

## JUDGING AND BASEBALL

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Justice John Paul Stevens loved baseball.<sup>1</sup> When I last saw the Justice in May 2019 at a law clerk reunion, we didn't talk about law or the Supreme Court—we talked about baseball. That wasn't unusual; he and I had bonded over our mutual love of baseball when I served as his law clerk during October Term 2009—the Justice's final Term on the bench. At the time, I was in the process of getting to know the Washington Nationals—a team that had caught the Justice's eye, too, as the Nationals began to build a competitive team that would win the World Series in 2019. (Go Nats!)<sup>2</sup> The Justice remained loyal to his Chicago Cubs, of course, and he finally saw them break the Curse of the Billy Goat in 2016.<sup>3</sup> But he was intrigued by pitcher Stephen Strasburg, who made his Nationals debut during my Term.

The Justice's love of baseball seemed fitting; it is our national pastime and he, in my utterly unbiased view, was a national treasure. I wondered (but never asked) whether his fondness for the sport had anything to do with George F. Will's observation that "baseball is a game of failure, and hence a constantly humbling experience."<sup>4</sup> Justice Stevens was a deeply humble jurist—and a deeply humble human. He recognized his own fallibility; he

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<sup>1</sup> See, e.g., Tom Gatto, *John Paul Stevens' Devotion to Cubs Recalled After Former Supreme Court Justice Dies*, SPORTINGNEWS (July 17, 2019), <https://www.sportingnews.com/us/mlb/news/john-paul-stevens-cubs-supreme-court-justice-dies/gxbq70d1mhnrlsxiq2o7ajxcy> [<https://perma.cc/65SJ-R9LA>] (recounting Justice Stevens' devotion to Chicago Cubs for over 90 years); Henry D. Fetter, *How Justice Stevens Changed Baseball*, ATLANTIC (June 29, 2010), <https://www.theatlantic.com/entertainment/archive/2010/06/how-justice-stevens-changed-baseball/58672/> [<https://perma.cc/R8PB-Y8SS>] (describing Justice Stevens as an "ardent Cubs fan").

<sup>2</sup> I think the Justice would forgive me this little indulgence.

<sup>3</sup> See A.J. Perez, *The Chicago Cubs' Billy Goat Curse, Explained*, USA TODAY (Oct. 25, 2016), <https://www.usatoday.com/story/sports/mlb/2016/10/25/chicago-cubs-billy-goat-curse-explained/92715898/> [<https://perma.cc/W65G-JSHB>] (explaining the history of the "curse" stemming from the refusal to permit a ticketed billy goat mascot to enter Wrigley Field for 1945 World Series game).

<sup>4</sup> GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL* 1–2 (reprt. ed. 2010).

owned his mistakes,<sup>5</sup> though he was rarely wrong (again, in my utterly unbiased view).

My favorite story from my Term is one about judging, baseball, and humility. Not only was Justice Stevens an unassuming legal giant, but he also was one of the only living witnesses to Babe Ruth's famous, and controversial, "called shot" home run during Game 3 of the 1932 World Series between the New York Yankees and the Chicago Cubs at Wrigley Field in Chicago.<sup>6</sup> A 12-year-old John Stevens had attended the game with his father.<sup>7</sup>

Over the years, the Justice spoke vividly of the memory, describing how Ruth pointed to the centerfield scoreboard with his bat during the fifth inning and then hit a towering home run in that direction on the next pitch. When he told the story at a judicial conference shortly before my clerkship began, an audience member—a bankruptcy judge—approached the Justice privately to question his memory.<sup>8</sup> That judge's grandfather had also been at the historic game and had described with equal clarity how Ruth's "called shot" home run had landed in the bleachers next to where he was sitting and nowhere near the centerfield scoreboard, as the Justice had remembered. The

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<sup>5</sup> Most famously, Justice Stevens cast the deciding vote in *Gregg v. Georgia*, 428 U.S. 153 (1976), only to clearly state by the end of his career on the Court that the death penalty was unconstitutional. *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) ("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. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (internal quotation marks omitted)). Justice Stevens also expressed regret over other decisions, including *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), a case that may have contributed to the dismantling of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 529 (2013). See Andrew Cohen, *Regrets, He Had a Few: The Legacy of John Paul Stevens*, BRENNAN CTR. FOR JUSTICE (July 18, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/regrets-he-had-few-legacy-john-paul-stevens> [<https://perma.cc/94BQ-TEWP>].

<sup>6</sup> See John Horne, *The Babe's Called Shot*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/discover-more/stories/baseball-history/called-shot> [<https://perma.cc/7WNC-S7RG>] (explaining that the "called shot" was controversial because of a debate over the significance of Babe Ruth's gesture during his time at bat).

<sup>7</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>]. Three months after this World Series game, the Justice's father would be arrested for purportedly embezzling money from the family insurance business to support The Stevens Hotel in Chicago, which the Stevens family also owned and which had been the largest hotel in the world when it was built. *Id.* His father's conviction was later overturned unanimously by the Illinois Supreme Court; the court observed that there was not a "scintilla of evidence of any concealment or fraud attempted." *People v. Stevens*, 193 N.E. 154, 160 (Ill. 1934).

<sup>8</sup> Justice Stevens discussed this event several times, including at the Seventh Circuit Judicial Conference in 2010, available on C-SPAN (May 3, 2010), <https://www.c-span.org/video/?293301-2/solicitor-general-kagan-justice-stevens> (around 7:15), and in his 2019 memoir, JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 18 (2019).

Justice had not seen the called shot after all, the bankruptcy judge respectfully confided.

As was characteristic, Justice Stevens turned the story into a charming anecdote about the reliability of eyewitness testimony. He later told Jeffrey Toobin in *The New Yorker* that it was a cautionary tale about trusting the memory of an “elderly witness.”<sup>9</sup> (His words, not mine. We clerks came to realize that Justice Stevens’s memory was far sharper than ours.)

After Toobin’s article appeared, it occurred to Justice Stevens that maybe both he and the bankruptcy judge’s grandfather had been right. Maybe there had been two home runs that day. The judge’s grandfather might have seen and recalled another home run, while the Justice might have had an accurate memory of the actual called shot. A scorecard from the game that hung in the Justice’s Chambers confirmed that Ruth had, indeed, hit two home runs that day, but we didn’t know where each had landed. I was given the plum assignment to determine whether the Justice’s memory could be confirmed with contemporaneous accounts.

With the help of the Supreme Court’s excellent librarians,<sup>10</sup> I eagerly undertook archival work to find news articles describing the trajectory of Ruth’s homers that day. In the pages of the *New York Times*<sup>11</sup> we found confirmation that Justice Stevens had been right. The bankruptcy judge’s grandfather also had been right about seeing a home run that day—just not the called shot. One home run, Ruth’s first, went where the judge’s grandfather had described, and the second, the called shot, had gone where Justice Stevens remembered—near the centerfield scoreboard.<sup>12</sup>

Justice Stevens couldn’t have been happier when I reported the results of my research. In that moment, I saw both the 90-year-old justice we loved and deeply admired and also the 12-year-old boy who had witnessed perhaps the greatest home run in the history of baseball. The Justice was open to being wrong, even though it was a memory he had held to firmly for

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<sup>9</sup> Toobin, *supra* note 7.

<sup>10</sup> Now, however, a PDF of the October 2, 1932 edition of the *New York Times* is available for any *New York Times* digital subscriber using the TimesMachine; you, too, can confirm the accuracy of Justice Stevens’s account. Evan Sandhaus, *Introducing the New TimesMachine*, N.Y. TIMES (July 11, 2013), <https://open.blogs.nytimes.com/2013/07/11/introducing-the-new-timesmachine/> [<https://perma.cc/TS2W-2GA9>].

<sup>11</sup> John Drebing, *Yankees Beat Cubs For 3d in Row, 7-5, As 51,000 Look On*, N.Y. TIMES (Oct. 2, 1932), <https://www.nytimes.com/1932/10/02/archives/yankees-beat-cubs-for-3d-in-row-7-5-as-51000-look-on-ruth-and-gehrig.html> [<https://perma.cc/T7EZ-QWRX>].

<sup>12</sup> *Id.* (“It [Ruth’s second homerun] was a tremendous smash that bore straight down the centre of the field in an enormous arc, came down alongside the flagpole and disappeared behind the corner formed by the scoreboard and the end of the right-field bleachers.”).

decades.<sup>13</sup> He knew as well as any judge that eyewitness accounts are inherently unreliable and that memories fade and change over time.<sup>14</sup> And so he sought the truth; he wanted the facts.

I'm convinced that my single greatest contribution during my clerkship year was uncovering the truth about where Ruth's two home runs landed that Saturday afternoon in 1932. Not everyone agrees about the significance of Ruth's (arguably ambiguous) gesture before he hit the shot to centerfield, but the home run's trajectory, at least, was settled with reliable evidence. (And I, for one, trust that Justice Stevens was right about the significance of Ruth's gesture, too.)

When you step foot into the marble palace at One First Street, it's easy to forget that the justices who don black robes to decide our most important legal questions are really just people. They are people with memories and experiences that shape who they are, how they think, and what they value. They are fallible—indeed, as Justice Stevens was willing to acknowledge—and they also yearn to get it right, as Justice Stevens ultimately did.

Without exception, it was the Justice's humanity, humility, and kindness that left an indelible mark on those who knew him and worked at his elbow in Chambers. He was the last great jurist driven by a relentless sense of common decency, common sense, and fairness above all else—including, and especially, above politics. His “entire life project,” as Andrew Siegel has observed, was based on “an unshakable faith in the capacity of men and women of the law to resolve difficult and contentious issues through the application of reason tempered by experience and humility.”<sup>15</sup>

Some would say that great judging involves little humanity; some might say it is a matter of calling balls and strikes. Judges wear black robes for a reason—umpires, too. Those critics might also say that “fairness,” for

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<sup>13</sup> See STEVENS, *supra* note 8, at 18 (“[M]y attendance at that game has long been my most important claim to fame . . .”).

<sup>14</sup> See, e.g., I. Daniel Stewart Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 10 (“A number of studies illustrate the point and demonstrate the substantial degree of perceptual and memory error in recounting the types of events that frequently are the subject of litigation.”); see also *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (“The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.” (citation omitted)); *State v. Delgado*, 902 A.2d 888, 895 (N.J. 2006) (recognizing that eyewitness misidentifications are “the single greatest cause of wrongful convictions in this country” (citing *State v. Dubose*, 699 N.W.2d 582, 592 (Wis. 2005))).

<sup>15</sup> Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342 (2006) (citing Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 157 (Earl M. Maltz ed., 2003); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087)).

example, is too squishy of a legal principle to apply with any consistency. Those same critics might also say that great judging, instead, involves only the careful reading of text, precedent, and history. I'm sympathetic to that view, to the desire to craft legal rules to ensure that judging has mechanical precision and maximum predictability.

Justice Stevens was a careful judge; he believed in "the judge as an impartial guardian of the rule of law."<sup>16</sup> But I doubt Justice Stevens thought the judge's obligation of "impartiality" also imposed on him a blindness to the wisdom gained from experience or the lessons of our shared humanity.<sup>17</sup> To the contrary, in his great, final dissent, the Justice defended constitutional interpretation based on "judges' exercising careful, reasoned judgment" that takes into account "the practical significance of judicial enforcement," without being "beholden" to history or ambiguous text.<sup>18</sup> In Justice Stevens, great judging and great humanity were inseparable. Our Nation is stronger for it.

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<sup>16</sup> *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).

<sup>17</sup> See 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/WB5V-3DFZ>] (In 2005, Justice Stevens told an audience at Fordham University Law School: "Learning on the job is essential to the process of judging . . . . At the very least, I know that learning on the bench has been one of the most important and rewarding aspects of my own experience over the last 35 years." (internal quotation marks omitted)); see also STEVENS, *supra* note 8, at 25 ("[M]y firsthand knowledge of the criminal justice system's fallibility has reinforced my conviction that the death penalty should be abolished.").

<sup>18</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 908–11 (2010) (Stevens, J., dissenting).

