



OF FACTS & FANTASIES

JUSTICE STEVENS AND THE JUDGE / JUSTICE STORY

Jeffrey L. Fisher

IN A RECENT ARTICLE in this publication, Professor Ross E. Davies took me and several other former clerks for Justice Stevens to task for telling an oft-repeated story about the Justice.¹ In the story, first written for public consumption by Professor Christopher Eisgruber, one of Justice Stevens' law clerks during the October 1989 Term, a "nervous lawyer was stumbling through an argument," and several times addressed members of the Court as "Judge." Chief Justice Rehnquist became irritated and eventually interrupted the lawyer to say that members of the Supreme Court are "Justices," not "Judges." As the lawyer apologized, Justice Stevens interjected that the lawyer should not feel too badly, since the Constitution makes the same mistake.²

Professor Davies allows that this is a "pleasing anecdote, if one is an admirer of Stevens."³ But he contends that the anecdote also has

Jeffrey Fisher, an associate professor of law at Stanford Law School, clerked for Justice Stevens during the October 1998 Term. Editors' note: Ross Davies, who is an editor of the Green Bag, voted in favor of publishing this article but took no part in editing or proofreading it.

¹ Ross E. Davis, *Obi-Wan Stevens vs. Dearth Rehnquist*, 13 Green Bag 2d 263 (2010).

² Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 NYU Ann. Surv. Am. L. xxix, xxx (footnote omitted). I recently repeated the story in *My Boss, Justice Stevens*, N.Y. Times, Apr. 9 & 11, 2010.

³ Davies at 264.

an unbecoming underside: It is “infused” with an “unkind” portrayal of William Rehnquist as an “irritable” and “pompous bully” who “mortif[ie]d” a “helpless lawyer.”⁴ Worse yet, according to Professor Davies, “the story of a kind Justice Stevens rescuing the helpless lawyer from an abusive Chief Justice Rehnquist is . . . not true.”⁵ In *Barnard v. Thorstenn*,⁶ which was argued on January 11, 1989, Justice O’Connor, not Chief Justice Rehnquist corrected a lawyer who used the word “Judge”; she did so politely; the lawyer did not seem to be “stumbling”; and Justice Stevens did not intervene until later in the argument when the lawyer used the word “Judge” again.⁷

What to make of this discrepancy? Professor Davies surmises that the story, as told by Justice Stevens’ clerks, is really “a clerical fantasy.”⁸ The clerks, in Professor Davies’ witty analogy, cast Chief Justice Rehnquist as a sort of Darth Vader, in order to contrast Vader’s “nasty evilness” with “Obi-Wan Stevens” “noble goodness.”⁹ In other words, if I understand Professor Davies’ criticism correctly, Justice Stevens law clerks during the 1988 Term were guilty of “fabricat[ing]” history at the expense of the integrity and reputation of Chief Justice Rehnquist.¹⁰ And subsequent law clerks multiplied the libel over the years through repetition without verification.

This is a substantial charge. And so it becomes important to sort out fact from fantasy. I will start with a disclosure and an observation. The disclosure: When I told the story recently, I assumed from the several times it has been told over the past two decades in journals and newspaper articles – as well as from an assurance from

⁴ Id. at 264-65, 267, 269. I realize that many of these adjectives are taken from different descriptions of the exchange, but I want to be careful to use Davies’ words, since none of the clerks’ renditions of the story characterize Rehnquist’s behavior.

⁵ Id. at 265.

⁶ 489 U.S. 546 (1989).

⁷ Davies at 266-67 & n.14.

⁸ Id. at 263.

⁹ Id. at 268.

¹⁰ Id. at 267-69.

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a lawyer (unconnected to Justice Stevens) who told me that he was in the room when it happened – that the story was true.¹¹ In the few hours I had to prepare my contribution to the *New York Times* op-ed page on the day Justice Stevens announced he was retiring, I did not confirm its accuracy by reference to any oral argument transcript.¹²

The observation: the fact that one exchange during one oral argument during Chief Justice Rehnquist's tenure deviates from the judge/justice story many of us have told does not mean that the exchange we have recounted never happened in some *other* argument.

Did the exchange occur in a different case? I do not know. Having now taken some time to research the matter, I have not been able to find the exact exchange that has been recounted over the years.¹³

But even assuming that the exact exchange never took place, there is a much more plausible explanation for the inaccuracy than Professor Davies' surmise of sinister or uncaring law clerks fabricating history. Earlier in the same Term that *Barnard* was argued, the Court heard argument in another case in which an extremely nervous lawyer, stumbling through her first Supreme Court argument, repeatedly referred to the Justices as "Judges." The case was *Teague v. Lane*.¹⁴ Five minutes into the argument, the following exchange occurred:

¹¹ For places besides the Eisgruber piece in which the story is recounted, see Talbot D'Alemberte, *Oral Argument: The Continuing Conversation*, 25 *Litigation* 12, 13 (Winter 1999); David G. Savage, *A Justice Born for the Ages*, *L.A. Times*, Apr. 19, 2002, at 1.

¹² I made this disclosure to the *New York Times* when I submitted the piece as well.

¹³ It is difficult to search oral argument transcripts from the time the story allegedly took place (sometime around the 1988 Term). For example, Westlaw's coverage of oral arguments does not begin until the 1990 Term, leaving one no alternative than reading page-by-page through each transcript of oral argument from the previous four terms of Chief Justice Rehnquist's tenure. I have not done that.

¹⁴ 489 U.S. 288 (1989) (argued Oct. 4, 1988).

Ms. Unsinn: Well, Judge, it was certainly a conclusion—

Question: Yes, I'm the Chief Justice, I'm not a judge.

Ms. Unsinn: – Pardon me, Justice Rehnquist.¹⁵

The audio of this oral argument is available online.¹⁶ I'm not sure whether Chief Justice Rehnquist's tone should be described as "abusive" (Davies' word), but I think it is entirely fair to characterize it as "irritated" (Eisgruber's word) or "stern[er]" (mine). And the lawyer certainly sounds quite shaken. In any case, I will let interested readers listen and decide for themselves.

So the Rehnquistian predicate to the law clerks' story did, indeed, take place. In fact, similar episodes took place with some regularity during this general time period. In *United States v. R. Enterprises, Inc.*,¹⁷ Chief Justice Rehnquist interrupted a lawyer who called him "judge" with the statement: "I'm the Chief Justice, not Judge."¹⁸ The lawyer responded: "I'm sorry. I beg your pardon, Your Honor. I apologize for that."¹⁹ In other arguments, Chief Justice Rehnquist admonished lawyers who called him simply "Justice." "I'm the *Chief* Justice," he would intone.²⁰

¹⁵ http://www.oyez.org/cases/1980-1989/1988/1988_87_5259/argument.

Note that the lawyer is so nervous that she still forgets to use the word "Chief" in her apology.

¹⁶ See http://www.oyez.org/cases/1980-1989/1988/1988_87_5259. The exchange excerpted above appears at the 4:57 mark.

¹⁷ 498 U.S. 292 (1991).

¹⁸ 1990 WL 601352, at 40 (argued Oct. 29, 1990). The audio is available at http://www.oyez.org/cases/1990-1999/1990/1990_89_1436, and the exchange takes place at the 40:30 mark.

¹⁹ *Id.*

²⁰ See *United States v. Gaubert*, 499 U.S. 315 (1991), oral argument transcript at 1990 WL 601416 (argued Nov. 26, 1990), at 23-24 ("Mr. Lowell: Justice Rehnquist, I think the Fifth Circuit followed – Question: I'm the Chief Justice. Mr. Lowell: – your precedents to a letter. They start with – Question: I'm the Chief Justice. Mr. Lowell: Sorry. Mr. Chief Justice, I do suggest that the Fifth Circuit followed your precedents to the letter."); *Mu'Min v. Virginia*, 500 U.S. 415 (1991), oral argument transcript at 1991 WL 636497 (argued Feb. 20, 1991), at 16-17 ("Mr. Blume: Justice Rehnquist, I think the term individual – Question: I'm the Chief Justice. Mr. Blume: I'm sorry, Chief Justice

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Still, in none of these arguments did Justice Stevens interject his observation about Article III in order to “rescu[e]” the lawyer²¹ or otherwise to ease the tension. So where does that leave us?

In terms of separating fact from fantasy, it seems that Professor Davies is correct that the full judge/justice story recounted over the years never happened in any single oral argument. In that respect, his article properly reminds us of the limitations of oral histories (even those that have been reduced to writing). And his article serves a valuable function in correcting the historical record.

At the same time, Davies’ suggestions that Justice Stevens’ clerks “fabricate[d]” an episode from the 1988 Term that unfairly cast Chief Justice Rehnquist in an unfavorable light²² appears mistaken as well. Both elements of the story – (1) Chief Justice Rehnquist’s interrupting a nervous lawyer to insist that she use the word “justice” instead of “judge” and (2) Justice Stevens’ quip about the Constitution making the same mistake – did happen during that Term, and in that order. In fact, one of the two elements – Chief Justice Rehnquist’s part – occurred several times around that general period. Thus, what appears to have happened is that, one way or another, two exchanges from two arguments – *Teague* and *Barnard* – got stitched together into one. I’ll not speculate on how that might have happened, except to observe that both exchanges arose from the same error by an oral advocate and thus make for a natural coupling during law clerk chatter.

Nor do I want to speculate on Davies’ reasons for conjuring up the more sinister (and more entertaining) scenario in which Justice Stevens’ law clerks eschewed easily discernible facts in order to fashion a more entertaining clash between “nasty evilness” and “noble goodness.”²³ I will simply point out the irony that his article

Rehnquist.”); *Burlington N. RR Co. v. Ford*, 504 U.S. 648 (1992), oral argument transcript at 1992 WL 687557 (argued April 20, 1992), at 12 (“Mr. Christian: This has historical precedent in Montana, Justice Rehnquist. Question: I’m the Chief Justice. Mr. Christian: I apologize, Mr. Chief Justice.”).

²¹ Davies’ interpretation of the story at 265.

²² Id. at 267-68.

²³ Id. at 268.

might be susceptible to the very same charge that he levies upon the clerks. Had Professor Davies done some additional research, he would quickly have learned that *Barnard* was not the only relevant argument in which judge/justice exchanges took place, and that Chief Justice Rehnquist often castigated lawyers for making the very mistake that the judge/justice story recounts.

This still leaves the question whether the judge/justice story, as told by the law clerks, is improper insofar as it is simply “unkind” to Chief Justice Rehnquist.²⁴ I’ll admit that I hesitated to recount the story in *The New York Times* for fear that someone might interpret it as casting an implicit aspersion on him. In the draft I submitted to the paper, I thus stated my belief that Justice Stevens’ quip was not “meant to show up Chief Justice Rehnquist – a man whom he liked and respected.”²⁵ But the *Times* edited out that clarification, apparently preferring to let the story stand on its own.

Even when revised so that one understands that the story’s two components come from two different oral arguments, I think it does indeed stand on its own. Based on my limited experience as a law clerk, and subsequently as an attorney at the lectern, Chief Justice Rehnquist was a warm and unpretentious person with his friends and colleagues. He was a dedicated public servant. But there can be no denying that he could be intimidating and stern on the bench, particularly in relation to first-time lawyers giving less-than-stellar arguments. I am not here to pass judgment on that practice (I don’t think it necessarily betrays some character flaw, let alone evilness), but only to observe it as a fact.

Besides, Chief Justice Rehnquist’s role in the judge/justice story is really just a set up guy – not an adversary. In order to understand Justice Stevens’ reference to Article III, the listener needs to know that someone on the Court asked a lawyer to use the term “Justice” instead of “Judge.” Whether that person was Chief Justice

²⁴ Id. at 269.

²⁵ Email of Jeffrey L. Fisher to New York Times (April 9, 2010). I wrote in full: “The point of this story is not that Justice Stevens meant to show up Chief Justice Rehnquist – a man whom liked and respected. Rather, the story reveals Justice Stevens’ view of himself and the Court.”

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Rehnquist or someone else is not of central importance.²⁶

And what does the story – again, in its revised form – tell us about Justice Stevens? Let me simply repeat the words I wrote at the end of my essay for the *Times* – commentary that the paper also edited out and thus that I publish for the first time here:

Justice Stevens is modest and self-effacing. He is smart and independent, often relying more on matter-of-fact legal insights than exalted theory to decide cases. And he is a *judge* in the great common law tradition. He has always paid close attention to the facts and practicalities of cases, eschewing ideology as a substitute for careful analysis.

Our Nation will miss his service deeply.²⁷



²⁶ Even if a listener insisted that the story inescapably compares Chief Justice Rehnquist with Justice Stevens in this context, it would not necessarily be misleading. Justice Stevens did think that “the Chief,” as he called him when I clerked, was sometimes too hard on lawyers. I remember one day, in particular, in which we discussed in chambers the Chief’s treatment of an attorney earlier that day. Justice Stevens shook his head and told us that at that moment he had “wanted to crawl under the bench.”

²⁷ Email of Jeffrey L. Fisher to the New York Times (April 9, 2010).