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By [Kate Shaw](#)

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THE MAKING OF A JUSTICE

Reflections on My First 94 Years



JUSTICE JOHN PAUL STEVENS

Author of Five Chiefs

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Reflections on My First 94 Years



JUSTICE JOHN PAUL STEVENS
Author of Five Chiefs

Kate Shaw is a law professor at Cardozo Law School. She clerked for retired Justice John Paul Stevens during the 2007-2008 term.

Last week, Justice John Paul Stevens sat down for a wide-ranging telephone interview with me. The occasion was the recent publication of his memoir, “[The Making of a Justice: Reflections on My First 94 Years](#)” (Little, Brown and Company, 2019). A lightly edited transcript of our conversation follows.

Question: Thanks so much for agreeing to do this, Justice. The book is wonderful, and it contains not only great biographical detail, but a lot of new insights for those of us who teach some of the cases you discuss in the book.

Justice Stevens: Well, anybody who is able to wade through the entire book is entitled to high praise.

Question: No, it’s very readable! So — will you tell me a little bit about why you decided to write the book?

Justice Stevens: I was just trying to think that through when you called. I really don’t know. I started to write about the party, on my 94th birthday. The project just grew after I started.

Question: So you didn’t sit down intending to write a comprehensive autobiography?

Justice Stevens: No I didn’t, I definitely didn’t. I didn’t have a clearly defined purpose at any time in figuring out what to write in the book.

Question: Do you think having spent so many years writing pretty much full time, the absence of a big writing project created a space you needed to fill with something and so you decided to do this?

Justice Stevens: Yes, I've always enjoyed writing, and I think that it just got me started, and then I just — had to keep going.

Question: Let me ask you a little bit about the process of writing the book, because it's so detailed: There are descriptions of your first-year constitutional law professor's specific lectures, and depositions you took as a young lawyer in Chicago, and then of course a lot of behind-the-scenes details regarding particular opinions while you were on the Supreme Court. What was your methodology? Did you rely mostly on your memory? Did you have journals that you kept along the way, or did you rely on your papers from the court?

Justice Stevens: It was actually a combination of different things. When I got up to the court, it occurred to me that I should ask my law clerks for help, and I wrote a letter to all of the clerks, asking them for their memories of their own terms.

Question: You did! I sent some memories in.

Justice Stevens: Of course, some of the memories, the [*District of Columbia v.*] *Heller* case itself, or *Bush against Gore*, some of those, I had pretty firm memories of. I knew I was going to cover them, and I did.

Question: What about your time before the court — did you keep journals when you were young, or did you mostly rely on your memory in reconstructing those events?

Justice Stevens: I mostly relied on my memory. That was pretty much the entire basis for the stuff about my pre-court years.

Question: Wow! That's incredible recall, Justice.

Justice Stevens: Well, they were pretty memorable events that you don't forget. Meeting Charles Lindbergh or Amelia Earhart or seeing Babe Ruth hit a home run. You don't have to have much of a memory to have those things come back to you when you start thinking about your childhood and so forth.

Question: You did have a number of pretty incredible encounters in your childhood. Let me ask you to talk about something else you write about in the book, which is your early exposure to the criminal justice system. When you were 12, your father was charged with embezzlement for transactions involving loans to save your family hotel, which was in distress after the stock market crash of 1929. The Illinois Supreme Court later unanimously reversed his conviction. Could you talk a little bit about what impact that early experience had on your later views on criminal justice?

Justice Stevens: It certainly convinced me that every now and then, criminal justice can go wrong because my dad was anything but a criminal. He was a very fine guy and completely honest. My memories of him were teaching me to tell the truth and things like that. That was an important event in my early life. There's no doubt about it.

Question: You think it instilled a degree of skepticism about the results of the criminal justice system?

Justice Stevens: Yes. It is a system which is a fine system, but it makes a lot of errors. The fact that it is capable of making errors is something we should keep in mind when we authorize something like the death penalty which is just — it cannot possibly be defended by the law of averages or something like that. You just should not put anybody to death unless you have absolute certainty on the issue of guilt or innocence.

Question: I want to come back in a couple of minutes to that. Let me stay with your early life for just a few more questions. I hadn't known that you worked on your college newspaper at the University of Chicago. You wrote some editorials and reviews; you served in a leadership position. I was going to ask whether you think that experience had any long-term impact, whether it shaped you at all as a writer, or in terms of your interactions with the press over the years.

Justice Stevens: It did have an impact, I'm sure. I remember it as an important part of my college life. I don't know if it affected my views on any particular issue, but it certainly had an impact on my general interest in writing and that sort of thing. Whether it colored my views on the constitutional rights of free speech and something like that, I really don't know.

Question: I was going to ask in a related vein about your general view of the press coverage of the court and its opinions. Do you think the Supreme Court press corps gives the public an accurate sense of the work of the court, just on balance?

Justice Stevens: I think they do a remarkably good job — to read Monday's output and summarize it in time for the next edition of the paper requires some pretty intelligent work. On the whole, I think the regular reporters do a very good job.

Question: Just a couple of more questions about your early life. The chapter on your naval service contains a lot of new detail about your wartime experience; it's a totally fascinating part of the book. I was going to ask you to talk for a minute on how formative that experience was, how you think your time in the military impacted the kind of justice you would later become, and your decision to share these details in the book.

Justice Stevens: Of course, when I joined the Navy and when I took up the correspondence course in cryptography, I had to sign an oath that I would never reveal what sort of work I was involved in. It was only some years after the war that Congress passed a statute relieving me of that obligation. A lot of that was totally secret for a number of years after World War II. I don't think the permission to describe it has made all that much difference right now. But the service did have an impact on me. I think my votes in the flag cases [*Texas v. Johnson* and *United States v. Eichman*, in which Stevens dissented from decisions holding that statutes prohibiting flag-burning violated the First Amendment] were no doubt influenced by my military experiences. No doubt about that.

Question: In the book, you describe the process by which you got your clerkship with Justice Wiley Rutledge — on the recommendation of two professors on the faculty of Northwestern, with no interview, and after you and your co-editor-in-chief of the law review flipped a coin to figure out who would get the Rutledge clerkship and who would clerk for Chief Justice Frederick Vinson. The hiring of Supreme Court law clerks is in some ways quite different today — anyone can apply; there are in-person interviews. But of course, professors still play an important gatekeeping role. So I was going to ask whether you think the process really is very different today — and if so, is today's process a better one?

Justice Stevens: I am not sure it's quite as different as it appears to be. Even today when I hire law clerks, I will pay especially close attention to the particular person who's recommending someone. For example, some judges I have especially high regard for, and some law professors also carry more weight than the average. It still might come down to a very important recommendation, which might actually determine the outcome. So I'm not sure the process is really as different as it appears to be.

Question: I see. What about the interview? Does the interview make some difference?

Justice Stevens: Yes. I always prided myself on my ability to choose good clerks, and one of the key elements was whether I thought I would like the person. If I got along well with a person in an interview, I was much more likely to hire that person. It's just a question of personal give and take which you develop in your interviews.

Question: OK, I was going to ask about when you were a young lawyer in private practice in Chicago before you became a judge and then a justice. In the book you mention at a few points that you were a Republican. There isn't a terribly strong sense of partisan identity that comes through, though at one point you mention that in those days, the Republican party was still the party of Abraham Lincoln. So I was going to ask if you'd be willing to comment on what your partisan identity or formation was like in those early years?

Justice Stevens: It really had almost nothing to do with my life or my practice of law. I had been born a Republican. My dad was an active Republican, but he was not active in politics and I really never was either. It's true that I did belong to that party, but it really had very little impact on my public work or my private views.

Question: Another episode in your early professional life is the period you spent serving as minority counsel on the Monopoly Power Subcommittee of the House Judiciary Committee. I'd always had the impression that it was a very formative experience, in particular in terms of your views on statutory interpretation. I was wondering if you could talk a little bit about that — how it impacted your view of how the court should approach interpreting statutes.

Justice Stevens: It was really an important part of my career because it was the first significant public job that I ever had. Of course, I think the working relationship between the members of the two parties was much more healthy at that time than it became later on.

Almost all the issues that came before the committee, the members of the committee did not approach them in a partisan sense at all. They really worked together on the investigations and their role in them. I just have a different impression of the attitudes of the members — it was very different then than I think it is now.

Question: What about specifically in terms of the role of legislative history and other interpretive devices in interpreting statutes — how do you think that experience affected your approach to answering interpretive questions, deciding how to address ambiguity in statutes?

Justice Stevens: I never really thought there was any reason to be skeptical about legislative history. During my years as a practicing lawyer, it just was part of your study of what Congress was trying to say in their statutes. I never really considered judges or scholars as either those who used legislative history or those who were opposed to it until after I got on the court. It seemed to me, obviously, that when you're trying to figure out what a group of drafters meant in what they wrote, anything that sheds light on the history is appropriate to consider.

Question: One related question — I believe that it's the case that Justice Stephen Breyer is now the only member of the court with any substantial legislative experience. At the same time, *all* of the most recent appointees have served in some capacity in the executive branch. Does that have any significant implications either for statutory interpretation or maybe in separation of powers cases?

Justice Stevens: I had not really focused on that change, but it probably is significant, and it may have an impact on the work of the court.

It may well be that Justice Sandra Day O'Connor's experience as a legislator and Justice Hugo Black's experience did have an impact... being more conscious of the public consequences of the decisions. I just haven't really thought about it, but I do think that there's a failure to pay adequate attention to the public impact of decisions ... and that's quite unwise.

Question: You talk in the book about some of the political patronage cases, in particular from your time on the U.S. Court of Appeals for the 7th Circuit, but more recently the partisan-gerrymandering cases. One thing that comes through in both of those lines of cases is your early and consistent view that the Constitution imposes a basic duty to govern impartially. Can you elaborate a bit on where that constitutional rule comes from, and if you have any comment on the court's recent, and of course now ongoing consideration of challenges to partisan gerrymanders?

Justice Stevens: Of course, I think it's an easy issue and they should have decided it a long time ago. What they'll do with it, I don't know, but it always seemed to me perfectly obvious that the government official has to act impartially. I think the constitutional source of that is

the equal protection clause of the 14th Amendment. I think I said that on several occasions. I think if you just focus on the importance of governing impartially, you can't possibly defend partisan gerrymandering. It is diametrically opposed to the duty to act impartially. It seems to me that that's a duty that should be shared by every public official.

Question: OK, you've mentioned *Heller*, and I should say it was very kind of you to mention my assistance with your dissent in that case. I was going to ask you to talk a little bit about why, of all of the cases that you participated in during your time on the court, *Heller* is the one that still keeps you up at night.

Justice Stevens: It's just a recurring problem that confronts us almost — if not on a daily basis, then at least on a weekly basis. These mass shootings are peculiar to America and are peculiar to a country that has the Second Amendment. So I think that interpreting the Second Amendment to protect the individual right to own firearms is really just absurd, and it's also terribly important. It happens over and over and over again. I think I should have been more forceful in making that point in my *Heller* dissent. I don't blame you any more than I blame myself for failing to place more emphasis on that point.

It's a characteristic of American society that is not shared by any other civilized country. I find it really mind-boggling that my suggestion that we ought to approach the problem by just getting rid of the Second Amendment really has not captured more popular support, because it's so obvious that it's an undesirable part of our government structure.

Question: When *Heller* was decided, there were people who argued that whether it was correct or incorrect, it was a victory for originalism, because not only Justice Antonin Scalia's majority opinion, but also your dissent engaged very extensively with founding-era materials. I was going to ask you to explain why you decided to fight so much of the *Heller* opinion on originalism's terrain.

Justice Stevens: I didn't really think at the time or I don't think now that the question of whether originalism is sound constitutional interpretation had any particular relevance to the outcome of that case. We're trying to understand what the draftsmen of the provision intended, and a lot of the evidence depends on the fact that New York and Philadelphia and Boston had local laws that would have been unconstitutional under the amendment as construed today. That's the point that Justice Breyer made so effectively in his dissent. I didn't think of it in terms of whether we were fighting an originalist battle or just a common-sense battle.

Question: I wanted to ask about *Bush v. Gore*, which is also a fascinating part of the book. You end your discussion of that case by saying that you "wish that the public confidence that the Court had earned when it ordered President Nixon to produce tapes containing evidence of his wrongdoing could be so easily restored," but that you "remain of the view that the Court has not fully recovered from the damage it inflicted on itself in *Bush v. Gore*."

So there's this suggestion that both the Nixon tapes case and *Bush v. Gore* are particularly important cases when it comes to the public's faith in the court as an institution.

What in particular makes those cases so important? Both involved presidents or prospective presidents — is that part of it? Is it that the court appears to many people to transcend partisanship in *United States v. Nixon*, while many people read *Bush* as representing the court succumbing to partisanship?

Justice Stevens: The other thing that's a significant point in both cases is the quality of the majority opinion. The opinion in the *Nixon* case made a lot of sense; there was really not much doubt about the correctness of the decision. But the majority opinion in *Bush* against Gore is even worse than I thought it was at the time. I read it over more carefully working on the book. I found that the opinion is internally inconsistent as well as just not making any sense. The quality of judicial work in both cases is a significant aspect of the importance of the cases.

Question: Just a few more questions, Justice. The term that I clerked, in addition to being the *Heller* term, was the term in which you announced in *Baze v. Rees* that you had concluded that the death penalty could not be constitutionally administered. You suggested earlier that there's a straight line between your early experience with the criminal justice system and that 2008 opinion, but obviously you were on the court for many years before announcing your conclusion about the death penalty. Had you long anticipated that you were moving in that direction? Did it surprise you when you got there?

Justice Stevens: It did surprise me. I really remember reading John Roberts' opinion in the case and thinking his whole business of it doesn't make any sense. It really dawned on me during the deliberations on that case, that the death penalty really cannot be justified on the grounds that ostensibly supported it. I really think it turns out to be just quite wrong. It really dawned on me when working on that case.

Question: Reading the chief justice's writing in that case was what crystallized it for you?

Justice Stevens: I think that's right.

Question: Wow. OK, so in the course of preparing this book you revisited nearly four decades of Supreme Court decisions. I was going to ask whether you came away with any new insights into the court's treatment of precedent. On balance, has the court been sufficiently protective of stare decisis or consistent in its treatment of precedent, both historically and, to the extent you wish to comment on it, in recent years and today?

Justice Stevens: I think it's been insufficiently respectful of prior decisions through the years, really beginning with Justice Thurgood Marshall's writing in his dissent — the last dissent that he wrote [in *Payne v. Tennessee*]. I also dissented in the case. It's a victim-

impact case. And I really think it's gotten even worse in the lack of respect for that doctrine that the court has developed over the years.

To say in the case they decided a couple weeks ago [*Franchise Tax Board of California v. Hyatt*], overruling a case I wrote, for six justices, and five justices overruled it. It made me think, maybe when they overrule they ought to find out whether at least the majority of the judges who have addressed the issue agree with it. Because overruling Nevada against Hall — it makes absolutely no sense in terms of — looking into the future. Because states have been sued in the courts of other states so rarely, that you might just as well have a rule you can follow rather than change it 20 years later for a different rule that clearly is not any better than the other one. Of course, my own views about sovereign immunity made the case particularly easy for me. But the reasons given for overruling it don't make a lot of sense at all. Of course, you can't spend a lot of time criticizing it because its impact on the law — because this happens so rarely, once or twice in 15 or 20 years. But to overrule the case? It just doesn't make any sense at all. [Justice Clarence Thomas'] opinion for the majority really doesn't explain why they needed to take a second look at it anyway.

Question: Yes, he has only a very short discussion of stare decisis, and Breyer's dissent seems to suggest that the case's insufficient respect for precedent has significance beyond just the narrow immunity issue presented in the case. Do you agree with that?

Justice Stevens: Yes, indeed. I certainly do.

Question: Your discussion just kind of answered this question. I was going to ask how much you keep up with the court these days. I gather you read most of what they produce?

Justice Stevens: Yes I do. It's a principal source of my reading. I'm a little bit behind right now, but I do keep up with their work.

Question: Just one more question. I was going to ask about proposals to change or reform the Supreme Court. Various proposals to change the court by increasing its size, changing selection methods, imposing term limits — some of which have been around for some time — seem to be attracting more public attention these days. I was going to ask if you had any interest in commenting on any of those proposals.

Justice Stevens: I think the number nine is right. They should stick to that. In time perhaps they'll come back to their senses on some of the issues. I don't think the remedy is changing the size of the court.

Question: OK, Justice, I appreciate your taking the time to do this. Enjoy the rest of the day, and I hope you get some ping pong or some swimming in.

Justice Stevens: Thank you very much.

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