

# Concluding Essay

## THE PARADOX OF JUSTICE JOHN PAUL STEVENS

*Sonja R. West and Dahlia Lithwick\**

In the days following Justice John Paul Stevens's death last year, numerous tributes and remembrances immediately poured forth. Former clerks, journalists, and legal scholars all grasped for the perfect words to capture the man and the justice we had just lost.

Yet many readers of these tributes and homages might have begun to wonder whether they were actually all talking about the same person. Because, taken together, the various portraits appeared to be full of contradictions. In one piece, for example, Justice Stevens is described as a frequent lone dissenter,<sup>1</sup> while in another he is praised for his consensus-building leadership.<sup>2</sup> For every tribute depicting him as a moderate around whom the Court shifted rightward,<sup>3</sup> there seemed to be another painting him as a jurist who drifted leftward.<sup>4</sup> He was a Republican yet also a liberal giant. He was deeply patriotic, while also a sharp critic of governmental institutions.

So who was the *real* Justice Stevens? How can we possibly be expected to understand his legacy if we can't even agree on the basic characteristics he embodied? Which of these portraits is correct?

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<sup>1</sup> See, e.g., Ian Gershengorn, *Remembering Justice Stevens*, SCOTUSBLOG (July 18, 2019, 6:44 PM), <https://www.scotusblog.com/2019/07/remembering-justice-stevens/> [<https://perma.cc/9ZY3-YNLR>] (discussing how Justice Stevens's "role of lone dissenter earned him a reputation of being an iconoclast").

<sup>2</sup> See, e.g., David Cohen, *John Paul Stevens, Long-Serving Supreme Court Justice, Dies at 99*, POLITICO (July 16, 2019, 8:48 PM), <https://www.politico.com/story/2019/07/16/john-paul-stevens-died-justice-obituary-121194> [<https://perma.cc/CM4b-8CM6>] (noting that Justice Stevens "became known for his ability to use that power to build coalitions").

<sup>3</sup> See, e.g., Jeffrey Toobin, *The Humane Legacy of John Paul Stevens*, NEW YORKER (July 17, 2019), <https://www.newyorker.com/news/postscript/the-humane-legacy-of-john-paul-stevens-supreme-court-died> [<https://perma.cc/XJ95-F338>] (observing that "[b]y the time [Justice Stevens] left the Court, during the tenure of John Roberts as Chief Justice, Stevens was the senior member of the Court's liberal wing—which was evidence, mostly, of how far the Court turned to the right during his long tenure").

<sup>4</sup> See, e.g., Cohen, *supra* note 2 (stating that Justice Stevens "evolved from a centrist and pragmatist to someone who was often the court's most-liberal voice").

The answer is that they all are. If Justice Stevens were a multiple-choice test, the right answer to pretty much every question would likely be “all of the above.” He was, in so many ways and at so many times, both a thing and also the opposite of that thing. And the secret to understanding Justice Stevens’s legacy is to appreciate how his seemingly paradoxical nature was, in fact, his greatest strength.

Let’s start with Justice Stevens’s childhood, in which he managed to grow up both rich and also poor. He was born in 1920 to a prosperous family who owned a grand downtown Chicago hotel—the world’s largest at the time.<sup>5</sup> Playing in the lobby of the Stevens Hotel, the privileged young John crossed paths with the elite and famous, catching glimpses of celebrities such as his aviation heroes Amelia Earhart and Charles Lindbergh. The onset of the Great Depression in the 1930s, however, thrust his family into financial ruin, and exposed him to life on both sides of the proverbial coin.

In what a court would later declare to have been a good faith attempt to save the hotel from bankruptcy, Justice Stevens’s father signed his name to two unsecured loans—an act that would ultimately lead to his conviction for embezzlement of more than a million dollars and a potential ten-year prison sentence.<sup>6</sup> During this time, Justice Stevens’s grandfather and uncle, who had both also been indicted but did not stand trial, suffered under the intense stress; his grandfather had a severe stroke and his uncle died by suicide. Thus while Justice Stevens would eventually become one of the most powerful actors in the criminal justice system, he first experienced the powerlessness of being one of its victims.

A year later, an appellate court found that there was “not a scintilla” of evidence of any crime, and overturned his father’s conviction.<sup>7</sup> Seeing firsthand how the criminal justice system “seriously misfired”<sup>8</sup> in his father’s case opened Justice Stevens’s eyes to both the irreparable human costs of the law’s mistakes as well as the vital necessity of having impartial judges who will work tirelessly and carefully to correct them. Indeed, when Justice Stevens later built his early career upon an investigation into corrupt judges in Illinois,<sup>9</sup> it was doubtless at least in part a response to the straight

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<sup>5</sup> *Hilton Chicago*, HIST. HOTELS AM., <https://www.historichotels.org/hotels-resorts/hilton-chicago/history.php> [<https://perma.cc/ESG6-ZQ8Y>].

<sup>6</sup> Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER (Mar. 15, 2010), <https://www.newyorker.com/magazine/2010/03/22/after-stevens> [<https://perma.cc/J9EN-FBYL>].

<sup>7</sup> *People v. Stevens*, 193 N.E. 154, 160 (Ill. 1934).

<sup>8</sup> See Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y. TIMES MAG. (Sept. 23, 2007), <https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html> [<https://perma.cc/D8J7-5P5U>].

<sup>9</sup> Toobin, *supra* note 6.

line he had come to draw between justice itself and the judges who administered it. He was suspicious of the notion of the unerring, oracular judge for the rest of his days. He also believed that his own capacity to make errors was something requiring constant and unrelenting scrutiny. Government actors have “a very strong obligation to be impartial,” he once said in an interview, “[t]hat’s just one of the most basic principles that cuts through all sorts of law.”<sup>10</sup>

After serving in the military as a code-breaker and winning a Bronze Star for his naval service during World War II, Stevens graduated from Northwestern University Law School with the highest GPA in the history of the school at that time.<sup>11</sup> He settled into a quiet, twenty-two-year career as a private antitrust lawyer before his appointment to the United States Court of Appeals for the Seventh Circuit in 1970.<sup>12</sup>

A mere five years later, President Gerald Ford selected then-Judge Stevens as his nominee to fill a United States Supreme Court vacancy. Chosen, in large part, because he was unlikely to make political waves, Justice Stevens was in fact quickly confirmed by the Senate in a vote of 98 to 0.<sup>13</sup> It is true that those were different, less partisan times and that a unanimous vote was somewhat less astonishing than it is today. Yet, in what may be the highest praise any Justice could aspire to, President Ford wrote, just before his death: “I am prepared to allow history’s judgment of my term in office to rest (if necessary, exclusively) on my nomination thirty years ago of Justice John Paul Stevens to the U.S. Supreme Court.”<sup>14</sup> Justice Stevens, therefore, was the unexciting compromise nominee, who also proved to be its opposite: a president’s crowning achievement.

Over his thirty-five years of service on the Supreme Court, little better captures the paradox that was Justice Stevens than how he managed to evolve into the Court’s outspoken liberal voice while, at the same time, steadfastly remaining the same conservative centrist he had always been. Surely, nobody was more surprised than he to learn that the gentle white-

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<sup>10</sup> See Jeffrey Rosen, *The Impartial Justice*, ATLANTIC (July 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/07/justice-stevens-was-impartial-end/594184/> [<https://perma.cc/2C9H-EQEV>].

<sup>11</sup> Nick Blumberg, *Chicago’s John Paul Stevens, the ‘Unexpected Justice’*, WTTW (Sept. 17, 2015, 1:09 PM), <https://news.wttw.com/2015/09/17/chicagos-john-paul-stevens-unexpected-justice> [<https://perma.cc/E8ST-886K>].

<sup>12</sup> Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html> [<https://perma.cc/594A-JXGQ>].

<sup>13</sup> *Id.*

<sup>14</sup> Letter from President Gerald R. Ford to Dean William Michael Treanor, Fordham University School of Law (Sept. 21, 2005), [https://graphics8.nytimes.com/packages/pdf/us/20100410\\_ford-stevens-letter.pdf](https://graphics8.nytimes.com/packages/pdf/us/20100410_ford-stevens-letter.pdf) [<https://perma.cc/V58Z-3M99>].

haired former antitrust lawyer had become the public symbol of the left flank of a Court that he increasingly claimed he could no longer recognize.<sup>15</sup> When questioned about this toward the end of his career, Justice Stevens always maintained that it was the Court, not he, that had changed. He noted how almost every member of the modern court had replaced someone to his or her left, and thus, as a consequence, what had once been the temperate moderate center of the Court eventually found itself on the left end of the scale.<sup>16</sup>

Indeed, as one of the Court's most frequent lone dissenters, it is difficult to imagine that Justice Stevens was ever unwittingly or thoughtlessly pushed or pulled in any direction. He was competitive and tireless in his battles, always ready for the next round. Once in an interview, Justice Antonin Scalia was asked which Justice was his favorite sparring partner, and he named Justice Stevens, explaining, "I think you should give the dissenter the respect to respond to the points that he makes. And so did John Stevens. So he and I used to go back and forth almost endlessly."<sup>17</sup>

Yet Justice Stevens, this lone rebel, was also its opposite: a unifying leader. As senior justice for the Court's left wing, he was strategic and understated and, over time, mastered the fine art of getting to five. By putting aside pettiness and ego, he solidified the more progressive justices into a united front and, more often than seemed possible, won votes from unexpected places. He worked not through partisanship but through reason, persuasion, and an unending presumption of good faith to find the common ground at times when it seemed there was none to find.

To accurately remember Justice Stevens, therefore, we need to recall how he stood still, how his convictions never wavered. He was not a creature who could be bargained with or easily swayed. Yet we also must remember the ways that he was the exact opposite—a jurist who changed over the decades. In fact, he was the first to admit that he did, of course,

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<sup>15</sup> Dissenting in a 2007 opinion involving school busing programs that attempted to remediate racial segregation, Justice Stevens sorrowfully concluded with the biting observation: "The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 802 (2007) (Stevens, J., dissenting).

<sup>16</sup> See Rosen, *supra* note 8 (quoting Justice Stevens as saying that it only appeared as though his decisions had become more liberal because "every judge who's been appointed to the court since Lewis Powell . . . has been more conservative than his or her predecessor. Except maybe Justice Ginsburg. That's bound to have an effect on the court").

<sup>17</sup> Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/index5.html> [<https://perma.cc/M8JX-HLMF>].

change some of his views, most notably on issues such as the death penalty and affirmative action.

This is because Justice Stevens, for each of his 99 years, was always both a teacher yet also a student. His young law clerks uniformly marveled at his willingness to listen closely to their novice views, always believing that he could learn as much from them as the other way around. He would seriously consider any counterargument offered and every new fact presented. He wrote his own first drafts (unlike most justices, who typically rely on their clerks to take the first pass), because he believed the task of putting words on the page was the best reassurance that he had reached the correct outcome. In particular, he would grapple with the facts of each case. He was known, moreover, to occasionally emerge from his office after finishing the first draft only to declare that his take had changed.

This is all in line with another truism about Justice Stevens—that he was simultaneously both assured in his convictions yet genuinely humble. His authentic humility, however, should not be confused with meekness. Because it was a rookie mistake to ever underestimate Justice Stevens. Naive oral advocates could be forgiven, of course, for being lured into complacency by Justice Stevens’s polite entreaties to ask a question or his apologies for taking up their time. Yet seasoned Court advocates will tell you that what came next was likely a question crafted to expose your argument’s most damning weakness. As former Solicitor General Paul Clement wrote: “[T]here is no justice who combined a kind and gentle manner with an ability to cut to the heart of a case and the weakness of an advocate’s position quite like Justice Stevens.”<sup>18</sup>

Another of Justice Stevens’s most emblematic paradoxes was his status as a man of great privilege combined with his ability to empathize deeply with those whom society had left behind. For most others of his era, such privilege—being a white, male, straight, Protestant, able-bodied, upper-class professional—would have constituted the beginning and the end of their worldview. Yet Justice Stevens managed to see himself in communities and lives that bore no resemblance to his own. One of the reasons it is so easy for John Paul Stevens fans to see a bit of themselves in him is likely because he was capable of seeing everyone else on their own terms. He viewed everyone—women, people of color, LGBTQ individuals, criminal defendants, factory workers—as fully realized moral equals and demonstrated a vast capacity for imagining their worlds. His ability to embrace all aspects of human diversity did not, of course, skew his legal

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<sup>18</sup> Paul Clement, *Justice Stevens at Oral Argument: Often Fatal; Always Kind*, SCOTUSBLOG (July 19, 2019, 1:18 PM), <https://www.scotusblog.com/2019/07/justice-stevens-at-oral-argument-often-fatal-always-kind/> [https://perma.cc/GQ2X-WDUU].

opinions away from some ghostly “true” meaning; it instead opened his eyes to how very different the complicated machinery of the law can look if you only take the time to view it from a new angle.

A great example of this is found in the case of *Illinois v. Wardlow*,<sup>19</sup> in which the Court had to decide whether the police had reasonable suspicion to stop a young black man solely because he took off running at the sight of a police officer. The five-justice majority, led by Chief Justice William Rehnquist, thought the answer was an obvious “yes.” In a partial dissent, however, Justice Stevens offered a different vantage point: “Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous.”<sup>20</sup> This is not “aberrant” behavior, he added; this is common sense when you live in a world where police officers are not necessarily on your side.<sup>21</sup> Justice Stevens did not understand this reality because he had experienced it in his own life; he knew it because he cared to imagine what life would look like for those who had.

Justice Stevens realized that when we make the effort to understand the lived experiences of people whom we might think of as our opposites, we usually find that we are far more similar than different. As he explained in dissents spanning decades: It is “[h]abit, rather than analysis, [that] makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; . . . [and] black and white,”<sup>22</sup> yet it is “interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes” that eventually moves us past this stereotypical thinking.<sup>23</sup>

Perhaps the most striking of all of Justice Stevens’s seeming contradictions, however, was the fact that he was a deeply reverent patriot but also a stern and clear-eyed critic of our country’s institutions, and even our Constitution itself.<sup>24</sup>

One of Justice Stevens’s most famous opinions is his dissent in *Texas v. Johnson*,<sup>25</sup> in which he argued in favor of the constitutionality of a state law banning the public desecration of the American flag. The dissent is

<sup>19</sup> 528 U.S. 119 (2000).

<sup>20</sup> *Id.* at 132 (Stevens, J., dissenting).

<sup>21</sup> *Id.* at 133.

<sup>22</sup> *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

<sup>23</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting).

<sup>24</sup> *See generally* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

<sup>25</sup> 491 U.S. 397, 436–39 (1989) (Stevens, J., dissenting).

powerful—even to those who may disagree with its legal conclusion—for its expression of Justice Stevens’s heartfelt devotion to his country. The American flag, he wrote, “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 good will for other peoples who share our aspirations.”<sup>26</sup> The value of the flag, he told us, is immeasurable, because it represents the “irresistible force” of liberty and equality—“ideas [that] are worth fighting for.”<sup>27</sup>

It is precisely because of his profound respect for the United States that Justice Stevens will also be remembered for his stern criticisms of it. Particularly in key dissents near the end of his career, he wrote persistently about his aspirations for our constitutional democracy, and his deep disappointment when governmental actors and institutions failed to meet these high standards. Dissenting in *Bush v. Gore*<sup>28</sup> he wrote—presciently and regretfully—about the public’s loss of confidence in an impartial court:

[The majority opinion] can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. 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.<sup>29</sup>

Justice Stevens was equally direct when he declared, in 2018, that then-nominee Brett Kavanaugh—whom Justice Stevens had long considered to be a “fine federal judge”<sup>30</sup>—had proven himself through his confirmation performance to be unfit to serve as a Supreme Court justice. He implored the senators to give serious consideration to Kavanaugh’s stark display of political bias and his unsubtle threats of reprisal against his enemies, not for political reasons but “[f]or the good of the Court.”<sup>31</sup>

During the last years of his life, Justice Stevens was upfront at the dismay he felt with the divisive politicking taking over the country and the

<sup>26</sup> *Id.* at 437.

<sup>27</sup> *Id.* at 439.

<sup>28</sup> 531 U.S. 98, 123–29 (2000) (Stevens, J., dissenting).

<sup>29</sup> *Id.* at 128–29.

<sup>30</sup> Adam Liptak, *Retired Justice John Paul Stevens Says Kavanaugh Is Not Fit for Supreme Court*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/us/politics/john-paul-stevens-brett-kavanaugh.html> [https://perma.cc/PST7-NUH7].

<sup>31</sup> *Id.*

institutions he held so dear. “You wake up in the morning and you wonder what’s happened,”<sup>32</sup> he told one reporter. The rancor and viciousness of modern political and judicial discourse worried him immensely. “The world is changing must faster than I anticipated,” he told another journalist about two months before his death, “[f]or the worse, I think.”<sup>33</sup> He believed we all could accomplish so much more, and he had made it his life’s work to help us do just that.

So who was the *real* John Paul Stevens? He was the man who gave us the lasting gift of demonstrating the moral strength inherent in thoughtfully being both the thing and also the opposite of that thing. It is an enviable trait, because it reflects not carelessness or inconsistency but a fullness of thought and a grasp of the complexities of life and of law.

For Justice Stevens, embracing life’s paradoxes meant that he could not judge through bumper-sticker platitudes or subscribe to legal theories promising easy answers to problems that exist only in a black-and-white world. He understood that so-called bright line rules are rarely neither brightly clear nor capable of delineating hard lines. He saw how rigid legal tests, while comforting and orderly, might at times create only the illusion of justice. He recognized how history can appear to be changing as new information surfaces, yet the future might seem stubbornly fixed due to inertia and entrenchment. He knew that this inescapable paradox requires us to continually scrutinize the former while we strive to bend the latter toward justice. In other words, he taught us to face head-on the uncomfortable ambiguities of the law and the often-conflicting realities of the human condition.

This is what we lost when we lost Justice Stevens. It takes true courage, Justice Stevens taught us, to reject labels not only for others but also for ourselves. It takes moral fortitude to shut out the cacophony of voices seeking to tell us who we are and what we ought to believe. If we follow his lead, perhaps as a country we might discover the power of being both the thing and also the opposite of the thing. He would likely tell us that it first demands listening to others with humility, and then it requires

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<sup>32</sup> Robert Barnes, *John Paul Stevens Looks Back on Nearly a Century of Life and Law, but Worries About the Future*, WASH. POST (May 11, 2019), [https://www.washingtonpost.com/politics/courts\\_law/john-paul-stevens-looks-back-on-nearly-a-century-of-life-and-law-but-worries-about-the-future/2019/05/11/494d5768-7332-11e9-9f06-5fc2ee80027a\\_story.html?fbclid=IwAR0sl3\\_S46Jtl49pkTRYJEHwDOcZ-d01-28SIQcGcWrFpXAa86Yq\\_BEEd5C8](https://www.washingtonpost.com/politics/courts_law/john-paul-stevens-looks-back-on-nearly-a-century-of-life-and-law-but-worries-about-the-future/2019/05/11/494d5768-7332-11e9-9f06-5fc2ee80027a_story.html?fbclid=IwAR0sl3_S46Jtl49pkTRYJEHwDOcZ-d01-28SIQcGcWrFpXAa86Yq_BEEd5C8) [https://perma.cc/9GY6-JRD8].

<sup>33</sup> Nina Totenberg, *Retired Justice John Paul Stevens Talks History, His New Book and Ping-Pong*, NPR (May 10, 2019), <https://www.npr.org/2019/05/10/717596511/justice-john-paul-stevens-talks-history-his-new-book-and-pingpong> [https://perma.cc/RG9B-7RLJ].

us to declare what we think is right with determination. But the hardest part of all is that the next day it insists we get up and do it all over again. It is the paradox of true intellectual freedom: that we must each stand alone, so that we may all rise together.