# Burger Move May Shift Court's Abortion Stand

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Warren E. Burger—by breaking a long tradition of his office as chief justice—helped to prevent the Supreme Court from deciding two abortion cases this term and may have caused an ultimate shift in the court's position on abortion.

In the process Burger precipitated a dramatic last-minute struggle within the court to strike down the anti-abortion laws of two states before the term expired last Thursday, according to informed sources.

Because of the delay, the court will decide the abortion issue with nine members instead of the seven justices who would have decided the cases this term.

This is the story reliable sources told about the internal court struggle over the abortion cases:

Traditionally the chief justice has assigned the job of writing the opinion of the court only when he voted with the majority in a case. When he was not in the majority, the chief justice traditionally has deferred to the senior justice on the majority side, who assigned the opinion.

Burger occasionally has tried to assign the opinion when he has been in the minority. In a number of instances in the past, senior justices voting with the majority—for example, the late Hugo L. Black and the late John Marshall Harlan—objected to the practice, and Burger backed down.

After the regular Friday conference following argument Dec. 13 on two cases challenging state anti-abortion laws Burger, who voted with the minority in the conference, assigned the court's opinion to Harry A. Blackmun.

It may be, according to court observers, that Blackmun was on the verge of joining the minority. But at the conference, he apparently voted with the majority in at least one of the two cases.

See ABORTION, A10, Col. 1

**ABORTION, From A1**

Both cases—Roe v. Wade, a case from Texas, and Doe v. Bolton, a case from Georgia—involved two separate issues: First, whether state laws making abortion a crime except in limited situations are constitutional, and second, whether federal courts have the power to prevent states from prosecuting persons under those laws and whether they should exercise it.

A majority of the seven-man court in tentative voting at the conference favored proponents of legalized abortion in both cases. Though the exact vote on each case is not known, Burger and Justice Byron R. White dissented in both.

When Burger circulated his routine assignment sheet that gave Blackmun the job of writing an abortion decision, Justice William O. Douglas objected. Douglas was the senior judge in the majority. He has been on the court 33 years.

He sent Burger a memorandum asserting his prerogative to assign the case, but Burger

held fast to his position.

Blackmun suggested that he would draft a memorandum of his views to see if he could achieve an amicable settlement of the affair.

Meanwhile, there was some evidence arising in the court's reported decisions that it was moving toward the legalized abortion proponents' position.

In mid-November the court heard the case of Eisenstadt V. Baird in which a contraceptive salesman appealed his conviction for delivering a lecture on contraception and for giving a woman a sample product. The opinion in that case, over Burger's dissent, recorded on March 22, said the decision to "bear and beget a child" is a personal and private one, setting the stage for a possible wide attack on state anti-abortion laws.

The same day that it heard argument on the abortion cases, the court heard Mitchum v. Foster, a case involving the question of federal court power to enjoin threatened state court civil proceedings when they would violate an individual's federally supported rights.

The court decided the Mitchum case unanimously in favor of federal court power. This indicated to some that a majority of the court was willing to encourage or allow federal courts ot use the injunction power in the abortion area.

As Blackmun drafted his memorandum, the two new Nixon appointees—Lewis F. Powell Jr. and William H. Rehnquist—joined the court. But because they had not been justices during the original abortion argument, they could not participate in the decision.

Blackmun finished his memorandum in the spring. It argued that the state laws in both cases were unconstitutional for a variety of reasons, including wide privacy grounds similar to those expounded in the Eisenstadt case. His memorandum received the informal support of the majority justices, but then he quickly withdrew it.

Court observers speculated that Burger convinced Blackmun that his opinion was too broad and that the case ought to be reargued before all nine justices.

On May 13, Justice Thurgood Marshall had turned down a request by the State of Connecticut that a federal court order overturning its state anti-abortion law be held in abeyance until the Supreme Court decided the abortion cases before it.

One month later, Marshall turned two similar cases over to the full court which went the other way — denying requests by individuals that lower court decisions that overturned anti-abortion laws in two other states be given immediate effect.

These contradictory decisions were a public sign that something might be changing at the court.

In withdrawing his memorandum, Blackmun suggested that since it was late in the term the cases ought to be put over until the fall.

Douglas objected, but Burger replied that five justices—himself, B l a c k m u n, White, Powell and Rehnquist—favored postponing the decision.

Douglas had left Washington for his annual vacation in Goose Prairie, Wash., but he circulated a note demanding that the abortion decisions be reported out immediately. It also attacked Burger's tactic of assigning opinions from the minority position as having caused the impasse.

Then came a strong threat. Douglas wrote that he had left with his clerk a memorandum with orders that it be filed as a dissenting opinion to any court order setting the cases over for rehearing.

That memorandum, he informed Burger, would explain in detail all the events that had led to the failure to decide.

But Burger went ahead anyway. The order was entered June 26, and Douglas never filed the dissent. Court observers said Douglas had probably been convinced that such a dissent would do the court more damage than good.

Though the ultimate outcome of the abortion cases is a matter of pure speculation, all nine members of the court will be able to vote on them next term unless some disqualify themselves. And if the Burger minority succeeds in persuading Blackmun and the two new justices to join it, the cases in all likelihood will be decided in favor of those wanting to prohibit or restrict abortion rather than in favor of those seeking more liberal abortion policy.