Sung Wan v. United States, supra, at p. 14; cf. also *McNabb v. United States,* 318 U. S. 332, 346. In the *McNabb* case a federal prosecution was involved, but, as that case plainly indicates, the Supreme Court standard of due process required of the States is, at least, no stricter than that required of subordinate federal courts. In *Lyon's v. Oklahoma,* 322 U. S. 596, 599, the use of a confession in evidence was held not to violate due process under the Fourteenth Amendment although ". . . counsel was not supplied [the accused] until *after* his preliminary examination, which was subsequent to the confessions" (Emphasis supplied). As in the instant case, the prisoner was ". . . competently represented before and at the trial . . . ." In the *Lisenba* case, supra, use of the confession was held not to have worked a denial of due process even though the accused had specifically requested counsel before he was subjected to crucial interrogation by the police and counsel was *not* summoned. It seems implicit in *Powell v. Alabama,* 287 U. S. 45, 71, that assignment of counsel for an accused in a capital case is timely, within the due process requirements of the Fourteenth Amendment, if not made ". . . at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." In the present instance the defendant had counsel from the time of his arraignment onward. Nor does he make any complaint in such regard. His contention is that he should have been supplied counsel at the moment of his arrest and before the police officers asked him any questions concerning the crime they were investigating.

The recognized limit of Supreme Court review of State convictions was well expressed in *United States v. Mitchell,* 322 U. S. 65, 68. True enough, the statement was a dictum (a federal conviction being there

involved), but, appearing as it does in an opinion for a majority of the Court's full membership, it may fairly be taken as interpretive of the Court's view of its own pertinent decisions. It was there said (p. 68) with respect to such review,—"Our sole authority is to ascertain whether that which a state court permitted violated the basic safeguards of the Fourteenth Amendment. Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice."

It is our opinion that the statements of the appellant to the police, made in the circumstances as hereinbefore related, were voluntary and uncoerced and that their use as evidence against him at trial did not violate the due process clause of the Fourteenth Amendment.

Judgment and sentence affirmed.

Commonwealth ex rel. Sheeler *v.* Burke.

Courts—Supreme Court—Original Jurisdiction—Habeas corpus—Reference for determination of factual issues—Referee's findings of fact.

1. A petition for habeas corpus is incapable of performing the functions of a writ of error or appeal. [157]

2. Where a petition for a writ of habeas corpus raises issues of material fact, and the Supreme Court refers the matter to a judge for the purpose of holding a hearing on the issues and to make findings of fact, his findings are purely advisory. [154]

Constitutional law—Due process—Criminal law—Murder—Plea of guilty to homicide by uncounseled defendant—Timely assignment of counsel—Coerced confession—Practice—Setting aside sentence and plea.

152, (1951).] Syllabus—Opinion of the Court.

3. The arraignment of and acceptance of a plea of guilty from an uncounseled defendant, charged with a capital crime, constitutes a denial of due process, especially where legal knowledge is required to determine whether the accused is properly chargeable with the alleged crime. [157]

4. The failure of a court to assign counsel timely to a destitute person charged with a capital offense is a violation of constitutional due process. [157]

5. A conviction in a capital case based upon a confession or self-incriminating testimony which has been coerced from the defendant by police officers constitutes a denial of due process which, in the procedural circumstances here present, is remediable by habeas corpus. [158]

6. In a habeas corpus proceeding it was *Held* that the relator's conviction of murder had been had without due process of law; and, the sentence and plea of guilty were vacated. [153-8]

Original jurisdiction. No. 356, Miscellaneous Docket, No. 9, petition for writ of habeas corpus in case of Commonwealth of Pennsylvania ex rel. Rudolph Sheeler v. C. J. Burke, Warden, Eastern State Penitentiary. Plea of guilty to indictment for murder and sentence of life imprisonment vacated and set aside.

Louis B. Schwartz and *Raymond J. Bradley,* for Petitioner.

John H. Maurer, District Attorney and *James W. Tracey, Jr.,* First Assistant District Attorney, for Commonwealth.

Opinion by Mr. Justice Jones, March 29, 1951:

Rudolph Sheeler, the relator, filed his original petition with this court for a writ of habeas corpus on the ground that he was being illegally restrained of his liberty in the Eastern State Penitentiary as a result of a life sentence imposed upon him by the Court of Oyer and Terminer of Philadelphia County on March 31, 1939, following his plea of guilty to an indictment (No. 574, March Sessions 1939, in said court) charging him

with the murder of James T. Morrow, a police officer of the City of Philadelphia, on November 23, 1936, in Northeast Philadelphia. The petitioner alleges that his plea and confession of the crime charged in the indictment were obtained and used in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and of Article I, Section 9, of the Constitution of Pennsylvania. We entered a rule to show cause why the prayer of the petition should not be granted on the district attorney of Philadelphia County who duly filed a responsive answer.

The petition and answer raised such important issues of material fact (for the resolution whereof on testimony taken at a hearing an appellate court lacks the requisite facilities) that we referred the matter to Honorable LOUIS E. LEVINTHAL, a judge of the Court of Common Pleas of Philadelphia County, for the purpose of holding a hearing on the issues framed by the petition and answer with notice to all interested parties; the order further directed that a record of the hearing, including a transcript of the testimony taken, together with the hearing judge's findings of fact on the issues raised be returned to this court. Judge LEVINTHAL ably and thoroughly performed the duties imposed upon him by our order of reference and the matter is now before us for final disposition. The findings of the learned referee are, however, purely advisory. The instant petition is peculiarly a matter for this court's action in the exercise of our original jurisdiction which, by reason of the unusual circumstances pleaded, we invoked at the instance of the relator. The services performed by the referee were in aid of our discharge of our duties in the premises.

From the findings of the referee, who heard and saw the witnesses, we summarize and adopt the following

salient facts and conclusions which are amply supported by substantial evidence.

Sheeler was taken into custody by the police of Philadelphia on February 16, 1939, on suspicion of having participated with a confederate, one Howard, in the murder of Officer Morrow. He was held by the police incommunicado in City Hall under a fictitious name which they intentionally gave him. He was subjected to coercion, both physical and psychological, in an effort to force from him a confession that he had been a participant in the Morrow murder. During the time he was so held by the police, he was denied opportunity to communicate with family or friends and was taken from his cell-room many times for questioning by detectives for a total of 45 to 50 hours within the first week. At the end of that period, to wit, on the morning of February 23, 1939, he orally "confessed" that he was with Howard when the Morrow crime was committed. A little later the same morning, he signed a statement in which he vaguely narrated the commission of the crime. He was given a hearing before a magistrate on February 24th where he denied that his "confession" was voluntary. He was held without bail for further hearing on the representation of the detective in charge that additional time was required for investigation and, thereupon, was recommitted to the custody of the police. Later that day (February 24th), he signed a statement in which he repudiated his earlier public assertion that the "confession" was involuntary.

On March 24, 1939, the relator was arraigned on various bills of indictment for the crimes covered by the "confession", including indictment No. 574 for the Morrow murder, whereto he pleaded guilty. He was not represented by counsel at the time of his arraignment and pleas.

On the same day (March 24, 1939), Sheeler signed and swore to an "affidavit of destitute circumstances and request to assign counsel" under the Act of March 22, 1907, P.L. 31, Sec. 1, 19 PS §784. The court subsequently assigned him counsel who were notified of their appointment about noon of March 28th, the day before the court hearing for determining the degree of the murder "confessed" and fixing the penalty. The court-appointed counsel mistakenly believed that Sheeler's "confession" and pleas of guilty were voluntary as he himself confirmed to them. They, therefore, did not consider it necessary or desirable to ask for a continuance of the hearing in order to examine into the "confession" or to investigate the underlying facts.

The following morning, March 29, 1939, a hearing on indictment No. 574 for the murder of Officer Morrow was had before the court en banc. The "confession" of February 23rd was offered in evidence and attached to the record. Sheeler also testified in support of the "confession". Several discrepancies in the evidence were noted by one of the members of the court en banc. After the hearing, the police retained their custody of the accused and on March 31st a final "confession" was obtained from him whereby the discrepancies above-mentioned were eliminated. The court then adjudged Sheeler guilty of murder in the first degree and sentenced him to imprisonment for life in the Eastern State Penitentiary to which he was transferred and where he is now held.

The accused's plea to the indictment for murder and his self-incriminating testimony, as well as the "confession", were the result of coercion, subtly and psychologically exerted upon him by the attendant and ever-present police in whose exclusive custody he was from the day of his apprehension (February 16, 1939)

to the time of his commitment to the Eastern State Penitentiary on April 1, 1939.

The question involved is not whether the relator was guilty or innocent of the murder charged against him but whether his conviction was obtained by violating his constitutional rights. As has long been recognized, a petition for habeas corpus is incapable of performing the functions of a writ of error or appeal: *Passmore Williamson's Case,* 26 Pa. 9, 17; *Commonwealth ex rel. McGlinn v. Smith,* 344 Pa. 41, 47, 24 A. 2d 1, and cases there cited. We take occasion to note in passing that no comparison is to be drawn between the instant application for habeas corpus and the extraordinary remedy of a motion for a new trial, nunc pro tunc, which we heretofore accorded the relator at his instance under the Act of April 22, 1903, P.L. 245, Sec. 1, and which was ultimately ruled against him.

We are unanimous that the relator's conviction of the murder of Officer Morrow was had without due process of law and that, consequently, the sentence imposed upon him and his plea of guilty on March 24, 1939, to the indictment charging him with that murder cannot be upheld. (1) The arraignment of and acceptance of a plea of guilty from an uncounseled defendant, charged with a capital crime, constitutes a denial of due process especially where, as here, legal knowledge is required to determine whether the accused is properly chargeable with the alleged crime: cf. *Powell v. Alabama,* 287 U.S. 45, 71. That Sheeler was not represented by counsel when he was arraigned and so pleaded to the indictment for murder is indisputably established by the evidence. Indeed, that fact is expressly conceded of record. (2) The failure of a court to assign counsel timely to a destitute person charged with a capital offense is equally a violation of constitutional due process: see *Powell v. Alabama,*

supra, where it was said at p. 71 that a court's duty to assign counsel for a destitute defendant charged with a capital crime ". . . is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Cf. also *Commonwealth v. Bryant,* at p. 135 ante. (3) A conviction in a capital case based upon a confession or self-incriminating testimony which has been coerced from the defendant by police officers likewise constitutes a denial of due process (e.g., *Turner v. Commonwealth of Pennsylvania,* 338 U.S. 62) which, in the procedural circumstances here present, is remediable by habeas corpus: see *United States ex rel. Innes v. Hiatt,* 141 F. 2d 664, 665-666 (C.A. 3rd Cir.).

The petitioner has met the burden of establishing that he is illegally detained and is, therefore, entitled to relief. But, inasmuch as his guilt or innocence of the crime charged cannot be resolved by this proceeding, we will follow the practice adopted in *Commonwealth ex rel. Townsend v. Burke,* 361 Pa. 35, 42-43, 63 A. 2d 77, and make the following order.

The sentence imposed on the relator by the Court of Oyer and Terminer of Philadelphia County on March 31, 1939, upon indictment No. 574, March Sessions 1939, is hereby vacated and set aside as is, likewise, the relator's plea of guilty to that indictment. It is further ordered and directed that Judge LEVINTHAL'S report be filed as a part of the record in this proceeding at the cost of the County of Philadelphia.

Letters

Sidelight On Hughes

In connection with Merlo J. Pusey's biography of Charles Evans Hughes, there is an interesting story, which I am now at liberty to tell, of how Justice Hughes was nominated for the Chief Justiceship by President Taft in 1910. I got the story from Mr. McMurray of Oklahoma at Johns Hopkins Hospital. I understood that he was there as a patient of Dr. Hugh Young, just having been operated on, or to be operated on. I was there with a very dear kinsman on a similar mission. This was in 1929.

What he told me was that he was a very close friend of Vice President "Sunny Jim" Sherman, and that he was in Vice President Sherman's office one morning when Vice President Sherman came in looking like a thunder cloud instead of wearing his usual smile. He asked what the trouble was. The Vice President said: "If you knew what I had in here, you would understand why I am feeling as I do." He then told the story of having had President Taft give him that morning for transmission to the Senate the appointment of Charles Evans Hughes to be Chief Justice.

However, before he left the President's office, a secretary announced Sen. Joe Bailey of Texas, saying: "Mr. President, Senator Bailey, as you know, has an appointment." President Taft then bade adieu to Vice President Sherman, and in doing so, said: "With reference to that matter we were discussing, please hold it in abevance, and do not do anything about it until you hear from me further."

Vice President Sherman then said to Mr. McMurray: "And I am afraid that Joe Bailey is going to talk President Taft into canceling this appointment and appointing Justice Edward Douglas White to the Chief Justiceship." McMurray then remarked: "The appointment you have in your pocket is a very historic document, and I would like very much to see it, if you please." Whereupon the Vice President produced it, and allowed him to read it.

President Taft did withdraw the appointment of Mr. Justice Hughes and did appoint Mr. Justice Edward Douglas White to be the new Chief Justice that same morning.

SAM HOBBS.
Former Member of Congress.
Selma, Ala.

(Feb., 1951)

C.A.

Even accepting Nye, it does not bar proceeding for Contempt but only that there must be a jury. It would be interesting to have a jury here, as was had in the early history of U.A.A.L.

XI

Original Filed in VIP Correspondence File

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 5, 1951.

Dear Chief:

You may care to include among today's petitions for certiorari denied No. 429, Sparks v. Civil Aeronautics Board. I am therefore sending you this note to tell you my final vote is a denial.

Ever yours,

F.F.

The Chief Justice.

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CHIEF JUSTICE

[March, 1951]

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

Dear Chief:

If, as I assume, we shall affirm the case on the construction given to §15 of the Act by the Maryland Ct., duly set forth in a per cur., I suggest we do so the next day or so. And for the reason that since the dead-line is April 28 for nominations, we should give them ample time for any further legal action in

Case controversy arises
as to what affidavit
would be sufficient.

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File

Supreme Court of the United States
Washington 13, D. C.

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CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 31, 1951.

Dear Chief:

Weeks ago, at the invitation of some former students, who are Dartmouth men, I agreed to go to an early lunch at the Dartmouth Club next Tuesday. Since that (Tuesday) is their fixed day for luncheon and it is too late to ask them now to select some other speaker, I hope it may be possible to fix our Conference for some other day convenient for everybody.

Others may be able to dispose of the RCA-CBS case in a few minutes, but for me - and perhaps others - the case raises issues that ought to be thoroughly canvassed. In any event, I do not want to feel under pressure of having to curtail discussion because I have to run off and meet an early engagement from which I ought not now to disengage myself.

Faithfully yours,

Felix Frankfurter

The Chief Justice.

March 31, 1951

MEMORANDUM FOR THE CONFERENCE:

One of the Brethren has informed me that, because of previous commitments, it will not be convenient for him to attend the Conference which I called for April 3rd at 11:00 a. m. Therefore, I am cancelling the Conference for that date.

Case No. 565 - Radio Corporation of America, et al v. The United States, et al - will be considered at the regular Conference scheduled for Saturday, April 7th.

The Chief Justice

Thank you all very much

V. T.

May 7, 1951.

Dear Brethren:

"It can't happen here" is, happily, one's instinctive reaction to an experience like that of Vogeler in Communist Hungary. We assume that the American way of life - our social heritage and our Constitution, or perhaps the very air we breathe - precludes such a happening.

But the enclosed charge shows that it can happen even in our day, in the very cradle of American independence. It is the instruction given to the jury on the new trial ordered by the Supreme Court of Pennsylvania, after it had reversed a conviction for murder on the basis of a Referee's Report submitted by one of the outstanding judges of the Court of Common Pleas. Indeed, the case of Rudolph Sheeler, whereby a man as innocent of the crime as any of us, was convicted of murder and incarcerated for twelve years is, in view of our professions, even a worse instance of lawlessness than the Vogeler case.

It is a widely entertained feeling that one ought not to be what is deemed "sentimental" in dealing with murderers and other dangerous criminals, and that the risk of an innocent man being convicted through extorted confession is too slight to be important. It is also suggested that it is difficult, if indeed not impossible, to convict without the third degree.

Experience disproves both claims.

The Sheeler case is not just one case out of thousands. Men do not indulge in base practices overnight. What the Sheeler case discloses is a state of mind in the Philadelphia police. It is the same police force whose doings we had occasion recently to examine in the Turner and Johnson cases. That the Philadelphia police are unlike the police of other cities is disproved by many cases from other cities. That the Sheeler case is not an isolated instance of an innocent man entangled in police misdeeds is evidenced by the fact that in the Harris case, in

338 U.S. 68, the South Carolina authorities, after our reversal, nolle prossed the indictment against Harris because the trial judge - so I was told when I was in South Carolina a little while ago - felt that Harris was innocent. In the first of the modern third-degree cases in this Court, Wan v. United States, 266 U.S. 1, our reversal finally resulted in the clearing of Wan. For anyone who has been alert to these matters over the years, these instances are too uncomfortably recurring.

Nor is it true that convictions cannot be had without confessions extorted by the third-degree. There was no trouble in convicting Watts without the confession which we required to be thrown out. Likewise there was no trouble in convicting Turner, after we reversed the case here. The fact of the matter is that these police practices afford a fertile opportunity to defense counsel in playing upon the emotions of juries to obtain acquittals or disagreements.

Why do I call your attention to this Pennsylvania opinion, when no third-degree case is pending before us? Just because no such case is now here. When we have a case before us its impact - usually a case seemingly of clear guilt - is likely to subordinate the significance of an extorted confession.

Faithfully yours,

F.F.

COMMONWEALTH	:	OYER & TERMINER, Philadelphia Co.
vs.	:	March Session, 1939
RUDOLPH SHEELER	:	No. 574

- - -

Members of the Jury:

By the verdict of "not guilty" which you have just rendered in this case, you have been privileged to participate in the belated righting of a great wrong, and in opening the way toward erasing a black and shameful page in the history of Philadelphia's Police Department.

It is not necessary at this time to review at length the lawless means by which that wrong was perpetrated. They have been judicially established beyond contradiction by the solemn judgment rendered five weeks ago by our Supreme Court, and their appalling details are spread at length, to be read by all, in its official record in this case. It will be sufficient for our present purposes to say that Mr. Sheeler was taken into custody in 1939 by certain members of the detective police, when he came from his home in New York to visit a sister who was ill in a hospital in this city. The pretext given for his arrest was an alleged suspicion, now revealed to have been wholly groundless, that three years before he had participated with a confederate in the murder of a police officer of which you have just now acquitted him.

At the time of Mr. Sheeler's arrest, the police had not a scintilla of evidence to connect him in any way whatever with that murder, and to this day, as you have learned from the candid statement of the district attorney, they have been unable to produce a single witness or line of testimony against him.

Having thus wrongfully taken Sheeler into custody, the detectives removed him to City Hall, where "he was held by the police incommunicado, under a fictitious name which they intentionally gave him." From then on, for a period of upwards of forty days, he was continuously and intensively questioned in an effort to wring a confession from him, and during that time, every fundamental right which our constitution and laws have created for the protection of an accused person was grossly violated. He was deliberately denied an opportunity to communicate with his family, friends and counsel, and was subjected to prolonged, physical brutal and psychological coercion. He was beaten, threatened, intimidated and terrorized. An attorney procured for him by his wife was refused access to him, and was finally forced to retire from the case as the result of a telephone call in which the district attorney in

charge of the prosecution was falsely impersonated. Misrepresentation, trickery, and all the subtle devices of psychological oppression and overreaching were brought to bear upon him, until, at last, his will to resist the persistent demands of the police that he incriminate himself was broken, and, in desperate fear of execution, he confessed to a crime he never committed. He was even forced to plead guilty to the indictment, and to repeat in open court, on the witness stand, the false "confession" he had been wheedled into believing was the only means of saving his life. The officers responsible for this miscarriage of justice even projected their evil influence into the court room, deceived the judges who heard the case and the district attorney who prosecuted it, and, by making the court itself an unconscious party to their shameful operations, obstructed and perverted the course of public justice.

The inevitable consequences followed; Sheeler was condemned to life imprisonment for a crime he did not commit, and for twelve long years, the lash of punishment has been laid upon him in a felon's cell. It is an ugly picture to contemplate- one to inspire wonder, alarm and deep resentment in the hearts of decent men.

The story of this outrage has but recently been revealed. Sheeler's plight finally came to the attention of his present counsel, Mr. Schwartz, who took upon himself the heavy task of exposing and bringing that flagrant injustice to an end. With unflagging labor and rare professional learning and ability, he has not only restored liberty to a friendless and persecuted man, but he has also performed a notable service to the public and to the cause of justice. He deserves the gratitude and thanks of the people, and the admiration and esteem of his brethren in a profession whose finest traditions have been exemplified by his work in this case.

The wrong that was worked against Sheeler cannot be righted by any perfunctory verdict of acquittal. Its sinister implications are broader and deeper. Considered largely, it poses a grave threat to the personal safety and liberty to us all. No man is safe, if the police power is to be abused with impunity, as it was here. When wisely and lawfully exercised, the police power of the state is a necessary and beneficent force in promoting the welfare and happiness of a people, preserving the public peace and protecting the citizen in the full enjoyment of his dearest possessions, his life and his liberty. In the hands of arrogant and cruel men, however, this same power becomes a terrible instrument of governmental tyranny and oppression, and it is only through the abuse of that power that despotisms rise and flourish, that liberty vanishes and that the safety and happiness of a free

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people are destroyed. Fortunately, Sheeler's fate is a rarity in the administration of justice in America, but it is an ominous counterpart of what occurs daily behind the Iron Curtain.

The lessons of this case will not be learned, if we are cynically to shrug our shoulders, indifferently go about our business, and promptly forget it. The tragedy of it will be immeasurably increased, unless it leads to reforms and improvements in police practice which give reasonable promise that such shocking incidents shall never be repeated. What, then, can be done toward that end? The identities and names of the ringleaders, if not all the participants, in the crimes committed against Sheelermare now known. They are written into the records of the Supreme Court. Unfortunately, time and the operation of the Statute of Limitations prevent the prosecution of those men for their crimes and conspiracies, and thus they will go unwhipped of Justice. By their conduct, however, they have revealed themselves as unfit to be longer entrusted with the police power. They have dishonored the force as a whole. Not the least of their offending is the harm they have done to their many honest and decent fellow officers. This mere handful of detectives has given solid basis for the taunts and jibes and slanders that are too often unjustly hurled at the police generally by the careless and undiscriminating among us. A shamed department cannot redeem its honor and regain public confidence until it has purged itself of such men. This, I have no doubt, will promptly be done. I know that Director of Public Safety Rosenberg is keenly aware of the implications of this case, that he is eager to improve and strengthen the force in every way possible, and, now that the Sheeler case is ended in the courts, that he can be relied upon to act vigorously and decisively upon its revelations.

From F.F.

REPORT

BY

Hon. LOUIS E. LEVINTHAL

TO THE

Supreme Court of Pennsylvania

IN THE MATTER OF

COMMONWEALTH EX REL. SHEELER
v. BURKE

Reprinted from
DISTRICT AND COUNTY REPORTS

Commonwealth ex rel. Sheeler v. Burke

Criminal procedure—Plea of guilty to and sentence for murder —Petition for writ of habeas corpus—Repudiation of confession— Use of physical force and psychological pressure—Suppression and falsification of material facts known or available to police—Interference with counsel—Inadequate representation.

1. Where a defendant pleaded guilty to an indictment for murder and was thereafter adjudged guilty of murder of the first degree and sentenced to life imprisonment, and it appears that the plea and adjudication were obtained by: (1) The use by the police of physical force and psychological pressure in extracting a "confession" and plea of guilty from the defendant; (2) the willful or reckless suppression and falsification at the trial of material facts known or available to the police; (3) the successful interference of the police with the lawyer engaged by the prisoner's wife, rendering ineffectual his efforts to safeguard the prisoner's rights; (4) the acceptance by the court of a plea of guilty from an uncounselled defendant charged with murder, and (5) the belated appointment by the court of counsel immediately preceding the trial, and after arraignment and plea, the sentence of life imprisonment constitutes a deprivation of liberty in violation of the fourteenth amendment to the Federal Constitution, and of article I, sec. 9, of the Pennsylvania Constitution, and it and the plea will be set aside upon writ of habeas corpus.

2. While the writ of habeas corpus cannot be used as a substitute for an appeal to review judicial errors or to test the correctness of a conviction, where the constitutional rights of a defendant in a criminal proceeding have been so abused as to offend those principles of law and those canons of decency which constitute the concept of due process, the courts will take appropriate action to vindicate fundamental justice.

Petition for writ of habeas corpus. Supreme Court of Pennsylvania, Eastern District, misc. dkt. no. 9, no. 356.

James W. Tracey, Jr., first assistant district attorney, for Commonwealth.

Louis B. Schwartz and *Raymond J. Bradley*, for relator.

LEVINTHAL, J. (of C. P. No. 6 of Philadelphia County), February 15, 1951.—

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of Pennsylvania:

In compliance with your order of December 20, 1950, I respectfully submit the complete record of the hearing conducted on the issues of fact framed by relator's petition for a writ of habeas corpus and the answer thereto of the District Attorney of Philadelphia County, together with the following

Findings of Fact

1. Relator, Rudolph Sheeler, was sentenced on March 31, 1939, by the late President Judge Harry S. McDevitt to life imprisonment in the Eastern State Penitentiary on bill of indictment no. 574, March sessions, 1939, Court of Oyer and Terminer of Philadelphia County, which charged Sheeler with the murder of James T. Morrow, a police officer, who had been shot to death on November 23, 1936, in the vicinity of the Sears, Roebuck store near the Roosevelt Boulevard in Northeast Philadelphia.

2. On March 17, 1939, Sheeler was indicted not only on bill no. 574, but also on the following: No. 575, charging voluntary and involuntary manslaughter in connection with the Morrow homicide; no. 576, charging him with armed robbery of one May Baxendale on September 19, 1936; no. 578, charging him with assault and battery with intent to kill May Baxendale; no. 579, charging him with carrying a concealed deadly weapon in connection with the Baxendale robbery, and no. 577, charging him with assault and battery with intent to kill one Christian Henningson (a police officer) on May 18, 1935.

3. On March 24, 1939, Sheeler was arraigned before Judge McDevitt and pleaded guilty to the charges in all the aforementioned bills.

4. The sentence of life imprisonment on bill no. 574 followed a hearing held on March 29, 1939, before a court of three judges consisting of President Judge McDevitt, Judge Francis Shunk Brown, Jr., and Judge

James C. Crumlish, who, on March 31, 1939, adjudged Sheeler guilty of murder in the first degree and fixed the aforementioned penalty. No sentence was imposed upon bills nos. 575 to 579, inclusive.

5. After the homicide of Morrow on November 23, 1936, the police detained one Joseph Broderick for sometime during November and December of 1936. They obtained a signed statement from him on December 9, 1936, in which he confessed that he had shot the officer. No prosecution was instituted against Broderick.

6. The coroner's inquest on the Morrow death was held on December 23, 1936.

7. On May 17, 1937, one George Harland Bilger confessed that he had shot and killed Morrow. In his confession Bilger also implicated as an accessory to his murder of Morrow one Alfred Gebhardt, an officer who was on police duty with Morrow in the vicinity of the Sears, Roebuck store at the time of the homicide.

8. Bilger was indicted on bills nos. 40 and 41 of June sessions, 1937, and was tried before Judge McDevitt and a jury on June 24, 1937. Bilger did not repudiate his confession. His only defense was mental irresponsibility. The jury rendered a verdict of guilty of murder in the first degree and fixed the penalty at death. Subsequently, a new trial was granted by Judge McDevitt. Bilger thereupon pleaded guilty, and on July 1, 1938, he was sentenced by Judge McDevitt to life imprisonment in the penitentiary.

9. Gebhardt was indicted on bills nos. 42 and 43 of June sessions, 1937, as an accessory before and after the fact of murder in connection with the Morrow homicide. He was tried before Judge McDevitt and a jury on June 29, 1937. The jury rendered a verdict of not guilty.

10. Bilger was also subsequently indicted on bill no. 423 of June sessions, 1937, for the murder of one

John Canham, who was shot on September 8, 1936. He was also indicted on several other bills charging him with armed robbery (bills nos. 425 to 433). He pleaded guilty to the murder charge and was sentenced to a term of life imprisonment on this bill by Judge McDevitt. On the robbery charges, to which he pleaded not guilty, he was found guilty by the jury on all except bill no. 433 (which related to the Baxendale robbery mentioned above in finding no. 2). He was sentenced to a term of 10 to 20 years on each of the eight robbery bills, to run concurrently. After the aforementioned sentence of Sheeler on bill no. 574, Bilger was pardoned and, on the initiative of Judge McDevitt, was released from the penitentiary.

11. On May 21, 1948, Sheeler presented a petition to the Supreme Court for allowance of a new trial, nunc pro tunc, in a proceeding under the Act of April 22, 1903, P. L. 245. On October 5, 1948, the Supreme Court authorized the Court of Oyer and Terminer of Philadelphia County to grant a rule for a new trial nunc pro tunc. On April 28, 1949, argument on the motion for new trial was heard by the court consisting of President Judge McDevitt and Judges Brown and Crumlish, and on September 26, 1950 (sometime after the death of Judge McDevitt), the motion for new trial was denied.[1]

12. On April 4, 1950, relator filed his original petition with the Supreme Court for a writ of habeas corpus, on which a rule to show cause was granted, returnable May 10, 1950. The petition alleged that Sheeler was being unjustly confined and deprived of his liberty in violation of the fourteenth amendment of the Constitution of the United States and article I, sec. 9, of the Constitution of the Commonwealth of Pennsylvania. On May 9, 1950, the district attorney

[1] Commonwealth v. Sheeler, 73 D. & C. 570.

filed an answer to the petition in which he denied that Sheeler was deprived of any of his constitutional rights.

In addition to the foregoing uncontroverted facts of record, I find the following:

13. Despite the confession and conviction of Bilger, Judge McDevitt did not believe that he was actually guilty. He told Captain Ryan in 1938 that the police should investigate further and find the real murderer of Morrow. When the police killed Jack Howard, alias Batten, alias Stitch, a dangerous criminal on February 6, 1939, and found him armed with two revolvers on his person and more at his home, it was assumed that Howard was probably involved in the Morrow and Canham murders and the Baxendale robbery and shooting.

14. On February 16, 1939, Rudolph Sheeler was taken into custody by the police of Philadelphia, without a warrant, for the purpose of questioning him as to his connection with Howard.

15. The following are the highlights of Sheeler's background and the circumstances of his arrest:

At the time of his detention he was just 23 years old, married, living with his wife and baby in Long Island City, N. Y., and regularly employed. He came to Philadelphia on February 16, 1939, to visit his older sister, Elizabeth Morgan, who was a patient at the St. Mary's Hospital.

Sheeler had been raised in several orphanages from the time he was five until past 15. His father was insane and an inmate of Byberry; his mother was a scrubwoman employed at that institution. Shortly after his graduation from the last of the orphanages he came to live with his married sister, Elizabeth, in Philadelphia. She had deserted her husband and children and, soon after Sheeler joined her in June 1931 she became the paramour of one Jack Howard, alias

Batten, alias Stitch. Mrs. Morgan's sole support was cut off when the mother met with an accident.

Sheeler's school education while in the orphanages consisted of seven grades and one year in manual training. About six months after leaving the orphanage the mother died. After meeting Howard he received a thorough training in crime. Under the evil influence of that criminal, Sheeler participated in many violations of the law, most of them as an accomplice of Howard, ranging from petty larcenies of milk and bread to purse-snatchings from women on the highways, to armed robberies. At times he would engage in criminal activities on his own, while bumming, begging, stealing and "preying on homosexuals". Intermittently he would resume his association with Howard. All of the multitude of these crimes occurred between 1931 and May 18, 1935. It was on that day that officer Henningson was shot by Howard, some time after a purse-snatching in which Sheeler had participated.

Following Howard's shooting of Henningson, which Sheeler learned about the following day, Sheeler dissociated himself from his senior partner in crime and abandoned his criminal career. He went to New York where he found employment in a restaurant. In September 1936 he married "a respectable girl", who was "a very good influence" upon him. Mrs. Sheeler died in 1949 and was therefore not available as a witness in this proceeding.

Sheeler came from his New York home to Philadelphia on February 16, 1939, his day off from work, to visit his sister at the hospital. He had learned of Howard's death and expected that the former associates of that criminal would be sought for questioning by the police. Meanwhile, the police had been informed that Elizabeth Morgan was Howard's paramour, and they kept watch at the hospital to appre-

hend any of Mrs. Morgan's visitors. As Sheeler left the hospital he was taken into police custody.

16. At about the same time three boyhood friends of Sheeler, Ferguson, Hazlett and Ruppert, were also arrested and taken into police custody. The police held Sheeler and his friends incommunicado in City Hall and "booked" them under fictitious names.

17. Sheeler was threatened and beaten by the police officers in an effort to induce him to confess that he had participated with Howard in the commission of various crimes. They resorted not only to physical force, but also employed psychological pressure and mental torture in an effort to extract from him admissions that he had participated with Howard, particularly in the robbery and shooting of May Baxendale and in the murder of Officer Morrow. (These two crimes were apparently believed to have been committed with the same revolver. The ballistics experts never so testified in any of the numerous trials.) Soon after his arrest Sheeler admitted his former association with Howard. One detective, who questioned him continuously for seven hours, without applying any unlawful coercion or duress, failed to elicit any information connecting Sheeler with Howard after the Henningson episode of May 1935.

18. Sheeler's wife, alarmed by her husband's failure to return home, came to Philadelphia and engaged Maurice G. Weinberg and Bertram U. Weinberg, two members of the Philadelphia bar, to ascertain his whereabouts. Inquiries were made at the morgue, at hospitals and police stations and the wife inquired at the missing persons bureau of the police department. At the detective bureau they were first informed there was no "Sheeler" in custody. After several days, on February 20, 1936, Mrs. Sheeler chanced to see her husband in a City Hall corridor being taken by the detectives from one room to another, and pointed him

out to her attorneys. Though one of the attorneys identified himself as a lawyer engaged by the wife, he was not allowed to see the prisoner, the police saying that they had his client "on ice". The attorneys thereupon filed a petition for a writ of habeas corpus returnable February 24th, naming Captain of Detectives Ryan as respondent.

19. During the first week of detention Sheeler was taken by the detectives from his cellroom for questioning for a total of approximately 45 to 50 hours. On February 21st the officers had him from 9:45 a.m. to 5:10 p.m., from 6:25 p.m. to 9:45 p.m., and then from 10:15 p.m. to 1:05 a.m. of the following morning, a total of 13½ hours. On February 22nd he was out of his cell from 9:25 a.m. to 3:55 p.m., and from 6:40 p.m. to 9:10 p.m. The same evening he was taken from his cell at 9:30 p.m. and returned on February 23rd at 10 p.m. He was interrogated by numerous detectives in relays, at all hours of the day and night.

20. On February 22nd the intimidation of Sheeler reached its climax. During the many hours he was outside the cellroom that day and throughout the following night the detectives intensified their physical violence and psychological pressure. The police had threatened that if Sheeler did not confess they would also prosecute his friends, Ferguson, Hazlett and Ruppert, and promised him that they would be released if Sheeler did "coöperate" with them. The police also threatened that if he did not "coöperate" to free Bilger, "an innocent man", and clear up the marred reputation of Officer Gebhardt, he would be prosecuted for other murders and for the crimes he had admitted, as well as for the Morrow and Baxendale crimes. Sheeler did not know that because of the statute of limitations he could not have been prosecuted in 1939 for crimes committed many years earlier. He believed, as he was informed by the police, that he could be sentenced to

prison for as long as "100 years" for all the crimes of his earlier youth.

The police did not tell Sheeler the date of the Morrow murder. They informed him, and he so believed, that they had checked his employment records at the New York restaurant for November 1936 and had learned that it was on his day off from work that the Morrow murder had occurred.

The police also informed Sheeler that a witness had been located who could identify him as one who had hitch-hiked an automobile ride on the road from Philadelphia to New York on the night of the Morrow murder, who had a revolver in his pocket at the time, and who actually disclosed to the motorist that he had shot an officer earlier that evening. At about three o'clock in the morning of February 23rd, Sheeler, who had been put in a "line-up" with two nonprisoners, was "identified" by one Hugh Quinn as the person seen by him on the night of the Morrow homicide under the aforementioned circumstances.

21. The police informed Sheeler, and he so believed, that if he persisted in asserting his innocence of the Morrow murder and in denying Quinn's statement, he would be tried and convicted and, in view of his many admitted prior crimes, would be severely punished and never pardoned. He was informed by the police, and so believed, that if he "coöperated" and confessed and pleaded guilty to the Baxendale and Morrow crimes he would not be sentenced to death but, with the assistance of the police and the sentencing judge, would be pardoned and released from custody after a relatively short term of imprisonment.

22. Believing that his position was hopeless unless he yielded to the threats and promises of the police, Sheeler orally "confessed" on February 23, 1939, that he was with Howard when the Baxendale and Morrow crimes were committed. At 10:50 a.m. that day he

signed a statement in which he "described" the commission of these crimes. The rather vague narrative was a combination of details he remembered hearing from the police and Quinn during the questioning and confrontation, of other details his past experiences in crime supplied, and of still others he imagined would lend plausibility to his story. After his "confession" was obtained the police sought to improve Sheeler's appearance and dress and tried to remove any noticeable evidence of violence, so that Sheeler might publicly "reënact" the crimes that day. (After the "reenactment" Sheeler "corrected" his "confession" as to the locale of the Baxendale crime.)

23. At the habeas corpus hearing on February 24, 1939, attorney Weinberg represented Sheeler in accordance with his express wish. The following strange colloquy is revealed by the record:

"Unidentified speaker, (obviously one of the detectives) : 'The man says he does not want a lawyer.'

"Mr. Weinberg: 'Do you want a lawyer or not?'

"The defendant: 'Yes, I do.' "

At this hearing Detective Richardson testified that the investigation of the cases against Sheeler had been completed the preceding day, and that the police were ready to give petitioner a hearing before the magistrate forthwith. Because of these representations by the police the court dismissed the petition for the writ, after Richardson had assured the court there would be "no obstacle in the way" of counsel.

24. At the magistrate's hearing which followed immediately, Sheeler was also represented by attorney Weinberg, who was denounced by Captain Richardson as "a man (who) don't understand criminal law, goes out snatching prisoners . . . keeps trying to interfere with us . . ." Detective Richardson testified that Officer Atkins had described Sheeler to a "T" as the person he saw at the scene of the Morrow crime, where-

as the record shows that the person referred to was one Pomroy, an employe at the Sears store, not at all involved in the homicide. At this hearing Sheeler was asked by his attorney: "Did you volunteer anything to the officers? Just answer 'yes' or 'no'." Defendant answered: "No." Sheeler was then held without bail for a further hearing on March 3, 1939, because of the representation by Detective Richardson that further time was required for investigation.

25. Despite the efforts of attorney Weinberg to have Sheeler released from the exclusive control of the police, he was returned to their custody and continued to be held in City Hall. At no time during his detention was he in the county prison, and he did not enter the penitentiary until April 1st. His detention at the City Hall for 42 days was "permitted" by Judge McDevitt at the request of Detective Richardson.

26. Observing the futility of his attorney's efforts on his behalf, Sheeler further yielded to the duress and psychological pressure of the police, and on February 24th signed a statement in which he repudiated his earlier public recantation of his "confession" and blamed the "influence of Attorney Weinberg" for his assertion that the "confession" was involuntary.

27. Thereafter the police treated Sheeler with apparent kindness, permitting him to see his wife and child occasionally and taking him out for meals and auto rides. Father Farley, on a casual visit to the cellroom, observed that "they were in accord, one with the other, the police and the boy in custody. It seemed to be some sort of an amicable settlement . . ."

28. Sheeler did not thereafter have the advice of Attorney Weinberg or any other lawyer of his or his family's choice. At the continued magistrate's hearing on March 3rd the magistrate, addressing Sheeler, asked him whether anyone represented him and he

replied in the negative. The record of that hearing contains the following:

"Attorney stepped up and told the defendant that he represented his sister and that the defendant's sister had requested him to represent the defendant."

Sheeler said: "I don't care to have anyone represent me." The hearing was continued to March 7th, at which time he was held without bail for court.

29. On March 24, 1939, Sheeler was arraigned on the various bills of indictment, including the murder bill no. 574, before Judge McDevitt and pleaded guilty. It is conceded of record that Sheeler was not represented by counsel at the time of his arraignment and pleas. Nor was he advised by anyone as to the effect of his pleas of guilty. (It should be noted that only one cell-room withdrawal pass was issued for Rudolph Sheeler on March 24th. That pass indicates he was taken out by a detective at 7:05 p.m. and returned at 8:05 p.m. This substantiates Sheeler's strange but uncontradicted testimony that he was arraigned and entered his pleas in an "empty courtroom".)

30. On March 24, 1939, Sheeler signed and swore to an "affidavit of destitute circumstances and request to assign counsel", and Judge McDevitt assigned Edmund G. J. Dale, Esq., and Robert C. Duffy, Esq., to defend Sheeler. These counsel were notified of their appointment at about noon of March 28th, the day before the case was listed for trial. They interviewed Sheeler in the detective headquarters, in the absence of the police, for several hours beginning at 6 o'clock that evening. The court-assigned attorneys, able and honorable members of the bar, mistakenly believed that Sheeler's "confession" and plea were voluntary, as they were told by Sheeler himself. They therefore did not consider it necessary or desirable to ask for a continuance of the trial or to examine the "confession" or the notes of testimony at the coroner's inquest, or at

the Bilger and Gebhardt trials. They prepared merely to have Sheeler "testify in a way which would be interesting to advance a sympathetic side to his story".

31. The following morning, on March 29th, at the hearing before the court en banc, the "confession" of February 23rd was offered in evidence and attached to the record. Sheeler also testified in support of his "confession". Several discrepancies were disclosed, one of which Judge Brown inquired about. The police kept Sheeler in their custody after the hearing and on March 31st a final "confession" was obtained from him in which the discrepancies uncovered by Judge Brown's questioning were eliminated.

32. Sheeler's account of the Baxendale and Morrow crimes, both in his "confession" and in his self-incriminating testimony, was palpably false and inconsistent with facts known or available to the police. The police explicitly informed the court en banc that the "confession" had been checked and found to be true. If the "confession" had actually been checked with reasonable care and intelligence, the following inherent contradictions would have been revealed:

(a) The confession described the Baxendale robbery and shooting as having occurred the same evening as the Morrow murder and shortly preceding it. In the statement Sheeler said that he and Howard went to the site of the Morrow crime because the Baxendale crime netted them only about $10. Actually more than two months intervened between the two crimes.

(b) Sheeler testified that he and Howard went to the vicinity of the Sears, Roebuck plant to rob shoppers of the store. The Morrow shooting occurred at about 6:30 p.m. The store had closed at 5 p.m. on that day.

(c) Sheeler's "confession" and his testimony indicate that Howard shot Morrow in the stomach, face to face. The coroner's physician, who was not produced

at Sheeler's trial, had on three prior occasions described Morrow's gunshot wounds in detail, indicating that he was shot from behind and the side, not in front. A fair summary of that testimony was given by Judge McDevitt himself in his amazing magazine article entitled "DEATH'S STAND-IN—Philadelphia's Riddle of the Reversed Clues" (True Detective Mysteries, December 1939, p. 56 at p. 117).

(d) The "confession" places the Morrow murder at a point adjacent to the parking lot, whereas the actual scene of the crime was several hundred feet distant.

(e) The "confession" mentioned two street and house addresses which the police knew, or should have known, to be false: (1) Quinn's residence was actually on Seventeenth Street, West New York, N. J. Sheeler mistakenly assumed that Quinn had given his address as Fourteenth Street, New York City, and recounted his visit to Quinn's "home" in New York City; (2) Sheeler gave an address on North Phillips Street as the home of one Grekowski with whom Howard lived in November 1936 and as the place from which Howard emerged to join him on the day of the Baxendale and Morrow crimes. Although Howard had stayed at Grekowski's house on Orkney Street for 10 days in the middle of 1936, the uncontradicted testimony in this case establishes that the house Sheeler referred to was where Grekowski had resided from 1932 to 1934, and that this house was torn down two years prior to the Morrow murder.

(f) In the "confession" it was stated that Howard's revolver was taken from an officer robbed by Howard in Brooklyn in 1934 or 1935. During the course of the hearing before me, this statement was checked by the police of New York City, at the insistence of counsel for petitioner, and found to be unsubstantiated.

(g) Most important is the fact that if the police had properly checked with the known employer of Sheeler (as they told both him and the court en banc they had done) they would have learned that he could not possibly have been in Philadelphia when the Baxendale and Morrow crimes were committed. The manager of the White Castle Restaurants clearly explained the employment records of his company which were offered in evidence. It is definitely established that Sheeler worked in the Upper Bronx, New York, on September 19, 1936 (the date of the Baxendale robbery) for 10 hours from 7 a.m. to 5 p.m., and on November 23, 1936 (the date of the Morrow murder) also for 10 hours, beginning no earlier than 5 p.m. and no later than 8 p.m. It would have been physically impossible for Sheeler to have been at the Sears, Roebuck plant at 6:30 p.m., to have fled on foot several miles, taken a trolley car to Fifth Street and Roosevelt Boulevard, hitch-hiked to Rahway by truck, then to New York City by auto, and then gone by subway to the Upper Bronx (as his "confession" narrates), and still arrive at his place of employment no later than 8 p.m. that evening. (Nor is it reasonable to suggest that he went to work long after his shift began and, in order to fabricate an alibi, registered as though he worked the full 10 hours. If he had done so, he would have refused to accept the conflicting stories of the detectives that the employer had no record of his employment and that the crimes were committed on his day off from work.)

33. The police testified at the Sheeler trial that Sheeler had been identified by "a respectable citizen of Syracuse . . . whose name we are not disclosing" as a young man who was picked up by the "witness" while Sheeler was in flight after the Morrow murder. The police knew, or should have known, that this unidentified "respectable citizen" was one Hugh Quinn, alias Mitchell, a disreputable criminal who had been convicted of many grave offenses and who, when not in prison, was a professional police informer. The

police also knew, or should have known, that Quinn had given a statement to the New York police in November 1936 which was inconsistent in essential details with Sheeler's "confession" and testimony, and that his description of the hitch-hiker could not have applied to Sheeler.

34. The police had so systematically demoralized and terrorized Sheeler that he became their eager collaborator in establishing his "guilt" of the Baxendale and Morrow crimes, of which he was actually innocent. His "confession", his guilty pleas, and his testimony on March 29, 1939, with respect to the Baxendale and Morrow crimes, were in fact false and fabricated, and the direct result of the coercion and psychological pressure of the police. (Sheeler's recent admission of guilt as to the Henningson shooting in his petition for writ of habeas corpus should be construed as merely the opinion of a layman. It is shown that Sheeler's participation was such that it is doubtful whether he was in fact guilty of any crime in connection with that shooting.)

Discussion

The fundamental issue in this case is not whether petitioner was guilty of the murder of Morrow, although the fact that he was actually innocent of that crime lends credence to his complaint that his "confession" and guilty pleas were involuntary. Nor is the issue whether he is entitled to a pardon. His innocence of the murder for which he was sentenced, his pathetic background and his remarkable self-improvement (encouraged by the humanitarian friendship of such men as Dr. George Dobbin Brown and Dr. Lawrence C. Lockley) naturally arouse our sympathy, despite the many crimes Sheeler admittedly committed for which he was never punished; but we are not concerned with the question of clemency. The sole inquiry here is whether Sheeler was denied his constitu-

tional rights. If so, he is entitled to relief as an act of justice, not of mercy.

It is well established that the writ of habeas corpus cannot be used as a substitute for an appeal to review judicial errors or to test the correctness of a conviction. Where, however, the constitutional rights of a defendant in a criminal proceeding have been so abused as to offend those principles of law and those canons of decency which constitute the concept of due process, our courts have never surrendered to the executive department of the government the power and duty, in appropriate cases, of acting effectively to vindicate fundamental justice. As was said by the United States Supreme Court in Ex Parte Lange, 18 Wall. 163, at p. 178, and quoted with approval by the late Chief Justice Maxey in Commonwealth v. Johnson, 348 Pa. 349, 353 (1944):

"There is no more sacred duty of a court than . . . to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman . . ."

Rudolph Sheeler's story in some of its aspects is extraordinary, even fantastic. Innocent men do not normally admit guilt, and if through duress they should falsely incriminate themselves, they naturally seek the earliest opportunity to repudiate their "confession". It is, therefore, not surprising that President Judge Brown, in his opinion (in which Judge Crumlish concurred) discharging the rule for a new trial nunc pro tunc, concluded that "there appears to be no ground for substantial doubt as to defendant's guilt". It should, however, be noted that this was said upon consideration only of briefs of argument and a few fragmentary affidavits, and not after full hearing in open court.

The skepticism I personally entertained on first reading the petition of Rudolph Sheeler was completely

dispelled after hearing the witnesses who appeared before me. The mass of clear, precise and indubitable evidence marshaled in his behalf was most impressive. The testimony of Father Farley is especially noteworthy. The Catholic chaplain corroborated Sheeler's account of having confided to him his secret innocence immediately after his arrival in the penitentiary in April 1939. The letter of May 6, 1945, in which the youthful convict bares his soul to the priest, is also revealing. It demonstrates that Sheeler had for years continued to rely on Judge McDevitt's and Father Farley's expected assistance in obtaining a pardon "*even if (he) were guilty*". Such consonant statements as these are, of course, not substantive evidence of the truth of the facts stated, but they rebut the suggestion that the story of Sheeler is of recent fabrication. His letter to the priest also shows that Sheeler realized that if he divulged the truth concerning his "confession", "violent explosions" would be set off, and that in his bewilderment and confusion Sheeler had decided to remain silent unless the situation became "desperate". The letter of Judge McDevitt dated September 16, 1946, which stated that the judge did not "seem to have much influence with the present Board of Pardons", but that he would "be glad to give (Sheeler) a good recommendation . . ." is of some significance in explaining why Sheeler finally revealed the truth to Mr. Dale and moved for a new trial through Mr. Maris. It should be noted that Judge McDevitt's letter was written after Father Farley had given him the photostatic copies of Sheeler's employment records establishing what the chaplain described as a "perfect alibi".

An analysis of the findings of fact will disclose that nearly all of them are supported by uncontradicted evidence. The only serious conflict in the testimony relates to the alleged physical beatings and mental

torture. The police would have us believe that their prisoner was eager to "coöperate" in solving the Morrow and Baxendale crimes, and that his confession was not only voluntary but freely volunteered. They protest that they treated him with the utmost consideration. It is true that Sheeler testified before the court en banc that he had not been beaten or threatened by the police, but it is difficult to accept at face value Sheeler's excessive laudations of his jailors as "the finest men" he ever met, who treated him "wonderful", and who "didn't care whether (he) was guilty or innocent" . . . who "didn't touch (him) or anything". It is clear to me that this overlavish praise reflected the mental and emotional state of Sheeler while on the witness stand before the three judges. He had made his "settlement" with the police. They were doing what they had promised. He was eager to "cooperate" with them. Indeed, when Judge Brown asked him some penetrating questions which indicated that serious discrepancies in his "confession" and testimony might be uncovered, he became "excited" as if panic-stricken lest he betray his innocence.

As a witness before me Sheeler was at first quite nervous and tense. He soon became calm and self-possessed. He impressed me with his sincerity and candor, his truthfulness and accuracy. He was corroborated, wherever possible, by disinterested and reliable witnesses, such as the manager of the restaurant corporation by whom he had been employed in the fall of 1936; by the Catholic chaplain, Father Farley; by Detective David Malone, whose bedside examination is especially revealing as to police methods of "interrogating" suspects; by the two reputable attorneys whom his wife had engaged; by the newspaper photographer who took the pictures at the magistrate's hearing which show marks on the face of Sheeler; by the record of the hearing in which explicit

reference is made to the marks; by Ferguson and Hazlett, who, though boyhood friends of Sheeler, were straightforward and trustworthy witnesses, and by Grekowski, whose uncontradicted testimony as to the North Phillips Street house indicates the inaccuracy of one detail in the "confession". Sheeler was also substantiated by the official record of the New York Surrogate Court which indicates the falsity of his explanation for being in Philadelphia when the Baxendale crime occurred. Most revealing are the cell-room withdrawal passes, which petitioner and his counsel examined for the first time when they were produced by the police department at the hearing before me after Sheeler left the stand.

On the other hand, the testimony of the detectives who contradicted Sheeler's account of their brutal treatment and intimidation was evasive and disingenuous. Their explanations for the evident bruises on Sheeler's face were contradictory and absurd. One told a story of a "suicide attempt" and another suggested that "pimples" might have disfigured his forehead and cheek. Captain Richardson, when questioned at the magistrate's hearing on February 24, 1939, testified that he could not explain the marks on Sheeler's face, and when asked directly whether Sheeler had been beaten or assaulted, answered: "Not in my presence." The police officers who denied the use of force in extracting the "confession" were discredited on cross-examination, in the course of which the detectives contradicted official records of the police department, their own testimony in prior proceedings, or the testimony of fellow detectives.

The testimony of Judge Carroll (the assistant district attorney at the Bilger, Gebhardt and Sheeler trials of 1937 to 1939) and of Attorneys Dale and Duffy (the court-appointed counsel) did not contradict

any of the essential details of Sheeler's version of what had occurred.

After careful study of the entire record, I respectfully suggest that the petition for a writ of habeas corpus should be granted, and the sentence of life imprisonment on bill no. 574 and the pleas of guilty on all bills, nos. 574 to 579, be set aside. This recommendation is based upon the following

Conclusion of Law

Under the extraordinary circumstances of this case, to wit, (1) the use by the police of physical force and psychological pressure in extracting a "confession" and plea of guilty from defendant; (2) the willful or reckless suppression and falsification at the trial of material facts known or available to the police; (3) the successful interference of the police with the lawyer engaged by the prisoner's wife, rendering ineffectual his efforts to safeguard the prisoner's rights; (4) the acceptance by the court of a plea of guilty from an uncounselled defendant charged with murder; and (5) the belated appointment by the court of counsel immediately preceding the trial, and after arraignment and plea; *the sentence of life imprisonment constitutes a deprivation of liberty in violation of the fourteenth amendment of the Constitution of the United States and of article I, sec. 9, of the Constitution of Pennsylvania.*

This is not the case of a "confession" extracted from a defendant merely by prolonged questioning, by "the suction process of interrogation", concerning the effect of which reasonable men may and do reasonably disagree. (See the majority and minority opinions in Haley v. Ohio, 332 U. S. 596 (1948); Watts v. Indiana, 338 U. S. 49 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949).) Here we have a "confession" wrung from a suspect by brutality, deception, intimidation, and foul play on the part of the police. So grave an abuse of

the power of arrest and detention must be vigorously condemned by all who cherish our basic constitutional liberties.

It is argued that the manner in which the "confession" was originally extorted is of no moment, from the constitutional point of view, because Sheeler pleaded guilty and testified before the court en banc in support of his "confession". This contention is, in my opinion, unsound as applied to the facts of this case.

The late Chief Justice Maxey (in Commonwealth v. Agoston, 364 Pa. 464, 478 (1950)) observed:

"If a man confesses to a crime *which he did not commit*, his confession, as soon as it is checked (as all confessions are), will always be found to be worthless because a lie never fits a fact."

Largely because of this logical assumption that the police, acting in good faith and with reasonable intelligence, *always* check a confession, our courts generally regard a guilty plea on arraignment, following an extra-judicial confession, as equivalent to a conviction of the highest order, one not normally subject to collateral attack. Our statute provides that if a person indicted for murder "is convicted by *confession*, the court shall proceed, *by examination of witnesses*, to determine the degree of the crime, and to give sentence accordingly": Act of June 24, 1939, P. L. 872, sec. 701, 18 PS §4701. (Italics supplied.) It may be conceded that this provision does not require formal proof of all the elements of the crime charged against defendant, but it does presuppose that the court and the district attorney will not be misled by the willful or reckless suppression or falsification of material facts known or available to the police.

One of the detectives was asked by the assistant district attorney: "Everything he (Sheeler) said, you were able to check on?" The witness categorically replied: "That is right". He also testified specifically that

"every restaurant was investigated", mentioning the White Castle System among others, and stated that he found that Sheeler was working *since November 1936*. (Actually Manager Shackleford testified that Sheeler was regularly employed since *before* the Baxendale robbery in September 1936). As already indicated, and as established by the testimony of the manager of the restaurant corporation, this could only have been a willful or stupid falsification of extremely important matters before the court. The detectives also suppressed or distorted the truth when they characterized Quinn as "a respectable citizen of Syracuse"; when they failed to tell the court that Quinn's original 1936 description, as disclosed in the report of Lieutenant Greenhalgh was inconsistent with his 1939 identification of Sheeler and with statements contained in defendant's "confession"; and when they made no mention of the description of Morrow's gunshot wounds as disclosed by the coroner's physician.

It is not suggested that the misconduct of the police was necessarily intended deliberately to convict of murder a man known by them to be innocent. An examination of the Sheeler trial transcript indicates that the law enforcement officers, in seeking to establish the guilt of Sheeler, the known associate and accomplice of Howard, were particularly anxious to free Bilger and to clear the reputation of their fellow-officer Gebhardt. The impression created from a reading of the record of the Sheeler trial is that the entire proceeding was in the nature of a vicarious prosecution of Howard, the dead desperado, for the purpose of exculpating Bilger, the living convict. (Note Judge Carroll's comment from the witness-stand, in the hearing before me, that the conflict of opinion between the then Mayor of Philadelphia and Judge McDevitt as to who actually killed Morrow "caused a very serious and severe rupture and therefore a beclouding of thinking in the men that

had the responsibility for determining who was the right person".)

The police were reckless, if not malicious, in their handling of the Sheeler case from February 16th until March 31st. In Townsend v. Pennsylvania, 334 U. S. 736 (1948) and Com. v. Townsend, 361 Pa. 35 (1949), it was "carelessness or foul play" of a much less flagrant variety and degree than manifested in this case that evoked judicial condemnation and resulted in the setting aside of the plea and sentence. When the police willfully or recklessly suppress or falsify evidence as to material facts within their reach, and thus mislead the court and counsel for the Commonwealth and for defendant, the court en banc has not been permitted, as the statute commands, to proceed "*by examination of witnesses* to determine the degree of the crime and to give sentence accordingly". Instead, the court's judgment and sentence have been unwittingly determined by police distortion and suppression of facts which if accurately presented would undoubtedly have led the court to direct the withdrawal of the pleas of guilty and the substitution of not guilty pleas.

Moreover, the evidence establishes that the pleas of guilty were themselves the direct result of the coercion and deception on the part of the police which had earlier induced Sheeler's "confession". The pleas under such circumstances were involuntary, and hence not immune to collateral attack.

There is another aspect of the case as to which there is little conflict in the testimony and which may be regarded as establishing that Sheeler was denied a basic constitutional right. Every person accused of murder has the unquestioned "right to be heard by himself *and his counsel*". There is no doubt that the active interference by the police with Attorney Weinberg's representation of Sheeler, their refusal to permit free consultation between their prisoner and the

lawyer engaged by his wife, and their frustration of counsel's efforts to assist him, amounted to a flagrant violation of his right to be heard by counsel of his choice. Our Federal and State Constitutions ordain that if a defendant in a capital case provides himself with counsel, the court shall allow the lawyer to assist and represent his client. What the court is directed to permit, the police are not empowered to prevent.

At the habeas corpus hearing of February 24th, despite the efforts of the police to oust the attorney selected by his wife, Sheeler had the momentary courage to defy the detectives and to tell the court that he wanted a lawyer. It cannot be seriously contended that the express refusal by Sheeler of the services of a lawyer retained by his sister at the magistrate's hearing of March 3rd was a free and voluntary waiver of his right to have counsel of his own choice. Rather is it a clear manifestation of the control improperly exerted over him by the police. In the interval between February 24th and March 3rd, the detectives had succeeded in inducing their helpless prisoner to reaffirm his repudiated "confession", to adhere to it, and to reject as futile the proffered services of counsel.

Neither can it be argued that the formal gesture of appointing court-assigned attorneys for Sheeler, after his arraignment on a charge of murder, after his plea, and immediately before trial, cured the constitutional infirmity produced by the police when they interfered with Sheeler's right to consult with counsel of his own free choice. The words of Mr. Justice Jones in Com. ex rel. Townsend v. Burke, 361 Pa. 35, at pp. 40 and 41 (1949), are peculiarly applicable:

"Once the lack of counsel became a denial of due process in the circumstances, the particular constitutional deficiency could not be lopped off and allocated to but one portion of the proceedings. Like a blood stream infection, which permeates the whole body, the

harmful condition cannot be isolated to what appears to have been the incipient focal point of infection."

There can be no doubt that the appointment of counsel by the court was belated and therefore ineffectual. Mr. Justice Horace Stern, in Com. v. Johnson, 365 Pa. 303, at p. 316 (1950), pointed out that under the decisions of the Supreme Court of the United States "counsel must be assigned for the defense of the accused in capital cases after indictment, or at least at the time of arraignment". This is but a succinct reaffirmation of what Mr. Justice Sutherland declared in Powell v. Alabama, 287 U. S. 45, at pp. 57 and 58 (1932): ". . . during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself . . . It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate."

The case of Canizio v. New York, 327 U. S. 82 (1946), where subsequent participation of counsel was held to cure the defect caused by accepting a plea from an uncounselled defendant, is distinguishable, first, because that was not a capital case, and, secondly, because defendant there had not suffered any real detriment by reason of the absence of counsel at his arraignment. Sheeler was decidedly prejudiced by the failure of the court to assign counsel prior to the time of his arraignment. Instead of merely a single interview of a few hours with their client in the detective headquarters at City Hall, the appointed attorneys would have had an opportunity for extended consultations with defendant and for careful study of the "confession" and of the relevant records relating to the Morrow homicide. The acquiescence of able counsel in Sheeler's apparent eagerness to stand trial immediately on his plea of guilty is understandable only in view of the short time available for consultation and study. As previously indicated, it would have been a relatively easy matter for intelligent lawyers to check the "confession" and to establish its inherent falsity.

Moreover, since all the charges against Sheeler were based on the assumption that he was acting as an accomplice of Howard, the law of criminal conspiracy with its technicalities and intricacies would have been considered by his attorneys, had their assignment not been so long delayed. As competent lawyers, they would have realized that even if the "confession" were assumed to be voluntary and true (although actually coerced and false), there were grave questions of law as to whether Sheeler could properly be adjudged guilty of the Morrow murder (bill no. 574) or of the Henningson shooting (bill no. 577). As to the former charge, counsel might successfully have contended that Sheeler was not engaged in the perpetration or attempt to perpetrate a robbery at the time of the alleged shooting of the officer by Howard. Even if the two men had been wishfully waiting at 6:30 p.m. to rob a customer of the store which had closed at 5 p.m., without any potential victim in sight, it is questionable whether Sheeler, as a matter of law, could be held responsible for the sudden shooting by Howard of the approaching policeman. As for the Henningson case, it might reasonably have been urged by counsel that according to the "confession" Sheeler was not criminally implicated in How-

ard's shooting of that officer in May of 1935. The assault took place while Howard was resisting arrest, at some considerable time after the purse-snatching by the two men had been completed, and not while the men were in flight from the scene of their earlier joint crime. Thus, counsel might well have convinced the court, if their appointment had afforded them an opportunity for adequate preparation of their client's defense, that the "confessed" conspiracy to commit a robbery had not yet begun to operate at the time of the shooting of Morrow, and that the conspiracy to rob had been fully completed when Henningson was shot.

In two recent cases the Supreme Court of the United States has had occasion to indicate how vital it is for a person accused of a capital crime to have effective aid of counsel *before* as well as *at* his trial.

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered": Von Moltke v. Gillies, 332 U. S. 708, 721 (1948).

"He (the accused) needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment": Williams v. Kaiser, 323 U. S. 471, 476 (1945).

Our own Supreme Court, in Com. v. O'Keefe, 298 Pa. 169, at p. 173 (1929), pronounced the same doctrine, and not in a capital case, when it declared:

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

Recognizing the danger of releasing prisoners by accepting their contradicted testimony concerning police misconduct, even when supported by other evidence, emphasis has been placed in this discussion

upon the uncontroverted and incontrovertible facts. It should be noted, however, that the uncontradicted facts lend credit to petitioner's charges of coercion and deception by the police.

Upon consideration of the entire record I unhesitatingly conclude that petitioner has sustained the heavy burden which the law imposes upon him of proving that he is entitled to the extraordinary remedy afforded by the writ of habeas corpus. The unusual circumstances of this case in their totality clearly establish that Rudolph Sheeler has for the past 12 years been deprived of his liberty without due process of law. It is accordingly recommended that the sentence on bill no. 574 be vacated, and the pleas on all the bills, nos. 574 to 579, inclusive, be set aside.

EDITOR'S NOTE.—On the basis of the foregoing report, the Supreme Court, on March 29, 1951, vacated and set aside relator's plea of guilty and sentence. See Commonwealth ex rel. Sheeler v. Burke, —— Pa. ——.

On April 5, 1951, relator, upon being arraigned in the Quarter Sessions Court of Philadelphia County, pleaded not guilty. When the case was called for trial on May 1, 1951, Judge Gordon directed the jury to return a verdict of not guilty, and relator was acquitted.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

May 19, 1951.

Dear Chief:

I should be grateful if, before we get under way at the Conference today, you will give me not more than two minutes to make a statement by way of what I believe the Parliamentarians call "personal privilege."

Faithfully yours,

F.F.

The Chief Justice.

RECEIVED
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CHAMBERS OF THE
CHIEF JUSTICE

Speeches, Misc.

REMARKS OF MR. JUSTICE FRANKFURTER AT THE DINNER OF THE AMERICAN LAW INSTITUTE, MAYFLOWER HOTEL, WASHINGTON, D. C., FRIDAY, MAY 18, 1951, ON THE OCCASION OF JUDGE LEARNED HAND'S RETIRMENT.

Truth is hard put to it. One should not talk ill of the dead, and it is not easy to speak well in the presence of the living. Happily I need not bring a stuttering tongue in joining your acclaim of our friend. For some years now the philosopher in Learned Hand has steeled himself against praise. I won't say he laps it up, but he has learned to assimilate it. Adulatory tolerance has partly been made easy for him. The skeptical humor behind those forbidding eyebrows has left him not unaware that increasingly the talk is not about a delightful, incalculable, firmly indecisive, whimsically penetrating creature called Learned Hand, but a legend. It deserves repeating that Learned Hand is heading straight for the glory and the dangers of a legend. The glory needs no gilding. The dangers may be lessened by exposure. For legends encourage laziness of understanding, and thereby attenuate the fructifying influence that comes from critical appreciation.

And it is very important for our civilization that the significance of Judge Hand be understood. It is important that he remain a mentor and not become a memory; it is important that his writings enter not merely anthologies but the minds of men. For just so long as law remains the framework of order within which the conflicts and contingencies of life must be composed, the endeavor behind his opinions should serve as an ever-fresh energy for others in their truth-seeking enterprise. His actual decisions will all be deader than a dodo before very long, as indeed many of them are already. Such is the evanescent fate of decisions of even the greatest judges. What underlies them is what survives. What underlies L. Hand's decisions is his insights and the morality of the mind which respects those

insights, and the beauty of form with which he has often clothed his thoughts.

Style is sound, the knowing ones tell me. But in Learned Hand's case, to say that style is sound is not a free translation of vox et praeterea nihil. He is one of those rare judges who is able to act on Holmes' suggestion to judges, that in order to be weighty they need not be heavy.

Not only was there left out of his composition that gift of dullness which so often creates an illusion of solidity, but he has not been very appreciative of it in others. Even in his salad days he did not wholly fulfill the functions of a judge of first instance. Theobald Matthew, you will recall, pithily summarized the duty of such a judge. He should be "quick, courteous and wrong" - "wrong" because otherwise there would be nothing left for the appellate courts to do. He didn't give much leeway for that to the Court of Appeals when he sat in the District Court, and he too often forgot it in the Court of Appeals. Speaking for myself, the only gain possibly to be had from his retirement from the Court of Appeals is that hereafter I shall feel freer to act on my belief that a decision of the Second Circuit might give occasion for review or even perchance that an opinion which he wrote might be wrong.

I have said that he has become a legend. But his achievements created the legend. Not even McArthur today supplants him as front page news. It was not always thus. He came to the bench unheralded. Not a single New York paper had the discernment to note that a great figure came upon the bench when he ascended it. And that is as it should be. Let not him be praised who putteth on the armor but him that taketh it off. Fortunately for us we can indulge our own need for praising great achievement even before he taketh off his armour. He is merely shifting it. Long may be continue to carry it with its lighter weight and in his lighter vein.

For next conference

File

February 27, 1951.

MEMORANDUM FOR THE CONFERENCE:

Two matters of more than ordinary public importance are now before us:

1. The review of the conviction of the eleven Communist leaders, No. 336, United States v. Dennis.
2. The petition for certiorari to review the conviction for contempt of the lawyers of these Communists, No. 201, Sacher, et al. v. United States.

If there are cases that call for undisturbed judicial detachment, and therefore for abstention of outside interference, these surely are such cases. And I am not at all unmindful of the fact that "a judge of the United States" - and it is certainly to be assumed of judges of this Court - "is expected to be a man of ordinary firmness of character." (Holmes, J., in Toledo Newspaper Co. v. United States, 274 U.S. 402, 424.) I wonder, therefore, whether the Court consults its self-respect in not taking notice of two occurrences as to these cases during the last few days: (1) a statement carried over the air, attributed to the Communist Party, to the effect that if this Court decides the Communists' appeal adversely to the defendants protest demonstrations will follow in various cities throughout the country; (2) a recommendation by a special committee of the American Bar Association, now approved by its House of Delegates, condemning the conduct of counsel for the defendants in the Communists' trial and calling for the disbarment of them and their like.

It is one thing to be disdainful of personal attacks, no matter how untrue and malevolent they may be. At least I have acted on that as a rule of life. It is quite another thing to disregard efforts broadcast throughout the land to have either the Communist Party or the American Bar Association displace this Court in the discharge of its constitutional duty of deciding cases properly before it, or at least creating serious public sentiment in relation to adjudications not yet rendered.

As a single judge, I would not hesitate to issue an order to show cause why an attachment for contempt should not issue against the American Bar Association - who certainly should know better - and the Communist Party.

At all events the matter seems to me serious enough for the consideration of the Conference.

F. F.

F F –
Rules on appeals

Feb

MEMORANDUM

BY MR. JUSTICE FRANKFURTER

September 27, 1951

Re: *Rules Governing Appeals.*

1. The 1948 revision of Title 28, U. S. Code, swept away the remainder of the statutory provisions governing civil appeals to this Court, and consequently enables us to conform the procedure for such appeals to the simplified system which we have prescribed for other reviews within the federal judicial system. Evidence has not been wanting to indicate that the necessary revision is considered by the profession to be overdue. And analysis of our Rules establishes that they require of litigants steps which are unduly burdensome to them and to the lower courts, and that the Rules themselves are in a number of instances actually misleading.

2. *The present Rules are burdensome.*—In order to take a civil appeal as of right to this Court, counsel must prepare the following nine documents:

(1) Petition for appeal.
(2) Order allowing appeal.
(3) Assignment of errors.
(4) Statement as to jurisdiction.
(5) Citation.
(6) Statement required by Rule 12 (2).
(7) Appeal bond.
(8) Praecipe for record.
(9) Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed.

And the appropriate judge of the court below must sign three documents:

(1) Order allowing appeal and fixing appeal bond.
(2) Citation.
(3) Indorsement approving bond.

3. To these burdensome requirements, three other appellate proceedings afford striking contrasts:

A. *Certiorari to this Court.*—Counsel prepares only the petition and supporting brief, which can of course be combined into a single document, and the praecipe for the record, as well as notice to opposing parties. No bond is necessary; and no judge of the lower court need do anything.

B. *Direct criminal appeal to this Court.*—Counsel need prepare only three documents:

(1) Notice of appeal.
(2) Statement as to jurisdiction.
(3) Praecipe for record.

No action is required below.

C. *Appeal from District Court to a Court of Appeals.*—Here, also, no action is required below and counsel need prepare only the following:

(1) Notice of appeal.
(2) Designation of Contents of Record.
(2a) Statement of Points (only when less than the complete record is designated, see Rule 75 (d), F. R. Civ. P.).
(3) Bond (amount fixed by Rule 73 (c)), and objections to sufficiency are disposed of by the Clerk.

4. *The procedure for allowance of appeal by the judge of the court appealed from is unnecessary.*—The procedure for allowance of an appeal is a relic from an older legal age. It is particularly unnecessary so far as appeals to this Court are concerned, since it is this Court, and not the court from which the appeal is taken, which determines the sufficiency of the appeal. In actual practice, judges of the lower federal courts allow the appeals *pro forma* without so much as a glance at the appeal papers, while the presiding judges of state courts either do the same or else, reflecting the anti-Federalism of an-

other day, refuse to allow any appeals at all, thus necessitating resort to a Justice of this Court.

The perfunctory nature of the allowance of the appeal is underscored by decisions here; we have held, in connection with three-judge cases in the District Courts, that although two judges do not constitute a quorum (*Ayrshire Collieries Corp.* v. *United States,* 331 U. S. 132), a single judge has authority to allow the appeal (*United States* v. *Hancock Truck Lines,* 324 U. S. 774). "Since appeal is of right, allowance would seem to be but a ministerial act which might be performed by any member of the court." *Ibid.* at 778.

Ultimately, this Court must decide, on an examination of the appeal papers, whether to dismiss the appeal, affirm or reverse the judgment, note probable jurisdiction, or postpone finding it, and set the cause for argument. Since the decision is ultimately ours in every case, is it not a useless and burdensome formality to require a meaningless preliminary decision elsewhere?

5. *The present Rules are actually misleading.*—In a number of instances, our Rules are actually misleading.

(a) Rule 11 (2) still states that "if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument." As our action on motions to dismiss or affirm indicates, this is simply not so; no appeal case is argued until and unless probable jurisdiction is noted or postponed to the merits.

(b) Rule 13 (2) provides that "Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor (see par. 9 of this rule), the clerk shall make an estimate of the cost of printing the record," etc. In fact, while such designation must be made within fifteen days after the filing of the record, the Clerk does not make any estimate until and unless probable

jurisdiction is noted, barring exceptional circumstances which need not be here indicated.

6. *Bonds.*—If an appeal bond is to be required at all, the amount should be fixed by the Rules, and objections to form or to sufficiency of the surety should be disposed of by the Clerk, as in the case of appeals to a Court of Appeals; there is no reason why the time of busy judges should be taken up with such minutiae. But it may well be questioned whether, in fact, an appeal bond serves any purpose. The appellant must pay the fees in the court below before he can obtain a certified record; he must pay a fee here to docket the case; he must deposit in advance the estimated cost of printing the jurisdictional statement; and, if probable jurisdiction is noted, the cost of printing the record. In these circumstances the appeal bond is a needless formality. Indeed, its lack of any real utility is underscored by the fact that we have never required any bond of the petitioner in certiorari cases. (Of course the foregoing has no reference to supersedeas bonds.)

7. *Statement of Points, etc.*—Under the present practice, the appellant is required to set forth his points on appeal three times before probable jurisdiction is noted, only one version of which is examined by the Court. (a) He must file Assignments of Error with his petition for appeal. (b) He should, and generally does, set forth his points in somewhat different form in his jurisdictional statement. (c) Within fifteen days after docketing the case, he is required by Rule 13 (9) to file a Statement of Points to be Relied Upon. Only (b) is seen by the Court with the appeal papers; the other formulations are printed if, and only if, probable jurisdiction is noted.

The purpose of the foregoing requirements is to sharpen and define the issues and to enable appellees to enlarge the appellant's abbreviated record. By insisting on a separate Assignment of Error every time an appellant desires to question any step in the lower court's reasoning or action, we simply encourage the prolixity of the bar.

Actually, when a "Question Presented" is set forth in broad terms, the Court knows the real issues; and then counsel should be free to argue every subsidiary point fairly comprehended within that issue.

It would save our time, and that of the bar, if we abolished the old formal assignments of error in this Court, as they have long since been abolished in appeals to Courts of Appeals (Rule 75 (d), F. R. Civ. P.) and provided simply for a formulation of the major questions presented in the jurisdictional statement. When and if probable jurisdiction is noted, the appellant should be permitted to supplement that formulation with a further statement of minor points which he proposed to brief or argue.

8. *Standard of Substantiality.*—The Court has, over the years, indicated in Rule 38 (5) the "character of reasons which will be considered" on certiorari. The ratio of groundless petitions for certiorari is still high, but that circumstance is due in decreasing degree to the misunderstanding of counsel as to the function of our certiorari jurisdiction. So far as appeals are concerned, however, and particularly in connection with direct appeals from federal district courts, no definition of substantiality has yet been set forth in the Rules. Is not the time ripe to avow candidly the extent to which even our obligatory jurisdiction is discretionary, and to educate the bar in the criteria that should govern us and them?

9. *Concrete proposals for simplification.*—In order to simplify the appeal procedure, and to conform it to the procedure for other federal appeals, it is proposed that our Rules be rewritten to provide for the following steps for perfecting an appeal to this Court.

> (a) File a notice of appeal in the court below, the same as now provided in Rule 73 (a) and (b), F. R. Civ. P.
>
> (b) Either abolish the appeal bond altogether, or else adopt the substance of Rule 73 (c), F. R. Civ. P. except for amount, which should be $500.

(c) Provide for filing a praecipe for record in the court below, as in Rule 75, F. R. Civ. P., and provide for forwarding of record as in Rule 73 (g).

(d) File a printed statement as to jurisdiction in the Supreme Court when the record is docketed there, precisely as counsel now files a petition for certiorari when he dockets his case.

(e) Abolish assignments of error; require that the questions raised by the appeal be set forth in the jurisdictional statement; provide that a "Question Presented" includes every subsidiary question fairly included therein; and permit supplementary designation of minor points.

(f) Provide for motions to dismiss or affirm to be filed in the Supreme Court, within the same time (30 days) now allowed for the filing of a Brief in Opposition to a Petition for Certiorari, appellees to print such motions themselves.

(g) Allow 20 days after service of a motion to dismiss or affirm, as now, for an opposing brief.

(h) Abolish petition for appeal, order allowing appeal, citation, and similar documents.

(i) Revise Rules to include a concept of substantiality similar to the "character of reasons which will be considered" on certiorari, as now set forth in Rule 38 (5).

(j) Provide for designation of portions of record to be printed within 10 days after probable jurisdiction has been noted or postponed to the merits instead of 15 days after docketing the case.

The foregoing is set forth in the interest of concreteness and is of course not offered as desired drafting. The mode by which rules incorporating these changes should be formulated—whether through an initial draft by the experienced hand of the Clerk or by a small Committee to be designated by the Chief Justice—is not for me to suggest.

not conference

#172-

October 4, 1951.

MEMORANDUM FOR THE CONFERENCE

Re: No. 172 - Kaufman v. Societe Internationale.

On further consideration I think this case does raise a serious question under Rule 24 (a) (2), Fed. R. Civ. P., and I vote to take it.

The Court left open in Clark v. Uebersee, 332 U.S. 480, the possibility of a proportionate recovery under § 9 (a) of the Trading with the Enemy Act. We therefore did not consider the question how such a recovery, if it exists, may be obtained, whether by the corporation as a pro tanto corporate asset or by the non-tainted interests who would be the ultimate beneficiaries. If it be a corporate right even though the benefit would not inure to all the stockholders, the interest of Kaufman and those similarly situated would derive through the corporation. Since that claim is not asserted in the suit in which Kaufman seeks to intervene, the opportunity of Kaufman et al. to share in the benefits of any partial recovery might be effectively concluded by the decision in the principal case.

The subject is too tangled to be left on the unsatisfactory disposition below. Therefore I am in favor of bringing the case here.

* * * *

Re: No. 178 - Uebersee Finanz-Korporation v. McGrath.

While this case raises quite different issues than No. 172, if three Justices feel that they are so related to the scheme of legislation, and the constructions under it, of the Trading with the Enemy Act that this case would enable us to see the problems of the Kaufman case in a better light, I vote to grant No. 178.

F. F.

October 3, 1951.

Dear Chief:

Will you be good enough to add the following to the Court's order in Nos. 89 and 90:

"Mr. Justice Frankfurter and Mr. Justice Jackson adhere to the views expressed in their concurring opinion in Alabama Public Service Comm'n v. Southern Railway Co., 341 U.S. 341, 351, as to the jurisdictional issue in these cases."

The foregoing has Bob's concurrence.

Faithfully yours,

The Chief Justice.

[1951]

Supreme Court of the United States

Memorandum

----------, 194---

Fred, this may interest. Even tho I'm very sceptical about its accuracy

VT

[Feb, 1951]

Monday

Dear Chief

Whatever may be the action taken by the Court in the Hiss case, I assume that you will note that I took no part — the usual formula.

TT

Original Filed in VIP Correspondence File

[Nov, 1951]

Supreme Court of the United States
Washington 13, D. C.

Friday

Dear Chief:

May I ask you to pass once more — I hope for the last time — Nos. 413 and 415 # on tomorrow's lists (List 2, Sheet 1). I thought I'd better finish all my writing on the argued cases first.

Yrs,

V.T.

Bondholders v Powell
Morris v. Nonp

November 23, 1951.

MEMORANDUM BY MR. JUSTICE FRANKFURTER FOR THE CONFERENCE.

1. This memorandum is the precipitate of long concern over a serious evil in relation to the Court's work. The evil is the filing, week after week after week, of utterly baseless petitions for certiorari. My dam of patience with this disturbing imposition on the Court has been burst by some shameful instances of disregard of the grounds of certiorari jurisdiction on this week's conference lists.

2. Petitions for certiorari in the cases listed below, to which short[shrift] was naturally given by the dead list, could not be justified, I believe, by the most recklessly tolerant imagination regarding the limits of our certiorari jurisdiction:

No. 310 - Watson v. Suddoth.

No. 360 - Katz, etc. v. Hoe & Co., Inc., et al.

No. 378 - Universal Equipment Company v. Harvey Corporation.

No. 381 - McCarty v. Nelson.

3. I need not elaborate the reasons why this abuse offends every consideration relevant to the efficient and economical conduct of our business. I hope it is not too much to expect [redacted] agreement that such abuse will not be stopped unless we bring drastically to the attention of the Bar that the abuse must stop. Certainly an effective way of stopping abuse in filing frivolous petitions for certiorari is the same as that provided by our Rule 30(2) for discouraging frivolous appeals. That rule authorizes the award of damages to the tune of 10% of the amount of the judgment. This is not a dead letter. See Bohn v. Bohn, 316 U.S. 646. That such a remedy against abuse of the judicial process has the approval of Congress is evidenced by 28 U.S.C. § 2103, which incidentally also shows that Congress thinks we ought not to be tolerant toward petitions for certiorari as to which there is "no reasonable ground for granting."

4. I believe that the considerations which underlie the existing Rules and legislation as to frivolous appeals, see Rules 13(9), 30(2) and 44, and 28 U.S.C. § 2103, imply power to impose additional costs for filing frivolous petitions for certiorari.

5. But, in any event, I hope it may commend itself to my brethren that we formulate a specific rule dealing with this subject, to bring sharply home to the Bar their responsibility in filing frivolous certioraris. This will have the added advantage, particularly if it were promulgated with some kind of explanatory statement, that from now on we shall hold the Bar to the minimum responsibility of not making themselves parties to frivolous drains on the Court's time and thought, not to mention the waste that is involved both in money and in man power. This is not a trifling matter. For there is harm to law generally in having litigants and lawyers think that this Court is an easy instrument for their purposes of delay, or complacently tolerates a display of inexcusable professional ignorance.

Supreme Court of the United States
Washington 13, D. C.

Dec. 11/51

Assignments

No. 180 - Kerotest Co
v.
C-O-Two

Frankfurter J.

No. 209 United States
v.
Kelly

~~Burton J.~~

Later assigned Minton

V.T.

To: The Chief Justice

From: Frankfurter, J.

Circulated: 12/7/51

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THE DEPORTATION CASES

Memorandum by MR. JUSTICE FRANKFURTER for the Conference

1. What is the evidence of history as to the scope of legislative power over deportation?

Of course there is wide scope of national power to be exercised through Congress in admitting aliens or allowing them to remain. But no case, thus far, even remotely touches the power that must be sanctioned if these deportations are to be sustained, namely, deportations of aliens who have become so deeply identified with life here as to be fairly describable as denizens, and who are sought to be deported for conduct which is in itself innocent in that to subject it to criminal prosecution would be a denial even as against an alien of due process of law. See the opinion of Chief Justice Hughes speaking for a unanimous Court in *De Jonge* v. *Oregon,* 299 U. S. 353. As to the limitation upon the crown, before separation of the colonies from the mother country, in its prerogative to expel alien residents in time of peace, see some of the materials in Joseph H. Choate's brief for appellants in *Fong Yue Ting* v. *United States,* 149 U. S. 698, p. 28 *et seq.*

2. Plainly, the right of deportation is qualified by the Due Process Clause. *Ng Fung Ho* v. *United States,* 259 U. S. 276, demonstrates that strikingly. I am not suggesting that that case decides our present problems. I do say that it makes clear beyond peradventure that our problem cannot be solved by generalities such as that the power of Congress over aliens is unlimited, or that the right of an alien to enter this country is a conditional privilege, which apart from begging the whole question, is contradicted by the *Ng Fung Ho* case. If it were a conditional privilege, Congress would be free to employ ad-

ministrative procedure as to deportation, as much so as is true of exclusion. In fact, however *Ng Fung Ho* decided that despite the plenitude of congressional power, it is unconstitutional for Congress to resort to the administrative process as to deportees, at least if they claim to be citizens.

While *Ng Fung Ho* was cited in the briefs, the real meat and meaning of the case as a limitation upon congressional power was not so much as adverted to. If due process restricts Congress even as to the machinery for getting aliens out of the country it certainly is at least arguable that due process also carries with it substantive limitations as to this congressional power now that due process has been given a substantive content as to every other claim.

3. Ever since *Calder* v. *Bull,* 3 Dall. 386, in 1798, there has been talk that *ex post facto* applies only to crimes, or that it does not apply to civil cases; and there have even been one or two statements explicitly denying its application to deportation proceedings against aliens. I fully appreciate that in law, a long repeated error may establish itself as law, but it does seem to me important when an issue is squarely presented, as it is in this case for the first time, that we discover whether we are merely resting on a hoary error rather than on intrinsic historical accuracy.

To contend that *Calder* v. *Bull* affords very little intrinsic authority for the scope which the Court in that case attributes to *ex post facto* is not to be wanting in respect for that case. The note which Mr. Justice Johnson appended to *Satterlee* v. *Matthewson,* 2 Pet. 380, 414, 416, app. I, 681, surely calls seriously into question the historical foundation of the *Calder* v. *Bull* Court, and the doubt thus cast upon that Court has been powerfully reinforced by the results of a historical investigation of Professor Crosskey in 14 U. Chi. L. Rev. 539 (1947). For the present, all I am saying is that the materials of Mr. Justice Johnson and Prof. Crosskey call for answer and not disregard. Again I am bound to say that we are

entitled to proper consideration of these serious matters from the government and have not received it.

The foregoing outlines briefly what seem to me serious questions in these cases which have not received the consideration that the gravity of the issues demands. It also indicates some of the unresolved anxieties in my mind. I have these anxieties although I have long had, I permit myself to say, familiarity with most of these questions and have every disposition to give the fullest possible reach to the national power in dealing with aliens.

I myself am in a state of dissatisfaction as a result of the arguments we heard a few days ago and should very much want to have further argument in which counsel would be directed to address themselves to carefully framed, specific questions. No possible public interest would be prejudiced by such reargument. Unless I am misinformed, these aliens could not be deported till Lord knows when, even were we to decide in the government's favor next Monday. Every consideration of a carefully matured judgment in issues that so deeply concern the national interest as well as traditional notions of individual rights counsels, to my way of thinking, pursuit of the most deliberative process before reaching an assured conclusion. Especially is this so since these cases will have to be decided by a Court of eight. Every reasonable precaution should be taken against the risk of disposing of these cases by an equally Court.

SUPREME COURT OF THE UNITED STATES

Nos. 293 and 294.—October Term, 1951.

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United States of America, Petitioner, 294 *v.* Lovknit Manufacturing Co., Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1952.]

Mr. Justice Frankfurter joins the Court in denying the motion of the Congress of Industrial Organizations for leave to file a brief *amicus curiae,* but desires to add the following:

The United States, through the Solicitor General, may, as any other party to a litigation, refuse consent for any reason or no reason, selectively or uniformly, to the filing of a brief here on behalf of an *amicus curiae.* But such action by the Solicitor General is to be deemed to be taken entirely as an exercise of discretion by him in no wise governed by a rule of this Court or the policy underlying it.

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To: The Chief Justice

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Minor changes.

Additions marked, pp. 4, 5

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No. 413.—October Term, 1951.

Bondholders, Inc., Petitioner,
v.
Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Seaboard Air Line Railroad Company.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January —, 1952.]

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The District Court required drastic changes in the ownership of the property and in the respective rights of the beneficial owners as between themselves. Only some of the Seaboard securities were to be permitted to share in the ownership of the railroad; others were to be eliminated. The removal of the junior securities from the Seaboard scene and the delivery of the entire property to the senior securities deprived the junior securities of nothing—so it was assumed. The District Court concluded that the dispossessed securities, both bonds and stock, were worthless on the forecast that the Seaboard would never earn enough to yield an income on these junior securities. The District Court assumed, as did this Court in 1943, that the future earnings of a railroad could be estimated with substantial accuracy. Any error in such computation was deemed to be insubstantial, so that the amount of the destroyed junior securities that might have been saved had error been avoided would likewise be negligible.

The elimination of the junior securities was naturally reflected in an alteration of the financial structure of the Seaboard. This was deemed desirable in any event in order to simplify that structure. It became impossible to preserve intact the respective positions of the holdings that survived the reorganization plan, that is, the rights as between themselves fixed in the terms of the old securi-

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The doctrines formulated by this Court on the basis of abnormal depression and early war years—before the implications of the accelerated momentum of economic expansion were generally appreciated—require District Courts to make two basic prophecies: a road's future earnings and the income rate on bonds and other securities appropriate for the future. From these two figures

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In the estimate of the two basic figures errors may enter in either or both. The highest probability of error and the largest amount of possible error is with respect to the estimate of future earnings. Thus, assuming a 4% interest rate and therefore a multiplier of 25, and estimating the average annual earnings of the Seaboard at $7,500,000, the formula would lead to a capitalization of $187,500,000. This amount of securities would then be distributed to the owners of the Seaboard's pre-receivership securities in the order of the seniority or priority of their old securities. If the amount of new securities is insufficient to provide anything for the old junior bondholders and stockholders, their old securities, being thus proved worthless, would be wiped out.

If, however, the future average earnings were estimated not at $7,500,000 but at $16,500,000 per year, the same multiplier as before, 25, would produce a capitalization of $412,500,000. The difference between the capitalizations based on two different estimates of earnings would be $225,000,000. This amount would be the measure of the old junior securities saved by the higher estimate of earnings but destroyed as valueless by the lower estimate. In many reorganizations older methods of valuation are

given some, usually minor, weight, *e. g.*, book figures on which the Interstate Commerce Commission approved the issue of securities, reproduction cost less depreciation, etc., etc.

When the District Court in 1943 approved the destruction of junior Seaboard securities, it did so by accepting the estimate of $7,500,000 as the future annual earnings of the road. Since that estimate was made and judicially decreed the average annual earnings for almost a decade have been $16,500,000. (The figures of earnings for 1943–1951 are reported earnings; real earnings may be higher, even though accounting technique may not wholly reflect them. The figures here given for estimated and actual earnings are in round sums.)

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For what the Seaboard situation proves is not the mischance of a mere guess. It calls into question the whole process of dealing with this problem. The estimates that

have been so vastly negatived by the event were the product of four years of intensive study by a Special Master, qualified as a specialist in railroad affairs, with special knowledge of the Seaboard, estimates confirmed by a vast judicial apparatus. And the Seaboard is not an isolated case. In other railroad cases post-prediction earnings over a substantial period are far above the estimates on which extinction was decreed against junior securities. Indeed, the records of these railroad reorganizations at the hands of the Interstate Commerce Commission and special masters, and courts have inevitably aroused deep scepticism as to expertise in this field, or, at least, as to reliance in decreeing drastic forfeitures on the basis of it. It is not to be wondered that both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by courts, not by virtue of specific authorization but as a matter of judicial administration.

To: The Chief Justice #413-FF

From: Frankfurter, J.

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SUPREME COURT OF THE UNITED STATES

No. 413.—October Term, 1951.

Bondholders, Inc., Petitioner, *v.* Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Seaboard Air Line Railroad Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[January —, 1952.]

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States, defaulted on its debts as they fell due. It applied to the Federal District Court in Virginia for a moratorium. This was granted on condition that the control and management of the road be transferred to the District Court, functioning through receivers. In December 1943 the District Court announced its readiness to give up control upon terms drawn from doctrines of this Court. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523.

The District Court required drastic changes in the ownership of the property and in the respective rights of the beneficial owners as between themselves. Only some of the Seaboard securities were to be permitted to share in the ownership of the railroad; others were to be eliminated. The removal of the junior securities from the Seaboard scene and the delivery of the entire property to the senior securities deprived the junior securities of nothing—so it was assumed. The District Court concluded that the dispossessed securities, both bonds and stock, were worthless on the forecast that the Seaboard would never earn enough to yield an income on these junior securities. The District Court assumed, as did this Court in 1943, that the future earnings of a railroad could be estimated with substantial accuracy. Any error in such computation was deemed to be insubstantial, so that the amount of the destroyed junior securities that might have been saved had error been avoided would likewise be negligible.

The elimination of the junior securities was naturally reflected in an alteration of the financial structure of the Seaboard. This was deemed desirable in any event in order to simplify that structure. It became impossible to preserve intact the respective positions of the holdings that survived the reorganization plan, that is, the rights as between themselves fixed in the terms of the old securi-

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For what the Seaboard situation proves is not the mischance of a mere guess. It calls into question the whole process of dealing with this problem. The estimates that have been so vastly negatived by the event were the product of four years of intensive study by a Special Master, qualified as a specialist in railroad affairs, with special knowledge of the Seaboard, estimates confirmed by a vast judicial apparatus. And the Seaboard is not an isolated case. In other railroad cases post-prediction earnings

over a substantial period are far above the estimates on which extinction was decreed against junior securities. Indeed, the records of these railroad reorganizations at the hands of the Interstate Commerce Commission and special masters, and courts have inevitably aroused deep scepticism as to expertise in this field, or, at least, as to reliance in decreeing drastic forfeitures on the basis of it. It is not to be wondered that both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by courts, not by virtue of specific authorization but as a matter of judicial administration.

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#169-FF

No. 169, McGrath v. Nagano. Per curiam: The judgment is affirmed by an equally divided Court. Mr. Justice Clark took no part in the consideration or decision of this case.

Clark
Sworn
1-28-54

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

February 1, 1952.

Dear Chief:

May I trouble you not to take up the consideration of No. 78, von Moltke v. Gillies, tomorrow, but to take it up at the Conference next after tomorrow's?

Thank you.

Yours faithfully,

FF.

The Chief Justice.

[March 12, 1952]

Supreme Court of the United States
Washington 13, D. C.

Later

Dear Chief:

No. 426 — Hood —
falls, I believe to me
to assign. And since
it's a pesky little
case, perhaps I'd
better take it
myself.

Yours,
FF

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 12, 1952

Dear Fred:

No. 379: Casey v. United States

Would you please assign Casey v. United States to me for a per cur.?

F. F.

The Chief Justice

Supreme Court Building

RECEIVED
MAR 13 10 59 AM '52
CHAMBERS OF THE
CHIEF JUSTICE

March 23, 1953.

Dear Brethren:

What's the use of reaching the Psalmist's age of discretion unless one is, on appropriate occasions, indiscreet? And so I am circulating this letter which I have just had from Judge Learned Hand. It is so delicious that I ought not to devitalize it by putting the substance of it in my own inadequate prose.

F. F.

NOTED
MAR 23 1952
F.M.V.

UNITED STATES COURTHOUSE

Judge Learned Hand's Chambers

March 19, 1953.

F. F.

Is there no way by which vos Serenissimi Novem can be stirred up to face the lion in his den and force the Admiralty Bar to accept in substance Charlie Clark's Rules of Civil Procedure? As I told the Judex Maximus, while I was still a full-fledged judge, that means a knockdown fight with an entrenched minor bureaucracy, but it is, to my archaic soul at any rate, an a bsurdity, amounting almost to a scandal, to go on giving allegiance to the present rules. True they are not so cumbersome as to result badly when used by the cognoscenti, though even to them they are in part mystic arcana. But they do serve with their barbarous terminology to frighten away the uninitiate and help secure a monopoly without warrant. (Well, perhaps not; though I think so). That aside, they are at least an offence to the Spirit of Progress Towards a Better and Bigger World, with their musty survivals of an outworn vocabulary. There is not a goddam reason why the whole of admiralty should not go in under the New Rules - on the whole the best handbook of procedure yet devised, I suspect. I agree that there are spots which must be oiled up, supplemented, etc., etc., but those are not many. In the bulk there is no reason in God's Green World why the ordinary procedure should not apply. No doubt there would be questions after the change; but most of them could be dealt with by that part of the ship's company that works in the bowels of the vessel - quorum pars sum - and need not intrude into your own rarified Stratosphere whose content, I agree, ought to be almost wholly made up of the Preservation of our Fundamental Civil Rights, about which you are all in such perfect accord.

Well, that's off my chest! For once, Charlie is absolutely on the ball. Awake, ye Paladins; gird on your swords; avant, avanti!!!

Thine

H. L.

[April, 1952]

Monday

Supreme Court of the United States
Washington 13, D. C.

Dear Chief:

In view of the special situation created by the nature of the dissents in Swift. Stanley → agree that it would not be a departure from our ~~S~~ rule to have Stanley speak ~~of~~ his dissent before I take two minutes to state mine.

Yes

H.F.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

May 1, 1952.

MEMORANDUM FOR THE CONFERENCE

Re: No. 326, Misc. - Leviton et al.
v. United States

Anticipating that the petition for certiorari in this case will be denied, I have prepared a memorandum to be filed when the order comes down. To avoid needless delay - this being a criminal case - I now circulate this memorandum so that the order can come down Monday next.

F.F.

[Nov., 1953]

Dear Chief:

May I - or can I - trouble you to say to Grover a word about my absence on the uniquely controlling ground that ~~I~~ I have to be in N.Y. on my 50th class dinner

[illegible]

SUPREME COURT OF THE UNITED STATES

Nos. 524, 525, 526, 527 and 528.—October Term, 1951.

Chemical Bank & Trust Co., Trustee, 524 *v.* Group of Institutional Investors. Alleghany Corporation, 525 *v.* Group of Institutional Investors. Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee, 526 *v.* Group of Institutional Investors. Farwell, et al., 527 *v.* Group of Institutional Investors. Missouri Pacific Railroad Co. 528 *v.* Group of Institutional Investors.	On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 9, 1952.]

Memorandum of Mr. Justice Frankfurter, in connection with the denial of the petitions for writs of certiorari.

Reference to the opinion in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, makes it unnecessary to indicate the reasons which preclude the Court from stating, however briefly, the grounds for denial of petitions for

certiorari. Selective notations of dissent from such denials would not correctly reflect the operation of the certiorari process. That would require notation not only of all dissents when petitions are denied. It would equally require public recording of dissents from the granting of petitions. Due regard for all these factors touching the administration of our certiorari jurisdiction has determined my unbroken practice not to note dissent from the Court's disposition of petitions for certiorari.

But it has seemed to me appropriate to indicate from time to time the issues that are involved in a litigation for which review has been sought and denied. These cases, arising out of the long drawn-out Missouri Pacific reorganization, present another such instance. The denial of these petitions for certiorari does not definitively close the door for relief to security holders who claim forfeiture of their rights. The current Interstate Commerce Commission plan for the reorganization of the Missouri Pacific system has not been consummated. It may never be consummated. If carried to the stage of confirmation by the lower courts, review may again be sought here, perhaps with the benefit of additional light. But as the matter stands, two great questions are in controversy; they are questions for which the Congress has not authorized the Interstate Commerce Commission to give final answers.

The reorganization plan sustained by the lower court involves the forfeiture of existing securities of vast proportions. The Commission's plan also eliminates existing corporations and directs financial power into new channels. These far-reaching consequences are based on the Commission's predictions of the future. One is not remotely unmindful of the relevant elements and their meaning on which judgment in such matters must be based, nor of the diffidence with which courts should sit in judgment upon the Commission's conclusions, by reminding that the Reorganization Act of 1933 (§ 77 of the Bankruptcy Act), 47 Stat. 1467, 1474, as amended, did subject to judicial review the determinations of the Commission and the processes which underlie them.

In three years (1940, 1944, and 1949) the Commission has proposed forfeiture plans on the basis of estimates of future earnings of the three component parts of the Missouri Pacific lines. The estimates on which the Commission based its proposals to strike down hundreds of millions of dollars of securities were the same in 1944 as in 1940. In 1949, the Commission recognized that the 1940 and 1944 estimates and forfeiture proposals were unsound, to the extent of millions of dollars.

In the eleven years since the Commission first proposed forfeiture on the basis of estimates of future earnings in this case, the actual earnings of each of the three component parts of the Missouri Pacific lines have exceeded those estimates. Two of the three have earned, in those eleven years, more than twice as much as the estimates; one earned almost fifty percent more than the estimate.

For the system as a whole, the actual earnings of the eleven post-estimate years averaged $18,000,000 per year more than the estimate on which the Commission's forfeiture plan was based. For every million dollars of underestimate of future earnings the Commission's forfeiture proposals would unjustly destroy twenty to twenty-five million dollars of securities. (For the basis of this calculation see my opinion in *Bondholders, Inc.* v. *Powell,* 342 U. S. 921.) The error indicated by the eleven years of actual earnings suggests that the Commission undervalued the property in 1940 and 1944 by $360,000,000 to $450,000,000.

In 1949, when the Commission adopted higher estimates for each of the three components of the Missouri Pacific lines and for the system as a whole, the Commission doubled the 1940 and 1944 estimate of the future

earnings of one of the three parts of the Missouri Pacific system. But the actual earnings of each of the three years since the 1949 estimate substantially exceeded even that doubled estimate. Similarly, though the Commission in 1949 substantially increased the 1940 and 1944 estimates for the other two components of the system, their actual earnings for the three ensuing years were, in the case of one of these two sections of the system, double the Commission's 1949 estimate, and, in the other, 48 percent above the 1949 estimate.

On the basis of the record of actual earnings so far available, the indicated error in the Commission's 1949 increased estimates of future annual earnings is $11,500,000; this sum, multiplied twenty to twenty-five times, in accordance with the Commission's procedures in determining the amount of forfeitures in railroad reorganizations, implies a wiping out, under the 1949 plan, of $230,000,000 to $287,500,000 of junior security holder interests.

Besides the rights which the Commission has thrice deemed valueless, it has proposed to substitute securities less valuable than what bondholders at present own. The total stated amount of Missouri Pacific system bonds, stocks, and accumulated, unpaid interest and preferred dividends, whose owners would suffer what amounts to partial or entire forfeiture, exceeds three quarters of a billion dollars.

Of these, the Missouri Pacific preferred and common stock, the two junior securities owned by the public, may be considered in connection with the estimates on which the Commission in its 1949 plan proposes to forfeit one in large part and the other entirely. The present preferred stock has a par value of $100 per share; in addition, as the Commission and the lower courts have noted, accumulated dividends (now approximately $150 per share) must be taken into account. As to each share,

having this aggregate lawful claim of $250 of participation in the railroad's property, the Commission's plan would wipe out as valueless some $217, and to allow $43 as of some value. At the present dividend rate, the Commission's finding in effect assumes that the Missouri Pacific system can earn on its present preferred stock not more than $2.15 per share. The actual earnings on this stock, in the eleven years since the Commission first began to issue its plans for the Missouri Pacific, have been $17 per share per year, or eight times the increased estimate made by the Commission in 1949. In the three years since the Commission ruled that the present preferred stock has a value of only $43 per share the company has earned more than $43 on each share.

As to the Missouri Pacific common stock: in 1940, 1944, and 1949 the Commission ruled that this stock is without value—*i. e.*, that the railroad system will in the years subsequent to the making of the estimates be unable to earn one cent on its common stock. The actual earnings on each share of this stock, in the eleven years since the the Commission first declared it valueless, have averaged $10 a year.

It might be expected that when the Commission has, at three different periods, made estimates of future earnings for each of three component portions of a railroad system, as well as for the system as a whole, and in effect for various classes of its securities some of the errors inevitable in each of the numerous estimates would be overestimates, and some would be underestimates. In this Missouri Pacific proceeding, the Commission's errors have invariably been underestimates—for the system as a whole, for each part of the system, for different classes of securities, in 1940, again in 1944, and once again in 1949.

This picture is of course drawn with a broad brush. Many other factors would enter into the whole fiscal

story of estimated earnings, actual earnings, miscalculations, foreseeable factors left out of account, unforeseeable factors, etc., etc. They would not affect the essentials here indicated—the uniformity of erroneous guessing, the invalid assumptions of such guessing, the tenuous nature of the process whereby vast interests were adversely affected, the inadequate basis for exercising the judicial scrutiny demanded by Act of Congress, etc., etc., etc. Even more than did the Seaboard situation the whole record in the Missouri Pacific reorganization proves "not the mischance of a mere guess. It calls into question the whole process of dealing with this problem. . . . the record of these railroad reorganizations at the hands of the Interstate Commerce Commission and special masters and courts have inevitably aroused deep sceptism as to expertise in this field, or, at least, as to reliance in decreeing drastic forfeitures on the basis of it. It is not to be wondered that both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by the courts, not by virtue of specific authorization, but as a matter of judicial administration."

SUPREME COURT OF THE UNITED STATES

No. 236.—October Term, 1952.

Louis Weber, Petitioner,
v.
The United States of America.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October 13, 1952.]

Mr. Justice Frankfurter.

This is another instance where I deem it appropriate to indicate what was before us in a petition for certiorari. See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912. One of the questions presented by this petition is the sufficiency of the claim that the verdict was vitiated because publications reflecting adversely on the defendant, before any testimony was taken in the case, precluded a fair and impartial trial. Under the circumstances the Court of Appeals, composed of Swan, Chief Judge, Augustus N. Hand and Frank, Circuit Judges, rejected the claim while acknowledging that

> "such comments by newspapers [as revealed by the exhibits herein] during the pendency of a criminal trial are inexcusable.[2]" *United States* v. *Weber,* 197 F. 2d 237, 239.

"[2] In England it is probable that the publishers would be severely penalized. See cases cited in Maryland v. Baltimore Radio Show, 338 U. S. 912, 921–936, 70 S. Ct. 252, 94 L. Ed. 562."

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Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 13, 1952.

Dear Chief:

Without being very ungracious and stuffy I had to accept an invitation, months ago, to a little private party to be given me by some of my oldest, most intimate friends. The party is in New York and it falls on this coming Saturday. To meet the wishes of my host I will have to take the two o'clock train.

I was going to ask you - on the assumption it would not be inconvenient to you or to the Brethren - to begin our conference with the argued cases, going into the certioraris as far as we could before lunch time and I would leave my votes behind for the rest. I now learn, however, that there is every prospect that we will conclude our arguments for the week today. If it were possible to have the conference tomorrow afternoon instead of Saturday - assuming that would throw no burden on anybody else - that would be still better.

Faithfully yours,

FF

9.

The Chief Justice.

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1952.

Julius Rosenberg and Ethel Rosenberg, Petitioners, *v.* The United States of America.	On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November 17, 1952.]

Mr. Justice Frankfurter.

Petitioners are under death sentence, and it is not unreasonable to feel that before life is taken review should be open in the highest court of the society which has condemned them. Such right of review was the law of the land for twenty years. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, convictions in capital cases arising under federal statutes were appealable here. But in 1911 Congress abolished the appeal as of right, and since then death sentences have come here only under the same conditions that apply to any criminal conviction in a federal court. (§§ 128, 238, 240 and 241 of the Judicial Code, 36 Stat. 1087, 1133, 1157.)

The Courts of Appeals are charged by Congress with the duty of reviewing all criminal convictions. These are courts of great authority and corresponding responsibility. The Court of Appeals for the Second Circuit was deeply conscious of its responsibility in this case. Speaking through Judge Frank it said: "Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." 195 F. 2d 583, 590.

After further consideration, the Court has adhered to its denial of this petition for certiorari. Misconception regarding the meaning of such a denial persists despite

repeated attempts at explanation. It means, and all that it means is, that there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari. It also deserves to be repeated that the effective administration of justice precludes this Court from giving reasons, however briefly, for its denial of a petition for certiorari. I have heretofore explained the reasons that for me also militate against noting individual votes when a petition for certiorari is denied. See *Chemical & Trust Bank Co.* v. *Group of Institutional Investors,* 343 U. S. 982.

Numerous grounds were urged in support of this petition for certiorari; the petition for rehearing raised five additional questions. So far as these questions come within the power of this Court to adjudicate, I do not, of course, imply any opinion upon them. One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise.

SUPREME COURT OF THE UNITED STATES

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[No date]

Supreme Court of the United States

Memorandum

----------, 194---

C.S.

Bob told me of proposal for Friday Conference.

Of course I'm for it — any hour!

V.T.

#111 - FF -

To: The Chief Justice
Mr. Justice Black
Mr. Justice Reed
Mr. Justice Douglas
Mr. Justice Jackson
Mr. Justice Burton
Mr. Justice Clark
Mr. Justice Minton

From: Frankfurter, J.

Circulated: 13 Nov. 1952

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1952.

Julius Rosenberg and Ethel Rosenberg, Petitioners, *v.* The United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November —, 1952.]

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Since 1911 Congress has charged the Courts of Appeals with the duty of reviewing all criminal convictions. These are courts of high importance and great responsibility. The Court of Appeals for the Second Circuit was deeply conscious of its responsibility in this case. Speaking through Judge Frank it said: "It goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." 195 F. 2d 583, 590.

After further consideration the Court has denied the petition for certiorari in this case. Misconception regarding the meaning of such a denial persists despite repeated attempts at explanation. It means, and all that it means is, that there were not four members of the

Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important according to the standards governing issue of the discretionary writ of certiorari. It also deserves to be repeated that the effective administration of justice precludes this Court from explaining, however briefly, the reasons for its denial of a petition for certiorari. I have heretofore explained the reasons that for me also militate against noting individual votes when a petition for certiorari is denied. See *Chemical & Trust Bank Co.* v. *Group of Institutional Investors,* 343 U. S. 982.

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Ariz. v. Calif.

January 15, 1953.

MEMORANDUM FOR THE CONFERENCE

Re: Arizona v. California

My poor head cannot understand how a third party's motion to intervene in a suit which the Court must first entertain but cannot entertain can give the Court jurisdiction to entertain it. I had supposed that a third party can intervene only in a suit in being.

I should suppose that these are self-evident propositions and I can think of only three possible answers to their application to the bill sought to be filed by Arizona:

1. While the proposed suit by Arizona requires the United States to be a necessary party, want of a necessary party is not a jurisdictional defect. (I am taking it for granted that the United States is a necessary party to this suit. As a matter of intrinsic analysis and in the light of the history of this whole litigation, to question that Arizona could not proceed without the United States is for me almost like questioning that two and two make four.)

2. Since the United States is ready to come in, its motion for intervention may be treated as a consent to be joined as a defendant by Arizona although Arizona has not seen fit to join her.

3. Since the United States deems it important that the issues tendered by Arizona be adjudicated, its motion to intervene may be treated as though it were an action by the United States for a declaratory judgment, and the pleadings by Arizona and California may be treated as those of interpleaded defendants.

None of these answers takes care of my doubts. Nor do I understand why, if the United States wants the issues tendered by Arizona against California to be adjudicated, the Government does not file a bill interpleading the two States. Brother Clark suggests there may be considerations of political prudence - I am using the word political in its innocuously scientific meaning - why the Government does not want to assume responsibility and wants to come in under the shelter of the Court's entertaining the suit by Arizona. Whatever may be the fact, I think deviation by this Court from the appropriate procedural course, in the interest of a particular situation, has a way of hitting us in the face tomorrow, with the inevitable result of twisting reason out of shape so as not to be governed by the prior deviation.

However, I have concluded that this is one of those cases where it is better to leave an error implicit than by exposure to establish it as a precedent.

RECEIVED
JAN 23 1953
CHAMBERS OF
THE CHIEF JUSTICE

F. F.

[1953]

Supreme Court of the United States

Memorandum

----------, 194---

Why do you
give him the
fee & praise?
He could not
split the fee
with me. FF

[1953]

Supreme Court of the United States

Memorandum

----------, 194--

As to Anti-Fascist,

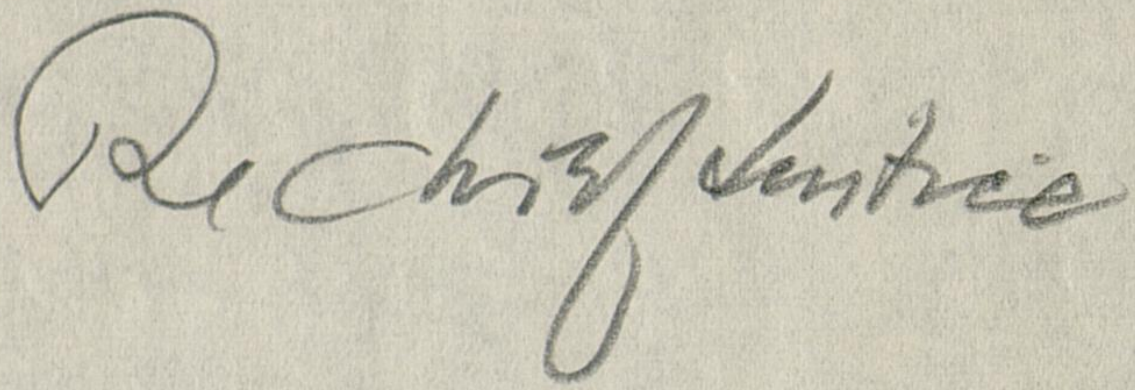
You at all Events,

are in the clear,

You said "a plague

on all your Houses."

V. C.



C. J.

I had the total

of cases - 1939 - Jan - 1953

Wrong: it's

17,568

Denials of cert: 12,314

Merits 3,379

Motions to file

Habeas Corpus etc. 1,802

Agreed dismissals 73

17,568

Not rehearing

nor motions as to briefs

$$\begin{array}{r} 12\tfrac{1}{2} \\ \times\ 14 \\ \hline 48 \\ 12 \\ \hline 168\tfrac{1}{2} \end{array}$$

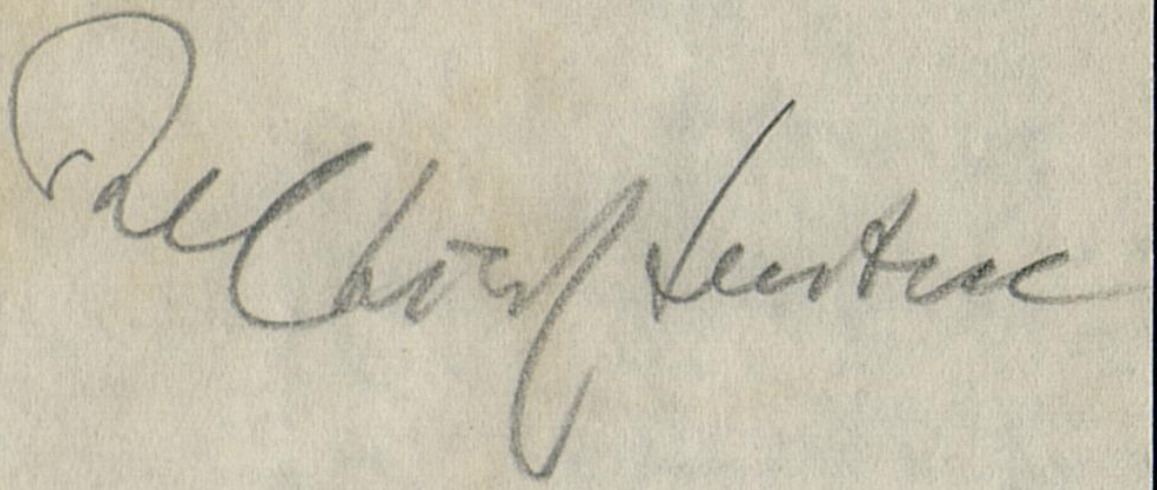
[Feb., 1953]

Supreme Court of the United States

Memorandum

_____, 194___

I now serve respectful notice that I shall take - sight/site unseen - whatever you and Stanley agree on as Ky. law - in so far as Kenton-Campbell et al Ky Counties' law is relevant to the disposition of this case! JT



Chief Justice Fred M. Vinson,
U. S. Supreme Court,
Washington 13, D. C.

Dear Sir:-

How does a traitor like Justice F. Frankfurter get to sit on the bench of the Supreme Court?

NOTED
FEB 27 1952
F.M.V.

American Citizen

THE TIMES

March 10, 1953

1

COURT OF CRIMINAL APPEAL

UNDUE INTERRUPTION BY JUDGE : CONVICTION QUASHED

REGINA v. CLEWER

Before the LORD CHIEF JUSTICE, MR. JUSTICE BYRNE, *and* MR. JUSTICE GERRARD

The COURT, by a reserved judgment, allowed an appeal by Brian Edward Clewer from his conviction of forgery before Mr. Justice Hallett at Bedford Assizes on October 10, 1952, on the ground that the Judge had interrupted counsel unduly during the trial. The appellant was convicted on an indictment containing six counts, three of forging three different cheques and three of uttering those cheques.

Judgment was reserved on March 2.

Mr. C. G. L. Du Cann and Mrs. Margaret Hallett appeared for the appellant ; Mr. S. L. Elborne for the Crown.

JUDGMENT

The LORD CHIEF JUSTICE, delivering the judgment of the Court, said that the Court was quite satisfied that there was no misdirection on any point of law, and it was only right to say that the Judge's summing-up was quite unobjectionable on any point and was perfectly fair. But it was with regard to incidents that took place during the trial that the Court had, with some reluctance, come to the conclusion that the conviction must be quashed.

Although the case took a very long time to try, the issues were in fact exceedingly simple:—The appellant was in partnership carrying on a cinematograph theatre business, and cheques drawn on the partnership account had to be signed by both partners. The appellant was admittedly in financial straits, and the charge against him was that he had forged cheques by forging his partner's name under his own, so that it appeared that the cheques had been signed by both partners. So far as the uttering was concerned, the forged cheques were all sent to creditors to whom the appellant was personally indebted, together with letters in his handwriting saying that they were sent in payment of his account.

The defence was that the cheques had been forged by the appellant's wife, and that he had only written the covering letters and had not intended them to be posted before he had received some money. Except that the appellant's wife, who was warned that she need not incriminate herself, had sworn that she was the forger, the case did not appear to the Court to have presented any features of difficulty.

There was certainly evidence which would have entitled the jury to reject the wife's story, but even if they had accepted it they would still have had to consider whether the appellant was not a party to the forgery.

COUNSEL'S COMPLAINT

The appellant was admittedly in financial straits, and the charge against him was that he had forged cheques by forging his partner's name under his own, so that it appeared that the cheques had been signed by both partners. So far as the uttering was concerned, the forged cheques were all sent to creditors to whom the appellant was personally indebted, together with letters in his handwriting saying that they were sent in payment of his account.

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There was certainly evidence which would have entitled the jury to reject the wife's story, but even if they had accepted it they would still have had to consider whether the appellant was not a party to the forgery.

COUNSEL'S COMPLAINT

Mr. Du Cann, who appeared below for the appellant and seemed to have conducted the case there with complete propriety, frankly admitted that the evidence was such that the jury could properly have convicted. The complaint was that, by reason of the frequency and nature of interruptions by the Judge, he never had an opportunity of putting his defence fairly before the jury. No doubt it was sometimes difficult, when the defence was one that appeared to the presiding Judge to be fantastic or devoid of merit—as this one was—to treat it with the same consideration as a defence not marked by those characteristics. At the same time, the first and most important thing for the administration of the criminal law was that it should appear that the prisoner was having a fair trial, and that he should not be left with any sense of grievance on the ground that his case had not been fairly put before the jury, and if counsel was constantly interrupted both in cross-examination and examination-in-chief, and, more especially, as in this case, during his speech to the jury, his task became almost impossible.

The more improbable the defence, the more difficult it was for counsel to discharge his duty to his client adequately, and, providing that he kept within the bounds of fair advocacy—as it was beyond question Mr. Du Cann had done—it was highly desirable that he should be allowed to do his best in presenting his case, leaving it to the Judge to deal with and maybe to demolish it in his summing-up.

INTERRUPTIONS "TIME AND AGAIN"

The Court had had the full transcript in the present case and had observed how, from a very early stage, the Judge from time to time imputed to Mr. Du Cann that he was setting up defences which in fact, as he assured the Judge, he was not; but time and again, both during the evidence for the prosecution and the evidence for the defence, he was interrupted by the Judge, who attributed those defences to him.

A more serious matter came up during Mr. Du Cann's final speech to the jury: while he was addressing them the Judge intervened and said that he would like Mr. Elborne to formulate what positive evidence there was that the appellant forged the signatures. Mr. Elborne, albeit with reluctance, as the Judge invited him to intervene at that unusual and unfortunate stage, tried to comply with the request. A dialogue took place between the Judge and Mr. Elborne in which it was only fair to say that Mr. Elborne had very little chance of formulating the case, and that occupied no fewer than seven pages of transcript.

In the course of that discussion the Judge referred once or twice to what he called a "dust storm" raised by Mr. Du Cann. The Judge said: "I think Mr. Du Cann sometimes thinks I am being offensive to him. I have really been admiring him. I have been watching them years and years and even been one myself. There are cases when you raise a dust storm and seeing your client escape is the very best advocacy. It requires skill and one sits admiring and watches that skill being asserted, but I am not sure that I am going to get entangled in any dust storm. I am more likely to tell the jury what are the facts they can infer and, if they think it right, that the forgery was done or brought about by this man."

In effect, what Mr. Justice Hallett was really saying in the presence of the jury was that counsel for the defence was raising false issues, that there was nothing in the defence being put forward, and that he intended to tell the jury so.

"GALLANT" DEFENCE

When he came to sum up, he summed up perfectly clearly, perfectly fairly, and, as need hardly be said with regard to any summing-up of that Judge, with meticulous accuracy as to the law, but it seemed to the Court that the whole conduct of the case must have conveyed to the jury the idea that he was completely convinced of the appellant's guilt, and was disparaging the defence which Mr. Du Cann was gallantly endeavouring to lay before them. Not only was there that very long interruption of the speech for the defence but thereafter there were some 15 or 16 further interruptions, and, with all respect to the Judge, the Court was unable to find, and Mr. Elborne, whose conduct of the prosecution was perfectly satisfactory, did not suggest, that those interruptions were called for by any misstatement of the evidence by Mr. Du Cann.

Issues of fact were entirely the province of the jury. Everyday experience showed that juries sometimes accepted defences which appeared highly improbable to Judges, and which would not be accepted if the decision rested with the Judge alone. The prisoner was entitled to have his defence, even the most improbable, put to the jury by his counsel, whose task was rendered impossible if he was constantly subjected to the kind of interruptions that had occurred in the present case. Moreover, to have his final speech interrupted for so long a period, and on so many occasions, was a most disconcerting experience, as every one who had been engaged in advocacy could well appreciate. The Court felt obliged to yield to the appellant's contention that the trial was irregular, and that the conviction ought not to stand.

No one would for one moment impute to the Judge any desire other than that a righteous verdict should be returned, but if on a full consideration of the case the Court came to the conclusion, as they had, that the defence had not had a fair opportunity, it seemed to them that their duty was to quash the conviction, and that in such circumstances it was impossible to apply the proviso.

Solicitors.—Messrs. Sampson and Co.: Director of Public Prosecutions.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 20, 1953.

Dear Brethren:

I may as well be hanged for a sheep as a lamb. In plain English, since I have already bored you stiff by my wearisome references to English standards of criminal justice compared with ours, I send you this judgment of the Lord Chief Justice. Lord Goddard is the most hard-boiled criminal judge in all England. I don't dare guess what some of our appellate courts, including this Court, would do in a similar case!

Faithfully yours,

FF

The Chief Justice.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

April 4, 1953.

Dear Chief:

No. 401, Misc. - On Lee v. United States, is on the dead list. This is a sequel, as you know, to the case which we decided in 343 U.S. 747, in which I was in dissent. This is a new case and not a petition for rehearing, and therefore I suppose the disqualification of a dissenter on a petition for rehearing does not strictly come into play. But it is immaterial to me whether in the spirit of that rule I ought not to have any say. In any event I think I want to file a memorandum on the denial of this new cert. and therefore I do not want that denial to come down on Monday next.

Faithfully yours,

The Chief Justice.

April 4, 1953

Dear Felix:

Re: No. 401, Misc. - On Lee v. U. S.

In my view, it is clear beyond doubt that this is not a petition for rehearing and, therefore, there is no disqualification of any dissenter in the decision affecting the petitioner here in 343 U. S. 747.

You certainly should have your say in the determination of this case in Conference if you desire.

C. J.

Mr. Justice Frankfurter.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

April 8, 1953.

Dear Chief:

On further reflection I have decided to wait for another opportunity - I hope it never comes - to say what I had thought of saying in No. 401, Misc., On Lee v. United States.

I suppose the case will be on this week's list, and I write to suggest that since last week you had it on the dead list you may want to put it there this week.

Faithfully yours,

FF

The Chief Justice.

#341 Misc. - FF

To: The Chief Justice
Mr. Justice Black
Mr. Justice Reed
Mr. Justice Douglas
Mr. Justice Jackson
Mr. Justice Burton
Mr. Justice Clark
Mr. Justice Minton

SUPREME COURT OF THE UNITED STATES

From: Frankfurter, J.

No. 341, Misc.—October Term, 1952.

Circulated: 4/30/53

Recirculated: _____

Harold Roland Christoffel, Petitioner, *v.* United States of America. | On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May —, 1953.]

Memorandum by Mr. Justice Frankfurter.

1. For sixty years, ever since *Williams* v. *United States*, 168 U. S. 382, every federal prosecutor who knew anything knew that it is wholly immaterial how wrong he may have been in supposing that a prosecution was supported by the statute designated in the indictment if the offense charged is covered by a different statute.

2. Since the ingredients of perjury in the local District of Columbia perjury statute, D. C. Code, 1940, § 22–2501, and the then applicable general perjury statute, 18 U. S. C. § 231, are the same, it is wholly immaterial whether the United States Attorney, in a prosecution in the District, assumed that he was prosecuting for perjury under one or the other. There is only one point of difference between the two statutes: the District of Columbia statute authorizes a maximum imprisonment of ten years, while five years is the maximum provided by the federal law. Accordingly, the question of the applicability of the District of Columbia statute rather than the United States Code provision arises only if the sentence exceeds the five-year maximum of 18 U. S. C. § 231.

3. That is precisely the issue raised in the present *Christoffel* case and that it precisely the issue that was not involved in the *Bennett Meyers* case. Meyers at-

tempted to raise it, but the Government made clear beyond peradventure in its brief in opposition to the petition for certiorari that the question was not before us:

> "Regardless of whether petitioner is right in his contention that crimes of this nature should be indicted under the federal statute, it does not follow that the error, if any, vitiates his conviction. The two statutes, federal and local, are substantially identical with the exception of the penalty provisions. The language of the indictment conforms to the rule requiring 'a plain, concise and definite written statement of the essential facts constituting the offense charged,' and it clearly states an offense within the federal statute. The only indication that the prosecution was brought under the local statute lies in the citation of that statute in the caption of the indictment (R. 2). A miscitation of the applicable statute in the caption is, of course, not the ground for reversal unless prejudice is shown. There was no prejudice. Petitioner was fully informed of the charge. The trial would have been conducted in the same manner, regardless of the citation given in the indictment. And the trial judge imposed a sentence within the maximum allowable under either the federal statute or the District of Columbia perjury statute (R. 391–392.)"

The *Meyers* case is a very good illustration of the wisdom of our decision in *Brown* v. *Allen,* the other day, that denial of a certiorari, in any event, has no legal significance. Even assuming that one could make a good guess, from the briefs in a denied case, why the Court in a particular case denied certiorari, we must be mindful of the fact that in only 11 out of the 48 States are the records and briefs that were before us on deposit and available to the Bar.

4. What is perfectly clear, therefore, is that this case for the first time requires us to face the question of the applicability of the local District of Columbia perjury statute as against the general federal statute on perjury. It cannot be that we should allow the willfulness or caprice of the local United States Attorney or the District Judges in the District to determine whether a maximum of ten years or five years may be meted out for perjury before congressional committees. We surely cannot leave the situation undetermined whether Christoffel, for committing perjury before a committee in the District, can be sentenced to ten years, but if the next day the committee moves its hearing to New York and Christoffel commits perjury there his punishment can only be five years.

5. On the merits, the matter is decisively disposed of by the reasoning and the decision of the Court of Appeals for the District in *O'Brien* v. *United States,* 99 F. 2d 368. That was the reverse of the *Christoffel* case. The false testimony was there given before local authorities. With his usual hardheadness Groner, C. J., pointed out that the criminal code for the District is a self-contained, separate body of laws for the District and even though for the same kind of offense the general federal punishment is lighter than for the local manifestation of that type of an offense, the severer local penalty controls. The core of his reasoning was derived from *Johnson* v. *United States,* 225 U. S. 405:

> "that the federal code embraces general legislation of general operation, while the District code embraces local legislation of local operation. . . ." 99 F. 2d, at 369.

6. In short, only perjury committed before local tribunals brings into play the District perjury statute. Now, of course, a committee of the Congress is not a local tribu-

nal; hearings before it are not "local operations." A congressional committee sitting in the District of Columbia is not localized, legally speaking, in the District, nor is it, legally speaking, localized in every city in which it may hold hearings. Hearings such as those before the Kefauver Committee or the Jenner Committee, held in various cities throughout the country, are before "a competent tribunal . . . in which a law of the United States authorizes an oath to be administered," and willful falsity before such a tribunal, as has long been established, *e. g., In re Loney,* 134 U. S. 372, is an offense only under the laws of the United States and not under local statutes.

7. Therefore we should, I submit, act on Brother JACKSON'S proposal for disposing of this petition, to wit, to grant and vacate with direction to the District Court to resentence in accordance with the requirement of 18 U. S. C. § 231.

October 11, 1951

Dear Felix:

I have your memorandum of October 8, 1951, in which you suggest that there be a conference this week before our Saturday conference to discuss your memorandum dated June 1, 1951.

Frankly, I had overlooked the suggestion in your memorandum that this conference should be held during the first week of this Term after we had finished the listed business.

I will call a conference to consider the proposals in your memorandum just as soon as Justice Minton returns to the Court. I am certain it is desirable to have a full Court in the discussion of this matter.

I note the statement in your memorandum to the effect that you do not recall a single instance in which we postponed a vote in an argued case. My recollection is very definite that we have postponed many such cases. I will make a check in regard to this feature, and see whose memory is correct on this point.

The policy I have followed in regard to argued cases has been precisely the policy which I have followed in regard to petitions for certiorari and appeals, namely, that cases are passed for further study on the suggestion of a single Justice. I am positive there have been many, many argued cases upon which votes were not cast at the first conference following argument. We will continue to pass any argued case upon the request of any member of the Court.

Sincerely,

(Signed) Fred M. Vinson

Mr. Justice Frankfurter

P.S.: I submit a list of cases, beginning in the 1946 Term and running through the 1950 Term, upon which votes were not cast at the first conference following argument.

57

OCTOBER TERM, 1946

48

No.	Style	Argued	Voted on
38 & 39	NLRB, etc. v. Donnelly Garment, etc. Held for Brief of NLRB	Oct. 16	Oct. 26
20	United Federal Workers v. Mitchell	Oct. 17	Oct. 26
84	Oklahoma v. Civil Service Commission	Oct. 17 & 18	Oct. 26
49	Haupt v. United States Held for petitioner's brief	Nov. 21 & 22	Dec. 14
55 & 76	Bethlehem Steel v. N.Y. Labor Relations Board	Dec. 16 & 17	Jan. 18
148-155	Albrecht, etc. v. United States Held for reply brief	Jan. 8	Jan. 18
658	Packard Motor Car Co. v. NLRB Held for reply brief	Jan. 9	Jan. 18
89-91	United States v. National Lead, etc.	Feb. 3, 4, & 5	Mar. 8
253-256	United States, et al v. Pullman Co., et al	Mar. 11, 12 & 13	Mar. 29
12 Orig.	United States v. State of California	Mar. 13 & 14	Mar. 29
606	United States v. Bayer Held for briefs	Apr. 2	Apr. 12
346	Silesian Amn. Corp. v. Clark Held for petitioner's reply brief	May 1	May 10
934	Clark v. Uebersee Finanz Corp.	May 1	May 10
733	Interstate Natural Gas v. FPC	May 2	May 10
954	United States v. Petrillo	May 5 & 6	May 12

15

OCTOBER TERM, 1947

No.	Style	Argued	Voted on
66-68	Cox, et al v. United States	Oct. 14 & 15	Oct. 25
61	United States v. Di Re	Oct. 17	Oct. 25
47	Williams v. Fanning	Oct. 22	Nov. 15
60	Musser v. Utah	Nov. 10	Dec. 6
8	U.S. v. Line Material	Nov. 12 & 13	Nov. 22
13	U.S. v. U.S. Gypsum Co.	Nov. 13 & 14	Nov. 22
101	Eccles v. Peoples Bk. of Lakewood Village	Dec. 9	Dec. 20
157	Massachusetts v. United States	Dec. 10	Dec. 20
225	Bakery Sales Drivers Local Union #33 v. Wagshal Held for petitioner's reply brief	Dec. 17 & 18	Jan. 3
258	Schwabacher v. United States	Jan. 6 & 7	Jan. 17
397	International Br. of Teamsters v. Denver Milk Producers	Jan. 9	May 1
72	Shelley v. Kraemer	Jan. 15 & 16	Feb. 2
87	McGhee v. Sipes	Jan. 15 & 16	Feb. 2
448	Shade v. Downing	Feb. 11	Mar. 13

14

OCTOBER TERM, 1948

No.	Style	Argued	Voted on
24	Hynes v. Grimes Packing	Oct. 21	Nov. 6
50	Young v. Ragen	Nov. 17	June 4
59	Marzani v. United States	Dec. 8 & 9	Dec. 18
464	Clayton Mark & Co. v. FTC Held for petitioner's reply brief	Mar. 31	Apr. 23
258	NLRB v. Pittsburgh Steamship Company	Apr. 19	Apr. 30
558	FPC v. Panhandle Eastern Pipe Line Co.	Apr. 22	Apr. 30

6

OCTOBER TERM, 1950

No.	Style	Argued	Voted on
30	United States v. U.S. Gypsum Co.	Oct. 19	Nov. 11
77	Montana-Dakota Utilities Co. v. Northwestern Public Service Co.	Nov. 27	Dec. 9
83	United States, ex rel. Tuohy v. Ragen	Nov. 27 & 28	Dec. 9
66	Dowd v. United States, ex rel. Cook	Nov. 28	Dec. 9
96 & 205	Canton RR & Western Maryland RR v. Rogan	Nov. 28 & 29	Dec. 9
122	NLRB v. Gullett Gin	Nov. 29	Dec. 9
132	Spector Motor v. McLaughlin	Nov. 29 & 30	Dec. 29
170	United States v. Penner Installation	Nov. 30	Dec. 9
267	O'Leary v. Brown-Pacific-Maxon, Inc. Held for briefs	Dec. 7	Dec. 29
87	Warren v. United States Held for briefs	Jan. 2	Jan. 13
363	62 Cases, etc. v. United States	Mar. 5 & 6	Mar. 12
364	United States v. Allied Oil	Mar. 6	Mar. 12
301	Moser v. United States	Mar. 7 & 8	Mar. 12
399	Breard v. City of Alexandria	Mar. 8	Mar. 12
310	Calif. State Automobile Ass'n. Inter-Insurance Bureau v. Maloney	Mar. 8	Mar. 12
433	United States v. Champlin Refining Co.	Mar. 8 & 9	Mar. 12
421	Hammerstein v. Superior Court of California	Mar. 9	Mar. 12
435	Bowman Dairy Co. v. United States	Mar. 9	Mar. 12
420	Shepherd v. State of Florida	Mar. 9	Mar. 12

18

OCTOBER TERM, 1949

No.	Style	Argued	Voted On
49 & 50	Parker and Steiner v. County of Los Angeles Supplementary statements to come	Nov. 8	Nov. 19
51	Darr v. Burford	Dec. 5 (Submitted)	Dec. 17
230	Swift & Co. v. Compania Colombiana del Caribe	Dec. 15	Jan. 7
373	Cohnstaedt v. Immigration and Naturalization Service Held for petitioner's brief	Feb. 7	Feb. 18

4

COPY

(22 pages)

COURT HELD A CONFERENCE ON THIS MATTER

ON WEDNESDAY, NOVEMBER 7, 1951

2:30 p. m.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 8, 1951.

Dear Chief:

At the end of last Term, on June 1st, I circulated the enclosed memorandum with the hope that the points therein raised would be discussed at the beginning of this Term. The memorandum deals with what seemed to me desirable, even though minor, modifications in our procedure for disposing of argued cases. Naturally I do not think that the questions that I have raised are so frivolous as not to warrant even consideration. They may turn out to be unsound after discussion, but certainly not without it. And since these are matters that affect our argued cases, I hope it will commend itself to you to set aside an hour or so one of these mornings before our Saturday conference. A hasty, catch-as-catch-can, discussion at the tail end of our Saturday conference would not serve a deliberative purpose.

Faithfully yours,

F.F.

The Chief Justice.

RECEIVED
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CHAMBERS OF THE
CHIEF JUSTICE

MEMORANDUM OF MR. JUSTICE FRANKFURTER
FOR THE CONFERENCE

June 1, 1951

At the beginning of the Term I ventured the thought that a few relatively minor changes in our present procedure for dispositions on the merits promise improvement in our work without any loss of the benefits of our tried methods. Reflection on the work of the Term has served to confirm what led me to open that subject.

It would greatly surprise me if all of us did not feel that discussion at Conference of some of the important cases this Term has not been adequately informed. This implies no reflection on anyone. I have myself felt unprepared certainly as often, probably more often, than others. All I mean to convey is that often there was no adequate opportunity to study a case before we voted on it. Too often we have discussed and taken a vote on a case at a stage when few, if any of us, had come to grips with the issues or had satisfied ourselves on the authorities. As illustrations, I suggest *Zittman* v. *McGrath; Montana-Dakota Utilities* v. *Northwestern Pub. Serv. Co.; Standard Oil Co.* v. *New Jersey; McGrath* v. *Kirstensen; United States* v. *Yellow Cab Co.; Timken Roller Bearing Co.* v. *United States; Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n; Snyder* v. *Buck; Collins* v. *Hardyman.* I name these cases as they occur to me. I could name others as instances where some of us certainly would have voted with greater assurance if, at the time, we had had more adequate understanding.

It is significant, I believe, that we passed at Conference for further study a number of cases before us on petition for certiorari or on appeal. I do not recall any instance—there may have been such—in which we postponed a vote

on an argued case. Of course, on argued cases we have had the benefit of argument—but in too many instances argument of little help.

Likewise, a good many instances occur to me in which the Justice to whom an opinion was assigned changed his vote in the course of preparation of the opinion. Such change seems to me highly creditable to the judicial process and is bound to occur on occasion after the most thorough exploration at the bar or at Conference. But certainly such shifts of view have a direct relation to the thoroughness of consideration before views are formally taken. 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 a little 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 postponement of voting to the Greek calends. I am not proposing the perfection of futility. But in light of our calendar we should be able to have more time for a maturer process of deciding each case.

To that end I suggest that during the first week of the next term, after we get through with the listed business, we devote a Conference to a full discussion of the kind of changes in our disposition of argued cases that are indicated by what follows.

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 vote derive from too-limited consideration and therefore express a dubious judgment. In these instances would it not be desirable that the case be assigned for a full report on the issues without the taking of a vote? It makes considerable difference whether a writer feels himself to act as a reporter, or as the exponent of a conclusion reached with the formality of a vote.

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 on the Saturday following argument. 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 in a substantial number of cases the real difficulties emerge for the first time in argument or at Conference, and especially if the case is argued toward the end of the week, cannot be fully considered by Saturday. 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 later than Wednesday be put over to the following Saturday, unless they present simple or familiar issues? I am not unaware of the advantage of considering a case under the impact of freshness. But freshness presupposes adequate comprehension of what it is that is fresh. My whole point is that too often our consideration has not 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. Yet at times the Court hands down decisions on a Monday although a majority opinion or a weighty dissent was not circulated until the Friday and even the Saturday preceding. Would it not be salutary to have an unwritten rule that *normally* a decision be not handed down in which the last major opinion has not been circulated later than Thursday forenoon?

Would it not also be desirable that by common understanding we would not send in our returns, at least when notified of an impending dissent, until the differing views are before us? Here, too, there are of course conflicting considerations. The writer of the Court's opinion naturally would like to know where he stands. On the other

hand a dissent of which notice has been given might unexpectedly cause, if not a change of vote, modification of the proposed Court opinion. I myself have usually resolved this conflict in favor of prompt returns. I should prefer, however, to be relieved of the desire to relieve the writer of the opinion of suspense, if it were our common understanding that returns be normally delayed for forty-eight hours to give dissenters an opportunity to notify their brethren of their decision to prepare a full-dress dissent.

Of course, these suggestions are not intended to be exhaustive. Such as they are, they are designed only to furnish concrete basis for discussion.

F. F.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

May 16, 1953.

Dear Chief:

I am sorry to have to hold up the Rosenberg case for one more week. If by the end of the coming week I have not circulated a memorandum the order should go down automatically on Monday the 25th.

Faithfully yours,

F.F.

The Chief Justice.

[June, 1953]

Supreme Court of the United States.

Memorandum.

----------, 194

Dear Chief -

For Your Consideration.

K-T.

Memorandum Re Ballard v. United States

In the exercise of its supervisory power over the lower federal courts, this Court is directing the dismissal of the indictment in the Ballard case, because, following the practice then prevailing in the federal district court in California, no women were included in the panel of the grand jury which found the indictment. This Court's authority to supervise practice in the lower federal courts should be exercised only to vindicate appropriate standards of judicial administration. In finding that the exclusion of women from the grand jury panel is fatal to the indictment, the Court embraces a claim for the benefit of the petitioners which they themselves abandoned more than four years ago. And since women have not been excluded from jury service in the California federal courts since 1944, the Court cannot justify its action as a means of emphasizing the duty of adopting a proper practice. Thus the Court directs the dismissal of an indictment under circumstances which spell disregard of the fair administration of criminal justice.

The defendants were fully cognizant of the facts and of the issues involved when they made their objection to the composition of the grand jury panel and when they abandoned it. They objected to the array before the district court, saved the point when their objection was overruled, and assigned it as one of the errors in their specification on appeal to the Circuit Court of Appeals. In ample time for the defendants to rely on it in the Circuit Court of Appeals, this Court decided Glasser v. United States, 315 U. S. 60, which indicated that we deemed it important that the jury be selected on what may be described as a modern democratic basis. And yet the point made and overruled in the District Court was not argued in the briefs before the Circuit Court of Appeals, although the defendants vigorously urged other claims to reverse their convictions. When on the Government's petition, the case came before this Court, the defendants surely pressed every claim that seemed to them relevant to sustain the judgment which the Circuit Court of Appeals had entered in their favor. Their briefs and oral argument vigorously pressed other questions going to the validity of the indictment. The exclusion of women was not even mentioned. And this Court, with the full record before it, took no notice

of this question which now is found to undermine the entire proceedings. If a procedural point can ever be abandoned, objection to the jury panels was here abandoned.

With the Glasser opinion before them and with the point properly preserved in their appeal papers, the abandonment of the issue by the petitioners, when the case came before the Circuit Court of Appeals and later before us, can mean only that they had no confidence in the point, and that, in any event, they had not been hurt by what is now deemed a fatal error. It does not help the proper administration of criminal justice to allow the defendants to resurrect a point which they had abandoned four years earlier. Even now, this Court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process. We are dealing with an exclusion which has a long historic justification and even now has been only partially relaxed. Exclusion is still the law of Congress where a State has not seen fit, as a score of States have not, to make women eligible for jury service. The Court seems to use the instant case as an opportunity for correcting an error in judicial administration. In Thiel v. Southern Pacific Co. we upset a verdict and directed a new trial as an effective way of correcting an objectionable existing practice in the selection of juries. In this case the Court dismisses an indictment because of a past practice pursued in good faith under misapprehension of relevant law. But that misconception has been corrected and the proper practice has been enforced since 1944. The Court orders dismissal of an indictment to ensure a change in federal practice that has already taken place.

Dismissal of this indictment will not put an end to prosecution for the offenses which it charges. And so it cannot, in any event, relieve the Court from deciding the central issue before us, namely, whether the mails may be used to obtain money by fraud when the fraud involves the dishonest claim of beliefs about religion. Dismissal of this indictment does not terminate the prosecution for the offense charged because Congress by the Act of May 10, 1934 (48 Stat. 772; 18 U. S. C. §587) has expressly saved this prosecution. By that Act, Congress allowed reindictment where an indictment was found defective but the basis of prosecution is left untouched. It provided that

" whenever an indictment is found defective or insufficient for any

> cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session."

Considering the history of the litigation in this Court, the most reasonable assumption is that the Government will press this prosecution.

A conviction was had. The Circuit Court of Appeals reversed and ordered a new trial. On petition of the Government, we brought the case here. The Government urged that the judgment of conviction be restored while the defendants challenged the very foundation of the prosecution by invoking the constitutional guaranty of freedom of religion. In April, 1944, we reversed the Circuit Court of Appeals, found that the district court had properly "withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents." 322 U. S. at 88. But the case was remanded to the Court of Appeals without considering the question whether the First Amendment affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences. Three Justices concluded that the verdict should stand, and joined in an opinion by the late Chief Justice denying that the First Amendment afforded immunity for fraudulent use of the mail simply because the false statements concerned religious beliefs. A fourth Justice likewise thought this issue had to be met. He concluded that the indictment should be dismissed because it raised issues inextricably bound up with traditional liberty. Upon remand the Circuit Court of Appeals, after considering the issues which impliedly were remitted to it by this Court, found no flaw in the jury's verdict and affirmed the conviction. After three years the case is again here, and the main issue urged, both in argument and in the extended briefs, is the power of the Government to maintain this prosecution in view of the First Amendment. A decision merely directing the dismissal of the indictment because of error in the selection of the grand jury which found it will inevitably lead to the curing of this defect by re-submission to a properly constituted grand jury. It can hardly be believed that the Government will not feel it its duty to do so. The whole machinery of criminal justice will thus again be set in motion. A trial will follow, and the District Court will naturally deem itself bound by the decision of its Circuit Court

of Appeals, twice left undisturbed here, rejecting the claim of religious liberty.

It is too much like playing with justice to await a third review, two or three years hence, before facing this issue explicitly. The doctrine that a constitutional claim should not be prematurely considered here is a vital feature in the harmonious functioning of our scheme of government. But it is a rule founded in reason, not a mechanical formula for avoiding an aspect of a litigation when it cannot be fairly decided without meeting it. If this controversy could really be disposed of merely by finding that the grand jury was improperly selected, the rule of abstention from constitutional decision would come into play. Such would be the case if further prosecution wer e barred by the statute of limitations. But the Act of 1934, as we have seen, removes the bar and sanctions a reindictment, which the circumstances of this litigation are bound to evoke. We cannot escape our responsibility by dealing merely with the remediable invalidity of the indictment, leaving the prosecution untouched.

In short, the prosecution will continue unless we terminate it. We can terminate it only if this Court should deem prosecution of the charge upon which the jury found the defendants guilty, and which the Circuit Court of Appeals sustained, beyond constitutional authority. We ought not to give implied sanction to continue the prosecution, if we do not mean to do so, by withholding our view on an issue inescapably bound up with disposition of the controversy before the Court. Candor repels it and the requirements of constitutional adjudication do not justify it.

On the question of constitutional immunity we agree in substance with the views of Mr. Chief Justice Stone that "none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise." 322 U. S. at 90.

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CHAMBERS OF THE
CHIEF JUSTICE

June 11, 1953

MEMORANDUM FOR THE CONFERENCE

Re: Nos. 535 and 631.

Consideration of these cases was postponed to await the outcome of No. 439, Levinson v. Deupree. In the interest of time - considering the bulging docket for the next conference - let me summarize on paper what these two cases are about and state the disposition I think should be made of them.

No. 535.

This case raises quite a different issue from that considered in Levinson v. Deupree. It is a tort action to recover, under Pennsylvania law, for a ship-board injury. The District Court's jurisdiction was invoked on the basis of diversity of citizenship. The action was brought on the law side rather than in admiralty, and it was tried to a jury. The question is whether or not, since this could have been a suit in admiralty, and since, had it been so brought the maritime rule of comparative negligence would have been applied, that maritime rule should be applied in this case, though it was an action at law and though Pennsylvania law makes contributory negligence a bar to recovery.

The Court of Appeals applied the principle of comparative negligence. This is an important and very doubtful ruling. It was the opinion of the Third Circuit that the implications of some of our recent decisions required this ruling. Maybe so, maybe not. I think we ought to take this case.

No. 631.

This case is within the Levinson v. Deupree area, but I don't believe we should bring it here. The short of the case is this: It was a suit in admiralty for recovery under the Virginia wrongful-death statute. Virginia gives both in rem and in personam recovery and has built into the statute a one-year limitation. The ship was outside Virginia waters for over a year following the death and in rem proceedings could therefore not be had, though in personam jurisdiction could probably have been obtained. The Fourth Circuit, following State law, rejected the claim that absence of the ship tolled the statute.

I think the decision below is correct, though the case is not ruled by our Levinson decision. I would not grant and affirm summarily. But I don't think the case is important enough for a grant and full consideration. I would deny the petition.

F. F.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

June 13, 1953.

Dear Chief:

The enclosed sonnets may interest you inasmuch as they seem to be applicable to the young friend of yours who, in Korea, gave his life to his country.

Thomas W. Lamont, II, is the son of the present member of the J. P. Morgan, a man of broad outlook and devotion to things of the spirit, as evidenced by the fact that he is a member of the Harvard Corporation. The lad who died was of course a grandson of the old Tom Lamont, who was President Wilson's financial adviser at the Paris Peace Conference.

The poet, Francis Plimpton, is an old student of mine and now a member of a leading law firm in New York. In view of his sonnets I don't have to tell you that he has a poet's vein in him.

It will interest you to know that the poet and his subject were men of Exeter, and that when the other day a Lamont Art Gallery was opened at Exeter these two sonnets were inscribed on its walls.

Faithfully yours,

FF

The Chief Justice.

THOMAS W. LAMONT II, '42

1924-1945

I

He bore an honored name, another's name
That stood for high achievement, leadership—
Most boys who start with someone else's fame
Are quite content to let their lives just slip
Along prepared and easy grooves; not he—
He was himself, and no one else. He thought
His own way through until he reached the free
Convictions of a searching mind that's taught
But tests the teaching. His the sturdy kind
Of independent thinking that insists
That no idea has any right to bind
Men to it, but that each idea exists
For man, not man for it. And so began
What happens here—a boy becomes a man.

II

Whatever others did, he stood erect
And straight for what he thought was right, without
The unsecure and qualified effect
That's left by those whose faith is really doubt.
And then the war, that cut across the length
Of all our lives. His generation lost?
Not lost, but found in their awakened strength—
They faced their task although they knew the cost.
He chose the silent service, submarines,
Where courage isn't flame, but means the test
Of taut and tightened nerves against machines.
And now—the restless sea, it gives him rest.
He bore an honored name, but what is more
He added honor to the name he bore.

FRANCIS T. P. PLIMPTON, '17

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

February 6, 1953.

Dear Fred:

By way of proof that at least some members of Congress thought well of the proposal to have the heads of the Executive Departments available for putting and answering questions on the floor of the two houses of Congress, I commend to your reading S. Rep. 837, 46th Cong., 3d Sess. (February 4, 1881).

There were some hard-boiled lads among the eight Senators who signed that report.

Faithfully yours,

F.F.

The Chief Justice.

C. J. read
2/6/53-

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May 18, 1953.

Dear Brethren:

In view of the turn that the discussion on the McCarran proposal took - the Chief's strong espousal of it - I should like to add a few words to what I said at Saturday's Conference, which I then withheld because I did not want further to postpone consideration of our business.

The central point in what I said about the McCarran proposal was that comparison between the Chief Justice's salary and that of any political officer was irrelevant to what is the controlling consideration affecting the Court, namely, the relation of its members one to another. Throughout the Court's history the Chief Justice has been merely primus inter pares, first among equals. This has been true not merely as to the determinations of the Court. Even details in the management of the Court's business - arrangement of the calendar, departures from the rules as to length of arguments, etc. - are matters for the collective action of the Court, except insofar as exigent circumstances require the Chief Justice to act for the Court on the assumption of implied ratification. This governing principle of collective action based on the equality of status of every member of the Court has not only been the great historic fact about the Court's working; it is also indispensable to its strength as an independent tribunal, unlike one of the great departments of government with a superior head.

The only disparity in the treatment of the Chief Justice and that of the other members of the Court for 164 years has been the extra salary of $500. Through all the changes in the scale of salaries that differential has been left undisturbed. The pettiness of the amount indicates that it was merely a kind of ceremonial rosette - just as he has precedence on public occasions, and within the Court, over the other members of the Court even though he be the most junior in service among them. The great power of assignment (in which I strongly believe) could be changed by a majority next Saturday.

But if the salary of the Chief Justice is to be related to that of the Speaker or the Vice President because forsooth their salaries may have been related in the past, then equally so should the salaries of the other members of the Court be related to these political functionaries.

If to create a gap, where there was none heretofore, between the Chief Justice's salary and that of political officers becomes significant it becomes equally significant to create such a gap between the salaries of these political

officers and the other members of the Court, when heretofore the differential was merely nominal. It cannot be that the creation of such a gap would be significant in the case of the Chief Justice and not be significant in relation to the other Justices. If introduction of the argument of comparison with political officers has validity it not only subordinates the other members of the Court to outsiders but inevitably within the Court. That is the fatal objection, I submit, to the proposal. I reject the relevance of a political comparison in regard to the place of this Court in our scheme of things. By acknowledging it, by sponsoring it, we would change the presuppositions as well as the practices of 164 years, during which this Court has been an institution apart - apart in the feeling of the people, the feeling of the other branches of the Government, the feeling within the Court as to the other branches of Government.

Of course the Court has not sponsored this proposal. But we cannot shut our minds to the fact that it is widely believed that the Court is supporting this bill. I am not suggesting that anyone is responsible for such a misconception. I do say that it is a belief that has considerable currency. Judging by what was said and by what was left unsaid the majority of the Court, unless I can't count heads, would disavow responsibility for urging this measure. To my mind it deserves serious consideration whether it would not enhance the prestige of the Court if it could be brought to the knowledge of the Congress that we are not behind this effort in any way so far as it affects the salaries of members of this Court.

Faithfully yours,

F. F.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 12, 1951.

Dear Fred:

Thank you for your letter of the 11th.

If it is necessary to put formally in writing that I do not regard my memory infallible on anything, I am glad to do so.

My point about postponing a vote did not imply that I thought we voted definitively on Saturday on all the cases argued the preceding days of that week. I should have expressed myself more clearly because my point is very different, and for me important. Of course votes are postponed. This is so for a variety of reasons: sometimes because there is a tie and the fellow who passes isn't ready to vote; or somebody asks that the case go over for one reason or another; or a reply brief is due - a not uncommon instance - or, or, or.

My point is that so long as it is a standing rule that a case is normally to be voted on the Saturday, that is the course that will be followed except for reasons that usually have nothing to do with the need, as it appears to me, of greater study and greater deliberation by the Court as a whole before any discussion ought to be started. I was not unmindful of instances where there is discussion - more or less inadequate - and then the case is put over. I was addressing myself to the desirability of recognizing that the burden ought not to be put on any one member of the Court to say "I am not prepared" or "I want this case to go over," when the practice of the Court, and therefore the momentum operating on every man, is to discuss the case on necessarily too limited consideration before the discussion is begun.

This is the problem to which points 1. and 2. of my memorandum address themselves. The Failure to reach a final decision because a particular Justice wants it to go over,

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or because there is a tie vote awaiting somebody to make up his mind, or for some other reason unrelated to points 1. or 2., do not touch my difficulty.

I wholly agree with you that the questions I raised in my memorandum should be discussed by a full Court and that therefore we should await Brother Minton's return.

Faithfully yours,



P.S. It would not be without interest to analyze the list of cases beginning with the 1946 Term in which there was a postponement of votes. Thus I notice that 9 cases in the October Term, 1950, were marked as voted on March 12th, from which I infer that we did not get around to a consideration of thoses cases at the Saturday Conference, and they had to go over to another Conference on Monday. Of course that has taken place more than once. Suffice it to say that the Gypsum case in the October Term, 1950, is a good illustration of what I am talking about. That case was argued on October 19th and not voted on until November 11th. I asked Stanley whether he had any recollection for this postponement and he reminded me that the reason was action on my proposal that inasmuch as the case had been here before he, Stanley, be asked to prepare a memorandum for the clarification and guidance of the Court.

The Chief Justice.

May 27, 1953.

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MAY 28 11 57 AM '53
CHAMBERS OF THE
CHIEF JUSTICE

Dear Brethren:

What follows comes to me in a letter this morning from a lawyer who is especially well informed about the history and the work of the Court - one whose arguments are much esteemed by every member of this Court:

> "Why does not the Court take up again the old custom that lapsed with Hughes, C. J., of holding cases over the summer? See, e.g., the first two or three cases in 280 U.S. What is the virtue of this hurry every spring, with or without later reargument?"

It is not without interest that the first two cases in 280 U.S. are cases that had been assigned to Brandeis, in 1929, when he was at the height of his powers. I could, of course, supplement the references to cases in 280 U.S. with other cases in preceding terms, e.g., Wan v. United States, 266 U.S. 1, likewise a Brandeis opinion.

Why do I circulate the observations of my correspondent? For the simple reason that I think a judgment as weighty as I deem to be his is not undeserving of knowledge by the Court.

F. F.

NOTED
MAY 28 1953
F.M.V.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 23, 1951.

Dear Chief:

Unless I am mistaken it falls to me to assign No. 3, United States v. Jeffers, and No. 83, Rochin v. California.

1. I have asked Tom Clark to take No. 3 and he is agreeable.

2. As to No. 83, the Rochin case, in view of Hugo's forecast as to the difficulties that anyone will encounter in writing that case for the majority, I had better take it on myself, and so please assign it to me.

3. I hope I have manifested to you that I care little what is or is not assigned to me. It is from that point of view that I should like you to know that if there is any case on the list that you would have special reasons for assigning to me, I hope you will not feel disinclined to do so because I have taken on No. 83. There is no reason in the world why you should not assign to me another case, if you are so minded.

Faithfully yours,

F.F.

The Chief Justice.

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The Black Day

To the Memory of Laurence Duggan

God help that country where informers thrive!
Where slander flourishes and lies contrive:—
Kill truth by whispers and keep fraud alive.

God help that country by informers fed
Where fear corrupts and where suspicion's spread,
By lies and libels, even to the dead.

God help that country where th' informer's shame
Outshouts the decent silence to defame
The dead man's honor and defile his name.

God help that country, cankered deep by doubt,
Where honest men, by scandals turned about,
See honor murdered and will not speak out.

God help that country—but for you—for you,
Pure heart, sweet spirit, humble, loyal, true,
Pretend, pretend we know not what we do.

ARCHIBALD MAC LEISH.

New York Herald-Tribune, December 24th 1948

The Sacramento Union

J. L. ROSENBERG, Editor — C. E. BOROM, General Business Manager — C. A. MOORE, Advertising Manager

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PHONE DIAL GIlbert 2-7811

MONDAY MORNING, JULY 11, 1949

The Hiss Trial

THE TRIAL of Alger Hiss is over, with the jury, standing at 8 to 4 for conviction, unable to agree upon a verdict. The jury's duty was difficult. It had to decide: Did Alger Hiss lie under oath? Could Alger Hiss be believed under oath? Did he have commitments, of a political and personal nature, which caused him to believe that a lie is justified if it serves a good purpose? Could Whittaker Chambers, his accuser, be believed under oath? Is it possible that a man who has so denounced himself, has, by confession and penitence, become truthful?

Hiss was under indictment for a shameful crime, lying under oath.

Into this extraordinarily complex problem two associate justices of the U. S. Supreme Court, Frankfurter and Reed, interjected themselves, obviously to add the weight of their high office to sway the jury in Hiss' favor. They had no way of knowing whether he was guilty or not. The Associate Justices could not and did not say that they knew that Hiss did not do what Chambers said he did. The most they could say was that Hiss had been a good person and that they could not believe ill of him.

In doing that they acted improperly. Their high positions may have swayed the jury unduly; some jurors might even believe that such lawyers might know the truth—which actually, as the hung jury indicates, nobody can know for sure.

When the case is retried, as the government has indicated it will be, it is to be hopd that the other associate justices on the Supreme Court pass a rule, or cause the chief justice to issue an edict, prohibiting Frankfurter and Reed from repeating their shameful conduct. It is not unreasonable to presume that their presence in the Hiss trial contributed to the hung jury.

August 8, 1949

Dear Felix:

I have your letter of the 6th in regard to the letter addressed to me by Herbert E. White dated July 29th, copy of which was sent to you and Stanley.

I have done no more with the letter than to read it. I do not recall ever having responded to such an epistle. As a matter of fact, if I did it would take a large part of my time as there are a lot of letter writers and other folks making comment from time to time about the Court and members of the Court. In any event, I would not have responded to this letter since he indicated that copies of it had been forwarded to you and Stanley, and if any statement were to be made in regard to the Hiss Trial, I thought it would be a matter to be considered by you or Stanley.

It is not as pleasant down here as it is in Mass., but it is not too bad. The state of mind is an important factor in any conclusion that one reaches in regard to the weather or, for that matter, anything else.

Roberta joins me in the wish that Marion and you are getting a real rest which will permit you to come back "steamed up" - as if you were ever in any other condition.

With kindest personal regards,

Sincerely,

(Signed) Fred M. Vinson

Honorable Felix Frankfurter,
Associate Justice of the Supreme Court,
Charlemont, Massachusetts.

FMV:McH

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

December 26, 1950.

Dear Chief:

There is a wedding this Saturday which I would much like to attend provided I can do so without the slightest inroad on the Court's convenience. As you know, I don't think our conferences ought to be under any sense of hurry, and certainly I do not want to be the person who contributes to such restraint. For all I know Saturday's conference may, in its normal course, well run into the afternoon and preclude my attendance at the wedding. That wouldn't bother me in the slightest. But I write to ask whether it may not be to everybody's convenience - or, at least, inconvenience to no one - to have our conference on Friday of this week instead of on Saturday.

Faithfully yours,

FF

The Chief Justice.

December 27, 1950

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CHIEF JUSTICE

MEMORANDUM FOR THE CONFERENCE:

The Conference this week will be held on Friday, December 29, at 11:00 a. m. instead of Saturday, December 30.

The Chief Justice

Thank you very much

F.T.

1

3018 Dumbarton Ave.
Sunday - Oct 10, 1948 ?

Felix Frankfurter

Cambridge, Mass.

Dear Chief:

This is a letter from a friend.

Of course, I remembered our discussion some weeks ago of your proposal to have admissions precede opinions and orders, and the vote that followed. But I was startled when you announced yesterday that the proposal would be carried into practice on Monday for the simple reason that it has not been the custom of the Court to change its arrangements by a mere majority vote against the strong feeling of the minority. And when I invoke custom I do not merely refer to something that has no better title to respect than that which has been done. That custom is rooted in human nature and ratified by wisdom. The point is that good feeling in the Court, as in a family, is produced by accomodation not by authority - whether that authority is of a parent or of a vote.

Of course votes - majority votes - must decide judicial business and such votes must be acted upon. But very different considerations apply to the family life of the Court - the way it should carry on its corporate life, its relations to the other branches of the Government, to the Bar, to the public. In such matters, the controlling considerations are those that relate to the best way of assuring inner harmony, whatever intellectual differences there may be. And that means not votes but accomodation - the give-and-take of comrades for accomodation to the purpose and not mere counting of heads.

Nor does that involve subordination of the majority to the minority. It means finding the largest common ground for agreement. And time spent in trying to secure it is time spent for the best possible purpose. Of course, even a strong minority with strong feelings should be very mindful of the feelings of the majority. In such a situation, time and strenuous search for some accomodating proposal to meet the feelings of both sides can work wonders. In any event, let me assure you that, whatever may be the strong feelings on your part for the changed order of business some at least of the five who voted did so as a matter of acquiescence and not out of deep feeling that the change is wise or important.

These being feelings of mine not born of the moment, I thought you should know them.

Very sincerely yours,

Felix Frankfurter.

February 7, 1947

Dear Stanley:

Let me spell out a bit what I said so badly at lunch.

"Judicial legislation" expresses a deep principle of our system of law and government. Like other principles, it cannot be expressed in mathematical or quantitative terms. And so it is sometimes used to convey what it embodies and sometimes it is not. If "judicial legislation" is intended to mean that courts never add something new or make something, but only "find" what is already in being, it is a fiction. If, however, it is used to convey that courts are very different law-makers from Congress or other legislatures, it states one of the basic postulates of our Government.

To speak of "retail and wholesale law-making" is a colloquial way of indicating the difference in functions between judiciary and legislature. I could give many examples - just as the best way to explain what is poetry and what is not, is to give good samples of each. For me good examples of inadmissible judicial legislation are the Court's opinions in the original Banco and Jewell Ridge cases and the dissenting view in Holly Hill.

Perhaps this quotation helps to make clear what is, I believe, a vital distinction:

> "The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' Kirschbaum Co. v. Walling, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."

Ever yours,

Mr. Justice Reed

FF

October 10, 1950.

Dear Brethren:

As we are beginning a new term, I am venturing to submit for your indulgent consideration some suggestions for improving the traditional process of opinion-writing. I do this on the assumption that we need not deem that the practice we have inherited is perfect and therefore immutable. I am for making any change in the traditions of the Court that is clearly calculated to improve the quality of the Court's work.

I am emboldened to put these suggestions because their underlying thought expresses the views of some of the ablest Justices of the past with whom I had the good fortune to discuss these matters long before I came here. It is hardly necessary to add that of course my suggestions do not imply criticism of the present Court or of its doings. I am addressing myself to a situation that long antedated all of us.

Faithfully yours,

F. F.

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CHIEF JUSTICE

October 10, 1950

SUGGESTED IMPROVEMENTS FOR DISPOSITION OF ARGUED CASES.

1. Postponement of Discussion at Conference. The present practice of voting on cases on the Saturday following argument is bound to lead to some ill-considered action. If a week elapsed - between argument and voting - there would be opportunity for investigation of particularly troublesome problems, often those that had emerged at argument.

2. Postponement of Definite Vote at Conference. Normally, the Court now votes upon every argued case the first time it comes up at Conference. From the frequently tentative nature of the views expressed on the basis of limited consideration, it would seem desirable that assignments be more frequently made for memoranda reports rather than for opinions on the basis of such tentative views. It makes considerable difference whether a writer acts as a rapporteur or as an advocate, more or less, of a predetermined conclusion.

3. Postonement of Returns on Opinions. Is it not desirable for members of the Court to have written expressions of the differing views, at least in obviously important cases, before sending returns on majority opinions? If it were the practice to delay sending returns, say for forty-eight hours after a Court opinion is circulated, prospective dissenters could decide whether they plan to prepare a full-dress dissent and notify the Court accordingly. It would be still better if all returns were delayed until dissents had actually been circulated, on the assumption of course of observing the tradition that dissents have priority in a Justice's work. It has been a matter of common belief that there is too much of a tendency to take too quick action on circulated opinions in support of one's vote.

4. Postponement of Handing Down Opinions. Opinions that take weeks in preparation deserve more than scanty attention. Yet at times the Court hands down decisions on a Monday although a majority opinion or significant dissent was not circulated until the Thursday, Friday, or even Saturday preceding. Would it not be salutary to have an unwritten rule that normally a decision be not handed down in which the last major opinion has not been circulated earlier than Thursday forenoon? F.F.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 29, 1948

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CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief:

1. Our conversation leads me to make a change in my Kovacs opinion, indicated by the underscored clause in the following sentence:

> "While I am not unaware of the circumstances that differentiate this case from what was ruled in Saia, further reflection has only served to reenforce the views I expressed in the latter case."

2. Deeming the talk about "preferred position" to be harmful to correct analysis of questions concerning the constitutional limits of free speech, I consider Kovacs peculiarly appropriate for saying my say about it. I am convinced of this precisely because the case is not disposed of on the basis of what I deem a misleading formula.

Perhaps I am unconsciously influenced in thinking this because I have long believed it desirable that Justices should express individual views on constitutional issues, even when one reaches a common result but would formulate it differently. In short, I see no intrinsic harm, and often much good, in multiple opinions. I expressed that view in a letter to the Journal of the A.B.A. more than a quarter century ago, incidentally pointing out that one of the really great figures in the Court's history - Miller - wrote 169 dissenting opinions out of a total of 783 rendered by him in the 28 years of his service. (9 A. B. A. J., p. 536) (See also Hughes, The Supreme Court, 67-68) I acted on this conviction very shortly after I came here, in Graves v. New York, 306 U. S. 466, 487. After all, that is the way this Court started its career - with multiple opinions. Of course there are things that hurt the Court - which rightly impair the public confidence in its complete disinterestedness on which the Court's authority ultimately rests - but the writing of conscientious opinions courteously expressed, whether for the Court, in concurrence, or in dissent, is not one of them. We are here largely for that purpose.

Faithfully yours,

FF.

The Chief Justice

Original Filed in VIP Correspondence File

[Oct, 1950]

Supreme Court of the United States

Memorandum

----------, 194---

Chief:

Please assign S.O.S F.T.C to Burton J. in any Event - that is, Even if Hugo assigns him also Loyalty Oath

(Conversation between a man who called and identified himself as Westbrook Pegler and Katherine Watters, about 12:15 p.m., December 17, 1948 - this summary was made shorthly after the conversation took place.)

I answered the phone in Mr. Justice Frankfurter's office at about 12:15 p.m., December 17, 1948, and a man's voice responded asking if this was Frankfurter's office. He spoke quickly and not very distinctly and said something else about a message yesterday. I told him I did not quite understand him and that I was Justice Frankfurter's secretary; then he said that he was Westbrook Pegler and had called here yesterday to ask if the Justice would speak to him. He asked me if the Justice had received his message. I explained to him that I was not here yesterday afternoon (Thursday, December 16th) and that Court was in session, and that perhaps he had spoken to the messenger.

Mr. Pegler then said that he wanted to know if the Justice would see him - he said that it was in regard to the Alger Hiss affair. He went on to tell me that Alger Hiss had mentioned the Justice in his testimony, and he wanted to know if the Justice would have something to say about it and would I find out. I told him that my instructions were that the Justice did not make statements to the press and that therefore I did not think he would be able to see the Justice. Mr. Pegler interrupted me and said that he knew this, but there were always exceptions and that he, Mr. Pegler, had just had an interview with another Justice of the Court. He asked me if I knew that Alger Hiss had been indicted, and went on to say that Mr. Hiss' mention of the Justice (I believe he said mention of the Justice in relation to Alger Hiss' job) "calls for some statement." "In fact", Mr. Pegler said,"it is even possible that the Justice might give testimony."

I repeated that the Justice did not give interviews of this type and when Mr. Pegler asked if he should call me back to find out I said I did not think it would be necessary.

Katherine Watters

December 17, 1948

January 6, 1947
Written on the Bench and typed from notes.

Dear Frank:

You have just told me that you "were told by a member of this Court that I saw the article before it was published." The reference is to Schlesinger Jr.'s article in January Fortune. Whoever told you that told you an unmitigated untruth. Not only is it untrue, but it has not the remotest basis in any fact. Not a shadow of a scintilla of fact, no matter how distorted!

The facts are: I have known young Schlesinger since his undergraduate days at Harvard College. Young Arthur's father is one of my close friends at Harvard. I had a letter from young Schlesinger stating that he was writing an article for Fortune and had seen every other member of the Court, could he come and see me. It would have been boorish not to see him and tell him what I did tell him, namely, that I shall not say a word about the Court's work or about any of its members; that I can do for him what I would do for anyone who asked me about the functions of the Court, that is, what books to read and who was most competent to talk about the Court, people like Judge Learned Hand, Professors Paul Freund and Henry M. Hart, and that's all I would say or did say. He told me he had, as a matter of fact, talked with all the people I had mentioned. When he left, he said that only one other member of the Court was as tight-mouthed with him as I was.

He never again talked with me about the article; at no stage of the writing did I see a draft of it, although my wife, after reading it, said, "I think you should read it - you'll learn some interesting things that even I know are not so, and some I don't know about."

I repeat that anyone who told you that I saw the manuscript of the article, or knew anything about its contents before publication, is stating that which is completely false. Anyone who repeats the falsehood, with knowledge of what I have here written, will be repeating the falsehood knowingly.

Sincerely yours,

(signed) Felix Frankfurter

Mr. Justice Murphy

December 3 - 1948.

Dear Chief:

I'm sorry to miss a boat - particularly if it's a good one. I hope there's another one - even if I catch it tardily.

Nobody is more ready - I firmly believe - for face-to-face talks than I. A "Gallup poll" might show I indulge in too many around here. But they take time - and other people's time - which I like to respect. I am at any time at your disposal.

Ever yours -

FF

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

Charlemont, Mass.
Aug. 6 '46

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
AUG 8 9 22 AM '46
CHAMBERS OF THE
CHIEF JUSTICE

Dear Red:

I have received a copy of a letter addressed to you, under date of July 29, by one Herbert E. White, purporting to be a lawyer. It would not surprise me, if you disregarded so ignorant and impudent a communication. But if you do see fit to answer it may not seem inappropriate to you to point out to White that

(1) the Supreme Court is not a factory of which the Chief Justice is the boss who gives orders, whereas, of course, the Chief Justice is merely primus inter pares, so that each member of the Court is guided (in his conduct) by his own conscience; that

(2) the past relations which led to my being called as a witness in the Hiss trial disqualified me from sitting in any case involving Hiss's liberty in any event, as was recognized (including the justification for testifying) even by Conservative lay papers, like the

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Boston Herald and the Dallas News.

If the circumstances were the same, I would do the same, for I would feel like a craven not to.

I hope the cruel Washington weather has abated, or that, in any event, Rolenda and you are not suffering from it.

Sincerely yours,

Julia Ward Howe

April 23, 1947

Dear Brethren:

Monte Lemann is, I suppose, unexcelled at the Louisiana bar. He happens to be an old and close friend and so it was natural for him to send me the enclosure. I thought it might interest the brethren.

F. F.

APR 24 1947

Copy

April 19, 1947

Hon. James D. Simon
St. Martinville, Louisiana

Dear Judge Simon:

I am taking the liberty of writing you with respect to the Willie Francis case, in which I have been much interested, and which is now before the Pardon Board.

The five to four division in the Supreme Court of the United States shows how close the case must be considered upon purely technical grounds. But what has impressed me most in my consideration of the case is the fact that where a similar question has arisen elsewhere, the view has always been taken that considerations of humanity should preclude execution. I am referring particularly to the practice in England, which I understand to be well settled. This has impressed me especially because the English are not soft people and have a deserved reputation for the recognition of fundamental human rights.

Yesterday, at a meeting of a Committee of the Louisiana Law Institute, I brought up the Francis case for informal discussion at lunch with those seated near me. Professor Ray Forrester, of the Tulane Law Schook, and Mrs. Daggett, of the faculty of the Louisiana State University Law School, both said that they felt strongly that Francis should not be executed.

It does not seem to me to be a determining factor whether electric current passed through Francis' body or not. The controlling circumstances would be the fact that he was exposed to the ordeal of an abortive execution.

I realize that the eyes of the world are in a sense upon us in this case, because I have myself had communications from lawyers of high standing, for whose opinion I have a great respect, one of whom wrote me recently that he felt it would be a serious blot upon our State if Francis was permitted to be executed. These considerations do not, of course, relieve the Pardon Board of its responsibility of reaching its own decision, but I imagine that you and the other members of the Board will feel as much influenced as I have been by opinions so entitled to respect. Where at the very least there is so much room for doubt as to what is the proper course to adopt, the further punishment of Francis is not as important as adherence to the highest standards of decency and humaneness which a large and informed body of public opinion feels would be betrayed by Francis' execution.

I hope you will forgive me for writing you, but I felt that I would be more comfortable with my conscience if I did so. I am sending copies of this letter to the other members of the Pardon Board, whom I do not know as well as I know you, and to my friend, Mr. Culligan, as well as to Mr. DeBlanc, who has appeared as attorney for Francis.

With personal regards, I am

Sincerely,

(sgd.) Monte M. Lemann

cc Hon. Fred S. LeBlanc
Hon. J. Emile Verret
Hon. M. E. Culligan
Mr. Bebrand De Blanc

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

June 14, 1947

Dear Chief:

Since you inquired about the returns in the Foster and Gayes cases, you may care to know that their disposition now turns on you.

As to Foster - Reed, Jackson and Burton agree with the opinion.

As to Gayes - Reed and Jackson agree with the opinion, Burton merely concurs in the result. He advised me that he does so because he would prefer to have the case go on the validity of the original sentence in 1938. That, however, would jeopardize even a majority for a result in the case. It would drive Reed away certainly, and would evoke a blast in holding as a matter of law that a boy of sixteen needed no counsel. As it is, Black advises me that he is even thinking of agreeing with my opinion in Gayes on the Canizio ground.

Faithfully yours,

F.F.

The Chief Justice

Original Filed in VIP Correspondence File

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 27, 1947

Dear Chief:

In looking over the list of cases for argument the next session I note that No. 3, Winters v. New York, opens the week of November 10th and No. 60, Musser v. State of Utah, closes it, with a lot of Sherman Law and Alien Property Custodian problems in between. Winters and Musser concern the same essential problems, namely the protection of freedom of speech as a limitation upon the power of a State to define crime. It occurs to me, therefore, that it might be advantageous to have the argument of the Musser case immediately follow that of Winters. We would thereby have concentration of argument and of consideration on our part in regard to two cases moving in the same legal field.

Assuming that this would be desirable, of course I do not know whether it can now be arranged to have Musser follow Winters.

Faithfully yours,

FF.

The Chief Justice

Original Filed in VIP Correspondence File

[1947]

Supreme Court of the United States

Memorandum

----------, 194---

Private

I'm trying my hardest to make Frank vote against hearing - since he told me that Wiley has been, and is being, instigated to stir up the decision taken this morning, and urged even by one of the dissenters. A word from you to Frank

Supreme Court of the United States

Memorandum

----------, 194---

might save what is
a situation fuse
of international
importance.

F.F.

The Chief Justice

next conference

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

May 9, 1947

Dear Chief:

In view of a misunderstanding in the Clerk's office in regard to the order to be followed in the printing of multiple dissents, you may deem it desirable to let Cropley's office know the rule arrived at by the Conference.

As I understand it, the following practise was agreed upon:

1. Oral delivery of dissents should follow the order of oral delivery of majority opinions, namely, from juniority to seniority.

2. In printing dissents the order of printing Court opinions should be followed, namely from seniority to juniority.

Now that we have it straight as to the oral delivery of dissents, we ought to be able to straighten out their order of publication.

Sincerely yours,

FF.

The Chief Justice

Original Filed in VIP Correspondence File

[1947]

Supreme Court of the United States.

Memorandum.

File

----------, 194

I've had a terrible
struggle with myself
to abstain from
wearing the red
robe. So — if
you give me se-
ductive Encourage-
ment or incitement
I might turn up as a red-coat.

October 27, 1947

Dear Felix:

I have your note in regard to the listing of the cases for argument at the next session.

I will talk to the Clerk and see what, if anything, can be done about having No. 60, Musser, follow No. 3, Winters.

I am truly,

C.J.

Mr. Justice Frankfurter.

Felix -

The Clerk will contact counsel in 60, and if it can be arranged, it will be.

D.J.

Memorandum for the Conference

In looking over the list of cases for argument for this week I noticed that No. 91, Lee v. State of Mississippi is to be submitted.

The Lee case, it will be recalled, is a capital case involving a Negro minor. Disposition of such a case - either affirming the conviction or reversing it - involves a determination which may fairly be called among the most important which the Court renders, in that it involves the susceptibilities of the States on the one hand and the feelings of the most sensitive minority group on the other. It is, I believe, against good judicial administration to dispose of such a case without oral argument and merely by reading briefs not always adequately revealing. I suspect submissions on brief when they do occur here are attributable, certainly in part, to the different functions which oral arguments play before different tribunals. For oral arguments are not deemed as vital in every State court as they have always been conceived to be here. (In Ohio for instance, unless I am misinformed, oral argument is not a matter of course but requires leave granted upon motion.)

Because of the importance which this Court attaches to oral argument - not necessarily because of the quality of the argument itself, but because of the inquiries it stimulates on the bench - the Court has in some instances in the past refused to accept submission on brief and requested oral argument. The Thirteenth Amendment, I know, would prevent us from physically dragging counsel before us to argue a case, but of course, if the Court puts down an order requesting oral argument, it is hardly likely that counsel would refuse to appear.

I am not unaware of Rule 25 whereby a case "may be submitted". But it is for the Court to accept or reject such submission. It has been a common practise for the Court to reject submissions, not to give "leave to submit case on printed briefs". Thus in the Journal for the October Term 1935, January 13, 1936 in No. 2 this order came down: "In view of the gravity of the questions involved, the Court directs that oral argument be had, and the case is set for oral argument, etc." See Journal for October Term, 1936, p. 45, direction as to No. 20. Likewis as to No. 28, October Term 1937, (Journal p. 49). In two recent cases ~~xxix~~ oral argument was requested after reargument was ordered. In Edwards v. California

on May 5, 1941, the Attorney General of California was "requested to appear either in person or by his representative to present the views of the State, et" (Journal, October Term, 1940, p. 224). And again in Skinner v. Oklahoma, the case was restored to the docket for oral argument and the Attorney General of Oklahoma or his representative was "requested to participate in the oral argument." (Journal October Term, 1941, p. 222).

It seems to me we should not accept submission in the Lee case but at once direct oral argument.

F. F.

November 17, 1947

Supreme Court of the United States.

Memorandum.

----------, 194

C O P Y

Nov. 14, 1947

Dear Zotz:

Just after reading your book, I met Mr. Justice Frankfurter, and sought to tell him of your use of words such as rutile and saltation. The Justice--there I go with antonomasia--likes a neat word or phrase himself. Generous to me, he avoids acroamatism when talking with an exoteric. But I feel awkward in his presence, and wonder if he views me with despience. As a matter of fact, I am always indulging in nugacities, because I am actually only an inceptor.

I envy you your orthoepical and neologistic achievements. You could have been a logogogue; or in India, a munshi. Never could I conceive you guilty of cacology, antiloquisms or an enallage. Perhaps my chief admiration is for your talent as a paronomasiast. Moreover, you are cleverly tralatitious.

This is sincere tribute from an abecedarian, indeed a mere caechumen, constantly using catachrestisms. Each day as I greet the ortive sun, I believe myself more insulse, eutectic and sciolistic. I scarcely know a sural from an etymon--unless the latter is expressed in uncial characters. But if I did, I wouldn't jactitate about it; I loathe Thrasonic people.

Nevertheless, I know you will excuse my nescience. Maybe in childhood I ran into a mangonel, somehow damaging the metopion. And of course, it could have been hebephrenia.

I do hope to see you soon, that you will be typically unaphonic, and that I shall find you more carnose than macilent. I only wish I had a panchymagogue for you.

Best of luck. Keep the Jolly Roget flying. Captain, I wouldn't kidd you.

Your friend,

Lewis Wood.

Captain Walter Karig.

Supreme Court of the United States.

Memorandum.

----------, 194

Chief

This may — or

may not — interest

you!

W. F.

November 25, 1947

Dear Stanley:

I prefer not to withhold from you that it pained me to hear you express agreement with the substance of Hugo(s pronouncements as to the calamitous implications of the General Electric case and the prophecy of disaster for our free life, if the case were not strictly confined to its own facts - if, in short, it were not for all practical purposes gutted, even though nor formally overruled.

It is not merely that Hugo had ten years in the Senate during which he had an opportunity to do something about the awful disaster to our economy that the General Electric case is supposed to be - four of which were in the heyday of the New Deal, when measures against monopoly were being successfully fashioned and when the Senate contained such powerful leaders against monopolistic tendencies as Borah, LaFollette, Norris and Wheeler. If there be this great danger to our free life, Congress can change it in five minutes this afternoon. Hugo's reply to this is: "You know very well that Congress wouldn't pass the necessary legislation." What is that but a distrust of the democratic process and a utilization of the non-democratic feature of our Government, of this Court, to fashion a policy that the representatives of the people will not adopt.

All this is on the theory that we really know what is good for the country much better than the representatives of the people do. That's exactly what McReynolds and Co. in their day thought. All the "liberals" threw their hats in the air when Brandeis castigated the then majority for assuming to exercise the power of a "super-legislature". It would shock Holmes and Brandeis out of their boots to learn that the beauty of the Sherman Law is its vast vagueness, whereby five members of this Court are able to decide what is good or bad for"the economy" of this country. Yes, I know, I am again invoking the names of Holmes and Brandeis. I am unashamed to be reverent of the great.

Faithfully yours,

Mr. Justice Reed

FF

June 23, 1947

Dear Harold:

One of the wisest of men said, "Where there is no moral indignation, there is to that extent no morality." Of course I am outraged by Drew Pearson's column to which my attention has just been called. I have known every man who sat on this Court since 1906 - many of them well and half a dozen intimately. It is on that besis that I can say to you what I have said behind your back, that this Court never had a Justice who was harder working or more conscientious.

I say this to give vent to my feelings, not that you need confirmation. There is only one way to deal with false and foolish writings about the Court - to treat them with intelligent neglect. Spot news and spot news psychology are about as relevant to our job and to our concern as yesteryear's snow. The thing to do is what you are doing - sink your soul in your work and in Washington's wonderful phrase, "leave the event to God." As to Drew Pearson, he has once more earned President Roosevelt's accolade.

Very sincerely yours,

F. F.

Mr. Justice Burton

Supreme Court of the United States.

Memorandum. File

Monday, 194

Dear Chief

I should like you to see this.

JT

[1949]

Monday

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Private

Dear Fred:

You will recall our talk about the Gobitis case (First Flag Salute) and my saying you might be interested in the response I had from the trio that subsequently flopped:
H. F. B: "Like you I don't like this kind of law much but I just don't see that there is anything in the due process clause that possibly can enable us to hold this unconstitutional."
W. O. D: "This is a powerful, moving

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document of contemporary and (I believe) historic value. I congratulate you on a truly statesmanlike job."

W.O.D. (on recirculation) "You have done a magnificent job on a subject which defies, because of the host of intangibles, conventional legal treatment. I agree"

F.M. "This has been a Gethsemane for me. But after all, the Constitution presupposes a government that will nourish and protect itself and therefore I join your beautifully expressed opinion."

Yrs
FT

File dissy In case of reargument or reconsideration

December 9, 1947

Dear Stanley:

Some of the best writings by far both of Holmes and Brandeis were circulated but unpublished opinions. If published, they would constitute two sizeable volumes. Holmes and Brandeis were, of course, profound thinkers, but they also had ordinary human feelings. And so I suspect they no more liked committing intellectual infanticide than do you or I. But they did it frequently during their service on the Court, because it advanced the best interests of the Court and of Law.

Reflecting on the examples of Holmes and Brandeis emboldens me to suggest that the circumstances in which we find ourselves in the Line case may make it equally wise and generous for you to subject your opinion in that case to intellectual infanticide. I think I am fully aware of the great and conscientious labor you have expended in producing that opinion, whereby it has become almost part of you and thereby, naturally enough, is not easily sacrificed. But consider the situation. You agree that the difference between you and those of us who are now in dissent is very narrow indeed - extremely narrow in comparison with the big gap that divides you from Black and Co. Merely by doing a polo piece you would reveal the precise situation on the Court, namely an equal division in regard to the central problem, the General Electric case. Why not let that equal division dispose of ~~that particular case~~ Line by an affirmance of necessity, leaving you to speak in the Gypsum case with the organ tones of unanimity against abuses of the General Electric doctrine. The rather technical and special point which troubles you, as compared with the main agreement with us, can await consideration when we have a full Court.

Whatever you may think of this suggestion, you will, I know, realize that I am making it after a good deal of reflection.

Ever yours,

Mr. Justice Reed

December 1, 1948

Dear Felix:

I have your note of the 29th in regard to the change in your Kovacs opinion. I note what you say in regard to your retaining your "say" in respect of the "preferred position", and likewise your views in regard to multiple opinions.

It is needless for me to state that any Justice may have his "say" on any subject. At the same time, as I stated to you, it was my understanding that the author of the opinion would drop the language which is the peg to which you express your views. So it seemed to me that it might be better to save the expression for another day but, of course, you do not see it that way.

In regard to the multiple opinion issue, I note that you have given this long study and feel that there are more plusses than minuses registered for the practice. However, it is hard to believe that multiple opinions in the early days of this Court, or the English practice, are our controlling precedents, nor is there anything in what I said or what I think that should or could convey to you any impression that "conscientious opinions courteously expressed, whether for the Court, in concurrence, or in dissent" should not be the order of the day. But, I do feel that the Bench, the Bar and the public generally have a right to be critical of the many opinions that sometimes appear in the disposition of cases. I know that the Bench and Bar have great difficulty, at times, in knowing what to do when we get through with some cases.

Sincerely,

[Signed] Fred M. Vinson

Mr. Justice Frankfurter.

FMV:McH

December 3, 1948

Dear Felix:

I have yours of the 2nd. Your trouble is that you "missed the boat" in regard to my attitude toward multiple opinions, and your very charming recitation of history since Chief Justice Taney's day leads me to this conclusion. I hardly expected it.

I am concerned, and will continue to be concerned, with the determination of issues in such manner that the courts may have a guide for subsequent action.

I note your expression of views in regard to the "ephemeral griping of an uninformed laity and, too often, of an unlearned or narrowly preoccupied bar." I do not think that any judge, worthy of his salt, should be influenced by any consideration other than his conscientious conclusion in respect of the issues presented. I do believe, however, that our function here is to decide the issues which are presented in such a way that judges and the Bar may know how to conduct themselves in the future.

Thanks for the lecture even though you misjudged my position and set up a straw man to attack. I would have preferred to have had it face-to-face. It started in that manner - it will only be continued in that way.

Sincerely,

FMV

Mr. Justice Frankfurter.

MEMORANDUM FOR THE CONFERENCE

RECEIVED
JUN 9 10 04 AM '48
CHAMBERS OF THE
CHIEF JUSTICE

1. Of course there is danger of scamping one's work at the end of the Term. All I can say is that what I am proposing in No. 59, Loftus v. Illinois, and No. 674, Hedgebeth v. North Carolina, was not influenced in the slightest by any thought of a deadline. I should deal with them in the same way, were we at the beginning of the Term.

2. As to No. 1289, Lustig v. United States, I am of opinion that the case falls outside the controlling decisions in Byars v. United States, 273 U. S. 28, and Gambino v. United States, 275 U. S. 310. The lower courts in the Lustig case were justified in finding that there was no participation by a federal agent in any unlawful search and seizure by State officers.

But we have for adjudication at the next Term Nos. 593-594, Wolf v. Colorado. These cases involve the question whether due process precludes the admission of evidence secured by an unlawful search and seizure even in State prosecutions. Should the Court reverse the Wolf cases, of course the United States can hardly avail itself of evidence secured unconstitutionally. I therefore think the Lustig case should be set down for reargument at the next Term followingthe Wolf cases.

F. F.

June 8, 1948

(1948)

Supreme Court of the United States

Memorandum

_____, 194___

Please give me light on this important question:

Is old Saunders as good as Harper?

(assuming same year.)

C. T.

[1945]

Chief

Re No. 329

I put dear little
Anne in St. Lucie
Jackson's custody.

V. T.

[1948]

Supreme Court of the United States

Memorandum

----------, 194---

Chief -

You probably
know it already -
but if not you
will want to know
that Senator George
will be 70 on January 29
next.

The
Ship Lustric

[1945]

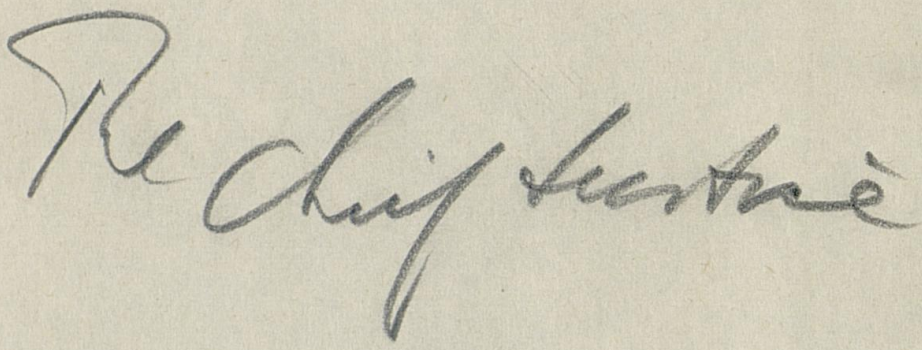
List:

No. 36

McDonald v. U.S.

is assigned to

Douglas V.



(1945)

A propos caring for what the crowd or the King think of a judge's work - A propos your reference to outside influence - you will be interested to read or rewrite (?) Lord Mansfield's remarks beginning the middle of ~~column~~ column 1111 herewith.

[1948]

Supreme Court of the United States

Memorandum

----------, 194---

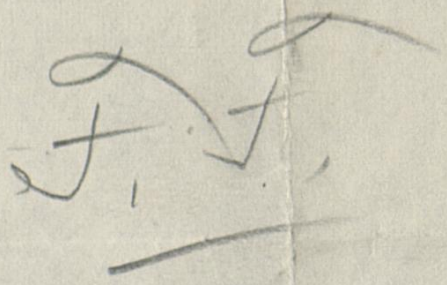
Felix —

Do you speak alone or do Bob also —

—

C J

In Von Moltke this alone



[1948]

Supreme Court of the United States

Memorandum

----------, 194--

I think this is the wise way

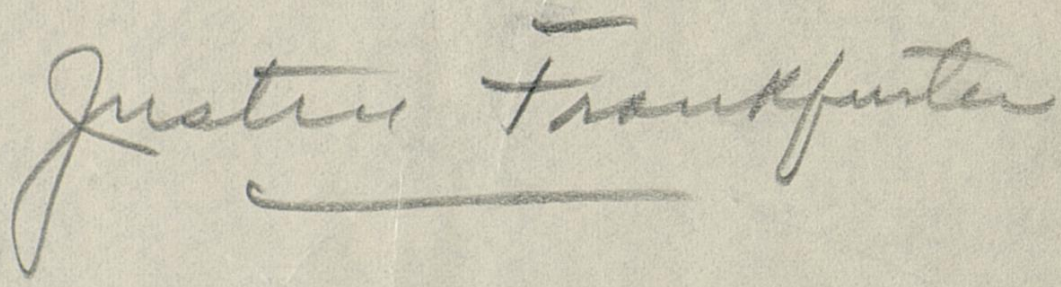
Felix —

Shall I announce opening + judgment in both Schem + Col

Before you announce your dissent —

Either way suits me

C J



[1948]

Chief:

I quite understand — and I evidently misconveyed myself.

I ~~[illegible]~~ did not mean to put on Jon the burden of "assent" (to circulation.) I wrote Jon, because the per cur. came from Jon and since I deem it highly desirable that there be as little

or friction
controversy account
the Brethren about
their case, I naturally
deemed it desirable
to put my thoughts
upon in the first
instance for such
consideration as
may commend itself
upon, in working
out a process where
as I understand it,
you and I were
associated.

41

Re Chief Justice

[Sept-16, 1948]

Dear Chief:

The latest bunch of certs. included No. 216 -Algoma Co. v. Wisconsin etc Bd. which raises another phase of issues to be argued early next term in Nos 14 and 15, 38 and 39. I assume that No. 216 will, as the A.G. of Wisconsin, in his response, suggests, be granted, and ought to be heard with Nos. 14 & 15, 38 & 39.

It occurs to me to suggest, if you agree, that No. 216 should and will be granted and should be heard with its cognate issues, that there might be enough of the Brethern around for an informal vote to grant, so that No. 216 may be set down for argument with its affiliated

cases, which, if I'm not mistaken, will be reached early in the term, and so counsel in No. 216 should be notified as early as possible.

We continue to enjoy New England sun - tho the natives cry for rain. I hope you two are having happy recess days.

Yours ever -

FF

F from New Milford, Conn.
Sept 16

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
SEP 20 9 58 AM '48
CHAMBERS OF THE
CHIEF JUSTICE

Dear Chief:

The latest bunch of cclts. included No. 216 — Algoma Co. v. Wisconsin Ed. Bd. — which raises another phase of issues to be argued Early next Term, in Nos. 14 and 15, 38 and 39. I assume that No. 216 will, as the A.G. of Wisconsin in his response suggests, be granted, and ought to be heard with Nos. 14 & 15, 38 & 39.

It occurs to me to suggest,

if you agree that No 216
should & will be granted &
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might be enough of the
Brethren around for an
informal vote to grant,
so that No. 216 may
be set down for argu-
ment with its affiliated
cases, which, if I'm not
mistaken will be reached
Early in the Term, & so
Counsel in 216 should
be notified as Early as
possible.

We continue "enjoying"
New England sun — tho the "natives"
cry for rain. I hope you tend

are having happy Rebecca days. Yrs Ever

[1948]

Supreme Court of the United States

Memorandum

----------, 194---

Ludecke is

NOT going

down!!

3018 Dumbarton Ave.,
Sunday
Oct. 10, 1948?

FELIX FRANKFURTER
CAMBRIDGE, MASS.

Dear Chief:

This is a letter from a friend

Of course I remembered our discussion, some weeks ago, of your proposal to have admissions precede opinions and orders, and the vote that followed. But I was startled when you announced yesterday that the proposal would be carried into practice on Monday for the simple reason that it has not been the custom of the Court to change its arrangements by a mere majority vote against the strong feeling of the minority. And when I invoke custom I do not merely refer to something that has no better title to respect than that which has been done. This custom is rooted in human nature and ratified by wisdom. The point is that good feeling in the Court, as in a family, is produced by accommodation, not by authority - whether the authority of a parent or of a vote.

Of course votes - a majority vote

Original Filed in VIP Correspondence File

FELIX FRANKFURTER
CAMBRIDGE, MASS.

must decide judicial business and such votes must be acted upon. But very different considerations apply to the family life of the Court – the way it should carry on in its corporate life, its relations to the other branches of the Government, to the Bar, to the Public. In such matters, the controlling considerations are those that relate to the best way of assuring inner harmony, whatever intellectual differences there may be. And this means not votes but accomodation – the give-and-take of comradeship, accomodation to the larger purpose and not mere counting of heads.

Nor does this involve subordination of the majority to the minority. It means finding the largest common ground for agreement. And time spent in trying to secure it, is time spent for the best possible purpose. Of course

over

even a strong minority with strong feelings should be very mindful of the feelings of the majority. In such a situation, time and strenuous search for some accomodating proposal to meet the feelings of both sides can work wonders. In any event, let me assure you that, whatever may be the strong feelings on your part for the changed order of business, some at least of the five who voted did so as a matter of acquiescence and not out of deep feeling that the change is wise or important.

These being feelings of mine not born of the moment, I thought you should know them.

Very sincerely yours
Frank Frank Jullet

Memorandum by MR. JUSTICE JACKSON.

In considering the proposal to change our order of business so that announcement of the Court's judgments and opinions on decision days will be deferred until applications for admission to the bar are first disposed of, there are phases of the matter not brought to the attention of the Court. This change will appear to many persons as a trivial matter, and, superficially viewed, perhaps it is. It may even appear captious to note a vote against it unless the reasons for and against such action are understood.

The reason, and the only reason, that has been urged for this reversal of our traditional procedure is that Senators and Representatives and some others who sponsor candidates for admission to our bar are kept from their duties during the time taken by the Court in delivering opinions. It may be admitted that the convenience of sponsors will be served by the change. The roster of those, however, who have endured this inconvenience includes the most brilliant and busy members of the legal profession who have served in the National legislature. Nor has this Court just now become aware of this situation, nor is this the first time a change in the order of business to convenience sponsors has been urged upon it.

I have asked the Clerk for such information as his files contain on the subject. It appears therefrom that Senator Dill and Representative Simmons in May of 1929 each addressed letters to Chief Justice Taft asking that admission to the bar be put at the head of the Court's order of business, for the convenience of members of Congress. Chief Justice Taft did not acquiesce in the subordination of the Court's announcements to admission but

he did prepare a reply to the effect that the Monday admission would be taken up at 2:30. However, the Court declined to go even that length and his reply remained unmailed in the Clerk's office.

This procedure was not established in the first place by accident or caprice and has not been adhered to without sound reasons, which to some of us are regarded as weighty enough to decline any present change—reasons I think, when considered, will be persuasive even to those who are inconvenienced by our ancient custom.

On four out of the five days of the Court week, except in the rarest emergencies, no opinions are delivered. Motions for admission to the bar are heard immediately upon convening except on Mondays. The Clerk's office is careful to inform applicants that motions made on Mondays are subject to delay. Moreover, the motion itself is a mere formality, which requires neither special standing or persuasiveness in the sponsor. He no longer is required personally even to vouch for the fitness of the candidate but only for the regularity of his papers. This function any member of our bar is permitted to perform for an applicant and with equal certainty of success. Therefore, any inconvenience suffered from our custom is because the Congressman chooses to perform the service, a quite proper courtesy to a constituent of course, and because they elect to make the motion on the one day of the week when the Court is most busy with its most important work—the decision of the issues that have come before us for final answer.

Sponsors can be accommodated only by shifting the inconvenience to others. On decision day many lawyers in private practice, many representatives of Government departments and agencies, not a few litigants and members of groups affected by litigation, attend to learn the decisions and hear the opinions. These substantially outnumber the sponsors and they have no such option as to the day they must attend for their purposes. It is these who must now sit through the commotion of routine and

repetitious ceremonies in order to be present for decision of their cases.

If there is doubt as to which should have a preferred place on the Court's calendar, I should think it would be answered by consulting their relative public interests and relation to the ends for which the Court exists. There is little public interest or general concern in who is admitted to our bar or by whom sponsored. Each is an individual and personal matter, important to the person admitted but to him alone. It is necessary to observe only generally that by way of contrast with these private interests our decisions are of the widest public interest, often affecting important functions of government on the lives of countless people. These announcements have been made first in the order of business because they outrank application for admission to the bar in importance to the Court and to the people we serve. They can now be relegated to second place only if we decide no longer to put first things first, or perhaps, if we devalue the importance of our own pronouncements.

The public interest in our decisions is largely reflected in the press representation, which has no similar interest to represent as to admissions to the bar. To serve this public interest "dead lines" must be met and assignments have been adjusted to get the results of our deliberations to the country as promptly as possible. Often great segments of industry, trade, labor or government anxiously await our fatal word. That it should be suspended, even briefly, while we expedite individual and formal applications does not seem a fitting reform. Also, large amounts in litigation and large values in the market place often depend on our decisions. We are irrevocably committed only when we mount the bench, but any delay after that decisive moment stimulates competition for "scoops" and multiplies opportunities for "leaks." Once we are fully committed to a decision good administration requires that its public announcement be made at the earliest possible moment.

To: The Chief Justice

From: JACKSON, J.

Circulated: 11/3/47

Recirculated:

[1948]

With the compliments of

Felix Frankfurter

NOTED

DEC 7 1948

F.M.V.

Fred, for your information

(1945)

Supreme Court of the United States

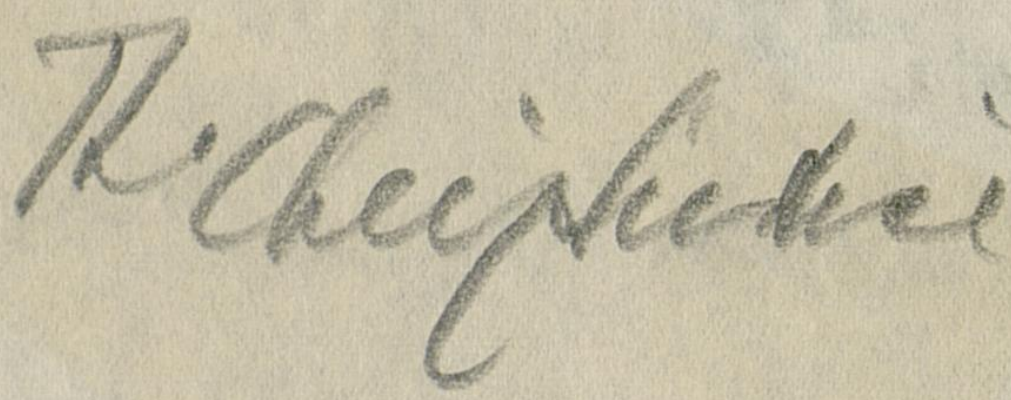
Memorandum

----------, 194---

Chief:

Your defense of Stanley makes me want to retain you now as my counsel!

F.



NOTED
DEC 7 1948
F.M.V.

12/7/48

William Costello, C.B.S. Correspondent, Braedcasting from Tokyo, Tuesday Morning, (Washington Time).

RECEIVED
DEC 7 5 46 PM '48
CHAMBERS OF THE CHIEF JUSTICE

"Japan's convicted war criminals and Gen. Tojo in particular, gained additional prestige today in the eyes of their home people when the United States Supreme Court agreed to review their case.

In fact, Tojo is a bigger hero today than he has been at any time since he lost the battle for Saipan. That may sound illogical to Americans but here is the way Japanese explain the situation. They regard the Supreme Court's action as evidence that the United States is not sure of its legal position in conducting the trials. The Japanese feel the United States is wavering and is not completely certain that justice has been done. They feel that notwithstanding the judgment of the war crime tribunal, the question of Tojo's guilt or innocence is now in doubt. They reason that if any such doubt exists in Washington there is infinitely more reason for doubt to exist in Japan. Then, their reasoning takes one long final step. They say Tojo was probably right after all. In fact, in the last 24 hours the whole Japanese attitude toward questions of war guilt has been turned topsy-turvy. Newspapermen came down to work early today certain the execution of the seven condemned men would take place within 48 hours. They were completely aghast at the court's decision. They rushed into print with extra editions and special radio bulletins. Tonight Japan's sense of war guilt has been virtually erased. The Supreme Court session appears to have undermined the whole moral value of the 2 1/2 year trial."

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
JAN 12 1 59 PM '49
CHAMBERS OF THE
CHIEF JUSTICE

January 12, 1949

Dear Chief:

I support Wiley's letter to you regarding No. 336 and No. 431.

No. 431 raises on the merits the same question as No. 336. But No. 431,(1) avoids any question of "standing" to sue, and (2) involving as it does the United Steelworkers of America, unlike the locals involved in No. 336, is the more important and probably would be better argued.

We should <u>not</u> have No. 336 argued without No. 431.

F.F.

Confidential – Seriously Unwill [1949]

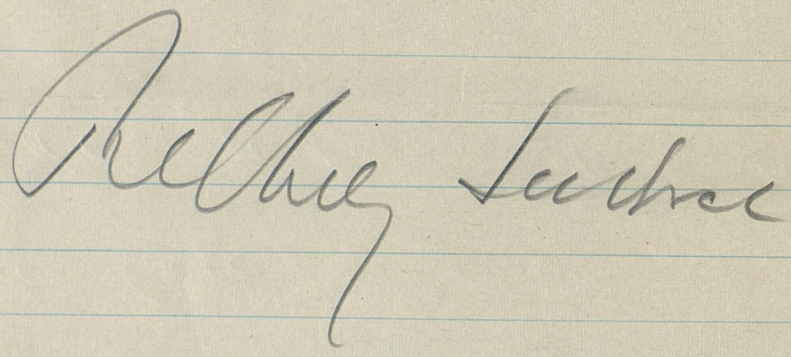
Chief

If you assign this case to me this is the opinion I'll circulate:

Per Curiam:

Since we take judicial notice that the railroads don't love freight-forwarders, we are compelled to decide against the railroads

x F



Supreme Court of the United States

Memorandum

File

77

----------, 194---

For myself, I should like this — or/and any other organization — to be told, very graciously of course, that Courts

Supreme Court of the United States

Memorandum

_____, 194___

are not supposed
to be rewarded
for deciding
what the Consti-
tution requires
them to decide

CHAMBERS OF THE CHIEF JUSTICE

February 3rd, 1949.

FOR CIRCULATION

Letter from Chicago Council against racial and religious discrimination dated 2-1-49 with enclosure.

NOTED

Mr. Justice Black..... ✓

Mr. Justice Reed..... Reed

Mr. Justice Frankfurter.....

Mr. Justice Douglas..... WOD

Mr. Justice Murphy..... Frm.

Mr. Justice Jackson..... ✓

Mr. Justice Rutledge..... ✓

Mr. Justice Burton..... WHB 2/4/49

Please Return to the Chief Justice.

Chicago Council against racial and religious discrimination

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BERNARD J. SHEIL

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Secretary
HORACE R. CAYTON

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CLIFTON M. UTLEY
JERRY VOORHIS
LOUIS WIRTH
JOHN YANCEY

Executive Secretary
HOMER A. JACK

Founded in 1943 as a non-profit organization to coordinate efforts to eliminate inter-group tensions by education, legislation, and direct action.

123 W. Madison St. • Chicago 2, Illinois • RAndolph 6-0594

RECEIVED
FEB 3 9 45 AM '49
CHAMBERS OF THE
CHIEF JUSTICE

February 1, 1949

Chief Justice Vinson
United States Supreme Court
Washington, D. C.

Dear Sir:

I have the privilege of informing you that the United States Supreme Court has been selected by a panel of over one hundred citizens for the 1948 Chicagoland Honor Roll released January first by the Chicago Council Against Racial and Religious Discrimination. The citation reads as follows:

To the United States Supreme Court for its decision outlawing the enforcement of racial restrictive covenants.

I am enclosing two copies of our January newsletter where the citation was printed.

Sincerely yours,

Setsuko Nishi

Setsuko Matsunaga Nishi,
(Mrs. Ken Nishi)
Organizational Secretary

SMN:gs
Encl.

462

Organizations Affiliated with the Chicago Council Against Racial and Religious Discrimination

Catholic Agencies

Catholic Labor Alliance
Catholic Youth Organization
Friendship House

Ethnic Groups

Chicago Resettlers Committee
East and West Fellowship
Japanese American Citizens League, Chicago Branch
Mexican Civic Committee
Pan American Good Neighbor Forum

Inter-Faith Groups

National Conference of Christians and Jews, Chicago Roundtable
Philodemic Council

Jewish Agencies

American Irish-Jewish Club
American Jewish Committee
Anti-Defamation League of B'nai B'rith
Bureau on Jewish Employment Problems
Conference of Jewish Women's Organizations
Hadassah
Jewish Labor Committee
National Council of Jewish Women
Young Men's Jewish Council

Labor Organizations

Chicago Flat Janitors Union, AFL
Chicago Industrial Union Council, CIO
Chicago Joint Board, Retail, Wholesale & Dept. Store, CIO
Chicago Newspaper Guild, CIO
Chicago Teachers Union, AFL
International Chemical Workers Union, AFL, No. 241
International Ladies Garment Workers Union, AFL
National Alliance of Postal Employees
United Automobile Workers, CIO, Region No. 4
United Automobile Workers, CIO, Local No. 734
United Public Workers of America, CIO, No. 248
United Transport Service Employees of America, CIO, No. 90

Miscellaneous Civic Groups

American Civil Liberties Union, Chicago Division
American Veterans Committee, Chicago Area Council
City Club of Chicago
Fellowship of Reconciliation, Chicago Chapter
International Order of Good Templars, Central States Grand Lodge
Independent Voters of Illinois
Roosevelt College of Chicago
Society of World Equiteers
Workmen's Circle, Youth Division

Negro and Inter-Racial Groups

Chicago Chapter, N.A.A.C.P.
Maywood Chapter, N.A.A.C.P.
Chicago Council of Negro Organizations
Decatur Chapter, N.A.A.C.P.
Chicago Urban League
Committee of Racial Equality
Committee of Racial Equality, University of Chicago Chapter
Negro Chamber of Commerce

Neighborhood Groups

Back of the Yards Neighborhood Council
Galesburg Inter-racial Committee
LaGrange Inter-racial Fellowship
Near West Side Inter-racial Council
Rockford Inter-racial Commission
Southside Community Committee
West Side Community Committee

Protestant Agencies

African Methodist Episcopal Zion Church, Christian Education Dept.
American Friends Service Committee, Midwest Branch
Chicago Congregational Union
Chicago Fellowship of All Christians
Church Federation of Greater Chicago
Congregational Christian Woman's Fellowship
Council of Church Women of Greater Chicago

Protestant Churches

Central Church of Chicago
Chicago Monthly Meeting of Friends
Erie Chapel Presbyterian Church
57th Street Meeting of Friends
First Methodist Church of Evanston
Greater St. John Baptist Church
Metropolitan Community Church
Oak Park Monthly Meeting of Friends
Olivet Institute Presbyterian Church
Peoples Church of Chicago
Unitarian Church of Hinsdale
Woodlawn A.M.E. Church

Social Service Agencies

Association for Family Living
Chicago Commons
Chicago Federation of Settlements and Neighborhood Centers
Hull-House
Marcy Center
Parkway Community Center

Temples and Synagogues

Chicago Federation of Reform Synagogues
K.A.M. Temple
K.A.M. Temple Sisterhood
Sinai Temple Sisterhood
South Shore Temple, Social Service Committee
Temple Isaiah Israel
Temple Sholom
Temple Sholom Sisterhood
Temple Sholom Senior League
Washington Boulevard Temple

Women's Groups

Chicago Woman's Aid
Federation of Colored Women's Clubs, Chicago and Northern District
Women's International League for Peace and Freedom
Gaudeamus Woman's Club
Women's Joint Committee on Adequate Housing
Alpha Kappa Alpha—Theta Omega and Beta Chapters
Y.W.C.A., Public Affairs Committee
Y.W.C.A., University of Chicago

PLEASE POST

PUBLISHED BY THE CHICAGO COUNCIL AGAINST RACIAL AND RELIGIOUS DISCRIMINATION
DR. PRESTON BRADLEY and BISHOP BERNARD J. SHEIL, Co-Chairmen
DR. JOHN B. THOMPSON, Chairman of Executive Board

AGAINST DISCRIMINATION

Vol. V, No. 7 | A Monthly Action Newsletter Edited by Mrs. Ken Nishi | January 1949

Illinois FEPC Campaign Underway

The Illinois FEPC Committee was launched at a luncheon meeting on December 16th at the Morrison Hotel with an address by Roderick Stevens, prominent New York Republican businessman and past president of the Bronx Board of Trade, who told why the New York FEPC law was good business.

Individual and organizational action now is none too soon:

1. Endorse and send copies of your endorsement of a strong Illinois FEPC law to the Illinois FEPC Committee, 130 N. Wells St., the Chicago Council, Governor Stevenson, your state legislators.
2. Write your state legislative representatives to support Governor Stevenson in his urging of an effective FEPC law. Send copies of your correspondence to the Chicago Council.
3. Affiliate with the Illinois FEPC Committee.

Pearson Spears Burial Discrimination

Spurred by Drew Pearson's broadcast on January 2nd attacking the discrimination by cemeteries making it virtually impossible for Japanese Americans (except Catholics) to be buried in the Chicago area, the Mayor's Commission and the Japanese American Citizens League called an emergency meeting on January 3rd. Documenting discriminatory burial experiences from Japanese ministers and several Japanese American organizations, they planned a course of action.

The Chicago Council urges quick action while the heat of Pearson's broadcast is still on:

1. Write to Paul A. Klenk, president of the Cemetery Association of Greater Chicago, Mt. Greenwood Cemetery, 2810 W. 111th St., Chicago; to Theodore Chmielen, president of the Metropolitan Chicago Cemetery Officials, Elmwood Cemetery, River Grove, Illinois; your family's cemetery; and the press protesting the cemeteries' refusal to bury Japanese Americans.
2. Write Mayor Kennelly, Governor Stevenson, your alderman, and state legislators to use their personal and official influence to make possible the burial of persons of Japanese descent in the Chicago area.
3. Send copies of your letters and replies to the Chicago Council.

1948 Balance Sheet on Intergroup Relations

The Chicago Council announces its fifth annual balance sheet on intergroup relations, compiled by use of a rating sheet sent to 175 Chicago leaders in race relations. The final list was selected by a special committee chaired by Edward Marciniak of the Catholic Labor Alliance.

A. Chicagoland Honor Roll

1. To the City Council of Chicago for including an anti-bias employment clause in the city's franchise with the Commonwealth Edison Company.
2. To Superintendent of Schools Herold C. Hunt for his leadership in developing an intercultural education program in the public schools.
3. To Dr. A. C. Ivy of the University of Illinois for his continued efforts to remove discriminatory practices from institutions of higher learning.
4. To Ben Parks for refusing to be censored by WBBM in his program, "Report Uncensored" featuring Negro-white relations.
5. To Warren Avenue Congregational Church and the Central Presbyterian Church on Chicago's west side for integrating Negroes into hitherto white congregations in the face of community tensions.
6. To Alderman Archibald J. Carey for his leadership in the City Council of Chicago on liberal programs affecting the welfare of the city.
7. To the Oakland-Kenwood Property Owners Association for leadership in adopting the Community Conservation Agreement as a democratic substitute for racial restrictive covenants.
8. To Roger Treat of the *Chicago Herald-American* for aggressive sports journalism against discrimination by the American Bowling Congress.
9. To Mrs. Arthur Falls and Mrs. Verna Siegrist for their leadership in reducing tensions in their community through the Englewood Goodwill Council.
10. To the students of the University of Chicago for their effective leadership towards the elimination of discrimination in their institution.

B. Chicagoland Defeats for Democracy

1. The continued violence against Negroes moving into "new" areas and the continued inability of the police department to apprehend those guilty of vandalism and arson.
2. The continued refusal of the department stores on State Street voluntarily to employ qualified Negroes as salesclerks.
3. The dismissal by Northwestern University of Mrs. Ruth McCarn, counsellor of women and defender of human rights.
4. The exclusion of Japanese Americans from burial privileges by Chicago area cemeteries.
5. The continued refusal of some Chicago hotels and restaurants to admit Negro guests without incident and cordially.
6. The severe compromises growing out of the location of sites for relocation housing projects.
7. The continued maintenance of quotas in the admission of students based on race, religion and national origin in the Chicago schools.

C. National Honor Roll

1. To the United States Supreme Court for its decision outlawing the enforcement of racial restrictive covenants.
2. (International) The adoption by the General Assembly of the United Nations of the International Declaration of Human Rights.
3. To the undergraduates on college campi for their action supporting democratic selection without regard to race, notably the football team at Yale University, the Phi Kappa Psi chapter at Amhurst College, and the students at Swarthmore College.
4. To the state of New York for the passage of the first state fair educational practices statute.
5. To the city of Philadelphia for the passage of a strong municipal fair employment practices ordinance with sufficient appropriations.
6. To the United Automobile Workers, CIO, for national leadership against discrimination in bowling.
7. To Phi Beta Kappa's *Key Reporter* for its consistent good use of articles and letters to break down discrimination in institutions of higher learning.
8. To the University of Arkansas student body and administration for opening the Medical School to a Negro student.
9. To the Secretary of the Treasury for discharging a supervisory employee in the South for not adhering to the President's executive order on fair employment practices in government service.
10. To Brandeis University (financed by Jewish funds) for the establishment of an institution open to all without restriction.

D. National Defeats for Democracy

1. The failure of the 80th Congress to pass civil rights legislation.
2. The continued discrimination in the nation's capital, despite its condemnation by the President's Civil Rights Report.
3. The continued recognition by the Supreme Court of the philosophy of separate but equal in public school facilities as evidenced in the recent Oklahoma case.
4. The passage by the 80th Congress of a Displaced Persons Bill with discriminatory provisions.

Shufro and Ducey Resign From Housing Authority

Milton Shufro, assistant executive secretary, and John Ducey, director of planning, have resigned from the Chicago Housing Authority as of December 15th. Both men, who have been with the Authority for more than nine years and equipped with rare competence for service in public housing, will leave vacancies difficult to fill. The Public Housing Association and other civic bodies are asking the question: Do their resignations mean that the Housing Authority is submitting to expediency as a result of the attacks by some City Hall leaders and the Illinois State Housing Board? The leadership of Mr. Shufro and Mr. Ducey in the Authority's non-discriminatory policy, these attacks, and their resignations seem to be not purely coincidental.

Friends of Chicago housing are planning a testimonial luncheon for the two men on Friday, January 28th, in the Casino Room of the Congress Hotel.

Dr. Jack Testimonial

Community recognition of the work of Dr. Homer A. Jack as executive secretary of the Chicago Council will be given on January 18th from 4 to 6 p.m. at Roosevelt College. Dr. Preston Bradley, Dr. Edward J. Sparling, Archibald J. Carey and Henry L. Kohn will be among those expressing the appreciation of Chicago's citizenry.

Tickets are available at the Council office.

Homer Jack's final words as executive:

"The Only Thanks For My Efforts Is A Strong Continuing Council."

Won't you give to make this possible?

5. The re-election of Rep. John Rankin of Mississippi and the election of Gov. Herman Talmadge of Georgia, known for their white supremacy ideology.
6. The refusal by the American Bowling Congress to amend its by-laws to include all without discrimination.

E. The Best Books and Pamphlets on Intergroup Relations

1. *The Protestant Church and the Negro,* by Frank Loescher. Association Press.
2. *The More Perfect Union,* by R. M. MacIver. Macmillan. $4.00.
3. *A Mask for Privilege,* by Carey McWilliams. Little, Brown. $2.75.
4. *The Balance of Power,* by Henry Lee Moon. Doubleday. $3.00.
5. *All Manner of Men,* by Malcolm Ross. Reynal & Hitchcock. $3.50.
6. *Americans from Japan,* by Bradford Smith. Lippincott. $5.00.
7. *Negro Ghetto,* by Robert Weaver. Harcourt, Brace. $3.75.
8. *A Man Called White,* by Walter White. Viking. $3.75.
9. *Segregation in Washington,* by the National Committee on Segregation in the Nation's Capital. 65c.
10. *Commentary* magazine for consistent high quality in reporting problems of inter-group relations.

N.Y. Experience Favors Non-Discrimination Housing Ordinance

With a battery of at least sixty organizations backing the non-discrimination in publicly-aided housing ordinance and favorable evidence of New York City's experience with a similar law, the second public hearings of the Housing Committee of the City Council were held on January 5th beginning at 10:30 a.m.

Though there is no such ordinance in New York outside of New York City, not a single project has been begun other than in the city, where five projects have been started or planned that come under the ordinance. Among them are the two Amalgamated Projects financed by the Bowery Savings Bank, whose president, Henry Bruere, testified vigorously against the ordinance when it was being considered on the grounds that it would dry up investments. The Queensview project is being built by the Mutual Life Insurance Company at a cost of $6,000,000 and is governed by a board of directors that includes such men as Beardsley Ruml, Gerard Swope, General David Sarnoff, Louis Pink and A. D. Lasker.

Alderman Archibald J. Carey, reporting on his recent New York trip said, "The majority, if not unanimous, opinion of those consulted* was that the general troubles in the building business today such as high cost, scarcity of materials, labor problems, etc. and the lack of experience in the field of private financing with public aid were of primary importance in housing developments. They further agreed that when the building problems have been solved and experience gained (the N.Y. ordinance was passed in 1944), the non-discrimination ordinance will be of very minor significance."

URGENT: Intensify your efforts to gain support from the following aldermen: Merriam (5), Olin(8), DuBois (9), Pacini(10), Wall(11), Kucharski(12), Egan(13), Wagner(14), Sheridan(16), Murphy(17), Duffy(19), Pistilli(20), Ropa(21), Janousek(22), Tourek(23), Bowler(25), Bieszczat (26), Sain (27), Gillespie(29), Rostenkowski(32), Brandt(33), Orlikoski(35), Ringa(36), Cullerton (38), Immel(41), Crowe(42), Bauler(43), Burmeister(44), Merryman(45), Young(46), Keenan(49).

* Persons consulted: *Louis Pink*: trustee of Mutual Life Insurance Company, former superintendent of insurance for the State of New York, and former member of the New York Housing Authority; *Charles Abrams*: lawyer, author, former General Counsel for the New York Housing Authority, and Housing Advisor to the New York Post; *Maxwell Tretter*: lawyer, and former Chairman of the New York Housing Authority; *General O. H. Nelson*: vice-president of the New York Life Insurance Company, in charge of housing; *George Brown*: Housing Advisor on the staff of the Mutual Life Insurance Company; *James Felt*: president of one of New York's largest real estate companies, agent for the Fresh Meadows Project of the New York Life; *Gerard Swope*: honorary chairman of the General Electric Company; *James England*: executive director of the New York Housing Authority; *Iskander Hourwich*: investment broker on William Street specializing in municipal investments; *Alfred K. Stern*: former chairman of Illinois Housing Board, present resident of New York, active in the field; *Abraham Kazin*: president of Amalgamated Housing Corporation; and several other persons interested and active in the field.

Yes, I want to support The Chicago Council and receive its newsletter regularly.

I gladly contribute $10* or $_____*

Name _____

Street _____

City _____ Zone _____

☐ check enclosed ☐ bill me

Mail immediately to The Chicago Council, 123 W. Madison St., Chicago 2.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

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CHAMBERS OF THE
CHIEF JUSTICE

February 5, 1949

Dear Chief:

It is amazing how a simple problem like that of the order in which the oral opinions should be delivered raises ghosts of conflicting understanding that continue to haunt this building. I am, therefore, venturing to raise the question again so that the rule may be agreed upon definitively and perhaps be put on paper by way of instruction to the Clerk.

You will recall that some question arose about this last Monday and there are at least two brethren who indicated a different understanding from that which I thought we had reached.

Whatever we had agreed upon, I just wonder whether the easiest way to formulate the rule isn't this: since the junior speaks first in announcing an opinion of the Court, why shouldn't the rule of junior first apply to the oral delivery of all the other classes of opinions, that is junior first both in the case of concurring and dissenting opinions subject only to change when a junior's opinion is supplemental to a controlling concurrence or dissenting by a senior. But whatever rule should govern us, since doubts have arisen, would it not be well to lay those doubts by one more effort at definitiveness.

Faithfully yours,

NOTED
FEB - 9 1949
F.M.V.

The Chief Justice

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File

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

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CHIEF JUSTICE

April 25, 1949

Dear Chief:

Apropos of Saturday's episode: Stanley and I have almost a habit of banter and I think we understand each other. As I scribbled in a note to him at Conference I was really complimenting him by what I said, for I was merely intimating that he knew exactly what he was doing. I don't know how many times I have told Stanley to his face that while there is about him an aura of sweet reasonableness, he is one of the most obstinate of men, with the result that often he yields less than he appears to yield when the feeling of his mind is not behind his yielding.

York v. Guaranty Trust Company is a good illustration. I talked with him about that case almost hours on end before he finally concurred in the opinion. But it was like the proverbial pulling of teeth, and the feeling of his mind really never accompanied his concurrence. And when that is true and a later situation arises, Stanly has a way of reverting to his original feeling.

Of course I am sending a copy of this letter to Stanley.

Faithfully yours,

FF

The Chief Justice

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Paul:

Telegram from clerk of 9th Circuit in re cost of printing record Nye & Nissen, No. 228.

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HBW

Mr. Justice Frankfurter - Per your request. I trust this is the information that you desired.

Paul Kelley -

Get Mary thanks.

LDC14 - NL PD WASHINGTON DC 4

CHARLES ELMORE CROPLEY

CLERK SUPREME COURT OF THE U S WASHINGTON D C

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PAUL OBRIEN CLERK U S COURT OF APPEALS SANFRANCISCO

[March 8, 1949]

#283 Riley v. Int Bus Transfer

Supreme Court of the United States

Memorandum

----------, 194---

Fred:

Here is the appropriate form, on which Hugo and I agree.

KT

[March, 1949]

Supreme Court of the United States

Memorandum

----------, 194---

Chief: Re Tidewater

Would you care — would it be of any use — to hear me "in chamber" on behalf of Wiley's ground in sustaining the diversity Act of 1940 (that's not my view!) but not Bob's.

Supreme Court of the United States

Memorandum

V

----------, 194---

You don't even have
to commit yourself
on Art III as widely
does - only don't
commit yourself
as does Bob. In my
conscience & a lifetime's
study of Art. III

Supreme Court of the United States

Memorandum

----------, 194---

problems it's a
terrible thing
for a majority
of this Court
to rip open
the seams of Art.
III — and quite
needlessly.

Re Chief Justice

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

March 28, 1949

Dear Fred:

Mr. Harrod is greatly appreciative of your willingness to see him. He would like to come in, if convenient for you, on Tuesday forenoon, April 5th. He wonders if 10:30 or 11 is a convenient hour for you.

Faithfully yours,

FF

The Chief Justice

FF
11 —
OK

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CHIEF JUSTICE

SUPREME COURT OF THE UNITED STATES

610 Miscellaneous.

In the Matter)
of)
Electric Power & Light Corporation)
Electric Bond and Share Company)
)

Petition for Stay of Execution.

[May 16, 1949]

Mr. Justice Frankfurter, dissenting.

This is a motion to stay the execution of a plan of dissolution of Electric Power & Light Corporation as ordered by the Securities and Exchange Commission under §11 (b) of the Public Utility Act of 1935. The Commission brought proceedings to enforce its order before the United States District Court for the Southern District of New York and that Court, having found the plan "fair and equitable", ordered its enforcement. The petitioners took appeals from this order to the Court of Appeals for the Second Circuit and asked for a stay of the execution of the plan pending appeal. It is conceded that such appeals would become nugatory if before their disposition the plan be executed. The Commission, naturally enough therefore in its memorandum in opposition to the motions for stay before this Court, indicates that whether the requested stay should be granted or withheld turns on "the merit or lack of merit in the appeals."

But the merits of the appeals before the Court of Appeals should be determined by that court and not here. If, on the motions for stay, that

Court had concluded that the appeals were frivolous, the motions for stay would fall with the dismissal of the appeals, But the Court of Appeals has not found the appeals frivolous. On the contrary, when the motions for stay came Before the Court of Appeals it suggested that the appeals be expedited by setting them for argument on the merits on a "typewritten record and briefs". The Commission and the other parties now opposing these motions resisted that suggestion "because of the serious consequences of delay *** and the absence of any issues of substance." The Court of Appeals took the matter under advisement and thereafter denied the stay but did not find the appeals frivolous and as such dismiss them. On the contrary, it indicated that if the appellants wished, the court would set the appeals for an early hearing.

Even though Congress gives an appeal as a matter of right in a defined class of cases, a Court of Appeals may find that an appeal is wholly without merit and an abusive attempt to invoke its jurisdiction, just as this Court may dismiss an appeal for want of substantiality although on the surface a case may fall in the category of controversies for which Congress has conferred an appeal as of right. Inasmuch as the Court of Appeals here has not found the appeals so lacking in merit as to call for their dismissal, but on the contrary is continuing to entertain the appeals, I cannot bring myself to agree that the right of appeal which Congress has conferred upon appellants is to be denied by rendering it wholly ineffectual. This Court ought not to be called upon in the first instance to determine whether an appeal is without substance when the Court of Appeals has refused to do so, when it is that court and not this Court to which the appeal lies.

I am duly mindful of the considerations that are urged as to the consequences of further delay. But I should think that a court of equity is not without resources to devise means for avoiding unjust enrichment by the appellants should the appeals ultimately go against them. In any event, if the appeals are without substance and should therefore be dismissed as frivolous, that conclusion ought to be capable of being summarily determined by the Court of Appeals without further delay. The disposition this Court is making of these motions is a shortcut that seems to me to disregard the relevant considerations for the exercise of appellate jurisdiction .

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

June 2, 1949

My dear Chief:

1. I am entirely content with the denial of the motion for a stay in the McGee case and myself voted to deny, because I thought, on the balance, the factors which made me uncomfortable were overbalanced by the considerations against granting a stay in the context of the total situation. But I should like to express again my conviction that in these death cases it ought to be a standing rule for the Clerk to invite a response from the State authorities immediately upon the filing of a motion like that in the McGee case.

2. I am confirmed in that conviction - growing out of the discomfort of passing on these matters more or less in the dark - by a rereading of the opinion of the Mississippi Court in McGee v. State, 40 So. 2d, 160. I cannot escape the inference that it was not one pool of jurymen from which the grand jury, with three Negroes, and the petty jury, with the Negro physisican were drawn. On the contrary, the Negro physician turned up in the special venire from which the petty jury was selected. I quote from p. 163 of the opinion:

> "The officials testified that Negroes are now being put on the jury lists; the public record of this case, and of the Circuit Court of Jones County, reveal that there were, in fact, three Negroes on the grand jury, which brought in this indictment against appellant. Such records also further reveal that on the special venire granted appellant, from which to select a petit jury, there was a member of the Negro race, a physician, who availed himself of his personal privilegebby asking the court to excuse him, which was done."

I repeat, that I am content with what we did in this case, But if there

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was just one pool out of which the four Negroes were drawn, no possible question could arise in the case. Quite a different situation is presented if the Negro physician turned up on the special venire from which the petty jury was selected.

Faithfully yours,

The Chief Justice

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To: The Chief Justice

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169

See pp. 5, 6, 7

SUPREME COURT OF THE UNITED STATES

No. 169.—October Term, 1949.

International Union, United Mine Workers of America, *v.* United States of America.	Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia.

[October 14, 1949.]

Memorandum on the question of mootness by Mr. Justice Frankfurter.

In 1947 the Mine Workers and various coal operators negotiated an agreement which created a welfare and retirement fund to be administered by three trustees, one to be selected by the operators, one by the Union, and the third, a neutral party, by the other two trustees. John L. Lewis was the Mine Workers trustee.

The first neutral trustee resigned in early 1948 after the trustees failed to agree upon the fund's operation. As a result of correspondence between the operators and Lewis, Lewis, on March 12, advised officers and members of all local unions in the bituminous districts that the operators and their trustee had violated the pension fund agreement. Thereupon the miners ceased work, and bituminous coal production dropped sharply. President Truman then created a board of inquiry, pursuant to § 206 of the Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 155, 29 U. S. C. § 176. The board reported on March 31 that the work stoppage "was not independent action by miners acting individually and separately," but concerted action induced by Lewis.

On the basis of this report, the President directed the Attorney General to invoke § 208 of the Taft-Hartley Act. The United States filed a complaint for relief in the District Court for the District of Columbia on April 3. On the same day the District Court issued a temporary

restraining order, to expire on April 13, directing that the Mine Workers and its officers be restrained "from continuing the strike now in existence," and ordering the Mine Workers through its officers to instruct its members to end the strike and return to work. On April 7, the Mine Workers and Lewis moved to vacate the restraining order, and the Government petitioned for a rule to show cause why the Mine Workers and Lewis should not be punished for civil and criminal contempt for violation of the temporary restraining order.

On April 10, Lewis and the operators' trustee agreed upon the selection of a third trustee, and the three trustees began their discussions of a pension plan on April 11. Lewis sent a telegram to Mine Workers officials on April 12, telling them of the appointment of the third trustee and predicting that the pension issue would soon be settled. He told them that their "voluntary cessation of work" should be terminated. A second telegram was dispatched later that day informing the local unions that an agreement on a pension plan had been reached. The miners gradually returned to work, and coal production picked up. Also on April 12 the court, on the Government's motion, extended the temporary restraining order to April 23.

After a trial without a jury, the District Court found the Mine Workers and Lewis guilty of criminal contempt for disobedience of the restraining order of April 3, and fined them $1,400,000 and $20,000, respectively. On April 21, the court issued a preliminary injunction in about the same terms as its temporary restraining order. On May 18, the court dismissed the civil contempt proceedings on the Government's motion. The Government also moved on the same day to discharge the preliminary injunction. On June 4, it filed a memorandum in support of this motion, and on June 23, 1948, the injunction was discharged.

The Mine Workers and Lewis appealed from the conviction for criminal contempt and the consequent fine on April 26, and on May 7 from the order granting the temporary restraining order, the judgment denying the motion to vacate the temporary restraining order, and the preliminary injunction. The Court of Appeals for the District of Columbia held that under *United States* v. *United Mine Workers,* 330 U. S. 258, the failure to obey the temporary restraining order was punishable as a criminal contempt, and that the fines were not excessive. No. 168 is a petition for certiorari to review that judgment. The court below held the appeal in No. 169 to review the temporary injunction moot on the ground that the temporary restraining order had expired by its own terms, and the preliminary injunction was discharged by the District Court.

It may be useful to summarize the time-table bearing on mootness.

April 3, 1948 Application by Government for preliminary injunction. Temporary restraining order granted, to expire April 13.

April 7, 1948 Motion by petitioners to vacate restraining order.

April 10, 1948 Selection of neutral trustee.

April 12, 1948 Pension dispute settled. Letter to miners from Lewis telling them to return to work. Restraining order extended to April 23.

April 21, 1948 Preliminary injunction issued.

May 7, 1948 Petitioners appealed from order granting temporary restraining order, from the judgment denying the motion to vacate the restraining order, and from the preliminary injunction.

May 18, 1948 Motion by Government to discharge preliminary injunction.

June 4, 1948 Government filed memorandum in support of motion to discharge injunction.
June 23, 1948 Injunction discharged.
June 6, 1949 Decision of Court of Appeals, sustaining the contempt and dismissing the appeal from the injunction as moot.

The scheme of the Taft-Hartley Act undoubtedly provides for enjoining a strike under the statutory conditions for a period of 80 days, so as to give the pacifying agencies established by that Act opportunity for the adjustment of the grievances. If recognized judicial procedure enables a review of the propriety of the issue of the injunction within that period, such opportunities for review must be availed of. If those opportunities are not taken advantage of within the statutory period for appeals before the expiration of the injunction, of course the case becomes moot, just as the expiration of any other injunction before review is had bars review.

Again, if within the 80-day period a settlement is arrived at between the industrial combatants and the men return to work on the basis of such settlement, the basis for adjudication on appeal is gone. Any settlement which ends the dispute giving rise to a legal controversy leaves no "case" or "controversy" for an appellate court. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.,* 242 U. S. 430; *Dakota County* v. *Glidden,* 113 U. S. 222; *Cartwright* v. *Howe,* 1 How. 188; see Robertson & Kirkham, Jurisdiction of the Supreme Court, § 257 (1936).

The fact of the matter is that on the present record the controversy between the operators and Lewis came to an end by a settlement between them; Lewis' instructions of April 12 to the miners to return to work were given even before the preliminary injunction was granted. On May 18, the Attorney General moved to discharge the injunction, supported by an affidavit of the Chief of the Bituminous Coal Section of the Coal Economics Branch

of the United States Bureau of Mines, Department of Interior.[1] Attached thereto were statistical reports tending to show the resumption of work by the miners. On June 4, the Government filed a memorandum in support of its motion to discharge the injunction "for the reason that a settlement has been reached within the contemplation of the Act . . . there is no longer a strike nor is there the threat of a strike . . . growing out of the dispute which originally led to the strike." The Government conceded that the entire dispute had not been settled, but stated that agreement on the vital differences had removed the strike threat so "as to constitute the 'settlement' contemplated by Sec. 210. In that connection, it is suggested that the settlement need not cover each and every element of a dispute so long as it goes to the essence of the problem and eliminates the threat of a strike or lockout."

If it be said that delay in settlement of labor disputes would be encouraged if settlement would make a law suit moot, it could equally be maintained that speedy settlement of other types of disputes is discouraged by the principle of mootness. The public consequences of a prolonged labor dispute may be serious. But so long as our judicial function is what it is, the answer is not disregard of the limitations on "the judicial power of the United States" but the effective use of stays and expeditious review. The historic and persisting basis of the federal judicial process is that the courts can exert their power only if a concrete, immediate, living contest between adversaries exists. Litigation must have "present actuality." *United States* v. *Hamburg-American Co.*, 239

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granted and the injunction discharged."

[1] Section 210 of the Taft-Hartley Act provides: "Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be

U. S. 466, 475.

The fact that a legal issue has not been determined and that the legal issue may arise again in the near or remote future does not save a case from being moot in the sense that the peculiar situation has come to an end, either through the death of a party (without transmission of his interest to his successor) or the complete cessation of a particular situation in relation to which a legal issue has arisen. To be specific, strikes in the coal industry have been intermittent during the whole of my life. The propriety or impropriety of an injunction is of course a factor of considerable importance in the strategy of the operators or the Mine Workers when a new difficulty arises. That does not lessen that fact that to pronounce upon the legality of an injunction after a strike is settled is in fact to give an advisory opinion—to make a pronouncement of law not for the legal determination of a defined, existing dispute between the operators and the Mine Workers but as a guide to their future conduct. And that is outside the competence of this Court. Our review of the injunction in this case could not undo the events of April, 1948. We could grant no "effectual relief." *Southern Pac. Term. Co.* v. *I. C. C.*, 219 U. S. 498, 514. The only effect of review now would be the influence it would exert upon Lewis in hazarding another injunction in another strike or in defying it were it issued. In short, we would be advising him on an important fact in his strategic moves. It might be better to have courts give advisory opinions. It might be better—it is not our system. See article "Advisory Opinions" in 1 Encyc. Soc. Sci. 475.

To be sure it may be suggested that if there is no opportunity to appeal from the injunction a settlement is Hobson's choice. Therefore it does become pertinent to consider whether there was ample opportunity, with due regard for all procedural safeguards, for an appellate re-

view of the injunction issued in this case. This opportunity, it seems to me, clearly existed. Petitioners could of course have petitioned this Court for certiorari immediately after filing the notice of appeal below. This is precisely the kind of situation for which provision is made by Congress by authorizing an appeal to be lifted out of a Court of Appeals. 28 U. S. C. § 1254 (1) (1948). The first Lewis case came here by this route. *United States* v. *United Mine Workers,* 330 U. S. 258, 269. We would either have issued a writ or, not doing so, we would not have allowed frustration of the right of appeal here any more than in other cases where the issue survived the end of a mere phase of it. And an issue continues its legal existence when the relief sought is for abatement of a continuing illegality or is directed against its potential recurrence. See *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290; *Southern Pac. Term. Co.* v. *I. C. C.,* 219 U. S. 498. In the latter case, appeals were taken to this Court on January 17, 1910, but argument was not had until December 9, 1910. Even though the I. C. C. order complained of had expired on November 15, 1910, the Court considered the merits. Here, had we granted certiorari, we could, had we seen fit, shortened the customary time for bringing the case on for argument.

From all of which I conclude that the petition for certiorari should be denied.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
NOV 5 1949
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CHIEF JUSTICE

November 2, 1949.

Dear Chief:

Harold and I had a talk about mootness in relation to the Lewis case, out of which grew a letter of mine to him, which you may care to see. I will trouble you to return it.

Faithfully yours,

The Chief Justice

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To: The Chief Justice
From: Frankfurter, J.
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SUPREME COURT OF THE UNITED STATES

No. 169.—October Term, 1949.

International Union, United Mine Workers of America, *v.* United States of America.	Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia.

[October 10, 1949.]

Memorandum on the question of mootness by Mr. Justice Frankfurter.

In 1947 the Mine Workers and various coal operators negotiated an agreement which created a welfare and retirement fund to be administered by three trustees, one to be selected by the operators, one by the Union, and the third, a neutral party, by the other two trustees. John L. Lewis was the Mine Workers trustee.

The first neutral trustee resigned in early 1948 after the trustees failed to agree upon the fund's operation. As a result of correspondence between the operators and Lewis, Lewis, on March 12, advised officers and members of all local unions in the bituminous districts that the operators and their trustee had violated the pension fund agreement. Thereupon the miners ceased work, and bituminous coal production dropped sharply. President Truman then created a board of inquiry, pursuant to § 206 of the Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 155, 29 U. S. C. § 176. The board reported on March 31 that the work stoppage "was not independent action by miners acting individually and separately," but concerted action induced by Lewis.

On the basis of this report, the President directed the Attorney General to invoke § 208 of the Taft-Hartley Act. The United States filed a complaint for relief in the District Court for the District of Columbia on April 3. On the same day the District Court issued a temporary

restraining order, to expire on April 13, directing that the Mine Workers and its officers be restrained "from continuing the strike now in existence," and ordering the Union through its officers to instruct its members to end the strike and return to work. On April 7, the Mine Workers and Lewis moved to vacate the restraining order, and the Government petitioned for a rule to show cause why the Mine Workers and Lewis should not be punished for civil and criminal contempt for violation of the temporary restraining order.

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After a trial without a jury, the District Court found the Mine Workers and Lewis guilty of criminal contempt for disobedience of the restraining order of April 3, and fined them $1,400,000 and $20,000, respectively. On April 21, the court issued a preliminary injunction in about the same terms as its temporary restraining order. On May 18, the court dismissed the civil contempt proceedings on the Government's motion. The Government also moved on the same day to discharge the preliminary injunction. On June 4, it filed a memorandum in support of this motion, and on June 23, 1948, the injunction was discharged.

The Mine Workers and Lewis appeealed from the conviction for criminal contempt and the consequent fine on April 26, and on May 7 from the order granting the temporary restraining order, the judgment denying the motion to vacate the temporary restraining order, and the preliminary injunction. The Court of Appeals for the District of Columbia held that under *United States* v. *United Mine Workers,* 330 U. S. 258, the failure to obey the temporary restraining order was punishable as a criminal contempt, and that the fines were not excessive. No. 168 is a petition for certiorari to review that judgment. The court below held the appeal in No. 169 to review the temporary injunction moot on the ground that the temporary restraining order had expired by its own terms, and the preliminary injunction was discharged by the District Court.

It may be useful to summarize the time-table bearing on mootness.

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Again, if within the 80-day period a settlement is arrived at between the industrial combatants and the men return to work on the basis of such settlement, the basis for adjudication on appeal is gone. Any settlement which ends the dispute giving rise to a legal controversy leaves no "case" or "controversy" for an appellate court. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430; *Dakota County* v. *Glidden*, 113 U. S. 222; *Cartwright* v. *Howe*, 1 How. 188; see Robertson & Kirkham, Jurisdiction of the Supreme Court, § 257 (1936).

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of the United States Bureau of Mines, Department of Interior.[1] Attached thereto were statistical reports tending to show the resumption of work by the miners. On June 4, the Government filed a memorandum in support of its motion to discharge the injunction "for the reason that a settlement has been reached within the contemplation of the Act . . . there is no longer a strike nor is there the threat of a strike . . . growing out of the dispute which originally led to the strike." The Government conceded that the entire dispute had not been settled, but stated that agreement on the vital differences had removed the strike threat so "as to constitute the 'settlement' contemplated by Sec. 210. In that connection, it is suggested that the settlement need not cover each and every element of a dispute so long as it goes to the essence of the problem and eliminates the threat of a strike or lockout."

Reason and authority make this case moot. *Barker Painting Co.* v. *Local No. 734,* 281 U. S. 462, is controlling. There a New York painting contractor obtained a preliminary injunction against a strike to enforce a particular wage scale on a particular job in New Jersey. The trial court later dismissed the contractor's bill on the merits. In the Court of Appeals, the contractor conceded that the return of the men to work in obedience to the preliminary injunction had resulted in the completion of the New Jersey job before the District Court's decree of dismissal. Hence, the Court of Appeals affirmed the decree of the District Court, not on the merits, but because of mootness, 34 F. 2d 3, and this Court affirmed. Compare *Montgomery Ward & Co.* v. *United States,* 326

[1] Section 210 of the Taft-Hartley Act provides: "Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged."

U. S. 690. In *Barker Painting,* the work was done under compulsion of the injunction; here the men returned by a settlement between the operators and Lewis.

If it be said that delay in settlement of labor disputes would be encouraged if settlement would make a law suit moot, it could equally be maintained that speedy settlement of other types of disputes is discouraged by the principle of mootness. The public consequences of a prolonged labor dispute may be serious. But so long as our judicial function is what it is, the answer is not disregard of the limitations on "the judicial power of the United States" but the extensive use of stays and expeditious review. The historic and persisting basis of the federal judicial process is that the courts can exert their power only if a concrete, immediate, living contest between adversaries exists. It might be better to have courts give advisory opinions. It might be better—it is not our system. See article "Advisory Opinions" in 1 Encyc. Soc. Sci. 475.

To be sure it may be suggested that if there is no opportunity to appeal from the injunction a settlement is Hobson's choice. Therefore it does become pertinent to consider whether there was ample opportunity, with due regard for all procedural safeguards, for an appellate review of the injunction issued in this case. This opportunity, it seems to me, clearly existed. Petitioners could of course have petitioned this Court for certiorari immediately after filing the notice of appeal below. This is precisely the kind of situation for which provision is made by Congress by authorizing an appeal to be lifted out of a Court of Appeals. 28 U. S. C. § 1254 (1) (1948). The first Lewis case came here by this route. *United States* v. *United Mine Workers,* 330 U. S. 258, 269. We would either have issued a writ or, not doing so, we would not have allowed frustration of the right of appeal. We could, had we seen fit, shortened the customary time for bringing the case on for argument.

In contrast to the situation here, the union in *Barker Painting* could more truthfully be said to have had no opportunity for appeal. Only by disobedience might it have been in a position to challenge the injunction, but even with this very limited choice available to the union, mootness was deemed a matter of course by the whole court.

From all of which I conclude that the petition for certiorari should be denied.

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Oct 24 10 06 AM '49
CHAMBERS OF THE
CHIEF JUSTICE

October 24, 1949

Dear Chief:

By one of those strange inattentions by which one - or at least I - sometimes says the opposite of what one means - I wrote "Aff." next to Nos. 40 and 41 when I should have written "Rev." (I may have been misled by noting that the name of the petitioner in 41 was a carrier, but it doesn't matter why I did it.) Not only was I of opinion, and am I, that the two cases should be reversed but I am strongly of the view that they should be reversed on the authority of United States v. Capital Transit Co., 325 U.S. 357.

So that others may know my views, I am sending a copy of this note to all the brethren.

Yours faithfully,

F. F.

The Chief Justice

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
NOV 3 2 54 PM
CHAMBERS OF THE
CHIEF JUSTICE

November 3, 1949

Dear Chief:

File — I do hope you agree that we ought to grant cert. in No. 300, State of Maryland v. Baltimore Radio Show. Surely we ought to hear argument before letting the States conclude that our decision in Bridges v. California, 314 U.S. 252, has rendered States powerless to protect potential jurors from being influenced in a trial for murder by ~~a~~ dissemination of an alleged confession which, at the trial, may be found to be constitutionally inadmissible under the decisions of this Court regarding coerced confessions.

Faithfully yours,

FF

The Chief Justice

Original Filed in VIP Correspondence File

File

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

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

NOTED
NOV 15 1949
F.M.V.

November 12, 1949

Dear Chief:

1. As bearing upon the question whether a State can be denied the right to treat as contempt the publication of evidence that may or may not be admitted in a murder case that has not yet come to trial, please let me remind you that our latest pronouncement in Craig v. Harney, 331 U.S.367, emphasized the fact that what was before the Court there concerned "what transpired in court" and that "what transpires in the courtroom is public property" (at 374).

2. In regard to No. 61, Hughes v. Superior Court, insofar as the point is taken that we are not dealing with a statute, but merely with a decision of a State court, let me refer you to a long line of decisions summarized in Skirotes v. Florida, 313 U.S. 69, 79. "The question before us must be considered in the light of the total power the State possesses."

Faithfully yours,

FF

The Chief Justice

Original Filed in VIP Correspondence File

[Nov. 15, 1949]

File

Tuesday

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

Dear Fred:

This is to "proposition" you!

What do you say to letting me try to put on paper the case for affirming the California pocketing judgment — the Hughes case. If my Effort turns out to be unconvincing it will be time enough for your doubts and disagreement

to assert themselves, and no harm will have been done. But there will be the gain of seeing things more clearly when reduced to writing. When considerations pro and con are formulated.

Yrs

FF

RECEIVED
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CHAMBERS OF THE
CHIEF JUSTICE

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 23, 1949

Dear Fred:

Unless I made the wrong entries, on three of the assigned cases the Conference found itself equally divided. Evidently there has been a shift of votes. I will trouble you to let me know what the shifts were so that I may make the proper entries in my docket. The cases are:

1. No. 23, Carter v. Atlantic Railway.
2. No. 45, United States v. Benedict.
3. No. 271, Alcoa v. United States.

Faithfully yours,

FF.

The Chief Justice

C. J. talked to Justice Frankfurter -
11/23/49

File

Later

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

NOTED
NOV 15 1949
F.M.V.

Dear Fred:

Please find time to read Judge Cochrane's opinion in the Timehouse case, below, 58 F.2d 396. He was reversed because he thought "filthy added nothing to "obscene, lewd and lascivious" — & that means "to incite" "rather than repel" etc. Yrs

P.S. I'm not asking S.J. to read Cochrane!

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 30, 1949

Dear Chief:

The enclosures from Dr. Overholser speak for themselves. You may care to see the manner in which I responded to his wishes.

Faithfully yours,

The Chief Justice

RECEIVED
NOV 30 5 27 PM '49
CHAMBERS OF THE
CHIEF JUSTICE

NOTED
DEC 1 1949
F.M.V.

FEDERAL SECURITY AGENCY
SAINT ELIZABETHS HOSPITAL
WASHINGTON 20, D. C.

#63,640

ADDRESS ONLY
THE SUPERINTENDENT
SAINT ELIZABETHS HOSPITAL

November 28, 1949

In re Sol Newstead

Mr. Justice Felix Frankfurter
United States Supreme Court
Washington 25, D. C.

Dear Mr. Justice Frankfurter:

Enclosed is a letter addressed to the Chief Justice and one addressed to you by Mr. Sol Newstead, a patient at Saint Elizabeths Hospital.

Mr. Newstead was admitted to Saint Elizabeths Hospital on November 1, 1949, from the Lake County Jail, Northern District of Indiana, as a United States Prisoner. He was adjudicated of unsound mind in the United States District Court for the District of Northern Indiana, Hammond Division, on August 9, 1949, while apparently under criminal charges of narcotics or addiction of drugs. Due to the brief period of time that this individual has been under observation we have not as yet arrived at a definitive determination of his mental status.

While it is not our wish to have our patients unduly annoy or harass busy public officials, we believe that in fairness to the patient he should be permitted a reasonable amount of access to persons whom he believes may be helpful to him in accomplishing his wish to be released. Accordingly, the enclosed letters are forwarded to you for your consideration. It would be appreciated if you might find occasion to acknowledge their receipt directly to this patient as it would help to allay his suspicions that his mail is being tampered with.

Very truly yours,

Winfred Overholser

Winfred Overholser, M.D.
Superintendent

Enclosures 2

Chief Justice Vinson
Supreme Court of the United States
Washington D. C.

11/23/49

Honorable Sir;

I am going through what one might well term a terrifying experience, to think that under direct Government supervision a federal prisoner could be strangled into insensibility by two guards, or attack unprovoked in every sense write several hundred letters to top Government officials pleading, begging that an investigation be made for almost 15 months, inhuman efforts made last October a year ago by Dr. Vogel and Dr. Chapman to railroad me to an insane asylum, to conceal suppress, and keep suppressed the crime of violence refused to

Because of my correspondence Mr. James V. Bennett Director of Bureau of Prisons had me removed from the west hospital where violent mental patients were confined (not drug addicts) and restored to line with drug addicts (not mental cases) on December 16th 1948 I immediately went to work as a nurse in the east hospital the following day.

If you please this records will show extreme personal prejudice and bias on the part of the Hon. Luther M. Swygert and the U.S. Attorney during the hearings of July 21st and August 3d

Please let me ask you point blank, am I not intitled

to the transcript of the referee hearings in Forma Pauperis

Great God, I sent 5 dollars to Senator Jenner of Indiana on Sept. 24th even he cannot obtain them for me I requested a partial copy from the beginning.

Now am aware I mailed three dollars to the Supreme Court and three dollars to Mr Sidney P Chandler Director of Administrative offices of U.S. Courts, On both occasions the money was returned

Legally I have no business to be confined in this insane hospital, therefore I say for Gods sake give this case the action it deserves. Respectfully Yours

Sol Newstead

November 30, 1949

Dear Sir:

Your letter of the 18th has duly come to hand, and I am confident that all who have responsibility in the matter will deal justly with the problems before them.

With good wishes,

Sincerely yours,

Mr. Sol Newstead

RECEIVED
Nov 23 4 15 PM '49
CHAMBERS OF THE
CHIEF JUSTICE

November 23, 1949.

MEMORANDUM FOR THE CONFERENCE

1. From the list of cases assigned for argument at the next session, circulated by the Clerk this morning, I learn that No. 51, Darr v. Burford, Warden, Oklahoma State Penitentiary, is to be submitted. The purpose of this memorandum is to state the reasons for my conviction that we ought not to accept submission of this case upon briefs, but should reset it for oral argument.

2. The case raises an issue that has long engaged the Court's attention. It concerns the availability of habeas corpus in a United States District Court to secure release from detention under a judgment of sentence by a State court. As such it involves one of the most delicate of all problems in the relations between the States and the Federal Government.

3. The perplexities of the problem are conclusively demonstrated by the conflict and contrariety of the Court's views regarding it. The hope that Ex parte Hawk, 321 U.S. 114, would give clear-cut guidance for the future was dashed by Wade v. Mayo, 334 U.S. 672. At the moment I am not concerned with the soundness or the unsoundness of the decision in the latter case. For present purposes it suffices to point out that the disharmonies between Ex parte Hawk and Wade v. Mayo occurred within less than four years, that Wade v. Mayo was the result of a close division of the Court, and that Wade v. Mayo likewise followed submission without argument. Not only have we our own fluctuating decisions. We now have the statutory modifications introduced by the 1948 Revision of the Judicial Code (28 U.S.C. § 2254.) The legislative history of this section in its final form is very relevant to the proper solution of our problem, and Judge Phillips in his dissent rightly refers to it.

4. It is sometimes suggested that we are not likely to get much light from counsel. The contrary assumption is the basis on which this Court has always acted, and it has from time to time, when an issue of public importance and difficulty was at stake, declined to yield to the submission of a case on briefs and set the case down for oral argument.

5. The reason which underlies adjudication after oral argument was expressed in a homely way by Brandeis when he said: "I would rather have a

poor argument than none". Argument is important not merely for what it itself conveys, but for the stimulus of thought that it may stir in the Justices through interchange of questioning and the excitation of speech against the frequently deadening influence of the printed page. Of course I am not suggesting that everybody is stimulated in the same way, or that everyone gets out of a bad argument what Brandeis got out of it. I am suggesting that there are some who do, and that the practice of adjudication in this Court after oral argument ought not to be within the control of counsel by submitting, for one reason of convenience or another, the case without argument.

6. Of course, we cannot send the Marshal to bring counsel here by force, but I have yet to know of an instance during the last forty years of failure to respond to a request by the Court for oral argument.

7. I am circulating these views among the brethren instead of restricting their expression to the Chief Justice on the assumption that a matter of Court policy is involved.

F. F.

RECEIVED
JAN 24 2 45 PM '50
CHAMBERS OF THE
CHIEF JUSTICE

January 24, 1950.

Dear Brethren:

You may be interested - or again you may not - by a comment which has come to me out of a clear sky from an editor (who is no particular friend of mine) of one of the most powerful newspapers in the country. I quote:

> "I can assure you that but for your explanatory opinion the press of the country would have interpreted the Court's action in the Maryland Radio case as an approval of the decision of the Maryland court as to the constitutional right of the press and the radio regarding publications affecting criminal trials."

Faithfully yours,

F. F.

[No date]

C. N.

I suppose the
Severability clause
does not make
it pertinent to
consider whether
the unconstitution-
ality of the Act's
application to Ser-
vants renders the
whole Act bad. Or

FOR CORRESPONDENCE IN RE EXTENSIONS OF TIME SEE

CHIEF JUSTICE - ORDERS - EXTENSIONS
OF TIME

File

12-17-49

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

Dear Chief

I'm sorry I had to run - else I would have made an appropriately appreciative little

speech. I had no
grievance – hardly
another thought about
the episode. And
don't let me irritate
you – I don't mean
to. Sometimes I over-
tease. Yours warmly VT

INDIA: PARLIAMENT'S FIRST SESSION

SUPREME COURT INAUGURATED

FROM OUR OWN CORRESPONDENT

DELHI, JAN. 29

The budget session of the new Parliament of the Republic of India opened on Saturday with the formal business, including the taking of the oath by all members present. Most members did so in English, the others taking the oath in either Hindi or Urdu.

The Speaker of the House continues to be Mr. G. V. Mavlankar, and of the 324 members (one for each million of the country's population) about 100 are new members recently returned by the provincial legislatures to replace others who had to resign because of a Congress Party ruling that they should confine themselves to the provincial legislatures of which they were also members. The House later adjourned until Tuesday, when the President, Dr. Rajendra Prasad, will address it on "The state of the Union" and a two-day debate will be opened.

On Saturday, too, the Supreme Court of India was formally inaugurated under the Chief Justice, Mr. Justice Harilal Kania, and held its first sitting in what was formerly the Chamber of Princes. For the present there are five puisne judges, but this number will probably be increased later. Both the Advocate-General, Mr. M. C. Setalvad, and the Chief Justice highly praised the work of the Judicial Committee of the Privy Council, which has ceased to have appellate jurisdiction from India.

The Chief Justice said that although the Privy Council's decisions would no longer be binding on that court, they were bound to be treated with great respect as they had become part of the law of the country. But the decisions of the Supreme Court of the United States of America, which was the only other country with so many states federating to form one Union, and the principles of law laid down by that court would, perhaps, be more relied upon for Indian decisions than they had hitherto been.

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

February 4, 1950

Dear Chief:

Would it not be appropriate and nice and internationally wise if the Court were to send greetings and good wishes to the Indian Supreme Court? I'm sure the Indian Embassy would gladly transmit the message.

Faithfully yours,

F.F.

The Chief Justice.

Informed FF
at Conference — when
he brought it up — that
I did not think we
ought to take it up.
FFF
2/4/50

2/13/50 -

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FEB 15 4 50 PM '50
CHAMBERS OF THE
CHIEF JUSTICE

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

Later

Dear Fred:

First and last - I am very sorry to have broken in on your rest. I should not have done it.

Since you mentioned assignments, I hope I'm right in assuming that the equal divisions in the Washington labor cases postpone their assignment. The reason I say that is because

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I'm preparing a memo analyzing all our previous decisions in this field, including the terms of the injunctions, as a basis for consideration of the precise questions now before. This is intended as an informative memo.

Take care of yourself — an extra day's indulgence may be a good investment.

Yr
FF

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

April 28, 1950.

Dear Chief:

1. Tomorrow is the Judicial Conference of my circuit and I shall therefore not be at our conference. I have asked Hugo to vote me, having left my dispositions with him.

2. One can never tell, and so I leave with you word that I am staying with Magruder, J. His home telephone number is Kirkland 7-3712.

3. If by any chance the Labor cases are ready to come down - I have had only informal indications of the support of some of the brethren to my opinions - I shall be here on Monday to announce them.

Faithfully yours,

F.F.

RECEIVED
APR 28 1 36 PM '50
CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice

For memo from Justice Frankfurter in re holding session of Court while ABA is meeting in Washington - see

Personal - Invitations - ABA Conv.

Fill

October 31/50

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

Dear Chief

I am Enthusiastic over the proposed change for the Court room. It enormously enhances the Ensemble Effect — it makes for greater convenience, courtesy and civilized relations. It makes of the nine judges a compact, intimate collectivity instead of nine disparate individuals who

do not see each other (except their immediate neighbors) and are not adequately taken in by counsel. I deeply hope that plan will be realized — it will greatly conduce to the camaraderie and comradeship of the Court.

Yours sincerely,

Felix Frankfurter

OCT 31 11 09 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

NOTED
FEB 28 1950
F.M.V.

RECEIVED
FEB 28 9 50 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

February 27, 1950.

Dear Brethren:

By way of diversion the excerpt quoted below from a letter I recently received may interest you. I ought to add that it is written by a layman - albeit a very distinguished scientist.

F. F.

"I am intrigued by the Solesbee case because of the evidence it seems to me to bear on the decline of Christian doctrine. For those who do not believe in life after death there does not seem to me anything specially inhumane in executing an insane person. The argument that a person who becomes insane while awaiting execution is thereby deprived of the possibility of presenting some extenuating evidence makes sense in relation to due process, but only at such a technical level that a violation of due process in this respect can hardly be called an offense against the basic and popularly held mores of our society. It seems to me, therefore, that the moral revulsion against execution of an insane person in the past must have had its deepest roots in the belief that the unshriven soul is damned. Evidently this belief is not potent among the brethren. Nor, in their opinion among the people of this country at large. I wish that I could feel sure that the decaying Christian morals were being replaced by something as good or better."

November 2, 1950.

Dear Brethren:

The Chief Justice has advised me that it seems to be indicated that I am leading a majority of the Court in No. 176, Harding v. United States. I do not however know where I am leading it to. Therefore I will be obliged to you if you will indicate below the disposition you are prepared to support.

F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Reed, J.			
Black, J.			
Vinson, C. J.	X		

November 2, 1950.

Dear Brethren:

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F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Reed, J.	✓		
Black, J.			
Vinson, C. J.			

I am for denial of certiorari. If granted, & necessarily reversed without opinion, I wish to be noted as dissenting.

FJR.

Nov. 2, 50

November 2, 1950.

Dear Brethren:

The Chief Justice has advised me that it seems to be indicated that I am leading a majority of the Court in No. 176, Harding v. United States. I do not however know where I am leading it to. Therefore I will be obliged to you if you will indicate below the disposition you are prepared to support.

F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Reed, J.		affirm	
Black, J.			
Vinson, C. J.			

Unfortunately a majority is against my position

November 2, 1950.

Dear Brethren:

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F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.			
Jackson, J.			
✓ Douglas, J.		either per cur or full dress for reversal — preferably per cur.	
Reed, J.			
Black, J.			
Vinson, C. J.			

November 2, 1950.

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F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.			
Jackson, J.	✓		
Douglas, J.			
Reed, J.			
Black, J.			
Vinson, C. J.			

I dont know ↑ ↗ - If full dress dissent is in works may be full dress or at least dinner coat answer is proper

November 2, 1950.

Dear Brethren:

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F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.			
Burton, J.		✓	
Jackson, J.			
Douglas, J.			
Reed, J.			
Black, J.			
Vinson, C. J.			

✓

HAAB 11/3/50

November 2, 1950.

Dear Brethren:

The Chief Justice has advised me that it seems to be indicated that I am leading a majority of the Court in No. 176, Harding v. United States. I do not however know where I am leading it to. Therefore I will be obliged to you if you will indicate below the disposition you are prepared to support.

F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.			
Clark, J.		✓	
Burton, J.			
Jackson, J.			
Douglas, J.			
Reed, J.			
Black, J.			
Vinson, C. J.			

November 2, 1950.

Dear Brethren:

The Chief Justice has advised me that it seems to be indicated that I am leading a majority of the Court in No. 176, Harding v. United States. I do not however know where I am leading it to. Therefore I will be obliged to you if you will indicate below the disposition you are prepared to support.

F. F.

	Affirm	Reverse	
		Per cur.	Full Dress
Minton, J.	✓	✓	
Clark, J.			
Burton, J.			
Jackson, J.			
Douglas, J.			
Reed, J.			
Black, J.			
Vinson, C. J.			

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 13, 1950.

Dear Chief:

To my way of thinking the West Virginia Compact case involves far-reaching issues and their illumination will gain if ample opportunity for competent argument is given. I am agreeable, therefore, to giving other States time to participate, but we will be swamped and not helped if the Attorney General of every State who wants to appear or send somebody can say he has a right to argue if Illinois has. My thought, therefore, is to have you protect yourself against too many individual State appearances. Perhaps some kind of conditional allowance of Illinois's motion - that is for herself and others similarly situated - might be possible.

Faithfully yours,

FF

The Chief Justice.

Original Filed in VIP Correspondence File

November 16 97

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

Dear Ted:

You were kind to bring me your good wishes in person — and it was my loss not to be here to receive them. But I found them awaiting me, & my best thanks for them

Yours &c

(1946)

Friday

Fred:

Two things, before I run loose — and I hope both hardly need to be said:

1st it was of course slipshod English for me to say "You don't know what will happen" when I meant "Nobody knows".

2d You certainly don't have to excuse me-nor

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I assume others – that nobody could "pressure" you: "right", "left" or "centre".

Have two old-fashioneds tonight!

T.L.

Supreme Court of the United States.
Memorandum.

FEB 13 1947

----------, 194

I personally do not care which way the rule goes so it is certain.

But I have reason to believe that if we depart from usual rule today it may make a

Supreme Court of the United States.
Memorandum.

2/10/47

FEB 13 1947

----------, 194

Fred,

The Clerk on inquiry by F.F., says the rule has been for junior judge to announce first in dissent as in stating ofs. of the Court.

Supreme Court of the United States.
Memorandum.

----------, 194

Fred,

FEB 13 1947

Don't worry. I will take care of the matter.

W.

2/10/47

Supreme Court of the United States.
Memorandum.

----------, 194

a problem later. And in my opinion it would be better not to raise the q. by departing from the usual procedure today.

W.

Original Filed in VIP Correspondence File.

Fib-Per
Fmv- 8/3/49

Law Offices
White & Harber
Sacramento, California

Clinton E. Harber
Herbert E. White
Lawrence A. Schei

RECEIVED
AUG 3 4 52 PM '49
CHAMBERS OF THE
CHIEF JUSTICE

July
Twenty-ninth
1 9 4 9

Honorable Fred M. Vinson
Chief Justice of the Supreme Court
of the United States
Washington, D. C.

Dear Sir:

The enclosed editorial from the July 11, 1949 edition of The Sacramento Union, regarding the shameful conduct of Justices Frankfurter and Reed in the Alger Hiss trial, may be of interest to you.

I think it is wrong for any Justice of a Supreme Court to participate as a witness or otherwise in any case which later on may be appealed to the Court of which the Justice is a member. It seems to me that such action violates the last sentence of Paragraph 33 of the Canons of Judicial Ethics of the American Bar Association. That paragraph, you will recall, states that a Judge should, "in prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct".

If I were a litigant and two Justices of the Supreme Court testified in the trial court as witnesses for my opponent and later on the case was appealed to the Supreme Court, I would feel that my chances of winning would be rather remote.

The behavior of Justices Frankfurter and Reed has lowered the prestige of your Court. I hope you will take the necessary steps to prevent a repetition of such conduct on their part.

Yours very sincerely,

Herbert E. White

HEW:vc
cc: Justice Felix Frankfurter
Justice Stanley Reed

RECEIVED
DEC 18 11 16 AM '48
CHAMBERS OF THE
CHIEF JUSTICE

Memorandum for the Brethren

Since Westbrook Pegler evidently intends to bring his poisonous pen into action against me in connection with the Alger Hiss affair, and since he will thereby inevitably involve the Court, I should like my colleagues to see the attached memorandum by way of background.

F. F.

December 18, 1948

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

October 27, 1947

Dear Chief:

If I am right in assuming that the assignments of (1) 52 and 96, and (2) 49 and 97, fall to me to make, I make the following dispositions,

(1)Nos. 52 and 96 - Burton, J.

(2)Nos.49 and 97 - Frankfurter, J.,

unless either assignment would cause inconvenience to your assignment-making.

Faithfully yours,

F.F.

The Chief Justice

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

RECEIVED
DEC 2 12 43 PM '48
CHAMBERS OF THE
CHIEF JUSTICE

December 2, 1948

Dear Chief:

In referring to the fact that multiple opinions go back to the beginning of the Court, I did not mean to imply that that was a practise only of the early days and had later fallen into disuse, so that resort to it now is the resurrection of something that is archaic. That, of course, is not the fact. To be sure, in the early days every justice individually expressed his views, especially in constitutional questions. That practise ceased largely because of the burdens that rested on the justices - in the early days due not merely to the business of this Court but to circuit duties. Deference to the great authority of Marshall had also something to do with it. But it cannot be said that multiple opinions ever went out of usage - that is, more than one opinion in support of the Court's conclusion or more than one dissent.

The appointment of almost every Chief Justice since Taney's day has been accompanied with some expression of hope that the divisions that have marked the Court's opinions would evaporate during the new Chief Justiceship and that hope has always been disappointed for reasons, as I believe, that are inherent in the functioning of the Court. A typical illustration of what I regard as the pursuit of a fata morgana was an editorial in the New York Tribune expressing the hope, when Taft was appointed Chief Justice, that in view of his "tact and good humor" with Taft "as moderator, it is probable that not a few asperities that mar the harmony of the celestial chamber, the consulting room, will be softened, and that not quite so often in the future will the Court divide five and four." That was a reference to divisions under White, but of course divisions under Taft were at least as plentiful. Then came Hughes, who was no slouch as a "moderator", and we

Original Filed in VIP Correspondence File

all know how divisions subsided during his regime - and divisions not always expressed by a single opinion on the same side.

Somehow or other all the other English-speaking nations seem to survive with the expression of individual views in almost every case. And I adhere to the view, which Jefferson so convincingly expressed, that were it possible to dispose of the business of the Court and to express individual views on constitutional issues that would be most desirable. But, in any event, bench and bar and the public generally have "a right to be critical" but their criticism is well-founded only if the quality of opinions is below the appropriate standard for this Court, whether in substance or in temper, or if opinions are merely repetitive.

If there is one thing that the history of this Court proves, it is that very little attention should be paid to the ephemeral griping of an uninformed laity and, too often, of an unlearned or narrowly preoccupied bar.

Faithfully yours,

F.F.

The Chief Justice

SUPREME COURT OF THE UNITED STATES

Nos. 278, 279, 280, 281 and 282.—October Term, 1945.

Reconstruction Finance Corporation; Insurance Group Committee; Guaranty Trust Company of New York, Trustee, Rio Grande Western Railroad Company Consolidated Mortgage; Central Hanover Bank and Trust Company, Trustee, Rio Grande Western Railroad Company First Trust Mortgage; United States Trust Company of New York, Trustee, Denver and Rio Grande Railroad Company Consolidated Mortgage; and The Chase National Bank of the City of New York, Trustee, Denver and Rio Grande Western Railroad Company Refunding and Improvment Mortgage, Petitioners,

278 *v.*

The Denver and Rio Grande Western Railroad Company, et al.

Same,

279 *v.*

The Denver and Salt Lake Western Railroad Company, et al.

Same,

280 *v.*

City Bank Farmers Trust Company, Trustee Under the Debtor's General Mortgage.

Same,

281 *v.*

The Denver and Rio Grande Western Railroad Company, et al.

Same,

282 *v.*

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[October —, 1946.]

MR. JUSTICE FRANKFURTER, dissenting.

On November 1, 1935, The Denver and Rio Grande Western Railroad Company and The Denver and Salt Lake Western Railroad Company, (hereinafter compendiously called "the debtor") initiated these proceedings for their reorganization under section 77 of the Bankruptcy Act. The plan of reorganization here in controversy was approved by the Interstate Commerce Commission on June 14, 1943. The District Court approved the plan for necessary submission to the various classes of creditors. All classes except the holders of the general mortgage bonds accepted the plan. On the effective date of the plan, the claims of these General Bondholders was about one-fourth of the debtors entire debt. Just short of eighty percent of this class of creditors (79.33%) voted to reject the plan. Congress has made the right of any class to reject a plan subject to the power of a district court to override such rejection, if the judge "is satisfied and finds * * * that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." The District Court on November 1, 1944, found that all the requirements of the statute had been met and confirmed the plan. 62 F. Supp. 384. But the Circuit Court of Appeals for the Tenth Circuit, a strong bench, on May 10, 1945, found that "the General Bondholders were reasonably justified, within the meaning of the statute, in rejecting the plan, and that the District Court was without authority to confirm the plan in the place of their adverse vote." 150 F. 2d 28, 40. On a fair construction of the requirements of Congress for the adjudication of railroad reorganizations, as applied to the situation before us, I cannot escape agreement with the Circuit Court of Appeals.

Railroad reorganizations are so enshrouded in the confusing intricacies of high finance that the true nature of decisive issues is too often lost to view. It may be useful

to an appreciation of what appears to me to be the crux of the case to put a situation that is sufficiently analogous but much more familiar. In the early depression years the big life insurance companies foreclosed a large number of farms. The foreclosure process, we assume, involved the control of the farm and all its income by a judge. The hypothetical farm began to make a fair income, enough to pay the insurance company a considerable part, if not the whole, of the annual interest. But instead of paying the interest, the judge applied the money to rebuild the homestead, to add a new barn, to purchase an adjacent field, the most modern machinery and additional heads of cattle. Thereby the farm became far more valuable than at any time since the insurance company placed the mortgage on it. Moreover, the judge retained as cash in the bank a portion of the income sufficient to pay off at least twenty percent of the mortgage. The farmer thinks he ought to be allowed to use the cash to reduce the mortgage, should be given credit for the income which the judge used to make the considerable improvements and which could have been used to reduce the mortgage. This would appear to be a natural attitude on the part of the farmer, and it would hardly seem that he was not reasonably justified to resist the claim of the insurance company to the farm, with all its improvements as well as the cash in bank.

This simple analogy may look almost trifling along side the complicated details involved in a plan for the reorganization of a railroad system. But is it an oversimplification of the controlling issue, namely, was the Circuit Court of Appeals wrong in holding that the General Bondholders were "reasonably justified" in rejecting the plan? Let the facts so clearly and fairly stated in the opinions below speak for themselves. Judge Huxman thus summarizes the Court's conclusion that the General Bondholders had "a real grievance."

> On November 1, 1935, the Debtor's total debts senior to the claim of the General Bondholders was

slightly over $101,000,000. The General Bondholders' claims at that time were approximately $30,000,000, making the total of the two claims approximately $131,000,000. Any one of the ten plans of reorganization prior to the final one fixed the value of the property at more than enough to satisfy the claims of all bondholders in full, as of the date this proceeding was instituted. During the ten intervening years, the claim of the Senior Bondholders increased to more than $139,000,000, and that of the General Bondholders to more than $43,500,000, making a total of more than $182,000,000, required for the two classes of claims.

During all of this period the Debtor enjoyed substantial income, amounting to approximately $50,000,000. Instead of using this income in payment of interest on the senior claims, it was used in making permanent and lasting improvements in the road. More than $43,000,000 was used in this way. None of these expenditures has resulted in a comparable increase or in any substantial increase in the final valuation, over the valuation prior to the making of the improvements. But as a result of this operation, the position of the General Bondholders has deteriorated from a 100 per cent participation in the amount of their claims to a mere ten per cent. Nor does it change the picture to say that these improvements were necessary to the railroad system. The fact still remains that earnings in which all had a vital interest were used in building a new railroad in many respects, which will be handed over to the Senior Bondholders, and the General Bondholders will practically be eliminated as a result thereof.

But this alone does not entitle the General Bondholders to a greater participation in the reorganized company. Neither does it condemn the plan of reorganization or the capital structure set up therein.

The operation of a railroad involves the expenditure of large sums for operation. It involves the formulation of plans of operation and the exercise of judgment and discretion. If, in the exercise of this discretion, funds are unwisely spent, from the viewpoint of the interest of all creditors, they may feel aggrieved, but they have no legal cause of complaint.

Neither was the Commission compelled to, nor would it be justified in adding the amount of these expenditures to the capitalized value if in the exercise of sound discretion it felt that the reasonable prospective earnings of the road, after the improvements did not justify it. However, in the face of all this, after satisfying in full the claims of the senior bondholders, the plan of reorganization should have made sure that all excess current assets, as well as all excess war profits yet to accrue, would go to the General Bondholders.

[20] The commission, as pointed out, adopted a conservative, sound estimate of the prospective earnings of the reorganized company. For this it is not to be criticized. An over-optimistic view would again surely lead the Debtor into the bankruptcy courts, with which it has had too much acquaintance already.[7] We, however, feel that there is more than a speculative probability that these war industries which have been constructed along the system, as well as the improvements which have been made by the use of these net earnings, might produce greater net returns than anticipated in the plan. If such should be the case, they certainly belong to the General

[7] Properties included in this railroad system have participated in the following reorganizations: The Denver & Rio Grande R. Co. was a successor in a reorganization proceeding in 1886; the Rio Grande & Western R. Co. was the successor in a reorganization proceeding in 1889; these two companies consolidated in 1908 under the name of the Denver & Rio Grande R. Co.; the present company was reorganized in 1920 and again in 1922 to 1924.

Bondholders and not to the Seniors, and the plan should bring this about. It could be done by issuing to the General Bondholders an additional amount of a subordinate stock which would receive returns only from excess dividends. This is a mere suggestion on our part, and in no wise binding on the Commission. Our duty is limited to pointing out defects in the plan. It is the responsibility of the Commission to correct them.

The Junction Bonds

[21] We think that the complaint as to the manner in which the Junction Bonds were handled is well taken. The Rio Grande Junction Railroad is a wholly owned subsidiary of the Debtor. It had bonds outstanding in the hands of the public for the payment of which the Debtor was liable, totaling $2,758,333. This claim was senior to that of the General Bondholders. The plan set aside securities for the payment of this claim. In an order dated September 13, 1943, the District Court directed the trustee to pay this claim with some of the surplus cash on hand, and retained the securities which were to be used in the payment thereof in the treasury of the company. The court treated the transaction as a purchase of securities rather than a payment of a debt. This is a play upon words, and, in any event, is immaterial to the issue. The fact remains that the new capitalization provided securities for the payment of these bonds. The value behind these securities in no wise belonged to the Senior Bondholders, because they had been paid in full. When surplus cash was used to pay this claim, the value behind the securities set aside for that purpose remained undistributed. Since the Senior Bondholders had been satisfied in full, this undistributed value in all equity and fairness belonged to the General Bondholders. Any plan which does not give it to them does not comply with the requirements of section 77, sub. e, of the Act.

Inasmuch as the right decision turns on an adequate appreciation of the facts, I deem it important to give the picture as drawn by Judge Phillips:

> "On November 1, 1935, during the depths of the national depression, the debtor came into court for reorganization. At that time the debtor's senior debts ahead of the general mortgage bonds aggregated slightly over $101,000,000 and the claim of the general mortgage bondholders aggregated about $30,000,000. With an immediate reorganization, a capitalization of $132,000,000 would have been adequate to give the general mortgage bondholders new stock equal to 100 per cent of their claim. No capitalization or valuation ever proposed for the debtor, in any plan presented, has been that low. During the eight years' delay in reorganization (in nowise due to the general mortgage bondholders, but, at least in part, to controversies among the senior security holders) and up to January 1, 1943, the effective date of the plan, the claims of the senior security holders, due to the accrual and nonpayment of interest, increased about $38,000,000. The debtor's net income available for interest during the trusteeship to the end of 1944 amounted to $49,420,972. It exceeded by approximately $9,500,000 the interest charges which accrued on the claims of senior security holders to the end of that year. As of December 31, 1935, the debtor's current assets were $9,727,230 less than its current liabilities. As of December 31, 1944, the debtor's current assets exceeded its current liabilities by $12,125,863.50. Thus, it will be seen there has been a favorable change in the current situation of $21,853,093, and, moreover, since the plan was formulated, the Junction Bonds have been paid and equipment obligations have been reduced from $5,758,000, the amount provided for in the plan, to $4,540,000, a reduction in that requirement of $1,218,000.

Approximately $43,000,000 of the income available, but not used, for the payment of interest has been expended in permanent improvements and betterments. While the investment value of the debtor's property thus was substantially increased, the Commission's valuation, based on estimated future earnings, was not increased proportionately. As a result, the claim of the senior security holders has increased and the participation of the general mortgage bondholders has been pressed downward until it is now fixed at 10 per cent of the new common stock. Many of the improvements and betterments referred to above have substantially increased the capacity of the railroad to handle increased traffic as it arises. Central train control installed in many segments, where the greatest density of traffic obtains, gives to those segments, in a large degree, the equivalent of a double-track railroad and increases the number of trains that can be operated over the road and the volume of traffic that can be handled by the road. Other of such improvements have contributed to efficiency and economy in operations. These improvements have enabled the debtor to handle the great increase in traffic resulting from the war effort and have placed the debtor in a position to more economically and efficiently handle a volume of traffic largely in excess of its prewar traffic, should future economic conditions produce such traffic. Under the plan approved and confirmed by the district court, 90 per cent of the common stock goes to the holders of the senior securities and 10 per cent to the general mortgage bondholders. As a result, should there be a substantial increase in the debtor's postwar traffic over its prewar traffic, 90 per cent of the increased earnings will inure to the benefit of the holders of the senior securities and only 10 per cent to the general mortgage bondholders, whose claim was decreased 90 per cent by reason of the failure to discharge interest accruals

with income available therefor and the diversion of such income to the cost of such permanent improvements. It seems to me, under all these circumstances, that, in addition to the other adjustments required to make the plan fair and equitable, the Commission should endeavor to modify the plan so as to give relief from the situation that lets the full impact of the improvement program fall upon the claim of the general mortgage bondholders and accords them no corresponding benefits.

From the confusing financial details one stark fact emerges. In 1939 the Commission found that the debtor would be able to earn enough in the future to provide an income on one-third of the General Mortgage bonds. In the reorganization plan in 1943 the Commission concluded that the debtor would not earn enough to provide income on more than one-tenth of the General Mortgage claims. The capitalization proposed by the Commission in 1943 eliminated as valueless more of the total claim of the General Mortgage bonds and more of the face amount of these bonds than did the capitalization proposed by the Commission in 1939. Since 1939 the debtor has achieved a position where it will be able to make large debt reductions and large reductions of its interest charges. It accumulated a very large net income in excess of its interest service, it expended large sums to decrease operating costs and to improve its business prospects with the result that the future earning power of the railroad was greatly increased. In the face of all these factors the senior security holders were given not only securities for the full amount of their claim but also all cash accumulations available for the reduction of the road's indebtedness. Improvements in the financial and physical structure of the road which will increase the profits of the future owners of this road have been made the basis of substantially wiping out one class of the present owners.

Inequitable consequences such as these led the Circuit Court of Appeals to conclude that the plan failed to satisfy

the command of Congress that as a matter of judicial judgment a reorganization plan must be found "fair and equitable". But to defeat the plan it is not necessary to find it intrinsically wanting in fairness and equity. Congress did not authorize the enforcement of a plan for reorganization merely because as a matter of judicial judgment it is "fair and equitable". Congress wrote into law another and a vital condition to the approval of a railroad reorganization plan. A plan must commend itself as "fair and equitable" to the various classes of creditors. And if any class rejects it, the plan cannot prevail unless there is a judicial finding that such rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." Claimants who are thus entitled to vote on their interests as a class are surely not expected to vote as altruists any more than they are to be allowed to behave as unreasonable obstructionists. If that which Congress has written is not to be stricken out, we must recognize the referendum which Congress has lodged in each class of creditors as a means of practical self-protection by each class of creditors and not as an occasion for empty dialectic. On a fair and practical construction of the power which Congress has seen fit to place in the hands of the various creditor classes, a class can be deemed not "reasonably justified" in exercising the right which Congress gave them to vote their interests, only if a court can say that no intelligent class of creditors, regardful of their class interests, but not obviously hostile to the common interest with which their class interest is involved, could have objected to the plan. Any other construction effectively reads "reasonably justified" out of the statute. And that in effect is what the district court, with this Court's approval, has done with the candor of silence. For it does not find that the General Bondholders were not reasonably justified in exercising their power of rejection. It does little more than assert this conclusion, apparently on the finding that the plan was in fact "fair and equita-

ble". It imposes its judgment that the plan was "fair and equitable" upon the General Bondholders and thus in effect deprives them of the very right which Congress gave them to be judges of their own interests so long as the court cannot say they were capricious or greedy in their judgment. This Court seems to be of the view that in its judgment a plan is "fair and equitable", it must appear equally fair and equitable to every class of creditors. But this can only mean that the Court deems redundant and therefore eliminates the Congressional requirement that before a plan can be approved by the Court, it must commend itself to the judgment of a class of creditors exercising the kind of judgment that men are entitled to exercise in the pursuit of their self-interest, as well as commend itself to the judicial sense of fairness.

In assuming that if a plan seems fair and equitable to a court, rejection of it by any class must be unreasonable, the Court not only disregards the contrary assumption of Congress, and thus disregards the mandate of Congress. Such an attitude is also oblivious of the practicalities of the situation. To assume that if a court finds a plan is "fair and equitable" no class of creditors can be reasonably justified in rejecting it, is to assume that the ascertainment of fairness concerning so complicated a situation as a plan for railroad reorganization lies in the realm of even approximate certitude. It is quite the opposite. A court in ascertaining whether a plan is fair and equitable is not engaged in ascertaining indisputable facts. It is forming a judgment, and largely a prophetic judgment, regarding a maze of factors, and as to each factor there is usually room for considerable difference in judgment. It is for this reason that Congress added to the requirement for the approval of the plan that it appear fair and equitable in the voting system by the classes of creditors.

For an addition it was by Congress to the recommendation of the legislation by Commissioner Joseph B. Eastman. As Federal Coordinator, Commissioner Eastman proposed to Congress that a court be authorized to confirm

the reorganization plan despite the failure to obtain a majority vote of one or more of the affected classes of creditors, provided that the district court was satisfied in two respects: (1) that the plan "makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it"; and (2) that the judge was satisfied that the plan is "fair and equitable." See Coordinator's Annual Report for 1934, pp. 237, 238.

But Congress deemed it in the public interest to give greater protection to the various classes of creditors than the Coordinator suggested. Congress limited in several respects the power of the courts to disregard a class vote against a plan, beyond the safeguards proposed by the Coordinator. For present purposes it is decisive to note that Congress added to the protection formulated by the Coordinator by requiring that a judge must now be satisfied and find that "such rejection is not reasonably justified in the light of the respective likes and interests of those rejecting it and all the relevant facts."

I cannot escape the conclusion that to hold, in the circumstances of this case, that the General Bondholders were not reasonably justified in rejecting the plan is to decide that this requirement, purposefully written into the law by Congress as an addition to the requirement that the judge must find the plan to be "fair and equitable", is but a meaningless repetition of that requirement.

The undesirability of further delay in taking this road out of the district court, where it has been for more than a decade, is bound to press upon any court. But it ought not lead to confirmation of a plan which fails to satisfy the explicit prerequisites for approval laid down by Congress, particularly so where the result is as drastic as the Circuit Court of Appeals and the expert Senate Committee on Interstate Commerce have made manifest. (Citations).

Congress has not curtailed, nor shown any desire to restrict, the right of self-protection which it gave to rail-

road creditors and to which the result of this case appears indifferent. On the contrary, Congress has since given decisive proof that it disapproved the construction which courts in the past have given to § 77, resulting in undue harshness to junior interests and promoting concentration of railroad control. It has emphatically indicated that the rights of junior interests, reflecting public interests, should be more carefully safeguarded. Whether Congress is of this view wisely or unwisely, it is not our business to decide. But it is the business of this Court to respect what I find to be a clear enunciation by Congress of the conditions which alone authorize courts to sanction a railroad reorganization.

The Chief Justice
from
Frankfurter, J.
(Dissenting)
10/24/44

C - SF - ASSOCIATE JUSTICES
Frankfurter

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

Nov. 21/46

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Dear Fred:

The Indian gentleman whom I shall bring in, to pay his respects, is

Dr. H. V. KATJUE,

the Minister of Justice in the United Provinces (population something like 60,000,000). He is a very distinguished lawyer, head a leading UN Assembly meeting.

F.F.

I'll phone in about 11 to see if you are free.

(1947

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

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

Dear Chief:

If I spoke unduly on what is an unemotional & merely technical matter, I'm sorry and apologize. But just before 7 o'clock I had most disturbing news concerning the health of our very dear Dave. That does not excuse a bad temper but may account for it.

Yours
FF.

From

F. F.

Supreme Court of the United States.

Memorandum.

----------, 194

Chief:

Since you were in on what was a "public fight" you might care to be in on the finish - at least for the present.

N. Y. Times 4/13/47

The Loyalty Order

Procedure Termed Inadequate And Defects Pointed Out

Of the writers of the following letter, Mr. Griswold is Dean of the Harvard Law School; Mr. Scott, an authority on the law of trusts; Mr. Katz and Mr. Chafee, who served as vice chairman of the Commission on Freedom of the Press, are Professors of Law at that school.

TO THE EDITOR OF THE NEW YORK TIMES:

The moral and political validity of the Executive Order "prescribing procedures for the administration of an employe's loyalty program in the executive branch of the government" will be measured by its efficacy in achieving its twin purposes. As stated, these are: to afford "maximum protection * * * [to] the United States against infiltration of disloyal persons into the ranks of its employes," and to afford "equal protection from unfounded accusations of disloyalty * * * [to] the loyal employes of the government."

It is possible so to administer the order as to accomplish these ends. It is also possible so to administer the order as to miss genuine culprits, victimize innocent persons, discourage entry into the public service and leave both the government and the American people with a hangover sense of futility and indignity.

The nature of the administration will hinge upon the procedures to be followed. This is the nub of the business. Here, as so often in our history, moral and political issues come to focus in a question of procedure. Although the order purports to prescribe a procedure, the prescription is shadowy and incomplete.

Conceivably, the silences of the draftsmen may be redeemed by wisdom in execution. At this time, however, we can only appraise the order according to its terms. The procedure actually described is quite inadequate. It fails to take due account of the gravity of the sanctions invoked against a person to whom the prohibitions of the order may be deemed to apply. It fails to draw upon the cumulative experience of courts and administrative agencies. It fails also to give effect to the conception of sound administrative procedure reflected in the very recently enacted Administrative Procedure Act.

Meaning of Dismissal

It is imperative to keep clearly in mind what a dismissal under the order means. Far more is involved than the loss of job. It means that:

(1) The person dismissed will be denied all opportunity for employment anywhere in the Federal Government.

(2) As a practical consequence, he will also lose almost all possibility of finding employment within any State or Municipal Government.

mendation is for removal and is accepted by the departmental head, his decision is subject to an "appeal" to the "Loyalty Review Board of the Civil Service Commission," which, after review, makes an "advisory recommendation."

Since there is no provision for a record, it is by no means clear what the Loyalty Review Board of the Civil Service Commission will review or on what basis. The order is, moreover, wholly silent as to the procedure to be followed by the Loyalty Review Board upon such review. The membership of the Loyalty Review Board is to be appointed from "officers or employes of the [civil service] Commission," presumably by the Commission.

Impalpable Standard

This tells its own tale, but the tale is not yet complete. The charges against the suspected public officer or employe will derive their significance from the standards of wrongdoing defined by the order. The governing standard is explicit. "The standard for the refusal of employment or the removal from employment * * * shall be that * * * reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." Even in the most mature and most careful and fairest of hearings, it would be sufficiently difficult for the defendant to come to grips with so impalpable a standard.

But even this is not all. The "activities and associations of an * * * employe which may be considered in connection with the determination of disloyalty may include one or more of the following: * * * Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, Fascist, Communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Here we swim in a sea of ambiguity. Is the Attorney General's designation to be taken as final? May the defendant undertake to show that a group with which he is sympathetically associated is not subversive, or must he limit his defense to an attempt to show that he has no connection with the organization? If he concedes his membership, and is foreclosed by the Attorney General's characterization of the organization, will this be taken as "proof" that he, as an individual, is likewise subversive, or at least as "reasonable grounds for belief" that he is disloyal? Where is the burden of proof? Is it on the accused?

Answers to Questions

These are questions which can be answered, and answered in such a way as to maintain both the integrity of

(3) Also, he will encounter special difficulties in obtaining employment in private organizations.

Consider the case of one who, for twenty or thirty years—his entire mature life—has worked in the Forestry Service, or the Bureau of Animal Industry of the Department of Agriculture, or the Postal Service, or the Bureau of Standards, or the Tennessee Valley Authority. To deny him all opportunity for employment in governmental service, federal, state or municipal, is to deprive him of the only means of livelihood for which he has any training or experience.

The tested wisdom of our tradition and national experience dictate that no sanction so drastic shall be applied save after adjudication of wrongdoing based upon a full hearing before responsible and impartial public officers, who are not themselves in fear of losing their own jobs.

The Executive Order provides for a hearing of sorts before a "loyalty board" in the particular department or agency, whose members are to be appointed by the departmental or agency head from the personnel of the department or agency. Since Cabinet officers and other senior personnel are unlikely to have either the time or the taste for such service, the membership will tend to be drawn from third or fourth line employes, who will themselves feel none too secure.

Evidence at Hearing

And the nature of the hearing? The suspected "officer or employe shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense." So far, good. But—"The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit."

The accused is also given a "right to reply to such charges in writing," and a "right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf. * * *" There the prescription ends. There is no provision that the accused shall be confronted by such evidence as there may be to support the charges against him, so that he may undertake to rebut it. Indeed, there is no requirement that the evidence against him shall be introduced at the hearing at all.

No provision is made for a detailed record of the hearing or, for that matter, for a record of any kind. There is no requirement that the findings of the loyalty board must be supported by the evidence. In fact, there is no requirement that the loyalty board make any findings whatever. After the "hearing," the loyalty board makes its recommendation to the head of the department or agency. If the recommendation is favorable, the matter is closed. If it is unfavorable, the head of the department or agency may, but need not, refer the case to the Civil Service Commission for a hearing before a loyalty review board. The Commission's hearing is subject to the same defects as the hearing before the loyalty board. The Commission's review board makes its recommendation to the head of the department or agency, who may, but need not, follow it.

Possibilities of Abuse

The Department of Justice and the Congress have lately been much concerned about the possibilities of abuse in administrative procedure. Their concern has been given effect in the investigation and report of the Attorney General's Committee on Administrative Procedure and in the Administrative Procedure Act which became a law on June 11, 1946. These now stand as a somewhat ironic commentary on the misty procedure so indistinctly sketched in the Executive Order.

The situation can be redeemed. The order does state that its expressed requirements as to procedure "shall be considered as providing minimum requirements," which may be supplemented by the heads of individual departments or agencies. This affords some possibilities for relief here and there, but is plainly inadequate.

It is for the President and his law officers to make the correction. In default of adjustment by Executive action, the correction may be imposed by the courts, but piecemeal, slowly and after much clamor and confusion.

ZECHARIAH CHAFEE JR., ERWIN N. GRISWOLD, MILTON KATZ, AUSTIN W. SCOTT.

Cambridge, Mass., April 10, 1947.

December 1 , 1950.

Memorandum to Files

Re: _____

My diary on this day shows an entry in this matter as follows: "in Court on pre-trial -- 4 hours."

This entry gives the impression that it represents an important legal skirmish in this action. As will appear below, such an impression would not hold up under close scrutiny.

We received notice by way of a post card from the Clerk's office that this case was on the December 1, 1950 pre-trial list -- 10 A.M. -- Court Room No. 5.

My "assignment"was to inform the Court as to Mr. __ _____ health and try to get the case off the list or secure a late trial date.

I arrived at the courtroom No. 5 in the Federal Building five minutes before 10 A.M. -- the appointed hour. I had the utmost difficulty in getting into the court-room. There seemed to be between three or four hundred lawyers attending this 10 A.M. pre-trial session. Shortly before 11:00 Judge McCarthy made his appearance and the session got under way. (On the basis of a minimum charge of $10 per hour per client, it would appear that the delay in starting the session from 10 to 11 was going to and fairly should cost the clients ot the 400 or so lawyers present approximately $4,000.) The pre-trial session started and I found a seat in the back of the room. No list had been posted and I had no idea when I might be called. After an hour I worked my way down to the front of the room and peeked at the list on the Deputy Clerk's desk. I found our matter about half way down the list of approximately 180 cases.

I asked the Deputy Clerk if he had any idea when I might be reached. He said no -- and that the Court wasn't exactly calling the cases according to the list.

Experience is a great teacher, and, having had no experience in the technique of pre-trial, I believed I should try to find out - for the future - how the pre-trial machinery operated. I finally managed to get a seat in the jury box right next to the

bench so that I could hear what was going on.

I soon realized what the Clerk meant when he said the Court was not going according to the list. One case was called and the Court stated to one of the lawyers - If I had known you were here, George, I would have called you earlier. (I realized, then, that I would have to wait until both all of the cases before me on the list were called and all of the cases involving counsel known personally to the Court were called.)

Pre-trial procedure is very interesting.

A case was called; counsel for one of the parties was present and informed the Court that counsel for the other side joined with him in a request that the case "go off" the list. The Court refused to take the case off the list and set the matter down for hearing on the first week. Another case was called, and, when counsel for neither party responded to the call, the Court instructed the Clerk to take the case off the list. (Moral: If both sides want the case off the list, it would appear that their best bet is to be conspicuous by their absence.)

Another case was called and counsel for the plaintiff appeared but counsel for the defendant did not appear. The Court asked counsel for the plaintiff what the case was all about. He was told that it involved an action for negligence against a railroad. The Court then asked counsel for the plaintiff what he was doing at this session which was a non-jury session, and did not counsel know that plaintiffs suing railroads were much better off with a jury trial. Counsel for the plaintiff then informed the Court that his client was in Texas and might not be able to attend the trial, that he would probably have to present his case by means of depositions, and that he felt that in the presentation of such a case he would be better off before a judge than before a jury. The Court disagreed with this, asked the Clerk if it was too late for the plaintiff to claim a jury trial, then stated that he had broad powers under the Rules and that he would grant forthwith a motion out of time for a jury trial. Counsel for the plaintiff seems to have acquiesced. (Moral: If you represent a railroad in a negligence action

it would be wise to appear in Court at pre-trial hearings.)

Shortly before 2 o'clock this matter was called by the Clerk. I stepped forward and advised the Court of Mr. _____ illness and requested that the case go off the list. The Court set the case down for January 16, 1951 with the notation that the case would then go off the list if Mr. _____ was not able to be present at that time.

The actual "running time" of the pre-trial hearing in this matter was slightly under one minute, but my diary and the firm's charges will have to reflect the entire 4 hours that I spent in Court.

As I left the Federal Building at 2 P.M. I contemplated the following in order of their relative importance (1) the lunch hour that I had missed; (2) the 11 and 12 o'clock appointments that I had been unable to keep; (3) the lack of any rhyme or reason to a pre-trial session - (a) why wasn't the list posted in advance?, (b) why couldn't the 180 cases either be split among the several judges or set down for different hours during the day so that so many lawyers would not have had to waste so much time; (c) why couldn't the entire matter have been handled by post cards and stipulations.

X

CHIEF JUSTICE
CHAMBERS OF THE
JAN 12 3 PM '51
RECEIVED

December 1 , 1950.

Memorandum to Files

Re: _____

My diary on this day shows an entry in this matter as follows: "in Court on pre-trial -- 4 hours."

This entry gives the impression that it represents an important legal skirmish in this action. As will appear below, such an impression would not hold up under close scrutiny.

We received notice by way of a post card from the Clerk's office that this case was on the December 1, 1950 pre-trial list -- 10 A.M. -- Court Room No. 5.

My "assignment"was to inform the Court as to Mr. __ _____ health and try to get the case off the list or secure a late trial date.

I arrived at the courtroom No. 5 in the Federal Building five minutes before 10 A.M. -- the appointed hour. I had the utmost difficulty in getting into the court-room. There seemed to be between three or four hundred lawyers attending this 10 A.M. pre-trial session. Shortly before 11:00 Judge McCarthy made his appearance and the session got under way. (On the basis of a minimum charge of $10 per hour per client, it would appear that the delay in starting the session from 10 to 11 was going to and fairly should cost the clients ot the 400 or so lawyers present approximately $4,000.) The pre-trial session started and I found a seat in the back of the room. No list had been posted and I had no idea when I might be called. After an hour I worked my way down to the front of the room and peeked at the list on the Deputy Clerk's desk. I found our matter about half way down the list of approximately 180 cases.

I asked the Deputy Clerk if he had any idea when I might be reached. He said no -- and that the Court wasn't exactly calling the cases according to the list.

Experience is a great teacher, and, having had no experience in the technique of pre-trial, I believed I should try to find out - for the future - how the pre-trial machinery operated. I finally managed to get a seat in the jury box right next to the

bench so that I could hear what was going on.

I soon realized what the Clerk meant when he said the Court was not going according to the list. One case was called and the Court stated to one of the lawyers - If I had known you were here, George, I would have called you earlier. (I realized, then, that I would have to wait until both all of the cases before me on the list were called and all of the cases involving counsel known personally to the Court were called.)

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X

CHIEF JUSTICE'S CHAMBERS
FEB 13 3 PM '51
RECEIVED

Supreme Court of the United States

Memorandum

----------, 194---

Dear Fred:

It may interest you to see what it means for an incompetent man to be made a Federal judge. This comes to me from a wholly dependable Boston lawyer.

FF

[1947]

Supreme Court of the United States.

Memorandum.

----------, 194

P.S. I have told this to him to his face.

C.S.

Stanley has a way of writing opinions that not infrequently make me want to dissent even when I agree with his result.

VI.

The C. V.

Supreme Court of the United States.

Memorandum.

File

January 7, 1947

Young Arthur Schlesinger's artible in Fortune has apparently greatly disturbed Brother Murphy. For obvious reasons, therefore, I should like all the brethren to see the letter I have written him.

F. F.

COVINGTON, BURLING, RUBLEE, ACHESON & SHORB
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EDWIN McELWAIN
RICHARD A. MOORE
WILLIAM M. AIKEN
CHARLES M. DAVISON, JR.
AMY RUTH MAHIN

WASHINGTON 5, D. C.

February 24, 1947

Mr. Justice Felix Frankfurter
United States Supreme Court
Washington, D. C.

Dear Mr. Justice:

I am taking the liberty of writing you about a matter in which I have been very much interested ever since I first encountered it in Law School some years ago, and about which I know that you also have some concern: the extent to which most litigants and some practitioners feel that petitions for rehearing should be filed in all cases almost as a routine matter, regardless of the presence of any new development not available or fully presented on the original hearing. Especially in the case of denial of petitions for certiorari, it has always seemed to me--and to other members of the Bar with whom I have discussed this problem--that in the absence of the most unusual or compelling circumstances no petition for rehearing should be filed, and in practice we have endeavored so to advise our clients. Occasional orders of the Court granting these petitions without explanation, however, make it difficult always to follow this rule as strictly as we would wish.

Three cases in which certiorari has been granted on petition for rehearing after a previous denial have come to my attention this Term--149 Madison Ave. Corp. v. Assetta, No. 497, December 9, 1946; Silesian American Corp. v. Markham, No. 346, February 17, 1947; and Interstate Natural Gas Co. v. Federal Power Commission, No. 733, February 10, 1947. In the first two of these the order contained a clue to the Court's reason for granting rehearing in that it assigned the case to be argued immediately after certain other designated cases. In the Interstate Natural Gas case, however, this was not true, and a subsequent examination of the petition for rehearing itself does not reveal any subsequent decision or substantial new matter not previously presented. An occasional order of this sort, without any readily discoverable explanation, not only tends to shake our own faith

in the futility of a routine petition for rehearing, but makes it almost impossible to convince the average lawyer or client that the Court has not merely changed its mind under the impact of persistent reiteration.

It is true that in some instances an explanation of the Court's action in granting certiorari on rehearing is given in the subsequent opinion of the Court after the case has been heard and decided; an example which I recall from the time I served as Mr. Justice Brandeis' law clerk is that of Kellogg Co. v. National Biscuit Co., in which certiorari was granted without any stated reason on the second petition for rehearing (304 U.S. 586), the explanation subsequently given in the opinion of the Court being that a conflicting decision had been rendered by another court after the denial of the original petition for certiorari (305 U.S. 111, 115-116). Even such an explanation, however, does not undo the damage done by the original order, both because of the delay necessarily involved and because the average lawyer who notes the order granting certiorari on rehearing probably never pursues the matter far enough to examine the subsequent opinion in an attempt to find the real explanation. It seems to me, therefore, that if the Court is not to encourage an even greater flood of petitions for rehearing, it must include in orders granting such petitions a very brief statement of the reason for its action. The inclusion in Rule 33 of a more definite explanation of the reasons for which a petition for rehearing will be entertained or granted, somewhat along the lines of Rule 38(5) with respect to reasons for granting certiorari, might also be helpful.

I hope that you will not think this letter is presumptious; I know that the Court is well aware of the problem and that none of the suggestions made is either new or original. I thought, however, that you might be interested in the point of view of one who must sometimes give litigants advice on whether or not to file petitions for rehearing, and of the possible effect of such unexplained orders as that in the recent Interstate Natural Gas Co. case.

Respectfully yours,

W. Graham Claytor, Jr.

W. Graham Claytor, Jr.

WGC:bhk