



DID YOU HEAR THE ONE ABOUT CHIEF JUSTICE BURGER AND THE ITINERANT LITIGANT?

BEHIND-THE-SCENES HUMOR AT THE
SUPREME COURT

Todd C. Peppers

OVER THE LAST DECADE, a handful of impertinent scholars have injected some needed levity into the study of the Supreme Court. The chief instigator of this small but growing field is Boston University Law School Professor Jay Wexler, who has published a series of tongue-in-cheek articles on judicial humor.¹ Using transcripts of oral argument before the Supreme Court, Professor Wexler answered the eternal question “who is the funniest justice?” by tracking the number of laughs generated by the individual justices, concluding in both his 2005 and 2007 studies that Associate Justice Antonin Scalia de-

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¹ See Jay D. Wexler, “Laugh Track,” *The Green Bag* 9 (Autumn 2005): 59-61; Jay D. Wexler, “Laugh Track II – Still Laughin’!” *Yale Law Journal Pocket Part* 117 (2007): 130.

served the crown as High Court punster. Despite (or perhaps because of) its light-hearted nature, Professor Wexler's research has had a surprising impact – triggering one serious academic study,² capturing the attention of the popular press,³ and encouraging a few intrepid journalists and legal scholars to look for other examples of judicial humor.⁴

What these studies erroneously assume, however, is that the justices are *solely* responsible for introducing needed laughter to the Court's dusty halls. While public evidence of judicial humor may be found at oral argument and in written opinions, a small group of previously overlooked individuals have also worked behind the scenes to bring mirth and merriment to the Marble Palace. Who are these "junior jesters" who struggle mightily to bring smiles to the stern countenance of Lady Justice? They are the young men and women who serve as law clerks to the Court's justices.

One remarkable example of law clerk humor is located at the Lewis F. Powell, Jr. Archives, housed at the Washington and Lee School of Law. Hidden away in Justice Powell's papers is a videotape of the June 27, 1987 reunion of his law clerks. This was a particularly significant reunion for the Powell family of clerks, since the Justice had announced his retirement from the Supreme Court on the previous day. Given Justice Powell's reputation of being a reserved and serious man, and the reunion's timing, I expected the

² Ryan A. Malphurs, "'People Did Sometimes Stick Things in my Underwear:' The Function of Laughter at the U.S. Supreme Court," *Communication Law Review* 10, Issue 2 (2010): 48-75.

³ Adam Liptak, "A Taxonomy of Supreme Court Humor," *New York Times*, January 24, 2011; Debra Cassens Weiss, "Scalia Teases Breyer the Most, and Gets the Most Laughs, New Study Concludes," *American Bar Association Journal*, January 18, 2011; Robert Barnes, "Supremely Funny: Study Covers Court's Penchant for Laughter," *Washington Post*, January 17, 2011; Adam Liptak, "So, Guy Walks Up to a Bar and Scalia Says," *New York Times*, December 31, 2005.

⁴ Bill Mears, "Justice Kagan Stays Alert With a Little Bench Humor," CNN.com, June 16, 2011; Dahlia Lithwick, "He'll Be Here All Week. The Verdict is In: John Roberts is Hilarious," *Slate Magazine*, March 1, 2011; Warren Richey, "Elena Kagan Shows Off Sense of Humor in Confirmation Hearings," *Christian Science Monitor*, June 30, 2010.

ODE TO THE SUPREME COURT

John J. Buckley, Jr.

I think that I shall never see
Save in some idyllic reverie
A sight so fair or place serene
As this our noble Court Supreme.

Nine Justices there grant all relief
Decreed in the name of their Burger Chief
A man of discerning vision and snowy mane
To whom no legal maxim is ever plain.

His opinions are studied for all they are worth
In reasoning, and research, and in unending mirth,
But to him there is really no greater perdition
Than that the Court might ever actually grant a petition.

“A case unheard,” he says, “never causes commotion,
And leaves more time for my latest promotion . . .”

videotape to contain heartfelt but serious (if not long-winded and teary-eyed) speeches by a handful of former clerks about the Justice, his service to the Court, and his place in the pantheon of great justices. What I watched, however, was a rollicking and irreverent affair that seemed more appropriate for *Comedy Central* than *C-SPAN*. In other words, what I found was a rare record of law clerks' humor.



Justice Powell was a native Virginian and a graduate of the Washington and Lee School of Law. He spent the majority of his legal career in private practice in Richmond, Virginia, before he was nominated to the Supreme Court by President Richard M. Nixon. Although Powell had declined an earlier attempt by Nixon to nominate him to the Court and accepted the nomination reluctantly, he

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later came to embrace his role as a justice and served on the Court from 1972 to 1987. Considered to be the critical “swing” vote on a Court divided between conservative and liberal factions, Powell was a reserved and courtly individual who was genuinely liked by his colleagues. Fellow Justice Sandra Day O’Connor once wrote that, “for those who seek a model of human kindness, decency, behavior, and integrity, there will never be a better man.”⁵ (Perhaps O’Connor was biased, since she and Powell made history by being the first Supreme Court justices to dance together in public.⁶)

Justice Powell and his law clerks held a reunion every June. In the early years of his tenure, the number of current and former law clerks was sufficiently small to allow Justice and Mrs. Powell to host reunion dinners at their Harbor Square apartment. By approximately 1976, however, the growing number of former clerks required a larger space, and the reunion dinners began to be held on Saturday night in the Supreme Court’s East Conference Room. The next morning, Justice and Mrs. Powell would host a brunch for the clerks and their spouses at the Alibi Club, an exclusive establishment located on I Street, N.W., in Washington. Former law clerk John J. Buckley, Jr. recently recalled that Justice Powell took great pride in the fact that so many clerks returned for the reunions, adding that “the large turnout was a remarkable tribute to the Justice.”⁷

According to Powell biographer (and former law clerk) John C. Jeffries, Jr., when Justice and Mrs. Powell joined the law clerks for dinner and entertainment on Saturday evening:

By common consent, the master of ceremonies was John J. Buckley, Jr. Taking off from some case or incident in the term just ended, Buckley would concoct an irreverent review of the Court’s work. Powell came in for much kidding, but somehow the sharpest points always targeted Chief Justice Burger, whose rich baritone Buckley mim-

⁵ Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (New York: Random House, 2003): 150.

⁶ “Justice Powell, Hailed for his Grace, is Buried,” *New York Times*, September 1, 1998.

⁷ Author’s Interview with John J. Buckley, Jr.

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icked to perfection. Powell would then speak briefly, and his remarks also took a standard form. After genially rebuking Buckley's impertinence and thanking Gail Galloway and Sally Smith for arranging the dinner, he would praise his clerks for the term just ended and introduce those selected for the next one. Somewhere along the way, Powell would reflect on the events of the past year and close by saying once again how much he and Jo enjoyed the association with their chambers family.⁸

The dissimilarity of the speeches given by Buckley and Powell contributed to the evening's general humor. "What was funny for me was the utter contrast between the two presentations," recalled former law clerk J. Harvie Wilkinson III. "You had the reserved and dignified Justice Powell and then John gets up and pokes fun at everyone under the sun. It was gentility versus irreverence."⁹

Buckley was a native of Larchmont, New York, who graduated from Georgetown University and the University of Chicago Law School, and clerked for Fifth Circuit Court of Appeals Judge John Minor Wisdom, before clerking for Justice Powell during October Term 1973. Buckley's co-clerks during that Term were John Jeffries, Jr.¹⁰ and Jack B. Owens.¹¹ The office staff was rounded out by secretaries Gail Galloway¹² and Sally Smith and messenger Spencer Campbell.

⁸ John C. Jeffries, Jr., *Justice Lewis J. Powell, Jr.: A Biography* (New York: Fordham University Press, 2001): 547-48.

⁹ Author's Interview with J. Harvie Wilkinson III.

¹⁰ A graduate of Yale University and the University of Virginia School of Law, Jeffries is presently the David and Mary Harrison Distinguished Professor of Law at the University of Virginia and the author of the critically acclaimed biography cited above.

¹¹ A graduate of Stanford University and Stanford Law School, Owens clerked for Judge Frederick G. Hamley of the United States Court of Appeals for the Ninth Circuit before clerking for Justice Powell. After his clerkship, Owens worked in private practice in Washington, D.C. and San Francisco before becoming general counsel at E. & J. Gallo Winery.

¹² In 1976, Galloway was selected to head the Office of the Curator of the Supreme Court – a position that she held until 2002.



John Buckley (left) and Justice Lewis Powell at the 1991 Powell clerk reunion.

Of all their experiences in the Powell chambers, what appears to have been most memorable to the three young law clerks was the “unique climate” of the Powell chambers.

The Justice’s office seemed to be enveloped by a perpetual heat wave. Anyone who entered was immediately met by a blast of hot, humid air. Oddly enough, this heat wave affected only his office; the other parts of the Chambers were just fine. The passing seasons failed to bring any relief, and the Justice’s office remained a constant 90 degrees. Having studied this phenomenon for several months, we concluded that the unrelenting heat was not attributable to any defect in the building’s heating or cooling system, but to the Justice’s own clear preference for such an environment. That

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preference was possibly explained by the fact that, as a Richmonder, he was accustomed to hot and humid weather. Perhaps, his service in North Africa during World War II reinforced this urge to recreate the tropics. Also, he held the Southern seat on the Court and undoubtedly took this responsibility very seriously. (Unfortunately, this Southern motif was incomplete, since his office had no Coke machine).¹³

The October Term 1973 clerks began to suspect, however, that the sultry climate also served to wear down those law clerks who tried to linger in Justice Powell's office and take issue with his opinion drafts. If this was Powell's plan, it worked to perfection. The clerks recall:

Being a Yankee, John Buckley was particularly vulnerable to the "Hot Box" treatment. Without fail, he would begin to wither in the heat after about five minutes. As the Term progressed, and cases became more difficult, he began to consult medical texts on heat prostration, heat stroke, and the like. Still, his ability to bear the tropical temperatures was limited, and as a result, John found himself more readily agreeing with the Justice as the months went by. John Jeffries, hailing from North Carolina, was a bit more successful in his meetings with the Justice. Even then, John had gone to Yale and his four years in New Haven began to show after awhile. Jack Owens was fresh from the Air Force and the product of military discipline. There were times, however, when even Jack was forced to divulge more than his name, rank and serial number.¹⁴

The climate, however, was not the only fearsome thing in the Justice's office. A close second was Powell's Dictaphone, which the law clerks nicknamed "Jaws" for the way it managed to chew up their legal memoranda. "At first glance, we did not appreciate the awesome power of that instrument," they have explained. "We later

¹³ John J. Buckley, Jr., John C. Jeffries, Jr., and Jack B. Owens, "Remembrances of Terms Past" (on file with the *Green Bag*).

¹⁴ "Remembrances."

learned . . . that it was by the Dictaphone that the Justice ruled the Chambers. . . . The Court armed [Powell] with an inexhaustible supply of tapes, and, absent a power failure, there was no way to stop him.”¹⁵

When not firing rubber bands into the ornate light fixtures that hung from the chambers’ high ceilings (the goal was to fire the rubber bands at just the right angle and speed as to land them in the well of the fixture, where they caught on fire) or worrying about properly ordering the Justice’s Saturday lunch (Powell insisted on a hamburger without pickles, prompting the clerks to ponder, punningly, whether he “should recuse himself in any case involving a manufacturer of that particular commodity, lest it suddenly find itself ‘caught in a pickle’ of the Justice’s making”¹⁶), the October Term 1973 clerks fretted about the peculiar rules about cert. pool memoranda.¹⁷

Under procedural rules dictated by Chief Justice Burger, each chambers participating in the cert. pool was required to send the original of each cert. pool memo to the Chief Justice; photocopies of the original memo went to the Associate Justices. Diligently following these instructions, the Powell clerks were surprised when the Chief Justice’s senior law clerk announced that the Powell chambers was mistakenly using “the wrong type of paper” while preparing the memos. The Chief Justice wanted the memos prepared on paper with *round*, not square edges. “Of course, we were eager to please the Chief Justice and only too happy to mend our ways,” write the clerks. “We asked, however, why the Chief Justice wanted round edges, rather than square edges. ‘Paper cuts!’ said [the senior Burger clerk]. ‘The Chief gets paper cuts from square

¹⁵ “Remembrances.”

¹⁶ “Remembrances.”

¹⁷ Since the early 1970s, it has been the practice of the majority of the justices to pool cert. petitions and divide their review among the participating chambers, with law clerks drafting memoranda making recommendations for the petitions’ disposition. On the current Roberts Court, only Justice Samuel Alito is not a member of the cert. pool. Adam Liptak, “A Second Justice Opts Out of a Long-time Custom: The Cert. Pool,” *New York Times*, September 25, 2008.

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edges.” This violation of procedural rules, and its impact on the Chief Justice’s health, haunted the Powell clerks.

Needless to say, we were distressed at the possibility of our having inflicted damage on the digits of the Chief Justice of the United States. Moreover, we were concerned that even the round edges might not provide adequate protection. John Buckley proposed that we personally purchase and present to the Chief Justice several sets of surgical gloves that he could wear when reading the memos. If necessary [the Chief’s principal clerk, Ken] Ripple could assist the Chief, in the fashion of a medical orderly, by pulling the gloves over the Chief’s hands, so that he would not have to touch any of the memos in an unprotected fashion. But, since we heard no more complaints about paper cuts, it was not necessary for us to actually make this proposal.¹⁸

Notwithstanding their light-hearted summary of October Term 1973, the clerks readily acknowledge the rare gift they received in clerking at the Supreme Court. “I shall never know how I managed to be so fortunate to obtain a clerkship with the Justice,” writes Buckley, “but I think I shall always regard that experience as the most treasured of my legal career.”¹⁹ Buckley adds, however, that his accent may have helped secure the clerkship. “One possible explanation was, however, offered by the Justice when he confessed that it took him three months before he began to understand anything I said. ‘Joh-on, . . . You . . . New . . . Yorkers . . . talk . . . too . . . fast,’ he said. I then knew why the Justice simply smiled and nodded whenever I had said anything during that period. I had thought that, with his usual discernment, he had been acknowledging legal brilliance.”²⁰

This was the hothouse environment in which Buckley’s humor was cultivated.



¹⁸ “Remembrances.”

¹⁹ Autobiographical Sketch by John J. Buckley, Jr. (on file with the *Green Bag*).

²⁰ Buckley Autobiographical Sketch.

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As for his role as reunion roast master, Buckley recalls that he stood up and made a few humorous remarks at one of the first law clerk reunions. “My comments were well received,” recalls Buckley, “and I got the gig.”²¹

Once Buckley formally assumed the role of the reunions’ jester, he often prepared for “the gig” by structuring his comments around a specific theme. At one reunion (after the Justice had retired), Buckley parodied a recent “60 Minutes” piece which investigated whether the public was getting its “money’s worth” from the retired justices. In his remarks, Buckley announced that he was mounting his own investigation with funds from the Supreme Court Curator’s Office. On another occasion, Buckley’s comments were sparked by a newspaper article which reported that pictures of Justice Powell were selling poorly in the Supreme Court Gift Shop, despite the fact – according to a Supreme Court employee quoted in the article – that Justice Powell was “the nicest one of them all.”²² In hopes of bucking-up flagging sales of Powell memorabilia, Buckley “was inspired to come up with a Justice Powell souvenir kit” for the gift shop. The kit itself was fashioned from an old Fisher Price farm set, which Buckley announced was “Justice Powell’s house,” with room in the barn’s hayloft for the law clerks.

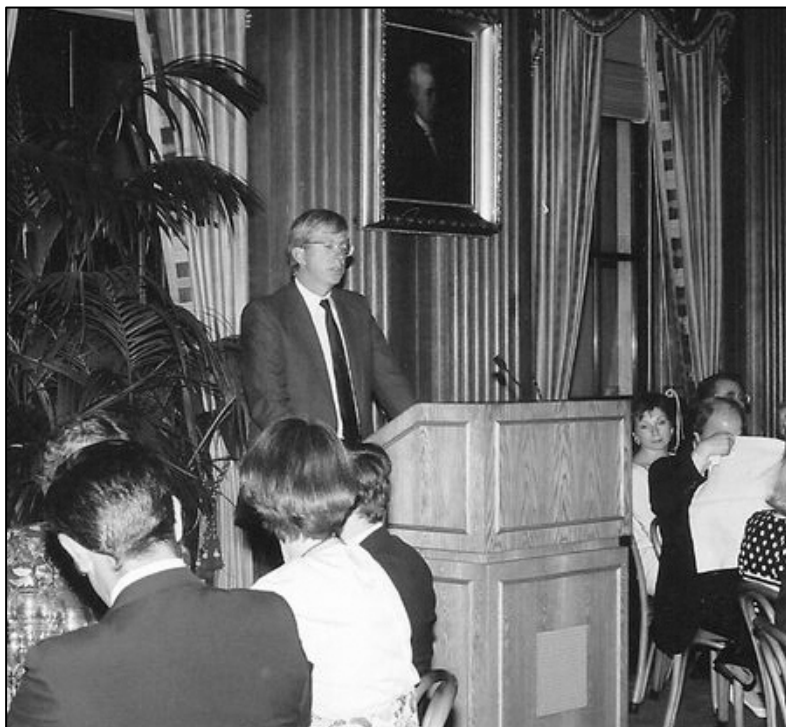
At the 1987 reunion which is preserved on videotape in the Powell Archives, Buckley warmly welcomed the assembled crowd to “Josephine Powell’s 15th Annual Pot Luck and Live Auction.” Glancing over at the guests of honor, Buckley noted that “Mrs. Powell kindly has invited her husband,” and he urged the Justice to enjoy the evening’s festivities. Returning his attention to the assembled throng, Buckley reassured them that the “live auction” would be quickly starting.

I want to go over a few of the items that we will be offering because, once the bidding starts, we won’t have time to go through each of them. The item number one, of course, is the

²¹ Buckley Interview.

²² James Clarity and Warren Weaver, Jr., “Briefings,” *New York Times*, April 22, 1983.

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John Buckley speaking at the 1991 Powell clerk reunion.

Virginia cured ham donated by Justice Powell. I don't know what made it sick, but evidently it's well. I've always been curious why people from Virginia like ham so much. I recall when I first clerked, Justice Powell would always be buying these hams and sending them down to the Court curator to be cured and they'd keep sending them back to the chambers saying they didn't do that. Justice Powell later installed a Virginian, Gail Galloway [as Court Curator], so . . . now the curator's office does cure hams. And it's kind of smoky down there these days. I asked Gail, "Gail, how do you keep your fires with the smoke to cure the hams all the time?" She said, "it's simple. We always burn the papers of the retired justices." I understand that's going to stop shortly.²³

²³ Transcript of June 27, 1987 Law Clerk Reunion (on file with the *Green Bag*).

No Buckley presentation would be complete without a few (gentle) jabs at Chief Justice Burger – and the fact that the Chief Justice had already retired did not change this tradition. “The second item we’re offering tonight is the Constitutional Bicentennial Birthday Party Kit, which has been given by former Chief Justice Burger,”²⁴ Buckley announced grandly. “It includes two hundred candles and one for good luck. It also has tri-corner party hats (which they wore during that era) and also a white wig, just like the one worn by the Chief Justice himself. And it has an exact replica . . . of the copy of the Constitution that was used by Chief Justice Burger to decide cases during his 17 year tenure. We know to a certainty that it is an exact copy. It’s missing the First, Fourth, Sixth and [unintelligible] Amendments.”²⁵

Turning away from the auction trope, Buckley informed the audience that he would next discuss current events in Washington. After dryly observing that it had been a slow news week (one that included news of Powell’s retirement), Buckley noted that the Justice had been featured in a recent article in *The American Lawyer Magazine*.²⁶ The article had recorded the number of questions that each justice had posed during two weeks of oral argument, concluding that Justice Antonin Scalia had asked the most questions (134), while Justice Powell had asked the fewest (one). “Well, let’s be candid about this,” remarked Buckley. “I asked Justice Powell, ‘you know Justice Scalia asked 134 questions and you just asked one question—what is the reason?’ He said to me [here, Buckley switched to a slow Virginia accent] ‘John, you only ask a question when you don’t know the answer.’”²⁷ Buckley’s mild poke at Justice Scalia – who was then finishing his first term on the Court – led to the loudest laughter and applause of the evening.

²⁴ Chief Justice Burger retired from the United States Supreme Court in September 1986 and subsequently served as the head of the Commission on the Bicentennial of the United States Constitution.

²⁵ Reunion Transcript.

²⁶ Stephen J. Adler, “How the Newest Justice Has Effected a Quiet Revolution in the Rehnquist Court,” *The American Lawyer*, March 1987.

²⁷ Reunion Transcript.

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Continuing his review of the Justice's media appearances, Buckley noted that Justice Powell had also been mentioned in a January 24, 1987 *Washington Post* article,²⁸ which disclosed that Justice Powell had bested his fellow justices in a friendly wager over snowfall levels in the District of Columbia. "Justice Powell's success at weather forecasting has had its effect because now at the souvenir stand near the Court we're able to offer a brand new edition of *Justice Powell's Farmer's Almanac* with weather forecasts," Buckley announced as he held up a mock copy of the almanac. Buckley explained that, unlike the traditional *Farmer's Almanac*, the new version would predict the weather on various justices' birthdays. Thus, Buckley revealed that on Burger's birthday, the weather would be "Windy and hot – major front of warm air expected to proceed from Minnesota area eventually reaching Washington and Capitol Hill. Do not expect relief until a new front of cool dry air arrives from Arizona desert." For Justice William J. Brennan, Jr.'s birthday: "Blizzard conditions, heavy snow, very limited visibility. Lawyers travel advisory in effect. No relief until bright front of sunny skies arrives from Virginia melting snow." And for the birthday of Justice Byron White, the only Supreme Court justice to have played professional football: "Good football weather."²⁹

After making some additional humorous remarks about Justice Powell's role as the High Court "swinger," and the lack of entertainment at previous reunions, Buckley's tone turned (temporarily) somber as he acknowledged the Justice's retirement. "I'm now going to do something Justice Powell would never do and that is to depart from precedent," Buckley informed the now-quiet audience. "I'm going to drop the mask I wear and I'm going to speak seriously for a few minutes, and I hope you will accept that. Because what I say . . . is something I think is felt by everyone here and it would be inappropriate if we did not acknowledge the historic importance of this evening." After summarizing the Justice's work during the term, and the love and respect that the entire family of Powell law

²⁸ Moira Mulligan, "Personalities," *The Washington Post*, January 24, 1987.

²⁹ Reunion Transcript.

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clerks felt for the Justice, Buckley observed that “I speak for all when I say that being called a Powell clerk was and still is an honor and a privilege of the highest honor.” He then led the room in a toast to Justice and Mrs. Powell.

The solemnity was broken by a videotaped tribute to Justice Powell. As the familiar theme of “Masterpiece Theater” began to play, the image of a bow-tie wearing John Buckley appeared, lounging in a chair and assuming the persona of that show’s host, Alistair Cooke. There followed an overview of Powell’s life and career, complete with vintage photographs, music, and tongue-in-cheek comments by Buckley (for example, when the videotape featured photographs from the Justice’s military service, Buckley pompously intoned: “In 1942 Justice Powell invaded North Africa – in the company of others, of course”). The head of the Curator’s Office, Gail Galloway, had helped gather photographs of Powell and his family, and Buckley and his wife, Jane Genster, sorted through the photographs on their dining room table as they selected images for the video presentation. The photographs stacked on the Buckleys’ dining room table soon had to be returned to the Supreme Court after Powell unexpectedly announced his retirement and the Curator’s Office was bombarded with media requests for images of the Justice.

The video was filmed on the Sunday before the reunion, with a final section featuring pictures of the Justice’s family of law clerks hurriedly added after his retirement announcement (when the law clerks’ pictures flashed onto the screen, the song “I Need This Job” from the Broadway musical “Chorus Line” played). Portions of the video were filmed in the Justice’s chambers, and the shots of the Justice’s office were filled with inside jokes (such as a copy of J. Harvie Wilkinson’s book³⁰ about his Powell clerkship lying on a table, and a lingering shot of the Justice’s Dictaphone accompanied by the theme music from “Jaws”). Buckley later laughingly observed: “I can’t imagine the Justice’s surprise at seeing a video of me sitting at

³⁰ J. Harvie Wilkinson III, *Serving Justice: A Supreme Court Clerk’s View* (New York: Charterhouse, 1974).

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his desk.”³¹

After the video tribute concluded, Justice Powell rose and addressed his law clerks. Unfortunately, the comments made by the soft-spoken Justice were not completely captured on the videotape. Buckley later remarked that there had been an undercurrent of emotion throughout the reunion. “It was a tough evening for him, [and the Justice] was very moved by the video.”

As for how the “genteel” Justice Powell more generally reacted to the reunions’ irreverent humor, Buckley remarked that “I’m sure that some of the jokes involving popular culture went over his head. Some of the other stuff, like cracks at the other justices, he liked, but he didn’t want to show it.”³² Wilkinson similarly concluded: “When John was holding forth, people would look at the Justice for his reaction. And you couldn’t tell with the Justice. He would laugh, but he was also restrained. As far as I know, he never suggested to John that he was out of bounds.”³³ Perhaps the best evidence of Justice Powell’s feelings about the comedic stylings of his former clerk is found in the inscription he wrote in a book that he gave Buckley: “For John Buckley, who has entertained our clerks and spouses for 14 years – indeed entertained them at *my* expense. Nevertheless, with appreciation.”



Journalists and legal scholars are often accused of having a myopic focus on the Supreme Court, displaying (say their critics) a single-minded obsession that fails to appreciate that the vast majority of cases and litigants never reach our nation’s highest court. The criticism has merit, and perhaps the new wave of scholarship on Supreme Court humor is only adding to the staggering amount of ink that is spilled while writing about the Court. On the other hand, if the legal academy is going to continue its intellectual love affair with the Court, perhaps it can at least take itself (and the Court) a little

³¹ Buckley Interview.

³² Buckley Interview.

³³ Wilkinson Interview.

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less seriously and enjoy the humor that can be found hidden in the Court's shadows. And let's admit it – essays on Supreme Court humor are more fun to read than yet another law review article on *Bush v. Gore*.³⁴



³⁴ 531 U.S. 98 (2000).