



OBI-WAN STEVENS VS. DARTH REHNQUIST

A CLERICAL FANTASY

Ross E. Davies

IN A 1993 LAW REVIEW ARTICLE, *John Paul Stevens and the Manners of Judging*, Professor Christopher Eisgruber¹ describes and analyzes Justice Stevens’s undeniable “kindness and wit, . . . [and] good manners.” Eisgruber illustrates Stevens’s qualities with, among other things, “two stories that Stevens clerks hand down from year to year.” The first story is not relevant here. The second story is. It

takes place in open court. A nervous lawyer was stumbling through an argument, and several times addressed members of the Court as “Judge.” The Chief Justice became more irritated each time that title was used, and finally interrupted the lawyer. “Counselor,” the Chief Justice intoned, “the members of this Court are Justices, not Judges, and you should address them accordingly.” The lawyer was mortified by this criticism, and began a long, hand-wringing apology. Justice Stevens leaned forward in his

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¹ Then of the NYU School of Law, now of Princeton. See www.princeton.edu/provost/about-the-provost/ (vis. Apr. 22, 2010).

chair, and said, “Don’t feel badly, counselor. The Constitution makes the same mistake.” Which it does.²

A pleasing anecdote, if one is an admirer of Stevens, and a non-admirer of Chief Justice William Rehnquist, who plays the irritable, unkind, and pompous bully, in contrast to the good-humored, kind, and gracious Stevens.

An experienced reader of law review articles might raise an eyebrow at this story. It’s not that a former clerk is telling a flattering story about his Justice (Eisgruber clerked for Stevens during the Court’s 1989 Term³). There are good, true tales about every member of the Court, and many a clerk will tell the ones about his or her former boss. The red flag is the footnote following the story. It reads, in its entirety: “See, e.g., U.S. Const., art. II, Sec. 2, para. 2, empowering the President to appoint, inter alia, ‘Judges of the supreme Court.’”⁴ Served a citation to such an authoritative source, the casual reader might be reassured about the accuracy of the anecdote, even though the only thing the footnote really tells us is that Stevens was correct about the Constitution’s use of the word “judges” to refer to people who have come to think of themselves as “Justices.” Article II has nothing to say about whether Rehnquist and Stevens said what Eisgruber says they said in the anecdote to which the footnote is attached. The use of footnotes of this sort – authoritative, but only partially, for the quotations or propositions they are attached to – is a not-uncommon practice among legal scholars and judges. Call it sleight-of-cite or *légère-de-footnote*. Confronted with this kind of maneuver, a careful reader might well wonder why the author did not do either more or less.

The slipperiness of Eisgruber’s footnote does not, however, make the Stevens-vs.-Rehnquist story untrue.

² Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 NYU ANN. SURV. AM. L. xxix, xxx (footnote omitted).

³ See Christopher L. Eisgruber, *Justice Stevens will not be easily replaced*, L.A. TIMES, Apr. 20, 2010, articles.latimes.com/2010/apr/20/opinion/la-oe-eisgruber-20100420 (vis. May 15, 2010).

⁴ Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 NYU ANN. SURV. AM. L. at xxx n.1.

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Indeed, there are reasons to believe it is true, most notably the reputations of the storytellers. In addition to Eisgruber, who is now the provost of Princeton University, tellers of the Stevens-vs.-Rehnquist story include a former president of the ABA and of Florida State University (Talbot D'Alemberte),⁵ a leading Supreme Court journalist (David G. Savage of the *Los Angeles Times*),⁶ and, most recently, a Stanford Law School professor and former Stevens clerk who is co-director of the school's Supreme Court Litigation Clinic (Jeffrey L. Fisher).⁷

But the story of a kind Justice Stevens rescuing the helpless lawyer from an abusive Chief Justice Rehnquist is nevertheless not true. Here is what really happened, from the Court's official transcript.⁸ On January 11, 1989, the Court heard argument in *Barnard v. Thorstenn*.⁹ The petitioners were represented by Maria Tankenson Hodge. During the first few minutes of her argument, Hodge correctly addressed members of the Court as "Justice" when answering their questions, except for one slip, when she said "Judge."¹⁰ After a second slip, Justice Sandra Day O'Connor spoke up, "I think we're generally called Justice." Hodge replied briefly and directly: "I'm

⁵ Talbot D'Alemberte, *Oral Argument: The Continuing Conversation*, 25 LITIGATION 12, 13 (Winter 1999).

⁶ David G. Savage, *A Justice Born for the Ages*, L.A. TIMES, Apr. 19, 2002, at 1.

⁷ Susan Estrich, Eduardo M. Peñalver, Jeffrey L. Fisher, Cliff Sloan, Deborah N. Pearlstein & Joseph Thai, *My Boss, Justice Stevens*, N.Y. TIMES, Apr. 9 & 11, 2010, www.nytimes.com/2010/04/11/opinion/11stevens.html (vis. Apr. 24, 2010).

⁸ Essential pages of the transcript are reproduced below at pages 270-272.

⁹ 489 U.S. 546 (1989).

¹⁰ Official Transcript Proceedings Before the Supreme Court of the United States, *Barnard v. Thorstenn*, Jan. 11, 1989, at 3, 5, 6 & 8 (available at the National Archives and in Lexis's "United States Supreme Court Transcripts" database). I have listened to a recording of the *Barnard* argument to confirm the transcript's accuracy. *Hear* www.oyez.org/cases/1980-1989/1988/1988_87_1939 (vis. Apr. 24, 2010). The transcript does seem to be accurate. On the recording, it sounds as though the questioner first addressed as "Judge" was Rehnquist. He neither objected to the mistake nor interrupted the lawyer, and the lawyer did not apologize. *Id.*; see Official Transcript at 5-6; compare text accompanying note 2 above.



*The Supreme Court that heard argument in *Barnard v. Thorstenn* on January 11, 1989. Back row, left to right: Antonin Scalia, John Paul Stevens, Sandra Day O'Connor, and Anthony Kennedy. Front row: Thurgood Marshall, William Brennan, William Rehnquist, Byron White, and Harry Blackmun.*

sorry. I apologize, Justice O'Connor." O'Connor made no comment in response to the apology, and continued her questioning of Hodge.¹¹ About six minutes later,¹² Hodge had an exchange with Stevens:

Question: It seems to me that burden would – might be alleviated somewhat if you had more lawyers?

Ms. Hodge: Well that – it might be alleviated if we had more lawyers who were actually there, Judge – Justice, excuse me, Justice Stephens [*sic*]. But it cannot be –

¹¹ See Official Transcript at 8 (page 271 below).

¹² Hodge's "Judge" exchanges with O'Connor and Stevens appear about 5 minutes and 40 seconds apart in the recording at oyez.org, and six pages apart in the transcript. Hear www.oyez.org/cases/1980-1989/1988/1988_87_1939; see Official Transcript at 8, 14 (pages 271, 272 below).

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Question: Well, your, your mistake in calling me Judge is also made in Article III of the Constitution, by the way.

(Laughter.)

Ms. Hodge: I do, do apologize. But it is not alleviated, if you have attorneys of record on cases for whom . . .

Shortly thereafter, Hodge made one more “Judge” slip, at which point she said, “I’m going to stop addressing people.”¹³ Her argument then wound on to its conclusion without any more titular mishaps.

So, when and how and why did the unnamed Stevens clerks who handed the story down to Eisgruber: (1) convert O’Connor’s straightforward correction of Hodge into mortifying criticism intoned by an increasingly irritated member of the Court; (2) delete several minutes of oral argument so that Stevens’s later freestanding remark was woven into the earlier O’Connor-Hodge exchange; (3) morph O’Connor into Rehnquist; (4) fabricate a long, hand-wringing apology by Hodge; and (5) rewrite Stevens’s amusing and constitutionally correct one-liner into a chivalrous intervention?¹⁴ I suspect we will never know.¹⁵ But I will hazard one supposition and one suggestion.

The supposition: Suppose that when George Lucas created *Star Wars* he had done things differently with Obi-Wan Kenobi (the leading character on the side of good) and Darth Vader (his evil counterpart).¹⁶ Suppose that although Kenobi and Vader were ri-

¹³ Official Transcript at 15.

¹⁴ Also, the *Barnard* recording and transcript show that Hodge was not “stumbling through an argument”; rather, she seems to have performed reasonably well.

¹⁵ There may be a plausible scenario in which someone outside the Stevens clerical circle crafted and perpetuated the story, but I have not been able to think of one. (Recall that *Barnard* was argued in January 1989 and Eisgruber clerked for Stevens in 1989-90, leaving little time for anyone to intervene in the development of the Stevens-vs.-Rehnquist story before it reached Eisgruber’s ears. See notes 3 & 10 above.)

¹⁶ See *Star Wars Episode IV: A New Hope* (1977); GEORGE LUCAS, *STAR WARS: A NEW HOPE, FROM THE ADVENTURES OF LUKE SKYWALKER* (1976; 1993 prtg.).

vals, they agreed most of the time – say, 63.6% of it.¹⁷ And when they did disagree, they did it civilly and in print, or discreetly behind closed doors.¹⁸ Moreover, both Kenobi and Vader were fun and fine human beings, liked and respected by their minions and peers.¹⁹ And they wore matching black robes.²⁰ Not surprisingly, conflicts between two such powerful public figures over weighty and controversial topics were widely followed and debated. Yet because those clashes were between two such able, reasonable, peace-loving characters (surrounded by others of the same sort²¹), they did not descend into saber-duels and civil war.

With such a cast, *Star Wars* would have flopped. Without the contrast of Vader’s nasty evilness, Kenobi’s noble goodness would not have glowed with sufficient cinematic brightness. And where would Lucas have found seat-edge drama if conflicting positions taken by the two tended to fall within the range (sometimes wide) held by decent members of civilized society? Kenobi would have been no less noble and his lifelong drive to vindicate his values no less worthy, but neither would have been quite so exceptional or exciting. My impression, based mostly on second- and third-hand information, is that Obi-Wan Stevens is an admirable person and a valuable public servant, and that Darth Rehnquist was too. We should be grateful that we live in a world where a little fabrication is

¹⁷ The rate at which Rehnquist and Stevens agreed during the Court’s 1988 Term, when *Barnard* was argued. *The Statistics*, 103 HARV. L. REV. 394, 395 (1989). It was a middling rate for both. Stevens had higher rates of agreement with Justices William Brennan (72.7%), Thurgood Marshall (73.6%), and Harry Blackmun (73.8%), and lower with the rest, while Rehnquist’s rates were higher with Justices Byron White (88.0%), Sandra Day O’Connor (93.4%), Antonin Scalia (82.3%), and Anthony Kennedy (92.1%). *Id.*

¹⁸ As all members of the Court tend to do these days.

¹⁹ As Stevens is and Rehnquist was. *See, e.g.*, notes 2 & 5-7 above; *Symposium: The Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1557 et seq. (Mar. 2006); *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1 (2005); Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, at A16.

²⁰ *See, e.g.*, photograph on page 266 above.

²¹ *See, e.g., id.*

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necessary to tell a story in which a good Justice fences with an evil one on our Supreme Court. Not because we lack Kenobi-caliber Justices, but, rather, because there seem to be no Vader-caliber villains on the Court for them to resist.

The suggestion: Unintended irony is heavy in the Stevens-vs.-Rehnquist story. The storytellers – Eisgruber (who told the story in 1993), followed by D’Alemberte (1999), Savage (2002), and Fisher (2010) – tell it both (a) to display Stevens’s own kindness, wit, and good manners, and (b) to emphasize the value of those characteristics in good judges generally.²² But the story itself is infused with an unkind and false portrayal of one of Stevens’s colleagues.²³ It is just the sort of story that would not be told by the Justice Stevens portrayed in the story.

Many members of the bar, the media, and the academy will participate in President Barack Obama’s attempt to fill the gap left by Stevens’s departure from the Supreme Court. We might do well to wish for the nominee (and the Court) the kind of treatment from them that Ms. Hodge received from Justice Stevens, and not the kind that Chief Justice Rehnquist has received from some of Stevens’s clerks.



²² See notes 2 & 5-7 above.

²³ As well as an unfair belittling of counsel before them. See note 14 above.

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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

GEOFFREY W. BARNARD, ETC., Petitioner V. SUSAN
ESPOSITO THORSTENN, ET AL.; and
VIRGIN ISLANDS BAR ASSOCIATION, Petitioner
V. SUSAN ESPOSITO THORSTENN, ET AL.

CAPTION:

CASE NO: 87-1939 & 87-2008

PLACE: WASHINGTON, D.C.

DATE: January 11, 1989

PAGES: 1 thru 60

ALDERSON REPORTING COMPANY
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1	mainland.
2	MS. HODGE: Yes, Justice, I --
3	QUESTION: With similar problems, in some
4	respects, at least as to transportation and distance.
5	MS. HODGE: The problems in Guam that I'm
6	reluctant to comment on would be those that exceed the
7	question of being a long way away across water.
8	QUESTION: And how has Guam dealt with this
9	problem? A little differently.
10	MS. HODGE: We are told -- we are told that
11	since the decision of this Court in Frazier, that Guam
12	has rescinded its absolute prohibition on non-resident
13	admissions and has adopted a rule which requires
14	non-resident lawyers to have a local lawyer with whom
15	they are affiliated, who appears with them in all
16	proceedings and signs all pleadings with them.
17	QUESTION: How would that work in the Virgin
18	Islands?
19	MS. HODGE: We don't think that it would work,
20	Judge, for several reasons. First of all --
21	QUESTION: I think we're generally called
22	Justice.
23	MS. HODGE: I'm sorry. I apologize, Justice
24	O'Connor.
25	QUESTION: What -- how do you think that would

1 that is a total failure, Justice Stephens. It does
2 function.

3 QUESTION: Maybe you -- maybe you ought to get
4 a new system, is --

5 MS. HODGE: We are able to call the United
6 States. As a matter of fact, the District Court said
7 that service has improved over the last ten years.

8 But it has not improved to the point at which
9 the court is comfortable relying on telephone
10 conferences as a substitute for an attorney's presence,
11 because the court, as we've pointed out, has a really
12 unusual judicial burden.

13 QUESTION: It seems to me that burden would --
14 might be alleviated somewhat if you had more lawyers?

15 MS. HODGE: Well that -- it might be
16 alleviated if we had more lawyers who were actually
17 there, Judge -- Justice, excuse me, Justice Stephens.
18 But it cannot be --

19 QUESTION: Well, your, your mistake in calling
20 me Judge is also made in Article III of the
21 Constitution, by the way.

22 (Laughter.)

23 MS. HODGE: I do, do apologize. But it is not
24 alleviated, if you have attorneys of record on cases for
25 whom the court must wait, who are not there, who call

