

Alzheimer's Disease and Related Disorders Association, Inc.



Winslow Homer  
*Two Boys Rowing*

Art Resource, N.Y.





Now before you get this let I  
wish to send my "son" sympathy.

We are all doing alot of  
praying these days and  
your speedy recovery will be  
added to our list of petitions.

Love,  
Maryann (Stevens)

Jan. 15, 1991

Dear Lewis -

I was in  
hospital.

Just want to say how  
badly I feel that you have  
taken another fall - with  
such unfortunate results.  
What a terrible way to  
start the New Year. John  
will probably have seen



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

CHAMBERS OF  
JUSTICE DAVID H. SOUTER

January 16, 1991

Dear Lewis,

Like everyone else here, I'm awfully  
glad to hear you're being refurbished,  
and I look forward to seeing you again  
very soon.

Yours sincerely,

David



February 14, 1991

Dear Bill,

Jo and I like to think of you and Mary being in Florida during February and March.

After three weeks in the Georgetown Hospital where a new hip bone was installed in my right leg, I am now back in my apartment in Washington. I expect to be able to return to the Court after I have further time to regain my strength.

I enclose a copy of my letter to Daniel Crystal, Executive Editor, Passaic County Bar Association. This is an issue that I will certainly keep because I agree entirely with what is written about you.

With affectionate greetings to you and Mary.

As ever,

Justice Brennan

lfp/ss  
Enc.



UNIVERSITY OF MIAMI  
CORAL GABLES, FLORIDA 33124-8087

OFFICE OF THE DEAN  
SCHOOL OF LAW  
P. O. BOX 248087  
(305) 284-2392

5 MAR 1991

February 27, 1991

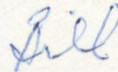
Chambers of  
Retired Justice Lewis F. Powell, Jr.  
Supreme Court of the United States  
Washington, D.C. 20543

Dear Lewis:

I have just returned to Florida and found your letter dated February 14, 1991. I was relieved to learn that you expect to return to Court after you regain your strength. I am going to call you very soon in the hope that I may come to see you.

Mary joins me in sending our affection. Best to Jo and yourself.

Sincerely,



William J. Brennan, Jr.



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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 28, 1991

Dear Mr. Hicks,

I regret exceedingly that I cannot be present for the ceremony on May 3 honoring Lewis Powell since I shall be on the West Coast at that time. Congratulations on establishing the new award in Lewis' honor.

Sincerely yours,

*Byron White*

C. Flipppo Hicks, President  
Virginia State Bar  
P.O. Box 708  
Gloucester, Virginia 23061

cc: Justice Powell

*Lewis —*

*We hope to see you back soon. I have not had a martini (of any kind) for a while, but it's about time.*

*BJ*



March 5, 1991

Dear Harry:

It was typically thoughtful of you to write about the ceremony scheduled by the Virginia State Bar on May 3.

Of course, it would be quite an honor if you and other Justices could attend, but it had not occurred to me that any member of the Court would think attendance was expected.

I have sufficiently recovered from my broken hip to walk slowly with the aid of a cane.

As ever,

Justice Blackmun

lfp/ss



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

File

7 MAR 1991

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 6, 1991

On this date I was  
still at home recovering  
from my hip surgery

Dear Lewis,

I have missed seeing you. Because of a long lasting and rather severe cold, I have refrained from visiting you and shedding my germs. It is finally on the mend.

I am burdening you with some reading material. The Court's resolution of the Due Process issue in state punitive damages actions is very disappointing. Had you still been on the Court it might have been turned around. The opinions are attached. It prompted me to give my first ever oral dissent from the bench.

The President's summit meeting on crime was convened on Monday. At the request of the Attorney General I spoke to the assembly. The text is enclosed and in it you will find references to the work of your committee on federal habeas.

We hope you are continuing a steady path of recovery.

Sincerely,

Sandra

The Honorable Lewis Powell



---

---

THE ATTORNEY GENERAL'S CRIME SUMMIT

LOCAL CONTROL OF CRIME

By

SANDRA DAY O'CONNOR

ASSOCIATE JUSTICE  
SUPREME COURT OF THE UNITED STATES

---

Washington, D. C.

March 4, 1991

---

---



Thank you for inviting me to speak to you this evening. Now that the threat from *Iraq* is under control, I can think of no topic more vital to our national interest than *crime* control. All that our nation offers, all that is important to each of us, means little if we do not feel safe as we go about our daily business, as we walk in our neighborhoods, and as we live in our homes. Effective law enforcement is essential to our pursuit of happiness, and the role of law enforcement in controlling violent crime is a topic deserving of the most careful consideration. It is fitting that you are gathered here to engage in this critical inquiry.

Tonight I will speak to you about local control of crime. I refer to "local control" in two senses. The first is control by the states, as opposed to the federal government. Our constitutional system leaves primarily to the states the power to define norms of behavior through criminal law and law enforcement. The federal courts have only limited power to interfere with this process, exercised largely through the writ of habeas corpus.

Fed H/C

The other type of "local control" of crime that I will discuss is control by the individual. What "controls" most of us, and prevents us from committing crimes, is an internalized sense of right and wrong. This personal control is far more important than anything law enforcement or the courts can do to prevent crime.

\* \* \*

Unlike most other nations of the world, the United States has chosen to administer justice through a dual system of state and federal courts. There is an inevitable tension inherent in our "indestructible union of indestructible states." The balancing of state and federal interests within the federal system is never static; constant and flexible accommodation of the often conflicting interests is required. Justice Hugo Black described the essence of what he called "Our Federalism":

"The concept [of 'our federalism'] does not mean blind deference to 'states' rights' any more than it means cen-



laws should be applied equally to all—a principle expressed by the phrase “Equal Justice Under Law,” inscribed over the great doors to the United State Supreme Court. Review of state court decisions on federal law by the United States Supreme Court is one means we have of encouraging the needed uniformity. But the sheer volume of state court decisions on federal questions permits the Supreme Court to review only a relatively small number of cases from state courts. This fact assures state courts a large measure of autonomy in the application of federal law. At the same time, it is especially important that state courts conscientiously follow the constructions of federal law adopted by the Supreme Court. In this way, our state and federal courts are dependent on each other for the successful functioning of our judicial federalism. The Founding Fathers joined our state and federal court systems in a marriage, for better or worse, a marriage requiring each partner to have appropriate respect and regard for the other.

Perhaps no place is this delicate balance between federal supremacy and respect for the states more manifest than in federal habeas corpus review of claims by state prisoners. By statute, federal courts have authority to hear the claims of state prisoners that they are being held “in custody in violation of the Constitution or laws or treaties of the United States.” In 1953, in the case of *Brown v. Allen*, the Supreme Court established that this authority includes the power of federal courts to review *de novo* issues of federal law, even if those issues have already been fully and fairly litigated in state court. This means that a criminal defendant who has a federal constitutional claim adjudicated against him in state trial court, affirmed on appeal by a state intermediate appellate court, affirmed by the state supreme court, and who has certiorari denied on the issue by the United States Supreme Court, nonetheless has the right to have a federal district court make an *independent* determination of the issue. Federal habeas is, in essence a second round of appeals. In fact, in many instances it is a third or fourth round of appeals, because most states also allow the state

yes



federal courts is substantial. Admittedly, many call but few are chosen. In the only study I have seen, only approximately 3.2% of federal habeas petitions are eventually granted, in whole or in part.

But the burden of federal courts from a flood of habeas petitions is the least of the problems. The true burden of federal relitigation of state decisions is felt by the states. It is the state that must respond to a federal habeas petition, relitigating in federal court issues the state had won, and won repeatedly, in state court. And if the state does lose in federal court and the petitioner is released from custody, it is the state that must retry him. Retrial becomes very difficult, and sometimes impossible, when many years have passed since the original trial. Witnesses and evidence become difficult to relocate; memories fade.

yes

Now, please don't misinterpret my concern. I do not advocate that *any* court may ignore a defendant's constitutional rights even though he has been found guilty. Quite the opposite. A court with jurisdiction to hear a defendant's constitutional claims has a constitutional obligation to resolve those claims fairly and independent of the defendant's guilt or innocence. I only point out that one of the prices we pay for independent federal review of state court decisions is that we increase the likelihood that the guilty will go free.

Another price we pay is a denigration of federalism. When a federal court decides independently a question that has been decided by several state courts, it shows a lack of respect for those state proceedings. Why do we allow relitigation of these claims in federal court? The answer cannot be that two rounds of review are better than one, because federal habeas does not involve the cumulation of judgments. Federal court determination of federal questions in habeas is independent of what the state courts determined, and is dispositive; the state court determinations are rendered a nullity. Independent federal court relitigation of issues that have been fully and fairly litigated by state courts may help to achieve a measure of national uniformity, but it seems to me that much of what motivates independent fed-



inal laws and to control anti-social behavior just as surely as cutting the budget for law enforcement. Justice Harlan captured the essence of the problem when he wrote:

"No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

I might also note that this uncertainty and lack of finality is felt not only by criminals and potential criminals, who are thereby less deterred, but by the victims of crime and their families, who must believe that the swift hand of justice is not so swift, and not so just.

\* \* \*

Federal courts can and do play an important error correcting role in connection with state criminal proceedings. But that role must be a limited one. We should ask whether the current system strikes the proper balance between our desire for the "correct" result and the need for finality.

In recent years the Supreme Court has taken some initial steps to reintroduce the concerns of federal/state comity and finality to the federal habeas process. In *Stone v. Powell*, we considered the application of the exclusionary rule to Fourth Amendment violation uncovered on federal habeas. We concluded that any deterrent effect that application of the exclusionary rule might have when applied so long after the fact of police misconduct was outweighed by the disruption to legitimate state interests caused by its application. We therefore held that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

In *Wainwright v. Sykes* and *Murray v. Carrier*, we dealt with the problem of state prisoners who had failed to meet certain state procedural requirements, and thereby pre-



that we fear punishment. Most of us do not commit crimes because we believe that crime is wrong. To my mind, the most effective deterrent to crime is not more efficient law enforcement, or swifter and more certain punishment, or an improvement in the economic well being of our citizens—though we must work toward all of these things. Our best defense against crime is development in each new generation of a sense of right and wrong.

The law has a part to play in this process. When a society outlaws certain behavior, and punishes it with certainty, it establishes a moral tone. The criminal law is an embodiment of a society's values, and it instructs its citizens on proper behavior over and above the threat of coercive force it represents. Part of the reason we believe that theft is wrong is that it is against the law.

Far more important, however, is what we learn much closer to home. The personal sense that some enticing bit of misbehavior is wrong—the “pang of conscience” that keeps us from shoplifting and that makes us recoil from more serious crimes—is mostly the product of more personal variables than sentencing guidelines or the enforcement of state procedural rules. A moral sense—that internalized commitment to self-control—begins early, and it is instilled over a lifetime. It is a product of those closest to us: our parents, our relatives and friends, our clergy, and our teachers.

James Q. Wilson and Richard Herrnstein have documented well the value of moral education on crime control. From the data they have pieced together, it appears that crime rates were high during the early decades of the nineteenth century, but declined steadily in the latter half. Wilson and Herrnstein argue that it is no coincidence that this decline coincided with the development of certain institutions designed to instill the virtues of “inner control” and “self restraint.” Indeed, it was in direct response to the crime and disorder of the growing American cities of the 1820s and 1830s that our citizens created such institutions as Sunday Schools, the YMCA, the Foster-Home Movement, and the public schools.



It is a problem of vital importance, and deserves all the resources we can devote to it. As you consider what the law can do to combat crime, I hope you will not ignore other tools for motivating virtuous behavior. Our Constitution teaches that crime control is primarily a matter for the states. But ultimately, the war on crime begins at home.



Today's public schools, and the goals we have established for them, bear little resemblance to those early efforts. As Wilson and Herrnstein explain:

"From the beginning, the purpose of the tax-supported public school was character formation more than intellectual development. Training pupils for occupations was subordinate to 'the goal of character building,' even in programs that emphasized manual arts."

The YMCA and the YWCA too were places for those who had come from the farms and villages to the city in pursuit of employment to find the moral community they had left behind. These institutions were something more than yuppie health spas.

All of these institutions attempted to instill in young people a sense of virtue, of self-discipline and inner control. And they worked. It is a basic fact of human nature that a child who is taught virtue will behave with virtue. The Old Testament teaches, "train up a child in the way he should go, and when he is old, he will not depart from it." (Proverbs 22:6)

We seem to have lost sight of this fact in too many of our schools and many of our other public institutions. We must, of course, teach our children the basic skills they will need in order to earn a living, but there is much more to being productive members of society than the ability to hold a job. Our schools must instill a sense of discipline; they must teach our children the value of self control.

And we must do our best to ensure that virtue is taught at home. We must provide aid to dysfunctional families, and we must see to it that fathers do not abandon their children. So that this vicious cycle is not perpetuated, we must provide education for childrearing and to prevent teenage pregnancy. One does not have to be a social scientist to understand that children from stable, nurturing homes will be better citizens.

\* \* \*

Some of the brightest minds in our country are gathered here to discuss the role of law enforcement in crime control.



vented state courts from deciding their federal claims. In recognition of the legitimate interests served by state procedural rules, and with the understanding that state courts should have the opportunity to hear these claims in the first instance, we held that such procedural default will bar federal habeas unless the prisoner can show that some external factor not of his own making caused him to default his claims and that he was prejudiced as a result.

Finally, in *Teague v. Lane*, we held that new rules and legal principles, issued in cases decided after a state court conviction has been affirmed on appeal, will not be applied in federal habeas corpus proceedings. *Teague* protects states from having criminal convictions reversed years later based on new rules that state courts could not have anticipated at the time of trial or appeal.

These are important steps, but, in my view, further reform is needed, and much of it will have to be statutory. The committee chaired by Justice Powell recommended time limits for filing certain federal habeas petitions, and also limits on successive petitions. I hope you will have an opportunity at this conference to discuss these and other proposals for altering federal habeas proceedings. Surely it is not too much to ask that state prisoners ask for federal review in a reasonable time and in a single petition. Consideration should also be given to altering the legal standard of review in all federal habeas corpus cases. I suggest that federal courts should ensure that the state proceedings in which the prisoner was convicted, and in which his federal claims were addressed, were fundamentally fair; they should not necessarily reexamine and decide anew every legal issue already addressed by the state courts. Under our federal system, the federal government owes this respect to the states.

\* \* \*

I would like to switch gears for a moment, and speak briefly about another form of local control over crime.

Most of us do not commit crimes and the reason we do not do so is not necessarily that crime is against the law, or



eral inquiry is the notion that federal courts are better at deciding questions of federal law than are the state courts. I wonder if this is necessarily true when it concerns the kinds of federal questions that arise repeatedly in state criminal trials.

But even if it is true that federal courts are more likely to vindicate federal rights than state courts, and that supremacy of federal law is achieved, the quest for error correction must, at some point, end. Respect for any system of decision making, indeed respect for the rule of law itself, entails the proposition that at some point dispute will come to an end and a legal decision will not be subject to further review or revision.

I am, by virtue of my office and my duties, keenly attuned to prisoner's federal rights. Indeed, the Bill of Rights commands that its guaranties be vindicated. All of us who have sworn to uphold the Constitution, both at the state and federal level, must do our utmost to see to it that no litigant's constitutional rights are violated, and to minimize the harm when they are. But we cannot litigate these issues endlessly. As the late Paul Bator put it:

"There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is a reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends.

There is indeed reason for such a policy. We are all well aware that certainty and immediacy of punishment are the most important elements of effective deterrence. Continued litigation of state criminal convictions in the federal courts tends to undermine the important interests in deterrence and rehabilitation that underlie the criminal justice systems of the states. The delay and uncertainty that federal relitigation brings frustrates the states' ability to enforce their crim-



post conviction collateral remedies for their criminal convictions. Even these state post conviction collateral determinations will not preclude subsequent independent federal review.

I do not suggest that the legal question in *Brown* was wrongly decided. I wish only to point out the very real costs of our present system of independent federal collateral review of state court decisions. There is no statute of limitations on federal habeas corpus petitions; and there are only very weak rules concerning successive petitions. As a result, state prisoners may raise federal challenges to their state convictions again and again and again. One recent study found that more than 30% of state prisoner habeas corpus petitions filed in federal court were filed by petitioners who had filed one or more previous federal habeas petitions. And with no statute of limitations, the time interval between state court conviction and federal habeas review can be lengthy. A Department of Justice study found that the average interval between state conviction and federal habeas corpus filing was 2.9 years, with almost one-third of the petitions filed more than 10 years after the conviction.

The burden of these delayed and repeated filings is great. We may begin with the federal courts. In his concurring opinion in *Brown*, in 1952, Justice Jackson noted that state prisoners had filed 541 federal habeas petitions that year. He bemoaned the "flood[] of stale, frivolous and repetitious petitions inundat[ing] the docket of the lower courts and swell[ing] our own." He warned his fellow Justices that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."

What Justice Jackson thought a flood in 1952 is only a trickle by today's standards. In 1990, state prisoners filed almost 11,000 petitions for federal habeas corpus review. While the number of habeas petitions was increasing more than twenty-fold, the number of federal district judges only doubled between 1952 and 1990. The strain on the lower



tralization of control over every important issue in our national government and its courts. The framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both state and national governments, and in which the national government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate interests of the states."

Any realistic picture of judicial federalism must acknowledge the primary role of the states in our federal system of government. The federal government is one of specified, enumerated powers; all powers not given to the federal government in the Constitution are given to the states and to the people. The generalized police power, that critical governmental authority to define and punish anti-social conduct, rests fundamentally with the states.

Despite the enormous changes we have undergone as a nation since the Constitution was written, our system of criminal law enforcement still relies on the states as the first line of defense. The vast bulk of all criminal litigation in this country is handled in the state courts. More than 11 million criminal actions (excluding juvenile and traffic charges) are filed annually in state courts. By comparison, roughly 45,000 criminal actions are filed annually in the federal courts. State courts account for 96% of all felony convictions in this country. 88% of all money expended on law enforcement is spent at the state and local level. James Madison might not know what to make of RICO, but, by and large, today's reality reflects the original plan.

State courts day in and day out apply federal constitutional law—most notably in the multitude of state criminal prosecutions. There is, of course, a need for some means to assure a reasonably consistent and uniform body of federal law among the state and federal courts. The goal of national uniformity rests on a fundamental principle—that a single sovereign's



---

THE ATTORNEY GENERAL'S CRIME SUMMIT

LOCAL CONTROL OF CRIME

By

SANDRA DAY O'CONNOR

ASSOCIATE JUSTICE  
SUPREME COURT OF THE UNITED STATES

---

Washington, D. C.  
March 4, 1991

---



March 7, 1991

Dear Bill:

Your letter of February 27, finally reached me on March 5. I appreciate your keeping in touch.

I have come to the Court for an hour or two each day this week to answer correspondence. I hope to be able to sit on CA4 perhaps as early as April but certainly by June. You and I both like to be active.

I am not entirely happy with all of the decisions handed down by the Court this Term. Of course, that is true of every Term. But I particularly miss you and Jo feels the same way about dear Mary.

As ever,

Hon. William J. Brennan, Jr.  
School of Law  
University of Miami  
P. O. Box 248087  
Coral Gables, Florida 33124-8087

lfp/ss



March 8, 1991

Dear Sandra:

Thank you for your letter of March 6, with its enclosures.

I have read with special interest and admiration your dissent in Pacific Mutual Life Insurance Co. v. Haslip. I fully agree with your opinion, and indeed I am more than a little bit shocked (if this word can be used) by the Court's open-ended approval of punitive damages. Judges and juries may impose these damages with little or no guidance and no limit on the amount.

I prepared a draft of an opinion in a case several years ago. I expressed the same reservations about punitive damages and the absence of standards or limitations that you have stated so well in your Haslip opinion. Statutes imposing penalties in criminal cases invariably specify a limit on damages or sentences. Haslip goes beyond the common law in this respect.

I commend you on delivering your opinion from the bench. I wish I had been in the Courtroom.

Sincerely,

Justice O'Connor

lfp/ss



March 13, 1991

Dear Maryan:

Now that I am back in our apartment after a long stay in the Georgetown Hospital with my broken hip, I have reviewed some of the letters written to me by friends. These letters kept my spirits from sinking too low. Among the numerous letters I received, I recall with special appreciation your note of January 15.

I think you know that I consider John to be as able as any lawyer or judge with whom I was ever associated. I also think of him as a dear friend.

I am gradually regaining my strength, and I have agreed to sit on the Fourth Circuit Court of Appeals the first week in June.

I send affectionate best wishes to you both.

As ever,

Mrs. John Paul Stevens  
1101 South Arlington Ridge Road  
Arlington, VA 22202

lfp/ss



UNIVERSITY OF MIAMI  
CORAL GABLES, FLORIDA 33124-8087

file

OFFICE OF THE DEAN  
SCHOOL OF LAW  
P. O. BOX 248087  
(305) 284-2392

25 MAR 1991

March 18, 1991

Chambers of  
Justice Lewis F. Powell, Jr.  
Supreme Court of the United States  
Washington, D.C. 20543

Dear Lewis:

Your letter was a welcome touch. I certainly hope I can follow your lead and arrange to sit with probably either the First or Third Circuits. Most of all, Mary and I hope to get in touch with you.

Mary and I send our most affectionate regards to Jo and yourself.

Sincerely,

Bill

William J. Brennan, Jr.



*you have advised Caroline  
that we will attend,*

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF

JUSTICE SANDRA DAY O'CONNOR

*Return this to me*

*Suspended*

10 APR 1991

April 11, 1991

Dear Jo and Lewis,

Our mountain climbing son, Brian, is coming to visit us next week. I have asked him to show a brief film made on one of the climbs and thought you might want to join us if you are free to see it. We will have cocktails on the ground floor near the theatre at 5:00 on Thursday, April 18, and Brian will show his brief film at 5:30. If your schedule is free, we look forward to seeing you there. If not, we understand.

Sincerely,

*Sandra*

The Honorable Lewis Powell  
and Mrs. Powell



April 19, 1991

Dear Brian:

Mrs. Powell and I enjoyed every minute of your film, the video cassette pictures, and particularly your comments.

You have had adventures shared by only a limited number of Americans. I commend you on having your climbs filmed. Indeed, the films seem quite professional in quality.

I am sending a copy of this letter to your mother as she must be very proud of you. You will not be surprised when I say that she is an exceptionally able Justice of this Court. Also as the first woman to serve on the Court during the two centuries of our country's existence, her place in history will be properly large.

Sincerely,

Mr. Brian O'Connor  
c/o Chambers of Justice O'Connor

lfp/ss

cc: Justice O'Connor



April 26, 1991

Dear Sandra:

I have read with interest and approval your excellent dissent in Pacific Mutual Life Ins. Co. v. Haslip.

I share your view about punitive damages. You might take a look at my dissenting opinion in Silkwood v. Kerr-McGee Corp. (January 11, 1984), 465 U.S. 1074.

In the event you may have missed it, I enclose an article on Haslip. I think it is perceptive.

Sincerely,

Justice O'Connor

lfp/ss  
Enc.



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

2 MAY 1991

May 2, 1991

Dear Lewis:

Although I know you won't agree with what I say about the James case, you might like to have a copy of my talk about the Shakespeare issue.

Sincerely,

*John* *yes*

Justice Powell

Attachment (Max Rosenn Lecture)



---

---

MAX ROSENN LECTURE—WILKES UNIVERSITY  
THE SHAKESPEARE CANON OF STATUTORY CONSTRUCTION

By  
JOHN PAUL STEVENS  
ASSOCIATE JUSTICE  
SUPREME COURT OF THE UNITED STATES

---

Wilkes-Barre, Pennsylvania  
Tuesday, April 30, 1991

---

---



### *The Shakespeare Canon of Statutory Construction*

The Duke of Gloucester, later King Richard the III, began his opening soliloquy with the famous line: "Now is the winter of our discontent . . ." The listener who at first assumes that the word "now" has reference to an unhappy winter soon learns that war-torn England has been "made glorious by the sun of York." It is now summer not winter and "grim visaged war has smoothed his wrinkled" forehead. Words—even a simple word like "now"—may have a meaning that is not immediately apparent.

Like the seasons, periods of war and peace come and go. As times change there is also a fluctuation in perceptions about the importance of studying humanistic values and their relationship to rules of law. Nevertheless, a society that is determined and destined to remain free must find time to nourish those values. The plays and poems of William Shakespeare, sometimes collectively described as the "Shakespeare Canon" are, perhaps, the most stimulating and exciting works in the English language. Canons of statutory construction, in contrast, are probably the duller materials that law students read. Judge Max Rosenn is a literate and just man, learned in both the dull and the fascinating aspects of the administration of justice. This School bears the name of an English politician who did not hesitate to challenge unorthodox views. For these reasons, I have decided that this lecture should include a mixture of comment on two apparently unrelated subjects: first, on the unorthodox view that Edward De Vere, the seventeenth Earl of Oxford, is the true author of the Shakespeare Canon and second, the utility of certain canons of statutory construction in the search for truth and justice. Because Shakespeare's plays are typically divided into five acts, I must, of course, discuss five canons of statutory construction.

#### ACT I

The First Canon of statutory construction is rather obvious: "Read the statute." The Supreme Court has reminded us over and over again that when federal judges are required



the first syllable of his name with only four letters — Shak — or sometimes Shag, or Shax — whereas the dramatist's name is consistently rendered with a long "a." For that reason, the protagonists of the Earl of Oxford's cause make a point of distinguishing between Shaksper and Shakespeare. In this respect, they are, in effect, relying on the first canon of statutory construction. In response, the Stratfordians point out that signatures, like statutes, should be read in their contemporary context, that incorrect spelling was common in Elizabethan England, and that we should always be conscious of the possibility of a scrivener's error. This response, like the Oxfordian response to the text of the First Folio, indicates that this is a case in which we must go beyond the First Canon.

## ACT II

The Second Canon of statutory construction is much like the first: "Read the *entire* statute." Courts often tell us that the meaning of a particular statutory provision cannot be divined without reading the entire statute. Similarly, the more of Shakespeare's writing that we read, the more we learn about him. At least, that is the position that the Oxfordians advocate.

As evidence of the author's probable noble birth, they point out that all but one of his plays — The Merry Wives of Windsor — are about members of the nobility. The contrast between Shakespeare's characters and the commoners, such as the alchemist or the miser, about whom his contemporary Ben Jonson wrote, is striking. Even more striking is Shakespeare's repeated reference to nobility as the highest standard of excellence. The question that a lonely Hamlet asked himself was "whether it is nobler in the mind to suffer the slings and arrows of outrageous fortune, or take arms against the sea of troubles and by opposing end them." In the first act of Macbeth, when Duncan proclaimed his succession, he noted that "signs of nobleness, like stars, shall shine on all deservers."<sup>2</sup> When Mark Anthony wanted to explain to Ju-

---

<sup>2</sup> Act 1, Scene 4, line 41.



"But it was not only Leicester who was widening his circle of conquests. Elizabeth too, it was said, was seducing handsome young men and keeping them under surveillance by her well-paid spies when they were not in amorous attendance on her. Prominent among these favorites was Edward de Vere, earl of Oxford, a boyish, hazel-eyed young courtier whose expression combined poetic languor and aristocratic superciliousness. Oxford excelled at those courtly graces Elizabeth admired. He was athletic and acquitted himself brilliantly in the tilt-yard, dashing fearlessly, lance lowered, against any and all comers and retiring the victor despite his youth and slight build. He was an agile and energetic dancer, the ideal partner for the queen, and he had a refined ear for music and was a dextrous performer on the virginals. His poetry was unusually accomplished, and his education had given him a cultivated mind, at home with the antique authors Elizabeth knew so well." Erickson, *The First Elizabeth* (1983), p. 267.

When Edward De Vere was 11 years old, his father died and he became a royal ward in Sir William Cecil's household. Cecil, also known as Lord Burghley, was the Queen's principal adviser and a master of intrigue who controlled an elaborate network of spies. In Hamlet, the character Polonius, is unquestionably a caricature of Burghley.<sup>6</sup> His position as

---

<sup>6</sup>"There is nothing original in pointing out that Polonius is clearly based on old Lord Burghley—merely in showing how close the resemblance is in detail. Lord Treasurer and the Queen's leading minister, he had been Southhampton's guardian, whose granddaughter the young Earl would not marry and had been made to pay for it. All the Essex faction detested the politic old man, who was irremovable until his death in 1598; after that it was safe to portray him as Polonius.

Hamlet describes Polonius to his face: "old men have gray beards, their faces are wrinkles, their eyes purging thick amber and plumb tree gum . . . together with most weak hams." Those who are familiar with Burghley's letters in his last years well know that they are full of his querulous complaints about his health, the weakness of his limbs, his gout, his running eyes: "I am but as monocolus' (one-eyed), he writes.



tention to the 16th Century context that produced the genius who created the Shakespeare Canon.

In those days relatively few people could read and write the English language, and those who were familiar with the leading works of Latin and Greek literature were even more scarce. Edward De Vere was such a person. In Lord Burghley's home he received instruction from the most accomplished tutors in England and later received degrees at both Cambridge and Oxford and became a member of Gray's Inn. As a young man he earned a reputation as a gifted writer. To the extent that literary skill is a product of education and training, De Vere's academic credentials attest to his unique qualifications.

On the other hand, we know little about the education of William Shaksper, the man from Stratford-on-Avon. Both his father and his daughter, who was married to a physician, were apparently illiterate. William did not attend Oxford or Cambridge and, indeed, there is no record of his attendance at any school. It is the assumption that his formal education was much too limited for him to have acquired the largest vocabulary of any author who ever lived that has led other authors like Mark Twain and John Galsworthy to doubt his authorship of the Shakespeare Canon.

Knowledge of the contemporary context provides these possible answers to this concern. The illiteracy of his daughter is merely a reflection of the universal gender discrimination that permeated Sixteenth Century England; except for persons of noble birth, education was for males, not females. Even though his father may have been uneducated, he achieved success in business in Stratford and occupied an important public office. Moreover, the quality of the secondary education that was available to the sons of leading citizens in towns like Stratford-on-Avon was of a high quality. It is not unreasonable to assume that a good high school education is all that was needed to nurture the genius of Shakespeare to full flower.

The most telling contemporary argument, however, is found in Ben Jonson's tribute to Shakespeare in the introduc-



also requires an ability to discount comments manufactured by staff members to appease lobbyists who were unable to persuade legislators to conform the statutory text to their clients' interests. As Chief Justice Rehnquist observed in a dissenting opinion a few years ago:

"The effort to determine congressional intent here might better be entrusted to a detective than to a judge. . . . While I agree with the Court that the phrase 'any other final action' may not by itself be 'ambiguous,' I think that what we know of the matter makes Congress' additions to § 307(b)(1) in the Clean Air Act Technical and Conforming Amendments of 1977 no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime."<sup>1</sup>

For present purposes, I shall confine my analysis of the Fourth Canon to the Sherlock Holmes' principle that sometimes the fact that a watchdog did not bark may provide a significant clue about the identity of a murderous intruder. The Court is sometimes skeptical about the meaning of a statute that appears to make a major change in the law when the legislative history reveals a deafening silence about any such intent.

This concern directs our attention to three items of legislative history that arguably constitute significant silence. First, where is Shakespeare's library? He must have been a voracious reader and, at least after he achieved success, could certainly have afforded to have his own library. Of course, he may have had a large library that disappeared centuries ago, but it is nevertheless of interest that there is no mention of any library, or of any books at all, in his will, and no evidence that his house in Stratford ever contained a library. Second, his son-in-law's detailed medical journals describing his treatment of numerous patients can be examined today at one of the museums in Stratford-on-Avon. Those journals contain no mention of the doctor's illustrious father

---

<sup>1</sup> *Harrison v. PPG Industries, Inc.*, 446 U. S. 578, 595-596 (1980) (dissenting opinion).



ally written. They also suggest that the possibility of a royal command may not be so absurd after all because Queen Elizabeth made an extraordinary grant to DeVere. Using a formula that was characteristic of special payments to members of the Secret Service, on June 26, 1586, she signed a privy seal warrant granting DeVere an annuity of 1,000 pounds per year for which no accounting was to be required. This was an unusually large amount at the time and the grant continued for the remaining 18 years of DeVere's life, it having been renewed by King James.<sup>9</sup> The Queen, it appears, may have been a member of the imaginative conspiracy and for reasons of her own may have decided to patronize a gifted dramatist, who agreed to remain anonymous while he loyally rewrote much of the early history of Great Britain.

Whatever one may think of the Fifth Canon as a method of analyzing the authorship question, before I leave the subject I want to refer briefly to three cases that suggest that the Fifth Canon should tell us something about justice. Two of them are cases decided by William Shakespeare, whoever he may be, and the third was decided by the Supreme Court of the United States.

In the *Merchant of Venice*, as security for a loan of 3,000 ducats, Antonio promised that if he should default, Shylock could have a pound of his fair flesh "to be taken and cut off from whatever part of his body" might please Shylock. As might have been predicted, Antonio did default and Shylock demanded literal performance of the terms of the bargain. In the end, however, justice was served by Portia's even more literal interpretation of the bond:

"Tarry a little, there is something else. This bond doth give thee here no jot of blood;  
The words expressly are 'a pound of flesh.'  
Take then thy bond, take thou thy pound of flesh,  
But in the cutting it, if though dost shed  
One drop of Christian blood, thy lands and goods

---

<sup>9</sup> B. M. Ward, *The Seventeenth Earl of Oxford 1550-1604*, at 255-263 (1928).



eral Tort Claims Act, waiving the defense of sovereign immunity, that the United States could be sued for damages caused by the negligence of Government employees.

Eighteen years earlier, Congress had enacted the Mississippi Flood Control Act of 1928 to authorize a major land acquisition and construction project to control overflow and damage along the banks of the Mississippi River where it was impracticable to construct levies. A section of that Act—I shall call it the “pound of flesh” provision—stated that “no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.”

In the ensuing decades Congress has authorized the expenditure of countless millions of dollars to construct additional flood control projects, many of which produce artificial lakes and recreational facilities. Unfortunately, a number of people have been killed or seriously injured in those facilities. The case of *United States v. James*, 478 U. S. 597 (1986), arose out of a tragic accident in the reservoir behind the Millwood dam in Arkansas. As the result of what the District Court found to be worse than gross negligence, enormous underwater portals were opened without adequate warning and water skiers were caught in the unforeseen swift current and hurled against the dam’s tainter gates. Some drowned and others suffered permanent injuries. As other innocent victims of the negligence of federal employees had in the past, representatives of the injured parties in the *James* case brought suit against the Federal Government under the Federal Tort Claims Act. The lower federal courts were divided on the question whether the pound of flesh provision enacted in 1928 in connection with the Mississippi River project should protect the United States from liability in such cases.

As you can see, the issue is much like the one that confronted Portia and the Italian Duke. For the Government based its defense on the plain language found in the text of the 1928 statute. The plaintiffs responded by arguing that the pound of flesh provision applied only to the Mississippi



project, that it had been impliedly repealed by the Federal Tort Claims Act which contained its own set of special defenses for the Government, and that in any event the use of the word "damage" rather than "damages" indicated that the statute did not apply to personal injury cases.

Although three dissenters including the Portia that now graces our Court, would have applied a modern version of Portia's jot of blood argument—using a narrow interpretation of the word "damage" to trump the majority's reliance on the First Canon of statutory construction—the majority ruled in the Government's favor. It relied, of course, on the First Canon of statutory construction, buttressed by the principles espoused by Angelo and Shylock. Sadly, there was no Italian duke to arrive on the scene in the nick of time and apply the Fifth Canon of statutory construction. Even more sadly, this is the kind of case—involving the average citizen rather than a nobleman who can command legions of well armed lobbyists—that is not apt to interest a busy Congress.

It is cases of this kind—and they appear in a variety of forms—that sometimes make me feel that now is a season of discontent. Judge Rosenn and I have lived long enough to learn, however, that like the seasons, judicial opinions about canons of statutory construction and the relationship between law and justice tend to come and go. The fear that a particular law may become a toothless scarecrow, and that if judges are ever allowed to extract a single tooth from any part of a venerable code of laws, the entire code may disintegrate, is a fear that experience teaches wise judges to discount in appropriate cases. Accordingly, no matter how unhappy a particular winter may be, in due course, it is sure to be followed by other seasons that will be "made glorious by the sun of York."

Thank you for inviting me to share this evening with you.



Are by the laws of Venice confiscate  
Unto the State of Venice."<sup>10</sup>

Although Portia's ruling may seem somewhat technical, she was actually making a just application of the Fifth Canon of statutory construction.

In *Measure for Measure*, Claudio was sentenced to death for the crime of fornication. Since Julietta was pregnant and hence there was no question about Claudio's guilt, and since the text of the law was perfectly clear, Angelo (who had been left in charge of law enforcement by the Duke) had no choice but to insist on literal application of the statute. Otherwise, as he explained, he would

"[M]ake a scarecrow of the law,  
Setting it up to [frighten] the birds of prey,  
And let it keep one shape, til custom make it  
Their perch and not their terror."<sup>11</sup>

Nothing, of course, could be more damaging to the fabric of society than allowing the law against fornication to deteriorate into a mere scarecrow. Accordingly, it was imperative that the death penalty be administered without delay.

Fortunately for Claudio, however, three Acts later, the all powerful Duke reappeared and pardoned him in the nick of time. Unlike the Merchant of Venice, in which justice was served by using one literal reading of the bond to trump another, in *Measure for Measure*, the Duke simply enforced the Fifth Canon without pausing to explain why any other result would have been unjust and absurd.

My final words are about a little known decision of the Supreme Court that averted the danger that a federal statute would turn into a toothless scarecrow. For background I must remind you that for a century and a half, the United States enjoyed the same sovereign immunity that Queen Elizabeth and King James possessed during Shakespeare's time. It was not until 1946, when Congress passed the Fed-

<sup>10</sup>The Merchant of Venice, Act IV, Scene I, lines 307-311.

<sup>11</sup>Measure for Measure, Act II, Scene I, lines 1-5.



in-law. Finally—and this is the fact that is most puzzling to me although it is discounted by historians far more learned than I—is the seven-year period of silence that followed Shakespeare's death in 1616. Until the First Folio was published in 1623, there seems to have been no public comment in any part of England on the passing of the greatest literary genius in the country's history. Perhaps he did not merit a crypt in Westminster Abbey, or a eulogy penned by King James, but it does seem odd that not even a cocker spaniel or a dachshund made any noise at all when he passed from the scene.

#### ACT V

The Fifth Canon of statutory construction requires judges to use a little common sense. This canon is expressed in various ways. An interpretation that would produce an absurd result is to be avoided because it is unreasonable to believe that a legislature could have intended such a result.<sup>8</sup> Both the Oxfordians and the Stratfordians believe this canon provides the answer to the authorship question. The traditional scholars consider it absurd to assume that William Shakespeare, who is known to have made a fortune as an investor in the Elizabethan theatre, if not also as an actor and playwright, was just a front for a gifted author who, for reasons unknown, elected to conceal his true identity from posterity. They point out that at least one of Shakespeare's plays, the *Tempest*, is generally considered to have been written several years after DeVere's death, and that the explanations for his use of a pseudonym depend on highly improbable theories of conspiracy, for at least Ben Jonson and Lord Burghley would surely have known the true identity of the author of the Shakespeare Canon. Nothing short of a royal command could have induced the author to remain anonymous.

The Oxfordians respond to the argument that it is absurd to claim that DeVere authored a play that was first published several years after his death by pointing out that there is great uncertainty about the dates when the plays were actu-

---

<sup>8</sup>See e. g., *Holy Trinity Church v. United States*, 143 U. S. 457, 459.



tion to the First Folio. Because Jonson must have been well acquainted with his leading competitor as a successful dramatist, these words take on special significance:

*"And, though thou hadst small Latin and less Greek,  
From thence to honour thee I would not seek  
For names; but call forth thundering Aeschylus,  
Euripides, and Sophocles . . .  
To life again, to hear thy Buskin tread  
And shake a Stage; . . .*

The emphasis is, of course, on the words "though thou hadst small Latin and less Greek" as evidence that the author of the Shakespeare Canon was a man of limited formal education.

The Oxfordians, however, are not without a contemporary reply. They argue that the words "though thou hadst small Latin and less Greek" were ambiguous because the word "though" sometimes conveyed the meaning "even if." Thus, the use of this ambiguous term may have been a conspiratorial ploy to preserve the anonymity of the true author of the canon. If you find this rejoinder a little hard to swallow, perhaps you should reflect on the ambiguity in another equally famous line by Jonson—"drink to me only with thine eyes." Is this a plea for his lover's abstinence asking her not to drink to him with anything but her eyes? Or, more probably, is it a subtle invitation to drink only to Jonson—to save her inviting glances for him alone. Does the word "only" modify the noun "eyes" or the pronoun "me"?

#### ACT IV

Since ambiguity persists, we must turn to the fourth canon of statutory construction. If you are desperate, or even if you just believe it may shed some light on the issue, consult the legislative history.

The study of legislative history is itself a debatable and complex subject, including subtopics such as the respective importance of committee reports, debates on the floor of Congress, and the fact that a proposed bill that would have unambiguously resolved the point at issue was not enacted. It



advisor to the King, his physical appearance, his crafty use of Rosencrantz and Guildenstern to try to ascertain the cause of Hamlet's antic disposition, and his employment of Reynaldo to spy on his own son, Laertes, while away at school, are all characteristic of Burghley. One who had lived in his house, as De Vere did, and therefore had first-hand knowledge of Burghley's use of a spy to report on the activities of his oldest son, could well be responsible for the scene including Reynaldo—a scene that seems to have no purpose except to illuminate Polonius'—or Burghley's—character. The suspicion that there is an autobiographical element in Hamlet increases when one recognizes the parallel between Hamlet's relationship with the fair Ophelia—the daughter of Polonius—and the fact that at the age of 21 De Vere married Ann Cecil, the daughter of Lord Burghley.

These are, of course, only tiny fragments from the text of the Shakespeare Canon. They are sufficient, however, to lead us to the Third Canon of statutory construction.

### ACT III

This Canon is much like the first and second, but it adds the requirement that the text be read in its contemporary context. In the case of *Cannon v. The University of Chicago* the Supreme Court tells us that "it is always appropriate to assume that our elected representatives, like other citizens, know the law [and that an] evaluation of congressional action [at a particular time] must take into account its contemporary legal context." 441 U. S. 677, 696–699. The Third Canon therefore tells us that we should direct our at-

---

One clue to Burghley's hold on power was his remarkable intelligence system. This is clearly rendered in Polonius' interview with Reynaldo, setting him to spy on his son's doing in Paris and report on them. Burghley's elder son, Thomas, had had an unsatisfactory record in France and been similarly reported. Burghley's famous Precepts, however, were for his clever younger son, Robert—Essex's enemy: Polonius has a similar set for his son, while his perpetual moralizing is Burghley all over—it drove the young men mad, all the more because the old man was all powerful and wise, though prosy and pedestrian." A. L. Drowse, *The Annotated Shakespeare* (1988 ed.), 1725–1726



lius Caesar why there was no reason to fear Cassius, it was enough merely to state: "he is a noble Roman and well given."<sup>3</sup> And after the conspirators had been defeated, Anthony gave Brutus the highest possible praise by referring to him as "the noblest Roman of them all."<sup>4</sup>

Shakespeare's account of the events that took place on the Ides of March may shed light on his views about the common man. When Julius Caesar walked through the streets of Rome, the crowds greeted him with unmixed enthusiasm—obviously in favor of offering him the crown. But when he was brutally murdered in full view of countless witnesses, a few well-chosen words from Brutus, the leader of the murderous gang, were sufficient to satisfy the crowd and earn their unquestioning support. Then a few minutes later Mark Anthony's marvelous address to his "friends, Romans, and countrymen" had the mob, once again, convinced that Caesar was their hero. Admittedly, it was a great speech, but how much respect for the common man does this sort of flip-flop-flip describe? Perhaps the answer is found in Casca's description of the crowd's reaction when Caesar refused the crown for the third time:

"[A]s he refus'd it, the rabblement howted, and clapp'd their chopp'd hands and threw up their sweaty night-caps, and utter'd such a deal of stinking breath because Caesar refus'd the crown, that it had, almost, chok'd Caesar, for he swoounded, and fell down at it; and for mine own part, I durst not laugh, for fear of opening my lips and receiving the bad air."<sup>5</sup>

Of course, the author of such a comment need not be of noble birth, but it seems appropriate to pause to take note of the fact that Edward DeVere was not an ordinary nobleman. In her biography of Queen Elizabeth, Carolly Erickson, after relating contemporary gossip about the Queen's relationship with the Earl of Leicester, had this to say about DeVere:

<sup>3</sup> Julius Caesar, Act 1, Scene 2, line 197.

<sup>4</sup> Act 5, Scene 5, line 68.

<sup>5</sup> Julius Caesar, Act I, Scene 2, lines 245-352.



to interpret acts of Congress, they must begin by reading the text of the statute. As one rather weary opinion writer explained: "If the intent of Congress is clear, that is the end of the matter, for the courts as well as the agency, must give effect to the unambiguously expressed intent of Congress." Although this proposition is universally accepted, debate often arises over the question whether there is ambiguity in the text, and if so, how far behind that text the judge may go in the quest for the author's intended meaning.

The text of the First Folio, published in 1623, seven years after William Shakespeare's death, unambiguously identifies him as the author of the Shakespeare Canon. Moreover, respected scholars are virtually unanimous in their conviction that the man from Stratford-on-Avon is the author of the masterpieces that are attributed to him. Nevertheless, questions that were raised by such skeptics as Mark Twain, Walt Whitman, Henry James, John Galsworthy, and Sigmund Freud still intrigue those mavericks who are persuaded that William Shakespeare is a pseudonym for an exceptionally well-educated person of noble birth who was close to the English throne. Edward De Vere, the seventeenth Earl of Oxford was such a person.

If we could find an original draft of one of Shakespeare's plays, or an excerpt in his own handwriting—or even a signed statement identifying himself as the author—we would have the kind of unambiguous evidence of authorship that would put an end to the matter. But the evidence of Shakespeare's handwriting that we do have is of an entirely different character. It consists of six signatures on legal documents, each suggesting that merely writing his name was a difficult task and, remarkably, that his name was Shaksper rather than Shakespeare.<sup>1</sup> Indeed, the references to the man from Stratford in legal documents usually spell

---

<sup>1</sup> See Ogburn, *The Mysterious William Shakespeare*, p. 120. Ogburn's comprehensive and interesting volume contains the primary current exposition of the arguments in favor of the Earl of Oxford's authorship. He credits John Thomas Looney with the scholarship that identified De Vere's identity. See *id.*, at 145–146.







May 15, 1991

Dear Thurgood:

I write this note to confirm our conversation concerning banks.

It is true that the Madison Bank was in trouble. All of its bank accounts of \$100,000 or less have been taken over by the Signet Bank headquartered in Richmond. I have checked with my bank in Richmond. It has the curious name of Crestar, and I was on its Board of Directors and its counsel for many years.

I am advised that the Signet Bank is considered to be perfectly safe.

Crestar has one or more offices in Washington, and a representative of Crestar may call you. You may prefer to move your account, although I do not think it is necessary. If you have further questions do not hesitate to call me.

Sincerely,

Justice Marshall

lfp/ss



*Colonial Williamsburg*



*To Lewis and Jo*  
**Courthouse Opening**  
*with much effectation*  
*and admiration*  
*Sandra O'C.*

Saturday, June 1, 1991



## VIRGINIA ROOM

Saturday, June 1, 1991



PRESIDING:

MR. CHARLES L. BROWN

*Chairman*

*Colonial Williamsburg Foundation*



ENTERTAINMENT

Mr. John Warner

Miss Jennifer Edenborn

## COURTHOUSE OPENING LUNCHEON



Cold Cantaloupe Soup



Salmon-Crab Niçoise



Chocolate Hazelnut Cake



*Millbrook,  
Chardonnay  
1989*





WILLIAMSBURG, *March 16, 1769.*

**T**HE COMMON HALL having this day determined to build a commodious brick COURTHOUSE in this city, and having appointed us to agree with an undertaker to build the same, we do hereby give notice that we shall meet at Mr. Hay's, on *Tuesday* the 4th of *April*, to let the building thereof. We are also appointed to dispose of the present courthouse, and the ground on which the same stands.

JAMES COCKE.  
JAMES CARTER.  
JOHN CARTER,  
JOHN TAZEWELL.

N. B. The plan of the above courthouse may be seen at Mr. Hay's, at any time.

## The Courthouse Opening Ceremonies

Saturday, June 1, 1991

Built in 1770, the Courthouse on Market Square in Williamsburg served as the meeting place for three institutions of local government for over 150 years. The James City County Court, the Williamsburg borough, or "Hustings" Court, and the mayor and aldermen of the city council, or "Common Hall," met regularly in this building to resolve judicial disputes and administer the affairs of the city and county. Each month, court day brought scores of local inhabitants to the Courthouse to participate in the public affairs of the community. At each session the prominent planters and merchants who filled the offices of county and city magistrates were confronted with a busy and extensive docket. They ruled on the legal issues involved in business disputes, heard petitions of widows and orphans seeking to protect their property, regulated the price of food and lodging in taverns, tried to cope with hogs loose in the streets, and levied taxes to maintain local services.

Ordinary Virginians took a remarkably active part in the process of government. More than any other institution in colonial Virginia, the city and county courts gave meaning to the idea of self-government. Acting as unpaid public servants in an age before salaried public service, these ordinary freeholders actually made the government work by the way in which they discharged the duties of constables, deputies, market clerks, road overseers, and watchmen. It was at this local level that men such as Washington, Jefferson, and Henry, as well as lesser folk, were first instructed in dealing with the rights and obligations of citizenship.

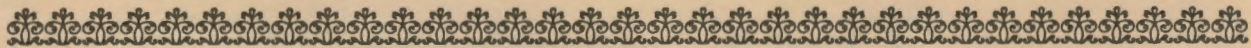
The Colonial Williamsburg Foundation has long believed that the story of local government is too important to be left uninterpreted in the Historic Area. Several years ago the Foundation determined that the Courthouse would be the best place to explain the role of local government in the lives of ordinary citizens in the late eighteenth century. Five years of research by legal and architectural historians uncovered the evidence for the physical setting and interpretive themes that would guide the restoration and interpretation of the building. After thousands of hours devoted to research, reconstruction, and reinterpretation, the Courthouse stands as a restored late eighteenth-century hub of the colonial community. Complete with court furnishings and filled with the vitality of costumed character interpreters, the Courthouse will serve to reveal how the uses of public power by competing groups and individuals ultimately defined the very nature of community government and gave rise to a distinctly American rule of law.

Since fall 1989 over one hundred skilled craftsmen have worked to restore this original building to its late-colonial appearance. Costumed artisans including cabinetmakers, carpenters, bookbinders, weavers, blacksmiths, and others have hand-produced all the internal fittings, furniture, books, and other miscellaneous items. An army of Colonial Williamsburg mechanics, architects, electricians, masons, and carpenters have made the building into a safe, comfortable, and modern exhibition building. Though much of their work will never be seen, the old Courthouse is now prepared to receive millions of visitors and withstand the test of time so that future generations may learn the lessons of self-government.



The restoration of the Courthouse was made possible through generous funding from:

Cabell Foundation  
Charles E. Culpeper Foundation  
Dyson Foundation  
Ethyl Corporation  
Mr. and Mrs. Charles D. Fox  
Flagler Foundation  
Gerald Norton Memorial Corporation  
Charles M. and Mary D. Grant Foundation  
The Richard and Caroline T. Gwathmey Memorial Trust  
Hunton & Williams  
Mr. and Mrs. Edward C. Joullian III  
Mars Foundation  
Media General, Incorporated  
Montgomery Street Foundation  
National Endowment for the Humanities  
The Pew Charitable Trusts  
The L. J. Skaggs and Mary C. Skaggs Foundation  
Sovran Bank, N. A.



## THE PROGRAM

11:30 A.M.

### WELCOME

Mr. Charles L. Brown  
Chairman of the Board of Trustees  
Colonial Williamsburg Foundation

### REMARKS

The Honorable Harry L. Carrico  
Chief Justice  
Supreme Court of the Commonwealth of Virginia

### REMARKS

Mr. Charles R. Longworth  
President  
Colonial Williamsburg Foundation

### INTRODUCTION

Justice Sandra Day O'Connor  
United States Supreme Court

### ADDRESS

Justice Lewis F. Powell, Jr.  
United States Supreme Court



July 1, 1991

Dear Thurgood:

The news of your retirement will disappoint millions of Americans without regard to race. By any measurement you have made a name for yourself as a thoughtful and independent Justice. Indeed, as the editorial in the Post made clear, your entire career has set an example that will inspire generations of young Americans.

I am proud to have served on the Court with you. We were not always together, but I respected your views even when we disagreed.

Our wives also are good friends. Jo thinks Cissy is a very special person.

With admiration and affection.

As ever,

Justice Marshall

lfp/ss

bc: Professor John C. Jeffries, Jr.

bbc: Lewis III



July 3, 1991

Dear Brian:

Your mother told me the good news of your engagement and forthcoming marriage to Judy Richards. I remember meeting her at the reception which your mother and father gave. She is quite lovely. I also was impressed - as I think I told you - by the account of some of your remarkable and dangerous experiences. Now that you will be a married man, my guess is that you will be a bit more conservative.

Our son Lewis III, a graduate of the U.Va. Law School, also has undertaken some dangerous experiences. He climbed Mt. Ranier and Mt. McKinley. The McKinley adventure took three weeks with some bad weather and at times a good deal of danger.

When you and your bride are again here at the Court it would give me much pleasure if you came by to see me.

Sincerely,

Mr. Brian O'Connor  
4007 East San Miguel  
Phoenix, Arizona 85015

lfp/ss



July 5, 1991

Dear Bill,

Jo and I go to Richmond tomorrow, and we will be in our home there most of July and August. I had hoped to see you today but you were properly recognizing that this is a national holiday.

I have been much pleased that you have had such a good recovery from the health problem that prompted you to retire. I also have had a fairly good recovery from my hip replacement. I have said many times that one of the great privileges of my life was to serve on this Court with you. Our relationship was very close.

I send love to Mary, and always affectionate best wishes to you.

As ever,

Justice Brennan

lfp/ss





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

JUL 11 1991

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.  
RETIRED

July 9, 1991

*My file  
on W.J.B.*

Dear Lewis,

Mary and I certainly treasure your note of July 5. I'm delighted that you'll be able to spend most of July and August in Richmond. Mary and I have scheduled a cruise in August to Canada, as far north as Quebec. We'll be gone about three weeks. We'll be looking forward to seeing you and Jo as soon as we get back. And you know how fully we reciprocate your kind words.

Our affectionate best to you both.

Sincerely,

*Bill*

Justice Powell



August 2, 1991

Dear Bill,

As you know, Jo and I are in our Richmond home. It is hard to believe that the summer is half over, and that we will return to the Court Labor Day weekend.

I believe that you and Mary planned to remain in Washington, perhaps taking short trips. Thurgood's retirement was a surprise to me as he had often said that he was appointed for life and expected to serve his term. Thurgood has certainly had a distinguished career and his place in history is secure.

I have not met Clarence Thomas who has been nominated by the President to take Thurgood's place. If confirmed, he will be one of the youngest persons to serve on the Court. In view of the opposition of the NAACP and the AFL, I would guess that confirmation is by no means certain.

I look forward to discussing all of these events when we are back in Washington. I know that Jo would join me in sending affectionate best to you and Mary.

As ever,

Honorable William J. Brennan  
Associate Justice of the United States  
Supreme Court (Retired)  
1 First Street, N.E.  
Washington, D.C. 20543

LFP/djb



File

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.  
RETIRED

August 6, 1991

6 AUG 1991

Dear Lewis,

You are just wonderful. I deeply appreciate your letter. I'm eagerly looking forward to our get-together when the summer is done. Mary and I leave on Friday and will be back on August 28. We'll certainly have plenty to talk about.

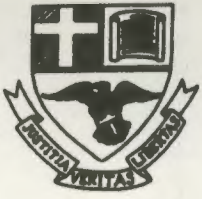
Mary joins me in sending Jo and you our most affectionate best.

Sincerely,

*Bill*

Justice Powell





SETON HALL LAW SCHOOL  
**CONSTITUTIONAL LAW JOURNAL**

1111 Raymond Boulevard, Newark, New Jersey 07102  
(201) 623-6219

AUG 20 1991

*e*

**EDITOR-IN-CHIEF**  
Armando O. Bonilla

**MANAGING EDITOR**  
Frank H. Walser

**BUSINESS MANAGER**  
Joseph J. Fell

---

**EDITORIAL BOARD**  
Susan C. Brodbeck  
John J. Cummings  
Jonathan A. David  
Thomas F. Doherty  
Phillip J. Duffy  
Sarah Jimenez  
Courtney A. Schael  
Kenneth S. Weitzman

---

August 19, 1991

The Honorable Lewis F. Powell, Jr.  
Associate Justice (retired)  
Care of the Clerk's Office  
U.S. Court of Appeals for the Fourth Circuit  
Tenth and Main Streets  
Richmond, VA 23219

My dear Justice Powell:

To mark his significant contribution to the legal community, the *Seton Hall Constitutional Law Journal* wishes to honor the retiring Associate Justice of the United States Supreme Court, the Honorable Thurgood Marshall. Recognizing your professional association with Justice Marshall, I thought it fitting to extend to you the opportunity to author a brief tribute.

This tribute will introduce the second issue of Volume II which will be dedicated to issues concerning discrimination. The *Journal* believes that a career as distinguished as Justice Marshall's should be lauded by a fellow jurist of your accomplishment.

Your reply is eagerly anticipated. Enclosed please find a complimentary edition of the *Journal*.

Thank you for your consideration.

Respectfully,

Armando O. Bonilla



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.  
RETIRED

August 20, 1991

Dear Mr. Bonilla,

As requested in your letter of August 19, I have written and I enclose a tribute to Justice Marshall. I am happy that a volume of your law review will be dedicated to him.

Sincerely,

Armando O. Bonilla, Esquire  
Seton Hall Law School  
Constitutional Law Journal  
1111 Raymond Boulevard  
Newark, New Jersey 07102

LFP/djb

✓cc: Jeff:

I enclose a copy of a proposed statement for the Seton Hall Law Review. I would welcome your comments.

L.F.P., Jr.

bbcc: Professor Jeffries,

I enclose a copy of the letter from the Editor & Chief of the Seton Hall Law Journal and my draft of a tribute to Thurgood Marshall.

L.F.P., Jr.



### Justice Thurgood Marshall

Justice Thurgood Marshall has announced his retirement from the Supreme Court to be effective upon the confirmation of his successor. This may occur before the new Term of the Court commences on the first Monday in October. A great deal will be written about Justice Marshall. I can add little to what others will say but am happy to comply with the request of the Seton Hall Law School to author a brief tribute.

I served on the Court for 15 1/2 years from January 1972 until June 26, 1987. I was 64 years old when I was appointed to the Court in the fall of 1971. Only one other Justice among the 104 persons to serve on the Court had ever been as old as I was when appointed.

During my tenure on the Court I sat beside Thurgood Marshall, and he and I became warm friends. He was a great story teller, and would amuse the Brethren at our Conferences. He and I often differed in the application of the criminal law but we were usually together in civil rights cases.

Before he came to the Court Marshall had a unique and constructive career. It is well known that he argued and won Brown v. Board of Education. As counsel to the NAACP he had made a name for himself in arguing equal protection cases involving colleges and universities. He also won the case that invalidated restrictive covenants in deeds. In sum, his name will rank high among the greatest of Supreme Court Justices.

September 1991

Lewis F. Powell, Jr.



August 20, 1991

Dear Mr. Bonilla,

As requested in your letter of August 19, I have written and I enclose a tribute to Justice Marshall. I am happy that a volume of your law review will be dedicated to him.

Sincerely,

Armando O. Bonilla, Esquire  
Seton Hall Law School  
Constitutional Law Journal  
1111 Raymond Boulevard  
Newark, New Jersey 07102

LFP/djb

bc: Jeff:

I enclose a copy of a proposed statement for the Seton Hall Law Review. I would welcome your comments.

L.F.P., Jr.

bbcc: Professor Jeffries,

I enclose a copy of the letter from the Editor & Chief of the Seton Hall Law Journal and my draft of a tribute to Thurgood Marshall.

L.F.P., Jr.



### Justice Thurgood Marshall

Justice Thurgood Marshall has announced his retirement from the Supreme Court to be effective upon the confirmation of his successor. This may occur before the new Term of the Court commences on the first Monday in October. A great deal will be written about Justice Marshall. I can add little to what others will say but am happy to comply with the request of the Seton Hall Law School to author a brief tribute.

I served on the Court for 15 1/2 years from January 1972 until June 26, 1987. I was 64 years old when I was appointed to the Court in the fall of 1971. Only one other Justice among the 104 persons to serve on the Court had ever been as old as I was when appointed.

During my tenure on the Court I sat beside Thurgood Marshall, and he and I became warm friends. He was a great story teller, and would amuse the Brethren at our Conferences. He and I often differed in the application of the criminal law but we were usually together in civil rights cases.

Before he came to the Court Marshall had a unique and constructive career. It is well known that he argued and won Brown v. Board of Education. As counsel to the NAACP he had made a name for himself in arguing equal protection cases involving colleges and universities. He also won the case that invalidated restrictive covenants in deeds. In sum, his name will rank high among the greatest of Supreme Court Justices.

September 1991

Lewis F. Powell, Jr.



MEMORANDUM

DATE: August 22, 1991  
TO: Justice Powell  
FROM: Jeff  
SUBJ: Tribute to Justice Marshall; Proposed CA4 schedule

Thank you for sending me a copy of your tribute to Justice Marshall. I enjoyed reading it and think that it will make an excellent contribution to the Seton Hall Law Journal's volume dedicated to him. I have no suggestions for it.

Your proposed schedule for CA4 sittings sounds great. The more work that I am able to do with you the better. The December 2 sitting should not pose a problem. I can make sure that I complete my bench memos before you leave for Richmond. And, if for some reason the briefs arrive late that month, I can mail the briefs (and bench memos) federal express to your home in Richmond. The other dates sound fine as well. I want to discuss with you one small matter which peripherally concerns the February 3 sitting. However, since it does not affect the sitting schedule and since I would prefer to mention it to you in person, I will await your return before talking to you about it.

I count the days until you return to D.C. While it has been a nice reminder to have your two hunting pictures hanging in my office (though a little unsettling to know that you shoot "turkeys"), I much prefer the real thing. I look forward to seeing you.

Jeff

Jeff



August 23, 1991

Dear Sandra,

Jo and I appreciate your sending us the announcement of Brian's marriage to Judith Ann Richards. Of course, I remember Brian very well and have admired him for some years. I believe Judith Ann was with him when you and John gave a reception at the Court, and Brian had some films that were fascinating.

Jo and I return to the Court Labor Day weekend. We have had a pleasant summer in Richmond where one of our daughters, Lewis III, and three grandchildren live. I am sitting again on CA4 the week beginning September 30 and so I will keep modestly busy. My health has been better.

The retirement of Thurgood will end an "era" of the Court. Of course, his place in history is quite secure. I know very little about Judge Thomas who presumably will be confirmed. The composition of the Court has changed almost dramatically since I retired in June 1987. Your presence on the court is important for our country.

With affection,

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

LFP/djb

bcc: Mrs. Powell

Sally's copy (mark Justice O'Connor's file)



August 27, 1991

Dear John,

This will confirm information Sally Smith has given you about the dates you suggest for your dinner in honor of Thurgood and Cissy. Jo and I are free Tuesday and Wednesday, the 24th and 25th of September. If necessary, we could adjust our schedule and join you and Maryan on Thursday, the 26th.

I enthusiastically approve the idea of a dinner in honor of Thurgood and Cissy. You and Maryan are very thoughtful and generous in every respect.

Sincerely,

Honorable John Paul Stevens  
Supreme Court of the United States  
Washington, D.C. 20543

LFP/djb



## Supreme Court Report

**"I don't think it makes sense that even though the Court views a particular decision as wrong, it is not free to change it."**

now has been almost universally understood not to be sufficient to warrant overruling a precedent."

He also objected that the Court's position in *Payne* will undercut its authority and its ability to command compliance with its rulings.

"By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5-4 vote over spirited dissents," Justice Marshall wrote, "the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course."

Justice Stevens objected to the Court's concern that victim-impact testimony is necessary to make capital sentencing more fair. That "is a classic non sequitur," he wrote. "The victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance."

According to press reports of Chief Justice Rehnquist's speech at the recent Fourth Circuit judicial conference, he reaffirmed there the view that stare decisis plays a reduced role in criminal cases.

"A criminal defendant has no reliance interest at all" in a constitutional precedent, he said. "I don't think it makes sense that even though the Supreme Court as presently constituted views, after mature consideration, a particular decision as being wrong, nonetheless it is not free to change it."

### Mandatory Life Terms

Overturning precedent played a central role in a second decision released on the Court's last day, *Harmelin v. Michigan* (No. 89-7272).

Under Michigan law, a criminal defendant faces a mandatory term of life in prison, without parole, for three offenses: first-degree murder; possession of 650 grams of narcotics with intent to distribute it; or simple possession of 650 grams of narcotics.

Ronald Harmelin was convicted of simple possession of 672 grams of cocaine, and had no prior convictions. He challenged his mandatory life sentence as a cruel and unusual punishment barred by the Eighth Amendment.

Harmelin's contention was

based largely on *Solem v. Helm*, 463 U.S. 277 (1983), which struck down as disproportionate a life sentence, without possibility of parole, under a South Dakota recidivist statute. The defendant in *Solem* had been convicted seven times for non-violent offenses.

The justices sustained the Michigan mandatory-life statute by a 5-4 vote. Justice Scalia and Chief Justice Rehnquist argued that *Solem v. Helm* should be overturned, but the three other justices in the majority took a more modest approach, concluding only that Harmelin's sentence was not disproportionate to his offense.

Justice Scalia's opinion, joined by the chief justice, stated that "our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law."

After devoting 19 pages to reviewing English parliamentary practices in the 17th century and the development of American constitutional law, Justice Scalia concluded that the Eighth Amendment bar against "cruel and unusual punishments" applies only to types of punishment (such as the use of thumbscrews, or the rack) and not to disproportionate sentences.

The principal historical evidence supporting this view, he wrote, is that some state constitutions expressly prohibited disproportionate sentences, while the Eighth Amendment does not.

Justice Kennedy, joined by Justices O'Connor and Souter, chose a narrower path, and announced that he would continue to adhere to the "narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."

Justice Kennedy's major disagreement with Harmelin's claim concerned the gravity of possessing 672 grams of cocaine.

In view of the "pernicious effects of the drug epidemic in this country," he wrote, "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence

without parole."

### White's Surprise

The lead (and spirited) dissenting opinion was by Justice White, who, ironically, dissented from the ruling in *Solem v. Helm* that the chief justice and Justice Scalia wished to overturn.

Indeed, Justice White's fidelity to stare decisis is conspicuous in these sequences of decision.

A dissenter in *Booth v. Maryland*, he nevertheless created the 5-4 majority reaffirming *Booth* in *South Carolina v. Gathers*, out of an apparent unwillingness to reverse *Booth* by a 5-4 margin. Only when the Court voted 6-3 to overrule in *Payne* did Justice White also vote to overrule *Booth*.

And in *Harmelin*, Justice White again stood by a precedent from which he had dissented initially.

For Justice White, joined by Justices Blackmun and Stevens, proportionality lies at the core of Eighth Amendment jurisprudence, as expressed in death penalty cases: "The death penalty is appropriate in some cases and not in others. The same should be true of punishment by imprisonment."

He rejected Justice Kennedy's view that the Michigan statute is not a disproportionate sentence under *Solem v. Helm*.

In his dissent, Justice White insisted, "Mere possession of drugs—even in such a large quantity—is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole."

Justice White pointed out that only one other state (Alabama) provides for a mandatory life sentence without parole "for a first-time drug offender, and then only when a defendant possesses ten kilograms or more of cocaine."

The Court reversed another constitutional precedent in late May. *California v. Acevedo*, No. 89-1690, approved the warrantless search of a container found in the locked trunk of a car.

The Court's 6-3 ruling overturned the holding in *Arkansas v. Sanders*, 442 U.S. 753 (1979), that such searches require a warrant.

White also dissented from overruling *Arkansas v. Sanders*. ■



September 4, 1991

PERSONAL

Dear Thurgood:

The article in the September issue of the ABA Journal entitled "Four Spirited Dissents" will be of interest. The article mentions two of my decisions that were overruled. You joined my opinions in both of these.

I read with special interest the quote from your dissenting opinion in a case last Term. I believe it was in Payne. You noted:

"Power, not reason, is the new currency of this Court's decision making."

The Court will miss you. I also miss the opportunity of seeing you regularly. As you know, Jo and Cissy are warm personal friends.

We send special best wishes to both of you.

Sincerely,

Justice Marhshall

lfp/ss

bc: Lewis III (with copy of David Stewart's article)



# Four Spirited Dissenters

BY DAVID O. STEWART

Overturning precedents has always been a delicate matter, even for the Supreme Court.

Reversing a previous decision disrupts expectations and necessarily calls into question the vitality of precedents.

Nevertheless, Supreme Court justices have insisted that the Court must be able to re-examine its precedents, especially on constitutional questions, to prevent the ossification of the law. Later experience and insights may call into question an earlier ruling.

In late June, however, a majority of justices displayed an enthusiasm for overturning precedents that suggests a new, more liberal attitude on the subject.

Indeed, in *Payne v. Tennessee* (No. 90-5721), Chief Justice Rehnquist explained on behalf of the Court that the 1989 decision being overturned was of modest force because it had been the product of a 5-4 vote, "the narrowest of margins, over spirited dissents," and involved only individual rights, not property or contract rights.

Predictably, this apparently new version of stare decisis—that precedents are less binding when involving individual rights and when opposed by four spirited dissenters—provoked spirited dissents, as well.

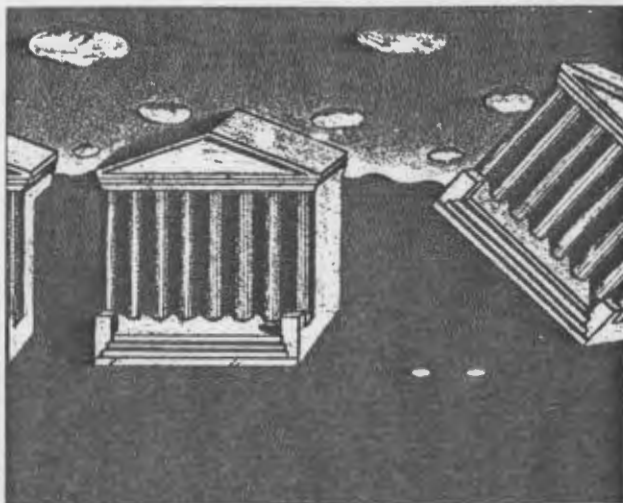
More centrally, this apparently relaxed attitude toward stare decisis also raised the question whether at least some justices are anticipating the reversal of substantially more precedents, perhaps on a scale not seen since the Court in 1937 overturned a number of conservative rulings that had blocked New Deal policies.

## Victim Impact Evidence

Pervis Payne was convicted in Tennessee on two counts of first-

*David O. Stewart is a partner in the Washington, D.C., office of Ropes & Gray.*

degree murder for the killings of a woman and her young daughter. During his sentencing hearing, the state presented the testimony of the



woman's mother, who described the sadness of the victim's surviving son (who also was gravely wounded by Payne).

The grandmother said that the little boy "cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie."

In closing argument, the prosecutor drove home the loss suffered by the surviving child, and urged the jury to show the boy "what type of justice was done."

Payne was sentenced to death.

Only four years ago, the Supreme Court ruled in *Booth v. Maryland*, 482 U.S. 496 (1987), that victim-impact statements could not be introduced during the sentencing phase of a capital trial.

Writing for the *Booth* Court, Justice Powell stressed that such evidence distracts the sentencer from the "character of the individual and the circumstances of the crime," which must control the capital sentencing decision.

Justice Powell also wrote that victim-impact evidence will concern "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," and thus is not relevant to the "blame-worthiness of the defendant."

Two years later, the Supreme Court reaffirmed *Booth* in *South Carolina v. Gathers*, 490 U.S. 805 (1989). Justice Powell's replacement, Justice Kennedy, voted to overrule *Booth*, but a *Booth* dissenter, Justice White, joined in reaffirming the precedent.

The Court's eagerness to overrule *Booth* in the last term was palpable. Certiorari was granted on the victim-evidence issue in *Ohio v. Huertas* (No. 89-1944), but certiorari had to be dismissed as improvidently granted.

The justices then quickly decided to hear Pervis Payne's case, and directed the parties to address the victim-evidence issue even though neither of the parties had submitted it to the justices.

Having finally managed to get the *Booth* issue before it, the Court voted 6-3 in *Payne* to overrule both *Booth* and *Gathers*, producing six different opinions.

Chief Justice Rehnquist wrote the majority opinion, but separate concurrences were issued by Justices O'Connor, Scalia and Souter. Justices Marshall and Stevens each wrote dissents.

The chief justice complained that *Booth* "unfairly weighted the scales in a capital trial."

Although the defendant facing the death penalty is permitted to submit "any relevant mitigating evidence," he wrote, the state seeking the death penalty is barred from "demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide."

Rehnquist insisted that "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."

The chief justice acknowledged that following precedent "is the preferred course because it promotes the evenhanded, predictable,



and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Nevertheless, he argued, stare decisis "is not an inexorable command," and should not be followed "when governing decisions are unworkable or are badly reasoned."

In particular, the chief justice continued, stare decisis has little role in cases involving individual rights: "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved[;] the opposite is true in cases such as the present one involving procedural and evidentiary rules."

Rehnquist listed 33 rulings over the last 20 years in which the Court had overruled precedent.

He did not, however, note that the average age of the overruled precedents in those cases was 40 years, while *Payne* overruled a 2-year-old precedent.

Perhaps recognizing the unique quality of such a speedy overruling, the chief justice announced the apparent new qualification on stare decisis, that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."

*Payne* thus announced a new rule for two types of victim-impact evidence: that relating to the victim and to the impact of the victim's death on the victim's family. Because the trial evidence did not include the victim's family members' views of the crime, the defendant and the appropriate sentence, the Court did not address the exclusion of such evidence under *Booth* and *Gathers*.

#### Power, Not Reason

Justice Marshall's dissenting opinion, issued on the day he announced his retirement from the Court, was a strongly written denunciation of the Court's decision and practices.

"Power, not reason, is the new currency of this Court's decision-making," he wrote.

"[T]he majority declares itself free to discard any principle of

constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices now disagree. The implications of this radical new exception to the doctrine of stare decisis are staggering," Justice Marshall argued.

"The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration."

Justice Marshall protested that the only change since *Booth* and *Gathers* was "this Court's personnel," and that such a change "until



**DAVID BERARDO**

*Keck, Mahin & Cate, Los Angeles*

*We entered  
the case late  
but TechLaw  
got us up  
to speed.*

"We came in on a complex failed bank case in April that was going to trial in November, and there had been no discovery on our side. We needed to understand over 80,000 pages of testimony along with financial statements and checks—graphics, which other systems couldn't handle. Techlaw scanned and indexed it in 30 days.

"Then we could easily research references for the deposition lawyer who was out of town. He'd call every night and get what he needed to check the story. Not a minute was wasted."

Techlaw images up to 20,000 documents a day, complete with photos, graphics and handwritten notes; stores them on optical disks and automatically indexes them for quick, easy desktop access using any word or phrase. Large case or small, we turn it around fast. So you can mobilize fast.

Call 1-800-TECHLAW for details.  
Circle 48 on Reader Service Card

**TechLaw Systems**

14500 Avion Parkway, Suite 300  
Chantilly, Virginia 22021  
(703) 818-3000



*Mr. and Mrs. Brian Day O'Connor*



Mrs. Helen  
Justice O'Connor  
Note received  
Sept 12.

I am sure  
a similar note  
went to other  
Justice

Dear Justice Powell & Mrs. Powell,

Thank you so very much for the engraved silver tray. We are still trying to decide the best place to display it. Such a gift has a great deal more meaning when you personally know the people. This is particularly true with Justice Powell. We were flattered you took such a special interest in the slide show, followed-up by a nice letter. We hope to visit with you on our next trip to Washington so that we may hear about your son's climbing adventures! Best regards, Brian & Judy



September 26, 1991

Dear Sandra:

The ceremony in your honor in the Dirksen Senate Office Building was impressive and appropriate. I recall how pleased I was when you were nominated and confirmed to be the first woman Justice of this Court. As you know, our daughter Molly and also our daughter-in-law Mims are lawyers. It may interest you to know that Molly entered the Law School at the University of Virginia in 1971. In her entering class of about 350 students Molly was one of only 16 women. Of course, when you graduated from Stanford there were virtually no women practicing law.

You were exceptionally well qualified to serve on the Court, and I am happy that I was with you for most of your decade. You were one of the few Justices with whom I felt free to talk about cases. Now, with the changes in the composition of the Court (perhaps the most conservative Court in years), your role in the center is even more important.

Apart from the Court, Jo and I have enjoyed our friendship with you and John. We send affectionate best wishes to both of you.

As ever,

Justice O'Connor

lfp/ss

bc: Mrs. Christopher J. Sumner  
Mrs. Lewis F. Powell, III



September 26, 1991

Dear Dennis:

I thought that your reception for Justice O'Connor was most appropriate on the 10th anniversary of her becoming a Justice of the Supreme Court. I had the pleasure of serving with her until I retired for health reasons.

Justice O'Connor is uniquely well qualified to be the first woman on the Court.

Sincerely,

Hon. Dennis DeConcini  
328 Hart Senate Office Building  
Washington, D. C. 20510-0302

lfp/ss

bc: Justice O'Connor



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

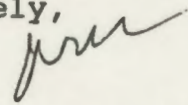
CHAMBERS OF  
THE CHIEF JUSTICE

October 3, 1991

MEMORANDUM TO THE CONFERENCE

Attached is a memo from the Marshal about the cost per capita of purchasing Thurgood's bench chair to give to him. I suggest we proceed by sending our checks in the amount of \$5.09 to the Marshal.

Sincerely,



cc: Chief Justice Burger  
Justice Brennan  
Justice Powell  
Al Wong

*paid  
10/7/91*

Enc.



c9

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

October 3, 1991

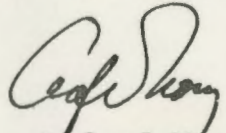
MEMORANDUM TO THE CHIEF JUSTICE

SUBJECT: Bench Chair - Justice Marshall

Should the court wish to continue the tradition of presenting a retiring justice his bench chair, it has been determined that the value of the chair (used furniture) is \$56.00

As was done previously, if we include Chief Justice Burger, Justices Powell and Brennan plus the Conference (8) for a total of eleven, the shared cost of each would be \$5.09 each.

Should this be approved, the Marshal should receive a check payable to the Supreme Court of the United States.

  
Alfred Wong  
Marshal



*Member of Congress*

MILBANK, TWEED, HADLEY & McCLOY

INTERNATIONAL SQUARE BUILDING

1825 EYE STREET, N.W.

WASHINGTON, D.C. 20006

(202) 835-7500

FAX: (202) 835-7586

I. T. T. 440667

ELLIOT L. RICHARDSON  
PARTNER

7 OCT 1991

1 CHASE MANHATTAN PLAZA  
NEW YORK, N. Y. 10005-1413

NIPPON PRESS CENTER BUILDING  
2-1 UCHISAIWAI-CHO 2-CHOME  
CHIYODA-KU, TOKYO 100

ALEXANDRA HOUSE  
16 CHATER ROAD  
HONG KONG

ROPEMAKER PLACE  
25 ROPEMAKER STREET  
LONDON, EC2Y 9AS

1903/04 SHELL TOWER  
50 RAFFLES PLACE  
SINGAPORE 0104

601 SOUTH FIGUEROA STREET  
LOS ANGELES, CA 90017

October 3, 1991

The Honorable Lewis F. Powell, Jr.  
Supreme Court of the United States  
Washington, DC 20543

Dear Justice Powell:

Justice William J. Brennan Jr. will be honored by the Columbia University Graduate School of Journalism at a dinner celebration December 11, 1991. This tribute will be the highlight of Freedom Week, a week-long series of events sponsored by the School to commemorate the 200th Anniversary of The Bill of Rights.

I am especially pleased to co-chair this significant evening with Arthur O. Sulzberger and N.J. Nicholas Jr. We invite you to attend the tribute as our guest.

As the author of more than 1,200 opinions, Justice Brennan's philosophy of individual rights leaves an extraordinary imprint on the nation's legal system and embodies values of equality and due process. In his 34 years on the Supreme Court, no other individual has matched his leadership in safeguarding our First Amendment.

You can understand that Punch, Nick and I deeply identify with Freedom Week. We hope you share our enthusiasm and will join us at the December 11th tribute in Low Memorial Library on the Columbia University campus.

With best regards,

Sincerely,

*Elliott L. Richardson*

R.S.V.P  
Committee Headquarters  
155 East 55 Street - Suite 6D  
New York, NY 10022  
(212) 755-1190



October 7, 1991

Dear Elliot:

Thank you for your letter of October 3, inviting me to attend the December 11, dinner celebration in honor of Justice Brennan in the Low Memorial Library on the Columbia campus.

I regret that I will not be able to attend. As Justice Brennan knows, I have had some health problems that included four weeks in the hospital. Although my recovery has been quite good, I have a checkup scheduled for December 11.

Bill Brennan is a friend whom I greatly admire. Although we often disagreed where the criminal law was at issue, he and I usually were together in cases involving civil rights and other constitutional questions.

I hope all goes well with you and Anne. It has been too long since we saw you.

Sincerely,

Hon. Elliot L. Richardson  
Milbank, Tweed, Hadley & McCloy  
1825 Eye Street, N.W.  
Washington, D. C. 20006

lfp/ss

cc: Justice Brennan



16 OCT 1991

CHAMBERS OF  
JUSTICE DAVID H. SOUTER

October 14, 1991

Dear Lewis,

I was in Boston last Saturday morning  
for a meeting of the American League  
of Trial Lawyers. A considerable number  
of people came up to me to inquire  
after you, and I was able to give them  
the good news that you'd come home  
the afternoon before. I know you don't  
have to be told how many friends you  
have out across the country, but I  
thought I'd use this as an excuse to  
tell you I <sup>too</sup> was glad to learn you were  
feeling ok again.

Yours sincerely,

David



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

ADMINISTRATIVE ASSISTANT TO  
THE CHIEF JUSTICE

October 17, 1991

Memorandum to Justice Powell

Re: Investiture Ceremony Guests

The Court's investiture ceremony for Judge Thomas will be held at 10:00 a.m. Friday, November 1, 1991 (the date selected by the Chief Justice instead of October 21, as originally proposed). The Chief Justice has indicated that your seat will be in the row of chairs in front of the box section. Mrs. Powell will be seated in the box section. In addition, you may reserve six seats in the public section for your guests.

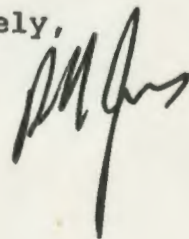
*today* Invitations to the investiture are being printed and will be mailed next week. Would you please provide my office with the names and addresses of your guests no later than Wednesday, October 23.

Guests will be asked to arrive at the Court by 9:45 a.m. A seating card will be presented to each guest prior to being seated in the Courtroom. An informal reception in the West Conference Room will follow the investiture ceremony.

The law clerks' section in the Courtroom will remain available to all law clerks, and employees will be permitted to stand in the back of the Courtroom. Unless otherwise invited, clerks and employees are not invited to attend the reception.

Thank you for your cooperation.

Sincerely,





October 18, 1991

Dear David:

I very much appreciate your longhand note of October 14. I am glad you were able to attend the meeting in Boston of the American College of Trial Lawyers.

In my view this is one of the best of the national organizations of lawyers. I am sure that you were warmly welcomed when you spoke at the recent meeting in Boston.

I hope to return to the Court next week, and perhaps we can have lunch in the near future.

Sincerely,

Justice Souter

lfp/ss



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

CHAMBERS OF  
THE CHIEF JUSTICE

October 23, 1991

MEMORANDUM TO THE CONFERENCE

At 12:05 this afternoon, at his request, I administered the judicial oath to Clarence Thomas. He thus becomes the 106th Justice of the Supreme Court. I administered the oath at this time so that Justice Thomas could begin his duties and get his clerks and staff on board. A public investiture will still take place on November 1, as previously planned.

Sincerely,

WHR/je

cc: Chief Justice Burger  
Justice Brennan  
Justice Marshall  
Justice Powell



WASHINGTON AND LEE  
UNIVERSITY

SCHOOL OF LAW

Lexington, Virginia 24450

12 8 OCT 1991

Office of the Dean  
Lewis Hall  
(703) 463-8502

October 25, 1991

*See my letter  
to Tony.*

The Honorable Anthony M. Kennedy  
Supreme Court of the United States  
One First Street, N.E.  
Washington, D. C. 20543

Dear Justice Kennedy:

Ms. Danielle M. Mosley, the President of the Third-Year Class at the Washington and Lee School of Law, has recently invited you to be the speaker at the Law School Commencement on May 17, 1992. I write to join in that invitation and to encourage you, on behalf of the students and the faculty, to join us on this special occasion. We also hope that Mrs. Kennedy will be able to join you.

The selection of our commencement speaker is made by the third-year class in consultation with the Dean. The third-year class is extremely enthusiastic about having you as its commencement speaker. It is a great personal pleasure for me to join in their invitation.

Our commencement is set for Sunday, May 17, 1992, in the early afternoon. The commencement is preceded by a lunch at the President's home, and the ceremony itself takes about an hour, with twenty or so minutes for the commencement address.

The commencement schedule would permit you and Mrs. Kennedy to travel to Lexington and return to Washington the same day, if your schedule requires. I need not tell you that the drive from Washington down the Shenandoah Valley to Lexington is a relatively brief one and, at that time of the year, is stunningly beautiful. We would, of course, love to have you stay with us in Lexington on Saturday or Sunday evening, or both, and we would arrange for you and Mrs. Kennedy to stay in a restored, historic home on the front campus of Washington and Lee University.



The Honorable Anthony W. Kennedy  
October 25, 1991  
Page 2

I know how very busy your schedule is, and how difficult it is at this point in the year to make plans for the spring. I hope, however, that our proximity to Washington and the possibility that you could travel here and return on that day, if necessary, might make it easier for you to undertake such a commitment at this point. We would, of course, make arrangements for you to be driven to Lexington and back to Washington.

There is great enthusiasm among the students and faculty at the prospect of your joining us as our commencement speaker. Justice Blackmun joined us in the spring of 1990, and Justice Powell is perhaps our most distinguished and loyal alum. Both, I am confident, would assure you that the time you would spend at Washington and Lee, no matter how brief, would be both enjoyable and memorable.

I very much hope that you will give Ms. Mosley's invitation most serious consideration. I will look forward to hearing of your reply.

Sincerely,

Randall P. Bezanson  
Dean and Professor of Law

RPB/cms

Enclosures (Law School Viewbook & Colonial Homes reprint)

bc: ✓The Honorable Lewis F. Powell, Jr.  
President John D. Wilson  
Professor Robin Morris Collin  
Mr. Farris P. Hotchkiss  
Mr. James M. Jordan  
Ms. Danielle M. Mosley



October 26, 1991

Dear Clarence:

You were most thoughtful to visit me in my Chambers on Friday of last week. As I mentioned, I was about to welcome you personally to the Court. After all you join me as one of the few southerners to serve on the Court in this century.

You will not be surprised to find that the work of a Justice is demanding, and probably will require a good deal of "homework" as well as on weekends. Nevertheless it is a great privilege to be on the Court and you will find the relationship with the other Justices to be friendly and supportive.

I look forward to our friendship.

Sincerely,

Justice Thomas

lfp/ss



October 29, 1991

Dear Tony:

Dean Randall Bezanson of the Washington and Lee University School of Law has advised me that you have been invited to speak at the Law School's commencement on May 17, 1992. W&L means a great deal to me as I hold both a B.S. and LL.B. degree from the school. I went on to Harvard for an LL.M.

Dean Bezanson's letter to you did not mention that Lexington is one of the most historic cites in the South (actually it is a small town). The college (originally called Liberty Hall) was founded with a grant of \$50,000 from George Washington. When the War Between the States ended in 1865 General Robert E. Lee became the President of Washington College, and upon his death his name was added. The Lee Chapel, the burial place of Lee, is on the W&L campus. The recumbent statute of Lee is considered quite beautiful.

If you should visit W&L you might please the audience by noting the favorable location of the school in Lexington, Virginia. It is only about an hour's drive from Sweet Briar, Randolph-Macon Woman's College, Hollins College and Mary Baldwin College - all four well known "women's" schools. W&L dances became famous, and particularly Fancy Dress Ball, because the students would invite the "most beautiful" young ladies from these schools to these dances.

VMI is considered the second best (to West Point) military school in the United States. General George C. Marshall, who commanded our World War II forces, was a graduate of VMI.

I did not intend to write such a long-winded letter. You are one of the best speakers (without notes) who has served on the Court in my memory. I know that Jo would join in sending our best to you and Mary.

Sincerely,

Justice Kennedy

lfp/ss

cc: Dean Randall P. Bezanson

bbc: Molly and Lewis



20

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

CHAMBERS OF  
THE CHIEF JUSTICE

October 29, 1991

Memorandum to the Conference

Re: Investiture Ceremony, Friday, November 1, 1991

Our schedule for Friday is as follows:

9:45-10 a.m.	Private oath signing and photographs in Conference Room.
10 a.m.	Go on Bench for Swearing-in.
10:15 a.m.	Reception in honor of Justice Thomas, East and West Conference Rooms.
11:00 a.m.	Conference.
1:00 a.m.	Luncheon.

For you information, attached is a copy of the Courtroom scenario and script.

Sincerely,

Attachment



COURTROOM SCENARIO AND SCRIPT FOR  
INVESTITURE OF JUSTICE CLARENCE THOMAS  
10 A.M., FRIDAY, NOVEMBER 1, 1991

[Note: Separate schedule for Chief Justice's walk-through and private photo opportunity and breakfast for Justice Thomas and family.]

- 9-9:45 a.m. Courtroom Seating.
- 9:40 a.m. [Buzzer for Justices to robe and assemble in Conference Room for private oath signing and photographs. (Justice Thomas escorted by Bill Radunovich from Ladies' Dining Room to Robing Room.)]
- 9:45-10 a.m. Private oath signing and photographs, Justices' Conference Room.
- 9:45 a.m. Mrs. Thomas, family and guests escorted by James Perry and Police Officer from Ladies' Dining Room to reserved seats in Courtroom [via Elevator #8 or Staircase #9, entering Courtroom by Marshal's Desk].
- 9:50 a.m. The Acting Attorney General and Mrs. Barr, the Solicitor General and Mrs. Starr escorted by Wayne Graham from the Solicitor General's Room to the Courtroom.
- [First, Mrs. Barr and Mrs. Starr escorted to reserved seats in bar section. Then, Acting Attorney General Barr and Solicitor General Starr (wearing usual formal attire) escorted to seats at Counsel's table, the Acting Attorney General on right of lectern and the Solicitor General on the left.]
- 9:55 a.m. Justice Thomas (wearing robe) escorted by Chief Deputy Clerk Frank Lorson from Justices' Conference Room to the John Marshall chair near the Clerk's desk in the Courtroom.
- 9:59 a.m. Justices move from Conference Room to area behind curtains in the Courtroom as usual.



10 a.m.

Marshal Al Wong cries the Court and Justices enter Courtroom in usual order.

\* \* \* \* \*

SCRIPT

THE CHIEF JUSTICE: THIS SPECIAL SITTING OF THE COURT IS HELD TODAY TO RECEIVE THE COMMISSION OF THE NEWLY APPOINTED ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, CLARENCE THOMAS.

THE COURT NOW RECOGNIZES THE ACTING ATTORNEY GENERAL OF THE UNITED STATES. WILLIAM BARR.

THE ACTING ATTORNEY GENERAL: MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, I HAVE THE COMMISSION WHICH HAS BEEN ISSUED TO THE HONORABLE CLARENCE THOMAS AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES. THE COMMISSION HAS BEEN DULY SIGNED BY THE PRESIDENT OF THE UNITED STATES AND ATTESTED BY ME AS THE ACTING ATTORNEY GENERAL OF THE UNITED STATES. I MOVE THAT THE CLERK READ THE COMMISSION AND THAT IT BE MADE PART OF THE PERMANENT RECORDS OF THIS COURT.

THE CHIEF JUSTICE: THANK YOU MR. BARR. YOUR MOTION IS GRANTED.

MR. CLERK, WILL YOU PLEASE READ THE COMMISSION?



[William Matthews steps forward, takes and hands Commission to the Clerk. The Acting Attorney General remains at lectern while the Clerk reads Commission.]

CLERK: (READS COMMISSION)

THE CHIEF JUSTICE: I NOW ASK THE CHIEF DEPUTY CLERK OF THE COURT TO ESCORT JUSTICE THOMAS TO THE BENCH.

MARSHAL: PLEASE REMAIN SEATED. ONLY THE COURT WILL RISE.

[The Chief Justice's chair is pulled back and away from the Bench. Chief Deputy Clerk Lorson escorts Justice Thomas up to the back of the Bench; the Clerk escorts Justice Thomas to the left of the Chief Justice, as the Chief Justice faces the Courtroom.]

THE CHIEF JUSTICE: JUSTICE THOMAS ARE YOU PREPARED TO TAKE THE OATH?

JUSTICE THOMAS: I AM.

[The Clerk stands between the Chief Justice and Justice Thomas holding the Bible and facing the Courtroom. The Chief Justice stands on the Clerk's right and raises right



hand. Justice Thomas stands on the Clerk's left and raises right hand. The Chief Justice administers judicial oath and Justice Thomas repeats the oath after him as follows:

I, CLARENCE THOMAS, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States under the Constitution and laws of the United States.

So Help me God.

THE CHIEF JUSTICE: JUSTICE THOMAS, ON BEHALF OF ALL THE MEMBERS OF THE COURT, IT IS A PLEASURE TO EXTEND TO YOU A VERY WARM WELCOME AS AN ASSOCIATE JUSTICE OF THIS COURT AND TO WISH FOR YOU A LONG AND HAPPY CAREER IN OUR COMMON CALLING.

[Chief Deputy Marshal Charles Cornelison escorts Justice Thomas to his seat on the Bench. (The Court sits.) The Chief Justice conducts further business: Circuit assignments.]



THE CHIEF JUSTICE: EFFECTIVE WITH THE APPOINTMENT OF JUSTICE THOMAS, AN ORDER HAS BEEN ENTERED BY THE COURT TODAY REVISING THE ASSIGNMENT OF THE CIRCUIT JUSTICES AS FOLLOWS:

FOR THE DISTRICT OF COLUMBIA, FOURTH AND

FEDERAL CIRCUITS: THE CHIEF JUSTICE

FOR THE FIRST AND THIRD CIRCUITS:

JUSTICE SOUTER

FOR THE SECOND CIRCUIT: JUSTICE THOMAS

FOR THE FIFTH CIRCUIT: JUSTICE SCALIA

FOR THE SIXTH AND SEVENTH CIRCUITS: JUSTICE STEVENS

FOR THE EIGHTH CIRCUIT: JUSTICE BLACKMUN

FOR THE NINTH CIRCUIT: JUSTICE O'CONNOR

FOR THE TENTH CIRCUIT: JUSTICE WHITE

FOR THE ELEVENTH CIRCUIT: JUSTICE KENNEDY

MARSHAL: [Bangs gavel.] THE HONORABLE COURT IS NOW ADJOURNED UNTIL MONDAY, NEXT, AT 10 O'CLOCK. THE COURT REQUESTS THE GUESTS TO REMAIN BRIEFLY IN THE COURTROOM WHILE THE BENCH IS CLEARED AND THE PRESS EXITS.

\* \* \* \* \*

[Justices derobe as normal. Police escort Justices' spouses and their guests to the Conference Room hallway where they meet Justices and proceed to West and East Conference Rooms. Other guests guided from Courtroom to West and East Conference Rooms for reception. No receiving line.]

10:15 a.m. Informal Reception, West and East Conference Rooms.



10:45 a.m.

Photo Opportunity. [The Chief Justice and Justice Thomas escorted by Toni House and Dennis Chapas from reception to front plaza for photos. Photographers set up and ready in advance. Following photos, the Chief Justice and Justice Thomas go to scheduled Conference.]

[If raining, photo session in Lower Great Hall.]

\* \* \*

[FOR JUSTICES ONLY]

10:55 a.m.

[Buzzer for Justices to leave reception and meet for 11 o'clock Conference, Justices' Conference Room.]



November 5, 1991

Dear Harry:

Charles Longsworth, the President of Colonial Williamsburg, said that you recently made a gift to the CW Foundation.

I recall your interest in Colonial Williamsburg. I am sure that you and Dottie would be welcome to visit Williamsburg again. You could get in touch directly with Charles R. Longsworth (Chuck Longsworth), or I would be glad to make the arrangements.

My best to you and Dottie.

As ever,

Justice Blackmun

lfp/ss





Foundation  
Williamsburg, Virginia 23187

Office of the President

September 30, 1991

*[Handwritten mark]*

Dear Justice Blackmun:

Thank you very much for your recent gift of \$100 to Colonial Williamsburg. We're delighted to have your support.

One project here that may be of special interest to you is the restoration of the Courthouse on Market Square, built in 1770 and opened for interpretation on June 1.

We're using the Courthouse to explain the role of local government in the lives of Williamsburg's citizens in the eighteenth century. We've restored the court furnishings and developed programs to demonstrate the development of the rule of law.

Your colleagues, Justice Sandra Day O'Connor and Justice Lewis Powell, honored us by their presence as speakers at the opening celebrations. I've enclosed copies of their remarks and some photographs.

If you are planning to be in Williamsburg, please call Emily Spencer (804-220-7401) in my office, and let us help make arrangements for a special tour. It would be a great pleasure to welcome you.

Sincerely,

*[Handwritten signature of Charles R. Longworth]*  
Charles R. Longworth

The Honorable H. A. Blackmun  
1701 North Kent Street  
Arlington, Virginia 22209

Copy to: (nso)  
✓ Justice Lewis A. Powell  
Justice Sandra Day O'Connor  
Mr. Norman G. Beatty

EHS



November 6, 1991

Dear Thurgood:

Thank you for your memorandum of November 4, advising that Grafton Gaines' retirement will occur on Thursday, November 19, and a farewell party will be given for him that afternoon.

Unfortunately for me, I have an appointment with a physician to make some tests that afternoon. This would be difficult to change. I therefore am writing Gaines a letter, a copy of which is enclosed.

I will miss Gaines who always has been courteous and helpful.

Sincerely,

Justice Marshall

lfp/ss

cc: Mr. Grafton Gaines



November 6, 1991

Dear David:

It came to Mrs. Powell's attention that Harbour Square Apartment N 622 will be available. She believes it is for sale.

We were told that it is a nice one-bedroom apartment. Its present owner is Paul Eason whose parents live in the South Building. My wife Jo obtained this information from the Easons whom she saw yesterday.

You told me some months ago that you liked Harbour Square because of its convenience to the Court. Also it is safe to walk at Ft. McNair. We have lived at Harbour Square since I went on the Court in January 1972. In our view it is an ideal place to live.

I have missed seeing you. It is about time we had another lunch together.

Sincerely,

Justice Souther

lfp/ss



November 7, 1991

Dear Sandra:

I enclose a copy of Norman Dorsen's letter of October 30, that arrived today. I am not surprised that your James Madison Lecture was "a splendid talk". This has become a rather famous lecture, and I was proud to have the opportunity to make it last year.

My physicians have put me on medicines that they think will prevent fainting spells. Happily, when I fainted at the Wilmer Institute in Baltimore (an affiliate of Johns Hopkins) I did not fall as happened last January.

I plan to attend the CW Board meeting, and also I have agreed to sit on CA4 the first week in December.

With affection,

Justice O'Connor

lfp/ss  
Enc.



NOV 1991

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

CHAMBERS OF  
JUSTICE DAVID H. SOUTER

November 7, 1991

Dear Lewis:

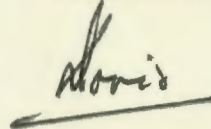
I am grateful for your note of the sixth about the Harbour Square apartment. I would make further enquiry immediately, but for the fact that I think I am going to look for something larger than a one bedroom.

I have decided that I will get through another year, one that I hope will be less extremely abnormal than last year, before coming to a decision about how extensively I want to plant myself here in Washington. My guess is that I will want something with two bedrooms, if not something even a little larger than that. Probably a year from now I will have that definite sense of what I wish to look for. For now, however, I am going to continue to tread water. (I am almost certain, by the way, that I will stay at Harbour Square if anything comes on the market in anything like a reasonable time).

I was very glad to read your suggestion of lunch. As I think I said to Mrs. Powell when I saw her a couple of weeks ago, I have missed seeing you, too, and would like very much for us to have lunch together. I am going to ask my secretary to call down to yours to find out about your schedule and see what we may be able to arrange. I look forward to it.

Again, thanks to you and to Mrs. Powell for your thought of me on the apartment.

Yours sincerely,



The Honorable Lewis F. Powell, III



November 8, 1991

Dear David:

Thank you for your note about Harbour Square. I am glad you plan to continue to have an apartment there and also retain your legal residence in your home in New Hampshire. As I mentioned, we have done exactly that. We are primarily based in our Richmond home during July and August, and we are there for all of the major holidays.

Perhaps I mentioned that we have had our apartment at Harbour Square since I went on the Court in January 1972, and think it is the best place to live in Washington, particularly if one is a Supreme Court Justice.

I look forward to having lunch with you in the near future.

Sincerely,

Justice Souter

lfp/ss





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

*h*

CHAMBERS OF  
JUSTICE DAVID H. SOUTER

November 19, 1991

Dear Justice Powell,

We would be honored if you would permit us to take you to lunch at your convenience.

Respectfully,

*Bill Araiza*

Bill Araiza

*Jon Nuechterlein*

Jon Nuechterlein  
Law Clerks to  
Justice Souter

*Henk Brands*

Henk Brands

*Peter Rubin*

Peter Rubin

Justice Powell





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

WFB-File

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.  
RETIRED

December 10, 1991

Dear Jo and Lewis,

How wonderful of you to send us your warm and gracious note. We tried so hard, though unsuccessfully, to get together at the dinner, but maybe we'll be lucky enough to do so very soon. We're going to Miami for a teaching stint at the Law School. Somehow, we must get together. It's been very lonesome without you.

Love,

Bill

Justice Powell and Mrs. Powell



December 10, 1991

Dear Maureen and Nino,

It was thoughtful of you to give the black tie in honor of our new Justice and his wife. The evening was pleasant in every respect.

It is not often that every sitting member of the Court and every retired Justice, including Chief Justice Burger, are present for a dinner.

I know Jo would join me in sending our special appreciation.

As ever,

Justice Scalia and Mrs. Scalia

lfp/ss





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

18 DEC 1991

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 18, 1991

Dear Lewis:

I was in Milwaukee Monday evening to address the Wisconsin Bar and other sponsoring organizations in their celebration of the Bill of Rights. At a reception beforehand, two lawyers came up to introduce themselves. One was maybe 20 years older than the other. They said that they had a case before the Court some years ago. It belonged to the younger man who did not expect to argue it. His older partner, however, insisted that he take the argument. (This is different from some associates I have watched perform in our courtroom.) Anyway, the younger man apparently did a good job. He won his case. He said that afterward you wrote the older man informing him of how well the younger man had performed. (To my embarrassment, I did not write down their names.) This meant a great deal to both of them, however, and I thought you should know about it.

Sincerely,

*Harry / by wsm*

Justice Powell



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL  
RETIRED

December 13, 1991

MEMORANDUM TO THE CONFERENCE

F Y I

## Best Fruit Cake Ever

1 Cup Butter	1 Tsp. Salt
1 Cup Sugar	Lemon Juice
4 Large Eggs	1 Cup Brown Sugar
1 Cup Dried Fruit	Nuts
1 Tsp. Baking Soda	1 or 2 Quarts Whiskey

Before you start, sample the whiskey to check for quality. Select a large mixing bowl, measuring cup, etc. Check the whiskey again. To be sure the whiskey is of the highest quality, pour one level cup into a glass and drink it as fast as you can. REPEAT. With an electric mixer, beat 1 cup of butter in a large fluffy bowl. Add 1 tsp. of thugar and beat again. Meanwhile, make sure the whickey is of the finest quality. Cry another tup. Open second quart if necessary. Add 2 arge leggs, 2 cups fried druit and beat till high. If druit gets stuck in beaters, just pry it loose with a drewscriver. Sample the whishey again, checking for conscisticity. Then sift 3 cups of salt or anything, it really doesn't matter. Sample the whiskey. Sift 1/2 pint lemon juice. Fold in chopped butter and strained nuts. Add a bablespoon of brown thugar, or whatever color you can find, and wix mell. Grease oven and turn cake pan to 350 degrees. Now pour the whole mess into the coven and ake. Check the whiskey again, and bo to ged.

*Anonymous*

cc: Chief Justice Burger, Ret.  
Justice Brennan, Ret.  
Justice Powell, Ret.



December 18, 1991

Dear Thurgood:

Jo and I appreciate your memo to the Conference in which you describe the "Best Fruit Cake Ever". You end up with "one or two quarts of whiskey" - perhaps a bit out of proportion with the other ingredients of the cake. I hope you favor Virginia boubon whiskey.

I know that Jo would join me sending affectionate greetings to you and Cissy for the Christmas season.

As ever,

Justice Marshall

lfp/ss