

Redden Strong Wills Hinder Molding of a 'Burger Court'

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Warren E. Burger, nearing the end of his third year as Chief Justice of the United States, is giving few signs that something properly called a "Burger Court" will soon emerge.

If recent rumblings from the Supreme Court are indicative, the busy and impetuous Chief Justice may be pedaling backward from the goal, if it is his goal, of molding a cohesive high bench.

Physically, he has had the bench sawed in three and the end portions of the once-solid Honduran mahogany slab have been turned inward. Judicially, however, the men behind the bench diverge on three or more courses.

Despite the recent arrival of more like-minded justices, Burger is increasingly and conspicuously on his

own in solitary dissent and separate opinion. Even his erstwhile "Minnesota twin," Justice Harry A. Blackmun, is starting to part company with Burger. Some of the divergences reflect the strong wills of nine independent men.

News Analysis

Others are seen as symptoms of leadership problems under Burger.

In recent weeks:

- Burger alone invited Congress to write new highway laws to straighten out a mischievous U.S. Court of Appeals, commanding the construction of a bridge over the Potomac "even to the point of limiting or prohibiting judicial review."

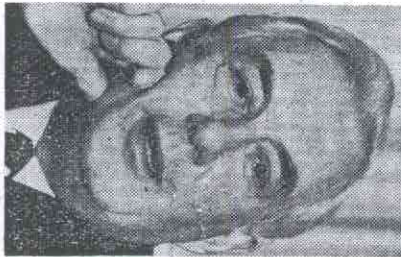
- Only Burger dissented as the court struck down laws requiring mobile Americans to wait as long as a year before being allowed to vote

in their new home states. A 1904 decision, written before a revolution in personal and political liberties, "is as valid today as it was at the turn of the century," he wrote.

- Although Blackmun reluctantly declared that "at this date" he could not oppose certain tough rules governing antitrust cases, Burger alone wrote that his brethren were wrong to apply the rules to supermarket chains which agreed not to compete with each other.

- With only Blackmun agreeing with him, Burger dissented as the court held that unwed fathers had an equal right to parenthood status with unwed mothers and married persons. "Centuries of human experience" support the way Illinois treats the male parent, he said.

See **BURGER**, A5, Col. 1



CHIEF JUSTICE BURGER
... pedaling backward

BURGER, From A1

Of all the recent strongly worded breaks with his fellow justices, Burger's handling of the Three Sisters Bridge controversy was the most puzzling to lawyers here who have watched with interest how the Chief Justice would approach his job.

No member of the court is expected to surrender deeply held convictions except in the face of persuasive argument. But students of the court agree that there are special demands on the Chief Justice to bring the court together. Others look to him for an extra measure of statesmanship and conciliation.

With this in mind, the puzzlement was why Burger would launch a solo protest against a lower-court decision the Supreme Court deemed inappropriate for review. (The high court left standing a Court of Appeals ruling that the bridge builders must comply more fully with federal highway law and Burger's pithy opinion was labeled a "concurring" opinion. It is rare in itself for a single justice to express his own reasons for not hearing a case.)

Was it because President Nixon, who had appointed him, had conspicuously displayed a deep personal interest in the government's petition? No other Nixon appointee joined Burger.

Slap at Bazelon?

More likely by far, in the view of experienced Washington lawyers, is that Burger intended a slap at Chief Judge David L. Bazelon, his adversary during 13 years on the District of Columbia Circuit Court. In other words, Burger, at the top of the judicial system, was reviving an old courthouse feud.

In doing so, Burger caused shock waves because he appeared to prejudice the propriety of laws denying access to courts by aggrieved persons. President Nixon's proposed congressional moratorium on school busing came immediately to the minds of readers who wondered whether the similarity occurred also to Burger.

It was the offering of advice to Congress which bothered lawyers the most. "Strict constructionist" judges often counsel against such breaches of the separa-

tion of powers.

On the other hand, Burger delivered the court's unanimous decision in last year's school desegregation cases,

repulsing Nixon administration moves to curtail the powers of federal judges to enforce the belated dismantling of dual school systems.

Reports seeping through Washington had Burger on the opposite side of the question in early deliberations among the justices. But if Burger felt pressure to agree with the White House on busing, he ultimately chose to go with the court, maintaining its commitment to racial justice in public education.

Detraction Seen

Unfortunately, in the view of some, he detracted from his collegial role in a one-justice opinion last summer stressing that some school boards apparently were over-reacting to the 9-to-0 decision by ordering excessive busing.

Perhaps one of Burger's most distinguished performances was his opinion last term, also for a unanimous court, holding unlawful occupational tests which failed to measure job capability but were fraught with potential discrimination against blacks seeking work. The opinion was in keeping with the "work ethic" of a self-made Midwesterner and it was on a par with many of the major civil rights decisions of the "Warren Court."

If Burger's preoccupation with managing the U.S. judicial system has stolen time from the judicial work of the court, it also has borne some fruit. The court building itself has undergone redecoration and clerks who labored in near-darkness now have adequate lighting. The bench configuration enables the justices to see and hear each other even if they do not heed one another.

Curiously and with apparent thoughtlessness, Burger made one drastic change that caused severe misgivings. He converted the conference room, where the justices meet as nine equals to deliberate secretly on cases, into his personal office.

And when Congress came through with requested

money for staff increases, Burger personally hired a third clerk for each justice, invading each colleague's personal prerogatives in a way that only a veteran justice could fully appreciate.

The Chief Justice, his predecessor, has coaxed more adequate budgets from conservative appropriations committees. Congress has now provided Burger with a \$40,000 executive assistant, which may help to reduce Burger's 14-hour work days.

Problems Publicized

In public appearances Burger has given fresh publicity to problems confronting the courts and the neglect of America's prisons. He also has brought resentment with stern demands for more "civility" by lawyers just when some attorneys contend that the judicial system, too, needs to protect unpopular advocacy and at a time when Burger himself has set an example of judicial combativeness.

Whether the full participation of the new justices will ultimately produce more harmony remains to be seen. The immediate outlook, however, is for a polarized if not splintered court.