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Remarks By

ATTORNEY GENERAL NICHOLAS deB. KATZENBACH

at the

Memorial Proceedings in Honor of  
the late Mr. Justice Harold H. Burton

Supreme Court of the United States

Washington, D. C.

Monday, May 24, 1965

12:30 p.m.

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 citizen, 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 open-mindedness 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 non-partisan 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 Independent-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 very 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 antitrust 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 this 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.