



Changing of the Chiefs

Joseph Zengerle

THE DEATH OF CHIEF Justice Rehnquist and the swearing in of Chief Justice Roberts prompted reflections on, among other things, their immediate predecessor and my boss during the 1973–74 Term of Court, Chief Justice Burger, with whom Roberts served less than a decade later, when he clerked for Rehnquist. The retrospectives about Burger did not present a complete picture of the man, so I offer this narrative of a judicial family sort.

A catalyst for my comment is the *Green Bag's* "A Backward Glance," by Bennett Boskey. Boskey clerked for Chief Justice Stone, but wrote about an afternoon tea in 1940 at the home of retired Justice Brandeis. Boskey writes: "all the women were ushered into one room and all the men into another. ... [N]o one was permitted to change rooms ... except that at about midpoint the Justice and Mrs. Brandeis swapped rooms."

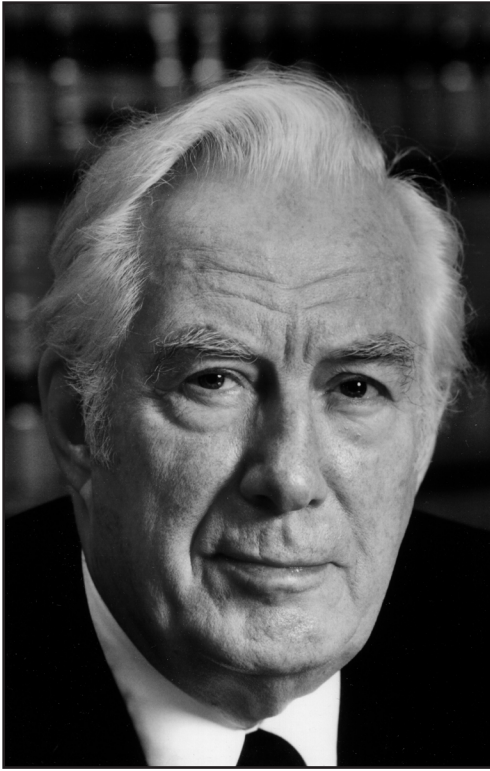
It appears, on the authority of Brandeis' grandson (my friend and Washington attorney Frank Gilbert), that at some Brandeis

teas the men and women were together, an alternative arrangement Chief Justice Burger came to prefer. In the dozen or so years after my clerkship, during which I attended the annual black-tie dinner of the Chief's law clerks (all members of the Warren E. Burger (WEB) Fete Society) at the Supreme Court, it was the unvarying practice that clerks and spouses gathered together at the Court for cocktails, but separated for the dinner, when Mrs. Burger would gather the spouses and lead them off to dine at another venue.

Regarding Burger's last dinner as sitting Chief Justice, in the fall of 1985 (which status would not be known until the next year, when Burger announced his retirement and Chief Justice Rehnquist succeeded him), it fell to me to be the dinner chair. By WEB Fete Society tradition, that job was passed on by seniority and geography of residence to successive clerks. My year, I proposed to keep the spouses and clerks together at the dinner for the first time.

But to begin at the beginning, perhaps

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Chief Justice Warren Burger.

*By Dennis Brack, collection of the
Supreme Court of the United States.*

the major reason the Chief chose me to be his first clerk from his former court, the U.S. Court of Appeals for the D.C. Circuit, was that I had clerked for Judge Carl McGowan, one of the most respected judges on that Court, notably divided at the time between, for example, Chief Judge David Bazelon and Judge Skelly Wright on the one hand and Judges Roger Robb and George MacKinnon on the other. (As apparent below, it probably didn't hurt that I also graduated from West Point.)

McGowan had managed Governor Adlai Stevenson's campaign for the Presidency in 1952. Burger had been instrumental in making General Dwight Eisenhower Stevenson's opponent in that campaign, because Burger was a figure in the Republican primary candidacy of Harold Stassen, former Governor

of Minnesota (Burger's home state). At the GOP convention in 1952, Burger delivered the Minnesota delegation and Stassen released his delegates to Eisenhower, allowing Ike to defeat Robert Taft on the first ballot.

It was President Eisenhower who appointed Burger to the Court of Appeals in 1956, having earlier appointed him as Assistant Attorney General for the Civil Division. Stevenson, President Kennedy's U.N. Ambassador during the Cuban Missile Crisis, was influential in persuading Kennedy to nominate McGowan to the D.C. Circuit in 1963, and President Johnson renewed McGowan's nomination after Kennedy's assassination.

Despite their divergent involvement in national politics, Burger and McGowan had a very good personal relationship, as McGowan enjoyed with virtually all the other judges on the D.C. Circuit. Indeed, it was McGowan who confided his view to Burger when they were colleagues on that Court that a telephone call Burger was about to return to the Attorney General would ask if Burger would accept President Nixon's nomination to be the Chief Justice of the U.S. (Chief Justice Warren had announced his intention to resign in 1968 and President Johnson then appointed Justice Fortas to succeed Warren, but Fortas's nomination was defeated by filibuster and Nixon, elected later in 1968, appointed Burger to the post in 1969.)

My transition as law clerk from one judge to the other predictably bridged significant differences in their personalities, management styles and judicial philosophies. I was unclear how my own relationship would fare after discussing with the Chief, in September, 1973, my first bench memo for him about a case soon to be argued in the new Term. The case concerned whether mandatory maternity leave regulations for public school teachers in Ohio (LaFleur) and Virginia

(Cohen), which required pregnant teachers to leave their employment several months before their due dates, were constitutional (the 6th and 4th Circuits had split on that question).

My wife and I had been married before we attended Michigan law school together, and Lynda, pregnant with our first child, was working for Antonin Scalia, then in the Executive Branch, through the day when her labor pains began in mid-September. A few days before the 1973–74 Term began, and a few days after our son Jason was born, I discussed my bench memo with the Chief, concluding with a recommendation that the maternity leave regulations in question be invalidated.

I was sitting side-by-side with the Chief as we were both looking at passages of my bench memo he had underlined. When I concluded my discussion of the memo, the Chief pushed back his chair, paused and said: “Well, Joe, the Court may agree with you, but I won’t.” (I hasten to add that I did not invoke as part of my presentation my wife’s immediately preceding experience with Jason, though the Chief had earlier accepted my proffered cigar.)

As the Chief predicted, following oral argument in mid-October, the majority of the Court agreed in conference to strike the state regulations. He and Justice Rehnquist, then in his second year on the Court, were together in dissent. In what I have always taken to be in part a gracious gesture by the Chief, as the senior Justice in dissent, he assigned the writing of the opinion to Justice Rehnquist, saving me the difficulty of helping him work against my own views on the case.

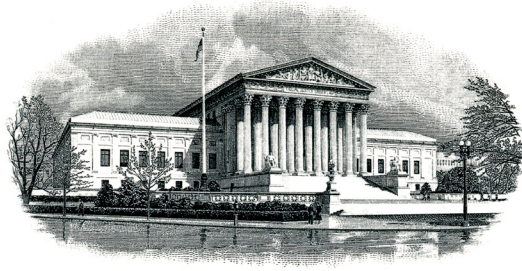
I found the Chief’s consideration in that case to be a consistent feature of our relationship for the next 20 years and more. We didn’t always agree, but that did not impair our ability to speak frankly with one another

and maintain a continuing mutual warmth, accompanied by his twinkle of acknowledgment that I might be an occasional dissenter while remaining a loyal member of the team. Indeed, in the 80s when Jason was writing a paper about the Court, the Chief welcomed us into his chambers, reserved seats for us during an oral argument, and in the midst of counsel’s struggle with a tough question, looked over at Jason and winked.

My regard for the Chief was enhanced by decisions he made in his other capacities, none more significant than when, upon the death of Chief Justice Warren, Burger decided – for the first time in the history of the Court – that his predecessor should lie in state in the Great Hall of the Court. The outpouring of affection for Warren led to three days of continuous procession through the Court and past the bier, a symbolic outlet for national grieving enabled by one of the best examples of Burger’s appreciation for ceremony. I took the opportunity during the recent similar proceedings for Chief Justice Rehnquist to remind some of his former clerks how that inspired tradition began.

More than 10 years after my clerkship, I approached the responsibility to organize the WEB Fete dinner in 1985 with the Chief’s spirit of occasion in mind, especially since it was, coincidentally, also the 50th anniversary of the Supreme Court building. Lynda, like me at the time a partner in a large law firm in Washington, was instrumental in developing the fundamental theory of the dinner: in a break with the past, spouses would cross the hall with the clerks and join them for dinner with the Chief (and of course Mrs. Burger), remarks on giving to the Chief a bound volume of the previous Term’s opinions, and the customary informal give-and-take among the Chief and his clerks.

An initial consideration was whether this change would be resisted. There had been



1935 · U.S. SUPREME COURT BUILDING · 1985

Chief Justice of the United States



ANNUAL WEB FETE SOCIETY DINNER · WASHINGTON · DISTRICT OF COLUMBIA · 1985

From the back of the WEB Fete card: "We the people of the United States, in Order to form a more perfect union ... and secure the Blessings of Liberty ... establish this Constitution for the United States of America." With these words, the American Constitution begins. Within its text it sets forth a democratic government by and for all Americans. One of its most important innovations was the establishment of a court unlike any other in the world, for not only can the Supreme Court of the United States settle disputes of law, but also rule on the validity of law itself. As it has evolved, the Supreme Court is the most powerful tribunal in the world with an authority to strike down Presidential directives and acts of Congress as it interprets the Constitution. Throughout its history the Supreme Court has known many homes – second-floor rooms over an open-air marketplace in New York, Independence Hall in Philadelphia, and even in private homes in Washington while the national Capitol was under construction. Beginning in 1801, the Supreme Court shared the Capitol Building with Congress in its permanent home. As the voluminous records and reference materials of the Court increased, however, the Capitol Building became overcrowded. In 1925, Chief Justice Taft lobbied Congress to support the construction of a separate building for the Supreme Court. Once Congress recognized the need for a new building, it appropriated 9.7 million dollars for construction and the formation of a building commission headed by the Chief Justice. Architect Cass Gilbert, renowned for his work on the Minnesota State Capitol and the Department of Commerce in Washington, D.C., was chosen to design the building. The cornerstone for the Supreme Court Building was laid in 1930, and the magnificent pillared structure, across from the Capitol Building, was completed in 1935. In 1972 the Office of the Supreme Court Curator was established by Chief Justice Burger to help preserve the history of the Supreme Court Building and to share its treasures with the public. It is solid proof – in stone and marble – of America's steadfast commitment to a government of "equal justice under law." Copyright 1985 Unicolor Corporation. Reprinted by permission. Reproduction restricted by 18 USC § 474.

some indication that perhaps the Chief and his clerks would not be candid in the post-dinner discussion, being inhibited by the presence of spouses. I thought particularly of the "old guard" in this respect – the Chief's clerks from his 13 years on the DC Circuit.

So I began a consultation with former clerks who had worked for the Chief on the D.C. Circuit in the 1950s (Charlie Hobbs) and 60s (Reece Bader), and included more recent clerks from the Supreme Court like Ken Starr and Alex Kozinski (70s) and the Chief's clerks from the immediately preceding (Mike Luttig) and current (Tim Flanigan) Terms. (Others I had reason to think would agree were my co-clerks Ken Ripple and Arthur Ferguson, those who would be seated at my table like Carter Phillips, fellow West Pointer Bob Mayer, and academics John Sexton and Lee Bollinger.) There was unanimous support for the change. Three unusual features of the dinner remained to be coordinated. First, in light of the anniversary of the Court building, one of my clients in private practice, Wyoming's Unicover Corporation, which specializes in philatelic matters, conceived of a "Maximum Card" (8" x 10") that would be laser-etched

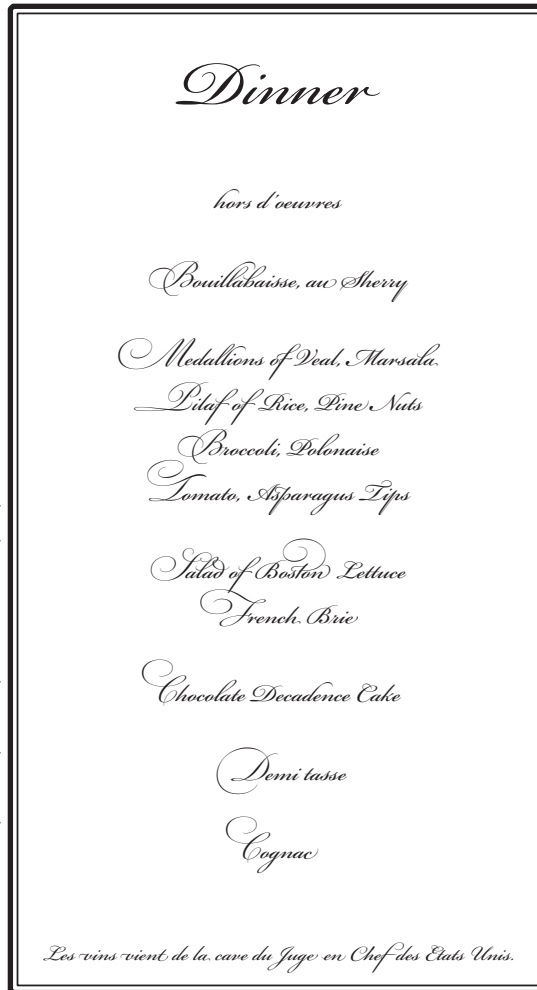
with a replica of the Court building contained on a three-cent stamp, large enough to avoid counterfeiting restrictions, underneath of which was printed the designation "1935 • U.S. Supreme Court Building • 1985".

That 3-cent stamp (from 1950), plus a 20-

cent stamp (from 1983) also showing the Court building, were affixed from my client's inventory to each of the Maximum Cards below the designation, supplying enough postage to warrant the U.S. Postal Service's providing a Washington, D.C. bullseye postmark on the stamps dated the night of the dinner, Saturday, October 19, 1985, on each Card. "Chief Justice of the United States" was also printed on the Card alongside the stamps, and in small print on the bottom: "Annual WEB Fete Society Dinner • Washing-

ton • District of Columbia • 1985".

Burger was pleased to sign the Cards above his title for each of the 54 clerks who attended the dinner. Each executed Card was inserted in a glassine envelope and placed under a clerk's dinner plate as a favor for the event. (I presume that, in an emergency, they could be addressed and mailed today and would be delivered by the USPS.)



Second, as a related comment to the first, I arranged for Roger Morigi, a stone carver on the original Supreme Court building and subsequent master carver for the National Cathedral, to guide the clerks and spouses on a tour of the building's exterior after the Chief's brunch for them at the Court on the Sunday morning following the dinner. Morigi was well-known for his expository abilities, having won an Academy Award in 1984 for the best documentary short subject (Italian-American stone carvers at the National Cathedral).

But third, the *pièce de resistance* was the seating arrangement for the sit-down dinner, which consumed an inordinate amount of time because clerks and spouses had never been seated together before, and I had decided in addition that an empty place was to be reserved at each table so that the Chief and his wife – seated separately throughout the meal – would rotate between each course to ensure that at least one of them had an opportunity to speak with the dozen tables. Obviously, all three unique aspects of the dinner were designed to make the initial integration of clerks and spouses a success.

The dinner proceeded with the rotations of the Chief and Mrs. Burger, Lynda and I escorting them to their appointed rounds between courses, both of them ending at our table. I made introductory remarks, Luttig presented the gift of the bound volume from the previous Term, and the Chief then addressed the group and answered a number of questions. After the dinner, when most guests had departed, the Chief approached Lynda and me, put his arms around both our shoulders and said, with obvious emotion: "This was the best dinner ever." He later wrote to me in a thank-you note: "I can't remember its equal."

One can speculate that Burger knew already this would be his last Term as Chief Justice. And that he may have dropped his guard a bit because of the disarming effect of being among so many women (the Chief had had several female clerks but only two were present that night, so most of the spouses were women). But the Chief, and the WEB Fete Society, never looked back. All subsequent dinners were jointly attended by clerks and spouses. In this strange twilight two Chief Justices later, it's hard to recall it was ever otherwise. *JZ*