



CHIEF JUSTICE BURGER WRITES AN OPINION ON PALIMPSEST

Douglas P. Woodlock

SENATOR JAMES B. ALLEN (D-AL), not known as a close observer of quotidian detail in the work of the Supreme Court, rose on March 28, 1972 to tell his colleagues that he had identified “a straw in the wind – an indication of the attitude of the U.S. Supreme Court on the question of congressional power to limit the exercise of discretionary powers by U.S. District Court judges.”¹ The straw had been separated from the chaff by the Court in its certiorari practice. It had been given flight by Chief Justice Warren E. Burger in a short slip opinion concurring in an otherwise unexplained denial of certiorari buried in the Orders List for March 27, 1972.

The Chief Justice’s concurrence, in which no other member of the Court joined, was offered in response to a decision of the United States Court of Appeals for the District of Columbia Circuit regarding the Federal-Aid Highway Act of 1968.² He saw the lower court’s decision as an instance of the judicial branch having “unjustifiably frustrated the efforts of the Executive Branch” – in this case by

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¹ 118 Cong. Rec. 10,490 (1972).

² The decision under review was *D.C. Fed’n of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971) (Bazelon, C.J.).

enjoining construction of the Three Sisters Bridge over the Potomac between Virginia and the District of Columbia.³ The Chief Justice said he concurred to explain that even if certiorari were granted “it would be almost a year before we could render a decision,”⁴ but that denial of the writ should not deter the Legislative Branch of government from acting more promptly and decisively. “Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the Three Sisters Bridge project, even to the point of limiting or prohibiting judicial review of its directives,” he advised.⁵

This road map for the Legislative Branch to limit the prerogatives of the Judicial Branch, in furtherance of the initiatives of the Executive Branch regarding District of Columbia transportation development, offered by the titular head of the Judicial Branch, was bound to get attention in the nation’s capital, among close followers of Supreme Court practice, and beyond the Beltway.

The Chief Justice’s concurrence presented three angles of approach. First, it captured home town interest by presenting a flare-up in the long-running conflict between the Chief Justice and the man who, until less than three years before, had been his own former Chief – David Bazelon of the United States Court of Appeals for the District of Columbia⁶ – and it related to a contentious issue about transportation in the Washington metropolitan area.⁷ Second,

³ *Volpe v. D.C. Fed’n of Civic Associations*, 92 S. Ct. 1290, 1291 (1972) (Burger, C.J., concurring). The Chief Justice’s concurrence in its original form is available only in the unofficial reports of Supreme Court decisions. It appears in a different form in the official United States Reports. 405 U.S. 1030 (1972). See *infra* notes 22-23 and accompanying text.

⁴ 92 S. Ct. at 1291.

⁵ *Id.*

⁶ See JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE* 202-03 (2001) (describing relations between the liberal and conservative wings of the D.C. Circuit during the 1960s as “poisonous,” and observing that the “principal battle was between David Bazelon and Warren Burger”).

⁷ The proposed bridge over the Potomac River between the District of Columbia and Virginia involved the use of islets known as the “Three Sisters” to anchor piers. The project was hotly contested by opponents of highway expansion poli-

A Certiorari Opinion on Palimpsest

from a procedural and institutional perspective, by employing a peculiar vehicle⁸ for a Chief Justice to use in making a self-abnegating suggestion to the other branches of government, it captured the interest of that group of legal professionals who follow the Supreme Court closely. But those two angles were far too acute to be newsworthy elsewhere, although they supported a broader – political – angle that would be of interest to readers other than Washingtonians concerned with local disputes and personalities or those concerned with procedural and institutional regularity in the Supreme Court. Coming shortly after the Nixon administration had proposed anti-busing bills seeking to limit the powers of federal district judges to employ busing as a remedy in school desegregation cases,⁹ it could

cies but strongly supported by powerful members of Congress, particularly Congressman William Natcher, chair of the appropriations subcommittee for the District of Columbia. Congressman Natcher held funding for the D.C. Metro system hostage for six years to encourage the District to permit construction of the bridge. The controversy drew the attention of President Nixon, who instructed the Justice Department to support the project in litigation challenging it. When the D.C. Circuit upheld an injunction preventing construction of the bridge, the Justice Department challenged the ruling in the petition for certiorari which gave rise to Chief Justice Burger's opinion concurring in the denial of the writ. The bridge project was ultimately withdrawn after Congress voted to release funds for the Metro system. See ZACHARY M. SCHRAG, *THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO* 119-41 (2006).

⁸ Over the Court's history, the noting of an individual Justice's vote on a certiorari petition has been unusual. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 331 (2007). Justice John Paul Stevens was particularly critical of the practice of publishing dissenting opinions from the denial of certiorari because of its tendency "to compromise the otherwise secret deliberations in our Conferences." *Singleton v. Commissioner*, 439 U.S. 940, 946 (1979). Whatever the value of such dissenting opinions, the practice of a stand-alone opinion concurring in a denial has apparently never taken root. But see 16B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4004.1 n.13 and accompanying text (2012) (observing that Justice Stevens "and other justices developed the further practice of responding to dissents from denials by opinions that effectively concur in the denials"). No such practice existed in 1972 when Chief Justice Burger issued his *Three Sisters Bridge* concurrence, nor for that matter was his opinion in response to a dissent from a denial.

⁹ The moratorium proposed by President Nixon was subjected to vigorous challenge. See, e.g., Frank Thompson, Jr. and Daniel H. Pollitt, *Congressional Control of*

reasonably be taken – as Senator Allen quickly did – to constitute an oblique advisory opinion regarding the constitutionality of Congressional limitations on the fashioning of busing remedies in school desegregation cases.

Senator Allen’s patron and compatriot Governor George Wallace¹⁰ had predicted the volatile political setting into which the Chief Justice’s concurrence was dropped. One of Wallace’s biographers reports that the Alabama governor anticipated quick and dramatic action from the President if Wallace were to take the Florida democratic presidential primary.

“If I win Florida, you just watch,” Wallace told a group of reporters gathered around his desk in Montgomery in mid-January [1972]. The White House would – within a week – come down “both feet” against “cartin’ children to Kingdom come.” Hell, Wallace prophesied, we’ll “have Mr. Nixon himself taking the batteries out of the buses.”¹¹

Wallace won the Florida primary on March 15, 1972. Nixon called for a busing moratorium on March 16. And the Chief Justice’s concurrence was handed down on March 27.

Judicial Remedies: President Nixon’s Proposed Moratorium on “Busing” Orders, 50 NORTH CAROLINA L. REV. 809 (1972). In June 1972, Congress reached a compromise regarding the moratorium by postponing enforcement of district court orders requiring the “transfer or transportation” of students “for the purposes of achieving a balance among students with respect to race.” Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 371-73 (1972). In signing the legislation, President Nixon called the provisions “inadequate, misleading, and entirely unsatisfactory.” *Statement on Signing the Education Amendments of 1972, June 23, 1972*, in PUBLIC PAPERS OF THE PRESIDENTS: RICHARD NIXON, 1972 at 701 (GPO 1974). Thereafter, several members of the Supreme Court denied petitions for stays of desegregation orders by reading the congressional compromise narrowly. See *Drummond v. Acree*, 409 U.S. 1228, 1229 (1972) (Powell, Circuit Justice); Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542, 1543 n.7 (1972).

¹⁰ Senator Allen served as Lieutenant Governor under Governor Wallace before winning election as United States Senator in 1968.

¹¹ DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM AND THE TRANSFORMATION OF AMERICAN POLITICS* 423 (1995).



As a newspaper reporter assigned to cover the Supreme Court that term for the Washington bureau of the *Chicago Sun-Times*, and one who had consequently decided to enroll in the first year of the evening division program at the nearby Georgetown University Law Center in an effort to understand more deeply the broader legal/regulatory beat in my portfolio, I had been puzzled by the Chief Justice's concurrence when reviewing the March 27 order list.¹² Senator Allen's identification of the straw it represented in the winds of the busing controversy prompted me to put together a Sunday piece teasing out the implications, while attempting to give some insight into certiorari practice for a lay readership.

One of the special benefits of my press credentials at the Supreme Court was that I found it possible to advance my legal education by interviewing scholars and practitioners throughout the country in addition to interacting with the very capable Georgetown faculty. Without exception, professional followers of the Supreme Court were generous in their willingness to instruct a reporter toiling in their vineyard, especially when that reporter turned out to be someone who was also making his way through law school. However, I had no idea what an unsettling development the slip opinion containing the Chief Justice Burger's concurrence actually was until I began taking readings among those attuned to the Court's policies and practices.

Even before I got my notebook out, I began dialing. The first person I reached was Fred Rodell at the Yale Law School. His characteristically quotable response was immediate and blunt. While I searched for my notebook, I began to record interview notes on the slip opinion I had received from the Press Relations Office at the Supreme Court, a copy of which is an image accompanying this article. In those of his comments that were fit for a family newspaper,

¹² My puzzlement was shared by the editorial page of the *Washington Post*, which several days later wrote that the Chief Justices's comments "strike us as peculiar to say the least." *Three Sisters: Back to the Drawing Boards*, WASH. POST, March 30, 1972.

Three Sister
SUPREME COURT OF THE UNITED STATES

VOLPE v. D. C. FEDERATION OF
CIVIC ASSOCIATIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

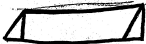
No. 71-931. Decided March 27, 1972

PETITUM.

The petition for a writ of certiorari is denied.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the denial of certiorari in this case, but solely out of considerations of timing. Questions of great importance to the Washington area are presented by the petition, not the least of which is whether the Court of Appeals has, for a second time, unjustifiably frustrated the efforts of the Executive Branch to comply with the will of Congress as rather clearly expressed in § 23 of the Federal-Aid Highway Act of 1968. If we were to grant the writ, however, it would be almost a year before we could render a decision in the case. It seems preferable, therefore, that we stay our hand. In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the Three Sisters Bridge project, even to the point of limiting or prohibiting judicial review of its directives.

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Unusual

Distinguish

God damn

Unheard of
Unusual
Not unique
Sounds
Try to make Ct
the judiciary arm
Limiting Congress
Stone
Supreme Ct
God damn screwy
damndest
Part 3, B
356 U.S. 44

Can't imagine
that this opinion
was written
at any place
but the
Justice Department

Rodell said "[t]hat phrase about limiting or prohibiting judicial review sounds like he is trying to make the judiciary into an arm of the Congress"; and, he added for good measure, "[r]eally, that opinion sounds like it was drawn up by somebody lobbying for busing limi-

A Certiorari Opinion on Palimpsest

tations in the Justice Department. It hardly sounds like something from the chief justice of the United States.”¹³

Raoul Berger, then at Harvard after publishing his book “Congress v. Supreme Court,”¹⁴ was pithy and to the point. He called the Chief Justice’s concurrence “gratuitous and unprecedented.”¹⁵

Others were more cautious. Archibald Cox said the concurrence “ought,” as I paraphrased him, “to be read narrowly as only an effort to make clear to Congress that when it writes legislation for construction of a bridge it may include a limitation on judicial review.”¹⁶

Charles Alan Wright, who was consulting with the Nixon administration on its busing initiatives, characterized the opinion as “unusual” but, like Cox, he gave it a narrow reading because, as I paraphrased him, “it dealt with an essentially administrative problem and did not raise the constitutional questions of busing legislation.”¹⁷

Most of those with whom I talked, particularly Supreme Court practitioners and former law clerks, declined to speak for attribution. But all were clearly disturbed by what was seen as – at a minimum – a rookie indiscretion on the part of a relatively new Chief Justice.

My piece went out on the *Sun-Times* newswire on Thursday for publication not only in the *Sun-Times*, but also in other Sunday papers. On Monday, April 3, the *New York Times* weighed in with an editorial noting that “the Chief Justice’s remarks are gratuitous and unusual.”¹⁸ The *Times* had its own gratuitous advice to offer:

President Nixon has frequently complained that the Supreme Court has intruded itself into the political domain. Chief Justice Burger would seem to be in need of a reminder that he ought not venture there – even to help out his good friend the President in the hot controversy over busing.¹⁹

¹³ Douglas P. Woodlock, *Did Burger tip court’s view on busing?*, CHICAGO SUN-TIMES, April 2, 1972.

¹⁴ RAOUL BERGER, CONGRESS v. THE SUPREME COURT (1969).

¹⁵ Woodlock, *supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *The Chief Oversteps*, N.Y. TIMES, April 3, 1972.

¹⁹ *Id.*

When next I ventured into the Press Room at the Supreme Court the normally phlegmatic functionary handling press relations – Bart Whittington – told me the Chief Justice was “not pleased” with my reporting. Meanwhile, October Term 1971 marched on with more momentous opinions by the entire Court of greater interest to my readership and my editors, including holdings that the death penalty was unconstitutional²⁰ and that there was only a glimmer of hope a news reporter’s privilege would be enforced.²¹



By the time the October Term 1971 ended, I had begun to believe that I might actually pursue a career in the law rather than one in journalism and I decided to speed up my passage through the customarily four-year evening division program by taking courses during the summer session. While studying in the library at the end of the summer before taking a final exam in Conflicts of Law, it occurred to me that a welcome, available, and plausibly justifiable job- and school-related distraction would be to take a break by looking at the recently published preliminary prints of the advance sheets for the official United States Reports in which the Order List from March 27 had been collected. I was surprised to find that the Chief Justice had amended his concurrence. His suggestion to Congress that it could “make unmistakably clear its intentions with respect to the Three Sisters Bridge project” was sharpened by adding three words to its conclusory observation that Congress was free “to the point of limiting or prohibiting judicial review of its directives *in this respect*.”²² He also added a lengthy footnote regarding the Federal-Aid Highway Act of 1968 and its relation to decisions of the D.C. Circuit.²³

²⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

²¹ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

²² 405 U.S. 1030, 1031 (1972) (Burger, C.J. concurring) (emphasis added). The concurrence as it appeared in the United States Reports paperbound preliminary print was the same as now appears in the hard cover volume.

²³ *Id.* at 1031 n.*.

A Certiorari Opinion on Palimpsest

The recasting of a controversial opinion after it was published in printed form struck me as another ripe topic for a Sunday piece, especially in the run-up to the beginning of October Term 1972 at the Court. None of the Supreme Court experts I contacted to discuss this development was now willing to speak for the record; but to a person, with varying degrees of partisanship and distaste, they treated the Chief Justice's amendment of his earlier concurrence as professionally problematic. The consistency of response made me comfortable in deciding that I could fairly describe the Chief Justice's reformulation in the lead paragraph to my piece as "an unannounced and highly unusual move [in which] Chief Justice Warren E. Burger carefully has reworded an opinion that had been interpreted as supporting Nixon administration proposals to strip the federal courts of the right to order busing in school-desegregation cases."²⁴

There were two basic interpretations given by my anonymous interviewees, neither of which was flattering to the Chief Justice. One interpretation was that he was trying to have his cake and eat it too; "Burger gets the benefit of both sides of this controversy," one attorney said. "First, in March, while Congress is still debating this issue, he drops the not-very-subtle hint that at least he didn't oppose anti-busing limitations of the federal court's jurisdiction. Now when it[']s all over but the shouting as far as the legislation is concerned, he doctors his opinion up so that it doesn't look like he has already taken a position on the issue."²⁵

The other interpretation was offered by another attorney with close connections to the court. "I think it[']s more likely that Burger didn't realize how that opinion was going to be received. Clearly it was inartfully written, and when it received the adverse comment, he probably decided to change the opinion to make it clearer that he was just referring to issues like the Three Sisters Bridge situation."²⁶

²⁴ Douglas P. Woodlock, *Burger rewords opinion affecting power on busing*, CHICAGO SUN-TIMES, Sept. 17, 1972.

²⁵ *Id.*

²⁶ *Id.*

But the unannounced²⁷ substantive transformation of a published opinion issued from the Court left those I interviewed ill at ease. “[I]t’s a bad business to go tinkering with court opinions – even individual opinions after they have been effectively published,” one anonymous attorney who followed the Supreme Court said.²⁸ He went on to say that “[i]t just smacks of George Orwell’s ‘1984,’ where everything unpleasant to remember was sent down the memory box and was forgotten forever.”²⁹



My recollection of these events over 40 years ago was refreshed this winter, when my wife and I undertook downsizing efforts as we left the house and barn which had absorbed my accumu-

²⁷ The docket for the case does not list any errata sheet providing notice of a modification of the Chief Justice’s opinion. It bears noting that slip opinions for the Court as a whole customarily contain the following language above the caption:

NOTICE: This opinion is subject to formal revisions before publication of the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical errors, in order that corrections may be made before the preliminary print goes to press.

However, as a single-Justice opinion, the Chief Justice’s concurrence did not include such a notice nor do the modifications he made before publication in the preliminary print of the United States Reports appear to fall within the definition of “formal revisions.”

²⁸ Woodlock, *supra* note 24.

²⁹ Douglas P. Woodlock, *New stand on busing?: Burger changes parts of controversial ruling*, LOUISVILLE COURIER-JOURNAL, September 17, 1972. Unlike legal reporting services which can be counted on to publish virtually anything a District Judge like me submits for publication, *see generally* *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 233-36 (D. Mass. 2009) (discussing vagaries of publication and “depublishing” of District Court opinions), newspaper editors filling a limited news hole cut the stories of their reporters as necessary to fill the Procrustean bed of the news page. Thus, the entirety of my Sunday September 17, 1972 article which had moved on the *Sun-Times* newswire was not published in the *Sun-Times* itself. *See* Woodlock, *supra* note 24. The quotation above was found in the *Courier-Journal* article, where the paragraph containing the Orwell allusion was published.

lation of books and papers for over 33 years after our move from Washington to Boston. In the course of that process I rediscovered the annotated slip opinion which illustrates this article. The pertinence of the recollection was put into broader context as I began reading Kevin McMahon's assessment of President Nixon's judicial policies and their implementation.³⁰ I learned from him that between March and September 1972 the principals – President Nixon and Chief Justice Burger – had been discussing the topic of the busing remedies.

McMahon noted Bruce Miroff's observation that "Nixon's goal during 1972 was not to take decisive action to block busing for racial balance but to keep the issue bubbling and on the minds of anxious white voters."³¹ McMahon himself observed – with the benefit of the Nixon tapes as evidence – that "Nixon actively worked to keep busing prominent during the campaign season. The president also made it clear to Chief Justice Burger that he preferred that the Court not issue a major busing decision in the fall of 1972."³² When did he do that? The Nixon tapes record a rambling one hour discussion in the Oval Office about the work of the Court and its personnel between the President and the Chief Justice on June 14, 1972, during which the Supreme Court and busing was a topic.³³

In the course of the discussion President Nixon can be heard telling Chief Justice Burger that "busing . . . just drives you right up the damn wall." As the Chief Justice began to observe that it was "[t]he most explosive issue . . .", the President interrupted to say "I hope . . . I hope it doesn't . . . that isn't going to get to you . . . not this fall?" To which the Chief Justice responded "No," and then added "We've got enough explosive issues this year without having another

³⁰ KEVIN J. MCMAHON, *NIXON'S COURT* (2011)

³¹ *Id.* at 232 (quoting BRUCE MIROFF, *THE LIBERALS' MOMENT* 237 (2007)). *See also* STEPHEN E. AMBROSE, *NIXON: VOLUME TWO, THE TRIUMPH OF A POLITICIAN, 1962-1972* at 587 (1989).

³² MCMAHON, *supra* note 30.

³³ Recording of Oval Office Conversation between Richard Nixon and Warren Burger, June 14, 1972, beginning at 1:15:30, available at nixontapeaudio.org/chron3/rmn_e733c.mp3.

one of those.” In response President Nixon observed “well that could bust the court, I mean right now. It shouldn’t come now.”

At that point in the discussion, Chief Justice Burger *sua sponte* raised the Supreme Court’s opinion in *Swann v. Charlotte Mecklenburg*, 402 U.S. 1 (1971), which had been issued under his name the year before, and told the President that “the *Swann* case was thoroughly misrepresented by the press . . . they wanted it depicted as a busing decision.” The Chief Justice offered his view that *Swann* was, in fact, the “first time the Court had put limits on busing.” And he explained to the President that he had thereafter used a “chambers opinion”³⁴ to clarify matters when “a restraining order came up to me and [following the practice in which] a judge frequently issues an individual memorandum in denying or granting a restraining order” he had “denied a stay on one of the school cases but in denying I said there seems to be some misapprehension and then instead of saying what I thought, I just took pieces of the [*Swann*] opinion out . . . but I didn’t construe it. I just said ‘Here’s what we said.’”



Chief Justice Burger’s explanation of the meaning of *Swann* to the anti-busing President who appointed him appears to have been a somewhat defensive exercise in revisionist history. Bernard Schwartz reports the development of the *Swann* opinion differently.³⁵ “The opinion that came down in the Chief Justice’s name was, of course, anything but the *Swann* opinion that Burger had sought to deliver.”³⁶ Schwartz observes that “[h]ad the first Burger draft come down as the final *Swann* opinion, it would have marked a serious setback for enforcement of civil rights.”³⁷ But, after multiple draft

³⁴ It was in Chief Justice Burger’s first year as Chief that the Court approved publication of in-chambers opinions in the United States Reports. Ira Brad Matetsky, *Introduction: The Publication and Location of In-Chambers Opinions*, 4 RAPP, part 2, at vi, xv (2005).

³⁵ BERNARD SCHWARTZ, *SWANN’S WAY: THE SCHOOL BUSING CASE & THE SUPREME COURT* (1986).

³⁶ *Id.* at 186.

³⁷ *Id.* at 188.

A Certiorari Opinion on Palimpsest

circulations, “[t]he final *Swann* opinion was a composite, containing both the lukewarm views of the Chief Justice in whose name it was delivered and the strong views of support of desegregation advocated by the Justices who favored a clear affirmance of Judge McMillan [the district judge who fashioned the Charlotte-Mecklenburg busing remedy].”³⁸ Schwartz concluded that “[t]he unsatisfactory nature of the Burger opinion did not, however, obscure the fact that the *Swann* decision was a categorical affirmance of Judge McMillan’s far-reaching desegregation order.”³⁹ Ultimately lower court judges “were told [in *Swann*] that they had broadside authority to order any remedies, including busing, to root out ‘all vestiges of state imposed segregation.’”⁴⁰

To be sure, as Chief Justice Burger reported to President Nixon during their June 14, 1972 discussion in the Oval Office, the Chief Justice had sought to use a chambers opinion to clarify *Swann*’s meaning by selective quotation. In that opinion, regarding another North Carolina desegregation plan – for Winston Salem/Forsythe County⁴¹ – the Chief Justice sought to return to “the approach that had been repudiated by *Swann*’s reversal of the limitations imposed by the court of appeals on Judge McMillan’s busing order.”⁴² By using the vehicle of a chambers opinion in the Winston-Salem/Forsyth County matter, the Chief Justice was able to announce his own views about *Swann*, unburdened by the need to craft an opinion that would incorporate the views of his colleagues. “But his restrictive interpretation in that opinion,” Schwartz observes, “was no more able to control the law on the scope of desegregation orders than were his first drafts in the *Swann* case. . . . Nothing that was said in

³⁸ *Id.* at 186; see also BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 100-12 (1979).

³⁹ SCHWARTZ, *supra* note 35, at 186.

⁴⁰ *Id.* at 188 (quoting *Swann*, 402 U.S. at 15).

⁴¹ *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221 (1971) (Burger, Circuit Justice).

⁴² SCHWARTZ, *supra* note 35, at 190; see also WOODWARD & ARMSTRONG, *supra* note 38, at 154-56.

the Burger *Winston-Salem* opinion could blur the effect of the signal *Swann* had given to the federal judges, a signal that led to widespread busing orders in courts across the South in response to the *Swann* decision.”⁴³



The unseemly and uncomfortable June 14, 1972 discussion of the prospects for Supreme Court busing cases during an election year that the Chief Justice found himself engaging in with the President underscores Chief Justice Burger’s awareness of the issue’s continuing potential for explosiveness. While the President, for his part, may have hoped to do no more than keep the issue alive to activate a base as part of his electoral strategies,⁴⁴ for the Chief Justice, the question of congressional limits on judicial review – whether as to busing or otherwise – was a fundamental institutional concern for the branch of government under his general supervision. By alluding to the question of limitations on judicial review in the *Three Sisters Bridge* litigation, the Chief Justice had poured accelerant on the busing dimensions to the issue. The public response to his concurrence plainly prompted him to walk his opinion back for official book publication to more familiar – and less incendiary – grounds for legislative control of judicial review in context of administrative law.⁴⁵

⁴³ *Id.*

⁴⁴ The President’s expressed interest in the Court’s busing docket continued after the 1972 election. In a January 2, 1973 telephone conversation of New Year’s greetings between the President and the Chief Justice (Recording of Telephone Conversation between Richard Nixon and Warren Burger, January 2, 1973, beginning at 3:18, available at nixontapeaudio.org/chron5/035-051.mp3), President Nixon asked Chief Justice Burger, “do you have a decision in this busing thing coming out . . . ?” The Chief Justice responded “No, that’s way down the road.” The President then said “That’s good; the longer the better.” The Chief Justice concurred, “[t]he longer the better is right.” The President then suggested “Maybe we can get some legislation passed and get it out of the way.”

⁴⁵ To some steeped in the distinctions between judicial review of administrative action and constitutional review, the controversy created by the Chief Justice’s certiorari concurrence opinions was viewed as overwrought. Professor Frank

A Certiorari Opinion on Palimpsest

Yet the Chief Justice was writing on the modern equivalent of palimpsest, the ancient manuscript scrolls from which text could be scraped and the manuscript used again. And, as with palimpsest, the undertext of his *Three Sisters Bridge* certiorari slip opinion as originally drafted remains for examination and evaluation because the bound volumes – and computer data bases – of the unofficial Supreme Court reports contain the original – and not the modified – text.⁴⁶ Such an examination and evaluation is further enriched by the oral record President Nixon preserved in the tapes he was generating at the White House, unbeknownst to most of his interlocutors including apparently Chief Justice Burger. Finding out precisely why and precisely when Chief Justice Burger chose to change his *Three Sisters Bridge* opinion would be assisted by a review of his papers; but they will not be available for review for another dozen years or so.⁴⁷ For the present, his multiple published opinions stand as a reminder that having the last word⁴⁸ through the vehicle of a single-Justice opinion is a dangerous business, especially when the author rewrites himself without explanation and thereby intensifies the appearance he enlisted in or had had his views conscripted for a partisan initiative.



Strong told readers of the *American Bar Association Journal* that “[p]roperly understood, the Burger concurrence, whether in its original or amended form, has nothing to do with any question of congressional power to restrict the federal courts in exercising constitutional review.” Frank R. Strong, *Three Little Words and What They Didn’t Seem to Mean*, 59 A.B.A.J. 29, 32 (1973).

⁴⁶ See *supra* note 3.

⁴⁷ Chief Justice Burger’s papers are held by the Swem Library at the College of William & Mary and will not be available to researchers until 2026.

⁴⁸ The single-Justice opinion, whether generated regarding certiorari matters or in-chambers for Circuit Justice matters, can be seen as a variant of the late breaking “Last Word” opinion examined in Ross E. Davies, *The Last Word*, 11 J. APP. PRAC. & PROCESS 229 (2010).