In Memoriam

HONORABLE

JOHN PAUL STEVENS

In Memoriam

HONORABLE
JOHN PAUL STEVENS

Proceedings of the BAR and OFFICERS of the
SUPREME COURT OF THE UNITED STATES

Proceedings Before the
SUPREME COURT OF THE UNITED STATES

Washington, D.C.
May 2, 2022

HONORABLE JOHN PAUL STEVENS

Announcement of the Death of Justice John Paul Stevens

SUPREME COURT OF THE UNITED STATES

Monday, October 7, 2019

PRESENT: CHIEF JUSTICE ROBERTS, JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE ALITO, JUSTICE SOTOMAYOR, JUSTICE KAGAN, JUSTICE GORSUCH, AND JUSTICE KAVANAUGH.

The Chief Justice said:

I want to take a moment to pay tribute to our friend and colleague John Paul Stevens, a retired Justice of this Court, who died on July 16, 2019. Justice Stevens was nominated to the Court by President Ford on November 28, 1975, and was confirmed by the Senate less than 20 days later. He was an active member of the Court for more than 34 years. At the time of his retirement on June 29, 2010, Justice Stevens had become the third-longest serving Justice in the history of the Court.

Justice Stevens devoted his life to public service. He was a commissioned officer in the United States Navy from 1941-1945, receiving a Bronze Star for his service. During the 1947 Term he was a law clerk to Justice Wiley Rutledge of this Court. Before joining this Court, Justice Stevens served five years on the United States Court of Appeals for the Seventh Circuit.

His kindness, humility, independence, and wisdom have left us a better Court. His commitment to justice has left us a better nation.

Justice Stevens was a dear colleague and friend. Our condolences go out to his children, his extended family, and his many admirers. At an appropriate time in the spring, the traditional memorial observance of the Court and Bar will be held in this courtroom.

Proceedings of the Bar and Officers of the SUPREME COURT OF THE UNITED STATES Monday, May 2, 2022

The Bar of the Supreme Court of the United States and the Officers of the Court met in the Upper Great Hall in the Supreme Court Building at 1:45 in the afternoon.

The meeting was called to order by Solicitor General Elizabeth B. Prelogar.

Remarks of SOLICITOR GENERAL PRELOGAR

Good afternoon. Members of the Stevens family, members of the Court, members of the Bar, and friends, this meeting of the Bar of the Supreme Court of the United States has been called to honor the memory of John Paul Stevens, who served as an Associate Justice of the Supreme Court from 1975 until 2010.

In addition to his time on the Court, Justice Stevens served his country as a judge on the United States Court of Appeals for the Seventh Circuit, as counsel to the House Judiciary Committee, and as a code breaker in the U.S. Navy during World War II.

Over decades on the bench, he dedicated his life to the rule of law and to the judicial craft. He was a jurist who fearlessly exercised independent judgment, guided by experience and the essential values underlying the Constitution and the American Project.

He was a person of integrity, blessed with a singular intellect, pragmatic temperament, humble nature, and generous soul. He was a devoted husband, father, grandfather, and great-grandfather, a beloved colleague, an inspiring mentor, and an extraordinary figure in American law. The Court and this nation are forever better for his service, and we all miss him greatly.

I want today to express my appreciation to Chief Judge David Barron and Teresa Roseborough, who co-chaired the Arrangements Committee for this meeting, and to the members of that committee: Stewart Baker, Preeta Bansal, David DeBruin, Sara Eisenberg, Jeff Fisher, Ian Heath Gershengorn, Judge Pamela Harris, Justice Leondra Kruger, Judge Lewis Liman, Nancy Marder, Judge Randolph Moss, Judge Alison Nathan, Skip Paul, Teresa Reed Dippo, Cliff Sloan, and Douglas Winthrop.

I also want to express my gratitude to Jamal Greene and Carol Lee, who co-chaired the Resolutions Committee, and to the members of that committee: Diane Amann, Christopher Eisgruber, Daniel Farber, Jean Galbraith, Abner Greene, Olatunde Johnson, Troy McKenzie, Eduardo Penalver, Deborah Pearlstein, George Rutherglen, Adam Samaha, Robert Schapiro, Kate Shaw, and Sonja West.

The meeting today will be chaired by Chief Judge Barron, and Scott Harris will be the secretary. I'll now turn the podium and the meeting over to Chief Judge Barron.

Remarks
of
THE HONORABLE DAVID J. BARRON

———

Madam Solicitor General, Mr. Chief Justice, Associate Justices, members of the Stevens family, Mr. Attorney General, members of the Supreme Court Bar.

It's a great honor to be with you all to remember a great man, but in saying that, I cannot help but think it seems a misleading way to describe Justice Stevens, not because it's inaccurate, but because it does not capture what made him great.

That description inevitably calls to mind an overpowering person, a larger-than-life person, but Justice Stevens's greatness, his gift, his example, his superpower, was to show that gentleness has a power all its own, and so too does humility.

The word that most comes to my mind when I think of him, and it has since I first met with him for my interview for a clerkship, is timelessness. Time seems slower in his presence, as if he had access to a longer time scale than most people do, a sense of the depth of time, how long it runs back, and how far it will run into the future, and how important it is when making decisions of consequence, as Justice Stevens did for all of his professional life, to be aware of that time scale.

He was a war hero, a pilot, a superstar law student, an accomplished tennis player, and I can attest from personal observation, an average golfer. But he was in all respects a great person. With his twinkle, his decency, his embodiment of the very best of our country just by being who he was, he had his own kind of overpowering presence in the way that gentleness and decency uniquely can.

Justice Stevens was an absurdly competent and productive person. He wrote more separate opinions than any Justice in the history of the Court, and he did it with fewer clerks than he could have had and while writing the first draft of every opinion.

He served on this Court for more than three decades, and then, as if that were not enough, he, upon his retirement, wrote three books and became a regular contributor for the New York Review of Books, with an appearance on "The Colbert Report" to boot.

The appearance came complete with the perfect quip. When asked by Colbert himself if there were any decisions that Justice Stevens regretted: "Other than this interview?" the Justice asked. "Yeah," Colbert replied. "I don't think so," Justice Stevens said.

He gave new meaning to lifelong learning and to second acts. His last reunion with us was held at his second home in Florida.

His daughter Sue was there to accompany him, as were members of his Chambers staff and almost all his law clerks, numbering more than 100 strong, including those who served with him while he was on the Seventh Circuit, a court he loved and that he made sure we knew to respect.

At the event, we held a Q&A with the Justice. He was by then somewhat faint of hearing, and his voice, still with his beloved Chicago in it and always soft, was even softer then. But his mind was, as always, sharp, and his wit too.

He had just written his third book. He was, to be clear, 99 years old at the time. The book ran more than 500 pages. But there was one passage in that book that warranted special inquiry.

It was the portion in which he had lavished praise on a particular group of people, his law clerks. This passage we all thought was of surpassing interest.

And it was in need of intensive interrogation: Just how great were we? What exactly were our greatest features? These were, of course, very un-Stevens-like questions, but in the moment, we could be forgiven for having lost sight of his example, and so we asked him, just how did you go about choosing such a tremendously gifted group?

And here, 99, with a cane to assist him in walking, the hearing a bit hard, the voice soft but no less Chicagoan, there was that twinkle and the perfectly Stevensesque answer: "Case by case," he said.

He knew what he was saying, that he wanted us to know that he was not a rules person. He was a case-by-case person, a context person, a facts person, a functionalist person, a no-shibboleth person, a realist person, a Leon Green, Wiley Rutledge person.

One sentence, a few words, and a whole philosophy of law and of life. Well, actually half of a philosophy, because he was saying in those few words that he was also an every-person-has-a-unique-worth person, an every-person-deserves-a-fair-shot person, an independent-minded person, a fair-competition person, a no-one-is-above-the-law person, a respect-everyone person, and without saying it, he was also reminding us why he was a person-to-treasure person.

In the remarks you will now hear from four of his former clerks and one young accomplished lawyer who just also happens to be his granddaughter, we hope you will get a sense of what made him the great Justice, the great judge, and the great person that he was and that he remains to all of us.

Our first speaker will be the Honorable Damian Williams, who is the United States Attorney for the Southern District of New York and who clerked for Justice Stevens in the 2008 Term.

Remarks
of
THE HONORABLE DAMIAN WILLIAMS

It's an honor to stand here in this Great Hall and to eulogize a great man, Justice John Paul Stevens.

I have two tasks today. First, I've been asked to speak as a representative of the law clerks from the Justice's final years on the bench. And second, I've been asked to reflect on the principle—a principle that is stitched into the Justice's life and in his career in the law, that in this nation, the law is supreme, and no one is above it.

Let's start with the light stuff. I clerked for the Justice in his second-to-last year on the Court, and by that time, he had seen the law from every conceivable angle.

As a kid in Chicago, he felt the jagged edge of the law when his father was wrongfully convicted of embezzlement, an experience that nearly ruined his family through and through.

He witnessed the law's power to redeem when that same conviction was overturned on appeal. He fought for our laws in the Pacific theater in World War II.

He hung a shingle and he practiced the law for years. He helped enforce the law when he investigated corruption in the Illinois Supreme Court. And of course, he helped shape the law as a judge and a Justice on this Court for decades.

So by the time we started our clerkship, Justice Stevens had seen it all. Or so it seemed. Now this was 2008, the days of hope and change. A young lawyer from Chicago had just been elected president, and a future president had been elected vice president.

Now one day the Justice walked into the clerks' office, and he stood in the doorway. And it became clear that he wasn't there to discuss a case or some legal issue that was on his mind. Instead, he started telling us about something in the law that he had never done. He explained that by tradition the Chief Justice swears in the new president, but neither law nor custom dictates who should swear in the new vice president. And he explained that in all his years on the bench, no one had asked him to swear in the new vice president. And then he turned, and he went back into his office.

We didn't know what to do with that.

Was it an offhand remark? Was it a clue or a bread crumb that we were supposed to pick up and do something with? We didn't know. But we, the law clerks, decided all on our own that it was time for a little off-the-books activity, a scheme to get Joe Biden to ask Justice Stevens to swear him in.

Now, if you think I'm about to describe how our little conspiracy worked and who joined it, you would be wrong. Or quite wrong, as Justice Stevens would have put it.

Let's just say that a few weeks later the phone rang in Chambers. Janice Harley answered it. We were in the other room and could hear. Oh, it's Joe Biden on the phone. Oh, he wants to speak with Justice Stevens. We waited.

A few minutes later, Justice Stevens walked back into the clerks' office, stood in the doorway, and with a smile on his face said, "Wouldn't you know, Joe Biden just called me and asked to swear him in as the next vice president." And then he turned and went back into his office. He never asked us if we had a hand in that coming together, but if he had, we obviously, obviously, would have pled the Fifth.

Okay, one more story. Later in our clerkship, the Justice gathered the law clerks in the office to talk about hiring a new batch of law clerks. And the Justice began to talk about the Term and how it was going and how he felt he was doing. And he told us that, unlike prior years, he wasn't planning on hiring his full complement of four law clerks, and that instead he was going to hire just one. It was time.

And even though we knew we were witnessing a significant moment in history, everything about it was classic Justice Stevens—low-key, plain-spoken, humble—even when closing the final chapter in his service to this nation, a body of service that consistently sought to preserve and protect the rule of law.

Now the rule of law and the supremacy of the law were uncontested for much of the Justice's life. They were just assumed to be true. It animated so much of his personal story, his rise to this Court, and his work on the Court. And even though the Justice passed away less than three years ago, you cannot possibly measure the distance between then and now in years. So much has happened. So much is now up for debate. And so much of that debate is coarse and cheap. For Justice Stevens, January 6 was just a date. George Floyd was just a name. And another land war in Europe was just inconceivable. And on and on and on.

I think we can all agree that Justice John Paul Stevens was a man for all seasons. But I often find myself wondering what he would make of this season. Our nation stands on troubled soil today. That is a fact. And Justice Stevens did not believe in airbrushing facts, so let's not do that. I think we all know that before the Justice passed there was an urgency in his writings, both in his dissents in his final years on the bench and also in some of the works that he authored in retirement. It was not an abandonment of hope, but instead, a questioning of the durability of certain principles that he thought were fundamental and true.

And I'm sure these past few years would have upset him, but still I do not think he would have given up hope. Nor should we. Because his life is all the testimony we need to know that great things can grow from troubled soil. This was a man from Chicago, a city that's best known for its Cubs and its corruption. This is a man whose family endured injustice and the Great Depression. This is a man who went to war to defend democracy.

And out of all of that emerged a man who was chosen for the federal bench because of his fierce independence and integrity, a man who was chosen for this Court because of his unimpeachable character.

Corruption, injustice, depression, war, Watergate. These are not small things. These are not easy things. These are not happy things. But they are the soil from which he grew. They explain him and how we as a nation got him.

His personal story also explains his belief, a belief that ran bone deep, that in this country the law is supreme and applies to all: the powerful and the powerless, the rich and poor, friend and foe. Because of him, a president, despite his high office, is not immune from suit, and it is that same unshakable belief in the supremacy of the law and that no one is above it, that led him to dislike official immunity of all sorts, especially the most notorious of them all, state sovereign immunity, a doctrine that he described as, and I quote, "the vainest of all legal fictions."

He was firm in his view that some English common law principles didn't make the trip across the Atlantic. Now that's how he viewed this world as a Justice, but it's also how he lived his life, gentle and kind to all, humble and unassuming with all.

To borrow from Kipling, he walked with kings and queens but never lost his common touch. This was a great man who was also a good man. And talking about him makes me miss him even more and miss the days when we had him.

And even though we cannot ask him what he would make of these days and these times, I'm sure if he were here he would do what he did when we clerked for him, and that is to first ask us what we think, and then he would listen patiently because he believed in us and was proud of us.

The Justice is gone, and the times, yes, have changed. But the sturdy, stately, beautiful legacy that he built is still here. It's in this room. It's in his granddaughter, Hannah. It's in us. It's in the life that he breathed into the law for a nation that he loved.

And I believe that Justice Stevens would expect us, the keepers of his legacy, to forge ahead, to not lose faith, and to summon our better angels. John Paul Stevens is and will always be one of those angels.

Chairman:

Thank you, Damian.

Our next speaker is Professor Eduardo Penalver, who is the president of Seattle University and who clerked for Justice Stevens in the 2000 Term.

Remarks
of
EDUARDO M. PENALVER

———

Good law clerks pay close attention to their Justice's passions. As a Stevens clerk in the 2000 Term, I quickly learned about several things that the Justice held dear. One was golf. He loved all sports, to be sure, especially his Cubbies, but golf held a special place in Justice Stevens's heart.

He was a devoted, some might say even a little obsessive, follower of professional golf. During our Term at the Court, computer terminals were not connected to the internet. Security reasons, I guess.

Each of us had a single internet-enabled computer in Chambers. If you wanted to use the internet, you had to go to that machine. If my kids are watching online, I'm talking about the dark ages before smartphones and streaming video.

One of my regular duties as a law clerk was to log onto that internet computer every few days to check on Justice Stevens's fantasy golf standings.

Justice Stevens also loved playing golf. Monday mornings in Chambers often began with the Justice offering us self-deprecating accounts of his weekend golf exploits.

But the Justice didn't confine his golfing to weekends or even to the golf course. Once, my co-clerk, Andy Siegel, walked in on Justice Stevens and Justice O'Connor testing their putting skills on the practice green that the Justice kept conveniently inside his office.

In a more serious vein, another passion of Justice Stevens was fairness. As an antitrust lawyer, he had a deep respect for the power of competition to drive innovation, and despite being a fierce although always good-natured competitor, or perhaps precisely because of that, he richly appreciated the importance of level playing fields that provide everyone with the opportunity to compete.

There's one final thing I'll mention that Justice Stevens loved. It quickly became apparent to me and to my co-clerks that Justice Stevens plainly or, as the Justice might have said, pellucidly, relished jousting with Justice Scalia.

Although both men possessed singularly brilliant legal minds, their personal and intellectual styles could not have been more divergent. Their footnote battles were the stuff of legend.

One of the many issues about which they found themselves in profound disagreement was the very meaning of fairness itself. For Justice Scalia, the central attribute of fairness was always formal equal treatment.

For Justice Stevens, in contrast, fairness was a complex and contextual concept, resistant to rigid characterization. On questions ranging from affirmative action to criminal justice to antitrust law, Justice Stevens favored accounts of fairness that afforded decisionmakers the discretion to depart from strictly equal treatment in the service of a more substantive kind of fairness. Flexibility and, above all, judgment were essential for fairness in his sense.

Tellingly, one of Justice Stevens's trademark adjectives for a decisionmaking he found to fall short in this regard was to call it wooden. So, if a case combined questions about fairness and equal treatment, compelling subject matter, and Justice Scalia on the other side, Justice Stevens was sure to be fully engaged.

And so I'd like to spend the rest of my brief remarks this afternoon talking about a blockbuster case from the 2000 Term that scored that particular hat trick. No, not that case. We're not supposed to cite that one.

The case I have in mind is *PGA Tour v. Martin*. Casey Martin was a professional golfer who suffers from a rare circulatory disorder that obstructs the flow of blood in his right leg. For Martin, walking creates the risk of hemorrhaging, blood clots, or worse.

In college and in competition to qualify for the PGA Tour, he was allowed to use a golf cart. When he earned his spot on the PGA Tour, he asked for permission to continue doing so, something that's allowed by the rules of the game of golf, but not by the PGA's special rules governing professional tournaments.

The PGA refused, arguing that waiving the so-called walking rule would fundamentally alter the nature of the tournament play and give Martin an unfair advantage since walking injected the factor of fatigue into PGA competition.

And so Martin sued under the Americans with Disabilities Act, and the district court ruled in his favor, and the Ninth Circuit agreed. The petition presented factbound error correction. No circuit split. So the clerks were a little bit caught off guard when the Supreme Court granted cert.

When my co-clerks, Joe Thai and Andy Siegel, asked Justice Stevens about it, he explained that sometimes the Court needs to take a case just because it's fun—to make up for all the ERISA cases.

Ultimately, seven Justices sided with Martin, with only Justices Scalia and Thomas dissenting. And when the Chief Justice assigned the majority opinion to Justice Stevens, he was positively giddy. Fairness, golf, and Scalia in dissent: the trifecta.

I can imagine no case more perfectly designed to bring out the essential elements of Justice Stevens's approach to fairness and to judicial decisionmaking.

Justice Stevens's opinion for the Court was trademark JPS. He began with a careful textual analysis of the ADA, including a reference to Congress's broad intent in enacting the statute and the legislative history.

One purpose of the ADA, he observed, was to force the reevaluation of long-standing practices that have the effect of excluding disabled people when reasonable accommodations would prevent that.

Fairness requires just these sorts of individualized determinations, not reflexive references to the way things have always been done. And as usual, Justice Stevens took extremely seriously the trial court's factual findings, particularly its finding that the fatigue Martin endures from playing with his disability, even while riding in a golf cart, was undeniably greater than the fatigue that other competitors experienced from walking the course. And this meant that Martin derived no competitive advantage from the requested accommodation, even on the PGA's account of the reasons behind the walking rule.

But, to my mind, the persuasive heart of Justice Stevens's opinion was his take-down of the notion that walking or, for that matter, physical exertion is in any sense essential to the game of golf, even at the professional level. And golf, he explained, is a low-intensity activity.

But not content with simply stating what for many of us is the obvious, he observed that the average golfer expends fewer than 500 calories walking an 18-hole course, puckishly pointing out that even that minimal exertion is spread over a five-hour period that includes many opportunities for rest and refreshment.

Finally, Justice Stevens took note of the many exceptions the PGA already makes to the walking rule in qualifying play, but also in professional play when necessary for logistical reasons.

And given this overall context, refusing to allow Casey Martin to ride in the golf cart was the antithesis of fairness. It represented the kind of rigid and exclusionary insistence on formal equal treatment for no good reason that the ADA was designed to prevent.

Now, for Justice Scalia in dissent, the case was an easy one. The very nature of competitive sport, he said, is the measurement by uniform rules of unevenly distributed excellence. This unequal distribution is precisely what determines winners and losers, and artificially to even out that distribution is to destroy the game.

Of course, we know from countless other cases and from their extramural writings that this conflict between Justice Stevens's contextual approach to fairness and Justice Scalia's rigid insistence on equal treatment was not merely disagreement about fairness in the game of golf. It reflected a far more fundamental disagreement about what constitutes fairness in the game of life.

PGA Tour v. Martin exemplified Justice Stevens's passion for fairness, as well as his appreciation of context, his comfort with complexity, and his respect for the virtue of judgment. It was also a fun case about golf. It was Justice Stevens at his very finest. And we miss him.

Chairman:

Thank you, Eduardo.

Our next speaker is the Honorable Corinne Beckwith, who is a judge on the District of Columbia Court of Appeals and who clerked for Justice Stevens in the 1993 Term.

Remarks
of
THE HONORABLE CORINNE A. BECKWITH

It is hard to even begin to capture Justice Stevens in a few words. My co-clerk and lifelong friend, Sean Donahue, during an interview on C-SPAN, once tried. He called him a "deeply curious person," a phrase that perhaps raises more questions than answers.

What I'd like to focus on is something of keen interest to me as I strive and every day fail to come close to the example Justice Stevens set, and that is Justice Stevens's

take on what it means to be a judge. He had strong feelings on the subject and a deep respect for the role of judges.

Justice Stevens wanted the public to have confidence in the evenhandedness of the courts. He cared about transparency. He cared, and he made sure we cared, about process. And beyond perception, he cared about getting it right. To that end, he was unwaveringly openminded. He wanted to consider a range of views, including, for some reason, ours.

In soliciting those views, Justice Stevens put people at ease, which was great if you happened to be completely in awe of the large marble building he worked in and intimidated by most of the people in it.

When Justice Stevens asked us questions about the cases we were preparing, he would often preface it by saying, "If you know." It was fine if we didn't, though, of course, we would quickly figure it out.

For someone who cracked enemy military codes and won a Bronze Star and sat on the Supreme Court of the United States, he was remarkably down to earth, easy to talk to, straightforward. When I interviewed with him for the clerkship, he confused me greatly by informing me near the end of the interview that, however things turned out, I like you.

Unfamiliar with his forthrightness, I was absolutely certain that meant I wasn't getting the job.

I remember Justice Stevens going to amazing lengths to reserve judgment on the issues in a case until he had read everything and heard oral argument. On one occasion, he reprimanded one of us—okay, it was me—when we mentioned that of the group of law clerks who got together to discuss a case that was coming up for argument, all of them had the same view of the threshold issue in the case. It turns out Justice Stevens definitely did not want to know that. He didn't want to be swayed.

Writing his own first drafts and staying out of the cert pool were also ways of preserving the independence that he viewed as so imperative. Perhaps the clearest manifestation of his independence was his penchant for writing separately. And we all have our favorite Stevens concurrences and dissents, but one of mine, perhaps in part because of my prior life as a public defender before I became a judge, is his concurrence in *Kyles v. Whitley*. There, the Court held, 5 to 4, that a man's conviction and death sentence should be vacated where the cumulative effect of the government's violations of *Brady v. Maryland* might well have been outcome-determinative. Justice Scalia wrote a searing dissent, arguing that the case was too factbound to have even warranted the Court's review in the first place.

Justice Stevens joined the majority, but he wrote separately to respond to Justice Scalia, as he loves to do. What stands out about his concurrence to me was his insistence that there are times when even Supreme Court Justices have to delve into those dusty record boxes and decide something inherently factual, like whether the suppression of evidence made a difference at a trial.

Justice Stevens took that deep dive in *Kyles*, and based on his "independent review of the case," a case where *Brady* violations were repeated and flagrant, where the jury

in the first trial had deadlocked, he had significant doubts about Curtis Lee Kyles's guilt. He didn't think he was doing anything extraordinary. He simply thought it was his job.

He wrote that "our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case even though our labors may not provide posterity with a newly minted rule of law." Particularly given the popularity of capital punishment, he concluded, "I cannot agree that our position in the judicial hierarchy makes such review inappropriate. Sometimes a performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis."

The flip side of Justice Stevens's broad view of the Supreme Court's own role in correcting errors that are within the Court's purview is his insistence that the Court not overextend its reach to issues not within its purview. For example—and I didn't get the memo that we weren't supposed to mention this case—but in his dissent in *Bush v. Gore*, in defending the Florida Supreme Court's own interpretation of the state legislature's intent in its election laws, Justice Stevens rejected what he saw as the petitioners' "unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed." Such confidence in those courts and the people who ran them was, he wrote, "the true backbone of the rule of law." And he, of course, ended on a weighty note. He said, "Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

And, again, what was also perfectly clear to Justice Stevens was that, in that case, the Florida Supreme Court simply "did what courts do."

I'd like to end with a quote from another native son of Illinois, the poet Carl Sandburg. Exactly 100 years ago this month, in his poem "Washington Monument at Night," Sandburg wrote this line: "The republic is a dream. Nothing happens unless first a dream."

The reason Justice Stevens had respect for the rule of law and for the role of the judge is not that he believed our legal institutions were perfect or even highly functional. It's that he knew that these institutions, like the republic itself, were capable of being great and were worth fighting for to make them great.

And I couldn't agree more with Damian. If we want to honor Justice Stevens's legacy, we will continue that work ourselves.

Chairman:

Thank you, Corrie.

Our next speaker is Skip Paul, who is a senior advisor at Centerview Partners and who clerked for Justice Stevens in the 1975 Term, the Justice's first.

Remarks
of
CHARLES S. "SKIP" PAUL

Good afternoon. I feel it's important to correct the record. Chief Judge Barron mentioned something about Justice Stevens's golf abilities. I've played a lot of golf in my life, but the last game I played with Justice Stevens, in fact, the last year of his life, was by far the best game, the best performance by a golfer at the age of 99 I've ever seen.

Now, to turn the clock back a bit, late morning on the Friday after Thanksgiving in 1975, the Chicago federal courthouse was closed. Judge Stevens, my co-clerk, and I were catching up on some backlog when the phone rang, interrupting our work.

It was President Ford calling to inform Judge Stevens that he was announcing the nomination to the Supreme Court later that afternoon. The judge stepped into our office, the clerks' office, told us the exciting news and said it was to be strictly confidential until late that afternoon. However, he was going to spend some time taking a walk around Chicago, starting down by the Art Institute.

Judge Stevens's mind must have been full of Chicago memories as he headed out of the federal building walking down to the lakefront. In reflection back on the Chicago skyline, he remembered his years of Chicago education from his grade school and undergraduate home at the University of Chicago through Northwestern Law School.

Also in that downtown skyline, he would see the location of the investigation of the Illinois Supreme Court led by him as a private citizen. This investigation resulted in the removal of two justices from that court. It was a bold result which revealed Stevens's deep belief that the justice system depends on lawyers serving the public interest in an independent and nonpartisan way.

The investigation of public service propelled the lawyer, John Paul Stevens, to an appointment on the Seventh Circuit. Hopefully, on that walk, his joy was not broken and his memories were not turned sour by his eyes looking to the western horizon and the skies above Wrigley Field, the home of his beloved Cubs, with the realization that he'd be leaving them.

Just three weeks after that walk, he would be confirmed unanimously by the Senate. Six weeks after that call from President Ford, Nellie Pitts and I were here in Washington moving into the new Chambers with a stack of work to do aided by the addition of a new co-clerk, George Rutherglen, who joined us from Justice Douglas's Chambers.

The warm welcome for Justice Stevens was actually "welcome back." It was a welcome back to the Rutledge clerk returning from the 1947 Term. His clerkship and close relationship with Justice Rutledge, a former law school dean, formed the foundation and the fabric of Stevens's priority on his own mentorship of his clerks.

After my clerkship, I practiced law for a short time, but then, as Justice Stevens repeatedly told me, I strayed from the law and went into a career in the entertainment business, something—a risk he clearly should have known in hiring a law clerk from Los Angeles.

But all through the 40 years after my clerkship, I never made an important life decision, an important business decision, without his thoughtful and caring advice. One funny thing always happened when I came here for that advice. Regardless of my age, when I was in my 40s, 50s, or 60s, a little older than that now, once sitting in his Chambers asking for the advice and the conversation started, I became a 25-year-old law clerk and Stevens became the boss. Time stood still in this mentorship.

After 20 years on the Court, Justice Stevens began a discussion with some of his former clerks about his own legacy. His thinking and direction were classic Stevens, guided by humility, a dedication to public interest, and a belief in mentorship. The Stevens Public Interest Fellowships were launched at Northwestern in 1996, initially funded by clerks and first expanded into law schools where clerks were on faculties so we could guide the evolution of the model.

When Justice Stevens retired in 2010, the Stevens Foundation was formed to expand the existing public interest program. To date, 788 fellowships have been granted and the foundation is operating in 40 law schools.

The fellowships encourage and support the law students to pursue work in public interest. This summer, there will be 150 Stevens public interest fellows in law schools. After graduation, the track record of Stevens fellows going into and pursuing careers in public interest is 74 percent, and the Stevens fellowships presently are the second largest summer public interest fellowship program in the country.

The Stevens fellows have become the next generation and extension of the Stevens clerk family. His gift to us of mentorship has produced a legacy of mentorship and a shared dedication to the importance of supporting young lawyers pursuing careers in public interest. One thing has become clear. As with Justice Stevens's own appointment, a Stevens clerkship is for a lifetime.

Thank you.

Chairman:

Skip just reminded me that I was wrong as I was coming up here, so let the record reflect that he was a better-than-average golfer.

Thank you, Skip.

Our next speaker is Hannah Mullen, who is a clinical fellow at Georgetown University Law Center and Justice Stevens's granddaughter.

Remarks
of
HANNAH MULLEN

Good afternoon. As has been mentioned, I'm the sixth of Justice Stevens's nine grandchildren and, perhaps improbably, the only one foolish enough, or lucky enough, to follow him into the law.

My grandfather was a great Justice and a great person. And he was also the greatest grandpa in the world. He was fun. In Florida, he swam in the ocean and built sand castles with us. We faced off for hours playing board games, trading victories in Scrabble and backgammon until my mother begged us to come to dinner, the food was getting cold.

Grandpa loved us, and he showed it. He brought my sister and me sugar cookies from our favorite bakery. He was a patron of our elementary school chorus concerts. We would beam at his old-timey grandpa-isms like, "Well, isn't that something," when one of us brought home a good report card or won a lacrosse championship.

Grandpa treated his grandchildren as his intellectual and athletic equals. It sounds ridiculous, but it's true. He would gloat after hitting cross-table forehands in ping pong. Before a backpacking trip I took as a teenager, he gave me a copy of Sense and Sensibility so we could discuss it when I returned from the woods. I think he was disappointed Jane Austen wasn't for me.

When I enrolled in law school, Grandpa began giving me law review articles to read so we could talk about them over his morning cup of coffee, and those articles were often written by his former clerks. He was so proud of all of you. He liked reading Jane Austen, but not nearly as much as he liked reading you all.

And Grandpa didn't hold forth during our intergenerational book clubs. He asked what I thought and listened even though I knew so little. He was the most brilliant person I ever met, and yet he could make the people around him feel brighter rather than dimmer in his presence.

I miss Grandpa every day, but since graduating from law school and becoming a civil rights lawyer, I've had the strange privilege of becoming more familiar with a different side of the man I knew and loved, the jurist Justice Stevens.

Every time I read one of Justice Stevens's opinions, I see another thing that I loved about my grandpa. For example, as has already been discussed, my grandfather is well known for his attention to the record in each individual case. He's described as a judge's judge who looks at each case on its merits.

And Grandpa sweated the small stuff off the bench too. He remembered the names of my elementary school classmates. He kept strawberry ice cream in his freezer so that my sister, who didn't share his love of chocolate, would always have a dessert she enjoyed.

It's easy to knock neurosis, but for Grandpa, attention to detail was a form of love, of seeing what was distinct about a person and their circumstances. It made him friends everywhere he went, even among people who disagreed with him.

So I smile knowingly when I read an opinion like Grandpa's partial concurrence in *Illinois v. Wardlow*, a Fourth Amendment case that asked whether someone's unprovoked flight from police was sufficiently suspicious to justify a *Terry* stop. In his separate opinion, Grandpa praised the majority for rejecting a *per se* rule, and then explained why he believed the facts in that case did not support a finding of reasonable suspicion. I admire Grandpa's opinion in *Wardlow* because he took special care to explain that different people may react to police differently, even when they're not doing anything wrong. He pointed out that innocent people, depending on their circumstances, could reasonably view police as a sign that danger is near, or perhaps even fear the police themselves. The facts of each individual case, he urged, should determine whether reasonable suspicion existed.

I'm similarly filled with nostalgia when I read one of Grandpa's many separate solo opinions. A personal favorite is his dissent in *Scott v. Harris*, if you're looking for some light reading later. Grandpa did what he thought was right even when most other people thought he was wrong. I mean, the guy ate apple pie for breakfast and he wore bow ties to work. He wasn't afraid of standing out in a crowd.

And he wasn't afraid of speaking his mind either. Anyone who has written a college thesis knows how it feels to have your whole family praise you for something they're probably not going to read. Grandpa, on the other hand, read all 30,000 words of my senior thesis and then told me why he thought I was wrong.

I've never felt more kinship with Justice Scalia than in that moment.

In being fully himself, he showed us that we could be ourselves, too.

The reason I love Grandpa's opinions is because they show that he was the same man on the bench and at the coffee table, tenacious and empathetic and observant and funny. His belief in spirited competition between equals was what made him hate bullies. He strove to see each person and their circumstance as unique in viewing him with instinctive sympathy for the underdog.

When I advocate for my clients, I often find myself citing my grandfather's opinions. I think that's the best way we can honor him—by using his words to try to do good. And I'm moved to know that generations of lawyers will continue to get to know him and inevitably come to love him through the words he left behind. I hope we make him proud.

Chairman:

Thank you, Hannah.

I'd like to invite Teresa Wynn Roseborough, who is general counsel for The Home Depot, who clerked for Justice Stevens in the 1987 Term, to join me to move the adoption of the resolutions to be presented to the Court.

Remarks
of
TERESA WYNN ROSEBOROUGH

Thank you, David. Thank you to all the eulogists who've spoken today.

As you have gleaned from their remarks, Justice Stevens was a remarkable man and a remarkable jurist. All of us, even if he had not been a Justice of the United States Supreme Court, would have been just as proud to work for him and would have been just as enriched by his intellect, his professionalism, his love for his country and its Constitution, his sense of fairness, his devotion to the protection of liberty, his gentle good humor, and his humility.

Justice Stevens was a patriot and a guardian. Having meritoriously served this country in war, he possessed a special regard for what this nation stands for. As Navy chaplain Captain Judy Malana, who is with us here today, said in honoring the Justice as he lay in repose in this hall, he was indeed a great man from our greatest generation, who faithfully answered the call to serve our country when we, the people, needed him most.

In *Texas v. Johnson*, Justice Stevens famously dissented from the Court's striking down of a Texas statute barring desecration of the flag. He said: "The American flag is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill."

This statement reflects Justice Stevens's deep devotion to this country as itself a beacon of freedom, equal opportunity, religious tolerance, and goodwill. It was not the flag alone, but this country he could not bear to see desecrated.

Justice Stevens was resolute and brave, going without fear or restraint where facts and law led him, with no ambition to tilt the scales to suit his ends or to incline future decisions to his pleasure or preferences.

For this reason, he's proved a conundrum for constitutional scholars who have sought, unsuccessfully, to identify lines of ideology that would have allowed the successful prediction of how he might decide a particular case or type of case. It may be that Justice Stevens will face history as an enigma and defy any characterization.

I believe, though, that his record of dedicated and faithful service to this nation and its rule of law will force us to create a new category, not liberal, not conservative, but simply impartial.

The Committee on Resolutions has prepared resolutions summarizing Justice Stevens's many contributions to this nation and its laws, and you have its work before you. Together with the committee's co-chairs, Jamal Greene and Carol Lee, I have the honor to move their adoption.

Chairman:

Thank you, Teresa.

The resolutions are now before us for adoption. If adopted, they will be presented to the Court by the Solicitor General.

I now put the resolutions to a vote. All in favor of adopting the resolutions, please signify by saying aye.

(A chorus of ayes.)

Any opposed?

(No response.)

No one is opposed. Hearing no opposition, I declare the resolutions adopted. And this completes our work here.

I want to say in closing that Justice Stevens's association with this Court just barely postdates World War II, when first he served here as a law clerk to Justice Rutledge. It spans the time that he argued here as a leading lawyer in Chicago, and it includes, of course, the time he first took the bench here as a Justice in 1975 and all of the ensuing three-plus decades that followed. It was always an institution that he admired and cherished, and we in turn admired and cherished him.

Before we proceed to the Court session, I would like to thank Counselor to the Chief Justice Jeffrey Minear, Marshal Gail Curley, Clerk Scott Harris, the Court Officer colleagues and their staffs for helping us with this very meaningful proceeding.

Thank you.

(Whereupon, at 2:46 p.m., the special meeting of the Supreme Court Bar concluded.)

Proceedings of the Bar and Officers of the SUPREME COURT OF THE UNITED STATES

Monday, May 2, 2022

3:00 p.m.

PRESENT: CHIEF JUSTICE ROBERTS, JUSTICE THOMAS, JUSTICE BREYER, JUSTICE ALITO, JUSTICE SOTOMAYOR, JUSTICE KAGAN, JUSTICE GORSUCH, JUSTICE KAVANAUGH, AND JUSTICE BARRETT.

The Chief Justice said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to Justice John Paul Stevens.

The Court recognizes the Solicitor General.

Solicitor General Elizabeth B. Prelogar addressed the Court as follows:

Mr. Chief Justice, and may it please the Court. At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for John Paul Stevens were adopted unanimously.

RESOLUTIONS

Today the Bar of the Supreme Court of the United States gathers to pay tribute to John Paul Stevens, a model of integrity, independence, and intellectual honesty who served the nation for 35 years as an Associate Justice of this Court, from December 1975 to June 2010.

A proud Chicago native and U.S. Navy veteran, Justice Stevens was a lawyer of the highest quality and a human being of the highest character. Gifted with an extraordinarily agile and curious mind, he used it well, writing more than 1,000 Supreme Court opinions, three books, and numerous articles. He was a patriot, with a profound, infectious sense of optimism, and yet his eyes stayed clear and his pragmatism never waned. Independent to the core and thoroughly decent, Justice Stevens lived a life dedicated to the rule of law and to equal justice under it.

Justice Stevens was married to Elizabeth Jane Sheeren for 37 years, and they had four children, nine grandchildren, and thirteen great-grandchildren. The Justice was married to his second wife, Maryan Mulholland, for 35 years, until her death in 2015. The Justice and Maryan are buried together at Arlington National Cemetery.

The Path to the Court

John Paul Stevens was born on April 20, 1920, in Chicago's Hyde Park neighborhood. He attended the University of Chicago Laboratory Schools for elementary and high school, then enrolled at the University of Chicago, where he was a brilliant student, majoring in English literature and graduating Phi Beta Kappa and with the university's highest honors.

In 1927, his family opened what was then the largest hotel in the world, the Stevens Hotel in downtown Chicago (which went into insolvency during the Depression and is now the Chicago Hilton). The young John Paul Stevens crossed paths with a number of noted guests, including Amelia Earhart and Charles Lindbergh. Despite his South Side origins, Stevens was a lifelong and diehard fan of the Chicago Cubs. Together with his father and older brothers, he attended the opening game of the 1929 World Series, in which the Cubs played the Philadelphia Athletics. He was also present for the third game of the 1932 Cubs-Yankees World Series, during which Babe Ruth hit his famous "called shot" home run. Justice Stevens proudly displayed a framed scorecard from that game in his Supreme Court Chambers. Much later, to the delight of the hometown crowd, he attended Game 4 of the 2016 World Series at Wrigley Field. When the Cubs went on to win the World Series for the first time since 1908, the Justice wrote, in his understated way, that he was "more than pleased."[1]

Stevens was commissioned as a Naval officer on December 6, 1941, the day before the Japanese attack on Pearl Harbor. He spent much of the war stationed at Pearl Harbor, working as a signals intelligence officer breaking Japanese codes, and was awarded the Bronze Star.

Stevens decided to go to law school after his discharge from the Navy. His older brother Jim, a practicing lawyer, told him how much satisfaction and pleasure a lawyer could derive from helping people. He selected Northwestern University School of Law because he intended to practice law in Chicago. In October 1945, he enrolled in an accelerated postwar course with summer classes that led to a law degree in two years. Northwestern's approach to teaching the law had a lasting effect on Stevens's thinking. Unlike Michigan and Harvard, Northwestern did not emphasize legal rules. Stevens's law professors, including Dean Leon Green, focused on facts, context, and procedure (including the identity of the decisionmaker). Stevens often quoted Professor Nathaniel Nathanson's advice: "Beware of glittering generalities." He recalled that Nathanson taught his students in constitutional law and administrative law to understand the arguments on both sides of each case. Nathanson sought to teach his students how to think about the law, and to their frustration, he declined to tell them what the right answer was.

Stevens's interest in antitrust law began at Northwestern, when he was assigned to write a law review comment on price-fixing in the movie industry.[2] Antitrust law taught him an important lesson in statutory interpretation—that sometimes the text of a federal statute cannot be read literally. Stevens became co-editor-in-chief of the law review and graduated first in his class, with the highest grades achieved to date in the history of the law school.

During Stevens's final year at Northwestern, he learned that he and his co-editor-in-chief would be offered Supreme Court clerkships: one for Chief Justice Fred Vinson, during the 1948 Term, and one for Justice Wiley Rutledge, during the 1947 Term. Both of them preferred the earlier opportunity, so they flipped a coin. Stevens

---

[1] JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 451 (2019).

[2] Comment, *Price-Fixing in the Motion Picture Industry*, 41 Ill. L. Rev. 630 (1947).

won and spent the 1947 Term clerking for Justice Rutledge. During his time as a law clerk, Stevens wrote the first draft of Justice Rutledge's opinion for the Court in the antitrust case *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[3] During that same Term Justice Rutledge dissented in *Ahrens v. Clark*,[4] in which the majority concluded that a group of German prisoners held at Ellis Island pending deportation could not bring a habeas case outside the territorial district in which they were held. Nearly 60 years later, Justice Stevens's majority opinion in the 2004 case *Rasul v. Bush*[5] (discussed below) would vindicate the core insight of Justice Rutledge's dissenting position.

Following his clerkship with Justice Rutledge, Stevens returned home to Chicago, where he joined the prominent law firm known today as Jenner & Block. Four years later, in 1952, he and a few young colleagues hung out their own shingle. The firm of Rothschild, Stevens, Barry & Myers was unusual for the time, counting among its name partners persons of Protestant, Catholic, and Jewish backgrounds. Stevens distinguished himself as a litigator with particular expertise in antitrust law. He argued one antitrust case before the Supreme Court of the United States,[6] and taught antitrust law as an adjunct professor at both Northwestern University (1950-54) and the University of Chicago (1955-58).

Public service also formed a cornerstone of Stevens's career during his 22 years in law practice. Moving to Washington, D.C. to serve as Associate Counsel to the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee (1951-52), Stevens helped investigate practices in the steel industry and in Major League Baseball. Hearings in the baseball inquiry featured testimony by figures such as Ty Cobb and Branch Rickey. Later, Stevens was a member of the Attorney General's Committee to Study the Antitrust Laws (1953-55).

Stevens also accepted numerous pro bono appointments. Among those that made a lasting impression was the case of *People v. La Frana*,[7] in which Stevens persuaded the Illinois Supreme Court to reverse his client's murder conviction. The case had turned on a confession coerced over the course of several days of incommunicado interrogation, during which La Frana was blindfolded, handcuffed behind his back, hanged from a door by his wrists, and beaten. This and other experiences influenced Justice Stevens's insistence that criminal defendants receive full and fair trials and appeals.

A longtime leader in the Chicago Bar Association, Stevens was chosen in 1969 as Counsel to a Special Commission convened to investigate charges of corruption in the Illinois Supreme Court. The swift and impartial work of Stevens and his small team of lawyers resulted in the resignation of two of that court's justices.

The year following the investigation of the Illinois Supreme Court, Stevens received an invitation to meet with Senator Charles H. Percy of Illinois. Percy, a

---

[3] 334 U.S. 219 (1948).
[4] 335 U.S. 188 (1948).
[5] 542 U.S. 466 (2004).
[6] United States v. Borden Co., 370 U.S. 460 (1962).
[7] 122 N.E.2d 583 (Ill. 1954).

liberal Republican who had known Stevens at the University of Chicago, was making an effort to get the best judges, regardless of party affiliation, appointed to the federal courts in Illinois. As Stevens expected, Percy began the meeting by soliciting suggestions for potential nominees to fill judicial vacancies. But near the end of their meeting, he took Stevens by surprise and asked if he would be interested in an appointment to the Seventh Circuit. Although the offer came at a time when his law practice was starting to thrive, Stevens overcame his initial hesitation and later agreed to accept President Richard Nixon's nomination. The Senate swiftly confirmed Stevens without opposition, and he took the judicial oath on November 2, 1970, launching a federal judicial career that would span four decades.

In urging Stevens to accept the nomination, Senator Percy had made the prescient observation that a seat on the court of appeals might one day lead to an appointment to the Supreme Court. Not long after taking the bench, however, Stevens assumed he had lost any possibility of promotion when the Seventh Circuit decided the case of the peace activist Rev. James E. Groppi. The Wisconsin State Assembly, without a hearing, had jailed Father Groppi for criminal contempt after he led a protest on the Assembly floor. A closely divided Seventh Circuit, sitting en banc, rejected Groppi's due process challenge to his punishment, with Stevens writing the principal dissent.[8] Stevens realized that the "law and order" side of the case would be popular at a time of social and political turmoil. He later recalled, "I thought to myself, 'Well, I can kiss goodbye to any notion of ever being on the Supreme Court.'" That prospect did not deter him from dissenting—a position vindicated later when the Supreme Court unanimously reversed the Seventh Circuit's decision.

Stevens served for five years on the Seventh Circuit, a court he described as both strong and collegial. When Justice William O. Douglas retired in 1975, Stevens was President Gerald R. Ford's choice to be the 101st Justice of the Supreme Court. Ford had given Attorney General Edward H. Levi the task of preparing a list of candidates for the position. Levi, who knew Stevens from Chicago, read federal judicial opinions extensively and concluded that Stevens was an outstanding judge—a "craftsman of the highest order" whose opinions were "gems of perfection." Stevens's Senate Judiciary Committee confirmation hearings, the last before the arrival of television cameras, were brief, and he was confirmed by a vote of 98–0 only 19 days after his nomination. He was sworn in as an Associate Justice of the Supreme Court on December 19, 1975.

The absence of controversy surrounding Justice Stevens's nomination and confirmation might seem surprising at first blush. After all, he was nominated by a Republican president and confirmed by a Democratic Senate, and he was the first Supreme Court nominee since the Court's decisions in *Furman v. Georgia*,[9] which placed a nationwide moratorium on capital punishment, and *Roe v. Wade*,[10] which recognized a constitutional right to abortion. Two months before his nomination, Stevens had written a Seventh Circuit opinion in which he expressed skepticism about

---

[8] Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1971) (en banc), *rev'd*, 404 U.S. 496 (1972); *id.* at 332 (Stevens, J., dissenting).
[9] 408 U.S. 238 (1972).
[10] 410 U.S. 113 (1973).

what he called the "so-called" right of privacy, which had formed the basis for the decision in *Roe*.[11]

But President Ford chose Stevens for his integrity and his excellence rather than for any particular ideology. Plain-spoken, direct, and lawyerly, he was not given to grand theories or one-size-fits-all solutions to complex legal problems. His approach to his work did not emerge from any single major premise, but was grounded in fastidious attention to the facts of the case, the values of the American constitutional tradition, consideration of precedent, context, and common sense. Justice Stevens's commitment to the rule of law was second to none, and for him, the conscientious exercise of independent judgment was what the rule of law required.

The Importance of Judgment

Justice Stevens's succinct opinion in a personal jurisdiction case, *Burnham v. Superior Court of California*,[12] nicely illustrates his aversion to overbroad legal theories. A California woman had served her husband, a New Jersey resident, with divorce papers while he was visiting their children on a business trip. Did the California court's exercise of jurisdiction over a nonresident violate the Fourteenth Amendment's Due Process Clause? Justice Antonin Scalia's lengthy opinion for four justices concluded that jurisdiction would lie based largely on the common understanding at the time of the Fourteenth Amendment's adoption that state courts could exercise jurisdiction over transient nonresidents who were served with process while in the state. Justice William Brennan's lengthy opinion for four other Justices agreed that the California court had jurisdiction, but insisted that it be grounded in contemporary notions of fairness rather than set in stone by tradition and history. Perceiving both sides of this clash of legal titans to be "unnecessarily broad," Justice Stevens wrote briefly to say that "historical evidence," "considerations of fairness," and "common sense" "all combine to demonstrate that this is, indeed, a very easy case."[13] His single-paragraph concurrence was the controlling opinion.

Across myriad areas of the law, Justice Stevens displayed a fearlessness about a judge's exercise of judgment. For example, early in his tenure on the Supreme Court, Justice Stevens declared his independence from the orthodoxy of different tiers of judicial review under the Equal Protection Clause. In *Craig v. Boren*,[14] a case involving two Oklahoma statutes that prohibited the sale of beer to men, but not women, age 18-20, Justice Stevens filed a concurring opinion invoking the principle that "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[15] Elaborating on this principle in a reapportionment case, he wrote that "the Clause does not make some groups of citizens more equal than others."[16] In both cases he found the justification offered by

---

[11] Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 721 (7th Cir. 1975).
[12] 495 U.S. 604 (1990).
[13] *Id.* at 640.
[14] 429 U.S. 190 (1976).
[15] *Id.* at 211–12 (Stevens, J., concurring).
[16] Karcher v. Daggett, 462 U.S. 725, 749 (1983) (Stevens, J., concurring).

the state insufficient after a careful review of the evidence, in one to support a sex-based classification and in the other to support an oddly shaped congressional district.

Justice Stevens went on to apply a similarly nuanced approach in other cases under the Equal Protection Clause. In fact, one is hard-pressed to find an opinion of his that uses the term "strict scrutiny," other than to reject an argument proposed by counsel or adopted by a lower court.[17] In a case involving a city ordinance that discriminated against individuals with intellectual disabilities, he refused to single out one standard of review among three identified by the court of appeals. As he wrote, "Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process."[18] He deployed the same approach in his opinions on affirmative action (discussed below), freeing him to reach different outcomes depending on the context and the applicable constitutional and statutory provisions.

Justice Stevens's freedom of speech opinions similarly reveal a taste for the particular and the contextual over grand theory. In his first such opinion, *Young v. American Mini Theatres*,[19] a challenge to a Detroit zoning ordinance for adult movie theaters, he distinguished the content at issue from what he saw as the First Amendment's core concerns: "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[20] Likewise, in *F.C.C. v. Pacifica Foundation*,[21] which upheld the F.C.C.'s power to regulate vulgarity on daytime radio, Justice Stevens wrote that although offensive language is "unquestionably protected," its constitutional protection "need not be the same in every context."[22] In particular, at the time of the decision (1978), broadcast media was pervasive in the lives of Americans and easily and uniquely accessible to children.[23]

Justice Stevens's granular approach to free speech helps to make sense of his dissenting opinion in *Texas v. Johnson*,[24] in which he would have upheld a criminal conviction for burning an American flag. Stevens's vote is attributable at least in part to his military service. His opinion alludes to "the soldiers who scaled the bluff at Omaha Beach," motivated by the "ideas of liberty and equality."[25] But Justice Stevens's dissent was also a paean to case-by-case adjudication. Citing to both *Young* and *Pacifica*, he wrote that "rules that apply to a host of other symbols" should not apply to the American flag, which for Justice Stevens stood as a unique "symbol of

---

[17] *E.g.*, Crawford v. Marion County Election Bd., 553 U.S. 181, 188 (2008) (plurality opinion).
[18] Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 451 (1985) (Stevens, J., concurring).
[19] 427 U.S. 50 (1976).
[20] *Id.* at 70 (plurality opinion).
[21] 438 U.S. 726 (1978).
[22] *Id.* at 746–47 (plurality opinion).
[23] *Id.* at 748–49 (majority opinion).
[24] 491 U.S. 397 (1989).
[25] *Id.* at 439.

freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations."[26]

In his last Term on the Court, Justice Stevens used *McDonald v. City of Chicago*,[27] a gun rights case out of his hometown, to offer a final defense of careful judgment over "any all-purpose, top-down, totalizing theory of 'liberty.'"[28] The question in *McDonald* was whether the Fourteenth Amendment protected an individual right to bear arms against state and local interference. Justice Stevens had dissented in the precursor to *McDonald*, *District of Columbia v. Heller*,[29] which declared that the Second Amendment protected an individual right to gun possession in the home. He thought *Heller* ignored the militia-oriented purpose of the Second Amendment; he would later call it the "most clearly incorrect" decision of his tenure and "the worst self-inflicted wound in the Court's history."[30] For Justice Stevens, then, it was especially important to emphasize that *McDonald* was no occasion for mechanical "jot-for-jot incorporation" of the Bill of Rights against state and local governments. Rather, as a case of substantive due process, it called for a flexible inquiry into "[t]extual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and above all else, the 'traditions and conscience of our people.'"[31] A judge's sensitivity not to the judge's own grand theory but rather to "the intrinsic aspects of liberty and the practical realities of contemporary society" lives up to the Constitution's commands while nodding, appropriately, to "humility and caution."[32] Applying this test, the erroneous decision in *Heller* should not, he believed, extend to state and local gun control laws.

Attention to Legislative Purpose

Justice Stevens's antiformalism was not limited to constitutional adjudication. In antitrust cases, his understanding of the Sherman Act as demanding a functional, factually sensitive rather than formalistic inquiry stayed with him from his law school days through his last Term as a Justice.[33] More generally, Justice Stevens's antitrust opinions bore significant responsibility for adding flexibility to the law of horizontal restraints[34] and tying arrangements.[35] An antitrust sensibility also infuses his most significant intellectual property opinion, *Sony Corporation of America v. Universal*

---

[26] *Id.* at 437.
[27] 561 U.S. 742 (2010).
[28] *Id.* at 878 (Stevens, J., dissenting).
[29] 554 U.S. 570 (2008).
[30] John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, Atlantic, May 14, 2019.
[31] *McDonald*, 561 U.S. at 872 (Stevens, J., dissenting).
[32] *Id.* at 881.
[33] *See* Am. Needle Inc. v. Nat'l Football League, 560 U.S. 183 (2010).
[34] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Ariz. v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).
[35] *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977).

City Studios, Inc. ("the Betamax case"),[36] in which Justice Stevens held for the majority that home video recordings of television shows fall within a safe harbor against copyright challenges. Stevens's opinion in the case characterizes the Copyright Act, which confers a limited monopoly, as striking a "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[37] In deciding that noncommercial home video recordings constituted fair use, Justice Stevens relied on the pragmatic temperament that characterized his jurisprudence in many other areas: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."[38]

In the realm of statutory interpretation more generally, Justice Stevens believed in the importance of considering the legislature's purposes and not just its text. He did not ignore the words of statutes; indeed many of his opinions engaged in close analysis of specific statutory terms and of the structure of the statute.[39] Yet he eschewed a "purely literal approach" to reading a statute and refused to put on "thick grammarian's spectacles."[40] Instead he preferred an approach "that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation."[41] Justice Stevens would frequently draw on legislative history to discover or confirm textual meaning,[42] contending that "it is always appropriate to consider all available evidence of Congress's true intent when interpreting its work product."[43] He also often relied on the broad remedial purpose of a statute to determine contested interpretive questions.

For example, in holding that section 2 of the Voting Rights Act applied to judicial elections, Justice Stevens gave the "broadest possible scope" to Congress's goal of "rid[ding] the country of racial discrimination in voting."[44] In environmental cases involving interpretations of the Clean Water Act and Endangered Species Act, Justice Stevens gave interpretive weight to Congress's broad remedial goal of protecting the environment.[45] In a case involving whether airline pilots with myopia were disabled

---

[36] 464 U.S. 417 (1984).
[37] *Id.* at 429.
[38] *Id.* at 456.
[39] *See, e.g.,* Mass. v. E.P.A., 549 U.S. 497, 528–29 (2007); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995); Chisom v. Roemer, 501 U.S. 380, 397–402 (1991); McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).
[40] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 112–13 (1991) (Stevens, J., dissenting).
[41] *Id.* at 112.
[42] *See Chisom*, 501 U.S. at 396; Green v. Bock Laundry Mach. Co., 490 U.S. 504, 523 (1989); Pittston Coal Group v. Sebben, 488 U.S. 105, 147 (1988) (Stevens, J., dissenting).
[43] Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65 (2004) (Stevens, J., concurring).
[44] *Chisom*, 501 U.S. at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).
[45] *See* Rapanos v. United States, 547 U.S. 715, 787, 809 (2006) (Stevens, J., dissenting); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs., 531 U.S. 159, 174–75, 179–80 (2001) (Stevens, J., dissenting); *Babbitt*, 515 U.S. at 698.

within the meaning of the Americans with Disabilities Act (ADA), Justice Stevens argued in dissent that recognizing myopia as a disability even if it could be corrected was consistent with the congressional goal of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." The Court, Justice Stevens argued, should give the ADA "a generous, rather than a miserly, construction."[46]

It might appear that one of Justice Stevens's most cited opinions, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[47] which announced a rule of judicial deference to reasonable agency interpretations of ambiguous federal statutes, marks something of a departure from his usual contextually sensitive approach. *Chevron* has been read as narrowing and disciplining what had been a more wide-ranging inquiry into agency interpretations.[48] Justice Stevens, however, consistently maintained that *Chevron* was simply a restatement of pre-existing administrative law, and his subsequent opinions seemed to confirm that view.[49]

After Justice Stevens retired from the Court, he continued to defend attention to legislative history against textualist critics: relying on the intent of the legislature resulted in better statutory interpretation given the large number of statutes, the central role of legislative committees in the lawmaking process, and the role administrative agencies play in the implementation of statutes.[50] Justice Stevens took on the standard textualist critiques of judicial reliance on legislative history. To Justice Stevens, ignoring legislative history would be "disrespectful to the professionals employed by a co-equal branch of our government."[51] And, rather than enlarging judicial discretion, giving weight to legislative history could serve as an appropriate constraint on judges.[52]

Liberty and Justice, for All

Justice Stevens's frequent appeals to factual sensitivity and context should not be mistaken for indifference to the stakes of a case or to the broader values underlying the U.S. Constitution and the American project. To the contrary, Justice Stevens saw upholding these values as essential in guiding a judge's exercise of judgment.

This perspective was quickly evident in a dissent that Justice Stevens filed during his first Term on the Court. *Meachum v. Fano* addressed whether the Due Process Clause gave a state prisoner the right to contest his transfer to a less hospitable facility.[53] Justice Stevens took issue both with the majority's holding and its reasoning, which held that a liberty interest existed only if created by law. Law, he wrote, "is not the source of liberty, and surely not the exclusive source. I had thought it self-evident

---

[46] Sutton v. United Air Lines, Inc., 527 U.S. 471, 495, 497 (1999) (Stevens, J., dissenting).
[47] 467 U.S. 837 (1984).
[48] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[49] *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
[50] *See* John Paul Stevens, *Law Without History?*, N.Y. Rev. Books, Oct. 23, 2014 (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).
[51] *Id.*
[52] *See id.*
[53] Meachum v. Fano, 427 U.S. 215 (1976).

that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects . . . ."[54] That steadfast commitment to the rights of the individual litigant resonated throughout Justice Stevens's jurisprudence, especially in his many opinions interpreting the meaning of the Fourteenth Amendment's protection of liberty under what he sometimes called the "Liberty Clause."[55]

In cases involving the democratic process, Justice Stevens consistently emphasized the role of the people in electing their representatives without interference or dilution from partisan legislators,[56] corporate money,[57] or the Supreme Court itself.[58] Justice Stevens co-wrote (with Justice Sandra Day O'Connor) the majority opinion in *McConnell v. F.E.C.* upholding the parts of a bipartisan federal law that regulated corporate campaign spending and that prohibited national political parties from receiving or spending "soft money."[59] Seven years later, in *Citizens United v. F.E.C.*, a new majority overturned the part of the law requiring corporations to direct some of their electioneering expenditures through a separate political action committee.[60] "On a variety of levels," Justice Stevens wrote in dissent, "unregulated corporate electioneering might diminish the ability of citizens to 'hold officials accountable to the people,' and disserve the goal of a public debate that is 'uninhibited, robust, and wide-open.'"[61]

The great value Justice Stevens placed on equal democratic citizenship underlay, at least in part, his religion jurisprudence as well. For him, the religion clauses not only protected freedom of conscience—a theme that he believed unified all the First Amendment's freedoms[62]—but also implicated equal treatment. Justice Stevens adopted a strong stance against government subsidies of religious institutions and practices,[63] and against state preference for religious over secular interests. He was the only Justice, for example, who viewed the Religious Freedom Restoration Act (RFRA) as a violation of the Establishment Clause.[64] By seeking to impose heightened

---

[54] *Id.* at 230 (Stevens, J., dissenting).
[55] *See* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 20 (1992); *see also McDonald*, 561 U.S. at 864 (Stevens, J., dissenting); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 915–16 (1992) (Stevens, J., concurring in part and dissenting in part); Bowers v. Hardwick, 478 U.S. 186, 216–18 (1986) (Stevens, J., dissenting); Washington v. Glucksberg, 521 U.S. 702, 743–45 (1997) (Stevens, J., concurring in the judgments); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 330–31, 339–44 (1990) (Stevens, J., dissenting); *Fitzgerald*, 523 F.2d at 719–20.
[56] *See Karcher*, 462 U.S. at 748–61 (Stevens, J., concurring); Vieth v. Jubelirer, 541 U.S. 267, 317–18 (2004) (Stevens, J., dissenting).
[57] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); McConnell v. F.E.C., 540 U.S. 93, 203–08 (2003); Citizens United v. F.E.C., 558 U.S. 310, 393–95, 423–24 (2010) (Stevens, J., concurring in part and dissenting in part).
[58] *See* Bush v. Gore, 531 U.S. 98, 126–29 (2000) (Stevens, J., dissenting).
[59] *McConnell*, 540 U.S. at 114–224.
[60] *Citizens United*, 558 U.S. at 318.
[61] *Id.* at 471 (Stevens, J., dissenting).
[62] *See* Wallace v. Jaffree, 472 U.S. 38, 50 (1985).
[63] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting).
[64] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).

scrutiny on all laws that substantially burdened religious exercise, even unintentionally, RFRA constituted a "governmental preference for religion, as opposed to irreligion," he said.[65] Justice Stevens believed it a "paramount purpose" of the Establishment Clause to protect religious outsiders from being made to feel like "a stranger in the political community."[66]

In cases involving the rights of religious objectors to legal exemptions, Justice Stevens long maintained that "there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application,"[67] a position the Court subsequently adopted in *Employment Division v. Smith*.[68] For Justice Stevens, the primary reason for not allowing piecemeal exemptions was to avoid the government being forced, inevitably, to choose the religious claims of some over those of others.[69] On this equality-centered view of the religion clauses, providing relief to religious claimants who were singled out for disfavored treatment, which Justice Stevens voted to do on several occasions,[70] was entirely consistent with *Smith* and was required "to protect religious observers from unequal treatment."[71]

Justice Stevens maintained a keen sense of procedural justice and of the role of the courts as a refuge for the powerless. It was this sense that drove Stevens to dissent in his first published opinion, Father Groppi's en banc case before the Seventh Circuit. Even though there was no reason to believe Groppi was innocent of the legislative contempt charges he was facing, then-Judge Stevens saw the Fourteenth Amendment as guaranteeing procedural protections before a person's liberty could be denied, whether by a court or a legislature. "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen,"[72] Stevens wrote, quoting Justice Louis Brandeis, whose seat on the Supreme Court he would later occupy.

Justice Stevens's unwavering insistence on procedural regularity faced its highest profile test in a series of cases adjudicating the rights of detainees held at the Guantanamo Bay detention camp in the years following September 11, 2001. First, in *Rasul v. Bush*,[73] Stevens wrote for the Court that the federal habeas statute applied to Guantanamo and gave federal courts jurisdiction to hear the detainees' claims. For Stevens, the fact that the detention site was formally on Cuban soil was no obstacle to

---

[65] *Id.* at 537.

[66] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

[67] United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment).

[68] 494 U.S. 872 (1990).

[69] *See Lee*, 455 U.S. at 263 n.2 (Stevens, J., concurring in the judgment).

[70] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd., 450 U.S. 707 (1981).

[71] *Hobbie*, 480 U.S. at 148 (Stevens, J., concurring in the judgment).

[72] Groppi v. Leslie, 436 F.2d 331, 336 (7th Cir. 1971) (en banc) (Stevens, J., dissenting) (quoting Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting)).

[73] 542 U.S. 466 (2004).

statutory habeas jurisdiction given that the site was under the complete control of the United States. He quoted Justice Rutledge's dissent from 56 years earlier in *Ahrens v. Clark*, decided during his term as a law clerk.[74]

Later, in *Hamdan v. Rumsfeld*,[75] Justice Stevens wrote for the Court invalidating the president's use of military commissions to try detainees who had been designated as enemy combatants. The Geneva Conventions and the Uniform Code of Military Justice forbid this, Justice Stevens wrote, notwithstanding the seriousness of the allegations made against the petitioner.[76] The principles of procedural justice that underlay the opinions in *Rasul* and *Hamdan* were evident as well in Justice Stevens's opinion in *I.N.S. v. St. Cyr*,[77] which refuted the government's argument that two federal statutes had impliedly stripped habeas courts of jurisdiction in deportation cases. The Court would not, he said, construe congressional statutes to preclude judicial consideration on habeas of important legal questions absent "a clear, unambiguous statement of congressional intent," which was wanting in *St. Cyr*.[78]

For Justice Stevens, the availability of strong, independent courts was essential to a just legal system. He accordingly favored accountability over immunity for governments and their officials. "The assumption that [immunity] could be supported by a belief that 'the King can do no wrong' has always been absurd," he wrote in dissent in *Seminole Tribe of Florida v. Florida*.[79] He thought it wrong—quite wrong—for the Court to stretch the Eleventh Amendment beyond its text and limit Congress's power to establish private rights of actions for citizens harmed by their states.[80] His opinion for the Court in *Clinton v. Jones* also emphasized accountability, holding that the office of the presidency does not immunize its current occupant from civil liability for pre-presidential conduct.[81] And this theme came through reliably in smaller cases as well. In *Smith v. United States*, the rest of the Court read the waiver of immunity in the Federal Tort Claims Act narrowly to exclude acts occurring on the territory of Antarctica.[82] Not Justice Stevens. To him, the "international community includes sovereignless places but no places where there is no rule of law."[83]

The importance Justice Stevens placed in the availability of civil and criminal process is likewise evident across a range of cases spanning his career. He dissented forcefully in *Bell Atlantic v. Twombly*,[84] in which the Court heightened the standard for pleading under the Federal Rules of Civil Procedure to require that the plaintiff's claim be "plausible" (and in an antitrust case, at that). He authored the Court's opinion in *Apprendi v. New Jersey*,[85] the first in a momentous series of cases requiring that

---

[74] *Id.* at 477 n.7 (quoting *Ahrens*, 335 U.S. at 209 (Rutledge, J., dissenting)).
[75] 548 U.S. 557 (2006).
[76] *See id.* at 635.
[77] 533 U.S. 289 (2001).
[78] *Id.* at 314.
[79] 517 U.S. 44, 95 (1996) (Stevens, J., dissenting).
[80] *See id.* at 76.
[81] 520 U.S. 681 (1997).
[82] Smith v. United States, 507 U.S. 197 (1993).
[83] *Id.* at 216–17 (Stevens, J., dissenting).
[84] 550 U.S. 544, 570 (2007) (Stevens, J., dissenting).
[85] 530 U.S. 466 (2000).

juries decide facts that increase a criminal defendant's sentencing exposure. And in *Scott v. Harris*,[86] Justice Stevens was the only dissenter in a case holding that the reasonableness of police using deadly force to stop a fleeing suspect could be decided as a matter of law, without the aid of a jury, based on the suspect's allegedly reckless driving. The record had included a video of the car chase that impressed the other Justices more than Justice Stevens. He didn't let the opportunity for a gentle ribbing slip by: "Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."[87]

Justice Stevens's Decency

Justice Stevens was kind, gracious, quick to smile, and unfailingly polite. His interventions at the Court's oral arguments were usually prefaced with a disarming, "May I ask you this?" or "May I ask you a question?" What followed was typically the most penetrating and difficult question of the argument. He was modest and unassuming; he enjoyed it when people did not recognize that he was a Supreme Court Justice. His sizeable circle of clerks adored him, and frequently noted to anyone who would listen that he was the best boss they could ever hope to have.

Decency, independence, and humble brilliance ran through all his work. He stayed outside the cert pool, having his clerks review all petitions and bring significant ones to his attention. In preparing for oral argument, he asked for no bench memos from his clerks. Instead, after he had read all the papers, he would stroll into the clerks' office and settle himself into a well-worn armchair. Then he would talk through the cases, aided by near-perfect recall of every prior case that had come before the Court during his time on it. When he had an opinion to write, he always prepared the first draft himself, so as to be sure that he was clear on his own view of the case.

Many of these first drafts were separate opinions. Justice Stevens wrote more dissenting opinions than any Justice in the history of the Court—and more concurring opinions as well. Influenced by his 1969 investigation of the Illinois Supreme Court, he sought to be clear, always, about why he had voted as he did. With his fearless independence, he was untroubled by occasionally being one against eight—although he wished his colleagues would rethink their votes.

Most of these dissents remain dissents, enduring markers of how Justice Stevens believed we could achieve a more just society. But on occasion they paved the way for future change. In *Bowers v. Hardwick*, Justice Stevens dissented from the Court's holding that the Constitution offers no protection against criminal liability for same-sex couples engaging in intimate conduct.[88] Rather, he concluded, individual decisions by a couple "concerning the intimacies of their physical relationship . . . are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[89] Seventeen years later, Justice Stevens assigned Justice Kennedy to write the opinion

---

[86] 550 U.S. 372 (2007).
[87] *Id.* at 390 n.1 (Stevens, J., dissenting).
[88] *Bowers*, 478 U.S. at 214 (Stevens, J., dissenting).
[89] *Id.* at 216 (Stevens, J., dissenting).

for the Court in *Lawrence v. Texas* overruling *Bowers*. The opinion stated: "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[90]

A Lifetime of Learning

Justice Stevens was deeply committed to the educative power of experience. As he memorably put it in a speech at Fordham Law School in 2005, "learning on the bench has been one of the most important and rewarding aspects of my own experience over the last thirty-five years [as a federal judge]."[91] Justice Stevens viewed his own willingness to engage in "learning on the job" as more than merely a natural inclination of his own (although it certainly was that). Intellectual curiosity and an openness to learning new lessons were, in his view, essential virtues of any good judge. Every new case presented an opportunity for development. In a statement overflowing with his characteristically generous optimism, Justice Stevens said that "pre-argument predictions about how a judge or Justice is likely to vote are far less significant than the knowledge that he or she will analyze the cases with an open mind and with respect for the law as it exists at the time of the decision."[92]

Justice Stevens's evolution on the death penalty bears all the hallmarks of his judicial personality and his commitment to constant learning. The lead opinions (co-signed by Justices Stewart, Powell, and Stevens) in the 1976 decisions of *Gregg v. Georgia*,[93] *Proffitt v. Florida*,[94] and *Jurek v. Texas*[95] upheld death penalty statutes in Georgia, Florida, and Texas, which had been revised in an effort to address the constitutional defects identified four years earlier in *Furman v. Georgia*.[96] The opinions—crafted narrowly to affirm the proposition that the Eighth Amendment did not categorically rule out the constitutionality of the death penalty—stressed the continuity of their approach with the earlier *Furman* decision, as well as the contingent and highly contextual nature of their conclusion. In that sense, the decisions themselves (implicitly) envisioned the possibility of change in the future.

During the ensuing decades, Justice Stevens was neither among the Justices who invariably voted to overturn death sentences nor among those who seemingly reflexively upheld the sentences imposed and affirmed by lower courts. An indication that Justice Stevens's views on the death penalty were shifting against its permissibility came in the 2002 case of *Atkins v. Virginia*,[97] in which he wrote the opinion for the Court holding that severely mentally disabled defendants lack the culpability necessary to justify the death penalty. Tellingly, the opinion also notes that the death penalty is not constitutional when applied to these defendants because—

---

[90] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[91] John Paul Stevens, *Learning on the Job*, 74 Fordham L. Rev. 1561, 1567 (2006).
[92] *Id.* at 1563.
[93] 428 U.S. 153 (1976).
[94] 428 U.S. 242 (1976).
[95] 428 U.S. 262 (1976).
[96] 408 U.S. 238 (1972).
[97] 536 U.S. 304 (2002).

owing to their limited ability to assist in their own defense—the process leading to its imposition was unreliable.

By 2008, Justice Stevens had come to a more categorical conclusion. In his concurring opinion in *Baze v. Rees*,[98] Justice Stevens painstakingly walked through the legal developments that had (in his view) rigged death cases against defendants as well as new information that he had come to appreciate more fully over the years after his 1976 vote to reinstate the death penalty.[99] "[J]ust as Justice White ultimately based his conclusion in *Furman* [that the death penalty was unconstitutional] on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'"[100] This later opposition to the manner in which the death penalty came to be applied was facilitated by the qualified nature of Justice Stevens's earlier endorsement of the state's power to impose that penalty coupled with his resolute openness to learning.[101]

Another important area in which Justice Stevens's thinking remained flexible over time was race-based affirmative action. Justice Stevens first offered his views on affirmative action in *Regents of the University of California v. Bakke*.[102] Although *Bakke* is usually cited for its holding on constitutional law, Justice Stevens's separate opinion on behalf of four Justices addressed only the statutory issue under Title VI of the Civil Rights Act of 1964. That statute prohibits racial discrimination "under any program or activity receiving Federal financial assistance."[103] Justice Stevens concluded that the university's program that set aside a fixed percentage of admissions for favored racial minorities was contrary to the "plain language of the statute."[104] Although he later wrote several opinions upholding affirmative action programs, he stated in his memoirs that he believed the basis of his *Bakke* opinion to be sound. It rested on the proposition that the meaning of Title VI did not depend upon interpretation of the Constitution, but instead established an absolute right of access to federally financed programs regardless of race.[105]

By contrast, he refused to interpret the Constitution to impose an absolute prohibition upon considering race in any government program. He took this position, first, in a case upholding a federal statute that set aside ten percent of funds for local public works projects to be allocated to minority businesses.[106] Consistent with his aversion to tiers of judicial scrutiny, he would have invalidated the program because Congress failed "to demonstrate that its unique statutory preference is justified by a

---

[98] 553 U.S. 35, 71 (2008) (Stevens, J., concurring in the judgment).
[99] *See Gregg*, 428 U.S. at 153.
[100] *Baze*, 553 U.S. at 86 (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).
[101] *See Gregg*, 428 U.S. at 175 (opinion of Stewart, Powell, and Stevens, JJ.); *see also* Gardner v. Florida, 430 U.S. 349 (1977).
[102] 438 U.S. 265 (1978).
[103] Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 42 U.S.C. § 2000d.
[104] 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).
[105] *See* Stevens, *supra* note 1, at 160–61.
[106] Fullilove v. Klutznick, 448 U.S. 448, 536 (1980) (Stevens, J., dissenting).

relevant characteristic that is shared by members of the preferred class."[107] He took the same position in a separate opinion in a case invalidating a set aside for construction contracts in Richmond, Virginia.[108] He would not have limited racial classifications by government only to "a remedy for a past wrong,"[109] but he found the set aside unconstitutional because, among other reasons, the city failed to argue that it promoted the efficient performance of city contracts.[110]

But he followed similarly contextual reasoning in upholding some racial preferences, first in a case protecting minority school teachers from layoffs.[111] He would have upheld this remedy on the ground that "in our present society, race is not always irrelevant to sound governmental decisionmaking,"[112] and the school district could reasonably conclude that an integrated faculty could provide benefits to the entire student body.[113] He took the same position in later cases on racial preferences by the federal government, first in concurring in a decision to give a preference to minority firms in obtaining broadcast licenses,[114] and then in dissenting from a decision that applied "strict scrutiny" to all such federal preferences.[115] In his dissent, he reiterated his skepticism of standards of review based on his judgment that, in practice, "uniform standards are often anything but uniform."[116]

The consistent judicial character revealed in these affirmative action decisions, separated by nearly 30 years on the Supreme Court, lend significant weight to Justice Stevens's frequent protests that he had not changed as much as people said he did. His 2019 memoir, *The Making of a Justice*, makes clear that his self-understanding as a thoroughgoing judicial moderate remained as firm as ever. In his view, his time on the Court did not fundamentally transform him. Rather, he learned from his experience as a Justice, as he constantly did from the world around him, and this led him to change the conclusions he reached on certain issues. But he remained steadfastly true to the incremental and nonideological vision of judging he articulated to the Chicago Bar the year before President Ford appointed him to the Supreme Court.

On the thirtieth anniversary of that appointment, President Ford put it just right in a letter commemorating the event: "I am prepared to allow history's judgment to rest (if necessary, exclusively) on my nomination thirty years ago of Justice John Paul Stevens to the U.S. Supreme Court," Ford wrote. "He has served his nation well, at

---

[107] *Id.* at 554.
[108] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 514–15 (1989) (Stevens, J., concurring in part and concurring in the judgment).
[109] *Id.* at 511.
[110] *Id.* at 512.
[111] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[112] *Id.* at 314 (Stevens, J., dissenting).
[113] *Id.* at 315.
[114] Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 601–02 (1990) (Stevens, J., concurring).
[115] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).
[116] *Id.*

all times carrying out his judicial duties with dignity, intellect and without partisan political concerns. Justice Stevens has made me, and our fellow citizens, proud . . . ."[117]

Carrying on our tradition dating to the days of Chief Justice Marshall,[118] it is accordingly:

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our great admiration and respect for Justice John Paul Stevens, our deep sense of loss upon his death, our appreciation for his contribution to the law, the Court, and the nation, and our gratitude for his example of a life well spent; and it is further

RESOLVED that the Solicitor General be asked to present these resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

The Chief Justice said:

Thank you, General Prelogar. I recognize the Attorney General of the United States.

Attorney General Garland addressed the Court as follows:

Mr. Chief Justice, and may it please the Court. Actually, I do not think that traditional prayer is necessary today because I am pretty sure that the request I will be making at the end of these remarks will please the Court.

The Bar of the Court met today to honor the memory of John Paul Stevens, Associate Justice of the Supreme Court from 1975 to 2010. Justice Stevens was humble, curious, and generous both as a judge and as a human being.

He exemplified open mindedness, collegiality, and integrity. He was unfailingly well prepared, civil, and intellectually formidable on every case he heard. He modeled the best of the judicial craft and was a proud and tireless guardian of judicial independence.

Justice Stevens was born on April 20, 1920, in Chicago. He attended the University of Chicago Laboratory Schools for elementary and high school and then the University of Chicago for college.

Justice Stevens graduated in 1941 and had begun work on a Master's degree in English when his dean asked him to consider cryptographic work for the Navy. He took the suggestion to heart and he was commissioned as a Naval officer.

In his distinguished Navy career, Justice Stevens helped crack codes with important consequences for the war effort. He did this through his knack for seeing angles in problems that others had missed, an ability that would be recognized throughout his subsequent career.

When he left the service, Justice Stevens pursued law school at the suggestion of his brother. At Northwestern, he became co-editor-in-chief of the law review and

---

[117] Stevens, *supra* note 1, at 527–28.
[118] 35 U.S. (10 Pet.) vii, viii (1836).

graduated first in his class. His outstanding performance and a lucky coin flip with a classmate won him a clerkship with Justice Wiley B. Rutledge.

Upon completion of the 1947 Term, Justice Rutledge gave Justice Stevens a photo inscribed "To my friend and former clerk with appreciation and affection." Years later, Justice Stevens made a practice of inscribing photos to his own clerks in the same way.

After his clerkship, Justice Stevens returned home to Chicago. He became a leading litigator in private practice and argued a case in this Court. He specialized in antitrust law, a subject he also taught as an adjunct professor of law at Northwestern and at the University of Chicago.

He accepted important opportunities for public service, including as an advisor on the Attorney General's advisory committee on the antitrust laws and as a counsel to a special commission to investigate charges of corruption in the Illinois Supreme Court.

He took cases pro bono, including a criminal matter in which he won reversal of his client's murder conviction premised on a coerced confession.

In 1970, he became a judge of the U.S. Court of Appeals for the Seventh Circuit, and then, in 1975, President Gerald R. Ford appointed him to the Supreme Court of the United States.

My distinguished predecessor, Attorney General Edward Levi, called Stevens "a craftsman of the highest order whose opinions were gems of perfection."

In 2005, former President Ford reflected on the appointment with pride, writing of his own presidency, "I am prepared to allow history's judgment of my term in office to rest, if necessary, exclusively on my nomination 30 years ago of Justice John Paul Stevens to the U.S. Supreme Court."

As a member of this Court, Justice Stevens was independent, insightful, and prolific. His vast body of opinions touched almost every corner of federal law. It would be impossible to do justice to that remarkable body of judicial work in these brief remarks, so I will limit myself to just a few examples.

In the realm of criminal law, Justice Stevens's landmark opinion in *Apprendi v. New Jersey* was the first in a line of cases that transformed the law of sentencing, a line that also included Justice Stevens's opinions in *United States v. Booker* and *Gall v. United States*.

His opinions in *INS v. St. Cyr*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld* protected the writ of habeas corpus as a means of testing the legality of executive decisions.

His opinion in *Chevron v. Natural Resources Defense Council*, holding that courts must defer to reasonable agency interpretations of ambiguous statutes, has chartered the course of administrative law for a generation.

And in antitrust law, his first love, his influential opinions in cases like *NCAA v. Board of Regents* and *American Needle v. NFL* have guided the principles governing horizontal restraints adopted by associations and joint ventures.

Justice Stevens's time on the Court was defined not only by what he contributed to the law, but by how he did so. He was kind and unassuming without any airs. He would often preface his questions from the bench with, "May I ask you a question?"

He was a warm colleague both on and off the bench. The affection that his fellow Justices felt for him was manifest. He also made good on the words he inscribed on the photos he gave his law clerks. They were both his former clerks and his friends.

I first met the Justice just a few years after he came on the Court. As a new clerk for Justice Brennan, I dropped by the Stevens Chambers to talk with his clerks about a case. When he heard us talking in the clerks' room, the Justice came in, plopped himself down in an easy chair and immediately entered into the conversation.

It was clear that he loved the give and take of the conversation. It was clear that this kind of discussion was central to the way he made up his mind about cases. It was very clear that even though he was very attentive to what we thought, the final decision would be his based on his own independent judgment. And it was also very clear that his clerks loved being part of that process.

For a moment, I was jealous of the fact that he had hired only two clerks who had undoubtedly become closer to their Justice than the rest of us in Chambers with twice that many, but then I remembered, because they were not in the cert pool, those two clerks would be working on every single cert petition.

But, while he was a congenial colleague and boss, Justice Stevens was also fearless in going it alone, whether piloting small airplanes, disputing that William Shakespeare actually wrote the Shakespeare plays, rooting for the Cubs as a south-sider, writing the first drafts of his opinions, or concurring or dissenting solo when his views departed from those of other Justices.

He placed a premium on exercising independent judgment and was insistent on explaining the legal reasoning underlying that judgment. He also believed that it was important to change your mind when you concluded that your original position was wrong or even if one of your published opinions was wrong.

As he put it just a few years before his retirement, "Learning on the bench has been one of the most important and rewarding aspects of my own experience over the last 35 years."

Justice Stevens embodied the independence and commitment to judging each case on its own merits. That is essential to the rule of law.

When Justice Stevens retired from the Court at age 90, he had been working long after most people his age had retired. Yet he appeared to have become younger each year he sat on the bench. In the words of President Obama, he retired "at the top of his game." Not that he really retired in any conventional sense. In the years after leaving the Court, he published three books, including "The Making of a Justice: Reflections on My First 94 Years."

Although he traded tennis for ping pong and acceded to his family's wishes that he stop swimming in the open ocean on his own, he kept up the kind of pace that made many believe there might well be a second 94 years.

In his last days, he flew to Portugal to participate in a conference. His travel companions reported he hadn't lost a step. At the time of his passing in 2019, Justice Stevens had been retired from active service for nearly a decade and yet, in the words of Justice David Souter, he remained "the soul of principle and an irreplaceable friend."

Justice Stevens will long be remembered for his extraordinary service to our country, for his commitment to the rule of law, for his fundamental decency, and for the integrity with which he worked and lived.

Mr. Chief Justice, on behalf of the lawyers of this nation and in particular the members of this Court's Bar, I respectfully request that the resolutions presented to you in honor of John Paul Stevens be accepted by the Court and that together with the chronicle of these proceedings, they be ordered kept for all time in the records of this Court.

The Chief Justice said:

Thank you, General Garland, General Prelogar, for your presentations in memory of Justice John Paul Stevens. We also extend our appreciation for the resolutions you have read today to co-chairs Jamal Greene and Carol Lee and members of the Committee on Resolutions and to co-chairs David Barron and Teresa Wynn Roseborough and the members of the Arrangements Committee.

Your motion that they be made part of the permanent record of the Court is granted.

As you've heard, John Paul Stevens was nominated to the office of United States Circuit Judge for the Seventh Circuit by President Richard M. Nixon on September 22, 1970. And just five years later, President Gerald Ford nominated him to be the 101st member of this Court. As Justice Stevens often noted, his appearance before the Senate Judiciary Committee marked the last untelevised confirmation hearing for a Supreme Court nominee. The Senate confirmed him unanimously, and he took his seat on December 19, 1975.

He led an extraordinary life of exemplary service to our country. He was born in Chicago. In the year he was born, Woodrow Wilson was president, and prohibition had just become the law of the land. William Howard Taft had not yet become Chief Justice, and the Supreme Court did not yet have a building of its own. Young John's parents ensured that he had an extraordinary upbringing. In 1927, he met both Amelia Earhart and Charles Lindbergh at the grand opening of the Stevens Hotel launched by his family in Chicago. Perhaps those encounters influenced his enthusiasm for aviation.

Although he grew up in a steadfastly Republican family, his father took John to see President Franklin Roosevelt's acceptance speech on the last day of the Democratic Party's convention in 1932, at which FDR first used the term "New Deal." FDR was just the first of many presidents John Paul Stevens encountered personally. Eighty years later, in another memorable encounter, President Barack Obama awarded Justice Stevens the Presidential Medal of Freedom, citing his "clear and

graceful manner in the defense of individual rights and the rule of law, always favoring a pragmatic solution over an ideological one."

Among other memorable encounters with persons of note, John was in attendance at Wrigley Field when Babe Ruth made his famous "called shot" home run. A life-long Cubs fan, he proudly displayed the box score from that game in his office. In 2006, he became the first Supreme Court Justice to step on the mound at Wrigley Field and throw out the first pitch at a Cubs game. He threw a strike. He called that the high point of his career.

But there were, to say the least, other impressive accomplishments. He attended the University of Chicago and, upon graduation in 1941, enrolled, as you've heard, in a secret program for cryptographic work in the United States Navy. Stationed in Oahu, Lieutenant Commander Stevens was part of a team of signal officers that cracked Japanese codes and hastened the end of the war.

After that, he chose to study at Northwestern Law, both for its excellence and because of the opportunity it offered to complete three years of law study in two years. He became co-editor-in-chief of the law review and earned record grades. He paid for his legal education through the GI Bill, and it proved to be an outstanding investment both for Stevens and for the country.

John Paul Stevens came to the Supreme Court as a law clerk for Wiley Rutledge, and among the cases decided by the Court that Term was *Ahrens v. Clark*, a challenge to postwar deportation brought by German prisoners detained on Ellis Island. Justice Rutledge dissented from an opinion limiting the writ of habeas corpus. In 2004, then-Justice Stevens relied on the Rutledge dissent when writing for the Court in *Rasul v. Bush*, which found that federal courts were not barred from reviewing the constitutionality of detention of terrorists at Guantanamo Bay.

He was always confident that a judge's job was simply to articulate the best way to decide each case. And when in dissent, he never seemed to doubt that the Court would eventually see things his way.

Following his clerkship, John Paul Stevens returned to practice in Chicago. He initially joined the firm that is now known as Jenner and Block, where he developed a specialized interest in antitrust law. His focus on that field led to his appointment as an associate counsel to the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary.

In 1952, he co-founded his own law firm. He devoted his time and considerable energy to various public service and pro bono work, observing later that most good lawyers devote a significant amount of time to public service for which they receive no pay.

After 18 years in private practice, John Paul Stevens began his career of distinguished service to the judiciary. In nearly 35 years on this Court, Justice Stevens wrote 400 majority and plurality opinions for the Court, beginning with *Mathews v. Diaz* in 1976. On a few occasions, 1,415 to be precise, he wrote a concurring or dissenting opinion or separate statement.

In this courtroom, Justice Stevens was universally polite and probing. He consistently asked questions that illuminated aspects of the case others had not spotted. Indeed, Justice Stevens's penetrating perception extended even to matters of civility and grace. In 1980, before Sandra Day O'Connor joined the Court, he was a catalyst for dropping the traditional salutation of "Mr. Justice" in favor of simply "Justice." When he retired in 2010, he noted with satisfaction that a letter written to the other Justices when he joined the Court would have been addressed "Dear Brethren," but he would begin "Dear Colleagues."

He did it all with a smile, an even keel, and a warm generosity, not just to those with life tenure or learned in the law but to all people he encountered. His service would be noteworthy alone for its length, the third-longest tenure in the Court's history and just a few months shy of the record. But he will remain an enduring inspiration to everyone associated with this Court because he served so well and with such a spirit of decency and kindness.

John Paul Stevens said that he hoped his legacy would be to be remembered as an honest judge and a good judge who tried to reach the best result in every case. Perhaps he would have welcomed our affirmation of that sentiment to be the last word today. But I hope he would not mind a concurring opinion from the members of the Court and the members of the Bar of this Court that this one-of-a-kind American will long be remembered for his extraordinary patriotism, humanity, and contributions to the rule of law.

(Whereupon, at 3:28 p.m., the Special Session was concluded.)