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Appendix A: The Stop and Frisk Conference Notes of Justices Douglas, Brennan and Fortas; and Appendix B: A Side-by-Side Comparison of the Stop and Frisk Conference Notes of Justices Douglas, Brennan and Fortas

John Q. Barrett

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APPENDIX A: THE STOP AND FRISK CONFERENCE NOTES OF JUSTICES DOUGLAS, BRENNAN AND FORTAS

Wainwright v. New Orleans
The Supreme Court's Conference, October 13, 1967

JUSTICE DOUGLAS'S CONFERENCE NOTES

Conference
October 13, 1967
No. 13 -- Wainwright v. City of New Orleans

CJ [Warren] question whether case is properly here for he was found guilty only of assaulting officer in jail house - he thought when we took the case that he was arrested and tried for vagrancy - what happened outside the jail - on that ground he would reverse - but it looks like it was improvidently granted - no simple element of vagrancy or resisting arrest -

HLB [Black] he was wrong in granting this man was not even civil - nothing done to damage him - dismiss as improvidently granted - of course he was not a vagrant -

WOD [Douglas] reverses - he was unconstitutionally in jail

528 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
JMH [Harlan] is there a federal right
to resist an illegal arrest?
Yes - he takes a chance

he was wrong - arrest was
illegal - no vagrancy - no
probable cause - was amount of
force he used to resist police
in jail beyond the pale? he
can’t make out the answer on
this record - record too
opaque so he would
dismiss or vacate +
remand for findings on
amount of force used

CJ [Warren] he would be willing to vacate
for findings

WJB [Brennan]   Schmerber indicates there is
no right to resist search-
dismisses as improvidently
granted - his presence in station
house was result of illegal
arrest - his May 14 trial
was dismissed - then started
(App B) the trial of assaulting
the officer in the station
house -

CJ [Warren] opinion of La Ct
says he was legally
arrested -

PS [Stewart] dismisses as
improvidently
granted

BW [White] dismisses
AF [Fortas] “

DECIDING THE STOP AND FRISK CASES

JUSTICE FORTAS’S CONFERENCE NOTES

No. 13, Wainwright v. City of New Orleans 10-13-67

The Chief Justice [Warren]
Not vagrant - but question whether we can
reach it

Black, J.
He voted to grant, but was
wrong - because P [petitioner] was not hurt!
Dismiss as improperly granted -

Douglas, J.
Would reverse - If P was properly in jail that
would be one thing. But here, what’s he
supposed to do [if - crossed out].

Harlan, J.
You have a right to resist an
unlawful arrest - not excessive
force -
No probable cause to arrest him on vagrancy -
Illegal arrest -
Was the amt of force used excessive -
Can’t tell from this record -
Believes per cur can be written
that this record is too
opaque to [dismiss - crossed out] reach
questions.
Otherwise would vacate + send
back for findings on reasonable
amt of force -

Brennan, J.
Dismiss as improvidently granted ----
Most of the evidence is on different

These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
charges -- a different case - that
were discussed -- Conviction on new
charge -----

Stewart, J.
Dismiss as improvidently granted

White, J.
Dismiss --
[crossed out: Indigent before used or not\textsuperscript{530}]

Marshall, J.
Dismiss as improvidently granted

\textbf{A.F. [Fortas]}
Dismiss as improvidently granted

\textsuperscript{530} This transcription is of questionable accuracy; the note is extremely hard to read beneath the lines crossing it out.
Conference

Wednesday, December 13, 1967

No. 63 -- Sibron v. New York

**CJ [Warren]** looks like a *manufactured* case - does not reach constitutional question - it was not stop + frisk - not in ordinance - were arrest without probable cause - reverses would not go on mootness - would not remand to let AG confess error below

**HLB [Black]** reverses on confession of error + remand to Ct of A to consider that confession - search was illegal

**WOD [Douglas]** reverses -

**JMH [Harlan]** (1) this case is moot - (2) can’t take DA confession of error against by Ct of A (3) on merits he would agree with CJ [Warren] - dismisses as moot - or vacate on confession of error

**WJB [Brennan]** reverses

**PS [Stewart]** he would forget mootness + reverses on merits - does

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531 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
not reach statute - it was
an illegal search under
4th A

[BW [White] reverses

AF [Fortas] “

TM [Marshall] “ it was conditional arrest
No. 63, Sibron v. New York

The Chief Justice [Warren]

No stop + frisk - a plain arrest + search without probable cause

532 These conference notes are in the William J. Brennan, Jr. Papers, Library of Congress, Manuscript Division.
No. 63, Sibron v. New York

The Chief Justice
Dont reach constlty of statute
No reasonable basis for stop -- + it was
a search, not a frisk

Black, J.
[Revse -- crossed out] Vacate on confession of error + send it
back
It was an illegal search --

Douglas, J.
Follow Chief - reverse but just to
send back to Ct of Appeals -

Harlan, J.
Moot - +
Wouldn't take DA's confession
of error in face of
highest court of state -
If reached merits, would agree
with Chief --
Dismiss as moot - or vacate -

Brennan, J.
Reverse

Stewart, J.
Reverse -- unreasonable search
under 14th or 4th -

White, J.
Reverse

533 These conference notes are in the Abe Fortas Papers, Yale University Li-
brary, Manuscripts and Archives.
A.F.
Reverse

Marshall, J.
Reverse --
Conference
Wednesday, December 13, 1967

No. 74 -- Peters v. New York

**CJ** [Warren] if this is stop + frisk, anything can be - police in his home + through peephole sees stranger - he calls police - gets gun + they start to run - probable cause to believe they were committing a crime - he arrested them - need not be a policeman to make an arrest - does not reach Act -

**WJB** [Brennan] can citizen arrest on probable cause? need not decide it for he was a policeman --

**HLB** [Black] affirms

**WOD** [Douglas] “ - probable cause for believing a burglary was under way

**JMH** [Harlan] can’t find probable cause - NY courts did not treat it that way - rests on the Act - if stop + frisk, it’s OK

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534 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.

PS [Stewart] " " " "  "

[page 2:]

BW [White] affirms

AF [Fortas] "

TM [Marshall] "
No. 74, Peters v. New York

The Chief Justice
He had probable cause -
Treat this as if he were not a
policeman - but he has
jurisdiction

Black, J.
Affirm

Douglas, J.
Affirm

Harlan, J.
Affirm
ok if under stop + frisk

Brennan, J.
Affirm

Stewart, J.
Affirm

White, J.
Affirm

A.F.
Affirm

Marshall, J.
Affirm

535 These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
Conference  
Wednesday, December 13, 1967  
No. 67 -- Terry v. Ohio

CJ [Warren] would use the case to lay down  
hard rules for stop and frisk  
statute can’t enlarge a policemen’s rights.

CJ [Warren] no stop and frisk law here -  
did police have “probable cause”  
(1) to talk to them (2) to think  
he was in danger of his life --  
an officer who sees what he  
saw has a duty to pursue  
it + frisk if there is a  
crime about to be committed --  
they don’t have to answer +  
they can walk away -- at  
that point there would be  
no probable cause -- but  
their actions may give him  
probable cause to think he’s  
in danger -- he can protect himself  
by seeing if they are  
armed -- affirms - he rests solely  
on “probable cause”-- would not disregard  
probable cause  
There was probable  
cause (1) to talk to  
the man (2) to fear  
he might be

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535 These conference notes are in the William O. Douglas Papers, Library of Congress, Manuscript Division.
endangered --
stop + frisk law can't
change these hereafter

HLB [Black] - affirms
agrees with CJ [Warren]
to stick by
"probable
cause" -- he
would construe reasonable suspicion
in NY law to mean

[page 2 of 4:]
[in circle:]
TM [Marshall] interrupts to say that
police did not go up to them
to question them
[end circle]

HLB [Black] probable cause - he
did not make arrest by talking
to them - he arrested them
only [crossed out: by] when he stood them
up - right to question citizen
is not a 4th A right - right
to stop + ask questions is part of
body of law, not 4th A -
4th A does not fit into it
until there is an arrest
policeman has right to defend
himself + to frisk them to
save his life - evidence taken would be admissible -
he would say this citizen
can't just walk away +
refuse to talk to the police
when questioned - there
is a right to investigate -
he could delay him
temporarily tho not
arrest him - no need
DECIDING THE STOP AND FRISK CASES

not decide that now but
that’s how he would decide it -

WOD [Douglas] affirms - agrees with CJ [Warren]

JMH [Harlan] affirms - frisking took place pretty early - cop can’t do that i.e. frisk without probable cause that a crime is committed - he does not look at this as a questioning case -

WJB [Brennan] affirms - there is 4th Amendment - it deals with seizure of persons + there must be “probable cause” - there is a seizure not for purpose of booking him for a crime but for purposes of frisking - is this probable cause to stop him question him, frisk him - he passes over case where there is a frisk + nothing found + police yet detain him - refer to Miranda + custodial detention includes a jail.

PS [Stewart] - agrees with CJ affirms
[page 4 of 4:] would not say a citizen can refuse to answer a cop - state can make stricter standards than the 4th Amendment - need not reach case where the frisk turns up contraband

BW [White] affirms - questioning is not 4th Amendment - it is involved in
a frisk or search for there is detention -

**AF** [Fortas] affirms with a precisely refined opinion not a *Miranda* type - we are writing a new kind of probable cause - he would be cautious - he would go case by case - he would leave untouched the round up type of frisks.

**TM** [Marshall] affirms
No. 67, Terry v. Ohio

The Chief Justice [Warren]

Did police officer have
prob cause to talk to these +
did he have prob cause to
believe his life was in danger
But people don’t have to answer
+ may walk away. Having
in mind a trained policeman
may read it differently from
ordinary citizen

Black, J.

Agree that should use
“probable cause” + not reasonable
suspicion. Don’t think they
arrested these people until
after he got guns. Does officer
have a right to interrogate people
doing peculiar things? Don’t
know that this is forbidden
by anything in Const. Right
to stop people does not stem
from Fourth. Further has
right to defend himself
don’t want anything said that
police can’t make guy stay
until he answers or he stub-
bornly refuses

537 These conference notes are in the William J. Brennan, Jr. Papers, Library of Congress, Manuscript Division.
No. 67, Terry v. Ohio

The Chief Justice [Warren]
Affirm
Policeman may accost people + ask question - They need not answer + may go off - But then Did he or did he not have probable cause to protect himself - Wouldnt put it on any basis other than probable cause - not suspicion or reasonable grounds -- Would write at length + say rights of police stems from 4th amdmt + not from a statute -

Black, J.
Agrees up to a point -- Agrees that you should stay with “probable cause” -- NY statute means “probable cause” -- Arrested only when he told them to go into store + put their hands on wall - Here: may police interrogate persons who are acting so they suspect crime -- This does not stem from 4th Amdmt -- “Seizure” means arrest.

Douglas, J.
Affirm
Harlan, J.
Affirm

These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.
Brennan, J.

**Affirm**

4th amendmt problem -- there
is a “seizure” of a person here --
Is there probable cause to detain,
question + frisk --
Would reserve on questions of
whether fellow may walk away --
or whether other things may
be used, having been found
in course of frisk

Stewart, J.

**Affirm**

Wouldn’t like to see us face question
of right to go away --

White, J.

**Affirm** -- police man [crossed out word] may ask
question -- [crossed out word] But 4th
amdmnt involved on frisk or
search --

AF. **Affirm**

but narrow + precise -

Marshall, J.

**Affirm**

I might put it on
suspcion of heist -- not
that [they were -- crossed out] cop was going to talk
to them - but was going to frisk them
Agrees - narrow + precise
Notes of the Court's Conference, *Wainwright v. New Orleans*,
October 13, 1967

**Notetaker:**
Douglas

**Speaker:**
Warren
**CJ** question whether case is properly here for he was found guilty only of assaulting officer in jail house -

he thought when we took the case that he was arrested and tried for vagrancy --what happened outside the jail -

on that ground he would reverse -- but it looks like it was improvidently granted- no simple element of vagrancy or resisting arrest -

Black
**HLB** he was wrong in granting this man was not even civil --

Black, J.
He voted to grant, but was wrong -- because P [petitioner] was not hurt!
nothing done to damage him –

Dismiss as improvidently granted – of course he was not a vagrant –

Douglas WOD reverses – he was unconstitutionally in jail

Douglas, J. Would reverse – If P was properly in jail that would be on thing. But here, what’s he supposed to do [if – crossed out].
is there a federal right to resist an illegal arrest?
Yes – he takes a chance he was wrong – arrest was illegal -

no vagrancy – no probable cause –

was amount of force he used to resist police in jail beyond the pale? he can’t make out the answer on this record –

record too opaque so he would dismiss or vacate + remand for findings on amount of force used

Was the amt of force used excessive – Can’t tell from this record -

Believes per cur can be written that this record is too opaque to [dismiss - crossed out] reach questions. Otherwise would vacate + send back for findings on reasonable amt of force –

CJ he would be willing to vacate for findings
Brennan WJB Schmerber indicates Brennan, J.
there is no right to resist search –

dismisses as improvidently Dismiss as improvi-
graded - dently granted ----

Most of the evidence is on different charges --
Notetaker: Douglas

Speaker: Brennan

his presence in station house was result of illegal arrest – his May 14 trial was dismissed – then started (App B) the trial of assaulting the officer in the station house –

Warren CJ opinion of La Ct says he was legally arrested –

Stewart PS dismisses as improvidently granted

Stewart, J. Dismiss as improvidently granted

White BW dismisses

White, J. Dismiss –[crossed out: Ending it before us does not]

Fortas AF

" A.F. Dismiss as improvidently granted

Marshall TM

" Marshall, J. Dismiss as improvidently granted
Notes of the Court’s Conference, *Sibron v. New York*,
December 13, 1967

Notetaker: Douglas
Speaker: Warren

**CJ looks like a manufactured case - does not reach constitutional question -**
No stop + frisk - not in ordinance -
were arrest without probable cause - reverses

it was not stop + frisk - not in ordinance -
were arrest without probable cause - reverses

would not go on mootness -
would not remand to let AG confess error below

**The Chief Justice**

No stop + frisk - a plain arrest + search without probable cause

No reasonable basis for stop +
it was a search, not a frisk

Black, J.

**HLB reverses on confession of error + remand to Ct of A to consider that confession -**

search was illegal

[Revse -- crossed out] Vacate on confession of error + send it back

It was an illegal search --
<table>
<thead>
<tr>
<th>Harlan</th>
<th><strong>JMH</strong> (1) this case is moot -</th>
<th>Harlan, J. Moot ++</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(2) can't take to DA confession of error against by Ct of A</td>
<td>Wouldn't take DA's confession of error in face of highest court of state -</td>
</tr>
<tr>
<td></td>
<td>(3) on merits he would agree with CJ -</td>
<td>If reached merits, would agree with Chief --</td>
</tr>
<tr>
<td></td>
<td>dismisses as moot - or vacate on confession of error</td>
<td>Dismiss as moot - or vacate -</td>
</tr>
<tr>
<td>Speaker</td>
<td>Notetaker:</td>
<td>Brennan</td>
</tr>
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<td>--------------</td>
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<td>---------</td>
</tr>
<tr>
<td>Brennan</td>
<td>WJB reverses</td>
<td>Brennan, J. Reverse</td>
</tr>
<tr>
<td>Stewart</td>
<td>PS he would forget mootness + reverses on merits - does not reach statute - it was an illegal search under 4th A</td>
<td>Stewart, J. Reverse --</td>
</tr>
<tr>
<td>White</td>
<td>BW reverses</td>
<td>White, J. Reverse</td>
</tr>
<tr>
<td>Fortas</td>
<td>AF &quot;</td>
<td>A.F. Reverse</td>
</tr>
<tr>
<td>Marshall</td>
<td>TM &quot; it was conditional arrest</td>
<td>Marshall, J. Reverse --</td>
</tr>
</tbody>
</table>

"A.F." stands for Associate Justice Fortas, and "TM" stands for Justice Marshall.
December 13, 1967

**Notetaker:** Douglas

**Speaker:** Warren

CJ if this is stop + frisk, any-thing can be -

police in his home + through peephole sees stranger - he calls po-

lice - gets gun + they start to run -

probable cause to be-

lieve they were com-

mitting a crime - he ar-

rested them -

need not be a policeman to make an arrest -

does not reach Act -

**Speaker:** Brennan

*WJB* can citizen arrest on probable cause? need not decide it for he was a policeman --

**Speaker:** Black

*HLB* affirms

Black, J.

Affirm

**Speaker:** Fortas

The Chief Justice

He had prob-

able cause-

Treat this as if he were not a policeman - but he has jurisdiction
Douglas, J. Affirm

Harlan, J. Affirm

Douglas

WOD " - probable cause for believing a burglary was under way

Harlan

JMH can't find probable cause - NY courts did not treat it that way - rests on the Act - if stop + frisk, it's OK
<table>
<thead>
<tr>
<th>Speaker</th>
<th>Notetaker:</th>
<th>Affirmation</th>
</tr>
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<tbody>
<tr>
<td>Brennan</td>
<td>Douglas</td>
<td>Brennan, J. Affirm</td>
</tr>
<tr>
<td>Stewart</td>
<td>PS</td>
<td>Stewart, J. Affirm</td>
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<td>A.F. Affirm</td>
</tr>
<tr>
<td>Marshall</td>
<td>TM</td>
<td>Marshall, J. Affirm</td>
</tr>
</tbody>
</table>
Notes of the Court’s Conference, *Terry v. Ohio*,
December 13, 1967

**Notetaker:**
Douglas  Brennan  Fortas

**Speaker:**
Warren  The Chief Justice  The Chief Justice

*CJ* would use the case to lay down hard rules for stop and frisk statute can't enlarge a policeman's rights.

*CJ* no stop and frisk law here -

- did police have "probable cause" (1) to talk to them (2) to think he was in danger of his life --
- Did police have prob cause to talk to these + did he have prob cause to believe his life was in danger
an officer who sees what he saw has a duty to pursue it + frisk if there is a crime about to be committed --

they don't have to answer + they can walk away --

But people don't have to answer + may walk away.

Policeman may accost people + ask question -

They need not answer + may go off -

at that point there would be no probable cause --

but their actions may give him probable cause to think he's in danger --

Having in mind a trained policeman may read it differently from ordinary citizen
Notetaker:  Douglas  Brennan  Fortas

Speaker:  Warren

he can protect himself by seeing if they are armed --

But then Did he or did he not have probable cause to protect himself -

affirms -

he rests solely on "probable cause" -- would not disregard probable cause

Wouldn't put it on any basis other than probable cause - not suspicion or reasonable grounds --

There was probable cause (1) to talk to the man (2) to fear he might be endangered--

stop + frisk law can't change these hereafter
Black, J. \textit{HLB} - affirms Black, J.

agrees with CJ to stick by "probable cause" -- Agree that should use "probable cause" + not reasonable suspicion. Agrees up to a point -- Agrees that you should stay with "probable cause" --

Would write at length + say rights of police stems from 4th amdmt + not from a statute --
he would construe reasonable suspicion in NY law to mean

[Marshall]

TM interrupts to say that police did not go up to them to question them [end circle]

[Black (continues)]

HLB probable cause -

he did not make arrest by talking to them - he arrested them only [crossed out: by] when he stood them up -

Don't think they arrested these people until after he got guns.

Arrested only when he told them to go into store + put their hands on wall -

Here: may police interrogate persons who are acting so they suspect crime -
Does officer have a right to interrogate people doing peculiar things? Don't know that this is forbidden by anything in Const.

right to question citizen is not a 4th A right - right to stop + ask questions is part of body of law, not 4th A - 4th A does not fit into it until there is an arrest

Right to stop people does not stem from Fourth.

This does not stem from 4th Amdmt -- "Seizure" means arrest.
Black policeman has right to defend himself plus to frisk them to save his life -

Further has right to defend himself -

Evidence taken would be admissible -
he would say this citizen can't just walk away + refuse to talk to the police when questioned - there is a right to investigate - he could delay him temporarily tho not arrest him - no need not decide that now but that's how he would decide it —

Douglas, J. Affirm

Douglas WOD affirms - agrees with

Harlan, J. Affirm

Harlan JMH affirms -
frisking
took
place
pretty
early - cop
can't do
that i.e.
frisk without probable cause
that a
crime is
committed
- he does
not look at
this as a
questioning
case -
there is
4th A - it
deals with
seizure of
persons +
there
must be
"probable
cause"
- there is a
seizure
not for
purpose of
booking
him for a
crime but
for pur-
poses of
frisking -
is this
probable
cause to
stop him
question
him, frisk
him -

Is there prob-
able cause to
detain, question
+ frisk --

Fortas
Affirm

Brennan, J.
he passes over case where there is a frisk + nothing found + police yet detain him - Would reserve on questions of whether fellow may walk away -

or whether other things may be used, having been found in course of frisk

refer to Miranda + custodial detention includes a jail.

Stewart PS - agrees with CJ affirms

would not say a citizen can refuse to answer a cop - Stewart, J. Affirm

Wouldn't like to see us face question of right to go away --
state can
make
stricter
standards
than the
4th A -

need not
reach case
where the
frisk turns
up contra-
band
Speaker: White

BW affirms -
questioning is not 4th A -
it is involved in a frisk or search for there is detention -

Notetaker: Douglas Brennan

Fortas

White, J.

Affirm -- police man [crossed out word] may ask question --

AF affirms with a precisely refined opinion not a Miranda type -

AF. Affirm but narrow + precise -

we are writing a new kind of probable cause - he would be cautious -
he would
go case by
case - he
would
leave un-
touched
the round
up type of
frisks.

Marshall

Marshall, J.
Affirm
I might put it on
suspicion of
heist -- not that
[they were --
crossed out] cop
was going to
talk to them -
but was going to
frisk them

TM affirms

Agrees - narrow
+ precise