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## The Supreme Court Conference\*

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It was Lord Coke who said: "The court is aptly resembled to a clock which hath within it many wheels and many motions; all as well the lesser as the greater must move; but after their proper manner, place and motion; if the motion of the lesser be hindered, it will hinder the motion of the greater." One of the main wheels of the Supreme Court is its weekly conference. It is my purpose to outline the events occurring at a typical conference, which is more important than any other meeting of the Court since it is there that all decisions are reached. To the lawyer it has real importance, to the student it has interest, and to the laymen it may bring understanding. Unlike the reported decisions, the contemporary news articles, the letters, biographies, and congressional debates, this prelude to judicial decision is not only unpublished but is for the most part unknown or misunderstood.

What occurs between the day of argument and the time of decision? I often wondered myself as I sat at the Bar of the Court in the chair reserved for the Attorney General. After sitting there for over four years it became my good fortune to become one of the ninety-two lawyers in American history to learn at first hand what goes on behind the heavy purple curtain that separates the open courtroom from the closed conference chamber.

My choice of subjects—the unsung works of the Court—was influenced by what in motion picture parlance might be called a "theme song" of Chief Justice Hughes. Before each of the annual meetings of the American Law Institute during his incumbency he spoke of the administrative problems facing the Court, most of which he feared the lawyers "but little understood." He pointed out that some lawyers thought there

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was some "mystery about . . . [the certiorari] work" of the Court, which mystery the Chief belied and insisted "should be dispelled." He found that "some think that applications . . . are distributed among the Justices ratably. . . . [O]thers think the Justice assigned to a Circuit deals with applications from the Circuit." My associate, the beloved Robert H. Jackson, some twenty years later added with a twinkle in his eye: "[A] suspicion has grown at the bar that the law clerks [of which each of us has two, save the Chief, who has three] constitute a kind of junior court which decides the fate of certiorari petitions. This idea of the law clerk's influence," said Mr. Justice Jackson, "gave rise to a lawyer's waggish statement that the Senate no longer need bother about confirmation of Justices but ought to confirm the appointment of law clerks." In fact, during my ten years on the Court I have been asked by prominent lawyers, who should know better, to please speak to my law clerks about their petitions.

Everyone may know what happens in our courtroom. Likewise some become familiar with the details of our schedule calling for argument of counsel during a two week period, followed by two weeks of recess. Argument sessions run from Monday through Thursday. On our regular docket each party at argument is allowed one hour, unless by reason of the nature of the question the case is transferred to the "Summary Calendar" and the time is cut in half. On Friday we sit in conference. The period of recess is devoted to opinion writing and the study of appeals and certiorari petitions.

How much time does each Justice have at conference on Friday of each argument week? Does conference discussion shed more heat than light? What is the demeanor of the Justices? Let us go from the austere courtroom—from the friezes depicting the lawgivers, the Greek Ionic columns and the heavy draperies—to the oak-paneled conference chamber and see what is going on there. Over the mantle facing the large rectangular conference table is a portrait of Chief Justice Marshall, the fourth Chief Justice by number, but the first in stature. Around this table are nine chairs, each bearing the nameplate of a member of the Court. At the east end sits the Chief Justice, and at the west, Mr. Justice Black, the senior Associate Justice. On the sides, in order of seniority, sit the remaining Associate Justices. Bookcases from floor to ceiling line the walls containing all the opinions of the Federal courts. Here the Court meets in conference at eleven each Friday morning during or preceding an argument week, and rarely does it rise before 5:30 P.M.

Only the Justices are present at conference. There are no clerks, no stenographers, no secretaries, no pages. This long-established practice is based on reason. The Court must carry on these Friday conferences in absolute secrecy, otherwise its judgments might become prematurely

known and the whole process of decision destroyed. We therefore guard its secrets closely. There must be no leak. But leak or no leak, the Court for over half a century has followed this practice. It seems that this alone might require its continuance for as Woodrow Wilson once said: “[O]ur democratic state was not a piece of developed theory but a piece of developed habit. It was not created by mere aspirations or by new faith—it was built up by slow custom.” This and other traditions of the Court lead me to the observation that the President’s adage applies equally to the Court.

Upon entering the conference room, each Justice shakes hands with those present, another custom begun by Chief Justice Fuller and hence dating generations back. We first take out our assignment sheets or lists for the day. As you know, the only power of the Court is to decide lawsuits between litigants with real interests at stake. The Court can proceed only through the judicial process. This precludes the making of advisory opinions, even to the President. The Court is therefore a passive instrument. Still the Court decided over 2000 questions last term. There was an average of over seventy cases on each list covering all of the conferences held during the term; the longest list included over 350 cases, the shortest less than forty. Our conference lasts about six hours, so this would allow on the average about five minutes to each item on the list or half a minute to each Justice. Perhaps this limited time brought Mr. Justice McReynolds to the conclusion that an “overspeaking judge is no well-tuned cymbal.” However, the Court is saved from being hopelessly bogged down by the elimination by consent of those cases that no Justice finds worthy of discussion.

The Chief Justice starts the conference by calling the first case on the list and discussing it. He then yields to the senior Associate Justice and on down the line seniority-wise until each Justice who wishes to be heard has spoken. There is no time limitation. The order is never interrupted nor is the speaker. Another tale going the rounds of the Court has to do with a conference of many terms back while the late Justices Harlan and Holmes were on the Court. Harlan was presenting his view of a case with which Holmes evidently did not agree. In the midst of Harlan’s argument, Holmes interrupted with the sharp remark, “That won’t wash! That won’t wash!” Justice Holmes often greeted Justice Harlan as “my strong hearted friend,” but he had never chided him about his legal conclusions. Harlan too, was strong minded and never turned away from a fight. In this regard his opinions show that he wielded a wicked pair of horns and often got his adversary out on both of them. Holmes, on the other hand, was the rapier type that cut so quickly one did not know his head was off until he attempted to turn it. Fortunately, the Chief Justice at the time was Melville Fuller. He had

already discussed the case and his position was similar to that of Harlan. When the diminutive but courageous, silver-haired, handlebar-mustached Chief Justice realized that all was not well between his bothers he quickly answered Holmes' "That won't wash," with a cheery "Well, I'm scrubbing away, anyhow." A tense situation passed over during the ensuing laughter.

After discussion of a case a vote is taken. We each have available a large docket book, evidently, from its appearance, handed down to us by the first of the Justices. It has a hinge on its flyleaf which is kept locked. There we keep a record of the votes. Ever since John Marshall's day the formal vote begins with the junior Justice and moves up through the ranks of seniority, the Chief Justice voting last. Hence the juniors are not influenced by the vote of their elders! While it takes five votes to decide a case, it takes only four to grant a writ of certiorari. In this manner, as Justice Van Devanter explained to the Congress back in 1925, the Court makes certain that any case deserving argument is afforded it. I might point out here that only thirteen percent of the petitions filed last term were granted. Less than two percent were state court cases. As the late revered Chief Justice Vinson said, "The Supreme Court has never been primarily concerned with the correction of errors in lower court decisions." The certiorari function, he continued, "is not simply to do justice between the parties. Everyone who comes here has had one trial and one appeal already." The purpose of the establishment of one Supreme National Tribunal was in the words of Chief Justice John Rutledge, "to secure the national rights and the uniformity of judgments." That is our mission. When certiorari is denied, it simply means that the petition did not get four votes, not that the result is right.

As you see from this routine, each Justice who does not disqualify himself passes on every piece of business coming to the Court. In some matters Justices excuse themselves. This is always noted. Perhaps they were connected with the litigation before it reached the Court, had some interest in its result, or did not hear the argument because of unavoidable absence.

I wish to emphasize here that the Court does not function by means of committees or panels. Some lawyers think a small committee of Justices passes on their petitions for certiorari. This is not true. Each Justice passes on each petition, each item, no matter how drawn, in longhand, by typewriter, or on a press. Our Constitution, as Brother Jackson has pointed out, "vests the judicial power in only 'one Supreme Court.'" This does not permit Supreme Court action by committees, panels, or sections. The method that the Justices use in meeting an enormous caseload such as last term varies. There is one uniform rule: judging is not delegated.

Each Justice studies each case in sufficient detail to resolve the question for himself.

After the vote is recorded in argued cases there remains the task of writing the opinion for the Court. At the conclusion of the conference the cases are assigned for writing. The Chief Justice assigns those in which he has voted with the majority and the senior Justice voting with the minority the remainder. This has always been the rule. People often ask about the powers and duties of the Chief Justice. While it is not the purpose of this paper to cover that subject I might say that as to conference matters, aside from the duty of assigning opinions, the Chief Justice has no more authority than other members of the Court. The Chief Justice, of course, presides and initiates discussion, as a general rule, but has only one vote. However, the assignment of opinions is a most important duty. The manner of assignment varies as to courts. In New York State it goes by rotation. In one State, I am told, it goes by chance, while in others by subject matter.

When one starts to write an opinion for the Supreme Court of the United States he learns the full meaning of the statement of Rufus Choate that "one cannot drop the Greek alphabet to the ground and pick up the Iliad." It takes the most painstaking research and care. Mr. Justice Cardozo was not far wrong when he said, "A Judge must be a historian and prophet all in one." In the average case an opinion requires three weeks work in preparation. When the author concludes that he has an unanswerable document, it is printed in the print shop in the Supreme Court building and circulated to each of the Justices. Then the fur begins to fly. Returns come in, some favorable and many otherwise. In controversial cases, and all have some touches of controversy, the process often takes months. The cases are often discussed by the majority both before and after circulation. The final form of the opinion is agreed upon at the Friday conferences. Of course, any Justice may dissent or write his own views on a case. These are likewise circulated long before the opinion of the majority is announced.

The practice of a majority opinion with dissents and concurrences does not conform with the European practice. Theirs resembles our *per curiams*. Our system may be the preferable one, but it presents practical difficulties. Mr. Justice Cardozo expressed the view that "comparatively speaking the dissenter is irresponsible. The spokesman of the Court is cautious, timid, fearful of the vivid word, the heightened phrase. . . . Not so the dissenter. . . . For the moment he is the gladiator making a last stand against the lions." For the most part the strong dissent forces the majority to take a more extreme position. Witness Chief Justice Taney in the *Dred Scott* case where the extreme statements found in the published opinion were inserted by the Chief Justice only after Mr. Justice McLean

had circulated his dissent. As Brother Jackson says, "the true test of a judge is his influence in leading, not in opposing his Court." Laymen are constantly troubled by the divisions of opinion on the Court. Even lawyers decry it, particularly when they come out on what they believe to be the short end. Differences of opinion must be expected on legal questions as on other subjects. Every newspaper that is published reflects differences not only in reporting but in editorials. Clergymen differ on theology. Professors argue over philosophy. Physicists tangle on physical phenomena and doctors are at variance not only on diagnosis but on cure. The history of progress is filled with many pages of disagreement. Why, therefore, in the words of E. Smythe Gambrell, former president of the American Bar Association, expect "the most influential men . . . on the bench . . . trained in a different philosophy and matured in a different climate" to have the same thoughts and views? They don't and they won't!

To perform the task of judging, the founders created a human institution—courts—and placed them in charge of human beings who like all such creatures are "on the dubious waves of error tost." In this respect judges are unlike that "certain French lady," mentioned by Benjamin Franklin in his address to the Constitutional Convention, who, while in a dispute with her sister expostulated: "I don't know how it happens, sister, but I meet with nobody—but myself—that's always in the right." But despite the differences and the conflicts there is one thing on which all agree and that is every man's right to disagree. Only by practicing this in full measure can truth ultimately be found. There will be, as always, some heat. Among judges, however, there is no contest, not even a "petty quarrel," but only a sincere and continuing effort to arrive at truth—at justice. As my Brother Frankfurter has so well put it: "What is essential [in judging] is . . . first and foremost, humility and an understanding of the range of the problems and [one's] own inadequacy in dealing with them: disinterestedness, allegiance to nothing except the search, amid tangled words, amid limited insights; loyalty and allegiance to nothing except the effort to find [that] path through precedent, through policy, through history, through [one's] own gifts of insight to the best judgment that a poor fallible creature can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law."