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Title
The Justices Private Papers

Permalink
https://escholarship.org/uc/item/5xw48277

ISBN
9781422427514

Author
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Publication Date
2008

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UCLA School of Law
Law & Economics Research Paper Series
Research Paper No. 09-06

BANKRUPTCY AND THE SUPREME COURT

by

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Electronic copy available at: https://ssrn.com/abstract=1357636

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by Kenneth N. Klee
(LexisNexis 2009)

Excerpt from Chapter 1, pages 44–48

THE JUSTICES' PRIVATE PAPERS

Partisanship aside, there is a different kind of politics that might operate in the Court: the politics of coalition building and vote trading. In order to gain insight into the internal politics of the Court, archives around the country were scoured and over nine linear feet of the Justices' private papers were collected and reviewed.[194] The papers reveal interesting if not conclusive insights into the internal operation of the Court.[195] For example, the papers show that sometimes Justices will defer to those Justices whom they hold in high regard or who are perceived to have expertise in an area.[196] On other occasions, Justices evidence testiness in their correspondence. For example, in his December 20, 1940, letter to Justice Douglas concerning *Palmer v. Connecticut Railway & Lighting Co.*,[197] Justice Frankfurter writes, "I

194. Not all of the Justice's papers are available for research. For example, according to Daun van Ee, Historical Specialist, Manuscript Division, The Library of Congress, Justice Byron White's papers are inaccessible until 2012. The papers of Justices Brewer, Fortas, and Stewart are archived at Yale University, which apparently only makes them available for research to Yale affiliates or those who apply to do research at Yale; moreover, the Stewart papers are closed to researchers until Justice Stevens retires from the Court.

195. On the other hand, some of the Justices' papers, including those of Justices Goldberg, Moody, Peckham, and Sutherland, contained little or nothing of value from a bankruptcy law perspective.

196. *See, e.g.*, Justice Marshall's March 18, 1970, Memorandum for the Conference in United States v. Key, 397 U.S. 322 (1970) explaining the basis for revision of his opinion: "It is difficult to gainsay Brother Douglas on the subject of corporate reorganization . . . ." (contained in Marshall papers). *But see* Justice Powell's handwritten notes on Justice Douglas' second draft opinion in Baker v. Gold Seal Liquors, Inc., 417 U.S. 467 (1974) in which Powell writes in the margin, "This is a juvenile opinion, long on meaningless generalities (some inaccurately expressed), & short on comprehension of a 77 Reorg. & on analysis." (contained in Powell papers).

197. 311 U.S. 544 (1941).

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am really troubled by your opinion . . . . What does trouble me is that you are not disclosing what you are really doing. As you know, I am no poker player and naturally, therefore, I do not believe in poker playing in the disposition of cases."[198] Of similar tenor, in his February 16, 1966, letter joining Justice Clark's opinion in *Perry v. Commerce Loan Co.*,[199] Justice Fortas attaches a letter he sent to Justices Harlan and Stewart dripping with sarcasm: "I am totally overcome by the matchless eloquence and irresistible logic of Brother Clark's opinion in this case . . . . it is not my weakness or vacillation, but Brother Clark's mighty strength that has caused this catastrophy [sic]."[200]

There are occasions when the author of the opinion by the Court changes. Sometimes Justices who authored dissenting opinions do so because they thought they were drafting the majority opinion and then lost support for their views.[201] Alternatively, sometimes Justices who thought they were writing a dissent persuade enough other Justices to switch votes that the opinion becomes the majority, even if it is written by another Justice.[202] In certain cases, Justices assigned to write a 5-4 majority opinion may change their views and nevertheless write the majority opinion coming out the other way. For example, Justice Black wrote the opinion of the Court in *Pearlman v. Reliance Insurance Co.*,[203] even though he switched his vote from the position

198. *See* December 20, 1940, letter from Justice Frankfurter to Justice Douglas (contained in Douglas papers).

199. 383 U.S. 392 (1966).

200. *See* February 16, 1966, letter from Justice Fortas to Justice Clark attaching February 16, 1966, letter from Justice Fortas to Justices Harlan and Stewart (contained in Clark papers).

201. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971) in which the Court used the Supremacy Clause to preclude a state from refusing to renew a debtor's driver's license based on the failure to pay an automobile related tort judgment. On April 5, 1971, Justice Blackmun proposed an opinion purporting to represent the majority with Justices Black and Douglas dissenting. Following shifting alliances on whether *Kesler* should be overruled, Justice Blackmun decided not to rewrite his opinion but instead recommended the case be reassigned so he could write a dissent. Justice White then wrote the majority opinion. For a more completed discussion of *Perez* and *Kesler*, *see infra* Ch. 2, pp. 175-77.

202. For example, in United States v. Durham Lumber Co., 363 U.S. 522 (1960), Justice Brennan drafted a dissent in December 1959 followed up by correspondence to other Justices in December 1959 and January 1960 that became the basis for Chief Justice Warren's majority opinion. (*See* Brennan Papers, correspondence dated December 10, 1959, December 11, 1959, January 21, 1960, & June 16, 1960).

203. 371 U.S. 132 (1962).

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he took in conference, because a majority of the Justices had shifted from reversing the court of appeals to affirmance.[204]

Sometimes dissenting Justices keep their dissents within the Court in recognition of the importance of the appearance of unanimity in Court decisions.[205] In the early 1900's, very few bankruptcy cases had published dissents[206] whereas published dissents became more common in later years.[207] Justice Stevens noted that "[p]ublished dissents from denials of certiorari were unknown in 1925 but are now [in 1983] a regular occurrence."[208] The raw data substantiate Justice Stevens' view.[209]

The Justices' papers reveal that there were sharp disagreements within the internal deliberations of the Court even when there was no published dissent.[210] As the Justices' regard for the unanimity of Court decisions diminished, published dissents increased dramatically in bankruptcy decisions.

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204. *See* Justice Black's November 6, 1962, Memorandum for the Conference (contained in Black papers).

205. For example, in his November 18, 1982, letter to Justice Blackmun commenting on *United States v. Security Industrial Bank*, Justice Stevens writes that "there is some virtue in trying to have Court opinions as unanimous as possible." Even though Justice Stevens shared Justice Blackmun's analysis in the dissent, he decided to join Justice Rehnquist's majority opinion. *See id.* (contained in Blackmun papers).

206. From 1900–1910, five percent of the bankruptcy cases had dissenting opinions, and there were none in the next two decades. Dissents also appear to have been rare in cases before 1900 based on Justice selecting "to suppress fundamental differences of view" in the interest of the appearance of harmony. *See* David P. Currie, "The Constitution in the Supreme Court: The First Hundred Years 1789-1888" at 150 & nn 201-04 (Univ. of Chicago Press 1990).

207. The data show that dissenting opinions became a regular part of the Court's bankruptcy decisions following significant statutory amendments in the 1930's. From 1930-1940, 25 percent of the Court's bankruptcy decisions had dissents, a trend that grew to 57 percent and, ultimately, 100 percent during the next three decades.

208. *See* Justice John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 13 & n. 63 (1983).

209. *See infra* Appendix B.

210. In a letter sent on November 4, 1939, from Chief Justice Hughes to Justice Douglas regarding Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939), Chief Justice Hughes writes that he does not agree with Justice Douglas' reasoning but will not dissent because the holding is narrow and the effect of the decision is salutary. In a handwritten note to Justice Brandeis regarding Security Mortgage Co. v. Powers, 278 U.S. 149 (1928), Justice McReynolds writes, "I voted the other way, but if you get a majority I shall not say anything." (contained in Brandeis papers).

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On some occasions Justices who disagreed about a decision follow up with an exchange of correspondence after the case is decided. For example, in *United States v. Kras*,[211] an indigent debtor filed a motion asserting his Fifth Amendment Due Process rights to be able to file a voluntary bankruptcy petition without paying the required $50 filing fee. Justice Blackmun's clerk suspected the case was a sham suit and the Justice appeared to agree, writing a decision distinguishing *Boddie v. Connecticut*[212] on the basis that there was no constitutional right to bankruptcy and that the bankruptcy discharge was not the only way for a debtor to receive a fresh start. Several Justices, including Justices Douglas and Stewart filed dissenting opinions lamenting that indigents would be unable to avail themselves of this important right. Within a year after the *Kras* decision was rendered, the Solicitor General wrote to Justice Blackmun and advised him that Kras paid the filing fee shortly after the Court's decision was rendered.[213] Two days later Justice Blackmun advised the Solicitor General that he "had a feeling there was something wrong with this case"[214] and the next day he sent a note to Justices Stewart and Douglas advising them that Kras paid the filing fee.[215]

ISBN 978-1-4224-2751-4
$80, hardcover

211. *See* United States v. Kras, 409 U.S. 434 (1973).

212. 401 U.S. 371 (1971).

213. *See* June 17, 1974 letter from Solicitor General Korman to Justice Blackmun (contained in Blackmun papers).

214. *See* June 19, 1974 letter from Justice Blackmun to Solicitor General Korman (contained in Blackmun papers).

215. *See* June 20, 1974 note from Justice Blackmun to Justices Stewart and Douglas (contained in Blackmun papers).

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