

PROCEEDINGS IN THE SUPREME COURT OF
THE UNITED STATES IN MEMORY OF
MR. JUSTICE BURTON.*

MONDAY, MAY 24, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

Mr. Solicitor General Cox addressed the Court as follows:

May it please the Court:

At a meeting of the Members of the Bar of the Supreme Court held at 11:00 o'clock this morning, resolutions expressing their profound sorrow at the death of Justice Harold Hitz Burton were offered by a Committee, of which Dean Erwin N. Griswold was Chairman. Addresses on the resolutions were made by the Honorable Kingsley A. Taft, Chief Justice of the Supreme Court of Ohio; Raymond S. Troubh, Esquire, of New York, New York; and the Honorable Robert Hale, formerly U. S. Representative from the State of Maine.

The resolutions unanimously adopted are as follows:

“RESOLUTIONS

“On behalf of the Bar of the Supreme Court, we have met to record our regard for Harold Hitz Burton, Justice

*Mr. Justice Burton, who retired from active service on October 13, 1958 (358 U. S., vii), died in Washington, D. C., on October 28, 1964. Services were held at All Souls Unitarian Church, Washington, D. C., on October 31, 1964, and at the First Unitarian Church, Cleveland, Ohio, November 2, 1964. Interment was in Highland View Cemetery in Cleveland, Ohio, on November 2, 1964. See 379 U. S., iv, ix.

of the Supreme Court of the United States for thirteen active years from 1945 to 1958. He died October 28, 1964, and is mourned by members of the profession, his many friends, and citizens everywhere.

"Harold Hitz Burton was born in Jamaica Plain, Massachusetts, on June 22, 1888. His great-grandfather, John Hitz, was the first Swiss Consul General to the United States, and his home was within what is now the Capitol Plaza diagonally across the street from the present Supreme Court building.

"Harold Burton's early education was in Switzerland where his mother had returned for her health. As a result, he was bilingual in English and in French and this undoubtedly contributed to his broad outlook. His mother died when he was seven years old, and he returned to the United States. He attended the Newton High School, and then went on to Bowdoin College, where he received the A.B. degree in 1909. His roommate at Bowdoin was Owen Brewster, later Senator of the United States from the State of Maine. Both Brewster and Burton proceeded to the Harvard Law School, and received their LL.B. degrees in the class of 1912. Other members of that class included John G. Buchanan of the Pittsburgh bar, Charles Evans Hughes, Jr., formerly Solicitor General of the United States, and later of the New York bar, and Ivan Cleveland Rand, who became a Justice of the Supreme Court of Canada.

"Justice Burton was married on June 15, 1912, immediately after his graduation from Law School to Selma Florence Smith, of West Newton, Massachusetts, then a recent graduate of Wellesley College. This was a happy union, and Mrs. Burton was a constant support and a source of strength to the Justice. They had four children, two daughters and two sons. Both of the sons are graduates of the Harvard Law School, and members of the bar of this Court.

"After leaving Law School, Harold Burton headed west, and was in practice in Cleveland for two years. Then he

went still farther west, and worked as a lawyer in Salt Lake City, and Boise, Idaho, from 1914 to 1917. With the outbreak of war, in 1917, he entered officers' training. He was commissioned a First Lieutenant, and eventually a Captain. From June 1918, he served in France, participating in the St. Mihiel offensive in September, in the Meuse-Argonne, and later in Belgium as operations officer of his regiment. His Colonel recorded that 'much of the success of the operations of the regiment was due to his careful analysis of all situations as they arose, and thorough preparation of the command for whatever emergency was to be met.' He was awarded the Belgian Croix de Guerre, and the United States Army Meritorious Service citation. When the order of the Purple Heart was established in 1932, he received its medal.

"With the close of the war, he returned to Cleveland, and spent the next ten years in private practice. During this period, however, he carried on many other activities. He taught Corporation Law at the Western Reserve University Law School. He was President of the First Unitarian Church of Cleveland, and Chairman of the Research Committee of the Citizens Committee on Regional Government. He was also active in important posts in the American Legion.

"At the close of this period, his character, outlook, and standing are clearly shown by a perceptive passage in a letter written to him by a leading citizen of Cleveland, Newton D. Baker. Some members of the bar had advanced Harold Burton for appointment to the United States District Court. As things worked out, it was perhaps fortunate that this did not succeed. At any rate, when the appointment went elsewhere, Mr. Baker wrote to him: 'My own mind leaned to you because you are young, studious, educated and have a desire to serve your day and generation measured by other standards than the mere monetary reward. There is a long career of fine usefulness ahead of you and I shall watch with delight the successful steps you take in accomplishing it.'

"In 1928, Harold Burton became a member of the Board of Education of East Cleveland. In November of that year, he was elected a member of the Ohio House of Representatives. On October 15, 1929, he was appointed Director of Law of the City of Cleveland, an office which he held until November 9, 1931. For a part of this time, he was Acting City Manager of Cleveland. On November 9, 1931, he became Acting Mayor of Cleveland, a post which he held until February 20 of the following year. For the next three years, he resumed private practice specializing in municipal law, but continued his active interest in public affairs. He was Associate Counsel for the City of Cleveland in its gas rate litigation. He was Chairman of the Intercity Committee of Lake Erie Ports. He was Chairman of the Cleveland Board of Education Committee on Citizenship Training, a member of the Governor's Commission on County Government, and Chairman of the County Charter Commission of Cuyahoga County.

"In 1935, Harold Burton was elected Mayor of Cleveland. He was reelected in 1937 and 1939. Thus, he was Mayor of this great and complex city during one of its most difficult periods in history, a service which he performed with devotion and skill, and with the acclaim of all elements in the community.

"In November 1940, Harold Burton was elected United States Senator from Ohio, and he resigned as Mayor in December 1940. On his last day as Mayor, the Cleveland News wrote:

"'We consider this to be the most unusual man in American politics, and the most unusual Mayor any city has had in these times. Other cities can take their LaGuardias, Kelleys, Hoans. We'll take you; the outstanding exponent of a city government that is honest, high minded, and right in step with all its people, common and uncommon.'

"He took office as Senator on January 3, 1941. As a Senator, he quickly made himself known as a quiet and

effective worker for the public interest. He was a member of the Senate's Committee on the Conduct of the War, of which then Senator Truman was Chairman. During the same time, he was Moderator of the American Unitarian Association.

"In September 1945, President Truman appointed him as Associate Justice of the Supreme Court of the United States, and he took his seat on the bench on October 1, 1945.

"When Justice Burton was appointed to the Court, the Minister of his church in Cleveland, the Reverend Dilworth Lupton, summed up his qualities in a way which future events fulfilled. He said: 'He will bring to the office a sportsmanship that will win him the respect of both adherents and opponents; a plodding intellectual penetration that will search out the heart of great issues; a faculty for creative listening that is a prime requisite of a judicial mind; and a sense of quiet humor that marks a matured man.

" 'And he will bring to the office a spirit of dedication to eternal principles—a dedication that few men possess.'

"In his work on the Court, he continued to show the qualities which had distinguished him in his earlier career. Few men, even among our greatest judges, have achieved the quality of disinterestedness so completely and effectively as Harold Burton did. He was quiet and thorough in his work, devoted to the Court and to the law, and wholly dispassionate in his reasoning and in his conclusions. He always had the warm respect of his colleagues, and the high regard of the members of the bar.

"His first opinion was a concurring opinion in the case of *Markham v. Cabell*, 326 U. S. 404, 413, involving the Trading with the Enemy Act. His final opinion was in *Ashdown v. Utah*, 357 U. S. 426, a first degree murder case. In between, were many notable opinions, including his opinion for the Court in *Henderson v. United States*, 339 U. S. 816 (1950), where in his characteristic logical and dispassionate way he reached the conclusion that all

persons are entitled to be free of discrimination on racial or other grounds in the operation of a carrier regulated by Federal statute. Other opinions which may be mentioned are his concurring opinion in the Steel Seizure case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 655), where he decided against the validity of President Truman's action, and his powerful dissenting opinion in *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 608. All of his opinions show great craftsmanship and thoroughness. They are simple, direct and unassuming, without verbal adornment or glittering phrase. They do not proceed by the broad sweep, or in generalities, but deal specifically with the case at hand. They are the work of a careful man whose mind penetrated deeply, step by step, and who reached his conclusions through painstaking effort. They reflect clearly the deep interest of Justice Burton in the viable administration of government in the interest of all the people. In this way, as well as in their professional skill, they are important contributions to our law.

"While on the Court, Harold Burton wrote a number of articles which expressed his point of view. He wrote about leading cases in the Court's history,¹ about John Marshall,² and about the Supreme Court and its independence.³

¹ The Cornerstone of Constitutional Law: The Extraordinary Case of *Marbury v. Madison*, 36 A. B. A. J. 805 (1950); The Dartmouth College Case: A Dramatization, 38 A. B. A. J. 991 (1952); Two Significant Decisions: *Ex parte Milligan* and *Ex parte McCordle*, 41 A. B. A. J. 121 (1955); and The Legal Tender Cases: A Celebrated Supreme Court Reversal, 42 A. B. A. J. 231 (1956).

² "Justice the Guardian of Liberty": John Marshall at the Trial of Aaron Burr, 37 A. B. A. J. 735 (1951); John Marshall—The Man, 104 U. Pa. L. Rev. 3 (1955).

³ The Supreme Court: Mr. Justice Burton Gives Interesting Comparisons, 33 A. B. A. J. 645 (1947); An Independent Judiciary: The Keystone of Our Freedom, 39 A. B. A. J. 1067 (1953); The Independence and Continuity of the Supreme Court of the United States, speech delivered in the National Convention of the Phi Alpha Delta Law Fraternity on June 22, 1956, at Cleveland, Ohio.

"In his work on the Court, as in his previous public career, Harold Burton could not be catalogued. He was never cynical, acid or vitriolic. He was always mild and unassuming. He was always hard-working and self-effacing. He proceeded through the force of his ideas, and not the strength of his words. As a commentator in the New York Times said at the time of his retirement: 'He has never been found among those public figures who automatically seem to give off sparks. It has been a long time since the Justice created headlines; he has been too busy and too earnest for that.'

"Just before his retirement in 1958, Justice Burton received the Bowdoin Prize, the highest award of his alma mater, made in recognition 'of his distinctive contribution through his outstanding service to his nation and his fellow man.' At that time, his eight colleagues on the Court wrote: 'Justice Burton has regarded his position on the Court as a trusteeship, and has dedicated himself to it wholly and without stint. His indefatigable energies for keen analysis have earned the respect of those who served with him, as his gentle, understanding, and undemanding nature has earned their deep affection and esteem.' And in the letter which the members of the Court wrote to Justice Burton at the time of his retirement, they said: 'Without exception, we believe that of all the Justices who have sat on this Bench, not one has adhered more closely than you to the ideal for which we all strive—"Equal Justice Under Law." ' 358 U. S. x, xi.

"With these words, which take on the character of *res judicata*, we close these remarks about the career of Justice Burton. Much of his contribution during his service on the Court was made in ways which will be fully appreciated only by those who are professionally the officers of the Court. His was a life of service, through which he made important contributions to the nation and to the law. It is accordingly fitting that we members of the bar of the Court should submit the following Resolutions.

“ We do

“ *Resolve* that we, the bar of the Supreme Court of the United States, express our profound sorrow at the death of Justice Harold Hitz Burton, and our deep appreciation for his contributions of public service, where he served with equal distinction and effectiveness in the Executive, Legislative and Judicial branches of the government, in the armed forces, and in civil life at all levels of our governmental system as an officer of his city, state, and nation, and as a Justice of the Supreme Court who was in all places unexcelled in his dispassionate search for light and truth:

“ *It is further Resolved*

“ That the Attorney General be asked to present these Resolutions to the Court, and to request that they be inscribed upon its permanent records, and that copies of these Resolutions be forwarded to the widow and children of Justice Burton.’ ”

Mr. Attorney General Katzenbach addressed the Court as follows:

Mr. Chief Justice, May It Please the Court:

The Bar of this Court met today to honor the memory of Harold Hitz Burton and to recall for posterity, as vividly as dry words permit, the many admirable qualities of the man, the distinguished capacities in which he served his community and his country, and, of particular importance to those assembled here, the contribution he made to the rule of law during his thirteen years as an Associate Justice of this Court.

Those who knew him most intimately have already paid fitting tribute to the traits of mind and character which transformed Harold Burton's acquaintances to friends and his friends to admirers. They have, in a sense, reaffirmed what was known by all who were ever affected by his public or private endeavors—that the private citi-

zen, like the public servant, embodied qualities of courage, dedication and fairness which placed him in the front rank of men.

As an infantry captain, Ohio state legislator, Mayor of Cleveland and Senator from Ohio, he was well served by these powerful personal attributes. On many different battlefields, his quiet fortitude enabled him to face hostile forces with equanimity.

Coming to this Court from the rough-and-tumble of politics and legislative compromise, Harold Burton succeeded, swiftly and with remarkable ease, in channeling the talents which had contributed to his earlier success into the more contemplative cast required of members of this Court. During each of his many eventful terms on this Court, Mr. Justice Burton demonstrated anew the qualities of fairness, tenacity and devotion to principle which had marked his earlier career.

His appointment to this Court was itself a tribute to his judicious and dispassionate temper. For his political affiliation was different from that of President Truman, who nominated Harold Burton for the first opening on the Court during his tenure in office. The President's choice was particularly striking in the light of his own commitment to vigorous rivalry between our major political parties; it must have been influenced by the qualities of fairness and openmindedness which he saw demonstrated by Harold Burton during their association in the Senate of the United States and in their joint service upon its committees. Justice Burton's nomination was, in every sense, a nonpartisan one because it placed upon this Court a man who was singularly free of preconceptions, prejudices, or predilections.

President Truman's judgment of his fairness was by no means the first. From the outset men had appreciated in him a disarming simplicity, objectivity of judgment and directness of expression. In politics, as later on this Court, these qualities stood him in good stead. He was first elected Mayor of Cleveland in 1935 as an Inde-

pendent-Republican candidate when the city was overwhelmingly Democratic. In the major battle of his administration four years later, Mayor Burton—then an avowed Republican—did not hesitate to take on the Republican governor of Ohio on the urgent question of relief.

Again, repeatedly, as a Senator, Mr. Burton's independent convictions led him against the current of his party's leadership and what others read as popular opinion—most particularly in the Senate debate over Lend-Lease and, in 1943 in a bipartisan resolution which he drafted calling for American leadership in forming a United Nations organization.

From the inception of his judicial career, Justice Burton devoted to the business of deciding cases and writing opinions the same care and energy that had made him an outstanding legislator and administrator. His first opinion for the Court concerned the application of the Fair Labor Standards Act to a corporation engaged in electrical contracting and in the sale of motors and generators. In determining that the Act applied to the corporation's employees, Justice Burton wove his way, in great detail, through the relevant history of the statute—including the debates on the floor of the Congress—and meticulously defining ambiguous statutory terms by reference to authorities ranging from the unabridged dictionary and the Encyclopedia of Social Sciences to industrial manuals issued by the Bureau of the Budget and the Social Security Board.

The precision manifested by this maiden effort emerged time and again in his opinions on questions of statutory construction. As a former legislator, he knew that legislative intent is a restless and shifting creature which almost never stands still long enough to be identified; but he persisted in the dominant concern of searching out the real wish of Congress by placing the statute in historical perspective and determining how Congress resolved the problem before it. He would then reconcile and align

statutory provisions in a manner calculated to carry out that wish as applied to the facts of the case before him without intruding his own view of policy.

Justice Burton left behind him in the legislative chambers all *a priori* notions of what statutes should say or what proper legislative policy might be. His judgment invariably rested upon an exhaustive examination of all available material casting light upon the meaning of legislation at hand. "He would not," as the poet said, "make his judgment blind." And yet, Justice Burton was wary lest finely drawn lines frustrate the purpose for which legislation was enacted. In his first Term on the Court, he alone dissented from the holding in *Commissioner v. Wilcox* that embezzled money did not constitute income within the meaning of the Internal Revenue Code; in his next-to-last Term, he wrote a majority opinion rejecting the argument that a certain federal criminal statute should be limited in its application to persons committing acts which would have been crimes under the common law. In each instance, it was his view that the very fine line sought to be drawn could not be harmonized with the will of Congress. And his dissent in *Wilcox* was, of course, vindicated by subsequent decisions.

When, in his view, fine lines were warranted, Justice Burton could draw them with the adeptness of the most skillful attorney. His carefully limited opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, in which his vote was the necessary one for reversal, is proof enough of that. And the hallmark of his opinions for the Court—an introductory sentence beginning: "This case presents two questions . . ." or "The issue here is whether . . ." or "The question before us is . . ."—epitomized his careful lawyerlike attitude towards the decision-making responsibility which resides with this Court. In Justice Burton's view, cases heard by this Court invariably narrowed themselves down to precise issues, and it was on the merits of those issues of law alone that they were to be decided. To him, who the parties were was irrelevant.

Justice Burton enriched our law with opinions ranging over a wide range of subject matter. He was the author of seminal opinions in the field of labor law, as well as cases defining the scope of the pre-emption doctrine. He also wrote opinions for the Court in several major anti-trust cases, and manifested his independent spirit in numerous forceful dissents.

At the conclusion of the 1957 Term, a crippling illness which had struck Justice Burton became too severe to permit him to carry on the heavy day-to-day labors required of members of this Court. Upon his retirement, however, he offered and was assigned by the Chief Justice to serve on the Court of Appeals for the District of Columbia Circuit; he did so for the following five years to the extent that his health and energy permitted.

His interest in the business of this Court never flagged. Despite the obvious incapacitating effect of his illness, Justice Burton would regularly attend sessions of the Court on Monday mornings to hear decisions rendered and would appear for the argument of important cases. His conduct on these occasions made observers of the Court marvel at his courage and dedication to the Court as an institution.

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Harold H. Burton be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General:

Your statement concerning our Brother Burton is music to our ears. In honoring him, you honor the Court. We agree with everything you have said, and need only add

to it a few remarks from our hearts to indicate what he meant to us as individuals and to the Court as an institution through the years of intimate association we had with him.

I think it is not beyond the spirit of our democratic institutions to say that Harold Burton was a nobleman, not in a patriarchal sense but in the sense that he was essentially a man of noble character, stamped by both integrity and humility. He was in all respects a friend of man, not of some men, but of all men. He was as free from animosity, prejudice and all other fetishes, which are common faults of human nature, as anyone we in our varied experiences have come in contact with. Because of these rare qualities, he was able to engage in the judging process with an equanimity that has been given to few men. Our feeling concerning him may be epitomized in our joint statement on the occasion of his retirement from the Court.

In our letter of farewell to him, we said:

“We believe that of all the Justices who have sat on this Bench, not one has adhered more closely than you to the ideal for which we all strive—‘Equal Justice Under Law.’”

No higher praise could be given to any Justice by his colleagues, and I am sure that none of the ninety-four Justices of this Court could have been more worthy of it. In addition, I think it might as properly be said that no one who has ever sat on the Court was a more leavening influence than was he—gentle, kindly, self-effacing, but with complete dedication to the principles of justice, he strove diligently and understandingly always for that which he believed to be right. His one overwhelming desire was to be helpful to everyone, on and off the Court.

He was the good Samaritan in every phase of his life—in public office, in his home, and on the streets. He made no show of this lovable trait of character, but occasionally his acts of kindness, which were so well known by his

friends, came to the attention of the public through the press. I will read one article concerning an incident which never would have been told by him, but which was brought to public attention by the beneficiary of his good deed. It was thus reported:

"A crippled beggar was pushing his wheel chair along a rainy Washington street. The pavement was wet. Crossing the street, the rubber tires of the wheel chair slipped, finally stalled at the curb. The chair wouldn't budge.

"A stranger hurrying through the drizzle, stepped over to the wheel chair and gave it a push.

"The cripple wiped his face with a soiled service cap and thanked the stranger, who asked where he was going. 'To the Union Station,' was the reply, 'to get out of the rain.'

"The well-dressed stranger offered to push the wheel chair to the station. 'We'll go there together,' said the stranger pushing the wheel chair ahead of him.

"'Work for the Government?' asked the cripple as they proceeded. 'Yes.'

"'Veterans Administration?' 'No.'

"'Where do you work?' persisted the wheel chair passenger. 'Over in the court.'

"'Which Court?' 'The Supreme Court.'

"The beggar twisted his head around for a good look at the man who was pushing him through the rain.

"'Which one are you?' he asked. The man who had rescued him was Justice Harold Burton."

Such acts of kindness were a way of life with Justice Burton. I am sure this way of life was natural to him, but it was also accentuated and made more meaningful by Selma, his wife of 52 years, whose benefactions and service in behalf of good causes have been well known to the people of Washington throughout the 25 years of their

residence here. Those facets of the lives of these two generous souls permeated their community, their church, and their family lives. With their four children, ten grandchildren and two great grandchildren, they made the ideal family.

As a man of God, Justice Burton found the time to serve as National Moderator of his church.

Justice Burton was one of the few Justices of the Supreme Court who served in all three Branches of the Government, thus bringing to the Court a profound understanding of the prerogatives of each of them and the relationships between them.

As Mayor of the great City of Cleveland, as United States Senator from the State of Ohio, and as a Justice of this Court, he brought his rare qualities and broad experience to all the complex and emotion-packed issues which were presented to the Court in his time. In all of these important offices which he held, his acts were marked with the label of simple honesty.

I shall never forget the statement of one of our colleagues who was endeavoring to give the strongest recommendation he was capable of for a man some of us did not know. He ended by saying he would trust this man as he would Harold Burton. We all realized what a recommendation that was.

This common honesty was made more meaningful throughout his life by the calm courage which brought him distinction both as a soldier in France and Belgium during World War I, as a reform Mayor of his city, and as a member of the Senatorial Committee on the prosecution of the War.

But, of course, he is best known to us by that same quiet, dignified courage as a Justice of this Court and during the long illness which necessitated his retirement. For this, he will always be remembered.

About two weeks before our Brother Frankfurter passed away, he came to my chambers and told me he would like to have a few moments at this ceremony to express his

feeling toward Justice Burton. He said he could best do this by merely reading a letter he had written to Justice Burton in 1964. I told him I was sure that all present would be happy to hear it. Unfortunately, Justice Frankfurter also went to his reward before these services could be held, but I now read his letter with the assurance that it expresses the sentiment we all have for Harold Burton:

“To you and to Selma and to many others I have often expressed my admiration to you as a member of the Supreme Court, for no member of the Supreme Court deserves admiration more than you for exercising with exquisite and unqualified fidelity the judicial power entrusted to members of the Court.

“What I have just said I would be writing if I were writing a formal history of the Court, namely, that no one who knows the history and behavior of individual Justices during the whole history of the Court as well as I do could single out any Justice who has been more conscientious in his duties while on the Court than you. You were a Judge in all that the term implies for you have never allowed any considerations except those relevant to a conscientious decision of issues before the Court to determine how litigations that came before you should be determined. May all your remaining days give you the satisfaction of having been so conspicuously good a Justice of our highest tribunal and may you not merely live in the past but also may you find comfort and strength from all your past as well as from the happy blessings that the good Lord has showered upon you in your family life.

“This brings you the best wishes and the most respectful admiration of your old friend and colleague.”

I will not discuss at this time the important decisions which Justice Burton wrote or participated in during his

13 years of service on the Court, but they are recorded in Volumes 326 through 357 of the United States Reports, and will always be a living part of our jurisprudence.

Mr. Attorney General, on behalf of the Court, I desire to thank you for your generous words concerning our Brother, and we accept with pleasure the Resolutions of the Bar which you have presented to us. In return, may I ask you to communicate our appreciation to the Bar of this Court and express our thanks for the interest which prompts them to have their sentiments preserved in our records for all time.

Let the Resolutions and your statement be spread upon the Minutes of this Court.

