

July 2, 1987

Dear John:

Although I have thanked you verbally, I write to say that I deeply appreciate your longhand letter on the day of my retirement. I think we have had a strong Court in every sense of the word, and also a Court in which friendships were genuine. I have never worked with anyone who had a quicker or more perceptive legal mind than yours. I also always will remember your unfailing courtesy and generosity.

I know that the pressures here on active Justices prevent much opportunity to see a retired Justice. Nevertheless, this Court will be my primary base and I look forward to a continuation of our friendship.

Sincerely,

Justice Stevens

lfp/ss

AUG 3 1907

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Sally -
as before
File
Resolute
30 July 1887

Dear Jo and Lewis,

What a pleasant surprise to
receive early this evening a bottle of
champagne, and no cold, too! Dottie and
I appreciate your thinking of us in this
way. We miss you.

We hope all is well with you, as
with us. We shall be back in Washington for
a week before long.

With gratitude and affection.

Harry

WASHINGTON AND LEE UNIVERSITY

LEXINGTON, VIRGINIA

OFFICE OF THE PRESIDENT

July 28, 1987

The Honorable Sandra Day O'Connor
Justice
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice O'Connor:

I know Justice Powell has often spoken to you of Washington and Lee and, I trust, has betrayed our special hope that we can figure out a way, in your busy life, to arrange a visit here. I write with this hope in mind.

A little over a year ago Elizabeth Watson of Lynchburg established a special lecture series in honor of her mother, Elizabeth Lewis Otey. Mrs. Otey was a pioneer in the women's rights movement in this country. She graduated from Bryn Mawr College in 1901 and received her doctoral degree from Berlin in 1907. Upon returning to this country she was named an agent of the Bureau of Labor where she was later engaged in a federal investigation into the conditions of employment of women and children. She authored the sixth volume of the published report entitled "The Beginning of Child Labor Legislation in Certain States." Mrs. Otey was the first woman to run for public office in Virginia when, in 1921, she unsuccessfully ran as the Republican nominee for the Office of Superintendent of Public Instruction. We are extremely pleased and proud to have had created for us the Elizabeth Lewis Otey Lecture Series, a series dedicated to bringing recognized women of achievement to the Washington and Lee campus.

Everyone here hopes that you will be able to accept our invitation to lecture under the auspices of this series. We can offer an honorarium of \$2,500 and will, of course, arrange for your transportation and your stay here in Lexington. We are three hours from the District by automobile or 50 minutes from the Roanoke airport.

We would shift our calendar in any way open to us to accommodate your own schedule. I will simply put down some dates that would suit us and then hope that you might be able to meet one of them--or can suggest yet another:

- (1) March 10, 11, 12, 13, 14 (1988)
- (2) April 25, 26, 27, 28, 29 (1988)
- (3) Most weekdays in the period November 2-20 (1987)
- (4) October 5, 6, 7, 8, 9 (1987)

Actually almost any class day in the month of March could be made to serve. We would hope you might manage to arrive in time to relax, have dinner, give an evening talk, and return in the morning. We would do our best to keep from exploiting you, though I know how much the Law School Faculty, especially, would welcome a chance for an informal conversation somewhere along the way.

The Honorable Sandra Day O'Connor
July 28, 1987
Page 2

I do hope something can be worked out. Do let us know as soon as you conveniently can.

Most sincerely,

John D. Wilson
John D. Wilson
President

JDW/bcb

cc: The Honorable Lewis F. Powell, Jr. ✓

Dear Justice Powell,

I hope you can find a way to encourage her to accept. I am late in getting this invitation off to her.

I hope your summer is going by pleasantly, in spite of the heat.

John

August 4, 1987

Dear Sandra:

This refers to the letter of July 28th from Dr. Wilson, President of Washington and Lee University, in which he invites you to speak on one of the dates mentioned.

Of course, I am partial to W & L, and also think you and John would enjoy a visit to the College and the little town of Lexington. The college was funded initially by George Washington, and Robert E. Lee was its President for some five years after the end of the War Between the States. VMI also is located there, and its graduates include General George Marshall. Both Robert E. Lee and Stonewall Jackson are buried in Lexington.

Dr. Wilson, the President of W & L, is a Rhodes Scholar and he and Mrs. Wilson live in the residence once occupied by Robert E. Lee. You and John would find the Wilsons quite congenial. Also, the Law School at W & L, though small, has quality, its physical plant is superb, and it has educated fine lawyers primarily from the South.

I appreciate, of course, that you continue to receive dozens of invitations each month, and so I write only to brief you and John a little bit about my alma mater.

As ever,

The Honorable Sandra Day O'Connor
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

LFP/djb

cc: Dr. John D. Wilson
President
Washington & Lee University
Lexington, Virginia 24450

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

File

August 15, 1987

The Honorable Lewis F. Powell
Supreme Court of United States
Washington, D.C. 20543

Dear Lewis,

Thank you for your letter encouraging me to visit Washington and Lee University. I would enjoy visiting it very much and am hoping to find a mutually satisfactory date.

I hope your summer has been pleasant. Mine has been wonderful. I have been in my Chambers briefly in between trips elsewhere, but have missed seeing you. It is delightful to know you will be in Chambers so close to mine.

Sincerely,

Sandra

Sandra Day O'Connor

SO'C/chs

*P.S. written before you dropped by
to say hello!*

September 22, 1987

Dear Harry:

One of my regrets on leaving the Court was to disappoint the four young lawyers whom I had engaged to be law clerks for the 1987 Term. As I am keeping one clerk, the four whom I had engaged drew lots. Bob Werner was the "winner", and he is now my only clerk.

I understand that Byron White has engaged a second one of the four, Christopher Drahozal, to clerk for the 1988 Term. This leaves Ms. Deborah Malamud and Edward R. Foley, both of whom have splendid records and impressed me in our interviews. Deborah is now with Bredhoff & Kaiser, and Ned Foley is an associate at Wilmer, Cutler. I understand that both would be quite interested in clerking here for the 1988 Term.

In the event you may be interested in interviewing one or both of them, I am enclosing the pertinent materials in my file on each of them. There is no confidential information in these files, and you may already have similar information. Feel free to keep my files as long as you wish, although eventually I would like to have them returned.

It was good to see you on Saturday, and looking so fit.

Sincerely,

Justice Blackmun

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Justice
File

Sept 1987
(after my
retirement)

Dear Dennis

We're assembling at 12⁵⁰
to-day in the Justice's dining
room to toast some birth days,
including your own. We hope
you will join us

Bill

CONFIDENTIAL

Nomination of Judge Robert Bork

The purpose of this memorandum is to record for my file certain facts pertaining to the Judiciary Committee hearings on the nomination of Judge Bork, and his decision not to withdraw his name.

My understanding, confirmed by Chief Justice Rehnquist (I still think of him as Bill), is that there is no recent precedent - perhaps none at all - of a sitting Justice testifying or making any statement for or against a nominee for the Court. Nor could we recall a retired Justice having done this. Former Chief Justice Burger has testified for Bork, and perhaps this was also without precedent. I understand, however, that Burger made clear that he would no longer sit on any federal court and therefore felt free to testify.

In the interviews I have given, I have specifically refused to answer any questions relating to the role of the Senate in general or to the qualifications of Bob Bork in particular. See Stuart Taylor, N.Y. Times. I have thought it inappropriate for a retired Justice to take any part,

however modest, in the selection of his successor. Nevertheless, I have been under substantial pressure to testify or make a public statement on Bork's behalf:

1. Senator Thurmond, ranking Republican on the Judiciary Committee, called first and strongly urged me to support Bork before the Committee.

2. Vice President Bush, a long time personal friend, called a few days later and said it would be helpful if I could testify or make a statement on behalf of Bork. Vice President Bush, typically thoughtful, did not "pressure me", and he accepted my reasons for remaining silent.

3. On Saturday, September 26, the President also called me and strongly expressed his hope that I would announce my support of Judge Bork or testify. The President was gracious and friendly, but did express his concern as to the "politicizing" of the confirmation process. He thought that a statement by me might make a difference. One does not lightly decline a request by the President. I therefore stated my reservations, but added that I would consider the matter further over the weekend and talk to Chief Justice Rehnquist.

As the Chief Justice was away during the day on Saturday, I did talk to Byron White on a confidential basis. He agreed that my reasons were sound. Byron has been a respected friend for many years. I called Bill Rehnquist Sat-

however modest, in the selection of his successor. Nevertheless, I have been under substantial pressure to testify or make a public statement on Bork's behalf:

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As the Chief Justice was away during the day on Saturday, I did talk to Byron White on a confidential basis. He agreed that my reasons were sound. Byron has been a respected friend for many years. I called Bill Rehnquist Sat-

urday evening, and requested his advice. As noted above, he could recall no precedent for a sitting Justice testifying, and he also thought my reasons for not "going public" were sound. The Chief Justice said, however, that he would give the matter further thought over the weekend, and if he had any change in his view he would let me know.

* * *

Having heard nothing further from Chief Justice Rehnquist, and having rethought the entire question over the weekend, I called Howard Baker at the White House Monday morning, September 28, and had a satisfactory conversation with him. I explained my view that it would be inappropriate for a newly retired Justice to take any part in the nomination or confirmation hearings of his successor. To make clear to Senator Baker the difference between my position and that of former Chief Justice Burger, I made two points: (i) that the vacancy at issue was one my retirement had created; and (ii) unlike Chief Justice Burger, I would sit on federal courts. I think Senator Baker recognized that these were substantial reasons, and he said he felt confident the President would also understand.

* * *

When I went to Richmond to sit on CA4 during the week of October 5, I thought - in view of the foregoing conversations - that my position had been made clear and final. I therefore was surprised on Thursday, October 8, to have an

urgent message delivered to me on the bench saying that Senator Warner was anxious to talk to me before going on the floor of the Senate. I declined to leave the bench as we were in the middle of arguments, but did call Senator Warner when we concluded the hearings about 1:30. He said, in substance, that he wanted my advice as to whether or not to support Bork. I declined to give him any advice and stated my reasons. I do not know whether the Administration had asked the Senator to call me.

The following day, Friday, the 9th, I was in my Richmond Chambers when Leonard Garment called. He pressed hard for me to make a statement, going so far to say that even though 53 Senators had announced they would vote against Bork, a statement by me could well change the vote of several southern Senators. I tried to make several points in this conversation: (i) I had never said publicly or even to my children whether I favored or opposed the appointment of Judge Bork; (ii) I had no intention of making any public statement either with respect to the Bork nomination or - if he is not confirmed - with respect to any other nominee; and (iii) even if I were willing to make a statement for Bork, it was unrealistic to think any Senators would change their publicly announced opposition. Although Mr. Garment was gracious at the end, he must have talked persistently for at least 20 minutes.

We returned to Washington on Sunday, the 11th. A telephone call from Lewis III advised that a special messenger from Leonard Garment had come to his residence (by mistake) to deliver an urgent letter. The messenger returned to Washington and delivered the letter, plus some clippings, to me at Harbour Square. I attach a copy of Garment's letter and the clippings. In view of the fact that the letter purports to reflect the views of Chief Justice Rehnquist, I talked to him. Bill advises that Garment's letter is not an accurate summary of what had transpired when Garment called him. Indeed, Bill was quite displeased, and agreed with me that if I answered the three questions stated in Garment's letter favorably to Bork, it would be inconsistent for me also to say that I was "not offer[ing] a view on the ultimate question -- should Bork be confirmed or not. . ." In sum, the Chief thought I was well advised to adhere to my position - as I had every intention of doing.

I called Mr. Garment on the morning of October 13. Without attempting to summarize our fairly brief conversation, I made it explicitly clear that I had no intention of making any public statement for or against Judge Bork.

* * *

If I felt free to make a statement, it would focus primarily on what I think properly has been characterized as the "politicizing" of the confirmation process, and also to some extent the nomination process. In my view, the White

House, and perhaps the nominee himself, have taken an unprecedently active part in attempting to win public support as well as the vote of uncommitted Senators. In major part I suppose this was a reaction to the type of campaign against Bork waged by special interest groups. The campaign has been comparable in many respects to the massive media and mail campaigning that goes on in presidential elections: much of it slanderous and irresponsible. Moreover, as evidenced by the negative voting of conservative southern Democrats, racial bloc voting is beginning to play an unwelcome role even in judicial appointment as well as national politics. One must be concerned that the public may conclude that the Supreme Court, like the other branches of government, is essentially political. As commentators have said, there even could be demands for a constitutional amendment to require the election of federal judges. This would be a disaster for the rule of law.

One of the three clippings enclosed with the Garment letter is David Broder's column in the Post of October 6, in which he expressed concern as to the consequences of what has occurred. I agree with Broder's final paragraph in which he refers to the "terrible damage to the underlying values of this democracy and the safeguards of our freedom."

I regret that my retirement, creating the vacancy on the Court, can be viewed as the proximate cause of what

we have witnessed. Of course, no one could have anticipated what has happened.*

L.F.P., Jr.

SS

*In my tenure on the Court vacancies have been created by retirements of Douglas, Stewart and Burger. In each case, their successors - two nominated by Reagan - were confirmed promptly.

Home 202-966-1364

October 10, 1987

The Honorable Lewis F. Powell, Jr.
6339 Ridgeway Road
Richmond, Virginia

Dear Justice Powell:

I have spoken to Bill Rehnquist about the 4th Circuit problem that might arise from your making a recommendation in the Bork matter.

Bill says he sees no such problem if you make a statement that is confined to addressing the following questions, without stating a recommendation on the vote:

(1) whether Judge Bork has displayed the judicial competence and temperament necessary in the next Supreme Court justice;

(2) whether in his scholarly writing with which you are familiar, and his judicial work with which you are specifically familiar, he has shown any signs of the extremism that his opponents have contended would upset the Court's balance;

(3) whether he has the character, the love of the law, and the devotion to the Constitution that are appropriate to a member of the Court.

This could of course be prefaced by a declination to offer a view on the ultimate question -- should Judge Bork be confirmed or not -- because of your belief that it would not be appropriate for a judge of a lower appellate court to do so. My language is of course merely suggestive.

Since yesterday, when Bob announced his intention not to withdraw, it has become very clear that the issues you and I talked about on the phone the other day are indeed the issues at stake here. I need hardly tell you how crucial they are, how great the danger is at this moment, or how important a statement from you would be.

Best,

Leonard Garment

Leonard Garment

L.P.

Whatever you decide to do you have my grateful thanks for your patience and courtesy.

L.

I called Mr. Garment on 10/13 and advised him that I will adhere to the position I have consistently taken. L.F.P. Bill Rehnquist agrees.

I have read very little of it.

This would be viewed as less than candid

Tues, October 6, 1987

THE WASHINGTON POST

David S. Broder

'When Judges Are Lynched to Appease the Public'

The victory that liberals now boast they will achieve in blocking Judge Robert H. Bork's elevation to the Supreme Court could be an expensive one. The game of judge-bashing, which they learned from their opponents on the political right, ultimately profits no one. It inevitably damages and could destroy one of the major safeguards of freedom in this society: the independence of the judiciary.

If Bork goes down, as seems likely, he would be the second prominent and principled jurist in a year's time to be victimized by a campaign of mass propaganda. The first was Rose Elizabeth Bird, the chief justice of the California supreme court. She was removed from the bench last November in a confirmation election that also terminated the tenure of two other "liberal" justices.

The parallels make activists of the left and right squirm, but they are unmistakable. The Senate confirmation process—like the California confirmation election—has been around for a long time. But neither has been used this way before. It is one thing for responsible senators to conclude, on their own reading of his record, that Bork does not belong on the Supreme Court, or for reputable legal scholars to oppose Bird's continued service on the California supreme court, as some did. It is something

else when judges are lynched to appease the public.

Bird lost because of the multimillion-dollar, mass-media and direct-mail campaign mounted by her opponents, and if Bork goes down, it will be for the same reason. Once that gun is drawn, every judge and judicial appointee can be held hostage to the engineered popular passions of the moment. Something precious and vital to our democracy will be gone.

There's an obvious irony in the fact that the battle against Bird was organized by the right-wing supporters of the same Ronald Reagan who is decrying the assault on Bork. And to complete the paradox, liberals like Norman Lear, who were fervent in their defense of Bird, are uninhibited in their slugging of Bork.

Both the left and right are ready to use all the tools of today's high-tech political communications industry on judges, as if it were a campaign for governor or senator or president. The radio-TV spots and the computer letters employ the same systematic exaggeration and repetition. Bird was beaten on the false allegation that she was "soft on crime" because she had voted "wrong" on case after case applying the death penalty. Bork is succumbing to the false charge that he is "insensitive to personal rights" because he has been "wrong" on

cases of importance to women and minorities.

With both, political opponents overlooked the judges' claims that they were applying the law as it came to them. In both cases, the opponents conveniently ignored the fact that if the judges truly were "extremists," as charged, their views could not easily prevail on their presumably "mainstream" colleagues on the bench.

In both cases, the opponents were emboldened by the fact that the elected executives who appointed the judges no longer enjoyed great public confidence and the judges themselves were out-of-the-ordinary individuals. Bird, the first woman to serve on the California supreme court, was appointed by Gov. Edmund G. (Jerry) Brown Jr. By the time she faced the voters for confirmation, Brown was out of office and out of favor. Bork, a scholar and teacher whose writings offer endless fodder for intellectual debate, was named by Reagan in the twilight of his presidency, when other politicians no longer feared his power.

Hard-boiled political analysts can look at the two cases and say, "Tough luck, Bird and Bork. Your names came up at the wrong time, and your opponents were smarter, meaner, better-financed and more aggressive than your supporters. That's the way it goes."

I have seen enough politics in my

life to have lost my squeamishness. But watching these tactics applied to judges is scary. It should send shivers down the spine of anyone who understands the role of the judiciary in this society.

Our history—like that of every other nation—has been marred by moments when a fever or passion seizes the people and goads them to demand extreme action. Genuine conservatives, from Madison to Taft, and genuine liberals, from Jefferson to Douglas, have understood that in such moments, the majority of the country will howl that the offending person's or group's property be seized or their liberties suspended.

It is precisely at such moments—when economic or political freedom is threatened by a massive and angry majority, when a president wants to seize the steel industry or conduct mass arrests of demonstrators—that the independence and integrity of the judiciary is the nation's most precious resource.

Candidates for elective office now routinely face battering by public emotions created by mass-media opinion manipulators. To subject judges and judicial appointees to the same propaganda torture tests, whether from the right or the left, does terrible damage to the underlying values of this democracy and the safeguards of our freedom. No one wins in such a game.

Judge Bork's Victory

CHICAGO
What a gutsy, judicious thing to do.

Every liberal pressure group in Washington was patting itself on the back. Senators Joe Biden and Ted Kennedy, champions of integrity and protectors of womanhood, were congratulating each other on their triumph in turning the Bork hearings into the personal vilification and public lynching of a proponent of judicial restraint. The media gathered at the White House for the surrender and humiliation they had been predicting for weeks.

And Judge Robert Bork crossed them all up. Under no illusions about the vote count against him, he declined to go gently into that political good night. Aware of a "danger to the dignity and integrity of the law" in the way his character and record had been maligned, he called for the world's greatest deliberative body to do what a Senate is supposed to do: to take the time to debate his nomination without the hoopla and hype of the campaign against him using the forum of the Judiciary Committee.

Liberals and Southern Democrats had the tickets. The bandwagon was rolling, and a majority of senators acted as if the Senate floor had become a redundancy in the television era. Serve up the next nominee, was the frenzied mood, and if he does not protect the current ideological makeup of the Court, we'll do to him what we did to Judge Bork.

The media story became "recrimination and disarray among the Reagan men"; the political story became the ability of black leaders to lean on Southern Democratic senators, using unfounded fears of racism to break votes away from the usual bipartisan conservative lineup.

The decision of Senator Howell Heflin of Alabama was supposed to be the example of the bandwagon's unstoppable. But you had to listen closely to catch the Southerner's caveat — that he had to oppose the nomination only at this preliminary stage in the process, and that his decision was not final.

Amid all this, a word began to surface that was at first ignored. The word was "lynch," and it was not being used just by stunned conservatives complaining about mob psychology and character assassination. The evenhanded columnist David Broder deplored a moment "when judges are lynched to appease the public." The pacifist, liberal Republican Senator Mark Hatfield of Oregon announced that he would vote to support the Bork nomination if it ever came to the floor because he did not like the atmosphere of a lynch mob.

The charge was true: Judge Bork

had been strung up without fair process, savaged by the A.C.L.U., A.F.L.-C.I.O., N.A.A.C.P., NOW power house operating out of a Democratic "war room" in the Senate chamber. Campaign strategy was set, mailings were made, opinion polls publicized, senators lobbied, the media manipulated to feed the bandwagon psychology.

A still, small voice in many undecided minds asked, "Is this the way to judge a justice? Are we setting a precedent we will regret?" That is why, when Robert Bork crossed up his tormentors with a tightly controlled statement that he looked to the full Senate for intelligent consideration, the response was not a derisive "Don't you know when you're licked?" Instead, it was to say: Let the Senate be the Senate. Deliberate; debate; vote.

Let senators ask each other: Should the criterion for judges continue to be individual merit and personal qualification, or a new standard of "ideological balance" on the courts to which they are appointed? Are the

Stopping the lynch-law bandwagon.

people better able to affect the Court through the election of a nominating President, or by the election of confirming senators?

Let the upper house, given the "advise and consent" function by the Framers because its members are supposed to be less swayed by passions of the moment, debate this question: Is the independence of the judiciary undermined when judges are required publicly to hint at future decisions in order to be confirmed?

Then let the Senate ponder the profound questions raised by this man in this time: Should judges discover new law in the Constitution, or should they leave it to legislators to enact law? Is the Supreme Court's mission primarily to protect the minority, or to insure that majority rule prevails in a democracy?

Should confirmation proceedings become gut-fighting political campaigns, with men and women of the law set up for lynching if they do not pass the right litmus tests?

Stop playing to the balcony, senators, and start the debate on the floor. Influence each other, then take your stand. Robert Bork, at the brink of defeat, has already won a victory for honor, decency and respect for the law. □

The Washington Post

AN INDEPENDENT NEWSPAPER

Judge Bork's Decision

JUDGE ROBERT BORK surprised and, we imagine, discomfited a good many people by announcing yesterday that he won't withdraw as Supreme Court nominee because to do so now would be to acquiesce in a cheapening of the confirmation process. In the campaign against him, he said, this process had been dangerously politicized while his record was seriously distorted. "If I withdraw now, that campaign would be seen as a success and it would be mounted against future nominees." "When judicial nominees are assessed and treated like political candidates, the effect will be to chill the climate in which judicial deliberations take place . . . and to endanger the independence of the judiciary."

We think Judge Bork is right in asking for the full-dress debate and formal decision. He says he harbors no illusions, and it would take some miraculous back-flips to confirm him; a majority of the Senate has now declared itself in opposition. But the nomination of a Supreme Court justice is an august act that deserves a more august end than a committee vote and a rush of head counts. Nor is it wrong to subject senators to the discipline that a formal vote entails, a discipline that some of them would still be pleased to avoid.

The judge is also right, we believe, that the campaign against him went to excess in some respects, was a campaign that the opponents will themselves have cause to regret in the future, one that, on some balance sheets, will cost them more than they gained. We have written this world without end, from the day he was nominated, when the first unseemliness was heard.

But we differ from Judge Bork in that we do not think these seamy aspects of the campaign overwhelmed or determined the entire process. Nor was the process quite so one-sided as he portrays. The nomination was itself a political act. The nominee had on his side the entire apparatus of the White House, the Justice Department and the Republican Party in the Senate. He himself testified for an entire week.

For all the excesses, it is hard to remember or to imagine a more exhaustive airing of the issues raised by this nomination, not merely as to particular decisions or series of decisions by the Supreme Court, but as to the role of the courts in our system. The fitting end is for the Senate now to complete its job—openly, officially, finishing its sentences, rounding out the record and accepting responsibility for the result.

October 13, 1987

Dear Bill:

Over the weekend I took a good look at the commemorative book, Defending the Constitution, distributed by A. Colish, Inc.

The book, with Archie Cox's introduction, comes at a fortunate time. I am proud to be quoted with you.

We hope to see you and Mary soon.

Sincerely,

Justice Brennan

lfp/ss

*File - correct procedure
in the future*

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

*John discussed
this with me before
he sent it to the C.J.*

October 23, 1987

Dear Chief:

Some time ago at conference we discussed the possibility of requesting Congress to enact legislation authorizing us to invite a retired justice to sit with us on cases in which we do not have a full Court. I have given the idea further thought, and believe it has sufficient merit to warrant further discussion. In the hope that you may agree, I tender this summary of what I understand to be the principal arguments for and against such a proposal.

There are some important advantages. First, if a retired justice were available, this would resolve the problems that arise when there is a prolonged illness or delay in filling a vacancy on the Court. Second, it would provide the Court with additional judge-power and thereby reduce somewhat the number of opinions that each justice must write. Third, it would make the prospect of retirement more attractive for eligible justices. My association with senior judges on the Seventh Circuit, my conversations with Lewis, and my thoughts about my own future persuade me that this point is a good deal more significant than might appear at first blush. It is, moreover, consistent with the congressional decision to continue paying retired judges and justices their full salaries in order to facilitate the retirement decision. Fourth, it would enable the Court to take action in the rare case in which there would not otherwise be a quorum of six justices.

As I remember the conference discussion, two principal disadvantages were identified: (1) intermittent and temporary changes in the composition of the Court might introduce an element of either actual or apparent inconsistency in the development of legal doctrine; (2) the problem of selecting the cases on which a retired justice would be invited to sit, and the related problem of selecting which of a plurality

of retired justices should be invited to sit on particular cases, might be awkward or divisive. Let me comment on each point.

The significance of the first point is, I believe, diminished by the fact that it would not be necessary to invite a retired justice to sit every time the opportunity arose. In an especially important or controversial case--a case like Chadha, for example--the Court might decide to have the case decided only by active justices. Such an approach would be comparable to the practice in the Courts of Appeals, where senior judges are not eligible to participate in en banc cases. Even in such cases, I think I would rather have the additional views of Warren Burger, Lewis Powell, or Potter Stewart than a vacant chair, but I can see the merit in the contrary position. Putting such cases to one side, however, there would still remain a significant number that present issues, such as questions of statutory construction and circuit conflicts, on which a definite answer would be more important than the particular make-up of the Court. In my judgment, the public at large would more readily accept a decision by a nine-person Court than a four-to-three decision or an affirmance by an equally divided Court. Of course, in those cases in which there are six or more justices in the majority, the result would not be affected by the presence of a retired justice. Several states, including Maryland, Minnesota, Hawaii and, I believe New Jersey, provide for the designation of a temporary justice when a vacancy occurs. I am told that Virginia also may call a retired justice to serve in certain situations.

Perhaps one reason why the prospect of a modest change in the personnel of the Court from time to time does not trouble me is my familiarity with the use of changing panels to develop the law at the Court of Appeals level. As the regular use of differing three-judge panels is an acceptable practice at the Court of Appeals level, I would think the occasional use of a retired justice on this Court would not diminish its authority or prestige.

My experience on the Court of Appeals leads me to discount the significance of the selection problem. I would suppose that we could agree that a retired justice would not be invited to sit unless we were unanimous in considering the invitation appropriate. Even if we acted by majority vote, the problem would be similar to an invitation to serve as a special master in an original case. If there is a plurality of retired justices available--as there usually is a plurality of senior judges available for service on each Court of Appeals--selection could be made by rotation, at random, or by specific invitation. In time, of course, a retired justice will reach a point at which he or she would no longer be willing or able to accept an invitation (or is simply too busy with other matters, such as bicentennials), but that phenomenon already occurs regularly at the Court of Appeals level and is capable of occurring in every federal court with respect to active service (see Rehnquist, The Supreme Court, at 183-184).

As noted above, there would be some negatives associated with the change I propose, but I am convinced that these would be outweighed by the long term public benefits that would flow from this modest change in the structure of the institution.

If you think further discussion of this question may be useful, please feel free to circulate all or any part of this letter to the Conference.

Respectfully,



The Chief Justice

November 6, 1987

Texas Justice

MEMORANDUM TO: The Chief, John, Sandra and Nino

In the event you may not have seen it, I enclose the story in yesterday's Wall Street Journal on Texas justice in the "tradition of Judge Roy Bean". If the facts in this story are correct, Judge Bean would be embarrassed by the comparison.

The Journal states that according to its "tally", Pennzoil lawyers from 1984 to early this year contributed more than \$355,000 to the nine Supreme Court Justices who decided not to review the Pennzoil judgment.

* * *

The opportunity to have lunch with you is a privilege I deeply appreciate.

L.F.P., Jr.

SS

Quality of Justice

Texaco Case Spotlights Questions on Integrity Of the Courts in Texas

Debate on Big Contributions To Campaigns of Judges Revives in Pennzoil Suit

Tradition of Judge Roy Bean

By THOMAS PETZINGER JR.
And CALEB SOLOMON

Staff Reporters of THE WALL STREET JOURNAL

More than a century after Judge Roy Bean established himself as "the law west of the Pecos," the image of hang-'em-high justice still clings to the courts of Texas.

Just ask Texaco Inc. Without holding a hearing, the justices of the Texas Supreme Court refused Monday to review the \$10.3 billion court judgment that threw the nation's eighth-largest company into bankruptcy proceedings.

Justice Texas-style extends beyond business. Last month, a state-court judge in Houston was charged with pulling a pistol on her neighbor in a dispute over a child's toy. And the case of Clarence

After the Decision

Texaco's control over its bankruptcy-law proceedings could be impaired by the Texas Supreme Court's refusal to review Pennzoil's judgment. Meanwhile, federal securities law may provide Texaco with its best strategy for persuading the U.S. Supreme Court to review its defeat. Stories on pages 2 and 22.

Brandley, a black man sentenced to death row after a highly questionable murder trial, has drawn national attention.

For corporate defendants, the root of what many see as this state's judicial problems is big-money politics. Texas remains one of only nine states whose Supreme Court justices are elected through partisan campaigning.

'The Major Problem'

"The major problem," Chief Justice John Hill said in an interview yesterday, "has been the excessive amounts of financial contributions . . . primarily from lawyers who practice in the court." The chief justice, who has announced plans to resign to campaign for judicial reform, says that among his fellow justices he is "a majority of one" who believes in scrapping the partisan political system. He refused to comment on the Texaco case or to say how he voted on whether to accept Texaco's appeal.

Even Texaco isn't alleging that the decision was bought with Supreme Court campaign contributions. But the decision, which in effect affirmed the record-breaking 1985 judgment won by Pennzoil Co. in a dispute over the ownership of Getty Oil Co., highlights the chief justice's remarks.

Lawyers representing Pennzoil contributed, from 1984 to early this year, more than \$355,000 to the nine Supreme Court justices sitting today, according to a tally by this newspaper. One of those lawyers for Pennzoil had contributed \$10,000 to the lower-court judge who later presided at the start of the state-court trial in Houston.

Donors on Texaco Side, Too

Lawyers representing Texaco have also been contributors, but they have given far less. They have also played the political-influence game in other ways.

What is most remarkable about the political contributions by personal-injury lawyers and other plaintiffs' attorneys in Texas is how routine they have become. Houston-based Pennzoil might very well have been victorious in another state, but the shadow that big-money politics has cast over the entire judiciary in Texas has, in the minds of many, tainted Pennzoil's unbroken string of victories in the Texas state courts.

If Texans were aware of the campaign-spending levels by lawyers for Pennzoil, "I assure you that nine out of 10 would say Pennzoil would win—without knowing the merits of the case," says Frank Tejeda, a lawyer who formerly headed the Texas House Committee on Judicial Affairs. "All I'm saying is that the perception is there. . . . Public confidence is at an all-time low."

The swiftness of the ruling stunned Texaco. "In all of our worst nightmares, none of us ever even conceived that the court wouldn't grant us oral arguments in a case of this magnitude," says James B. Sales, a lawyer for Texaco in Houston who is the president-elect of the Texas Bar Association. "They have savaged Texaco."

Human Nature

Insurers and other business defendants, long on the losing end of many Texas Supreme Court decisions, are among those who fault the political nature of the courts. It can take \$1 million to run a contested Supreme Court race. Says Richard Geiger, a lawyer who lobbies for the insurance industry in Texas, "It kind of defies human nature to say they're not influenced" by large donations.

The State Commission on Judicial Conduct is just beginning to respond to such complaints. In June it took the unprecedented step of rebuking two justices currently sitting on the court: Justice C.L. Ray was "reprimanded" for taking free airplane flights from attorneys with business before the court; public records show that one Pennzoil lawyer owned part of the aircraft involved. In addition, Justice William W. Kilgarlin was "admonished"—a lesser rebuke—because his law clerks had taken an all-expenses-paid junket to Las Vegas with a lawyer who had a case pending before the court. That lawyer isn't con-

nected with Pennzoil or Texaco.

The commission's action is no reason to scrap Texas' highly democratic judicial-election system, says former Gov. Mark White. "You've got federal judges that are in the penitentiary," he says. "You don't throw away the whole federal system."

Nevertheless, in issuing the rebukes, the state commission's report said that "a shadow was being cast upon the reputation of the Texas Supreme Court itself," adding that "a severe challenge was being made to the personal integrity of several of the justices."

Among many Texaco partisans, it is an article of faith that Pennzoil has won its case all the way through the Texas courts largely on the back of its lawyers' reputations and influence. But Texaco's chief appellate lawyer in Texas, Russell McMains of Corpus Christi, said yesterday that he doubted that this factor controlled the outcome.

For one thing, the court rejects roughly 90% of all appeals, he points out. But beyond the statistics, he adds, "there was probably a predisposition not to take the case," as suggested by the court's quick disposition of a dispute that had generated 25,000 pages of trial transcript and thousands of pages of briefs. The case was on the court's docket only four months.

"The predisposition probably was political—not necessarily in favor of someone," Mr. McMains says. "I think it was just the inertia and impetus of the case—and the politics of the court—that no one wanted to take a stand, and the easiest way not to take a stand is not to take a case," he says. "I don't think they saw anything to be gained professionally, juridically or politically by taking the case."

Quality of Justice: Texaco Case Raises Questions About the Integrity of the Court System in Texas

Something to Lose?

But there may have been something to lose. "A judge whose rulings are adverse to the interests of litigants, to specific lawyers or to certain segments of the bar can expect those persons or groups to work against the judge's re-election," Anthony Champagne, a judiciary expert at the University of Texas at Dallas, said in a widely cited 1986 study of the Texas courts. And the plaintiffs' bar is by far the most generous "segment."

The political tradition of the Texas courts was a reaction to the state's Reconstruction Constitution of 1869, in which the carpetbaggers had given the governor single-handed control of all appointments. When Texas finally bade farewell to the Yankees, the locals saw to it that every important public job in the state—including every judge from the county level on up—was controlled by the voters.

As the state's population swelled during the oil boom of the 1970s, running a statewide campaign became a big-money proposition, and state campaign-finance reports show that the state's most successful plaintiffs' lawyers helped fill the coffers. There began a period in which the Supreme Court vastly revised liability law in Texas, establishing precedents under which Texas lawsuits—long before *Pennzoil vs. Texaco*—began leading to some of the biggest judgments in the country.

A Big Contributor

One of the most generous contributors was Joseph D. Jamail Jr., a Houston personal-injury lawyer whose string of million-dollar judgments and settlements

earned him the sobriquet "the king of torts." Mr. Jamail, who now is Pennzoil's chief trial lawyer, once said, "Those of us who are successful at the bar are called upon to do more."

One of Texaco's outside lawyers, William Edwards of Corpus Christi, certainly couldn't quarrel with that proposition. His contributions to Supreme Court candidates accounted for much of the \$90,000 that lawyers for Texaco donated in the same period that Pennzoil's lawyers gave \$355,000. Mr. Edwards, however, withdrew from his Texaco engagement before the appeal went to the Supreme Court. He couldn't be reached yesterday.

Last year the Judicial Conduct Commission, taking note of "considerable notoriety" surrounding the court, launched an investigation in which it interviewed 243 witnesses, including lawyers and law clerks. The commission found, among other things, that Justice Ray or members of his family took five trips valued at \$350 an hour aboard a twin-engine Cessna aircraft owned by Longhorn Express Inc., a company whose principal stockholders, according to the commission's report, were "Houston area attorneys who practice before the Supreme Court."

Records available in the Texas secretary of state's office show that one-quarter of the company was owned by W. James Kronzer, who about a year later joined the legal team that helped Pennzoil win the trial-court verdict and defend it in the appeals courts.

Corporation Dissolved

Mr. Kronzer couldn't be reached yesterday. Records available in the Texas secretary of state's office show that at an annual meeting in his law offices last year, he and his fellow shareholders of Longhorn Express voted to dissolve the corporation at roughly the time the state investigation was under way. There is no known connection between the dissolution and the investigation.

The commission's report also says that Justice Ray assured one lawyer—who was unconnected with the Pennzoil case—that "if you don't win this one, the next one will be yours." It also alleged that he had ordered another case transferred from one lower-level court to another jurisdiction at the request of a lawyer who had also been a major donor, causing "the appearance of partiality."

Justice Ray told the commission that there was absolutely nothing improper in any of his actions and that contributions had no bearing on his decisions. Yesterday his lawyer, Buck Wood, asserted that some of the commission's allegations were "factually wrong" and that others improperly applied the law. But he said that he couldn't immediately elaborate.

Justice Kilgarlin, whose law clerks took the Las Vegas junket, didn't find out about the trip until after they returned and was admonished only for not advising them about the ethical standards of the court. "I simply disagree with the commission that there was any violation of ethical standards," says the justice's lawyer, Morris Atlas.

Questions about Pennzoil's relationship with the state judiciary began long before Texaco took the case to the Texas Supreme Court. Within days of being assigned the Pennzoil case, lower-court Judge Anthony J.P. Farris accepted a \$10,000 contribution from Pennzoil's Mr. Jamail—the judge's largest re-election con-

tribution by far and an amount he described as a "princely sum" in a letter to another supporter. Texaco, for its part, had hired a member of the judge's re-election campaign committee, but that lawyer—who happened to be a dear friend of Mr. Jamail's—soon withdrew from the case.

Although Judge Farris was often harsh with Pennzoil's lawyers during the trial, his most important rulings from the bench favored Pennzoil. Mr. Jamail said he had planned the contribution before knowing the judge would preside over the trial.

Judge Farris, who died last year, was ailing during the trial and was replaced three-quarters of the way through by a visiting judge, Solomon Casseb Jr., who prepared the all-important jury instructions—largely on the basis of a draft submitted by Pennzoil—and who was the first judge to uphold the jury verdict. Mr. Jamail said in an interview last year that "I've known Sol Casseb since I was a child almost," although one member of Texaco's legal team was also known to have a family acquaintance with the judge.

Campaign contributions have not preceded all of Pennzoil's victories in the case. In April, after its first glimpse at the case, the U.S. Supreme Court ruled 9-0 to dissolve a federal-court injunction that had absolved Texaco from posting a multibillion-dollar appeals bond, as Texas law requires. It was a major victory for Pennzoil, although perhaps a pyrrhic one, as it thrust Texaco into seeking Chapter 11 protection from Pennzoil and other creditors.

Texaco now is counting on the U.S. Supreme Court to hear and reverse its appeal of the judgment itself. Even though Texaco fared poorly in its last appearance there, a Texaco employee says the company is comforted knowing that "Pennzoil hasn't contributed a penny."

TONY CANTU CONTRIBUTED TO THIS ARTICLE

Supreme Court of the United States
Washington, D. C. 20543

7M

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Received
12/17/87

Dear Lewis,

I am very pleased to receive the book about the Adams women, and look forward to reading it soon. John is also pleased to have the documentation on your security experiences during WWII. Many thanks from both of us.

Have a wonderful Christmas in Richmond.

We look forward to
seeing you in January
and will miss you
at our party this
Saturday.

Sincerely,

Sandra



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

7M

Received
12/17/87

Dear Lewis,

I am very pleased to
receive the book about
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December 18, 1987

Dear Sandra:

Of the tributes to me in the December issue of the Harvard Law Review, yours is the one that means the most to me - and always will. I am moved by what each of the other contributors has written, but only you know me well as a Justice of this Court both personally and professionally. Moreover, my admiration for you personally and as a Justice of this Court is unbounded.

Jo and I are leaving for Richmond tomorrow, and will be in our home there until the weekend of January 10. I have agreed to sit again on CA4 during the first week of January. We will miss your party tomorrow evening. I also regret not being at lunch with John on Sam Sterrett's birthday.

Jo and I were at Mayo for my semi-annual checkup on Tuesday and Wednesday, and happily the reports to date all seem good.

With affectionate best to you and John.

Sincerely,

Justice O'Connor

lfp/ss

File on correspondence
with Justices

The New York Times, December 22, 1987

Capital Reading

Gentle Justice Powell

WASHINGTON, Dec. 21 — The December issue of the Harvard Law Review carries a tribute by Justice Sandra Day O'Connor to a colleague, Justice Lewis F. Powell Jr., who retired from the Supreme Court last summer. Here are excerpts:

Few people join the Court without their fair share of outstanding personal accomplishments. With respect to how many of the Justices, however, could their colleagues say, years later, "His very presence among us, day to day and on the bench, was something each of us valued — indeed, treasured"? I can say that about Justice Powell, for I have known no one in my lifetime who is kinder or more courteous than he. If at times he was unhappy or frustrated with one of us, he never expressed a harsh thought or criticism. Instead, he would smile and say, in his soft Southern accent, something like: "Now, I would be pleased to have any of you join me, and I would be happy to hear any of your suggestions."

Impossible to Forget

The humanizing influence of Justice Powell's courtesy and kindness is not an easy thing to measure, but for those of us who felt it, it will be impossible to forget. Nor should one assume that his gentle nature affected only the atmosphere in which we worked. At conference discussions, he would often focus on the equities of the particular case, for the parties and the problems they presented were very much alive to him. With his deep sensitivity to the real people whose hardships or injuries sometimes recede from view in appellate litigation, Justice Powell always strived to reach a fair result in each and every case. Indeed, at times, I think he may have been willing to sacrifice a little consistency in legal theory in order to reach for justice in

a particular case. He was always humble, though, about his own expertise. I often heard him say, "Now maybe I just don't understand this case, but it seems to me..."

No matter what the job or position, the decision to enter final retirement must always be a hard one. For a Supreme Court Justice, there is an added problem (if I may call it that) because the work is always important and never dull. The flow of applications, petitions and briefs — endless though it is — invariably brings new and challenging issues before us every day of our lives. We have the sense of accomplishment that comes as decisions are made, opinions circulated and judgments finally announced. There is the stimulation that comes from discussing difficult issues with one's colleagues and with the very intelligent law clerks working at the Court. Added to all this, one could not think of leaving without also being reminded that any change in membership inevitably changes the dynamics of working relationships and, perhaps, even the direction of the Court itself.

Justice Powell must have had some of these thoughts, and many others, as he decided to retire. Throughout his tenure as an active member of the Court, he wrote persuasively and memorably. He carried more than his share of the Court's workload, and he graced the lives of all who had the privilege of his company and counsel. Justice Powell has given too much to the Court and to the country for anyone to begrudge him a well-earned rest from the duties he carried out so ably and responsibly. For his years of active service, he will be warmly and affectionately remembered by those who know him personally and by every thoughtful student and observer of the Court.



Black Star/Dennis Brack

Justice Lewis F. Powell Jr.



United Press International

Justice Sandra Day O'Connor