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ESSAY: JUSTICE STEVENS' JURISPRUDENCE OF RESPECT

*Nancy S. Marder**

As anyone who has ever met Justice Stevens knows, he treats everyone with the utmost respect and civility. At some point in most reminiscences, there is a story about the respect he shows others, which illustrates his humanity, and quite simply, “what a nice guy he is.” I will contribute my stories as well. But I believe that his deep and abiding respect for people speaks to more than just comportment; it provides the foundation for his jurisprudence—a jurisprudence of respect.

Justice Stevens treats people, whether law clerks, lawyers, or litigants, with the utmost respect and assumes that they perform their jobs with the best intentions. He takes a similar view of the judiciary and the legislature. In his review of lower court opinions, his jurisprudence of respect translates into a regard for the work that lower court judges do in both the federal and state court systems and an effort to recognize and build upon that work whenever possible. In the realm of statutory construction, Justice Stevens’ jurisprudence of respect means interpreting statutes to give effect to Congress’ broad purpose, which can be discerned from the text, legislative history, context, and related sources.

I had the privilege of clerking for Justice Stevens for two years (1990–1992). When I began my clerkship, my only legal experience had been working for one year at a law firm and clerking for two years for lower court judges. My co-clerks had similar work experience. By that point, Justice Stevens had been a Justice for fifteen years, a court of appeals judge for five years, and a practicing lawyer for twenty years.¹ Yet, Justice Stevens listened to our views

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1. Justice Stevens entered private practice in 1949, after having served as a law clerk to Justice Wiley Rutledge. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 79–80 (2010). He was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1970 by President Nixon and served until 1975, when he was appointed to the U.S.

on cases and considered our arguments. He respected the ideas of his law clerks, even though we were new to the law.

The high point of the clerkship for me, and probably for most of Justice Stevens' law clerks over the course of his almost thirty-five years at the Supreme Court, was the early morning or late afternoon discussion of cases. Justice Stevens would come into the clerks' office and sit in his worn leather chair. The conversation might begin with a newspaper headline or a sports event, but it would soon shift into a discussion of the cases. Justice Stevens was always interested in what his clerks had to say about a case. He might agree or disagree, but he would always take our arguments seriously. If he disagreed, he would come in the next day, having given additional thought to the argument, and say where he now stood on the issue and what he found persuasive. He always made us feel that he respected our opinions and listened carefully to them.

The discussion of the case would continue during the drafting of an opinion because, as Justice Stevens taught us, arguments that seem persuasive in discussion might reveal their weaknesses in the writing process. At the time when I clerked for Justice Stevens, he was the only Justice who wrote his own first drafts of opinions.² He adhered to this practice for his entire time at the Court. This meant that his opinions always reflected his views and were always written in his voice. For example, in a case in which Justice Stevens dissented because he believed the Court was reading a statute too literally and ignoring Congress' purpose, he wrote, as few clerks could have done, that the Court was reading the statute with "its thick grammarian's spectacles."³ Similarly, no law clerk would have

Supreme Court by President Ford. COMM'N ON THE BICENTENNIAL OF THE U.S. CONST., THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS AND ITS JUSTICES 1790–1991, at 228 (1992).

2. For seventeen years—from the time Justice Marshall retired in 1991 to the time that Justice Alito left the certiorari pool ("cert. pool") in 2008—Justice Stevens was also the only Justice who did not belong to the cert. pool. This was a practice he maintained throughout his entire tenure on the Court. Instead, Justice Stevens' law clerks reviewed all of the certiorari petitions rather than depending on just one law clerk from the cert. pool who advised the other Justices. See Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool,'* N.Y. TIMES, Sept. 26, 2008, at A21 (reporting that Kathleen Arberg, the U.S. Supreme Court's public information officer, had confirmed Justice Alito's exit from the cert. pool).

3. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 103, 113 (1991) (Stevens, J., dissenting); see also Linda Greenhouse, *Justices Protect Unions from Members*, N.Y. TIMES, Mar. 20, 1991, at A24 (highlighting that part of Justice Stevens' dissent in which he "said that the

thought to refer to “propaganda broadcasts to our troops by ‘Tokyo Rose’ during World War II” in *Citizens United v. FEC*⁴ because no law clerk had lived through that experience. In *Texas v. Johnson*, the flag-burning case, he also wrote from the perspective of one who had fought for his country during World War II.⁵

Although Justice Stevens wrote his own first drafts, he depended on his law clerks to fill in the gaps, and in this role, we tried to make a contribution. Justice Stevens made us feel that the writing process was a collaborative one. He usually accepted our suggestions and was as thrilled as we were when we found cases to support a particular point or added a footnote that undermined an argument raised by the majority opinion when he was in the dissent. Justice Stevens treated our work with respect, and this in turn inspired us to try to produce the best work we possibly could.

Justice Stevens also treated lawyers who appeared at oral argument before the Supreme Court with great respect. He tried to put them at their ease. After all, arguing a Supreme Court case is not a common, everyday experience for most lawyers. For example, it is an oft-repeated story among Justice Stevens’ law clerks that during one oral argument a lawyer kept referring to the justices as judges. The lawyer became even more flustered after being corrected several times by the Chief Justice. Justice Stevens came to the lawyer’s aid by making the following observation: “Excuse me, but if I am not mistaken Article III makes the same mistake.” His comment relieved the tension of the moment and also showed respect for the lawyer and the Constitution.

Justice Stevens, alone among the Justices, would often preface his questioning of a lawyer by asking: “May I ask you a question?”⁶

Court had ignored the overall purpose of the attorney’s fees law by examining the statute only through ‘its thick grammarian’s spectacles’”).

4. 130 S. Ct. 876, 947 (2010) (Stevens, J., dissenting); see also Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1 (“In *Citizens United*, [Justice Stevens] referred to Tokyo Rose, the World War II propagandist. ‘My clerks didn’t know where that came from,’ he said last week.”).

5. 491 U.S. 397, 436–37 (1989) (Stevens, J., dissenting).

6. See, e.g., Jeffrey Kahn, *Zoya’s Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 716 (2010) (providing an excerpt of an oral argument that includes Justice Stevens asking Deputy Solicitor General Kneeder, “[C]an I ask you a question[?]”); Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, NEW YORKER, Mar. 22, 2010, at 38, 39 (“[Justice Stevens] does something that none of his colleagues do: he asks permission. ‘May I ask you a question?’ or ‘May I ask you

Although his questions were inevitably the most difficult, and went to the crux of the issue, his manner of asking was always courteous and respectful. He approached oral argument as a collaborative endeavor between Justices and lawyers. He sought their aid in understanding how far their arguments reached and what the implications of their positions were, and used oral argument to clarify his own thinking about a case.⁷

Nowhere was Justice Stevens' respect for individuals more essential than in his treatment of pro se petitioners. A few of these petitioners were "frequent filers" at the U.S. Supreme Court, meaning they filed numerous certiorari petitions. Eventually, the Court decided to amend Rule 39 so that pro se petitioners could be denied leave to proceed *in forma pauperis*.⁸ Justice Stevens dissented, suggesting that such an amendment was unwise.⁹ He explained that it was preferable to let these petitioners file *in forma pauperis* certiorari petitions, and deny the petitions on the merits if they were frivolous rather than prevent the petitioners from filing altogether.¹⁰ At least if the petitions were denied on the merits, the petitioners could feel that their claims had been considered, whereas if they were not permitted to file at all, the courthouse doors would have been closed to them. Moreover, there was always the possibility that one of their pro se petitions contained a meritorious claim. Every so often it happens, and when it does, as it did in *Gideon v. Wainwright*,¹¹ it can change the course of the law.

Justice Stevens treated law clerks, lawyers, and litigants with respect, and this personal code of conduct also infused his jurisprudence. In my view, he adhered to "a jurisprudence of

this?").

7. John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1563 (2006) ("[P]re-argument predictions about how a judge or Justice is likely to vote are far less significant than the knowledge that he or she will analyze the cases with an open mind and with respect for the law as it exists at the time of the decision.").

8. *See In re Amendment to Rule 39*, 500 U.S. 13 (1991) (per curiam).

9. *Id.* at 14.

10. *Id.* Justice Stevens also explained that it was easier to deny a petition on the merits than to decide if it was frivolous, and the cost of administering the amended rule would probably be greater than any administrative benefit. *Id.*

11. 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and holding that the Sixth Amendment's provision of the right to counsel in all criminal prosecutions was applicable to the states under the Fourteenth Amendment to the U.S. Constitution).

respect.” In his opinions, he was always respectful of lower court judges in the federal and state court systems, and recognized that they tried to perform their job conscientiously.

Justice Stevens showed respect for lower court judges’ efforts especially when they tried to follow the Supreme Court’s test, only to find that the test had changed. In *Purkett v. Elem*,¹² the Supreme Court held that a reason for a peremptory challenge need not be one “that makes sense, but a reason that does not deny equal protection,”¹³ even though the Court had said earlier in *Batson v. Kentucky* that the reason must be “related to the particular case to be tried.”¹⁴ Justice Stevens disagreed with the Court when it corrected the Eighth Circuit judges for following what the Supreme Court had instructed them to do in *Batson*. He found the Court’s approach to be “disrespectful to the conscientious judges on the Court of Appeals who faithfully applied an unambiguous standard articulated in one of [the Court’s] opinions” and that “[t]o criticize those judges for doing their jobs is singularly inappropriate.”¹⁵ Moreover, the Court did this in a per curiam opinion, without “the courtesy” of full briefing and oral argument.¹⁶

In his opinions, Justice Stevens often commended lower court judges for their work and incorporated their reasons into his opinion. For example, in *Chapman v. United States*,¹⁷ which came to the U.S. Supreme Court from an *en banc* decision by the Seventh Circuit,¹⁸ several defendants challenged their sentences because the weight of the carrier had been included in the weight of the drug, making their sentence much longer than it would have been if based only on the weight of the drug. Justice Stevens, writing in a dissent joined by Justice Marshall, did not think that Congress could have intended to include the weight of the carrier of the L.S.D. as part of the weight of

12. 514 U.S. 765 (1995) (per curiam).

13. *Id.* at 769.

14. 476 U.S. 79, 98 (1986).

15. *Purkett*, 514 U.S. at 774 n.8.

16. *Id.* at 774; *see also id.* at 770, 775 (arguing that it is “unwise” for the Court to announce a law-changing decision without briefing and argument).

17. 500 U.S. 453 (1991).

18. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (*en banc*), *aff’d sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

the L.S.D.¹⁹ His dissent built upon the reasons provided by five Circuit judges in their two dissenting opinions.²⁰ When faced with ambiguous language and sparse legislative history, Justice Stevens opted for an interpretation that furthered Congress' goals, in contrast to the Court's interpretation, which, in Justice Stevens' words, "show[ed] little respect for Congress' handiwork."²¹

Justice Stevens saw his job as not only building upon the work of lower courts—where there were many fine judges—but also trying to give effect to the purposes of Congress when it enacted legislation. In construing a statute, he looked to the broad purposes that motivated Congress to act in the first place. In the realm of statutes, "Congress is the master."²²

For example, in *West Virginia University Hospitals, Inc. v. Casey*,²³ Justice Stevens, in a dissent joined by Justices Marshall and Blackmun, considered Congress' purposes in providing a "reasonable attorney's fee" to a prevailing party in a civil rights case.²⁴ After studying the text and the legislative history, he concluded that Congress intended to make a prevailing party whole, and therefore, intended the cost of an expert witness fee to be included in a "reasonable attorney's fee." The statute did not explicitly say this, but the reading he gave was one that tried to effectuate Congress' broad purpose. To do otherwise would be to disrespect a coequal branch of government and to make it redo the work it had already done. He explained: "[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error."²⁵

Justice Stevens' jurisprudence of respect recognizes the roles that various institutions play in our democracy and appreciates that

19. *Chapman*, 500 U.S. at 468–69 (Stevens, J., dissenting).

20. Chief Judge Bauer and Judges Wood, Cudahy, and Posner joined Judge Cummings' dissent. *Marshall*, 908 F.2d at 1326. All of these judges also joined Judge Posner's dissent. *Id.* at 1331.

21. *Chapman*, 500 U.S. at 477.

22. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

23. *Id.* at 83.

24. *Id.* at 103 (Stevens, J., dissenting).

25. *Id.* at 115 (footnote omitted).

each institution tries to play its role as best it can. Congress passes statutes, and the Court is often called upon to interpret them. When there are competing interpretations, the Court must choose one. However, the Court can perform this role while still showing respect to Congress by trying to interpret the statute in a manner that gives effect to Congress' broad purpose.

Whether questioning a lawyer during oral argument or construing a statute, Justice Stevens' efforts were guided by a respect for the individuals and institutions involved. I had the opportunity to observe this first-hand for the two years that I served as his law clerk, and I have had the opportunity ever since to try to learn from Justice Stevens' example and to share this knowledge with my students.

