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THE OCTOBER 1984 TERM: A COURTWATCHER'S PERSPECTIVE

Russell W. Galloway, Jr.*

This article reports on the 1984-85 Burger Court. It is based on the author's sabbatical project, which included attendance at all 155 oral arguments held during the October 1984 Term. The purpose is to examine the Burger Court and to provide glimpses of events which rarely, if ever, appear in the Court's written opinions.

I. SETTING THE STAGE

The Term prior to the October 1984 Term was one of the most conservative of the post-1937 era. The Court was dominated by a five-vote coalition of Justices including the conservative "four horsepersons" (Justices Rehnquist, Burger, O'Connor, and Powell) and Justice White. In a series of stunning victories during the October 1983 Term, the conservative wing adopted the views of the Justice Department and routed the liberals, Brennan and Marshall, who responded with a string of blistering dissents.¹ Commentators across the political spectrum declared that a new, more conservative era of Supreme Court history had begun and predicted that the October 1984 Term would provide more of the same.²

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1. See, e.g., *United States v. Leon*, 104 S. Ct. 3405 (1984) (good-faith exception to exclusionary rule); *Firefighters Local 1748 v. Stotts*, 104 S. Ct. 2576 (1984) (affirmative action); *Schall v. Martin*, 104 S. Ct. 2403 (1984) (preventive detention); *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (government manger scene); *Grove City College v. Bell*, 104 S. Ct. 1211 (1984) (sex discrimination); *Pennhurst State College v. Halderman*, 104 S. Ct. 900 (1983) (eleventh amendment).

2. *TIME* magazine's October 8, 1984 cover story, for example, traced the recent history of the Court, stating, "[S]ince the appointment of Sandra Day O'Connor by President Reagan in 1981, many experts have begun to discern a rightward tilt." *Court at the Crossroads*, *TIME*, Oct. 8, 1984, at 28, col. 3. The article also observed that a Reagan reelection could produce "a much more conservative Court, a Warren Court in reverse." *Id.* at 29, col. 1. According to *TIME*, the rightward shift would probably affect abortion, religion, criminal procedure, affirmative action, free speech, and economic rights. *Id.*

Other commentators supported *TIME*'s "rightward tilt" hypothesis. In July, 1984, for ex-

On the day before the opening of the October 1984 Term, *The Washington Post's* court reporters joined the chorus and predicted that the rightward plunge would continue during the October 1984 Term, especially in cases involving church-state relations and criminal procedure. The reporters wrote:

If a "counterrevolution" happens this term, most expect it to come in the field of religion Many analysts say they believe that the court will . . . carve out a new approach to future church-state cases, stressing "accommodation" of religious activity instead of strict separation of government and religion.³

Similarly, referring to the widely-noted school-search case, *New Jersey v. T.L.O.*,⁴ the reporters predicted, "The justices are likely to do for school administrators this term what they did for police and prison officials last term: further reduce judicially imposed obstacles to officials' flexibility and control."⁵

II. THE COURT AND THE 1984 ELECTION

One of the main events of the October 1984 Term was the November 1984 presidential election. The 1984 Burger Court was the second oldest Court ever; only the nine old men of the mid-1930's Court were older.⁶ On election day in 1984, the average age of the

ample, James Kilpatrick published an article which applauded "the court's four relatively consistent conservatives—Burger, Rehnquist, O'Connor and Powell—[for] finally [getting] their act together. They formed a solid working coalition with Justice White and occasionally with Justice Blackmun. The result was nearly total frustration for the liberal wing." Kilpatrick, *Court's Term Had Conservative Tone*, Casper Star-Tribune, July 12, 1984, at A10, cols. 1-2.

Elder Witt, Court analyst for the CONGRESSIONAL QUARTERLY, agreed. Witt contended that the October 1983 Term was a "watershed term" in which the Court "[i]n virtually every area of law, . . . swung its weight to the side of the government," putting "its stamp of approval on the administration's proposals for significant changes in national policy on questions of civil and individual rights, business, environmental and criminal law." Witt, *Court Swings to the Right, Gives Reagan Major Victories*, CONG. Q., July 14, 1984, at 1709.

The late Joseph Kraft added to the consensus, labelling the October 1983 Term a turning point in Supreme Court history. Kraft, *At Last a Conservative Majority Emerges on the High Court*, Salt Lake Tribune, June 18, 1984, at A9, col. 1. "After years of fumbling," wrote Kraft, "the Supreme Court under Warren Burger has finally evolved a coherent majority eager to speak out confidently on doctrinal issues . . . [which] reflect the views of a clear conservative majority." *Id.*

3. Berbash & Kamen, *Supreme Court to Address Church—State Relations, Police Powers*, *The Washington Post*, Sept. 30, 1984, at A4, col. 1.

4. 105 S. Ct. 733 (1985).

5. Berbash & Kamen, *supra* note 3, at col. 4.

6. When Justice Van Devanter retired in 1937, the ages of the Justices were as follows: Brandeis 80, Van Devanter 78, McReynolds 75, Sutherland 75, Hughes 75, Butler 71, Cardozo 67, and Roberts 62.

Justices was 70.2 years. When Justice Blackmun turned seventy-six on November 12, 1984, the Burger Court became the first Court ever with five Justices aged seventy-six or older.⁷ Given the advanced age of the Justices, commentators argued that the winner of the 1984 election could, quite conceivably, shape the Court for decades.⁸

Articles on this theme appeared in early 1984.⁹ A column by *Washington Post* staff writer David Broder summed up what was at stake for the Court in the 1984 election.¹⁰ "[T]he aging tribunal is likely to undergo major reconstruction" in the near future, Broder contended, and he labelled this "probably the most important unpublicized issue in this election."¹¹ The issue was crucial, Broder argued, because of "the huge gap between the fundamental philosophies of these two men [Reagan and Mondale] on the role of law and the judiciary in our society."¹²

In the months before the presidential election, the Justices gave a series of speeches which some commentators interpreted as "stump speeches" designed to influence the outcome of the election.¹³ First, Stevens charged the conservatives with "overstepping judicial authority" to achieve their desired results.¹⁴ Second, Marshall charged the conservatives with failing to remedy constitutional violations.¹⁵ Third, Blackmun charged the conservatives with moving to the right

7. Will, *The Aging of the Court*, *The Washington Post*, Oct. 14, 1984, at D7, cols. 2-3.

8. See, e.g., Kraft, *At Last a Conservative Majority Emerges on the High Court*, *The Salt Lake Tribune*, June 18, 1984, at A9, col. 1.

9. See, e.g., Galloway, *The Supreme Court and the 1984 Election*, *SANTA CLARA MAGAZINE*, Winter 1984, 19; Witt, *Next President Likely to Reshape High Court*, *The San Francisco Chronicle*, Feb. 5, 1984, at A10, col. 1; Epstein, *Next President May Mold High Court*, *The San Jose Mercury News*, Feb. 19, 1984, at 1, col. 3.

10. Broder, *Where There's A Real Difference*, *The Washington Post*, Oct. 21, 1984, at C7, col. 6.

11. *Id.*

12. *Id.* Broder continued:

Reagan sees the law as a bulwark of existing social, political, and economic arrangements. He would make the Supreme Court a forum for asserting states' rights against federal standards or controls; a tribunal where property rights were granted at least equal, if not superior status with claims of human rights; and a place where traditional values and practices are defended against legislation or litigation aimed at changing the status quo

Mondale has seen the work of lawyers and judges as being part of the ongoing struggle for social justice and individual rights.

Id.

13. See also *infra* notes 76-89 and accompanying text.

14. Remarks by Justice John P. Stevens, Dedication of Arthur Rubloff Building, Northwestern University School of Law, Aug. 1, 1984.

15. Remarks by Justice Thurgood Marshall, Judicial Conference of the Second Circuit, Hartford, Conn., Sept. 14, 1984.

"by hook or by crook."¹⁶ Fourth, Brennan charged that the Court had "condoned both isolated and systematic violations of civil liberties" in recent cases and that, "[m]ore and more Americans are turning to state courts for relief in defending constitutional rights because they are afraid that the U.S. Supreme Court won't help them."¹⁷ This public criticism was, according to one commentator, "nothing short of extraordinary."¹⁸ The Justices "are giving the appearance of being out on the hustings."¹⁹

In addition to these speeches, Rehnquist got into the act with an October 19, 1984 speech in which he all but invited Reagan to pack the Court with ultra-conservatives. Rehnquist contended that presidents *should* appoint people who they believe agree with them, because that's how current public opinion is infused into the Court. As Rehnquist put it, "There is no reason in the world why a president should not . . . appoint people . . . who are sympathetic to his political or philosophical principles."²⁰ Rehnquist tried to downplay the likelihood that Reagan courtpacking would produce an ultra-conservative Court by stressing that presidents often guess incorrectly and that the Court fosters individualism rather than bloc-voting.²¹

16. In violation of the rules of the Cosmos Club, a Washington, D.C. social club, members of the audience leaked Justice Blackmun's "off the record" speech to the press, which reported it. *See, e.g.*, Kamen, *Blackmun Says "Weary" Court is Shifting Right*, *The Washington Post*, Sept. 20, 1984, at 1, cols. 3-5.

17. Berbash, *Brennan Says Rulings Violated Civil Liberties*, *The Washington Post*, Oct. 25, 1984, at 1, col. 1. Fred Berbash, *Post* staff writer, suggested that the minority Justices were possibly trying to influence the presidential election by pointing out the Court's reactionary trend and warning that a Reagan reelection would exacerbate the trend. *Id.* According to Berbash, the swing to the right began in January 1984, when Powell and White began siding regularly with Rehnquist, O'Connor, and Burger to produce a solid conservative majority. Thereafter, "Day after day, in case after case, the court moved in the same direction—to the right—with the same solid conservative majority at the helm." *Id.* "The shift," Berbash continued, "has isolated Blackmun, Stevens, Marshall and Justice William J. Brennan Jr." *Id.* at col 4.

18. Berbash, *Justices Making Their Frustrations Public*, *The Washington Post*, Sept. 23, 1984, at A8, col. 1.

19. *Id.*

20. Speech by Justice William H. Rehnquist, University of Minnesota College of Law, Minneapolis, Minn., Oct. 19, 1984.

21. *Id.* Rehnquist's speech was labelled a stump speech by several commentators. Al Kamen of the *Washington Post* contended that the speech was designed to affect the presidential election by neutralizing Mondale's claim that people should vote Democratic to prevent Reagan from packing the Court with Jerry Falwell supporters. Kamen, "*Court-Packing*" *Backed in Rehnquist Speech*, *The Washington Post*, Oct. 20, 1984, at A9, col. 2. *See also infra* note 23 and accompanying text. Similarly, American University Professor Herman Schwartz wrote that Rehnquist's speech was intended to support Reagan by misleading the public into thinking that presidents can't predict what their appointees will do once on the Court. Actually, Schwartz pointed out, presidents normally do predict quite accurately what

Ultimately, however, the Supreme Court did not become a major issue in the November 1984 election. Mondale and Ferraro made a few efforts to scare people with the specter of a "Falwell Court"²² packed with right-wing Christian fundamentalists. Mondale's problem, however, was that the American people were apparently *glad* that Reagan would have the opportunity to pack the Court with conservatives.²³ Therefore, Mondale was not in a position to exploit the Court issue.

Ironically, however, Reagan was also unable to use the Court issue, because, at seventy-four, he did not want *anyone's* age to become an election issue. George Will summed up the stalemate on the issue as follows:

The "court issue" probably favors President Reagan because, to many voters and especially to many blue-collar Democrats, liberal justices are equated with forced busing and the "coddling" of criminals. But how does a president in his seventies say that some justices in their seventies may have to be replaced soon? Very carefully.²⁴

III. ORAL ARGUMENTS

The centerpiece of the author's sabbatical project was attendance at every oral argument held during the October 1984 Term. Sometimes the arguments were dull and uninteresting, drawing sparse crowds and virtually no public interest. Often, however, the sessions were lively and full of excitement. This section describes some of the major arguments of the October 1984 Term, those that played to standing room only audiences and triggered intense media attention.

kind of Justice they are appointing. Moreover, this was especially true of Reagan, who would probably choose people like Robert Bork and Richard Posner, who have already displayed their ultraconservative philosophies during their careers as federal judges. Schwartz, *Rehnquist's Partisan Intrusion*, The New York Times, Oct. 26, 1984, at A35, cols. 1-4.

22. Jerry Falwell, a fundamentalist Christian pastor, is head of the so-called "Moral Majority." Falwell campaigned vigorously for Reagan, claiming that Reagan would likely appoint to the Court conservative Justices who would oppose abortions, favor school prayer, and otherwise back the conservatives' "social agenda."

23. Polls showed that most people believed the judicial system was too soft on crime. The majority wanted tougher, more conservative judges, not liberal, "Warren Court" types. Interview with Chuck Rund, pollster for the Reagan-Bush reelection campaign, in Washington, D.C. (Sept. 21, 1984).

24. Will, *The Aging of the Court*, The Washington Post, Oct. 14, 1985, at D7, cols. 1-2.

A. *The Major Cases*

1. *Tennessee v. Garner*²⁵

One of the most interesting arguments in the first month of the Term occurred during the shoot-to-kill case, *Tennessee v. Garner*. Called to the scene of a nighttime burglary of an unoccupied building, a Memphis police officer saw a fifteen year-old youth run from the back of the building and crouch near a fence. The officer called, "Halt, police." When the youth tried to climb the fence to escape, the officer fatally shot him with a service revolver. The officer admitted he did not believe the suspect was armed or had hurt anyone. Memphis police policy under such circumstances was for the officer to shoot to kill, i.e., "shoot for the mass" (torso), and the officer did so. Tennessee law authorized shooting persons fleeing from "serious felonies" whether or not the suspect was violent or armed. The issue presented in the case was whether the shooting violated the suspect's constitutional rights.

The attorneys for Memphis and Tennessee took the straightforward "leave it to the legislature" line. A dramatic point in the argument occurred when Justice Stevens induced them to admit that flight is not even a crime under Tennessee law, and that flight is only an offense punishable by a \$50 fine under a Memphis ordinance. Tennessee was therefore asking for authority to perform summary police executions for conduct punishable by a \$50 fine. The Tennessee attorneys argued that: 1) any other approach would be "unworkable," although the attorneys then admitted they had no idea how other states had managed this issue; 2) the policy was "shoot-to-kill," not shoot-to-wound; and 3) the shoot-to-kill policy could be applied to a fleeing antitrust violator if the legislature wanted. This response to a question from Justice Blackmun evoked shocked laughter in the courtroom.

Steven L. Winter of New York brilliantly argued the case for the suspect's survivors, contending that the Model Penal Code rule should be adopted and that police should only be allowed to shoot fleeing felons when a reasonable officer would believe shooting was necessary to protect the physical safety of the officer or others. Winter's strongest point was that a majority of the states and seventy-five percent of America's police departments had restricted shoot-to-kill authority to situations when the officer believes the suspect is armed and/or is likely to inflict violent injury. Winter also argued that

25. 105 S. Ct. 1694 (1985).

studies show no change in crime rates or arrest rates when restricted shoot-to-kill policies are in effect, and that the restrictions actually *improve* officer safety. This evidence seemed to eliminate all pragmatic justification for Tennessee's brutal shoot-to-kill policy.²⁶

The *Garner* oral argument left the definite impression that the Court would strike down Tennessee's archaic shoot-to-kill law. The main opposition during the argument came from Justices Rehnquist, O'Connor, and Burger.²⁷ These three Justices pushed Winter hard, and when the decision was issued in 1985, they dissented from the Court's 6-3 ruling that the Tennessee law was unconstitutional.²⁸

2. *Harper & Row, Publishers, Inc. v. Nation Enterprises*²⁹

On election day, November 6, 1984, the Court was packed for arguments in the Gerald R. Ford memoirs case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*. *Harper & Row* involved an article by Victor Navasky, editor of *The Nation*, based on a "purloined copy" of Ford's not-yet-published memoirs, *A Time to Heal*. The article, which contained 300 to 400 words of direct quotation involving the most interesting passages in Ford's account of the Nixon pardon, scooped *Time's* planned pre-publication article on the same subject. As a result, *Time* cancelled its agreement to publish excerpts from the memoirs and refused to pay the agreed \$12,500 to Harper & Row, which then sued Nation Enterprises for breach of copyright. The central issue was whether the fair use doctrine³⁰ is

26. Thirty local police departments across the nation had filed an amicus brief opposing Tennessee's rules.

27. Chief Justice Burger engaged Winter in an obtuse line of questioning that dramatically displayed the Chief's slow-wittedness. Burger began by posing the following hypothetical: What if, after killing the suspect, the officer had discovered that victims had been killed during the burglary? Winter answered, correctly, that if the officer had *known* about the killings, he would have been justified in shooting to kill, because the dangerousness of the burglar would then be established. Without such knowledge, however, shooting should not be allowed. Burger couldn't accept this. "How would the officer know?" he asked, clearly implying that the officer should shoot because "maybe" the burglar did in fact kill someone. Winter quite properly explained that the law requires officers to act on what they know or should know, and that officers should not be allowed to kill based on mere speculation. Burger then returned to the same hypo twice more, asking the same question: "But how could the officer know whether the burglar had killed someone?" Winter explained clearly each time, but Burger apparently could not grasp the concept that police should be and normally are required to act on the basis of what they know.

28. *Tennessee v. Garner*, 105 S. Ct. 1694 (1985). The dissenters argued that the "compelling" need to capture burglars outweighed the suspect's interest in not being shot, especially because the suspect chose to risk his life by fleeing.

29. 105 S. Ct. 2218 (1985).

30. Under federal copyright law, persons who use copyrighted materials are not guilty

inapplicable, or applicable in modified form, when the alleged copyright infringement precedes publication of the work.

The arguments did not reveal which way the Court was leaning, but logic suggested that the Justices would favor Ford, an elder statesman of the Republican Party, and Harper & Row, a large publisher, against the *The Nation*, which is a liberal periodical.³¹ In fact, when the decision came down in May 1985, all five of the Court's Republicans (Burger, Blackmun, Rehnquist, Stevens, and O'Connor) voted for Ford, while three of the Court's four Democrats (Brennan, White, and Marshall) voted for *The Nation*. Powell, the fourth and most conservative Democrat, voted with the Republicans.

3. *FEC v. NCPAC*³²

Another major case which packed the press box and galleries during November 1984 was *FEC v. NCPAC*. The case presented the crucial question of whether the federal government may constitutionally limit independent expenditures by political action committees (PAC's) on behalf of candidates in presidential elections.³³ Congress had moved to regulate such expenditures by imposing a \$1000 limit, and the issue in *FEC v. NCPAC* was whether that limitation violated the first amendment.

Clearly, the restriction on campaign expenditures infringed upon the PAC-contributors' freedom of expression. The question,

of infringement if their use is a "fair use." 17 U.S.C. § 107 (1976).

31. In predicting these outcomes based on perceived biases of the Justices, one should keep in mind the following passages from Justice William O. Douglas's autobiography:

[Chief Justice] Hughes made a statement to me which at the time was shattering but which over the years turned out to be true: "Justice Douglas, you must remember one thing. At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting out predilections."

In time I came to realize that Hughes was right when he said that a Justice's decisions were based 90 percent on emotion.

DOUGLAS, *THE COURT YEARS* 8, 33 (1980).

This comment proved quite true during the October 1984 Term in general and in the Ford memoirs case in particular. See also *infra* note 110 (description of the relation between the Justices' policy views and their own respective economic profiles).

32. 105 S. Ct. 1459 (1985).

33. Having decided that the election process would be improved by public funding, in 1971 Congress passed the Presidential Election Campaign Fund Act, popularly known as the Fund Act, 26 U.S.C. §§ 9001 *et seq.*, which gives candidates the choice to accept federal funds (now \$40 million) if they are willing to forego private contributions. Since then, all candidates have accepted the public funds. This practice meant that private contributors had no one to give their contributions to, so PAC's sprang up to fill the gap.

then, was whether a sufficiently compelling countervailing justification existed to overcome the first amendment's strong presumption against such infringements. In the landmark case, *Buckley v. Valeo*,³⁴ the Court held that limits on *contributions* to candidates are justified by the compelling interest in avoiding corruption and the appearance of corruption, but that limits on independent *expenditures* by individuals on behalf of candidates are unconstitutional.³⁵ The open question was whether PAC's are sufficiently different from individuals so that *Buckley* was not controlling.

Charles N. Steele, General Counsel for the FEC, argued that PAC expenditures comprise a greater threat to fair elections than expenditures by individuals. Because of their ability to amass and spend huge sums, he argued that the PAC's distort campaigns and threaten to corrupt the election process. Steven B. Feirson, attorney for the National Conservative Political Action Committee, however, contended that the expenditure limit violated the first amendment.

The *FEC v. NCPAC* case produced a classic role reversal among the Justices. The conservative Justices, who usually advocated restraint in exercising judicial review over other branches of government, suddenly became wild-eyed libertarian activists in this area because the PAC's tend to favor conservative candidates. Similarly, liberal activists, who were normally staunch civil libertarians, became blind to the first amendment values at stake, because they wanted to restrain the big-money PAC's. The reversal vividly appeared at oral argument, when Burger, O'Connor, and Rehnquist led the attack on the FEC. The final result was a 7-2 decision holding the limit on PAC expenditures unconstitutional.³⁶ Rehnquist wrote the majority opinion.

4. *The Establishment Clause Cases*

a. *Wallace v. Jaffree*³⁷

Of all the cases argued in the October 1984 Term, those that generated the most public interest were three establishment clause cases which were argued in early December. The first, *Wallace v. Jaffree*, which was argued on December 4, raised once again an issue which has been America's peculiar obsession since 1961—school prayer.

34. 424 U.S. 1 (1976).

35. 424 U.S. at 51.

36. 105 S. Ct. 1459 (1985).

37. 105 S. Ct. 2479 (1985).

The arguments in *Wallace v. Jaffree* went surprisingly well for the respondents, who attacked an Alabama statute which authorized teachers to call for a minute of silence for meditation or prayer. A 1978 statute, which was not challenged, required teachers to announce a minute of silent *meditation* at the start of the day. In 1981, another statute was passed authorizing the teachers to announce that the minute was for "meditation or prayer." In his excellent argument for respondents, Ronnie L. Williams, a Mobile attorney, stressed that: 1) the daily repetition of "meditation or prayer" instructions had the effect of advancing religion by putting the authority of the teacher behind the suggestion of prayer; 2) the admitted purpose of the statute's sponsor was to "return prayer to the public schools;" and 3) the main effect of the teachers' repeated dwelling on prayer was to promote prayer.

Chief Justice Burger tried repeatedly to characterize the Alabama statute as merely authorizing teachers to explain the students' first amendment rights, but Williams deftly rebutted the Chief by pointing out that *daily repetition* of the right to pray explanation amounts to promotion of prayer rather than mere explanatory teaching. In contrast to Williams' effective argument, Deputy Solicitor General Paul M. Bator, who had argued brilliantly earlier in the Term, was faltering and unpersuasive.

Naturally, given the public's obsession with the school prayer issue, *Wallace v. Jaffree* was duly reported by the networks the night of December 4, 1984.³⁸ On CBS, reporter Fred Graham said that the Justices did not find anything wrong with the minute of prayer.³⁹ Yet, when the decision came down in July 1985, the Court struck Alabama's statute down by a 5-4 vote.

b. *School District v. Ball*⁴⁰ and *Aguilar v. Felton*⁴¹

The Court was packed again the next morning for the arguments in the so-called "Parochial" cases, which were two establish-

38. On the morning of the *Wallace* argument, television cameras were already in place in front of the Court. This practice was quite unusual *before* the arguments. A long line of spectators waited in the cold winter morning outside of the Court. Inside, the Court was filled with press representatives, lawyers, and the public. The press box was filled to capacity, and a long line of press representatives were funneled off into special seats. The attorneys' section was also full. Clearly the response was the largest of the Term.

39. Graham's report seemed misleading. Chief Justice Burger, of course, found nothing wrong with the Alabama statute, but Justices Marshall, Blackmun, and Stevens were not so sanguine.

40. 105 S. Ct. 3216 (1985).

41. 105 S. Ct. 3232 (1985).

ment clause cases that challenged government aid to parochial schools. Once again, the television cameras were out in front of the Court, the Solicitor General's Office was represented in force, and the celebrities' section was packed with notables, including Senator Daniel P. Moynihan of New York.

The Grand Rapids case, *School District v. Ball*, was argued first. The arguments revealed that the Justices did not favor the Grand Rapids program. Surprisingly, even Justice White, a staunch supporter of government aid to parochial schools, said the program had constitutional problems. The community "leisure-time program," in which parochial schools offered classes to part-time students who were not among their full-time enrollment, appeared especially suspect because the program was actually administered by parochial school personnel and taught by parochial school teachers at their schools. The "shared-time program," in which public school teachers conducted art, music, physical education, and remedial and accelerated math classes for regular students in parochial school classrooms, presented a closer issue, but White's comments suggested that the program's legality was shakier than expected. A.E. Dick Howard, University of Virginia law professor, argued for Ball and, after a poor start, made a strong argument that effectively attacked Grand Rapids' proposed "core curriculum" test. Ultimately, the Court's decision struck down both of the Grand Rapids programs.

Arguments in *Aguilar v. Felton* followed. This case involved a challenge to the use of federal Title I⁴² funds to pay New York public school teachers to teach remedial reading at parochial schools. Title I presented federal aid to parochial schools in its most defensible form, because the aid was only given to provide remedial classes for educationally deprived children in poor areas. Solicitor General Rex Lee's argument in support of Title I, however, was weakened by his overly dramatic style, his reedy, piercing voice, and his *faux pas* of addressing Justice Blackmun as "Justice [long pause] Brennan." In an opinion written by the *true* Justice Brennan, the Court later held the New York program unconstitutional because it "results in the excessive entanglement of church and state."⁴³

5. *In re Snyder*⁴⁴

In re Snyder, which was argued in April, 1985, presented an-

42. 20 U.S.C. § 2701 (1965).

43. 105 S. Ct. at 3237 (1985).

44. 105 S. Ct. 2874 (1985).

other fascinating oral argument. Snyder, an attorney, was appointed to represent an indigent criminal defendant. After completing the work, Snyder submitted his claim for attorney's fees. The Eighth Circuit sent the claim back for more details. Snyder's second submission was also sent back, because the form was incorrect. Frustrated, Snyder sent a sharply worded letter to a court secretary, saying *inter alia*, that he was "appalled" at the level of payment and "extremely disgusted" by the treatment of the claim for fees; that, with regard to the form of the claim, the court could "take it or leave it;" and that his name should be removed from the list of attorneys willing to take appointments.

The Eighth Circuit's response was shocking. When its demand for an apology was refused, it issued a show cause order, demanded an apology at the hearing, and suspended Snyder for six months after he refused to apologize. This response was too harsh even for the authoritarian Burger Court. The Justices hounded the Eighth Circuit's attorney, who responded with an equivocating and evasive argument. Even the conservative Justices indicated that the suspension was improper.

The *Snyder* oral arguments had several interesting elements. Snyder's attorney, David L. Peterson of Bismark, North Dakota, irritated the Justices when he tried to skip several nonconstitutional theories and jump right into the first amendment issue of whether the suspension violated Snyder's freedoms of speech and petition. Indeed, the case offered the Court a wonderful opportunity to define the first amendment rights of lawyers with new clarity. Instead, the Justices pushed Peterson relentlessly regarding nonconstitutional theories,⁴⁵ and Justice Stevens castigated both Peterson and the *amici* for failing to address these theories adequately. The Justices pursued the nonconstitutional analysis so hard that Peterson never reached his first amendment arguments. It was both an object lesson and a warning to attorneys not to hastily attempt to reach constitutional issues.

The Eighth Circuit's attorney, John J. Greer of Spencer, Iowa, found himself in trouble after refusing to deal candidly with the facts of the case. Snyder's suspension clearly resulted from his refusal to apologize for what the Eighth Circuit judges felt was the "disrespectful tone" of Snyder's letter. Yet Greer tried to deny this and

45. The main alternative theory was that a single rude letter did not constitute "conduct unbecoming a member of the bar" sufficient to support a suspension under F.R. APP. P. 46. See *infra* note 46.

pretend that the suspension resulted from Snyder's refusal to submit proper vouchers and from his withdrawal from future representation of indigents. The Justices did not agree. Moreover, Greer compounded his problems by trying to "backdoor" the disrespect theme into the case, saying the suspension was based on the "totality" of Snyder's conduct. This equivocation forfeited Greer's remaining credibility.

Chief Justice Burger, more alert and involved in this argument than usual, pushed repeatedly for concessions that Snyder could and should have communicated in more respectful terms. White, however, countered Burger by pointing out that Snyder's forceful letter did actually shake the Eighth Circuit into changing its procedures. Burger finally backed off, pointing out that the letter was to a secretary, and not to a judge; that, if the vouchers were inadequate, the appropriate response was to deny the claim for fees rather than to suspend the attorney; and that the Eighth Circuit had demanded an apology, thus showing that it was disciplining Snyder for his expression rather than merely for his noncompliance with technical rules. When the decision came down several months later, the Court ruled against the Eighth Circuit, but did so on nonconstitutional grounds.⁴⁶

6. *Sedima v. Imrex Company*⁴⁷ and *National Bank v. Haroco*⁴⁸

Two cases argued on April 17, 1985, *Sedima v. Imrex Company* and *National Bank v. Haroco*, involved the important question of whether the Racketeering Influenced and Corrupt Organizations Act (RICO)⁴⁹ may be used against legitimate businesses. The cases were of tremendous interest to the corporate bar, and the oral arguments drew a standing room only crowd of attorneys.

In *Sedima*, the Second Circuit held that civil RICO liability may not be imposed absent both a prior criminal conviction for predicate acts listed in RICO, and a "RICO injury" or a "racketeering injury" distinct from the injury caused by the predicate crimes. In

46. *In re Snyder*, 105 S. Ct. 2874 (1985). The Court ruled simply that a single incident of "unlawyer-like rudeness" does not compromise sufficient "conduct unbecoming a member of the bar" to support suspension.

47. 105 S. Ct. 3275 (1985).

48. 105 S. Ct. 3291 (1985).

49. 18 U.S.C. §§ 1961-68 (1970). RICO imposes civil liability for treble damages and attorney's fees against persons who, in conducting an enterprise, engage in a pattern of racketeering and commit two or more of the "predicate offenses" listed in the statute.

Haroco, the Seventh Circuit held that a "racketeering enterprise injury" is a prerequisite to RICO civil liability. The Burger Court had to decide whether to adopt these or other limits to protect legitimate businesses from civil RICO suits.⁵⁰

The Justices were obviously struggling with this problem during the oral arguments. RICO is a complex statute. Stevens said he had read it "about a million times" and still did not understand it. The cases were hard to call, because they involved cross-cutting social policies that put the Justices into a double-bind situation. The main interests in the cases were law-and-order, protectionism for big business, and judicial door-closing. Normally the dominant conservative wing was unwilling to restrict the scope of criminal statutes. Here, however, a law-and-order approach would both expose big business, one of the conservatives' main allies, to serious problems, and invite an enormous amount of federal litigation. This was the last thing the conservatives wanted. Ultimately, the conservatives stuck to their law-and-order views, and refused to create an exception to protect big business from RICO. The liberals dissented, voting to create an exception that would favor big business.⁵¹

B. *The Oral Advocates*

1. *The Solicitor General's Office*

The most visible group of attorneys at oral arguments during the October 1984 Term was the Solicitor General and his staff. These Justice Department attorneys represent the United States and its agencies in litigation before the Supreme Court. The members of the Solicitor's Office performed impressively, winning the bulk of their arguments. In general, they seemed to have a sounder approach to oral arguments and a better grasp of the Court's thinking than did outside attorneys.

50. Congress's main purpose in enacting RICO was to attack "organized crime," i.e., criminal syndicates like the Mafia. But instead, Congress ended up enacting very broad statutory language. The list of predicate offenses, for example, includes loan sharking, narcotics sales, gambling, prostitution, and other activities characteristic of crime families, but it also contains the following "big three:" mail fraud, wire fraud, and securities violations. The big three cover most garden variety business torts and thus expose legitimate business organizations to RICO suits. The carrots of treble damages and attorney's fees have induced the plaintiffs' bar to transform a wide variety of commercial claims into RICO claims, and the result is a flood of federal court litigation seeking to impose RICO civil liability on business corporations. In response, lower federal courts began formulating, or inventing, one might say, restrictions on RICO civil suits which were designed to dam the flood and protect legitimate businesses from RICO.

51. *Sedima v. Imrex Co.*, 105 S. Ct. 3275 (1985).

Solicitor General Rex E. Lee was the most prominent of all the attorneys who argued before the Supreme Court in the October 1984 Term. Lee argued a series of important cases during the Term, including the state autonomy case,⁵² the draft registration case,⁵³ the Haitian refugees case,⁵⁴ the "Parochaid" case,⁵⁵ and the regional banking case.⁵⁶

Lee's arguments were, for the most part, unimpressive, and he endured several embarrassing moments. One such moment occurred during *Lowe v. SEC*,⁵⁷ when he looked like a Court jester during a give-and-take with Justice Stevens. Stevens posited a hypothetical in which the government banned the publication of law review articles by law students. Lee hesitated and then said seriously, "Justice Stevens, that is at the very edge of what is permissible." Spectators broke out laughing at this answer.⁵⁸

Other members of the Solicitor General's Office played important roles as oral advocates in the October 1984 Term. Lawrence Wallace, the senior member of the office, argued several cases.⁵⁹ Wallace had a strange, breathless style of oral argument that gave an impression of nervousness, but his thinking was clear and forceful, and his arguments, while awkward, were effective.

One of the most effective advocates of the Term was Deputy Solicitor General Andrew L. Frey, the government's leading attorney in criminal cases. A stocky man with salt-and-pepper hair and beard, and his stomach protruding from under his vest, Frey made several excellent arguments which were low-key, knowledgeable, rational, persuasive, and punctuated by strange little blasts of air into

52. *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985).

53. *Wayte v. United States*, 105 S. Ct. 1881 (1985).

54. *Jean v. Nelson*, 105 S. Ct. 2992 (1985).

55. *Aguilar v. Felton*, 105 S. Ct. 3232 (1985).

56. *Northeast Bancorp v. Board of Governors*, 105 S. Ct. 2545 (1985).

57. 105 S. Ct. 2557 (1985).

58. Lee announced his resignation on April 30, 1985. He considered his biggest victories to be enhancing executive power vis-a-vis Congress and the judiciary, increasing the use of illegally obtained evidence, approval of tax deductions for parochial school tuition, and restricting affirmative action. See Kamen, *U.S. Solicitor General Lee Resigning Amid Controversy*, *The Washington Post*, May 1, 1985, at A4, cols. 1-4. His biggest loss was the failure to roll back the constitutional right to abortion. *Id.* at col. 1. Lee dismissed conservative demands for more aggressive pressure on the Court as tactically unsound. "It's a question of what you can get away with, how far you can push the Supreme Court or move the Supreme Court in the direction you want to go . . . I can breathe fire with the rest of them, [but] you have to play for the long run." *Id.* at col. 2.

59. Wallace has argued over 80 U.S. Supreme Court cases, more than any other twentieth century attorney except the great New York lawyer John W. Davis, and former Solicitor General Irwin Griswold.

his nasal cavity. Frey usually took the hard-line, law-and-order position.⁶⁰

2. *The Harvard Professors*

The second most prominent group of attorneys who argued during the October 1984 Term were four Harvard professors, Paul Bator, Charles Fried, Lawrence Tribe, and Arthur Miller, all of whom were among the Term's very best oral advocates.⁶¹

Bator, a conservative intellectual, argued three cases, at times with an elegance unsurpassed by any other attorney. His best showing occurred in the second case argued during the Term, *Alexander v. Choate*.⁶² This case addressed the issue of whether Tennessee's reduction of free hospital services from twenty to fourteen days per year illegally discriminated against handicapped persons. Bator made an impressive argument in favor of the legality of the cut, using the classic approach of *reductio ad absurdum*, claiming that appellee's position would make *all* limits on hospitalization illegal. This claim became the crux of the subsequent discussion. All the Justices wanted to know whether *any* limit was available to Tennessee that would *not* have a discriminatory impact on some group of handicapped persons and thus would not be subject to the same challenge. Ultimately, the Court upheld Tennessee's action on the ground that it did not deny handicapped persons "meaningful access" to free hospitalization.

Bator also argued the closely-watched school prayer case, *Wallace v. Jaffree*,⁶³ in which he fared much more poorly, and the John Mitchell domestic wiretap case, *Mitchell v. Forsyth*,⁶⁴ in which he performed successfully. Bator's nomination for a federal judgeship was withdrawn during the Term for unspecified personal reasons, and he returned to Harvard.

Charles Fried, another Harvard professor, was appointed to take Bator's place in the Solicitor General's Office. Fried handled the argument and re-argument in *Pattern Makers' League v.*

60. Given Frey's consistent law-and-order position, it was ironic that his nomination for federal judge was withdrawn during the Term because of conservative opposition based on his support of Planned Parenthood and a gun control organization.

61. Bator and Fried were actually second-in-command in the Solicitor General's Office during the Term. Fried succeeded Bator in early 1985, when Bator returned to Harvard.

62. 105 S. Ct. 712 (1985).

63. 105 S. Ct. 2479 (1985).

64. 105 S. Ct. 2806 (1985).

NLRB.⁶⁵ This case tested whether a union may fine former members for quitting a union and then returning to work during a strike in violation of a union rule. Fried invoked the well-settled rule that the Court should defer to the National Labor Relations Board (NLRB) as long as the NLRB action is not contrary to the fundamental structure of the National Labor Relations Act (NLRA). Fried asserted that the NLRB's action was quite consistent with the fundamental concepts of the NLRA in that it preserved the Act's symmetry by holding that the right to *refrain* from collective action, like the right to *engage* in collective action, is fully protected and may not be bargained away. Fried's forceful arguments were among the best of the Term,⁶⁶ and he won the *Pattern Makers'* case by a narrow five-to-four vote.⁶⁷

Lawrence H. Tribe, renowned constitutional scholar and Supreme Court advocate, was the third Harvard law professor to appear before the Court during the October 1984 Term. Tribe argued three cases, including the important regional banking case, *Northeast Bancorp v. Board of Governors*,⁶⁸ in which he was co-counsel with Rex Lee. Tribe's arguments were impressive but not overwhelming. At one point in the *Board of Education v. National Gay Task Force*⁶⁹ argument, Rehnquist and Tribe both insisted on talking at the same time, making what they said completely unintelligible and drawing a laugh from the audience.

The fourth and last of the Harvard professors was Arthur R. Miller, who made one of the best arguments of the Term in *Phillips Petroleum Company v. Shutts*,⁷⁰ a complex civil procedure case involving due process rules for plaintiffs' class actions. Miller was especially effective in dealing with difficult standing issues that many attorneys who argued during the Term were unable to handle.

3. Other Illustrious Advocates

Norton J. Come, dean of American labor lawyers, made several appearances, including one in *NLRB v. International Longshore-*

65. 105 S. Ct. 3064 (1985).

66. After Rex Lee resigned, Fried became Acting Solicitor General, and he was later promoted to Solicitor General, a position which he still held at the date of this writing, February, 1986.

67. *Pattern Makers' League v. NLRB*, 105 S. Ct. 3064 (1985).

68. 105 S. Ct. 2545 (1985).

69. 105 S. Ct. 1858 (1985).

70. 105 S. Ct. 2965 (1985).

men's Association (ILA II),⁷¹ which involved a battle between the longshoremen and the teamsters. Come, who has a gravelly voice and a low-key, deliberate style, has argued more than fifty Supreme Court cases since he joined the NLRB in 1958.⁷²

Other famous advocates argued during the October 1984 Term. Former Columbia law professor and federal judge Marvin Frankel argued twice, once against another former federal judge, Harold Tyler. University of Virginia law professor A.E. Dick Howard argued once. The Washington, D.C. and New York City bars were admirably represented by numerous advocates.

IV. CONFLICT ON THE COURT

The 1984-85 Burger Court was characterized by relatively harmonious relationships among the Justices. The spicy conflicts depicted in *The Brethren*⁷³ were either nonexistent or hidden from public view. The Justices were amicable during oral arguments, avoiding the kind of courtroom hostilities with which Justices Warren and Frankfurter entertained the public in the late 1950s and early 1960s. Moreover, Supreme Court staff members kept up the solid front and steadfastly denied the existence of any secret wars among the Justices.

The standard line taken by the Justices was that the Burger Court was a team working together to get the job done. Justice Stevens, for example, said that the Court is more of a team than most people think and that *The Brethren* exaggerated the degree of animosity among the Justices.⁷⁴ Stevens said that despite ideological differences, the current Court has harmonious interpersonal relations and less tension than the Vinson Court had in 1947-48, when Stevens clerked for Justice Rutledge. Stevens mentioned Powell as a unifying figure who is respected by all the Justices. Justice Brennan also asserted that there was no serious friction between the

71. 105 S. Ct. 3045 (1985).

72. Come confirmed the popular thesis that Justice Brennan has had a disproportionate influence on the Burger Court's labor law jurisprudence. Come also said, however, that the days of the "Brennan Court" were ending. He added that it has become increasingly difficult for him to argue NLRB positions before Court, because many are contrary to earlier pro-labor NLRB and Court precedents. According to Come, his arguments before the Court now twist him into "a pretzel." Interview with Norton Come, Washington, D.C. (June 24, 1985).

73. WOODWARD & ARMSTRONG, *THE BRETHREN* (1979).

74. Interview with Justice John P. Stevens in Washington, D.C. (April 2, 1985). New York Times Court reporter Linda Greenhouse also contended that *THE BRETHREN* gave a false impression by focusing on the most divisive cases of the 1969-76 period. Interview with Linda Greenhouse, Washington, D.C. (April 24, 1985).

Justices.⁷⁵

The only solid evidence of intra-Court conflict came from the speeches and opinions of the Justices themselves. First came a speech by Stevens on August 4, 1984, criticizing "my present colleagues' enthusiastic attempts to codify the law instead of merely performing the judicial task of deciding the cases that come before them."⁷⁶ Stevens criticized several decisions, including the landmark *Stotts*,⁷⁷ *Grove City College*,⁷⁸ and *Leon*⁷⁹ cases, as illustrations of this pattern:

In *Firefighters Union v. Stotts*, a case that required nothing more than the construction of the terms of a consent decree, the Court elected to make a far reaching pronouncement concerning the limits on a court's power to prescribe affirmative action as a remedy for a proven violation of Title VII of the Civil Rights Act. In *Grove City College*, . . . the Court went out of its way to announce that the statute did not forbid sex discrimination throughout the assisted institution even though neither party argued that it did In the *Leon* and *Sheppard* cases, the Court leaped at the opportunity to promulgate the widely heralded good faith exception to the exclusionary rule without even pausing to consider whether the rule itself was applicable.

Justice Marshall, speaking at the September 14, 1984 Conference of the Second Circuit, delivered what one commentator called a "sharp denunciation of recent decisions by the court's conservative majority."⁸⁰ Marshall contended that decisions issued in the October 1983 Term revealed "a very disturbing pattern:"

The Court seems to concede in each case that important federal rights are at issue and that they may have been violated. It then denies the victims the only effective remedies to those violations. Almost as an after-thought, it sometimes suggests that the victims pursue other remedies, and it then offers ones that will have little or no effect Where no remedies are offered, or where the only ones offered can accomplish little, those who need protection will have reason to turn away from the legal system. They will be convinced that their rights are being trivi-

75. Interview with Justice William J. Brennan, Jr., Washington, D.C. (May 6, 1985).

76. Remarks by Justice John P. Stevens, Dedication of Arthur Rubloff Building, Northwestern University School of Law, Aug. 1, 1984.

77. *Firefighters Local 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

78. *Grove City College v. Bell*, 104 S. Ct. 1211 (1984).

79. *United States v. Leon*, 104 S. Ct. 3405 (1984).

80. Berbash, *Marshall Hits High Court Rulings*, The Washington Post, Sept. 15, 1984, at A4, col. 1.

alized more than they are being protected.⁸¹

A few days later, Justice Blackmun joined the chorus by giving a speech to the Washington, D.C. Cosmos Club in which he charged that the Court's Majority was reaching out to achieve its conservative goals even when the cases did not so require.⁸² According to Blackmun, the Court had recently tended to "decide more than the case requires,"⁸³ and was going "where it wants . . . by hook or by crook."⁸⁴ Blackmun fueled speculation about growing tension on the Court, saying, "Extremism is increasingly showing up in opinions . . . because of a 'lack of accommodation' among the Justices."⁸⁵

Justice Brennan gave two speeches during the October 1984 Term which expressed his displeasure with the Court's decisions. Speaking to members of the *Mercer University Law Review* on October 23, 1984, Brennan echoed Marshall's charge that the Court had "condoned both isolated and systematic violations of civil liberties" in recent cases.⁸⁶ Brennan referred repeatedly to cases favoring the government over the individual and claimed they are "a departure from tested constitutional standards."⁸⁷ Returning to a theme he had repeated since the 1970s, Brennan said, "[m]ore and more Americans are turning to state courts for relief in defending constitutional rights because they are afraid that the U.S. Supreme Court won't help them."⁸⁸

In a May 2, 1985 speech at the seventy-ninth annual dinner of the American Jewish Committee, Brennan made an unusually pointed attack on the current Court, voicing many of the themes he had articulated in his dissents. According to Brennan:

81. Remarks of Justice Thurgood Marshall, Judicial Conference of the Second Circuit, Hartford, Conn., Sept. 14, 1984.

82. See Kamen, *Blackmun Says "Weary" Court Is Shifting Right*, The Washington Post, Sept. 20, 1984, at 1, cols. 3-5.

83. *Id.* at A42, col. 3.

84. *Id.* at 1, col. 3.

85. *Id.* at col. 4. Blackmun also "described the court as weary and overworked, a place where there is now 'very little humor.'" *Id.* at col. 2. He added that his job was "a rotten way to earn a living" and "no way to live." *Id.* at cols. 2, 3.

Conceivably, Blackmun felt the pressure more than the other Justices, in part because, as author of the original right-of-abortion opinion, *Roe v. Wade*, 410 U.S. 113 (1973), he was under constant pressure from anti-abortion activists. Police protection at the Court was doubled on Oct. 10, 1984, because of a death threat sent to Blackmun. A bullet was shot through the window of Blackmun's residence later in the Term. See Specter, *Shot Fired Through Blackmun's Window*, The Washington Post, March 5, 1985, at A1, col. 4.

86. *Brennan Says Rulings Violated Civil Liberties*, The Washington Post, Oct. 25, 1984, at 1, col. 1.

87. *Id.* at col. 2.

88. *Id.* at col. 1.

[I]ncreasingly Court watchers are asking . . . isn't the Court these days becoming primarily concerned with vindicating the will of the majority and less interested in its role as a protector of the individual's constitutional rights? . . .

I cannot deny that there has been a startling difference between decisions handed down by the Court in 1963—20 years ago—and the decisions handed down in 1983. In 1963, constitutional claims were sustained by the Court in 86 percent of the cases presenting them and rejected in only 14 percent of the cases. In 1983, in disturbing contrast, the figures were almost precisely reversed: constitutional claims were sustained in only 19 percent of the cases and rejected in 81 percent.⁸⁹

Friction between the Court's liberal and conservative wings was also evident in some of the opinions issued during the October 1984 Term. Perhaps the most vivid example was *Oregon v. Elstad*,⁹⁰ which struck what Brennan's dissent called "a potentially crippling blow to *Miranda*"⁹¹ by holding that the "fruit of the poisonous tree" doctrine⁹² does not apply to *Miranda*⁹³ violations. *Elstad* sparked an unusually sharp exchange of charges among the Justices. Brennan's dissent included the following:

The Court's decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally, the Court reaches out once again to address issues not before us Today's decision, in short, threatens disastrous consequences far beyond the outcome in this case It is but the latest of the escalating number of decisions that are making this tribunal increasingly irrelevant in the protection of individual rights, and that are requiring other tribunals to shoulder the burden.⁹⁴

Justice O'Connor's majority opinion responded by calling Brennan's

89. Remarks of Justice William J. Brennan to the 79th Annual Dinner of the American Jewish Committee, New York, N.Y., May 2, 1985.

90. 105 S. Ct. 1285 (1985).

91. *Id.* at 1299.

92. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

93. *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required prior to custodial police interrogations).

94. 105 S. Ct. 1299, 1322 (Brennan, J., dissenting).

analysis "wholly unpersuasive"⁹⁵ and asserted that Justice Brennan, "with an apocalyptic tone, heralds this opinion as dealing a 'crippling blow to *Miranda*.' . . . [He] not only distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same."⁹⁶

Brennan's anger about the Burger Court's evisceration of constitutional liberties was also evident in *Wainwright v. Witt*,⁹⁷ which softened the test for excluding persons opposed to capital punishment from sitting on juries in capital cases. Labelling Rehnquist's majority opinion as "brazenly revisionist,"⁹⁸ "unpardonable,"⁹⁹ and a "bit of *legerdemain*,"¹⁰⁰ Brennan's dissent castigated the Majority for allowing states to place the fate of capital defendants in the hands of hanging juries.¹⁰¹ Brennan's dissent concluded with the following attack on the Burger Court's approach to criminal cases:

Today's opinion for the Court is the product of a saddening confluence of . . . the most disturbing trends in our constitutional jurisprudence respecting the fundamental rights of our people These trends all reflect the same desolate truth: we have lost our sense of the transcendent importance of the Bill of Rights to our society Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution's fundamental guarantees. One can only hope that this day too will soon pass.¹⁰²

Despite such occasional outbursts of angry criticism in speeches and dissenting opinions, the general feeling was that the 1984-85 Burger Court was not inclined to hang its dirty laundry out in public view. The Court was, in fact, relatively peaceful and harmonious, at least compared to the days when Douglas, Black, and Warren exchanged fire with Frankfurter and Jackson.¹⁰³

95. *Id.* at 1295.

96. *Id.* at 1285 n.5.

97. 105 S. Ct. 844 (1985).

98. *Id.* at 866.

99. *Id.* at 871.

100. *Id.* at 870.

101. *Id.* at 871.

102. *Id.* at 872-73.

103. For a vivid discussion of the hostilities on the early Warren Court, see SCHWARTZ & LESHNER, *INSIDE THE WARREN COURT* 49-67 (1983).

V. CONCLUSION

As the October 1984 Term moved toward its conclusion and the decisions came down in large numbers, a consensus began to emerge among commentators that the Term was less conservative than expected. On May 5, 1985, for example, *Washington Post* court reporter Al Kamen wrote that the October 1984 Term had so far been a "dramatic reversal" of the conservative October 1983 Term in civil liberties cases.¹⁰⁴ Similarly, ACLU Legal Director Burt Neuborne, who had earlier compared himself to Napoleon's general left behind to cover the retreat from Russia, reported, "We are holding our own."¹⁰⁵

New York Times Supreme Court reporter Linda Greenhouse, however, cautioned that the character of a Term can never be known until the end-of-Term crunch, when many of the hotly-contested cases are announced.¹⁰⁶ Sure enough, the conservative wing came on strong during June and July 1985 and reclaimed statistical dominance over the liberals.¹⁰⁷

104. Kamen, *High Court Reverses Trend: Individuals Win More Civil Liberties Cases*, *The Washington Post*, May 5, 1985, at A1, cols. 2-4. According to Kamen:

Individuals have won more than half of the civil liberties cases reaching the Supreme Court this year, a dramatic reversal of last year, when the government won eight of every 10 such cases

Last term, the court ruled on 69 civil liberties cases, which are those pitting individual constitutional rights against government authority. It decided 13 in favor of the individual and 56 in favor of the government

But, this year, individuals have won 15 of 28 decisions in cases raising civil liberties issues.

Id. at col. 3.

105. *Id.* at col. 1. Paul Bator, who had returned to Harvard, suggested, "The outcry last year criticizing the [C]ourt for a rightward lunge might have had some effect." *Id.* at A14, col. 2.

106. Interview with Linda Greenhouse in Washington, D.C. (April 24, 1985).

107. Brennan dissented in ten of the Term's last 13 decisions and disagreed with Rehnquist and Burger in 12. The conservative wing won ten of the final 12 split decisions: *Cornelius v. N.A.A.C.P. Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439 (1985) (5-2 decision) (free speech); *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 105 S. Ct. 3420 (1985) (7-2 decision) (Indian lands); *Carchman v. Nash*, 105 S. Ct. 3401 (1985) (6-3 decision) (criminal procedure); *United States v. Bagley*, 105 S. Ct. 3375 (1985) (5-3 decision) (criminal procedure); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 105 S. Ct. 3346 (1985) (5-3 decision) (arbitrability of international antitrust claims); *United States v. De Hernandez*, 105 S. Ct. 3304 (1985) (7-2 decision) (criminal procedure); *Sedima v. Imrex Co.*, 105 S. Ct. 3275 (1985) (5-4 decision) (RICO civil liability); *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985) (6-3 decision) (equal protection); *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985) (6-3 decision) (procedural due process); *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985) (5-4 decision) (eleventh amendment).

The liberal wing won two of the 12: *Aguilar v. Felton*, 105 S. Ct. 3232 (1985) (5-4

The overall voting data suggested that it was business-as-usual for the conservative Burger Court during the October 1984 Term. The conservatives won the lions' share of divided cases during the Term. The liberals, Brennan and Marshall, posted the highest dissent rates on the Court, which were roughly two and one-half times as high as Burger and O'Connor's. White and Powell were substantially right of center. Blackmun was roughly in the statistical center. Stevens was a little left of center. Rehnquist, of course, joined Burger and O'Connor on the far right.

The only changes from prior Terms were minor ones. Burger moved back to the right of O'Connor, resuming the second-most-conservative slot that he held throughout the 1970's.¹⁰⁸ White moved to the right of Powell.¹⁰⁹ Stevens was closer to the Court's statistical center than in earlier Terms, when he was substantially left of center. Blackmun was in the center for the second straight Term, after his sojourn in the left wing during the 1981-83 period.¹¹⁰

Despite its end-of-Term conservative rally, the October 1984 Term will probably be remembered as more moderate than its pred-

decision) (establishment clause), and *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985) (5-4 decision) (establishment clause). The one unanimous decision in the last thirteen cases was *Thomas v. Union Carbide Agricultural Products Co.*, 105 U.S. 3325 (1985) (article III). Separate opinions concurring only in the judgment were filed in *Thomas* on behalf of Brennan, Marshall, Stevens, and Blackmun.

108. See Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981).

109. Powell's voting pattern may have been skewed by his 43 absences following surgery to remove cancer of his prostate. Powell's absence resulted in eight 4-4 splits, a modern record, and elicited a burst of commentary concerning his critical role on the Court. An April 1, 1985 article, for example, argued that the current Court is "sharply divided," and that Powell often controls the outcome in close cases. Kamen, *Powell Acts as Court Majority-Maker: Virginian Is Swing Vote on Divided Bench*, *The Washington Post*, April 1, 1985, at A1, cols. 4-6. In addition to the 4-4 votes in cases argued during Powell's absence, Kamen pointed out that there had been nine 5-4 decisions to date in the Term, and Powell had been in the majority eight times. *Id.* Kamen concluded, "Powell so far this term has been the court's decisive figure, its swing man and majoritymaker." *Id.* at col. 5. Similarly, an editorial in *The Washington Post* stated that Powell has a "rather remarkable role on this tribunal: He is more than many had realized, the pivotal decision-maker, the justice whose vote in close cases is almost always the decisive one." *Justice Powell in the Center*, *The Washington Post*, April 4, 1985, at A16, col. 1.

110. Interestingly, 1985 financial statements filed by the Justices reveal that the Justices' policy views rather closely reflect their economic profiles. The conservative four horsepersons are the first, second, third, and fifth wealthiest members of the Court. Powell is first at \$2.6 to \$5.6 million. O'Connor is next at \$996,000 to \$2.2 million. Burger is third at \$665,000 to \$1.02 million. Rehnquist is fifth at \$169,000 to 470,000, just behind Blackmun.

The liberals are poorest. Marshall is last at \$5,000 to \$15,000. Brennan has \$56,000 to \$190,000. Stevens, the third most liberal Justice, has \$35,000 to \$115,000.

The moderates are in the middle. White reports \$60,000 to \$200,000. Blackmun has \$216,000 to \$630,000. These figures do not include the value of the Justices' homes.

ecessor.¹¹¹ The liberal wing won some major victories, overturning *National League of Cities*,¹¹² sweeping the four establishment clause cases, and declaring Tennessee's shoot-to-kill law unconstitutional. When all the votes were counted, however, it was still conservative dominance, Burger Court style, that characterized the Term. The conservative wing prevailed in seven out of eight divided fourth amendment cases, eight of nine free speech cases, and many more cases covering a wide variety of issues. By the end of the Term, the Court's short-range direction seemed unclear, and commentators¹¹³ wondered whether the 1985-86 Court would resume the reactionary course of the October 1983 Term or continue the more moderate pattern of the October 1984 Term.

111. See, e.g., Kamen, *supra* note 104; E. WITT, A DIFFERENT JUSTICE 2 (1985). As Elder Witt, Court analyst for the Congressional Quarterly, put it, "[I]n the term . . . from October 1984 through June 1985, the Court moved back toward the moderate center and away from the unremitting conservatism of the previous term." *Id.*

112. *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985).

113. E.g., E. WITT, *supra* note 111.

