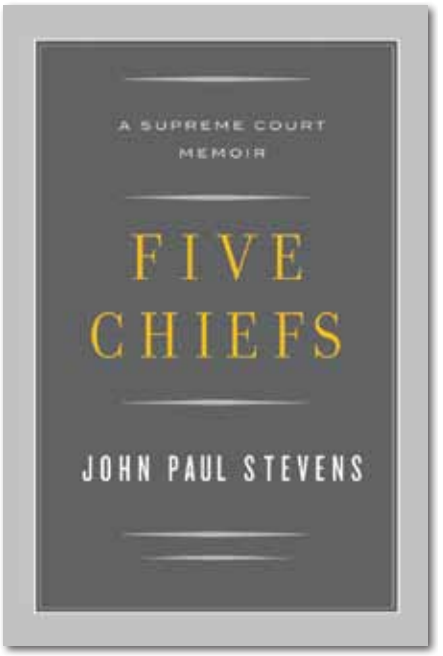
Justice Served

U.S. Supreme Court Justice John Paul Stevens's thirty-five-year tenure was marked by intellectual rigor, lack of pretention, and the firm belief that absolutism had no place on the bench.

By Michael O'Donnell



Five Chiefs: A Supreme Court Memoir

by John Paul Stevens
Little Brown and Company, 340 pp.

In an age of judicial philosophies, abstract methods of interpretation, and trite baseball metaphors, John Paul Stevens was a common-law judge. Justice Antonin Scalia practices textualism; Justice Clarence Thomas practices originalism. Chief Justice John Roberts is developing a sort of reactionary legalism. Even the Supreme Court's liberals have gotten in on the game. In a head-scratching 2005 book, Justice Stephen Breyer professed his theory of "active liberty," which has not exactly caught on as a beacon for progressive constitutionalists.

Through the din of this nonsense one delighted to hear the strong plain chords of a Stevens, who harkened back to an earlier breed of jurist. His lights were not the so-called "neutral principles" hashed out in law review articles and perfected in warlike opinions by judge-partisans. They were centuries-old practices like judicial restraint, respect for the Court's precedents and procedures, and, above all, an anachronistic faith in judges' discretion. In his new book, *Five Chiefs: A Supreme Court Memoir*, Stevens favorably quotes Justice Potter Stewart, who famously said of obscenity, "I know it when I see it." But where, cry the legal theorists, is the principle in that sort of decision making? Stevens might reply that it's amazing how many cases a judge will get right when he has no dogma to uphold and no movement to lead.

Stevens's retirement from the Supreme Court in 2010 after thirty-four years of service was a tremendous loss for the country. As the senior associate justice for sixteen years, he led the liberal wing through the Court's highest and lowest moments since Watergate. The high point both for the institution and Stevens personally was the trio of war-on-terror cases in which the Court put a stop to President Bush's lawlessness at Guantanamo Bay. Stevens wrote the two most important opinions—*Rasul v. Bush* (2004) and *Hamdan v. Rumsfeld* (2006)—and supervised a majority in a third, *Boumediene v. Bush* (2008). (He dissented in two other war-on-terror cases in 2004.) The low point was a pair of decisions that might best be described as institutionalized lawlessness. In *Bush v. Gore* (2000) the Court reached out and handed Bush the presidency, and in *Citizens United v. Federal Election Commission* (2010) it struck down most legal restrictions on corporate campaign spending. Stevens issued the two great dissents of his career in those cases, noting pointedly the damage the Court had done to itself. If only he were still there to help with the repairs.

The Court's liberals stood behind Stevens in *Citizens United*—as they did throughout much of the 2000s. He proved a canny strategist and leader, assigning opinions in a way that preserved majorities and shaped future coalitions. He secured key victories in decisions limiting capital punishment and permitting affirmative action. In *Five Chiefs* he implies that he cultivated Justice Anthony Kennedy in gay rights litigation from the mid-1990s. Stevens assigned Kennedy to write the Court's 1996 opinion in *Romer v. Evans*, which struck down a Colorado constitutional amendment that targeted homosexuals. He again gave Kennedy the honors in 2003's *Lawrence v. Texas*, which invalidated

Texas's antigay sodomy law. It may simply be that Kennedy was the justice least sure of his majority vote and Stevens prudently gave him the assignment to solidify it. Then again, Stevens may have sensed that the subject matter would appeal to Kennedy, who never misses a chance to write for the ages. Regardless, in the gay marriage and Defense of Marriage Act cases that are sure to come, liberals can thank Stevens that we have a good chance at Kennedy's decisive vote.

This recent leadership was a welcome surprise given that Stevens spent his early years on the Court as an unpredictable maverick. He arrived in 1975 as President Ford's sole appointment and immediately displayed confident independence tempered with midwestern geniality. He politely declined to join the "cert pool," by which the justices' law clerks share the work of reviewing thousands of petitions for the Court's attention. He dissented prodigiously and made a habit of filing concurring opinions to explain his quixotic views. As his biographers Bill Barnhart and Gene Schlickman note in *John Paul Stevens: An Independent Life*, during his first three terms Stevens "was the most prolific writer on the Court, authoring 65 dissents, 35 concurrences, and 36 opinions for the Court." Uniquely among the justices, he did all his drafting himself. "John Paul Stevens has not yet begun to write," went the saying at One First Street.

Stevens has a rare intellect, but unlike many of his colleagues he wore his learning lightly. Unlike Justices Breyer and Kennedy, he had no continental pretensions and did not look for the opportunity to speak a little French. Justices Roberts and Scalia are both brilliant in their way, yet they manifest that brilliance with disdain (Roberts) and shrill mockery (Scalia) of those who disagree. Stevens quietly but firmly pushed back, proving himself a match for any justice on the Court. In *District of Columbia v. Heller* (2008), which overruled a seventy-year-old precedent to hold that the Second Amendment creates an individual right to bear arms, he dissented with a historical analysis more persuasive than Scalia's. In *Five Chiefs* Stevens bemusedly describes the "extensive and interesting discussion[s] of history" in Scalia's opinions while making clear that such methodology is not the talisman that his brethren think. But he could play the game when he had to.

A fine example of Stevens's stolid fighting heft is his ninety-page dissent in Citizens United. *His opinion was so thorough and devastating that the majority divided the task of responding to it among Roberts, Scalia, and Kennedy, each of whom took on a section.*

Another fine example of Stevens's stolid fighting heft is his ninety-page dissent in *Citizens United*. His opinion was so thorough and devastating that the majority divided the task of responding to it among Roberts, Scalia, and Kennedy, each of whom took on a section. One of the main points of disagreement between the dissent and the majority was the conservatives' assertion—in the face of 100 years of federal laws and Court decisions to the contrary—that the First Amendment does not permit distinctions between speech by corporations and speech by individuals. After listing an unanswerable litany of major distinctions—including the financial resources of corporations, their limited liability, and their perpetual "life"—Stevens wrote,

> *The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expenditures based on "nothing more" than a fear that corporations have a special "ability to persuade," as if corporations were our society's ablest debaters and viewpoint-neutral laws such as [McCain-Feingold] were created to suppress their best arguments.... In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.*

Five Chiefs is a funny little memoir, as quirky and interesting as its author. Its conceit is a personal history of the Supreme Court arranged through the five chief justices Stevens has known. Two of them—Fred Vinson (who served from 1946 to 1953) and Earl Warren (1953 to 1969)—he knew very little. Vinson led the Court when Stevens clerked for another justice during the 1947–48 term, and Stevens occasionally gave him a ride in his beat-up car. Warren was chief during Stevens's years of private practice; Stevens argued an antitrust case before him in 1962. Hence the book's early chapters contain fewer personal recollections and more general remarks on the Court as an institution.

There are some notable early pages, though. Ever opinionated, Stevens levels criticism at two major decisions of the Warren Court. *Brown v. Board of Education* (1954), he writes, unquestionably reached the right result, but "[u]nlike most admirers of the opinion, I have never been convinced that the benefits of its unanimity outweighed what I regarded as two flaws in the Court's disposition of the cases." Namely, the Court held *Brown* over for an additional term to let the parties debate a remedy, and then it ordered desegregation to proceed "with all deliberate speed"—a famously baffling directive that led to southern foot dragging. Stevens also offers choice words about *Griswold v. Connecticut* (1965), which laid the foundation for *Roe v. Wade* by invalidating a state law banning contraceptives. Justice Douglas's opinion relied not on the text of the Constitution but on "penumbras, formed by emanations" that surround the guarantees of the Bill of Rights and "help give them life and substance." Stevens calls this "virtual incoherence" and would have reached the same result on less mystical grounds.

Stevens joined the Court during Chief Justice Warren Burger's tenure. Burger has been widely portrayed as a vainglorious boob: pompous, ineffectual in leadership, and incompetent in assigning and drafting opinions. Stevens decorously spends pages praising Burger's stewardship of the Court's heritage by commissioning just the right painting and so forth. But then Stevens reinforces the prevailing image by describing the way Burger withheld his views in the justices' conferences and assigned opinions to himself or to others who did not command a majority, causing confusion and acrimony as a result. Stevens is no Scalia: he does not come right out and call Burger an ass. As he did in his opinions, Stevens makes his point with the subtle but telling comment. He writes that when he joined the Court, Justice Potter Stewart suggested that he "keep in mind the possibility that either the Chief or Harry [Blackmun], or possibly both, might not adhere to the position that he expressed at conference."

The best sections of *Five Chiefs* concern the Court under the leadership of William Rehnquist and John Roberts (1986–2005, and 2005 to the present). Stevens genuinely liked both men and found them to be excellent administrators. Here, as elsewhere, the biggest value of *Five Chiefs* is its anecdotal color in filling in our understanding of the Court and its members. In a section on *Bush v. Gore*, Stevens recounts a story about the night Bush's petition to halt the Florida recount arrived at the Court. Stevens happened to bump into Justice Breyer at a Christmas party; "we had a brief conversation about the stay application. We agreed that the application was frivolous." The two parted ways "confidently assuming that the stay application would be denied when we met the next day." The Court's conservative majority thought otherwise and halted the recount in a flurry of opinions. Stevens concludes, with an understatement that belies the power of his famous dissent, "To the best of my knowledge no Justice has ever cited any of them. What I still regard as a frivolous stay application kept the Court extremely busy for four days."

Similar comments reveal the limits of Stevens's regard for Roberts. Stevens, a Chicagoan, built a vacation home in Michigan City, Indiana, in 1961. In 1969, he writes, "John Roberts was a high school freshman in a boarding school in LaPorte, Indiana," only a few miles away from Michigan City. Stevens swore in the young chief justice, who told the Senate that judges, like umpires, merely call balls and strikes. Every lawyer in the country who heard that statement knew it was cant—especially Stevens, who was there at Wrigley Field in 1932 to see Babe Ruth call his shot. An umpire can't send you to Guantanamo for the rest of your life with a sack over your head.

While Stevens clearly respects the abilities and achievements of both Rehnquist and Roberts, he uses *Five Chiefs* to dismantle several of their decisions. For Rehnquist he focuses on the trigger-happy death penalty jurisprudence and, more esoterically, the late chief's enthusiastic development of the doctrine of sovereign immunity, which prevents individuals from suing state or federal governments and has frustrated many a civil rights plaintiff. Stevens contends that Rehnquist's Eleventh Amendment cases—in which the Court constitutionalized the sovereign immunity doctrine without much regard for the amendment's text—was the worst mistake of Rehnquist's tenure.

For Roberts, Stevens singles out a case that was decided after his own retirement. In *Snyder v. Phelps* (2011) the Court overturned a jury verdict in favor of a plaintiff whose son's military funeral was heckled by religious fanatics bearing posters saying "God hates fags" and "Thank God for dead soldiers." The father sued under the tort doctrine of intentional infliction of emotional distress, but the Court held, 8–1 behind Roberts's opinion, that the protesters' speech was protected by the First Amendment. Stevens makes clear that he would have joined Justice Alito's dissent. Common-law judge that he was, Stevens eschewed simple line-drawing for a detailed analysis of each case's complexities. In *Five Chiefs* he notes a critical distinction overlooked by the *Snyder* Court:

> *It is easy to gloss over the difference between prohibitions against the expression of particular ideas—which fall squarely within the First Amendment's prohibition of rules "abridging the freedom of speech"—and prohibitions of certain methods of expression that allow ample room for using other methods of expressing the same ideas.*

In other words, the Court could have prevented the protesters from speaking at a certain location—a funeral—without taking the prohibited step of preventing them from uttering a certain message. The protesters could have said the same vile things elsewhere.

Both *Snyder* and *Citizens United* are First Amendment cases, and in them Stevens argues for less speech rather than more. This does not exactly put him at the vanguard of liberal constitutionalism. Nor did his dissents in the flag-burning cases of 1989 and 1990, in which he criticized the Court's judgment that federal and state laws protecting the flag are unconstitutional. It is far more common in our legal tradition to celebrate First Amendment absolutists like Hugo Black than jurists who treat that provision with anything like nuance.

And therein lies Stevens's tremendous appeal as a judge—regardless of whether one agrees with all of his decisions. He was an absolutist about nothing. Absolute positions on the law—be they on the subject of free speech or the framers' intent—often require the judge to set down reason and common sense so that he can hold a banner with both hands. It is therefore unsurprising that the one justice about whom Stevens has no kind words in *Five Chiefs* is Clarence Thomas, who is more rigid in his vision of the Constitution than perhaps any justice in the Court's history. If the Tea Party has taught us anything, it is that the absolutists will shout past each other until the whole damn operation grinds to a halt. Without Stevens, the Supreme Court is that much more likely to do the same thing. WM

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