

Interview with Justice John Paul Stevens

5. May 2010 By John Bursch

At the Sixth Circuit Judicial Conference being held in Columbus, Ohio, this week, U.S. Supreme Court Justice John Paul Stevens conducted a public interview with two of his former law clerks. The interview covered a broad range of topics, including his choice of ties, why he does not participate in the cert. pool, his views on where Supreme Court Justices should be sworn in, and how he maintains his youthfulness. After the jump is a summary (not a verbatim transcript) of the questions and answers from this extraordinary interview.

Why do you wear bow ties?

Because I can't tie a Four-In-Hand knot.

Thoughts about the death penalty?

The Eighth Amendment's prohibition on cruel and unusual punishment must account for evolving standards of decency; an originalist view of the Amendment is just not workable. Recent cases have made the death penalty more accessible, when I think that the trend should be just the opposite. Among other things, recent advancements in DNA evidence demonstrate that the criminal justice system does not always work.

Why did you decide not to participate in the cert. pool?

It goes back to my experience as a law clerk. When I joined the Court, Chief Justice Burger invited me to participate in the pool. I read a number of the pool memos, and they were very long, detailed, and well written. But I concluded that I could review cert. petitions much faster without the pool memos. The pool was just not the most efficient way to process cert. petitions. I still feel that way, and perhaps Justice Alito has reached the same conclusion.

Why do you always write the first draft of your opinions, rather than delegate that task to your clerks?

The year that I clerked for Justice Rutledge, he wrote (on a yellow legal pad) the first draft of every opinion except for two. He would finish the draft, leaving only a few details or citations for me to fill in. I follow the same practice.

How do you feel about the “liberal” label? Is that how you would describe yourself?

There is a vast difference between political conservatives and judicial conservatives. A judicial conservative asks questions such as, should we be deciding this question, or is it a question better left to another institution. I have always thought of myself as a conservative. But there have been decisions in which the newspapers would describe the votes as either conservative or liberal. Those labels are misapplied from time to time.

Do you ever reflect on your experience as a trial lawyer?

Experience in litigation is very valuable when you are on the bench and to the judicial process. One experience that has directly reflected on my work is a case involving whether an Illinois judgment was influenced by improper contacts between counsel and the court. There were two dissenting opinions in the Illinois Supreme Court that were never published, out of a concern for collegiality. I have often thought that if I do not agree with the majority’s rationale in a given case, I should let the public know about it. As a result, my practice has been to write and publish dissents.

When you were on the 7th Circuit, you dissented from an en banc opinion involving the sanction of a priest by the Wisconsin legislature for a welfare protest on the floor of the legislature. The Supreme Court later reversed. How did you feel about the vindication of your dissent?

That was an interesting case. The Wisconsin Supreme Court voted unanimously to uphold the punishment the legislature inflicted on the priest. Once the case was in the federal system, I wrote a dissent from the en banc opinion, which affirmed the contempt punishment, and I realized that with life tenure, I did not have the same public considerations as those Wisconsin Justices. It was a stark example of how elected and appointed judges differ. (I also realized I could kiss goodbye any chance of being selected for the Supreme Court.) Life tenure is an incredibly important part of our positions as federal judges.

What has it been like to go through the process of being written about in your two recent biographies?

One of those works was authored by two *Chicago Tribune* writers, and I told them they may not be making a wise financial decision writing such a book! Frankly, I have mixed feelings about the books. I have always enjoyed my privacy and am not anxious to receive any more ink than necessary.

Share some of your memories of your service in World War II and the impact that has had on you as a Justice.

One of my opinions - with which my clerks disagreed - was my dissent in the flag burning case. The clerks related that outcome to my experience as a veteran. Ironically, as a result of that decision, no one burns flags anymore.

My job in the military was to analyze enemy communications at Pearl Harbor. Each day, you would receive a full day of intercepted Japanese transmission traffic. One day, a lieutenant intercepted a message that a Japanese battleship had changed location to a very significant place. I sent out appropriate warnings. Later, I received subsequent messages that demonstrated the lieutenant had misunderstood the communication. And I've often thought about that when reading statutes - that the end product does not necessarily come out the way the authors intended it. I've always thought a judge has a duty to look not only at the statutory text, but at the background and context to see if an interpretation makes sense. This view was also influenced by my work as counsel to the House Judiciary Committee. Granted, you can carefully parse statutory language with a dictionary, but that does not always represent what the authors intended.

When you leave the bench, there will be no veterans or Midwesterners on the Court. Do either of those forms of diversity matter to the Court?

The problem is there are only nine seats. There should be representation of different parts of the country, of other law schools, of non-judges, etc. Those are all desirable features. But the President has only one seat to fill and you cannot appoint everybody. In an ideal world, it would be better to have more practicing lawyers and veterans on the Court, but when you get down to particular choices, it is the individuals that matter.

One practice that I always followed was to hire clerks from some of the less well known law schools. They have worked out absolutely beautifully, because the best person in a smaller law school may be just as good or even better than the top students at the most well known law schools.

When you took your seat on the Court, the only repeat player was the Solicitor General. That has changed dramatically with a small bar of Supreme Court specialists. Do you have any reflections on that change?

On the whole, the level of advocacy has improved over the years. But there are times when someone who has never appeared before the Court makes one of the best arguments you have heard in many years. One area where advocacy has particularly improved is the quality of the representation of the states, particularly due to the rise of state solicitor generals.

What are your thoughts on current trends in the federal confirmation process?

It sure has changed since I went through the process. One of the changes is in the interviews that the nominee has with members of the Senate before the hearings begin. I remember well when I went through the process that the reason for the interviews was to correct what happened with President Nixon's nomination of Clement Hainsworth. Hainsworth had a speech defect, stuttering, that manifested itself at the hearing in response to Senators' questions. Several Senators later commented that if they had known about the problem, they would have perceived Hainsworth's testimony differently. So interviews were initiated from that time going forward, but not to discuss substantive issues. For example, I was never even asked about *Roe v. Wade* in interviews following my nomination. As I understand it, the interviews today are very intense, and the Senators ask the nominee all kinds of questions involving cases that have yet to be presented to the Court. I think that's wrong, because it is true that you don't really know how you will decide a case until you are presented with it. It is quite unfortunate to pin judges down on particular issues.

How will you feel the first Monday of October this year?

I really don't know; I take things as they come. Right now, I'm just concerned with finishing the work for this Term. Majority opinions have to be circulated by June 1, dissents by June 15.

Justice Sotomayor was sworn in at the Supreme Court, rather than the White House. Do you have views on the appropriate location for the swearing-in ceremony?

When I was sworn in, the President came to the Court for the ceremony. I was very moved that the President was appearing before the Court for that particular occasion, and that is the way it should be. From that point on, a nominee becomes a member of the third branch, not a representative of the executive. I think the recent practice of conducting the ceremony at the White House is an improper symbol that overlooks the separation of powers. I have not attended those ceremonies. I was really delighted to see the present administration come to Justice Sotomayor's ceremony at the Court, which is the way I really think it ought to be done.

Symbols are really important. And that is one symbol that means a lot to me.

When your successor is named, will you have any advice for that person?

Somebody who is appointed and confirmed to this position is usually a person that does not need much advice! I would certainly be willing to discuss certain problems and procedures, but I do not have any reservoir of thoughts to pass on to my replacement.

Has the increasing number and length of separate opinions contributed to the decrease in the number of cases the Court decides annually?

I vote for cert. in a number of cases that the Court chooses not to take. I do not think the recent decline in the volume of cases the Court decides is a function of the number of separate opinions or the length of opinions.

You recently turned 90 and still play tennis three times per week. What's the secret of your youth?

That's an easy question. When you marry a beautiful dietitian, that will do wonders for you.