



TO THE BAG

TO ARE IS HUMAN

To the *Bag*:

The slow evolution from “are” to “is” in describing the United States in Supreme Court jurisprudence (Minor Myers, *Supreme Court Usage & The Making of an ‘Is,’* 11 GREEN BAG 2D 457) recalls a more recent, if less weighty, shift in usage by the nation’s highest court.

I came upon it 22 years ago while reading the Court’s opinion in *Malley v. Briggs*, 475 U.S. 335, a police immunity case stemming from a Rhode Island drug arrest. Justice Byron White, writing for the majority, felt the need to define the word “toking,” which had come up in a wiretapped conversation. “[I]n drug parlance,” White wrote, “‘toking’ means smoking marihuana.” That’s right, marijuana spelled with an “h.” In a separate opinion, Justice Lewis Powell Jr. wrote in a footnote that one of the defendants at trial “denied seeing any marihuana at that party or receiving a marijuana cigarette.” Powell spelled the illegal weed with an “h” and a “j” in the same sentence! More aptly than Powell probably knew, his writing was labeled as a partial concurrence and partial dissent.

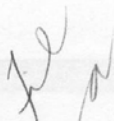
That launched me on a word search like Myers’ in which I found that the Court had, to that point, used the “h” spelling in 118 cases, and the “j” version in only 35. Mirroring Powell’s ambivalence, the Court used both spellings in 20 cases. I wrote about this discovery in a light *National Law Journal* article* laced with obligatory puns

* Tony Mauro, *Has High Court’s Spelling Gone to Pot?*, NAT’L L.J., Apr. 14, 1986.

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about the Court "going to pot" and how it could "jointly" solve the problem. Then I forgot about it.

Unbeknownst to me, but confirmed by documents in the Thurgood Marshall papers at the Library of Congress (Box 378, Folder 2) the article got noticed inside the Marble Palace. Reporter of Decisions Henry Lind sent a copy to the justices, along with a memo detailing the spelling preferences of several dictionaries. He asked the



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

April 11, 1986

Honorable Thurgood Marshall
Associate Justice

Dear Justice Marshall:

I'm not sure whether you are a regular reader of the National Law Journal, so you may or may not have seen the enclosed article.

Toni House and I have had a running dialogue for some time about the "problem." So maybe it's time to take a vote. I personally am ready to capitulate and use "marijuana," taking "judicial notice" that it now is the generally popular spelling.

I would like, however, to point out a few things. The author of the National Law Journal is wrong when he says "most dictionaries" use "j." Here is a compilation from the leading dictionaries:

- (1) Webster's Third New International Dictionary (1961): "marihuana or marijuana also marajuana."
- (2) Webster's Ninth New Collegiate Dictionary (1983): "marijuana also marihuana."
- (3) The American Heritage Dictionary (1969): "marijuana, marihuana ... [Mexican Spanish mariguana, marihuana]."
- (4) Black's Law Dictionary (5th ed. 1979): "Marihuana, mariguana, marijuana."
- (5) 1976 Supplement to the Oxford English Dictionary: "marijuana, marihuana Also mara- maria-; mariguana."

The 1984 edition of the GPO Style Manual lists "marijuana" as the preferred spelling. This is a switch from the 1973 edition that preferred "marihuana."

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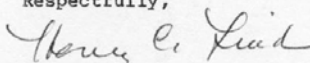
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Honorable Thurgood Marshall
April 11, 1986
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I told Toni that maybe an argument in favor of the Mexican Spanish spelling, "marihuana," is the fact that most of the "stuff" comes from Mexico. Or maybe Mr. Zeese's solution of avoiding the problem and using "cannabis" is the way to go.

I would appreciate it if you would indicate your preference on one copy of this memo and return it to me. A majority vote will control (I hope there won't be a "splintered" vote).

Respectfully,



Henry C. Lind
Reporter of Decisions

Enclosure

I prefer:

_____ marijuana

_____ marihuana

_____ other (please indicate) _____ .

(Signed) _____

justices to vote on how to spell the cannabis-bearing plant. A few days later, Lind reported the results: four justices favored “j,” one favored “h,” and three gave Lind their proxies, which he cast in favor of “j.” Lind declared the issue resolved: “[T]he spelling from now on should be a ‘j.’ I hope that this will settle the matter.”

It did. Ever since the Court voted, the “j” spelling has appeared in its decisions 102 times. “Marihuana” has appeared only 7 times – all in quotations from old cases or in references to laws such as the Marihuana Tax Act. Just as the Supreme Court finally decided the United States was a singular noun, so too did it bow to modern practice in spelling marijuana. It was high time.

Tony Mauro
Supreme Court Correspondent
Legal Times

To the Bag

M

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

MEMORANDUM TO THE CONFERENCE April 22, 1986

FROM: Henry C. Lind, Reporter of Decisions

RE: Spelling of "marijuana"

I have now received all votes but one. There were four votes for "marijuana," one vote for "marihuana," and three Justices gave me their proxies, which I have cast for "marijuana." Therefore, the spelling from now on should be with a "j." I hope that this will settle the matter.

HCL
HCL

To the Bag:

I enjoyed Professor Myers's careful study of when "the United States" became clearly a singular noun in the Supreme Court. *Supreme Court Usage and the Making of an 'Is'*, 11 GREEN BAG 2D 457. Along the lines of the saying about progress in science, I believe this article shows that writing styles evolve more through old writers dying off than through living writers changing their habits.

Robert A. James
Pillsbury Winthrop Shaw Pittman LLP
San Francisco, CA

To the Bag:

The recent article by Minor Myers, *Supreme Court Usage and the Making of an 'Is'* (11 GREEN BAG 2D 457), depicts in abundant detail how Supreme Court prevailing usage started off to say "the United States are" as if the plural was describing a collection of independent states. That was before the Civil War. The article went on to demonstrate how after the Civil War, although somewhat gradually – and a little more slowly than has sometimes been thought – the prevailing Supreme Court usage in opinions shifted to the singular "the United States is."