SPEECH GIVEN BY
THE HONORABLE JAMES R. BROWNING*

Conference on "Earl Warren and the Warren Court:
A Fifty-Year Retrospect"
February 27, 2004, UC Berkeley

One day early in 1958, I received a telephone call in my office in the Tower Building, 14th & K Streets in Washington, DC, from the office of the Chief Justice asking me if I could come to his office. I said I could.

When I arrived, the Chief Justice told me the Court had authorized him to ask me if I would become Clerk of the Supreme Court. I said I would. The Chief Justice responded, "You haven't asked your wife, come back to see me when you have." Marie Rose said yes.

The time was momentous. Although the fires that had been lit in *Brown v. Board* had begun to subside, they were re-ignited by the Court's decision in *Cooper v. Aaron.*

The Supreme Court had also recently defended the right of former members of the Communist Party to join the legal profession, narrowed the breadth of legislative investigations of Communists and other alleged subversives, and overturned convictions under the Smith Act. Three of these decisions came down on June 17, 1957, a day later referred to as "Red Monday."

Public disquiet over Supreme Court decisions which many regarded as undercutting national security, reached a fever pitch. A bill restricting the jurisdiction of the Court to hear such cases was narrowly defeated. The legislature of the State of Georgia adopted a resolution calling for the impeachment of the Chief Justice. A similar call was made in the U.S. Senate. "Impeach Earl Warren" billboards appeared along public highways across the nation. Pamphlets carrying the same demand made their way even to the Earl Warren High School in Downey, California.

---

* U.S. Court of Appeals, 9th Circuit

Meanwhile, I was acquainting myself with my new duties as Clerk of the Court. Among these duties was that of transferring the historic documents of the Court from the basement of the Supreme Court building to the National Archives. The Court had staunchly refused to give up any of these files. In fact, Rule l (not Rule 2) of the Supreme Court said that, "The Clerk shall not permit any original record or paper to be taken from the office." In 1956, Chief Justice Vinson authorized transfer of the case files from the first forty years of the Court to the National Archives. Chief Justice Warren continued this process, authorizing the transfer of case files preceding 1860. I was to supervise this project.

Early in the process, I came across a large package in a basement vault bearing a notice signed by a former Clerk of Court, stating that the package should under no circumstances be opened – reminiscent of the WWII joke about the document that was so highly classified that nobody could read it. I opened the package and found, on very frail parchment, the original opinion in the 1792 case, *Oswald v. New York* – the earliest case for which records existed. The vault also contained the original, handwritten version of opinions in *Chisholm v. Georgia, Marbury v. Madison, Gibbons v. Ogden,* and other seminal cases. Another box contained the minutes of the Court for the years 1790 through 1805. These historic treasures had remained in the dark corners of the Supreme Court building for more than a century gathering dust, inaccessible to the public.

Many lawyers and the bar associations had severely criticized the Court. About the time I became Clerk in 1958, the Chief Justice withdrew his membership from the ABA because of its charge that Communist cases had undermined national security. The ABA's press release said the Chief Justice's membership had been revoked because he had failed to pay his dues. That was too much, the Chief Justice was a very practical man particularly on financial matters and this was a blow below the belt. He wrote asking the ABA for a letter that he could show his children, "proving that their father had neither welched on his duties nor failed to pay his bills."

Over the next three years, I traveled to bar associations around the country to show them these pieces of the Court's history. The amount of materials remaining from those early years was actually rather small – I could fit all of the documents into my brief case. I would arrive at the bar association conference or symposium and spread these materials across a table as I described them to the audience. Many were of great historic significance: the argument in *Marbury v. Madison* in Marshall's handwriting; *McCulloch v. Maryland*; papers on *Scott v. Sanford,* better

known as the Dred Scott Case, including a printer's proof on which Chief Justice Taney had added and deleted material as he developed the opinion.

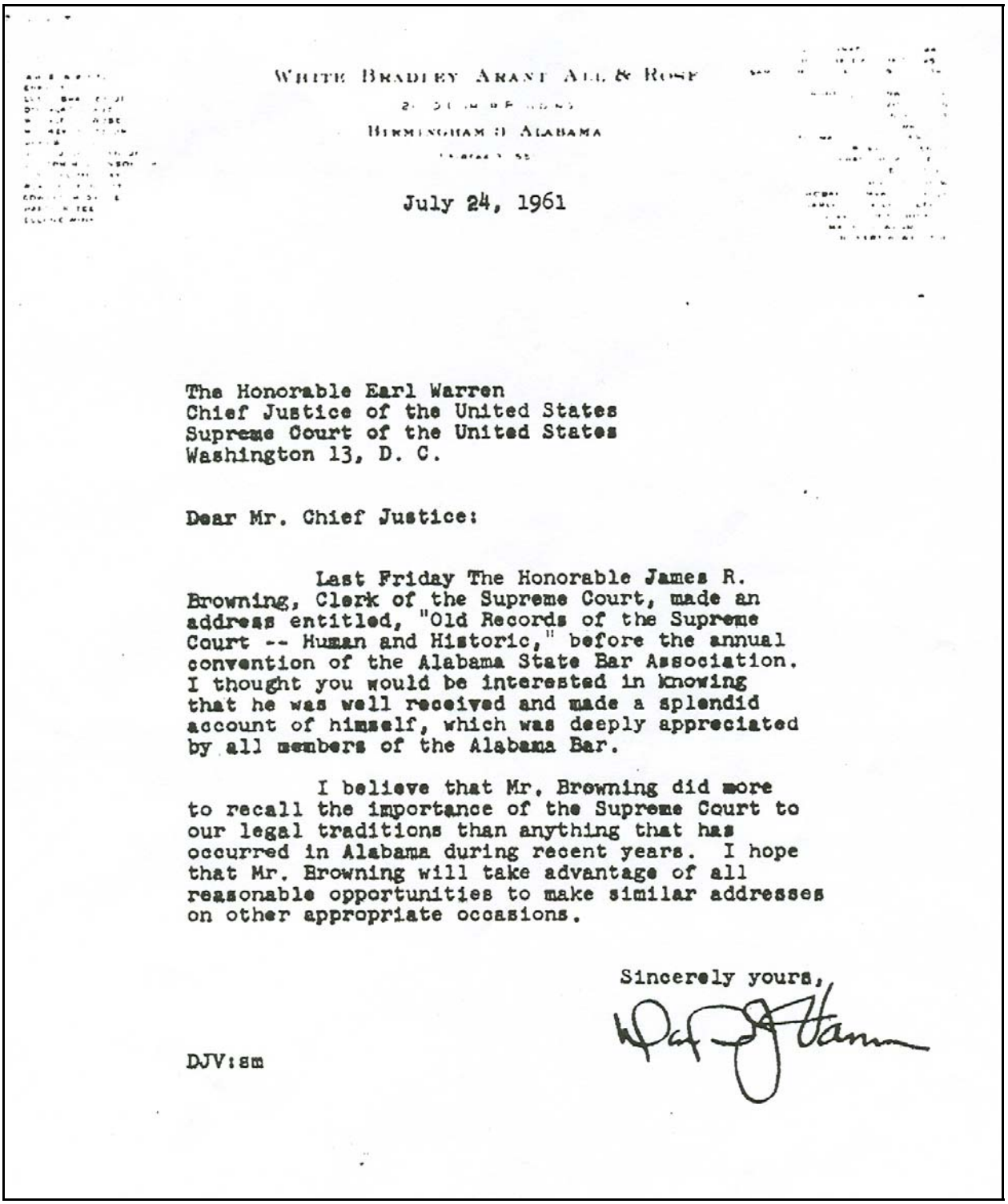
The documents not only highlighted the gravity and solemnity of the Court, but reminded the audience that the Court has always been a human institution, subject to the frailties of all human things.

I brought with me a certificate filed by Mrs. Belva Lockwood, from 1879, in support of her application to the Bar of the Supreme Court, and the Court's response: "None but men are admitted to practice before the Supreme Court of the United States." I included a formal invitation from the House of Representatives, dated 1838, asking the Justices to attend the funeral of a Congressman, and the Court's response: "The Justices of the Supreme Court cannot, consistently with the duties they owe to the public, attend in their official character the funeral of one who has fallen in a duel."

I brought with me a photocopy of the notes that Chief Justice John Marshall, as a young lawyer, took during the six weeks that he attended law lectures at William and Mary College. At the time, Marshall was courting a young lady named Polly Ambler, whom he later married. He was taking his lecture notes in the passion of that courtship. On the pages that had to do with assumpsit he began: "Assumpsit: the plaintiff must set forth everything essential to the gist of the action with such certainty. . . ." And so forth and so on. And at the bottom of the page with all sorts of fancy curlicues, "Polly Ambler." Finally, also at the very bottom of the page, sort of weakly, "Polly." John Marshall's very human qualities were brought to life as only these original documents could.

What does this have to do with Chief Justice Warren and the Warren Court? The audiences at the bar associations were enthusiastic. There were standing ovations and bales of congratulatory letters; not for me, mind you, but for the institution. The lawyers and bar association members who attended were, for the most part, opposed to the direction taken by the Warren Court. Many questioned the very legitimacy of the Court in a way that had not been seen since the Court crisis during the New Deal. Surrounded by the great history of the Court, lawyers could once again view the Court in a positive light, and give expression to their personal and professional attachment to the institution that rose above the rancorous issues of the day.

On July 24, 1961, an officer of the Alabama Bar Association wrote the following letter to the Chief Justice of the United States:



WHITE BRADLEY ARANT ALL & ROSE

BIRMINGHAM 3, ALABAMA

July 24, 1961

The Honorable Earl Warren
Chief Justice of the United States
Supreme Court of the United States
Washington 13, D. C.

Dear Mr. Chief Justice:

Last Friday The Honorable James R. Browning, Clerk of the Supreme Court, made an address entitled, "Old Records of the Supreme Court -- Human and Historic," before the annual convention of the Alabama State Bar Association. I thought you would be interested in knowing that he was well received and made a splendid account of himself, which was deeply appreciated by all members of the Alabama Bar.

I believe that Mr. Browning did more to recall the importance of the Supreme Court to our legal traditions than anything that has occurred in Alabama during recent years. I hope that Mr. Browning will take advantage of all reasonable opportunities to make similar addresses on other appropriate occasions.

Sincerely yours,

DJV:sm

The Chief Justice encouraged me to repeat the performance before other bar associations and I did so whenever asked.

The Chief Justice was a good boss. He ran the Court, I ran the Clerk's Office. I remember only one instance in which he gave me instructions regarding the handling of a particularly notorious appeal. He said, "Handle it the same way you would any other matter."