

## REMARKS

### Introduction to Keynote Speaker

HON. ROBIN S. ROSENBAUM\*

I have always admired Justice Stevens as a jurist and as a person. But it wasn't until I began reading about Justice Stevens's life that I began to grasp just how exceptional Justice Stevens has always been, even as a young man. In fact, there are so many remarkable things about Justice Stevens that I cannot possibly do his career justice—no pun intended—in the few minutes I have. But I will try. Before I do, though, I wish to note that many of the facts about Justice Stevens's life that I will be sharing with you were gathered by Bill Barnhart and Gene Schlickman in the book *John Paul Stevens: An Independent Life*.<sup>1</sup>

The Honorable John Paul Stevens grew up in Chicago, the youngest of four boys. He graduated Phi Beta Kappa from the University of Chicago, where he studied literature; served in many capacities for the student newspaper, *The Daily Maroon*, including, among others, as the chairman, the night editor, and the sports editor; played for the school's undefeated tennis team; and was the head class marshal.

Upon obtaining his undergraduate degree, Justice Stevens returned to the University of Chicago for graduate studies in English. The year was 1941, and a dean at school encouraged Justice Stevens to take a type of restricted Naval correspondence class in cryptography. As it turned out, the Navy used the course to screen for the best and the brightest to serve in cryptography. In Justice Stevens, the Navy had found just such a man. So on December 6, 1941, Justice Stevens volunteered for the Navy. Justice Stevens has been

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<sup>1</sup> BILL BARNHART & GENE SCHLICKMAN, *JOHN PAUL STEVENS: AN INDEPENDENT LIFE* (2010).

known to say about his timing, “I’m sure you know how the enemy responded the following day.”

Justice Stevens spent nearly four years in the Navy, where he rose to the rank of lieutenant. He is a recipient of the Bronze Star, a medal authorized by President Roosevelt in February 1944 to recognize “heroic or meritorious achievement or service” in a non-combatant role.

When Justice Stevens completed his military service, he decided to attend law school, rather than returning to his graduate studies in English. Justice Stevens said that his choice was “profoundly influenced” by a letter that his brother Jim, who had become a lawyer in 1938, wrote to him. Jim Stevens provided advice to Justice Stevens that Justice Stevens described as “hauntingly similar to that expressed in a letter written in 1761 by a young lawyer named John Adams: ‘Now to what higher object, to what greater character, can any mortal aspire than to be possessed of all this knowledge, well digested and ready at command, to assist the feeble and friendless to discountenance the haughty and lawless, to procure redress to wrongs, the advancement of right, to assert and maintain liberty and virtue, to discourage and abolish tyranny and vice?’”

Justice Stevens attended law school at Northwestern, where he served as a co-editor of the law review and graduated first in his class. Professor W. Willard Wirtz wrote in his recommendation of Justice Stevens for a clerkship with Justice Wiley Blount Rutledge, “Stevens has the quickest, and at the same time best balanced, mind I have ever seen at work in a classroom. I have worked with him, too, in connection with 2 or 3 law review projects. The man is just as solid as he is brilliant. Beyond all this he has a personality which makes it a pure delight to work with him. I suppose that he is undoubtedly the most admired, and at the same time, the best liked man in the school.”

Not surprisingly, Justice Rutledge seized the opportunity to have Justice Stevens clerk for him during the 1947-1948 Supreme Court term. Among other cases decided that term was *Ahrens v. Clark*.<sup>2</sup> Ahrens and about 120 other German nationals were detained at Ellis Island as enemies of the United States, although the fight against

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<sup>2</sup> 335 U.S. 188 (1948).

Germany had ended.<sup>3</sup> They filed petitions for writ of habeas corpus in the District Court for the District of Columbia, alleging that they were subject to the custody and control of the Attorney General.<sup>4</sup> The Supreme Court concluded that they could not file their petitions outside the district where they were being held.<sup>5</sup> Justice Rutledge, with Justice Stevens's assistance, dissented, presciently writing "[I]f absence of the body from the jurisdiction is alone conclusive against existence of power to issue the writ, what of the case where the place of imprisonment, whether by private or public action, is unknown? What also of the situation where that place is located in one district, but the jailer is present in and can be served with process only in another? And if the place of detention lies wholly outside the territorial limits of any federal jurisdiction, although the person or persons exercising restraint are clearly within reach of such authority, is there to be no remedy . . . ?"<sup>6</sup>

Fifty-six years later, in an interesting turn of fate, Justice Rutledge's dissent in *Ahrens v. Clark* took a central role in *Rasul v. Bush*,<sup>7</sup> an opinion that Justice Stevens authored. In *Rasul*, fourteen Guantanamo Bay detainees filed habeas petitions, or complaints that were construed as habeas petitions, against President George W. Bush in the District Court for the District of Columbia.<sup>8</sup> Drawing on Justice Rutledge's dissent in *Ahrens*, among other sources, Justice Stevens, joined by five other Justices, said that the petitioners' presence was "not 'an invariable prerequisite' to the exercise of § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts within its respective jurisdiction if the custodian can be reached by service of process."<sup>9</sup>

Following his clerkship, Justice Stevens went into private practice, eventually starting his own firm. Among Justice Stevens's many interesting matters, Justice Stevens argued *United States v. Borden Co.* before the Supreme Court. He also represented Charles

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<sup>3</sup> *Id.* at 189.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 192.

<sup>6</sup> *Id.* at 195 (Rutledge, J., dissenting).

<sup>7</sup> 542 U.S. 466 (2004).

<sup>8</sup> *Id.* at 470–71.

<sup>9</sup> *Id.* at 467.

Finley (owner of Major League Baseball's Athletics) and helped Finley to move the team to Oakland from Kansas City (previously Philadelphia) in 1968. Somehow, during all of this work, he still managed to play tennis, compete at national bridge tournaments, and become an airplane pilot.

According to the story as recounted by Senator Charles H. Percy, when Senator Percy asked Justice Stevens if he would consider appointment to the Seventh Circuit, Justice Stevens suggested checking back with him in six years. But Senator Percy responded, among other things, "In six years, you ought to be on the Supreme Court." In September 1970, Nixon appointed Justice Stevens to the Seventh Circuit. Justice Stevens, who was confirmed on November 20, 1970, was the first Seventh Circuit judge to have clerked for a Supreme Court justice.

President Gerald Ford nominated Justice Stevens as an Associate Justice of the Supreme Court in 1975 to take Justice William O. Douglas's seat. Justice Stevens was confirmed 98-0 and was sworn in on December 19, 1975. In 2006, President Ford said, "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."

Although Justice Stevens retired from the Supreme Court in 2010, he has kept very busy, most recently writing his book *Six Amendments*.

We are very fortunate to have Justice Stevens with us here today to discuss the important symposium topic of overcriminalization. Commentators on the topic of overcriminalization have noted that it can take many different forms. Indeed, Justice Stevens has written about or endorsed Supreme Court opinions addressing overcriminalization issues stemming from the actions of each of the three branches of government: the legislative, executive, and judicial branches.

For example, *United States v. Wells*,<sup>10</sup> decided in 1997, is an opinion that some have argued reflects overcriminalization on the part of the judiciary—as well as on the part of the executive, for seeking an allegedly overcriminalized construction of the statute at issue. There, the Supreme Court considered whether, under 18 USC

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<sup>10</sup> 519 U.S. 482 (1997).

1014, which prohibits knowingly making a false statement to a federally insured financial institution, the false statement charged must be material in order to violate the statute.<sup>11</sup> The Supreme Court decided that it need not be.<sup>12</sup> Justice Stevens dissented, explaining that Congress “could not have intended that someone spend up to 30 years in prison for falsely flattering a bank officer for the purpose of obtaining favorable treatment.”<sup>13</sup>

In *Stewart v. McCoy*,<sup>14</sup> decided in 2002, Justice Stevens wrote to explain why he thought it appropriate to deny *cert*. This memorandum addressed an overcriminalization issue stemming from legislative and state judicial acts.<sup>15</sup> In *Stewart*, the respondent before the Supreme Court had been convicted under Arizona law of giving advice to members of a street gang.<sup>16</sup> He was sentenced to fifteen years in prison.<sup>17</sup> On habeas review, the lower federal courts ordered the respondent released because they concluded that his speech was protected under the First Amendment.<sup>18</sup> The warden sought *cert*. Justice Stevens explained that although he viewed the lower courts’ conclusion that the respondent’s speech was protected under the First Amendment as “debateable,” he nonetheless thought that *cert* was appropriately denied because of the “harsh sentence for a relatively minor offense.”<sup>19</sup>

In *Kimbrough v. United States*,<sup>20</sup> decided in 2007, Justice Ginsburg concluded on behalf of the Supreme Court that a district court does not abuse its discretion when it concludes in sentencing a particular defendant that the disparity between the crack cocaine and powder cocaine Sentencing Guidelines yields a sentence that is “greater than necessary” to achieve Section 3553(a)’s purposes, even in a mine-run case.<sup>21</sup> While *Kimrough* does not mention an earlier case that the Court considered, *United States v. Armstrong*

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<sup>11</sup> *Id.* at 484.

<sup>12</sup> *Id.* at 499–500.

<sup>13</sup> *Id.* at 512 (Stevens, J., dissenting).

<sup>14</sup> 537 U.S. 993 (2002).

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

<sup>16</sup> *Id.* at 469.

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

<sup>18</sup> *Id.*

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

<sup>20</sup> 552 U.S. 85 (2007).

<sup>21</sup> *Id.* at 110–11.

(1996),<sup>22</sup> there are echoes of points that Justice Stevens raised in his dissent in *Armstrong* in the *Kimbrough* opinion. In *Armstrong*, the Supreme Court concluded that in order to establish entitlement to discovery regarding selective prosecution, a defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not.<sup>23</sup> Justice Stevens dissented, asserting that the court's inherent power gives it the authority to require the government to respond to what the court deems a sufficient factual showing of selective prosecution.<sup>24</sup> The crime at issue in *Armstrong* involved crack cocaine.<sup>25</sup> Justice Stevens explained, in his view, the district judge's order "should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called crack cocaine . . . . Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct . . . . Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks . . . . The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses."<sup>26</sup> These concerns that Justice Stevens expressed in his *Armstrong* dissent are essentially the same as those that later justified the Court's opinion in *Kimbrough*.

Justice Stevens is indeed a living legend, and we are very lucky to have him here with us today. Without further ado, it is my honor and privilege to introduce the Honorable John Paul Stevens.

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<sup>22</sup> 517 U.S. 456 (1996).

<sup>23</sup> *Id.* at 470–71.

<sup>24</sup> *Id.* at 477.

<sup>25</sup> *Id.* at 489.

<sup>26</sup> *Id.* at 477–80.