

June 18, 1947

Dear Felix:

I have just seen your circulation in Chenery, Nos. 81 and 82, and I am going to take whatever onus there may be in making the following suggestions to you.

I am fully in sympathy with your situation insofar as it involves the necessity on your part of following either one of two courses, namely, writing an adequate dissent under impossible limitations of time (such as I faced in the Yamashita case) or of filing your dissenting opinion after the case comes down. I do not like either choice. On the other hand, there are times when one or the other becomes necessary, as when I followed the first choice in Yamashita and you the second in Denver and Rio Grande.

You will recall that in the Yamashita case my dissenting opinion contained a very general reference to the shortness of time which the Court had taken to dispose of the case. You will recall also that you specifically suggested to me that I should eliminate that rather soft statement of the actual situation and I did so in compliance with the suggestion.

The basis for it was that you felt neither the Court nor any of its members should ever disclose or specifically acknowledge such a situation, even though the acknowledgment was in accordance with the actual fact. I thought your suggestion both proper and right. I therefore followed it.

All of which comes down to a return by me of the same suggestion to you in this instance, made in all sincerity and friendliness. I do not think you intended consciously to disclose the confidential routines of the Court. More especially do I not believe that you would want to make a partial disclosure. Nor do I think that it is your purpose in doing so simply to dictate that the case shall not go down. Yet, what you have written will have either one or the other effect. It will put two men on this Court in a very bad light. One is Burton, who for whatever reason simply could not get the job done. The case was argued in December. It was assigned to him in the course of our regular routine. It remained under that assignment until June 3d, when Murphy took it over, not by request but by the Chief's assignment. He of course will appear, if your circulation goes down, in the light of having caused all of the delay. I do not think either implication is fair, that is, I do not think it is quite fair to Harold, nor do I think it is fair to Frank. He least of all should be charged with the implication of delay your circulation involves. What you have written is indeed only a partial disclosure of the true situation. I do not think any disclosure at all should be made and I am quite sure that is your own tempered view also, but especially by virtue of our conversations concerning Yamashita. Nor do I think you would consciously make a partial statement which puts in false light at least two members of the Court and perhaps others. I therefore earnestly and sincerely urge in the interest of the Court, as well as of the relations among its members, that you withdraw the circulation and, if you feel so inclined, substitute one like that you made in Denver and Rio Grande.

As always,

Mr. Justice Frankfurter