The Burger Court Opinion Writing Database

United States v. Will

449 U.S. 200 (1980)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

79-983 / 79-1689

October 2, 1980

MEMORANDUM TO CONFERENCE:

The vote on allowing Hubert Will to participate in oral argument for the Judges' Class, prompted me to consider noting my strong dissent on the record. You will recall I said that I would need to weigh whether my going on the record would further compound the damage that Will's appallingly bad judgment creates.

I conclude that my public dissent would compound the damage and I can only hope that some combination of the activities of Messrs. Carter, Reagan, and Anderson, along with Iran and Iraq, will preempt the news the day of the argument.

Having devoted close to 100 hours, more or less, in the past months to the Judges' Compensation problem, I am profoundly concerned that Will's bad judgment could well operate to damage our cause in Congress and negate some of the efforts already expended with the Salary Commission and the efforts of our supporters in the Bar.

If we are concerned about the appearance of judicial propriety as canons, standards - and our opinions - suggest, I am still at loss to understand why we are not collectively damaged by having a United States Judge appear in this Court for a class of which we are certified as members. We have acquiesced in that certification and Hurbert Will at the lectern is bound to be perceived as our advocate. This bears on the public perception of our role.

This whole problem is related to the discussion we had in the Spring about announcing that we waive benefits, if any, that may accrue to judges as a class, except the 5.5% voted by the present Congress.

This question seems to me too important to leave to decision next week when we will be immersed in a heavy order list and the argued cases.

I, therefore, suggest we convene in the Conference Room at 2:00 p.m. today. I have discussed this with Bill Brennan who will be available until 3:00 p.m.

Regards,

WEB

Sincerely

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

CHAMBERS OF
THE CHIEF JUSTICE

October 6, 1980

Re: Nos. 79-983 & 79-1689 - United States v. Will

MEMORANDUM TO THE CONFERENCE:

The attached were inadvertently deleted from the October 2 memorandum.

WEB

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: NOV 26 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–983 AND 79–1689

United States, Appellant,
79–983 *v.*
Hubert L. Will et al.

United States, Appellant,
79–1689 *v.*
Hubert L. Will et al.

On Appeals from the United States District Court for the Northern District of Illinois.

[December —, 1980]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present two questions: (a) when, if ever, the Compensation Clause allows the Congress to repeal or modify a congressionally defined formula for annual cost-of-living increases in the salaries of federal judges; and (b) whether the financial interest of the District Judge and each of the Justices of this Court in the outcome of this litigation precluded the District Judge initially and now precludes all Justices from hearing these cases or whether the Rule of Necessity governs.

I

Congress has enacted an interlocking network of statutes to fix the salaries of federal judges and high-level officials in the Executive, Legislative, and Judicial Branches. It provides for quadrennial review of overall salary levels and annual cost-of-living adjustments determined in the same fashion as those for federal employees generally. In four consecutive fiscal years, Congress, with respect to high-level Executive Branch, legislative, and judicial salaries, enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically opera-

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

CHAMBERS OF
THE CHIEF JUSTICE

December 1, 1980

Re: (79-983 - United States v. Will
(
(79-1689 - United States v. Will

MEMORANDUM TO THE CONFERENCE:

I have the several commentaries on the first draft in this case. As a very difficult case - at least I find it so - it is not surprising to encounter differences Some of them I can accommodate; some I cannot and each will need to go his own way.

However, I will await more time to respond.

Regards,

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

CHAMBERS OF
THE CHIEF JUSTICE

December 9, 1980

RE: Nos. 79-983 & 79-1689, United States v. Will

MEMORANDUM TO THE CONFERENCE:

Enclosed is Draft II of the above.

In substance I believe I have taken into account various comments received. In addition I have made other changes as marked marginally.

As to the former, each must evaluate the changes in light of the memos circulated.

Regards,

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: DEC 9 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79–983 AND 79–1689

United States, Appellant,
79–983 *v.*
Hubert L. Will et al.

United States, Appellant,
79–1689 *v.*
Hubert L. Will et al.

On Appeals from the United States District Court for the Northern District of Illinois.

[December —, 1980]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present the questions whether under the Compensation Clause, Art. III, § 1, Congress may repeal or modify a congressionally defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect.

I

Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches, including federal judges. It provides for quadrennial review of overall salary levels and annual cost-of-living adjustments determined in the same fashion as those for federal employees generally. In four consecutive fiscal years, Congress, with respect to these high-level Executive Branch, legislative, and judicial salaries, enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme, once the Executive had determined the amount. In two of these years, the legislation was signed by the President and became law before the start

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

CHAMBERS OF
THE CHIEF JUSTICE

December 11, 1980

RE: Nos. 79-983 & 79-1689, United States v. Will

Dear Potter and John:

I have no problems with the comments each of you has advanced. Our "disagreements" are superficial rather than real. As to Years 2 and 3, they relate only to characterizations of Congress' adoption of the Adjustment Act.

With regard to the "fractions of a day" rule, I am quite willing to describe the Government's argument as being that we should treat the President's assent as having been given at the start of October 1. I see no reason, however, to state that the rule applies only in the context of construing statutes. Blackstone placed his discussion of the rule in his description of estates for years, see 2 Commentaries *140-*142, and the Illinois case quoted (through Louisville v. Savings Bank) in footnote 29 involved a contract dispute. See also Combe v. Pitt, 3 Burr. 1423, 97 Eng. Rep. 907 (K.B. 1763). Of course, we are free to redefine the contours of the rule, but I see no need to do so in these cases. Referring to "substantial justice" or to constitutional limits on legislative authority (if not just a subcategory of "substantial justice") is not to say that the rule does not apply; it simply recognizes that the rule is not absolute--that it applies, exceptions and all.

I am enclosing six of the pages of Draft II printer's proofs on which we have typed changes that I believe will accomodate your respective thoughts.

Regards,

WEB

Mr. Justice Stewart
Mr. Justice Stevens

cc: The Conference

pp. 1, 3, 4, 8, 10, 14, 16, 21, 23-27

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: DEC 12 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 79-983 AND 79-1689

United States, Appellant,
79-983 v.
Hubert L. Will et al.

United States, Appellant,
79-1689 v.
Hubert L. Will et al.

On Appeals from the United States District Court for the Northern District of Illinois.

[December —, 1980]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

These appeals present the questions whether under the Compensation Clause, Art. III, § 1, Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect.

I

Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches, including federal judges. It provides for quadrennial review of overall salary levels and annual cost-of-living adjustments determined in the same fashion as those for federal employees generally. In four consecutive fiscal years, Congress, with respect to these high-level Executive Branch, legislative, and judicial salaries, enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme, once the Executive had determined the amount. In two of these years, the legislation was signed by the President and became law before the start

JD

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

CHAMBERS OF
THE CHIEF JUSTICE

December 12, 1980

MEMORANDUM TO THE CONFERENCE

RE: Nos. 79-983 & 79-1689, United States v. Will
Cases held

We have been holding two cases for Will:

No. 79-1180 Duplantier v. United States
No. 80-4440 Foley v. Carter

Duplantier concerns the constitutionality of applying the disclosure provisions of the Ethics in Government Act to judges. I will circulate a memorandum with regard to that case in the near future.

Foley is the action brought by William Foley in the nature of an interpleader regarding the Year 4 statute. The District Court held that the statute that year did not apply to federal judges and thus the judges were entitled to the 12.9% increase effective October 1, 1979. The President appealed. The Court of Appeals certified two questions to this Court: (1) whether the statute applied to judges and (2) if so, whether it violates the Compensation Clause. We have disposed of both these questions in Will. See pp. 28-29. I therefore recommend that we dismiss the certificate. This operates in effect to "remand" the case to the Court of Appeals for resolution of any other issues present. We have not yet requested briefing briefs from the parties.

I see no reason why the order dismissing the certificate in Foley could not be entered Monday when Will issues. Please let me know if this is satisfactory. It might simplify things if the two came down at once, and it will take only a "one liner."

Regards,

WEB

The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 17, 1980

CONFIDENTIAL

MEMORANDUM TO THE CONFERENCE:

I am informed that the mechanics of the Administrative Office make it impossible to give Federal judges the benefit of the Will decision before December 30.

Our salary checks are independently drawn and absent dissent, the amounts due for year 1 and year 4 will be delivered during this calendar year, provided we order the mandate to issue forthwith. Under Rule 52, this can be done. I see no reason why this should not be done but I await any comments.

Regards,

WEB

Brennan 80

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

CHAMBERS OF
THE CHIEF JUSTICE

December 30, 1980

MEMORANDUM TO THE CONFERENCE:

Upon receiving my monthly salary check today, I was reminded that there was not a clear-cut decision on paying the Will decision amounts with the December check. The combination of responses and informal comments was that we might quite as well allow the payment to be made in January. If we do this, the tax on that amount, which will eat up a large part, will be deferred until April 19, 1982.

Regards,

WEB

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

79-983

CHAMBERS OF
THE CHIEF JUSTICE

January 29, 1981

MEMORANDUM TO THE CONFERENCE:

As you are aware, the annual salary for Associate Justices was adjusted from $72,000 to $88,700 on January 1, 1981. This salary adjustment will first appear in your pay check on Februa 1, 1981, for the month of January.

However it now appears, contrary to earlier indications th the retroactive pay will not be received for about 2-7 weeks. Although Judge Roszkowski ordered the retroactive payment made the Will cases following our remand, the funds are being held pursuant to Judge Roszkowski's order, in an interest-bearing account in the Clerk's Office of the U.S. District Court for th Northern District of Illinois pending determination of attoneys fees and costs which will be deducted from the retroactive amou prior to distributuion.

Actual distribution of our retroactive pay must be made by the Treasury, at the Order of the Comptroller General, not by t Supreme Court.

The following figures--subject to court costs and attorney fees--represent the retroactive pay which you will receive:

	Gross Amount Due	Additional JSAS
Year 1 (Will I)	$ 1,250.00	$ 45.00
Year 4 (Will II)	$11,625.00	$523.13
"Year 5"(current year)	$ 1,849.98	$ 83.25
TOTAL	$14,724.98	$651.38

Regards,

WEB/pw

P.S. The funds for retroactive pay, currently on deposit in the Clerk's Office, are drawing 16.9% interest. This will substantially reduce the amount to be deducted for attorney's fees.

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

79-983

CHAMBERS OF
THE CHIEF JUSTICE

March 5, 1981

MEMORANDUM TO THE CONFERENCE:

The enclosed will help keep you informed. I had my clerk do a "back up" on my recollections from Department of Justice experiences on the jurisdictional amount.

Regards,

WEB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1980

RE: No. 79-983 and 79-1689 United States v. Will

Dear Chief:

I was in dissent at conference on Years 2 and 3 but am not so firm in that view that I cannot be persuaded to the contrary. I therefore would like to offer some suggestions for your consideration.

1. Byron's last two suggestions and John's 1, 3, 6 and 7 seem to me to have considerable merit.

2. Page 1 of your draft: should we purport to answer "when, if ever", Congress may repeal or modify a judicial pay formula, or focus rather our inquiry on whether, in this particular case, Congress has overstepped the bounds of the Compensation Clause? And would it not be preferable to reverse the order of the stated issues since the discussion of the recusal issue is first addressed in the opinion.

3. Page 7: does not the Government contend that the 1979 increase was in effect for 11, not 12 days? U.S. Brief at 51, n. 43.

4. Pages 24-25: Should not the statement of the Government's position on the Compensation Clause be expanded to state that it is that the Compensation Clause prohibits only those diminutions that "discriminate" against Article III judges? If so, should not the discussion and refutation of this construction also be amplified to prove the obvious - namely, that it is contrary to the original understanding and to subsequent and settled precedent.

The citation and reliance on O'Malley v. Woodrough gives me problems. Is its holding that application of a general tax to judicial salaries does not constitute diminution in any way relevant to the issue in this case? You state that the instant situation "is quite different from the situation in O'Malley v. Woodrough . . . "; rather aren't the situations identical insofar as both involve nondiscriminatory cuts in judicial take-home pay? Of course, it is plainly correct that "the inclusion of other officials in the freeze does not insulate a diminution in judges' salaries from the clear mandate of the Compensation Clause"; but ought not support for that proposition rest on reasoning other than reliance on O'Malley?

5. Page 25: Is it accurate to say that the Compensation Clause "embodies a practical balancing of the need to increase compensation . . . against the need for judicial independence." First, is it the case that increased salaries are in opposition to judicial independence? Isn't it rather that the countervailing interest is Congressional control over the budget? In any event, I seriously question that the Compensation Clause contemplates a balancing of interests: did not the Framers rather construct the clause as a flat prohibition of diminution of judicial salaries? In other words, doesn't the clause reflect a judgment that the public interest in a strong and independent judiciary is to be preferred absolutely over the fiscal concerns on the opposite side of the "balance"?

On the same page 25, I wonder if the final sentence of the last full paragraph can be omitted. Might it not be taken to imply that the result in this case is attributable to our sense of the equities in an inflationary age, rather than the dictates of the Constitution?

Pages 25-26: This deals with Years 2 and 3 as to which I had a different view at conference. I do hope you will find it possible to revise and expand this discussion so that I can be persuaded I was wrong. My problems are these: First, the opinion implies that the setting of fixed dollar amounts is somehow significant; second, it implies that the appropriation of funds is significant; third, it implies that the question of whether Congress has "surrender[ed]" its power to retract a formula pay increase is a matter of statutory construction, rather than Constitutional law; finally, it implies that the key to the argument is the characterization of the cost-of-living adjustments as an "announced legislative policy."

I had approached the problem of Years 2 and 3 from the viewpoint that the Compensation Clause does not permit Congress to retract pay increases after they are promised. The cleanest basis for a contrary view, as I see it, that would be consistent with United States v. More, 3 Cranch 159, would be to hold that judicial compensation "vests" for purposes of the Compensation Clause at the point in time when it becomes due and payable. That approach would make unnecessary, I think, any consideration of the 4 points you discuss.

6. Page 28: the opinion states that the District Court has not "examined the impact that the invalidity of the statute in Year 1 would have on the base salary on which the increases in Years 2, 3 and 4 are calculated," and that further proceedings are required to resolve this. Yet on Page 5, at note 4, the opinion acknowledges that the quadrennial increase received in March, 1977 superseded the Year 1 increase, and thus that appellee's complaint for Year 1 is significant "only insofar as it affected judicial compensation from October 1, 1976, to March 1, 1977." The base from which Years 2, 3 and 4 are calculated is thus unaffected by the invalidity of the statute in Year 1. That base remains that fixed by the quadrennial increase of March, 1977. I suggest that we explicitly hold this, so as to eliminate any possible confusion on remand.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 11, 1980

RE: Nos. 79-983 and 79-1689 United States v. Will

Dear Chief:

I agree with your recirculation of December 9 in the above.

Sincerely,

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 18, 1980

RE: Will Decision

Dear Chief:

I do not think we should issue the Mandate forthwith at this stage.

Sincerely,

The Chief Justice

cc: The Conference

Brennan 80

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 10, 1981

MEMORANDUM TO THE CONFERENCE

RE: Will v. United States

I am in full accord with Potter's view that it would be inappropriate for us either to oppose or support the award of counsel fees in this case. In addition, I think it would be most unwise. Our friends of the media would have a field day. It is inevitable, I think, that the opposition would be distorted whether or not, as Bill suggests, we propose that any savings be donated to charity. In the end the whole business would be a great disservice to the institution.

Bill

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 1, 1980

Re: Nos. 79-983 and 79-1969, U.S. v. Will

Dear Justice Powell,

Justice Stewart has asked me to send you the enclosed. He says that any separate opinion he files in this case would be along these lines.

Sincerely yours,

Carolyn

Justice Powell

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

From: Mr. Justice Stewart

1st DRAFT

Circulated: 5 DEC 1980

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 79-983 AND 79-1689

United States, Appellant,
79-983 *v.*
Hubert L. Will et al.

United States, Appellant,
79-1689 *v.*
Hubert L. Will et al.

On Appeals from the United States District Court for the Northern District of Illinois.

[December —, 1980]

JUSTICE STEWART, concurring in part and dissenting in part.

I join all but Part IV-B of the Court's opinion. There the Court declares that federal judges are entitled to a 4.8% salary increase, retroactive to October 1, 1976, because the President, for unknown reasons, waited until the first day of that fiscal year to sign the annual pay bill.[1] If the President had acted just a few hours sooner, and signed the bill before the clock struck midnight, federal judges would not, under the Court's reasoning, be entitled to that increase. I cannot subscribe to such hair-splitting.[2]

[1] The President signed the bill the same day that the Adjustment Act increases for judges would otherwise have taken effect. This was also the day that Executive Order No. 11941 was issued, implementing the Adjustment Act for that year.

[2] The 1976 Pay Act was passed by the House on September 1, 1976, and by the Senate on September 8. The Conference Report was adopted by both Houses on September 22. See 122 Cong. Rec. 28881, 29377, 31863, 31896-31897 (1976). The record does not show what caused the delay between congressional clearance and Presidential signature. But there is nothing to suggest that the delay was not the result of routine scheduling problems for the President, and that the President may have seen no reason to act before the first day of the fiscal year. Indeed, one may assume that he did not rush to sign the bill a stroke before midnight because, unlike the Court today, he relied upon the general rule that a statute is

V

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1980

Re: Nos. 79-983 & 79-1689, U.S. v. Will

Dear Chief,

The changes you propose in your opinion for the Court are all satisfactory, so far as I am concerned.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 11, 1980

Re: Nos. 79-983 & 79-1689, U.S. v. Will

Dear Chief,

Would you be willing to incorporate in your opinion for the Court all or most of what John Stevens has written in his concurring opinion? If you should do so, would John be willing to withdraw his concurring opinion? If so, I would withdraw my separate opinion in the interest of unanimity.

The first sentence of the last paragraph of Part II appearing on page 16 of your proposed opinion as recirculated on December 9, is, I think, inadvertently inaccurate. It says, among other things, that § 455 is totally inapplicable to a Justice of this Court. I trust you will be willing to change that sentence to something along the following lines:

> We therefore hold that § 455 did not overturn the traditional operation of the time-honored rule of necessity.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 12, 1980

Re: Nos. 79-983 and 79-1689, U.S. v. Will

Dear Chief,

In the event there is any doubt, I have withdrawn my separate opinion in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

CONFIDENTIAL

December 17, 1980

Re: Will Cases

Dear Chief,

Thanks for your memorandum. I think it is quite important that our decision in this case be treated in an entirely routine way. I am, therefore, instinctively opposed to any action that would (1) differentiate between us and the other members of the federal judiciary, or (2) interfere with the normal 25 day rule embodied in Rule 52.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

79-932
79-1659

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 10, 1981

MEMORANDUM TO THE CONFERENCE

Re: Will v. United States

Although there is much merit in what John Stevens says, it has been my view that it would be inappropriate for us either to oppose or to support the award of counsel fees in this case. Perhaps we should talk about it at the next Conference.

P.S.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1980

Re: Nos. 79-983 and 79-1689
United States v. Will

Dear Chief,

Please join me.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 1, 1980

Re: Nos. 79-983 and 79-1689
United States v. Will

Dear Chief,

I have joined your opinion, which I think is a strong one. I have the following observations, however, some of which are very minor.

In the first full paragraph on page 4, the material before the semicolon in the third sentence could well be dropped. On page 6, I suppose the word "contemplated" near the middle of the page should be the word "completely". On page 11, in the next to the last line of the text, I would substitute for the words "the case" the words "a case such as this".

More substantively, it seems to me that the "duty to sit" aspect of this case is somewhat overdone, particularly by invoking Cohens v. Virginia, which if read literally would suggest that we sit despite disqualifications. After all, as you say, disqualification is not a jurisdictional matter. I think we should accept the applicability of §455 except in those very narrow circumstances where disqualification would preclude any judgment at all. The first sentence of the last paragraph of Part II has somewhat of a different ring. Also, I would be just as happy if footnote 19 were omitted.

With respect to pages 21-23, I think it could be made clearer that except for year two, entitlement repeals were strictly temporary.

I'm not sure that Congress is so dissatisfied with indexing techniques since they continue to use them in other contexts. Their actions with respect to top officials seems more prompted by political considerations than by disenchantment with indexing. Hence, I would be just as happy to omit footnote 31.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1980

Re: 79-983 & 79-1689 - U.S. v. Will

Dear Chief,

I am still with you.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

CONFIDENTIAL

December 18, 1980

Re: Will Decision

Dear Chief:

With respect to Will, I agree with Potter and John.

Sincerely,

Byron R. White
by RE

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 2, 1980

Re: Nos. 79-983 and 79-1689 - U.S. v. Will

Dear Chief:

Please join me.

Sincerely,

T.M.

Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 17, 1980

Re: Will decision

Dear Chief:

I agree that the mandate should issue forthwith.

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

December 11, 1980

Re: Nos. 79-983 and 79-1689 - United States v. Will

Dear Chief:

I join your recirculation of December 9 and have no objections to the changes proposed in your letter of today to Potter and to John.

There is some merit, I suspect, in getting as close to unanimity as we can. For this reason I recede from my Conference vote and join your opinion.

I sense that there is some pressure to get this opinion down before the holidays. Personally, I hope that we do not overdo the rush, if such exists. If there is a quorum around later next week, why could not the opinion come down after Monday? This would give your chambers and the printer time to do the necessary polishing. We do this kind of thing in the Spring, and I doubt if the world would come to an end if we indulged in it in December.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 18, 1980

Personal

Re: Nos. 79-933 and 79-1699, United States v. Will

Dear Chief:

Because I did not participate in the decision of these cases, I shall not participate in any order that may issue concerning the [illegible]. If an order does issue, I would like to have this [illegible] on the [illegible].

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Brennan 80

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1981

Re: Will v. United States

Dear Bill:

On my return from conference today, I find a brief note from Judge Myron H. Bright. He encloses two copies of a letter dated March 19 he has sent to Judge Roszkowski and asks that I send one copy to you. It is enclosed.

In view of the discussion this morning, I am having other copies made and distributed to the Conference.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

MYRON H. BRIGHT
UNITED STATES CIRCUIT JUDGE
P. O. BOX 2707
FARGO, N. D. 58108

March 19, 1981

The Hon. Stanley J. Roszkowski
United States District Judge
Room 1903, The Dirksen Bldg.
219 South Dearborn Street
Chicago, Illinois 60604

Re: Nos. 78 C 420, 79 C 4368, 80 C 6692. Will, et al. v. United States. Objections and comments to Application of Counsel for the Plaintiffs' Class for an Award of Attorneys' Compensation in the sum of $850,000.00.

Dear Judge Roszkowski:

As a federal judge and a member of the class certified for relief in these cases, I wish to express my deep appreciation to counsel for plaintiffs and to the class representatives for devoted and dedicated service to the federal judiciary. As a matter of principle, however, I must enter comments and objections to the proposed attorney's fee award of $850,000 to plaintiffs' counsel. Having carefully read a draft of the application for fees and the recommendations of the class representatives, I nevertheless must conclude that such an award would be excessive.

I should note to the court that I have not received a copy of Mr. Forde's final application for attorney's fees. However, a federal judge has furnished me with a draft of

With all due respect for my fellow judges representing the class, I cannot agree with their recommendations on reasonable fees in this case. The anamoly in the amount of fees requested is striking. The attorneys' hours (which I do not dispute) would seem to approximate one lawyer working full time during two years, i.e., six billable hours per day five-day week x 50 weeks = 1,500 hours per year x 2 - 3,000 hours for two years. The fees claimed of $850,000 exceed by about one-half the gross salary of any single federal district or appellate judge for the past ten years and by far exceed the individual federal pay of the Chief Justice or any Associate Justice of the United States Supreme Court, also for the past ten years. Judges may be underpaid but there is not that much difference between us and the lawyers.

Finally, by filing these comments I would note the concurrence of my views with the named plaintiffs who seek a speedy final resolution of this case and prompt payment of backpay.

Respectfully submitted,

Myron H. Bright

I hereby certify that on the 19th day of March, 1981, I have caused to be mailed this original to the Clerk of the United States District Court, U.S. Courthouse, 219 Dearborn Street, Chicago, Illinois 60604; and that I have mailed copies hereof to counsel for plaintiffs, Mr. Kevin M. Forde, 111 West Washington Street, Chicago, Illinois 60602; to counsel for defendant, Mr. Neil Kislowe, Department of Justice, Washington, D.C. 20530; as well as copies to my colleagues on the Eighth Circuit Court of Appeals; and to certain other judges.

Myron H. Bright

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1980

79-983 and 79-1689 U.S. v. Will

Dear Potter:

I voted at Conference the same way you did with respect to Year 1, and accordingly incline to share the view expressed in your opinion concurring in part and dissenting in part, circulated today.

I think, however, there is considerable advantage in having a unanimous Court. I know from our recent discussion that you also share this view. Accordingly, I will await the changes that the Chief is making in his opinion before coming to rest.

Perhaps, as I believe John suggested, the majority position on Year 1 can be strengthened. Maybe the Chief can persuade us.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 11, 1980

79-983 and 79-1689 U.S. v. Will

Dear Chief:

Your opinion circulated on December 9, is a fine one, and I expect to join you.

I do think, in the interest of unanimity, it would be helpful if you could meet John Stevens' suggestions. I view them as consistent with your opinion and perhaps strengthening it.

Your footnote 29 now pretty well meets my concerns about Year 1. I have not talked to John, but perhaps you and he can get together. I would then be glad to join you.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 18, 1980

Will Decision

Dear Chief:

I also am inclined to think it best to let the mandate take its usual course.

Sincerely,

L. Lewis

The Chief Justice

LFP/lab

Copies to the Conference

Brennan 86

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 12, 1980

79-983 and 79-1689 U.S. v. Will

Dear Chief:

Please join me.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 11, 1981

MEMORANDUM TO THE CONFERENCE

Will v. United States

This refers to John's comments on the suggestion that we consider either opposing the award of $850,000 to counsel in the above case, or that Bill Foley be requested to do so.

I strongly agree with John's description of the situation. My recollection is that all of us believed, as John states, "that the harm done to the Federal Judiciary by this litigation far outweighs" the temporary benefits. This has been my view from the outset. In the short term, the suit - and its outcome - may well have diminished public respect for federal judges. In the long run, this litigation is likely to defer indefinitely the day when Article III judges are fairly compensated.

It can be said, I suppose, that counsel only did what he was hired to do, and that the blame - if any - lies on the plaintiff judges. Responsibility for the suit probably can be shared both by counsel and the plaintiffs, but in any event counsel merits no accolades. John also is "on target" when he takes exception to an hourly rate of $300 - certainly if this is a flat rate applicable to office as well as courtroom work.

Having said all of the foregoing, I would not approve of this Court taking any position on the fee question. I certainly would not participate in any praise of counsel or the plaintiffs. I am open to discussion as to whether the Administrative Office should act.

Sincerely,

Lewis

LFP/lab

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 1, 1980

Re: Nos. 79-983 & 79-1689 United States v. Will

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 12, 1980

Re: Nos. 79-983 and 79-1689 U.S. v. Will

Dear Chief:

I am still with you.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 17, 1980

Re: Will

Dear Chief,

I have some reluctance about the suggestion contained in your letter of December 17th regarding the application of your Will decision to our salary checks before December 30th if we order the mandate to issue forthwith. My reservation stems from the fact that we have necessarily, and quite properly, drawn press attention by reason of the fact that your opinion for a unanimous court relied on the "no reduction in compensation" clause in the Constitution. I am sure that the Bar as well as the Bench will appreciate and understand this reasoning, but as to the fabled "man in the street" I have greater doubt.

But if we add more fuel to this necessary fire by ordering the mandate to issue forthwith, we will affect the nine checks which go to the nine members of this Court, and expedite their delivery, while not doing the same for any of the other federal judges who are beneficiaries of the same decision. If this result were likewise required by the Constitution, as all nine of us felt the result in Will was required, I would uphold my sworn duty, as I know the remaining eight would. But the result you propose as I understand it, could be accomplished only by an exception to the general rule regarding mandates, which would represent an exercise of our discretion in no way required by the Constitution. Therefore, unless I have missed something in your memorandum, I would not vote to issue the mandate immediately.

Sincerely,

WER

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1981

MEMORANDUM TO THE CONFERENCE

Re: Will v. United States

I am in complete accord with the suggestion contained in John's memorandum of March 10th. If necessary to avoid any appearance of reducing our own "gain" by opposing the attorney's fee award, I would be happy to submit to any proposal that gave the difference between proposed fees and fees actually awarded be donated to some charity if that is possible.

Sincerely,

WHR

Copies to the Conference

J

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 1, 1980

Re: 79-983 and 79-1689 - United States v. Will

Dear Chief:

After studying your first draft, I find that it presents me with several rather serious problems. Although some are more significant than others, let me simply identify them in the order in which they occur:

(1) I would omit footnote 4 on page 5. Alternatively, perhaps there is something in the record that could be cited with a comment that we consider it irrelevant to the issues.

(2) On page 16, I would prefer to omit the sentence which reads: "No conceivably valid public purpose would be served by requiring disqualification under § 455." I believe a very strong public interest is served whenever a judge who has an interest in the outcome of litigation disqualifies himself. I agree that that interest is outweighed by the rule of necessity in these cases, but I believe the sentence as written is incorrect.

(3) As I read the last sentence of Part II on page 16, it purports to decide a very important constitutional question which need not be reached in view of our construction of § 455 as not having been intended to modify the rule of necessity. I think all of the reasons which support the strong policy of avoiding the expression of any opinion on a constitutional question unless it is essential to the disposition of a case apply to that sentence; I therefore feel very strongly that it should be omitted.

(4) It also seems to me that the duty to avoid constitutional issues whenever possible would make it appropriate in this opinion to address the statutory questions before we discuss any constitutional issue. I therefore would like to suggest that you consider placing the discussion of all statutory issues in a new Part III which could precede your present Part III. Whether or not that suggestion is acceptable, should not the discussion of the special statutory question relating to Year 4 which is now found on page 27 be included in the same section that discusses the other statutory construction questions?

(5) In the second and third lines on page 17 I would omit the parenthetical reference to the English Judiciary because it has such a different history and different constitutional status.

(6) As presently written, I do not believe the brief discussion of Year 2 and Year 3 at pages 25 and 26 adequately explains either the constitutional theory that was presented to the District Court, or the reasons why it is unacceptable.

(7) Finally, I disagree with the reason given in footnote 29 on page 24 for rejecting the Government's constitutional argument with respect to Year 1. If the matter were to be decided by a "substantial justice" test, I think I would be inclined to agree with Potter and Lewis that we should overlook the fraction of a day. For me, the controlling consideration is quite different. The point is that the ancient maxim concerning fractions of a day is a rule of construction designed to ascertain the intent of the legislature. In this case there is no serious question about the intent of Congress. It is perfectly clear that the increases were intended to become effective at the beginning of the first day of each fiscal year, and it is equally clear in both Year 1 and Year 4 that Congress intended to prevent the increases from taking effect at 12:01 a.m. on October 1st. The "fraction of a

day" issue in this case is not concerned with legislative intent or "substantial justice." Rather, the question is whether the constitutional barrier to any diminution in the salary of an Article III judge raises an obstacle to the fulfillment of the clear intent of Congress to rescind a salary increase after it has become effective. In my opinion, that issue is the same whether the increase has been in effect for ten days or ten hours.

Respectfully,

The Chief Justice

Copies to the Conference

79-983 and 79-1689 - United States v. Will

JUSTICE STEVENS, concurring in part.

My reason for rejecting appellees' contentions concerning Years 2 and 3 is sufficiently different from the Court's to require separate exposition. In my opinion, the network of statutes described in Part I of the Court's opinion, ante, at 1-7, is much more than merely an announcement of "a policy of annual cost-of-living adjustments for an unspecified future period." Ante, at 26.[1] It constituted, in my judgment, a solemn commitment by the Congress to provide Article III judges with annual increases in compensation in order to maintain the level of their real income. Congress has, in my opinion, breached that commitment. The dispositive question, however, is not whether Congress made and breached a solemn promise, but whether its decision to breach that promise violates the Compensation Clause of Article III.[2] I do not consider a refusal to allow a promised

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[1] That the network of statutes is more than an announcement of legislative policy is established by the fact that affirmative congressional action was required to prevent the promised salary increases from becoming effective. A mere declaration of legislative policy ordinarily requires affirmative action to give it effect, not to prevent it from taking effect.

[2] The Compensation Clause provides:

> "The Judges, both of the supreme and inferior courts, shall hold their Offices during good

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 11, 1980

Re: 79-983 and 79-1689 - United States v. Will

Dear Chief:

The length of our Conference yesterday made me forget to send a letter with my draft concurrence that I had intended to dictate. The note from Potter, which I have just received, has reminded me of my omission.

If you would be willing to incorporate the substance of my separate writing, I would definitely withdraw it. I merely thought it would be helpful to write it out separately in order not to delay the completion of this opinion in the event that you prefer to adhere to your present rationale with respect to Years 2 and 3.

If you are disposed to accept my paragraph relating to Year 1, perhaps it could simply be added at the end of your present footnote 29, with this one qualification. I would hope you would consider deleting the last sentence of the footnote as now written; my reason for making this suggestion is that the sentence implies that the Court is doing the "line-drawing" or "hair-splitting." The critical point for me is that the Framers of Article III of the United States Constitution drew a firm line that could not be transgressed ten seconds, ten hours, or ten days after the salary increase became effective.

Respectfully,

The Chief Justice

Copies to the Conference

V

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 11, 1980

Re: 79-983 & 79-1689 - United States v. Will

Dear Chief:

The changes in the pages that you have sent to Potter and me do seem to remove any substantive differences between us. I surely will not write separately simply because I might have expressed a thought in somewhat different language. I therefore join your opinion.

I do, however, have two suggestions on pages 25 and 27 to submit for your consideration:

a. On page 25 in footnote 30, would it not be appropriate to substitute "whether" for the word "when"?

b. On page 27, should not the next to the last sentence describing Year 2 refer to October 1 as "the time it was first scheduled to become part of judges' compensation" rather than "the time it first became . . ."?

Respectfully,

JPS

The Chief Justice

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

CONFIDENTIAL

December 17, 1980

Re: Will

Dear Chief:

In my opinion there is no reason to treat this case any differently than any other. Since the immediate issuance of the mandate would constitute special treatment, my vote is against any such action.

Respectfully,

John

The Chief Justice

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Brennan JS

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

79-183
79-1681

March 10, 1981

MEMORANDUM TO THE CONFERENCE

Re: Will v. United States

As one member of the class to whom certain judges have circulated a printed memorandum recommending that $850,000 be paid to counsel for their work in preserving the independence and the quality of the Federal Judiciary, I would like to suggest that we give serious consideration to either opposing the award or possibly requesting Bill Foley to do so. For several reasons, I think the memorandum takes a position that is contrary to the best interest of the Federal Judiciary.

First, in my judgment history will prove that the harm done to the Federal Judiciary by this litigation far outweighs the minimal benefits that it produced. The memorandum grossly overstates the net benefits of the litigation. Had this suit never been filed, the bulk of the recovery would nevertheless have been obtained in the Foley litigation. Moreover, in the long run, judicial salaries may well be lower than those that Congress would otherwise authorize because of their reaction to federal judges "who give themselves a raise."

Second, the memorandum overstates the degree of success that was obtained. The plaintiffs were entirely unsuccessful on the principal theory of recovery and were able to prevail at all only because Congress committed an obvious blunder in 1979 and the President was a little slow in his paperwork in 1976. The maximum benefit for which the plaintiffs can claim any credit is the 5.5 percent increase that was withheld for a few months as a result of the 1976 action.

Third, the suggestion on page six of the memorandum that counsel should be given special credit for handling unpopular litigation is a little hard to swallow. There are quite a few lawyers who would have regarded the opportunity to represent the Federal Judiciary as a privilege. It surely is not quite like a march on Selma.

Fourth, at a time when we should be concerned about the cost of legal services, it strikes me as somewhat unseemly to approve hourly rates of about $300 per hour.

The attorneys who represented the class should, of course, be paid for their professional services. But I believe their compensation should reflect the fact that the litigation produced no significant benefits for their clients and therefore their compensation should be measured by an appropriate hourly rate. In my judgment, the rates requested are not appropriate. To characterize this case as a great victory for the Federal Judiciary in order to justify a fee award of $850,000 is both misleading and apt to exacerbate the harmful effects that the litigation has already produced.

Respectfully,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 11, 1981

Re: Will v. United States

Dear Harry and Bill:

Since you both mentioned that you did not receive these documents, I have xeroxed copies for your information. You will note that the Notice was sent to all class members so I assume the others did receive copies.

Respectfully,

John

Justice Blackmun
Justice Rehnquist

cc: The Conference