To: Mr. Justice Powell

From: Anne

No. 83-1968, Thornburg v. Gingles

(augmentation from D.C. E.D. N.C.) (argument December 4, 1985)

Questions Presented

(1) Does §2 of the Voting Rights Act entitle protected minorities, in a jurisdiction in which minorities actively participate in the political process and in which minority candidates win elections, to "safe electoral districts" simply because a minority concentration exists sufficient to create such a district?

(2) Does racial bloc voting exist as a matter of law whenever less than 50 percent of the white voters cast ballots for the black candidate?
Troublesome case for me as
I see no clear way to draw a
principled line between the
assuring any minority the election
of its candidates & proportional
representation.

But given § 2, the D.C.'s decision
may have to be affirmed. It is
therefore by N.C. judges.

BENCH MEMORANDUM

(For Va., for nearly 100 years, Republicans
were under D.C.'s analysis - were
denied participation
in the political process in State
elections. I was a Democrat)

To: Mr. Justice Powell         December 3, 1985
From: Anne

No. 83-1968, Thornburg v. Gingles

(appellate from D.C. E.D. N.C.) (argument December 4, 1985)

Questions Presented

(1) Does §2 of the Voting Rights Act entitle protected
minorities, in a jurisdiction in which minorities actively
participate in the political process and in which minority
candidates win elections, to "safe electoral districts" simply
because a minority concentration exists sufficient to create such
a district?

(2) Does racial bloc voting exist as a matter of law
whenever less than 50 percent of the white voters cast ballots
for the black candidate?
In this case, black voters, who are appees here, challenged the redistricting plan enacted by the North Carolina General Assembly for the election of state legislators. Appees claimed that the plan made use of a number of multi-member districts and of one single-member district in a manner that violated their rights under §2 of the Voting Rights Act, as amended, 42 U.S.C. §§ 1981 and 1983, and the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Appees argued that the plan diluted minority voting strength by submerging black population concentrations in the multi-member districts and by fracturing such concentration between more than one single member district. A three-judge panel of the District Court for the Eastern District of North Carolina evaluated the plan under §2 of the Voting Rights Act.

Briefly stated, the DC concluded that the "fundamental purpose" of the amendment to §2 was "to remove intent as a necessary element of racial vote dilution claims brought under the statute." The DC believed that, under §2, a vote dilution claim requires proof that an electoral mechanism "results," under the "totality of the circumstances," in minimizing the voting strength of racial groups. The DC listed a number of factors relevant to this inquiry, drawing these factors from the Senate Report accompanying amended §2, which in turn derived the factors from White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (CA5 1973), aff'd on other grounds, 424 U.S. 636 (1976) (per curiam). The DC also noted that the
"linchpin" of vote dilution is racial bloc voting: When members of the majority consistently refuse to vote for minority candidates, observed the DC, minority votes are in danger of being submerged. But the DC emphasized that the mere fact that blacks constitute a minority in a multi-member district does not alone establish that dilution has resulted from the challenged plan. The DC also emphasized that the fact that blacks have not been elected in numbers proportional to their percentage in the population does not alone establish vote dilution. "Nor does proof that in a challenged district blacks have recently been elected to office." See Zimmer, supra, 485 F.2d at 1307.

The DC then made comprehensive findings concerning the challenged districts and the existence of the Zimmer factors. The memo will discuss these findings in the discussion section. The DC found that the plan violated §2 and enjoined appts from holding elections under the plan. The DC did not reach appees' other statutory and constitutional arguments.

Discussion

At the outset, I note that appts do not challenge the DC's decision that Congress intended to relieve voting rights plaintiffs of the burden of proving discriminatory intent. Rather, appts agree that the test is whether, under the "totality of the circumstances," a plan "results" in vote dilution. Moreover, appts agree that evaluation of a districting plan requires application of the Zimmer factors. Appts' challenge is actually fairly narrow, though the implications of this decision will be important. I believe that the DC did apply the
appropriate legal standard in evaluating appees' claim, but that
the Court should carefully examine and probably refine the
definition of "racial bloc voting" used by the DC. This memo
will attempt to answer the concerns expressed in your memo to the
file.

I want to point out that the "questions presented" are
worded in the manner selected by appts and that such wording
tends to mischaracterize the nature of the DC's decision. In
particular, the first question does not reflect any aspect of the
DC's ruling. The DC never suggested that blacks were entitled to
"safe electoral districts" simply because such districts could be
created. On the other hand, a finding that black concentrations
exist is necessary, but not sufficient, to a decision that black
votes have been diluted by a plan and that another plan could
remedy that dilution. The second question seems to me to be the
more important one because a finding of racial bloc voting will
often be crucial to a determination that a plan violates §2. I
believe that the Court's opinion in this case must caution the
lower courts carefully to evaluate evidence of bloc voting and
perhaps should adopt a more stringent definition of bloc voting
than that used by the DC. But examination of what the DC
actually found with respect to bloc voting in this case suggests
that its findings should be upheld even under a more stringent
definition.

Appts and the SG essentially make two points. First, they
argue that the DC erroneously failed to consider recent election
successes of black candidates in the challenged districts. Since
appropriate legal standard in evaluating appellees' claim, but the Court should carefully examine and probably refine definition of "racial bloc voting" used by the DC. This will attempt to answer the concerns expressed in your memo file.

I want to point out that the "questions presented" are worded in the manner selected by appts and that such wording tends to mischaracterize the nature of the DC's decision. In particular, the first question does not reflect any aspect of the DC's ruling. The DC never suggested that blacks were entitled to "safe electoral districts" simply because such districts could be created. On the other hand, a finding that black concentrations exist is necessary, but not sufficient, to a decision that black votes have been diluted by a plan and that another plan could remedy that dilution. The second question seems to me to be the more important one because a finding of racial bloc voting will often be crucial to a determination that a plan violates §2. I believe that the Court's opinion in this case must caution the lower courts carefully to evaluate evidence of bloc voting and perhaps should adopt a more stringent definition of bloc voting than that used by the DC. But examination of what the DC actually found with respect to bloc voting in this case suggests that its findings should be upheld even under a more stringent definition.

Appets and the SG essentially make two points. First, they argue that the DC erroneously failed to consider recent election successes of black candidates in the challenged districts. Since
it is clear that the DC did evaluate those successes, the SG must be making a broader point. I assume that the argument is that evidence of electoral success weighs heavily against, or even forecloses, a finding of vote dilution. Section 2 states that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered." Thus, it is clear that electoral success is only one circumstance among the "totality of circumstances" to be considered under §2. In short, I agree that a showing of electoral success is a factor that would tend to negate a claim of vote dilution. But the wording of the statute requires rejection of the argument that such showing, no matter what other circumstances are presented, forecloses a claim of vote dilution.

The SG's position concerning electoral success is particularly ill-founded in this litigation in light of the DC's conclusion about the successes reflected in this record. Specifically, the DC found that, while the 1982 elections suggested that a "more substantial breakthrough of success could be imminent," the recent elections had "enough obviously aberrational aspects . . . to make that a matter of sheer speculation." As a general matter, reliance on a single election year would rarely be sufficient either to prove or disprove vote dilution since any particular election can be subject to idiosyncracies. More specifically, here, the DC noted that success in 1982 could partly be attributed to the pendency of this litigation, which led white leaders to organize support for
black candidates. Significantly, the 1982 elections occurred after this lawsuit was commenced. See Zimmer, supra, 485 F.2d at 1307 (noting that electoral success may be attributable to factors other than voting strength, namely, political efforts to thwart challenge to districting plan). In the face of this finding by the DC, I simply do not see how the Court could reverse for failure to consider recent electoral success.

Second, appts and the SG make a more troubling point by arguing that the DC in effect granted relief because appees had been denied proportional representation. In this case, the Court will have the opportunity to explain the significance of the proviso to §2. The DC believed that the proviso means that the "fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population" does not alone establish a vote dilution claim. I tend to think that the DC's interpretation of the proviso is correct. The sentence immediately preceding the proviso, as well as one of the Zimmer factors, makes clear that the court can consider the "extent" to which members of the minority group have been elected to public office. Thus, it seems plain that a showing that the number of black election victories is disproportionate to black population is a relevant consideration. The proviso must mean that such showing is not sufficient; rather, the court must consider it along with other circumstances.

Appts and the SG believe that the DC's definition of racial bloc voting had the effect of leading the court to grant
relief because blacks had been denied proportional representation. The DC stated that bloc voting is legally significant "when the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election." Significantly, the SG agrees with the DC that proof of racial bloc voting is the "linchpin" of a successful vote dilution claim. See Rogers v. Lodge, 458 U.S. 613, 623 (1982) ("Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race."); McMillan v. Escambia County, 748 F.2d 1037, 1043 (CA5 1984) (no factor is dispositive, but racially polarized voting ordinarily is "keystone" of §2 claim). But the SG disagrees with the definition of bloc voting used by the DC. The SG claims that, under the DC's definition, "even a minor degree of racial bloc voting would be sufficient to make out a violation, regardless of whether it actually results in black electoral defeats." The SG then gives an example of what could happen under the DC's definition: "in a two-person where there is a small white voting majority, if the candidate receives 51% of the vote in the white community of the vote in the black community, and the black community receives the reverse, the district court would hold the community is severely racially polarized." SG Brief (emphasis in original).
I agree with the SG that it is necessary carefully to define "racial bloc voting," and I also tend to agree that the Court should not adopt a definition under which a plaintiff could succeed merely by showing that less than 50 percent of white votes were cast for black candidates. Moreover, the Court should give a word of caution respecting reliance on statistical analyses of the type relied on by appees in this case. See Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1481-82 (CA5 1984) (Wisdom, J.) (noting that statistics must be carefully evaluated because of "risk that a seemingly polarized voting pattern in fact is only the presence of mathematical correspondence of race to loss inevitable in such defeats of minority candidates"); noting further that it may be necessary to examine factors other than race that may correlate with election outcomes) (quoting Jones v. City of Lubbock, 730 F.2d 233, 234 (CA5 1984) (Higginbotham, J., specially concurring).

But I do not think that the definition should be as stringent as that apparently recommended by appts (the SG does not really provide a definition). Since §2 guarantees "equal" access, I do not think that appees should be required to show racial bloc voting so severe that it effectively shuts them out of the electoral process. The fact that, despite polarized voting, blacks have attained some electoral success does not mean that their votes have not been diluted. For example, the success may have been achieved only through single-shot voting, which means that black voters have been forced to sacrifice their right
to vote for a full slate of candidates in order to elect one black representative.

On balance, I think that the Court should adopt a definition of racial bloc voting that is not simply tied to the statistical showing offered by the parties. As Judge Higginbotham put it, "The inquiry is whether race or ethnicity was such a determinant of voting preference in the rejection of black . . . candidates by a white majority that the [challenged plan] denied minority voters effective voting opportunity." 

_**Jones v. City of Lubbock**, 730 F.2d 233, 234 (CA5 1984) (Higginbotham, J., specially concurring)._ Such definition would permit the lower courts to take a common sense approach to evaluation of proffered statistics as well as to eradicate the SG's fears that reliance on statistics will render the proviso meaningless.

Though I agree that the Court should refine the definition of "racial bloc voting," the argument made by the SG and appts concerning the DC's "definition" of this factor essentially overlooks the careful findings made by the DC in this connection. I believe that the findings should be upheld. The SG's attack on the findings assumes that the 1982 election successes will be taken into account in evaluating bloc voting. If you agree with the DC's conclusion that the the 1982 results are of dubious value, the SG's argument here loses force. And, even if the 1982 results are considered (and the DC did consider them), I think that the DC properly found racial bloc voting in the challenged districts. The following excerpt is a portion of the DC's
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discussion of racial bloc voting in the challenged multi-member districts considered as a whole:

In none of the elections, primary or general, did a black candidate receive a majority of white votes cast. On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested. Republican voters were more disposed to vote for white Democrats than to vote for black Democrats. . . . One revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates.

In addition to this general discussion, the DC examined racial bloc voting in each district. The DC discussed the figures supplied by appes' expert witness and explained why, even in elections that presented a fairly substantial percentage of white votes cast for the black candidate, those figures established bloc voting. For example, in one primary election for the state House, a black candidate received 50 percent of the white vote. In addition to the fact that this election took place in 1982 and thus was of dubious value as an indicator of black success, the DC noted that there were only 7 white candidates for 8 positions in the primary and one black candidate had to be elected. Moreover, the black candidate, "the incumbent
chairman of the Board of Education, ranked first among black voters but seventh among whites." With respect to every challenged district, the DC made that type of careful evaluation to show the existence of substantially polarized voting.

Since your memo to the file suggested that I focus on the standard applied by the DC, I have not spent sufficient time to comment extensively on the DC's findings of fact. It may be appropriate to remand in the event that the Court thinks it necessary to refine the definition of "racial bloc voting." But I believe that the Court could choose simply to affirm. I tend to think that the DC's determination that each challenged district violated §2 probably is correct, with the possible exception of one district. (In that district, blacks have enjoyed electoral success since 1973 roughly proportional to their numbers; the DC's findings show, however, that the voting in the district is racially polarized so it may be proper to uphold the DC's decision to invalidate the district.) Similarly, the DC made careful findings with respect to the other Zimmer factors that I believe should be upheld. The nature of those findings can be underscored to suggest that challenges to redistricting will not succeed simply because a minority group believes that it has been denied proportional representation.

Conclusion

The DC applied the appropriate legal standard by evaluating the challenged plan to decide if, under the totality of the circumstances, it resulted in vote dilution. The DC made specific findings to explain why recent electoral successes were
chairman of the Board of Education, ranked first among voters but seventh among whites." With respect to challenged district, the DC made that type of careful evaluation to show the existence of substantially polarized voting.

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Conclusion

The DC applied the appropriate legal standard by evaluating the challenged plan to decide if, under the totality of the circumstances, it resulted in vote dilution. The DC made specific findings to explain why recent electoral successes were
of dubious value in deciding if the plan denied blacks equal access to the political process. While the DC properly decided that racially polarized voting is a crucial circumstance, the Court should adopt a definition of racial bloc voting that approves of the manner in which the DC evaluated the statistics in this case but that, to some extent, rejects language used by the DC to describe the relevance of the statistics.
I. DC, applying Zimmer factors, found:
1. Zimmerq effects of voter discrimination remain
2. Block voting along racial lines
3. Racial appeals in elections
4. Majority vote requirement in primaries
5. State's failure to justify the form of the seven challenged districts

II. See 2(b) requires consideration of "totality of circumstances"

III. Other relevant facts (Ask counsel)

A1. In several (most) of challenged districts, blacks have been elected
A2. Increasing core numbers of white vote for black candidates

3. No remedies to:
   (a) Registration
   (b) Party affiliation or candidacy

4. (c) No white seating of candidates

Ask?
Would blacks fare better
1. With 30% of voters in a
   three-seat multi-member district, or
2. With 40% in one district (one "safe")
   & district for blacks) & 40% in each
   of 3 districts?
83-1968  THORNBURG v. GINGLES  NC 3 6/4
52 of Voting Rights Act
Argued 12/4/85
See Transcript of Thornsbery (460 U.S.) argument.

Home Dist. 2 & Senate Dist. are not in this appeal.

DC relied on state-wide statistics rather than the Districts at issue.

Clearly erroneous rule doesn't apply to the findings of DC — they are mixed Qs of law & fact.

County lines have been observed since Colonial days.

N.C. is not a homogeneous state

"Access to political process" clearly exists. Thus in all that 52 requires.

BRB emphasized words "right to elect" in statute. The 46 answered this term mean "right to elect" mean full participation in electoral process — not an absolute right.

Fred (56)

Congress was concerned with "opportunity."

Standard of access & opportunity was met in at least three Districts.
 Freed (cont) 
Must look at each District — District by District. Congress so intended.

White Register standard requires removal of 145 districts.

If multi-member Districts were broken up into Single Member Districts, blacks would suffer.

See note 12 of AG's Br (or SC's Br). § 56 relief on Senator Dale

Chambers [appellee] (See transcript)

In two of Districts — 1 House Dist 8 & Senate Dist 2 — no black ever elected. [But these two Districts are no longer at issue]

See appellee Ex. Vol II, Ex. 4 a

— House Dist 36. Eight members elected. Prior to 1982, no black elected; one in 1982

House Districts (SG found on 2 H/B 23, 39 & 21)

Concede that since '73, one black has been elected in H/B.
Chambers (cont.)
Black elected in HD 35 in 1975
(If I write, I must look at Appellees' Exhibits)

BAR noted the difference bet. findings of historical facts & legal Qs such as what constitutes "polarized voting".
83-1968 Thomburg v. Gingles (DC - N.C.)
(§ 2 Voting Rights Case) (Redistricting Plan)

1. § 2 provides: "A violation is established if, based on totality of circumstances, the political processes - are not equally open to participation [by blacks] in that [blacks] have less opportunity than other members of the electorate to participate in the process" and have "right to elect." [And the provision on to proportional representation]

2. DC's okd. (3 NC Judges). Applied the Zimmer factors (2 relied on White v Regan) in considering "totality of circumstances."

DC found "racial bloc voting" was present in all districts at issue, and was most relevant factor.

DC findings of "historical facts," are binding on us. But, a definition of "racial bloc voting" is @ of law.

Also reliance upon statistics is subject to judicial review.

Not clear what standard DC applied.
Thornburg v. Gingles (D.C. - N.C.)

(52: Voting Rights Case) (Redistricting Plan)

1. § 2 provides: "A violation is established if, based on totality of circumstances, the political processes ... are not equally open to participation [by blacks] in that [blacks] have less opportunity than other members of the electorate to participate in the process and have 'right to elect.' [And the provision on to proportional representation]

2. D.C.'s ch. 3 NC Judge: applied the Zen
   factors (as relied in White v. Regester) in considernng "totality of circumstances.
   DC found "racial bloc voting" was
   present in all districts at issue, and
   was most relevant factor.

   DC findings of "historical facts" are
   binding on us. But on definition
   of "racial bloc voting" is Q of law.
   Also reliance upon statistics is
   subject to jndv. review.

   Not clear what standard DC
   applied.
3. Racial Block Voting - Standard

We unduly relied on statistics that may or may not be reliable, if reliable as statistics are not necessarily proof of unlawful action by whites.

How persons vote & why are personal decisions - not state action & no way State can control these decisions.

Thus, as practical matter only way to ensure black electors is to create "safe districts" - single member districts. In effect, these in "proportional representation" - but despite the proviso, this seems to be what §2 requires.

Standard: At least it may help to articulate a standard for determining "block voting". J. Hagg绪mann (CHS)'s may be useful:

The inquiry is whether race or ethnicity was such a determinant of voting preference in the rejection of black candidates by white majority that the challenged plan denied minority voters effective voting opportunity.
The Chief Justice

Affirm

DC found facts as to each Dest. (or with an State wide - e.g. historical decision) that Appellant 56 did not refute.

Can't identity any specific errors.

DC relied too much on statements of "Block Voting" in trouble some.

Not impressed by Experts.

Justice Brennan

Affirm

DC used proper standards, correctly decided the case.

Facts are to racial block voting are historical - & we must accept them.

Justice White

Affirm

No aggregate error.

On any definition of disfavored voting, the facts demonstrate it.

Wouldn't write case same way as DC did.

Can't find a verdict for 115 in this type of case.

Case 23 (Durham) close Q.
Justice Marshall

(Handed a surprise)

Justice Blackmun

Affirm

Three issues:
1. Significance of black success
   (only one factor)
   
2. OK to apply experience standard
   
3. Racial bloc voting
   
   uncontradicted.

Justice Powell

Affirm - except as to Part 28

See my notes.

Facts were decided by DC and
historical facts must be accepted.

Not sure Zimmer factors meet merit

the importance given them by DC

Now do I think statements are
to "block voting are necessarily
dependable."
Justice Rehnquist

Affirm except as to Part 23

Except possibly as to Durham

Justice Stevens

Affirm across Bd.

Would defer to DC - all 3 M.C. judges.

Issue is statutory - not Constitutional.

Zimmer factors are "mush-mush".

Justice O'Connor

Affirm except as to Part 23

DC gave no weight to preserving County lines.

Will probably write something.
December 6, 1985

To: Mr. Justice Powell
From: Anne
Re: No. 83-1968, Thornburg v. Gingles
(appeal from D.C. E.D. N.C.)

The following voting districts are in issue on this appeal. I have included a brief summary of some of the relevant statistics, but have not attempted to include the DC's findings on racial bloc voting.

(1) House District 21 (Wake County): This is a 6-member district. 21.8% of the population of the district is black; 15.1% of the registered voters are black. A black citizen was elected to serve in the House in 1980 and 1982.

(2) House District 23 (Durham County): This is a 3-member district. 36.3% of the population is black; 28.6% of the registered voters are black. Since 1973, a black citizen has been elected each two-year term to the House delegation. (This is the district that I believe may not violate §2. I must
(3) House District 36 (Mecklenburg County): This is an 8-member district. 26.5% of the population of the county is black; 18% of the registered voters are black. In this century, only one black citizen has been elected to the House from this county. That black was elected in 1982, after this lawsuit was commenced. Seven other blacks had previously run unsuccessfully for a House seat.

(4) House District 39 (part of Forsyth County): This is a 5-member district. 25.1% of the population is black; 20.8% of the registered voters are black. In 1974 and in 1976, a black citizen was elected to the House delegation. In 1978 and 1980, blacks ran unsuccessfully for the House. In 1982, after this litigation was commenced, two blacks were elected to the House. (No blacks have been elected to the Senate from Forsyth County).

(5) Senate District 22 (Mecklenburg/Cabarrus Counties): This is a 4-member district. 24.3% of the population is black; 16.8% of the registered voters are black. One black citizen has been elected to the Senate; that citizen served from 1975 to 1980. Since then two blacks have unsuccessfully run for a Senate seat, and no black now serves on the Senate delegation.
Appellants do not challenge the DC's conclusion that two other districts, House District 8 and Senate District 2, violated §2. In House District 8, no black had ever been elected to the House, and in Senate District 2, no black had ever been elected to the Senate.

I think that the Court should affirm. The meaning of the proviso to §2 is that a DC may not order relief on the ground that a protected minority has failed to achieve proportional representation. But, once the DC properly concludes that the totality of the circumstances shows that a group has been denied equal access to the electoral process (here, through dilution of their votes), the DC may order relief. The fact that the relief ordered may give the group an opportunity to achieve proportional representation should not run afoul of the proviso. I believe that the Court should refine the definition of "racial bloc voting." The Court also should point out that racial bloc voting is only one of the Zimmer factors approved by Congress and that the DC should carefully evaluate statistics offered to establish that factor since, as this case demonstrates, racial bloc voting will be important in making out a violation of §2.
December 14, 1985

83-1968 Thornburg v. Gingles

Dear Chief:

Your assignment sheet for the December cases has just come to my desk (at 1:00 p.m. today).

I called you immediately but you had left the Court. I do not think I should write 83-1968 Thornburg v. Gingles, the North Carolina reapportionment case. I was one of possibly only three Justices who did not agree to affirm the District Court in all respects. My view was that the DC erred in its decision with respect to the Durham district (No. 23). In addition, I am not in accord with the extent to which the DC viewed the Zimmerman factors as the standard to apply, or with the DC's heavy reliance on statistical testimony with respect to "block voting".

In view of my differences, I doubt that an opinion I would write would attract a Court. It seems to me, therefore, that the case should be reassigned. I would, of course, appreciate being given another case to write, as I am well up to date.

Sincerely,

The Chief Justice

1fp/ss

cc: The Conference