

SOME THOUGHTS ON JUSTICE STEVENS AND JUDGING

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Justice Stevens served on the Supreme Court for thirty-five years and on the Seventh Circuit for five years before that, so summarizing his judicial career will be a multi-year, multi-volume project for legal scholars. But Justice Stevens's underlying approach to judging may be easier to summarize. Two aspects of his approach stand out in my mind—namely, the importance he attached to the actual facts of a case and his deep respect for the law.

First, although the Supreme Court's primary concern is with legal issues of broad significance, Justice Stevens never lost sight of the fact that the Court decides real cases, with real parties and real facts. Indeed, from his perspective, the parties and what happened to them are central. Not because his decisionmaking was driven by "empathy"—at least not in the sense that the word has been tossed around by politicians and the media in connection with the confirmation process for recent Supreme Court appointees—but because, to a common law judge, context should matter, and matter a lot. That's why Justice Stevens's opinions often include detailed explanations of the facts of a case, explanations that often reflect research into the record going well beyond what the parties provided in their briefs. It's also why Justice Stevens often asked carefully crafted hypothetical questions at oral argument (questions that would make the most experienced advocates shudder)—to test how the legal principles the Court was being asked to adopt in one context would work in others.

Two specific examples of Justice Stevens's concern with the parties and the facts, neither of them likely to warrant mention in the yet-to-be-written definitive study of his career, come to mind from my tenure as one of his law clerks during the October Term 1980. One involved a federal prisoner who filed literally hundreds of pro se civil rights, habeas corpus, and other actions in a variety of state and federal courts—indeed, hardly a week went by at the Court during the October Term 1980 without a petition for certiorari or mandamus or some other form of relief being submitted by this prisoner.¹ Finally, several courts had had enough and entered orders

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¹ The Fifth Circuit reported that he had filed more than 500 cases in state and federal courts throughout the country. *See In re Green*, No. 81-1186, 1981 U.S. App. LEXIS 13861, at *1 (5th Cir. Apr. 27, 1981) (citing *Green v. Camper*, 477 F. Supp. 758, 759–68 (W.D. Mo. 1979)).

directing their clerks' offices not to accept any further filings by the prisoner. He challenged one of these orders, entered by the Fifth Circuit, by filing yet another petition for mandamus in the Supreme Court. There was no question that, as the Fifth Circuit recited, the prisoner's filings were "malicious and frivolous,"² but that was not the primary issue, from Justice Stevens's perspective. Rather, Justice Stevens was deeply concerned that, if prison guards learned that the prisoner no longer had access to the federal courts, he might become a prime target for their frustrations. It was only after Justice Stevens became comfortable that the Fifth Circuit's order avoided that danger—by providing an exception for actions that alleged physical harm or threats of physical harm³—that he voted to deny the prisoner's petition for mandamus.⁴

The second example is a First Amendment case, *Schad v. Borough of Mount Ephraim*.⁵ The appellants in *Schad* were the operators of an adult bookstore who had been convicted of violating a local zoning ordinance that prohibited live entertainment in a particular commercial district; the live entertainment offered in their establishment was nude dancing, available for viewing in private booths through glass panels with curtains that opened when coins were inserted in a slot. The town's offered justification for the ordinance was that live entertainment in general was inconsistent with the character of the commercial district in which the bookstore was located. The Court reversed the convictions, holding that Mount Ephraim had failed to offer a sufficient justification for an ordinance that broadly prohibited live entertainment, a well-established protected category of expression, and which apparently had been selectively enforced against the appellants.⁶

Justice Stevens concurred in the judgment but could not join the majority's opinion because he was troubled by the absence of record evidence concerning the specific character of the commercial district. As Justice Stevens saw it, such factual detail was important because, "even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, its roots were germinated by more serious concerns . . ."⁷ Justice Stevens noted that the record, sparse though it was, indicated that the commercial district included establishments such as the Club Al-Jo, the Spread Eagle Inn, and Villa Picasso.⁸ But without

² *Id.* at *2.

³ *Id.* at *3.

⁴ *In re Green*, 452 U.S. 903 (1981).

⁵ 452 U.S. 61 (1981).

⁶ *Id.* at 72–76.

⁷ *Id.* at 80 (Stevens, J., concurring in the judgment) (footnote omitted). I would like to say that Justice Stevens's law clerks had something to do with that elegant turn of phrase, but modesty, not to mention honesty, precludes that claim.

⁸ *Id.* at 81–82 (footnotes omitted).

more factual development, he explained, it was impossible to tell whether the appellants' adult bookstore/dance emporium "introduced cacophony into a tranquil setting or merely a new refrain in a local replica of Place Pigalle."⁹ He ultimately joined in the judgment because he believed it was Mount Ephraim's burden to develop a record to justify the ordinance, and the town had failed to carry that burden.¹⁰

In a postscript to the Mount Ephraim story, my co-clerk and I decided to try to plug the gap in the record that had so bothered Justice Stevens. To do that, after the case had been decided and the Term had ended, we took a field trip to Mount Ephraim to see for ourselves whether the commercial district was a "tranquil setting" or a "local replica of Place Pigalle." Our research was inconclusive on that question, but we did learn that the Spread Eagle Inn was named for an American eagle with spread wings, rather than carrying some less savory connotation. And we viewed the adult bookstore in question only from the outside (which was for the best given that we had a toddler with us). On balance, we concluded that a more complete record likely would not have changed the outcome of the case.

The other notable aspect of Justice Stevens's approach to judging is that it is driven by his deep love and respect for the law. Justice Stevens sees the law as more than merely a system of rules and regulations and sees lawyers as more than technicians trained to manage and manipulate those rules and regulations. The law, to Justice Stevens, is the backbone of society, the foundation on which everything else rests, and lawyers and judges are the custodians and guardians of that foundation.

Another case the Court decided in the October Term 1980, also not likely to turn up on any list of Justice Stevens's greatest hits, reflected Justice Stevens's view of the role of the law and, in particular, of the importance of certainty and predictability in the law. In that case, *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*,¹¹ an association of nursing homes sought a declaration that the United States Department of Health, Education & Welfare and its Florida counterpart had been improperly computing Medicaid reimbursements for nursing home services and sought retroactive monetary relief from the State to compensate for the error. The court of appeals had held that the regulation at issue was invalid and, contrary to the district court, that the Eleventh Amendment did not bar the claim for monetary relief. The Supreme Court reversed on the Eleventh Amendment issue, holding that its

⁹ *Id.* at 83. Not being members of "the greatest generation," Justice Stevens's law clerks were baffled by the reference to Place Pigalle (pronounced "pigal" in French). Diligent research revealed that the reference was to a district in Paris known for its sex shops and prostitutes, a reputation that led to it being given the nickname "Pig Alley" by American soldiers during World War II.

¹⁰ *Id.* at 83–84.

¹¹ 450 U.S. 147 (1981).

1974 decision in *Edelman v. Jordan*¹² controlled and rejecting the nursing home association's request that the Court reconsider *Edelman*.

Justice Stevens concurred in the Court's per curiam opinion reversing the court of appeals, but wrote separately to emphasize the importance of stare decisis. He explained that he believed that *Edelman*—which predated his appointment to the Court—had been wrongly decided. Although he believed that an argument might be made for dispensing with stare decisis in this instance to address a particular injustice, he was more concerned

about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel. Granting that a zigzag is sometimes the best course. I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity.¹³

This presumption of validity, he believed, “is an essential thread in the mantle of protection that the law affords the individual. . . . It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.”¹⁴

Justice Stevens found the best expression of this view not in prior decisions of the Court, but in Robert Bolt's classic *A Man for All Seasons*, in an exchange between Sir Thomas More and his daughter's suitor, Roper. In that memorable passage, which others on the Court had referenced before,¹⁵ Thomas More explains that the law must be respected, even to protect the Devil himself, for otherwise,

when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!¹⁶

Underlying this respect for the law and stare decisis is a fundamental modesty, a recognition that an individual judge is not a source of ultimate truth, but rather a steward who works within a structure others have constructed. Thus, like Thomas More, Justice Stevens was confident that he “know[s] what's legal, not what's right. And I'll stick to what's legal.”¹⁷ He might not be certain about “[t]he currents and eddies of right and wrong,”

¹² 415 U.S. 651 (1974).

¹³ *Fla. Dep't of Health & Rehabilitative Servs.*, 450 U.S. at 153 (Stevens, J., concurring).

¹⁴ *Id.* at 154. Another turn of phrase for which the law clerks, sadly, can claim no credit.

¹⁵ *E.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978).

¹⁶ ROBERT BOLT, *A MAN FOR ALL SEASONS* 38 (Vintage Books 1962); see *Fla. Dep't of Health & Rehabilitative Servs.*, 450 U.S. at 154 n.14.

¹⁷ BOLT, *supra* note 16, at 37.

where others “find such plain sailing,” but “in the thickets of the law, oh, there I’m a forester.”¹⁸

In Justice Stevens’s view, “in the thickets of the law,” judges and lawyers, like Thomas More, should be the “forester[s].” And what was true of Thomas More can likewise be said of Justice Stevens: “I doubt if there’s a man alive who could follow” him in those thickets.¹⁹ When the law professors write their tomes on Justice Stevens’s judicial legacy, and inevitably struggle to try to fit him into an ideological category or to find some other unifying principle that transcends individual opinions, I suggest that they consider his fundamental judicial modesty and his view of the role of the law and lawyers as possible overarching themes.

Every one of Justice Stevens’s law clerks will tell you that he was the best boss we’ve ever had. Every one of us will also tell you that he was the best judge we’ve ever encountered. The best boss part is easy to explain—he is brilliant, thoughtful, kind, and unbelievably generous with his time and talent. The best judge part is probably more complicated, but rests at least in part, I think, on his particular approach to the task of judging and the concern for the parties and respect for the law which underlie it.

¹⁸ *Id.*

¹⁹ *Id.*

