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Book Review

THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS*

by John Paul Stevens

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> A fruitful parent of injustice is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic.[1]

1 Mark Sherman and Connie Cass reported in the Associated Press on 17 July 2019 that, "John Paul Stevens, the bow-tied, independent-thinking, Republican-nominated justice who unexpectedly emerged as the Supreme Court's leading liberal, died Tuesday in Fort Lauderdale, Florida, after suffering a stroke on Monday. He was 99." A lot of information is packed into this brief description; some of it seemed deliberately ironic, and some of it like surprised observations, but clothed in awe and respect. In a biography published in 2010, Bill Barnhart and Gene Schlickman wrote that, "in the daily press, Stevens is characterized as a hermit in a monastery".[2] We can now compare public perceptions of John Paul Stevens J ("JPS") as presented by Barnhart and Schlickman, among others, with the confessions of the hermit himself in this book, *The Making of a Justice*, published in the year of his death.

2 Born on 20 April 1920, the youngest of four boys, he could not answer the question "Why are stoves not made of silver?" and was sent to the lower class in first grade, prompting his father to remind him frequently of the advice first attributed to Julius Caesar, that it was better to be "first in a little Iberian village than second in Rome". That, according to JPS, was his first academic motivation. He enrolled in the Northwestern University Law School (in Chicago) in 1945, and began his stint as Supreme Court Justice Wiley Rutledge's clerk in October 1947. It was at Northwestern that Homer Carey, JPS's mentor, advised him that "John Stevens" was as unique as "John Smith"; therefore, he

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* Little Brown & Co, 2019.

1 Benjamin Cardozo, *The Paradoxes of Legal Science* (University of Columbia Press, 1928) at p 61.

2 Bill Barnhart & Gene Schlickman, *John Paul Stevens: An Independent Life* (Northern Illinois University Press, 2010) at p 9.

should sign off his name in green ink (very much like the practice of the British heads of Military Intelligence). Green ink did not appeal to JPS, but he got the point, and thereafter, added his middle name to his signature.

3 JPS enjoyed his clerkship with Rutledge J whom he obviously liked and admired. In *The Making of a Justice* he described the four tasks of the Rutledge clerks. First, they had the time-consuming job of writing "cert memos" summarising the petitions for hearings in the Supreme Court. The clerks wrote about 20 one- to two-page memos a week. The second task was unique to Rutledge J's chambers. He wanted his clerks to write similar memos of litigants without counsel. The petitions of such litigants were usually handwritten and illegible, and almost invariably denied. Those petitions (*in forma pauperis*)[3] were vetted by the clerks of the Chief Justice. Rutledge J wanted to review such applications himself, and so he asked his clerks to prepare similar memos for him. This helped him persuade the court to hear some of those petitions. The third task was to help Rutledge J prepare Bench memos in important cases, and the fourth was to help prepare the opinions for their judges. Rutledge J wrote the first drafts himself on yellow legal pad and then had them typed by his secretary, but he did allow JPS and Stanley Temko (JPS's co-clerk), to draft one opinion each. JPS wrote the first draft in *Mandeville Island Farms, Inc v American Crystal Sugar Co*.[4]

4 Returning to Chicago in 1948, he joined the firm of Poppenhusen, Johnston, Thompson, Raymond and Mayer; a firm of 24 lawyers. There, he had the privilege of working with Edward R Johnston in antitrust cases, and soon after, getting more specific work on antitrust law as an associate counsel to the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary. When he returned to Poppenhusen, Ed Rothschild and Jack Barry (two of the four lawyers, including JPS, who joined Poppenhusen in 1948) decided to start their own firm, and invited JPS to join them. The firm was known as "Rothschild, Stevens & Barry", and found success with work from unexpected sources.

5 Though happy at Rothschild, Stevens & Barry, JPS accepted a nomination to the Federal Court of Appeal in the Seventh Circuit in 1970. He was in contention with his friend, Bob Sprecher, for the job. After his appointment was announced, JPS found out that Harry Blackmun J (whom he not met before) was giving the commencement address at a university in Indiana. JPS flew his Cessna to Indiana over

3 In the form of a pauper, that is, litigants too poor to engage counsel.
4 334 US 219 (1948).

the weekend to meet Blackmun J and tell him that he had been appointed to the Seventh Circuit. JPS displays his sense of humour when he wrote:

> Harry was characteristically gracious – so gracious, in fact, that he wrote a very nice letter to Bob Sprecher welcoming him to the federal judiciary. Because Harry was always so meticulous in his work at the Court, years later I enjoyed telling my colleagues that Harry had made at least one mistake.

6 In 1973, the year Richard Nixon resigned as President of the United States, JPS had a coronary bypass. Since then, he made a more serious effort to be healthy by playing tennis more regularly. William O Douglas J resigned after 36 years on the Supreme Court. JPS and Phil Tone, who succeeded JPS as the clerk to Rutledge J, were the two contenders recommended by Warren Burger CJ to fill Douglas' seat. JPS was chosen, and his passage through the Senate hearing was largely uneventful. The testiest interrogation came from Senator Kennedy who told JPS that the National Organization for Women opposed his nomination, and asked if JPS would go out of his way to decide cases in favour of disfavoured litigants. When JPS declined to do so, he received a lecture from Senator Kennedy, ending with the exchange in which Senator Kennedy said:

> … it is not going to satisfy great numbers of people in this country who feel as I do that there has been a broad sector of our society that has been denied certain rights because there are statutes, ordinances, and regulations which discriminate on the basis of sex. If you want to leave the record just saying that you are going to apply every law equitably, that is the way it will stand.

JPS replied, "I'd be proud to have the record stand that way."

7 In the rest of *The Making of a Justice*, JPS gave a short account of each of the terms he served, beginning with the October term of 1975 – his first on the US Supreme Court. The notable case in JPS' first term was *Jurek v Texas*[5] in which he voted to uphold the death penalty clause under the Texas constitution, a decision that he was to regret the rest of his life.[6] In 1992, JPS showed what exactly he meant when he would apply the law equally to all – and not that he would simply vote in favour of women just because women were generally discriminated against. This came in the case of *Bray v Alexandria Women's Health Clinic*.[7] In that case, JPS dissented (together with Blackmun, Sandra

5 428 US 262 (1976).

6 John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (Little Brown & Co, 2019) at p 143.

7 506 US 263 (1976).

O'Connor, and David Souter JJ – Marshall had retired) against the Antonin Scalia J-led majority of William Rehnquist CJ, and Byron White, Anthony Kennedy and Clarence Thomas JJ reversing the convictions in the lower courts of anti-abortionists who trespassed on abortion clinics to block patients going in.

8 As he grew in confidence and became more comfortable in the highest court in America, JPS's jurisprudence began to take a more definite shape, and his judgments became sharper as his prose grew in eloquence. *McDonald v Chicago*,[8] the last case JPS was to be involved in, upheld by a majority that the right to own guns for self-defence is a fundamental aspect of liberty under the Fourteenth Amendment. Scalia J had written a separate concurring judgment with the majority and in it he relied on the doctrine of originalism as the basis for the court's judgment. That doctrine is shrouded under the protective cask of historical record, namely, that that was what the framers of the Constitution had intended.

9 JPS responded to Scalia J's judgment in his dissent:

> My point is not to criticize judges' use of history in general or to suggest that it always generates indeterminate answers; I have already emphasized that historical study can discipline as well as enrich substantive due process analysis. My point is simply that Justice Scalia's defense of his method, which holds out objectivity and restraint as its cardinal – and, it seems, only – virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be buried in the analysis. At least with my approach, the judge's cards are laid on the table for all to see, and to critique. The judge must exercise judgment, to be sure. When answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion; our constitutional system has always depended on judges filling in the document's vast open spaces. But there is also transparency.

JPS went on to show that Scalia J had in fact gone against "the Court's canonical substantive due process decisions"; in other words, going completely against long established precedents in the interpretation of the constitution.[9] Barnhart and Schlickman point out the direct opposition between Scalia J and JPS:[10]

8 561 US 742 (2010).

9 John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (Little Brown & Co, 2019) at p 518.

10 Bill Barnhart & Gene Schlickman, *John Paul Stevens: An Independent Life* (Northern Illinois University Press, 2010) at p 235.

> Scalia's reliance on tradition as the touchstone for Supreme Court review represents a major threat to anyone who believes that law must evolve with society, sometimes with the aid of judges. As any advocate of an idea would, Scalia parses cases of all sorts in search of opportunities to inject his theory into the process of making justice. Framing the debate in this way, [JPS] represented the contrary view: Americans fought the revolution and wrote the Constitution precisely to protect individuals from entrenched institutions and values imposed by a majority.

JPS, both from this autobiography and the accounts from others, seemed to be a judge of fine judicial temperament, no matter whether one agrees with his jurisprudence or not.

10 JPS retired in 2010 after almost 35 years on the Bench. JPS concluded *The Making of a Justice* with the elation he felt on account of the surprise party held to celebrate his 94th birthday on 17 April 2014 organised by his wife: "Even if I live another ninety-four years, I will never forget it." He lived on for another five.

11 The obituary in *The Times*[11] concluded with a tribute to the scholarship of JPS with this observation:

> Having evolved from idiosyncratic dissenter to influential elder, Stevens returned to Shakespeare, arguing that the works ascribed to the Bard were in fact written by Edward de Vere, the 17th Earl of Oxford. After visiting Stratford-upon-Avon he observed that the purported playwright left no record of a literary presence. 'Where are the books?' he said, 'You can't be a scholar of that depth and not have any books in your home.'

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11 18 July 2019.