



Justice Stevens: An Historic Legacy of Championing Constitutional Values

On April 9, 2010, Supreme Court Associate Justice John Paul Stevens announced that he will retire this summer. The fourth-longest service justice in history, Justice Stevens was nominated to the Supreme Court in 1975, and later in April he will celebrate his 90th birthday. Over the course of his long and distinguished career on the bench, Justice Stevens has become an unparalleled champion of the Constitution in the face of the Court’s increasingly conservative jurisprudential trend. He has emerged in the past decade as one of the Court’s most vocal and eloquent spokespersons for individual liberties, separation of powers, and equal access to justice. A recognized strategist and tactician, Justice Stevens has been a leader in forging coalitions on split decisions, cultivating the swing vote justices to join him in defending civil rights, environmental protections, and judicial oversight of executive power. Even in dissent, he writes more frequently and more boldly than other justices, clearly articulating and defending core Constitutional values. Upon his retirement, the Supreme Court – and the country – will lose one of its strongest voices in defense of Constitutional protections.

Justice Stevens is a Chicago native and a graduate of the University of Chicago. He enlisted in the Navy the day before WWII began and served as a cryptographer throughout the war, receiving a Bronze Star for his service. Following his discharge in 1945, Justice Stevens attended law school at Northwestern University on the GI Bill, finishing in two years and graduating as valedictorian. He clerked for Supreme Court Justice Wiley Rutledge, notably collaborating with Justice Rutledge on his lengthy dissent in a 1948 case involving the wartime detention of German-born U.S. citizens who were still being held at Ellis Island. Justice Stevens wrote in a memo to his boss, “I should think that even an alien enemy ought to be entitled to a fair hearing on the question whether he is in fact dangerous,”¹ but the Court held 6-3 that the plaintiffs did not have the right to challenge their detention in a U.S. court. Justice Stevens practiced law, specializing in antitrust law, in Chicago from 1948 until 1970, when President Nixon nominated him to a seat on the Seventh Circuit Court of Appeals. President Ford elevated him to the Supreme Court in 1975.

During his first two decades on the bench, Justice Stevens maintained a relatively low profile and was considered to have somewhat idiosyncratic views. However, in recent years, Justice Stevens has been credited with effectively building majority coalitions on controversial cases. Since 1994, when he became the senior Associate Justice (the most senior of those justices other than the chief), Justice Stevens has been responsible for assigning opinions when the Chief Justice is not in the majority, and he has wielded that power by strategically assigning certain opinions to the swing vote justices in order to keep them on board in 5-4 decisions. As

¹ Jeffrey Toobin, “After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?” *The New Yorker*, March 22, 2010, available at http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin?currentPage=6#ixzz0iYAoX18C

Jeffrey Toobin explained, Justice Stevens “has used that power to build coalitions and has become the undisputed leader of the resistance against the conservatives on the Court.”² According to Harvard law professor Richard Fallon, Justice Stevens has proven to be “a wily practitioner of coalition politics, who has cobbled together liberal majorities for a number of important decisions in a generally conservative era.”³

In essence, as former acting Solicitor General Walter Dellinger has said, Justice Stevens has served as the Chief Justice of the Liberal Supreme Court⁴ – even though Justice Stevens still does not consider himself a liberal. “I don’t think of myself as a liberal at all,” he said in a 2007 interview. “I think as part of my general politics, I’m pretty darn conservative.”⁵ Nevertheless, as the Court has moved further and further to the right, Justice Stevens has continued to articulate his positions loudly and clearly, even in the face of an increasingly conservative majority: he files more dissents and separate opinions than any of his colleagues. As Adam Liptak wrote in *The New York Times*, Justice Stevens’s “version of American justice [i]s propelled by common sense and moral clarity.”⁶ His retirement will leave a significant gap in the liberal bloc on the increasingly conservative Court.

Justice Stevens’s Landmark Decisions Preserving Core Constitutional Values

Justice Stevens has authored a striking number of landmark decisions in recent years, on matters ranging from executive power to access to justice to environmental protections.

Separation of Powers and Due Process Justice Stevens has been the most outspoken defender of the need for judicial oversight of executive power, and he wrote the opinions in some of the most important cases ruling against the Bush Administration’s treatment of suspected ‘enemy combatants.’

- In *Rasul v. Bush* (2004), one of the Supreme Court’s first responses to the Bush Administration’s assertions of executive power in its “War on Terror,” Justice Stevens wrote the opinion establishing that federal courts have authority to determine whether foreign nationals held at Guantanamo were lawfully imprisoned.
- In *Hamdan v. Rumsfeld* (2006), Justice Stevens’s opinion for the Court struck down the military commissions set up by the Bush Administration to try detainees at Guantanamo because they violated the Uniform Code of Military Justice and the Geneva Conventions.

Criminal Justice and Constitutional Rights Justice Stevens has always been a protector of the rights of the accused and the fairness of the criminal justice process. In criminal justice cases,

² *Id.*

³ Jeffrey Rosen, “The Dissenter,” *New York Times Magazine*, September 23, 2007, available at http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html?_r=1.

⁴ Toobin, “After Stevens,” *supra* note 1.

⁵ Rosen, “The Dissenter,” *supra* note 3.

⁶ Adam Liptak, “After 34 Years, a Plainspoken Justice Gets Louder,” *The New York Times*, January 25, 2010, available at <http://www.nytimes.com/2010/01/26/us/26bar.html>.

Justice Stevens has long taken the most expansive view of individual rights; he has voted against the government and in favor of the individual more frequently than any other sitting justice.⁷

- In *Atkins v. Virginia* (2002), Justice Stevens wrote the 6-3 landmark ruling that executing mentally retarded defendants violates the Eighth Amendment's prohibition against cruel and unusual punishments.
- In *Ferguson v. City of Charleston* (2001), Justice Stevens wrote the majority opinion holding that hospital officials had conducted an unreasonable search in violation of the Fourth Amendment by submitting the results of diagnostic medical tests to law enforcement without the permission of the patients. The hospital had been cooperating with law enforcement efforts to identify pregnant women who had used cocaine.
- In *Apprendi v. New Jersey* (2000), Justice Stevens authored the majority opinion holding that the Sixth Amendment right to a jury trial prohibits judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury beyond a reasonable doubt. *Apprendi* is considered a cornerstone of the recent cases protecting a defendant's right to a jury trial and correcting the constitutional flaws of the Federal Sentencing Guidelines, including the 5-4 decision in *United States v. Booker* (2005) also authored by Justice Stevens.

Environmental Protections In a 5-4 decision in *Massachusetts v. EPA* (2007), the Court held that the Environmental Protection Agency has the authority to regulate carbon dioxide and other greenhouse gases from cars and trucks. Writing for the majority, Justice Stevens concluded that the EPA's rationale for declining to regulate greenhouse gases was inadequate, and the agency must articulate scientific grounds for avoiding regulation. Commentators have noted that Justice Stevens cited several of Justice Kennedy's prior opinions in this ruling, possibly as a strategic move to keep Justice Kennedy on board.

Access to Justice Justice Stevens has been a strong supporter of keeping the courthouse doors open to injured people seeking redress. Writing for the Court in a 6-3 decision in *Wyeth v. Levine* (2009), Justice Stevens wrote that FDA approval of a medication does not shield a manufacturer for liability under state law, upholding a jury verdict in favor of a Vermont musician whose arm had been amputated after an injection of an anti-nausea drug. Wyeth, the drug's manufacturer, had argued that it could not be sued for damages, even though it had improperly labeled the drug and failed to warn about the risks of injections, because the FDA had approved the drug. And in *Tennessee v. Lane* (2004), in a 5-4 decision authored by Justice Stevens, the Court allowed Tennesseans with disabilities who could not access the upper floors in state courthouses to sue the state for money damages under the Americans with Disabilities Act.

⁷ Rosen, "The Dissenter," *supra* note 3. In criminal justice cases from 1995 to 2001, Justice Stevens voted against the government 69.7% of the time.

Federalism and the Rehnquist Revolution Under the leadership of Chief Justice Rehnquist, the Supreme Court, in a series of 5-4 decisions, dramatically limited the scope of Congress's powers as part of an ideological agenda to protect state governments from federal encroachment and limit the scope of federal regulation. For the first time since the New Deal, the Court struck down major legislation as exceeding Congress's regulatory power under the Commerce Clause, exceeding Congress's enforcement power under the Fourteenth Amendment, or infringing upon states' rights. This new federalism jurisprudence, dubbed the "Rehnquist Revolution," appeared to aggressively go after Congressional power in order to dismantle decades' worth of civil rights laws, environmental regulations, and other federal protections of ordinary Americans. In a series of decisions toward the end of Chief Justice Rehnquist's tenure, Justice Stevens authored opinions which held onto a fragile 5-justice majority and walked the Court back from some of the most extreme positions of the "Rehnquist Revolution."

- In *Gonzales v. Raich* (2005), the Court, in a 5-4 ruling written by Justice Stevens, affirmed Congress's power to control or ban the use of marijuana even in states where it had become legal for medical uses. A decade earlier, in *United States v. Lopez* (1995), the Court had limited Congress's power under the Commerce Clause to matters that directly affect interstate commerce—thereby throwing into jeopardy a wide range of federal laws regulating matters such as gun control and hate crimes, which affect commerce but are not directly related to commerce. In *Raich*, Justice Stevens wrote a majority opinion that kept Justice Kennedy, in the majority in *Lopez*, on board. The decision was considered the Court's reaffirmation of Congress's power to regulate interstate conduct and a return to a general understanding of the principles of federal regulatory power that had been established since the New Deal.
- In a series of decisions in the 1990s, the Rehnquist Court restricted Congress's enforcement power under the Fourteenth Amendment and defended states' rights to be immune from federal power, thereby severely eroding both Congress's power to pass civil rights laws and plaintiffs' ability to challenge discriminatory practices in court. In 2004, Justice Stevens authored a 5-4 opinion, joined by Justice O'Connor, in *Tennessee v. Lane* which is considered a bulwark against the Court's concerted attack against civil rights litigants. Tennessee had argued, based on recent Supreme Court precedent, that an individual could not sue the state for discrimination on the basis of disability because the American with Disabilities Act unconstitutionally infringed upon state sovereignty. The majority, unexpectedly retaining Justice O'Connor's vote, ruled that Congress, in passing the ADA, did have enough evidence that people with disabilities were being denied fundamental rights to due process under the Fourteenth Amendment; therefore the ADA was a legitimate exercise of Congressional power. Furthermore, the majority preserved the ADA's remedy for discrimination, holding that the "reasonable accommodations" mandated by the ADA were not unduly burdensome and disproportionate to the harm.

Getting to Five

In addition to authoring an important series of landmark rulings, Justice Stevens has secured some major victories for the liberal bloc on the Court by strategically assigning majority opinions to the swing vote justices. As Pamela Harris, a former Stevens clerk who runs the

Georgetown University Supreme Court Institute, recently said, “It seems that over the last decade or so, Justice Stevens has really become a master tactician on the court.”⁸ As such, Justice Stevens can be credited with preserving a fragile or unlikely majority in numerous split decisions in recent years.

- In *Grutter v. Bollinger* (2003), Justice Stevens assigned the majority opinion to Justice O’Connor, considered the swing vote in racial discrimination and affirmative action cases. Although the lawsuit invited the conservatives on the Court to rule that affirmation action programs were discriminatory against white students in violation of civil rights statutes and the Fourteenth Amendment, the 5-4 ruling in *Grutter* upheld the University of Michigan Law School’s affirmative action admissions policy and recognized the compelling state interest in obtaining the educational benefits that flow from a diverse student body.
- In *Lawrence v. Texas* (2003), the Court struck down the sodomy law in Texas and ruled that intimate consensual sexual conduct was part of the liberty protected by the Fourteenth Amendment. Considered the *Brown v. Board of Education* for gay rights, this landmark ruling was authored by Justice Kennedy. Commentators have noted that Justice Stevens could have chosen to write this historic decision himself but may have opted to assign it to Justice Kennedy in order to preserve his participation in the majority.⁹
- In *Roper v. Simmons* (2005), the Court ruled that the Eighth Amendment prohibits capital punishment for crimes committed when the perpetrator was under the age of 18. Justice Kennedy authored the 5-4 majority, and commentators also point to this decision as an example of Justice Stevens’s strategic assignment of an opinion in order to build and preserve a majority coalition.¹⁰

A Strong Defender of Justice Even in Dissent

Justice Stevens’s clear and eloquent dissents have provided an important counter narrative to the loud dominant conservative voices on the Rehnquist and Roberts Courts. Dissents are often potential majority opinions of the future,¹¹ and through his dissents Justice Stevens has made powerful contributions to the jurisprudential conversation and shown that the Court has lost touch with principles of fundamental fairness.

- In *Bush v. Gore* (2000), Justice Stevens wrote a scathing dissent from the Court’s ruling to stay the recount of votes in Florida during the 2000 presidential election. He chastised the majority for undermining the state judges’ ability to make impartial decisions about the recount and contributing to popular cynicism about the capabilities of judges. “It is

⁸ Joan Biskupic, “Justice Stevens Keeps Cards Close to Robe in Supreme Court,” *USA Today*, March 12, 2010, available at http://www.usatoday.com/news/washington/judicial/2009-10-18-stevens-supreme-court-justice_N.htm.

⁹ See Rosen, “The Dissenter,” *supra* note 3.

¹⁰ See Benjamin Wittes, “Whose Court is it Really?,” *The Atlantic*, January/February 2006, available at <http://www.theatlantic.com/doc/200601/john-roberts/2>.

¹¹ “In three-fourths of the Court’s overruling actions from 1958 through 1980, justices gave dissents in earlier cases as the basis for overruling those decisions or based overruling opinions on ideas from prior dissents.” Suffolk Law Rev. article, referencing STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 239, 373 (4th ed. 1993).

confidence in the men and women who administer the judicial system that is the true backbone of the rule of law,” Justice Stevens wrote. “Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. 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.”

- More recently, in *Citizens United v. Federal Election Commission* (2010), Justice Stevens read his 90-page dissent from the bench in order to display his frustration with the Court’s ruling. In *Citizens United*, the five conservatives on the Court overturned nearly a century of precedent in order to hold that the First Amendment prohibits the restriction of corporate funding of independent political broadcasts in elections. Eighty percent of the American public disagrees with the Court’s ruling,¹² fearing that the decision will open the floodgates of corporate money into the political process. Justice Stevens’s impassioned dissent takes the conservative justices to task for their aggressive activism and their defense of corporate interests at the expense of individuals’ abilities to participate in the democratic process. “The rule announced today — that Congress must treat corporations exactly like human speakers in the political realm — represents a radical change in the law,” he said from the bench. “The court’s decision is at war with the views of generations of Americans.” Justice Stevens ended his dissent by attacking the Court’s rejection of the common sense of the American people, “who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”
- Justice Stevens also wrote an exceptionally long dissent in *District of Columbia v. Heller* (2008), in which the five conservative justices struck down gun control legislation as a violation of the Second Amendment. For the first time, departing from century-old precedent about the scope of the Second Amendment, the Court ruled that the amendment protects an individual right to keep and bear arms. In his dissent, Justice Stevens called out the majority’s judgment as “a strained and unpersuasive reading” of the Constitution which overturned longstanding precedent and “bestowed a dramatic upheaval in the law.”
- Justice Stevens’s separate concurrences and dissents in criminal justice cases have made a powerful plea for the rights of the accused and the integrity of the criminal justice system, particularly when it comes to the death penalty. In *Baze v. Rees* (2008), in which the Court upheld the constitutionality of lethal injections, Justice Stevens wrote separately to express his discomfort with the death penalty, even though precedent bound him to uphold the method of execution at issue in the case. “State-sanctioned killing is . . . becoming more and more anachronistic,” he wrote, showing how deterrence, retribution, and other purported justifications for the death penalty failed in practice. “I have relied on my own experience in reaching the conclusion that the imposition of the death penalty ‘represents the pointless and

¹² Dan Eggen, “Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing,” *The Washington Post*, February 17, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

needless extinction of life with only marginal contributions to any discernible social or public purposes.’’ And in cases like *Smith v. Spisak* (2010), in which he wrote a separate concurrence, and *Wood v. Allen* (2010), in which he dissented, Justice Stevens’s opinions ardently defend the right to effective assistance of counsel and challenge other justices’ acceptance of factual situations in which he perceives flagrant misbehavior and neglect by capital defendants’ attorneys.

- In two companion school desegregation cases in 2007, the Supreme Court struck a major blow to *Brown v. Board of Education* and struck down two public school districts’ voluntary race-based enrollment policies. Justice Stevens wrote in dissent, “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”

A Legacy of Championing Constitutional Values

Justice Stevens’s important leadership and heightened stature have developed over the past fifteen years in reaction to the increasingly conservative Court. Despite the dominance of conservative jurisprudence, Justice Stevens has been responsible for some of the most important rulings in the past fifteen years on civil rights, immigrant rights, environmental protections, habeas corpus, and the rights of criminal defendants. Whether by articulating powerful opinions through his strong, clear voice, or by strategically holding onto the swing votes of Justices O’Connor and Kennedy, Justice Stevens has been a stalwart defender of our most important liberties and Constitutional protections. Through his historically lengthy service on the bench, he has emerged as a champion of individual rights and human dignity as well as a master tactician on the Court. His fierce defense of core Constitutional values and his distinctive voice will be greatly missed.