

REFLECTIONS ON OT07

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“[H]e didn’t teach us what to do as much as he helped us learn what we were capable of doing.”†

That’s how Kenneth Manaster recently described Justice Stevens’s approach to the young lawyers who staffed him on the 1969 Special Commission charged with investigating misconduct on the Illinois Supreme Court. But Manaster could just as easily have been describing the Justice’s style when it came to his law clerks. The nature of the twelve-month clerkship, which ordinarily began while the Justice was away for the summer, simply didn’t afford much opportunity for sustained training; perhaps his approach was dictated by necessity. But I think it was also reflective of his general inclination toward his clerks. He seemed to have decided to accord to each of us, upon arrival, a presumption that we were perfectly capable of discharging the duties of this awe-inspiring job for which we had somehow been selected; that we had views that merited his consideration; that we would add something of value to discussions about the cases pending before the Court and those vying for review. He provided basic guidelines, but mostly he placed his trust in our abilities and good judgment. And I think that all of us, simultaneously thrilled and terrified at the Justice’s evident assessment (mistaken assessment, as I’m sure it seemed to many of us—I know it did to me), somehow rose to the occasion: we quickly became the lawyers he seemed to believe we were. There was no real alternative.

The Justice’s general orientation in this regard was not limited to his law clerks; he actually seemed to approach everyone, from his colleagues on the Court to judges on the lower federal courts to the lawyers who appeared before him, with this same presumption of good sense and good faith, almost without exception. And I think that like his law clerks, others who found themselves on the receiving end of this incredible trust responded by working to earn it: Justice Stevens improved everyone’s game.

This basic ethos was reflected everywhere in chambers. Our short chambers manual described the certiorari work flow followed in chambers—at the time, Justice Stevens was the only Justice who did not

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† Kenneth A. Manaster, *John Paul Stevens—Judge and Teacher*, SCOTUSBLOG, (May 11, 2010, 4:05 PM), <http://www.scotusblog.com/2010/05/john-paul-stevens%E2%80%94judge-and-teacher>.

participate in the cert pool—and included a number of tips, representing the accumulated wisdom of years of clerks, on issues in which the Justice was (or was not) ordinarily interested. It ended on a note I recall well: “There is very little orthodoxy in these chambers, and, on second thought, disregard what’s written here if you disagree.”

* * *

This process of transformation—of our becoming the lawyers Justice Stevens seemed to believe we were, of learning “what we were capable of doing”—was still in its early stages the first time my co-clerks and I sat down with Justice Stevens in September 2007. He had spent the summer far from Washington, as was his habit (and that of all of the Justices), and his travels that year had included a trip to Hawaii, where the Ninth Circuit Judicial Conference was being held.¹ My three co-clerks and I had arrived in chambers over the course of the summer, and our direct interactions with the Justice until then had been limited to phone consultations about stay requests. This gradual fade-in actually worked quite well. We all found it a great relief—as did the clerks in other chambers—that the Court’s summer recess permitted us to acclimate ourselves to the majesty of the surroundings and the magnitude of the work without any actual *Justices* in the mix. So by the time September rolled around, we were reasonably comfortable in chambers, although still terrified of the Justice himself.

On that first day we encountered the Justice in person, we gathered around him in what came to be a familiar configuration: the Justice in his usual chair (feet up or down—it depended), with three of us on the couch, and one in the chair across from him. (We rotated; he did not.) After some opening pleasantries, he began the conversation. He clearly wanted to talk, and he had two things on his mind.

First, he wanted to discuss the October 2006 Term, the first full Term with both Chief Justice Roberts and Justice Alito on board. (The Chief Justice had been confirmed in September 2005 and Justice Alito in January 2006.) The addition of the two new Justices marked the first change in the Court’s membership since Justice Breyer’s confirmation in 1994, and it had been a divisive Term, notwithstanding the new Chief’s professed goal of increasing consensus and unanimity on the Court.²

¹ For great video of that conference, including a panel featuring a lei-clad Justice Stevens, see *Conversation with Justice John Paul Stevens*, C-SPAN VIDEO LIBRARY (July 19, 2007), <http://www.c-spanvideo.org/program/200035-2>.

² See, e.g., *Nomination of Judge John G. Roberts, Jr.*, 151 CONG. REC. 20,637 (2005) (“[T]he Chief Justice has a particular obligation to try to achieve consensus consistent with everyone’s individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed.” (internal quotation mark omitted)); see also Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC, Jan./Feb. 2007, at 104, 105.

The Term had featured several major cases on socially divisive issues like abortion and the use of race in school admissions. In *Gonzales v. Carhart*,³ Justice Kennedy wrote for a five-Justice majority in a case that looked an awful lot like a simple replay of *Stenberg v. Carhart*,⁴ with different Court personnel dictating a different outcome. And in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵ the Chief Justice concluded that the Fourteenth Amendment prohibited voluntary plans to integrate public schools in Louisville and Seattle; while Justice Breyer's powerful dissent answered the majority point by point, Justice Stevens wrote only for himself, both to identify the "cruel irony" in the Chief Justice's use of *Brown v. Board of Education* to justify the case's result, and to lament, it seemed, the end of an era: "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."⁶

Perhaps as important, the Term had featured a number of procedural cases that imposed new burdens on litigants seeking their day in court, including *Bell Atlantic Corp. v. Twombly*,⁷ in which the Court rejected *Conley v. Gibson*'s "notice pleading" standard in favor of a "plausibility" standard in antitrust cases; *Bowles v. Russell*,⁸ a case in which the Court deemed a habeas petitioner's appeal untimely notwithstanding the fact that a federal judge had extended the filing deadline, along the way overturning several earlier decisions; and *Ledbetter v. Goodyear Tire & Rubber Co.*,⁹ in which the Court held 5–4 that the statute of limitations for Title VII pay discrimination claims begins to run at the time of an *original* discriminatory pay decision.

Reflecting on the year, the Justice observed that the commentators who had identified the theme of the Term as "clos[ing] the courthouse doors"¹⁰ had gotten it somewhat wrong. In an interview earlier that summer, the Justice had similarly rejected this "door closing" metaphor; instead, he had described the Term as having revealed a major fault line between bright-

³ 550 U.S. 124 (2007).

⁴ 530 U.S. 914 (2000).

⁵ 551 U.S. 701 (2007).

⁶ *Id.* at 798, 803 (Stevens, J., dissenting).

⁷ 550 U.S. 544 (2007).

⁸ 551 U.S. 205 (2007).

⁹ 550 U.S. 618 (2007).

¹⁰ See, e.g., Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 437 (2007) ("[T]he effect of many of the Court's decisions [during the October 2006 Term] was to close the courthouse doors"); Jess Bravin, *Court Under Roberts Limits Judicial Power: Conservative Shift Sets Hurdles for Litigants; Businesses Get a Break*, WALL ST. J., July 2, 2007, at A1 ("[T]he biggest change under Chief Justice Roberts might not involve who wins on the merits" but "who gets through the courthouse door in the first place."); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 ("One theme was the court's sustained interest, across many areas of legal doctrine, in limiting the ability of plaintiffs to bring or appeal lawsuits.").

line rules, which the new majority appeared increasingly inclined to favor, and a more individualized, case-by-case, and issue-focused approach to adjudication.¹¹ But by the time we sat down to talk to the Justice at the end of that summer, he offered a slightly different framing. What had really begun to happen, he explained, was the delinking of *rights* and *remedies*. That most basic common law principle—that where there is a right, there exists a remedy—had been largely cast aside in this new era. And for Justice Stevens, the finest of common law judges, it was a principle judges disregarded at their own peril.

The Justice also wanted to talk about his trip to Hawaii. He had been stationed there during his time in the war as a naval cryptographer, but he wasn't interested in waxing nostalgic about his wartime experiences; what he wanted to talk about was swimming. The Justice has always been a great swimmer, probably beginning with his childhood along the shores of Lake Michigan, and the time he spent stationed in Hawaii had been no exception—he had gone swimming regularly, along with colleagues in the Navy, at several beaches in particular. On this 2007 trip, the Justice managed to locate the best beach from his time in Hawaii over sixty years earlier, and decided to take a swim there, for old times' sake. This wasn't just an ordinary swimming beach, he informed us, but a beach known for particularly high-quality body surfing; and the Justice, at this point eighty-seven years old, loved body surfing. But the waves on this beach were large and the current strong, so the U.S. Marshals charged with keeping the Justice safe insisted on a condition: the Justice would swim accompanied by two former Navy Seals, who would ensure his safety out in the choppy waters. The Justice seemed to believe the precaution was unnecessary, but he gamely agreed to the condition, and proceeded to spend several hours swimming under the former Seals' watchful eyes. This ability to move between the heavy and the light—to refuse to allow the weight of constant losses, of which there were many in those years, to wear him down—was one of the things I came to admire most about the Justice during my year with him. The stakes were never lost on him, but neither did he lose himself as a private person—a humble, down-to-earth, exceedingly kind person, for all his extraordinary brilliance—with a life outside of the awesome responsibilities he bore as a Justice and the ability to set aside the work of the Court when circumstances called for it.

That quality was in full effect at the end of the 2007 Term. The Term's last day featured the Court's announcement of the much anticipated decision in *District of Columbia v. Heller*.¹² Justice Scalia summarized from the bench the Court's 5–4 decision recognizing, for the first time, an individual right to keep and bear arms unrelated to military service. Justice Stevens followed the opinion announcement with a powerful statement

¹¹ *Conversation with Justice John Paul Stevens, supra* note 1.

¹² 554 U.S. 570 (2008).

from the bench, concluding:

What impact the Court's totally unnecessary entry into this entanglement will have on the ongoing debate between the advocates and opponents of gun control, and indeed, on this Court's role as a guardian of the rule of law, is a matter that will be debated by future historians at length. It is, however, clear to us that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.¹³

I think we all felt a little bruised after the delivery of those two opinions; it seemed to us that Justice Scalia's opinion was quite wrong, and that the majority was making a terrible mistake. So it was a difficult note on which to end the Term.

But after the Chief Justice announced that the Court would stand in recess until October, Justice Stevens ambled back to chambers, and we all piled into a van to head to the restaurant where the Justice customarily treated his clerks and chambers staff to a celebratory end-of-Term lunch. To our surprise, our destination proved to be a small, nondescript seafood restaurant tucked into a strip mall in Maryland (I hadn't yet learned that much of the best food in D.C. can be found in strip malls outside of the district). But despite the modest appearance of the restaurant, we proceeded to have one of the best seafood meals any of us could remember. And notwithstanding the weight of the morning, it was a lovely and light-hearted meal, at which we avoided entirely the subject of the Term. We talked instead about travel plans for the upcoming summer, our career aspirations, and a few recently published books the Justice had somehow managed to devour that spring, even in the sprint to the end of the Term. We ordered a round of drinks, and I recall very well the old naval toast the Justice made with a smile, eyes twinkling, when they arrived: "Death to our enemies."

¹³ For an audio recording of the opinion announcement, see *District of Columbia v. Heller*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/2000-2009/2007/2007_07_290 (last visited May 27, 2012).

