

## JOHN PAUL STEVENS

*Joseph Thai\**

“It is confidence in the men and women who administer the judicial system,” John Paul Stevens once wrote, “that is the true backbone of the rule of law.” *Bush v. Gore* (2000) (dissenting). As a justice on the Supreme Court, Stevens has sought to administer his part of the judicial system by examining the details of every case before him with great care, deciding each based on the best judgment he could apply to competing sides, and explaining the reasons for his judgments as fully as possible. As a result of this case-by-case approach, what has emerged from more than thirty years of Stevens’s work on the Court is a voluminous body of judicial opinions that defy simple categorization by ideology or outcome, but that reveal a highly intelligent, independent, and honest effort to uphold the rule of law in cases large and small.

### *Life*

Stevens’s roots were firmly planted in the Midwestern city of Chicago, where he was born on April 20, 1920. His mother taught English in high school, and his father built and owned the lavish Stevens Hotel, which went bust during the Great Depression.

Stevens received his primary and secondary education at the University of Chicago Laboratory Schools, founded by the pragmatist John Dewey. He also attended college at the University of Chicago, where he studied English literature. Upon graduating Phi Beta Kappa in 1941, Stevens enrolled in graduate studies there with a view toward teaching high-school English like his mother.

Over the summer of 1941, however, at the urging of a college dean who recruited for the Navy, Stevens completed a naval correspondence course on cryptography, and on December 6, 1941, Stevens enlisted in the Navy as a commissioned intelligence officer. The country’s apparent desperation in accepting his enlistment, Stevens once remarked, encouraged the next day’s attack on Pearl Harbor.

From 1941-1945, Stevens served at Pearl Harbor as a code-breaker of intercepted Japanese transmissions. For this critical work, at which he excelled, Stevens received a Bronze Star.

Following his World War II service, Stevens heeded a brother’s advice to serve the public as an attorney, and enrolled in law school at Northwestern University. There, he became the editor-in-chief of the law review and graduated first in his class after two years, with the highest grade point average in the school’s history. On the strength of his academic record, as well as the recommendation of professors who considered him “the

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\* Associate Professor of Law, University of Oklahoma. A.B., 1995, Harvard College; J.D., 1998, Harvard Law School. Law Clerk, 2000-2001, Justice John Paul Stevens. This article will be published in *The Encyclopedia of the Supreme Court of the United States* (Macmillan 2008).

quickest” and “best balanced mind” they had encountered, Justice Wiley Rutledge hired Stevens as a law clerk for the Supreme Court’s 1947-1948 term. (Rosen p. 55).

Rutledge left a profound impression on the young Stevens. After the clerkship, Stevens recalled with admiration his mentor’s “painstaking review” of every aspect of a case, his deliberate “habit of understanding before disagreeing,” his preference for reasoned judgment and practical considerations over “theoretical rules,” and his “conviction that an independent judiciary is absolutely necessary for the preservation of law.” (Stevens 1956, pp. 179-198). Later, as a justice, Stevens would follow Rutledge’s methodological example, and in the context of a different world struggle, Stevens would reaffirm Rutledge’s core belief in the indispensability of due process in wartime.

After the clerkship, Steven returned to Chicago and entered private practice. He proved very successful as an antitrust lawyer, served on prominent congressional and executive committees studying antitrust matters, taught the subject at Northwestern and the University of Chicago, and published in the field.

The respect Stevens earned as a lawyer led to his appointment in 1969 to investigate allegations that two justices on the Illinois Supreme Court had accepted bribes. Stevens’s widely-praised investigation, which led to the resignation of those justices, garnered the attention of Senator Charles Percy of Illinois, who recommended him for appointment to the Seventh Circuit Court of Appeals. President Richard Nixon did so in 1970.

As a Seventh Circuit judge, Stevens wrote opinions of “consistent excellence” in “an astonishing number of areas,” according to an ABA representative evaluating his subsequent Supreme Court nomination. (Thai 2006, p. 1556). President Gerald Ford nominated Stevens upon Justice William Douglas’s retirement, with the hope of uniting the country after Watergate behind a non-ideological nominee of unquestionable merit. Less than a month later, the Senate approved by a vote of 98-0.

### ***Judicial Method***

According to Justice Louis Brandeis, one reason the public respects the members of the Supreme Court is that “they are almost the only people in Washington who do their own work.” (Wyzanski p. 61). John Paul Stevens has adhered to this venerable practice as a justice. In an era of increasing reliance on law clerks, Stevens alone has insisted on his chambers independently reviewing the thousands of certiorari petitions filed each year, rather than relying on a pool of law clerks from the eight other chambers for a recommendation on whether the Court should hear a case. Stevens also stands out as the only justice on the current Court to write the first drafts of his opinions, rather than revise those crafted by law clerks. In his words, writing the initial draft is “terribly important,” because it gives him “a chance to think it through,” and “you don’t often understand a case until you’ve tried to write it out.” (Rosen p. 72).

Stevens’s opinions bear a remarkable resemblance in form to those of his admired mentor. As he has described Rutledge’s opinions, his own typically contain a “full

statement of all the factors which lead to and qualify the result which is eventually reached,” as well as a “full statement of opposing arguments and countervailing considerations” found less persuasive, indicating that “the faculty of judgment and not merely the logical application of unbending principles has been employed to resolve an actual controversy between litigants.” (Stevens 1956, p. 182).

Although Stevens has wryly noted a preference for writing majority opinions, he has distinguished himself for writing more dissents than any of his colleagues on the Court. Dubbed “the dissenter” by the *New York Times*, Stevens has eschewed masking disagreement for the appearance of unity on the Court. As he has explained, “I just feel I have an obligation to expose my views to the public.” (Rosen p. 56).

Whether writing for the Court or himself, Stevens has strongly preferred deciding each case narrowly based on reasons particular to its context, rather than, as colleagues such as Antonin Scalia has espoused, broadly based on categorical rules fashioned by judges. Stevens’s approach falls within a common law tradition of judicial restraint, whereby judges develop the law slowly and cautiously over the course of many cases. For Stevens, the approach reflects a “duty to avoid unnecessary lawmaking,” as well as pragmatic mistrust of “untried statements of general principles.” (Stevens 1982, p. 180; Stevens 1956, p. 188). It also reflects his central conviction that sound judicial decisions ultimately require use of the faculty of judgment, which reliance on absolute principles obscures but does not avoid.

Stevens’s sense of duty and pragmatism has led him, when construing statutes, to attempt to effectuate the will of the legislature through consideration of “all reliable evidence of legislative intent.” *Exxon Mobil Corp. v. Allapattah Services* (2005) (dissenting). Because “any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand,” Stevens believes in reviewing not only the relevant statutory provision but the entire statute, and considering the statute in light of legislative history as well as historical context. *Griffin v. Oceanic Contractors* (1982) (dissenting). As he has written, relying solely on the text of the statute may leave a court “uninformed, and hence unconstrained” to interpret an ambiguous provision consistent with its own policy preference, rather than with the legislative purpose behind the enactment. *Circuit City v. Adams* (2001) (dissenting).

When construing the Constitution, Stevens has sought to implement its fundamental principles one case at a time. He has specifically rejected the more ambitious approach of colleagues like Justices Scalia and Clarence Thomas of discovering and following the original meaning of the constitutional text. While he believes that original understanding may be important, he does not think it is always possible, as a practical matter, to divine how words written centuries ago were meant to apply in unforeseen contexts.

More importantly, in Stevens’s view, the Framers of the Constitution “made no attempt to fashion a Napoleonic Code that would provide detailed answers to the many questions that would inevitably confront future generations.” Instead, they often used general language with the expectation that “the vast open spaces in our charter of government”

would be interpreted incrementally “by the common-law process of step-by-step adjudication that was largely responsible for the development of the law at the time this nation was conceived.” (Stevens 1992, p. 35-36). The process of faithfully applying basic and broad constitutional principles—such as “liberty,” “due process,” and “equal protection”—relies on the exercise of impartial judgment for which the Constitution granted judges life tenure, according to Stevens. And “just as the Framers themselves decided to say no more than was necessary,” Stevens infers that “their silence was a command to the judges of the future to exercise comparable self-restraint.” (Stevens 1985, p. 452).

### *Cases*

Stevens’s views on judicial restraint have led him, in the legislative context, to defer to the reasonable interpretations of administrative agencies construing statutory ambiguity or silence in one of his most important opinions for the Court, *Chevron v. Natural Resources Defense Council* (1984). Out of respect for congressional delegation of policymaking authority, and out of pragmatic recognition of administrative expertise, *Chevron* gave breathing room to the modern administrative state by allowing agencies to fill in statutory gaps not on the basis of “judges’ personal policy preferences,” but “in light of every day realities,” and consistent with the policies of a democratically accountable incumbent administration.

*Chevron* does not, however, permit an agency to disregard an unambiguous congressional command, as Stevens made clear in the landmark environmental case of *Massachusetts v. EPA* (2007). Through his majority opinion, the Court held that the President’s anti-regulatory stance on global warming could not displace Congress’ clear directive in the Clean Air Act that the Environmental Protection Agency “shall” regulate greenhouse gases from emissions of new motor vehicles upon an agency finding of public endangerment.

The constitutional balance of power between Congress and the President also came to the fore in *Hamdan v. Rumsfeld* (2006). In perhaps the most significant presidential powers decision in a generation, Stevens reaffirmed for the Court the fundamental constitutional principle that “the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.” As a result, the Court invalidated the military commissions created unilaterally by President George W. Bush to try terror suspects at the Guantanamo Bay Naval Base, Cuba. Those tribunals violated federal law, according to *Hamdan*, by failing to provide the most basic protections afforded by military laws and treaties, including the right of an accused to see and hear evidence against him.

*Hamdan* itself was made possible by another key terrorism decision which Stevens authored, *Rasul v. Bush* (2004). There, the Court rejected the President’s position that Guantanamo Bay’s location outside the United States deprived federal courts of jurisdiction, through the writ of habeas corpus, to review the legality of the detention of foreigners held there. In doing so, Stevens’s opinion revived the dissenting view of Justice Rutledge in *Ahrens v. Clark* (1948)—a case Stevens worked on as a law clerk—

that such a “narrow and rigid territorial limitation” should be “avoid generally, even assiduously, out of regard for the writ’s great office in the vindication of personal liberty.”

Indeed, *Hamdan* and *Rasul* reflect Rutledgean vigilance for preserving the rule of law and the freedom that it guarantees through protecting access to an independent judiciary and ensuring fair process even in wartime. But as significant as these decisions were, they were not sweeping. *Hamdan*, for its part, invalidated only the specific tribunals established by the President and challenged by the detainee in that case, and left the door open for commissions constituted in accordance with federal law. *Rasul*, likewise, limited its holding to its particular context, finding the United States’s sovereign control over Guantanamo Bay sufficed to support habeas jurisdiction, but declining to opine whether jurisdiction might extend anywhere or everywhere else.

This practice of deciding no more than necessary displays, in these cases, not only Stevens’s judicial restraint and pragmatism. By leaving room for the political branches to respond in matters of national security, these decisions also exhibit Stevens’s respect for their coordinate role in our constitutional system. As he has stated elsewhere, the better course is to decide the case “actually presented” than “to craft an all-encompassing rule for the future,” for it is “far wiser” to give elected officials “an unimpeded opportunity to grapple with these emerging issues . . . than to shackle them with prematurely devised constitutional constraints.” *Kyllo v. United States* (2001) (dissenting).

Stevens’s preference for “small” decisions recurs in nearly all areas of law. (Schauer p. 544). For example, in the free speech area, Stevens upheld for the Court the government’s power to proscribe the afternoon radio broadcast of George Carlin’s “seven dirty words” monologue, but took pains to emphasize the “host of variables” limiting the decision, including the hour of the program and the pervasiveness of the broadcast medium. *FCC v. Pacifica Foundation* (1978). More famously, in *Texas v. Johnson* (1989) (dissenting), Stevens vigorously argued that the government may ban the burning of the American flag, because, unlike other emblems, it “uniquely symbolizes” the nation’s ideals of “liberty and equality,” and is “worthy of protection from unnecessary desecration.”

In these and other First Amendment cases, Stevens has eschewed the Court’s absolutist framework of dividing speech in the abstract into “protected” and “unprotected” classes, and presumptively invalidating regulations that target protected speech because of its content. On the view that such an “all-or-nothing” method “sacrifices subtlety for clarity,” and is “ultimately unsound” given “the complex reality of expression,” Stevens instead has used a balancing approach that calls for judges to weigh the value of the particular expression at issue against the importance of the government interests advanced by the regulation. *R.A.V. v. St. Paul* (1992) (concurring). This approach accords with Stevens firm conviction that “placing greater reliance on the judgment of judges” rather than the application of rigid rules will yield sounder decisions and more open explanations. (Stevens 1956, p. 187).

In the area of Equal Protection, Stevens similarly has called for a context-sensitive approach that requires judgment over a categorical one that minimizes it. Rejecting the Court's tiered scheme for reviewing equal protection claims under differently weighted standards with the observation that "[t]here is only one Equal Protection Clause," Stevens has attempted to directly assess whether government has complied with what he regards as the fundamental constitutional guarantee that it "govern impartially." *Craig v. Boren* (1976) (concurring). That attempt has led to his vote to invalidate racial set-asides in federal contracting (*Fullilove v. Klutznick* (1980) (dissenting)), but to uphold racial preferences in college and law school admissions (*Gratz v. Bollinger* (2003) (dissenting); *Grutter v. Bollinger* (2003)).

These results follow, according to Stevens, from the "critical difference" between using race in a context where it would produce no racially-related benefits, such as highway construction, and using race in a context where it would, such as education. (Stevens 2006, p. 1565). Indeed, in Stevens's view, the educational benefits conferred by diversity give rise to a further distinction between *including* a minority on account of race and *excluding* one because of race. Thus, wrote Stevens, the Court's invocation of *Brown v. Board of Education* (1955), which struck down racially segregated schooling, to strike down voluntary school integration plans constituted "a cruel irony." *Parents Involved in Community Schools v. Seattle School District* (2007) (dissenting).

Despite the small footprint that Stevens's decisions generally leave, over the course of more than three decades, he has left a large impression on the law of the land. In *Gregg v. Georgia* (1976), for instance, Stevens co-wrote the main opinion rejecting the view that capital punishment always violates the Eighth Amendment, and upholding a scheme of guided jury discretion that continues to shape the death penalty today. Nevertheless, Stevens has led the Court in narrowing the class of death-eligible defendants by barring the execution of the mentally retarded and juveniles as "cruel and unusual" punishment. *Atkins v. Virginia* (2002); *Thompson v. Oklahoma* (1988); *Roper v. Simmons* (2005). Additionally, Stevens has argued that the "liberty" guaranteed by the Due Process Clause encompasses the "intimate choices" of all persons, regardless of sexual orientation. *Bowers v. Hardwick* (1986) (dissenting). The Court embraced that view in *Lawrence v. Texas* (2003). Stevens has also assured the font of federal power to legislate in a wide array of areas, from narcotics to civil rights, through affirmation of an expansive interpretation of the Commerce Clause that harkens back to Chief Justice John Marshall's nationalist vision of the Constitution. *Gonzales v. Raich* (2005).

Finally, a pair of cases that altered the course of two presidencies underscores Stevens's commitment to keeping the courthouse open for everyone, and his trust in the work of judges to uphold the rule of law. In *Clinton v. Jones* (1997), Stevens for the Court rejected the President's categorical contention that private lawsuits against the Executive may not proceed during his term in office. Noting a citizen's "right to an orderly disposition of her claims," as well as "confidence in the ability of federal judges" to accommodate official responsibilities, the Court allowed a sexual harassment suit against President Bill Clinton to proceed. Subsequent testimony by Clinton led to his impeachment.

In *Bush v. Gore* (2000), Stevens dissented from a divided Court's decision to halt a recount of votes in Florida and thereby effectively decide the presidential election. Believing the majority's doubts about the fairness of the recount, under the supervision of state court judges, "can only lend credence to the most cynical appraisal of the work of judges throughout the land," Stevens penned with profound sadness: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

### ***Legacy***

In describing his place on the Court, Stevens's admirers and critics alike have often referred to him as the "leader" of its "liberal" wing during the late Rehnquist and early Roberts era. Stevens himself has denied both labels. Although his colleagues have immense respect for him, Stevens has not considered himself a "mobilizer." (Rosen p. 81). Moreover, he has held the firm belief that he has not changed since President Ford appointed him as a moderate in 1975. Rather, he has observed that the Court has moved steadily to the right with almost each successive appointment.

For his part, Ford in 2005 stated his willingness to stake "history's judgment" of his presidency "exclusively" on his appointment of Stevens to the Court. Ford noted that Stevens "has served his nation well, at all times carrying out his judicial duties with dignity, intellect and without partisan political concerns." (Ford).

Stevens, in turn, would prefer that history judge him "based on what my written opinions say." Those opinions have added backbone to the rule of law for more than three decades, one case at a time. They explain with great care and candor all the considerations that went into each of his attempts to apply the law impartially based on his best judgment. As such, they embody his efforts to fulfill what he regards as the core judicial function. And whether or not people agree with those opinions, Stevens has concluded, "I just hope they say he did the best he could." (Third Branch).

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