

Memorandum



Subject	Date
Erwin Griswold Correspondence	December 11, 1981

To: The Attorney General

From: John Roberts *JR*

Dean Griswold has delivered a copy of his 1976 Tucker Lecture, entitled "Equal Justice Under Law," with the comment that in it you might find "a measure of resonance" with your recent speeches on judicial restraint. The first part of Dean Griswold's piece concerns the increasing discretionary aspect of Supreme Court review. He criticizes the Court for disposing of mandatory appeals in a summary fashion, and then not considering itself bound by the precedent of a summary affirmance (which nonetheless binds the lower courts). While Dean Griswold considers this "discretionary" treatment of mandatory appeals a means by which the Court follows policy preferences, the area is probably too procedural and arcane to merit your attention.

The second part of the piece is devoted to the same judicial policymaking themes which you have recently been addressing. Dean Griswold criticizes the process by which the Bill of Rights has been "incorporated" into the due process clause, and thereby made binding on the states. He devotes a section to the so-called "right to privacy," arguing as we have that such an amorphous right is not to be found in the Constitution. He specifically criticizes Roe v. Wade. Dean Griswold concludes by attacking judicial action which lays down legislative rules, such as was done in the Miranda case, and judicial action which intrudes on state executive functions -- the third of the Federal Legal Council categories. Interestingly enough, the egregious example Dean Griswold focuses on in this area is the Alabama Mental Hospital case, Wyatt v. Stickney, which was prosecuted beginning in 1972 with the vigorous support of our Civil Rights Division (see page 837 of the article). The Civil Rights Division is still involved in the case which, like most institutional litigation, is interminable. Governor Fob James was by last week to discuss specific aspects of the case with Brad Reynolds, and there is some movement to modify our involvement.

I have drafted a response to Dean Griswold's letter.



Office of the Attorney General
Washington, D. C. 20530

Erwin N. Griswold, Esquire
Jones, Day, Reavis & Pogue
1735 Eye Street, N.W.
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Dear Erwin:

Many thanks for your note of December 2, and the accompanying copy of your 1976 John Randolph Tucker Lecture "Equal Justice Under Law."

You were quite right that I would find "a measure of resonance" in your lecture with some of the themes which I have been addressing recently. Although some editorial writers have seen fit to criticize my efforts in this area, I was cheered to see that you have been making many of the same points and also stressing the desirability of commentary from outside the Court on the decisions of the Court. I particularly agree with the comment made near the end of your lecture, where you note that courts enhance their own prestige and effectiveness by restricting themselves to the proper judicial function.

Thank you again for sharing your lecture with me.

Sincerely,

William French Smith
Attorney General

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December 2, 1981

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Hon. William French Smith
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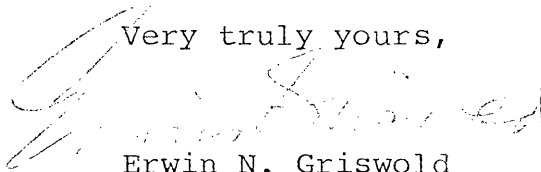
Dear Bill,

In connection with your recent speeches, I take the liberty of sending you a copy of a lecture which I gave several years ago at the Washington and Lee University.

You will find, I think, a measure of resonance here.

With best wishes,

Very truly yours,



Erwin N. Griswold

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