Memorandum:--In Re:-- Extensions of time for the filing of petitions for cert. or other modes of bringing review of a case before the Court.

With the exception of the few instances wherein a party intends to cross-petition in the event the other party files a petition for cert. in a cause, I am unable to see where our present practice or rules result in any undue burden upon counsel. And, even in such causes, it is my thought that the cross-petitioner could, and should, protect his interests by filing a timely application for an extension of time in which to file his petition for cert. and indicating that the filing of a petition for cert. by his adversary is a condition precedent to his filing.

In the ordinary case, the Respondent is given (Rule 38 (3)) twenty days (respondents located in the far west and outlying possessions twenty-five days) after receiving notice of the filing, a copy of the petition, etc., in which to file brief in opposition. This is ample time for him to either respond or to file a petition for an extension of time in which to file his response.

Certainly, so I would assume, that Members of the Bar of this Court are charged with the applicable statutes and rules governing practice before the Bar. If such be the case, then it strikes me as being rather unusual for a Member to assume that there will be no review of a case sought simply because a petition for cert. is not filed within the regular period prescribed by the statute in the particular case--the additional permissive period allowed under which extensions for filing may be granted in the discretion of a Justice of this Court is just as much a part of the "time for filing" as the regular time.

In the case which Mr. Justice Frankfurter mentions, the order upon which review is being sought here was entered September ___,1949; time for filing pet. for cert. would expire on December ___, 1949; petitioner filed a timely motion for an extension of time, which was granted to January 16, 1950; petitioner filed his petition for cert. on January 11, and, upon the same day, served notice, copy of the petition for cert. etc., upon the Respondent. Apparently, counsel for the Respondent had assumed that inasmuch as 90-days had elapsed for the date of the judgment below, and he had received no notice of the filing of a petition for cert. that a review of the case would not be sought. In view of this, I presume that he was taken by surprised when he received the notice of filing, etc., but, regardless of this, I do not see how our practice, etc., could be held accountable for his prematurity of judgement. In any event, he still had 20 days under rule 38 (3) in which to file his opposition, or to secure an extension of time in which to file such opposition. He followed the latter course and secured an extension of time to February 27, 1950 to respond. Certainly, he was not harmed, nor his rights affected under this procedure. I assume that whenever a responsible attorney plans to be away from his practice, he, like members of other professions, arranges for proper substitutes to take care of his clients.

However, regardless of the apparent adequacy of our present rules and practice as I see it, it may be desirable to effectuate some procedure under which the adverse parties will be informed, or "put on notice" of the filing of "motions for extensions of time for the filing of petitions for cert. or other modes of bringing review of a case before the Court". If such be the case, it is my notion that a requirement to the effect that "all motions, etc., shall be accompanied by proof of service of a copy thereof on the opposition" would be preferable, then the attempt to accomplish the same thing through "suggesting" or requiring the party securing the extension, etc., to notify the opposition. I doubt the wisdom of bringing into the order language which may be looked upon as a "contingency" upon which an extension is granted, as this may open a field that it might be well to avoid-i.e., what is the effect of an extension in the event the party securing the same fails to notify the opposition, etc.

If the opposition is served with a copy of the petition or motion for an extension of time, he will certainly be on notice and advised as to the possibilities with respect to the "time element" of his cause. A general rule could be adopted making this a requirement with respect to all motions, petitions, etc., filed with the Court, or an individual Justice thereof. And, if desirable it could be made a part of the Rule, or a direction by the Court, that the Clerk be required to notify the opposing party, or counsel, of the action of the Court taken upon such motion, petition, etc.

NOTE RESPECTING NOTICE TO OPPOSING PARTY
OF EXTENSION OF TIME FOR FILING GRANTED
BY ORDERS OF THE JUSTICES.

The accompanying draft phrases an order granting extension of time to file which extends beyond the form in general use by including a direction to notify the opposing party that the time he had computed under statute or rule for a step in his case to be taken had been enlarged. There is no provision in present statutes or rules requiring such notice, nor have the Justices imposed it as a duty upon counsel as an established practice.

Extension of time to file petitions for certiorari is provided, as a discretionary power, by 28 USC 2101(c) and by Federal Criminal Rule 37(b)(2), and contains a jurisdictional element. Extension of time for filing briefs, rehearing petitions, etc., is regulated by rule and practice and jurisdiction per se is not involved.

To avoid stirring up the jurisdictional question of whether a Justice can "condition" his extension of time, when granted under statutory or Criminal Rule authority, and to promulgate a single form which can be used for all the types of time extension granted, it is suggested that directing counsel to notify his opponent rather than conditioning the extension upon his doing so, may be the way to skirt the possible jurisdictional challenge.

How soon should the notice be given? Insertion in the order of a specific time would require consideration of circumstances in each case. To use the word "immediately" is to ask the impossible. "Promptly" is an indefinite word permitting too much latitude. I have used the phrase "with all possible expedition" to carry the meaning that notice should be given as soon as it can be effected.

- Cropley.

January 23, 1950.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 19

_____

VS.

_____

ORDER EXTENDING TIME WITHIN WHICH TO FILE

_____.

UPON CONSIDERATION of the application of counsel for the _____;

IT IS ORDERED that the time for filing _____ _____ in the above entitled cause be, and it hereby is, extended to and including _____ _____, 195 ___. The party, or his counsel, obtaining this order shall notify, with all possible expedition, the opposing party, or his counsel, of the extension of time granted hereby.

_____

Associate Justice of the Supreme Court
of the United States.

Dated this _____

day of _____, 195___.

January 24, 1950

MEMORANDUM FOR THE CONFERENCE.

A new point of practice has turned up in my experience here, which seems to me of sufficient general importance to bring to the attention of my brethren. It concerns a desirable procedure for orders extending the time within which to file a petition for certiorari, or other modes of bringing a review before the Court.

It seems to me the ordinary period of three months is more than ample not only for the intrinsic difficulties presented by the preparation of a petition but also with due regard to the dilatory habits of our profession. But of course there are situations where an extension of time must be granted. The situation which has just been brought to me is in regard to a case decided in the First Circuit. This time it was counsel for respondent who asked for an extension, and the ground he gave was that by long prearrangement he was due to sail for Europe the day after his time was up, but he had assumed that since three months had elapsed after he obtained his favorable judgment no petition for review would be sought for he had not been notified of any extension of time for his opponent.

Inquiry on my part revealed that such extensions for the filing of petitions are granted without any mechanism for bringing notice of it to the opposing party. Here is a gap that I think should be filled. The Clerk and I have had full discussion of the matter and at my request he has drawn an order which seems to me admirably suited to meet the situation that has been revealed, and I suggest the desirability of its adoption as the formal order for submission to us upon application for extending the time within which to file pleadings, as it were, in this Court. Herewith is attached a copy of this order and the Clerk's note explaining the problems which he sought to meet - and I think he has done so admirably - in the proposed draft.

F. F.

January 30, 1950

MEMORANDUM FOR THE CONFERENCE:

On January 24, Justice Frankfurter circulated a memorandum relative to extension of time within which to file petition for certiorari or other modes of bringing review of a case before the Court. With the memorandum, he transmitted a statement from the Clerk dated January 23, 1950, together with a suggested order extending time within which to file, placing upon the party seeking the extension the responsibility of notifying "with all possible expedition, the opposing party, or his counsel, of the extension of time granted hereby." Justice Frankfurter thinks that this order meets the situation he has in mind, and suggests its adoption as a formal order in extending time within which to file "pleadings, as it were, in this Court."

It doesn't strike me that this does the job. In my view, the motion for the extension should state that notice that the motion for extension will be made has been brought to the attention of the opposing party, or his counsel. In that way, they will be put on notice, and they can guard their own interest rather than learn about the granting of the motion for extension subsequent to its entrance and notification to the party making the motion, and then his notification of the extension of time granted by the Justice to the opposing party or counsel. The time element, particularly in cases coming from far distant points in the United States, territories, or insular possessions may prevent knowledge of the granting of the motion until the time has elapsed in which the opposing party may file his motion for an extension of time within which he may file petition for certiorari or other modes for bringing a review before this Court.

It would seem to me that the Rules, both Civil and Criminal, should be amended, requiring the moving party to show notice to the adversary party that he is filing a motion. Then, with compliance with the rule shown, the last sentence of the proposed order might well be deleted, or the order might contain, in lieu of the last sentence, the following:

> "It appears that the _____, or his counsel, notified the _____, or his counsel, on _____195_, that the motion for the extension of time would be made."

Chief Justice

FEB 2 9 49 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

February 1, 1950.

MEMORANDUM FOR THE CONFERENCE DEALING WITH EXTENSION OF TIME.

The main purpose of my memorandum of January 24th regarding the granting of extension of time for filing a petition for certiorari, etc., was to bring to the attention of the brethren a gap disclosed by an application to me for extension of time to file a reply in opposition to a petition for certiorari. It is a case from the First Circuit, No. 313 Misc., Royal v. Royal. I welcome the memorandum from the Chief Justice in that it recognizes that this is a problem calling for consideration.

His suggestion for meeting the problem arouses spontaneous sympathy in me because I at first thought that the solution now proposed by him was the way to meet the situation when I first encountered it. I, too, thought that the remedy was to require notice to be given of an application for extension of time. That, of course, would turn what has always been an ex parte application into an adversary proceeding. Reflection, informed by a talk with the Clerk, persuaded me that practical considerations preclude the desirability of such a change, and for these reasons:

1. If notice is to serve a purpose an application for time extension presented to one of us would, in the absence of dependable waiver, require withholding of action pending presentation of opposition until the final day upon which we could act under statute or Rule. No compensating interest of justice appears to justify such self-imposed new burden on the Justices.

2. Many applications for time extension are presented close to the statutory or Rule deadline. Requirement of notice of the motion to opposing counsel, as a condition precedent to its presentation, would frequently result in receipt of notice after the expiration of time within which action must be taken. This undedirable result would, of course, vary with the distance of counsels' residence from the Court and from each other. The requirement may well confuse and annoy opposing counsel who, justifiably, would resent that it was too late to exercise the implied right to oppose the motion. Protests, now practically unknown to the accepted ex parte practice, would be encouraged.

3. Many applications for extensions come from indigent litigants and prisoners. Such movants know little about rules or practice. Great leniency in waiving technical requirements in their cases, generally handled pro se, is shown. That a

notice of motion requirement would increase indulgence of informality is not so pertinent as the encouragement it would give to protests by the opponent, usually the Government or a State authority. More important is the hardship imposed upon prisoners who, under prison regulations, are restricted in the number of communications they may send. Conceivably separate communications to give notice and transmit their motion to us may exceed a prisoner's quota and thereby raise, at the least, embarrassing questions. And we cannot alter penal institution administrative rules at the unknown place where the situation may arise.

4. The inappropriateness of the requirement of notice of motion, implying the right to oppose, is emphasized by a special class of recurring situations, e.g., where a large record filed with a certiorari petition must be printed. If the work would require more than the 10 days fixed for service under Rule 38, par. 3, counsel are notified and submit a pro forma application to extend the time to 10 days beyond the indefinite date such printing is performed, to meet an internal mechanical condition. Here ex parte action is feasible and notice to opponent of the extension granted, as proposed in my memorandum, affords ample protection.

5. Regulation of the discretionary power to extend time by Rule, binding Justices and counsel alike, would needlessly restrict our present latitude in varying the terms of our orders to the precise situation presented in individual cases. In the absence of statutory provision, the flexible ability to deal with matters presented in Chambers without the restriction of prescribed Rule should, I submit, be preserved.

F. F.

February 3, 1950

MEMORANDUM FOR THE CONFERENCE:

Re: Extensions of Time

The initial memorandum, circulated by Justice Frankfurter on January 24, dealt with an application which came to him as Circuit Justice for the First Circuit in No. 313 Misc., Royal v. Royal, in which the respondent desired an extension of time to file a reply in opposition to a petition for certiorari. Counsel for the respondent had booked passage for a trip to Europe following the expiration of the statutory period for the filing, and desired additional time in which to file his opposition to the petition for certiorari.

The memorandum brought to my mind the problem of protecting the right of a litigant who, though succeeding in part in the lower court, would desire to file a cross petition for certiorari only in the event his adversary filed petition for certiorari. There have been a number of instances since I have been with you in which cross petitions have been filed, and urged only in the event that the petition for certiorari would be granted.

It occurred to me that the present Rules protected the right of the respondent in the case to which Justice Frankfurter's attention was called as it is shown by the happenings after the extension of time to file the petition. In this case, respondent filed a motion for extension of time in which to file opposition, and it was granted. He lost no rights.

I start off on the basic premise that any proceeding here is an adversary one. An adversary party should know what is going on in his case, and that action ex parte should only be taken by the Court or a Circuit Justice in extraordinary circumstances to insure justice to a litigant. To place the responsibility for protecting the rights of an adversary upon counsel who presents a motion for extension to file a petition after the action of a Circuit Justice is not my notion of the protection that an adversary party should have. It seems to me that notice of the motion to the adversary party is necessary to protect his interest.

Suppose that the respondent in Justice Frankfurter's case had desired to file a cross petition; that petitioner's motion for an extension was properly granted with the language contained in the proposed order; thereupon counsel for the petitioner, either advertently or inadvertently, failed to inform the respondent of the extension. With the elapse of the statutory period in which to file a cross petition, the respondent would be out of luck.

In Justice Frankfurter's case, and in all ordinary cases, it seems to me that the present Rules are satisfactory. When the petitioner files his petition for certiorari within the extended period, the respondent is given, under Rule 38, par. 3, 20 days (for respondents located in the Far West and outlying possessions 25 days) after receiving notice of the filing, copy of the petition, etc., in which to file brief in opposition. If this period

of time is not sufficient, because of a trip to Europe or any other proper reason, he may, as respondent did in the Royal case, file an application for extension of time in which to file. But this Rule does not meet the case I was talking about in my memorandum when a respondent would file a cross petition in the event his adversary filed a petition for certiorari.

I do not think that there is any necessity to change the orders for the ordinary case, but I do think it is worthy of consideration to think about changing the Rules so that one party may not secure ex parte a final advantage over his adversary.

Referring to Justice Frankfurter's Item No. 1 in the memorandum dated February 1, I do not think that withholding of the action pending presentation of opposition until the final date on which we could act would really constitute a significant new burden on the Justices, and if it did, I think there would be a compensating interest of justice to justify it. Counsel for the respondent might well feel that action ex parte had not been in the interest of justice to his client if he were barred from filing a cross petition. I well understand that it can be said that he could file his petition for certiorari even though the petitioner did not, but that is requiring him to take a step that he might not feel was in the best interest of his client. His judgment below may not have been all that he desired, but his client's interests would have been partially satisfied and the litigation terminated, if petitioner does not file petition for certiorari.

Item No. 2 - I cannot quite agree with this line of reasoning. If the petitioner delays filing of a motion for extension up until the expiration date, without sufficient time to notify his adversary, why should his rights be preferred over the rights of an adversary who might desire to file a cross petition? The petitioner has pursued the dilatory tactics, and in the case stated has done nothing during almost all the period allowed him under the statute. The distance that the litigants are apart could be spanned easily by telegram or telephone if the mails were too slow. Justice Frankfurter states that the requirement of notice of the motion might "well confuse and annoy opposing counsel who, justifiably, would resent that it was too late to exercise the implied right to oppose the motion."

In my experience, both at the bench and bar, the giving of notice of the filing of a motion or pleading is an accepted practice when required, and, generally speaking, a courtesy when not required. I well know the resentment a respondent would have if the delay in filing of the petition for certiorari, occasioned by an extension of time in which to file, and of which he had no notice, caused him to lose opportunity to file cross petition.

Item No. 3 - Justice Frankfurter's latest memorandum gives me cause to pause. I discussed this situation with Justice Frankfurter prior to the circulation of my memorandum. I called to his attention the problem that any change in Rule or practice should consider well the case of the indigent litigants and prisoners proceeding pro se. I agree with what Justice

Frankfurter says in regard to such persons confined and the restrictions upon them making it difficult for them to give the notice prior to the filing of the motion for extension, but it is not in any wise different from the notice that is required in the proposed order suggested by Justice Frankfurter. Ordinarily, so far as prisoners are involved, cross petitions are not in the picture.

Item No. 4 - I may be wrong in my interpretation of the discussion hereunder as it applies to the issue which I present to the Conference. As I understand it, Rule 38, par. 3 deals with the notice of the filing of the petition and involves the printing problem. Here the petition has been filed within the proper period. The respondent has an obligation to know whether it is filed. The Rule requires service "by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the Clerk." It doesn't deal with the filing of a motion for extension in which to file the petition for certiorari. In my view, it has nothing to do with the problem which I think should be considered. If there is a large record filed with the certiorari petition to be printed, and the printing will "require more than the 10 days fixed for service under Rule 38, par. 3, counsel are notified and submit a pro forma application to extend the time to 10 days beyond the indefinite date such printing is performed, to meet an internal mechanical condition."

Item No. 5 - I realize that discretionary power is a wonderfully necessary attribute of the work of courts and justices. I recognize the attitude toward the restriction of discretionary power, but I am thinking of the rights of litigants to know that application has been made, and to have knowledge that the exercise of that discretionary power is being called into play, before its exercise, so that he may be able to protect his rights, which are just as important as the rights of a petitioner.

I cannot agree that "notice to opponent of the extension granted", as proposed in Justice Frankfurter's memorandum, affords ample protection. The notice that is given by the litigant with extension granted is not what I think an adversary party is entitled to know of his opponent's action in the case, or the court's action in the case.

Chief Justice.

RECEIVED
FEB 4 9 33 AM '50
CHAMBERS OF THE
CHIEF JUSTICE

February 3, 1950.

MEMORANDUM FOR THE CONFERENCE RE EXTENSION OF TIME.

This memorandum is circulated not for the pleasure of arguing but to aid if possible in dealing with questions to which my original memorandum has given rise.

1. Plainly enough, I lacked clarity in bringing to the Conference's attention the situation of which the application in Royal v. Royal made me aware. In that case the respondent filed a motion for an extension of time in which to file his brief in opposition. The ground of his application was that he had not known until the last minute that the petitioner's time had been extended and he had assumed that the judgment of the Massachusetts Supreme Judicial Court would be accepted. I was not worrying about the respondent. Of course he was entitled to an extension. There was no difficulty in giving him the extension to which he was entitled. The train of thought that the application started in my mind was the undesirability of dragging out needlessly the bringing of cases to this Court when Congress has given the generous time of three months for filing petitions with an appropriate leeway of extending the time for just cause for sixty/days further. It struck me as desirable to plug a hole whereby any extension on behalf of a petitioner would not require further extension for the respondent because he had not been advised of the extension. I thought - and still think - that a practical way of dealing with the interest which alone was in my mind, namely the expeditious administration of justice, was a formal provision in our order for extension putting upon petitioner's counsel the duty of giving notice of such extension to the respondent.

2. The problem that I stated in not too clear a fashion brought a totally different problem to the Chief Justice's mind, namely, the effect of an extension of petitioner's time without respondent's knowledge of it on a respondent with a contingent interest in filing a cross-petition. I had not thought of that situation. I quite agree that that is a lacuna which should be filled. Statistically speaking I do not think it is a very recurring problem. The number of total cross-petitions that are filed in the Court is extremely small and the number of situations where a cross-petition awaits the filing of a petition ~~is~~ must be small to the van-

ishing point. However, I do think now that the situation has been disclosed it should be met.

I venture to suggest that the easy way to meet it is to provide that any extension of time to file certiorari will automatically extend the statutory period to all parties to the litigation.

3. I am bound to adhere to the view that every action taken by a Justice in chambers ought not to be treated as an adversary proceeding, with all the consequences of an adversary proceeding. I do not think that everything that is should remain so. But I do suggest that there is an impressive reason for the practice that we have inherited whereby applications such as those for extension of time do not become adversary proceedings.

4. I circulated my original memorandum because I thought that my brethren who are more frequently called upon to deal with such applications might have the same kind of a problem as I had in Royal v. Royal, and might deem uniformity of treatment desirable. But if the upshot of that suggestion is to introduce the adversary proceeding in the granting of extension of time I shall indeed rue the day I wrote that memorandum.

F. F.