December 19, 1979

Hon. Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Powell:

How could you have let Justice Brennan do such a thing to you?

Getting soft on grandmothers because somebody played to your personality quirks is one thing. But yielding to "cogent, articulate legal argument" is quite beyond the pale.

Whoever leaked these tidbits to Jack Anderson needs his plumbing checked.

Sincerely,

Dave

David A. Martin
Dear Dave:

My warm thanks for your note about the famous case of Moore v. East Cleveland.

I suppose you and I just didn't know who was doing our thinking for us.

Here is my letter to Bill Brennan. I am sure he is in full accord, but I thought it well to have our files reflect Anderson's gross error.

I suppose that you and Cindy will soon be moving to Charlottesville. This pleases me, as you will add strength to an already fine faculty. Also, I think you and your family will enjoy life in that rather unique town and campus of culture and history.

My best to you both.

As ever,

David A. Martin, Esquire
Department of State
Washington, D. C. 20520

lfp/ss
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. created 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,

Mr. Justice Brennan

1fp/ss
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 affirrnance 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
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Sincerely,

Bil

Mr. Justice Powell
Moore v. City of East Cleveland and Nixon Tapes Case

The attached draft of a letter of January 7, 1980, to Justice Brennan was never sent. It was written when he was commenting on what was said in The Brethren about these two cases. Bill apparently writes a summary each Term of what happened in cases considered to be most important. I have never seen his current "memoirs", but his letter of January 3 - though substantially accurate with respect to my role in Moore - was inaccurate in several particulars with respect to the Tapes Case.

L.F.P., Jr.
Thank you for your full letter of January 3, that contains a complete record of how the opinions in the Moore v. City of East Cleveland case were developed.

Although the case is hardly important enough to be of any interest to future historians who write about the Court, I think it is just as well that our respective files document the facts.

I am also glad that you included in your letter the final two or three paragraphs. Although they were quite unnecessary so far as I am concerned, again it is prudent -
for the benefit of whoever may look into these matters in the distant future - for you to record the facts. Incidentally, Woodward's description of my role in the Tapes Case, including his account of what transpired between you and me, also is far from the truth. You were entirely supportive of the memorandum I circulated except we did differ as to how to describe the qualified privilege of a President. Memoranda that I prepared well before the argument (indeed, I had commenced worked on the case the preceding summer following Johnny Sirica's decision), make clear that in my view the presidential privilege could not defeat the need for evidence in a trial such as the Tapes Case. Indeed, we were all of one mind about the result, and the precise language adopted in describing the privilege - though not ideal from my viewpoint - reflected a reasonable accommodation of the views of all of us.
I was proud of the way the Court functioned in the Tapes Case, and thought then - and still do - that each member of the Court participated responsibly and constructively in resolving according to law a serious constitutional crisis.

Sincerely,

[Signature]

[Name]
Jack Anderson

The Brethren Can Be Articulate

The Supreme Court's wall of secrecy has now been breached by Bob Woodward and Scott Armstrong in their book "The Brethren."

The petty, behind-the-scenes shenanigans—veto swapping, back-scratching, playing to personality quirks—that are sometimes the deciding factors in cases of far-reaching importance have been devastatingly detailed in the book.

Cohent, articulate legal arguments by one justice, of course, can also persuade a colleague to change his vote on occasion.

A case in point was the decision in Moore v. City of East Cleveland, decided in May 1977—several months after the period covered in the Woodward-Armstrong book. Court sources told my associate Gary Cohn that a stirring dissent drafted by Justice William Brennan Jr. creating a five-man majority out of an initial four-man minority.

Inez Moore, who lived with her son and two grandsons in East Cleveland, Ohio, had been convicted of violating a local housing ordinance that restricted occupancy of a home to members of a single, narrowly defined family. One of the grandsons was the child of her deceased daughter, and this relationship was not included in the city ordinance's definition of "family."

For refusing to expel the 10-year-old boy, who had lived with her since infancy, the grandmother was fined and sentenced to prison. She appealed.

Grounds that the ordinance was unconstitutional.

Powell, at first voted against Moore. But Brennan wrote a blistering dissent, noting, among other things, that "if the ordinance were applied to Washington, D.C., then President Carter would be in violation. "Several members of the Carter family who would not have been covered by an East Cleveland-type ordinance were at that time residing in the White House."

Powell not only changed his vote, but proceeded to write the resulting majority opinion. He wrote that the city had undertaken "intrusive regulation" of family life—one of the liberties protected by the due process clause of the Fourteenth Amendment—without any overriding justification.

The majority opinion held that the Constitution's protection of the family sanctity was deeply rooted in the nation's history and tradition, and extended to families that shared their household with uncles, aunts, cousins and grandparents.

Chief Justice Warren Burger—who dissented on grounds that Moore should have exhausted her administrative remedies by asking for a zoning variance—was "absolutely furious" at Powell's last-minute change of mind, according to court sources. Powell's "defection" had matched a Burger defeat from the jaws of victory.

Footnote: My office has repeatedly requested interviews with Burger to get his side of Supreme Court stories. He has repeatedly refused to be interviewed. We'll continue to ask for his comments each time we report on court activities he doesn't think the public is entitled to know about.

Medigap Mess—For two years members of Congress have been hearing horror stories about older Americans ripped off by high-pressure insurance agents selling so-called "Medigap" policies. These policies are supposed to pick up the slack that Medicare and Medicaid leave in treatment of many illnesses.

Investigations by Senate and House committees and the Federal Trade Commission have turned up a disturbing pattern of oversell and under-coverage in these insurance policies. To curb the offending hard-sell agents and their companies, Rep. Claude Pepper (D-Fla.) and Sens. Bob Dole (R-Kan.) and Max Baucus (D-Mont.) are pushing legislation that would slap felony charges on shady sales agents, and set up a program of voluntary approval of insurance companies' Medigap policies by Uncle Sam.

The health insurance lobby is striving in not-so-discrete fashion to get the badly needed legislation pigeonholed for further study, in hopes of strangling the bill in its crib. The heaviest lobbying has come from the Health Insurance Association of America, Mutual of Omaha, Colonial Penn and UniSec Fidelity.

So far, the search for a senator willing to introduce a delaying measure has struck out.