peting interests that permitted agreement to come out of the proceedings in Philadelphia. He will no doubt lead that commemoration with the grace and dignity and good sense that we saw in our daily life with him in chambers. We will miss him in those chambers. But we will enjoy and profit from the national commemoration of the document that the Chief has served so well.

---

*Alex Kozinski**

"Do you think that someone who was selected by Justice Douglas as his law clerk can serve the Chief Justice well?"

This was not a hypothetical question and I reflected before I answered. Just days before, I had been called with the news that Justice Douglas had selected me as his law clerk. Later that day there was a second call: Justice Douglas had retired. Disappointment was soon replaced by hope; although it was late November, the Chief Justice had not yet picked his clerks. I was afforded an interview with the Chief's selection committee, former law clerks who screened applicants and made recommendations. The question was not unexpected and, yet, I was somehow unprepared for it.

"I suspect I would disagree with the Chief Justice about as often as with Justice Douglas," I finally said. It must have been the right answer because I eventually got the job. I was most likely also wrong. It turns out that the Chief Justice and I agreed far more often than I had anticipated. In those areas of the law where I thought we might have our greatest differences — personal freedom and the individual's struggle to maintain his individuality against the demands of the modern state, areas traditionally viewed as the domain of liberals — I found him to be flexible and open-minded. While he never adopted an absolutist view of the first amendment, always balancing competing interests, his weighing had a decidedly antistatist, even libertarian, bias.

His opinions in cases involving freedom of thought and religion are good illustrations. It is somewhat surprising to see how often he wrote in this area and how frequently those opinions upheld the claims of litigants asserting these freedoms.[1] There will be enough time for

---

* Judge, United States Court of Appeals for the Ninth Circuit.

[1] *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (holding that a Massachusetts statute giving schools and churches the power to veto liquor licenses for premises within a 500-foot radius violated the establishment clause); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that denial of unemployment benefits to a Jehovah's Witness who quit after being transferred to a weapons production department violated first amendment right to free exercise of religion); McDaniel v. Paty, 435 U.S. 618 (1978) (holding that a Tennessee statute barring clergy from serving as delegates to the state's limited constitutional convention

scholars to dissect this body of precedent and draw precise conclusions; my view is impressionistic and two cases suffice to illustrate my point. The first is *Wisconsin v. Yoder*,[2] in which the question was whether the state could fine Amish parents for failing to send their children to formal schools after they completed the eighth grade. The Chief Justice's opinion is a model of understanding and respect for the rights of the individual. He started by recognizing that "[p]roviding public schools ranks at the very apex of the function of a State."[3] But, he continued, that interest,

> however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . .[4]

Noting that "the respondents' religious beliefs and attitude toward life, family, and home have remained constant — perhaps some would say static — in a period of unparalleled progress in human knowledge,"[5] the Chief Justice recognized that "[t]he Amish mode of life has . . . come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."[6] At the heart of the opinion is his conclusion — based I am convinced on his own personal philosophy — 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."[7]

I find it difficult to formulate a more accurate description of the proper relationship between the individual and the state.

This same tolerance for sincerely held beliefs, inconsistent though they be with those of the majority, is evidenced in *Wooley v. Maynard*,[8] decided the Term I clerked for Chief Justice Burger. In that case, George Maynard and his wife Maxine, Jehovah's Witnesses residing in New Hampshire, had refused to display the state's slogan — "Live Free or Die" — on their vehicles' license plates. In Mr.

---

violated the free exercise clause); Wooley v. Maynard, 430 U.S. 705 (1977) (discussed *infra* at pp. 976–77); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (holding that New York's reimbursement of church-sponsored schools for the expense of student examinations violated the establishment clause); Wisconsin v. Yoder, 406 U.S. 205 (1972) (discussed *infra* at p. 976); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that a Rhode Island statute supplementing private-school teachers' salaries and a Pennsylvania program supplementing teachers' salaries in, and authorizing purchases of certain secular educational services from, private schools violated the first amendment).

[2] 406 U.S. 205 (1972).

[3] *Id.* at 213.

[4] *Id.* at 214.

[5] *Id.* at 216.

[6] *Id.* at 217.

[7] *Id.* at 224.

[8] 430 U.S. 705 (1977).

Maynard's words, "'I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.'"[9] For this, he had been ticketed, jailed, and threatened with additional jail time. The Maynards sued to enjoin enforcement of the statute.

The opinion is an excellent illustration of the Chief's commitment to core first amendment values. He noted that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."[10] He continued: "A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts."[11] Applying these principles to the case before him, the Chief Justice noted that

> we are faced with a state measure which forces an individual, as part of his daily life — indeed constantly while his automobile is in public view — to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In so doing, the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[12]

He also wrote that

> [t]he fact that most individuals agree with the thrust of New Hampshire's motto is not the test. . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.[13]

Once again, it is difficult to find in the writing of any Justice sentiments more acutely attuned to the concept of individual freedom or more sensitive to the myriad ways in which the state can encroach upon that freedom.

These cases are typical in many ways. Chief Justice Burger's concern for the individual, his suspicion of the power of the state and the arbitrary manner in which it can be wielded to crush individualism, permeated much of his thinking. To be sure, he had his views and leanings. He respected the prerogatives of the other branches of government; he disapproved of reversing criminal convictions for artificial or insubstantial reasons; he did not believe in hindering police in performing legitimate law enforcement functions. At the same time, he proclaimed clearly and repeatedly that he would never vote to

---

[9] *Id.* at 713.
[10] *Id.* at 714.
[11] *Id.*
[12] *Id.* at 715 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
[13] *Id.*

overrule *Miranda*, because to do so would be an invitation to lawlessness by law enforcement authorities.

What perhaps was most surprising to me when I joined the Chief Justice's staff was the open-mindedness he brought to the judicial decisionmaking process. I had expected to find a man set in his ways, with a ready answer for whatever case might come along. I learned to the contrary. I found a man willing to listen to and anxious to hear the views of young lawyers a third his age and with a tiny fraction of his legal and life experience. I had the sense that he counted on us to second-guess his instincts, precisely because our views were fresh and unburdened by experience. He did not always agree, although he did far more often than I ever expected. But he always listened and understood.

Perhaps the second most surprising thing I discovered during my brief tenure as his law clerk[14] was the breathtaking scope of his job as chief administrative officer of the federal judicial system, as well as his abiding interest in the administration of justice. While other Justices were devoting their days to the Court's judicial business, the Chief's days were interrupted by a thousand big and little responsibilities: entertaining visiting "firemen," from district judges to presidents of foreign nations; preparing for and attending board meetings of the National Geographic Society and the Smithsonian Institution; choreographing the judicial conference; monitoring legislation affecting the judicial system. The list of duties seemed endless. Yet, if he learned that the family of one of his clerks was in town, he would push everything aside and extend hospitality to them for a precious half-hour or hour at a time. For a man who was well along in years even then, his sheer energy astonished me.

A tribute to the Chief would not be complete without a mention of what he is like as a person. I cannot imagine working for a kinder, more generous human being. In the time I have known him, I have never heard him say a bad word about anyone. He treated and regarded everyone around him with respect and civility. When disagreements arose, he shrugged and accepted that not everyone must think as he does. At the same time, he was generous with his help and advice, particularly to those of us who were members of his family of law clerks. When, at the end of my clerkship, I got married, he offered his chambers for the event, joking that if we contemplated divorce it would have to be by writ of certiorari. My favorite picture from my wedding day is of the Chief Justice of the United States rinsing glasses.

---

[14] I served for one year. My brother Ken Starr, who has written so eloquently above, *see supra*, p. 971 had the good fortune of serving for two years, during the second of which we were colleagues.

Years later I was the first of his law clerks to become a judge, when I was appointed Chief Judge of the United States Claims Court. I admit to feeling some trepidation as to how he would react upon learning that one of his former law clerks was playing sorcerer's apprentice, as a trial judge no less. I had often heard him say that he would trust any of his law clerks to argue a case before the Supreme Court, but not to take care of a traffic ticket.

His concern and respect for the function of the trial court loomed large in my mind as I advised him of my pending appointment. I need not have worried. As always, his respect and affection for one of his own allayed any concerns he might have had. He spoke with confidence and affection as he welcomed me to the judicial family, and I thought I detected a measure of pride that one of his own "children" had joined him on the bench. There are now four of us. In addition to Judge Starr on the District of Columbia Circuit and myself, there is Judge Kenneth Ripple of the Seventh Circuit and Judge H. Robert Mayer of the Claims Court (soon to be appointed to the Federal Circuit).

The day last June we learned about the Chief's pending retirement, a number of us, his former law clerks, called each other. It was a strange feeling, like losing an anchor. None of us had fully realized how much he continued to be part of our professional frame of reference; it is still hard to tell people that "I clerked for the *former* Chief Justice." But what he has given us, what he has given the country, endures far beyond his tenure as Chief Justice. I am confident posterity will judge him as a great Chief Justice, just as I am learning to appreciate with the passage of time what a superb mentor he was to those of us lucky enough to have clerked for him.

---

*John Edward Sexton**

The very first bench memo I produced for Chief Justice Burger dealt with a California decision striking down, as violating the equal protection clause, a statutory rape law that applied only to males. Two years before, the First Circuit had invalidated a similar law on the same ground, and the Chief Justice had dissented from the denial of certiorari — indicating only that he would have granted the writ and reversed summarily. In the first paragraph of my memo, I noted his position in the earlier case, but I went on to argue against it — using arguments, I must concede, very much like those that had been used by the lower courts.

---

* Professor of Law, New York University Law School.