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Remarks by Dean William M. Treanor

William Michael Treanor

Georgetown University Law Center, wtreanor@law.georgetown.edu

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REMARKS

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WILLIAM M. TREANOR*

Thank you. That was a wonderful introduction. I hadn't thought of it as an all-you-can-eat cupcake event but I guess that's fair. And it's a privilege to be here today and to be part of this celebration of one of the great judicial careers in the nation's history, so Justice Stevens, we are so honored that you are here today, we are so honored that we have this occasion to look back on your tenure on the Court, so thank you very much. And I want to thank all of our participants; this is really an extraordinary program. The first panel of academics and the second panel of practitioners were really absolutely remarkable, and so I want to thank everybody who came here, and I particularly want to recognize Pam Harris, who is the moderator on the last panel. Pam is the executive director of our Supreme Court Institute and this is actually her last day at Georgetown. She is going to go to the Department of Justice on Monday, and so I would just like a round of applause for Pam Harris.

So in a moment you'll be hearing from Acting Solicitor General Neal Katyal, but before I introduce the Acting Solicitor General, I want to talk a little bit about Justice Stevens's contribution and specifically his contribution to the rule of law. And my framework on this, my perspective is really shaped by the Fordham conference that you just heard described a minute ago, which was five years ago. It was part of the celebration of Fordham's Centennial, and Professor Abner Green on the faculty, who was a clerk for Justice Stevens, said, "There has never been a symposium on Justice Stevens's legacy, we should use the occasion of the centennial to bring together many of his former clerks in academia to talk about what his legacy was." And we were just absolutely delighted when Justice Stevens accepted and then shortly before the symposium took place, I was sitting at my desk and I got a phone call and it was from Benton Becker, who was President Ford's counsel, and President Ford, as you heard earlier, nominated Justice Stevens for the Court. And Mr. Becker said that President Ford had found out about the symposium and I should expect a letter from President Ford. And so a couple of days later I received the letter,¹ and I presented it at the symposium and, needless to say, it was a very emotional experience. I know that Justice Stevens was very touched to receive it and hung it on a wall of his Supreme Court chambers and everyone there, everyone who

* Dean, Georgetown University Law Center. © 2011, William M. Treanor.

1. Letter from Gerald R. Ford, former President of the United States, to author (Sept. 21, 2005). The letter has been reprinted in several sources. See, e.g., William Michael Treanor, *Introduction*, 74 *FORDHAM L. REV.* 1557 (2006).

was part of that really treasures the memory of that occasion.

The letter starts out:

Historians study the significant diplomatic, legislative and economic events that occur during a presidential term to evaluate that presidency. Normally little or no consideration is given to the long term effects of a President's Supreme Court nominees. Eisenhower's Earl Warren, John Adams' John Marshall and Wilson's Louis Brandeis immediately come to mind, although references to these great jurists are usually absent in presidential biographies.

President Ford continued: "Let not this be the case with my presidency. For I am prepared to allow history's judgment of my term in office to rest if necessary exclusively on my nomination thirty years ago of Justice John Paul Stevens to the U.S. Supreme Court." And it's an extraordinary statement. It's unparalleled in American history. I don't know of any other American President who would say that he would be content to let his reputation rest on the act of nominating a Supreme Court Justice. But it's very appropriate, and I think it really captures the Ford legacy as well as the legacy of Justice Stevens.

Coming in as a result of Watergate, President Ford confronted a deeply wounded nation and he saw his mission as being, to quote the title of his autobiography, *A Time to Heal*, his mission was to heal the country. Watergate had challenged the primacy of the rule of law, but the challenge to the rule of law during the Nixon presidency was not limited to the crimes of Watergate. It had also taken place through the judicial selection process. When Nixon was running for President in 1968, when he was on the stump, he said if he were elected President he couldn't think of a finer Chief Justice than Henry Friendly, who was the legendary judge of the Second Circuit. Nixon made six nominations to the Supreme Court. He never nominated Henry Friendly and the unsuccessful nominations of Judges Carswell and Haynsworth in particular were deeply divisive. And John Hart Ely, who went on to become one of the great constitutional scholars of his generation—really, I think, of any generation—at the time was the general counsel of the Transportation Department, and in anticipation of Justice Douglas's resignation he wrote a memo which captured the concern of the time. He talked about how Watergate was really not the only thing that the Nixon presidency had done to undermine constitutional government. Equally important, he said, was the cynical selection process and specifically the Haynsworth and Carswell nominations.

Now when President Ford became President and then Justice Douglas stepped down, he faced great pressure from many constituencies to name someone from a range of ideologies, a range of perspectives, but he decided—President Ford decided—that the right thing to do was to pick someone not on the basis of ideology but on the basis of their strength as a jurist. And so he told Attorney General Levy, who was an extraordinary person in American history, a great attorney general, he told him that he wanted a list of candidates and he wanted

the Attorney General to consider the following factors: competence, previous court experience, personal integrity, a history of independent thought; and he wanted someone in their 50s, because he wanted the Justice to have a substantial period on the bench. He got more than he bargained for, I'm sure. So Attorney General Levy produced a list of candidates and it seems clear he particularly highlighted then-Judge Stevens. President Ford took the list, he read some of then-Judge Stevens's opinions which he pronounced concise, persuasive, and legally sound. He slept on his decision and the following day he nominated Justice Stevens, who was confirmed within three weeks ninety-eight to nothing. So it was a very different world, but it's also a testament to Justice Stevens and the respect that he held in the bench and the bar at that time.

There was criticism. In historical hindsight it seems striking: the National Organization of Women worried about, in light of his opinion on the ERA, whether he would be good for women's rights. And there was also concern about his health. But again as the ninety-eight to nothing vote reflects, as the three weeks of consideration reflect, there was an enormous embrace of Justice Stevens as the right person to pick at that time. *The New York Times*, when Justice Stevens retired, observed that he "may be the last Justice from a time when ability and independence, rather than perceived ideology, were viewed as the crucial qualifications for a seat on the Court."² But I think the broader point is that his nomination by President Ford was a powerful statement of faith in the rule of law and a healing act at a time of deep division. The selection of someone President Ford called the finest legal mind, which is the title of today's symposium, played an important role in restoring faith in government and I think as we focus on his legacy on the Court I think it's also important to recognize the legacy of his nomination.

Justice Stevens's legacy on the Court accords with the historical impact of his nomination. I think all of us know, and I think it's just reaffirmed by the first two panels, he was a Justice profoundly committed to the rule of law, he took precedent seriously, he considered carefully the consequences of his decisions, he thought deeply about the judicial role, he was fair, and he also changed his mind when he thought that was appropriate. And so when he spoke at the Fordham symposium his lecture was called "Learning on the Job," and it reflected the way in which he both reconsidered his initial views of cases, when he read the briefs and reflected on them, and how his views changed over time in areas such as affirmative action and substantive due process. And it's because he fulfilled his great promise, it's because he became the kind of judge he became, that President Ford celebrated his role in selecting Justice Stevens.

So after the Fordham event I called back Benton Becker, President Ford's counsel, and I told him how moved Justice Stevens was when I presented President Ford's letter to him. And a few days later I got a call back from Mr. Becker and he said the President wants to hear it from you himself. So it was a

2. Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1.

great thrill. I called up President Ford and I told him how moved Justice Stevens had been to receive the letter and President Ford was absolutely delighted. And he repeated to me what he had written in his letter, that he would be pleased if the judgment of history rested in determining the merit of his presidency rested on his selection of John Paul Stevens for the Court. And President Ford's letter to me concluded:

Justice Stevens has served his nation well at all times, carrying out his judicial duties with dignity, intellect and without partisan political concerns. Justice Stevens has made me and our fellow citizens proud of my three-decade-old decision to appoint him to the Supreme Court. I wish him good long life, good health and many more years on the bench.

Warmest regards,
Gerald R. Ford

And so today as we mark the conclusion of that tenure on the bench, that most remarkable tenure, we join with President Ford in wishing Justice Stevens long life, good health and we all say, Justice Stevens, thank you.

And it is now my privilege to welcome the Acting Solicitor General of the United States, Neal Katyal. Professor Katyal is the Paul and Patricia Saunders Professor of National Security Law and the director of the Center on National Security Law here at Georgetown. Before coming to Georgetown, he served as a law clerk for Justice Stephen Breyer. He then went on to serve as National Security Advisor in the Justice Department and I have to say it's a particular privilege for me to introduce him here today because we worked together ten years ago and I admire his integrity and his brilliance and it has been a privilege for me to watch his career unfold and the difference that he's made in the law and the campaign for individual liberties in the past ten years. He served as co-counsel for Vice President Gore in the election dispute in 2000. In 2006 he represented Salim Ahmed Hamdan before the Supreme Court in *Hamdan v. Rumsfeld*, and it's particularly appropriate that he's here because Justice John Paul Stevens wrote the opinion for the court in *Hamdan*.³ And former Solicitor General Walter Dellinger stated that *Hamdan* is simply the most important decision on presidential power and the rule of law ever. Ever. I'm quoting Professor Dellinger. Among his countless accolades Solicitor General Katyal was named Lawyer of the Year in 2006 by *Lawyers USA*, one of the top fifty litigators of forty-five or younger by *American Lawyer* in 2007, and in 2008 one of the ninety greatest Washington lawyers of the past thirty years by *Legal Times*. Please join me in welcoming Neal Katyal.

3. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Stevens, J.).