

Court

January 4, 1978

Supreme Court Rules

Dear Bill and Byron:

The brief for petitioners in 76-5729, Oliphant, et al. v. Suguamish Indian Tribe, reminds me of a couple of points that I hope will be addressed in your revision of our Rules:

1. Length of Briefs - Petitioner's brief in this case is 192 pages long, including 66 pages of an appendix bound and printed with the brief. I would favor a limitation on the length of briefs, say to 50 or 60 pages. I believe that several of the circuits limit briefs to no perceptible disadvantage of anyone except printers. Even lawyers fees may increase - though not necessarily - with the length of briefs.

2. Questions Presented - This brief states four "Questions Presented". The Questions, printed in "block" type (all caps), are difficult to read, verbose and argumentative. Indeed, they are almost unintelligible. I am reminded of the brief we rejected a year or two ago because of Questions that consumed several pages, and were in fact unintelligible. Our present Rules address the need for succinct and unargumentative Questions. I hope that by reframing the language in more specific terms, we can put counsel on notice that we will reject briefs that fail to comply.

In addition to the above (but not related specifically to the briefs in No. 76-5729), I hope revisions in the Rules can assure a more uniform level of readability in what is filed. Perhaps I have a personal interest, as my eyes are not too strong and the intensive reading of the past six years has not helped them. But apart from accommodating dimming vision, I see no reason why briefs and appendices filed in this Court should not conform to the highest standards of readability.

My understanding is that the present requirement that briefs be printed in not smaller than 11-point type (Rule 39) is ambiguous in that a fairly wide variety of types are so classified. Some of these are more readable than others. In this particular case (76-5729), the principal briefs are quite readable. I particularly like the style of type used by the Solicitor General when his office writes the brief. While we could not require that briefs be printed only in a single style of 11-point type, perhaps - with the advice of someone knowledgeable in this area, we could limit the printing of briefs to several standard styles that are most readable. In addition, with advice from someone who knows this business, we should specify the minimum "leading" and margins.

If briefs are not printed, I hope the new Rules will state explicitly that any substitute for printing (e.g., typing or any of the new modes of mechanical reproduction) be double-spaced. Not infrequently we receive typed briefs, single spaced, that I have found rather repellant.

One further thought, not original with me, relates to the extension of time for the filing of briefs. I have been lenient in granting extensions, perhaps because of my sympathy for the problems of busy lawyers. But the entire litigation process in our country has become intolerably long drawn out and expensive. Although we can do relatively little in our Rules to address the principal causes of protracted litigation (discovery, class actions, crowded dockets, etc.), I would like to see our Rules tighten up on time schedules wherever this reasonably can be done. Specifically, I would favor making clear that extension of time for the filing of briefs will be the exception, requiring a showing of genuine need.

I hope that the revised Rules will make it quite clear - perhaps with some black-letter warning at the beginning of the Rules - that a failure to comply with the Rules will result in rejection of briefs, and - in the discretion of the Court - in refusing to hear oral argument.

Sincerely,

Mr. Justice Rehnquist
Mr. Justice White
Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

January 24, 1978

Dear Jo and Lewis,

Your birthday present to me substantially
eased the trauma of becoming another year
older. Many thanks for your thoughtfulness
and generosity. Best wishes to you both always.
Potter

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1978

MEMORANDUM TO THE CONFERENCE

I completed the radiation therapy this morning and the doctors assured me it was entirely effective. However I'll be left for some days with a throat problem which is aggravated when I over use my voice. I plan to be at conference Friday but to say as little as possible.

W.J.B. Jr.

Court

February 28, 1978

Dear Bill:

The party you gave here at the Court last week for Jane Alexander and Henry Fonda was an exceptionally fine occasion.

In addition to the opportunity of visiting with these talented artists, I enjoyed seeing a number of your other friends. It was quite a distinguished company.

I was glad to see you evidencing such strength. Your spirit has remained vital, and with the passage of time it seems to me that you also have adjusted remarkably well in every respect to the physical disability. A person of less courage and intellectual vigor would have surrendered, but you have managed extraordinarily well to carry on both with your work and in nourishing friendships and interests of a lifetime.

We continue - as we always will - to miss you in our deliberations. But it is a privilege to have you with us here at the Court most of the time.

Please thank Kathy for her part in the party. I thought she looked lovely.

Affectionate best to you both.

As ever,

Mr. Justice Douglas

lfp/ss

melac f

March 4, 1978

Dear Bill and Potter:

The enclosed copy of address given by George Bush last August may be of interest.

I find his views fully compatible with my own. I only wish there were more leaders of our country who spoke out strongly on these issues.

Sincerely,

Mr. Justice Rehnquist
Mr. Justice Stewart

Enclosure

LFP/lab

Mr. Menz

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 6, 1978

Dear Chief,

Here are my votes for last week's cases. I will send a memo to the Conference tomorrow with the reasons for my votes.

No. 77-10, Exxon Corp. v. Governor of Maryland --

very tentatively to affirm

No. 77-39, Pinkus v. United States -- Reverse ✓

No. 76-1410, Agosto v. INS -- Reverse ✓

No. 77-335, Oppenheimer Fund v. Sanders -- Reverse ✓

No. 76-1621, McClellan v. McSurely -- Affirm or DIG ✓

No. 76-1560, United States v. United States Gypsum Co --

Affirm ✓

No. 76-6637, 76-6767 -- Daviage v. United States, Scott v.

United States-- Reverse ✓

Sincerely,

T.M.

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 6, 1978

Dear Chief:

Confirming my action at conference today I
assigned No. 76-709 Butz v. Economou to Byron and
No. 75-1914 Monell v. Department of Social Services
to myself.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Coun

March 9, 1978

Dear Bill:

As you may recall, I greatly admired the sculptured likeness of you that was unveiled last spring by the Department of the Interior at the C&O canal.

I have obtained a picture of it that I wish to frame and keep as a cherished possession.

It would be doubly cherished if you would inscribe it for me.

As ever,

Mr. Justice Douglas

lfp/ss

Cont

May 23, 1978

MEMORANDUM TO THE CONFERENCE:

I think it appropriate for me to report briefly on the performance of our Brother Marshall at Mr. Jefferson's University on Sunday.

Thurgood was the only speaker at the commencement ceremonies at which some 4,000 students were graduated from the college and the several graduate schools. In addition to the graduates, there must have been at least twice as many admiring parents, plus the faculties in all of their colorful regalia.

With enough substance in his address to look scholarly in the official records, there also was enough of Thurgood's lightheartedness to keep the graduates awake (at least half awake). Comments were universally and properly commendatory.

It was a fine performance.

L.F.P., Jr

SS

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1978

No. 76-1621 McAdams v. Surely

MEMORANDUM TO THE CONFERENCE:

I have concluded that we should give serious consideration to dismissing this case as improvidently granted.

On yesterday, I reviewed the several opinions that have been filed. The Court is about as badly fragmented on the Speech or Debate Clause central issue (Part II) as if we were three separate panels in disagreement on a Court of Appeals, producing a disabling intracircuit split. Our opinions will afford no guidance to other courts, and are not likely to be reassuring to the members of the Congress in terms of their knowing the boundaries of their constitutional privilege.

Moreover, we have Bakke and the capital cases in which the Court also speaks with several voices. But the law will not be left in the same degree of confusion by either of these cases as it will be with respect to Speech or Debate if we bring down McSurely.

I am persuaded that the Court will be disserved institutionally if all three of these cases are brought down at the end of a Term, with divisions among us as sharply divided as they happen to be.

Although I still feel as strongly as ever that the McSurely litigation is wholly without merit as to at least three of the four defendants, and that 11 years in the courts in a frivolous vendetta is enough. Normally, I would think that our first duty, once we take a case, is to do justice to the parties. But I believe that if we DIG this case, the injustice will be limited to one additional final hearing in the District Court. Although I think CADC

erred in remanding rather than disposing of the case, Judge Leventhal's opinion makes it rather clear that he shares my own view as to the lack of substance to the McSurely claims, at least as to the three Washington defendants. A District Court, on remand, will have this guidance.

In sum, I am motivated to suggest a DIG by genuine concern as to of this Court's duty to afford guidance and stability on major constitutional issues. But I also believe that in the end a just result probably will be reached if we allow this case simply to run its tortuous course.

L. F. P. _{rdc}

L.F.P., Jr.

ss

July 25, 1978

Dear Harry:

I wish that you and Dottie could have been with us at the Virginia Bar Association meeting at the Homestead last weekend.

The banquet speaker was Bowie Kuhn. He gave a lighthearted, humorous talk about baseball and his duties. Near the end of his speech, he referred admiringly to your opinion in the 1972 antitrust case, and quoted your poem from Grantland Rice.

Mr. Kuhn, who is a graduate of the University of Virginia Law School, also spoke to me about your opinion with genuine admiration.

Jo and I are enjoying being in our home in Richmond, even though we have had extremely hot weather for the past week. I like to think of you and Dottie on the shores of a cool lake in northern Minnesota -- or is it Wisconsin?

We send affectionate best to you both.

As ever,

Mr. Justice Harry Blackmun
c/o Dr. D. C. Connolly
R. R. 1
Hayward, Wisconsin 54843

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

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

8/9/78
conv
JLL

Kearney, Wisconsin
August 5, 1978

Dear Lewis,

I was pleased to have your letter. I would have enjoyed hearing Samie Kahn. But his comments about the opinion in the 1972 antitrust case must be taken with a grain of salt. After all, he prevailed! Nevertheless, it is good to know he did not resent - as the CJ and BHW apparently did, - my "sentimental journey". That was one opinion I really enjoyed working on - but they would not join Part I!

I have started the "Trail of the Fox" and so far it is fascinating. No time before. I appreciate your placing it in my hands.

The ABL, I hope, is not proving too strenuous. Are you not giving the dissertation at the Prayer Breakfast this year? It will go well, I know.

What a term we had and what a relief to have it behind us! The days are cool, almost cold, here, but the sun is warm. Work occupies a good part of each day, but there is time for ^{daily} swims, some sailing (I am poor at it), soaking up the atmosphere of the woods, walking, and reading (which I need). I am grateful for and appreciate the summers.

My very best to you and Jo.

Sincerely and with affection,
Harry

memo to
Carr

September 4, 1978

Dear Byron:

The enclosed letter from Dean Rusk probably confirms what you already surmise: that you probably have a superstar in Benna Solomon.

On the basis of Dean Rusk's enthusiastic recommendation, I was fully prepared to engage her when you "scooped me"!

The important thing, however, is to have clerks of her competency here at the Court. We all benefit.

I do hope you and Marion had a relaxing and interesting summer.

As ever,

Mr. Justice White

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Court
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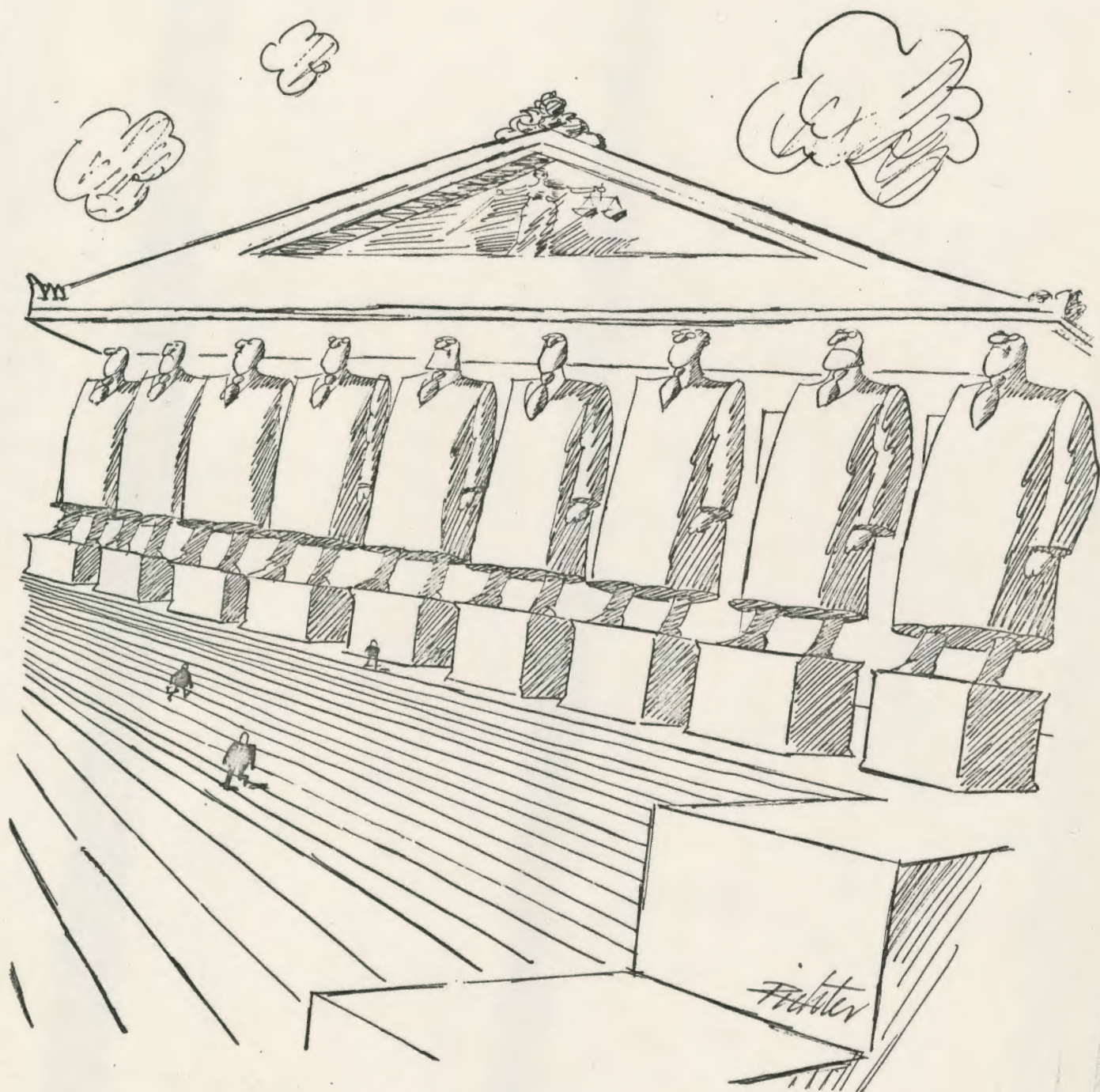
September 11, 1978

Dear Brothers:

In the event you missed the enclosed gem from the
New Yorker, I think you will find it amusing.

L.F.P.
L.F.P., Jr.

SS



Stewart, Justice
D

September 14, 1978

Dear Helene,

It is sad for those of us who will continue to work at the Court to think of your leaving us.

This is especially true of our Chambers because you always have been so thoughtful and cooperative in every respect. I particularly remember - as does Sally - the warmth of your welcome when we came to the Court in January 1972, and the generous and intelligent guidance that you gave us in those early days when we knew so little about the day-to-day procedures here. For example, we had never heard of "conference" books, discuss lists, cert memos and the like. We certainly could not have managed without you.

And what in the world will I do without your candy jar? Whenever my weakness for sweets overcame me, I found some excuse to visit the Stewart Chambers. You never disappointed me.

In sum, you will be greatly missed. You have many friends here. Do keep in touch.

Sincerely,

lfp/ss

29

September 14, 1978

Dear Helene,

It is sad for those of us who will continue to work at the Court to think of your leaving us.

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In sum, you will be greatly missed. You have many friends here. Do keep in touch.

Sincerely,

lfp/ss

members of court

October 30, 1978

Dear Thurgood:

I write to say that I probably will not be able to attend the dedicatory ceremony at Howard on November 18, as our daughter and her family from Houston will be here that weekend.

I do congratulate Howard on your being the speaker on that occasion. Having heard you at Charlottesville last May, I know that it would be a pleasure to hear you again.

I hope you are receiving good reports from Goodie.

As ever,

Mr. Justice Marshall

lfp/ss

Justice

November 27, 1978

MEMORANDUM TO THE CONFERENCE

I will be absent from the Court tomorrow, as I will be out of the city attending the funeral of a dear friend.

Sincerely,

LFP/lab

CHAMBERS OF
JUSTICE POTTER STEWART

November 30, 1978

MEMORANDUM TO THE CONFERENCE

I contemplate adding the following footnote at an appropriate place in my Memorandum:

There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the South-Eastern Underwriters case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act -- to give insurance companies only a limited exemption from the antitrust laws.

The repeated insistence in Mr. Justice Brennan's Memorandum that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct -- and entirely irrelevant to the issue now before the Court. For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

In short, the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the Commerce Clause. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only "the business of insurance." See SEC v. National Securities, Inc., 393 U.S. 453, and note 33 infra. At the risk of undue repetition, let it be emphasized again: The fact, if it is a fact, that Blue Shield is an insurer, and the fact

that its Pharmacy Agreements are validly regulated by state law under the McCarran-Ferguson Act is quite irrelevant to the question here. That question, quite simply, is whether the Pharmacy Agreements are "the business of insurance" and thus exempt from examination under the antitrust laws. For the reasons stated in this memorandum, I believe that they are not.

P.S.
P.S.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

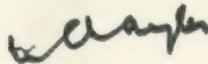
December 13, 1978

Dear Lewis:

I want to thank you kindly for
your recent note. Once again, your
thoughtfulness has brought me cheer.

My best wishes to you and Jo
for the Holiday season and always.

Yours faithfully,



The Honorable Lewis F Powell, Jr.