

## SIXTY-FIVE ORAL ARGUMENTS WERE NOT ENOUGH: A TRIBUTE TO JUSTICE STEVENS FROM ACROSS THE BENCH

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I first heard the name John Paul Stevens in 1975. I had just finished my first year as a law student at Northwestern Law School and was working on a master's degree in political science as part of a joint-degree program when President Ford announced then-Judge Stevens's nomination to the Supreme Court. Like everyone at the Law School, I was excited that a Northwestern Law alumnus was going to be elevated to the Supreme Court, but candidly, I never expected his presence there to have much of an impact on my professional life. Although the focus in this Essay will be the relationship between the Justice and me that developed over decades while he sat on the Supreme Court, and I stood at the podium or sat at counsel table during oral arguments, I have a couple of memories about the Justice that provide context for my deep admiration of him.

After his confirmation to the Supreme Court, Justice Stevens began hiring Northwestern Law alumni as his law clerks. He hired one each from the two graduating classes ahead of mine, and both of them had clerked for the same judge for whom I clerked after I graduated, Judge Robert A. Sprecher. The Judge and Justice Stevens had been very close friends during their tenure together on the United States Court of Appeals for the Seventh Circuit before Justice Stevens was "promoted." It was because of Justice Stevens's presence on the Supreme Court and apparent willingness to consider Northwestern students as possible clerks that I decided to apply for a clerkship. A clerkship on the Court no longer seemed like a fantasy.

As it happened, Justice Stevens did not even interview me. For the 1978 Term, the Justice decided to reduce the number of law clerks in his Chambers to two (he was entitled to four and in his first three years on the Court had hired only three), and he had hired the Presidents of the Harvard and Stanford Law Reviews, before I had even sent in my application. When I interviewed the Justice after he retired at a public event at the Law School in 2016, he asked me why I had not applied to clerk for him. I told him that I had. He

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very kindly commented that not giving me a chance was one of the many mistakes he had made during his time on the Court. In truth, he did not make a mistake; he had two outstanding clerks that Term. But even though I did not get the clerkship I thought was my best opportunity, I had the good fortune to be hired to clerk for Chief Justice Warren Burger that Term. Without Justice Stevens, I am not certain that would have happened.

Law clerks typically have a lot of interaction with their own Justice, but they tend to have quite limited contact with the others. My experience with Justice Stevens was, however, a bit unusual. One day I was in his law clerks' office talking about some case when the Justice walked in unexpectedly. I apologized and started to make my way out, when Justice Stevens said: "No, stay. I value your input as much as anyone else's." I doubt that was completely true, but it was very kind, and I did stick around and offered my two cents about whatever case he drifted in to discuss. I believe he was the rare Justice who engaged freely and happily with any law clerk.

Even more remarkably, when Justice Stevens learned that my co-clerk, Chris Walsh, and I were considering returning to Chicago to practice law after our clerkships, he reached out and invited us to join him for lunch to talk about practicing law with private firms in Chicago. To be sure, it was not an elegant setting; we met with him in the cafeteria in the basement of the Supreme Court (twice). Not surprisingly, he had very high praise about his law firm, Rothschild, Barry & Myers, which he had cofounded. Chris, in fact, went there after his clerkship. The Justice also had nothing but compliments for the lawyers at Sidley & Austin, where I had summered and where I would end up five years later (albeit in the Washington, D.C. office).

I came away with two special memories from those lunches. The first was how overwhelmed and appreciative I felt that the Justice would spend as much time as he did with us in order to give us candid and valuable advice about becoming practicing lawyers, particularly in Chicago. The second was how shocked I was that the three of us could sit in a public eating area surrounded by Court visitors without anyone seeming to recognize that the Justice was sitting among them. By contrast, my co-clerks and I went to the same cafeteria with the Chief Justice on one occasion and spent ninety percent of the time being introduced to visitors who came up to the table to say hello to the Chief and ask if they could take his picture. And that was long before the days of iPhone cameras and selfies.

Instead of going back to Chicago after my clerkship, however, I went to the University of Illinois to teach law and then joined the Solicitor General's Office in 1981. I argued my first case in front of Justice Stevens in January 1982, which was Justice O'Connor's first Term on the bench, meaning that Justice Stevens was no longer the junior Justice on the Court.

That case was *McElroy v. United States*.<sup>1</sup> It involved the question of whether a criminal statute that outlaws transporting forged securities in interstate commerce was violated by the defendant presenting a check obtained in Ohio to a merchant in Pennsylvania without proof that the forgery itself had taken place before the check was transported across state lines.<sup>2</sup>

The case is largely forgettable but for the fact that the opinion for the Court was written by Justice O'Connor and was one of her first two or three opinions as a Supreme Court Justice. Justice Stevens wrote a solo dissent, a not uncommon occurrence, which meant that the United States prevailed by an 8–1 vote. What was particularly memorable about the argument were the questions from Justice White and Justice Stevens. Because the check in the case undeniably was carried across state lines, I focused on that fact to demonstrate that the interstate commerce requirement had been satisfied. Justice White wanted to know whether it made any difference that the *check* itself moved across the border as long as the defendant did so in the process of trying to avoid having his forgery detected.<sup>3</sup>

It was never clear to me whether Justice White was simply giving a rookie advocate a hard time or not, but it quickly became obvious that Justice White's questioning triggered genuine concern in Justice Stevens who followed up with one of his famous hypotheticals:

Suppose you have the same facts you have here, except as Justice White suggests, the theft was from Pittsburgh, but yet he lived in Ohio, and he called up from the Ohio Turnpike to Beaver Falls and said, I am on my way in, I am going to pick up the check in Pittsburgh and deliver it to you. He did exactly that, but it was a forged check. Wasn't that exactly like this case?<sup>4</sup>

I said no, because in our case the check in fact had moved across state lines, which made it a much easier case. But what became clear to me was that Justice White (along with the rest of the Court) was comfortable with the idea that the check did not need to cross state lines to violate the statute, and he simply wanted me to embrace that theory of the case. By contrast, Justice Stevens found that idea very troubling and even wondered what the federal interest would be if the check itself never made it out of Pennsylvania as in his hypothetical.<sup>5</sup> In some ways, his question anticipated the Court's later decisions limiting Congress's authority under the Commerce Clause.<sup>6</sup> That

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<sup>1</sup> 455 U.S. 642 (1982).

<sup>2</sup> *Id.* at 643.

<sup>3</sup> Transcript of Oral Argument at 23, *McElroy v. United States*, 455 U.S. 642 (1982) (No. 80-6680).

<sup>4</sup> *Id.* at 25–26.

<sup>5</sup> *Id.* at 30.

<sup>6</sup> *See United States v. Morrison*, 529 U.S. 598, 598 (2000) (holding that Congress did not have constitutional authority under the Commerce Clause to create a private right of action in the Violence

the oral argument influenced the Justice's vote is made plain in his dissent where he argued: "Under the Court's analysis, petitioner would have violated § 2314 if he had left his home in Ohio, picked up a forged check in Pittsburgh, and negotiated it in Beaver Falls."<sup>7</sup>

Justice Stevens thought this was beyond what Congress intended. At the end of the day, my client won the case, but I did not succeed in persuading Justice Stevens. This was the first, but not the last time that would be true.

In the ensuing twenty-eight Terms, I had the privilege of arguing before Justice Stevens sixty-four more times before he retired from the Court. What never ceased to amaze me was how unfailingly gracious he was. He routinely apologized for interrupting arguing counsel, which, of course, was unnecessary. We all know that the argument time is the Justices' time, not the lawyer's. Still, his style was unique and endearing.

Two other facets of his style at oral argument were humility and wit. I was in the courtroom the day when a lawyer referred to him as Judge Stevens and then immediately apologized. Justice Stevens, obviously not as concerned about the moniker as some members of the Court (the Clerk of the Court tells arguing counsel not to refer to any of the Justices as "Judge"), immediately reassured the flustered lawyer: "Well, your mistake in calling me Judge is also made in Article III of the Constitution, by the way."<sup>8</sup> Article III, Section One specifically refers to "Judges" of the "supreme" Court.

What made Justice Stevens's understated style of asking questions particularly powerful was the contrast of that style with the questions' content: His questions were often the hardest ones counsel would face during the argument. One of my favorite memories of an exchange with Justice Stevens was not in a case I argued. My then-partner and good friend, Rex Lee, argued on behalf of the National Collegiate Athletic Association (NCAA) in a case against Jerry Tarkanian, the former head basketball coach of the University of Nevada at Las Vegas (UNLV).<sup>9</sup>

The issue in the case was whether the NCAA could be considered a state actor for purposes of 42 U.S.C. § 1983 and the Fourteenth Amendment, because of its actions in connection with the suspension of Coach Tarkanian by UNLV, which as a state university is a state actor.<sup>10</sup> Justice Stevens, who I believe was the best hypothetical questioner on the Court (evidenced also

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Against Women Act); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that Congress did not have power under the Commerce Clause to pass a law forbidding individuals from knowingly carrying a gun in a school zone).

<sup>7</sup> *McElroy*, 455 U.S. at 660 (Stevens, J., dissenting).

<sup>8</sup> U.S. CONST. art. III, § 1.

<sup>9</sup> *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

<sup>10</sup> *Id.* at 191–92.

by his question in *McElroy* quoted above), asked Tarkanian’s counsel the following:

Well, let me give you this example. Supposing United Airlines tells O’Hare Airport in Chicago that we won’t land here anymore, because we think your airport manager is doing a sloppy job of turning on the lights, or something like that, at night. They just say, we won’t do it. And O’Hare says, well, we can’t operate without United, so we’ll fire him. Would United become a state actor because they have enough economic power to insist on that kind of result?<sup>11</sup>

The transcript then reads: “The mere—if you—” and, if you listen to the tape of the oral argument, there is a long silence, which is interrupted by Justice Scalia interjecting: “You want to try to say no,” which is followed in the transcript by “[Laughter].”<sup>12</sup> I remember often seeing lawyers standing at the podium after Justice Stevens would ask a question like his “O’Hare” hypothetical, and you could see from the expression on their faces that they knew there was a trap in the hypothetical, but they often could not figure out what would be worse, saying yes or saying no.

My favorite oral argument exchange between Justice Stevens and arguing counsel occurred when I was not in the courtroom. In *Grutter v. Bollinger*, which was the challenge to the constitutionality of the University of Michigan Law School’s admissions process,<sup>13</sup> my law firm, Sidley Austin, filed a brief on behalf of retired military officers. In that brief, we argued that the United States military academies rely upon affirmative action in their admissions in order to ensure a racially integrated officer corps, which is critical to our national security.<sup>14</sup> We further contended that the admissions process at Michigan’s law school was not materially different and that both systems should be constitutional.<sup>15</sup>

I need to make a disclaimer here. Although my name was at the top of the brief, my partner, Virginia Seitz, took the laboring oar in preparing the amicus brief, and for that reason she was listed as counsel of record. The brief was the subject of some back and forth between Justice Ginsburg and petitioner’s counsel early in the oral argument.<sup>16</sup> But the role of the brief became much more important later in the oral argument (at least for me) when the Solicitor General went to the podium to argue in support of petitioner.

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<sup>11</sup> Transcript of Oral Argument at 35, *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (No. 87-1061).

<sup>12</sup> *Id.*

<sup>13</sup> 539 U.S. 306 (2003).

<sup>14</sup> *Id.* at 330–31.

<sup>15</sup> *See id.*

<sup>16</sup> Transcript of Oral Argument at 7–9, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

After the first sentence of argument, Justice Stevens politely interrupted as follows:

General Olson, just let me get a question out and you answer it at your convenience. I'd like you to comment on Carter Phillips' brief. What is your view of the strength of that argument?<sup>17</sup>

Two things are striking about this question. First, it reflects Justice Stevens's remarkable gentility, which I have already noted, in asking questions—“answer it at your convenience.” It should not surprise anyone that the Solicitor General responded immediately. Second, I was unbelievably flattered to have the Justice use my name to identify the brief. The recognition was undeserved, but the publicity was great. I have long suspected that he did it because we are both Northwestern Law School alums, but I could never work up the nerve to ask him that question.

Over the years, actually decades, I developed a very warm relationship with Justice Stevens. He always nodded to me with a smile when he walked onto the bench and, of course, he treated me with the same cordiality he extended to all arguing counsel. I cannot say that my record with the Justice reflected any special deference to my arguments. I lost his vote in thirty-four of the sixty-five I cases I argued before him. And technically, I only argued sixty-four times in his presence. On the day of one case I argued in the Court, Washington, D.C. suffered a twenty-two-plus inch snow storm, and I had to get a ride to One First Street with Justices Scalia and Kennedy. Justice Stevens had even tougher transportation woes. His flight from Florida was cancelled, and he missed the argument (along with Justice Souter), although he no doubt read the transcript. He joined Justice Thomas's opinion for a unanimous Court in *Norfolk & Western Railway Co. v. Hiles*.<sup>18</sup>

I wish I could say that my last argument before Justice Stevens was one for the ages but, sadly, it was not. I represented Alabama and other States, along with an interstate Compact of States, in an original action against North Carolina where my clients sued North Carolina for breach of the Compact involving building a nuclear waste disposal site.<sup>19</sup> The very last question Justice Stevens asked was about how the money that would be generated by the site (had it been built) would have been distributed among the Compact's members.<sup>20</sup> It was a straightforward question about the mechanics of the Compact, which reflected another trait of many of Justice

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<sup>17</sup> *Id.* at 19.

<sup>18</sup> 516 U.S. 400, 401 (1996).

<sup>19</sup> *Alabama v. North Carolina*, 560 U.S. 330, 338 (2010).

<sup>20</sup> Transcript of Oral Argument at 81, *Alabama v. North Carolina*, 560 U.S. 330 (2010) (No. 132, Orig.).

Stevens's questions: they dug into the nuts and bolts of the dispute in front of the Court. He was just as interested in the minutiae as he was in the big picture legal issues; he had a complete grasp of both aspects of a case. And, he had amazing intellectual curiosity. Because of the breadth of his potential concerns, I always prepared for arguments not only at the level of broad legal principles, but also by getting into the weeds of the factual setting in a case, knowing that Justice Stevens might ask a question as simple as, "How does all of this work?"

Like everyone else, I had no idea that the Justice would announce his retirement at the end of the 2009 Term. It was a sad day for me because I knew I would miss his welcoming smile when he walked onto the bench, his gracious way of asking questions, and even the minefield of his hypotheticals, all of which made his role on the bench very special to me personally. Others in this Symposium will focus on him as a boss and as a brilliant jurist, but my strongest memories of the Justice came from his unique and inspiring role during oral argument: He was both the gentlest and the toughest questioner on the Court for thirty-five years.

