ABA Section of Litigation
AMERICAN BAR ASSOCIATION

NEWS AND INFORMATION FROM THE APPELLATE PRACTICE COMMITTEE

Appellate PRACTICE JOURNAL

Summer 2010
Volume 29, Number 4

SECTION OF LITIGATION | AMERICAN BAR ASSOCIATION

New Biography Traces the Career of John Paul Stevens

By Steve Sanders

With exquisite timing, Northern Illinois University Press recently published the first book-length biography of retiring Supreme Court Associate Justice John Paul Stevens. *John Paul Stevens: An Independent Life* was written by Bill Barnhart, a former longtime writer for the *Chicago Tribune*, and research associate Gene Schlickman, a retired lawyer and former Illinois state legislator.

The project began in 2002, and according to Barnhart, Justice Stevens cooperated "at arm's length." Stevens sat for two brief interviews and did not interfere with Barnhart and Schlickman's efforts to interview family members, former clerks, and others. Because the book's publication coincided with Stevens's retirement announcement, Barnhart has been in demand for interviews, commentaries, panel discussions, and other appearances, including a book party at the famed Chicago journalists' watering hole, the Billy Goat Tavern.

Barnhart answered questions about Stevens's early days as a lawyer and an

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— YOUNG LAWYERS' CORNER —

Getting Your Foot in the Door: The Petition for Certiorari

By Scott L. Nelson

For every decision by a federal appellate court, there's at least one party that thinks the outcome is wrong, provoking the question: Can't we take this to the Supreme Court?

The answer is nearly always that you can. But should you? And how do you go about it? Most lawyers know the answer to the latter question is that you file a petition for a writ of certiorari. But many litigators have little or no experience with preparing and filing a "cert petition," to use the common shorthand term.

I won't pretend to be comprehensive. For a complete discussion, the best source is *Supreme Court Practice*, by Gressman, Geller, Shapiro, Bishop, and Hartnett. Sometimes still referred to as "Stern and Gressman" after its original authors, it is the standard reference work relied on by even the most experienced Supreme Court litigators.

The Supreme Court's Certiorari Jurisdiction

The Supreme Court's docket is almost entirely discretionary. Unlike appellate

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John Paul Stevens

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appellate judge and how these experiences shaped his tenure on the Supreme Court.

Q. How did John Paul Stevens's career as an attorney prepare him for appointment as a federal appellate judge?

A. Lawyers who worked in private practice with John Paul Stevens reported to us two aspects of his lawyering that suited him well as an appellate judge. First, Stevens had a rare ability among his fellow practitioners on all sides of an issue to find the nub of a matter and derive a solution overlooked by others. In this regard, he was the opposite of a typical litigator. His success arose from conciliation based on creativity.

When a case reaches the appellate level, judges in review usually do not hear evidence but rather apply law to the facts and arguments developed at trial. The ability to extract a novel, appropriate point of view from pleadings without the benefit of fresh evidence is the mark of an excellent appellate judge.

It's worth noting that Stevens is a fan of the detective Perry Mason. A wonderful example of his detective skills can be found in his dissent in *Scott v. Harris*, a 2007 police chase case in which the Supreme Court did consider raw evidence.

Second, lawyer Stevens had an uncanny ability to keep his cool in stressful situations. As one former Stevens partner told us, "He was soft-spoken. When Stevens raises his voice, he's on the wrong side of the case." He almost never did. Senior lawyers in the world of Major Leage Baseball recognized this talent in the 1960s when they conspired to have the volatile baseball entrepreneur Charles Finley hire Stevens as his lawyer. Finley raised his voice crudely and often in negotiations as he sought to move the Kansas City Athletics to Oakland. But he trusted the low-key Stevens.

Appellate courts, especially the Supreme Court, are home to large egos. Stevens's

Learning to Be a Judge: John Paul Stevens on the Seventh Circuit Court of Appeals

The following is excerpted from John Paul Stevens: An Independent Life, *by Bill Barnhart and Gene Schlickman (Northern Illinois University Press 2010). (Footnotes from the original text are omitted.)*

Stevens's elevation to the Supreme Court of the United States from the Seventh Circuit U.S. Court of Appeals in 1975 put him at the pinnacle of the legal hierarchy. In a 2006 letter to a law school dean, former President Gerald Ford declared, "Normally, little or no consideration is given to the long term effects of a President's Supreme Court nominees. . . . Let that not 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 John Paul Stevens to the U.S. Supreme Court." Yet in some ways Stevens's appointment to the federal appeals bench in Chicago five years earlier by President Richard M. Nixon marked a more distinct moment in the evolution of the nation's judicial selection system. Coming as it did from the playing fields of Illinois and Washington politics in the 1960s, Stevens's Seventh Circuit appointment turned out to be a milestone of judicial independence.

* * *

A *New York Times* analysis, written in December 1975 while Stevens was under consideration for the Supreme Court, found his Seventh Circuit opinions "followed established procedures rather than a political or legal ideology." More specifically, the *Times* review said Stevens tended to obey legal precedents, favor judicial restraint, trust in the legal system and defend economic competition against government intervention. On the other hand, the *Times* concluded, Stevens stood firmly for litigants denied basic individual or property rights who could demonstrate that government agencies had failed to follow established procedures and precedents. "The result is some of Judge Stevens's opinions would be called conservative by civil libertarians and others would displease the law-and-order advocates," *Times* reporter Lesley Oelsner wrote.

A federal circuit court of appeals has limited opportunities, given its subsidiary role to the Supreme Court, to innovate in the process of law. But as a new judge, Stevens had no apparent interest in doing so. He saw his job as one of society's many decision makers, along with legislators, government agency chiefs, business managers, juries, lower court judges, school authorities, and others. There was no reason to believe, he often said, that his court's opinion of a controversy necessarily held any more wisdom or integrity than the opinions of others who touched the dispute before it arrived on appeal at the Dirksen Courthouse.

Stevens mused about his task in a 1973 speech to Northwestern law school alums, which he titled "The Education of a Judge": "In the flow of cases that our court processes I have been surprised to note how often the outcome depends, not on our appraisal of the merits, but rather on our identification of the proper decision maker. . . . Every decision maker—whether he be an umpire in the World Series, a legislator, a corporate manager, a member of a school board, or a federal judge—is fallible. But if he has earned the right to make decisions through an acceptable selection process, it is safe to predict that most of his decisions will be acceptable." Stevens entertained his audience by noting that he recently had voted in favor of a political appointee who had sued Illinois's governor to get his job back but, in a subsequent ruling in the case, had voted in favor of the governor who had fired the employee [*Adams v. Walker*, 1974].

> Judge Pell demonstrated in his dissent [from the second ruling] my votes were logically inconsistent and could only be explained by the fact that I had changed my mind. In a matter of weeks I had become an older and wiser judge. Of course, . . . since I voted on both sides of the same issue, I can await Supreme Court review with complete equanimity because the Court will surely agree with at least one of my votes. . . . I have learned how the security of life tenure enables a federal judge . . . to feel completely free to vote either way—indeed, even both ways—whenever a new issue confronts him.

Judge Frank M. Coffin, former chief judge of the First U.S. Circuit Court of Appeals in Boston and author of the memoir *The Ways of a Judge: Reflections From the Federal Appellate Bench*, could have been describing Stevens when he depicted the introverted nature of the job: "One of the paradoxes about appellate courts is that there can co-exist the kind of intimate collegiality . . . and a profound, almost antique individualism.

ability to shape the law in these environments is based on the fact that he doesn't have one.

Q. From your account of Stevens's time on the Seventh Circuit [see our excerpt below], it seems as though he took to judging quite readily. Although lacking ego, as you say, he was also no Hamlet. He's known for making up his mind carefully but quickly and sticking to a position. Did you find any roots for this self-confidence in his early background?

A. When Stevens was chair of the *Chicago Daily Maroon*, the undergraduate student newspaper at the University of Chicago, he and his fellow editors vowed not to spill ink on events and issues happening outside the campus. "We shall depart from the traditional Maroon procedure this year, and devote relatively little editorial attention to the problems of the world outside the university," read a front page editorial in October 1940.

This disengagement, of course, was announced at a time of intense national debate over whether the United States, under President Franklin Roosevelt, should come to the aid of Europe against Nazi Germany.

The editor's vow lasted only until November, when they endorsed Roosevelt for reelection to an unprecedented third term. Two months later, they declared an end to their noninterventionist policy on issues beyond the Quadrangles, noting that "numerous people have expressed indignation at what they have felt to be our lassitude in limiting ourselves to the relatively trivial" internal campus issues.

In my view, U.S. participation in World War II molded the decisive mind of John Paul Stevens that Court watchers recognize today. Based on family letters, it appears that his parents did not want him to volunteer for military service, which he did in secret before the Pearl Harbor attack of December 1942, and did not want him to marry a Catholic girl, which he did shortly after his formal enlistment in the U.S. Navy on the day before the attack.

. . . In the supertechnical, industrialized, computerized, organized age, appellate courts are among the last redoubts of individual work."

Although he was permitted to hire two law clerks per year, Stevens preferred a single clerk, known as an "elbow clerk," who worked at the elbow of his boss for a one-year assignment. Stevens donated the salary of his second clerk to employ a clerk for the court as a whole. He and his elbow clerk worked like a small, independent law firm. "My relationship with him was very much like the relationship of an associate to a senior partner in a law firm," said former Seventh Circuit clerk James S. Whitehead. "There was a tremendous amount of cordiality, of mutual professional respect, of openness, but there wasn't a lot of closeness. We each sort of did our jobs. He wasn't a pal. I don't think we ever went to lunch together." "I thought there was going to be a lot of writing involved, bench memos and so on," recalled former clerk Robert A. Garrett. (A bench memo is a summary of a case prepared by a law clerk for an appellate judge before the judge sits at the bench to hear oral arguments by advocates in the case.) "It was much more of a speaking clerkship. We would talk through a lot of things. I would find him developing his thoughts and his arguments by that give and take."

But Stevens was learning to judge, not to debate. Clerks were unlikely to change his mind once he had read the facts of a case and the relevant law. "He was a very challenging person to have to debate on issues," Garrett recalled. "I argued a case in the Supreme Court a few years ago, and my greatest worry was that I was going to have to answer questions from Stevens. Most people worry about [Justice Antonin] Scalia; I worried about Stevens. I could never in the time that I clerked for him, at least to my own satisfaction, answer things well enough to persuade him in an argument."

H. Douglas Laycock, a clerk for Seventh Circuit Judge Walter J. Cummings during Stevens's tenure, recalled that, to maintain friendly relations and clear the docket, two of the three judges hearing a case typically deferred to the text of the third member who had been assigned to write the opinion. Backseat editing was kept to a minimum. "The other two members of the panel would approve almost anything he said so long as it did not change the result agreed upon in conference," Laycock said. "Judge Stevens would not; if he disagreed with a passage in an opinion, he would call the opinion writer and try to work out mutually acceptable language; if that failed, he would file a separate opinion. Indeed this is how I came to know Judge Stevens so well; on some cases I worked as closely with him as I did with Judge Cummings."

Stevens's first law clerk, Gary Senner, was emblematic of his approach to the job. Unlike most clerks to judges, Senner was not a freshly minted law school graduate but a former litigator in the Justice Department's antitrust division who had joined Stevens's law firm, as it happened, on the day Stevens was nominated to the bench. He had applied to the firm because of Stevens's reputation and was pleased to follow him to the bench. "My year there he was learning to be a judge," Senner said. "He was very conscious that intellectually there was a transition that you had to make" from the private practice of law. But Stevens wanted to "hit the ground running," Senner recalled. "He was looking for somebody as a sounding board who had a little more experience." For one thing, Stevens was a stickler about correct writing, Senner recalled. "He was very proud and confident of his writing skills," Senner said. "He was an English major. He would lecture me about things like not using 'very' and other adverbs and adjectives—no exaggeration." Stevens would not sign even routine opinions for the court that he felt he had not contributed to sufficiently, Garrett said.

Pride of authorship was only part of the story. As Judge Coffin wrote in his memoir, "to the extent that we do our job well, using the disciplines of our guild well, we move from mere jobbist to craftsman and occasionally to master craftsman when we write an opinion that marshals facts and precedents, logic and analogy, and the broad policy implications of the decision in contemporary society so that the result is seen as fair, expectable, and perhaps even inevitable." Stevens seemed to be striving for Coffin's ideal. But "as a very junior judge, he wasn't seeing necessarily the best cases to write on," said Senner. "So, when he got a case that involved an opportunity to think about an issue that had broader implications—fairness of the legal process—then he probably dealt with it with more interest than somebody who'd been sitting on the bench for twenty years. It was an opportunity to start fashioning his view of judging."

Published in Appellate Practice Journal, Volume 29, Number 4, Summer 2010.

More important, the life-or-death work of tracking the radio signals of the Japanese navy, which Stevens did in intense 24-hour shifts under extreme secrecy in Pearl Harbor, did not permit the luxuries of indecisive analysis or self-doubt.

Q. When he moved from the Seventh Circuit to the Supreme Court, did Stevens's approach to judicial work remain the same?

A. Justice Stevens brought part of the Seventh Circuit with him to Washington, including two law clerks and the secretary of one of his appellate colleagues. According to these individuals, his approach to the work in the Marble Palace was about the same as in the Dirksen U.S. Courthouse in Chicago. His secretary, Nelly Pitts, noted one difference. In the days before personal computers, the amount of paperwork tripled to meet the needs of nine justices, instead of three judges typically on an appeals panel.

Stevens immediately set himself up in the "business of judging," as he calls it, establishing his own territory. His third clerk, George Rutherglen, a holdover from the chambers of Justice William Douglas, recalled that Stevens was a bit of a mystery: "He was from the very beginning quite independent in his mind and his views." Clerks in other chambers would ask, "'What new reasoning is Justice Stevens going to come up with.' What they were really saying was, 'why doesn't he agree with the justice I'm working for?'"

But too much can be made of the "maverick" label that Court watchers quickly applied to freshman Stevens. He was one of just a few justices who had worked as a law clerk for the Court. He knew all the justices, especially Byron White, with whom he served in the U.S. Navy, and Thurgood Marshall, whom he witnessed as a civil-rights advocate arguing before the Fred Vinson Court and with whom he litigated cases when Marshall was solicitor general.

As Stevens put it, "Frankly, I felt pretty comfortable promptly. I wasn't a stranger there, and I did feel that my background and memories as a clerk brought a lot of practices and customs of the clerks to mind."

One element of Stevens's independent streak that remained from his first days was his refusal to join the so-called cert pool, whereby law clerks for a number of justices divided up the analyses of petitions for certiorari. Stevens and his clerks always performed that task on their own.

Q. How did Justice Stevens grow and evolve on the Supreme Court?

A. Research by law professors and evidence from the papers of Justice Harry Blackmun suggest that Justice Stevens evolved along two principal paths.

First, he became more consistently liberal, based on statistics compiled by several academic databases. In his first 10 years on the Court, Stevens was in the middle—net conservative some years and net liberal in others. Still, he never was described as a swing vote. About the time of the Ronald Reagan administrations, and Reagan's Supreme Court appointments, Stevens became more consistently associated with the liberal voting bloc.

Notable changes in Stevens's voting pattern concern affirmative action and capital punishment. Stevens has acknowledged that he has "learned on the job" in the affirmative-action arena since the 1978 *University of California Regents v. Bakke* affirmative-action decision, wherein he wrote that the complaint of reverse discrimination wasn't ripe for constitutional adjudication. In the 2003 *Grutter v. Bollinger* decision concerning the University of Michigan Law School, Stevens did not write, but he said in a speech shortly thereafter that he believed affirmative action to diversify the student population of a law school was important. His death-penalty writings have become more liberal as evidence has mounted over the years of the failings of the practice.

In my view, Stevens became more pragmatic as well as more liberal. He became more willing to apply basic principles of liberty and fairness in ways that moved the law forward. One interesting example is *PGA Tour, Inc. v. Casey Martin*.

Second, as Stevens became more senior on the Court, he became more assertive in using his analytic skills and persuasive powers to affect outcomes in the Court's docket. Two examples cited in *John Paul Stevens: An Independent Life* are *Planned Parenthood v. Casey* and *Burson v. Freeman*, two 1992 decisions. *Casey* involved abortion; *Burson* involved political speech. Stevens's name is not associated with either decision, but the Blackmun papers reveal his behind-the-scenes craftsmanship at work. ■

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Published in Appellate Practice Journal, Volume 29, Number 4, Summer 2010.