

# The Burger Court Opinion Writing Database

*Moore v. East Cleveland*

431 U.S. 494 (1977)

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

January 3, 1980

75-6289

Dear Lewis:

Thank you for your letter of December 27, 1979. The statement in Jack Anderson's column of December 18, that a dissent of mine in Moore v. City of East Cleveland caused you to switch your vote, and thus "create a five-man majority out of an initial four-man minority," is not true - as the decisional history of the case conclusively establishes.

The case was argued in the week of November 1, 1976. It was discussed and voted upon at the Conference of November 5, 1976. You, Thurgood, Harry and I, and initially the Chief Justice, voted to reverse. Potter, Byron, Bill Rehnquist and John voted to affirm. At the end of the discussion, the Chief Justice changed his vote from reverse to affirm.

On November 22, the Chief Justice circulated a memorandum to the Conference reciting that he had concluded "that I would assign the case to myself" but that if the argument for affirmance made in his memorandum "does not . . . gain the support of four or more votes . . . I will ask the senior Justice of five to take the case for assignment." On November 23, Potter, Bill Rehnquist and John responded that each could agree, but Thurgood, Harry and I responded that we could not agree. On December 10, the Chief Justice circulated a memorandum to the Conference that since his "view . . . has not attracted significant support . . . I have concluded I am not in a position to write for the Court" and "will assign the case to someone else." The assignment was made to Potter.

On January 3, 1977, more than a month before Potter, on February 10, circulated a proposed opinion for the Court, you circulated to Thurgood, Harry and me what your covering memorandum styled "a first rough draft of a dissenting opinion", advising us that "I will await, of course, circulation of the Court's opinion before putting my dissent in final form." You circulated your dissenting opinion February 11,

the day after Potter circulated. Thurgood and I on that day, February 11, and Harry, on February 14, circulated to the Conference our joins of your dissent, Harry and I also stating that we would file additional separate dissents. On March 25, you recirculated your dissent with the joins of Thurgood, Harry and me noted thereon.

On April 11, John circulated a memorandum to the Conference that he was changing his vote from affirm to reverse the judgment. Potter, by memorandum of April 12, advised the Chief Justice that "In view of John Stevens' memorandum, the case should be reassigned." On the same day I wrote the Chief "If as Potter suggests the above should be reassigned, and it falls to me to do it, I assign it to Lewis." The Chief Justice responded by hand "It does and I have altered the records accordingly."

On April 28, you circulated a proposed announcement of the judgment of the Court and an opinion converted from your dissent that Thurgood, Harry and I had joined. Thurgood and I on May 11, and Harry on May 13, joined that circulation. On May 31, you announced the judgment of the Court and delivered the opinion for the four of us. I, (joined by Thurgood) also filed a concurring opinion. John filed an opinion concurring in the judgment. The Chief Justice, Potter (joined by Bill Rehnquist) and Byron each filed a dissenting opinion.

Obviously then you at no time switched your vote. Rather, your vote throughout to reverse became the Court vote to reverse the judgment when John changed his mind on April 11.

In earlier columns Anderson identified alleged "memoirs" of mine as the source of his wholly false statements of positions taken by the Chief Justice in United States v. Nixon. Twenty-three years ago, at the end of my first Term, I initiated a practice that I've since followed at the end of each of the twenty-three Terms that I have sat on the Court. I, or my clerks for my revision, prepare case histories of the decisional process in cases selected from those delivered by me that Term for the Court, or in which I had a part in the composition of the opinion. These histories are neither "memoirs" nor "diaries" but simply reference materials that I have found useful for later cases. They are kept in a drawer of my desk or in a locked safe in my chambers. My law clerks for each Term have been made to understand that they are confidential materials not to be removed from my chambers.

The authors of "The Brethren" claim to have some of these histories and also documents from my files. If so, they obtained them without my knowledge or consent. I have never met either Woodward or Armstrong.

I have never talked to either of them, by telephone or in person. I have not personally delivered or authorized any person to deliver the histories or other materials to Woodward, Armstrong or anyone else. They could only have obtained them from some unauthorized person or persons, for example a faithless law clerk. That smacks of encouraging or aiding and abetting a theft.

Moreover, Anderson could not in any event assert that the histories were the source of his untruth that you switched your vote in Moore v. City of East Cleveland. I made no history of that case since the opinion delivered by you was not one in the composition of which I had any part whatever.

Sincerely,

Mr. Justice Powell

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

75-6289

December 27, 1979

Dear Bill:

Barrett McGurn's daily circulation shortly before Christmas (which is becoming a bit tedious) included the Jack Anderson column from the Post of December 18, entitled "The Brethren Can be Articulate". Anderson correctly states that legal arguments by one Justice may persuade a colleague to change his vote. But the case he cites does not support his thesis. The column states:

"A case in point was the decision in Moore v. City of East Cleveland. Court sources told my associate Gary Cohn that a stirring dissent drafted by Justice William Brennan, Jr. creat[ed] a five-man majority out of an initial four-man minority".

Anderson then states that you wrote a "blistering dissent" that caused me to switch my vote.

You often persuade me, and I am sure you will continue to do so, as I greatly respect your views. But we were together on this case from the beginning. I therefore write only for the benefit of your records and mine to correct Anderson's gross misstatement.

I have checked my file, and find that at our Conference on November 5, 1976, you voted to reverse, as did Thurgood, Harry and I. None of the four of us changed his vote. My notes were quite explicit in stating my reasons for reversal. Incidentally, the Chief initially voted to reverse but later did change his vote to affirm - a perfectly proper course of action.

In addition, I had written a pre-Conference memorandum on the case in which I indicated my consistent view of the merits. Following the Conference I wrote and circulated a dissenting opinion in which you joined. You also circulated a fine dissent, but my dissent became the

plurality decision of the Court joined by you, Thurgood and Harry. John joined the judgment.

It is curious that a "Court source" should have conveyed false information to Anderson, and to have done so - apparently - three years after Moore was decided. I wonder whether some law clerk of that vintage, with a faulty recollection, was motivated by Woodward's book to volunteer erroneous information to Anderson. Let us hope this virus does not spread.

May I say generally that I think the book's and the media's portrayal of you as the principal personal adversary of the Chief is outrageous. The nine of us here know that differences are professional and not personal. The truth is, we have a strong and conscientious Court, with no significant personal friction. It would be a sad day for justice if we did not debate and test each other's views.

I think the real Brothers have accepted the Woodward smears with appropriate contempt. I particularly admire the dignity with which you and the Chief have borne the "slings and arrows".

Sincerely,

*L Lewis*

Mr. Justice Brennan

lfp/ss

I hope you and Marjory had your children with you for Christmas. If so, I know it was a happy period.

We were in Richmond, with half of our family. Jo is still there for a few days.