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Tribute to Justice John Paul Stevens

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JUSTICE JOHN PAUL STEVENS

The undersigned, who are presently judges and senior judges of the United States Court of Appeals for the Seventh Circuit, again express our appreciation to the *Chicago-Kent Law Review* for reviewing the work of this court. And we are especially pleased that the *Review* decided to dedicate this issue to our former colleague and present Circuit Justice, the Honorable John Paul Stevens.

Judge Wood came to our court as Justice Stevens' successor, but had come to know him before that time. All the rest of us served with Justice Stevens here in the Seventh Circuit. We grew to know and appreciate him through the day-to-day experience of working together, studying, listening to oral arguments, exchanging views, agreeing and dissenting. The association brought forth our high admiration.

We presume to speak also for colleagues no longer with us. We do not hesitate to say that the feelings we express were shared by the late Senior Judges J. Earl Major, John S. Hastings, Roger J. Kiley, and Judge Otto Kerner.

Some of us had not really known Justice Stevens until we shared the bench, and only then acquired knowledge of his earlier career as we came to appreciate the quality of the judicial work for which it had so admirably fitted him. In 1941, Justice Stevens graduated from the University of Chicago, a member of Phi Beta Kappa. In 1947, he ranked first in his graduating law school class at Northwestern University where he edited the *Law Review*. For the following year, Justice Stevens had an introduction to the United States Supreme Court as law clerk to Justice Wiley Rutledge.

Upon returning to Chicago, Justice Stevens entered private practice with Poppenhusen, Johnston, Thompson and Raymond, now known as Jenner & Block. From 1952 until his appointment to this court in 1970, Justice Stevens was a partner in the Chicago firm of Rothschild, Stevens, Barry & Myers, specializing in an antitrust and corporate practice.

Justice Stevens interrupted his practice at several points to perform public legal service. In 1950, he served as an associate counsel for a United States House of Representatives subcommittee studying monopoly and its impact on various businesses, including major league baseball. From 1954 to 1955, Justice Stevens was a member of the At-

torney General's National Committee to Study the Antitrust Laws. In 1969, he became general counsel to an Illinois special commission investigating allegations of judicial corruption. This investigation, in which he served without compensation and which was believed by many to be professionally hazardous, led to the resignation of two justices of the Supreme Court of Illinois.

During this period, Justice Stevens lectured at the University of Chicago and Northwestern Law Schools and wrote numerous articles in the antitrust field, earning a reputation as a scholar. Since becoming a Justice, he has shared his knowledge and experience at the Aspen Institute for Humanitarian Studies and the Salzburg Seminar in American Studies.

The intellectual independence and practical orientation developed in his years as student, practitioner, and teacher served Justice Stevens well on the Seventh Circuit bench. As colleagues, we can attest to his judicious but nondoctrinaire mind. His opinions were closely reasoned and carefully researched. Yet, they illustrate a certain maverick quality and thus defy categorization under the traditional labels of conservative, moderate, centrist, liberal, or progressive. Justice Stevens' opinions show an interesting duality: a reluctance to enlarge the scope of judicial involvement in policy-making yet a willingness to expand the concept of fairness.

In dissent, he was respectful but made his point. Justice Stevens introduced an early dissent by saying: "Since I find myself out of step not only with respected colleagues but also with a whole parade of recent decisions, I shall explain at some length why I am convinced the parade is marching in the wrong direction."[1] In another case,[2] Justice Stevens criticized this court's decision in *Roth v. Board of Regents*,[3] later reversed by the United States Supreme Court,[4] opening his dissent with:

> Two distinctions are decisive. The first is the distinction between wise policy and a constitutional mandate; the second is the distinction between procedure and substance. Because these distinctions are blurred in the majority opinion in *Roth*, as well as here, I believe that these apparently reasonable and relatively innocuous decisions have in fact planted a pernicious seed.[5]

Justice Stevens had barely arrived at the Seventh Circuit when he

1. United States v. Smith, 440 F.2d 521, 527 (7th Cir. 1971) (Stevens, J., dissenting).
2. Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971).
3. 446 F.2d 806 (7th Cir. 1971).
4. Board of Regents v. Roth, 408 U.S. 564 (1972).
5. 447 F.2d at 1028 (Stevens, J., dissenting).

participated in one of our rare *en banc* sessions. The majority refused habeas relief to Father James Groppi, ordered imprisoned under a resolution of the Wisconsin legislature following a disruptive protest in the state capitol.[6] Justice Stevens dissented, arguing that there was a denial of due process because the legislature had failed to give notice of the charge, or an opportunity to present a defense.[7] The United States Supreme Court unanimously reversed.[8]

We attempt no comprehensive evaluation of Justice Stevens' five years of effort on our court. Illustrations, however, of his impact on jurisprudence are readily found. In *Illinois State Employees Union v. Lewis*,[9] Justice Stevens wrote: "While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political process is actually at war with the deeper traditions of democracy embodied in the First Amendment."[10] Supported by a concurrence, the panel reached a result consistent with his thought that a non-policymaking state employee may not be discharged for refusing to transfer his political allegiance from one political party to another.[11] *Lewis* led to *Burns v. Elrod*.[12] Justice Stevens did not participate in the *Burns* decision, and there was no majority opinion, but the decision stands at least for the proposition that "a non-policymaking, nonconfidential government employee can [not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."[13]

Justice Stevens has made many contributions in the developing field of prisoners' rights. In *Harris v. Pate*,[14] he recognized the difficulty an incarcerated person may have in obtaining affidavits and reversed a summary judgment entered after denial of a continuance. *United States ex rel. Miller v. Twomey*[15] prescribed due process requirements for prison discipline. Justice Stevens observed that "liberty protected by the due process clause may — indeed must to some extent — coexist with legal custody pursuant to conviction. The deprivation of liberty following an adjudication of guilt is partial, not total. A re-

6. Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1971).
7. *Id.* at 332 (Stevens, J., dissenting).
8. 404 U.S. 496 (1972).
9. 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).
10. 473 F.2d at 576.
11. *Id.* at 572.
12. 509 F.2d 1133 (7th Cir. 1975), *aff'd sub nom.*, Elrod v. Burns, 427 U.S. 347 (1976).
13. *Id.* at 375.
14. 440 F.2d 315 (7th Cir. 1971).
15. 479 F.2d 701 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

siduum of constitutionally protected rights remain."[16] Justice Stevens repeated that language in his dissent in *Meachum v. Fano*,[17] a United States Supreme Court decision. Justice Stevens pointed out his thought that the Court was incorrectly narrowing the liberty interest of a prisoner entitled to due process protection.[18]

In *Estelle v. Gamble*,[19] Justice Stevens dissented from an eight to one decision of the Court which held that inadequate medical treatment of prisoners may give rise to a cause of action under the eighth amendment.[20] The plaintiff in *Estelle*, however, had failed to state a claim against the prison medical director upon which relief could be granted. Justice Stevens' forceful dissent made three points: first, that the Court was being too strict in construing the prisoner's *pro se* complaint; second, that the grant of *certiorari* had been inappropriate; and third, that a claim of cruel and unusual punishment must be tested by objective standards, rather than by the intent of the prison officials involved.[21]

A recent United States Supreme Court case, *Bell v. Wolfish*,[22] involved restrictions and practices to which pre-trial detainees, not free on bail, were subjected by the jail administration. The Court held that these practices were not punishment and imposition of them therefore did not deprive detainees of liberty without due process of law.[23] Justice Stevens dissented, finding the Court's test for what is punishment "unduly permissive," although he applauded the Court's recognition that under the due process clause a detainee may not be punished prior to an adjudication of guilt.[24]

For those who have never had the experience, we can attest that it is a remarkable and joyful feeling to have "Supreme Court lightning" strike an admired colleague. It happened in this instance on the Friday after Thanksgiving, a day not noted for high attendance. Those who missed the excitement are still regretful.

Of course, we all shared the chores of circuit judges, the never ending stream of criminal appeals, the hope of each of us that a patent case would be assigned to someone else, the repetitious reviews of the

16. 479 F.2d at 712.
17. 427 U.S. 215 (1976).
18. *Id.* at 232 (Stevens, J., dissenting).
19. 429 U.S. 97 (1976).
20. *Id.* at 104.
21. *Id.* at 108-09 (Stevens, J., dissenting).
22. 441 U.S. 520 (1979).
23. *Id.* at 541.
24. *Id.* at 584 (Stevens, J., dissenting).

NLRB, the *pro se* appeals of hapless people, and the duty of approving the not-too-challenging details of district court jury selection plans, needs for magistrate and referee positions, and the like. Thus, we especially treasure recollections of Justice Stevens' quizzical humor, his habit of prefacing an incisive question to counsel with almost an apology for asking it. We had, too, a little feeling of vicarious accomplishment that our colleague did, and still does, fly his own airplane. We recall our worry one summer when we learned that Justice Stevens was to have heart surgery, the great success of which taught us to view such operations with confidence.

Late in 1975, after he was sworn in as a Justice, we shared a dinner in his honor. The speeches were mercifully informal, and after his response, Justice Stevens handed each one a handwritten note of greeting and reminiscence. Those who have had occasion to read his script will realize that we do not keep the notes as calligraphy, but prize them for other reasons.

As is always the case when a new Justice is appointed, Justice Stevens' appointment brought forth an enormous amount of speculation. There were predictions about how he could be expected to vote in certain types of cases and with whom he would align himself on the high Court. Any of us when asked at that time were willing to make only one prediction: the new Justice would be a hard working, sharp minded, and very independent member of the Court. We had come to appreciate his ability to focus on the dispositive issues and, if necessary, to write separately to point them out. We were certain he would bring that precision and independence (not to mention willingness to take on extra work) to the United States Supreme Court.

Justice Stevens' few years on the Supreme Court bench have provided ample support for our first impressions. Of the eleven cases the Court heard during his first week of oral argument, Justice Stevens wrote opinions in seven. These seven, which included three majority opinions,[25] one concurrence,[26] and three dissents,[27] were joined in by as few as one and as many as eight other members of the Court. In one of his dissents,[28] he was joined by Justices Stewart and Blackmun, but in

25. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Mathews v. Diaz, 426 U.S. 67 (1976).

26. Goldberg v. United States, 425 U.S. 94 (1976).

27. Norton v. Mathews, 427 U.S. 524 (1976); Mathews v. Lucas, 427 U.S. 495 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

28. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 821 (1976) (Stevens, J., dissenting).

two others[29] he dissented with Justices Brennan and Marshall. The topics on which he wrote ranged from equal protection for aliens[30] to the antitrust liability of regulated utilities.[31] If others were surprised by any of this, we were not.

These first opinions have been followed by some two hundred more but the pattern has remained the same. The statistics compiled by the *Harvard Law Review* at the end of each term of the United States Supreme Court indicate that after his first full term on the Court, Justice Stevens had written considerably more opinions than any other Justice.[32] This honor had previously gone to Justice Douglas, but Justice Douglas had achieved it, not surprisingly, by writing a great number of dissents.[33] Justice Stevens, in an era of increased work by all of the members of the Court, wrote more dissents in his first full term than Justice Douglas wrote in his last, but Justice Stevens, in marked contrast to Justice Douglas, also wrote more concurrences than any other Justice.[34]

Just a year after his elevation to the United States Supreme Court, Justice Stevens spoke of the importance to the legal profession, the courts, and the nation, of disagreeing without being disagreeable.[35] Justice Stevens' own ability to disagree with absolute courtesy and cordiality was well appreciated by those of us who sat with him and we are certain it is equally appreciated by his new colleagues.

Despite Justice Stevens' tendency to write separately and his not infrequent dissents, Justice Stevens has always agreed with each of his colleagues more than he has disagreed, while at the same time retaining his independence. The *Harvard Law Review* statistics again demonstrate this. During the 1976-77 term, for example, Justice Brennan aligned himself with Justice Rehnquist in only 36.8% of the cases which they heard, but aligned himself with Justice Marshall in 93.6% of the cases. Justice Rehnquist, in contrast to his tendency to disagree with Justice Brennan, aligned himself with Chief Justice Burger in 78.4% of the cases. Justice Stevens, no doubt to the surprise of many, agreed less

29. Norton v. Mathews, 427 U.S. 524, 533-38 (1976) (Stevens, J., dissenting); Mathews v. Lucas, 427 U.S. 495, 516-23 (1976) (Stevens, J., dissenting).

30. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Mathews v. Diaz, 426 U.S. 67 (1976).

31. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

32. Note, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 295 (1977).

33. Note, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 275 (1975).

34. In the 1977-78 term, Justice Powell wrote more concurrences, and slightly more opinions in total, than Justice Stevens but Justice Stevens' pattern is still apparent. Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 327 (1978).

35. Address by Justice John Paul Stevens, Illinois State Bar Association Centennial Dinner (January 22, 1977), *printed in* 65 ILL. B.J. 508 (1977).

often with the Chief Justice than with any other member of the Court. But Justice Stevens still agreed with Chief Justice Burger over half (51.4%) of the time. Nor was there any one member of the Court with whom Justice Stevens could be predicted to agree. He agreed most often with Justice Stewart, but that agreement occurred in only 62% of the cases. The 1978 *Harvard Law Review* statistics merely confirm this pattern. Even when the cases heard are divided into subject areas, such as criminal cases or civil constitutional cases, Justice Stevens' independence stands out. He does not align himself with any one Justice, or group of Justices; nor is there anyone with whom he consistently disagrees.[36]

Even when he is writing a majority opinion, Justice Stevens tends to be precise and to select narrow grounds for decision. He wrote for the Court in *Hampton v. Mow Sun Wong*,[37] holding invalid a regulation of the Civil Service Commission barring non-citizens from federal civil service employment.[38] Reading beneath the careful statement of facts, one may sense the majority's unhappiness that highly qualified persons were being excluded from the service because they were aliens. But, of course, emotion is not an acceptable ground for decision.

Justice Stevens examined considerations which might support the requirement complained of in *Hampton*. Assuming, without deciding, that they would adequately support an explicit determination by Congress or the President to exclude noncitizens from the federal service, Justice Stevens concluded these considerations could not provide an acceptable rationalization for such a determination by the Civil Service Commission.[39] As to one consideration which might have been a proper foundation for the decision of the Commission, there was nothing to indicate that this was a real as opposed to a hypothetical justification.

It should be noted that the exact situation on which *Hampton* was predicated did not survive for long. The President issued an executive order requiring, with limited exceptions, that a civil service applicant be a citizen or national.[40] The order has been upheld by the courts.[41]

36. Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 329-30 (1978). For criminal cases, the range of Justice Stevens' agreement is from 45.7% with Justice Rehnquist to 65.7% with Justice Stewart. For civil constitutional cases, Justice Stevens' range of agreement is from 40% with Justice White to 65.7% with Chief Justice Burger.

37. 426 U.S. 88 (1976).

38. *Id.* at 116-17.

39. *Id.*

40. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976), *reprinted in* 5 U.S.C. § 3301 app., at 384 (1976).

41. Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979).

In *Zurcher v. Stanford Daily*,[42] Justice Stevens wrote separately to make an important historical point that would have otherwise gone unmentioned.[43] There were four decisions in *Zurcher*. The first three focused primarily on whether the probable cause standards for obtaining warrants to search the premises of persons not implicated in criminal activity, specifically in newspaper offices, should be different from the standards otherwise applicable. Justice Stevens' separate dissent pointed out that the problem would not have arisen prior to the elimination of the "mere evidence" rule in *Warden v. Hayden*.[44] In his *Zurcher* dissent, Justice Stevens concluded:

> In the pre-*Hayden* era, [documentary evidence] was routinely obtained by procedures that presumed that the custodian would respect his obligation to obey subpoenas and to cooperate in the investigation of crime. These procedures had a constitutional dimension. . . .
>
> . . .
>
> A showing of probable cause that was adequate to justify the issuance of a warrant to search for stolen goods in the 18th Century does not automatically satisfy the new dimensions of the Fourth Amendment in the post-*Hayden* era.[45]

In *National Society of Professional Engineers v. United States*,[46] Justice Stevens, previously noted as an experienced antitrust lawyer, wrote thoughtfully concerning the policies underlying the Sherman Act, and the Act's application to a profession,[47] expanding upon *Goldfarb v. Virginia State Bar*.[48] In *Young v. American Mini Theatres, Inc.*,[49] Justice Stevens demonstrated that there is a limited area in which expression can properly be classified on the basis of its content for the purpose of regulation without offense to the first amendment.[50]

In *Cannon v. University of Chicago*,[51] Justice Stevens, writing for the Court, was able to find the implication of a private remedy in a statute which contained no express provision for one. With characteristic candor he acknowledged a "strict approach" recently followed by the Court on such questions and then meticulously explored all the relevant tests which are part of that approach.[52] Our admiration is not

42. 436 U.S. 547 (1978).
43. *Id.* at 577 (Stevens, J., dissenting).
44. 387 U.S. 294 (1967).
45. 436 U.S. at 581-82 (Stevens, J., dissenting).
46. 435 U.S. 679 (1978).
47. *Id.* at 686-96.
48. 421 U.S. 773 (1975).
49. 427 U.S. 50 (1976).
50. *Id.* at 70.
51. 441 U.S. 677 (1979).
52. *Id.* at 717.

dulled by the fact that *Cannon* reversed the decision of a panel of this court.[53]

Justice Stevens' willingness to depart from tradition was exemplified by his dissent in *Eastlake v. Forest City Enterprises, Inc.*[54] The majority in *Eastlake* upheld a city charter requirement that any change in land use agreed to by the city council be approved by a referendum.[55] Relying very heavily on state court decisions in the area, Justice Stevens argued for recognition of a difference between the legislative character of general zoning enactments and an administrative character of a decision on a change as to one parcel, applied for by the owner. The referendum device, in his view, was an unreasonable method of decision in the latter type and a denial of due process.[56]

Justice Stevens also has written critically of the practice of filing dissents from denials of *certiorari*, pointing out the very limited significance of a denial of *certiorari*, and suggesting that dissents therefrom are unnecessary and potentially misleading.[57] Justice Stevens maintains an independent voice.

We have enjoyed thinking about our former colleague and current friend in preparing this tribute which, because of our feeling toward him, we regard as inadequate. We cherish our recollections and enjoy our too rare opportunities to be together at judicial conferences and the like. And we consider with pride the record he is continuing to build as a member of the United States Supreme Court.

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53. Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976).
54. 426 U.S. 668 (1976).
55. *Id.* at 679.
56. *Id.* at 695 (Stevens, J., dissenting).
57. Singleton v. Commissioner, 439 U.S. 940, 942-46 (1978).

* Senior Judge F. Ryan Duffy had approved the text of this tribute before his death on August 16, 1979.

HARLINGTON WOOD, JR.

Judges and Senior Judges
United States Court of Appeals for
the Seventh Circuit