Printed in U.S.A.
Vol. 106, No. 2

JUSTICE STEVENS AND THE NEWS MEDIA: AN EXERCISE IN EXPOSITION

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ABSTRACT—Justice John Paul Stevens in nearly 35 years on the U.S. Supreme Court had few dealings with the news media. Nonetheless, anecdotes of his press relations, as well as his opinion-writing in cases related to First Amendment press freedom, provide clues for needed reforms by both sides in the interaction between the court and the press.

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INTRODUCTION 658
I. A FUTURE JUSTICE MEETS THE PRESS 662
A. Depression Headlines 662
B. A Young Newsman 665
C. Wartime Secrets 667
D. Supreme Court Feud 668
E. Investigating Judges 669
II. JUDGING THE PRESS 671
A. Private Persons in Public Controversies 673
B. Proving Falsity as Well as Fault 676
III. A JUSTICE AND THE MEDIA 678
A. Home, Sweet Home 680
B. Pot and the Commerce Clause 682
C. "Secret Trials" 684
D. President Clinton in Court 688
CONCLUSION: "LEARNING ON THE JOB" 691

INTRODUCTION

In May 2004, Justices John Paul Stevens and Stephen G. Breyer spoke at the annual Seventh Circuit Judicial Conference in Chicago. After the banquet, the two jurists settled into comfortable chairs on the ballroom stage to field questions from Bill Kurtis, a well-known Chicago news broadcaster and a law school graduate.[1] The Q&A began as follows:

> Bill Kurtis: "One of the pleasing things for me is seeing a Supreme Court justice wearing a wireless mike." (laughter) "Fortunately, we won't be able to take them off."[2]

Kurtis went on in this light vein, noting that C-SPAN had declined to record the event and, as a result, hinting a certain intimacy that he could exploit. It took a while, but Kurtis got to his question—what happened in the Supreme Court's secret conference concerning *Bush v. Gore*?[3]

> Bill Kurtis: "There have been a lot of stories about what happened inside the chambers and the conferences, of wrestling with the issue. Justice Stevens, let's start with you. Give us a little feel for the atmosphere inside. And I don't even know the name of the case. Was it Bush versus Florida?" (laughter)

[1] Bill Kurtis received his Juris Doctor degree from Washburn University School of Law in 1966. *See Bill Kurtis*, CBS CHICAGO, http://chicago.cbslocal.com/personality/bill-kurtis (last visited July 2, 2012).

[2] Interview by Bill Kurtis with John Paul Stevens & Steven G. Breyer, Assoc. Justices, Supreme Court of the U.S., in Chi., Ill. (May 10, 2004) (audio tape on file with author).

[3] 531 U.S. 98 (2000).

> Justice Stevens: "Well, you're starting off with a case that I don't want to talk about." (laughter and applause) "So, I would suggest that you start all over." (laughter and applause)[4]

This brief dialog between Justice Stevens and broadcaster Kurtis neatly summarizes Justice Stevens's relations with the news media and the media's relations with him. The misconnection brings to mind the theory of parallel universes. This Essay argues that, in the interest of public understanding and the Court's stature, a better connection between the Court and the press could be established and that Justice Stevens's legacy as a federal judge contains clues for bridging the gap.

In the history of the Court, interactions between Justices and journalists have ranged from cozy to hostile, with a great deal of detachment in between. Political science professor Richard Davis of Brigham Young University has noted that Justices have no obligation to engage public opinion—or, therefore, the press—in making their decisions. Nonetheless, "[f]rom the beginning of the Court, justices have possessed external strategies for shaping press coverage and public opinion regarding themselves as individuals and the Court as a whole."[5]

Recollections gathered from journalists who covered the Court during Justice Stevens's tenure, a review of press coverage of Justice Stevens, and his comments during my interview with him for this Essay suggest that Justice Stevens's posture toward the press was purposively detached. His minimalist media strategy (Justice Stevens does not keep a press-clipping file)[6] fits his personal and professional inclinations towards the media as well as the tradition of the Court's cloister. His relations with the press resemble his press-related jurisprudence—respect for the institution and the Free Press Clause of the Constitution but no special treatment for the media. When asked at the 2007 Ninth Circuit Judicial Conference in Hawaii about the need for Justices to be more open in communicating their work, Justice Stevens replied, "Read what I've written."[7] Those who do will find a

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[4] Interview by Bill Kurtis with John Paul Stevens & Stephen G. Breyer, *supra* note 2.

[5] RICHARD DAVIS, JOURNALISTS AND JUSTICES xvi–ii, at 186 (2011).

[6] Interview with Justice John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., in Wash., D.C. (Apr. 21, 2011) [hereinafter Interview with Justice Stevens] (on file with author). The finding aids for the papers left by the four Justices who passed away most recently, all of whom served with Justice Stevens, list files containing press clippings and interviews contained in the collections. *See* A Guide to the Lewis F. Powell Jr. Papers, 1921–1998: A Collection in Lewis F. Powell, Jr. Archives–Collection No. 001, *available at* http://ead.lib.virginia.edu/vivaxtf/view?docId=wl-law/vilxwl00013.xml&doc.view=print;chunk.id=; Harry A. Blackmun Papers: A Finding Aid to the Collection in the Library of Congress, *available at* http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2003/ms003030.pdf; Register of the William H. Rehnquist Papers, *available at* http://cdn.calisphere.org/data/13030/tn/kt4z09r7tn/files/kt4z09r7tn.pdf; William J. Brennan, Jr.: A Register of His Papers in the Library of Congress, *available at* http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2002/ms002010.pdf.

[7] *Conversation with Justice John Paul Stevens* at 13:25 (C-SPAN television broadcast July 19, 2007), *available at* http://www.c-spanvideo.org/program/PaulSte#.

treasure trove of good writing about engaging legal and social conflicts set inside a high barrier of legal conventions. But his career off the bench provides another source of evidence for examining his, and the Court's, relations with the press and the public.

It is hard to argue with Justice Ruth Bader Ginsburg when she said, "Mass media reporters are the people in fact responsible for translating what courts write into a form the public can digest."[8] But, as Justice Stevens suggested in his remarks in Hawaii, the ease and effectiveness of the digestion are restrained by the Court's reliance on its written opinions as its principal statements of law and its resolutions of cases.[9] One result for both sides is a wariness, not to say antagonism, arising from a conversational void. Endorsing that view, Justice Antonin G. Scalia found an appropriate press strategy for Justices in the legendary boxing style of Mohammed Ali, known as rope-a-dope: "[H]e described it as a tactic of lying back against the ropes and letting your opponent beat the bejabbers out of you until he gets tired."[10]

There is, however, a need to rationalize Justice Ginsburg's theory of the media's role with Justice Scalia's notion of reality. Otherwise, the work of the Court is likely to be viewed increasingly as a black-robed sideshow of national political combat instead of an independent branch of government. Evidence from Justice Stevens's life and tenure helps explain the barrier between Justices and the press and points to cracks in the barrier that each side could exploit.

Justice Stevens's limited encounters with the press left him wary. In his early private life, during his service as a navy officer, and later as a lawyer working for a public investigatory commission in Illinois, he had reasons to question the integrity of the press.[11] After more than three decades on the Court, his first-ever network television interview did not go well.[12] Justice Stevens had agreed to be interviewed by ABC television shortly after attending the 2007 memorial service for President Gerald R. Ford at the National Cathedral. He agreed, with the understanding that he would discuss his recollections of the late President. Indeed, viewers of ABC's *Nightline* program were told, "And he's now remembering the man who nominated him to the high Court, President Gerald Ford."[13] But more

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[8] Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2121 (1995).

[9] *See Conversation with Justice John Paul Stevens*, *supra* note 7, at 12:53.

[10] Justice Antonin Scalia, *A Justice Critiques the Press*, *in* POLITICS AND THE MEDIA 262, 263 (Richard Davis ed., 1994).

[11] *See* discussion *infra* Part I.C–D.

[12] Interview with Justice Stevens, *supra* note 6. For a discussion of Justice Stevens's conflict with the media, see also *infra* Part I.D.

[13] *Nightline: Justice Stevens' First TV Interview* at 0:10 (ABC television broadcast Jan. 2, 2007), *available at* http://abcnews.go.com/Nightline/video/justice-stevens-tv-interview-10334251.

than half of the nearly three-minute interview by reporter Jan Crawford concerned Justice Stevens himself and his "liberal" leanings on the Court, not his remembrances of President Ford, as he had been led to expect.[14]

Justice Stevens's jurisprudence arising from the First Amendment's Free Press Clause and statutes affecting news organizations, like his own relationship with the press, was case-specific. In considering the public's right to know, he avoided what he calls "the glittering generality."[15] As in much of his opinion writing, Justice Stevens sought to balance interests and refrained from using a strict rule applying a media privilege in the manner of Justice Hugo Black, who revered the First Amendment's Free Press Clause as a statement of an absolute right that was not to be "balanced" against other public concerns.[16]

This Essay looks at Justice Stevens's relationship with the news media through two lenses: biographical and judicial. Part I presents anecdotes of the news media in his life, from boyhood to the start of his judicial career at age fifty. Part II summarizes a sampling of Justice Stevens's opinions regarding libel claims against the news media, one of the essential controversies for the media under the Constitution's Free Press Clause. Part III offers four examples of how the news media treated opinions written or joined by Justice Stevens and discusses how he responded. The responses, which represent communication to the public outside the constraints of formal opinion-writing conventions, were mostly offered in speeches to law groups. They fall into two categories. In the first speeches I cite, Justice Stevens emphasizes the distinction between public–political policy preferences and what he saw as his duty under the law. This distinction is a defining conflict between the Court and the press. But his remarks, unfortunately, in my view, were hardly less formal than his written opinions. In the second category of Justice Stevens's reactions, he directly criticized the media's coverage as misrepresenting the Court's work. These examples reflect a more conversational tone that, I argue, is a welcome

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[14] *Id.*; Interview with Justice Stevens, *supra* note 6.

[15] John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Judicial Restraint, Address During the University of San Diego School of Law Nathaniel L. Nathanson Memorial Lecture Series (Oct. 10, 1984), *in* 22 SAN DIEGO L. REV. 437, 447–48 (1985). The article credits Nathaniel L. Nathanson, one of Justice Stevens's Northwestern University School of Law professors, for the notion of glittering generality in the law. *Id.* at 441.

[16] *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–75 (1960) ("Neither as offered nor as adopted is the language of this [First] Amendment anything less than absolute. . . . To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas . . . . [T]here is, at least in those areas, no justification whatever for 'balancing' a particular right against some expressly granted power of Congress."); George C. Lamb III et. al., Special Project, *Justice Stevens: The First Three Terms*, 32 VAND. L. REV. 671, 702 (1979) ("Justice Stevens seems to attach great importance to the unique role of the press as a provider of essential information. He seems willing to balance the right of free press only against other constitutional g[u]arantees, and to subordinate it to other rights only when absolutely necessary.").

addition to Justices' communication with the public. Part IV, the conclusion, looks at Justice Stevens's strategy towards the media and explores how his legacy can inform a discussion about improving relations between the Court and the press.

I draw on research that my colleague, Gene Schlickman, and I completed for our 2010 biography of Justice Stevens, books and scholarly papers on the Supreme Court and the press, opinions written or joined by Justice Stevens relating to the news media, speeches by Justice Stevens, and my May 12, 2011 interview with Justice Stevens in his chambers.

I. A FUTURE JUSTICE MEETS THE PRESS

A. Depression Headlines

In a November 2010 interview on the CBS News program *60 Minutes*, Justice Stevens spoke for the first time on network television about an incident in his boyhood that placed him and his family in a glaring media spotlight. As the son of a prominent Chicago businessman, young John Stevens[17] saw his family's name in dreadful front-page headlines.[18] In 1932, amid the Great Depression, the prosperous family business dynasty built on hotels and insurance underwriting collapsed.[19] Chicago newspapers reported complaints made by ordinary policyholders against Illinois Life Insurance Company, founded and headed by Justice Stevens's paternal grandfather James W. Stevens.[20] The story of a rich family seeming to benefit at the expense of ordinary people led to criminal charges of embezzlement against James and his sons, Ernest J. (Justice Stevens's father) and Raymond W. Stevens.[21] The essence of the indictments was that the Stevens men had looted Illinois Life and its policyholders to bail out their iconic hotels.[22]

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[17] Justice Stevens began routinely using his middle name, Paul, only after he graduated from law school. *See* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS 55 (2010).

[18] *See 60 Minutes: Supreme Court Justice Stevens Opens Up* at 4:12–5:25 (CBS television broadcast Nov. 28, 2010) [hereinafter Interview with *60 Minutes*], *available at* http://www.cbsnews.com/video/watch/?id=7096996n; *see also Supreme Court Justice John Paul Stevens Opens Up*, CBSNEWS.COM (Dec. 5, 2010, 9:13 PM), http://www.cbsnews.com/stories/2010/11/23/60minutes/main7082572.shtml?tag=currentVideoInfo;videoMetaInfo (describing the *60 Minutes* interview and noting "[t]he age of 12 was eventful" for the young Stevens).

[19] This description of Justice Stevens's family background is drawn from BARNHART & SCHLICKMAN, *supra* note 17, at 23–35. His father and grandfather built and managed the former La Salle Hotel and the Stevens Hotel, now the Hilton Chicago on South Michigan Avenue. *Id.* at 25–27. At the time of its opening in 1927, The Stevens was considered the largest hotel in the world. *Id.* at 26.

[20] *See Bare Tangled Finances of Illinois Life*, CHI. DAILY TRIB., Dec. 16, 1932, at 1.

[21] *See Hold E. J. Stevens for Fraud: Seized in His Home*, CHI. DAILY TRIB., Jan. 28, 1933, at 1; *Stevens Arrested in Insurance Case: Chicagoan Is Accused of Plot to Defraud Illinois Life of $1,000,000*, N.Y. TIMES, Jan. 28, 1933, at 19; *Vote to Indict 3 Stevenses on Fraud Charges: Embezzlement Is Alleged, Also Conspiracy*, CHI. DAILY TRIB., Jan. 31, 1933, at 3.

[22] *Vote to Indict 3 Stevenses on Fraud Charges: Embezzlement Is Alleged, Also Conspiracy*, *supra* note 21.

James suffered a debilitating stroke and was excused from prosecution; Raymond committed suicide in his home before the trial; Ernest, the remaining defendant, was convicted and sentenced to one to ten years in prison.[23]

Chicago newspapers, especially the *Chicago Herald and Examiner*, covered the scandal sensationally and censoriously. Following are the headlines of a typical *Chicago Herald and Examiner* article: "Stevens Insurance Crash Goes Back to 'Dream Hotel': Clan Leader's Ambition for Gain Undermines Illinois Life; Rosy Prospects Collapse; Parallels Samuel Insull Case."[24] The lead paragraph of the article read, "When James W. Stevens, then 70, decided to build the world's biggest hotel on S. Michigan Ave., he laid the groundwork for the wreckage of one of Chicago's largest fortunes."[25]

Even the more staid *Chicago Tribune* extensively covered the story of the Stevens family downfall.[26] The coverage included a lengthy and especially personal feature about Justice Stevens's paternal grandmother, who was divorced from James and unconnected to the allegations: "Ex-wife Clings to Old Home of the Stevens Family in Faded South Side Residential Area."[27]

John Stevens, the youngest of Ernest Stevens's children, was at home when Cook County States Attorney Thomas J. Courtney staged a headline-grabbing arrest of John's father on the evening of January 27, 1933.[28] Courtney said he made the surprise arrest because he feared Ernest and his family would flee the country.[29] The story made *The New York Times*.[30] John Stevens was twelve years old. A few days later, on February 11, 1933, twelve-year-old John Stevens and other family members were held in their home at gunpoint as four armed men claiming to be "federal agents" ransacked their home.[31] Justice Stevens has a clear memory of the episode.

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[23] *Ernest Stevens Gets One to Ten Years in Prison: Granted 60 Day Stay of Commitment*, CHI. DAILY TRIB., Nov. 28, 1933, at 2.

[24] *Stevens Insurance Crash Goes Back to 'Dream Hotel': Clan Leader's Ambition for Gain Undermines Illinois Life—Rosy Prospects Collapse—Parallels Samuel Insull Case*, CHI. HERALD & AM., Dec. 26, 1932, at 4. Sam Insull was the head of Chicago's electric utility and had been accused of fraud and had fled the country. *See* JOHN F. WASIK, THE MERCHANT OF POWER 198–202 (2006).

[25] *Stevens Insurance Cash Goes Back to 'Dream' Hotel*, supra note 24.

[26] *Archives: Chicago Tribune*, PROQUEST ARCHIVER, http://pqasb.pqarchiver.com/chicagotribune/advancedsearch.html (perform key word search for "Ernest Stevens" for the date range Dec. 16, 1932 to Jan. 28, 1934) (last visited July 2, 2012).

[27] Virginia Gardner, *Ex-wife Clings to Old Home of the Stevens Family in Faded South Side Residential Area*, CHI. DAILY TRIB., Mar. 26, 1933, at 2.

[28] *Ernest Stevens Arrested in $1,000,000 Conspiracy*, CHI. HERALD & AM., Jan. 28, 1933, at 1; *Hold E. J. Stevens for Fraud: Seized in His Home*, *supra* note 21.

[29] *Hold E. J. Stevens for Fraud: Seized in His Home*, *supra* note 21.

[30] *Stevens Arrested in Insurance Case: Chicagoan Is Accused of Plot to Defraud Illinois Life of $1,000,000*, N.Y. TIMES, Jan. 28, 1933, at 19.

[31] *Bandits Terrorize E. J. Stevens, Family*, CHI. AM., Feb. 14, 1933, at 1; *U.S. Probes Robbers'*

"We were all lined up, and they threatened to . . . shoot everybody with . . . a submachine gun," he recalled to *60 Minutes* interviewer Scott Pelley.[32]

The banner headline in the *Chicago American* read: "Bandits Terrorize E.J. Stevens, Family."[33] The coverage included a front-page photo, from the newspaper's files, of a statue of two boys—John and his brother Bill—that their proud father had placed in the lobby of the Stevens Hotel years earlier.[34]

Alarmed by the reference to "federal agents" in the news coverage, Dwight H. Green, U.S. District Attorney in Chicago, announced to reporters on February 15, 1933, that he had instructed Melvin H. Purvis to probe the Stevens home invasion.[35] The *Chicago Tribune* editorial page speculated that the invaders might have been rogue federal agents employed to enforce the Volstead Act and other by-then-repudiated Prohibition Era laws, which were in their final weeks: "Prohibitionists have made their law and their enforcers so intolerable that an act of banditry can be very easily accepted as an act of law enforcement."[36] In short, the Stevens story had legs. But the newspaper interest in the Stevens family ended abruptly on February 16, 1933, when Chicago Mayor Anton J. Cermak was shot in Miami, Florida, and reporters scrambled to cover that story.[37] In 1934, Ernest Stevens's conviction was overturned by the Illinois Supreme Court, which ruled that the reallocation of funds among the Stevens family businesses was legitimate business practice and that there was no evidence of fraudulent intent on the part of Ernest Stevens.[38] The *Chicago Tribune* covered the news in a short article buried on page three of the Tuesday news section in between a story about models and a fur advertisement. [39]

Raid at Home of E. J. Stevens, CHI. DAILY NEWS, Feb. 15, 1933, at 3; Interview with *60 Minutes*, *supra* note 18, at 4:17.

[32] Interview with *60 Minutes*, *supra* note 18, at 4:17.

[33] *Bandits Terrorize E. J. Stevens, Family*, *supra* note 31.

[34] *Id.*

[35] *U.S. Probes Robbers' Raid at Home of E. J. Stevens*, *supra* note 31. Melvin H. Purvis Jr. was a young, diligent lawman who had just been appointed chief agent in Chicago for the U.S. Bureau of Investigation (today, the FBI) and who would go on the have a spectacular but brief career with the Bureau. In 1934, Purvis became a national celebrity through his involvement in the killings by law enforcement personnel of Depression Era criminals Charles Arthur Floyd ("Pretty Boy Floyd"), Lester J. Gillis ("George 'Baby Face' Nelson"), and John Dillinger. *See* ALSTON PURVIS & ALEX TRESNIOWSKI, THE VENDETTA: SPECIAL AGENT MELVIN PURVIS, JOHN DILLINGER, AND HOOVER'S FBI IN THE AGE OF GANGSTERS 24, 161–68, 233–48, 262–63 (2009); MICHAEL WALLIS, PRETTY BOY: THE LIFE AND TIMES OF CHARLES ARTHUR FLOYD 262–66, 438–39, 458–61 (W. W. Norton & Co. 2011).

[36] *Federal Men Under Prohibition*, CHI. DAILY TRIB., Feb. 16, 1933, at 8.

[37] *See Mayor Cermak of Chicago Is Seriously Wounded as Assassin Fires on President Elect in Miami*, CHI. DAILY TRIB., Feb. 16, 1933, at 26.

[38] People v. Stevens, 193 N.E. 154, 160 (Ill. 1934).

[39] *Ernest Stevens Freed by State Supreme Court: Embezzlement Conviction Is Reversed*, CHI. DAILY TRIB., Oct. 23, 1934, at 3.

Asked by Pelley if the trial of his father influenced his work as a judge, Justice Stevens said, "It may well have, because it . . . was an example of the system not . . . working properly."[40] Regarding the newspaper coverage, he told me, "I know there was distress within the family about the fairness of some of the reporting . . . I know my dad felt that the *Examiner* had particularly rabble-rousing stories."[41] He also said the headlines about Ernest's arrest for an alleged $1 million embezzlement might have led to the home invasion.[42]

B. A Young Newsman

Justice Stevens said he was never interviewed by a reporter amid the family's tragedy.[43] His "first encounter with the press" came as a freshman at the University of Chicago when he joined the staff of the student newspaper, the *Daily Maroon.*[44]

During Stevens's freshman year, 1937–1938, the *Daily Maroon*'s editor-in-chief was senior student William H. McNeill. McNeill was a precocious critic of the university in general—its energetic and brilliant president Robert M. Hutchins, in particular—and much of student life. He declared a five-point platform for the newspaper, including the abolition of intercollegiate athletics, "progressive politics," and "a chastened President (Hutchins)."[45] He denounced the college's fraternity system.[46] He organized a "[p]olitical [u]nion" for "parliamentary style" debates on national and international issues among three campus factions—conservatives, liberals, and radicals.[47] All of this was too much for many of McNeill's fellow seniors, Justice Stevens recalled: "There was a custom at Chicago back in those days of tossing people into the [university's] botany pond. . . . Some seniors tossed Bill into the botany pond to indicate their displeasure about the way he was running the Maroon."[48]

At the end of his freshman year, John Stevens joined the *Daily Maroon* staff:

> I just thought that maybe if the paper is off on the wrong track the thing to do

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[40] Interview with *60 Minutes*, *supra* note 18, at 5:16.

[41] Interview with Justice Stevens, *supra* note 6.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] William H. McNeill, Editorial, *The Daily Maroon Platform*, DAILY MAROON (Chi.), Oct. 1, 1937, at 1.

[46] *Id.*

[47] *Daily Maroon Initiates Political Union for Discussion by All Campus Partisans*, DAILY MAROON (Chi.), Oct. 12, 1937, at 1.

[48] Interview with Justice Stevens, *supra* note 6. McNeill later became a history professor on the University of Chicago faculty. Robert Goodier, *A Germ of an Idea*, UNIV. CHI. MAG., July–Aug. 2010, at 44, 46.

> is to join it and not fight with it. So, I went to the [*Daily*] *Maroon* and asked if I could write for the [*Daily*] *Maroon* as a sports reporter or something like that, with the idea of trying to make it a better publication, and then I got interested in the work.[49]

In his junior year, 1940–1941, John Stevens became the chairman of the *Daily Maroon*'s board of control for that academic year.[50] Unlike McNeill's policy of confronting major off-campus issues and stimulating political debate, Justice Stevens's editorial board declared in October 1940, "The *Daily Maroon* . . . will not have a platform. . . . We shall depart from traditional Maroon procedure this year, and devote relatively little editorial attention to the problems of the world outside the university."[51] But the isolationist policy did not last long.[52] By November, with seniors facing an imminent prospect of war, the newspaper endorsed Franklin D. Roosevelt for President.[53] It published extensive articles and letters featuring the greatest intellectual combatants on campus as they debated the biggest controversy in the nation: America's participation in the war in Europe.[54] President Hutchins vehemently opposed the U.S. entry into World War II.[55] Mortimer J. Adler, an outspoken academic whom Hutchins had recruited to the faculty, was just as adamant that the United States must aid Europe.[56] The *Daily Maroon*'s circulation soared under Justice Stevens's leadership with this timely and thorough coverage of a pressing national controversy.[57] What's more, Justice Stevens recalled, "It was a lesson I've often learned that intelligent people could disagree."[58]

The future Justice Stevens wrote a few editorials, including one defending the free press. Another student publication, called *Pulse*, had selected the Phi Delta Theta fraternity as the "Big One" on campus.[59]

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[49] Interview with Justice Stevens, *supra* note 6.

[50] *Hankla, Leiser, Rubins, Stevens Head Maroon*, DAILY MAROON (Chi.), May 28, 1940, at 1. "Chairman" was the most senior staff position at the time. The title "editor in chief" was abolished after the McNeill era.

[51] Ernest S. Leiser, Editorial, *Daily Maroon*, *1940–41*, DAILY MAROON (Chi.), Oct. 1, 1940, at 1. Leiser, who wrote most of the *Daily Maroon*'s editorials in the 1940–1941 academic year, was director of television news at CBS at the outset of the Cronkite era in the 1960s. Robert F. Worth, *Ernest S. Leiser, 81, Producer; Helped CBS News Move to TV*, N.Y. TIMES, Dec. 2, 2002, at B8; Interview with Justice Stevens, *supra* note 6.

[52] *See* Ernest S. Leiser, Editorial, *A Change of Policy*, DAILY MAROON (Chi.), Jan. 3, 1941, at 1.

[53] Ernest S. Leiser, Editorial, *The Maroon's Choice*, DAILY MAROON (Chi.), Nov. 5, 1940, at 1.

[54] *See Extra: Special War Supplement*, DAILY MAROON (Chi.), Jan. 27. 1941, at 1; *Maroon Supplement Features Hutchins, Adler Controversy*, DAILY MAROON (Chi.), Jan. 27. 1941, at 1.

[55] *See Extra: Special War Supplement*, *supra* note 54.

[56] *Id.* Regarding Aldler's recruitment to the University of Chicago by Hutchins, see WILLIAM H. MCNEILL, HUTCHINS' UNIVERSITY: A MEMOIR OF THE UNIVERSITY OF CHICAGO, 1929–1950, at 34–36 (1991).

[57] Interview with Justice Stevens, *supra* note 6.

[58] *Id.*

[59] John Stevens, Editorial, *Dear Old Fraternite-e-e*, DAILY MAROON (Chi.), Nov. 6, 1940, at 2.

Losing fraternities in the competition had complained of favoritism on the part of *Pulse* and bribery by the Phi Delts.[60] John Stevens disagreed:

> There is absolutely no reason why Pulse should not have the right to plug the Number One house on campus. They did so without obligation or coercion. The fact that the Phi Delts purchased copies, sold numerous subscriptions, and paid for numerous [photo] cuts had nothing whatsoever to do with the choice of Phi Delta Theta . . . .[61]

Justice Stevens's evaluation of news media coverage of the Supreme Court had its roots in his undergraduate years, when he joined his college newspaper and engaged in campus issues big and small, rather than simply complaining from the sidelines.

C. Wartime Secrets

John Stevens enlisted in the U.S. Navy on December 6, 1941, the day before the Japanese attack on the naval station at Pearl Harbor.[62] His duties as a junior communications officer included interpreting radio signals intercepted from the Japanese navy that would indicate ship locations and movements.[63] It was top-secret work, in no small measure because the Japanese did not know that the Allies had broken their radio code and were busy reading their messages.[64]

"During the war we all took an oath that we would *never* reveal anything that we learned during the war," Justice Stevens recalled.[65] He further explained that: "It was expected to be a totally permanent secrecy oath. It was only many, many years later that they changed the policy and decided they would allow discussion of things during the war. For years, I never talked to anybody about the work that I did."[66]

Immediately after the Allies' victory over the Japanese navy at the Battle of Midway in June 1942, the *Chicago Tribune* published an article that suggested the Allies were reading Japanese radio messages.[67] Amid a flurry of investigations and charges against the *Chicago Tribune* by the U.S. Navy and Congress, the Japanese navy altered its code that August.[68] Justice Stevens's unit, working twenty-four hours a day, seven days a week, in the

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[60] *Id.*

[61] *Id.*

[62] This description of Justice Stevens's war experiences is drawn from BARNHART & SCHLICKMAN, *supra* note 17, at 36–51.

[63] Justice John Paul Stevens, *COMINT Memories of a U.S. Supreme Court Justice*, CRYPTOLOG (U.S. Naval Cryptologic Veterans Association, Eugene, Or.), Summer 1983, at 61.

[64] DAVID KAHN, THE CODE-BREAKERS: THE COMPREHENSIVE HISTORY OF SECRET COMMUNICATION FROM ANCIENT TIMES TO THE INTERNET 562–64 (rev. ed. 1996).

[65] Interview with Justice Stevens, *supra* note 6.

[66] *Id.*

[67] *See* KAHN, *supra* note 64, at 603.

[68] *Id.*

Navy Building in Washington, D.C., was forced to respond. "Everybody thought that the story was the source of it. . . . It affected our work, but we still plodded along," he recalled.[69]

D. Supreme Court Feud

On the advice of his brother Richard J. Stevens, who had graduated from the University of Chicago Law School in 1938, John Stevens—freshly discharged from active service in the U.S. Navy—enrolled in the Northwestern University School of Law in 1945.[70] Near the end of his law school years, Stevens won a coin flip with fellow student Arthur R. Seder Jr. and thereby obtained a clerkship with Justice Wiley B. Rutledge for the October 1947 term.[71] The Supreme Court that would assemble that October was a cauldron of personality conflicts and sharp differences on legal interpretation. Rivalries among the Justices, especially Hugo L. Black and Robert H. Jackson, were reported with relish in Washington newspapers.[72] A year before Justice Rutledge picked John Stevens as a clerk in 1947, headlines about a "feud" on the Court appeared in the Washington newspapers.[73]

Several Justices were said to have their favorite reporters. For example, newspaper columnist and radio broadcaster Drew Pearson was close with both Chief Justice Fred M. Vinson and Justice Douglas.[74] Justice Douglas also counted among his friends and advisers journalists Eliot Janeway of *Time* magazine and Arthur Krock of the *New York Times*.[75] Justice Rutledge, who mostly stayed out of politics and the Court's internal squabbles, kept in touch with veteran journalist Irving N. Brant, a friend

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[69] Interview with Justice Stevens, *supra* note 6. Years later, documents and interviews with Japanese officials revealed that the *Chicago Tribune* article had not prompted the Japanese to alter the code. *See* KAHN *supra* note 64, at 603–04.

[70] This description of Justice Stevens's law school experiences is drawn from BARNHART & SCHLICKMAN, *supra* note 17, at 51–63. Ernest J. Stevens had received a law degree from Northwestern University School of Law in 1907. *Id.* at 53; THE BOOK OF CHICAGOANS: A BIOGRAPHICAL DICTIONARY OF LEADING MEN OF THE CITY OF CHICAGO 644 (Albert Nelson Marquis ed., 1911).

[71] Interview with Arthur R. Seder, Jr., CEO (ret.), Am. Natural Res. Co., in Charlottesville, Va. (May 23, 2005).

[72] *See* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 296–97 (2010); *see also id.* at 306–07 (describing the early years of this division on the Court).

[73] *See, e.g.*, Thomas Reedy, *Supreme Court 'Feud' Flares Openly; Jackson Denounces Black as a 'Bully*,' WASH. POST, June 11, 1946, at 1.

[74] JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 275 (2004); BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 210 (2003); JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY 201 (2002).

[75] FELDMAN, *supra* note 72, at 188, 317–20 (reporting that the journalists encouraged Justice Douglas's political pursuits); MURPHY, *supra* note 74, at 163, 184–86, 190, 197 (reporting that the journalists quietly supported a campaign for Justice Douglas's presidential bid).

and someone who had helped convince President Roosevelt to appoint Justice Rutledge to the U.S. Court of Appeals for the District of Columbia in 1939 and, in 1943, to the U.S. Supreme Court.[76]

Justice Stevens does not recall receiving instructions from Justice Rutledge about how he and his co-clerk, Stanley L. Temko, should deal with inquiring reporters:

> It was perfectly clear that we weren't supposed to talk. We never did. Neither Stan nor I had occasion to. The clerks all ate together in the [Court's] cafeteria, and either we were smart enough or someone told us to be aware of reporters sitting at the next table trying to overhear us. We were conscious of keeping Court business within the Court.[77]

Justice Stevens clerked at the Court during an historic clash of great judicial minds, when "[f]riends became enemies"[78] and the press followed the drama. He was not a combatant but was a front-row spectator. Reminiscing about his joining the Court as a Justice in 1975, he said: "I did feel that my background and memories as a clerk brought a lot of practices and customs of the court back to mind."[79] Avoiding the press was part of that institutional knowledge.

E. Investigating Judges

After his clerkship, John Paul Stevens entered private practice in a Chicago law firm and became active in the Chicago Bar Association.[80] In June 1969 he was named general counsel to a special commission—often referred to as the "Greenberg Commission"—that the Illinois Supreme Court created to investigate ethics charges against two of the court's sitting justices, Ray I. Klingbiel and Roy J. Solfisburg.[81] The commission, comprising senior members of the Chicago and Illinois bar associations, was formed by the court to report on sensational newspaper disclosures of the justices' deliberations of *People v. Isaacs*[82] and their alleged conflict of interest in deciding the case.[83]

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[76] *See* FERREN, *supra* note 74, at 166–67, 218–19; *see also* FOWLER V. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 26–40 (1965) (detailing the correspondence that began the friendship of the journalist and Justice Rutledge).

[77] Interview with Justice Stevens, *supra* note 6.

[78] FELDMAN, *supra* note 72, at xi.

[79] *An Interview with Supreme Court Justice John Paul Stevens*, THIRD BRANCH, Apr. 2007, at 1, 10.

[80] This description of Justice Stevens's role in the Chicago Bar Association and 1969 investigation of two Illinois Supreme Court justices is drawn from BARNHART & SCHLICKMAN, *supra* note 17, at 141–44, 162–65. *See generally* KENNETH A. MANASTER, ILLINOIS JUSTICE (2001) (chronicling Justice Stevens's involvement in the investigation).

[81] *See* MANASTER, *supra* note 80, at 26, 37.

[82] 226 N.E.2d 38 (1967).

[83] *See* MANASTER, *supra* note 80, at 21–22.

Theodore J. Isaacs was a high-profile Illinois political figure[84] who had been indicted for corruption committed while he was director of the state's revenue department.[85] The Illinois Supreme Court had quashed the indictment.[86] But reporters discovered that Klingbiel and Solfisburg, who had voted in Isaacs's favor, had received stock in a commercial bank that Isaacs had helped organize. Newspapers competed fiercely for scoops about the scandal.[87] In July, the commission's public hearings, led by Stevens and his staff of fellow pro bono lawyers, received front-page treatment.[88] Justice Stevens has said that his 1970 appointment to the Seventh Circuit in Chicago, his stepping-stone to the Supreme Court, resulted from the favorable public and professional attention he received in the investigation.[89]

Stevens avoided stepping ahead of the commission members. He held no press conferences and was quoted exclusively from his questions to witnesses and other formal statements at the public hearings. The summertime work, under a tight August 1 deadline, led to two noteworthy press experiences for the future Justice Stevens. The first concerned the chief justice of the Illinois Supreme Court, Walter V. Schaefer. Like many lawyers in Illinois and beyond, John Paul Stevens admired Wally Schaefer, as he was affectionately known.[90] He had been one of Stevens's professors at Northwestern Law and had once offered Stevens a job in the Democratic administration of Illinois Governor Adlai E. Stevenson.[91] In 1962, President John F. Kennedy had considered Schaefer for a U.S. Supreme Court nomination.[92]

In his deposition taken by Stevens for the Greenberg Commission, Schaefer revealed that he had attempted to suppress news coverage of the scandal by telephoning a friend, Roy M. Fisher, editor of the *Chicago Daily News*.[93] In my interview with Justice Stevens, he said he had not formed an opinion about Schaefer's interference with news coverage at that time but said he could see a circumstance—far from the Schaefer particulars—when such interference might be warranted:

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[84] *Id.* at 6–7.

[85] *Isaacs*, 226 N.E.2d at 41.

[86] *Id.* at 54.

[87] *See* MANASTER, *supra* note 80, at 4–6.

[88] *See e.g.*, John Oswald & Thomas Powers, *Probe Hears 3 Justices: They Say Isaacs Case Given out of Order*, CHI. TRIB., July 15, 1969, at 1.

[89] MANASTER, *supra* note 80, at 267–68.

[90] BARNHART & SCHLICKMAN, *supra* note 17, at 162–63; JOHN BARTLOW MARTIN, ADLAI STEVENSON OF ILLINOIS 80 (1976) (citing the nickname "Wally").

[91] BARNHART & SCHLICKMAN, *supra* note 17, at 80, 162–63.

[92] *Id.*

[93] Transcript of Deposition of Walter V. Schaefer at 98–100, In the Matter of The Special Commission in Relation to No. 39797, People v. Isaacs, 226 N.E. 2d 38 (1967) (No. 39797) (on file with author, courtesy of Kenneth A. Manaster) (taken in Chicago on June 25, 1969).

> Supposing there's a matter of national security that was in the court and the justice or judge learned that the newspaper was going to publish something that he thought was inaccurate and would be detrimental to national security. I don't see anything wrong with the judge calling up and saying you ought to think twice about running that story.[94]

Stevens was directly involved in a second controversy regarding the press during his Greenberg Commission work. Just before one of the commission's final public hearings, the future Justice Stevens agreed to give a *Chicago Daily News* reporter a background interview on upcoming witness testimony by a prominent Chicagoan who was not a target of the probe.[95] In my interview with Justice Stevens, he described the arrangement as follows:

> The next to last day of the hearings we had planned to introduce some information that reflected seriously on [the witness]. I invited [the reporter] to come to the office the night before the day of testimony so I could explain to him some of the stuff that was going in[to the public record at the hearing] for fear he might not be able to follow it. I thought it would be fair to give him a hand on the understanding he definitely wouldn't publish anything until after the hearing. He published it the next morning. That taught me a lesson that sometimes you can't trust reporters.[96]

Justice Stevens said he has never forgotten the broken agreement.[97]

Before he became a public figure, Justice Stevens encountered the news media as a teenager, a naval officer, a Supreme Court clerk, and a private lawyer. Each of the episodes presented the media as an institution with its own agenda, well separated from Justice Stevens's own concerns and obligations.

II. JUDGING THE PRESS

The process by which John Paul Stevens first won nomination to a federal judicial post attracted press attention in Chicago, but most of it had nothing to do with him. Reporters gave much more ink to lawyer Charles A. Bane who was initially nominated by President Richard M. Nixon for the Seventh Circuit vacancy that Stevens eventually filled.[98] Bane withdrew his name from the process in the summer of 1969 amid negative press coverage about his alleged discrimination against a Jewish applicant for an apartment in his co-op building.[99] Justice Stevens's own nomination and subsequent

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[94] Interview with Justice Stevens, *supra* note 6.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *E.g.*, George Tagge, *Nixon to Pick Charles Bane for Court Job: Package Deal Is Reported*, CHI. TRIB., May 8, 1969, at N3; *Bane Picked by Nixon to Be U.S. Judge: Will Fill Vacancy in Chicago*, CHI. TRIB., May 28, 1969, at 2.

[99] Aldo Beckman, *U.S. Tax Case Costs Bane Judgeship*, CHI. TRIB., Sept. 27, 1969, at 11; Donald

confirmation received brief, pro forma coverage in the *Chicago Tribune*.[100]

Judge Stevens installed himself on an upper floor of the Everett McKinley Dirksen U.S. Courthouse in downtown Chicago, home of the Seventh Circuit Court of Appeals, where reporters were not welcomed and seldom ventured, even for oral arguments.[101] "Normally, I never *had* any relations with the press as a judge," Stevens said of his four decades on the federal appellate bench.[102] He continued: "Mainly, I thought they ought to read opinions instead of trying to save time by getting sound bites from judges."[103] Seventh Circuit clerks delivered copies of decisions by their panels to the pressroom many floors below.[104]

Still, when Justice Stevens began his judicial career on the Seventh Circuit in the fall of 1970, the press had been unusually busy covering the judicial branch both in Chicago and nationally. Illinois Supreme Court Justices Klingbiel and Solfisburg had resigned after the revelations of the Greenberg Commission.[105] Judge Julius J. Hoffman of the U.S. District Court in Chicago had become nationally notorious because of his cantankerous handling of the Chicago Conspiracy Trial of seven radicals arrested after the 1968 Democratic National Convention.[106] In Washington, D.C., two federal appeals court judges, first Clement F. Haynsworth and then G. Harrold Carswell, had been nominated to the Supreme Court by President Richard M. Nixon for the seat of Justice Abe Fortas.[107] But both nominees were rejected by the U.S. Senate—the first such rejections since 1930.[108] None of this media attention touched Stevens directly. After his confirmation, the *Chicago Tribune*'s first mention of then-Judge Stevens came in April 1972, when he dissented from a 2–1 decision that outlawed a school district's ban on sideburns and facial hair among male students

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Janson, *A Nixon Nominee Accused of Bias Against Jews*, N.Y. TIMES, June 15, 1969, at 51; Michael Killian, *Bane Won't Accept U.S. Judgeship*, CHI. TRIB., July 4, 1969, at 1; Mike Royko, *Bane Target of Bias Charge*, CHI. DAILY NEWS, May 28, 1969, at 3. Justice Stevens's nomination and confirmation is discussed in BARNHART & SCHLICKMAN, *supra* note 17, at 135–38, 144–57.

[100] *See, e.g.*, Aldo Beckman, *2 Illinoisans Named U.S. Judges*, CHI. TRIB., Sept. 22, 1970, at A3; Aldo Beckman, *Percy Backs Lawyer for U.S. Court*, CHI. TRIB., Apr. 11, 1970, at W2; *2 Illinoisans O.K.'d as Judges by Senate*, CHI. TRIB., Oct. 9, 1970, at 8.

[101] E-mail from Richard Phillips, former reporter, Chi. Tribune, to author (Feb. 2, 2007) (on file with author); *see also* BARNHART & SCHLICKMAN, *supra* note 17, at 158–59 (noting that, except when the judges delivered a major opinion, the press usually ignored the Seventh Circuit).

[102] Interview with Justice Stevens, *supra* note 6.

[103] *Id.*

[104] E-mail from Richard Phillips to author, *supra* note 101.

[105] *See* MANASTER, *supra* note 80, at 239.

[106] *See, e.g.*, J. ANTHONY LUKAS, THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL (1970).

[107] Stanley I. Kutler, *Nixon, Richard*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 687, 687 (Kermit L. Hall et al. eds., 2d ed. 2005).

[108] *Id.*

without parental permission.[109]

A. Private Persons in Public Controversies

In April 1968 a prominent Chicago lawyer and outspoken civil liberties advocate, Elmer Gertz, spotted his name in a lengthy magazine article about "a nation-wide conspiracy to harass and intimidate the police."[110] The article, in *American Opinion*, a publication of the ultraconservative John Birch Society, called Gertz a "Communist-fronter" and a "Leninist" and accused him of participating in "Marxist" and "Red" activities.[111]

What Gertz actually did to draw the attention of the magazine's publisher and John Birch Society founder, Robert Welch, was to represent the family of a seventeen-year-old boy who had been murdered by a Chicago police officer.[112] The officer had been convicted of murder in a criminal trial at which Gertz played no part.[113] Gertz represented the family in a civil suit against the officer.[114] Claiming that the article was defamatory, Gertz sued Robert Welch, Inc.[115] A federal jury found in Gertz's favor, awarding him $50,000 for the libel, but U.S. District Court Judge Bernard B. Decker set the verdict aside notwithstanding the jury verdict.[116] Gertz appealed. In reviewing Decker's decision and writing the opinion for a Seventh Circuit panel, Judge Stevens got a chance to have an impact on the Supreme Court—and the news media—well before he advanced to become a Justice.

The case, as had several before it,[117] tested the limits of the Supreme

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[109] Robert Davis, *'A Student Right': Appeals Court Backs Long Hair*, CHI. TRIB., Apr. 28, 1972, at 15 (quoting from Judge Stevens's dissent in *Arnold v. Carpenter*, 459 F.2d 939, 945–46 (7th Cir. 1972) (Stevens, J., dissenting) (arguing that the requirement for parental permission was reasonable because "the transient customs of [a student's] elders" should be tolerated, just as nonconformist behavior should be tolerated and explaining that, to do otherwise, "nourishes the pernicious seed of intolerance by encouraging confrontation rather than accommodation")).

[110] Gertz v. Robert Welch, Inc., 471 F.2d 801, 803 (7th Cir. 1972) (internal quotation marks omitted), *rev'd*, 418 U.S. 323 (1974). For excerpts from the magazine article, see ELMER GERTZ, *GERTZ V. ROBERT WELCH, INC.* 1–6 (1992).

[111] *Gertz*, 471 F.2d at 802–03 (internal quotation marks omitted).

[112] *See id.* at 803–04.

[113] *See id.*

[114] *Id.* at 804.

[115] *Id.*

[116] *Id.*; Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970).

[117] *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31–36 (1971) (concerning a magazine distributor who sued a local radio station for defamatory reporting after he was acquitted at trial of charges of distributing obscene materials); Monitor Patriot Co. v. Roy, 401 U.S. 265, 266 (1971) (concerning a political candidate who sued a local newspaper for publishing an article that described the candidate as a "former small-time bootlegger" (internal quotation marks omitted)); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 135–36 (1967) (concerning a former University of Georgia football coach who sued the *Saturday Evening Post* for reporting that he had conspired to "fix" a football game in 1962); Time, Inc. v. Hill, 385 U.S. 374, 376–78 (1967) (concerning the victim of a crime who sued the

Court's landmark press freedom ruling in 1964, *New York Times Co. v. Sullivan*.[118] In its *New York Times* decision, the Court rejected a libel claim asserted by a public official against the New York Times Company, which had published an advertisement regarding a civil rights controversy.[119] The Court ruled that, despite factual errors in the text of the advertisement, the First Amendment protected freedom of expression on public issues against libel actions by public officials without proof of malice.[120] After *New York Times*, federal courts considered several cases alleging false and defamatory statements made by the press against persons involved in public issues who were not public officials.[121] The rule at the time of Judge Stevens's decision in the libel case of *Gertz v. Welch, Inc*., seemed to be this: Individuals who injected themselves into significant matters of public concern, such as the conviction of a police officer for murder and a controversy over a possible national conspiracy against the police, would find themselves vulnerable to the *New York Times* standard of free expression, even if they were "private figures" by any other definition.[122] Judge Stevens found that commentary on significant public issues, even if it contained false statements that defamed a private person, was protected under the *New York Times* standard.[123]

Moreover, Judge Stevens stated that Gertz's "considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a 'public figure,' as that term has been used by the progeny of *New York Times*."[124] To broaden the scope of the *American Opinion*'s assertions beyond the magazine's own reporting, Judge Stevens asserted that "more credible and respectable authors" had written on the same police harassment theme.[125] As an example, he cited a 1966 *Reader's Digest* article by nationally known

publisher of *Look* magazine for reporting that a new play was loosely related to the crime he and his family had suffered); Walker v. Assoc. Press, 191 So. 2d 727, 729–30 (La. Ct. App. 1966) (concerning a controversial former U.S. Army General, Edwin A. Walker, who sued the Associated Press for reporting that he led a demonstration against school integration), *rev'd*, 389 U.S. 28 (1967) (per curiam); *see also* JOE MATHEWSON, THE SUPREME COURT AND THE PRESS 51–60 (2011) (describing the major Supreme Court cases leading up to the Seventh Circuit's decision in *Gertz*). *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), was the most factually relevant case to *Gertz*, although it was decided after Gertz's appeal was argued before the Seventh Circuit.

[118] 376 U.S. 254 (1964).

[119] *Id.* at 256, 264–65.

[120] *Id.* at 284.

[121] *See, e.g.*, *Rosenbloom*, 403 U.S. 29; *Butts*, 388 U.S. 130; *Hill*, 385 U.S. 374; *Walker*, 191 So. 2d 727.

[122] *See Rosenbloom*, 403 U.S. at 43–44 ("We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.").

[123] Gertz v. Robert Welch, Inc., 471 F.2d 801, 805–08 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

[124] *Id.* at 805.

[125] *Id.* at 806 & n.10.

Northwestern University School of Law Professor Fred E. Inbau.[126] Then, using the *New York Times* standard, he found no evidence of malice in the magazine's statements about Gertz:

> Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. . . .
>
> . . . .
>
> . . . We cannot . . . apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.[127]

Judge Stevens's ruling in *Gertz* might have been relegated to case footnotes in subsequent opinions, joining other decisions that had expanded the effect of *New York Times*. But on appeal the U.S. Supreme Court seized the libel case as an opportunity to comprehensively revisit its own defamation rulings in the aftermath of *New York Times*. The 5–4 decision in the Court's *Gertz v. Robert Welch, Inc.* opinion, written by Justice Lewis F. Powell Jr., reversed Judge Stevens's ruling.[128] The result was a retreat from the Court's trend toward nearly absolute protection of the press against libel actions in presenting news and commentary on matters of public interest.[129]

Justice Powell declined to acknowledge Judge Stevens's suggestion that Gertz probably was a public figure.[130] In the first paragraph of his opinion, Justice Powell labeled Gertz a private citizen.[131] More important, the majority diminished its previous holding in *Rosenbloom v. Metromedia, Inc.*,[132] which had created a greater burden for a private individual defamed in press coverage of matters of "general or public interest."[133] The Court found that state and federal judges should not have to "decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . . . We doubt the wisdom of committing this task to the conscience of judges."[134] In taking up Gertz's case, the Court tempered the concepts of "public person" and matters of "significant public interest."

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[126] *Id.* at 806 n.10 (citing Fred E. Inbau, *Behind Those "Police Brutality" Charges*, READER'S DIG., July 1966, at 41).

[127] *Id.* at 807–08.

[128] 418 U.S. 323 (1974).

[129] In 1975, at a Chicago reception celebrating the confirmation of Justice John Paul Stevens, the new Justice shook Gertz's hand and said, "You are the only attorney who reversed me in the Supreme Court. . . . We decided your case as we did because we thought that was the direction the law was going in defamation cases." GERTZ, *supra* note 110 at 232–33.

[130] *See* text accompanying notes 123–24.

[131] *See Gertz*, 418 U.S. at 325.

[132] 403 U.S. 29 (1971).

[133] *Gertz*, 418 U.S. at 346.

[134] *Id.*

"Then, for a time, the pendulum swung back toward tougher libel standards for the press."[135] Gertz received a retrial and successfully claimed malice as well as defamation by Welch, winning a $400,000 jury award.[136] On appeal by Robert Welch, the Seventh Circuit upheld Gertz's award in 1982.[137] The Supreme Court, with Justice Stevens abstaining, denied certiorari.[138]

B. Proving Falsity as Well as Fault

In his *Gertz* decision for the Seventh Circuit, Justice Stevens adopted the Supreme Court's protective stance that existed at that time toward the press, only to see it moderated by the higher court in the context of reversing his opinion. Ten years after joining the Court, he confronted another element of *Gertz*. This time, Justice Stevens, in dissent, joined three fellow Justices who opposed a broad expansion of the press privilege under the First Amendment in *Philadelphia Newspapers, Inc. v. Hepps*.[139] A 5–4 decision in an opinion written by Justice Sandra Day O'Connor crafted a new protection for the media: A private figure, exempt from the malicious intent threshold of *New York Times v. Sullivan*, must prove that a defamatory statement published in the context of reporting and commentary about matters of public concern was false.[140]

In 1975 and 1976, a series of articles in the *Philadelphia Inquirer* had linked Maurice S. Hepps, a convenience store franchisor in Philadelphia, and his franchisees to purported organized crime figures and to the use of organized crime figures in influencing government actions affecting them. Hepps and the franchisees sued the newspaper owner and the reporters who wrote the stories for defamation.[141]

Based on British common law, many state courts had held that, in finding libel, defamatory statements were assumed to be false.[142] The *Gertz* Court endorsed this traditional view of "defamatory falsehood": "so long as they do not impose liability without fault, the States may define for themselves an appropriate standard of liability."[143] In a sharp departure from the *Gertz* norm, Justice O'Connor wrote for the *Hepps* majority: "Here, we

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[135] MATHEWSON, *supra* note 117, at 60.

[136] *See* GERTZ, *supra* note 110, at xii–xiii (indicating that Gertz received both compensatory and punitive damages on retrial); *see also* Gertz v. Robert Welch, Inc., 680 F.2d 527, 530–31 (7th Cir. 1982) (summarizing the district court's decision in the defamation action), *cert. denied*, 459 U.S. 1226 (1983).

[137] *Gertz*, 680 F.2d at 530.

[138] Robert Welch Inc. v. Gertz, 459 U.S. 1226.

[139] 475 U.S. 767, 780, 790 (1986) (Stevens, J., dissenting).

[140] *Id.* at 776–77 (majority opinion); *see also* MATHEWSON, *supra* note 117, at 60–61 (discussing the diminished "legal impact of private-plaintiff status" resulting from the Court's opinion in *Philadelphia Newspapers*).

[141] *Phila. Newspapers*, 475 U.S. at 769–70.

[142] *See* Norman L. Rosenberg, *Libel*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 107, at 581, 581–82.

[143] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–48 (1974).

hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."[144]

Writing in dissent for himself and three other Justices, Justice Stevens attacked the logic and potential effect of the majority's decision. The primary winners from the majority's "pernicious" decision, he wrote, would be news outlets and "character assassins" who maliciously or negligently published scurrilous statements about a private individual that could not be proven true or false.[145] According to Justice Stevens, in the case at hand, the negative reporting about plaintiffs Hepps and his franchisees relied on guilt by association. Hepps and franchise holders were said to have "connections" to "underworld figures" and to have engaged in corruption with them.[146] One way of proving the falsehood of the newspaper account would be for Hepps to demonstrate that the "underworld figures" were in fact law-abiding citizens. Acknowledging this possibility, Justice Stevens wrote that the truth or falsity of the assertions against a person "connected" to the plaintiffs "depends on the character and conduct of that third party—a matter which the jury may [under the majority's ruling] well have resolved against the plaintiffs on the ground that they could not disprove the allegation on which they bore the burden of proof."[147]

In her ruling, Justice O'Connor agreed that Hepps faced difficulty, especially where the newspaper and its reporter were protected by a reporter's shield law.[148] But she concluded that a requirement that a plaintiff prove falsity was necessary to promote the First Amendment's interest of fostering truthful reporting by the news media on matters of public concern: "[W]e hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[149]

Taking note of the risk that Justice O'Connor's ruling imposed on a private individual whose reputation had been defamed, Justice Stevens disagreed: "The Court's decision trades on the good names of private individuals with little First Amendment coin to show for it."[150] Elmer Gertz

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[144] *Phila. Newspapers*, 475 U.S. at 768–69. Showing that the statements were false was complicated by Pennsylvania's reporter's shield law, which "allows employees of the media to refuse to divulge their sources." *Id.* at 770–71 ("No person . . . employed by any newspaper of general circulation . . . or any radio or television station, or any magazine of general circulation, . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit." (omissions in original) (quoting 42 PA. CONS. STAT. § 5942(a) (1982))).

[145] *Id.* at 780–81, 785 (Stevens, J., dissenting).

[146] *Id.* at 769 (majority opinion).

[147] *Id.* at 786 (Stevens, J., dissenting).

[148] *Id.* at 776–77 (majority opinion).

[149] *Id* at 777.

[150] *Id.* at 790 (Stevens, J., dissenting).

no doubt was pleased.

In a general sense, Justice Stevens's opinions in *Gertz* while on the Seventh Circuit and his dissent in *Hepps* while on the Supreme Court represent two sides of free press jurisprudence—his *Gertz* opinion for the majority siding with press freedom and his *Hepps* dissent pulling back. But a more precise analysis notes, as Justice Stevens did, that in *Gertz* he was an appellate judge ruling under the constraints of prevailing Supreme Court precedent,[151] notably the *New York Times* standard. The *Hepps* case confronted Justice Stevens as a Justice, who is empowered to guide the law. But, this time, he was unconvinced that the facts of the *Hepps* case warranted the departure from precedent. The two cases tell less about Justice Stevens's attitude toward the news media and more about his belief in judicial restraint.[152]

III. A JUSTICE AND THE MEDIA

Anyone familiar with artist Andy Warhol's remark that "in the future everyone will be world-famous for fifteen minutes"[153] will understand that Supreme Court Justices harbor attitudes about the news media and how they should be famous. In his interview for this Essay, Justice Stevens revealed one anecdotal example of press strategy at the Court. Neither Chief Justice Warren E. Burger nor Justice Byron R. White had special sympathy for a so-called press privilege under the First Amendment's Free Press Clause.[154] Yet, Justice Stevens recalled,

> Whenever there was a First Amendment case in which the Court was going to uphold the right of the press, [Chief Justice Burger] wrote the opinion himself. When there was a case in which they were going to rule against the interest of the press, he assigned it to Byron. Byron had to write more than his share of First Amendment cases rejecting privilege claims. So, the press did not give Byron an entirely fair shake. When you were going to make points by ruling

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[151] GERTZ, *supra* note 110, at 232–33.

[152] *See, e.g.*, Stevens, *supra* note 15, at 438; John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Some Thoughts on Judicial Restraint, Address at the Annual Meeting and Banquet of the American Judicature Society (Aug. 6, 1982), *in* 66 JUDICATURE 177 (1982).

[153] The quotation comes from Warhol's exhibition catalogue for his exhibit at a Swedish gallery in 1968. *See* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 819 (Justin Kaplan ed., Little, Brown & Co. 17th rev. ed. 4th prtg. 2002) (1882).

[154] *See e.g.*, DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 336 (1998) ("[Justice White] could, and did, refuse interviews with impunity."); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 158 (1992) ("Under Burger, the press at the Court had been treated as the enemy or, at best, a nuisance."); *see also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) (concerning a Massachusetts law that barred nonmedia corporation from spending money to influence a public referendum); *id.* ("Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination.").

with the press [Chief Justice Burger] would keep the case for himself.[155]

I have found no evidence of Justice Stevens currying favor with the news media. Yet his press strategy was hardly inert. On occasions, he declined to accept the passive, rope-a-dope strategy described by Justice Scalia[156] and instead reacted to press criticism through speeches to law organizations. For example, just a few weeks after the end of the Court's 1997 and 2004 Terms, Justice Stevens found ways to counterpunch fairly rapidly to negative news coverage of his work in each of the just-concluded terms. Speaking to the Clark County Bar Association in Las Vegas in August 2005, he rhetorically took a "Mulligan" (second chance at a golf swing) for five of what he called his "unwise" opinions and votes.[157] But rather than revising his work, he drew a distinction between his public policy preferences and his duty as an appellate judge: "In each I was convinced that the law compelled a result that I would have opposed if I were a legislator."[158] With the immunity from popular opinion granted by lifetime tenure, he said, "our job is vastly simplified by our duty to allow legislatures and executives to fashion policy in response to their understanding of the popular will."[159]

Of the five opinions he discussed in Las Vegas, Justice Stevens said two cases, *Exxon Mobil Corp. v. Allapattah Services, Inc.*, concerning proper court jurisdiction in class action suits,[160] and *United States v. Booker*, concerning the technicalities of sentencing guidelines,[161] were "of greater

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In THE MAN WHO ONCE WAS WHIZZER WHITE, Professor Hutchinson cites three opinions written by Justice White and joined by Chief Justice Burger that concentrated on the "bile" of the news media, HUTCHINSON, *supra* at 382. *See also* Herbert v. Lando, 441 U.S. 153 (1979) (regarding discovery proceedings aimed at journalists in libel cases); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (allowing police searches of newsrooms with proper warrants); Branzburg v. Hayes, 408 U.S. 665 (1972) (rejecting a journalist's claim to be excused from testifying before a grand jury).

In *Herbert v. Lando*, Justice White wrote:

> It is suggested that the press needs constitutional protection from these burdens [of discovery inquiries by a plaintiff into a journalist's state of mind in libel cases] if it is to perform its task, which is indispensable in a system such as ours.
>
> Creating a constitutional privilege foreclosing direct inquiry into the editorial process, however, would not cure this problem for the press. Only complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment.

441 U.S. at 176 (footnote omitted).

[155] Interview with Justice Stevens, *supra* note 6.

[156] *See supra* note 10 and accompanying text.

[157] John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Judicial Predilections, Address at the Clark County Bar Association Luncheon Meeting (Aug. 18, 2005), *in* 6 NEV. L.J. 1, 1 (2005) (internal quotation marks omitted).

[158] *Id.*

[159] *Id.* at 6.

[160] 545 U.S. 546, 572–75 (2005) (Stevens, J., dissenting).

[161] 543 U.S. 220 (2005).

interest to lawyers than to members of the general public."[162] A third, his dissent in *Granholm v. Heald*, concerning the end of state restrictions on the sale of wine from out-of-state wineries,[163] attracted little press notice. But two of the opinions he chose from the 2004 Term had generated considerable negative press reaction. By reviewing the opinions he wrote for the Court majority in *Kelo v. City of New London*, concerning eminent domain,[164] and *Gonzales v. Raich*, concerning medical use of marijuana,[165] Justice Stevens guaranteed national press coverage of his efforts to clarify his work on two controversial issues.[166] Unlike his written opinions for the Court, setting out detailed precedent and reflecting the dense style of traditional legal reasoning, his remarks outside the Court allow us to see how well a Justice communicates to the public given a second chance in a far less formal venue. Thoughts about improved communications between Justices and the press benefit from such comparisons.

A. Home, Sweet Home

In *Kelo v. City of New London*, a case from Connecticut about the Fifth Amendment's Takings Clause, the Supreme Court's 5–4 decision endorsed the power of local governments to take private property for use by private developers for the public purpose of local economic development.[167] The ruling sparked immediate and broad public opposition. Public approval of the Court sank to a record low 42% in a Gallup poll taken shortly after the June 23, 2005 decision.[168] The *Chicago Tribune*'s extensive news coverage, commentary, editorials, and letters to the editor about *Kelo* in June and July 2005 included headlines such as: "Is Your Home Safe?";[169] "A Blow to Freedom";[170] "Eminent Domain Ruling Spurs Widespread Backlash";[171] "There's No Such Thing as Home, Sweet Home";[172] and "High Court Ruling Steamrolls Rights of the Little Guy."[173]

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[162] Stevens, *supra* note 157, at 1–3.

[163] 544 U.S. 460, 493–94 (2005) (Stevens, J., dissenting).

[164] 545 U.S. 469 (2005).

[165] 545 U.S. 1 (2005).

[166] *See, e.g.*, Linda Greenhouse, *Justice Weights Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

[167] 545 U.S. at 488–90. *See generally* JEFF BENEDICT, LITTLE PINK HOUSE (2009) (describing the *Kelo* case).

[168] Lydia Saad, *Supreme Court Starts Term with 51% Approval*, GALLUP.COM (Oct. 6, 2010), http://www.gallup.com/poll/143414/supreme-court-starts-term-approval.aspx.

[169] Editorial, *Is Your Home Safe?*, CHI. TRIB., June 24, 2005, § 1, at 24.

[170] Jim Munkcacsy, Letter to the Editor, *A Blow to Freedom*, CHI. TRIB., June 28, 2005, § 1, at 18.

[171] Kenneth R. Harney, *Eminent Domain Ruling Spurs Widespread Backlash*, CHI. TRIB., July 24, 2005, § 16, at 1.

[172] Dennis Byrne, *There's No Such Thing as Home, Sweet Home*, CHI. TRIB., June 27, 2005, § 1, at 15.

[173] John Kass, *High Court Ruling Steamrolls Rights of the Little Guy*, CHI. TRIB., June 26, 2005,

Justice Stevens, in his *Judicial Predilections* speech, sympathized with the negative reaction to his ruling: "My own view is that the allocation of economic resources that result from the free play of the market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."[174] Setting aside that admission, his speech text improved considerably on the text of his *Kelo* opinion. Using 636 words, instead of the 4155 words of his *Kelo* opinion, Justice Stevens's speech summarized the extensive history of the Court's eminent domain jurisprudence.[175] He demonstrated that his judgment fell clearly within the Court's precedent.[176] He did not reiterate word-for-word any of the text of his formal opinion, but instead clarified and simplified the issues and his finding. The speech text was briefer and more conversational. For example, the text of the opinion reads, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[177] The speech text is clearer: "[W]e have always allowed local policy makers wide latitude in determining how best to achieve legitimate public goals."[178]

In another example, the opinion text reads, "As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate."[179] But the speech makes the point more directly: "Time and again judges who truly believe in judicial restraint have avoided the powerful temptation to impose their views of sound economic theory on the policy choices of local legislators."[180]

In his speech, Justice Stevens moved from the more formal to the less formal. But there was plenty of room to move farther in that direction, still without changing the legal essence of the ruling. Justice Stevens and the news media covering the story could have learned much from a *Chicago Tribune* reader, whose letter to the editor was a compact, lucid exposition of *Kelo* in less than 100 words:

> The banner headline on the June 24 [*Chicago Tribune*] front page, "Eminent [D]omain [E]xpanded," was dangerously misleading and certainly not supported by the story that followed.
>
> The Supreme Court simply refused to overturn state laws that have been in

§ 1, at 2.

[174] Stevens, *supra* note 157, at 4.

[175] *Id.* at 3–4.

[176] *Id.*

[177] Kelo v. City of New London, 545 U.S. 469, 483 (2005).

[178] Stevens, *supra* note 157, at 4.

[179] *Kelo*, 545 U.S. at 489.

[180] Stevens, *supra* note 157, at 4.

> place since the 1950s, ruling that nothing in the U.S. Constitution prevented states and cities from determining for themselves what is a "public use."
>
> The law is the same now as it was before the decision.
>
> How is that *expanded*?[181]

The three texts discussed in this subpart—Justice Stevens's *Kelo* opinion, his *Judicial Predilections* speech, and the *Chicago Tribune* letter to the editor—could comprise the basis for a useful discussion of Supreme Court's news media relations.

B. Pot and the Commerce Clause

In *Gonzales v. Raich*, a 2005 case from California, the Supreme Court discussed the scope of the federal Controlled Substances Act[182] and invalidated state medical marijuana laws.[183] The opinion that Justice Stevens wrote for a five-member majority focused on the historical importance of the Constitution's Commerce Clause but sparked critical commentaries with arresting headlines, including: "Court's Ruling on Marijuana Reeks of 'Reefer Madness'";[184] "Court's Marijuana Ruling Trespasses on Doctor–Patient Territory";[185] and "What Were Those Justices Smoking?"[186] It also yielded sympathetic comments such as: "Not About Pot," an editorial in the *Washington Post*,[187] and a lengthy analysis in the *Los Angeles Times*, "Unconstitutional Cannabis."[188]

Raich is an excellent example of my theme because the case is really about two things: medical marijuana use, an obvious topic of interest to the press, and the power of the Commerce Clause, a topic that seldom makes headlines. Often the Court must deal with publicly controversial subjects in terms of constitutional guidelines little known to the public.[189] Bridging that gap, I believe, is vital to the Court's independence and its stature as the third branch of government.

In his *Judicial Predilections* speech, Justice Stevens again revealed his own point of view, this time about the use of medical marijuana and the

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[181] Dennis McClendon, Letter to the Editor, *Misleading Headline*, CHI. TRIB., June 28, 2005, § 1, at 18.

[182] Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–971 (2006)).

[183] 545 U.S. 1 (2005).

[184] Editorial, *Court's Ruling on Marijuana Reeks of 'Reefer Madness,'* USA TODAY, June 7, 2005, at 12A.

[185] Gregory Goldmakher, Letter to the Editor, *Court's Marijuana Ruling Trespasses on Doctor–Patient Territory*, USA TODAY, June 9, 2005, at 21A.

[186] Nick Gillespie, Op-Ed., *What Were Those Justices Smoking*?, L.A. TIMES, June 7, 2005, at B13.

[187] Editorial, *Not About Pot*, WASH. POST, June 8, 2005, at A20.

[188] Editorial, *Unconstitutional Cannabis*, L.A. TIMES, June 7, 2005, at B12.

[189] *See* Gonzales v. Raich, 545 U.S. 1 (2005).

distinction between his private opinion on the topic and the work of judicial review:

> I have no hesitation in telling you that I agree with the policy choice [to authorize medical marijuana] made by the millions of California voters, as well as the voters in at least nine other states (including Nevada), that such use of the drug should be permitted, and that I disagree with executive decisions to invoke criminal sanctions to punish such use.[190]

But unlike his elaboration of the *Kelo* decision, in which he attempted to clarify the judicial background surrounding the Fifth Amendment's Takings Clause, Justice Stevens's Las Vegas comments about *Raich* touched only briefly on what he had seen as the constitutional centerpiece of the case, the Article I Commerce Clause.[191]

In his speech, Justice Stevens, perhaps assuming that the lawyers in the room were aware of his Commerce Clause jurisprudence, missed an opportunity to convey to a broader public audience the importance of one of the building blocks of his jurisprudence.[192] Justice Stevens wrote in his *Raich* opinion: "The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself."[193] His speech text read: "Unless we were to revert to a narrow interpretation of Congress'

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[190] Stevens, *supra* note 157, at 4.

[191] *See id.*

[192] Justice Stevens's Commerce Clause jurisprudence was influenced greatly by Justice Rutledge. Rutledge believed that the Commerce Clause was essential to the existence of a national government. For an indication of Justice Stevens's reliance on Justice Rutledge's views regarding the Commerce Clause, see *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 665–66 (1977) (Stevens, J., dissenting) (quoting WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 25–27 (The Lawbook Exchange, Ltd. 2004) (1947)). In *Vendo*, Justice Stevens revealed Justice Rutledge's jurisprudential impact when he wrote, "Perhaps more than any other provision in the Constitution, it was the Commerce Clause that transformed the ineffective coalition created by the Articles of Confederation into a great Nation." *Id.* at 665. Justice Stevens continued his dissent by quoting the following text from A DECLARATION OF LEGAL FAITH:

> It was . . . to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today.
>
> So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the commerce clause in the new structure of power.
>
> . . . On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. To it may be credited largely the fact we are an independent and democratic country today.

Id. (omissions in original) (quoting RUTLEDGE, *supra*) (internal quotation marks omitted). In a final show of respect for the words of Justice Rutledge, Justice Stevens concluded his dissent with the following warning: "Only by ignoring this chapter in our history could we invoke principles of federalism to defeat enforcement of the 'Magna Carta of free enterprise' enacted pursuant to Congress' plenary power to regulate commerce among the States." *Id.* at 666 (footnote omitted).

[193] 545 U.S. at 16.

power to regulate commerce among the States that has been consistently rejected since the Great Depression [of the 1930s], in my judgment our duty to uphold the application of the federal statute was pellucidly clear."[194]

It is unlikely, however, that his core belief in the primacy of the Commerce Clause was "pellucidly" clear to those upset by the Court's sudden ban on medical marijuana. Instead, the press provided the useful clarification that was missing from Justice Stevens's speech. The *Washington Post* editorialized: "The Constitution's [C]ommerce [C]lause, which provided the foundation for the [C]ourt's ruling in this case, is the foundation of the modern regulatory state, underpinning since the New Deal huge swaths of federal law: worker protections, just about all federal environmental law, laws prohibiting racial discrimination in private-sector employment."[195] Editorial writers at the *Los Angeles Times* agreed, more colorfully:

> For decades, during and after the New Deal, [the Commerce Clause] became the all-purpose authority for anything the federal government wanted to do, or to prevent individual states from doing. . . .
>
> Federalism and the [C]ommerce [C]lause bring out the hypocrite in all of us. . . .
>
> In the tired arguments of the last century about the courts and the Constitution, it has usually been liberals with ambitious national agendas favoring a strong [C]ommerce [C]lause that clears away the underbrush of state laws in their path. Meanwhile, conservatives have defended the sanctity of "states' rights." When the issue is the medical use of marijuana, the siren song of states' rights tempts liberals and libertarians, while more mainstream conservatives are happy—on this occasion—to see the jackboots of Washington come stomping on the prerogatives of Sacramento. Thus Gonzales vs. Raich is an excellent litmus test of intellectual integrity.[196]

On this occasion, the press, not the Justice, drew the better distinction between law and a public policy popular in certain circles.

C. "Secret Trials"

Though he did not write an opinion for the Supreme Court's 1979 decision restricting press access to a criminal court proceeding in *Gannett v. DePasquale*,[197] Justice Stevens took the stage at the College of Law at the University of Arizona in Tucson to criticize news media coverage of the majority opinion he had joined a month earlier.[198] The Court's decision, authored by Justice Potter Stewart, affirmed an agreement between

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[194] Stevens, *supra* note 157, at 4 (footnote omitted).

[195] Editorial, *supra* note 187.

[196] Editorial, *supra* note 188.

[197] 443 U.S. 368, 393–94 (1979).

[198] *See* John Paul Stevens, *The* Gannett *Case in Perspective*, B. LEADER 2, Nov.–Dec. 1979, at 2, 3.

prosecutors and defense lawyers to bar the public and the press from a pretrial hearing on whether a defendant's confession and other evidence should be suppressed at the upcoming trial.[199] Many media commentators seized on the majority's broad ruling that the Sixth Amendment's "right to a speedy and public trial"[200] was granted to the accused, not the public or the press. In particular, press commentators jumped on text of the concurring opinion by Chief Justice William H. Rehnquist that read: "[A]s the Court today holds, the Sixth Amendment does not require a criminal trial or hearing to be opened to the public if the participants to the litigation agree for any reason, no matter how jurisprudentially appealing or unappealing, that it should be closed."[201]

Editorial writers and columnists attacked. The *Washington Post* inveighed against "Secret Trials," with references to "the Star Chamber" and "the Spanish Inquisition."[202] The *Washington Post*'s columnist Jack Anderson remarked:

> In its continuing war with the press, the Supreme Court so far has shied away from infringing on the First Amendment's guaranteed freedom to publish. Instead, its recent decisions have chipped away drastically at the media's freedom to gather the news—a necessary first step that the [C]ourt majority evidently feels does not warrant First Amendment protection.[203]

A *Los Angeles Times* editorial, "A Disastrous Assault," read: "The U.S. Supreme Court, turning its back on the Constitution and two centuries of an open judicial process, has taken this nation further down the ominous path to secret trials."[204]

Anthony Lewis, a Pulitzer Prize-winning columnist for the *New York Times* and the newspaper's former Supreme Court correspondent,[205] drew Justice Stevens directly into the controversy.[206] Lewis noted that in the Court's previous Term, Justice Stevens had written a compelling dissent about the right of the press under the First and Sixth Amendments to acquire, as well as disseminate, information.[207] The case, *Houchins v. KQED, Inc.*, arose from a suit by San Francisco television station KQED to obtain camera and reporter access to a portion of a county jail where a

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[199] *Gannett*, 443 U.S. at 390–91, 393–94.

[200] U.S. CONST. amend. VI.

[201] *Gannett*, 443 U.S. at 404 (Rehnquist, J., concurring).

[202] Editorial, *Secret Trials*, WASH. POST, July 3, 1979, at A16.

[203] Jack Anderson, *High Court Now a Top-Secret Agency*, WASH. POST, July 28, 1979, at B12.

[204] Editorial, *A Disastrous Assault*, L.A. TIMES, July 4, 1979, at B6.

[205] *Biography: Anthony Lewis*, NYTIMES.COM, http://www.nytimes.com/library/opinion/lewis/bio_lewis.html (last visited July 2, 2012).

[206] Anthony Lewis, Op-Ed., *Abroad at Home: Decision in the Dark*, N.Y. TIMES, July 5, 1979, at A17.

[207] *See id.*

prisoner had committed suicide.[208] The Court ruled in favor of the jailer,[209] but Justice Stevens dissented:

> It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.
>
> For that reason information gathering is entitled to some measure of constitutional protection.[210]

In a footnote, he acknowledged that the Constitution does not grant a "right to receive or acquire information" but wrote that the marketplace of ideas would be "barren" without information to exchange.[211]

Regarding the Sixth Amendment, Justice Stevens wrote, "By express command of the Sixth Amendment the [trial] must be a 'public trial.'"[212] He explained that imprisonment was part of the judicial proceeding, as was a trial, and that the "community at large," not just the accused, had an interest in a fair and open proceeding.[213] Columnist Lewis seized on this point of Justice Stevens's argument in *KQED*: "What goes on in prison is part of the criminal justice process that ought to be known to the public, Justice Stevens said just a year ago. Yet, astonishingly, he . . . joined the Stewart opinion [in *Gannett*]."[214]

In his September 8, 1979 Tucson speech, which was covered the next day by national news media,[215] Justice Stevens sniped about "representatives of the news media who seem to fear that the majority's decision [in *Gannett*] has removed the cornerstone of our constitutional edifice" and "prophets of doom [who] argue that the Watergate scandal would never have been exposed if *Gannett* and other cases had been decided a few years ago."[216] He drew a distinction between the First Amendment, as he had employed it in defending *KQED*, and the Sixth Amendment, which had been the greater factor in the Court's *Gannett* decision but had played only a supporting role in Justice Stevens's *KQED* dissent. In the speech, he acknowledged that the Sixth Amendment was

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[208] 438 U.S. 1, 3 (1978).

[209] *Id.* at 16.

[210] *Id.* at 32 (Stevens, J., dissenting) (footnote omitted).

[211] *Id.* at 32 n.22.

[212] *Id.* at 36.

[213] *Id.* at 36–37.

[214] Lewis, *supra* note 206.

[215] Linda Greenhouse, *Stevens Says Closed Trials May Justify New Laws*, N.Y. TIMES, Sept. 9, 1979, at 41; Jim Mann, *Stevens Denies Court Paved Way for Secret Trials*, L.A. TIMES, Sept. 9, 1979, at A13; Morton Mintz, *Justice Says Press Too Afraid of Ruling*, WASH. POST, Sept. 9, 1979, at A4.

[216] Stevens, *supra* note 198.

unambiguous in granting the right to an open trial only to the accused.[217] On the other hand, he recognized conflicting views about the First Amendment and a supposed right of the press and public to obtain as well as disseminate information.[218] Drawing on his love of fictional defense lawyer Perry Mason, Justice Stevens noted that trials depicted in the Perry Mason stories frequently presented a judge holding private conversations with lawyers in the courtroom.[219] Such proceedings that bar the press and public, he explained, are essential to the plea bargaining process and the consideration of sensational evidence that might be suppressed from the trial.[220] He concluded, "Although much of the debate is unpersuasive, it is all constructive. . . . [I]t maximizes the likelihood that legislators and other lawmakers will make constructive changes in the rules relating to access to governmental proceedings."[221] As he did in the wake of his controversial *Kelo* decision, he welcomed public and legislative awareness of and debate about an issue.[222]

The public discussion may have had an effect. The following year, in *Richmond Newspapers, Inc. v. Virginia*, the Court significantly modified its *Gannett* ruling by distinguishing between a right to public attendance at a pretrial hearing and a public right to attend a trial.[223] In the *Richmond Newspapers* case, the trial judge had granted a defense motion to close the trial itself.[224] Neither the prosecutor nor members of the press in attendance had objected.[225] But the Court, in a plurality opinion with only Chief Justice Rehnquist dissenting, held that the right of the public and press to attend a trial is guaranteed by the First Amendment.[226] In his concurrence, Justice Stevens recalled his *KQED* dissent and remarked, "[*Richmond Newspapers*] is a watershed case. Until today, the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any

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[217] *Id.* at 2.

[218] *Id.* at 3.

[219] *Id.* at 2.

[220] *Id.* at 2, 29.

[221] *Id.* at 29.

[222] *See* Stevens, *supra* note 157, at 4 ("I believe that the public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing such [economic] policy concerns [of local legislators]."); Stevens, *supra* note 198, at 3, 29 ("[D]iscussion can only generate interest and thought about the status and future of . . . the general rule [protecting the disseminations of ideas]. . . . The fact that the framers of the Constitution did not foresee for a particular rule—or the fact that the Supreme Court may have failed to discern the framers' actual intent—does not foreclose action by other lawmaking institutions.").

[223] *See* 448 U.S. 555, 573–75, 580–81 (1980).

[224] *Id.* at 559–60.

[225] *Id.* at 560.

[226] *Id.* at 580 (Stevens, J., concurring).

constitutional protection whatsoever."[227]

The very term "secret trials" evokes widespread concern. In an easily comprehensible and candid speech in Tuscon, Justice Stevens succeeded in placing anxiety about public and press access to trials in the context of the Constitution and contemporary legal standards. He spanned, in simple terms, the rights of a defendant and the rights of the public. He invited further public discussion, which, in my view, was facilitated by his speech and by the fact that three other Justices made public remarks about the case—an unusual display by Justices on a single issue.[228] Finally, he seemed delighted to herald the "watershed" decision in *Richmond Newspapers*, easing restrictions on access to trials, which almost certainly was the fruit of those discussions.

D. President Clinton in Court

In May 1997, Justice Stevens wrote the *Clinton v. Jones* opinion for a unanimous Supreme Court, holding that President William J. Clinton had no right, under his claims of presidential immunity or separation of powers, to halt a 1994 lawsuit that had been filed against him concerning his unofficial behavior as the Governor of Arkansas.[229]

The decision was broadly accepted by newspaper editorial writers and columnists. The *Chicago Tribune* editorialized that Paula C. Jones had "secured a place for herself in the nation's constitutional law and history" by providing an opportunity for the Court to reject President Clinton's "outrageous argument that the [P]resident of the United States is somehow above the laws he is sworn to uphold and enforce."[230]

The *New York Times*'s Anthony Lewis wrote that the ruling underscored "the importance of judicial independence . . . . It countered the notion, heard so often, that judges are driven by the politics of the President who appointed them. Yes, judges have what Justice Holmes called their can't-helps, the beliefs that are the product of a life's experience. But they do try to be judges."[231] But one prescient conjecture by Lewis was absent in commentary elsewhere:

> Nor do I think the drain of this case on the operation of the Presidency should be minimized[—]not just appearance in court, if that happens, but the endless decisions on how to proceed. No doubt that is why those who have tried to destroy Mr. Clinton's legitimacy since the day he was first elected are

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[227] *Id.* at 582.

[228] Chief Justice Warren Burger and Justices Harry A. Blackmun and Lewis Powell gave speeches commenting on the *Gannett* case. Greenhouse, *supra* note 215. In her article for the NEW YORK TIMES, Linda Greenhouse reported, "People who follow the Supreme Court could remember no instance in which four Justices have spoken publicly about an opinion." *Id.*

[229] 520 U.S. 681, 684–86, 695 (1997).

[230] Editorial, *Citizen Clinton vs. Citizen Jones*, CHI. TRIB., May 28, 1997, § 1, at 16.

[231] Anthony Lewis, *Abroad at Home: When the Court Speaks*, N.Y. TIMES, May 30, 1997, at A29.

salivating at the Supreme Court decision.[232]

Lewis questioned Justice Stevens's assertion that the ruling would not generate, in Justice Stevens's words, "politically motivated harassing and frivolous litigation" or take much of the President's attention.[233] Lewis's forecast proved to be tragically correct for President Clinton, and it still nags Justice Stevens.[234]

A federal appeals panel in Arkansas had rejected President Clinton's plea for immunity from the litigation during his tenure in the White House and ordered pretrial proceedings and a possible trial to unfold as they would under Federal Rules of Civil Procedure for any private defendant, subject only to orders by the district judge to delay particular proceedings because of "specific, particularized, clearly articulated presidential duties."[235] Justice Stevens concurred when the unanimous Court affirmed the Eighth Circuit's ruling.[236]

Justice Stevens's ruling against the President made headlines, but the press quickly turned to what would happen next in the dramatic political saga. By late 1997, attempts by Paula Jones's lawyers to show a pattern of sexual harassment by President Clinton led to court-authorized depositions of individuals far afield from Jones's initial claims. In particular, in December 1997, Jones's lawyers served White House intern Monica S. Lewinsky with a subpoena.[237] One month later, President Clinton gave a deposition discussing his relationship with Lewinsky.[238] Allegations that he lied in that deposition became part of the articles of impeachment voted on by the House of Representatives in December 1998.[239]

In light of the damage done to President Clinton as a result of the depositions in the Paula Jones case, the charge has lingered that Justice Stevens was "naïve" about the case's dark and intensively partisan political backdrop. "It still goes on," Justice Stevens told me in May 2011.[240] In 2008, veteran Supreme Court correspondent Nina Totenberg said that "Stevens . . . had no concept of what politics had become. He came from an era when crooked politics meant money, not ideological power."[241] Another

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[232] *Id.*

[233] *Id.*; *see also Jones*, 520 U.S. at 708 (rejecting the President's claim that the Court's decision "will generate a large volume of politically motivated harassing and frivolous litigation").

[234] Interview with Justice Stevens, *supra* note 6.

[235] Jones v. Clinton, 72 F.3d 1354, 1362 (8th Cir. 1996), *aff'd*, 520 U.S. 681.

[236] *Jones*, 520 U.S. at 684, 708.

[237] *See From the Report: Tracking a Presidential Affair*, WASH. POST, Sept. 13, 1998, at A32.

[238] *Id.* (reporting that, on January 17, 1998, Clinton denied "having 'sexual relations' with Lewinsky under a definition provided by her lawyers").

[239] Articles of Impeachment Against William Jefferson Clinton, H.R. Res. 611, 105th Cong. (1998) (as referred to H.R. by Rep. Henry J. Hyde, Dec, 16, 1998); H.R. REP. NO. 105-830, at 1–5 (1998).

[240] Interview with Justice Stevens, *supra* note 6.

[241] Interview with Nina Totenberg, Legal Affairs Correspondent, Nat'l Pub. Radio, in Wash., D.C.

commentator, Jeffrey Toobin, summarized Justice Stevens's determination that the *Jones* litigation was "highly unlikely to occupy any substantial amount of [Clinton's] time,"[242] as "an epically incorrect prediction."[243] Further, Toobin wrote that, "Stevens, who was nearing his eightieth birthday cloistered from the hubbub of life in the age of cable news, had not anticipated that Jones's lawsuit would turn into a magnet for the [P]resident's political enemies."[244]

To Justice Stevens, this analysis ignored the facts surrounding the case in May 1997 and the limited questions President Clinton had presented in his appeal. Justice Stevens complained that many commentators wrote that his discussion in Jones "show[ed] how dumb I was, that nobody but the village idiot could say something like that, because look what happened . . . an awful lot of authors have used that as an example of one of the most stupid statements in an opinion in history."[245]

In the interview, Justice Stevens noted that the parameters of the case at the time of the Court's decision simply concerned the rights of Paula Jones as a private plaintiff in conflict with the official obligations of the President of the United States.[246] No member of the district court, the appeals court, or the Supreme Court ever heard any testimony or oral arguments about a political conspiracy to undermine the President. Monica Lewinsky was not at issue in the case the Justice decided.[247] "What we held in the case was that the trial did not have to be postponed," Justice Stevens said. Contrary to Toobin's implication, Justice Stevens said, "I said in the opinion it's not likely that the trial itself would take an inordinate amount of the President's time, which I still think is correct."[248] (In April 1998, the trial judge dismissed Jones's suit with no trial.)[249] Justice Stevens added that, in their oral arguments, attorneys for Paula Jones and President Clinton had conceded that the trial court judge could delay depositions if she found they interfered with Clinton's official duties.[250] The fate of President Clinton rested not on whether there should be depositions in *Jones v. Clinton*, which was not an issue before the Court, but what he said in one of the depositions:

> What happened was that he lied at the [*Jones*] deposition and that [lie] got

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(Oct. 8, 2003).

[242] Clinton v. Jones, 520 U.S. 681, 702 (1997).

[243] JEFFREY TOOBIN, THE NINE 118 (2007).

[244] *Id.*

[245] Interview with Justice Stevens, *supra* note 6.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] Peter Baker, Jones v. Clinton *Suit Dismissed: Judge Finds 'No Genuine Issues for Trial*,*'* WASH. POST, Apr. 2, 1998, at 1.

[250] Interview with Justice Stevens, *supra* note 6.

> involved in the Monica Lewinsky stuff. . . . That's what caused the impeachment. Everybody has interpreted it the other way around and said, didn't he [Justice Stevens] realize what a terrible thing this would expose [President Clinton] to if he had to give his deposition. That was not the issue.[251]

In *Jones*, the Court faced a potential crisis in the presidency and the simple rights of a civil litigant with a complaint against the president. Justice Stevens maintains that what happened to President Clinton and Paula Jones after his ruling bore no relation to the case before the Court or his ruling.[252] Journalists were not alone in their ex post facto criticism of the *Jones* ruling. In his 2004 memoir, President Clinton called the decision "one of the most politically naïve decisions the Supreme Court had made in a long time."[253]

Justice Stevens has said that his written opinions should suffice for the press and public.[254] Given the examples above of his own deviation from that rule, it's important to cite his full comment on this point at the 2007 Ninth Circuit Judicial Conference before concluding with some ideas about better Court–news media relations:

> I think it's entirely appropriate to stay out of the limelight, because, after all, we do say an awful lot in our opinions, much more than most of you are willing to read. You try to explain your decisions as carefully as you can. That is a characteristic of the judiciary. It's not a characteristic of other branches of government. We are unique in our openness and in our duty to explain why we make the decisions we do. I think it's perfectly appropriate for a Justice to say, I've done the best I can to explain what my job is all about. Read what I've written. And I don't have to go around making speeches to try to persuade you that there are other reasons for reaching these results.[255]

This point of view notwithstanding, Justice Stevens has taken the advantage of speaking opportunities to elaborate upon the work of the Court. In my view, Justice Stevens and his fellow Justices should welcome these opportunities and work to make them more effective. I now turn to additional steps that might make the process work better.

CONCLUSION: "LEARNING ON THE JOB"

In a September 2005 speech during a symposium held at the Fordham University School of Law, Justice Stevens said, "I know that learning on the bench has been one of the most important and rewarding aspects of my

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[251] *Id.*

[252] *Id.*

[253] BILL CLINTON, MY LIFE 762 (Vintage Books 2005) (2004).

[254] *See Conversation with Justice John Paul Stevens*, *supra* note 7, at 13:20.

[255] *Id.* at 13:25.

own experience over the last thirty-five years."[256] What can the news media as well as current and future Justices learn from his legacy about the relationship between the Supreme Court and the press? "I think for the most part, the press has done a good job covering the Court," Justice Stevens said during the interview for this Essay.[257] But evidence from Justice Stevens's activities on and off the bench suggests that he and his colleagues, both active and retired, might consider a few changes in the relationship between the Court and the news media.[258] Four proposals deserve attention.

First, "syllabuses"[259] summarizing "bench" opinions released by the Court on decision days[260] could be written for a broad audience. Second, an idea from the 1960s in which the legal community would provide individuals to answer reporters' questions about Court decisions on deadline might be revisited. In this same vein, a third proposal would space the release of Court rulings over more days to reduce the release of newsworthy rulings on the same day. Fourth, Justices who, like Justice Stevens, speak almost exclusively to professional law groups and scholarly audiences should consider a change of venue to include nonpartisan organizations of journalists and media executives. By making the Court's work more widely accessible under media deadline pressures, the first three changes could increase the number of mass media reporters covering the Court, beyond the dozen or so full-time Supreme Court correspondents. The fourth idea could broaden the professional sphere of the Justices' interactions to include those who, for better or worse, act as their Greek chorus.

As to my first proposal, syllabuses are written by the Supreme Court's "Reporter of Decisions"[261] in a style that serves Court experts in the bar and academia but almost no one else. Justice Ginsburg, in her Georgetown Law

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[256] John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Learning on the Job, Remarks at the Fordham University School of Law's Symposium on the Jurisprudence of Justice Stevens (Sept. 30, 2005), *in* 74 FORDHAM L. REV. 1561, 1567 (2006).

[257] Interview with Justice Stevens, *supra* note 6.

[258] Justice Stevens is not unacquainted with proposing structural changes to Court procedure. In a 1982 speech to a law society, he recommended the creation of a separate division of the federal judiciary—a "new court," he called it—to review petitions for certiorari to the Supreme Court. Stevens, *supra* note 152, at 181–82.

[259] Tony Mauro, *The Supreme Court's Man of Many Words*, NAT'L L.J., Aug. 25, 2010, *available at* http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202471039307 (explaining the preference of longtime Supreme Court reporter Frank D. Wagner for "syllabuses" instead of "syllabi").

[260] *Information About Opinions*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/opinions/info_opinions.aspx (last visited July 2, 2012) (describing the immediate preparation and release of "bench opinions" that provide the public with the text of opinions delivered by the Court).

[261] Mauro, *supra* note 259 (describing the primary responsibilities of the "Reporter of Decisions," including editing opinions and writing syllabuses); *see also* Ginsburg, *supra* note 8, at 2120 (emphasizing the important role of the Reporter of Decisions in preparing accurate and modest legend-like syllabuses).

Center speech, called them "an almost press-release-style summary [that] can assist the reporter to get it right."[262] Clearly, Justice Ginsburg has not read many effective press releases. In an interview with *The National Law Journal*, Frank D. Wagner, who retired in 2010 after more than twenty-three years as the Court's Reporter of Decisions, said: "[S]yllabus preparation often involves taking an electronic copy of the majority opinion and boiling it down and down and down until we're left with the case's essence, its bare bones."[263] This electronic boiling down process, which is reviewed and frequently edited by the Justice who wrote the opinion,[264] hardly represents an arm's length, fresh look at an opinion using the journalist's inverted pyramid style of presenting the most important information first. Institutionally speaking, it is not surprising that staff members in the Reporter of Decisions' office do not stray far from their Justices' texts. "It's a safer course, but not the most useful," said Michael Eric Herz, a law professor at Benjamin N. Cardozo School of Law in New York City.[265] Given that the syllabuses may not be cited as judicial authority, more user-friendly summaries could be prepared that would serve as an effective gateway to the full opinion instead of a barrier. The dense opening paragraph of the syllabus to the highly controversial *Citizens United v. FEC* ruling in 2010 provided no clue about the essence of the opinion.[266]

In a violation of a basic journalism rule about lead writing, nowhere in the lead paragraph do we learn, so to speak, that the victims of the crime died; that is to say, that the Court overruled decades-old limitations on electioneering spending by labor unions and corporations. Most of the

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[262] Ginsburg, *supra* note 8, at 2124–25.

[263] Mauro, *supra* note 259.

[264] Ginsburg, *supra* note 8, at 2120.

[265] Telephone Interview with Michael Eric Herz, Arthur Kaplan Professor of Law & Co-Dir., Floersheimer Ctr. for Constitutional Democracy, Benjamin N. Cardozo Sch. of Law (July 6, 2011).

[266] The first paragraph of the syllabus in *Citizens United v. FEC* exemplifies the inaccessibility of a typical syllabus:

> As amended by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election, § 434(f)(3)(A), and that is "publicly distributed," 11 CFR § 100.29(a)(2), which in "the case of a candidate for nomination for President . . . means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days," § 100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U. S. C. § 441b(b)(2). In *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 203–209, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, that political speech may be banned based on the speaker's corporate identity.

130 S. Ct. 876, 880–81 (2010) (alterations and omissions in original).

Court's opinions introduced by a syllabus contain a disclaimer that the syllabus "constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader." Professor Herz said syllabuses have become longer and more complex, not more convenient.[267] Of course, things could be worse. Thousands of television viewers will recall the media scramble to interpret the Court's late-night bench opinions in *Bush v. Gore*[268] on December 12, 2000. Reporters fumbled live and on air though sixty-five pages handed to them at 10:00 PM by runners from the Court building, in a chaotic effort to grasp the main point of the decision.[269] There was no syllabus.[270] The *New York Times*'s next-day coverage of this frenzy appeared under the headline "Once Again, the TV Mystery Prevails as Late-Night Fare."[271]

In 1986, Justice Stevens authored what may be the shortest opinion by the Court in decades,[272] *McLaughlin v. United States*, concerning whether an unloaded handgun displayed during a robbery constituted a "dangerous weapon" that would make the defendant eligible for an enhanced penalty.[273] The five-paragraph opinion was introduced by a perfectly comprehensible two-sentence summary followed by a single word, "Affirmed."[274]

Asked during a 2007 video interview why there is not more such

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[267] Telephone Interview with Michael Eric Herz, *supra* note 265.

[268] 531 U.S. 98 (2000).

[269] Peter Marks, *The Media: Once Again, the TV Mystery Prevails as Late-Night Fare*, N.Y. TIMES, Dec. 13, 2000, at A1; *see also*, Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 185–186 (2002) (describing the chaos that ensued in the hours after the Court released its decision).

[270] "It definitely did not contain a syllabus," recalled legal affairs writer Jeffrey Toobin, who was on the scene. E-mail from Jeffrey Toobin, Sr. Analyst, CNN Worldwide, to author (July 10, 2011, 4:34 AM) (on file with author). Linda Greenhouse, who also was in the media gaggle, said: "That was part of the cause of the massive confusion in the press corps. Remember that the decision was styled "'per curiam,' without the author's name, and per curiam decisions typically don't have a syllabus." E-mail from Linda Greenhouse, Supreme Court Correspondent, N.Y. Times, to author (July 8, 2011, 10:43 PM) (on file with author).

[271] Marks, *supra* note 269; *see also* Herz, *supra* note 269 (discussing some of the news media coverage of the scramble).

[272] Bryan A. Garner, *The Style of Supreme Court Opinions*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 107, at 706, 709; *see also* Interview by Bryan A. Garner with John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., *available at* http://lawprose.org/interviews/supreme-court.php?vid=stevens_part_1&vidtitle=Associate_Justice_John_Paul_Stevens_Part_1.

[273] 476 U.S. 16, 16–17 & n.1 (1986).

[274] The summary reads:

> On the basis of his display of an unloaded handgun in the course of a bank robbery, petitioner was convicted under 18 U.S.C. § 2113(d), which provides an enhanced penalty for assault by use of a "dangerous weapon" during a bank robbery.
>
> *Held:* An unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d). Pp. 17–18.
>
> Affirmed.

Id. at 16.

brevity in the opinion-writing process, Justice Stevens replied in jest, "I guess I haven't written many more."[275] The complexity of most controversies that find their way to the Court require greater exposition in a syllabus as well as the opinions of the Justices. Yet *McLaughlin* represents the holy grail for journalists covering the Court and others seeking clear, concise communication by the Justices. Since the days of Chief Justice Warren Burger, the Court's rules require petitions for certiorari and appeal briefs to state the question or questions for the Court "on the first page following the cover, and no other information may appear on that page."[276] A similar rule requiring the Court's answer(s) to be presented briefly in syllabuses and majority opinions would be a giant step toward better public understanding.

Regarding my second proposal, in 1964, the American Association of Law Schools (AALS) began an educational program that provided expert analysis of pending Supreme Court cases prepared as background for reporters.[277] The brief undertaking placed law professors in the Court's pressroom to answer questions after opinions were released.[278] This idea quickly ran into snags. Chief Justice Earl Warren did not like the idea "because of concern that such interpretation could be construed as coming from the Court."[279] Still, the first thing reporters covering a breaking story want to do is talk directly to the experts on the subject, whether it's a fire chief at a fire, an economist after the release of a labor department unemployment report, or a legislator after an important vote.

The AALS program of placing professors in the Court's pressroom was well intended, except that the reporters who might have benefited most were not in the Court's pressroom. They were scattered far and wide, reading wire service headlines about Court decisions and wondering if there could be a unique story for them and their readers. Today, interactive webinars and conference calls going live on the Internet as soon as possible after the release of Court decisions could put these journalists in the loop while keeping the Justices out—a double win for the independence of the press and the judiciary.

My third proposal, a staggered release by the Court of multiple newsworthy decisions, reflects a longstanding complaint by journalists.[280]

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[275] Interview by Bryan A. Garner with John Paul Stevens, *supra* note 272, at 4:17–4:38.

[276] SUP. CT. R. 14(1)(a), 24(1)(a), *available at* http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf; *see also* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE 25, 83 (2008) (providing background and commentary on the first-page rule); JOHN PAUL STEVENS, FIVE CHIEFS 152–53 (2011) (crediting Chief Justice Burger for the first-page rule).

[277] DAVID L. GREY, THE SUPREME COURT AND THE NEWS MEDIA 132–33 (1968).

[278] *Id.*

[279] *Id.*

[280] *Id.* at 144–45; *see also* Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1558 (1996) ("The last day of the 1987–1988 Term was a journalistic nightmare that has attained the status of legend. The Court issued nine decisions that filled

Coverage of the Court's work could only improve if opinions were handed down more frequently, with an eye toward avoiding more than one major decision on the same day.

Finally, several current Justices have been criticized for addressing partisan organizations during the October 2010 Term.[281] "As much as any string of decisions, this has been a central story line of the [T]erm," wrote Jeff Shesol, deputy chief speech writer for President Bill Clinton and author of *Supreme Power: Franklin Roosevelt vs. the Supreme Court*.[282] But there's no ethical or other reason why Justice Stevens could not have delivered his *Judicial Predilections* speech, and *The* Gannett *Case in Perspective* speech, to nonpartisan professional audiences of newspaper editors, television producers, or Internet bloggers. Indeed, his important message about the separation of judicial review from public policymaking and his complaints about news coverage of the Court were better suited for media audiences than law schools or other law organizations.

Supreme Court reporter Dahlia Lithwick of *Slate.com* had some fun with what she sees as a recent trend among Justices to step more eagerly into the press spotlight: "[W]hy are the [J]ustices suddenly seeking media exposure like Paris Hilton? . . . Justices [have] storm[ed] into television studios like Iraqi insurgents into Anbar province."[283] She cited Justice Stephen Breyer's appearances on the *Charlie Rose Show* (October 26, 2005) and *Fox News Sunday* (December 3, 2006); Justice Ruth Ginsburg's interview with Mike Wallace of CBS News (February 11, 2009); Chief Justice John G. Roberts, Jr.'s appearance on ABC News's *Nightline* (November 14, 2006); and Justice Stevens's appearance on *Nightline* (January 2, 2007).[284]

Lithwick offered the following explanation for the Justices' apparent pursuit of increased media exposure:

> Clearly they're concerned about being seen as remote and out-of-touch. . . . The [J]ustices have long claimed that the Court is the most open of the branches because they must justify their actions in writing. But at some point they seem to have collectively realized that America ain't reading. And so, in the fine tradition of the pharmaceutical industry, they have replaced that fine print with an infomercial.[285]

In this regard, taking the lead of the pharmaceutical industry is a good idea.

Justice Stevens's style of communicating beyond his written opinions

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446 pages in the United States Reports, including a number of important cases . . . ." (footnote omitted)).

[281] Jeff Shesol, Op-Ed., *Should Justices Keep Their Opinions to Themselves?*, N.Y. TIMES, June 29, 2011, at A23.

[282] *Id.*

[283] Dahlia Lithwick, *Why Are the Justices Popping Up All over the Tube?*, NAT'L L.J., Mar. 7, 2007.

[284] *Id.*

[285] *Id.*

is well suited for the Justices who follow him if they choose to engage in more expansive Supreme Court–news media relations. His speeches are nearly always expositions of the Court's work, not remarks about himself or appeals to political or judicial ideology. Even at a gala event by the 2010 Chicago Bar Association to celebrate his retirement, held in the South Michigan Avenue hotel built by his father and grandfather in the 1920s,[286] Justice Stevens offered commentary on four recent cases from which he dissented, with almost no personal comments.[287] Seriousness of purpose is an appropriate characteristic of extrajudicial communications by a Supreme Court Justice. Still, conveying the work of the Court beyond the small community of Court watchers requires exposure to a larger venue. In retirement, Justice Stevens has written a book.[288] He has been interviewed for broadcast on the subject of longevity by an affiliate of AARP.[289] He has written about death penalty jurisprudence for the *New York Review of Books*.[290] Free of the work of a sitting Justice, he has shown the way for better relations with the press and public by his sitting colleagues and those who follow. None of his recent outreach is beyond the time constraints of active Justices. Each has improved public accessibility to the Court. None has diminished the Court's stature or independence.

Justice Stevens has even had some fun. One exception to my "seriousness of purpose" proscription above occurred at his post-retirement speech to Chicago's Better Government Association in October 2010, when he delighted his audience with extemporaneous remarks about his favorite baseball team:

> I wrote out a week or so ago a learned statement about stare decisis that would be fascinating to scholars . . . for the evening. . . . But as the day has gone on, I thought it might be more appropriate to talk a little bit about the Chicago Cubs.[291]

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[286] *See supra* note 19.

[287] Maria Kantzavelos, *Justice Stevens Honored at Annual Awards Dinner*, CHI. DAILY L. BULL., Sept. 16, 2010, at 1. For opinions of the cases discussed by Justice Stevens, see *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995).

[288] STEVENS, *supra* note 276.

[289] Inside E Street: John Paul Stevens Discusses Longevity (AARP television broadcast July 5, 2011), *available at* http://www.aarp.org/health/longevity/info-07-2011/video-john-paul-stevens-conversation-on-longevity.html.

[290] John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 10, 14 (book review).

[291] John Paul Stevens, Assoc. Justice, Supreme Court of the U.S., Address at the Better Government Association Annual Award Luncheon at 0:11–0:34 (Oct. 13, 2010), *available at* http://www.bettergov.org/development/2010_award_luncheon.aspx.