

**UNITED STATES REPORTS**

**VOLUME 515**

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**CASES ADJUDGED**

**IN**

**THE SUPREME COURT**

**AT**

**OCTOBER TERM, 1994**

**MAY 30 THROUGH SEPTEMBER 29, 1995**

**TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS**

**END OF TERM**

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**FRANK D. WAGNER**

**REPORTER OF DECISIONS**

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**WASHINGTON : 1998**

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# DEATH OF CHIEF JUSTICE BURGER

## SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 26, 1995

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Present: CHIEF JUSTICE REHNQUIST, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

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THE CHIEF JUSTICE said:

As we open this morning, I announce with sadness that our friend and colleague Warren Earl Burger, former Chief Justice of this Court, died yesterday in the early morning, at Sibley Hospital in Washington, D. C.

He was born in St. Paul, Minnesota, in 1907. He was a self-made man. Not having the finances to attend college full time he sold insurance during the day to pay his way through night school. He spent two years at the University of Minnesota and then graduated with honors four years later from the Mitchell College of Law, formerly the St. Paul College of Law.

His remarkable professional career began with a long tenure at a private firm in St. Paul where he specialized in civil and administrative practice. While in private practice, he made time to be an adjunct professor of contracts and actively participated in local civic and political organizations. In 1953, President Eisenhower appointed him to the Department of Justice as an Assistant Attorney General in charge of the Civil Division. A few years later, he was nominated to the United States Court of Appeals for the District of Columbia Circuit, where he served for 13 years until his ap-[vi]-pointment as Chief Justice of the United States by President Nixon in 1969.

He served as Chief Justice for 17 years and will long be remembered as a major contributor to the decisional law of this Court. He was also an innovative reformer of the administration of justice. As appellate judge he had helped establish the Appellate Judges' Seminar at New York University and later cochaired an eight-year study for the ABA on standards of criminal justice. As Chief Justice, he reduced the time for oral arguments in our own Court from two hours to one hour, he introduced modern technology to the processing of opinions, he changed our straight bench

into a bench with its current wings, and he helped found the Supreme Court Historical Society. For the judicial system as a whole, he helped create or sponsor, a series of institutions to foster more efficient ways to do justice in the nation's courts. These included the Institute for Court Management, the National Center for State Courts, the state-federal judicial councils, the expansion of the Federal Judicial Center, and the annual Brookings Seminars at which leaders of the three branches met to discuss judicial reform.

Following his retirement as Chief Justice in 1986, he continued his commitment to public service and devoted large amounts of his time to the Chairing of the Commission on the Bicentennial of the United States Constitution. And as a result of his efforts as chairman of that Commission, millions and millions of people who were previously unacquainted with the United States Constitution became acquainted with it.

The members of the Court will greatly miss Chief Justice Burger's energy and warmth, and I speak for all of them in expressing our profound sympathy to his son Wade, his daughter Margaret Mary, his grandchildren, and to all those whose lives were touched by this remarkable man and his wife Vera, who died last year. The recess the Court takes today will be in his memory. At an appropriate time, the traditional memorial observance of the Court and Bar of the Court will be held in this Courtroom. □

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**CASES ADJUDGED**

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**AT**

**OCTOBER TERM, 1995**

**OPINIONS OF MARCH 20 THROUGH (IN PART) JUNE 13, 1996**

**ORDERS OF MARCH 20 THROUGH JUNE 13, 1996**

**TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS**

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**FRANK D. WAGNER**

**REPORTER OF DECISIONS**

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**WASHINGTON : 1999**

**PROCEEDINGS IN THE SUPREME COURT OF THE  
UNITED STATES IN MEMORY OF  
CHIEF JUSTICE BURGER\***

TUESDAY, APRIL 30, 1996

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Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

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THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our late colleague and friend, Chief Justice Warren Earl Burger.

The Court recognizes the Solicitor General.

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Mr. Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court this afternoon, resolutions memorializing our regard for the Honorable Warren E. Burger and expressing our profound sorrow at his death were unanimously adopted. With the Court's leave, and following recent precedent, I shall read selectively from the resolutions at this time and shall ask that they be set forth in their entirety in the records of the Court.

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\* Chief Justice Burger, who retired from the Court effective September 26, 1986 (478 U. S. VII), died in Washington, D. C., on June 25, 1995 (515 U. S. III).

## RESOLUTION

Warren Earl Burger served the Court and the country as Chief Justice of the United States from 1969 until his retirement in 1986. Lawyer, administrator, and jurist, Warren Burger embodied the finest traditions of American law in a career that spanned 65 years.

Chief Justice Burger was very much a product of this Nation, a practical man with a passion for freedom and an understanding of the responsibilities that freedom entails.

As a judge, he understood that the exercise of liberty must be guided by our traditions constrained by the rule of law. As an administrator, he sought tirelessly to improve the ways in which the legal system works for the people it is supposed to serve. Above all, as a lawyer, he knew the importance of tempering abstract legal doctrine with common sense.

The resolution describes Burger's birth and early life in Minnesota, how he worked his way through college and law school and quickly established himself as one of the preeminent lawyers in the State's private bar, his marriage to Elvera Stromberg, who would be his lifelong companion, and commitment to his family, and his increasing involvement in the affairs of his community.

An incident of that time helps illustrate Burger's personal commitment to the principles that animate the Constitution. After Pearl Harbor, there was widespread support for the policy of forcibly relocating California's Japanese Americans. The young St. Paul lawyer's voice was one of the few to argue that these citizens' constitutional rights ought not be sacrificed to popular passion.

He organized a committee of the Council on Human Relations to help resettle some of them in Minnesota, and opened his home to one family for nearly a year while the father looked for work.

Although Burger refused all requests that he run for public office, he became deeply involved in Minnesota political [VII] life. At the 1952 Republican National Convention, he was instrumental in swinging his State delegation to support Dwight D. Eisenhower, thereby assuring General Eisenhower the party's nomination.

Following the election, President Eisenhower called him to Washington to serve as an Assistant Attorney General of the United States in charge of the Civil Division. The resolution discusses his outstanding contributions at the helm of the Civil Division until his appointment, 3 years later, to the United States Court of Appeals for the District of Columbia.

At that time, the Federal courts of the District of Columbia had the widest jurisdiction of any courts in the United States, functioning as the equivalent of State courts for the District itself, as well as having the regular jurisdiction of other Federal courts.

Judge Burger quickly found himself embroiled in important controversies regarding the criminal law that were sweeping both the legal profession and the Nation at the time. Burger's opinions, whether for the court or in dissent, grew to the view that solicitude for the rights of the defendant should be tempered by recognition of the need to enforce the law, yet he was reluctant to press to overrule prior decisions, preferring instead to curtail their reach while preserving their essence.

The resolution then describes aspects of Burger's tenure at the D. C. Circuit, which established him as a leader on his court and throughout the Nation.

When Chief Justice Earl Warren retired, President Nixon turned to Warren E. Burger. With the unanimous endorsement of the Judiciary Committee, Burger was quickly confirmed by the Senate. He was sworn in as Chief Justice of the United States on June 23, 1969.

There were many who expected that as Chief Justice he would try to overturn the landmark criminal law decisions of the Warren Court, but neither those who hoped for this outcome, nor those who feared it, seemed to have considered [viii] that one of the hallmarks of this judge was respect for precedent.

Chief Justice Burger cared too deeply for the great institution that is the Supreme Court of the United States to believe that its decisions, the articulation of our Nation's highest law, could be tossed aside whenever there was a change of personnel on the bench.

His approach to major criminal law precedents such as *Miranda v. Arizona* and *Mapp v. Ohio* was to leave such rulings intact, while defining their outer limits.

Under his leadership, for instance, the Court held that an otherwise inadmissible statement could be used to impeach a defendant's credibility at trial. He joined in one opinion establishing a public safety exception to *Miranda* and, in another, deciding that a confession obtained in violation of *Miranda* did not taint a second valid confession obtained later.

Similarly, the Court he led trimmed the exclusionary rule enshrined in *Mapp* by carving out good faith exceptions.

Burger's conservatism was of that American strain which insists that the law protect the individual from the excesses of State power. He was to state clearly and repeatedly that he would never vote to overrule *Miranda* because to do so would be an invitation to lawlessness by law enforcement authorities.

He concurred in decisions extending to misdemeanor cases the right of indigent defendants to counsel, and recognizing a defendant's right to a psychiatrist if necessary for his defense.

Chief Justice Burger placed a premium on protecting individual liberties. His strong commitment to the First Amendment values of freedom of speech and the press can be seen in many of his opinions.

In *Wooley v. Maynard*, for example, he authored the opinion holding that a State may not compel an individual to carry on his license plate a slogan offensive to his deeply held views. [ix]

Yet Burger also recognized that our freedoms are not absolute, that there are limits beyond which we may not go without trampling on the rights of others. In *Miller v. California*, Chief Justice Burger crafted the definition of obscenity that we use today.

Further, in declaring that it was up to local juries applying contemporary community standards to decide whether a particular work fit the Court's formulation, he put to rest the idea that there was some uniform national community standard in such matters.

The resolution describes The Chief Justice's commitment to the freedom of conscience exemplified by his opinions for the Court interpreting the religion clauses in cases such as *Lemon v. Kurtzman* and *Wisconsin v. Yoder*.

Turning to Burger's contributions to the area of civil rights, the resolution observes that, as district courts became involved in complicated questions of quotas, racial balance, redrawing of school district lines, busing and more, many doubted the propriety of the Court's involvement at all, and some believed that Chief Justice Burger was hostile to such efforts.

He put disbelief to rest in *Swann v. Charlotte-Mecklenburg Board of Education*. Writing for a unanimous Court, The Chief Justice emphatically affirmed the vital role of the Federal courts in eliminating all vestiges of racial segregation from public school systems.

In other civil rights cases, he led the Court in upholding congressional set-asides of a percentage of public works funds for minority businesses,



invalidating State aid to racially segregated private schools, and sustaining the Internal Revenue Service's denial of tax exemptions to private schools that practice racial discrimination.

During Chief Justice Burger's tenure, the Court also adopted a progressive approach to the rights of women and members of other disadvantaged groups under the Equal Protection Clause. His own more significant opinions included *Reed v. Reed*, striking down a State statute giving [x] preference to men over women in estate administrations, and *Hishon v. King and Spalding*, applying Title VII's prohibition of sex discrimination to law firm partnership decisions.

He voted to end gender classifications on social security dependent benefits and jury selection, and to declare invalid State laws restricting aliens' access to public employment and welfare benefits.

After discussing Burger's role in *Roe v. Wade* and its progeny, the resolution turns to The Chief Justice's extraordinary contributions to this Court's separation of powers jurisprudence.

Warren Burger was intensely interested in American Government. He understood fully the concerns that had led the Framers to separate Government power among competing and mutually restraining legislative, executive, and judicial branches. In a case that produced one of his most important opinions, *Immigration and Naturalization Service v. Chadha*, the Court invalidated the device known as the one-House veto.

History will surely view Chief Justice Burger's opinion for the Court in another separation of powers case as the most significant of his career, indeed as one of the most important opinions of any justice at any time. *United States v. Nixon* was to lead directly to the resignation of a President.

The special prosecutor's indictment of certain defendants in the Watergate affair was being hampered by President Nixon's refusal to turn over tapes and other records of conversations between him and others, including Government officials.

The President, like several of his predecessors, claimed executive privilege. The district court had ruled that the special prosecutor had rebutted the presumption of privilege and ordered an in camera examination of the subpoenaed material.

The Chief Justice's opinion for the Court upheld the validity of the district court's order. The President's generalized assertion of privilege could not prevail over the fundamental demands of due process of law and the fair

administration of criminal justice. It would have to yield to the demonstrated specific need for evidence in a pending criminal trial.

Chief Justice Burger's interest in American Government also served him well as the administrative leader of the third branch. Indeed, he took his title, Chief Justice of the United States, seriously. In his eyes, its mandate encompassed stewardship of the entire judicial system, State and Federal.

His role in reforming the American judicial system was profound. He was an active leader of the Federal judiciary as Chairman of the Judicial Conference of the United States. He turned the Federal Judicial Center, of which he was Chairman of the Board by statute, into a respected source of research and writing about the courts, and a rich educational resource. He promoted the idea of circuit executives, officials who now contribute so much to the efficient working of our courts.

In addition to his many contributions toward beneficial change, Chief Justice Burger revered this Court's history and saw its building not just as a courtroom and chambers, but as an opportunity to educate the public.

A guiding spirit of the Supreme Court Historical Society and creator of the position of Curator of the Supreme Court, Burger helped to empty spaces with exhibits and to rekindle discussion and debate about our constitutional heritage.

The resolution finally recounts the qualities that mark The Chief Justice as a man of great warmth and kindness. This was a man who, for example, conceived and personally supervised the construction of a ramp to enable Justice Douglas to take his place at the bench after the latter's stroke. He was a man who, for more than 10 years, sent pins garnered in his world travels to the handicapped child of a former clerk.

Many could not comprehend why Warren Burger would leave one of the most powerful positions in Government to serve as Chair of the Commission on the Bicentennial of the United States Constitution.

They did not know the man, with his love of that normal document, his understanding of our Nation's traditions, his [xii] appreciation of the lessons of history, and his faith in the power of education. There was no one in the United States more suited to the task, and no role more fitting as a capstone to his distinguished career.

We cherish this image of Warren Burger as a teacher of fundamental democratic values to the Nation's children and to us all.

Wherefore, it is accordingly

**RESOLVED** that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Chief Justice Warren E. Burger is no longer with us, our admiration for his deep understanding of our history and traditions as a Nation, and his commitment to those wide restraints that make us free, and our gratitude for his ceaseless labors to improve the administration of the Nation's system of justice; and it is further

**RESOLVED** that the Solicitor General be asked to present these resolutions to the Court, and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

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**THE CHIEF JUSTICE** said:

Thank you, Mr. Solicitor General. I recognize the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

**MR. CHIEF JUSTICE**, and may it please the Court:

The Bar of this Court met today to honor the memory of Warren Earl Burger, The Chief Justice of the United States from 1969 to 1986.

Born in St. Paul in 1907 to a family of modest means, Warren Burger was raised on a small truck farm in Stacy, Minnesota. He attended local public schools and in high school [xiii] was president of the Student Council and editor of the school newspaper, and he lettered in football, hockey, swimming, and track. He then worked his way, selling insurance by day, through the University of Minnesota and the St. Paul College of Law, now William Mitchell, where he attended nights, receiving his law degree magna cum laude in 1931. Two years later, he married Elvera Stromberg. Harry Blackmun, his childhood friend and future colleague on this Court, was best man.

After graduating from law school, he soon joined an established firm in St. Paul, where he became a partner. From the beginning, Warren Burger demonstrated in both his public and his private life a deep commitment to just treatment of individuals of all races.

In the 1940's, he served on St. Paul's first Council on Human Rights, which he helped organize to fight racial discrimination, and when Japanese Americans were forced to leave their West Coast homes following the bombing of Pearl Harbor, he led a committee to help resettle those who had been displaced.

He became aligned politically with Harold Stassen, managing Stassen's first gubernatorial campaign in 1938, and his campaign for the Republican presidential nomination in 1948.

While serving as Stassen's floor manager at the Republican National Convention in 1952, Burger pledged the Minnesota delegation's support to Dwight Eisenhower, ensuring Eisenhower's nomination on the first ballot.

His energy, abilities, and political acumen did not go unnoticed. In 1953, he left Minnesota for Washington, D. C., accepting President Eisenhower's appointment to serve as an Assistant Attorney General in charge of the Civil Division under Attorney General Brownell. His distinguished service in that capacity included several appearances before this Court.

In 1956, President Eisenhower persuaded the Assistant Attorney General to forgo his return to private practice in St. Paul and instead to accept the President's nomination to [xiv] a seat on the United States Court of Appeals for the District of Columbia. He would serve with distinction on that influential court for 13 years, developing a national reputation.

Judge Burger's express desire to restore greater balance to the criminal justice system caught the attention of the newly inaugurated Richard Nixon. Impressed as well with Judge Burger's reputation as an outstanding jurist, President Nixon nominated him to replace the retiring Earl Warren.

Less than 5 weeks later, on June 23rd, 1969, Warren Burger was sworn in as this Nation's fifteenth Chief Justice.

He served in that role for 17 years, longer than any other Chief Justice in the 20th Century.

Confounding the expectations of those who hoped, or feared, that he would immediately set about reversing the decisions of the Warren era, the new Chief Justice was not an advocate for radical change. His experiences as a practitioner, as Government official, as Federal judge, had instilled in him a skepticism towards rigid doctrinal views of any stripe.

His jurisprudence was complex and nuanced, but consistently reflective of certain core values, a reverence for the constitutional framework envisioned by the Founders, a deep appreciation of the personal and structural importance of our fundamental liberties, including those of the people as an organized community, an understanding that the law must take account of realities beyond the courtroom, and a steadfast dedication to improving the administration of justice.

In addition to his contributions as a jurist, Warren Burger's tenure was remarkable for his intensive efforts to improve the quality of both the bench and the bar. He implemented the most significant administrative overhaul of this Court since the Taft era, directing substantial investments in systems and modernization and at the same time devoting significant resources to the preservation and commemoration of the Court's traditions and history, making the Court a more accessible and welcoming place for the thousands who visit its halls. [xv]

As Chief Justice of the United States, Burger approached the task of judicial administration with an appreciation that how justice is dispensed at every level directly affects the lives of the people.

In 1971, for example, he helped found the National Center for State Courts in Williamsburg, Virginia, which provides information, education, and management services for Court leaders.

Following a prison riot at Attica, New York, he was instrumental in establishing the National Institute of Corrections, an agency charged with providing specialized correction service to State and local corrections agencies, and as Chairman of the Board of the Federal Judicial Center, The Chief Justice guided the newly established center's growth into a full fledged agency for research and training for the Federal courts.

The Chief Justice also visited and studied legal institutions in various parts of the globe, and participated actively in symposia with scholars and statesmen from around the world.

Drawing largely on the British experience, he promoted the establishment and growth of the American Inns of Court program, which today has hundreds of local chapters throughout the 50 States and the District of Columbia, bringing novice attorneys together with more experienced attorneys and local judges to help the former develop trial skills and to promote more generally a sense of ethics and fellowship within the profession.

Burger's concern for the practical effect of legal rules played an important part in his jurisprudence. He was, for example, skeptical that the benefits of the exclusionary rule justified its cost to society. While the Court has retained the exclusionary rule, Chief Justice Burger played a key part in excepting from its reach classes of cases that do not persuasively implicate the rule's deterrence rationale.

Most noticeably, he delivered the opinion of the Court in *Nix v. Williams*, recognizing the inevitable discovery exception. The basis for the exception was explicitly pragmatic. [xvi] If the prosecution can establish

by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received.

The Chief Justice's reluctance to afford unlimited scope to abstract doctrine featured prominently in his landmark opinion for a unanimous Court in *United States v. Nixon*, upholding the special prosecutor's subpoena of the President's tape-recorded conversations.

Although The Chief Justice recognized that the President has a legitimate need for confidentiality in the performance of his executive duties, he rejected the contention that the President is entitled to an absolute privilege from disclosure.

The Chief Justice observed that privileges against forced disclosure are rare exceptions to the demand for every man's evidence. They are not lightly created nor expansively construed, for they are in derogation of the search for truth.

Though skeptical of judge made rules, Chief Justice Burger observed strict fidelity to the dictates of the Constitution, particularly the structural limitations that inhere in the separation of powers, which he believed critical to the stability of our system of governance.

In 1983, he delivered the landmark opinion in *INS v. Chadia*, striking down on separation of powers grounds a one-House veto provision in the Immigration and Nationality Act, which permitted either House of Congress unilaterally to overrule immigration decisions delegated by law to the discretion of the Attorney General.

Notwithstanding Congress' use of similar provisions in literally hundreds of enactments, the Court held the one-House veto procedure to be violative of the constitutional requirements for a valid legislative act, namely, bicameral approval and presentment to the President.

The Chief Justice's opinion explained: The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices [xvii] were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.

'With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom

than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”

Toward the end of his tenure, Chief Justice Burger again wrote for the Court in *Bowsher v. Synar*, striking down provisions of the Gramm-Rudman-Hollings Act that required the President to make budget cuts specified by the Comptroller General under certain emergency conditions.

Concluding that the Comptroller General was answerable to Congress, The Chief Justice rejected the argument that he was unlikely, in fact, to act as an agent for the legislative branch. The separation of powers must be strictly enforced, he wrote, because as the Founders well understood, in the long term, structural protections against abuse of power are critical to preserving liberty.

To Warren Burger, there was special significance in the first three words of the Constitution: “We, the People.” They were a concise, yet momentous declaration that for the first time in history, power was created in a Government from the bottom up, not from the top down.

That Government was under the Constitution, therefore would not always be tidy, was all only natural. Democracy, as The Chief Justice understood it, is people, men and women with all their virtues and flaws, trying to work together to produce ordered liberty.

The Chief Justice’s abiding faith in the ordinary men and women of this Nation is reflected in his belief that along with the structural safeguards afforded by the separation of powers, the guarantees of the First Amendment are critical to the maintenance of ordered liberty.

The link between structural integrity and free speech is manifest in his several opinions involving the right of the [xviii] people to hear, see, and communicate observations concerning criminal proceedings. The Chief Justice explained that people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Warren Burger’s appreciation of the value of individual liberties was reflected in many of his constitutional opinions. In *Wisconsin v. Yoder*, for example, where the Court upheld on free exercise grounds the right of Amish parents to except their offspring from uniform State schooling requirements, he recognized as a constitutional imperative the principle that a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different. In *Wooley v. Maynard*, he again championed the right not to conform, authorizing the Court’s opinion affirming the right of Jehovah’s Witnesses

to refuse to display the motto, “Live Free or Die,” on their New Hampshire license plates. He explained that where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interests cannot outweigh an individual’s First Amendment right to avoid being the courier for such message.

He recognized at the same time, however, that the claims of individual liberty do not invariably outweigh the right of the people as a community to foster and protect common values and needs. Under the now-familiar standard for the Court articulated by The Chief Justice in *Miller v. California*, whether speech is obscene and therefore unprotected is judged from the viewpoint of the average person applying contemporary community standards.

And in *Paris Adult Theater I v. Slaton*, he upheld for the Court the State’s authority to regulate the exhibition of obscene material in places of public accommodation, recognizing that the State’s legitimate interest encompassed the interest of the public in the quality of life in the total community environment, the tone of commerce in the great city centers, and possibly the public safety itself. [xix]

In The Chief Justice’s jurisprudence, the balance of individual and community rights is sensitive, as exemplified by his opinions for the Court in cases involving claims of religious establishment. In upholding New York’s tax exemption for property used for religious education or charitable purposes in *Walz v. Tax Commission of New York*, he acknowledged that the test is inescapably one of degree, and explained that it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution.

In the following year, in *Lemon v. Kurtzman*, The Chief Justice again wrote for the Court, this time striking down State programs providing aid to parochial schools that fostered an excessive degree of entanglement of church and State.

Finally, Warren Burger remained true on the bench to his lifelong commitment to the equal treatment of individuals, irrespective of race or national origin. In one of his first major opinions as Chief Justice, he delivered the Court’s unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*. Affirming the propriety of comprehensive relief, including busing of students to remedy racial segregation in education, he was equally vigilant in guarding against less direct, but still invidious forms of discrimination.

He wrote opinions for the Court adopting a disparate impact standard for Federal statutory claims of racial discrimination in employment, condemn-



ing on equal protection grounds the provision of State aid to racially segregated private schools and sustaining the denial of Federal tax exemptions to private schools that practice racial discrimination.

Nor were racial minorities the only beneficiaries of The Chief Justice's abiding belief in equal work. In his opinion in *Reed v. Reed*, the Court for the first time struck down on equal protection grounds a State statute that arbitrarily discriminated against women, and in *Hishon v. King and Spalding*, his opinion for the Court held that the Federal statutory prohibition of sex discrimination in employment applies to partnership decisions made by a law firm.

It was because of his dedication to, indeed, reverence for the principles embodied in our Constitution that Warren Burger retired from the Supreme Court in 1986 to head the Commission on the Bicentennial of the Constitution. He served in that capacity as a tireless emissary of the Constitution to the ordinary men and women, and particularly the children of this Nation.

In that role, as in all of the varied contexts in which he toiled and emerged as a leader in the law, as private lawyer, Assistant Attorney General, appellate judge, and Chief Justice of the United States, his dedication to liberty and equality, his faith in the citizens of this land, and his commitment to maintaining the integrity of our constitutional structure, guided his steps and consequently illuminated the path for us all.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of Chief Justice Warren B. Burger be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

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THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, and thank you, General Days.

The Court thanks both of you for your presentation today in memory of our late colleague and friend, Chief Justice Burger.

We ask that you convey to Chairman John Sexton and the members of the Committee on Resolutions, Chairman Charles A. Hobbs and the members of the Arrangements Committee, and Michael Luttig, Chairman of today's

meeting of the Bar, our appreciation for these appropriate resolutions.  
[xxi]

Your motion that these resolutions be made a part of the permanent records of the Court is granted.

For 17 years, a longer tenure than all but three of his predecessors, Warren Burger presided over this Court. During that period of time, as might be expected, he authored numerous important opinions for the Court on a variety of subjects. The Nixon tapes case, *INS v. Chadha*, *Miller v. California*, *Milliken v. Bradley*, *Nebraska Press Association* were but a few. The resolutions mentioned many others.

He was particularly interested in the constitutional doctrine of separation of powers, and in the speech and religion clauses of the First Amendment. He was a person of strong convictions, who was nonetheless able to work harmoniously with his colleagues.

The English scientist and philosopher, Alfred North Whitehead said in one of his books, all the world over and at all times, there have been practical men absorbed in irreducible and stubborn facts. All the world over, and at all times, there have been men of philosophic temperament who have been absorbed in the weaving of general principles.

No one, of course, is wholly in one of these camps or the other, but I think one would have to say that Warren Burger was predominantly in the camp of the practical man, as you have suggested, General Days.

He was concerned as to how the Court's decisions would be translated into law at the trial level and at the community. To that end, he was instrumental in the founding of the National Center for State Courts, as you have mentioned, General Reno, an organization devoted to providing administrative and technical assistance to State court systems.

He was instrumental in the founding of the Institute for Court Management. He pioneered the idea of the Inns of Court in the United States, where law students, faculty, practicing lawyers, and judges could dine and meet together in the pursuit of their common interests.

He was firmly of the view that the English system on which these Inns were patterned did a better job of disciplin-[xxii]-ing practicing lawyers than did the more formal procedures employed in this country.

Here at the Court, Warren Burger made changes that materially improved our operation. Take, for example, his reconfiguration of the bench on which my colleagues and I are now sitting.

We take for granted the shape of the bench, and after 25 years it is understandable, but before the advent of Warren Burger it was an absolutely straight bench, making it difficult for colleagues on either end to question counsel, difficult for colleagues in the middle to hear questions from either end, and difficult for counsel to address their remarks to those towards the end of the bench.

By simply moving the two wings of the bench slightly forward, all of these difficulties were corrected or alleviated, although others may have been brought about.

It can also be said, I think, that he made the Court more centrist by bringing the left and right wings closer together.

Chief Justice Burger also brought the Court from the days of a hot lead printing press to automation in the printing of its opinions. The hot lead press which we had when I became a member of the Court some 20 years ago was little different from the printing press the Court had when I was a law clerk in the early fifties and, indeed, little different from the kind of hot lead press on which we set type for our high school newspaper at the beginning of World War II.

And during the June crunch, as we came to know it, you would have to wait 2 or 3 days between the time you sent an opinion, draft opinion to the printer, and the time you could get it back.

This all changed under Chief Justice Burger's regime, and major steps toward the kind of automation we have today were taken.

Warren Burger was a man of tremendous energy. Often, when a lawyer takes the bench, he becomes less involved than previously with the various concerns of the legal profession, but this was not true of Warren Burger. As an appellate judge, he helped to found the Appellate Judges Conference at New York University, and he also played an important part in the drafting of the standards of criminal justice for the American Bar Association.

When he retired as Chief Justice in 1986, he said that one of the reasons he did so was that he could not do justice to both the office of Chief Justice and his position as Chairman of the Committee on the Bicentennial of the Constitution.

When asked why he had chosen his chairmanship over the Chief Justiceship, he replied that he thought the President would have no trouble finding someone to be Chief Justice—but he might have trouble

finding someone to be Chairman of the Committee on the Bicentennial, and after his retirement, he was able to concentrate on the Bicentennial Commission and bring that tremendous energy to bear to make Americans better acquainted with their Constitution.

He was on occasion pressed by scholars to devote a large part of the resources of the Committee to academic forums and treatises on constitutional law, but he declined to do so. He saw his job as bringing home to millions of Americans the significance of their Constitution, and he succeeded magnificently in doing so.

Warren Burger and I were good friends from the first time I met him, when he informally swore me in as an Associate Justice of this Court in December 1971. I continue to miss him.

I remember stopping in to see him only a few weeks before his death, and he was very proud of a just-published book he had written about famous Supreme Court cases entitled, *It is So Ordered*. Here was a man, 88 years old, who had just finished writing a book.

Warren Burger, the fifteenth Chief Justice of the United States, left a large mark on this Court. He also left a large mark on the legal profession as a whole, a profession in which he retained an abiding interest throughout his life. ■

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