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THE EARLY YEARS OF THE WARREN COURT: EMERGENCE OF JUDICIAL LIBERALISM (1953- 1957)*

Russell W. Galloway, Jr.**

INTRODUCTION

This article discusses voting patterns on the United States Supreme Court during the first four terms of Earl Warren's tenure as Chief Justice of the United States.¹ The foundation for the discussion is primarily statistical. Each of the four terms (October 1953-1956) was initially considered as a separate analytical unit. With respect to each term, the votes of each justice were tabulated and a set of standardized tables was generated.² These tables, in turn, were inspected to identify any salient trends emerging from the voting patterns of the justices. The results are analyzed in this article.

This statistical method of analysis is derived from the work of political scientists C. Herman Pritchett, Glendon A. Schubert, and their colleagues and successors.³ The data base used here includes all Supreme Court cases decided on the merits, where formal opinions were prepared for the Court by an identifiable justice.⁴ Since the Pritchett-Schubert school customarily uses a data base which includes only divided cases,

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1. This is the first in a series of three articles which will cover the entire Warren era.

2. The basic statistical tables for each of the four terms are set forth in the appendices. They include: tables on disagreement rates (app. A) and tables on dissent rates (app. B).

3. The leading works of the Pritchett-Schubert school, in order of publication, are as follows: C.H. PRITCHETT, *THE ROOSEVELT COURT* (1948); G.A. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); G.A. SCHUBERT, *THE JUDICIAL MIND* (1965) [hereinafter cited as *JUDICIAL MIND*]; H.J. SPAETH, *THE WARREN COURT* (1966); J.D. SPRAGUE, *VOTING PATTERNS OF THE SUPREME COURT* (1968); *FRONTIERS OF JUDICIAL RESEARCH* (J. Grossman & J. Tannenhaus eds. 1969); *AMERICAN JUDICIAL BEHAVIOR* (S. Brenner ed. 1973); G.A. SCHUBERT, *THE JUDICIAL MIND REVISITED* (1974) [hereinafter cited as *JUDICIAL MIND REVISITED*]. This article uses the so-called "bloc analysis" portion of the Pritchett-Schubert statistical model.

4. The following cases are not included: (1) cases in which full review was denied; (2) cases in which no opinion was written; and (3) per curiam cases (even those with opinions).

i.e., those in which dissenting votes are cast, this study reflects a broader class of opinions, and thus is a limited replication of prior studies.⁵

For purposes of ordering and reporting the statistical data, it is convenient to divide the Warren era into three periods:⁶ (1) the four-year period from the October 1953 Term through the October 1956 Term during which there was a growth of liberalism on the Court; (2) the four-year period from the October 1957 Term through the October 1960 Term during which there was a heated contest between a liberal and a conservative bloc regarding the proper role of the judiciary; and (3) the eight-year period from the October 1961 Term through the October 1968 Term during which the liberals achieved dominance on the Court.⁷ As noted above, this article will deal with the first of these periods, the "early years," which was characterized by an emergence of judicial activism.

Although the article will make no attempt to discuss the general history of the early 1950's, a brief word is perhaps in order to remind the reader about the setting in which these judicial events took place. At the start of the October 1953 Term, the Eisenhower Administration was in its first year. The predominant concern of the era was the "Communist menace."⁸ The Korean War was in its fourth year, and fourteen months still remained before the United States Senate was to

5. The cases were coded and tabulated independently by the author, and the article was written before consulting the prior statistical studies. Therefore, the study comprises an independent replication of other studies.

6. *Cf.* JUDICIAL MIND REVISITED, *supra* note 3, at 102-04 (Warren era divided into "early," "middle," and "late" periods). Here, as in Schubert's book, the periods are defined statistically, *i.e.*, by studying data concerning the voting patterns of the justices, not by reading the opinions or studying the history of the period. Any statistical report of this nature has a frustratingly abstract quality. On the other hand, it has the merit of providing a sound, value-free empirical basis for the intuitive judgments that are the heart of good historical writing. In this sense, the article is an effort to provide a statistical foundation for later substantive studies of the Warren era.

7. The three periods do not correspond exactly with the more organic periods that a historian would detect in the data. Thus, the October 1953 Term was the end of a conservative period on the Court that began in the late 1940's. Similarly, the October 1957 Term was a transition stage involving the end of the "early" years of judicial liberalism on the Warren Court and the beginning of the "middle" years of retreat and division on the Court. The use of periods defined by whole terms of Court is an artifact of the statistical method adopted here, not a basis for concluding that judicial revolutions occur only during summer recesses.

8. *See, e.g.*, R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955). Justice Jackson's work, written only a few months before his death in October 1954, vividly illustrates the overriding concern about Communism that permeated the period.

condemn Senator Joseph R. McCarthy.⁹ The United States economy was in the midst of a vast boom that had begun after World War II.

The predominantly conservative mood of the nation was reflected in the mood of the Supreme Court just before Earl Warren took office.¹⁰ Seven of the nine justices were moderate to conservative. Chief Justice Fred Vinson, during the immediately preceding terms, had been the central figure in a group of relatively conservative justices which included Harold H. Burton, Sherman Minton and Tom C. Clark. The conservative forces were also buttressed by two brilliant spokesmen, Felix Frankfurter and Robert H. Jackson, who occupied the far right of the Court as early as the October 1946 Term.¹¹ Frankfurter and Jackson continued to champion the conservative cause in the early 1950's. Justice Stanley F. Reed completed the Court's conservative wing. William O. Douglas and Hugo L. Black comprised the liberal wing of the Court which, since the deaths of Frank Murphy and Wiley Rutledge in 1949, had been reduced to two and consigned to the position of recurrent dissent.¹²

On August 8, 1953, less than a month before the start of the October 1953 Term, Chief Justice Vinson died. President Eisenhower appointed the three-term governor of California, Earl Warren, to succeed Vinson as Chief Justice. The new Chief Justice hurriedly packed his bags at the governor's mansion and rushed to Washington for the opening of the October 1953 Term. In the next few pages, the discussion will center on the voting patterns of the justices during the ensuing four terms with the intent of uncovering the judicial attitudes that characterized the first period of the Warren era.

9. THIS FABULOUS CENTURY: 1950-1960, at 132 (1970).

10. The statistical analysis that provides the basis for this article has not yet been done for the Supreme Court terms prior to the October 1953 Term. Therefore, these introductory remarks are based upon prior analyses of earlier terms by Pritchett and Schubert plus the usual array of historical sources.

11. C.H. PRITCHETT, *supra* note 3, at 44.

12. There has been much discussion regarding the propriety of using the generic terms "liberal" and "conservative" to describe the justices. Prior studies have suggested that these terms oversimplify the data. Schubert's major finding, for example, is that conservatism on the Court has two distinct dimensions, economic and political. *E.g.*, JUDICIAL MIND, *supra* note 3, at 97. The simple liberal-conservative terminology is adopted here to make it easier for the reader to grasp the main trends, but without any intent to suggest that liberalism and conservatism are unidimensional phenomena.

THE VOTING PATTERNS DURING THE EARLY YEARS

The October 1953 Term

The Court's personnel remained unchanged throughout Warren's first term. The Court's two most conservative members were Harold H. Burton and Stanley F. Reed.¹³ Grouped with Burton and Reed in a five-vote conservative wing were Sherman Minton, Felix Frankfurter and Robert H. Jackson. In splendid isolation on the Court's liberal wing were William O. Douglas and Hugo L. Black. Balanced between these two wings were Earl Warren and Tom C. Clark.

The distance between the Burton-Reed and the Douglas-Black pairs which occupied the Court's right and left extremes is graphically illustrated by the following table:

TABLE 1
DISAGREEMENT RATES—OCTOBER 1953 TERM

| | LIBERALS | | CONSERVATIVES | |
|---------------|----------|-------|---------------|-------|
| | Douglas | Black | Burton | Reed |
| LIBERALS | | | | |
| Douglas | — | 14.7% | 51.4% | 53.8% |
| Black | | — | 45.1% | 53.0% |
| CONSERVATIVES | | | | |
| Burton | | | — | 11.8% |
| Reed | | | | — |

As this table indicates, Reed disagreed with Burton in only 11.8% (8/68) of the cases in which both participated during the term.¹⁴ By comparison, Reed disagreed with Douglas in 53.8% (35/65) of the cases and with Black in 53% (35/66) of the cases. On the liberal side, Douglas disagreed with Black in only 14.7% (10/68) of the cases, while he disagreed with Burton and Reed

13. The descriptions in this paragraph are based upon the statistical data concerning the justices' disagreement rates set forth in app. A, table 1 *infra*.

14. The number of cases for each pair of justices during the term reflects the cases in which both justices voted. Differences in numbers of cases reflect the fact that the justices do not vote in all cases decided during a particular term. Abstentions result from illness, voluntary disqualification, etc.

at rates of 51.4% (36/70), and 53.8% (35/65) respectively.

A study of Table 2 demonstrates that Minton, Frankfurter, and Jackson were more closely aligned with the conservative pair, Burton and Reed, than with the liberals, Douglas and Black. Frankfurter and Jackson aligned fairly closely, agreeing in 81.3% (52/64) of the cases,¹⁵ while Minton was not closely paired with anyone.

TABLE 2
DISAGREEMENT RATES—OCTOBER 1953 TERM

| | LIBERALS | | CONSERVATIVES | |
|-------------|----------|-------|---------------|-------|
| | Douglas | Black | Burton | Reed |
| Minton | 42.9% | 45.1% | 24.8% | 26.5% |
| Frankfurter | 45.7% | 40.8% | 24.6% | 32.3% |
| Jackson | 48.4% | 46.0% | 23.4% | 31.7% |

The new Chief Justice, Earl Warren, and Truman's ex-Attorney General, Tom C. Clark, registered the lowest rate of disagreement among the justices, disagreeing in only 7.8% (5/64) of the cases.¹⁶ Although Warren and Clark were actually located between the two wings, they agreed with the conservatives substantially more often than with the liberals. (See Table 3).

These statistics shed interesting light on the career of Earl Warren as Chief Justice. Warren, of course, has become associated in the public mind with liberal judicial activism, and "Impeach Earl Warren" has become a classic symbol of right-wing American politics.¹⁷ In his first term, however, Warren by no means simply joined the liberal Douglas-Black bloc. On the

15. See app. A, table 1 *infra*.

16. This was the third lowest disagreement rate in the Warren Court's early years, surpassed only by the 3.3% Black-Warren disagreement rate in the October 1955 Term and the 4.3% Douglas-Black disagreement rate in the same term.

17. Following the Supreme Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1953), Earl Warren was "singled out by the John Birch Society for special treatment." Of this treatment the Chief Justice commented, "Along the highways throughout the nation, they rented large billboards saying 'Impeach Earl Warren' and signed 'John Birch Society.' This continued until six months before my retirement . . . I never was inflamed by them, and in passing one of them I could even smile as I surveyed the surroundings and speculated as to why it was placed at that particular site." E. WARREN, *THE MEMOIRS OF EARL WARREN* 303, 305 (1977).

TABLE 3
DISAGREEMENT RATES—OCTOBER 1953 TERM

| | Warren | Clark |
|----------------------|--------|-------|
| Clark | 7.8% | — |
| LIBERALS | | |
| Douglas | 36.9% | 46.8% |
| Black | 34.8% | 38.2% |
| CONSERVATIVES | | |
| Burton | 25.0% | 21.7% |
| Reed | 25.4% | 21.9% |

contrary, as Table 4 shows, he agreed with the conservatives in a substantially higher percentage of cases.

TABLE 4
WARREN'S AGREEMENT RATES—OCTOBER 1953 TERM

LIBERALS

| | |
|---------|-------|
| Douglas | 63.1% |
| Black | 65.2% |

CONSERVATIVES

| | |
|--------|-------|
| Burton | 75.0% |
| Reed | 74.6% |

Similarly, Table 5 demonstrates that Warren did not join in most of the dissents filed by Douglas and Black.

TABLE 5
DISSENTS OF WARREN, DOUGLAS AND BLACK—
OCTOBER 1953 TERM

| | Without Warren | With Warren | Total |
|---------|----------------|-------------|-------|
| Douglas | 24 | 5 | 29 |
| Black | 20 | 6 | 26 |

On the other hand, Warren was closer to Douglas and Black than any of the other justices were.¹⁸ For example, in the few cases in which Warren dissented, he did so in the company of Douglas and Black, as the following table shows:

TABLE 6
WARREN'S DISSENTS—OCTOBER 1953 TERM

| Total | With Black | With Douglas | With Black and Douglas |
|-------|------------|--------------|------------------------|
| 8 | 5 | 6 | 5 |

Given both the existence of a five-vote conservative majority and the fact that the moderates, Warren and Clark, tended to side more with the conservatives than with the liberals, it is not surprising that the data on voting patterns reveal conservative dominance on the Court during the October 1953 Term. This is confirmed by Table 7 which shows the justices' dissent rates.¹⁹

TABLE 7
DISSENT RATES—OCTOBER 1953 TERM

| JUSTICE | DISSENT RATES |
|---------------|---------------|
| LIBERALS | |
| Douglas | 41.4% |
| Black | 36.2% |
| CONSERVATIVES | |
| Minton | 23.3% |
| Frankfurter | 15.1% |
| Jackson | 20.3% |
| Burton | 15.1% |
| Reed | 16.2% |
| MODERATES | |
| Warren | 11.8% |
| Clark | 8.7% |

18. See app. A, table 1 *infra*.

19. See app. B, table 1 *infra*.

The fact that the liberals (Douglas and Black) disagreed with the Court's decisions more than twice as often as the two most conservative members (Burton and Reed) shows the degree to which the conservative wing dominated the Court.

The relative isolation of the liberal pair is further demonstrated by the fact that each of the other seven justices disagreed with Douglas and Black in a substantial number of cases.

TABLE 8
DISAGREEMENT RATES—OCTOBER 1953 TERM

| | Douglas | Black |
|-------------|--------------------|-------|
| Warren | 36.9% | 34.8% |
| Clark | 46.8% | 38.2% |
| Minton | 42.9% ^o | 45.1% |
| Frankfurter | 45.7% | 40.8% |
| Jackson | 48.4% | 46.0% |
| Burton | 51.4% | 45.1% |
| Reed | 53.8% | 53.0% |

In light of the foregoing statistical data, it is safe to conclude that the October 1953 Term was dominated by a seven vote moderate/conservative majority. Additionally, the voting patterns during the first term plainly illustrate the presence of a two-vote liberal minority, which found itself in "splendid isolation," dissenting in roughly forty percent of the cases.

The October 1954 Term

Warren's second term began on October 4, 1954. Four days later Robert H. Jackson died, and the Court's conservative wing lost one of its two most articulate spokesmen. Justice Jackson's successor, John Marshall Harlan, another preeminent spokesman of judicial conservatism, was not seated until March 28, 1955. Thus, for nearly six months out of the eight-month term, the Court had only eight justices.

Perhaps partly due to Jackson's absence, the Court adopted a distinctly more liberal posture during this second term. This shift can be discerned from an examination of the change in the dissent rates among the Court's liberal and conservative wings.

TABLE 9
DISSENT RATES—OCTOBER 1953 TERM

| JUSTICE | DISSENT RATE | PRIOR TERM | CHANGE |
|---------|--------------|------------|--------|
| Douglas | 24.7% | 41.4% | —16.7% |
| Black | 16.0% | 36.2% | —20.2% |
| Reed | 31.7% | 16.2% | +15.5% |

In contrast to the prior term, Stanley F. Reed, the Court's most conservative member, dissented more than the liberals, Douglas and Black. Reed's dissent rate was almost double that of the October 1953 Term, while Douglas and Black dissented roughly half as often.

Significantly, Chief Justice Warren, during his second term on the Court, shifted toward the liberal side. During the October 1953 Term, he was more closely aligned with the conservatives than with the liberals, yet one year later the position was reversed and Warren was disagreeing with the Court's most conservative member twice as much as with the two liberals.

TABLE 10
WARREN'S DISAGREEMENT RATES—OCTOBER 1953
AND 1954 TERMS

| JUSTICE | OCT. 1953 TERM | OCT. 1954 TERM | CHANGE |
|----------------------|-------------------|-------------------|--------|
| LIBERALS | | | |
| Douglas | 36.9% | 21.5% | —15.4% |
| Black | 34.8% | 16.5% | —18.3% |
| CONSERVATIVES | | | |
| Reed | 25.4% | 36.3% | +10.9% |

Justice Clark also moved toward the left. Like Warren, he now disagreed with the conservatives more often than he did with the liberals.

TABLE 11

CLARK'S DISAGREEMENT RATES—OCTOBER 1954 TERM

LIBERALS

| | |
|---------|-------|
| Douglas | 26.3% |
| Black | 17.5% |
| Warren | 8.5% |

CONSERVATIVES

| | |
|--------|-------|
| Harlan | 40.0% |
| Reed | 29.6% |

Justice Frankfurter's voting pattern during the second term was distinctly more liberal than during the prior term. He disagreed with the liberals less frequently and conversely, disagreed with Stanley F. Reed, the most conservative member of the Court, more frequently than during the prior term.

TABLE 12

FRANKFURTER'S DISAGREEMENT RATES—OCTOBER 1953
AND 1954 TERMS

| JUSTICE | OCT. 1953 TERM | OCT. 1954 TERM | CHANGE |
|----------------------|-------------------|-------------------|--------|
| LIBERALS | | | |
| Douglas | 45.7% | 33.3% | -12.4% |
| Black | 40.8% | 23.5% | -17.3% |
| CONSERVATIVES | | | |
| Reed | 32.3% | 39.2% | + 6.9% |

In the spring of 1955, the Court issued decisions in several areas that reflected this liberal shift, including, most notably, the anti-subversion area.²⁰ These cases drew dissents from Minton, Burton, Reed, and the newly-seated Harlan. The majority in-

20. Thus, the outburst of liberal activity that many commentators have noted during the spring of the October 1956 Term had a predecessor two years earlier.

cluded the liberal pair (Douglas and Black), the moderate pair (Warren and Clark), and, significantly, Felix Frankfurter, the erstwhile conservative stalwart.

Meanwhile, Justice Minton moved to the right of Frankfurter into a loose four-vote conservative coalition with Burton, Harlan and Reed. Each of these four justices disagreed with Douglas, the Court's most liberal member, in a substantial percentage of cases.

TABLE 13

DOUGLAS' DISAGREEMENT RATES—OCTOBER 1954 TERM

| | |
|--------|-------|
| Reed | 49.4% |
| Harlan | 46.7% |
| Burton | 44.3% |
| Minton | 39.5% |

In summary, during the October 1954 Term, there was a substantial movement to the left by three justices (Warren, Clark, and Frankfurter). The liberal camp (Douglas and Black) dissented less frequently indicating that the posture of the Court was becoming more activist in nature. This is further evidenced by the fact that the conservative wing (Reed and Burton) dissented more frequently than they had during the prior term. Only one justice (Minton) moved to the right.

The October 1955 Term

The Court, which had regained full strength with the seating of John Marshall Harlan on March 28, 1955, remained unchanged in personnel during the October 1955 Term. This was the third term for Chief Justice Earl Warren. To his right sat the senior associate justice, Hugo L. Black, the first of President Franklin Delano Roosevelt's appointees. To the left of the Chief Justice sat Stanley F. Reed, Roosevelt's second appointee. Thereafter, in order of seniority, came Felix Frankfurter and William O. Douglas, two additional Roosevelt appointees; then three Truman appointees, Harold H. Burton, Tom C. Clark and Sherman Minton; and finally the second of Eisenhower's appointees, John Marshall Harlan.

Harlan, during his first full term on the Court, defined his position as one of vigorous conservatism. In fact, Harlan's voting pattern was distinctly the most conservative on the entire Court. This can be demonstrated by the data on the justices'

disagreement rates, which show that Harlan disagreed with *each* of the Court's four most liberal justices more than did any other justice.²¹ The following table, for example, compares Harlan's voting pattern with that of Stanley F. Reed, who had occupied the far right position during the prior two terms.

TABLE 14

REED'S AND HARLAN'S DISAGREEMENT RATES WITH COURT'S
MOST LIBERAL JUSTICES—OCTOBER 1955 TERM

| | Reed | Harlan |
|---------|-------|--------|
| Douglas | 38.3% | 42.3% |
| Black | 35.1% | 43.6% |
| Warren | 31.9% | 38.7% |
| Clark | 20.7% | 34.6% |

In light of the data contained in the preceding table, it seems clear that the replacement of the conservative Robert H. Jackson by Harlan did not change the fundamental balance between the liberals and the conservatives on the Court. It may, however, have had some effect on the voting of Felix Frankfurter. Throughout the years they were on the Court together, Frankfurter and Harlan disagreed relatively infrequently. This pattern strikingly emerged during Harlan's first full term; Frankfurter and Harlan agreed in 90.4% (85/94) of the cases. Perhaps swayed by the appearance of a second articulate conservative on the Court, Frankfurter moved sharply back to the right, leaving the position in the center that he had maintained during the prior term.

During this period, an interesting development also occurred within the Court's liberal wing. Earl Warren, after two terms in the center with Clark, moved squarely into the liberal camp with Douglas and Black, creating a tight three vote liberal bloc. The cohesion on the left is graphically illustrated by the following table showing the agreement rates of the three justices.

21. See app. A, table 3 *infra*.

TABLE 15

DOUGLAS', BLACK'S, AND WARREN'S AGREEMENT
RATES—OCTOBER 1953 TERM

| | Black | Warren |
|---------|-------|--------|
| Douglas | 95.7% | 90.1% |
| Black | — | 96.7% |

The 96.7% agreement rate between Warren and Black was the highest agreement rate for any pair of justices during the entire four terms that comprise the Warren Court's "early years." The movement of Chief Justice Warren, within three short terms from a position to the right of center to a position alongside the Court's two most liberal members presents an interesting question for historical interpretation.

As he moved into the liberal bloc, Warren began to part company with Justice Clark. This is demonstrated by their increased rate of disagreement which doubled that of the prior terms.

TABLE 16

DISAGREEMENT RATES OF WARREN AND CLARK—
OCTOBER 1953, 1954, AND 1955 TERMS

| TERM | DISAGREEMENT RATE |
|-----------------|-------------------|
| Oct. 1953 | 7.8% |
| Oct. 1954 | 8.5% |
| Oct. 1955 | 16.9% |

Clark retained his position in the center of the Court with a slight leaning toward the liberal side.

During the October 1955 Term, the remaining three justices (Minton, Reed, and Burton) became closely aligned. Collectively, they disagreed in approximately ten percent of the cases, a much lower disagreement rate than they had with either the Douglas-Black or the Frankfurter-Harlan pairs.

TABLE 17

MINTON'S, REED'S AND BURTON'S DISAGREEMENT RATES—
OCTOBER 1955 TERM

| | Minton | Reed | Burton |
|---------------|--------|-------|--------|
| Minton | — | 9.6% | 13.8% |
| Reed | | — | 11.7% |
| Burton | | | — |
| LIBERALS | | | |
| Douglas | 39.4% | 38.3% | 40.0% |
| Black | 31.9% | 35.1% | 37.2% |
| CONSERVATIVES | | | |
| Frankfurter | 29.3% | 32.6% | 26.1% |
| Harlan | 24.4% | 25.6% | 21.8% |

Analysis of the justices' dissent rates during the term indicates that no particular group on the Court was dominant. All the dissent rates were in the same relatively low range. Douglas and Black remained content with the bulk of the decisions and continued to dissent at only half the rate of the October 1953 Term. Warren's dissent rate doubled as a result of his movement into the liberal bloc and unwillingness to continue going along with the conservative majority. Similarly, Frankfurter's dissent rate increased considerably as he moved to the right with Harlan and began opposing liberal decisions with increasing frequency. (See Table 18).

As the foregoing discussion indicates, the October 1955 Term marked the appearance of three blocs on the Court: a three-vote liberal bloc (Douglas, Black, and Warren), a three-vote conservative bloc (Minton, Reed, and Burton), and a two-vote conservative bloc (Frankfurter, Harlan). Clark remained in the middle, splitting away from Warren, with a slight inclination towards the liberal position.

The increased tendency toward bloc voting produced a series of five to four and six to three decisions, split along liberal-conservative lines, with the results going both ways; neither bloc assuming a dominant position. Out of the ninety-

TABLE 18
DISSENT RATES—OCTOBER 1955 TERM

| JUSTICE | DISSENT RATE | PRIOR TERM |
|-------------|--------------|------------|
| Douglas | 23.4% | |
| Black | 17.0% | |
| Warren | 14.3% | 7.5% |
| Clark | 14.1% | |
| Minton | 14.9% | |
| Reed | 18.1% | |
| Burton | 20.2% | |
| Frankfurter | 22.8% | 14.6% |
| Harlan | 23.1% | |

four cases decided during the term, thirty saw the entire liberal bloc in opposition to at least one of the conservative blocs.²²

The October 1956 Term

The Supreme Court underwent two personnel changes during the October 1956 Term. The first, which involved a major change in the liberal-conservative balance of power, was the retirement of Sherman Minton on October 15, 1956 and the seating of William J. Brennan on the following day. Minton had been a moderate-conservative. Brennan, in contrast, would spend most of his long term on the Court as a member of the liberal wing; indeed he was destined to become the elder statesman of the liberal cause after the resignation of Douglas in the 1970's.

The second change in Court personnel occurred upon the retirement of Stanley F. Reed on February 25, 1957 and the

22. In 20 cases, the liberal bloc opposed the Minton-Reed-Burton bloc. Of these 20 cases, the conservatives won 13 and the liberals won 7. Justice Clark provided a fourth liberal vote in 10 of the 20 cases, and Frankfurter joined the liberals in 7 of the 20. In 19 cases, the liberal bloc opposed the Frankfurter-Harlan bloc. Of these cases, the liberals won 10 and the conservatives 9. In 13 of the 19 cases, Clark voted with the liberals; in the cases which the liberals won, the additional liberal votes were provided nearly equally by Minton, Reed and Burton. In 9 cases, the liberal bloc was opposed by all members of both conservative blocs.

seating of his successor Charles E. Whittaker on March 25, 1957. Reed, who had served as Solicitor General under Franklin D. Roosevelt, began his Court tenure as a moderate liberal, but later shifted to the right and became a member of the conservative wing. In fact, he had the most conservative voting pattern on the Court during the October 1953 and 1954 Terms. Whittaker, however, was also a conservative, so this change did not substantially alter the basic balance of power on the Court.

Reed's retirement ushered in a period during which the seats to each side of Chief Justice Warren were occupied by Justices Black and Frankfurter respectively. This seating pattern had an unusually symbolic meaning, since Black and Frankfurter were generally recognized as the intellectual leaders of the liberal and conservative wings of the Court. Thus, as the spectator looked at the Court, he could see the leader of the liberal wing (Black) to the left of the Chief and the leader of the conservative wing (Frankfurter) to the right of the Chief.²³ Moreover, with the sole exception of Clark, the seating of the justices symbolized their substantive alignment.²⁴ Thus, if one looked from the gallery, Brennan, Clark, Douglas, and Black were all located to the left of Warren, while Frankfurter, Burton, Harlan, and Whittaker were seated on his right.

During the October 1956 Term, the data concerning the justices' rates of disagreement suggest that the justices who had served previously on the Court divided into two blocs. On the liberal wing were Douglas, Black, and Warren. The Minton-Reed-Burton bloc passed out of existence with the retirement of Reed and Minton, and Burton moved into the Frankfurter-Harlan conservative bloc raising its membership to three. In a high percentage of cases, the two blocs disagreed, with the liberal block exhibiting greater cohesion. (See Table 19).

The Court retained its liberal judicial posture in the October 1956 Term, as shown by the fact that the conservatives again dissented more frequently than the liberals. This reflects the trend that began during the October 1954 Term and continued to a lesser degree during the October 1955 Term.

23. The author can recall attorneys describing how Black and Frankfurter, their minds fully made up, used questions during oral argument as a means for debating with each other, to the extreme discomfiture of the advocates before the Court. See HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* 233-34 (1975).

24. The symbolism would be complete if Clark had been located in the center between the two four-vote blocs.

TABLE 19
DISAGREEMENT RATES—OCTOBER 1956 TERM

| | LIBERALS | | | CONSERVATIVES | | |
|----------------------|----------|-------|--------|---------------|--------|--------|
| | Douglas | Black | Warren | Frankfurter | Harlan | Burton |
| LIBERALS | | | | | | |
| Douglas | — | 10.5% | 14.0% | 47.0% | 49.0% | 51.0% |
| Black | | — | 10.0% | 39.0% | 46.0% | 50.0% |
| Warren | | | — | 39.0% | 40.0% | 41.0% |
| CONSERVATIVES | | | | | | |
| Frankfurter | | | | — | 17.0% | 30.0% |
| Harlan | | | | | — | 23.0% |
| Burton | | | | | | — |

TABLE 20
DISSENTS—OCTOBER 1956 TERM

| JUSTICE | DISSENTS | DISSENT RATE | CHANGE FROM PRIOR TERM |
|----------------------|----------|--------------|------------------------|
| LIBERALS | | | |
| Douglas | 28 | 22.9% | —0.5% |
| Black | 24 | 20.9% | +3.9% |
| Warren | 13 | 10.9% | —3.4% |
| Total | 65 | | |
| CONSERVATIVES | | | |
| Frankfurter | 35 | 28.5% | +5.7% |
| Harlan | 33 | 27.3% | +4.2% |
| Burton | 36 | 29.5% | +9.3% |
| Total | 104 | | |

An obvious hypothesis, based upon Justice Brennan's status as champion of the liberal cause in the 1970's, would be that Brennan's arrival on the Court played a major role in the liberal trend. With this hypothesis in mind, it is interesting to examine Justice Brennan's voting pattern during his first term.

TABLE 21

BRENNAN'S DISAGREEMENT RATES—OCTOBER 1956 TERM

| JUSTICE | DISAGREEMENTS | DISAGREEMENT RATE |
|----------------------|---------------|-------------------|
| LIBERALS | | |
| Douglas | 23 | 20.5% |
| Black | 19 | 18.0% |
| Warren | 12 | 11.0% |
| Total | 54 | |
| CONSERVATIVES | | |
| Frankfurter | 30 | 26.5% |
| Harlan | 34 | 31.0% |
| Burton | 39 | 35.0% |
| Total | 103 | |

Table 21 demonstrates that: (1) Brennan voted with the liberals more than with the conservatives; (2) he did not, however, move directly into the tight liberal bloc but instead was situated toward the center; and (3) he agreed with Chief Justice Warren more than with any other justice.²⁵ When Brennan's voting pattern is compared with his predecessor's (Minton) during the prior term, it seems clear that Brennan's appointment marked a definite shift to the left in terms of individual judicial philosophy. (See Table 22).

Justice Tom C. Clark remained in his accustomed position between the two wings. In fact, he was almost precisely in the center as the following table shows.

25. The only justice not included in Table 21 is Justice Clark. Brennan's disagreement rate with Clark was 28.0%.

TABLE 22

DISAGREEMENT RATES OF MINTON (OCTOBER 1955 TERM)
AND BRENNAN (OCTOBER 1956 TERM)

| JUSTICE | Minton Oct. 1955 | Brennan Oct. 1956 |
|----------------------|---------------------|----------------------|
| LIBERALS | | |
| Douglas | 39.4% | 20.5% |
| Black | 31.9% | 18.0% |
| Warren | 28.6% | 11.0% |
| CONSERVATIVES | | |
| Harlan | 24.4% | 31.0% |
| Burton | 13.8% | 35.0% |

TABLE 23

CLARK'S VOTING PATTERN—OCTOBER 1956 TERM

| JUSTICE | AGREEMENTS | DISAGREEMENTS |
|----------------------|------------|---------------|
| LIBERALS | | |
| Douglas | 78 | 45 |
| Black | 76 | 47 |
| Warren | 89 | 34 |
| Total | 243 | 126 |
| CONSERVATIVES | | |
| Frankfurter | 78 | 46 |
| Harlan | 78 | 45 |
| Burton | 82 | 41 |
| Total | 238 | 132 |

Analysis of the cases decided during the term shows that the liberals, after a slow start, began winning an increased percentage of cases during the later part of the term. Early in

the term, Douglas and Black had the highest number of dissents. Thereafter, they dropped off and Harold Burton assumed the lead. During this stretch, the liberals (Douglas, Black, Warren and Brennan) kept picking up at least one vote from the moderate and conservative forces, often Clark, sometimes Frankfurter, and on occasion even Burton.

The Court's liberalism during the October 1956 Term has been widely recognized in historical writings.²⁶ The most important and controversial issue involved the degree to which the government could infringe individual rights in order to identify and suppress allegedly subversive activities.²⁷ The culmination of the trend occurred on June 17, 1957, one of the most notable days in the history of the Court. Here is Alpheus Thomas Mason's account of the day, which provides an appropriate finale for this discussion of the first four terms of the Warren era:

At a single sitting, June 17, 1957, the judiciary had a field day. It upheld the right of anyone to preach the overthrow of government, so long as the preaching is limited to "abstract principle" and does not openly advocate specific action to overthrow government. It limited the power of congressional committees to make investigations and to require witnesses to testify. It denied the power of states to require witnesses to testify in investigations authorized by state legislatures. It restricted the power of officials to discharge government employees.²⁸

Basically, the October 1956 Term left the Court with two blocs: Douglas, Black, Warren, and Brennan on the liberal wing; Frankfurter, Harlan, and Burton on the conservative wing. During the term, the conservatives dissented somewhat more frequently than the liberals, indicating a slight liberal dominance. This dominance was largely attributable to Justice Brennan who, during his first term, sided with the liberals more than the conservatives. Justice Whittaker, who replaced Reed late in the term, potentially provided a fourth conservative vote. Clark remained balanced almost precisely in the center. Thus, though a wave of strong liberal decisions were issued

26. *E.g.*, A.T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 3-4 (1958).

27. The leading cases included *Service v. Dulles*, 354 U.S. 363 (1957); *Yates v. United States*, 354 U.S. 298 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957); *Jencks v. United States*, 353 U.S. 657 (1957); *Königsberg v. State Bar*, 353 U.S. 252 (1957); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

28. A.T. MASON, *supra* note 26, at 3-4.

at the end of the term, the structure of the Court's personnel suggested the possibility of 4-1-4 splits in future votes.

The preceding discussion has focused primarily on the voting patterns among the justices within each of the Warren Court's first four terms. Additional light is shed on the impact of the statistical data when the voting patterns of the first four terms are examined as a collective unit.

TRENDS DURING THE "EARLY YEARS" OF THE WARREN COURT

Growth of Liberalism

The most salient trend during Earl Warren's first four terms was the growth of liberalism on the United States Supreme Court. This trend appears to be the defining characteristic of what deserves to be called the "first period" of the Warren era. The trend can be convincingly demonstrated from a variety of perspectives.

First, consider the voting patterns of the Court's two most liberal members, Douglas and Black.²⁹

TABLE 24
DOUGLAS' AND BLACK'S DISSENT RATES

| TERM | Douglas | Black |
|-----------|---------|-------|
| Oct. 1953 | 41.4% | 36.6% |
| Oct. 1954 | 24.7% | 16.0% |
| Oct. 1955 | 23.4% | 17.0% |
| Oct. 1956 | 22.9% | 20.9% |

Douglas and Black began the Warren era with the highest dissent rates (Douglas, 41.4%; Black, 36.6%) of any of the justices in any of the four terms.³⁰ Thereafter they dropped off to roughly half that level. Obviously, Douglas and Black became much happier with the Court's decisions after the October 1953 Term.

29. Appendix A shows that, in each of the four terms, Douglas occupied the far left position on the Court and Black occupied the position second from the far left.

30. The next highest rate was Justice Reed's 31.7% dissent rate during the October 1954 Term.

In addition, Douglas and Black moved from a position of lonely isolation to one of membership in an expanded liberal wing of four. This can be shown by comparing their disagreement rates with the next two most liberal justices during the fourth terms.

TABLE 25
DOUGLAS' AND BLACK'S DISAGREEMENT RATES
WITH WARREN AND CLARK/BRENNAN

| | Warren | Clark/Brennan |
|----------------|--------|-----------------|
| Douglas | | |
| Oct. 1953 Term | 36.9% | 46.8% (Clark) |
| Oct. 1954 Term | 21.5% | 26.3% (Clark) |
| Oct. 1955 Term | 9.9% | 26.1% (Clark) |
| Oct. 1956 Term | 14.0% | 20.5% (Brennan) |
| Black | | |
| Oct. 1953 Term | 34.8% | 38.2% (Clark) |
| Oct. 1954 Term | 16.5% | 17.5% (Clark) |
| Oct. 1955 Term | 3.3% | 18.5% (Clark) |
| Oct. 1956 Term | 10.0% | 18.0% (Brennan) |

The third vote in the emergent liberal coalition was provided by Chief Justice Warren, who moved from a right-of-center position in his first term to a position in the heart of the liberal bloc in the third and fourth terms.

TABLE 26

WARREN'S DISAGREEMENT RATES—A SHIFT TO THE LEFT

| TERM | LIBERALS | | CONSERVATIVES | |
|-----------|----------|-------|---------------|----------------|
| | Douglas | Black | Burton | Reed/Harlan |
| Oct. 1953 | 36.9% | 34.8% | 25.0% | 25.4% (Reed) |
| Oct. 1954 | 21.5% | 16.5% | 25.6% | 36.3% (Reed) |
| Oct. 1955 | 9.9% | 3.3% | 34.1% | 38.7% (Harlan) |
| Oct. 1956 | 14.0% | 10.0% | 41.0% | 40.0% (Harlan) |

Justice Clark moved initially to the left with Warren, but then parted company with the liberals and moved toward the right during the October 1956 Term.

TABLE 27

CLARK'S DISAGREEMENT RATES WITH DOUGLAS AND BLACK

| TERM | Douglas | Black |
|-----------|---------|-------|
| Oct. 1953 | 46.8% | 38.2% |
| Oct. 1954 | 26.3% | 17.5% |
| Oct. 1955 | 25.1% | 18.5% |
| Oct. 1956 | 38.8% | 39.4% |

As a result of his shift to the right and Warren's shift to the left, Clark parted company with Warren toward the end of the period.

TABLE 28

CLARK'S AGREEMENT RATES WITH WARREN

| | |
|----------------|-------|
| Oct. 1953 Term | 7.8% |
| Oct. 1954 Term | 8.5% |
| Oct. 1955 Term | 16.9% |
| Oct. 1956 Term | 27.8% |

Just when Justice Clark moved away from the liberal bloc, Justice Brennan arrived on the Court to take his place. In fact, Brennan, in his initial term, agreed with Douglas and Black more often than Clark did at any time in the four terms. Thus, at the end of the October 1956 Term the Court had prospects for its first four-vote liberal bloc since the Douglas-Black-Murphy-Rutledge coalition in the late 1940's.

Decline of Conservatism

During the period covered by this article, the Court's conservative wing dropped in size from seven to four. At the end of the October 1952 Term, the conservative forces included Chief Justice Vinson, Felix Frankfurter, Robert H. Jackson, Harold H. Burton, Stanley F. Reed, Sherman Minton, and Tom C. Clark. The replacement of Jackson by Harlan in 1955, and Reed by Whittaker in 1957, did not change matters, but the replacement of Vinson by Warren in 1953, and Minton by Brennan in 1956 represented major losses for the conservatives and gains for the liberals. By the end of the October 1956 Term, the conservative bloc included only Frankfurter, Harlan, Burton and Whittaker.

With the increasing strength on the left came increasing dissent on the right. During the October 1953 Term when they were dominant, the Court's most conservative members had dissent rates below 20%. By the October 1956 Term, dissent rates on the right had risen to near the 30% level.

TABLE 29

DISSENT RATES OF CONSERVATIVE JUSTICES

| TERM | Frankfurter | Burton | Reed | Harlan |
|-----------|-------------|--------|-------|--------|
| Oct. 1953 | 15.1% | 15.1% | 16.2% | |
| Oct. 1954 | 14.6% | 18.3% | 31.7% | |
| Oct. 1955 | 22.8% | 20.2% | 18.1% | 23.1% |
| Oct. 1956 | 28.5% | 29.5% | | 27.3% |

Rates of disagreement among the Court's most extreme left and right wing members started out around 50%, dropped substantially lower by the third term and then returned to the 50% level during the fourth term.

TABLE 30
HIGHEST DISAGREEMENT RATES

| TERM | DISAGREEMENT RATE | JUSTICE |
|-----------|-------------------|----------------|
| Oct. 1953 | 53.8% | Douglas-Reed |
| | 53.0% | Black-Reed |
| | 51.4% | Douglas-Burton |
| Oct. 1954 | 49.4% | Douglas-Reed |
| | 46.7% | Douglas-Harlan |
| | 44.3% | Douglas-Burton |
| Oct. 1955 | 43.6% | Black-Harlan |
| | 42.3% | Douglas-Harlan |
| | 40.4% | Douglas-Burton |
| Oct. 1956 | 51.0% | Douglas-Burton |
| | 50.0% | Black-Burton |
| | 49.0% | Douglas-Harlan |

The same pattern is reflected in the data concerning average number of dissents per case.

TABLE 31
AVERAGE DISSENTS PER CASE

| | |
|----------------|------|
| Oct. 1953 Term | 1.89 |
| Oct. 1954 Term | 1.57 |
| Oct. 1955 Term | 1.66 |
| Oct. 1956 Term | 1.88 |

The Court's swing to the left during the early years of the Warren era is plainly in evidence when one considers the changes in dissent rates of Douglas, Black, Frankfurter and Burton.

TABLE 32

DISSENT RATES OF LIBERALS AND CONSERVATIVES—
OCTOBER 1953 AND 1956 TERMS

| JUSTICE | DISSENT RATE | | CHANGE |
|----------------------|--------------|-----------|--------|
| | OCT. 1953 | OCT. 1956 | |
| LIBERALS | | | |
| Douglas | 41.4% | 22.9% | —18.5% |
| Black | 36.6% | 20.9% | —15.7% |
| CONSERVATIVES | | | |
| Frankfurter | 15.1% | 28.5% | +13.4% |
| Burton | 15.1% | 29.5% | +14.5% |

CONCLUSION

The early years of the Warren era on the United States Supreme Court were marked by a shift toward liberalism on the Court. The liberal wing increased from two to four justices. The conservative wing decreased from seven to four. Moreover, the conservative wing was far less cohesive than the liberal wing. In a number of cases, conservative justices such as Frankfurter split off and voted with the liberals. As a result of these developments, the conservatives lost the dominance they held during the October 1953 Term and ended the early years slightly on the losing end of the voting statistics. The statistical evidence of the Court's shift toward a more liberal posture corroborates the conclusion reached by many scholars that the 1953-1957 period marked the emergence of liberalism on the Court from the shadows of the McCarthy-cold war era.

Appendix A

TABLE 1

DISAGREEMENT RATES—OCTOBER 1953 TERM

| | Douglas (70) ^a | Black (71) | Warren (68) | Clark (69) | Minton (73) | Frankfurter (73) | Jackson (64) | Burton (73) | Reed (68) |
|-------------|------------------------------|---------------|----------------|---------------|----------------|---------------------|-----------------|----------------|--------------|
| Douglas | % ^b | 14.7 | 36.9 | 46.8 | 42.9 | 45.7 | 48.4 | 51.4 | 53.8 |
| | # ^c | 10/68 | 24/65 | 29/62 | 30/70 | 32/70 | 30/62 | 26/70 | 35/65 |
| Black | % | | 34.8 | 38.2 | 45.1 | 40.8 | 46.0 | 45.1 | 53.0 |
| | # | | 23/66 | 26/68 | 32/71 | 29/71 | 29/63 | 32/71 | 35/66 |
| Warren | % | | | 7.8 | 30.9 | 26.5 | 27.1 | 25.0 | 25.4 |
| | # | | | 5/64 | 21/68 | 18/68 | 16/59 | 17/68 | 16/63 |
| Clark | % | | | | 26.1 | 21.7 | 21.7 | 21.7 | 21.9 |
| | # | | | | 18/69 | 15/69 | 13/60 | 15/69 | 14/64 |
| Minton | % | | | | | 32.9 | 23.1 | 24.8 | 26.5 |
| | # | | | | | 24/73 | 15/64 | 18/73 | 18/68 |
| Frankfurter | % | | | | | | 18.7 | 24.6 | 32.3 |
| | # | | | | | | 12/64 | 18/73 | 2/68 |
| Jackson | % | | | | | | | 23.4 | 31.7 |
| | # | | | | | | | 15/64 | 19/60 |
| Burton | % | | | | | | | | 11.8 |
| | # | | | | | | | | 8/68 |
| Reed | % | | | | | | | | |
| | # | | | | | | | | |

a Total number of cases in which justice participated

b disagreement rate

c ratio of disagreements to number of cases in which both justices participated

TABLE 2
DISAGREEMENT RATES—OCTOBER 1954 TERM

| | Douglas (81) a | Black (81) | Warren (80) | Clark (81) | Frankfurter (82) | Minton (82) | Burton (80) | Harlan (15) | Reed (82) |
|-------------|-------------------|---------------|----------------|---------------|---------------------|----------------|----------------|----------------|--------------|
| Douglas | % b | 15.0 | 21.5 | 26.3 | 33.3 | 39.5 | 44.3 | 46.7 | 49.4 |
| | # c | 12/80 | 17/79 | 21/80 | 27/81 | 32/81 | 35/79 | 7/15 | 40/81 |
| Black | % | | 16.5 | 17.5 | 23.5 | 32.1 | 35.4 | 40.0 | 43.2 |
| | # | | 13/79 | 14/80 | 19/81 | 26/81 | 28/79 | 6/15 | 35/81 |
| Warren | % | | | 8.5 | 20.0 | 23.8 | 25.6 | 40.0 | 36.3 |
| | # | | | 7/80 | 16/80 | 19/80 | 20/78 | 6/15 | 29/80 |
| Clark | % | | | | 21.0 | 22.2 | 21.5 | 40.0 | 29.6 |
| | # | | | | 17/81 | 18/81 | 17/79 | 6/15 | 24/81 |
| Frankfurter | % | | | | | 28.0 | 21.3 | 13.3 | 39.2 |
| | # | | | | | 23/82 | 17/80 | 2/15 | 32/82 |
| Minton | % | | | | | | 25.0 | 26.7 | 18.3 |
| | # | | | | | | 20/80 | 4/15 | 15/82 |
| Burton | % | | | | | | | 26.7 | 20.0 |
| | # | | | | | | | 4/15 | 18/80 |
| Harlan | % | | | | | | | | 46.7 |
| | # | | | | | | | | 7/15 |
| Reed | % | | | | | | | | |
| | # | | | | | | | | |

a Total number of cases in which justice participated

b disagreement rate

c ratio of disagreements to number of cases in which both justices participated

TABLE 3
DISAGREEMENT RATES—OCTOBER 1955 TERM

| | Douglas (94) a | Black (94) | Warren (91) | Clark (92) | Minton (94) | Reed (94) | Burton (94) | Frankfurter (92) | Harlan (78) |
|-------------|-------------------|---------------|----------------|---------------|----------------|--------------|----------------|---------------------|----------------|
| Douglas | % ^b | 4.3 | 9.9 | 26.1 | 39.4 | 38.3 | 40.4 | 39.1 | 42.3 |
| | # ^c | 4/94 | 9/91 | 24/92 | 37/94 | 36/94 | 38/94 | 36/92 | 33/78 |
| Black | % | | 3.3 | 18.5 | 31.9 | 35.1 | 37.2 | 35.9 | 43.6 |
| | # | | 3/91 | 17/92 | 30/94 | 33/94 | 35/94 | 33/92 | 34/78 |
| Warren | % | | | 16.9 | 28.6 | 31.9 | 34.1 | 36.0 | 38.7 |
| | # | | | 15/89 | 26/91 | 29/91 | 31/91 | 32/89 | 29/75 |
| Clark | % | | | | 19.6 | 20.7 | 29.3 | 32.2 | 34.6 |
| | # | | | | 18/92 | 19/92 | 27/92 | 29/90 | 27/78 |
| Minton | % | | | | | 9.6 | 13.8 | 29.3 | 24.4 |
| | # | | | | | 9/94 | 13/94 | 27/92 | 19/78 |
| Reed | % | | | | | | 11.7 | 32.6 | 25.6 |
| | # | | | | | | 11/94 | 30/92 | 20/78 |
| Burton | % | | | | | | | 26.1 | 21.8 |
| | # | | | | | | | 24/92 | 17/78 |
| Frankfurter | % | | | | | | | | 9.6 |
| | # | | | | | | | | 9/94 |
| Harlan | % | | | | | | | | |
| | # | | | | | | | | |

a Total number of cases in which justice participated

b disagreement rate

c ratio of disagreements to number of cases in which both justices participated

TABLE 4
DISAGREEMENT RATES—OCTOBER 1956 TERM

| | | Douglas (122) ^a | Black (115) | Warren (119) | Brennan (113) | Clark (117) | Reed/ Whittaker* | Frankfurter (123) | Harlan (121) | Burton (122) |
|--------------------|----------------|-------------------------------|----------------|-----------------|------------------|----------------|---------------------|----------------------|-----------------|-----------------|
| Douglas | % ^b | | 10.5 | 13.6 | 20.5 | 38.8 | | 46.7 | 49.2 | 51.2 |
| | # ^c | | 12/114 | 16/118 | 23/112 | 45/116 | | 51/122 | 59/120 | 62/121 |
| Black | % | | | 9.9 | 18.1 | 39.4 | | 39.1 | 46.0 | 50.0 |
| | # | | | 11/111 | 19/105 | 43/109 | | 45/115 | 52/113 | 57/114 |
| Warren | % | | | | 11.0 | 27.8 | | 26.5 | 30.6 | 34.8 |
| | # | | | | 12/109 | 32/115 | | 47/119 | 45/112 | 48/117 |
| Brennan | % | | | | | 28.0 | | 26.5 | 30.6 | 34.8 |
| | # | | | | | 30/107 | | 30/113 | 34/111 | 39/112 |
| Clark | % | | | | | | | 38.5 | 38.5 | 33.3 |
| | # | | | | | | | 45/117 | 45/117 | 39/117 |
| Reed/ Whittaker | % | | | | | | | | | |
| | # | | | | | | | | | |
| Frankfurter | % | | | | | | | | 17.4 | 30.3 |
| | # | | | | | | | | 21/121 | 37/122 |
| Harlan | % | | | | | | | | | 23.3 |
| | # | | | | | | | | | 28/120 |
| Burton | % | | | | | | | | | |
| | # | | | | | | | | | |

a Total number of cases in which justice participated

b disagreement rate

c ratio of disagreements to number of cases in which both justices participated

* data omitted because too small to be meaningful

Appendix B

TABLE 1
 DISSENT RATES—OCTOBER 1953 TERM

| JUSTICE | CASES | DISSENTS | RATE |
|-------------|-------|----------|-------|
| Douglas | 70 | 29 | 41.4% |
| Black | 71 | 26 | 36.6% |
| Warren | 68 | 8 | 11.8% |
| Clark | 69 | 6 | 8.7% |
| Minton | 73 | 17 | 23.3% |
| Frankfurter | 73 | 11 | 15.1% |
| Jackson | 64 | 13 | 20.3% |
| Burton | 73 | 11 | 15.1% |
| Reed | 68 | 11 | 16.2% |

TABLE 2
 DISSENT RATES—OCTOBER 1954 TERM

| JUSTICE | CASES | DISSENTS | RATES | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 81 | 20 | 24.7% | —16.7% |
| Black | 81 | 13 | 16.0% | —20.2% |
| Warren | 80 | 6 | 7.5% | — 4.3% |
| Clark | 81 | 5 | 6.0% | — 2.7% |
| Frankfurter | 82 | 12 | 14.6% | — 0.5% |
| Minton | 82 | 15 | 18.3% | — 5.0% |
| Burton | 82 | 15 | 18.3% | + 3.2% |
| Harlan | 15 | 4 | 26.7% | — |
| Reed | 82 | 26 | 31.7% | +15.5% |

TABLE 3
DISSENT RATES—OCTOBER 1955 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 94 | 22 | 23.4% | — 1.3% |
| Black | 94 | 16 | 17.0% | + 1.0% |
| Warren | 91 | 13 | 14.3% | + 6.8% |
| Clark | 92 | 12 | 14.1% | + 8.1% |
| Minton | 94 | 14 | 14.9% | — 3.4% |
| Reed | 94 | 17 | 18.1% | —13.6% |
| Burton | 94 | 19 | 20.2% | + 1.9% |
| Frankfurter | 92 | 21 | 22.8% | + 8.2% |
| Harlan | 78 | 18 | 23.1% | — 3.6% |

TABLE 4
DISSENT RATES—OCTOBER 1956 TERM

| JUSTICE | CASES | DISSENTS | RATE | CHANGE |
|-------------|-------|----------|-------|--------|
| Douglas | 122 | 28 | 22.9% | — 0.5% |
| Black | 115 | 24 | 20.9% | + 3.9% |
| Warren | 119 | 13 | 10.9% | — 3.4% |
| Brennan | 113 | 12 | 10.6% | — |
| Clark | 117 | 21 | 17.9% | + 3.8% |
| Reed | 47 | 6 | 12.8% | — 5.3% |
| Whittaker | 41 | 6 | 14.6% | — |
| Frankfurter | 123 | 35 | 28.5% | + 5.7% |
| Harlan | 121 | 33 | 27.3% | + 4.2% |
| Burton | 122 | 36 | 29.5% | + 9.3% |