

April 14, 1993

Dear Chief:

A brief note to say that you were superb law night. Jo and I had the good fortune to hear your speech on C-Span. We are proud of you.

If your speech will be made available to the public I would like to have a copy. At a different level of discourse, it is about time we have lunch together again - at the Monocole or La Colline.

As ever,

The Chief Justice

lfp/ss



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

CHAMBERS OF
THE CHIEF JUSTICE

Sally

May 10, 1993

April 16, 1993

Dear Lewis:

On May 11, 1993, at 3 p.m. the annual employees' service awards ceremony will be held in the East Conference Room, with a reception following in the West Conference Room.

I invite you to join me on this occasion so that your other colleagues and I may acknowledge your 25 years of government service. Chief Justice Burger will also be receiving a service award.

Service awards will be presented to the Justices first. The entire ceremony, including the presentation of any special achievement or superior performance awards, will last about 15 minutes. I hope you will be able to attend for whatever time your schedule allows.

Sincerely,

*1
you*

Justice Powell (Ret.)

** I include my service in Air Force*

2002 May 1993

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

File

CHAMBERS OF
THE CHIEF JUSTICE

Sears -

I think that your Va.
Union speech bears only indirect-
ly on the present brouhaha
over the release of T.M.'s papers.
I would not re-release it.

Bill

I agree.

File
Reference to

Thurgood Marshall

pg 3

REMARKS

of

LEWIS F. POWELL, JR.

ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT

VIRGINIA UNION UNIVERSITY
INSTALLATION CEREMONY

RICHMOND, VIRGINIA

MARCH 7, 1980

It was good of you to invite me to take part in this ceremony. The installation of Dr. David Shannon as the eighth President of Virginia Union University is an important event—important for our city and our Commonwealth. Your Board of Trustees, in naming Dr. Shannon, have chosen wisely. His distinguished record of accomplishments as a teacher, scholar, and pastor promise a rewarding tenure as President. I congratulate warmly both Dr. Shannon and the University.

Virginia Union, since its founding 115 years ago, has played an important role. It has trained thousands of young people to be useful citizens, and a remarkable number to be leaders. Few universities in our country have such a high percentage of alumni in positions of leadership.¹

Virginia Union also has been constructive in the long struggle against discrimination, and a moderating force in this community, helping to bring together citizens of all races.

I

I have chosen as a subject the role of the Supreme Court in eliminating racial barriers in our society. At long last, it is fair to say that racial equality is an accepted goal of our country. Indeed, it is recognized as a constitutional and moral imperative. The legislative and executive branches of government, at both the state and federal levels, now actively support this goal by laws, by executive orders, through administrative agencies, and by substantial enforcement machinery.

It may come as a surprise to some of the younger persons in this audience that it was the judicial branch of the federal government—not the legislative or executive branches—that for years stood virtually alone in efforts to remove racial barriers. Although the entire federal judiciary has played its

¹ See Richmond News-Leader, Nov. 17, 1977 (editorial); Richmond Times-Dispatch, Nov. 18, 1977 (editorial).

part, the Supreme Court provided the basic inspiration and guidance.

This came through a long series of landmark decisions. The decisions began in the late '20s and early '30s when the Court was viewed as ultra-conservative. In the earliest cases, the Court held that all-white primaries were invalid.^{1a} Recognizing that access to the ballot is perhaps the single most important right in a representative democracy, the Court insisted that primaries—like general elections—be open to all races.

In 1938, in *Gaines v. Canada*,² the Court—speaking through Chief Justice Hughes—held for the first time that a segregated state law school must open its doors to blacks. In Missouri, as in a number of other states at that time, legal education was foreclosed to black students except through limited scholarships to attend out-of-state schools. Even in 1938, the Court left open to the State of Missouri the option of providing a “separate but equal” law school for minority students.

These cases were historic but tentative starting points. From them, the Court proceeded case by case—as a court must—to ban discrimination by expanding the reach of the constitutional provision that guarantees to all citizens the equal protection of the laws. The earlier cases dealt with particular instances of segregation and were limited to the facts before the Court. Gradually, however, the outline of broader principles became apparent. This method of reasoning, on established principle, from one case to another, is the essence of our common law tradition.

A major breakthrough came in 1948 when the Court decided *Shelley v. Kraemer*.³ There actually were two cases before the Court, one from Missouri and the other from Michigan. In both cases, the issue was the validity of private covenants—

^{1a} *Nixon v. Condon*, 286 U. S. 73 (1932); *Nixon v. Herndon*, 273 U. S. 536 (1927).

² 305 U. S. 337 (1938).

³ 334 U. S. 1 (1948).

enforced by state law—restricting the use and occupancy of certain real estate to white persons. The covenants were invalidated as denials of equal protection. I am happy to add, as an important footnote to history, that the winning counsel was Thurgood Marshall—now my friend and colleague on the Court.

Two years later Thurgood Marshall again won a major victory. In *Sweatt v. Painter*,⁴ the Court ordered the admission of blacks to the University of Texas Law School. This case differed from the earlier Missouri case because Texas had purported to operate a separate but equal law school for black citizens. The Court nevertheless invalidated segregated education in state graduate schools, and announced principles that soon were applied to all education.

II

Sweatt v. Painter was the precursor of a case every school child in America knows about: *Brown v. Board of Education*,⁵ which outlawed state-imposed segregation in the public schools.

The moral and constitutional force of the *Brown* decision was not limited to education. Chief Justice Warren, speaking for the Court, did emphasize the critical importance of education—characterizing it as “the very foundation of good citizenship.”⁶ But the Court went further. It strongly implied that all forms of government-imposed segregation are intolerable and inconsistent with the Constitution. You will not be surprised to hear that the winning counsel in *Brown* again was Thurgood Marshall.

I pause to say that no American did more to lead our country out of the wilderness of segregation than Thurgood Marshall.

The force of the *Brown* precedent was felt immediately in

⁴ 339 U. S. 629 (1950). See also *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950); *Sipuel v. Board of Regents*, 332 U. S. 631 (1948).

⁵ 347 U. S. 483 (1954).

⁶ *Id.*, at 493.

areas beyond education. In a series of cases from 1955 through 1958, the Court struck down segregation in various public facilities, including buses, parks, and beaches.⁷

It proved far easier for the judicial branch to invalidate segregation than it did to implement those decisions. It is important to understand that although the Supreme Court can say what the law is and establish principles of broad application, it has little power to implement them. Accordingly, in the second *Brown* decision,⁸ delivered a year after the first, the Court made clear that the federal district courts had the primary duty to ensure desegregation of the schools. But again, courts have no legislative or administrative authority, and they can act only when parties bring cases before them.

I hardly need say to this largely Southern audience that the reaction to *Brown* delayed its implementation for many years. The Court itself recognized that a way of life so long accepted as lawful could not be changed without a period of difficult readjustment. It therefore used the famous phrase "all deliberate speed" in instructing lower courts how to proceed. Also, the *Brown* decision was thought to require merely the elimination of all legal barriers to integration. In other words, it was initially thought that if public authorities were netural, desegregation would be achieved by freedom of choice.⁹

Throughout the turmoil, however, the Court remained resolute. In 1958, it refused to back down from its command to desegregate when official resistance in Little Rock threatened to frustrate the Court's mandate.¹⁰ The Court, convening in special session, emphatically rebuffed the local defiance. It was necessary, however, for President Eisenhower to call

⁷ *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U. S. 54 (1958) (*per curiam*); *Gayle v. Browder*, 352 U. S. 903 (1956) (*per curiam*); *Holmes v. City of Atlanta*, 350 U. S. 879 (1955) (*per curiam*); *Mayor of Baltimore v. Dawson*, 350 U. S. 877 (1955) (*per curiam*).

⁸ *Brown v. Board of Education*, 349 U. S. 294 (1955).

⁹ See *Bradley v. School Board*, 345 F. 2d 310 (4th Cir. 1965) (*en banc*); *Briggs v. Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955).

¹⁰ *Cooper v. Aaron*, 358 U. S. 1 (1958).

up the National Guard to enforce the Court's order. Significantly, this was the first important official act by another branch of the federal government in aid of school desegregation.

Again, in 1964, another effort to circumvent the law occurred—I regret to say—in Prince Edward County of our state. The closing by the county of its public schools, and the establishment in their place of private schools, were invalidated by the Court.¹¹ The decision made clear that the judicial branch would not tolerate attempts—however ingenious—to evade the constitutional duty to eliminate racial discrimination in education.

The process of desegregation nevertheless was painfully slow. I have found it difficult to explain to young people, including my children, how it was possible for the process—one declared to be required by the Constitution—to drag on for years. This is not an occasion to review that history. I will say only that one must have lived during the period to have any conception of the intensity of resistance, the actual turmoil, and the legal uncertainties.¹² Indeed, it was not until the late '60s and early '70s that the courts and school authorities had reasonably clear guidance as to their duties.

It was in 1968, 14 years after *Brown*, that the Supreme Court—by then properly impatient with the slowness of the desegregation process—imposed on school authorities the affirmative duty to accomplish desegregation. In *Green v. County School Board*,¹³ a case arising from New Kent County, the Court held that freedom of choice plans were constitutionally inadequate. *Green* was followed in 1971 by *Swann v. Charlotte-Mecklenburg Board of Education*,¹⁴ which validated the use of extensive busing where necessary to eradicate continuing discrimination.

¹¹ *Griffin v. County School Board*, 377 U. S. 218 (1964).

¹² For an excellent discussion of the early history of school desegregation in the South, see J. H. Wilkinson, *From Brown to Bakke: The Supreme Court and School Integration* 78-127 (1979).

¹³ 391 U. S. 430 (1968).

¹⁴ 402 U. S. 1 (1971).

But even today some legal uncertainties remain, and the desegregation process has not been completed. Scarcely a Term of Court passes without our being asked to review school cases, many of which have been in litigation for years. The South, though originally the scene of most litigation, has had a significantly better record of desegregation than many other sections of the country.

The courts have drawn a distinction between *de jure* segregation, where state laws validated separation of the races, and *de facto* segregation where—despite the absence of state mandate—segregation is still practiced in various ways by school boards and public officials.¹⁵ For many years, it was thought that this distinction shielded schools outside of the South from *Brown v. Board of Education*. Thus, for a quarter of a century after *Brown* little was done to dismantle segregated schools in some of the areas from which the bitterest criticism of the South has emanated.

In more recent years, indeed since I went onto the Court in 1972, major desegregation cases have arisen in rather surprising places: Boston,¹⁶ Cleveland,¹⁷ Columbus,¹⁸ Dayton,¹⁹ Denver,²⁰ Detroit,²¹ Milwaukee,²² Omaha,²³ Wilmington²⁴—and even Pasadena, California²⁵—to mention only a few of the non-Southern cities in which the federal courts have been called upon to enforce desegregation.

¹⁵ See, e. g., *Keyes v. School District No. 1*, 413 U. S. 189, 205-208 (1973).

¹⁶ *Morgan v. Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 421 U. S. 963 (1975).

¹⁷ *Reed v. Rhodes*, 455 F. Supp. 546 (N. D. Ohio 1978).

¹⁸ *Columbus Board of Education v. Penick*, 443 U. S. — (1979).

¹⁹ *Dayton Board of Education v. Brinkman*, 443 U. S. — (1979); *Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977).

²⁰ *Keyes v. School District No. 1*, 413 U. S. 189 (1973).

²¹ *Milliken v. Bradley*, 418 U. S. 717 (1974).

²² *Brennan v. Armstrong*, 433 U. S. 672 (1977) (*per curiam*).

²³ *School District v. United States*, 433 U. S. 667 (1977) (*per curiam*).

²⁴ *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), aff'd mem., 423 U. S. 963 (1975).

²⁵ *Pasadena Board of Education v. Spankier*, 427 U. S. 424 (1976).

III

I have summarized, to this point, the role of the courts—and especially that of the Supreme Court—in the historic movement that commenced about a half century ago toward equal rights for all citizens. Although I have concentrated on school desegregation decisions, the Court's contribution in other areas should not go unmentioned. Landmark cases like *Baker v. Carr*²⁶ and *Reynolds v. Sims*²⁷ struck down legislative apportionments that had prevented some citizens' votes from having equal weight. In many ways, these voting rights cases were as important as *Brown* itself in securing equal rights for all.

It was not until the mid-'60s that Congress commenced seriously to implement the Equal Protection Clause. It then adopted major legislation with respect to voting,²⁸ fair employment,²⁹ fair housing,^{29a} and educational opportunities.³⁰ With the legislative and executive branches finally committed, the task of the courts in the movement toward full equality became primarily supportive rather than innovative. The great principles of *Shelley v. Kaemer*, *Sweatt v. Painter*, *Brown v. Board of Education*—and their progeny—had become the law of the land. The detailed implementation and enforcement of these principles became the responsibility of the legislative and executive branches. But the courts remained active in this cause. It was their duty to review the constitutionality of the statutes, interpret the often ambiguous language of complex legislation, review administrative decisions, and support enforcement of valid laws and actions.³¹

²⁶ 369 U. S. 186 (1962).

²⁷ 377 U. S. 533 (1964).

²⁸ *E. g.*, Voting Rights Act of 1965, 79 Stat. 437.

²⁹ *E. g.*, Civil Rights Act of 1964, tit. VII, 78 Stat. 253.

^{29a} *E. g.*, Civil Rights Act of 1968, tit. VIII, 82 Stat. 81.

³⁰ *E. g.*, Civil Rights Act of 1964, tits. IV and VI, 78 Stat. 246, 252.

³¹ See, *e. g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91 (1979); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973).

As the cases are legion, I will mention specifically only two additional ones—both controversial.

Last Term, in a case that I missed because of illness, the Court sustained a privately-negotiated affirmative action program. It is important to remember that the Constitution condemns only discrimination through governmental action. It leaves the conduct of private employers and citizens to regulation by legislation. The task in *United Steel Workers v. Weber*,³² therefore, was to interpret the intent of Congress when it adopted Title VII of the Civil Rights Act of 1964.³³

Affirmative action is a sensitive issue, implicating—when imposed by government—constitutional as well as policy considerations and often the rights of innocent citizens on both sides. In *Weber*, the Court concluded that Congress—despite the lack of clarity in the statute—had intended to allow the company and the union to agree on such a program.

I turn finally to *University of California Regents v. Bakke*,³⁴ where the constitutional issue was presented because the challenged action had been taken by a state university.³⁵ The moral and constitutional implications of the case were enormous. On the one hand, there was the principle—central to the Equal Protection Clause—that no one should be treated differently because of his race. On the other hand, our cases established that there was a duty to provide appropriate remedies when state action has caused or contributed to racial inequality. As it was conceded in *Bakke* that there had been no discrimination by the University, the inflexible quota system was invalidated. But the Supreme Court held that race was an appropriate factor to be considered by admission committees.

My opinion

³² 443 U. S. 193 (1979).

³³ 42 U. S. C. § 2000e *et seq.*

³⁴ 438 U. S. 265 (1978).

³⁵ Four Justices did not reach the constitutional issue because they concluded that Title VI of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000d *et seq.*, controlled. See 438 U. S., at 408 (STEVENS, J., concurring in the judgment in part and dissenting in part).

IV

Perhaps I have said enough to demonstrate my thesis: that the Supreme Court has played the leading role in the movement towards true racial equality in our country. As the lawyers in the audience know, I have mentioned only some of the relevant cases. There have been many others. Also, I should make clear that, although the Court has announced the great principles, the heaviest judicial burden has been borne by the federal district courts and courts of appeals. The state courts do not have the primary responsibility for interpreting the Constitution. But in recent years they also have been strongly supportive.³⁶

It is appropriate before closing, particularly since we are gathered here in the capital of Virginia, for me to recognize several Virginia lawyers whose able advocacy—like that of Thurgood Marshall—contributed greatly to the civil rights movement. They include Oliver W. Hill, a friend with whom I worked in bringing a new charter to our city in 1949 and who was the first black citizen to serve on the governing body of a major Southern city. There also were Mr. Hill's partners: Spottswood W. Robinson, III, a graduate of this University and now a highly respected judge; Henry L. Marsh, III, another prominent graduate and our mayor; and S. W. Tucker, formerly of Emporia and now a leading member of the Richmond Bar.

I also mention one non-lawyer and another friend—Booker T. Bradshaw, who served with me on the Richmond School Board. With other concerned white and black citizens, Mr. Bradshaw helped Richmond avoid the violence and racial discord that marred human relations in a number of Southern cities during the desegregation era.

I close with a few final observations. I have addressed—from the viewpoint of a federal judge—what has been the major domestic problem of our country for most of this cen-

³⁶ See, e. g., *Crawford v. Board of Education*, 17 Cal. 3d 280, 551 P. 2d (1976).

ture. Solutions to all of the problems of fairness and justice have not been found. There never has been a utopia, and we are not likely to see one. Yet few would doubt that great progress has been made or that much remains to be done to realize the promise of our uniquely democratic society. There are, of course, limits to what government can or should do. We must look primarily for tolerance and understanding to come from the hearts and minds of people.

As I stated at the outset, you have every reason to be proud of the record of this University. Over the years, you have been responsive not merely to the needs of black citizens but to those of the greater community. Richmond and our state are fortunate to have you located here. Virginia Union also is fortunate to have as its new leader a scholar of Dr. Shannon's distinction. Again, I extend to him and to you warmest congratulations.

LEWIS F. POWELL, JR.

March 7, 1980

June 4, 1993

Dear Chief:

The dinner you gave here at the Court in honor of Byron and Marion is one they will remember. I thought your remarks also were most appropriate.

As ever,

The Chief Justice

lfp/ss

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

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1993

The Honorable Joseph I. Lieberman
Chairman
Subcommittee on Regulation and Government Information
United States Senate
Washington, D.C. 20510-0703

Dear Mr. Chairman,

My colleagues and I have discussed at Conference your letter of June 1st which was sent to each of us. They have each requested that I respond on their behalf as well as my own. We recognize the importance of the issues into which your Subcommittee will be inquiring, and regret that we are unable to either appear personally on Friday, June 11th, or furnish any detailed response to your questions. We have our usual Friday Conference scheduled for June 11th, and the month of June is traditionally one of our busiest because it is then that we try to wind up the Court's business for the current term.

Even with the limited time available to us, however, we have no hesitancy in expressing the opinion that legislation addressed to the issues discussed in your letter is not necessary and that it could raise difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court.

We appreciate your having advised us of the hearings and of the questions that your Subcommittee wishes to explore.

Sincerely,

William H. Rehnquist

August 4, 1993

Dear Chief,

Jo and I were happy to read in the Richmond newspaper that you were named "Swedish-American of the Year". I had not remembered that you were only a third generation American. Regardless of generation, you are an American whom I greatly admire.

As ever,

Honorable William H. Rehnquist
General Delivery
Greensboro, Vermont 05841

LFP/djb

Richmond Times-Dispatch

August 3, '93

CLOSE-UPS

COMPILED FROM WIRE SERVICES

Not so Swedish?

*Wanted
2.9.93*

STOCKHOLM, Sweden — U.S. Chief Justice **William H. Rehnquist** was named "Swedish-American of the Year" despite being labeled "un-Swedish" because of his record on capital punishment.

Rehnquist, whose grandparents were Swedish, on Sunday received the "Vasa Order of America," a plaque given annually to prominent Americans of Swedish descent by the private, 35,000-member Vasa Order.

Rehnquist has authored majority opinions saying death penalty convictions in state courts cannot be appealed at federal level. Sweden banned capital punishment in 1921 and long has opposed it elsewhere.

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

CHAMBERS OF
THE CHIEF JUSTICE

September 9, 1993

MEMORANDUM TO THE CONFERENCE

I propose that the annual welcoming reception for our new law clerks be held Wednesday, September 29th at 4:00 p.m. The reception will be in the Justices' Dining Room as usual and I hope that as many of you as possible will be able to attend.

Sincerely,

Wm

cc: Chief Justice Burger
Justice White
Justice Brennan
Justice Powell
Robb Jones
Tony Donnelly

Sally,

*I do expect
to be in Richmond
& hope you
will be with
me. I think*

*this has
been
approved.
Has it?*

September 13, 1993

Dear Chief:

Thank you for the memorandum of September 9, in which you invite me to attend the reception for new law clerks on September 29.

As I will be sitting on the Fourth Circuit Court of Appeals in Richmond on that date I will not be able to join in welcoming the new law clerks.

I like to recall that you and I were sworn in on the same day, and at the same session of the Court. Indeed, I think I was your senior as I took the public oath of office about half a minute before you did.

Sincerely,

The Chief Justice

lfp/ss