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Justice Harold H. Burton and the Work of the Supreme Court

David N. Atkinson

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DAVID N. ATKINSON*

ALTHOUGH RELATIVELY NEGLECTED BY SCHOLARS, Harold H. Burton served for thirteen years on the United States Supreme Court during a turbulent period of innovative constitutional policymaking.[1] The postwar years furnished the Court with a veritable avalanche of questions which had been only partially addressed, if at all, by preceding Supreme Courts. As one of nine, he was given a full opportunity to join in fashioning the new set of relationships between the individual and the government which had earlier been set in motion as a consequence of the constitutional readjustment of 1937. Only Justices Hugo L. Black, Felix Frankfurter, and William O. Douglas remained with him on the Court for the duration of his service. Throughout, Justice Burton's views were often sympathetic to government positions.[2] Nonetheless, he was neither as dogmatic nor as predictable as has sometimes been supposed.[3] Hard working and open-minded, he was inevitably involved in the cross currents of small group interaction within the Supreme Court. Consequently, the purpose of this essay — relying on law clerk questionnaires and interviews — is to describe and evaluate his intra-Court behavior.[4]

Elsewhere I have contended that the neglect of what are often described as "minor" Justices is unfortunate.[5] This belief has been intensified by two recent developments. First, the recommendations from the Freund Study

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[1] Harold Hitz Burton was born on June 22, 1888 in Jamaica Plains, Massachusetts. He graduated Summa Cum Laude and Phi Beta Kappa from Bowdoin College in 1909, and from Harvard Law School in 1912. He worked as an attorney in Cleveland, Salt Lake City and Boise before serving as a Captain in the 361st Infantry in World War I. After the war, he returned to Cleveland as an attorney, eventually serving in the Ohio State Legislature (1929), Director of Law for the City of Cleveland (1929-1932) and Mayor of the City of Cleveland (1934-1941). He was elected as Republican Senator from Ohio in 1941 and was appointed to the United States Supreme Court by President Truman in 1945. Justice Burton retired from the Court on October 13, 1958 and died on October 28, 1964. M. BERRY, STABILITY, SECURITY, AND CONTINUITY 3-26 (1978). His values, reference groups, and personality structure are considered in Danelski, *Legislative and Judicial Decision-Making: The Case of Harold H. Burton*, in POLITICAL DECISION-MAKING (1970).

[2] *See* Atkinson, *American Constitutionalism Under Stress: Mr. Justice Burton's Response to National Security Issues*, 9 HOUST. L. REV. 271 (1971).

[3] *See* Atkinson & Neuman, *Toward A Cost Theory of Judicial Alignments: The Case of the Truman Bloc*, 13 MIDWEST JOURNAL OF POLITICAL SCIENCE 271 (1969).

[4] From 1945 through 1958 twenty-three law clerks served with Justice Burton. A questionnaire was sent to each of these individuals. Eight responses were received, most of them quite detailed. Four others who did not respond in writing consented to an interview, where the same topics presented in the questionnaire were discussed. The participating clerks ranged across the entire spectrum of Justice Burton's Supreme Court career. What is revealed in this essay about his judicial behavior represents a consensus of attitudes among the clerks.

[5] Atkinson, *Minor Supreme Court Justices: Their Characteristics and Importance*, 3 FLORIDA ST. U. L. REV. 348 (1975).

Group and the proposed National Court of Appeals have raised serious questions about the intra-Court procedures and practices followed by the Justices in recent years.[6] Perhaps an additional perspective can be gained by a consideration of the factual situation existing during the recent past.[7] And second, the role of support personnel and the discretion political elites — be they Presidents or Justices — delegate to them has again become a topic of current interest conducive to an appraisal of the practices of the 1940's and 1950's inside the Supreme Court.

I. THE OTHER JUSTICES

Justice Burton sat with three Chief Justices: Harlan F. Stone, Fred Vinson, and Earl Warren, and thirteen Associate Justices: Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, James F. Byrnes, Wiley B. Rutledge, Tom C. Clark, Sherman Minton, John Marshall Harlan, William J. Brennan, and Charles E. Whittaker. Despite the internecine unpleasantries which periodically befell relationships among some of the others,[8] Justice Burton never yielded his affability. He acted with unfailing courtesy toward his colleagues. As one of his law clerks recalled: "His relationships with the other Justices were very cordial. He was a calm, patient, thorough and pleasant man who generated affection. He had respect for the personalities of his fellow Justices and made allowances for their human qualities."[9] None of the law clerks remembered any altercations of any kind, nor, given the Justice's personality makeup, would they be expected. "He was always extremely fair in his appraisal of the positions of the other Justices and was never outspoken in criticism of their positions or their personal traits or characteristics."[10] Even Justice Burton's private diary, which he meticulously kept throughout his Supreme Court years, is devoid of critical evaluations of any of the Justices.

Within the Court, he seemed closest to Justice Frankfurter. One clerk found this rather remarkable "when one considers Frankfurter as a supra intellectual scholar and Burton as a man of practical legislative experience with little intellectual charisma. Frankfurter frequently consulted with Burton and in fact spent a good deal of time lobbying with him."[11] There were circumstances which encouraged a close relationship between Justices Burton and Frankfurter. Justice Burton had replaced Justice Roberts, whom Justice Frankfurter liked (though he thought him naive). Justice Burton

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[6] FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (Washington, D.C.: Administrative Office of U.S. Courts, 1973).

[7] The data here reported would tend to suggest that proposals for institutional changes ought to be taken under the most serious advisement inasmuch as personal characteristics may be more important in assessing a Justice's ability to cope with the work of the Supreme Court than even the institutional environment. *See* Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973).

[8] *See generally*, FROM THE DIARIES OF FELIX FRANKFURTER (J. Lash ed. 1975); Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 Nw. U. L. Rev. 716 (1974).

[9] Questionnaire reply from one of Justice Burton's law clerks [hereinafter cited as Clerk questionnaire reply].

[10] Clerk questionnaire reply, *supra* note 9.

[11] *Id.*

graduated from Harvard Law School, of which Justice Frankfurter was an alumnus.[12] He also of course came increasingly to see Justice Burton as an ally in constitutional struggles.

Nonetheless, Justice Frankfurter's enthusiastic attempts to win an additional vote which, when they occurred, usually followed a conference of the Court, were not always successful. "On one or two occasions such sojourns appeared to be successful," a clerk recalled, "but on more occasions the efforts of a particular member of the Court to dissuade him might result only in a minor change of position upon subsidiary points which would not fully change his vote."[13] Justice Burton received these overtures patiently because "he felt that it was important to hear every side of an argument as objectively as he could and that when he disagreed with a colleague he should do so in such a manner that no rancor could possibly result from the disagreement."[14]

Justice Burton did not himself participate to the same extent as some of the others did in behind-the-scenes discussions. In fact one clerk suggested that, in the normal situation, the other Justices would see an opinion by Justice Burton for the first time when it was first circulated. If he was troubled by a point of law he would attempt to clarify the matter in his mind by conferring with Justice Frankfurter or, in the alternative after 1955, Justice Harlan.

Although always cordial toward his associates, Justice Burton gave the impression of being somewhat emotionally detached from them. He seemed to have little contact with most members of the Court, except of a very general nature. Every year he would ask the other Justices to sign two Court pictures of himself which he would then give to his law clerks. He attached importance to this and it may have been the only "favor" he asked of anyone during the course of a term. He was not a disputant, he was never contentious, and chamber visiting was not a normal part of his daily routine. Serious and hard working by disposition, his principal interaction with the other Justices was during the noon lunches which he attended when he did not eat alone in his office.

II. Opinion Writing

Justice Burton often expressed the idea "that an opinion should attempt to 'orient the entire subject involved in the issue at hand' so that the opinion would 'not only explain the basis for the decision' but serve to re-orient a larger body of law 'so that the opinion would furnish clear guideposts for related problems.' "[15] The clerk explained the origin of this view:

> He attributed this philosophy to Justice Reed and stated that he regarded Justice Reed's opinions as the best models to follow. [We] clerks were constantly making strenuous efforts to wean him from the "Reed" philosophy as all of the Supreme Court clerks regarded the long, rambling and tedious opinions of Mr. Justice Reed as the

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[12] Interview with one of Justice Burton's law clerks [hereinafter cited as Clerk interview].

[13] Clerk questionnaire reply, *supra* note 9.

[14] *Id.*

[15] *Id.*

> worst possible models to follow. Justice Frankfurter was also acutely aware of Justice Burton's penchant for the long, rambling and repetitive opinions and rather consistently attempted to confine Justice Burton to writing about the particular case he was deciding. I think that Justice Frankfurter and several generations of clerks were somewhat successful in discrediting the "Reed Opinion" outlook which Justice Burton initially accepted.[16]

Opinion writing was a self-imposed drudgery for Justice Burton. He wore himself out re-drafting opinions. He would re-draft opinions six to twelve times, and in each draft the sentences would get a little longer. "His clerks constantly attempted to pare the sentences down and to convince him that he had resummarized the same arguments two or three times and we were only moderately successful."[17]

The opinions followed an elaborate format. He would (1) state the questions for decision, which was always the hallmark of a Burton opinion even if the questions were so complex and multiple that an initial one-sentence statement was practically impossible. He would then, in order, (2) explain why certiorari had been granted in certiorari cases; (3) state the history and background of the problem; (4) analyze all the related opinions and precedents and attempt to show the direction toward which each pointed; (5) detail the reasons for, and the precedents favoring, the ruling he was announcing; (6) re-summarize all of the reasons for the ruling; (7) state any intended limitation on the scope of the ruling; (8) and announce that the judgment was either reversed or affirmed. There were many occasions when other members of the Court would insist that parts of his opinions be eliminated or pared as they were aware of his tendency to decide too much.

The opinions were always prepared in accordance with a standardized procedure:

> A law clerk would write a brief memo on the basis of the Petition for Certiorari or statement of jurisdiction. Each memo would conclude with the clerk's own recommendation. Justice Burton would read the Petition for Certiorari or statement of jurisdiction and, after doing whatever research he thought necessary, write (in longhand) his own brief analysis. Only after doing this would he read the clerk's memo and check his conclusion against the clerk's conclusion. On Friday nights in advance of each Saturday's conference (the conferences were then held on Saturday mornings), commencing about 7:00 p.m. he met with both his clerks and discussed each Petition for Certiorari (or statement of jurisdiction) set for decision on the next day. In some cases a lively discussion might ensue until he reached a conclusion. Most of the conferences lasted until about 11:00 p.m.[18]

The cases scheduled for discussion at the Court's conference on Saturday

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[16] *Id.*

[17] *Id.*

[18] *Id.*

would also be discussed at the Friday night conference.[19] The business of the Friday night conference in Justice Burton's chambers was described as follows:

> On some occasions, the clerk might succeed in changing Justice Burton's tentative decision and on many cases he would convince the clerk that the clerk's initial recommendation was not the best solution. In most cases the Friday night conferences served to narrow some of the Justice's (or clerk's) conclusions about the case.[20]

When cases were set for oral argument, the clerk who had written the memorandum for the Petition for Certiorari (or statement of jurisdiction) would review the briefs and write a "Bench Memo." This was developed in some detail and would include an analysis of the principal precedents relied on by both sides. It would conclude with the clerk's recommendation. The Bench Memos would usually be read before oral argument, and Justice Burton would take them with him to the bench during oral argument. If there were matters of special concern indicated in a Bench Memo or problems the clerk thought ought to be more fully explored, Justice Burton might (though not often) direct a question to counsel aimed at clarifying such matters.

When Justice Burton was assigned to write the opinion of the Court, he would ask the clerk who had by then written two memoranda on the case to write a draft opinion. Knowing that Justice Burton would himself write a very long draft opinion, the clerks usually wrote a short opinion with the hope it would shorten the draft. "He prepared his own draft before looking at the clerk's draft and our efforts were therefore usually wasted," a clerk recalled. "On some occasions he would borrow a sentence or two (or maybe a paragraph) from the clerk's draft in preparing subsequent drafts of his own."[21] Justice Burton's own opinion was usually written on the narrowest possible grounds. He hewed closely to the facts of a given case and avoided broadly stated or quotable pronouncements. "On the whole, the final official opinion he published was virtually entirely a product of his own pen."[22] As Table I indicates, Justice Burton was an infrequent dissenter. He dissented at a rate substantially below many others on the Court. Although the subject was seldom discussed, a clerk surmised that "he felt that in the normal case dissents served little useful purpose. He had a strong sense of the history of the Court as an institution and the value of precedents."[23] Another clerk emphasized an institutionally disfunctional aspect of frequent dissenting: "Justice Burton felt that dissenting opinions had a divisive influence on the Court and weakened respect for its work and should be avoided in most cases.

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[19] During the Chief Justiceship of Earl Warren the Saturday conference was set back to Friday. Thereafter Justice Burton's own office conference with his clerks was held on Thursday evening.

[20] Clerk questionnaire reply, *supra* note 9.

[21] *Id.*

[22] *Id.* Another clerk offered a quantitative estimate: "In most cases the clerks prepared a draft opinion which was never used. The Justice's opinion was in every case 95% to 100% his own language." *Id.*

[23] *Id.*

In many instances he did not indicate a disagreement with the majority even though he might have actually not agreed.[24]

Although Justice Burton preferred to reconcile conflicting views within a single opinion, he would dissent if this proved impossible and if the dissent might have a tendency to narrow the doctrine announced in the majority opinion.

III. Oral Argument

Justice Burton almost never asked questions during oral argument. However he listened carefully to what the lawyers said. "I seem to recall," said a clerk, "that he made many statements to the effect that oral argument was quite important."[25] And another clerk remembered that "he told me once he relied upon oral presentation to clear up his doubtful states of mind."[26] Oral argument did apparently change Justice Burton's mind in *Louisiana ex rel. Francis v. Resweber*,[27] involving a double jeopardy claim where a convicted murderer was placed in an electric chair which, due to a mechanical malfunction, was inoperative. Although he had initially favored the state's position, after oral argument he was persuaded by the defendant's claim and wrote a dissent.

Some kinds of arguments interested him more than others:

> He felt that his best opinions dealt with problems of legislative construction and history because of his legislative background and he often felt that the Chief Justice tried to assign him opinions dealing with such problems. In such cases he might take a more active interest and participate in the argument in the belief that he might be assigned the task of writing the opinion.[28]

Oral argument may have had less effect on Justice Burton than many of the others because "he had probably spent more time on each case in advance of the oral argument than any other Justice on the Court."[29] His meticulous preparation, including the Bench Memos, which were not written in most of the other offices, was in contrast with Justice Frankfurter's view that oral argument should be conducted before briefs were read when the mind was without preconceived conclusions, a practice followed at the time on the Court of Appeals for the Second Circuit.[30]

Even though Justice Burton particularly enjoyed listening to John W. Davis, Hayden Covington, and Burton K. Wheeler argue cases, none of the law clerks thought oral argument much influenced any of his decisions.[31]

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] 329 U.S. 459 (1947). *See* B. Prettyman, Death and the Supreme Court 90-128 (1st ed. 1961).

[28] Clerk questionnaire reply, *supra* note 9.

[29] *Id.*

[30] M. Schick, Learned Hand's Court 90 (1970).

[31] During oral argument Justice Burton listened attentively to the lawyers, and not much else.

IV. Work Schedule

The word most frequently used by his law clerks to describe Justice Burton's daily routine was "methodical." "He was a terribly conscientious man and worked, in terms of hours, harder than any Justice on the Court. He did an excessive amount of homework and was in his office many, many nights and weekends. He was a completely methodical man."[32] Another clerk described Justice Burton as "a spartan in his work habits. With rare exceptions each day was alike."[33] He breakfasted early and set out on foot from the small apartment he and Mrs. Selma Burton occupied at the Dodge Hotel located north of the capitol building. By 8:00 a.m. he was regularly at his desk. He would work until approximately 5:00 p.m. or 5:30 p.m. either at his desk or on the bench. At this time he would usually take a short swim in the Senate swimming pool. Even then he worried about wasting time that might be more profitably utilized and so while swimming or walking he worked at memorizing various "patriotic quotations" that appealed to him.[34] He and Mrs. Burton often attended diplomatic receptions, but even when he did he would leave early and return to the Court by 9:00 p.m. Otherwise he would return directly to the Court after dinner. He worked until 11:00 p.m. or midnight each day and then walked back to his two rooms at the Dodge Hotel. The routine never varied. "He ate the same light lunch each day: soup, whole wheat toast, tea and Jello. He did not drink, smoke, swear, or procrastinate and was not a bore about it. In fact, he never mentioned his virtues."[35] Lunch was usually taken alone in chambers unless the Court was sitting, in which case he would make a point of joining the other Justices in the Court dining room.

Justice Burton was methodical and habitual about nearly everything he undertook. A clerk described how he systematically struggled with the disease which eventually forced him from the Court and, on a lesser matter, how he was unable to wrench away from a Monday morning habit:

> The affliction (Parkinson's disease) which ultimately caused his death caused him to stutter (almost imperceptibly). To combat this

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A clerk recreated the scene:

> I think the entire time I sat in the courtroom I heard him ask one question from the bench, and that question was, "What page was that?" He did not in any way participate in dialogue with counsel; he just didn't do it. He sat very attentive, almost like a statue, very erect, and I can picture him sitting there almost immobile; didn't scribble notes, didn't read his mail as some of the Justices did from time to time."

Clerk interview, *supra* note 12.

[32] Clerk questionnaire reply, *supra* note 9.

[33] *Id.*

[34] Among the quotations he committed to memory were Lincoln's Gettysburg Address, the closing part of Lincoln's Second Inaugural, the beginning and end of the Declaration of Independence, sections from the Constitution, the Star Spangled Banner, America the Beautiful, several of the Psalms, and the entire membership of the United States Supreme Court and the Presidents who appointed them. Justice Burton explained that, "As I do not have a photographic memory, I have found it helpful to learn accurately a few important and well stated quotations. It gives familiarity to the words . . . and makes the quotations available for miscellaneous use in many connections." Justice Burton's diary, November 2, 1947. (The Harold H. Burton Papers; The Library of Congress.)

[35] Clerk questionnaire reply, *supra* note 9.

> tendency, he kept the door to his office closed and read briefs, memos and correspondence aloud to himself. Only a very few were aware of this habit. He also did much of his work in longhand to combat a slight twitch in his hand. He always got his haircut on Monday morning bright and early with the barber who maintained a one-chair barber shop in the building. On a few occasions the barber's Monday morning hangover would make it impossible for him to finish. Justice Burton then had to "hide-out" for several hours in his office while the barber rested a little to prepare for the finish. Justice Burton's secretary repeatedly urged him to schedule his haircut for some time other than Monday mornings, but was unable to shake the fixed habit of getting the haircut early Monday morning.[36]

Even after his health began to break, Justice Burton refused to adopt a lighter schedule. He still worked a long day in addition to most of the evenings. Additional difficulties beset him. "During my clerkship," one of his last clerks remembered, "he was having severe difficulty with his eyes and control of his hands, and he worked at a very slow pace."[37]

On the afternoon of June 13, 1958, Attorney General William P. Rogers called on Justice Burton in order to clarify rumors of the Justice's possible retirement. In confirming the rumors, Justice Burton indicated he had hoped to serve one more year but now "felt handicapped in doing the work of the Court and serving at my best during a term. Taking 10 hours a day. Seven days a week."[38] When he concluded he could no longer follow his usual schedule, Justice Burton did not hesitate to retire from the Court.

V. Law Clerks

Justice Burton preferred to recruit law clerks who had previously clerked for a lower court judge and thus were not entirely without experience in a judge's office. He also favored clerks from the Third Judicial Circuit, over which he presided. Consequently, it was common for him each year to take Judge Herbert F. Goodrich's clerk (from the Court of Appeals for the Third Circuit) who had been recruited by Judge Goodrich from the University of Pennsylvania Law School. Justice Burton was a striking contrast to Judge Goodrich, who was an enormously gifted technical legal scholar (his principal treatise being on the conflict of laws) who dispatched his work quickly and effortlessly. Whereas Justice Burton labored week after week on his opinions in longhand, Judge Goodrich would dictate several of his elegant opinions at a single sitting.

If Justice Burton was something of a plodder — which he was — he was nonetheless respected by his law clerks. He quickly drew them into the decision-making process. Although the final decisions were always his own, he was not reluctant to use the clerks as "a 'sounding board' against which he

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[36] *Id.*

[37] *Id.*

[38] Justice Burton's diary, June 13, 1958. (The Harold H. Burton Papers; The Library of Congress.)

tested his own thoughts and conclusions. He was quick to abandon conclusions which appeared to be faulty when discussion revealed weaknesses."[39]

He was always available for comment and discussion. If a clerk felt strongly about an issue he would listen patiently, without visible emotion or any effort to interrupt, and when the clerk was finished he would often say something like: "I'll certainly think about that."[40] But the clerks did not feel it proper for them to press beyond a certain point: once they were persuaded Justice Burton understood their arguments the propriety of the situation required that argument cease. As was emphasized: "He was *not* dominated by his clerks. He was *not* a Charlie McCarthy. But with facts, logic and persuasion, you could 'reach him,' and he was opinionated."[41]

The two clerks each term divided the cases between themselves and spent most of their time writing memoranda and draft opinions, although the latter were seldom much used: "He did not ask for much help in opinion writing. He *did* want you to read his drafts and suggest things for his consideration. He did his own opinion writing 95% of the time."[42] Another clerk indicated the way in which a clerk's time was usually allocated:

> The bulk of the work of the clerks was in studying through the petitions for certiorari and statements of jurisdiction, a much smaller amount of time in recommending the decision in cases which the Court had agreed to hear, and very little time in writing opinions. Strangely, a very small amount of time was spent in independent research. Neither the clerks nor the justices had the time to enter into independent research. Rather, we had to assume that the lawyers were very capable and that they had sufficiently prepared their cases so that further extended research was unnecessary.
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> In talking to the law clerks in the other offices, I found that the situation was the same in the other offices, that the clerks did very little independent research. One exception was the office of Justice Frankfurter, who used his clerks very little in passing on petitions for certiorari and statements of jurisdiction on appeal, and rather used them for independent research.[43]

Conversation with the clerks tended to be either directed toward the business at hand or inquiries of a friendly personal nature. Justice Burton did not speak speculatively about personalities or events, either concerning his Senate experiences or his years on the Supreme Court. "He was not," said a clerk, "a communicative person about anything."[44] Even after the conference of the Court, Justice Burton did not discuss in detail what had been said by anybody or what had occurred. He simply told the clerks how the vote came out. He never evidenced strain about what had been done in the conference, at least in front of the clerks.

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[39] Clerk questionnaire reply, *supra* note 9.

[40] Clerk interview, *supra* note 12.

[41] Clerk questionnaire reply, *supra* note 9.

[42] *Id.*

[43] *Id.*

[44] *Id.*

The only directions Justice Burton gave the law clerks concerned the form which he preferred for the memoranda which they prepared. The form was explained as follows:

> The law clerks had detailed instructions on preparing memorandums for him on petitions for certiorari and jurisdictional statements, and we followed these forms very carefully. These memorandums were given to him with the respective papers and he studied through our memorandums first before reading the briefs and the accompanying papers. He would on our memorandums underline and make code markings and any comments he wanted to make either at the end or by interlineation, our memorandum always being double spaced. He would then use our memorandums with his markings and additions at the Court conferences.[45]

There were no general or specific rules the clerks were asked to follow in screening petitions or jurisdictional statements. All petitions were treated alike. One clerk, however, perceived "a general mandate that a case must involve questions of general importance to merit certiorari and that the Court could not right every injustice or 'wrong opinion' presented to it."[46] Nonetheless, Justice Burton never expressly imposed qualitative standards on the clerks. Each petition or jurisdictional statement would be summarized for the Justice "except where the case was frivolous — for example, a diversity case where the only issue was sufficiency of evidence."[47]

Whether Justice Burton would vote to grant a certiorari petition or a jurisdictional statement tended to depend on several considerations. For example:

> He often felt that some questions, even though of general importance, should await decisions of several lower courts before being brought to the Supreme Court for decision. He also tended to avoid grants of certiorari in cases where two or more questions were involved in which the Court might be able to decide the case but on so many different grounds that no one particular theory could receive the blessing of a clear-cut majority of the Court.[48]

VI. Public Criticism and Private Evaluation

Not a great deal of personal notice was accorded Justice Burton nor did he seem especially affected by attention given to the Court in general. He read with interest law reviews and other periodicals that commented on his opinions, but he did not seem to respond to them antagonistically. When he was sometimes criticized for taking a "middle ground" on issues before the Court he considered that to be a compliment. He was not a voracious or eclectic reader:

> His work schedule was such that he very seldom read newspa-

[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

> pers or law review articles or current periodicals. I think he purposefully sought isolation from current opinion by driving himself to long hours of work in his office. I am sure he read fewer magazines and periodicals than any other member of the Court. In his summer vacations his reading was probably confined to American history, with which he was always fascinated — particularly histories of the Court and of the Lincoln period of American history.[49]

Since Justice Burton was never able to produce very many opinions during a term, this soon became a subject of interest to Court-watchers. "I don't believe," concluded a clerk, "he was particularly sensitive to public criticism except, perhaps, in the early days when his output in terms of quantity was subject to some smirking."[50] The most publicized criticism of Justice Burton's opinion output was made by Drew Pearson in his "Washington Merry-Go-Round" on June 23, 1947. It was obviously a matter of substantial concern to Justice Burton. Characteristically, his diary entry contains nothing pejorative. He first corrected an inaccuracy: "he [Drew Pearson] said 3 opinions and 3 dissents — including today's it should be 6 opinions and 2 dissents."[51] The thrust of Pearson's indictment was:

> He claimed that this [the small number of opinions Justice Burton had written] indicated that I was "soldiering" on the job and not doing my share. He seemed to attribute this to my having attended too many receptions, etc. — especially those given by smaller nations, etc. I decided to make no comment whatever.[52]

Immediately he received sympathetic letters from Justices Frankfurter and Douglas. He was orally reassured as to the unfairness of the charge and its lack of justification by Chief Justice Vinson and Justices Black, Reed, and Jackson, but he specifically noted that Justices Murphy and Rutledge did not mention the matter. An offer to reply in kind was received from the office of the redoubtable Harold Ickes, but Justice Burton held to his first inclination which was "not to say anything and to let it drop."[53]

A clerk described the episode's denouement:

> He never mentioned the matter to me — nor to others that I know of. I was told that some personnel of the Court told Drew P. that he was off base with his attack — that Burton put in more hours working than any other Justice. At any rate Drew then wrote a little article about Justice B. wheeling a legless veteran through a rainstorm in a wheelchair to Union Station. Whether there was any connection I do not know.[54]

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[49] *Id.* Justice Burton was interested in constitutional history and authored ten articles on the Supreme Court, its personalities, and its famous cases. They are collected in THE OCCASIONAL PAPERS OF MR. JUSTICE BURTON, (E. Hudon ed. 1969).

[50] Clerk questionnaire reply, *supra* note 9.

[51] Justice Burton's diary, June 23, 1947. (THE HAROLD H. BURTON PAPERS; The Library of Congress.)

[52] *Id.*

[53] *Id.*

[54] Clerk questionnaire reply, *supra* note 9.

There is no evidence that Justice Burton was privately dissatisfied with the quality of his work while on the Supreme Court. He was not an introspective person and he seemed to tranquilly accept each day in turn.

> He had no exaggerated notion of his role or importance. He was open-minded and humble. But he was not a self-conscious man, in the sense that he lacked confidence in his judgment, contribution and grasp of issues. He labored prodigously — the work was hard on him. It took a real toll. But I never saw any signs he was dissatisfied with the product.[55]

If he was not dissatisfied, neither was he unaware of his own shortcomings. He knew that opinion writing was an ordeal for him, especially in view of his meticulous approach to this aspect of the Court's work. However, he always worked on an opinion until he was satisfied with it; no hasty circulations issued from Justice Burton's office. He knew also that he was "not 'colorful' or highly 'articulate' and realized that his literary style was not effusive — but he distrusted 'color' and 'effusiveness' as tending to be misleading."[56]

Justice Burton seldom expressed any particular satisfaction or dissatisfaction with any of his opinions. "I am inclined to think," suggested a clerk, "he 'never looked back.' He seldom discussed himself or his own work and I think he was just 'bashful' and embarrassed when he or his own work was being discussed."[57]

There was one case, however, he may have mentioned more than any other, and that was *On Lee* v. *United States*,[58] where he dissented in favor of the accused and against the Government. A clerk described the implications of *On Lee*:

> His dissent stressed the "surreptitious" nature of the concealed microphone which captured the incriminating words of the defendant. In later cases involving "wire-tapping" and the use of concealed listening devices, he often reiterated that persons should be free in their homes, offices and like places against "surreptitious" surveillance. Otherwise, even the innocent are afraid to speak frankly to friends, family and associates for fear that even innocent (though personally embarrassing) conversations might be overheard by outsiders. Of course, his law clerks agreed with him on this point and we sometimes tried to convince him that later cases — *Schwartz* v. *Texas*, 344 U.S. 199 — *Dragna* v. *California*, 344 U.S. 921 (microphone planted in headboard of defendant's bed and behind toilet) — raised the same grave questions of rights of privacy. He was sympathetic to the view in these cases, but did not vote in favor of limiting the surveillance because, as he stated, "I have already

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 343 U.S. 747 (1952).

dissented once and expressed my view and further repetition is not helpful to the Court."[59]

The last paragraph of his dissent in *On Lee* hints at Justice Burton's belief in maintaining the integrity of a citizen's right of privacy along with his concomitant respect for certainty and stability within the legal system.[60] These two considerations seem to have given *On Lee* a special place in his memory.

VII. Conclusions

A pragmatic and ad hoc approach to constitutional policy-making characterized Justice Burton's work on the Supreme Court. He did not have a systematic or theoretically coherent theory of constitutional adjudication as did, for example, Justices Black and Frankfurter. He had no theory of "absolutes," as did Justice Black, nor had he a theory of "relatives," as did Justice Frankfurter, into which each attempted to fit every problem.[61] And yet his work was not without pattern:

> Justice Burton was consistent in that he believed the Constitution to express broad principles with undefined boundaries which the Court would have to define from time to time in the light of conditions at the time of decision. As a "middle of the road" man, he was constantly attempting to adjust the broad principles to meet the current demands (part of his habit of referring to the Constitution as a "living document") so that most cases represented a clash of different constitutional absolutes — rights of property versus individual freedom — calling for the best and most practical accomodation of each. This may be a form of consistency but not in the same sense some people use the term "consistency."[62]

Justice Burton exercised his power of office with restraint; he was precedent oriented and took the differentiation of primary functions among the three branches of the federal government as a given. According to a clerk: "He felt strongly that a judge should be a judge between litigants rather than a judge of whether institutions or practices were right or wrong. When he did not feel hemmed in by constitutional limitations, his views could never be considered conservative or moribund."[63] His humanism, perhaps influenced by his strong Unitarianism, was not parochial. His clerks agreed with one of their number who especially emphasized that: "It is important to note that Mr. Justice Burton was, in my experience, as free from prejudice as any man could

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[59] Clerk questionnaire reply, *supra* note 9. *See also* Chief Justice Warren's remarks in 381 U.S. XVII-XVIII (1964).

[60] 343 U.S. 747, 766-67 (1952).

[61] *See, e.g.*, W. Mendelson, Justices Black and Frankfurter: Conflict in the Court (2d ed., 1966).

[62] Clerk questionnaire reply, *supra* note 9.

[63] *Id.*

be."[64] More particularly, as a member of the Court, Justice Burton was in early opposition to the nation's system of segregated schools.[65]

Although undoubtedly a "minor" jurist in Supreme Court history, Justice Burton was respected by those who worked with him as "a good judge in the traditional sense":

> He was as impartial, unprejudiced and free of willfulness as any human being could be. He was a totally and thoroughly decent man and litigants were always sure of a fair shake from him. Unlike certain other judges, he did not lobby nor attempt to lead others away from their own judgments. His weaknesses were perhaps more mechanical than anything else, *i.e.*, his rather lackluster and sterile writing talents and his inability to increase his rather limited output.[66]

Justice Burton's only noticeable fault, Justice Frankfurter once confided to a clerk, was "an 'overregard' for the difficulties of the 'men on the firing line' (the trial judges)."[67]

During one term in the 1950's, all of the law clerks decided to conduct a poll in order to determine who was the "best" Justice on the Supreme Court. An objection was made to the question on the grounds that all of the Justices were unique in their own way and it would be very difficult to speak of one of them as being the "best." The question was therefore rephrased as follows: "If all nine Justices were to be drawn from the same mold, which of the nine Justices would you pick to serve as the model?" The almost unanimous choice was Justice Burton.

In the case of Justice Burton there were no unexpected internal contributions which he made to the daily dispatch of Court business. He assumed no leadership roles;[68] he was what he appeared to be. His strengths and limitations were apparent to all. What he was may be more important than what he did. Felix Frankfurter, with interesting perceptiveness, described

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[64] *Id.*

[65] The Court's voting pattern in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), was as follows:

> [O]n June 9, 1952, the Justices by a seven-to-one margin voted to hear the cases. Justice Jackson cast the negative vote; Chief Justice Vinson's vote was not recorded. The real divisions, however, appeared at the conference of December 13, 1952, following the first round of argument. Here a remarkably diverse quartet favoring reversal of *Plessy* — Black, Douglas, Minton, and Burton — confronted a doubtful Chief Justice Vinson and the varyingly doubtful Reed, Frankfurter, Jackson and Clark.

G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 314 (1977). *See also*, R. KLUGER, SIMPLE JUSTICE 508-699 (1975); Atkinson, *Justice Sherman Minton and the Protection of Minority Rights*, 34 WASH. & LEE L. REV. 97, 99-107 (1977).

[66] Clerk questionnaire reply, *supra* note 9.

[67] *Id.*

[68] It has been suggested Justice Burton assumed the role of social leader on the Supreme Court. *See* R. MARQUARDT, THE JUDICIAL JUSTICE: MR. JUSTICE BURTON AND THE SUPREME COURT 261-64 (1973). (Doctoral Dissertation; University of Missouri — Columbia Library). There is no persuasive evidence for such a suggestion.

Harold Burton's career as the "triumph of character."[69] But perhaps a clerk put it best of all:

> His strength was his rock-ribbed, New England honesty and objectivity and his open-mindedness. He commanded respect from his colleagues for these virtues. He had an even tempered disposition and seemed to be without emotion, though he had great compassion and knew that it was the lives and liberties of people, as well as the stability of government, with which he was dealing. He did not like the idea of government putting people to death (capital punishment) but knew it had to happen on occasion and "the law" should not be distorted to save every condemned person. He was not the greatest Supreme Court Justice in terms of natural ability, articulateness, range of understanding or versatility, but he tried harder than the rest and, to my mind, he was the nicest. One of the Frankfurter clerks who is now considered a great scholar on the work of the Court once said, "I would not hesitate to trust my life to his decision — if I were innocent."[70]

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[69] The treatment that Waite [Chief Justice Morrison R.] received contemporaneously and since then reminds me of the very inadequate and unfair estimate of Mr. Justice Burton. When the time comes to write a biography of him, the subtitle, "The Triumph of Character" would be most appropriate, for in my judgment not even Cardozo had the moral qualities which are the prerequisites of a Justice, including a deep sense of humility, to a greater extent than dearly beloved Burton.

Letter from Felix Frankfurter to Paul A. Freund, November 5, 1963 (THE FELIX FRANKFURTER PAPERS; The Library of Congress).

[70] Clerk questionaire reply, *supra* note 9. The reference is almost certainly to the late Alexander Bickel.

TABLE I: ACTION OF INDIVIDUAL JUSTICES[71] 1945-1958

TERMS

	Opinions Written[72]			
	opinions of court	concurrences	dissents[73]	Total
Black	204	35	133	372
Brennan (1956-1958)	36	9	22	67
Burton	96	20	70	186
Clark (1949-1958)	116	10	38	164
Douglas	204	40	192	436
Frankfurter	142	116	222	480
Harlan (1955-1958)	49	18	53	120
Jackson (1945-1953)	89	37	91	217
Minton (1949-1956)	64	3	34	101
Murphy (1945-1948)	49	7	39	95
Reed (1945-1956)	121	19	74	214
Rutledge (1945-1948)	44	35	48	127
Stewart (1958 only)	10	5	4	19
Stone (1945)	15	6	13	34
Vinson (1946-1952)	77	1	16	94
Warren (1953-1958)	62	3	21	86
Whitaker (1956-1958)	21	3	11	35

[71] For the 1945, 1946, and 1947 terms, the source of this data is volumes 326-35 of United States Reports. The criteria for counting was taken from 82 HARV. L. REV. 301-02 (1968). However, a Justice's opinion is often subject to differing classifications, depending upon the interpretation given to the criteria. It should be kept in mind therefore that these figures, while indicative of the action of the Justices, may not be agreed upon by all legal scholars.

For the 1948-1958 terms, the source of this data is volumes 63-73 of HARVARD LAW REVIEW (1949-1960).

[72] Whenever a Justice notes separately the manner in which he would have disposed of the case and gives a reason, however brief, for such dispositions, he is credited with having written a concurring or dissenting opinion.

[73] A Justice is considered to have dissented when he votes to dispose of the case in any manner different from that of the majority of the Court. Opinions concurring in part and dissenting in part are counted as dissents.