

46B

November 28, 1980

Re: No. 79-935 - Allen v. McCurry

Dear Bill:

Potter has responded to our dissent in this case by a number of footnotes. I find those footnotes interesting, for it seems to me that they substantially narrow his opinion. One might well argue that they narrow it so much that the only point on which there is disagreement between Potter's opinion and the dissent is on the meaning of the legislative history and prior precedent of this Court. I think the result is good and beneficial.

As it now stands, I think it could be said that the Court reverses the Court of Appeals only for its conclusion that the lack of habeas requires the provision of a federal forum. I cannot disagree with Potter on that narrow issue, but, of course, the dissent would rather affirm the Court of Appeals on our different analysis. I think that the problem with the Court's opinion now is that it does not give the lower courts much direction, or any direction at all, as to how to go about applying collateral estoppel rules. For this reason, I am quite content to leave the dissent just as it is, for it may serve as a little encouragement to the lower courts to apply preclusion rules carefully and consider the factors we have mentioned.

I see no reason to make any changes in our dissent. Do you agree?

Sincerely,

Mr. Justice Brennan

SGL
OK