

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

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

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 NOTES⁵²⁸

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

[page 2 of 3:]

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 -

[page 3 of 3:]

PS [Stewart] dismisses as improvidently granted

BW [White] dismisses

AF [Fortas] “

TM [Marshall] “

JUSTICE FORTAS'S CONFERENCE NOTES⁵²⁹

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

⁵²⁹ 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 not⁵³⁰]

Marshall, J.
Dismiss as improvidently granted

A.F. [Fortas]
Dismiss as improvidently granted

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

Sibron v. New York

The Supreme Court's Conference, December 13, 1967

JUSTICE DOUGLAS'S CONFERENCE NOTES⁵³¹

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

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

[page 2 of 2:]

BW [White] reverses

AF [Fortas] “

TM [Marshall] “ it was conditional
arrest

JUSTICE BRENNAN'S CONFERENCE NOTES⁵³²

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.

JUSTICE FORTAS'S CONFERENCE NOTES⁵³³

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 Library, Manuscripts and Archives.

A.F.

Reverse

Marshall, J.

Reverse --

Peters v. New York

The Supreme Court's Conference, December 13, 1967

JUSTICE DOUGLAS'S CONFERENCE NOTES⁵³⁴

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

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

WJB [Brennan] affirms in CJ's [Warren's] hands

PS [Stewart] " " " "

[page 2:]

BW [White] affirms

AF [Fortas] "

TM [Marshall] "

JUSTICE FORTAS'S CONFERENCE NOTES⁵³⁵

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.

Terry v. Ohio

The Supreme Court's Conference, December 13, 1967

JUSTICE DOUGLAS'S CONFERENCE NOTES⁵³⁶

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

⁵³⁶ 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

[page 3 of 4:]

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
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 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 A -
need not reach case where
the frisk turns up contraband

BW [White] affirms - questioning is
not 4th A - 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

JUSTICE BRENNAN'S CONFERENCE NOTES⁵³⁷

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.

JUSTICE FORTAS'S CONFERENCE NOTES⁵³⁸

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

⁵³⁸ These conference notes are in the Abe Fortas Papers, Yale University Library, Manuscripts and Archives.

[page 2 of 2:]

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
suspicion of heist -- not
that [~~they were -- crossed out~~] cop was going to talk
to them - but was going to frisk them
Agrees - narrow + precise

APPENDIX B: A SIDE-BY-SIDE COMPARISON OF THE STOP AND
FRISK CONFERENCE NOTES OF JUSTICES DOUGLAS, BRENNAN AND
FORTAS

Notes of the Court's Conference, *Wainwright v. New Orleans*,
October 13, 1967

	<u>Notetaker:</u>	
	Douglas	Fortas
<u>Speaker:</u>		
Warren	CJ question whether case is properly here for he was found guilty only of assaulting officer in jail house -	The Chief Justice
	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 -	Not vagrant - but question whether we can reach it
Black	<u>HLB</u> 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 –
Dismiss as improp-
erly granted

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].

Notetaker:

Douglas

Fortas

Speaker:

Harlan

is there a federal right to resist an illegal arrest?
 Yes – he takes a chance he was wrong – arrest was illegal -

Harlan, J.
 You have a right to resist an unlawful arrest – not excessive force

no vagrancy – no probable cause –

No probable cause to arrest him on vagrancy – Illegal arrest –

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

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

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

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 –

Warren

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 granted - Dismiss as improvi-
dently granted ----

Most of the evidence
is on different
charges --

Notes of the Court's Conference, *Sibron v. New York*,
December 13, 1967

<u>Notetaker:</u>	Douglas	Brennan	Fortas
<u>Speaker:</u>			
Warren	<u>CJ</u> looks like a <u>manufactured</u> case - does not reach constitutional question -	The Chief Justice	The Chief Justice Dont reach constlty of statute
	it was not stop + frisk - not in ordinance - were arrest without probable cause - reverses	No stop + frisk - a plain arrest + search without probable cause	No reasonable basis for stop + it was a <u>search</u> , <u>not a frisk</u>
	would not go on mootness - would not remand to let AG confess error below		
Black	<u>HLB</u> reverses on confession of error + remand to Ct of A to consider that confession -		Black, J. [Revse -- crossed out] Vacate on confession of error + send it back
	search was illegal		It was an illegal search --

Harlan	<u>JMH</u> (1) this case is moot -	Harlan, J. Moot -+
	(2) can't take to DA confession of error against by Ct of A	Wouldn't take DA's confession of error in face of highest court of state -
	(3) on merits he would agree with CJ -	If reached merits, would agree with Chief --
	dismisses as moot - or vacate on confession of error	Dismiss as moot - or vacate -

	<u>Notetaker:</u> Douglas	Brennan	Fortas
<u>Speaker:</u> Brennan	<u>WJB</u> reverses		Brennan, J. <u>Reverse</u>
Stewart	<u>PS</u> he would forget mootness + reverses on merits - does not reach statute - it was an illegal search under <u>4th A</u>		Stewart, J. <u>Reverse</u> -- unreasonable search under 14th or 4th -
White	<u>BW</u> reverses		<u>White, J.</u> Reverse
Fortas	<u>AF</u> "		<u>A.F.</u> Reverse
Marshall	<u>TM</u> " it was conditional ar- rest		Marshall, J. Reverse --

Notes of the Court's Conference, *Peters v. New York*,
December 13, 1967

	<u>Notetaker:</u>	
	Douglas	Fortas
<u>Speaker:</u>		
Warren	<u>CJ</u> if this is stop + frisk, any-thing can be -	The Chief Justice
	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 -	<u>He had prob- able cause-</u>
	need not be a policeman to make an arrest -	Treat this as if he were not a <u>policeman</u> - but he has <u>jurisdiction</u>
	does not reach Act -	
Brennan	<u>WJB</u> can citizen arrest on probable cause? need not decide it for he was a policeman --	
Black	<u>HLB</u> affirms	Black, J. Affirm

Douglas	<u>WOD</u> " - probable cause for believing a burglary was under way	Douglas, J. Affirm
Harlan	<u>JMH</u> can't find probable cause - NY courts did not treat it that way - rests on the Act - if stop + frisk, it's OK	Harlan, J. Affirm ok if under stop + frisk

		<u>Notetaker:</u>	
		Douglas	Fortas
<u>Speaker:</u>			
Brennan	<u>WJB</u> affirms in CJ's hands		Brennan, J. <u>Affirm</u>
Stewart	PS " " " "		Stewart, J. <u>Affirm</u>
White	<u>BW</u> affirms		White, J. <u>Affirm</u>
Fortas	<u>AF</u> "		A.F. <u>Affirm</u>
Marshall	<u>TM</u> "		Marshall, J. <u>Affirm</u>

Notes of the Court's Conference, *Terry v. Ohio*,
December 13, 1967

Notetaker:

Douglas

Brennan

Fortas

Speaker:

Warren

The Chief
JusticeThe Chief Justice
Affirm

CJ would use
the case to lay
down hard
rules for stop
and frisk

statute can't
enlarge a po-
licemen'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 be- lieve 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 an-
swer + 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 ac-
tions may give
him probable
cause to think
he's in danger

--

Having in
mind a
trained po-
liceman may
read it differ-
ently from
ordinary citi-
zen

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 dis-
regard prob-
able cause

Wouldn't put it
on any basis
other than prob-
able cause - not
suspicion or rea-
sonable grounds

--

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

stop + frisk
law can't
change these
hereafter

Would write at length + say rights of police stems from 4th amdmt + not from a statute --

Black

HLB - affirms

Black, J.

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" --

		<u>Notetaker:</u>	
		Douglas	Brennan
<u>Speaker:</u>			Fortas
Black	he would construe reasonable suspicion in NY law to mean		
Marshall	[in circle:] <u>TM</u> interrupts to say that police did not go up to them to question them [end circle]		
Black (continues)	<u>HLB</u> probable cause -		NY statute means "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 ques-
 tion 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.

Notetaker:

Douglas Brennan Fortas

Speaker:

Black

policeman Further has
has right right to defend
to defend himself
himself +
to frisk
them to
save his
life -

evidence
taken
would be
admissible
-

he would don't want
 say this anything said
 citizen that police
 can't just can't make
 walk away guy stay until
 + refuse to he answers or
 talk to the he stub-bornly
 police refuses
 when
 questioned
 - there is a
 right to
 investi-
 gate - he
 could de-
 lay him
 temporar-
 ily tho not
 arrest him
 - no need
 not decide
 that now
 but that's
 how he
 would de-
 cide it -

Douglas	<u>WOD</u> af- firms - agrees with CJ	Douglas, J. Affirm
---------	---	-----------------------

Harlan	<u>JMH</u> af- firms -	Harlan, J. Affirm
--------	---------------------------	----------------------

frisking
took
place
pretty
early - cop
can't do
that i.e.
frisk with-
out prob-
able cause
that a
crime is
committed
- he does
not look at
this as a
ques-
tioning
case -

	<u>Notetaker:</u>	
	Douglas	Brennan Fortas
<u>Speaker:</u>		
Brennan	<u>WJB</u> af- firms -	Brennan, J. <u>Affirm</u>
	there is <u>4th</u> 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 -	<u>4th amendmt</u> problem -- there is a "seizure" of a person here --
	is this probable cause to stop him question him, frisk him -	Is there prob- able cause to detain, question + frisk --

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

+ custo-
dial de-
tention
includes a
jail.

Stewart

PS -
agrees
with CJ
affirms

Stewart, J.
Affirm

would not
say a citi-
zen can re-
fuse to an-
swer a cop
-

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

	<u>Notetaker:</u>	
	Douglas	Brennan Fortas
<u>Speaker:</u>		
White	<u>BW</u> af- firms - questionin g is not <u>4th</u> A -	White, J. <u>Affirm</u> -- police man [crossed out word] may ask question --
	it is in- volved in a frisk or search for there is detention -	[crossed out word] But <u>4th</u> amdmnt involved on frisk or search --
Fortas	<u>AF</u> affirms with a precisely refined opinion not a <u>Mi- randa</u> type -	AF. <u>Affirm</u> but narrow + precise -
	we are writing a new kind of prob- able cause - he would be cau- tious -	

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 af-
firms

Agrees - narrow
+ precise