story about when Professor Rusk was invited to the White House, to talk to President Kennedy about becoming Secretary of State. After that he went over to the State Department, and a young man there who didn't know him personally took him around and introduced him to all the senior members in the State Department. And he of course thought that being appointed Secretary of State he must be dean of some college or university, so as he took him around he'd say, "Ambassador so-and-so, I'd like to have you meet Dean Rusk." They'd open their eyes, you know, and wonder about this little fellow doing so well or having such brass as to call him Dean Rusk. Now Dean, I don't know whether that's apocryphal or not; but whether it is or not, its a good story, and has always stuck in my mind and so I revealed it to you today.

Now I want to say that I never thought that I would have to come down here in Georgia to the Sibley lecture to hear all the things that I've done in life. Really—but its very generous of Dean Beaird to relate them in all events. But I want to tell you about my experience in the law school and my failure to offer to answer a question that was asked of me. I still retain that idea, and those of you who were with me this morning will know that I didn't volunteer any answers. I waited for questions. That's a pretty good way in life to do; then you know you're on solid ground when you're answering questions.

Now I'm very much privileged to be here, and I do hope that you will excuse my more than usual gravelly voice, because since ten o'clock this morning, I've been answering questions of law students, and it has had an effect on my voice. But I am privileged to be invited to speak to the students at the University of Georgia. This is due somewhat to the fact that I myself am a product of a state

[15] Clark, *Dedication to Chief Justice Earl Warren*, 48 NEB. L. REV. 6, 13 (1968).

university to which I'm very much devoted; and I have a great respect for state universities, and I'm particularly grateful that I'm invited here to the first state supported university in the nation. I think that's a great distinction that you have here—you certainly started a great tradition in the life of this country, that has contributed more than anything else I know, to the welfare of this nation. So I wish you all well, and I'm happy to be with you on this particular occasion.

I am sorry I did not accept one of the earlier invitatons extended to me through my long-time friend, Dean Rusk. I would have done so except for the fact that so many people believe when a man retires from public office he does so just so he'll have more time to make public speeches. And there are so many people who have been put off—or in my instance people whom I put off speaking for—because I told them the work of the Court was such that I couldn't travel or couldn't take time away from my work, and maybe someday I'd be able to do it. Well when that day arrived on my retirement, a lot of them remembered it, and there were just so many requests for me to make talks at different universities (and that's the only place I have talked since I entered the judiciary twenty years ago) that it's been an awfully difficult thing to get around to all the universities. And so, I'm a little late coming to you here, but I promised Dean long ago that I would come here the first opportunity that I got—and this is it.

It would have been better for me if I had come earlier because I would then have been able to speak about things more pleasant than those which saturate the news today. These events are so distracting from the wonderful things our country represents that it would seem almost fatuous to attempt to communicate with young people who are searching, not only for a meaningful private life, but for an understanding of government in a free and healthy society, without at least touching upon some of the disturbing events of the day.

Today the preoccupation of the Nation is with morbid events. Our concern is with affairs both at home and abroad. Although we were told a year ago that "peace is at hand," the war goes on in Indo-China, and within the week it was announced that 46,000 people, mostly civilians, have been killed there since that time. True, our prisoners of war are home and our troops are not fighting there, but war has not ceased in that part of the world. And war anywhere, particularly when abetted on either or both sides by great powers, endangers the entire world. This is tragically demonstrated by the events of the past week, which we are told brought us, in spite of

the detente between ourselves and Russia, to an eyeball-to-eyeball confrontation that necessitated an instant alert of all our Armed Forces around the world. As serious as these matters are, they are further agitated and confounded by the sordid reports of corruption and the violation of the fundamental rights of our citizens by some of the highest officers in our national government.

Together these revelations have so shocked the nation that people are even questioning the efficacy of our basic institutions. The national mood is leaning toward a cynicism that interprets these derelictions as being the norm of public life, and that certain people in present circumstances just happened to be caught.

This is a libel on the myriad of public servants in all eschelons of our Government. If it were true, our system would have collapsed of its own weight long ago instead of achieving the things which have made this the strong nation it is with unsurpassed freedom of the individual throughout the almost two hundred years of our national existence.

There is grave danger in such a mood because this is a government of the people through their elected representatives. If the people ever conclude that it makes no difference who is elected or appointed to public office because they are all crooked and, either through indifference or despair, fail to respond fully to their responsibilities of American citizenship, our nation will be on a decline suggestive of that of other free nations through the ages.

Our is still a young country; yet it has the oldest written Constitution on earth. This does not mean that we were the first to have free government of the people. Before the Christian Era, there were scores of Greek city states where the people governed themselves by direct action. They prospered for a time, but as their people became tired of the duties of citizenship, they eroded and eventually sunk into oblivion under some form of dictatorship; and so it has been with free governments ever since, until we are now one of the oldest in existence. The later experiment of Rome lasted longer than any because there for centuries citizenship was viewed as a public office; but even after it became the acknowledged leader of the Western World, it crumbled and fell to barbarians when its citizenry became indifferent and the government became corrupt.

Even in our time we have seen the same thing happen in many nations throughout the world. In the past two centuries, country after country has patterned its institutions after ours because the people admired our way of life and believed that by copying our

institutions they could have the same freedoms. So they provided in their constitutions for a representative form of government with three equal branches, separation of powers, the rule of law, an independent judiciary, and even Bills of Rights to protect the individual from excessive use of power. Sadly however, the vast majority of them, although still our allies, have succumbed to special interests protected by the armed forces of the nation, and are in the fullest sense of the word military juntas without any citizen participation. Yet lip service is still given to the trappings of free government without any of its blessings. And I have seen many public men from other countries who are in these circumstances come to my office and tell me how their country is organized the same as ours, and how they have freedom of speech and the press and so forth; and they relish in that fact although they have only the trappings and not the realities.

Our Government has remained free because we have adhered to the substance of our Constitution and particularly its Bill of Rights. This has been the sheet-anchor of our freedoms. It is because of the tendency to want to change our institutions to remedy what we consider the evils of government rather than attack the wrongful acts and actions themselves that I feel justified in calling this dangerous course of public reaction to your attention.

All three branches of the Government are endangered because we now hear discussions as to whether it would be desirable to have constitutional changes to insure more efficient ways of compelling integrity and openness in the highest reaches of Government. It is suggested that we find other ways of electing a President and Vice President, it is suggested that we curb the powers of the President as now provided under the Constitution, and even that we change our system to the parliamentary system in order to be able to change administrations more easily in times of crisis or dereliction of duty.

We are being subjected to the public spectacle of legislative committees on nationwide television asking witnesses, who have just confessed to debauching the public service, if they have any advice to give to the American people for the purification of our institutions. One of them, after confessing to both obstruction of justice and perjury concerning it, was asked if he had any advice to give to the young people of America about entering the public service and particularly about serving in the White House. His answer was that he would advise them to stay away from it. What advice and from what source for the millions of young Americans who are preparing

themselves for meaningful citizenship and without which our constitutional system would soon erode and leave us with words but not the freedoms they guarantee.

Let me give you one example of meaningless words in a Constitution. I could give you numerous others if time permitted, but this should be sufficient for our purposes. The Constitution of the U.S.S.R. adopted in 1936 as amended in 1965 contains the following provisions:

> Article 125. In conformity with the interests of the working people, and in order to strengthen the Socialist system, the citizens of the U.S.S.R. are guaranteed by law; (a) freedom of speech; (b) freedom of the press; (c) freedom of assembly including the holding of mass meetings; (d) freedom of street expressions and demonstrations.
>
> Article 124. In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of antireligious propaganda is recognized for all citizens.
>
> Article 127. Citizens of the U.S.S.R. are guaranteed inviolability of the person. No person shall be placed under arrest except by decision of a court of law or with the sanction of a procurator.
>
> Article 122. Women in the U.S.S.R. are accorded all rights on an equal footing with men in all spheres of economic, government, culture, politics and other social activity.
>
> Article 123. Equality of rights of citizens of the U.S.S.R., irrespective of their nationality or race in all spheres of economic, government, culture, politics and other social activity is an indefeasible law.

Ladies and gentlemen, need I say more on this subject?

I want to say to you with all the fervor I possess that our one hope for the security of our freedoms in the third century of our national existence, which begins in less than three years, depends upon the meaningful participation of the young people of this day in the affairs of our Government. And it must be remembered that on the average the youngest people—the eighteen-year-olds—now admitted to full participation of citizenship will be in the saddle about two-thirds of that century.

I also desire to say to you with equal fervor that we are not in any

trouble nationally because of any weakness in the Constitution. We are hurting because people are not adhering to it. Instead of following it, people in high station have been secretly violating it until many people now question its efficacy. But it is the basic structure of the American way of life and should be maintained as such.

In fact, it is time for us to recall the old adage that we should not destroy good buildings merely because they have bad tenants. Properly maintained, the constitutional structure can protect us against corruption in office, the secretive assumption of personal power, the tainting of the political process, and the pollution of the administration of justice.

The danger of all these things was considered by the Founding Fathers. They divided up the power of government in a federal system between three coordinate branches through a system of checks and balances which left ultimate sovereignty—as is said in the opening words of the Constitution—in "We the People of the United States."

There have been violations of constitutional principles in the past, but when exposed to public view the nation has always had sufficient strength to right the wrong and go on to better practices. And so we must do in the present instance. It is not an excuse for unlawful conduct to say that there have been scandals in other administrations. Today's actions must be met today because we have been taught that "[s]ufficient unto the day is the evil thereof."[16] Any other approach, in present day colloquialism, would be a "cop out."

For years, I have viewed the tendency of many people to try to rectify what they consider to be governmental wrongs by seeking constitutional restrictions on the agency in question instead of proceeding through existing constitutional procedures to accomplish their purpose. Fortunately, the people are slow in amending their Constitution. If they were not so minded, the Constitution by this time, instead of being a storehouse of our governmental principles and fundamental rights, would be a confused mass of unrelated and conflicting restrictions on governing power which would inhibit rather than promote constitutional government.

The Journals of Congress are replete with such proposals designed to meet some supposed constitutional crisis. But the vast majority of them, on sober second thought, died aborning. Otherwise, all of

[16] Matthew 6:34.

our governmental institutions would not be recognizable.

Let me mention to you some of the changes that would have been made in the judicial process in my experience because that is the branch of the Government with which I have been engrossed for the past twenty years.

When I came to the Supreme Court in October 1953, the late Senator Joseph McCarthy was at the zenith of his orbit on the Cold War, and was demeaning people all over America by calling them to the witness stand and compelling them to admit that even many years before, they had known someone whom the Senator claimed to be a Communist. It will be remembered that it was in this era that the John Birch Society, by their words, and the Senator, by his actions, portrayed President Eisenhower as being a "dedicated Communist." When one of these contempt cases, intitiated in the McCarthy era, the *Watkins*[17] case, came to our Court, we held that while Congress has broad powers of investigation to determine what legislation it desires to enact, it has no power to expose merely for the sake of exposure. This caused McCarthy and others who were enamored by or feared him to advocate that the Supreme Court be stripped of its authority to adjudicate any cases involving subversion. This proposal never went very far because as you will remember McCarthy's orbit soon ended in disaster for him. However, his soul mate in the Senate, Senator Jenner, of Indiana, carried on the battle in connection with some criminal cases which involved the rights of individuals guaranteed by the Bill of Rights in the Constitution. The hysteria was so great at that time over other classes of cases that this legislation to curb the jurisdiction of the Supreme Court lost by only eight votes in the Senate.[18]

At about the same time, the school desegregation cases were the object of much criticism, and a spate of legislation designed to curb the jurisdiction of the Court in such cases was initiated.[19] About the time the furor of this issue receded, the Court decided that state compelled prayers in the public schools intruded upon the freedom of religion rights of the first amendment,[20] and the flood gates were

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[17] Watkins v. United States, 354 U.S. 178 (1957).

[18] For a discussion of attempts to restrict the Supreme Court's jurisdiction, see B. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 360-65, 455-57 (2d ed. 1973).

[19] *Id.*

[20] Engel v. Vitale, 370 U.S. 421 (1962) (daily use in New York public schools of so-called "Regents' Prayer"); Schempp v. School District, 374 U.S. 203 (1964) (Bible reading and recitation of the Lord's Prayer).

again opened. It was not long before there were more than fifty constitutional amendments introduced in the House of Representatives to override the decision.[21]

Then in the early 1960's when the Court in the case of *Baker v. Carr*[22] held that the right of one man to have his vote count as much as that of any other in the election process was a justiciable question, a storm of protest again arose, and, by a well orchestrated program among the malapportioned States, a procedure never before invoked was called into play to amend the Constitution without reference of any kind to the Congress of the United States. The amendment would have established a so-called Court of the Nation composed of the fifty state chief justices with the power of final review of all Supreme Court decisions that would affect federal-state relations.[23] The legislatures of about twenty States, a little more than twenty as I recall it, without debate and some in almost secrecy, approved this proposal; and if about a dozen more, maybe fifteen more, had done the same thing, this proposal would have become a Constitutional amendment. It was only thwarted when one of the large newspapers of the nation exposed the activity to the public, and caused a public reaction. Had it been approved by the requisite number of States, the Supreme Court would have become a mere appendage to the Constitution. Yet it was done without any debate worthy of the name.

We have seen more recently—last year to be exact—a President running for re-election on a platform to prevent the federal courts from exercising their judicial discretion in using the tool of busing to prevent racial discrimination in school segregation cases. His approach to the problem was not to accomplish his purpose through the judicial process, but to restrict the process by a constitutional change or by statute. Now after re-election, that same President insists that without legislation of any kind, or without constitutional

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[21] *See Proposed Amendments to the Constitution Relating to School Prayers, Bible Reading, etc., A Staff Study for the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (Committee Print 1964); *Hearings on Proposed Amendments to the Constitution Relating to Prayers and Bible Reading in the Public Schools Before the House Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964); Note, *School Prayer and the Becker Amendments*, 53 GEO. L.J. 192 (1964).

[22] 369 U.S. 186 (1962).

[23] For a discussion of these proposed constitutional amendments and the program behind them see Bonfield, *The Dirksen Amendment and the Article V. Convention Process*, 66 MICH. L. REV. 949 (1968); McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964).

right, he has the right to handcuff the judicial process so that the courts cannot fairly conduct an investigation of alleged criminal conduct in his administration. And that is one way, if we allow one change in the Constitution to weaken it other changes will follow until, if it is permitted, all or most of our basic rights will be gone. This is the inevitable result of any indication that the people may be willing to tinker with constitutional principles in order to achieve dubious results that might not be obtained in accordance with them.

Permit me to cite one more attempted interference with the judicial process which, in my opinion, is a very serious one, because it is a continuation of the effort to curb the basic jurisdiction of the Supreme Court. It is more insidious than some of the others I have mentioned because it was not initiated in the Congress, it was not initiated in any of the legislatures of the country, and was announced, not as a curb on the Court, but ostensibly to help it. It was a proposal to divest the Court of its authority to determine what cases should be reviewed by it through the establishment of a so-called National Court of Appeals of seven members chosen by vote from the judges of the courts of appeals with the longest active service and delegating to it a function which has been traditionally exercised by the Supreme Court. The judges would only have a three-year term, and they would not have to be headquartered at any given place. They could work at their own accustomed courts if they wished to do so.

This temporary court, changing a third of its members every year, would be expected to examine all the cases now subject to review by the Supreme Court and refer to the latter, four or five hundred which it believed should receive its attention. All the others would become final without ever reaching the Supreme Court. And I wish that you would analyze the decisions of the last thirty or forty years and determine in your own minds just how few of those cases would ever have come to the Supreme Court if lower courts on Jorner opinions and Jorner beliefs on their part had concluded the question so it was no longer necessary for the Supreme Court to act. I say to you frankly that there never would have been a *Brown v. Board of Education*;[24] I say to you with equal assurance there never would have been a *Gideon v. Wainwright*;[25] there never would have been

[24] 347 U.S. 483 (1954).
[25] 372 U.S. 335 (1963).

a decision of the Supreme Court on many of the most important cases that we have had because they would have been declared final in a court of that kind before there was any reference to the Court at all. Thus, in effect, we would no longer have "one Supreme Court" as provided in the Constitution to which the people have always had access, but a boxed-in court obeying the will of a subordinate court whose personnel is changed from year to year and has no meaningful responsibility to the people.

The determination as to what cases should be reviewed by the Supreme Court is one of its most important functions in order to have a uniform body of jurisprudence throughout the nation. It is of a very delicate nature which only years of study and concentration can make effective, and which no court as temporary as the one proposed could give to the subject. It is proposed to make this drastic change, not by a constitutional amendment, but by simple legislation—and that proposal in itself is a serious constitutional question, which I would suggest would be a good thing for students of the law at the present time to survey. This was all done by an ad hoc committee of seven law professors and lawyers, operating in secrecy and not asking the opinion of any judge on any court. Even the members of the Supreme Court were not apprised of the proposal until it was announced through a national television program.

The claim for its need is that the Supreme Court is overburdened and must be relieved of some of its responsibilities. It uses the number of cases seeking review as the basis for its conclusion that the Court cannot keep up with its work, rather than the number of cases the Court does review. In using those numbers, it is reminiscent of the technique used by the late Senator Joseph McCarthy.

The former function of determining what cases should be reviewed, while important, is not a great time consumer as is the decision-making function. The latter is the real burden of the Court, and in this respect it does not hear more cases now than when I came to it twenty years ago. Mr. Justice Douglas, who has just surpassed in years the tenure of every Justice who has ever sat on the Supreme Court, recently stated that he wrote more opinions in the early years of his tenure than he is writing in these later years. And as everyone familiar with the work of the Supreme Court knows, he is still its most generative writer. Not one of the Justices who has served for a number of years has complained of the workload, and at least four of the five have spoken out against the proposal publicly.

In this respect, it should be said that for the past thirty-five years,

the Supreme Court has always been current with its work. It has never had a backlog of undecided cases, and each year on the last day of the court term the Chief Justice announces that "All cases submitted and all business before the Court at this term in readiness for disposition having been disposed of, it is ordered by this Court that all cases on the docket be, and they are hereby, continued to the next term." That means that all cases that are ready to be argued have been argued, and all cases that have been argued have been decided by the Court before it adjourns the term sometime in July.

An adequate discussion of this proposal would justify a full lecture period, but we do not have time for that today. Those who are interested in it might read the arguments for and against it in recent issues of the American Bar Journal.[26] I have discussed the proposal only to emphasize the danger of tinkering with the constitutional powers as defined by the Founding Fathers.

The Constitution was never supposed to be a code for official conduct. It was a document of only five thousand words—about as long as an average magazine article—defining our governmental structure, and the powers of each of its three branches. It has been sufficiently elastic to enable us to govern ourselves in freedom for two hundred years, and with but few amendments. It has been my great privilege to live through more than a third of those years and to have served for more than a half century in some branch of government—local, state, or federal. Throughout that time, I have observed that people can more effectively serve in accordance with the Constitution than by trying either to lightly change or subvert it.

Ours is not the easiest form of government to live with because it calls for individual effort to make it run properly. But it is the best because we can make of it what we will. That is why I lose patience when I hear of young people being advised to stay out of politics because it is dirty. Of course, there are people who betray their trust

[26] *E.g.*, Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973); *Creation of New National Court of Appeals is Proposed by Blue-Ribbon Study Group*, 59 A.B.A.J. 139 (1973); Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835 (1973); Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973); Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846 (1973).

in the public service, as some do in every walk of life. The news almost daily tells us about scandals in business, industry and the professions, but we do not hear anyone advising young people to shun those fields of activity merely because some of the people in them are dirty. Nor would it be right to do so, because they do not characterize that branch of service. And along that line, while I was waiting yesterday to come here—I had a three hour wait for Eastern to get our plane out of Washington—I read the newspaper, some parts of it that I don't always cover every day. And I read a letter there to the editor that really impressed me, and I thought it might be worthy of reading because it's exactly in my thought. It was written by a man of some distinction. This is the letter:

> The recent pause in the Watergate hearings provided some time for reflection. In spite of the many thousands of words of spoken and written commentary, there is one major point that has not come to my attention which deserves to be made. Hence this comment.
>
> Whatever else Watergate reveals about the shortcomings of our national character and political system, it discloses the woeful failure of our system of education, and particularly higher eduction, to teach our young people the necessity for the ethical conduct of politics in a democratic system of government.
>
> We have witnessed the deplorable and pathetic testimony of the loyal, the expeditious, the well-dressed and well-fed, coming from respectable families, and from some of our best colleges and universities. We have heard their weak rationalizations of why they did what they did.
>
> Politicians are already in bad repute. And Watergate will hardly raise their stature in the eyes of the public.
>
> Where our educational institutions, and particularly our institutions of higher learning, have failed, is to teach: First, the place of politics in our system of self-government; second, some rules of ethics in practical politics; and third, the need for every citizen at some stage in his or her life to participate in some form of the political process. This is equally important whether it is ringing doorbells for a candidate, serving part-time on an elective or appointive body, such as a board of education, or working for some unit of the federal, state, or local government.
>
> This is every citizen's responsibility. If we as citizens are unwilling to assume such a responsibility, if we merely sit it out

> on the sidelines apathetically, then we have no right to criticize what happens in government. The end result will be that we'll get what we deserve.
>
> It should also be noted that in other democracies, Great Britain for one, politics is considered a necessary and honorable profession. Calling someone a "politician" is, in England, not a term of contempt as it is so often here. British politicians are not the whipping boys for what's wrong with society. There they are recognized as worthy of esteem as highly essential harmonizers of conflicting viewpoints. Without politicians, no system of self-government can function adequately.
>
> But here our colleges and universities in both under-graduate and graduate courses devote much time and effort to training our young people for the professions: Law, medicine, engineering, and others; but with a few exceptions, they completely fail in educating the young on the necessity of their participating in practical politics.
>
> That is where we are in default. That is certainly one of the lessons, and a very important one, of Watergate. There is an urgent need to take action so that the successors to the "loyal but unethical," the "teamplayers," will have a better realization of the need for participation in politics and government on a higher moral and ethical plane.[27]

I thought that was worthy of reading to you, and it does incorporate my own views about the responsibility of citizenship.

The answer to our problem, it seems to me, is for everyone to choose his own way of life, and then to devote his energies to making it a wholesome and satisfying experience. But whatever path one chooses to follow, there is always the added responsibility of citizenship because no one can have true satisfaction unless he does his part in maintaining a free wholesome society. And such a society can be maintained only under free government. Ours has been preserved because the vast majority of our citizens have given their allegiance to the Great Charter of Our Liberties. Our hope for the future rests upon continued adherence to it. This is the responsibility of all of us, and we must not neglect it.

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[27] Washington Post, Nov. 1, 1973, § A, at 31. The letter was written by Robert Hinckley of Salt Lake City, Utah, and the editors noted that he served as chairmen of the Civil Aeronautics Authority, Assistant Secretary of Commerce for Air, and director of the Office of Contract Settlement in the Roosevelt administration. He recently concluded four terms on the board of regents at the University of Utah.

Ladies and gentlemen, it has been a great privilege and a great pleasure for me to visit with all of you today, and I hope I may have that experience again.