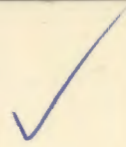


[c. DEC. 1971]

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
THE CHIEF JUSTICE

Dear Lewis, I have copy of your  
Dec 10 letter to Mr Jay Johns.  
Since William & Mary has so much of  
John Marshall, (its most famous  
dropout) I hope, with tongue in cheek,  
that you will urge some folks to  
place Marshall items in the Supreme  
Court Museum. I have a dish from



his dinner set, a set of books which he  
autographed & I am giving them  
to the Court to place with his Bench  
Chair and other items, including  
tellers.

We are finding the visitors to the  
Court exhibit great interest in these  
aspects of the past.

We look forward to the  
week end.

Regards WEB



DR. ST. GEO. T. GRINNAN  
825 WEST GRACE STREET  
RICHMOND, VA.

DIAL 4-0461

April 8. 1940

Dr. St. Geo. T. Grinnan  
1600 W. Grace St. Richmond

My dear Morton: I taught school for William Marshall at his school, Cleveland High School at Markham U<sup>2</sup>, session 1895-6. I was the only teacher. I arrived at the school Sept 14. 1895. I soon learned that Mr. Marshall had lost his gold watch that belonged to his ancestor Chief Justice John Marshall some six months before I arrived. In November 1895 two months after I arrived Mr. Marshall came in to dinner from the field in front of the house with the valuable watch which he had found. Signed St. George Tucker Grinnan



STATE OF VIRGINIA, )  
COUNTY OF FAUQUIER. ) SS:

We hereby certify that the watch lately owned by William C. Marshall, and transferred by him to Judge J. K. M. Norton, of Alexandria, Va., is the watch that was owned and used by Chief Justice John Marshall.

WITNESS our hands this first day of February, A. D.  
1896.

*Wm C. Marshall*  
*Just Marshall*  
*Judge J. K. Norton*  
*J. A. Marshall*

Subscribed and sworn to before me this <sup>12<sup>th</sup></sup> day of  
February, A. D. 1896.

*Wm H. Lake*

Justice of the Peace.

*Wm H. Lake*



Chief -

Here is the Report on  
the Hearings

Senator Bayh's inquiry  
into my views as to domestic  
subversion cases begins  
on p 207 & goes thru 213.

The newspaper article  
- which you have seen -  
is reprinted pp 213-217

Many Thanks

Lewis



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

Jan 9, 1972

Dear Lewis

Many Thanks for  
your kind note with Potter's  
and Byron's comments. There  
are some hours of some  
days when that helps.

Just how long we can  
keep up even with high  
pressure pushing of  
conferences and all other time  
conserving measures, I do not  
know.

However we have a good



debate generated on the 7<sup>th</sup> and  
Report and Bot Meserve tells  
me they will try to get the  
Governors to approve the  
three judge court abolition  
at the January meeting.

Again my thanks.

Warren



MEMORANDUM

TO: The Chief Justice  
FROM: Lewis F. Powell, Jr.

DATE: February 15, 1972

Lights in my Office

During your absence last week, the electrician checked the lighting in my office and found it quite defective.

They have on hand some florescent light fixtures, similar to those in Justice White's chambers, which can be put in my office on a temporary basis. They have in mind your plans to renovate and relight all of the chambers. The temporary relief for my chambers will not be incompatible with the long range program, and will not involve purchasing any fixtures or equipment.

If this has your approval, they will install the fixtures on Saturday of this week.

L. F. P., Jr.



*Lewis has just turned up in the piles of files.*  
*Perhaps you'd like to have it?*  
*WJB*

Transcript of Recording at  
February 19, 1972 Dinner Party at Court

Chief Justice and Mrs. Warren, Justice and Mrs. Reed,  
Justice and Mrs. Clark, and Brothers of the current crop:

We welcome Lewis Powell and Bill Rehnquist and their ladies to these portals. You have now joined a select company for, in the whole history of the country, only 98 preceded Lewis and 99 preceded Bill. And some of those served only a few months or a few years. Having said that, I hasten to explain that we are a "select" company because we were selected and because we are here. We should have no illusions, and do have none, about the fact that Presidents could well have selected others in our places -- Justices who would have graced this Court. But we are the ones who are here -- not those others who might well have been. And so it falls to us to maintain the great traditions, to preserve the continuity of the institution, and to meet the new problems that arise.

If the Court is great, it is because of its aspect as an institution. Like the other branches of government, it is made up of fallible human beings, but in some respects perhaps a little different from other fallible human beings who govern our country's destinies. We are perhaps even somewhat different from our brothers on the other Federal courts in the sense that we have no hopes or ambitions for something else. A Circuit or District Judge can properly hold hopes for higher appointment. For us, there should be none and there is none. To what could any lawyer, who has devoted his life to the law, aspire after



reaching this Court? It might even be reasonable to engrave over our doorway an acknowledgment that all who enter here have abandoned ambition for the future, for surely this is true.

On the day I took office the President came to the Court to pay tribute to Earl Warren's great career of more than 50 years of public service and his service on this Court during one of the stirring periods in its history. He spoke eloquently, I thought, of something very central to the Court as an institution, when he said that the key to the Court's place in American life and our system was that it represented continuity with change. Continuity with change are words that might well be inscribed in our marble panels along with "Equal Justice Under Law." We can all agree on the essential continuity even as we may not agree on the time, the content and the pace of change. But if we view our task as being alert to these concepts, drawn as we are from varied backgrounds of experience and different regions of the country, the Court will remain a great institution and a great force for both stability and progress and a balance wheel in our way of life.

It is perhaps because we reflect along these lines in our rare moments of relaxation that we find we are not merely tolerant of each other's errors -- we accept each other's positions because, however wrong, they are honestly arrived at -- not guided by even subconscious ambitions appropriate for those in the political branches where policy cannot be an absolute. There they correctly have constituencies to whom they must answer, as we have not. Our constituency is all the people and our guide is the Law.



And so it is that however strongly we feel at times, we are finally bound to know that we are equal custodians of a great charge to maintain this institution as it has evolved under the Constitution. And if we do that, even reasonably well, we will have done our part.

So it is pleasant to be present to help welcome Lewis and Bill and their ladies to the Court and to say how much we look forward to working with them in the years ahead -- years we hope will be long and we know will be fruitful.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 22, 1972

MEMORANDUM TO THE CONFERENCE

Re: Memorial for Mr. Justice Black

The Memorial Ceremony for Justice Black was fixed for Monday, April 3, but Justice Douglas advises he has a commitment out of Washington for that day.

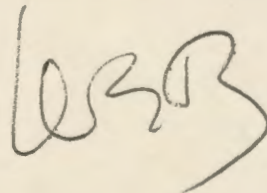
Canvassing various participants I find

Tuesday, April 4, is not available for several participants

Friday, April 7, is not available for Elizabeth and H. L. Black, Jr.

This leaves Wednesday, April 5, or Thursday, April 6, and before we proceed further, please let me know when we gather this morning whether these two days are acceptable to the Court.

Regards,





MEMORANDUM

TO: The Chief Justice

DATE: February 22, 1972

FROM: Lewis F. Powell, Jr.

Memorial for Mr. Justice Black

I will be available on either Wednesday, April 5, or Thursday,  
April 6.

L. F. P., Jr.



B

MEMORANDUM

TO: The Chief Justice

DATE: March 3, 1972

FROM: Lewis F. Powell, Jr.

Here is a reprint of Roger Traynor's address to the Law School at Dickinson College last June.

It is one of the best commentaries on our times that I have seen.

I have referred it to the American Bar Journal.

L. F. P., Jr.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 13, 1972

Re: Court Photograph

Dear Chief:

National Geographic is fine with me.

Sincerely,

L. F. P.

The Chief Justice

lfp/ss

cc: The Conference



March 14, 1972

Dear Mary:

Please have the following case put on  
the discuss list for the Conference on Friday,  
March 17:

71-5908 Chambers v. Mississippi

Sincerely,

Miss Mary Burns

lfp/ss



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 14, 1972

Dear Lewis and Bill:

After I had made some points at Conferences in the Fall of 1969, John Harlan came in and said with a smile, "You sound just like Felix." Whereupon I thanked him for the extravagant compliment and asked, "Just why?" The response was to send me a batch of memos Frankfurter had written in a vain effort to get the Court to change some of its less desirable habits.

I do not intend my efforts to be vain, and I did not leave the life of relative ease in the Court of Appeals to be frustrated. I do not expect the Court to accept my ideas 100% (I'll settle for 90%) but we must keep pressing, and those of us who are new are not wedded to the ideas and processes of the past.

These memos will make good summer reading.

Regards,

W.B.

Mr. Justice Powell ✓

Mr. Justice Rehnquist

LJP

I reviewed all of these in July 1972. Felix made the same points year after year, without success. I think most of her suggestions are sound.

Her basic theme is that cases are not as maturely considered as they should be. With this, I fully agree. See my speech to Fourth Circuit.



from Frankfurter, J.  
9/27/55

## MEMORANDUM FOR THE CONFERENCE

By Mr. Justice FRANKFURTER

If what follows does not carry its own justification, no introductory words of mine will help. From Term to Term I am reinforced in my conviction that we could improve upon the means for assuring due deliberation in our decisions.

At the risk of wearisome repetition, I say again that it would greatly surprise me if all of us did not feel that discussion at Conference of some of the more important cases last Term was not sufficiently informed. This implies no reflection on anyone. I certainly felt inadequately prepared at least as often as anybody. All I mean to convey is that on occasion we were denied, in the very nature of the customary conduct of our business, adequate opportunity to reach a solid judgment before we voted on a case. Too often we discussed and voted on a case at a stage when few, if any, of us could have come to grips with the issues or had time to explore the relevant materials, considering the meagerness of briefs and arguments. I could easily give instances where some of us certainly would have voted with greater assurance if, at the time, we had had more adequate understanding.

I hardly recall a case, except the decree in the segregation cases, as was true of the main decision, in which we postponed a vote after argument for further study. The exception is significant. Who will deny that this maturing process in the segregation cases fully vindicated itself?

Likewise we had more than one instance where the Justice to whom an opinion was assigned changed his vote on fuller study. Such change seems to me highly creditable to the judicial process and is bound to occur on occasion, even after thorough exploration of a case at the bar

So This is  
not new...

!

✓



or at Conference. But certainly such shifts of view have a direct relation to the thoroughness of consideration before the formality of a vote. Assignment of an opinion on the basis of a Conference vote is bound to give considerable momentum to the views implied by the assignment, even though formally they may have been tentatively expressed. And how many of us, not writing in a case can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues more thoroughly?

Of course we cannot all examine every case with the care required of the writer of the Court's opinion before voting on it. Nor am I suggesting the postponement of voting to the Greek calends. I am not so foolish as to think we should aim at perfection. But in view of the state of our business we should be able to have more time for a maturer process of deciding each case than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt of inspiration. Ideas have to be incubated and brought slowly to maturity.

To that end, I suggest consideration of the following promising, even if minor, modifications in our practice.

1. Investigation of doubtful cases prior to vote-taking.—Normally the Court now votes upon every argued case the first time it comes up at Conference. Frequently the views which underlie such a vote derive from too limited consideration and necessarily express a tenuous judgment. In these instances, would it not be desirable that the case be assigned for a full report on the issues without taking a vote? Psychologically it makes considerable difference that a writer is under explicit instruction to act as a reporter to explore and to report the result of his study, instead of being the draftsman of views for a conclusion reached with the formality of a vote. This is not the less true because at times a change of conclusion from the vote is forced upon the writer by further study.

By the Holy  
Grail, I hope  
so. This  
explains some  
of the ———  
that emanates  
from here!

This said  
15 years  
ago!

Some true  
inerts.

This is same  
rationale for  
1969 proposal  
defer all cert  
cases for  
supporting memo.  
F.F. was 15 years  
a head of me!

But not often  
enough!



2. *Fuller consideration of difficult or complicated cases prior to discussion at Conference.*—The present practice is to vote, as a rule, on all cases heard on the days immediately preceding Conference. In the cases which present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, this schedule affords sufficient consideration preceding Conference. But there are cases, and not too rarely, in which the real difficulties emerge for the first time in argument or at Conference. Especially if such a case is argued toward the end of the week, it cannot be fully considered the next day or two.

Our present schedule needlessly crowds the mind and thereby tends toward premature judgment. Would the desirable pressure for keeping the business of the Court moving be harmed if it became the practice that cases argued after Wednesday be put over to the week following, unless the cases are obviously easy of decision? (This will be so—unless we have taken cases we should not have—only where the lower court is palpably in error or where there is conflict and one of the courts was clearly wrong.) I am not unaware of the advantage of considering a case under the impact of freshness. But freshness presupposes adequacy of what it is that is fresh. Too often our consideration has not had the impact of knowledge and understanding needed for sound judgment.

3. *More adequate consideration of majority and dissenting opinions.*—Opinions that often take weeks in preparation deserve more than scanty attention. The terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be not less important than the so-called result. Yet at times the Court hands down decisions on a Monday although a majority opinion, or a weighty dissent, was not circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that normally a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring

Most such cases ought not be here! — Affirm summarily or DISIG

Amen!

I decline to act for 10 days—

Spinelli,  
M. & Grosso  
Chimel  
et al  
W. Therspoon



or dissenting), has been circulated later than Wednesday noon?

Would it not also be desirable that, by common understanding, we would not send in our returns, when duly apprised of an impending dissent, until the differing views are before us? Here, too, there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, a dissent of which notice has been given might, on reconsideration of the cases in light of the dissent, cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, which is the old practice, I believe. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns be normally delayed for forty-eight hours to give dissenters an opportunity to notify their brethren of their intention to prepare an adequate dissent and withhold returns to await such dissent.

I respectfully submit these suggestions in the belief that it can at any rate do no harm to re-examine our way of doing business. Self-criticism harms no institution.

September 16, 1955.



Mr. Justice Brandeis  
Mr. Justice Cardozo  
Mr. Justice Holmes  
Mr. Justice Sutherland  
Mr. Justice Taney  
Mr. Justice Washington  
Mr. Justice White  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Marshall  
Mr. Justice Roberts  
Mr. Justice Stevens  
Mr. Justice Brennan  
Mr. Justice Burger  
Mr. Justice Rehnquist  
Mr. Justice O'Connor  
Mr. Justice Scalia  
Mr. Justice Kennedy  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer  
Mr. Justice Alito  
Mr. Justice Kagan  
Mr. Justice Thomas  
Mr. Justice Gorsuch  
Mr. Justice Kavanaugh  
Mr. Justice Barrett  
Mr. Justice Jackson  
Mr. Justice Brandeis  
Mr. Justice Cardozo  
Mr. Justice Holmes  
Mr. Justice Sutherland  
Mr. Justice Taney  
Mr. Justice Washington  
Mr. Justice White  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Marshall  
Mr. Justice Roberts  
Mr. Justice Stevens  
Mr. Justice Brennan  
Mr. Justice Burger  
Mr. Justice Rehnquist  
Mr. Justice O'Connor  
Mr. Justice Scalia  
Mr. Justice Kennedy  
Mr. Justice Souter  
Mr. Justice Ginsburg  
Mr. Justice Breyer  
Mr. Justice Alito  
Mr. Justice Kagan  
Mr. Justice Thomas  
Mr. Justice Gorsuch  
Mr. Justice Kavanaugh  
Mr. Justice Barrett

From: Mr. Justice Frankfurter, J.

9/5/56

# MEMORANDUM FOR THE CONFERENCE

From Mr. Justice Frankfurter

Even before I came on the Court, I had good reason to believe that the course of proceedings leading to adjudication was not all that it might be. My grounds for feeling that the deliberative process was inadequate derived from the intimacies I had enjoyed over the years with Justices Holmes, Brandeis, and Cardozo. My own experience on the Court has enforced my conviction that we could readily improve on the means for insuring due deliberation. To that end I have for some time, from Term to Term, circulated memoranda submitting suggestions, with a view not to their adoption but to their consideration. Even though these memoranda have been stillborn, I continue to feel that there are inadequacies that call for correction. I am duly mindful of the wisdom behind the whimsey, "everybody's out of step but Johnny," but indifference is not refutation, and neglect of my prior circulations may only mean that the press of other business has derailed their consideration. I therefore think it appropriate to continue to submit my suggestions to the Conference until time is found for their consideration. It is consideration I seek, not agreement.

What follows is in substance what I have heretofore put to the brethren.

## I.

Normally the Court now votes on every argued case the first time it comes up at Conference. At the risk of wearisome repetition, I say that it would greatly surprise me if all of us did not feel that discussion at Conference on some of the more doubtful, difficult, and important cases we have had before us has not been sufficiently informed. This implies no reflection on anybody. I certainly have felt inadequately prepared at least as often as



anyone. All I mean to convey is that because of the very nature of the customary conduct of our business, we have at times discussed and voted on cases involving important or complicated issues at a stage when few, if any, of us could have come to grips with them or had time to explore the relevant materials, considering the meagerness of briefs and arguments. Necessarily then our voting has derived from too limited a consideration and must have been based on a tenuous judgment. This situation may also occur in the occasional cases in which the real difficulties emerge for the first time at the argument or in Conference.

There have been few cases, except the main decision and the decree in the Segregation Cases, in which we postponed a vote after argument for further study. The exception is significant. Who will deny that this maturing process, proceeding in a designedly unhurried atmosphere, was fully vindicated in the final outcome of the Segregation Cases?

Likewise, we have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change for me vindicates the integrity of the judicial process, for, if reason is to guide, it is bound to occur on occasion even after thorough exploration of a case before and at Conference. But certainly such shifts of view have a direct relation to the thoroughness of consideration before the formality of a vote. And how many of us, not writing in a case, can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, I suggest consideration of the following promising, even if minor, modifications in our practice.

1. *Investigation of doubtful cases prior to vote-taking.*—In doubtful, difficult, important cases, would it not be desirable that the case be assigned to a Justice for a full report on the issues without taking a vote? The



occasions when the nature of the legal problems of a case makes it desirable not to reach conclusions by the Friday after argument will not be many. But these few may be compelling from the point of view of reaching a wise decision. In the relatively few instances when such a course is desirable the considerations for not coming to a vote are precisely those which may be decisive. I am, of course, aware that all votes are deemed to be tentative. Formally no doubt this is so. But it is not true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, and another thing for a Justice to be charged with exploring the problems in a case, free from the drive of a determined result, however denominated "tentative." The mental pressures of the two situations are bound to be very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only how cases are decided but also the way in which a conclusion is formulated—the direction and breadth and atmosphere of an opinion. This aspect of the work of the Court depends on the way an opinion is written. It is, however, a fact overwhelmingly established by experience that amiable aspects of collegueship often lead to acquiescence in the form of an opinion, even though all those who agree with the result are not wholly in agreement with everything that is said in support of the conclusion. I need not elaborate on this. All of us, in our own experience, could give ample proof. But in those cases in which the nature of the subject matter, the limited time that has been had for exploration of problems and materials, the inadequacy of the arguments, etc., etc., call for the allowance of a period of time for the maturing of wisdom, a report by a member of the Court, as against a draft opinion, will enlist desirable collaborative contributions of all the Justices in the final formulation of the Court's opinion.

Somerville '55



2. *Fuller consideration of cases prior to discussion at Conference.*—In the cases which present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued toward the end of the week cannot be fully considered during the next day or two. Our present schedule crowds the mind and thereby tends toward premature judgment. Would the desirable drive to keep the business of the Court moving be harmed if it became the practice that cases argued after Wednesday be put over to the week following, unless the cases are obviously easy of decision? (This will be so—unless we have taken cases we should not have—only where the lower court is palpably in error or where there is conflict and one of the courts is clearly wrong.) I am not unaware of the advantage of considering a case under the impact of freshness. But freshness presupposes adequate knowledge of what it is that is fresh. Too often our consideration has not had the impact of the knowledge and understanding needed for sound judgment.

Same as 55

In making these suggestions I realize that of course we cannot all examine every case with the care required of the writer of the Court's opinion before voting on it. Nor am I suggesting the postponement of voting till doomsday. But in view of the state of our business we should be able to have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt of inspiration. Ideas have to be incubated and brought slowly to maturity.

|||

3. *More adequate consideration of majority and dissenting opinions.*—Opinions that often take weeks in preparation deserve more than scanty attention. The



terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down decisions on a Monday morning although a majority opinion, or a weighty dissent, was not circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that *normally* a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring or dissenting) has been circulated later than Wednesday noon?

Would it not also be desirable that, by common understanding, we not send in our returns, when duly apprised of an impending dissent, until the differing views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, a dissent of which notice has been given might, on reconsideration of the case in light of the dissent, cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for forty-eight hours to give dissenters an opportunity to notify their brethren of their intention to prepare a dissent, and I would propose also the withholding of returns to await such dissent,

## II.

It is our present practice that whenever we vote at Conference to grant a petition for certiorari or note probable jurisdiction of an appeal and then make a summary disposition of the case, the order comes down the following Monday. Summary disposition of a granted petition



or a noted appeal is, from the point of view of litigants and reversed courts, a fairly drastic method of keeping the Court's business moving. It is, and ought to be, employed only in clear cases. We must also make certain that we are not, in the form of the judgment rendered, deciding more than we mean to. Ought we not to safeguard ourselves by letting a week go by before having the order go down? This will give us time to reconsider whether the decision is in fact so clear that no further brief or argument is needed and that the form of our judgment fully conforms to our decision.

III.

Our usual practice with decisions *per curiam* is also to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders lie over a week so that we can take a second look or have second thoughts.

September 5, 1956.

Yes. See e.g.  
Watts v. U.S.

1969 Term  
1968?

Summary  
reversal  
with

4 dissents



September 30, 1957.

Dear Brethren:

October Term 1957, Greetings.

Experience on the Court strongly confirmed views I had come to over the years before I came here regarding some remediable shortcomings in the Court's internal procedure. And so I have ventured to circulate, at the opening of several preceding Terms, memoranda suggesting changes designed to improve our deliberative process. The changes I proposed were relatively minor but seemed to me fruitful for the better conduct of our business. In this memorandum I have reconsidered these past suggestions, reformulated them and have added new matter, especially Part I, which the experience of the last Term has particularly forced on my attention. I am circulating these suggestions, not with a view to their adoption, but to their consideration and discussion at an early Conference.

I.

The last shall be first, and so I start off with suggesting that it ought to be possible to take some steps in the management of our business whereby we will avoid concentration of difficult and far-reaching adjudications toward the end of the Term.

Massing important adjudications is bad for the Court, internally and externally: internally, it inevitably hampers the judicial process; externally, it makes for public indigestion with consequent misinformation and mischievous reaction to decisions. —

Inasmuch as maintenance of the Court's authority precludes one-man decisions, a "massing of important cases" affects the quality of the decisional process, even though the writing of the Court's opinions is distributed. Unless the mind of the whole Court is directed to every case and

"Massing."

The May-June  
"Syndrome"  
again

Shoddy at best!

We did  
just this  
in June 1972



critical thought is brought to bear on individual opinions for which there is collective responsibility, one-man decisions will to no small degree result. The crowding of many cases at the same time on the Court's preoccupation puts an excessive strain on the conditions indispensable for the wise functioning of the deliberative process.

Since public and congressional comprehension of what the Court decides depends on the press reports of decisions and opinions, ignorance and misapprehension are inevitable if our opinions cannot be absorbed by the daily press. A massing of important decisions overtaxes the already ineagre ability of the press to report our decisions with a fair degree of accuracy. Greater sensationalizing, because of the restricted space for reporting normally follows a "big day" at the Court, and congressional response—not merely talk but legislative proposals—is apt to be based on distorted and inadequate reporting of opinions. (The space given by the New York Times only serves to throw into bold relief the inadequate reporting by the press generally and even the New York Times was unable to absorb all that the Court decided on June 17 last.)

I am well aware that this is an old and difficult problem, but I have always been impressed with the fact that just as the end of the session of Congress leads to a log-jam that is conducive to hasty and mischievous legislation, so the Court's decisions at the end of the Term, over the years, have also reflected an undue proportion of dubious decisions or ill-considered opinions. I repeat. I am aware of the difficulties of managing the flow of business to avoid the end-of-the-Term's log-jam. But if we recognize the problem and put our minds to the alleviation of the difficulties it raises, I am sure that we can avoid some at least of the undesirable implications of such a concentration of major cases as we had during the last few months of the last Term. Perhaps as a starter it could be made possible, through the timely printing of records, to have enough cases ready in January so that,

T.C.'s suggestion of  
expanding decision days?

Carrying the opinions in important  
cases, rendered at  
end of term, over to the  
next term, without  
reargument?

Dozens of  
Cir.'s have  
argued this  
for years.

And every Term



instead of taking a long recess in both December and February, two weeks of argument from the end of the Term could be moved into earlier weeks. Maybe this would involve extra printing costs, but I think it is no economy in any true sense to save money at the expense of an adequate deliberative process.

II.

*Premature voting*  
Normally the Court now votes on every argued case the first time it comes up at Conference. I assume that every one of us at one time or another has felt that discussion at Conference on some of the more doubtful, difficult, and important cases has not been sufficiently informed. This implies no reflection on anybody. I certainly have many times felt inadequately prepared. All I mean to convey is that because of the very nature of the customary conduct of our business, we have at times discussed and voted on cases involving important or complicated issues at a stage when few, if any, of us could have come to grips with them or could have had time to explore the relevant materials, considering the meagerness of briefs and arguments. Necessarily then our voting has derived from too limited a consideration and must have been based on a tenuous judgment. This situation may also occur in the occasional cases in which the real difficulties emerge for the first time at the argument or in Conference.

In very few cases do we postpone a vote after argument for further study. As illustrated by the course of deliberation in the *Segregation Cases*, resort to such a maturing process, designed for the reflection that can only come from an unhurrying atmosphere, emphatically vindicates itself. It may be suggested that the *Segregation Cases* were not unique in proving the desirability of taking time for maturing judgment, to afford time, that is, for deeper thought.

Take another manifestation of the need for adequate deliberation and interchange of thought upon due consid-



eration. We have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change for me vindicates the integrity of the judicial process. If reason is to guide, a change of opinion is bound to occur on occasion even after thorough exploration of a case before and at Conference. But certainly such shifts of view have a direct relation to the thoroughness of consideration before the formality of a vote. And how many of us, not writing in a case, can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, I suggest consideration of the following promising, even if minor, modifications in our practice.

7. 1. *Investigation of doubtful cases prior to vote-taking.*—In doubtful, difficult, important cases, would it not on appropriate occasion be desirable that the case be assigned to two Justices for full, separate reports by them, independently arrived at, on the issues without taking a vote beforehand? This process was followed on the important questions of the significance of a denial of certiorari in criminal cases, when REED, J. and I were asked to prepare memoranda before the matter was voted on. (*Brown v. Allen*, 344 U. S. 443.) The occasions when the nature of the legal problems of a case makes it desirable not to reach conclusions by the Friday after argument will not be many. But these few may be compelling from the point of view of reaching a wise decision. In the relatively few instances when such a course is desirable the considerations for not coming to a vote are precisely those which may be decisive. We say, of course, that all votes are tentative. Formally no doubt this is so. But it is not true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, another for a Justice to be charged with exploring the problems in a case, free from the drive of

— or of grant.

9 DISIG's  
1969 Term



a determined result, however denominated "tentative." The mental pressures of the two situations are bound to be very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only how cases are decided but also the way in which a conclusion is formulated—the direction and breadth and atmosphere of an opinion. This aspect of the work of the Court depends on the way an opinion is written. It is, however, a fact overwhelmingly established by experience that amiable aspects of collegueship often lead to acquiescence in the form of an opinion, even though all those who agree with the result are not wholly in agreement with everything that is said in support of the conclusion. I need not elaborate on this. But in those cases in which the nature of the subject matter, the limited time that has been had for exploration of problems and materials, the inadequacy of the arguments, etc., etc., call for the allowance of a period of time for the maturing of wisdom, a report by members of the Court, as against a draft opinion, will enlist desirable collaborative contributions of all the Justices in the final formulation of the Court's opinion.

Of course, such an assignment for a report as a basis for voting presupposes promptitude in its completion.

2. *Fuller consideration of cases prior to discussion at Conference.*—In the cases which present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued on Thursday cannot be fully considered by Friday, in view of the shortness of time and the necessary preparations that must be made for Friday's Conference. Our present schedule crowds the mind and thereby tends to force us toward premature judgment. Would the desirable drive to keep abreast of the business of the Court be curtailed if it became the practice that cases argued

Report

Putting over Thursday  
Cases



on Thursday be put over to the week following, unless the cases are obviously easy of decision? (This will be so—unless we have taken cases we should not have—only where the lower court is palpably in error or where there is conflict and one of the courts is clearly wrong.) I am not unaware of the advantage of considering a case under the impact of freshness. But freshness presupposes adequate knowledge of what it is that is fresh. Too often, consideration has not had the impact of the knowledge and understanding needed for sound judgment.

In making these two suggestions I realize that we cannot before voting all examine every case with the care required of the writer of the Court's opinion. Nor am I suggesting the postponement of voting till doomsday. But in view of the state of our business we should be able to have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt of inspiration. Ideas have to be incubated and brought slowly to maturity.

3. *More adequate consideration of majority and dissenting opinions.*—Opinions, that often take weeks in preparation deserve more than scanty attention. The terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down decisions on a Monday morning although a majority opinion, or a weighty dissent, may not have been circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that normally a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring

opinion circulated  
after Wednesday, not to  
be down till  
following Monday.

Not whole  
anyone else  
can put in  
a full  
individual  
"reasons"  
shall be  
but unanimous  
opinions.



or dissenting) has been circulated later than Wednesday noon?

Would it not also be desirable that, by common understanding, we not send in our returns, when duly apprised of an impending dissent, until the differing views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, a dissent of which notice has been given might, on reconsideration of the case in light of the dissent, cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for twenty-four hours to give writers of dissenting and concurring opinions an opportunity to notify their brethren of their intention to prepare them, and I would propose also the withholding of returns to await such opinions.

### III.

It is our present practice that whenever we vote at Conference to grant a petition for certiorari or note probable jurisdiction of an appeal and then make a summary disposition of the case, the order comes down the following Monday. Summary disposition of a granted petition or a noted appeal is, from the point of view of litigants and reversed courts, a fairly drastic method of keeping the Court's business moving. It ought to be sparingly employed, only in clear cases. We must also make certain that we are not, in the form of the judgment rendered, deciding more than we mean to. Ought we not to safeguard ourselves by letting a week go by before having the order go down, circulating all orders except the

No Returns before  
dissents circulated -  
24 hour notice of  
dissents.

Summary dispositions to  
be circulated, not not to  
come down for a week.

See Fortas' at  
all bitter  
protest at  
summary  
reversal of  
Watts v US  
1969 on  
threat to  
President  
stat.



obviously formal? This will give us time to reconsider whether the decision is in fact so clear that no further brief or argument is needed and that the form of our judgment fully conforms to our decision.

IV.

Our usual practice with decisions *per curiam* on which argument has been had is also to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders, after appropriate circulation, lie over a week so that we can take a second look or have second thoughts.

F. F.

*Per curiam not to  
come down for a week,  
after being circulated.*

*Yes  
let set  
up  
procedures  
and DOIT*



September 29, 1958.

DEAR BRETHREN:

October Term 1958, Greetings.

Of course I do not want to make a nuisance of myself, but time has not lessened my conviction that a few, relatively simple, internal procedural changes in connection with the business of the Court would give every promise of improving our deliberative process. In this memorandum I have reconsidered and reformulated my past suggestions and added new matter. I am circulating these suggestions, in the hope of their consideration and discussion at an early Conference.

I.

Normally the Court now votes on every argued case the first time it comes up at Conference. I assume that every one of us at one time or another has felt that discussion at Conference on some of the more doubtful, difficult, and important cases has not been sufficiently informed. This implies no reflection on anybody. I certainly have many times felt inadequately prepared. All I mean to convey is that because of the way we have customarily conducted our business, we have at times discussed and voted on cases involving more or less new, important and complicated issues at a stage when few, if any, of us could have come to grips with them or, considering the meagerness of briefs and arguments, could have had time to explore the relevant materials. Necessarily then our voting has derived from too limited a consideration and must have been based on a tenuous judgment. This situation may also occur in the occasional cases in which the real difficulties emerge for the first time at the argument or in Conference.

In very few cases do we postpone a vote after argument for further study and deliberation. As illustrated by the *Segregation Cases*, resort to such a maturing process, designed for the reflection that can only come from an unhurrying atmosphere, emphatically vindicates itself.



I suggest that the *Segregation Cases* were not unique in proving the desirability of taking time for maturing judgment, to afford time, that is, for deeper thought.

Take another manifestation of the need for adequate deliberation and interchange of thought. We have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change for me vindicates the integrity of the judicial process. If reason is to guide, a change of opinion is bound to occur on occasion even after thorough exploration of a case before and at Conference. But certainly such shifts are a direct reflection on the thoroughness of consideration before the formality of a vote. And how many of us, not writing in a case, can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, I suggest consideration of the following promising, even if minor, modifications in our practice.

1. *Investigation of doubtful cases prior to vote-taking.*—In doubtful, difficult, important cases, would it not on occasion be desirable, before a vote is taken, that the case be assigned to two Justices for full, separate reports by them, independently arrived at, on the issues presented? This process was followed on the important questions of the significance of a denial of certiorari in criminal cases, when REED, J. and I were asked to prepare memoranda before the matter was voted on. (*Brown v. Allen*, 344 U. S. 443.) I dare to think that the Court arrived at a maturer, better considered judgment as a result of the stimulus of these memoranda. The occasions when the nature of the legal problems in a case makes it desirable not to reach conclusions by the Friday after argument will not be many. In the relatively few instances when such a course is desirable, however, the considerations for not coming to a vote are precisely those that may be decisive. We say, of course, that all votes are tentative. Formally no doubt this is so. But it is not



true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, and another for a Justice to be charged with exploring the problems in a case, free from the drive of a determined result, however denominated "tentative." The mental pressures of the two situations are bound to be very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only how cases are decided but also the way in which a conclusion is formulated—the direction and breadth and atmosphere of an opinion. This aspect of the work of the Court depends on the way an opinion is written. It is, however, a fact overwhelmingly established by experience that amiable collegueship often leads to acquiescence in the form of an opinion, even though all those who agree with the result are not wholly in agreement with everything that is said in its support. I need not elaborate on this. But in those cases in which the nature of the subject matter, the limited time available for exploration of problems and materials, the inadequacy of the arguments, etc., call for the allowance of a period of time for the maturing of wisdom, a report by members of the Court, as against a draft opinion, will enlist desirable collaborative contributions of all the Justices in the final formulation of the Court's opinion.

Of course, such an assignment for a report as a basis for voting presupposes promptitude in its completion. It presupposes the kind of self-discipline that may surely be attributed to members of the Supreme Court.

2. *Fuller consideration of cases prior to discussion at Conference.*—In the cases that present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued on Thursday cannot be fully considered by



Friday, in view of the shortness of time and the necessary preparations that must be made for Friday's Conference. Our present schedule crowds the mind and thereby tends to force us toward premature judgment. Would the desirable drive to keep abreast of the business of the Court be curtailed if it became the practice that cases argued on Thursday be put over to the week following, unless the cases are obviously easy of decision? (They will not be easy of decision unless we have taken cases we should not have, except where the lower court is palpably in error or where there is conflict and one of the courts is clearly wrong.) I am not unaware of the advantage of considering a case when it is fresh in the mind. But the value of freshness presupposes adequate knowledge of what it is that is fresh. Too often, consideration has not had the impact of the knowledge and understanding needed for sound judgment.

In making these first two suggestions I realize that we cannot, before voting, all examine every case with the care required of the writer of the Court's opinion. Nor am I suggesting the postponement of voting till doomsday. But we should have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt either of labor or of inspiration. Ideas have to be incubated and slowly nourished into healthy life.\*

\*One of the most eminent of American scientists, Professor Percy W. Bridgeman, a Nobel Prize winner, accounted thus for his thought process:

"For me, at least, new ideas germinate only in an atmosphere of leisure. I have to immerse myself in a problem and then let it gestate in my brain, without the distraction of other interests, if I am to expect a solution to come sauntering into my mind when I wake up two or three mornings later." *Isis* for July 1947, p. 129. Do not our problems require a thought process not unlike that described by Professor Bridgeman?

Hold all  
Thursday argued  
cases for  
following  
week absent  
unanimous  
consent.

OR

Dispose of  
Monday argued  
cases at  
a special  
conf. on  
Mon. or Tues  
at 3:30 -



3. *More adequate consideration of majority and dissenting opinions.*—Opinions that often take weeks in preparation deserve more than scanty attention. The terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down a decision on a Monday although the majority opinion, or a weighty dissent, may not have been circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that *normally* a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring or dissenting) has been circulated later than Wednesday noon?

Would it not also be desirable that, by common understanding, we not send in our returns, when duly apprised of an impending dissent, until the differing views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, reconsideration of the case in light of the dissent might cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for twenty-four hours to give writers of prospective dissenting and concurring opinions an opportunity to notify their brethren of their intention to prepare them, and I would propose also the withholding of returns to await such opinions.

## II.

It is our present practice that whenever we vote at Conference to grant a petition for certiorari or note prob-



able jurisdiction of an appeal and then make a summary disposition of the case, the order comes down the following Monday. Summary disposition of a granted petition or a noted appeal is, from the point of view of litigants and reversed courts, a fairly drastic method of keeping the Court's business moving. It ought to be sparingly employed, only in clear cases. We must also make certain that we are not, in the form of the judgment rendered, deciding more than we mean to. Ought we not to safeguard ourselves by letting a week go by before having the order go down, circulating all orders except the obviously formal? This will give us time to reconsider whether the decision is in fact so clear that no further statement of reasons, however brief, is needed and that the form of our judgment fully conforms to our decision.

### III.

Our usual practice with decisions by *per curiam* order on which argument has been had is also to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders, after appropriate circulation, lie over a week so that we can take a second look or have second thoughts.

### IV.

These last observations, it will be noted, are all concerned with factors that, because of undue expedition and premature final adjudication, lead to less than attainable excellence. They lead me to remark more generally about the overriding need for that time that is essential for each member of the Court to give appropriately full consideration to every case that the Court has undertaken to review. Am I wrong in assuming that instances over



Bowell  
M<sup>c</sup>Cormack

Look at  
Baker & Carr

the course of the Term will occur to each of us in which this desideratum was lost sight of in the eagerness to have a case come down on a certain day? Changes in majority opinion and dissent, changes often fundamental to the theory of decision and certainly to its precise formulation, criss-crossed the Court in circulations that continued until almost the last minute before we went on the bench. It surely cannot be denied that such an atmosphere is hardly conducive to the full and mature consideration by every member of the Court of the implications of action, and the form that it takes in an opinion, to which he has formally subscribed.

In the abstract everyone of us will heartily agree that there is no virtue in deciding cases simply for the sake of deciding them, or in being primarily concerned with the quantity of our business or the rapidity of its disposition. "Deliberate speed" is not a bad motto for the process of opinion-rendering. I think it is fair to say that it is always better to put a case over than to hand it down in an atmosphere of confusion and last minute changes for whose implications no one can vouch and when there cannot have been time for adequate attention. Certainly a case should be put over when a member of the Court expresses doubt that, in the time remaining, adequate consideration cannot be given a case. But the burden should not be placed on an individual objector in holding up disposition. We should set our faces against agreeing on a Friday that a case come down on the following Monday when it is probable that this can be achieved only under the disadvantageous circumstances that we have all observed. Moreover, there should be no hesitancy, even after Conference, to request that a case not go down because unexpected difficulties have been revealed. Of course this places a burden on each member of the Court to be perfectly frank in stating the difficulties he apprehends still remain in properly considering and disposing of a case when it has been suggested that it is ready to come down. It places



on us an obligation not to acquiesce in a case being prematurely and precipitately handed down simply for fear of appearing obstructionist. When there is doubt the issue should be resolved in favor of delay.

Perhaps it would be best to have a firm rule that when there is a circulation of an opinion after Thursday afternoon with anything more significant than merely stylistic changes, the case should be held over another week.

F. F.

Monday

I will no longer agree to an opinion unless it has been static - unchanged + in final form for one week - unless possibly simple & unanimous.



Harlan, W.

Mr. Justice Douglas  
Mr. Justice Clark  
Mr. Justice Harlan ✓  
Mr. Justice Brennan  
Mr. Justice Whittaker  
Mr. Justice Stewart

From: Frankfurter, J.

Circulated: 9/29/59

Recirculated: \_\_\_\_\_

September 29, 1959.

DEAR BRETHREN:

October Term, 1959—Greetings!

Once again I venture to submit some suggestions for the conduct of our business. I continue to entertain the hope that time will be found early in the new Term to consider these suggestions at a Conference set aside for the purpose. The history of reforms, big or little, shows that they do not come overnight. I persist in this endeavor for a very simple reason. No branch of government is as free to pursue wisdom in the discharge of its responsibility as is this Court. But to succeed in this pursuit as effectively as is within human attainment demands active recognition of the limiting conditions for such success.

I.

Normally, the Court now votes on every argued case the first time it comes up at Conference. Is there one of us who has not felt on occasion that discussion at Conference on some difficult and important case has disclosed the need for further deliberation and discussion? Under such circumstances, even what is called a tentative vote is a vote largely in the dark. This can hardly be escaped. At times, even if not often, we discuss and vote on cases involving more or less new and complicated issues at a stage when few, if any, of us could have come to grips with them or, considering the meagerness of briefs and arguments, could have had time to explore the relevant materials. Necessarily then our votes must derive from too limited consideration and be based on a too tenuous judgment. This is especially true, however rarely it may happen, when the real difficulties emerge for the first time at the argument or in Conference.



In very few cases do we postpone a vote at the Conference immediately following the argument for further study and deliberation. As cannot be too often illustrated by the *Segregation Cases*, resort to such a maturing process for study and reflection can only come from an unhurrying atmosphere which ample time alone can afford. It will be recalled by those who were here at the time that at our first Conference, after the reargument of the *Segregation Cases* in early December 1953, we were led by THE CHIEF JUSTICE in what might be called a reconnoitering discussion, without thought of a vote. We then took several weeks to reflect on the views that were expressed, more in the spirit of inquiry than as conclusions, and there followed two further Conference discussions, weeks apart, before we finally came to a Court decision. I submit that the *Segregation Cases* were not unique in proving the need for taking the necessary time for a matured judgment and thereby securing the fortunate outcome resulting from such an intellectual procedure.

Take another manifestation of the need for adequate deliberation and interchange of thought by the brethren for securing a collective judgment beyond that afforded by the customary procedure. We have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change vindicates the integrity of the judicial process. If reason is to guide, a change of opinion is bound to occur at times even after thorough exploration of a case before and at Conference. But certainly such shifts may also bear on the lack of thoroughness of consideration before the formality of a vote. And how many of us, not writing in a case, can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, these modifications in our practice suggest themselves.

I did not see this  
before our Oct 16  
Conf. Now I have  
F.F. back of me!

Correct.



1. *Investigation of doubtful cases prior to vote-taking.*—In obviously doubtful, difficult and important cases, would it not on occasion be desirable, before a vote is taken, but after preliminary discussion, that the case be assigned to two Justices for full, separate reports by them, independently arrived at, on the issues presented? This process was followed on the vitally important procedural question of the significance of a denial of certiorari in criminal cases, when Reed, J., and I were asked to prepare memoranda before the matter was voted on. (*Brown v. Allen*, 344 U. S. 443.) I dare to think that the Court arrived at a better considered, surer judgment as a result of the stimulus of these memoranda. The occasions when the nature of the legal problems in a case makes it desirable merely to exchange views and not vote by the Friday after argument may not be many. In the relatively few instances when such a course is desirable, however, the considerations for not coming to a vote are precisely those that may be decisive. We say, of course, that all votes are tentative. Formally, no doubt, this is so. But it is not true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, and another for a Justice to be charged with exploring the problems in a case, free from the drive of a determined result however denominated "tentative." The mental pressures exerted by the two situations will be very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only the result reached but the way in which a conclusion is formulated—the direction and breadth and atmosphere of an opinion. These heavily influence the course of decisions. This vital aspect of the work of the Court depends on the content of an opinion—what it explicitly decides, how that is phrased, what is said passingly, what is intimated, what is left unsaid. It is, however, a fact

If there are  
differences of  
view - otherwise  
one should be  
enough.

Here is my 1969-  
1970 procedure re  
4 vote IFP cases

Some of  
the ridiculous  
cases we  
grant are  
proof of the  
F.F. points

yes



overwhelmingly established by experience that amiable collegueship often leads to acquiescence in the form of an opinion, even though all those who agree with the result are not wholly in agreement with everything contained in it or to be inferred from it. Surely each of us has had experience with this. But in those cases in which the nature of the subject-matter, the limited time available for exploration of problems and materials, the inadequacy of the arguments, etc., call for the maturing of wisdom not merely regarding the result but the mode of its formulation, a report by members of the Court, as against a draft opinion, will enlist desirable collaborative contributions by all the Justices in the final terms of the Court's opinion.

Of course, such an assignment for a report as a basis for voting presupposes promptitude in its completion. It presupposes the kind of self-discipline that may surely be attributed to members of the Supreme Court.

*2. Fuller consideration of cases prior to discussion at Conference.*—In the cases that present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued on Thursday cannot be fully considered by Friday, in view of the shortness of time and the necessary preparations that must be made for Friday's Conference. Our present schedule crowds the mind and thereby tends to force us toward premature judgments. There is such a thing as an intellectual traffic jam. Would the desirable drive to keep abreast of the business of the Court be curtailed if it became the practice that cases argued on Thursday be put over to the week following or, at the least, be merely tentatively discussed without a vote until the next Friday, unless the cases are obviously easy of decision? (They will seldom be easy of decision unless we take cases we should not, except where a lower court is palpably in error or where there is conflict in the circuits.) I am aware of the advantage of voting on a case



when it is fresh in the mind. But the value of freshness presupposes adequate basis for judging what it is that is fresh. Too often, consideration has not had the impact of the knowledge and understanding needed for sound judgment.

{ adequately  
informed  
freshness

In making these first two suggestions I realize that we cannot, before voting, all examine every case with the care required of the writer of the Court's opinion. Nor am I suggesting the postponement of voting till doomsday. But we should have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt either of labor or of inspiration. Ideas have to be incubated and slowly nourished into healthy life.\* Our Reports are replete with instances of memorably important results reached after a long incubating process and because of it.

3. *More adequate consideration of majority and dissenting opinions.*—Opinions that often take weeks in preparation deserve more than rapid, and therefore scanty, attention. We cannot be too conscious of the fact that the terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down a decision on a Monday although the majority opinion, or a weighty dissent, may not have

| yes

Thus fallacy of  
some to dwell on  
words & phrases  
out of context—

\*One of the most eminent of American scientists, Professor Percy W. Bridgeman, a Nobel Prize winner, accounted thus for his thought process:

"For me, at least, new ideas germinate only in an atmosphere of leisure. I have to immerse myself in a problem and then let it gestate in my brain, without the distraction of other interests, if I am to expect a solution to come sauntering into my mind when I wake up two or three mornings later." *Isis* for July 1947, p. 129. Do not our problems require a thought process not unlike that described by Professor Bridgeman?



been circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that *normally* a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring or dissenting) has been circulated later than Wednesday?

No more of this if even one J. asks deferral

Would it not also be desirable that we be governed by an unwritten rule not to send in our returns, when duly apprised of an impending dissent, until all notified views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, reconsideration of the case in light of the dissent might cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for twenty-four hours to give writers of prospective concurring and dissenting opinions an opportunity to notify their brethren of their intention to prepare them. Upon such notification, returns should, I respectfully submit, be withheld to await the concurrence or dissent.

This appears in every memo -

GTW often told me 1956-1966 that S.C. opinions had only fraction of critical analysis that ours in C.A. were given by the non-writing judges.

I will continue to be a "holdout" if only for press of other matters

## II.

It is our present practice whenever we vote at Conference to grant a petition for certiorari or note probable jurisdiction of an appeal and then make a summary disposition of the case, that the order comes down the following Monday. Summary disposition of a granted petition or a noted appeal is, from the point of view of litigants and reversed courts, a fairly drastic method of keeping the Court's business moving. It ought of course to be employed only in clear cases. We must also make certain that we are not, in the form of the judgment rendered,



deciding more than we mean to. Ought we not to safeguard ourselves by letting a week go by before having the order go down, circulating all orders except the obviously formal? This will give us time to reconsider whether the decision is in fact so clear that no further statement of reasons, however brief, is needed, and that the form of the judgment fully conforms to our decision.

III.

Our usual practice also with decisions by *per curiam* order on which argument has been had is to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders, after appropriate circulation, lie over a week so that we can take a second look or have second thoughts.

IV.

These last observations, it will be noted, are all concerned with factors that, because of undue expedition and premature final adjudication, lead to less than attainable excellence. They lead me to remark more generally about the overriding need for the time that is essential for each member of the Court to give appropriately full consideration to every case that the Court has undertaken to review. Am I wrong in assuming that instances over the course of the Term will occur to each of us in which this desideratum was lost sight of in the eagerness to have a case come down on a certain day? Changes in majority opinion and dissent, changes often fundamental to the theory of decision and certainly to its precise formulation, criss-crossed the Court in circulations that continued until almost the last minute before we went on the bench. It surely cannot be denied that such an



atmosphere is hardly conducive to the full and mature consideration by every member of the Court of the implications of an opinion to which he has formally subscribed. *on basis of an earlier draft.*

In the abstract everyone of us will heartily agree that there is no virtue in deciding cases simply for the sake of deciding them, or in being primarily concerned with the quantity of our business or the rapidity of its disposition. In this matter we should be wholly unconcerned with the point of view of the statistician. I think it is fair to say that it is always better to put a case over than to hand it down in an atmosphere of confusion and last minute changes for whose implications no one can vouch because there cannot have been time for adequate attention. Certainly a case should be put over when a member of the Court expresses doubt that, in the time remaining, adequate consideration can be given a case. But the burden should not be placed on an individual objector in holding up disposition. We should set our faces against agreeing on a Friday that a case come down on the following Monday when it is probable that this can be achieved only under the disadvantageous circumstances that we have all observed. Indeed, there is much to be said for the view, strongly held by Mr. Justice Brandeis, that even after the Conference has agreed on a case coming down, the case should be held, as a matter of routine, for another week before the opinion is announced. There certainly should be no hesitancy, even after Conference, to request that a case not go down because difficulties or questions hitherto not considered have troubled the mind of a Justice. Of course this places a burden on each member of the Court to be perfectly frank in stating that for him difficulties he apprehends still remain in a case even after it has been suggested that it is ready to come down. It places on us the unwelcome burden not to acquiesce in a case being prematurely handed down at the risk of appearing dilatory or obstructive. When there is doubt the issue should be resolved in favor of delay.

*One member*

*this is for C.A.'s*

*12 days was practice of D.C.C.A.*



Perhaps it would be best to have a firm rule that when there is a circulation of an opinion after Thursday afternoon with anything more significant than obviously stylistic changes, the case should be held over another week.

F. F.



September 29, 1960.

DEAR BRETHREN:

October Term, 1960—Greetings!

Here I am again with my hardy annual, for in going over the work of last Term I cannot feel that we ought to "rest easy in Zion." In saying this, perfection is neither my ideal nor my aim. As a human institution, the Court is inevitably subject to human fallibilities and frailties. But the extent of the consequences of these fallibilities and frailties to no small degree depends on the conditions under which they operate. By now it is a familiar saying that the history of liberty in large measure reflects observance of procedural safeguards. So I venture to say judicial excellence to no small degree reflects the intellectual procedures by which the judicial function is exercised. From Term to Term I re-examine these suggestions of mine, in light of further reflections and the light shed by the experience afforded by the latest Term. Accordingly, there are revisions and some matters additional to what I wrote last year.

I.

Normally the Court now votes on every argued case the first time it comes up at Conference. Is there one of us who has not felt on occasion that discussion at Conference on some difficult and important case has disclosed the need for further deliberation and discussion? Under such circumstances, even what is called a tentative vote is a vote largely in the dark. It is nobody's fault if at times, albeit infrequently, we discuss and vote, though with professed tentativeness, on cases involving more or less new and complicated issues at a stage when few, if any, of us could have come to grips with them or, considering the meagerness of briefs and arguments, could have had time to explore the relevant materials. Neces-

Within an  
institution as  
well as for  
"consumers"



sarily then our votes must derive from too limited consideration and be based on a too tenuous judgment. This is especially true when the real difficulties emerge for the first time at the argument or in Conference.

In very few cases do we postpone a vote at the Conference immediately following the argument for further study and deliberation. As cannot be too often illustrated by the *Segregation Cases*, resort to such a maturing process for study and reflection can only come from an unhurrying atmosphere which ample time alone can afford. It will be recalled by those who were here at the time that at our first Conference, after the reargument of the *Segregation Cases* in early December 1953, we were led by THE CHIEF JUSTICE in what might be called a reconnoitering discussion, without thought of a vote. We then took several weeks to reflect on the views that were expressed, more in the spirit of inquiry than as conclusions, and there followed two further Conference discussions, weeks apart, before we finally came to a Court decision. I submit that the *Segregation Cases* were not unique in proving the need for taking the necessary time for a matured judgment and thereby securing the fortunate outcome of such a procedure.

Take another manifestation of the need for adequate deliberation and interchange of thought for securing a collective judgment beyond that afforded by the customary procedure. We have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change vindicates the integrity of the judicial process. And how many of us, not writing in a case, can say with assurance that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, these modifications in our practice suggest themselves.

1. *Investigation of doubtful cases prior to vote-taking.*—In obviously doubtful, difficult and important cases, would it not on occasion be desirable, before a vote is

✓



taken, but after preliminary discussion, that the case be assigned to two Justices for full, separate reports by them, independently arrived at, on the issues presented? This process was followed on the vitally important procedural question regarding the significance of a denial of certiorari in criminal cases, when Reed, J., and I were asked to prepare memoranda before the matter was voted on. (*Brown v. Allen*, 344 U. S. 443.) I dare to think that the Court arrived at a better considered, surer judgment as a result of the stimulus of these memoranda. The occasions when the nature of the legal problems in a case makes it desirable merely to exchange views and not vote by the Friday after argument may not be many. But in the relatively few instances when such a course is desirable the considerations for not coming to a vote are precisely those that may be decisive. We say, of course, that all votes are tentative. Formally, no doubt, this is so. But it is not true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, and another for a Justice to be charged with exploring the problems in a case, free from the drive of a determined result however denominated "tentative." The mental pressures exerted by the two situations are very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only the result reached but the way in which a conclusion is formulated—the breadth and momentum of an opinion. These heavily influence the course of decisions. This vital aspect of the work of the Court, depends on the content of an opinion—what it explicitly decides, how that is phrased, what is said passingly, what is intimated, what is left unsaid. It is, however, a fact overwhelmingly established by experience that amiable collegueship often leads to acquiescence in the form of an opinion, even though all those who agree with the



result are not wholly in agreement with what is said and what is implied. Surely each of us has had experience with this. But in those cases in which the nature of the subject-matter, the limited time available for exploration of problems and materials, the inadequacy of the arguments, etc., call for the maturing of wisdom, not merely regarding the result but the mode of its formulation, a report by members of the Court as against a formulated final opinion, will enlist desirable collaborative contributions by all the Justices in the final terms of the Court's opinion.

Of course, such an assignment for a report as a basis for voting presupposes promptitude in its completion. It presupposes the kind of self-discipline that may surely be attributed to members of the Supreme Court.

2. *Fuller consideration of cases prior to discussion at Conference.*—In the cases that present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued on Thursday cannot be fully considered by Friday, in view of the shortness of time and the necessary preparations that must be made for Friday's Conference. Our present schedule crowds the mind and thereby tends to force us toward premature judgments. There is such a thing as an intellectual traffic jam. Would the desirable drive to keep abreast of the business of the Court be curtailed if it became the practice that cases argued on Thursday be put over to the week following or, at the least, be merely tentatively discussed without a vote until the next Friday, unless the cases are obviously easy of decision? (They will seldom be easy of decision unless we take cases for argument that we should not.) I am aware of the advantage of voting on a case when it is fresh in the mind. But the value of freshness presupposes adequate basis for judging what it is that is fresh. Too often, discussion and decision have not had the impact ✓



of the knowledge and understanding necessary for sound judgment.

In making these first two suggestions I realize that we cannot, before voting, all examine every case with the care required of the writer of the Court's opinion. Nor am I suggesting the postponement of voting till doomsday. But we should have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt either of labor or of inspiration. Ideas have to be incubated and slowly nourished into healthy life.\* Our Reports are replete with instances of memorably important results reached after a long incubating process and because of it.

3. *Reconsideration of cases by the Conference.*—Even the utmost care consistent with timely disposition of cases will not avoid occasional instances in which consideration of a case before and at Conference fails to expose or emphasize considerations which become evident, upon maturer study and reflection by the writer of the Court's opinion. Under our present practice it has been customary for him simply to go forward to the circulation of an opinion dealing with the case as he has come to see it although those new views have not had the benefit of focused discussion of what are matters newly raised.

If new knowledge or new insight gained from the intensive analytical and creative process of opinion-writing is

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"For me, at least, new ideas germinate only in an atmosphere of leisure. I have to immerse myself in a problem and then let it gestate in my brain, without the distraction of other interests, if I am to expect a solution to come sauntering into my mind when I wake up two or three mornings later." *Isis* for July 1947, p. 129.



sufficient to change the writer's vote or markedly to alter his view of the proper approach to the case, is not that in itself sufficient to justify further consideration of the case by the Conference to be based on a memorandum by the brother to whom the opinion was assigned setting forth in full the processes by which he was led to a new viewpoint?

4. *More adequate consideration of majority and dissenting opinions.*—Opinions that often take weeks in preparation deserve more than rapid, and therefore scanty, attention. We cannot be too conscious of the fact that the terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down a decision on a Monday although the majority opinion, or a weighty dissent, may not have been circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that *normally* a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring or dissenting) has been circulated later than Wednesday?

Would it not also be desirable that we be governed by an unwritten rule not to send in our returns, when duly apprised of an impending dissent, until all notified views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, reconsideration of the case in light of the dissent might cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for twenty-



four hours to give writers of prospective concurring and dissenting opinions an opportunity to notify their brethren of their intention to prepare them. Upon such notification, returns should, I respectfully submit, be withheld to await the concurrence or dissent. After all, the writer of the Court opinion may want to revise his draft after reading dissenting or concurring opinions, and he should feel wholly free to do so, indeed encouraged to do so, without having the supporting approvals of his original draft already in hand.

Would it not also be wise, after opposing opinions have been circulated, to have a second short discussion of the case at the next Conference, the purpose being to expose and narrow the precise differences between the views expressed? All too often opposing opinions do not satisfactorily join issue, largely because the briefs and argument, reflected in Conference discussion, have not adequately exposed the issues and their implications upon which decision must turn. Interchange of views at Conference by the writers on each side, of what have emerged as the crucial issues in the case, and their reasons for siding one way or the other, cannot fail to clarify the exposition of the controlling issues in the definitive opinion or opinions. Such a discussion would of course also afford the Court as a whole the benefit of a closely directed discussion of what have, on full reflection, evolved as the ultimate questions in the case, questions which would, I am confident, gain in lucidity by being subjected to the indicated scrutiny.

## II.

Whenever we vote at Conference to grant a petition for certiorari or note probable jurisdiction of an appeal and then make a summary disposition of the case, it is our present practice to have the order come down the following Monday. Summary disposition of a granted petition or a noted appeal is, from the point of view of litigants



and reversed courts, a fairly drastic method of keeping the Court's business moving. It ought of course to be employed only in clear cases. We must also make certain that we are not, in the form of the judgment rendered, deciding more than we mean to. Ought we not, therefore, to safeguard ourselves by letting a week go by before having the order go down, circulating all orders except the obviously formal? This will give us time to reconsider whether the decision is in fact so clear that no further statement of reasons, however brief, is needed, and that the form of the judgment fully conforms to our decision.

III.

Our usual practice also with decisions by *per curiam* order on which argument has been had is to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders, after appropriate circulation, lie over a week so that we can take a second look or have second thoughts. ✓

IV.

These last observations, it will be noted, are all concerned with factors that, because of undue expedition and premature final adjudication, lead to less than attainable excellence. They lead me to remark more generally about the overriding need for the time that is essential for each member of the Court to give appropriately full consideration to every case that the Court has undertaken to review. Am I wrong in assuming that instances over the course of the Term will occur to each of us in which this desideratum was lost sight of in the eagerness to have a case come down on a certain day? Changes in majority opinion and dissent, changes often fundamental



to the theory of decision and certainly to its precise formulation, criss-crossed the Court in circulations that continued until almost the last minute before we went on the bench. It surely cannot be denied that such an atmosphere is hardly conducive to the full and mature consideration by every member of the Court of the implications of an opinion to which he has formally subscribed.

In the abstract everyone of us will heartily agree that there is no virtue in deciding cases simply for the sake of deciding them, or in being primarily concerned with the quantity of our business or the rapidity of its disposition. In this matter we should be wholly unconcerned with statistics as such. I think it is fair to say that it is always better to put a case over than to hand it down in an atmosphere of confusion and last minute changes for whose implications hardly anyone can vouch because there cannot have been time for adequate attention. Certainly a case should be put over when a member of the Court expresses doubt that, in the time remaining, adequate consideration can be given it. But the burden should not be placed on an individual objector to hold up disposition. We should set our faces against agreeing on a Friday that a case come down on the following Monday when it is probable that this can be achieved only under the disadvantageous circumstances that we have all observed. Indeed, there is much to be said for the view, strongly held by Mr. Justice Brandeis, that even after the Conference has agreed on a case coming down, the case should be held, as a matter of routine, for another week before the opinion is announced. There certainly should be no hesitancy, even after Conference, to request that a case not go down because difficulties or questions, hitherto not considered, have troubled the mind of a Justice. Of course this places a burden on each member of the Court to be perfectly frank in stating that for him difficulties he apprehends still remain in a case even after it has been suggested that it is ready to come down. It places on us the unwelcome



burden not to acquiesce in a case being prematurely handed down at the risk of appearing dilatory or obstructive. When there is doubt the issue should be resolved in favor of delay.

Perhaps it would be best to have a firm rule that when there is a circulation of an opinion after Thursday afternoon with anything more significant than obviously stylistic changes, the case should be held over another week.

F. F.



HAB against all "Rules" HARLAN J  
C.J. Keeping up to date  
WTR prefers "ad hocism"

T.C.C. in general prefers ad hocism

JMH in favor of all proposals (particularly a four  
rule on 1 per cent  
also NOB's sug)

CEW content with present

P.S. - NOB's suggestion; September 25, 1961.

DEAR BRETHREN:

October Term, 1961—Greetings!

On full reconsideration of our methods of doing business, I venture to raise the following questions regarding our internal procedure, in the hope that a day may be set aside, rather early in the Term, for a full discussion by the Conference for the problems herein raised. What I have written is cast in the form of concrete suggestions solely to further concrete discussion. Revisions and additions have made this a substantially new memorandum.

# I.

Normally the Court now votes on every argued case the first time it comes up at Conference. Is there one of us who has not felt on occasion that discussion at Conference on some difficult and important case has disclosed the need for further deliberation and discussion? Under such circumstances, even what is called a tentative vote is a vote largely in the dark. It is nobody's fault if at times, albeit infrequently, we discuss and vote, though with professed tentativeness, on cases involving more or less new and complicated issues at a stage when few, if any, of us could have come to grips with them or, considering the meagerness of briefs and arguments, could have had time to explore the relevant materials. Necessarily then our votes must derive from too limited consideration and be based on a too tenuous judgment. This is especially true when the real difficulties emerge for the first time at the argument or in Conference. In such circumstances what is called for is systematic investigation of the new problems that have emerged. Spontaneous, inevitably haphazard discussion is hardly adequate. Systematic investigation and mature reflection on it take time. For these situations Lord Bacon's advice is espe-

Memoranda in  
difficult cases.  
↑

This is same  
basic idea as  
memo by proponents  
of a 4 vote  
grant in IFP.  
Perhaps - ALL?

On a 4 Vote grant  
we should resist  
one of the 4 should  
do a memo to  
support the grant

The only thing  
agreed is as  
circulated  
cases, which  
generally go  
for a week.



cially pertinent. "It were better that, in causes of weight the matter were propounded one day and not spoken to till the next day; '*in nocte consilium*.'" (Bacon, *Essays: "Of Counsel,"* 1 Works (1859) 28, 29.) All of us in the abstract believe in Conference deliberations. But the intensity of conviction with which this belief is held of course varies. There is thus a natural disinclination for a Justice to stop the show, as it were, by urging postponement of consideration or voting in a particular case. The burden of doing so ought not to be thrown on a particular Justice.

In very few cases do we postpone a vote at the Conference immediately following the argument for further study and deliberation. As cannot be too often illustrated by the *Segregation Cases*, resort to such a maturing process for study and reflection furnishes that unhurrying atmosphere which adequate time alone can afford. It will be recalled by those who were here at the time that at our first Conference, after the reargument of the *Segregation Cases* in early December 1953, we were led by THE CHIEF JUSTICE in what might be called a reconnoitering discussion, without thought of a vote. We then took several weeks to reflect on the views that were expressed, more in the spirit of inquiry than as conclusions, and there followed two further Conference discussions, weeks apart, before we finally came to a Court decision. I submit that the *Segregation Cases* were not unique in proving the need for taking the necessary time for assuring a matured judgment and thereby securing the fortunate outcome of such a procedure.

Take another manifestation of the need for adequate deliberation and interchange of thought, in order to secure a collective judgment, beyond that afforded by the customary procedure. We have had more than one instance where the Justice to whom an opinion was assigned changed his vote after fuller study. Such change vindicates the integrity of the judicial process. And how many of us, not writing in a case, can say with assurance

In June 1969  
the Boddie &  
Sank's "delay"  
produced  
tension —

Here we go  
— again;  
But, he's  
right as  
rain —



that we would not have changed our minds more often had we had an opportunity to examine the issues in difficult cases more thoroughly?

To deal with these problems, these modifications in our practice suggest themselves.

1. Investigation of doubtful cases prior to vote-taking.—In obviously doubtful, difficult and important cases, would it not on occasion be desirable, before a vote is taken, but after preliminary discussion, that the case be assigned to two Justices for full, separate reports by them, independently arrived at, on the issues presented? This process was followed on the vitally important procedural question regarding the significance of a denial of certiorari in criminal cases, when Reed, J., and I were asked to prepare memoranda before the matter was voted on. (*Brown v. Allen*, 344 U. S. 443.) I dare to think that the Court arrived at a better considered, surer judgment as a result of the stimulus of these memoranda. The occasions when the nature of the legal problems in a case makes it desirable merely to exchange views and not vote by the Friday after argument may not be many. But in the relatively few instances when such a course is desirable the considerations for not coming to a vote are precisely those that may be decisive. We say, of course, that all votes are tentative. Formally, no doubt, this is so. But it is not true psychologically. It is one thing for a Justice to be charged with formulating the views registered by a majority, even though they are said not to be definitive, and another for a Justice to be charged with exploring the problems in a case, free from the drive of a determined result however denominated "tentative." The mental pressures exerted by the two situations are very different.

Moreover, another psychological factor comes into operation. What matters, and matters to a very important degree, in the disposition of a case is not only the result reached but the way in which a conclusion is formulated—the breadth and momentum of an opinion.

C.J. - No  
H.L.B. - No  
W.O.D. - No  
T.C.C. - No  
J.M.H. - Yes  
N.J.B. - "ad hoc" basis  
C.E.W. - No  
P.S.

Ad hoc is  
no practice  
at all -



These heavily influence the course of decisions. This vital aspect of the work of the Court, depends on the content of an opinion—what it explicitly decides, how that is phrased, what is said passingly, what is intimated, what is left unsaid. It is, however, a fact overwhelmingly established by experience that amiable collegueship often leads to acquiescence in the form of an opinion even though all those who agree with the result are not wholly in agreement with what is said and what is implied. Surely each of us has had experience with this. But in those cases in which the nature of the subject-matter, the limited time available for exploration of problems and materials, the inadequacy of the arguments, etc., call for the maturing of wisdom, not merely regarding the result but the mode of its formulation, a report by members of the Court as against a formulated final opinion, will enlist desirable collaborative contributions by all the Justices in the final terms of the Court's opinion.

Of course, such an assignment for a report as a basis for voting presupposes promptitude in its completion. It presupposes the kind of self-discipline that may surely be attributed to members of the Supreme Court.

2. *Fuller consideration of cases prior to discussion at Conference.*—In the cases that present more or less familiar issues, or are adequately briefed and argued at the beginning of the week, our present practice affords sufficient consideration preceding Conference. But most cases argued on Thursday cannot be fully considered by Friday, in view of the shortness of time and the necessary preparations that must be made for Friday's Conference. Our present schedule crowds the mind and thereby tends to force us toward premature judgments. There is such a thing as an intellectual traffic jam. Would the desirable drive to keep abreast of the business of the Court be curtailed if it became the practice that cases argued on Thursday be put over to the week following or, at the least, be merely tentatively discussed without a vote until

CJ. - NO  
HUB - NO  
W.D. - NO  
TCC - NO  
JMA - YES  
W.J.B. - NO  
CEW - NO  
P.S. - NO

Putting over  
"Thursday cases"



the next Friday, unless the cases are obviously easy of decision? (They will seldom be easy of decision unless we take cases for argument that we should not.). I am aware of the advantage of voting on a case when it is fresh in the mind. But the value of freshness presupposes adequate basis for judging what it is that is fresh. Too often, discussion and decision have not had the impact of the knowledge and understanding necessary for sound judgment.

In making these first two suggestions I realize that we cannot before voting all examine every case with the care required of the writer of the Court's opinion. Nor am I suggesting the postponement of voting till doomsday. But we should have more time for a maturer process of deciding the doubtful, important cases than has too often in the past been available. The job of adjudicating the most exacting cases that come before this Court is not unlike the work of scientists and philosophers. It is rarely accomplished in a brief spurt either of labor or of inspiration. Ideas have to be incubated and slowly nourished into healthy life.\* Our Reports are replete with instances of memorably important results reached after a long incubating process and because of it.

3. *Reconsideration of cases by the Conference.*—Even the utmost care consistent with timely disposition of cases will not avoid occasional instances in which consideration of a case before and at Conference fails to expose or emphasize considerations which become evident, upon maturer study and reflection by the writer of the Court's opinion. Under our present practice it has been cus-

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tomary for him simply to go forward to the circulation of an opinion dealing with the case as he has come to see it although those new views have not had the benefit of focused discussion of what are matters newly raised.

If new knowledge or new insight gained from the intensive analytical and creative process of opinion-writing is sufficient to change the writer's vote or markedly to alter his view of the proper approach to the case, is not that in itself sufficient to justify further consideration of the case by the Conference, to be based on a memorandum by the brother to whom the opinion was assigned setting forth in full the processes by which he was led to a new viewpoint?

## II.

Whenever we vote at Conference to grant a petition for certiorari or note probable jurisdiction of an appeal and then make a summary disposition of the case, it is our present practice to have the order come down the following Monday. Summary disposition of a granted petition or a noted appeal is, from the point of view of litigants and reversed courts, a fairly drastic method of keeping the Court's business moving. It ought of course to be employed only in clear cases. We must also make certain that we are not, in the form of the judgment rendered, deciding more than we mean to. Ought we not, therefore, to safeguard ourselves by letting a week go by before having the order go down, circulating all orders except the obviously formal? This will give us time to reconsider whether the decision is in fact so clear that no further statement of reasons, however brief, is needed, and that the form of the judgment fully conforms to our decision.

## III.

Our usual practice also with decisions by *per curiam* order on which argument has been had is to have the order come down on Monday following the Friday Conference at which the *per curiam* is decided upon. Since the decision in these cases is often as important as those in which

This is done now -  
memos further  
draft - except in  
5-14 decisions

|        |           |
|--------|-----------|
| C.J.   | NO        |
| H.B.   | NO        |
| W.D.   | NO        |
| T.C.   | YES.      |
| J.M.H. | YES       |
| W.B.   | - ad hoc. |
| C.E.W. | YES       |
| P.S.   | YES       |

W.D.'s memo  
as to C.A. 9  
suggestion

Chm. portaut.  
Added important  
in view of  
our new  
10:00  
schedule

T.C.



the necessity of writing an opinion affords a period of time for further reflection, I wonder whether it might not also be wiser practice, even in "clear" cases, to let *per curiam* orders, after appropriate circulation, lie over a week so that we can take a second look or have second thoughts.

IV.

A. Opinions that often take weeks in preparation deserve more than rapid, and therefore scanty, attention. We cannot be too conscious of the fact that the terms on which a conclusion is reached—what is said and how it is said, what is not said and what is implied, the atmosphere that is generated—may be as important as the so-called result. Yet at times the Court hands down a decision on a Monday although the majority opinion, or a weighty dissent, may not have been circulated until Conference day or the afternoon preceding. Would it not be salutary to have an unwritten rule that *normally* a decision will not be handed down in which the Court's opinion, or a substantial individual opinion (concurring or dissenting) has been first circulated later than Wednesday?

Would it not also be desirable that we be governed by an unwritten rule not to send in our returns, when duly apprised of an impending dissent, until all notified views are before us? Here too there are conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands, and he should be advised as promptly as possible. On the other hand, reconsideration of the case in light of the dissent might cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt return when I voted with the Court, and this, I believe, is traditional. I should prefer, however, to be freed from the pressure of my desire to relieve the writer of the opinion of suspense, by a common understanding that returns normally be delayed for twenty-four hours to give writers of prospective concurring and

Is this SU?

Time

Returns

CS - NO  
HLB NO  
WOD NO  
T.C.C. NO  
JMA YES  
WJB NO  
CEW NO  
PS sympathetic to this  
good rule

CS - NO  
HLB - NO  
WOD - NO  
TCC - does this himself  
JMA YES  
WJB NO  
CEW NO  
PS



dissenting opinions an opportunity to notify their brethren of their intention to prepare them. Upon such notification, returns should, I respectfully submit, be withheld to await the concurrence or dissent. After all, the writer of the Court opinion may want to revise his draft after reading dissenting or concurring opinions, and he should feel wholly free to do so, indeed encouraged to do so, without having the supporting approvals of his original draft already in hand.

Would it not also be wise, after opposing opinions have been circulated, to have a second short discussion of the case at the next Conference, the purpose being to expose and narrow the precise differences between the views expressed? All too often opposing opinions do not satisfactorily join issue, largely because the briefs and argument, reflected in Conference discussion, have not adequately exposed the issues and their implications upon which decision must turn. Interchange of views at Conference by the writers on each side, of what have emerged as the crucial issues in the case, and their reasons for siding one way or the other, cannot fail to clarify the exposition of the controlling issues in the definitive opinion or opinions. Such a discussion would of course also afford the Court as a whole the benefit of a closely directed discussion of what have, on full reflection, evolved as the ultimate questions in the case, questions which would, I am confident, gain in lucidity by being subjected to the indicated scrutiny.

B. The same undue expedition which, in instances, can press us to premature decision can also be the cause of less than attainable excellence in the formulation of the opinion which expresses the definitive views of the Court. In this, as in every aspect of our work, one cannot too often emphasize the overriding need for the time that is essential so that each member of the Court may give appropriately full consideration to every case that the Court has undertaken to review. Am I wrong in assuming that instances over the course of the Term will occur

*Imp*

*I'm not sure  
about this one.*

*P.S. in favor.*



to each of us in which this desideratum was lost sight of in the eagerness to have a case come down on a certain day? Changes in majority opinion and dissent, changes often fundamental to the theory of decision and certainly to its precise formulation, criss-crossed the Court in circulations that continued until almost the last minute before we went on the bench. It surely cannot be denied that such an atmosphere is hardly conducive to the full and mature consideration by every member of the Court of the implications of an opinion to which he has formally subscribed.

In the abstract everyone of us will heartily agree that there is no virtue in deciding cases simply for the sake of deciding them, or in being primarily concerned with the quantity of our business or the rapidity of its disposition. In this matter we should be wholly unconcerned with statistics as such. I think it is fair to say that it is always better to put a case over than to hand it down in an atmosphere of confusion and last minute changes for whose implications hardly anyone can vouch because there cannot have been time for adequate attention. Certainly a case should be put over when a member of the Court expresses doubt that, in the time remaining, adequate consideration can be given it. But the burden should not be placed on an individual objector to hold up disposition. We should set our faces against agreeing on a Friday that a case come down on the following Monday when it is probable that this can be achieved only under the disadvantageous circumstances that we have all observed. Indeed, there is much to be said for the view, strongly held by Mr. Justice Brandeis, that even after the Conference has agreed on a case coming down, the case should be held, as a matter of routine, for another week before the opinion is announced. There certainly should be no hesitancy, even after Conference, to request that a case not go down because difficulties or questions, hitherto not considered, have troubled the mind of a Justice. Of course this places

*absolutely*  
*I agree*  
*with J.M.H.*



a burden on each member of the Court to be perfectly frank in stating that for him difficulties he apprehends still remain in a case even after it has been suggested that it is ready to come down. It places on us the unwelcome burden not to acquiesce in a case being prematurely handed down at the risk of appearing dilatory or obstructive. When there is doubt the issue should be resolved in favor of delay.

Perhaps it would be best to have a firm rule that when there is a recirculation of an opinion after Thursday afternoon the case should not be handed down the immediately following Monday. Even so-called "stylistic changes" may appear important to others than their author, in that nuances in phrasing may have substantive significance if only by way of overtones or undertones.

V.

The occasional problem of setting a case over for reargument at a subsequent Term when some among the Brethren feel that crucial or potentially crucial points have not been adequately canvassed in briefs and argument, or that there is not enough time before the end of the current Term for the independent research and thought essential to the formation and expression of views, often involves considerations peculiar to the individual case. But while it would therefore seem unwise to attempt to frame anything in the nature of a "rule" intended to bind a majority of the Brethren in such situations, I venture to suggest that to leave the matter to an entirely *ad hoc* determination as to the propriety of a reargument tends to subordinate considerations of appropriate judicial procedure—procedure designed to maintain the conditions of informed and responsible decision—to the immediately prevailing view on the merits of particular cases. Would it be unwise to come to a general understanding that, in the absence of circumstances of compelling exigency, a case should be set down for reargument whenever two or more of the Brethren conclude that

*Rearguments*

CJ. - NO  
H4B - NO  
NOD - NO  
FCC - NO  
JMH 46  
WJB NO  
CEW NO  
DS YES



in conscience they cannot satisfactorily undertake decision without further preparation which requires this course? I am sure that the instances of holding over will continue to be rare indeed, for surely we can assume that none among us would lightly invoke such a tacit understanding.

VI.

Finally, I venture to believe that we ought not to deem irrevocable the present policy never to carry an argued case beyond our June adjournment date without having it reargued. Is there not an occasional case that is unwisely disposed of under pressure of the Term's end? This is so either because of its intrinsic difficulty, its inept presentation, shifting views within the Court, or the need, in light of the nature of the issues, for longer reflection. Why should the Court be forced to choose between considering such cases too hastily or setting them down for reargument at the Term following? Experience has demonstrated—one could cite important instances—that the summer affords excellent opportunity to reflect upon these few cases of great difficulty and importance at leisure, isolated from the confusion of other business and unhurried by a deadline. In the rare situation when it is clear that a case would get inadequate consideration if decided by the time the Court adjourns and when what is needed is more time to think, to mull over things, we should hold the case under advisement over the Summer and plan to hand down opinions in such a case promptly at the beginning of the new Term. I raise this question with full awareness of the circumstance that begot the present practice and the considerations that have been advanced for rigid adherence to it.

F. F.

Carrying  
opinions over

*James S. Thompson for this*

|      |     |
|------|-----|
| CT   | NO  |
| H4B  | NO  |
| WOD  | NO  |
| TCC  | NO  |
| JMH  | YES |
| NJB  | NO  |
| CEW  | NO  |
| P.S. | NO  |



Supreme Court of the United States  
Washington, D. C. 20543

*Very file*

CHAMBERS OF  
THE CHIEF JUSTICE

March 21, 1972

MEMORANDUM TO THE CONFERENCE:

This will confirm that everyone<sup>"</sup> passed<sup>"</sup> on the  
new chamber next to Mr. Justice Blackmun's new chambers.  
Mr. Justice Powell has elected to take it when it becomes  
available.

Regards,

*WRS*



B

April 7, 1972

Dear Chief:

As you may know, Mr. Justice Reed's messenger is seriously ill.

It recently came to my attention that Mr. Justice Reed is driving himself to and from the Court and on yesterday he had a minor collision doing about \$100 of damage to his car.

Jo and I took the Reeds to the party last night, and Mrs. Reed is quite worried about Stanley's driving.

It occurs to me that possibly one of the messengers in the Marshal's office, or one of the other drivers, could be detailed to drive Justice Reed to and from the Court each day.

I felt sure you would want to know about this situation.

Sincerely,

The Chief Justice

lfp/ss

bc: Phil



Supreme Court of the United States  
Washington, D. C. 20543

April 7, 1972

CHAMBERS OF  
THE CHIEF JUSTICE

CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE:

Re: Library

Over the past year or two I have not been able to give the Library problems a priority. Other matters were more pressing.

Our Conference discussions reveal a common analysis of the problem, but not much as to a solution. I am not officially informed, but informally, that Mr. Houston contemplates retirement at the end of the Term.

I have now reached the conclusion that an "internal" solution is not a real one and that we must go outside. If there was anyone in the present staff capable of bringing order and competence to the operation, those talents should have been visible long ago. In three years I have seen no evidence that persuades me.

I have, therefore, designated Byron White and Harry Blackmun as a "search committee" to find a qualified Librarian for the long-range solution. That may mean bringing such person in as an "Associate Librarian" for an interim until Mr. Hallam retires, but such a transitional period will probably be useful.

I hope that before Fall we will have some concrete alternatives.

Regards,

WRB



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 3, 1972

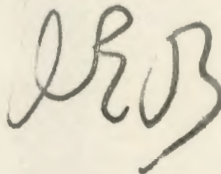
MEMORANDUM TO THE CONFERENCE:

In order to accommodate those of the Court who may be interested in attending the funeral of J. Edgar Hoover, I am rescheduling our 10:30 Conference for 1:30 tomorrow afternoon.

Hopefully those of us who will be going to the funeral will be back at the Court by 12:15 or 12:30 in time for our usual Conference day luncheon.

Attached is copy of memorandum detailing arrangements for Mr. Hoover's funeral. It would be appreciated if all offices would respond as quickly as possible indicating their attendance or non-attendance at the funeral in order to enable Mr. Hepler to finalize numbers for Mr. Mohr's office.

Regards,



cc: The Marshal

Copies to the Retired Justices



Office of the Marshal  
Supreme Court of the United States  
Washington, D. C. 20543

RECEIVED  
MAY 3 1 19 PM '72  
CHAMBERS OF THE  
CHIEF JUSTICE

May 3, 1972

MEMORANDUM TO THE CHIEF JUSTICE

Mr. John P. Mohr has been designated as the FBI coordinator of the funeral arrangements for J. Edgar Hoover. One of his secretaries, Miss Webber, has just passed the following information to us and I will call her later this afternoon to determine if there are additional details for the Court.

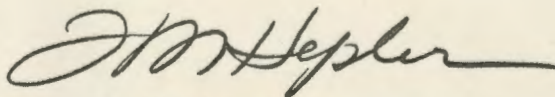
The Memorial Service will be at 11:00 a.m. at National Presbyterian Church, 4101 Nebraska Avenue, N. W. This was Mr. Hoover's church, and the pastor is Dr. Elson who also serves as the Chaplain of the United States Senate. Interment will be at Congressional Cemetery, and Miss Webber stated that the ceremony there is to be private and she did not know if any members of the Court were on the invitation list.

I can arrange for limousines to take the Justices to the church, if you so desire. Wives are to be included if they wish to attend. I suggest that we depart from the garage at 10:30 a.m., and Captain Coble will make arrangements for a Police Escort because of the heavy traffic. When we arrive at the church there will be a section of pews reserved for the Members of the Court and any wives who attend.

If Mary Burns can make a determination of how many Justices and wives will attend, I can call that information to Mr. Mohr's office so they will have an idea of how many seats to reserve.

If the Court plans to attend I would like to know this afternoon so that I can make the necessary arrangements.

Respectfully submitted,



F. M. Hepler  
Marshal



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 1 '72

Dear Lewis

I am "calling off"  
the appearance of the Court  
at the Joint Session tonight but  
I want you to be sure you  
were not the "last straw" that  
led to it. I feel we should be  
there with at least 6 or 7  
to look like a "court". With  
only 3 there would be  
snide press comment  
that would be good for  
no one.

As it happens, Byron



has a fixed commitment,  
Rehnquist + Marshall  
are at a Judicial Conference,

<sup>as I see,</sup>  
Potter, <sup>1</sup> feels we must go  
with six or not at all.

It is better that we not risk  
offense or press chit-chat  
by having only three, albeit  
three sterling & worthy  
representatives! (Reed, H&B  
+ W&B.)

One more word - of  
encouragement, I hope. Every  
year on the Court of Appeals  
(but no longer) I found myself  
almost frantic with not 6 or 7



3/ but 12-15 opinions squashed  
in June. Somehow they  
always get out. They have  
a way of doing it. There  
is a certain dynamism  
in an opinion once begun,  
like a human embryo. It  
tends to grow perhaps because  
below the surface <sup>even</sup> before it  
gets on paper, 35-40 years  
of experience is at work in  
the subconscious. Just  
now, for example, I  
have completed - in 45  
minutes - a narrowly



concurring - in - the - result  
opinion in WJB's Midwest  
video. It is virtually final  
in first draft (you will say,  
it looks like a first draft!)  
because it has been  
"marinating" in my mind  
for weeks without conscious  
focus.

So, relax, my friend.  
It always works out. When  
I hit a you when it doesn't  
the news will be  
CHIEF JUSTICE RETIRES!

As ever  
Wanene



June 1, 1972

New Chambers Being Redecorated

Dear Chief:

My wife Jo has been conferring with the architects, the Marshal's office and with an interior decorator (employed, I believe, by the Marshal's office) about various matters relating to the new chambers. These include the "fireplace" (which is quite optional with me), carpeting, wall paper and draperies.

I assume that the Marshal's office or the architects, or both, will make the decisions as to what is to be done and whether costs and expenditures are within the budget and duly authorized. I merely want to be sure that neither Jo nor I has any responsibility in this area.

Having in mind the exaggeration in the press as to the changes in the courtroom and the "redecorating" of Justices offices, I want to be sure that we stay within budget and also avoid what anyone might fairly regard as inappropriate expenditures. I will be content with anything so long as I have good lighting conditions and comfortable room temperature.

If there is anything I can do to relieve you of details on this, please let me know.

Sincerely,

The Chief Justice



June 9, 1972

Law Clerks - This Summer

Dear Chief:

It would be helpful to my chambers if Phil Fox could remain available through July (actually until July 28), if this is consistent with budgetary and other constraints.

I will be in Richmond, at the Fourth Circuit Court of Appeals, most of the summer, with my secretary and one law clerk primarily based there. In view of this, vacation plans and the arrival of my new law clerk, Phil's availability would be most helpful.

Phil would, of course, also be available to help you and other members of the Court as needed. We can hope that the workload will be light.

Sincerely,

The Chief Justice

bc: Phil



June 15, 1972

Dear Chief:

After reviewing carefully my situation last night, I have concluded that I cannot go to Williamsburg this weekend.

Two of my opinions for the Court are still in some difficulty, requiring possible revisions and refinements in light of dissents (Byrum and Healy). In addition, I have not yet come to rest in several of the other major cases which I wish to study carefully.

If you and Vera are able to go, Jo will accompany you and you may be sure that your welcome will be warm and enthusiastic. Carl Humelsine has reserved the "Queen's Suite" for you at the Inn.

I am keenly disappointed by this turn of events. Yet, it is clear to me that I cannot in good conscience ~~leave~~ leave at this time in view of the state of my work.

Sincerely,

The Chief Justice

lfp/ss



B

July 5, 1972

Dear Warren:

The Fourth Circuit Conference went well, although you were greatly missed.

Both Clement and I - at the first session - explained your absence and conveyed your greetings.

My talk was received with very considerable interest, and dozens of lawyers, judges and professors spoke to me of their hope that something would be done about the problems, and expressed a willingness to help. Judge Roszel Thomsen of Baltimore said that he was on a committee of the Judicial Conference that might be helpful at the right time.

I do hope that you are beginning to "unwind" a bit. You certainly had a terribly pressure-packed year. I think you must have a feeling of satisfaction, however, that the Term went well and the Court disposed of a number of major issues in opinions which I believe will stand the test of time.

Do get some rest and diversion this summer. No one has earned this more.



I want to thank you again for your many courtesies to me during my first six months on the Court. You were invariably thoughtful, generous and considerate. I always welcomed your advice, and appreciated the opportunities which you gave me to work on interesting cases.

Jo and I both are especially grateful to Vera. She could not have been more thoughtful or attentive. She certainly did much to make Jo's introduction to Washington a pleasant one.

With our affectionate best to you both.

As ever,

Hon. Warren E. Burger  
Chief Justice  
Supreme Court of the United States  
Washington, D. C. 20543

lfp/ss



B

July 11, 1972

Dear Warren:

I would appreciate your thinking as to whether my talk to the Fourth Circuit should be submitted to the American Bar Association for possible publication?

If I were to submit it, I would make certain revisions. It would be necessary to eliminate or modify some of the more personal statements which are more appropriate for a speech than an article. Also, I would like to expand - if I can find relevant material - my brief discussion of possible means of reducing the caseload. In this connection, if you know of any law review discussions of the possibility of a special high court of criminal appeals, I would be interested in knowing about them.

But the purpose of this letter is to obtain your candid reaction as to whether it would be helpful at this time to publish the substance of this talk. Obviously I have no personal interest in publication unless it might contribute to some solution of our problem.

Warm best wishes.

Sincerely,

Hon. Warren E. Burger  
Chief Justice  
Supreme Court of the United States  
Washington, D. C. 20543

lfp/ss



July 27, 1972

Dear Warren:

I tentatively plan to be in Washington on Tuesday, August 1, and if you are free would enjoy having lunch with you.

I will ask my clerk, Larry Hammond, to advise you definitely on Monday.

You may have seen the enclosed story in the Post about the Solicitor General's petition for rehearing in U.S. v. Byrum. There is no basis for a rehearing. The rule advocated by the Government would twist the statutory language, and also would be inequitable in the impact on grantors of closely held stock rather than of listed stock.

Looking forward to seeing you.

Sincerely,

Hon. Warren E. Burger  
Chief Justice  
U.S. Supreme Court  
Washington, D. C. 20543

lfp/ss  
Enc.



B

August 29, 1972

Dear Warren:

I have wanted, since returning from San Francisco, to say again how very pleased I was with your "State of the Judiciary" address.

All of your annual reports at ABA meetings have been excellent, but I think this was the best of all. I heard many favorable comments.

Also, I had an opportunity after returning to Richmond to read your interview in U.S. News & World Report. I am delighted that you were able to get on the record some of the things you discussed. This is bound to be helpful with the Congress and the public generally.

Jo and I spent a couple of days with Molly and Kit in Los Angeles and then three days with our oldest daughter, Jody, and her family who spend the month of August on her husband's ranch in Texas. These were pleasant interludes for us, especially to be with our daughters.

I have been back here in my Richmond office since last Thursday trying to catch up on cert notes and other reading. In talking to the Court today I was advised that



you were away - which I hope means that you and Vera are off for two or three weeks of genuine rest and relaxation. Jo and I were concerned that both of you should have been slightly indisposed at San Francisco. You are far too important to our nation to take any chances with your health, and I am afraid this is exactly what you do with the extremely heavy load which you so generously carry. The time has come to let others take over some of the peripheral - though important - responsibilities which you shouldered when you became Chief Justice.

I plan to return to Washington on September 11, if my new chambers are ready for occupancy at that time.

As ever,

Hon. Warren E. Burger  
Chief Justice  
Supreme Court of the United States  
Washington, D. C. 20543

lfp/ss



B

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

Sept 18 '72

Dear Lewis

I hope you  
don't feel three years  
older this year and thus  
have a depressing Birthday.  
As we make the discovery  
that we will never see sixty  
again we can take heart that after  
nearly half a century we are on  
the way - perhaps - to some changes,  
slow though they will be in  
coming.

Happy Birthday WSB



September 19, 1972

Dear Chief:

Congressman's Railsback's office called this afternoon to say that he and his associates (named below) would like to visit you at 9:15 a. m., Thursday, September 21.

The members of Congress in the group, in addition to Tom Railsback are:

Wendall Wyatt, R. Oregon (*Appropriations*)  
Abner Mickva, D. Ill.  
Edward Biester, R. Pa.  
Walter Flowers, D. Ala. (*Jud.*)  
James Mann, D. S. C.

As you will note from my memorandum of September 14, I had advised Congressman Railsback of my personal unavailability on the morning of September 21, as I have a medical examination scheduled at Bethesda at 9:00 a. m. However, I am trying to change this appointment and will know about this early tomorrow morning.

Sincerely,

The Chief Justice

lfp/ss



September 20, 1972

Dear Chief:

Here is a copy of Tom Railsback's letter, confirming their visit tomorrow morning at 9:15.

I will come to your office a few minutes before 9:00 a. m. - if this is agreeable. It might be desirable for us to visit a few minutes before the guests arrive.

Sincerely,

The Chief Justice

WJ/ss



September 27, 1972

Dear Chief:

I would like to put the following case on the discuss  
list for the Conference beginning Monday:

No. 71-1168 Streckfus Steamers, Inc. v. City  
of St. Louis

Sincerely,

The Chief Justice

lfp/ss



B

October 1, 1973

PERSONAL

Law Clerks for Next Term

Dear Chief:

Over the weekend, I made my selection of clerks for the 1974 Term. Although I really would have liked more time, I was doing my own interviewing and correspondence. This was taking a great deal of my own time, and so I thought it best to conclude the process before we commence the 1973 Term.

Several of the applicants whom I interviewed, but did not select, made fine impressions on me and are fully qualified for clerkships here. I thought possibly your committee (which does the screening for you initially) might like to take a look at these applicants if they are not already on your list:

William S. Jacobs  
1376 Markan Court, N.E. # 2  
Atlanta, Georgia 30306

. . . . . Number One in his law class at Duke, and now clerking for Judge Bell of CA 5 (who wrote me that Jacobs is one of the best clerks he has ever had). Former Dean Snead of the Duke Law School (now on CA 9) personally alerted me to Jacobs as being one of the most able students he had had in his entire teaching career. The only negative (if it be one) is that Jacobs elected not to serve as an officer of the Law Review preferring to do some independent writing and instructing.



William C. Bryson  
 Chambers of Judge Henry J. Friendly  
 U.S. Courthouse  
 New York, New York 10007 . . . . .

Editor-in-Chief of the Texas  
 Law Review, graduating second  
 in his class; magna cum laude at  
 Harvard College; now clerking  
 for Henry Friendly; has strong  
 recommendations from Dean  
 Keeton and Professor Charles  
 Wright.

David Meyer Becker  
 5320 29th Street, N.W.  
 Washington, D.C. 20015 . . . . .

Editor-in-Chief of Columbia Law  
 Review, and - I believe - Number  
 1 in his class; strongly recommended  
 by the Dean and several faculty  
 members; now clerking for  
 Judge Leventhal.

Having interviewed each of the foregoing personally, I am satisfied  
 that they would be congenial with you. I believe you would find Jacobs  
 and Bryson especially compatible personally.

I would be quite happy to have any one of the three clerking for me,  
 and my decisions in favor of other candidates were very close indeed.

If you are interested in the biographical data sheets on any of these  
 individuals, one of your secretarial staff can obtain them from Sally Smith  
 or Gail Galloway in my office.

Sincerely,

Mr. Chief Justice

LFP/gg



October 4, 1972

Motions Docket

Dear Chief:

This refers to the discussion at the Conference on yesterday as to delegating to you the responsibility for the routine decisions on the motions docket.

These motions for leave to file briefs amicus, for specified counsel to argue, for additional time, for division of time among counsel and the like.

You would, of course, bring to the Conference any motion which seemed to merit discussion, and any Justice could request that any motion be placed on the discuss list.

This suggestion, as a means enabling the Conference to concentrate on matters of substance appeals to me provided it does not increase the burden on you. Subject to this proviso, the proposal has my full approval.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference



CHAMBERS OF  
THE CHIEF JUSTICE

October 6, 1972

*Let's go along with  
the Chief*

MEMORANDUM TO THE CONFERENCE:

Re: Docket Sheets

Confirming our discussion at Monday's Conference indicating agreement to standardize the docket sheets, I attach copies of the three docket forms presently being used by four of the Justices.

Appellate docket: This docket sheet is used by Mr. Justice Blackmun, Mr. Justice Powell, Mr. Justice Rehnquist and myself. It differs from that used by Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White and Mr. Justice Marshall as follows:

(1) There are two additional columns -- one for "hold" and a "blank" for additional motions, petitions for rehearing, rules, etc.

(2) The proposed appellate form is for one case and one case only, with the back of the form used for notes or comments on the Conference. The docket sheet presently used by some Justices is reversible allowing two cases to be incorporated on one sheet of paper. This reduces bulk but requires constant leafing through the docket book for the case in question and for that reason I abandoned it.

Mr. Justice Stewart uses a distinctly different docket sheet. It has merit -- using one side for the vote on cert or appeal and the reverse -- in the same case -- for voting on the merits. Despite this advantage, I am more disposed to continue the use of the proposed appellate form.

Original (jurisdictional case) docket sheet: I suggest no change in this docket sheet. It is used infrequently and seems adequate for our requirements. I invite suggestions, however, for the improvement of the form.



IFP docket: The IFP cases present a different problem. My office -- and I believe all other offices -- generally use the 8-case per page green docket sheet for internal record keeping. I personally use this form for the "dead" list cases only. I believe as a docket sheet for Conferences it is quite inadequate although it is a tremendous space saver.

For my use in Conference for the discuss cases, I have a special green docket sheet -- which is identical to the appellate docket sheet but green. My permanent files, of course, must include the 8-case green IFP form and the Conference action is carefully recorded in each case. (In reality, for my records, there are two green IFP docket forms, as the one-case IFP "green" up until now has been for my use only, although it may or may not have been adopted by others this year.)

It is my recommendation that the single case appellate docket, the orange (original docket) and the 8-case IFP green docket sheet be adopted by all. (I shall continue the use of the single case green for the discuss list since my needs are different. It is available to all who wish to utilize it.)

If the above is agreeable, the IBM Mag-Card Automatic typewriter will be utilized to duplicate nine sets of each of the three forms. This will produce more bulk but in the long run will be simpler and more efficient. This would implement the action taken on Monday and will save considerable typing all around.

Regards,

WLB

Attachments



DOUGLAS, J.

MARSHALL, J.

BRENNAN, J.

BLACKMUN, J.

STEWART, J.

POWELL, J.

WHITE, J.

REHNQUIST, J.

MEMO:



Orig.

....., 19.. *Recommitted*  
 ..... , 19.. *Reallotted*  
 ..... , 19.. *Passed*  
 ..... , 19.. .....

vs.

[illegible]



No. .... I. F. P.

|                     | GRANT | REFUSE | RULE |
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| Powell, J. ....     |       |        |      |
| Blackmun, J. ....   |       |        |      |
| Marshall, J. ....   |       |        |      |
| White, J. ....      |       |        |      |
| Stewart, J. ....    |       |        |      |
| Brennan, J. ....    |       |        |      |
| Douglas, J. ....    |       |        |      |
| Burger, Ch. J. .... |       |        |      |

No. .... I. F. P.

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| Rehnquist, J. ....  |       |        |      |
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| Brennan, J. ....    |       |        |      |
| Douglas, J. ....    |       |        |      |
| Burger, Ch. J. .... |       |        |      |



I. F. P. DOCKET

No. .... I. F. P.

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| Powell, J. ....     |       |        |      |
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| White, J. ....      |       |        |      |
| Stewart, J. ....    |       |        |      |
| Brennan, J. ....    |       |        |      |
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| White, J. ....      |       |        |      |
| Stewart, J. ....    |       |        |      |
| Brennan, J. ....    |       |        |      |
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| Burger, Ch. J. .... |       |        |      |



CHAMBERS OF  
THE CHIEF JUSTICE

October 6, 1972

MEMORANDUM TO THE CONFERENCE:

At the opening Conference our discussion of "household" matters included some subjects touched on in the past from time to time. Since they bear on our day to day work and we are at the outset of what will likely be a heavy Term, I suggested that I would try to recapitulate some of the key factors discussed. I note also that memos in the "archives" from the past 25 years or more have touched occasionally on these same problems.

1. Circulated opinions. There is general agreement that when a proposed opinion for the Court is circulated each of us has the burden to give a prompt response. That step, whether definitive in terms of concurrence or qualified in some way, or notice of dissent should generally have priority over current work each of us has on our own opinions.
2. Dissents. When a dissent has been indicated, either at the initial vote at Conference (or at the latest when an opinion is circulated) the Senior Justice of the potential minority view should assume responsibility for agreement as to which Justice will undertake writing a dissent. This will serve two purposes: first, it will focus responsibility for a prompt dissenting draft; second, it will tend to minimize overlapping and repetitive dissents.



3. Concurring opinions. It will be helpful if a Justice who decides to write a concurring opinion advises the author of the proposed Court opinion and all others. This could have several benefits: first, the author of the Court opinion may be able to accommodate the concurring view and thus eliminate a concurring opinion; second, any other Justice contemplating a concurring opinion may be able to consolidate concurring views in a single concurring opinion.

Regards,

W B B



October 7, 1972

CONFIDENTIAL

Dear Chief:

This refers to our discussion in Conference of the Commission on Salaries, as to which you will be appointing the members representing the Judiciary.

Although you know the ABA people very well indeed, in thinking about possible candidates from the bar the following names come to mind:

Bernard G. Segal  
William T. Gotsett  
Edward L. Wright  
Chesterfield Smith  
Leon Jaworski  
Whitney North Seymour  
Burnham Enersen

You are quite familiar with all of these gentlemen, with the possible exception of Chesterfield Smith and Burnham Enersen.

Chesterfield Smith is the President Elect of the ABA, a former President of the Florida bar, and a law partner of former Senator Spessard of Florida. Smith is tough minded and attractive, and knows his way around in politics. If there are southern members of Congress on the Commission, Chesterfield would be a good candidate as a lawyer who could work with them.



Burnham Enersen, a former President of the California State Bar, is a widely respected California lawyer. If there were some reason for you to wish the Far West represented, he merits consideration.

Bernie Segal is the best qualified lawyer in the ABA in this area. If he is not appointed to the Commission as one of its public members, you will no doubt consider him seriously.

I would think that the membership from the House and the Senate would be relevant - in part at least - to your own consideration of who should represent the Judiciary. Whit Seymour is a superb advocate, and has excellent judgment and a high sense of public responsibility. But he is a "Wall Street lawyer", associated with "large financial incomes and interests", and conceivably would not be as influential as someone from the hinterlands like Ed Wright or Chesterfield Smith.

If the Commission is predominantly Democratic, and if it also has some old-line Democratic politicians on it, Leon Jaworski might be a meritorious candidate.

If you are thinking of including a law school dean, in addition to the obvious ones whom you know very well, I would add the name of Phil Neal.

There are, of course, many other well-qualified lawyers and deans. The above list is suggestive only.

Sincerely,

The Chief Justice

lfp/ss



October 9, 1972

Docket Sheets

Dear Chief:

The suggestion in your memorandum of October 6, with respect to docket sheets has my concurrence.

Any set of forms agreeable to other members of the Court is entirely satisfactory with me.

Sincerely,

The Chief Justice

lfp/ss



October 16, 1972

Dear Chief:

I would like to have the following cases put on the discuss  
list for the Conference on October 20:

No. 72-222 Louisville and Nashville RR v. Kentucky - p. 3

No. 72-187 Square D Company v. Hodgson - p. 3

Sincerely,

The Chief Justice

lfp/ss



October 20, 1972

Dear Chief:

Please show that in Martin v. City of New Orleans, No. 71-6627, Mr. Justice Powell would remand for reconsideration only in light of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). (See concurring opinion in Lewis v. City of New Orleans, 408 U.S. 913).

Sincerely,

The Chief Justice

cc: Mr. Michael Rodak, Jr.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

October 26, 1972

Dear Lewis:

It might be useful if you would send  
copies of the attached letter to the six members  
we visited with in August. In the rush of  
closing they may have missed this in the  
Congressional Record.

Regards,

WSB

Mr. Justice Powell

Attachment  
Letter to the Speaker



October 26, 1972

Dear Warren:

I wish to say again that I thought your remarks at the memorial ceremony on Tuesday were supremely appropriate, and delivered just as everyone would expect from a great Chief Justice.

As ever,

The Chief Justice

lfp/ss



October 30, 1972

Dear Chief:

I would like to have the following case put on the discuss list  
for the Conference on Friday, November 3:

No. 72-290 California v. Halpin - p. 5

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Michael Rodak, Jr.



November 2, 1972

Dear Chief:

I have just had a telephone call from Senator Harry Byrd of Virginia, who advised that the parking privileges of Supreme Court Justices will be restored.

He states that each member of the Court will receive a communication to this effect in the near future.

He also asked me to inform you and members of the Court that it was not he who had initiated any restriction of the parking privileges. The Senator Byrd referred to in the memorandum was from West Virginia - not Virginia. Also, Harry Byrd advised me that there never was any intention to eliminate the Supreme Court Justices.

Sincerely,

The Chief Justice

lfp/ss



November 2, 1972

Dear Chief:

I plan to be out of the city on Saturday of this week (November 4), unless it is necessary to continue the Conference on that day.

I will, of course, conform my plans to the convenience of other members of the Court if this should become necessary.

Sincerely,

The Chief Justice

lfp/ss



Supreme Court of the United States  
Washington, D. C. 20543

*Mura  
norm*

CHAMBERS OF  
THE CHIEF JUSTICE

November 7, 1972

MEMORANDUM TO THE CONFERENCE:

I intend to ask Jack Weiss to work out a tentative schedule for making the Reed and Clark clerks available to those who want them.

Please advise if you desire to be included and we will then firm up the assignment for a definite period. The period will be approximately eight weeks if all Justices participate.

Regards,

*WRB*

*I will be happy to have one of these clerks assigned to my chambers for whatever period or periods they are not needed by you or other Justices. ~~Indeed,~~*



November 7, 1972

Dear Chief:

I will be happy to have one of these clerks assigned to my chambers for whatever period of periods they are not needed by you or other Justices.

Sincerely,

The Chief Justice

lfp/ss



November 8, 1972

Law Clerks - Next Year's Budget

Dear Warren:

This refers to our discussion at last Friday's Conference as to staffing for future years.

First, may I again urge that you include in the budget a request for two additional permanent staff lawyers. One of these should be assigned full time to you and the other can work for the entire Court, as Ken Ripple is now doing so effectively.

Not only will this afford you mature assistance (which you so obviously need and deserve), but also - as several members of the Court suggested - it will be a "pilot project" for other Justices to observe.

We are all concerned with the extraordinarily heavy workload which you carry so well. Indeed, I do not understand how you manage to discharge the wide variety of duties as Chief Justice and, at the same time, produce such a high level of performance as a member of the Court.

My second suggestion relates to my own chambers. What would you think of including in the budget a request for funds for a fourth law clerk for me and for any other Justice who may desire one? I do not have the background in constitutional and criminal law which enables me to function without a great deal of reading and research. There simply is not enough time for me to do this on my own, with the requisite thoroughness. Accordingly, I keep my three clerks heavily committed.



What I would really like to try out is having four clerks, with each to serve two-year terms on a staggered basis. A number of the Circuit Courts of Appeals are now requiring their clerks to serve for two years. If one always had two experienced clerks, the new incoming ones could come directly from law school without being required to serve a year at the Circuit Court level.

In my conversations with Tom Railsback and Wendell Wyatt, they both emphasized that the Court should ask the Congress for whatever assistance we think we need to discharge our constitutional duties. If the Congress turns us down, that is its responsibility. But if we fail to ask for what we think we need, then the failure is ours.

Sincerely,

The Chief Justice

lfp/ss



November 21, 1972

Personal

Dear Chief:

I have reviewed the draft interview, and think it excellent.

You will note my suggested changes in pencil. None is substantive with the exception of the question on page 7. This answer - however you frame it -- is likely to attract press comment and criticism. You may wish to give some further thought as to how best to reflect a neutral political viewpoint and yet record the reservation that most lawyers have as to legislative changes in the traditional jurisdiction of the Court.

Sincerely,

The Chief Justice

LFP, Jr.:pls



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 27, 1972

Dear Chief:

With the help of my secretaries and law clerks, I feel that I am at least staying even and perhaps moving slightly ahead in the unceasing battle to keep myself informed about what is going on within the Court. One modest change which would help the paper processing system in my chambers would be for join letters to be sent in duplicate to each chambers, just the way circulations now are. This is obviously not a matter of any great import, but I am wondering if some or all of the rest of you might also find it helpful.

Sincerely,

*WHR*

The Chief Justice

Copies to the Conference



*Misc  
mem*

November 27, 1972

Dear Chief:

Bill Rehnquist's suggestion as to duplicate copies of join letters has my full support.

Sincerely,

The Chief Justice

cc: The Conference



December 9, 1972

*Miss  
news*

Dear Chief:

Bert Early called to say that Roger Moreau was killed in the United crash at Chicago yesterday afternoon.

Two of Roger's assistants whom you may remember, as Nancy and Delores, were on the plane but miraculously survived with relatively minor injuries.

Sincerely,

The Chief Justice

lfp/ss



December 10, 1972

*use  
more*

Court Yards

Dear Chief:

Now that so many of us are in the west wing of the building, I hope we can persuade the Congress to give us enough money to put tables and chairs in at least one of the west court yards.

Not only do the clerks and secretaries enjoy during the spring the few tables and chairs in the northeast court yard, but I am sure several of the Justices also would enjoy these attractive facilities if they were available.

Sincerely,

The Chief Justice

lfp/ss