

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 1, 1994

Re: No. 92-7247, Farmer v. Brennan

Dear David:

Please join me.

Sincerely,

HAB

Justice Souter

cc: The Conference

11/05

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

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

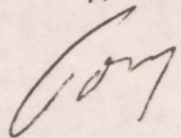
May 27, 1994

RE: 92-7247 *Farmer v. Brennan*

Dear David,

I would be pleased to join your opinion.

Sincerely,


Best thanks for your patience.

Justice Souter

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

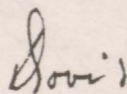
May 26, 1994

MEMORANDUM TO THE CONFERENCE

Re: 92-7247, *Farmer v. Brennan*

The attached sixth draft incorporates a revision of footnote eight on page sixteen. This follows a correspondence between Tony and me prompted by his concern about the risks of mentioning "willful blindness." The upshot is that I have deleted reference to the doctrine as such, but have retained the examples as practical pointers in applying the rule we adopt. I don't believe the change will be objectionable to the others who have joined the opinion. But if I am mistaken, I hope anyone who does object will let me know.

Yours sincerely,



HAB

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

May 16, 1994

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

Re: *Farmer v. Brennan*, No. 92-7247

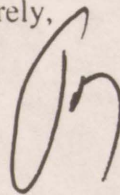
Dear David:

I appreciate the changes you have made and want to join your opinion, but I have some problems with footnote 8 on page 16 concerning willful blindness.

The footnote says that the willful blindness doctrine may be relevant both in establishing knowledge of the underlying facts and also in establishing awareness of the risk that a particular result will occur. As for risk awareness, it seems redundant and confusing to speak of willful blindness because we are necessarily talking about the probability that a particular result will occur. I am not aware of support in the criminal law for applying a distinct willful blindness doctrine with respect to the risk that a particular result will occur. When criminal liability depends on the defendant's awareness of certain facts as opposed to the defendant's awareness of the risk of a potential result of his action or inaction, there is support for applying the willful blindness doctrine, but a great deal of confusion about how to apply it. See *Tomala v. United States*, 112 S. Ct. 1991 (1992) (White, J., joined by THOMAS, J., dissenting from denial of cert). Footnote 8 states that "[t]he criminal law allows liability to rest on proof that a defendant purposefully avoided obtaining final confirmation of what he strongly suspected to be true" and suggests that the doctrine applies in this context when a prison official "purposefully avoids confirming his reasons to believe that one prisoner has planned an attack on another." I am not sure that is correct. In my view, "[i]t is not culpable to form a conscious purpose to avoid learning the truth unless one is aware of facts indicating a high probability of that truth." *United States v. Jewell*, 532 F.2d 697, 707 (Kennedy, J., dissenting); see Note, Model Penal Code Section 2.02(7) and Willful Blindness, 102 Yale L.J. 2231, 2243 (1993).

In sum, in this case, which concerns awareness of the risk that a particular result will occur, it seems unwise to use the mischievous phrase "willful blindness," which must be qualified and explored with some care. We may have to deal with it in some context in a later case, and I would prefer not to introduce it here. If you could delete the footnote, I would be pleased to join your opinion.

Sincerely,



Justice Souter

Copies to the Conference

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

CHAMBERS OF
JUSTICE ANTONIN SCALIA

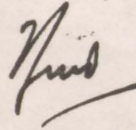
May 13, 1994

Re: No. 92-7247 - Farmer v. Brennan

Dear David:

I am withdrawing my dissent and would be pleased to join your opinion.

Sincerely,

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Justice Souter

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

May 12, 1994

MEMORANDUM TO THE CONFERENCE

Re: *Farmer v. Brennan*, No. 92-7247

Nino and I are finally singing the same tune. I believe that the revised Part III contained in the attached draft will enable him to join.

Yours sincerely,

Davis

HAB

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 11, 1994

Re: 92-7247 *Farmer v. Brennan*

Dear David:

Your changes are helpful and I am still with you.

Sincerely,

Sandra

Justice Souter

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

May 10, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear Chief:

The new draft omits, rather than modifies, the language about which you expressed concern in your April 19th letter. The discussion of injunctive relief, for that matter, now contains no references to Nino's dissent at all. I've modified that section in response to your comment and others I received since Nino's dissent circulated (as well as my own reflections), and the modifications are substantial enough that Nino will probably want to take a fresh look at his critique of the section.

Yours sincerely,

Davis

Chief Justice Rehnquist

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

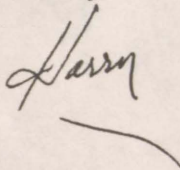
April 19, 1994

Re: No. 92-7247, Farmer v. Brennan

Dear David:

Although I probably shall join your opinion, I have concluded to write separately. I shall get this out as soon as I can.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Justice Souter

cc: The Conference

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

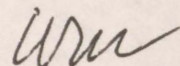
April 19, 1994

Re: No. 92-7247 Farmer v. Brennan

Dear David,

I have one minor reservation about the changes you have made in response to Nino's dissent. I think the statement in new footnote 11, on page 22, is correct as far as it goes, but I think it is somewhat incomplete; an injunction is available without a showing of past wrongs, but there has to be compliance with the requirement that there be some sort of continuing or recurrent violation. This entire thought could be conveyed by breaking the third sentence into two sentences, placing a period after "occurred," and revising the following sentence to read: "So long as 'there exists some cognizable danger of recurrent violation,' 'an injunction [is available] to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs.' United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (citations omitted)." This, or some other revision that conveys the same idea, would be fine with me.

Sincerely,



Justice Souter

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE CLARENCE THOMAS

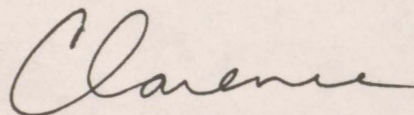
April 19, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear Nino:

I am pleased to join your dissenting opinion.

Respectfully,

A handwritten signature in cursive script, appearing to read "Clarence", written in dark ink.

Justice Scalia

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 31, 1994

Re: 92-7247 Farmer v. Brennan

Dear David:

I join your opinion in this case.

Sincerely,

Sandra

Justice Souter

Copies to the Conference

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

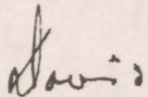
March 22, 1994

Re: 92-7247, *Farmer v Brennan*

Dear Ruth:

Thanks very much for your join. Your suggestion is taken and will be reflected in the next circulating draft.

Yours sincerely,


A handwritten signature in dark ink, appearing to read "D. Souter", is written above a horizontal line.

Justice Ginsburg

Copies to the Conference

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

CHAMBERS OF
JUSTICE RUTH BADER GINSBURG

March 22, 1994

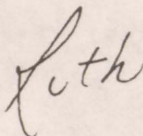
Re: 92-7247 - *Farmer v. Brennan*

Dear David:

I join your opinion, with one last request. As now worded, the sentence beginning at the bottom of page 25 and continuing onto page 26 implies that petitioner might be entitled to an injunction ordering respondents never to place him in a penitentiary, even in administrative seclusion there. To avoid that suggestion, you could rephrase the sentence along these lines:

He suggested that affirmance was nevertheless proper because there was no present prospect that petitioner will be placed in a setting where he would face a "continuing threat of physical injury," *id.*, at 26, but this argument turns on facts about the likelihood of a transfer that the District Court is far better placed to evaluate than we are.

Respectfully,



Justice Souter

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

CHAMBERS OF
THE CHIEF JUSTICE

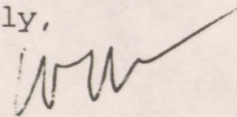
March 21, 1994

Re: 92-7247 - Farmer v. Brennan

Dear David:

Please join me in your second draft.

Sincerely,



Justice Souter

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

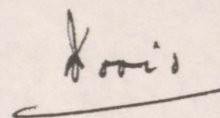
March 18, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear Ruth:

Attached is a second draft of the opinion. It incorporates the change you offered with respect to *Canton v. Ohio*, and it includes the language I proposed in my March 10 letter to the Chief, as modified by your suggestion, and a little further editing of my own. I hope these revisions (which I assume are acceptable to John) will enable you to join.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "R. B. Ginsburg", with a long horizontal line extending to the left.

Justice Ginsburg

Copies to the Conference

7AB

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

CHAMBERS OF
JUSTICE RUTH BADER GINSBURG

March 15, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear David:

Appreciation for your careful consideration of my suggestions. The modifications you describe appear to meet my concerns. I have one lingering question. Should the opinion do more to distinguish institutional-type cases (generally involving a class action attack on multiple, allegedly infirm, prison practices), from the case-specific grievances of a particular individual? Cf. Title VII litigation, where the distinction between individual and class claims is well-developed.

Respectfully,

Ruth/b

Justice Souter

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

March 14, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear Ruth:

Thank you for your letter. On the first of your specific comments, regarding the draft's treatment of *Canton*, I am happy to accept the modification you offer.

On the second, as I hope you gathered from my response to the Chief's letter (which apparently crisscrossed with yours), I agree that the requisite knowledge of a risk should not be presumed from court pleadings and have proposed to revise the draft accordingly. As I have proposed to revise it, the opinion would merely reiterate what the Court said in *Helling* (which postdates the decisions below): that for a claim seeking injunctive relief from an ongoing, objectively intolerable risk of serious harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct" 113 S.Ct., at 2482; see also *id.* ("[w]ith respect to the objective factor, [the inmate] must show that he himself is being exposed to unreasonably high levels of ETS").

I have to say, though, that I remain doubtful that there is a solid theory for affirming the denial of injunctive relief in this case. You suggest the possibility of resting on the ground that, while petitioner might be entitled to a narrowly-tailored injunction, petitioner is almost surely not entitled to the specific injunctive relief he has actually sought. Even if that near-certainty were enough to justify affirmance on a ground not relied upon below, however, I would think it well within the District Court's discretion, assuming an Eighth Amendment violation were actually established, to grant the lesser-included remedy to which you refer (even if petitioner had not also sought "such other and further relief as th[e] [District] Court may deem just and proper," J.A. 70).

I can, to be sure, see the value of saying that even if a violation were found the District Court need not grant the specific injunctive relief requested but remains free (indeed, obliged) to issue the narrowest possible order. I would also have no objection to saying here, as we did in *Helling*, that on remand "[t]he District Court will have the usual authority to control the order of proof, and if there is a failure of proof on the [objective] element . . . , it would not be an abuse of discretion to give judgment for [respondents] without taking further evidence." 113 S.Ct. at 2482. But the District Court having applied a single incorrect test to reject petitioner's claim in its entirety, I see little to be gained by dividing the baby at this stage. I hope you can see your way clear to joining an opinion that allows

the government to develop on remand its case-specific arguments for denying both damages and injunctive relief.

Last, on your general point, I hope the return of the mistakenly omitted language on page 15 (which I noted in my letter to the Chief) helps for now. When the dust settles I will take another look at the opinion as a whole with a view to tightening it as you suggest.

Yours sincerely,

Stovis

Justice Ginsburg

Copies to the Conference

HAB

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

CHAMBERS OF
JUSTICE DAVID H. SOUTER

March 10, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear Chief:

Thank you for your letter of the seventh. On your first difficulty, I am willing to delete "uncivilized," as you requested. Instead of "barbarous," I'd prefer "inhumane," which appears elsewhere in the draft and with some frequency in prior Eighth Amendment opinions (sometimes as "inhuman"). Would that meet your concern?

On your second difficulty, it was not my intention to imply that the subjective requirement disappears in the injunctive relief setting, or that the mere filing of a complaint satisfies the subjective requirement. Nor did I wish to suggest that injunctions should be any easier to obtain in this area than in others, and I agree with you that district courts should not be precluded from giving prison officials time to rectify the situation before issuing an injunction. I had hoped that the references in the discussion of injunctive relief to "the subjective requirement" and to the defendant-officials' "awareness," the statement that "a district court *may* grant *appropriate* injunctive relief," p. 20, and the cites to *Hutto v. Finney* and *Bell v. Wolfish* would do the trick, but if it would bring you on board I would be happy to delete the point about a complaint putting a defendant-official on notice and otherwise revise the carryover paragraph at pages 19-20 to read:

To meet the Eighth Amendment's subjective requirement in a suit seeking recompense for a previously experienced injury, an inmate must offer proof directed backwards; he must show that, before the injury occurred, the defendant-official knew of a substantial risk of serious harm and disregarded it by failing to take reasonable preventive measures. By contrast, in a suit seeking an injunction to prevent harm yet to have occurred it is the defendant-official's present state of mind that matters, and the Eighth Amendment's subjective requirement can accordingly be established during the litigation itself. If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, it is hard to see how the defendant-official can claim lack of awareness. And once knowledge of such a risk is established, the defendant-official's refusal to take reasonable measures to alleviate it reveals a level of subjective blameworthiness that we have called deliberate indifference to inmate health and safety. With the Eighth Amendment's objective and subjective requirements satisfied, the district court may grant appropriate injunctive

relief. Cf. *Hutto v. Finney*, 437 U. S., at 685-688 & n. 9 (approving injunction designed to stop "an ongoing violation" of the Eighth Amendment). Of course, courts should approach issuance of injunctive orders with the usual caution. See *Bell v. Wolfish*, 441 U. S., at 562 (warning courts against becoming "enmeshed in the minutiae of prison conditions"). A district court may appropriately exercise its discretion, for example, by giving prison officials time to rectify the situation before issuing an injunction.

I would also, if you would like, add the following as a footnote:

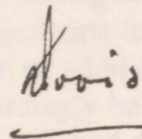
This discussion assumes that an inmate seeks injunctive relief on the ground that there is an ongoing Eighth Amendment violation in prison officials' refusal to alleviate an existing, objectively intolerable risk of serious injury. If, instead, an inmate claims entitlement to injunctive relief solely because an Eighth Amendment violation has occurred in the past, then, of course, he must show a "cognizable danger of recurrent violation" in order to obtain an injunction. *United States v. W.T. Grant Co.*, 345 U. S. 629, 633 (1953).

And I would revise Part III as necessary to correspond with these changes.

I don't doubt that analyzed in either an ongoing-violation framework or a past-violation framework petitioner is more likely in the end to lose than to win. But in the posture the case comes to us, I don't think we can reach that conclusion with sufficient certainty, and I remain of the view that it is best to send the whole thing back, as we did in both *Helling* and *Wilson*.

One last note: before an inadvertent omission causes any confusion, I should point out that the highlighted words will be added in the next circulation on page 15, eleven lines from the bottom of the page: "... it is enough that the official acted or failed to act despite *his knowledge* of a substantial risk of serious harm."

Yours sincerely,



Chief Justice Rehnquist

Copies to the Conference

HAB

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

CHAMBERS OF
JUSTICE RUTH BADER GINSBURG

March 9, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear David:

I appreciate the attempt to be comprehensive, but am concerned that the opinion, because of its length and complexity, may slip from the grasp of district judges. In particular, the opinion's formulations of the subjective test at pp. 1, 10, and 20, might be viewed as inconsistent with the discussion of "obvious" risks at pp. 15-19. Perhaps some tightening would help to clarify the standard.

Two more specific comments:

1. In the discussion of *Canton* at pp. 14-15, you distinguish liability under §1983 from liability under the Eighth Amendment as if §1983 itself provides a distinct substantive source of liability. Although *Bivens* provides the cause of action here, in many cases prisoners will be suing state officials under §1983 and alleging Eighth Amendment violations. In such cases, of course, the *mens rea* standard will be the subjective one, rather than the objective *Canton* standard; the latter would be relevant only if, for example, a prisoner in a city jail sued the city as well as individual prison officials and alleged that the city failed to train the officials to comply with the Eighth Amendment. To clarify, perhaps replace the first three sentences (and accompanying citation) of the second full paragraph on page 14 with the following:

Canton's objective standard, however, is not an appropriate test for Eighth Amendment liability. Section 1983 merely provides a cause of action, and "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels v. Williams*, 474 U. S. 327, 330 (1986). And while deliberate . . .

2. I agree with the Chief's second comment and would prefer simply to affirm the denial of injunctive relief. First, under the subjective standard we adopt, "official capacity" suits are inappropriate, except where necessary to obtain injunctive relief from an official who has actually committed an Eighth Amendment violation. I am not persuaded that defendant-officials should be presumed to know of a risk to an inmate's safety solely on the

basis of court pleadings. For example, when he was Director of the Bureau of Prisons, respondent J. Michael Quinlan must have been a named defendant in dozens of *Bivens* suits by prisoners, but it is unlikely he had any personal knowledge regarding the subject matter of any of these lawsuits. Second, even if Farmer had established that respondents violated the Eighth Amendment, he might be entitled to a narrowly-tailored injunction, perhaps one requiring that he be segregated from the general prison population wherever he is housed; however, he would almost surely not be entitled to the specific relief he has actually sought, an injunction against placing him in a penitentiary.

Respectfully,

StH

Justice Souter

Copies to the Conference

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

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

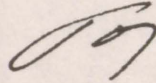
March 8, 1994

Re: *Farmer v. Brennan*, No. 92-7247

Dear David:

At conference, I voted to affirm, so I will await the further writings before weighing in.

Sincerely,



Justice Souter

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

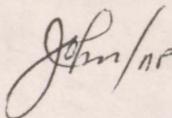
March 8, 1994

Re: 92-7247 - Farmer v. Brennan

Dear David:

Please join me.

Respectfully,

A handwritten signature in cursive script, appearing to read "John/PJ", written in dark ink.

Justice Souter

Copies to the Conference

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

March 7, 1994

Re: 92-7247 - *Farmer v. Brennan*

Dear David:

Although I agree with most of your opinion, I have two difficulties with it. The first is quite specific: I wonder if you could substitute a word like "barbarous" for "uncivilized" on page 5, third line in first full paragraph. It seems to me that "uncivilized" could describe quite a number of conditions that would not rise to an Eighth Amendment violation.

The second is more general, and it concerns the subjective component of Eighth Amendment claims, where a plaintiff seeks injunctive relief. As I read your opinion, the subjective component effectively disappears when a plaintiff seeks injunctive relief, because a defendant-official's knowledge can be presumed from the plaintiff's filing of a complaint. Allowing a plaintiff to establish the subjective component merely by filing a lawsuit seems to me a somewhat novel proposition. But even if one were to accept its correctness, for an injunction to issue there must be a "cognizable danger of recurrent violation." *United States v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953). Since there would be no violation at all until the subjective and objective components concurred, I would think that a defendant would be entitled to a period thereafter to rectify the situation before an injunction should issue. Analyzed in this framework, I am not sure that the District Court's denial of an injunction may not have been proper.

If you are agreeable to this sort of change, I will be happy to offer more specific suggestions that would enable me to join your opinion.

Sincerely,

WHR /-jer

Copies to the Conference

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

March 7, 1994

CHAMBERS OF
JUSTICE CLARENCE THOMAS

Re: No. 92-7247 - *Farmer v. Brennan*

Dear David:

I will await Nino's dissent.

Respectfully,

CT/sfs

Justice Souter

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

CHAMBERS OF
JUSTICE ANTONIN SCALIA

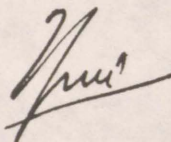
March 7, 1994

Re: No. 92-7247 - Farmer v. Brennan

Dear David:

I will be circulating a dissent in this case.

Sincerely,

A handwritten signature in black ink, appearing to be "Souter", written in a cursive style.

Justice Souter

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

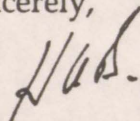
March 7, 1994

Re: No. 92-7247, Farmer v. Brennan

Dear David:

I have read your proposed opinion in this case with great interest. It, of course, does not coincide with my view as expressed at Conference. I shall await developments.

Sincerely,

A handwritten signature in dark ink, appearing to be "J.S.", written in a cursive style.

Justice Souter

cc: The Conference