

A MODEST MEMOIR: JUSTICE STEVENS'S SUPREME COURT LIFE

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The title of Justice John Paul Stevens's new book, *Five Chiefs: A Supreme Court Memoir*, tells us several things about the author before we have read a single page. By deflecting attention from the author to his subject, the title makes clear that this book will not be a celebration or even an exploration of Stevens's long tenure on the Court. And by designating the book a memoir rather than an autobiography, the title also cautions us not to expect a detailed account of the author's path to the Court. Instead, the modesty of the title prepares us for the modesty of the author, whose focus will be on the ways in which five Chief Justices ran their Courts. Stevens himself will be at the forefront only when needed to illuminate their successes and flag their occasional errors. Even this project is treated with self-deprecatory irony: the epigraph, borrowed from Lincoln's Gettysburg Address, announces that "[t]he world will little note, nor long remember, what we say here . . ."¹ This is, in short, a book about the Court itself rather than about the author.

It is also a departure from earlier contributions to the rarefied genre of Supreme Court autobiography. In the nineteenth century, the nine Justices who wrote accounts of their lives generally did so for targeted audiences, most often family or editors requesting biographical data.² John Marshall produced the first Court autobiography in response to a request for such information from Justice Story to include in his review of Marshall's *History of the Colonies*. Marshall's letter providing this autobiographical information was published for the first time in 1932, almost a century after his death.³ Joseph Story wrote a "brief memoir of [his] life" for his young son while still on the bench, omitting any discussion of his judicial opinions.⁴ The exception—Stephen Field, who apparently intended his work as a campaign biography for a projected presidential run—ignored his judicial career in favor of his swashbuckling adventures during the

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¹ JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011) (link).

² Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 240 (2004) (link).

³ *Id.* at 241.

⁴ *Id.* at 245.

California gold rush.⁵ Even Justices such as Samuel Miller and Henry Brown who touched briefly on the Court in their autobiographies did so only to underscore their successful careers.⁶ None of these authors anticipated an audience interested in his work on the Court.

If Stevens departs from the nineteenth-century Justices' narrow focus on their lives outside the Court, he is also less than eager to adopt the insider model that made its first appearance in the work of some twentieth-century Justices. In his comprehensive autobiography, Chief Justice Hughes declares himself "justified" in revealing Court confidences "in defense of the Court's integrity" from charges that he and other Justices voted strategically to undermine President Roosevelt's Court-packing plan.⁷ And Earl Warren, in his posthumous memoir, exposed another extraordinary episode: the unorthodox procedures he employed in guiding the Court toward a unanimous decision in *Brown v. Board of Education*.⁸ The most innovative and expansive autobiographer, however, was William O. Douglas. In his third volume, *The Court Years*, Douglas took on the unprecedented role of Court gossip to give his readers glimpses inside the Court. These glimpses usually revealed Douglas scoring points against his adversaries and exposing such unflattering episodes as one Court member raising his fist against another during a heated exchange at conference.⁹

The first two twenty-first-century autobiographies, written by Justice O'Connor (with her brother as co-author) and Justice Thomas, share a common theme—the shaping effect of an extraordinary childhood on the Justice's life. O'Connor's memoir describes her childhood on the family cattle ranch on the remote Arizona–New Mexico border, with its potent lessons of self-reliance, endurance, and community; the narrative ends well before its author's appointment to the Court.¹⁰ Thomas's memoir follows a similar path, describing his difficult Georgia childhood and the powerful influence of his grandfather on his personal and professional lives before ending his story with a bitter account of his controversial confirmation

⁵ *Id.* at 258–59.

⁶ Miller boasts of his constitutional law opinions, calling himself "the organ of the court in that class of cases as often as any man who ever sat on that bench." *Id.* at 258. Brown found his work on the Supreme Court less enjoyable than that on the district court, but noted that the former had other compensations since it was "a position of far more dignity, was better paid and was infinitely more gratifying to one's ambition." *Id.* at 272.

⁷ *Id.* at 281.

⁸ Warren is, however, careful to use "we" rather than "I" in his account, attributing the strategy to the collective Court rather than—as other scholars have—to himself alone. See, e.g., BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 82–101 (1983).

⁹ Ray, *supra* note 2, at 314–15.

¹⁰ SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002) (link).

hearing.¹¹ The reception of both books signaled the public's interest in an account of a Justice's early life and career: both became bestsellers, with Thomas's book reaching the top of the *New York Times* bestseller list.

Stevens, always an independent voice on the Court, not surprisingly chooses to reject these earlier approaches and instead recreates the form of the Supreme Court autobiography for his own purposes. At its core, *Five Chiefs* is an assessment of the Court's institutional performance rather than a personal history, though this assessment comes from a privileged observer and participant. The book's organizing principle—what Stevens describes as chapters devoted to “each of the five Courts during which I had some personal contact with the chief justice”¹²—allows him to consider from a succession of vantage points both the style of leadership and the jurisprudence that distinguish those Courts. For each Chief Justice, he tells us, his “memories primarily reflect a different point of view: that of another justice's law clerk for Vinson; of a practicing lawyer for Warren; of a circuit judge and junior justice for Burger; of a contemporary colleague for Rehnquist; and of an observer of superb advocacy before Roberts became a colleague.”¹³ In executing this project, he observes apologetically, “some autobiographical comments must be tolerated.”¹⁴ For the reader, those comments are less tolerated than savored for what they reveal about both the Court and the author.

As a Court insider for thirty-five years, Stevens has a sharp sense of the extent to which the administrative prerogatives of a Chief Justice may affect his colleagues in both small and large ways. Under Vinson, the Court heard argument from noon until 2:00 PM, when it took a short lunch break before returning for the afternoon session. The effect, Stevens recalls, was that at times “Justice Rutledge thought it necessary to give Frank Murphy, his neighbor on the bench, a jab or two to make sure that he was awake.”¹⁵ In contrast, Burger's decision—made without consultation—to replace the Court's straight bench with one angled at both ends had more significant consequences: “As a result, all nine justices can now see and hear one another as well as the advocates.”¹⁶ Stevens is less appreciative of an unattributed change in conference voting procedures instituted between his clerkship year and his return as a Justice. Previously, the Justices had given their views on cases in order of seniority, with the vote taken in order of reverse seniority and only after everyone had spoken. By 1975, the Justices announced their votes as part of their initial comments. The result, Stevens laments, is that junior Justices have less of an opportunity to influence the

¹¹ CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007) (link).

¹² STEVENS, *supra* note 1, at 7.

¹³ *Id.* at 8.

¹⁴ *Id.*

¹⁵ *Id.* at 71.

¹⁶ *Id.* at 117.

votes of their senior colleagues.¹⁷

Such irritants to the side, Stevens finds something praiseworthy in the administrative efforts of each of the Chief Justices under whom he served. He finds Burger—the subject of a scathing critique in *The Brethren*¹⁸—underappreciated for preserving the Court's heritage, instituting the collegial custom of birthday lunches for the Justices, and introducing such internal reforms as electronic word processing.¹⁹ Stevens does not, however, hesitate to identify Burger's weaknesses in presiding over the Court's conferences, where he was less than impartial in summarizing cases and was also “less well prepared, and less articulate” than his two successors.²⁰ Rehnquist, in turn, is described as efficient, “meticulously accurate,” and impartial when presiding over conference and oral argument.²¹ At the same time, he is critical of Rehnquist's rigid ten-day rule for law clerk drafts and gently disapproving of the gold stripes that he added to the sleeves of his robe. Although the other Justices “immediately and uniformly” rejected the suggestion that they update their robes to something more colorful, Stevens notes drily of Rehnquist that “with regard to his own robes, he went right ahead.”²² Stevens finds Roberts “an excellent chief justice” even if “not quite as efficient as his predecessor,” a minor weakness more than compensated for by his effectiveness at presiding over conferences. And he is, “[w]ith the possible exception of Earl Warren, . . . the best spokesman for the Court in nonjudicial functions.”²³

Stevens's praise of the Chiefs' administrative efforts in no way insulates them from candid criticism of their jurisprudence. He notes his “misgivings about Vinson's judgment in some of the cases” decided during his clerkship year, though he praises Vinson's opinion in *Shelley v. Kraemer*.²⁴ He finds flaws in the Warren Court's handling of *Brown v. Board of Education*,²⁵ most prominently its “belated and somewhat tentative command” to desegregate “with all deliberate speed.”²⁶ Two later Chief Justices receive harsher criticism. Stevens identifies Rehnquist's lengthy quotation of the poem “Barbara Frietchie” in his *Texas v. Johnson* dissent²⁷ as a motivation for his own separate dissenting opinion and considers

¹⁷ *Id.* at 74.

¹⁸ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT passim* (1979) (link).

¹⁹ See STEVENS, *supra* note 1, at 150–153.

²⁰ *Id.* at 154.

²¹ *Id.* at 171.

²² *Id.* at 173.

²³ *Id.* at 210.

²⁴ 334 U.S. 1 (1948) (link).

²⁵ 347 U.S. 483 (1954) (link).

²⁶ STEVENS, *supra* note 1, at 100.

²⁷ 491 U.S. 397, 424–425 (1989) (Rehnquist, J., dissenting) (link).

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Rehnquist's sovereignty jurisprudence "ostentatious and more reflective of the ancient British monarchy than our modern republic."²⁸ Roberts's opinions in *Snyder v. Phelps*²⁹ and *Citizens United v. FEC*³⁰ provoke a sharp and uncharacteristically condescending response:

Given the fact that most of his colleagues joined the chief in his funeral-speech opinion, perhaps I should give him a passing grade in First Amendment law. But for reasons that it took me ninety pages to explain in my dissent in the *Citizens United* campaign finance case, his decision to join the majority in that case prevents me from doing so.³¹

Curiously, it is Burger who emerges unscathed by Stevens's criticism and is praised instead for such landmark opinions as *United States v. Nixon*,³² *Reed v. Reed*,³³ and *Swann v. Charlotte-Mecklenburg Board of Education*.³⁴

That immunity is pierced when Stevens turns to an issue of particular interest to him: the assignment of majority opinions. As the Court's senior Associate Justice for many years, Stevens assumed the Chief Justice's role of assigning majority opinions when the Chief was in dissent. He suspects that Burger, seeking positive press attention, was careful to assign himself successful First Amendment cases but gave those rejecting such claims—and therefore likely to draw hostile press responses—to Justice White. "Because of that history," Stevens notes, "I tried to avoid assignments that might be interpreted as associating a particular justice with a particular issue."³⁵ Stevens is critical, too, of Justice Brennan's decision to assign *Patterson v. McLean Credit Union*³⁶ to himself rather than to the uncertain Justice Kennedy, who subsequently changed his position and the outcome of the case.³⁷ Stevens remains pleased with his own assignment of some major cases, including *Romer v. Evans*³⁸ to Justice Kennedy and *Grutter v. Bollinger*³⁹ to Justice O'Connor.⁴⁰ He doesn't mention that those choices meant denying himself the prominence that the authors of those opinions

²⁸ STEVENS, *supra* note 1, at 177, 197. Stevens felt that "the lengthy quotation might detract from the force of the legal analysis in his opinion." *Id.* at 177.

²⁹ 131 S. Ct. 1207 (2011) (link).

³⁰ 130 S. Ct. 876 (2010) (link).

³¹ STEVENS, *supra* note 1, at 221.

³² 418 U.S. 683 (1974) (link).

³³ 404 U.S. 71 (1971) (link).

³⁴ 402 U.S. 1 (1971) (link).

³⁵ STEVENS, *supra* note 1, at 236.

³⁶ 491 U.S. 164 (1989) (link).

³⁷ STEVENS, *supra* note 1, at 237.

³⁸ 517 U.S. 620 (1996) (link).

³⁹ 539 U.S. 306 (2003) (link).

⁴⁰ STEVENS, *supra* note 1, at 238.

enjoyed. In his own closest approach to the role of Chief, Stevens proved himself both strategic and generous in his assignments.

That note of pleasure over his assignments is unusual in its brief self-congratulation. If Stevens is hard on some of his former colleagues, Chief Justices among them, he is also willing to recount some of his own missteps on the Court. He recalls his first day on the bench, when he tried to follow Justice Powell's instruction to push his chair back at the close of argument to let the other Justices pass by. "I gave my chair such a firm shove," he recalls, "that I missed catapulting down those stairs by only a matter of inches. I continue to thank the good Lord for saving me from what would have been a truly memorable opening argument."⁴¹ And in one of his earliest conferences—as the junior Justice he also served as doorkeeper—he failed to hear a knock on the door and found his two neighbors, Justices Brennan and Rehnquist, rising to the occasion. His ironic response makes clear the embarrassment of the moment:

That humiliating lesson taught me to keep track of priorities—for the junior justice, there is one responsibility even more important than being fully informed about the views of your colleagues: remembering that you are what Tom Clark described as the most highly paid doorman in the country.⁴²

Such moments humanize the Court as a community of co-workers, some more senior and experienced than others, who need to accommodate themselves to the customs and settings of their institution. Stevens provides one of his most extended insider accounts when he describes in detail what the bench looks like from the Justices' perspective, with its pads, microphones, goblets, and spittoons. The reader then learns what he keeps in the single drawer: "a pocket-size copy of the Constitution."⁴³ There are occasional flashes of humor, as when Stevens discloses his response, as the most junior Justice, whenever voting to break a 4–4 tie: "Because Brennan and Rehnquist were invariably on opposite sides of such cases, I liked to begin by announcing: 'I agree with Bill.'"⁴⁴ But there are no accounts of squabbles or ill feeling among the Justices, in spite of many 5–4 decisions and profound legal disagreements.

Although Stevens does not refer to all of his colleagues as "my friend," he tends to treat them all as agreeable judicial neighbors who share his interest in maintaining cordial relations amid the inevitable jurisprudential

⁴¹ STEVENS, *supra* note 1, at 136.

⁴² *Id.* at 141.

⁴³ *Id.* at 117.

⁴⁴ *Id.* at 141. Brennan and Rehnquist shared the same first name, William, and thus the same nickname.

clashes. From the vantage point of his lengthy tenure, he finds a generous explanation for what he considers a harsh outcome in an Eighth Amendment case. Three Justices who “quite incorrectly” found a severe prison sentence acceptable are excused on the grounds of their recent arrival at the Court, as Stevens analogizes legal development to personal development.⁴⁵ Thus, “just as the meaning of the Eighth Amendment itself responds to evolving standards of decency in a maturing society, so also may the views of individual justices become more civilized after twenty years of service on the Court.”⁴⁶

Stevens’s version of a Supreme Court autobiography, aimed at a general rather than a legal audience, makes clear the human dimension of what is among the most powerful and private of workplaces. “[J]udges,” he tells us, “are merely amateur historians,” and he makes no claim to having produced an authoritative history of his own service on the Court.⁴⁷ He offers instead a modest account of his engagement with the Court as a law clerk, attorney, and colleague: his personal perspective on the Chiefs and the other Justices with whom he worked, often at odds on the law, free to criticize one another’s opinions, but nonetheless sharing a sense of the Court itself as a communal institution. Stevens ends his memoir by applying President Ford’s description of America⁴⁸ to the Court itself: “It is,” he concludes with satisfaction, “a place where we not only could but did regularly disagree without being disagreeable.”⁴⁹

⁴⁵ *Id.* at 226.

⁴⁶ *Id.*

⁴⁷ *Id.* at 225.

⁴⁸ President Ford’s quotation comes from his 1976 State of the Union Address. *Id.* at 244.

⁴⁹ *Id.*