

# The Burger Court Opinion Writing Database

*Landmark Communications, Inc. v.  
Virginia*  
435 U.S. 829 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Mr. Justice Blackmun  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice  
Circulated: MAP 15/4/1978

Recirculated: \_\_\_\_\_

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

**No. 76-1450**

Landmark Communications, Inc.,  
Appellant,  
v.  
Commonwealth of Virginia. } On Appeal from the Su-  
preme Court of Virginia.

[March —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.<sup>1</sup>

<sup>1</sup> Article VI, § 10 of the Constitution of Virginia provides in relevant part:

"The General Assembly shall create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge. The Commission shall be authorized to conduct hearings and to subpoena witnesses and documents. Proceedings before the Commission shall be confidential."

Va. Code § 2.1-37.13 implements the constitutional mandate of confidentiality. It provides in relevant part:

"All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 20, 1978

Re: 76-1450 - Landmark Communications, Inc. v. Virginia

Dear Harry:

I agree on your March 20 memo. Even when we don't intend it, the professors -- and lawyers -- convert innocuous declarative sentences into "doctrine". I've substituted a bland "other".

Also, a few other minor changes will be around.

Regards,

A handwritten signature in black ink, appearing to read "WB", which is the initials of Justice William Blackmun.

Mr. Justice Blackmun

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: MAR 22 1978

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1450

Landmark Communications, Inc.,  
Appellant,  
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Commonwealth of Virginia. } On Appeal from the Su-  
preme Court of Virginia.

[March —, 1978]

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8/9/11/13/14

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated: APR 25 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-1450

Landmark Communications, Inc.,  
Appellant,  
v.  
Commonwealth of Virginia. } On Appeal from the Su-  
preme Court of Virginia.

[March —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.<sup>1</sup>

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13

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

4th DRAFT

Recirculated APR 27 1978

## SUPREME COURT OF THE UNITED STATES

No. 76-1450

Landmark Communications, Inc.,  
Appellant,  
v.  
Commonwealth of Virginia. } On Appeal from the Supreme Court of Virginia

[March —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented on this appeal is whether the Commonwealth of Virginia may subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before a state judicial review commission which is authorized to hear complaints as to judges' disability or misconduct, when such proceedings are declared confidential by the State Constitution and statutes.<sup>1</sup>

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 26, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1450, Landmark Communication's, Inc.  
v. Virginia

I shall in due course circulate a brief concurring opinion. My apologies for the delay.

26  
P.S.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 27, 1978

Re: No. 76-1450 - Landmark Communications  
v. Virginia

Dear Chief,

I have just sent the enclosed concurrence to the Print Shop in the hope that there will be no unwarranted delay in the announcement of this case.

Sincerely yours,

P.S.  
P.J.

The Chief Justice

Copies to the Conference

To: The Chief Justice  
Mr. Justice BREWSTER  
Mr. Justice WHITE  
~~Mr. Justice MARSHALL~~  
Mr. Justice BLACKMUN  
Mr. Justice POWELL  
Mr. Justice REHNQUIST  
Mr. Justice STEVENS

From: Mr. Justice STEWART

Dictated:

28 APR 1978

Transcribed:

1st *printed* DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-1450

Landmark Communications, Inc.,  
Appellant,  
v.  
Commonwealth of Virginia. } On Appeal from the Supreme Court of Virginia.

[May —, 1978]

MR. JUSTICE STEWART, concurring in the judgment.

Virginia has enacted a law making it a criminal offense for "any person" to divulge confidential information about proceedings before its Judicial Inquiry and Review Commission. I cannot agree with the Court that this Virginia law violates the Constitution.

There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary. Virginia's derivative interest in maintaining the confidentiality of the proceedings of its Judicial Inquiry and Review Commission seems equally clear. Only such confidentiality, the State has determined, will protect upright judges from unjustified harm and at the same time insure the full and fearless airing in Commission proceedings of every complaint of judicial misconduct. I find nothing in the Constitution to prevent Virginia from punishing those who violate this confidentiality. Cf. *In re Sawyer*, 360 U. S. 622, 646 (concurring opinion).

But in this case Virginia has extended its law to punish a newspaper, and that it cannot constitutionally do. If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 15, 1978

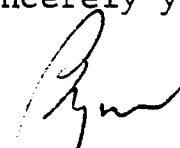
Re: 76-1450 - Landmark Communications, Inc. v. Virginia

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Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1450, Landmark Communications, Inc. v. Virginia

I vote to reverse the judgment of the Supreme Court of Virginia. When the State seeks to punish criminally the making of truthful statements about public officials relating to their performance of their public duties, it must meet a very stringent burden of justification. In my view, the State has failed to meet this burden. All of the interests asserted by the State relate to the maintenance of the confidentiality of Judicial Commission proceedings, and such confidentiality can be maintained by methods less burdensome to clearly protected speech than the method at issue here.

With regard to defining the interest protected, I would prefer not to place too much weight on the fact that this case involves a newspaper. The statute at issue applies to any person who divulges Commission information, so that, for example, an individual who reads about a Commission proceeding in the newspaper and repeats it to a friend would apparently have violated the statute. I would hold that such an individual is as much protected as is the newspaper, rather than giving the press any special protection in the circumstances of this case.

*JW* ·

T. M.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

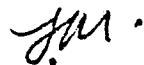
March 23, 1978

Re: No. 76-1450 - Landmark Communications v. Virginia

Dear Chief:

Please join me.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 20, 1978

Personal

Re: No. 76-1450 - Landmark Communications v. Virginia

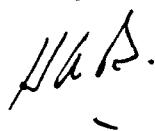
Dear Chief:

In a separate note I have joined your opinion.

I hope you will find it possible, however, to eliminate the last sentence of the first paragraph of Part IV on page 12. I always shudder when a reference to "the least restrictive alternative," or to something similar, appears in this Court's opinions. I feel the same way about a phrase of this kind as I do about "compelling state interest." It is so easy, several years after the enactment of legislation, to think of another way the legislature or Congress might have accomplished its purpose.

Of course, your use here is unobjectionable by itself. But I am afraid it might be used by others in the future to demonstrate your adherence to the theory. I might say that I was able to have Lewis eliminate a similar reference in one of his circulating opinions.

Sincerely,



The Chief Justice

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 20, 1978

Re: No. 76-1450 - Landmark Communications v. Virginia

Dear Chief:

Please join me.

Sincerely,

*Ha. S.*

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

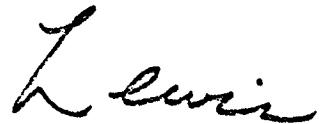
March 15, 1978

No. 76-1450 Landmark Communications v. Virginia

Dear Chief:

Please show at the end of your next draft that I  
took no part in the decision of this case.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 20, 1978

Re: No. 76-1450 - Landmark Communications, Inc. v.  
Virginia

Dear Chief:

I am ready to join your opinion in this case if you can see your way clear to make what seems to me a relatively small addition on page 10. In the last sentence of the first paragraph in Part B, you say:

"The instant question -- whether the publication of truthful information withheld by law from the public domain is similarly privileged -- was not reached and indeed was explicitly reserved in Cox. 420 U.S., at 497 n. 27."

It seems to me that your opinion now decides one facet of this broad question reserved in Cox, but leaves open, as did Cox, the constitutionality in other circumstances of governmental efforts to prohibit the publication of information which has been mandated to be confidential. I am in complete agreement with the reasoning and analysis of the remainder of the opinion, but think that it would help to focus on the relationship between the question reserved in Cox, which you discuss in the sentence set forth above, and the rest of the opinion, if you

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 22, 1978

Re: No. 76-1450 Landmark Communications, Inc. v. Virginia

Dear Chief:

Please join me.

Sincerely,

The Chief Justice  
Copies to the Conference

Wm. Brew  
00977

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

76-1450 - Landmark Communications v. Virginia

From: Mr. Justice Stevens

Circulated: APR 12 197

Recirculated: \_\_\_\_\_

MR. JUSTICE STEVENS, concurring.

Although I join Parts I, II, and III of the Court's opinion, my reasons for rejecting the State's "clear and present danger" justification differ somewhat from the Court's. The State argues that its statute is necessary to avoid injury to a judge's reputation and a decrease in the public's esteem for the judicial system.<sup>1/</sup> Even if these kinds of injury were inevitable, however, I believe that the First Amendment would protect the third party from punishment for publishing this accurate news story. The mere fact that speech creates a clear and present danger of adverse opinion

1/ The State also claims that its statute is necessary to protect complainants and witnesses from possible recrimination, see ante, at 4. With respect to this justification, I agree with the Court that the publication in this case posed no "clear and present danger" to the operation of the Judicial Inquiry Commission. Ante, at 14-15. In my opinion the strongest justification for censorship is the importance of making it possible for judges to resign without appearing to acknowledge that there is merit to a complaint; for there are many cases in which the complaint, if resisted, would not lead to removal but which, when processed informally, lead to voluntary resignations which are in the public interest. Effective settlement negotiations require confidentiality; but if the Commission's internal security is defective, I do not believe even this interest justifies censorship of third parties after a breach of security has already occurred.

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

Printed  
From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: APR 13 1978

*1st DRAFT*

## SUPREME COURT OF THE UNITED STATES

No. 76-1450

Landmark Communications, Inc.,  
Appellant,  
*v.* On Appeal from the Su-  
preme Court of Virginia,  
Commonwealth of Virginia.

[April —, 1978]

MR. JUSTICE STEVENS, concurring.

Although I join Parts I, II, and III of the Court's opinion, my reasons for rejecting the State's "clear and present danger" justification differ somewhat from the Court's. The State argues that its statute is necessary to avoid injury to a judge's reputation and a decrease in the public's esteem for the judicial system.<sup>1</sup> Even if these kinds of injury were inevitable, however, I believe that the First Amendment would protect the third party from punishment for publishing this accurate news story. The mere fact that speech creates a clear and present danger of adverse opinion cannot justify its abridgment.<sup>2</sup>

<sup>1</sup> The State also claims that its statute is necessary to protect complainants and witnesses from possible recrimination, see *ante*, at 4. With respect to this justification, I agree with the Court that the publication in this case posed no "clear and present danger" to the operation of the Judicial Inquiry Commission. *Ante*, at 14-15. In my opinion the strongest justification for censorship is the importance of making it possible for judges to resign without appearing to acknowledge that there is merit to a complaint; for there are many cases in which the complaint, if resisted, would not lead to removal but which, when processed informally, lead to voluntary resignations which are in the public interest. Effective settlement negotiations require confidentiality; but if the Commission's internal security is defective, I do not believe even this interest justifies censorship of third parties after a breach of security has already occurred.

<sup>2</sup> "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 27, 1978

Re: 76-1450 - Landmark Communications v.  
Virginia

Dear Chief:

Please join me. I have also decided to withdraw  
my brief separate concurrence.

Respectfully,



The Chief Justice

Copies to the Conference