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A TRIBUTE TO WARREN E. BURGER

The Honorable Donald P. Lay†

I first met Warren Burger when he was a United States circuit judge on the prestigious District of Columbia Court of Appeals. I had just been appointed to the Eighth Circuit in 1966. I attended the Appellate Judges' Seminar at New York University for newly-appointed judges. At that time, Harry Blackmun was on the Eighth Circuit; he was a good friend of Warren Burger. Blackmun wrote ahead for me to meet Judge Burger at the seminar. Burger was lecturing to the class of state and federal judges on the law of insanity in criminal trials. I will always remember the warm greeting and visits that I had with this distinguished jurist. At the time, I felt as if I were just a babe sitting at the feet of many fine jurists, and Judge Burger made me feel welcomed and relaxed.

Harry Blackmun and Warren Burger had a mutual admiration for one another. They had grown up in Saint Paul as boyhood friends. Even though their careers had separated, both in their own ways had attained singular distinction as outstanding jurists of two respected courts of appeals in the country. I will always remember Judge Blackmun, in oral argument in our court, asking counsel if he or she were familiar with a case Judge Burger had written on the District of Columbia Circuit. If not, Judge Blackmun would suggest it be read, since it "set out a well-written opinion in the field." I also recall a D.C. Circuit case to which Blackmun would call to counsel's attention a dissent written by Judge Burger, describing it as "a better view of the law." Many people credit Chief Justice Burger for recommending to President Nixon that then-Judge Blackmun be appointed to the Supreme Court. Blackmun was appointed after Judge Haynsworth and Judge Carswell did not get congressional approval.

After Blackmun went on the Supreme Court, the press affectionately dubbed Blackmun and Burger the "Minnesota Twins." Although Blackmun's and Burger's viewpoints grew

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farther apart on the Supreme Court, particularly after the abortion cases, they remained good friends down through the years.

I was privileged to serve under Chief Justice Burger on the United States Judicial Conference from 1980 until he retired as Chief Justice. The Chief Justice consolidated conference committees and gained a reputation as an excellent administrator. He held strong views on upgrading the federal courts. His leadership was instrumental in getting through Congress the bill for the appointment of federal magistrates. The Chief Justice had studied the use of lay magistrates in England and believed a modified application could be used in the federal courts. Today, everyone recognizes that without such assistance, the district courts would be overwhelmed in handling their case dockets.

Chief Justice Burger made many contributions to the federal judiciary, and he was the guiding force in so many reforms. Throughout his tenure, he was interested in both prison and sentencing reform. He was influential in the move to have Congress adopt the federal sentencing guidelines. The guidelines sought to bring about changes in existing disparities in sentencing; the reform also abolished the federal parole system and all its inequities. The Chief Justice was challenged by the American bar in his criticism of the quality of performance of lawyers, particularly at the trial bar. He sought separate lawyer licensing standards to practice in the federal courts. Although the Judicial Conference rejected compulsory standards, leaving the licensing matters to state courts, his general concern brought about many needed state bar reforms, along with the institution of much-needed continuing legal education programs in the various states.

Chief Justice Burger also was the guiding force behind the creation of the various American Inns of Court, which seek to train young students and lawyers in trial advocacy skills. In addition, he promoted jury reform through a plan to better utilize unused jurors called for duty, and he was a leader in reducing the size of civil juries from twelve to six as a means of cost efficiency. In the federal courts today, the rules allow juries of eight, with two of the eight sitting as alternates in the event that jurors are excused during the trial. In no event can a civil jury be less than six.

Perhaps the Chief Justice's greatest disappointment was the failure of the bar and Congress to adopt his plan to create a national court of appeal. He urged the creation of a national court of appeal in order to decide splits by circuit courts on issues the Supreme Court allegedly did not have capacity to take. He predicted that this procedure would reduce the number of petitions of certiorari. Many of us on the Judicial Conference opposed the idea, since it was felt the creation of another intermediate court of appeal was not needed and would add to delay and excessive costs in litigation in the long run. The idea, however, is still alive. There is no question that the upward trend in the number of appeals in the federal courts, along with the population growth in this country, will require some radical changes in our federal judicial structure in the future. The projection of caseloads ten to twenty years from now is frightening.

In my judgment, the most personal satisfaction that the Chief Justice attained was after his retirement from the Court, when he became Chairman of the Commission on the Bicentennial of the United States Constitution. His leadership made Americans, particularly young students, aware of the significance of the Constitution and its meaning to our overall way of life in these United States. His introductory letter to a pamphlet containing the Constitution exemplifies his goals and dedication:

Ever since people began living in tribes and villages, they have had to balance order with liberty. Individual freedom had to be weighed against the need for security of all.

The delegates who wrote this Constitution in Philadelphia in 1787 did not invent all the ideas and ideals it embraced, but drew on the wisdom of the ages to combine the best of the past in a conception of government of rule by "We the People" with limits on government to protect freedom.

This Constitution was not perfect; it is not perfect today even with amendments, but it has continued longer than any other written form of government. It sought to fulfill the promises of the Declaration of Independence of 1776, which expressed people's yearning to be free and to develop the talents given them by their Creator.

This Constitution creates three separate, independent branches of government, with checks and balances that keep the power of government within the boundaries set by law. This system does not always provide tidy results; it depends on a clash of views in debate and on bargain and compromise.

For 200 years this Constitution's ordered liberty has unleashed the energies and talents of people to create a good life.

The Chief Justice always had a great sense of humor. On January 2, 1990, the Post Office honored the Supreme Court by issuing a stamp with Chief Justice John Marshall's picture on it. I have collected stamps since I was a young boy. I obtained the personal stationery from each of the Supreme Court Justices and asked them to autograph the outside of their chamber envelopes. I then obtained first-day covers on each of the envelopes adorned with the John Marshall stamp. My grandson someday will inherit a unique and historical collection. When I made my request to the Chief Justice, he responded:

Dear Don: Here it is. Not being a "stamp buff" I did not think of this when the stamp was launched. They used a very poor likeness of Marshall—as I remember him (you are too young!). WEB

Books will be written about Chief Justice Burger which will detail his many accomplishments; space here can only highlight a small segment of them. The nation, as well as the entire judicial system, has benefited greatly from his life. William Mitchell College of Law has been deeply enriched by the Chief Justice and the distinction he brought to the school. The library at William Mitchell College of Law, named in his honor, will always provide a living memorial to his life. We at William Mitchell are fortunate indeed.