



**School of Law**

# **A CLERICAL FANTASY: OBI-WAN STEVENS VS. DARTH REHNQUIST**

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FROM THE BAG

All persons involved in the judicial process – judges, litigants, witnesses, and court officers – owe a duty of courtesy to all other participants.

Burger, C.J., joined by  
Rehnquist, Stevens, et al., J.J.

*In re Snyder*, 472 U.S. 634, 647 (1985)

The Division's procedures would not be unconstitutional even if we assumed that Division employees, like federal judges, are occasionally discourteous and occasionally make mistakes. The Due Process Clause does not guarantee a correct or a courteous resolution of every dispute.

Stevens, J., dissenting, joined by  
Burger, C.J., and Rehnquist, J.

*Memphis Light, Gas and Water Division v. Craft*,  
436 U.S. 1, 25 n.7 (1978)



# A CLERICAL FANTASY

## OBI-WAN STEVENS VS. DARTH REHNQUIST

*Ross E. Davies*

**I**N HIS 1993 ARTICLE, *John Paul Stevens and the Manners of Judging*, Professor Christopher Eisgruber<sup>1</sup> illustrates Justice Stevens's undeniable "kindness and wit, . . . [and] good manners" with "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 chair, and said, "Don't feel badly, counselor. The Constitution makes the same mistake." Which it does.<sup>2</sup>

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.

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<sup>1</sup> Then of the NYU School of Law, now of Princeton. See [www.princeton.edu/provost/about-the-provost/](http://www.princeton.edu/provost/about-the-provost/) (vis. Apr. 22, 2010).

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

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 Term). 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.'"<sup>3</sup> 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.

Indeed, there are reasons to believe it is true, most notably the reputations of the storytellers. Since 1993 the story has been retold by some pretty respectable people, including a former president of the ABA and of Florida State University (Talbot D'Alemberte),<sup>4</sup> a leading Supreme Court journalist (David G. Savage of the *Los Angeles Times*),<sup>5</sup> and, most recently, a former Stevens clerk and Stanford Law School professor who is co-director of the school's Supreme Court Litigation Clinic (Jeffrey L. Fisher).<sup>6</sup>

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<sup>3</sup> *Id.* at xxx n.1.

<sup>4</sup> *Oral Argument: The Continuing Conversation*, 25 LITIGATION 12, 13 (Winter 1999).

<sup>5</sup> *A Justice Born for the Ages*, L.A. TIMES, Apr. 19, 2002, at 1.

<sup>6</sup> *My Boss, Justice Stevens*, N.Y. TIMES, Apr. 11, 2010.

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But the story of kind Justice Stevens rescuing the helpless lawyer from abusive Chief Justice Rehnquist is nevertheless not true. Here is what really happened, from the Court's official transcript.<sup>7</sup> On January 11, 1989, the Court heard argument in *Barnard v. Thorstenn*.<sup>8</sup> Early on, counsel for petitioners correctly addressed members of the Court as "Justice" when answering their questions, except for one slip, when she said "Judge."<sup>9</sup> After a second slip, Justice Sandra Day O'Connor spoke up, "I think we're generally called Justice." Counsel replied simply – "I'm sorry. I apologize, Justice O'Connor." – and then continued with her argument. About six minutes later,<sup>10</sup> counsel 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 –

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, counsel made one more "Judge" slip, at which point she said, "I'm going to stop addressing people."<sup>11</sup> Her argument then wound on to its conclusion without any more mishaps.

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<sup>7</sup> Essential pages of the official transcript are reproduced below at pages 326-328.

<sup>8</sup> 489 U.S. 546 (1989).

<sup>9</sup> 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 argument to confirm the transcript's accuracy. *Hear* [www.oyez.org/cases/1980-1989/1988/1988\\_87\\_1939](http://www.oyez.org/cases/1980-1989/1988/1988_87_1939) (vis. Apr. 24, 2010). On the recording, it sounds as though the questioner first addressed as "Judge" was Rehnquist, but whoever it was did not object.

<sup>10</sup> Hodge's "Judge" exchanges with O'Connor and Stevens are about 5 minutes and 40 seconds apart in the recording at [www.oyez.org](http://www.oyez.org) (*hear id.*), and six pages apart in the transcript. See Official Transcript at 8, 14 (pages 327, 328 below).

<sup>11</sup> Official Transcript at 15.

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 counsel into mortifying criticism intoned by an increasingly irritated member of the Court; (2) delete several minutes of argument so that Stevens's later freestanding remark was woven into the earlier O'Connor exchange; (3) morph O'Connor into Rehnquist; (4) fabricate a long, hand-wringing apology by counsel; and (5) rewrite Stevens's amusing and constitutionally correct one-liner into a chivalrous intervention?<sup>12</sup> I suspect we will never know.<sup>13</sup> But I will hazard a supposition and a 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).<sup>14</sup> Suppose that although Kenobi and Vader were rivals, they agreed most of the time – say, 63.6% of it.<sup>15</sup> And when they did disagree, they did it civilly and in print, or discreetly behind closed doors.<sup>16</sup> Moreover, both Kenobi and Vader were fun and fine human beings, liked and respected by their minions and peers.<sup>17</sup> And they wore matching black robes.<sup>18</sup> Not surprisingly, conflicts between two such powerful public figures over weighty and controversial topics were widely followed and debated. Yet because those

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<sup>12</sup> Also, the *Barnard* transcript and recording show that Hodge was not “stumbling through an argument”; rather, she seems to have performed reasonably well.

<sup>13</sup> 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.

<sup>14</sup> 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.).

<sup>15</sup> 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 Brennan, Marshall, and Blackmun, and lower with the rest, while Rehnquist's rates were higher with Justices White, O'Connor, Scalia, and Kennedy. *Id.*

<sup>16</sup> As all members of the Court tend to do these days.

<sup>17</sup> As Stevens and Rehnquist are. See, e.g., notes 2-6 above; *Symposium: The Jurisprudence of Justice Stevens*, FORDHAM L. REV. 1557 et seq. (Mar. 2006); *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1 (2005).

<sup>18</sup> See, e.g., page 319 above.

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clashes were between two such able, reasonable, peace-loving characters (surrounded by others of the same sort<sup>19</sup>), 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 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. Eisgruber, D'Alemberte, Savage, and Fisher all tell it both to illustrate Stevens's own kindness, wit, and good manners, and to emphasize the value of those characteristics in good judges generally.<sup>20</sup> But the story itself is infused with an unkind and false portrayal of one of Stevens's colleagues.<sup>21</sup> It is just the sort of story that would not be told by the Justice Stevens portrayed in the story.

As members of the bar, the media, and the academy participate in President Barack Obama's attempt to fill the gap to be 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 received from Stevens's clerks.

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<sup>19</sup> See, e.g., *id.*

<sup>20</sup> See notes 2-6 above.

<sup>21</sup> As well as an unfair belittling of counsel before them. See note 12 above.

ORIGINAL

U.S.  
1983

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

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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

