

# JOHN PAUL STEVENS

## An Independent Life

BILL BARNHART AND GENE SCHLICKMAN

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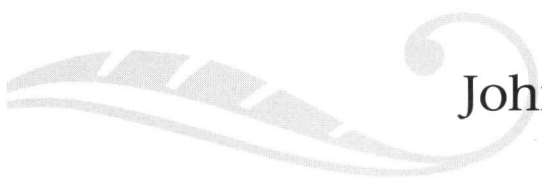
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FRONTISPIECE PHOTO: Justice John Paul Stevens outside the Supreme Court building, 1988. Photo by Abe Frajndlich © 2009.



John Paul Stevens



*To our wives,*

*Kate and Sherry,*

*for their contributions*

*measurable and immeasurable.*

*“Learning on the job is essential to the process of judging.”*

—JUSTICE JOHN PAUL STEVENS

*“At the very least, these details will humanize the judge for you, so that  
you will be arguing to a human being instead of a chair.”*

—JUSTICE ANTONIN SCALIA AND BRYAN A. GARNER

## Acknowledgments

Compared to the political branches of the U.S. government—Congress and the presidency—few journalists, academics, and concerned individuals study the third branch—the federal courts. Indeed, we discovered that it can't be done without a great deal of help. Many people contributed their time and talents to this book.

We are especially grateful to two people who were our unofficial Library of Congress researchers, Vicki Fredrichs and Eric Romsted. Their incredible diligence over many days in the library's public reading room in Washington, D.C., allowed us, in the comfort of our homes, to tap into the rich veins of knowledge available in the papers left by Supreme Court justices of the past. As Justice John Paul Stevens notes in this book, the record of the Court and its activities is abundant. But digging up and sorting the documents is no easy task.

As outsiders to the relatively small cohort of journalists and scholars who track the Court, early in our work we benefitted from critiques and encouragement from two individuals who know Justice Stevens well: law professors Kenneth A. Manaster of Santa Clara University School of Law and Joseph T. Thai of the University of Oklahoma College of Law. Professor Manaster was a member of the unpaid staff who investigated wrongdoing by members of the Illinois Supreme Court in 1969. His book *Illinois Justice: The Scandal of 1969 and the Rise of John Paul Stevens* is a fascinating account of a critical episode in Stevens's professional life. Professor Thai's scholarly paper "The Law Clerk Who Wrote *Rasul v. Bush*: John Paul Stevens's Influence from World War II to the War on Terror" gave us the type of link between past and present that biographers love.

Justice Stevens remained impartial—one might even say independent—throughout the process of our research and writing of this book. While he did not sit for extensive interviews, he provided anecdotes, made himself available when questions arose, and was, throughout, a gracious and interested spectator. Nellie A. Pitts and Janice Harley of the Justice Stevens chambers assisted us in every



way we asked, as did the staff of the Supreme Court of the United States, especially Kathleen L. Arberg in the public information office and Lauren Morrell in the curator's office. Dozens of former Stevens law clerks granted us on-the-record interviews.

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We called on the faculties and staffs of numerous academic institutions for research materials and guidance. At the University of Chicago, where Justice Stevens was educated from kindergarten through his senior year of college, we thank Alice Schreyer, Daniel Meyer, Julia Gardner, and Christine Colburn of the Special Collections Research Center at the Regenstein Library; Abner J. Mikva, Dennis J. Hutchinson, and Judith Wright of the University of Chicago Law School; David Pervin of the University of Chicago Press; and William Harms of the University of Chicago news department. At Northwestern University in Evanston and Chicago, where Justice Stevens attended law school, we were aided by Professors Dawn Clark Netsch and Robert W. Bennett of the law school; Kevin B. Leonard and Patrick M. Quinn of the university's library; and Pat Vaughan Tremmel of the media relations office. A 2005 seminar on Justice Stevens at the Fordham University School of Law in New York City was a gold mine for us. We thank Dean William Michael Treanor, Professor Abner S. Greene, and Reference Librarian Janice E. Greer of the law school library. Hemant Kumar Sharma of the University of Tennessee Political Science Department conducted a swift and useful analysis of the Spaeth Supreme Court Database on our behalf. Anne S.K. Turkos, archivist for the University of Maryland Library, provided background on one of Justice Stevens's mentors, Leon P. Smith, Jr. Nona Kay Watt, associate librarian at the Law Library of Indiana University Maurer School of Law, opened to

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John Paul Stevens





## The Flag

Returning from lunch, the nine justices stepped through a parted curtain behind their bench and settled into their chairs. The session of oral arguments was about to resume on this spring day in 1989. Like his colleagues on the Supreme Court of the United States, Associate Justice John Paul Stevens knew he was in for another wry performance by a celebrity lawyer named William M. Kunstler.

Outside, the March drizzle did not deter one hundred or so protesters demonstrating for free speech and making Kunstler's case on the sidewalk in front of the marble building in Washington, D.C. Damp American flags hung limply on their poles. Inside, the next case on the docket was *Texas v. Johnson*, in which the Court considered whether a Texas law making desecration of the nation's flag a criminal offense was constitutional. Making a crime of flag-burning seems easy to divide as a public issue—free speech versus mandated respect for country and flag. It was a well-worn debate that seemed unlikely to inspire any novel thinking, let alone unscripted drama. But Justice Stevens, then sixty-eight years old and in his fourteenth year on the Court, was having his own thoughts. No one flipped a coin in the ornate courtroom that afternoon, but there often was no better way of guessing Stevens's eventual vote on the case, even after comprehensive legal briefs had been filed by lawyers on both sides.

"To watch Stevens read a brief is to blow your mind," said one of his former law clerks, David J. Barron, who used to gather with his fellow clerks around the stuffed leather chair in the clerk's room



where Stevens mulled new cases. "I've never seen anyone chuckle reading a brief. [He] sees argument and counter-argument at the same time."<sup>1</sup> Elizabeth J. Sesemann, one of his daughters who grew up at the Stevens dinner table as well as, occasionally, in the Stevens chambers, said, "I don't think what other people believe ever influences his decisions, *ever*."<sup>2</sup>

In his more than three decades on the Court, Stevens consistently has been, by far, the Court's most prolific writer of special opinions, which are concurrences and dissents in which a justice expresses a viewpoint distinct from the majority. Concurrences and dissents may not directly affect the up-or-down outcome of the case at hand as the nine justices vote, but they often influence future Court actions. Special opinions are extracurricular work for justices that help reveal a justice's idiosyncrasies and make his or her mark on the law. According to data from the Court's 1986 term through its 1998 term, Stevens was the least likely of his colleagues to sign on to, or join, another's special opinion based on the percentage of special opinions he joined. But he was the most likely to have his special opinions joined by others, suggesting that his independence has had particular value to the Court.<sup>3</sup>

The political process of selecting the chief justice and eight associate justices of the Supreme Court, nine individuals whose decisions affect the lives of every American, is not well suited for recognizing such constructively independent thinking and installing it on the bench. Ideologues of the left and right want candidates for judge-ships to recite current bumper-sticker slogans and expect fealty to superficial doctrines. Advocates of rival judicial disciplines want to see their adherents sitting on the bench and want them to follow rules for judging gleaned from arcane law journals. Confirmation hearings and debates in the U.S. Senate, in its duty to advise and consent to presidential appointments of federal judges, have been contentious and drawn out. A president, whose power to appoint federal judges is underappreciated by political analysts and historians, wants each White House nominee to be confirmed as quickly and painlessly as possible. The confirmation hearings for Sonia Sotomayor, President Barack Obama's Supreme Court nominee in 2009,