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Oral History of Distinguished American Judges

HON. JOHN PAUL STEVENS
JUSTICE, U.S. SUPREME COURT
An Interview

with

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MR. TROY A. MCKENZIE: Justice

00:00:24 Stevens, good morning.

HONORABLE JUSTICE JOHN PAUL STEVENS: Good morning.

MR. MCKENZIE: Thank you for participating in this, and we will be conducting an oral history of the Justice with the goal not so much of discussing the Justice's time on the Supreme Court, but some of the experiences and influences from his

00:00:45 life before coming to the Court, including his educational and professional background, his time on the Seventh Circuit, and then later his transition to Associate Justice on the Supreme Court.

MS. CAROL F. LEE: Perhaps to begin at the beginning, with the University of Chicago Lab Schools, your law clerk, Ed Siskel, wrote that in many

00:01:08 ways, you are the intellectual heir of John Dewey, who was the founder of

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the Lab Schools.[1] And we thought we might ask you whether you think there was any intellectual influence that

00:01:22 John Dewey had on you through the Lab Schools.

JUSTICE STEVENS: It's very interesting because I just don't know. I had heard of John Dewey, but I did not realize that he was one of the people responsible for the Lab School. But it was a very good school, and I remember it very well. They had good faculty and good

00:01:45 people, and I enjoyed my time there very much.

MS. LEE: I think what Ed was thinking about was that Dewey is often described as a pragmatist, and you, yourself, have been described as a pragmatist as a judge. One of the

[1] Edward Siskel, ***The Business of Reflection***, University of Chicago Magazine, August 2002. John Dewey (1859-1952), a leading proponent of the American school of thought known as pragmatism, espoused an empirically based theory of knowledge. He viewed learning as a process in which humans actively manipulated and adapted to their environment. He founded the laboratory school at the University of Chicago, where he sought to apply his pedagogical ideas. Dewey left Chicago for Columbia in 1904.

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	hallmarks of Dewey's thinking was constantly reexamining, reflecting on ideas and values in light of concrete
00:02:11	situations.
	JUSTICE STEVENS: Well, I just don't know. I haven't thought of the association with Dewey. The Lab School was different from other
00:02:22	grammar schools because it was a six-year program. And the high school had a sub-freshman year which combined the seventh and eighth grades. And I always thought that was great because we got finished up a year earlier than many of my contemporaries. But I didn't ever think of it in the pattern of Dewey.
	MR. MCKENZIE: Justice, I wanted to
00:02:49	ask you a little bit about your family growing up. And you came from a very prominent family that was active in business and civic affairs in the city of Chicago up through the time of the Great Depression. And I wanted to ask you just about your

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	experiences growing up. Do you remember your family's views about the role of business and government
00:03:15	and the courts as a general matter? JUSTICE STEVENS: Well, my parents were Republicans, and my father was active in business and active in the community too. And he
00:03:28	was very proud of the city. He came from Colchester, Illinois. And I recently received a brick from the present owner of the area where he grew up, and there's a stained glass window in a church dedicated to his grandfather. So there's the history of Illinois that the family's had. And his grandfather's name was Socrates Stevens. It was Socrates
00:04:04	and Amanda. MR. MCKENZIE: Well, actually I wanted to follow up on that. You mentioned a church that was associated with the family. Did your family have strong religious views one way or the other? JUSTICE STEVENS: Yes, my mother was

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	a very devout Christian
00:04:20	Scientist, and her mother also was a Christian Scientist. And there was some conflict between my parents on that particular faith. But she was really a very strong believer in mind
00:04:37	over matter.
	MR. MCKENZIE: And did they raise you as a Christian Scientist?
	JUSTICE STEVENS: Yes, I went to Sunday school and was active for, as a young boy. And she in fact every summer went to Boston to be at the annual reunion of Christian Scientists or something. So she was quite a believer.
00:05:04	MR. MCKENZIE: Growing up, did you have a sense of your family's economic status as opposed to other schoolchildren, others in the city of Chicago?
	JUSTICE STEVENS: Well, yes, until the Depression came, the family was very wealthy and we had a place up in Michigan and a very nice home on 58th

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	Street in Chicago. And I was
00:05:34	conscious of the fact, but it didn't change… I mean most of my friends were of course from the school, and we all got along very well together. But of course those things changed
00:05:48	with the Depression.
	MR. MCKENZIE: And how did the Depression change the circumstances of your family?
	JUSTICE STEVENS: Well, we went from being the dominant figure in the hotel business in Chicago to losing the interest in the hotel.[2] The family basically lost its wealth. And my dad, after the Depression, was
00:06:16	employed as a hotel manager in a hotel on the South Side of Chicago, first the Hyde Park Hotel and the Sherry Hotel.
	MS. LEE: Continuing with your childhood, you grew up in the Hyde

[2] Justice Stevens's family owned the Stevens Hotel in Chicago, the world's biggest hotel at the time it opened in May 1927. They lost the hotel to creditors in June 1932. BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 26, 31 (2010).

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	Park area of Chicago?[3]
	JUSTICE STEVENS: Yes.
	MS. LEE: What was Hyde Park like? And what kinds of people did you
00:06:39	associate with? Did you…
	JUSTICE STEVENS: Well, several of my friends were in families that worked on the faculty of the university. There were a
00:06:51	member of the Bogert family. George Bogert was a professor at the law school,[4] and others who had a connection with teaching. Fielding Ogburn, the Ogburn was a sociology professor at the university.[5] And so among my friends were always children of people associated with the university.

[3] Hyde Park is a neighborhood on the South Side of Chicago where the University of Chicago was established in 1891. Until the middle of the 20th century, Hyde Park's population was almost entirely white.

[4] George Gleason Bogert, the author of a treatise on trusts, was a professor of law at the University of Chicago from 1925 to 1949.

[5] William Fielding Ogburn (1886-1959), a sociologist, statistician, and educator, became a professor in the Sociology Department at the University of Chicago in 1927, where he taught until 1951.

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	MS. LEE: Did you come into contact
00:07:19	with people of different ethnic groups or different races or…
	JUSTICE STEVENS: No, the only different ethnic group was the [Jewish] community; anti-Semitism was prevalent in the area. But I didn't have a problem with that because there were several Jewish children in the school and among my friends. So that never
00:07:48	colored my own thinking. But there was much more anti-Semitism prevalent in society at that time that people sometimes have forgotten about.
00:08:01	MS. LEE: And you were aware of that. Did it bother you that there was anti-Semitism?
	JUSTICE STEVENS: Yes, it did because I had some very good friends. And when I got into college, later on I went not only to the grammar school

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	and U. high,[6] but I went to the University of Chicago too. And I
00:08:18	joined a fraternity,[7] which before the year I joined it--in fact most fraternities [were non-Jewish], there were some Jewish fraternities and non-Jewish. But there were three of us who were very good friends, one of whom was Jewish. And we wouldn't join the fraternity unless they changed their rules. So we broke, we made a step in the right direction in that area.
00:08:45	MS. LEE: Turning to another feature of the time that you were growing up, Prohibition, did you have a view at the time or form a view later about the wisdom of Prohibition?
00:08:59	JUSTICE STEVENS: Well, I do remember when it came to an end, and they

[6] John Paul Stevens attended the University of Chicago Lab Schools, founded by John Dewey, from elementary school through high school. BARNHART & SCHLICKMAN, ***supra*** note 2, at 23.

[7] John Paul Stevens was a member of Pi Upsilon fraternity, which had been his father's fraternity when he attended the University of Chicago. The Oyez Project, John Paul Stevens, http://www.oyez.org/justices/john_paul_stevens.

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permitted 3.2 beer, the first change. And I think that was in '32, wasn't it, that the 18th Amendment was succeeded by the end of Prohibition?[8] But it didn't have much impact on my own life because both of my parents were non-drinkers, and they were both during Prohibition and thereafter.

00:09:28 So it didn't change our particular personal life. But I do remember feeling that it was a very stupid program. But I do also remember traveling in the South, there was a difference. They didn't have, alcohol was not generally available in the South as it was in the North shortly after Prohibition. Everything, it was state option. The

00:09:58 states did what they wanted to do.

MR. MCKENZIE: Justice, you mentioned what the Great Depression did to your family's fortunes, and I wanted to

[8] On March 22, 1933, President Franklin D. Roosevelt signed the Cullen-Harrison Act, which amended the Volstead Act to permit the manufacture and sale of 3.2% beer. The Eighteenth Amendment was repealed by the Twenty-First Amendment, which was ratified on December 5, 1933.

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	ask you about something related to
00:10:10	that, which was the criminal case involving your father.[9] Did that affect your views of either what due process means or about the importance of appellate review? Because on appeal, your father's conviction was reversed, and the court said there wasn't a scintilla of evidence against him.[10] Do you think that planted a seed of your interest in
00:10:38	due process or appellate review? JUSTICE STEVENS: You know, I've been asked that before. I'm not sure. I just don't know, because I was quite young at the time. And I never took the whole criminal proceeding as seriously as perhaps I should have, because I had complete faith in my father's innocence, which was

[9] John Paul Stevens's father, Ernest Stevens, was charged with embezzlement for investing assets of a family-owned life insurance company in bonds issued by the family-owned Stevens Hotel. He was tried before a jury in Illinois state court and convicted in October 1933. The conviction was overturned on appeal the following year. BARNHART & SCHLICKMAN, *supra* note 2, at 26, 31-34.

[10] People v. Stevens, 193 N.E. 154, 160 (Ill. 1934).

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	vindicated later on. And I never
00:11:02	really considered the possibility he might spend some time in prison. It just wasn't something that seemed likely to happen, even after the conviction. And so I don't remember
00:11:17	having a particular reaction to trial process and all that. I think that came later.
	MR. MCKENZIE: One of the features of the case was sensational press coverage. . .
	JUSTICE STEVENS: Correct.
	MR. MCKENZIE: Including Hearst papers. Did you remember reading any of those stories in the paper? Did
00:11:37	they affect your. . .
	JUSTICE STEVENS: Yes, I did.
	MR. MCKENZIE: . . . views about the press?
	JUSTICE STEVENS: I did, and I remember developing you might say a hostility to the way in which the press emphasized it and made it a matter of great public interest,

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00:11:53	their banner headlines and things like that. And in fact, one of those banner headlines had something said like Stevens charged with embezzlement of a million dollars or
00:12:07	something.[11] And that headline I think was probably responsible for the home invasion that occurred a few days later in Hyde Park. And I do. . . MR. MCKENZIE: That's when your family home was invaded by. . . JUSTICE STEVENS: Yes, four guys came in around 6:00 in the evening, one of them dressed as a police officer, and they purportedly
00:12:33	were going to serve a warrant on my dad. And in fact, what they did is they came in and cut the phone wires and conducted a thorough search of the house and voiced a few threats of things that might happen. But I do associate that event with the

[11] Justice Stevens may have been referring to a headline, ***Ernest J. Stevens Arrested in $1,000,000 Conspiracy***, CHICAGO HERALD & EXAMINER, Jan. 28, 1933, at 1. ***See*** BARNHART & SCHLICKMAN, ***supra*** note 2, at 275, 19.

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	publicity that came before.
	MS. LEE: Now onto the University of Chicago. You were an English major . . .
00:13:10	JUSTICE STEVENS: Correct.
	MS. LEE: At the University of Chicago. And it is tempting to wonder whether the reading of literary texts that you undertook as a student of
00:13:24	literature had any influence on the way that you subsequently read and interpreted legal texts.
	JUSTICE STEVENS: Well, yes, the answer is yes, and I always thought that being able to read and understand lyric poetry would be the best training that a young lawyer could get to learn and understand statutes. You have to stop and think
00:13:49	about what some ambiguous provisions mean and so forth. And I do remember thinking that my training in the English department was very, very helpful later on when I was trying to

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	read statutes and other legal documents.
	MS. LEE: You also were a student in the Great Books curriculum at. . .
	JUSTICE STEVENS: Yes.
00:14:16	MS. LEE: . . . University of Chicago with President Robert Maynard Hutchins and Mortimer Adler.[12] Was there anything that you recall among the works that you read among the great classics
00:14:30	that shaped your view about law or liberty or the role of government?
	JUSTICE STEVENS: I'm not sure. When you mention Adler and Hutchins, the thing I remember most vividly is that when I was in college, that was immediately before World War II, and I remember that Adler was the strong interventionist, and Hutchins was an

[12] Robert Maynard Hutchins, who had previously been the dean of Yale Law School, served as president of the University of Chicago from 1929 (when he was 30 years old) until 1945, and chancellor from 1945 to 1951. He was an iconoclast who reformed undergraduate education at the University of Chicago. He brought philosopher Mortimer J. Adler to Chicago from Columbia. Together they taught a two year honors course that came to be known as Great Books. See BARNHART & SCHLICKMAN, *supra* note 2, at 38.

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	isolationist.
00:15:00	And they disagreed on what the country should be doing. And I remember thinking that even the smartest guys in the world don't often agree. And I did learn, and I think of it more often than you might expect, that there are intelligent, good arguments for both sides of very difficult issues. And I think of Hutchins and Adler as an example of
00:15:27	that, and I've often thought of that because they both were inspiring teachers and brilliant individuals.
	MS. LEE: I read a later piece that you wrote in which you quoted and
00:15:41	discussed John Stuart Mill and his work ***On Liberty.***[13]
	JUSTICE STEVENS: Right.
00:15:55	MS. LEE: And again at the University of Chicago, you were a journalist.[14]
	JUSTICE STEVENS: Yes.

[13] John Paul Stevens, ***The Third Branch of Liberty***, 41 U. MIAMI L. REV. 277, 283 (1986).
[14] BARNHART & SCHLICKMAN, ***supra*** note 2, at 37-42.

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MS. LEE: So that the same breed whom you had developed some hostility toward when you were, when your family was the subject of coverage, you decided that you wanted to be one. Why was it that you decided to get involved in the student newspaper?

00:16:15 JUSTICE STEVENS: Well, that's actually sort of a personal incident. When I was a freshman, the editor of ***The Daily Maroon*** was Bill McNeill,[15] who was a very

00:16:25 smart, good person. But he was too liberal for the student body generally. And I remember there was a tradition that if you didn't like some student leader, they would dump him in the Botany Pond.[16] And that was a ritual way of student protest

[15] William McNeill later became a professor of history at the University of Chicago. He wrote influential books on world history, including THE RISE OF THE WEST: A HISTORY OF THE HUMAN COMMUNITY (winner of a National Book Award) and PLAGUES AND PEOPLES.

[16] Botany Pond, originally created as an outdoor research laboratory for botanists, is located near biology and zoology buildings on the University of Chicago campus.

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against others. And they dumped Bill McNeill in the Botany Pond, which was not a very heroic event. But in any

00:17:00 event, I thought they were wrong, that he was a pretty good person. And so I decided to just go to work on the newspaper. And to the extent that it might not been a perfect reflection of student views, I thought maybe if I participated in the paper I might be able to help improve it. And so I started out as the sports 00:17:26 reporter and that sort of thing. But I got interested in journalism, and I worked on the paper for my all four years in college and made some very good friends on the paper.

00:17:39 MS. LEE: Do you think that years later when you were a judge and then a justice, and you had to deal with cases involving the legal issues affecting the press, that your own experience had any effect?

JUSTICE STEVENS: I think it probably

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	did. Yeah, I think it probably did. I remember that, you think about different things to generate
00:18:01	circulation at times, and some of the ideas you come up with are not very praiseworthy. But the press has a great deal of power, and I think it's important for judges to realize that. And in fact, I think the press's influence on the Court is greater than people realize, and that goes back to my days with Warren Burger. When he had opinions to write that
00:18:32	were favorable to the press point of view, he'd write them himself.[17] But when he had to sign opinions that were contrary to the views of the press, he'd assign them to Byron White,[18]
00:18:43	because Byron was a good tough guy

[17] E.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

[18] E.g., Herbert v. Lando, 441 U.S. 153 (1979); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1979).

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	and could take criticism. But I think that the press has more of an influence on the Court than is sometimes appreciated.
	MR. MCKENZIE: Justice, you mentioned the disagreement between Hutchins and Adler about intervention in the years leading up to World War II. You of course served in the military. You
00:19:15	actually joined right before Pearl Harbor.
	JUSTICE STEVENS: Correct.
	MR. MCKENZIE: As a preliminary question, maybe it's obvious because you joined the military before Pearl Harbor, did you come to a view about the wisdom of intervention in World War II before that time?
	JUSTICE STEVENS: Yes, I
00:19:33	thought that Adler had the better of the argument. And I always felt that sooner or later we would have to be involved in the war. And I think that was the general view, of course
00:19:48	men particularly because the women

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weren't considered eligible for military service at the time. But everybody realized that sooner or later we were going to be in the war in Europe. And that started months before the Japanese attack.

MR. MCKENZIE: Could you describe your work in the military during the war?

00:20:12 JUSTICE STEVENS: Yeah, it's kind of interesting. During my senior year, the dean of students was a man named Leon Smith, who was Leon Perdue Smith. And he's a very fine person. But he was an undercover agent for the Navy,[19] and he offered me

00:20:39 the opportunity to take a course in cryptanalysis, which if I succeeded, it's a correspondence course, and if I succeeded, I'd become eligible for

[19] Leon Perdue Smith, Jr. (1899-1964) was an assistant professor of Romance languages and dean of students at the University of Chicago from 1936 to 1942. He was on military leave from the university from 1942 to 1946, serving as a lieutenant commander and then a commander in the office of the Director of Naval Communications in the Office of the Chief of Naval Operations. University of Maryland alumni magazine, November-December 1948.

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a commission right away. And I did

00:20:52 that, and during the months of the summer of 1941, my principal activities were working on that correspondence course. And oddly enough, I never met anybody in Washington who had anything to do with the course, and I don't know how it got started. But after I progressed to a certain point, they sent me a letter saying you're

00:21:15 eligible to apply for a commission. And as it so happens, on December 6th, 1941, I went up to Great Lakes and took the physical exam, did the paperwork to sign up. And then of course the next day the Japanese attacked.

MR. MCKENZIE: Did your experience in cryptography, cryptanalysis influence the way you read texts, or maybe

00:21:42 legal texts later on in your career?

JUSTICE STEVENS: Yes, it did. And there are two incidents that I particularly recall, one thing that--

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	perhaps the most important, was I
00:21:54	learned how often there could be garbles. You get messages that are intercepted by radio operators who learned the Japanese, well, the equivalent of the Japanese Morse code, with kana. Their alphabet had, I don't know, about 30 or 40 characters in it. And how often they'd mistake three dots for four dots. And you'd get the wrong
00:22:22	character in your message. So I learned that the risks of what later on are described as scriveners' errors, you have to be very, very careful that you got the right kind of text. There was one occasion when the man who was on duty before I showed up had warned me that the Japanese battleship, I forget, I think the Haruna, had
00:22:53	been identified in a message involving the Truk Island base force, and which would've been a dramatic

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	change in the location of a major ship, and to watch out for further evidence of
00:23:12	the battleship in that part of the ocean. And I did, but what I found out was that the message on which he'd relied to draw that inference was a garble, a "ra," it should have been a "nu," or something like, and instead of being the battleship, it was the call sign for the personnel of the Truk base force or something like that. But I learned how a garble can cause a
00:23:39	misunderstanding at the other end. And so that was one incident that I remembered dramatically, that you can get misinformation. And that affected my thinking about statutes that contain mistakes on the part of the authors of the statute, and they happen. They're more, even with expert draftsmanship over on the Hill, sometimes they do have errors. That

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00:24:09 one incident had an impact on my thinking.

MR. MCKENZIE: Justice, many commentators have stated that your military service helps to explain

00:24:21 your dissent in the flag-burning cases, Texas against Johnson, and U.S. against Eichman.[20] Do you think there is a connection between your wartime experiences and those cases?

JUSTICE STEVENS: I think there may well be, because I think sometimes the value of symbols of patriotism and the like are given less respect than they should have.

00:24:52 I do think that the flag does have an important symbolic message to convey to people, and it does generate patriotic attitudes toward the country, and they actually affect the behavior of peoples. So I do think that I have that feeling myself, and

[20] Texas v. Johnson, 491 U.S. 397 (1989) (striking down Texas flag burning statute); U.S. v. Eichman, 496 U.S. 310 (1990) (striking down federal Flag Protection Act of 1989).

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	I do think that there is more importance to the actual symbolic value of the flag than is generally
00:25:21	appreciated. People think, you think the other side is the importance of the free expression of ideas. And of course, I fully go along with that. But I never saw why it was absolutely
00:25:36	necessary to protect that particular form of symbolic speech. And it's interesting. In the years since the flag burning decision, nobody burns flags anymore. It was a dramatic event at the time. It was opposition to the Vietnam--Vietnamese War. But I think of course in a sense it's a wonderful decision. You like to think that we have that degree of freedom here that
00:26:07	even burning a flag is something that will be protected. So I do recognize their merit on both sides of the issue. But I thought the contrary arguments were not given the weight that they were entitled to. And I

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also might say I thought the reasoning in Bill Brennan's opinion is highly unpersuasive, because basically that reasoning

00:26:40 would give constitutional protection to any form of symbolic speech. . .

MS. LEE: So turning to another episode during the war that you are aware of, and that you've commented

00:26:56 on, this was the targeted killing of Yamamoto. And Admiral Yamamoto, you have said that it bothered you, that it seemed different from simply people dying in the ordinary course of battle, because it was more like an execution, but without any process.[21] And that's a very interesting reaction. Could you talk a little bit about that?

00:27:27 JUSTICE STEVENS: Well, that's true. I can remember thinking that it is a different kind of military operation

[21] U.S. forces learned of the flight plans of Admiral Isoroku Yamamoto, commander of the Japanese combined fleet and architect of the 1941 attack on Pearl Harbor, and shot down his plane on April 18, 1943. See BARNHART & SCHLICKMAN, *supra* note 2, at 50.

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	when you go after a particular individual instead of just fighting for a piece of territory or something like that. And it did seem to me just a little bit unusual. And it's true also that when you're given statistics about
00:27:49	the number of deaths on the highways or something like that, they don't have the same impact on your thinking as witnessing or knowing about the fatality when someone in your family
00:28:00	or a friend is killed on the highways. It's a much more dramatic event. But I can't say that I thought about it in terms of due process. It just seemed to me that picking out an individual target was a very unusual kind of military operation. And if I remember correctly, I think I was told that before they went forward with the
00:28:25	operation, they got the approval of President Roosevelt.
	MS. LEE: When you were thinking

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about that, do you think that any of the works of philosophy or ethics that you had studied in college had any impact on the way that you thought about this?

JUSTICE STEVENS: I just don't know.

00:28:45 MR. MCKENZIE: Justice, I wanted to ask about other wartime events that may have come to your attention at the time. And we spoke earlier about the flag and the flag burning case

00:28:56 much later. But I wondered if you were aware of the flag salute controversy during that era, and if you had any views about the Court's decision in the Barnette case involving Jehovah's Witnesses and saluting and pledging to the flag.[22]

JUSTICE STEVENS: Well, I really wasn't aware of it during the war. But of course I became aware of

00:29:18 it later on. And I think perhaps the

[22] In West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Supreme Court held 6-3 that compelling children in public school to salute the flag was unconstitutional.

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	most interesting phase of that particular litigation is the fact that Justice Frankfurter started out on the winning side and then when the case was reheard, several votes switched.[23] And it illustrates how different his views were from the majority when the switch took place.
00:29:47	MR. MCKENZIE: Another wartime event was the internment of Japanese-Americans during the war. Were you aware of that? Did you have views about it at the time?
00:29:56	JUSTICE STEVENS: At the time I have to confess that I thought it was probably a sound military decision. Of course later on I've learned that if you had all the information it never should have been

[23] In Minersville School District v. Gobitis, 310 U.S. 586 (1940), the Supreme Court, with only one dissent, had upheld the constitutionality of compelling public school students to salute the flag. Justices Black, Douglas, and Murphy, who joined the opinion of the Court in Minersville v. Gobitis, voted to overrule the case in West Virginia Board of Education v. Barnette, which prompted a memorable dissenting opinion by Justice Felix Frankfurter. 319 U.S. at 646 (Frankfurter, J., dissenting).

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approved. And I think there was some failure of explanation of what the real facts were in the high command of the military and even in the executive branch of the government.[24]

00:30:23 But it was a tragic decision, and the fact that it was really a pretty stupid decision too, I don't think became generally known until quite a long time afterwards, because just as an average civilian--of course I was a civilian, well, I guess I wasn't, I don't know, at least I was just a beginning member of the military--but it just seemed to me, it seemed to the general public to be

00:30:52 a sensible defense measure, which later on, as I say, it clearly was not.

MR. MCKENZIE: So after the war, you decided to attend law school. And

00:31:05 you've spoken before about the

[24] For an account of how the military and the Department of Justice concealed the absence of facts supporting the need to relocate all persons of Japanese ancestry from the West Coast, see Hohri v. United States, 782 F.2d 227, 232-237 (D.C. Cir. 1986), rev'd, 482 U.S. 64 (1987).

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	influence of your brother. . .
	JUSTICE STEVENS: Yes.
	MR. MCKENZIE: . . . In that decision. What was his advice about the study of law and about the practice of law?
	JUSTICE STEVENS: Well, it's very interesting. He had a practice by himself or with another young lawyer for his first--he's five years older
00:31:27	than I was. And he originally enlisted in the Army, but then he had a personal injury, so he was mustered out earlier. And he had been practicing during most of the war. But I wasn't sure what to do after the years in the military. And I became
00:32:01	aware of the GI Bill of Rights. And that was a major event in learning the opportunity to further my education that way.
	And I don't know whether his letter
00:32:16	came first, or the knowledge about the Bill of Rights, but in any event,

Timecode Quote

he wrote me a very long letter about what he regarded as the rewards of the law practice. And it was a very persuasive statement of how much both benefit and enjoyment and satisfaction you get out of helping people who really need help. And he did a number of things in practice

00:32:47 where he did, not for financial gain, but he would help other people. And he kind of inspired me at the time. I thought that's really an appealing project. And his description of the psychic rewards of helping people in the law practice, really what made me make up my mind definitely to go to law school.

MR. MCKENZIE: Did you consider at

00:33:20 the time another professional life, or going to graduate school after the war?

JUSTICE STEVENS: I don't remember. I think I'd pretty well

00:33:30 decided that the law made sense, and I was fortunate. They dropped the

Timecode	Quote
	bomb in the summer of '45. And I had been transferred--I was on leave in the States at that time. And so I was back in Washington when the war ended, and I was able to get out very promptly. And I sent applications to Michigan, Northwestern, Chicago, and Harvard, I think, or maybe Yale, I
00:34:06	don't know. And at that time it was really pretty easy to get in law school, and not nearly as hard as it is now. But I decided I wanted to go to a law school in Chicago because I intended to practice in Chicago, and so I had to choose between Chicago[25] and Northwestern. And having spent my full educational training in the pre-war years at
00:34:30	Chicago, I thought it would be a good challenge to go to a different law school. And so I went to Northwestern, which had a fine reputation as a school at the time.

[25]Justice Stevens meant Chicago when he referred to Michigan in the recorded interview.

Timecode	Quote
00:34:41	MR. MCKENZIE: Do you think that your service in the military made you a better law student than if you had gone to law school immediately after your undergraduate years?
	JUSTICE STEVENS: I think it might have, although to be honest with you I had good grades in college before too. But I was in a very exceptional class of students. We
00:35:02	were fairly, those of us who were able to get out promptly-- I started in October of '45, so that I was really discharged in a matter of days after the war. And our class was relatively small. I think all but maybe three or four--and there were about 30 or 40, 50, something like that, members of the law school class. And most of the members of
00:35:30	the class were recent, had been involved in the military in some way or another. And everybody was very serious. We felt like we were senior citizens at the time 'cause we were a

Timecode Quote

00:35:44 couple of years older than others. And a number of the students were married, and so you had, it was a serious business trying to learn a new profession. So it was in a particularly good class, that there was a very stimulating class. And we all had, a number of us had similar experiences, one kind if another. So it was a serious class, and a

00:36:14 hardworking class. And I think they were, I was fortunate to be in that group.

MR. MCKENZIE: Did you view law school as principally an academic experience, or did you think of it as professional training, that your goal was to learn as much about what it would be like to be a practicing lawyer?

00:36:33 JUSTICE STEVENS: I think the latter, Troy. I would say the latter. And because everybody, as I say, we went on an accelerated two-year program. We got three semesters

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00:36:47 by going to school in the summer. And that was true at the major law schools all around the country at the time, that three years were compressed into two. So everybody was interested in completing your training promptly.

MS. LEE: Justice, in the very beginning, the front of your book, ***Five Chiefs***, you included a photo of

00:37:14 Professor Nathaniel Nathanson, and you then wrote about him in the very first paragraph of your book.[26] So he clearly was an important figure--

JUSTICE STEVENS: Yes.

MS. LEE: In your life. Could you please tell us about the influence that Professor Nathanson had on you?

JUSTICE STEVENS: Well, it was tremendous. First of all, he was an awfully nice person.

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[26] JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 3, 5-6 (2011). Nathaniel L. Nathanson was a full-time faculty member at Northwestern Law School from 1936 to 1977 and remained a professor of law at Northwestern until 1983. He was best known for his work in administrative law, constitutional law, civil liberties, international law, and human rights.

Timecode	Quote
00:37:35	But he was a former clerk to Justice Brandeis. And everybody in the class was very favorably impressed with the fact that he had had that experience. We also actually had a tax professor
00:37:50	who had been a former clerk to Oliver Wendell Holmes. So between the two of them, we felt we were in a privileged group. But he was a very, very likeable and inspiring person. He was obviously very competent because he had written a great deal about administrative law. He taught constitutional law and ad law. And the statement that I have quoted more
00:38:23	than once is to beware of glittering generalities, which is something that is very good advice, because especially, well, there are a lot of members of the profession who spend too much time repeating glittering generalities. And some of them have become members of the Supreme Court, by the way. And he was a very thorough scholar.

Timecode	Quote
00:38:58	I remember we spent I don't know how many weeks on Marbury against Madison, I think maybe almost a semester just talking about that case, and cases that were cited in
00:39:11	Marbury, and cases related to it, cases relating to mandamus and relating to other aspects of the judiciary and the like.[27] But he was very, very thorough, and he was very open-minded. I remember another case that was particularly important was the Myers case. And you remember Brandeis had dissented in the Myers case.[28] And so we expected that he of
00:39:41	course believed in the dissenting, that we'd get kind of an adversary's, I mean an advocate's presentation of

[27] Marbury v. Madison, 5 U.S. 137 (1803), was a landmark case in which the Supreme Court asserted its authority to declare federal statutes unconstitutional. Chief Justice John Marshall declined to issue a writ of mandamus sought by William Marbury on the ground that the provision of the Judiciary Act of 1789 that apparently authorized the Court to issue such a writ violated Article III of the Constitution.

[28] Myers v. United States, 272 U.S. 52 (1926); id. at 240 (Brandeis, J., dissenting). The Court held that a federal statute requiring the consent of the Senate to the President's removal of executive officers was unconstitutional.

Timecode Quote

the case. But he was totally neutral in developing the issues. And so when we went ahead to the Rathbun case, Humphrey's Executor,[29] we thought that he would say that was a case that really vindicated Brandeis' position and so forth. But instead he just, as a

00:40:14 professor, he insisted we understand the arguments on both sides. And he never, I don't remember him ever expressing a view on which was right. And I think just that his example of

00:40:29 the thoroughness with which he explored the arguments on both sides and tried to think it through made a huge impression on most of us in the class.

MS. LEE: One thing that you have mentioned is Professor Nathanson's

[29] Humphrey's Executor v. United States, 295 U.S. 602 (1935). President Roosevelt attempted to remove William E. Humphrey, a member of the Federal Trade Commission, in the absence of any of the causes for removal specified in the statute. Humphrey sued to challenge the dismissal and, after Humphrey's death, Rathbun, the executor of his estate, pursued the litigation. The Court upheld the authority of Congress to establish quasi-legislative or quasi-judicial agencies whose members had fixed terms and who could be removed only for cause.

Timecode	Quote
	training the students to live with uncertainty to realize that the law doesn't produce logical, tidy, clear --
00:40:57	JUSTICE STEVENS: That's right.
	MS. LEE: Answers.[30]00:41:13And he said you're not going to get answers. How, do you remember how you reacted to that, and
00:41:17	did you become comfortable with uncertainty?
	JUSTICE STEVENS: Well, I thoroughly enjoyed his class and learned a lot. I don't know exactly how to say, answer the question, but he did not regard his role as one providing you with answers to black letter rule or rules and the like, but rather trying to figure out how to
00:41:42	approach questions and respond to them. And I recall being very favorably impressed with his approach

[30] John Paul Stevens, ***Judicial Restraint***, 22 SAN DIEGO L. REV. 437, 439-442 (1985) (discussing Professor Nathanson's constitutional law class, including discussion of the ***Myers*** and ***Humphrey's Executor*** cases).

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to the law generally, and I think it had an impact on my approach to cases later on.

MS. LEE: You have also identified Professor Leon Green, as you wrote, a great law teacher who had a special influence on your understanding of

00:42:12 the law.[31] How would you describe the influence of Professor Green?

JUSTICE STEVENS: Well, in fact I've thought of it recently. I remember him describing four law

00:42:24 schools at the time, Harvard and Michigan on the one hand, and Yale and Northwestern on the other. And Harvard and Michigan were true rules schools, whereas Yale and Northwestern were schools where you tried to understand the procedures involved, the facts-- had an entirely different approach to the law. And the specific doctrine that

00:42:53 he did not like was the doctrine of

[31] John Paul Stevens, S*ome Thoughts About a General Rule*, 21 ARIZ. L. REV. 599, 604 n.25 (1979).

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proximate cause. And he thought that tort law generally had focused unwisely and gave more emphasis to the causation issue than to the issue of whether the defendant had a duty to the plaintiff that had been violated in the case.

So he got me thinking because of his approach, I thought often of what is

00:43:24 the duty that's been challenged and involved in a particular case as opposed to a more black letter approach to rules generally. And I think that he's probably the real

00:43:40 reason where I kind of resisted in the equal protection area, the notion there are three tiers of scrutiny. And when I wrote in one of the opinions, I said there's really only one equal protection clause.[32] You can't put things in different pigeonholes. You ought to figure out what the pros and cons of the

[32] Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

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argument are on both sides and work

00:44:06 out what particular duty the state in that case owes to the person challenging the regulation. And his approach to the law had a huge impact on my work later on.

MS. LEE: And you also mentioned that he focused on who was the decision maker, as--

JUSTICE STEVENS: Correct.

MS. LEE: At least as much as what

00:44:29 the law was.

JUSTICE STEVENS: Yeah, the other book that he was famous for, or was particularly well regarded, was a book called ***Judge and Jury,*** in which he had a

00:44:36 number of essays in which he emphasized the difference and the importance of the role of the factfinder on the one hand and the judge on the other.[33] And that had a very important impact on my thinking.

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[33] Leon Green, JUDGE AND JURY (1930).

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MS. LEE: Were all of the professors at Northwestern of the facts and procedure approach, or were there any who leaned toward a more rules-based

00:45:04 approach?

JUSTICE STEVENS: Well, I'd say most of them were similar to Leon Green in their approach, but different courses, different emphasis. But for example, Harold Havighurst, who later became dean, he succeeded Leon when Leon went down to Texas, his contracts book was not organized on rules relating to offer

00:45:35 and acceptance and consideration and so forth[34] as they might be in Williston[35] and some of the other treatises, but he had cases involving personal services, cases

00:45:46 involving construction contracts,

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[34] Harold C. Havighurst was on the faculty at Northwestern Law School from 1930 to 1957 and 1958 to 1966, and served as dean from 1948 to 1957. His contracts treatise, The Nature of Private Contract, was published in 1962. Leon Green left Northwestern in 1947 to teach at the University of Texas.

[35] Samuel Williston's treatise, The Law of Contracts, was first published in five volumes from 1920 to 1922.

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cases involving different kinds of contracts. And so his approach was definitely similar to Leon Green's approach.

MS. LEE: Are there any other professors at Northwestern who stand out in your mind as having been an influence?

JUSTICE STEVENS: Yes, Fred

00:46:06 Inbau, who taught criminal law, who we called him Hanging Fred, and he did a lot of work with prosecutors and others, having them understand the legal implications of the different rules.[36] And although he was a believer in strong enforcement of the law, he also did a lot of progressive teaching to the law enforcement community, and I took

00:46:46 evidence from him and criminal law.

MS. LEE: Thank you.

JUSTICE STEVENS: Well, you asked me

[36] Fred Inbau, who taught at Northwestern Law School from 1945 to 1977, specialized in teaching, developing, and demonstrating effective interrogation techniques.

Timecode	Quote
	about other professors. See, the faculty
00:46:57	in the law school in those days was maybe ten teachers. That would've been a big law school, whereas now they're several times larger and they're all paid a lot better too. But for example, Homer Carey was the world's greatest expert in future interests as well as real property law.[37] And he always returned his grades very promptly. And you'd
00:47:24	finish the exam. Maybe a day or two later we'd get the grades. And I think he followed the practice of giving everybody the same grade they had received from the last course unless they did something stupid in class. Because one time he turned in the grades, and then a few days later the driver of the bus, the Chicago Transit Authority, grabbed a bunch of
00:47:54	exam papers that had been left on the

[37] Homer F. Carey taught property law and trusts at Northwestern Law School from 1932 until his death in 1950.

Timecode	Quote
	bus.
	MR. MCKENZIE: Ungraded.
	JUSTICE STEVENS: And so he turned in the grades, and it's not
00:48:01	clear he read the exams before he did them. But Homer Carey, among other things, advised the class that lawyers would be well-advised to have some distinctive characteristic associated with their name. And for example, to use green ink in the pen would, maybe you'd remember the lawyer. Lawyers generally were in smaller firms than they are
00:48:29	nowadays. But in any event, that advice is what prompted my decision to use the name Paul along with the John Stevens, 'cause John Stevens is so much like John Smith that nobody would associate the name. But I was going to go on to mention Brunson MacChesney too. He taught the course

Timecode	Quote
	in agency and corporate law.[38]
	And he arrived at the school after
00:49:00	starting-- the students, the class
	apparently began a week or two late
	because he had been working in
	Washington on some war job in the
	Department of Justice. I don't
00:49:13	remember exactly what it was, but I
	do remember him describing Tom Clark
	as an extraordinarily good lawyer who
	was better than most people knew.
	And this was before he became a
	judge. He was a very competent
	attorney general.[39] Well, he didn't
	become attorney general until later,
	so that doesn't fit. And I do
	remember him commenting on
00:49:39	what a fine lawyer Tom Clark was.
	But the more memorable thing about

[38] Brunson MacChesney joined the Northwestern law faculty in 1940 and taught there until his death in 1978. He taught corporations and administrative law and later became a leading figure in international law, serving two terms as president of the American Society of International Law.

[39] Tom C. Clark (1899-1977) became Assistant Attorney General for the Antitrust Division in 1943, and subsequently became head of the Criminal Division of the Department of Justice. President Truman appointed Clark as Attorney General in 1945 and nominated him to the Supreme Court in 1949.

Timecode	Quote
	Brunson MacChesney who was a very well-respected teacher,[40] was that one day he showed up in class, and it was the morning class, wearing the French Legion of Honor with the red ribbons and so forth on. And he explained to the room, most of whom were veterans and many of whom had been in combat
00:50:04	themselves, whereas he had had a job in Washington during the war and had this very elaborate decoration on, that the rules of the French Legion of Honor required the recipient to
00:50:18	wear it the first day you received it, or something like it,[41] and I remember some of my classmates thinking, well, he probably didn't

[40] Justice Stevens meant "teacher" in the recorded interview when he referred to "student" .

[41] During World War II, MacChesney held a number of positions in government, including with the Office of Price Administration and the Foreign Economic Administration, for which he went to Dakar, Algiers, and Paris immediately after its liberation. In Paris, he served as special assistant to the U.S. Ambassador. ***See*** James A. Rahl, ***Brunson MacChesney: Recollections and Appreciation***, 72 Nw. U. L. Rev. 171, 172 (1977). The French government made MacChesney a Chevalier of the Legion of Honor for his services relating to economic affairs when he served in Paris. The medal was presented to MacChesney by the French minister of population in a ceremony in Chicago in October 1945. ***In Memoriam -- Brunson MacChesney, 1909-1978***, 12 INT'L LAW. xv (1978); ***News by Classes***, THE MICHIGAN ALUMNUS, Nov. 30, 1945, at 158.

Timecode	Quote
	need to have that kind of rule to come to class to show it off. But anyway, that was a memorable experience for our class.
	MR. MCKENZIE: Justice, you attended law school at a very interesting time in American law because it was after
00:50:45	the New Deal, and the Supreme Court had rapidly changed. There was a lot of new legislation. Many of the older doctrines that the Court, the pre-New Deal Court, had enforced were going by the wayside. Do you remember feeling that you were learning law at a pivotal moment? Did it seem as though what you were learning was new and fresh and
00:51:09	different from what had come before?
	JUSTICE STEVENS: Well, I remember that during our senior year, Art Seder and I were co-editors of the law review, and we both had
00:51:20	pretty good grades. And the first project that we undertook in the law review was an issue devoted to the

Timecode	Quote
	Taft-Hartley Act, which was passed that year. And so there's an issue of the ***Northwestern Law Review*** which responded to that change in the law.[42] So it was true that we were aware of what was going on in the law generally.
00:51:51	MR. MCKENZIE: During law school, did you form a view or think about whether the original meaning of the Constitution should control its interpretation?
	JUSTICE STEVENS: I don't think that approach to interpreting constitutional law developed until Ed Meese became attorney general many, many years later.[43] But it was always
00:52:11	part of our work in any case to try and understand the history that led to particular decisions. And so I think original meaning was part of our training and understanding

[42] At the time John Paul Stevens was a student at Northwestern, the law review was published under the title the Illinois Law Review.
[43] Attorney General Edwin Meese III, Address before the American Bar Association, Washington, D.C. (July 9, 1985).

Timecode	Quote
00:52:26	generally, but not as sort of a special, sacred document. It was just part of your study about a particular issue. MR. MCKENZIE: You mentioned working on the issue of the law review about Taft-Hartley. Did you develop views about the rise of the administrative state, the proliferation of agencies, and new agencies at the time?
00:52:48	JUSTICE STEVENS: No, I don't associate it with Taft-Hartley. I do associate it with the Rathbun case and the Myers case. And that generated discussion about the administrative state. But I think that discussion and talking about administrative law generally was a later development. Of course the Administrative Procedure Act I think
00:53:14	was passed either when we were in law school or just a year before.[44] But that was reshaping administrative law

[44] The Administrative Procedure Act was enacted June 11, 1946, during John Paul Stevens's time in law school.

Timecode	Quote
	at the time.
	MR. MCKENZIE: While you were in law
00:53:26	school, were there particular doctrines that you remember learning that you thought were particularly wrong, in any field? Constitutional law or admin.
	JUSTICE STEVENS: Well, the one that I remember most clearly is the proximate cause in tort law as doing more harm than good. I don't recall any particular constitutional
00:53:50	law doctrine that stood out.
	MR. MCKENZIE: I also wanted to ask you about something you had mentioned earlier, that Professor Nathanson had stressed avoiding glittering generalities, being comfortable with a flexible standard that pays attention to circumstances. Did you find it persuasive at the time, or was it only later when you became a
00:54:18	judge, that you thought that was a persuasive view of looking at the world?

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	JUSTICE STEVENS: Probably a little of both, I think. But I
00:54:25	think we were conscious at the time that the school did have a different approach to the law generally than the Harvard approach did, and that has stuck with my thinking from time to time. I do think even today some of the Harvard graduates are more rule-oriented than some of the others. You know, maybe this digresses, but you mentioned
00:54:49	glittering generalities in another concept. I think I'll take, I'd like to take this opportunity to explain how I avoided one glittering generality, which during my practice on the Court of Appeals and the first couple of years on the Supreme Court, I had developed a rule of my own that I would not hire any Yale law clerks. And the reason for that was that I
00:55:16	couldn't understand Yale's grading

Timecode	Quote
	system.[45]
	And then a few years later, a few years after I got there, I got an application from Carol Lee, whom you
00:55:28	may know whom I'm talking about. And she was from Yale. And I said well, we can't, I'm sorry. I've got a black letter rule here that disqualifies her. And then I got a letter from a professor in Oxford, who described her academic career at Oxford, in which he explained, it was a handwritten letter. It was very, very persuasive. He explained to me
00:55:53	that they had a system of alpha grades that a superior student once in a great while might get an alpha. And he said and by the way, you have an applicant named Carol Lee who got, I can't remember, 10 or 12 alpha, which was unheard of at Oxford. And I thought well, maybe I shouldn't

[45] Unlike other law schools that used letter grades with pluses and minuses, Yale Law School had only four grades, Honors, Pass, Low Pass, and Failure. Justice Stevens selected Carol Lee as a law clerk for the 1982 Term and subsequently hired numerous law clerks from Yale Law School.

Timecode	Quote
	enforce my black letter rule against this particular applicant. She may turn
00:56:21	out to be qualified. And not only was she qualified. She could even type faster than Nellie could type.[46] And that taught me a lesson that even your own self-imposed rules sometimes
00:56:36	can be broader than necessary.
	MS. LEE: Thank you, Justice. Switching to the next topic, which is the ***Illinois Law Review,*** you were the co-editor-in-chief of the law review in your third year at Northwestern. And we wondered whether you had learned any lessons that stuck with you in your time on the law review.
	JUSTICE STEVENS: Well, I'm
00:57:09	really not sure, except I do remember it was a lot of work. And I've respected people who survived on other law reviews since then. And I worked well with my co-editor, Art

[46] Nellie Pitts served for many years as Justice Stevens's secretary at the Supreme Court.

Timecode	Quote
	Seder, who is still an inspiration. He made a number of bombing runs in England during the war. But the odd thing about my friend Art, he and I were born on the same day. We're
00:57:48	precisely the same age. Our grades in school were almost the same. I had a little bit of an edge on one or two classes, I guess. But I just want to mention him because he was an
00:58:02	exceptional student at Northwestern, an exceptional friend. And he's still, still a friend today.[47]
	MS. LEE: Did the co-editors-in-chief have a role in deciding which articles the law review was going to publish, and how did you decide?
	JUSTICE STEVENS: I don't know. We just got the job done. There were no black letter rules
00:58:26	explaining our assignments.
	MS. LEE: Well, Troy, why don't we

[47] Arthur R. Seder, Jr. clerked for Chief Justice Vinson from 1948 to 1950, then joined the law firm now called Sidley Austin in Chicago. In 1960 he became counsel for American Natural Gas Company. He became the company's president in 1973 and chairman and president in 1976.

Timecode	Quote
	turn to Justice Rutledge?
	MR. MCKENZIE: Sure. So Justice, you were a law clerk to Justice Rutledge --
	JUSTICE STEVENS: Right.
	MR. MCKENZIE: Here at the Supreme Court. And we wanted to ask a little bit about your time in that job and what you learned, and your
00:58:43	experiences, and starting with how --
	JUSTICE STEVENS: Let me interrupt and
	tell you about getting the job first.
	MR. MCKENZIE: Yes.
	JUSTICE STEVENS: Art and I, I had mentioned we were so close in our grades that when a position became available, both for Chief Justice Vinson and a position for Wiley Rutledge, the only difference being that the Vinson job was a year
00:59:05	later, the faculty could not decide which of the two of us should get the nod to the first job. And so we settled our dispute by flipping a

Timecode	Quote
	coin in the law review office. And I won the flip and therefore got the job with Wiley Rutledge.
	MR. MCKENZIE: So you arrive in Washington-- you never interviewed, then? You just --
	JUSTICE STEVENS: No, I
00:59:27	never-- I was interviewed by Willard Pedrick, who had, I guess he clerked for, I'm not sure what the relation, and Willard Pedrick, and Willard Wirtz, who was later secretary of labor.[48] They're
00:59:43	the two who are responsible for our getting clerkship opportunities.
	MR. MCKENZIE: So when you arrived in Washington to clerk for Rutledge,

[48] Willard H. Pedrick was a law professor at Northwestern from 1946 to 1966.He had clerked for then-Judge Fred M. Vinson on the D.C. Circuit after graduating from Northwestern Law School in 1939. When Vinson resigned from the court in 1943 to become Director of the Office of Economic Mobilization, he arranged for Pedrick to be detailed by the Marine Corps to assist him. In 1946, Pedrick recommended Northwestern's top graduating student, Frank Allen, to be Chief Justice Vinson's law clerk. Allen clerked for Vinson from 1946 through 1948. W. Willard Wirtz taught law at Northwestern from 1939 to 1942 and again from 1946 to 1954. Wirtz had been hired in the late 1930s by Dean Wiley Rutledge to join the faculty at the University of Iowa law school, and had become a close friend of Rutledge. Erin Miller, Getting His Clerkship, SCOTUSblog, http://www.scotusblog.com/2010/04/getting-his-clerkship. Wirtz served as Secretary of Labor from 1962 to 1969.

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what guidance did the Justice give you about the decisional process, how he thought about cases and the law, or did you just jump in?

JUSTICE STEVENS: I just jumped in.

01:00:04 MR. MCKENZIE: Just jumped in.

JUSTICE STEVENS: And my co-clerk, Stan Temko, was already there.[49] And I perhaps learned more from Stan about the procedure at the Court than from anyone else.

MR. MCKENZIE: Now you've stated in the past that Justice Rutledge encouraged his law clerks to state their view of the case, that he

01:00:21 wanted you to think the case through. Do you remember disagreeing frequently with him on the ultimate outcome of the case, or infrequently?

JUSTICE STEVENS: It would

01:00:33 be infrequently, but there was one

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[49] Stanley L. Temko, who graduated first in his class at Columbia Law School and was editor-in-chief of the Columbia Law Review, had previously been selected by the late Chief Justice Harlan Fiske Stone to be his law clerk, before Stone's sudden death in 1946. Miller, ***supra*** note 48. After his clerkship with Justice Rutledge, he became a partner at the law firm Covington & Burling in Washington, D.C.

Timecode	Quote
	case on which I remember having a fairly violent discussion with him, where it was either a Social Security case or some kind of a case involving interpretation of a statute, in which I felt that he was off the base. And I did not persuade him. I do remember that. But he did encourage us to explain exactly what we felt, and
01:01:04	there was never any feeling that we should not express disagreement with him. But I can't remember disagreeing with him on any case except that one.
	MR. MCKENZIE: Do you remember a time when you persuaded him to change his view of a case?
	JUSTICE STEVENS: No, I don't. I don't remember. I think
01:01:31	there was one dissent we wrote in the Ahrens case in which I think I helped him make it a little stronger and longer dissent than he originally had planned. But I don't think I

Timecode	Quote
01:01:44	persuaded him to change his view.[50]
	MR. MCKENZIE: Now, Justice Rutledge wrote the first draft of his own opinions.
	JUSTICE STEVENS: Yes.
	MR. MCKENZIE: I wanted to ask you if you could just explain how he used his law clerks. What did you do?
	JUSTICE STEVENS: Well, first of all we did all the certs.
01:02:02	We wrote him a cert memo on every case, and there weren't that many then. And that included the in forma pauperis cases.[51] And he was not confident that the Chief would adequately review them. And at that time, the in forma pauperis cases circulated to other justices. They went to the Chief's office first.

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[50] Ahrens v. Clark, 335 U.S. 188, 193 (1948) (Rutledge, J., dissenting). For a discussion of law clerk John Paul Stevens's influence on Justice Rutledge's dissenting opinion, see Joseph T. Thai, ***The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence From World War II to the War on Terror***, 92 VA. L. REV. 501, 504-13 (2006).

[51] ***In forma pauperis*** cases are filed by indigent petitioners, most of them prisoners, who lack the resources to pay the Supreme Court's filing fees.

Timecode	Quote
	The Chief
01:02:33	wrote a one, usually a one-page memo about whether he'd exhausted his state remedies or something. But he very often gave a summary that was not adequate to even find out what the
01:02:47	issues were. And so Rutledge insisted that Stan and I look at the original papers ourselves and find out whether there might be an issue there.
	And there were times when we did spot issues that we thought needed further attention. One of them gave rise to the dissent in the Marino case, Marino against Ragen, where Rutledge,
01:03:13	I think he described the Illinois post-conviction system as an "Illinois merry-go-round."[52] You had to exhaust writ of error, writ of error coram nobis, habeas corpus, and so forth. Had to do all three 'cause

[52] Marino v. Ragen, 332 U.S. 561 (1947); ***id.*** at 563, 570 (Rutledge, J., concurring) ("Illinois merry-go-round").

Timecode	Quote
	the attorney general most of the time would urge for a denial of a federal review on the ground another remedy had not been exhausted. So a very
01:03:41	important part of our work was examining the records in in forma pauperis cases to be sure that we weren't missing issues. And there were occasions when Rutledge would
01:03:53	add cases to the discuss list that otherwise would've been. See, at that time the --
	MR. MCKENZIE: The dead list at the time.
	JUSTICE STEVENS: Yeah. Cases, actually we took cases off the dead list. Originally the stuff that was not going to be discussed at conference was put on a dead list.
01:04:12	And everything else was discussed. And any justice could take a case off the dead list. But we sometimes added cases to the conference discussion because Rutledge had this more thorough procedure in reviewing

Timecode	Quote
	in forma pauperis cases. And some of those really did merit attention. The Marino case was one that he
01:04:36	wrote a separate opinion in.[53] But you asked me what our, our duties were to do all the certs including the in forma pauperis. And the in formas, we wouldn't necessarily write
01:04:46	memos in the in formas. We would at least look at them. That was part of our job. And the second thing was he assigned each of us at the beginning of the term I think three or four cases to write bench memos. So we would study the case much more thoroughly. And I wrote a memo on the cement industry, Federal Trade Commission against whatever the
01:05:13	cement company's name was.[54] And Stan

[53] Justice Rutledge concurred in Marino v. Ragen, in which the Court vacated the judgment below in view of the state's confession of error. He wrote to state his view that the Court should have addressed the defects in the Illinois post-conviction system more generally. Justice Stevens said "dissent" in the recorded interview when he meant "opinion".

[54] Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

Timecode	Quote
	wrote his bench memo.
	And then we also did not, we did not write original drafts, but he would, before he'd circulate an opinion, he would often ask us to get material to put in the footnotes. I mean, I can remember one draft. The draft would be his handwritten draft and sometimes Edna, the secretary,[55] would
01:05:46	type them up before we saw them. Sometimes we had the draft itself. And it'd be a footnote, JPS get cites. And I remember on one opinion the only cite I could find was an
01:05:58	1816 Mississippi state court decision. And I got him to change the footnote. But he really did the opinion writing, except that he assigned, we each had either one or two opinions in which we wrote the first draft.
	And I wrote the first draft in the

[55] Edna Lindgreen was secretary to Justice Rutledge at the Supreme Court.

Timecode	Quote
	Mandeville Island Farms case, which you know.[56] And my draft was about six or seven pages. The issue was
01:06:28	whether a price-fixing agreement among producers of sugar violated the Sherman Act. And I thought it did, and I cited four or five cases and wrote the opinion. And he wrote an opinion in which my four or five pages are the center of about a 30 or 40-page opinion in which he basically thought we ought to reexamine, I think the E.C. Knight case, is it?[57] And
01:06:59	so my one contribution to his jurisprudence was not all that, my contribution was not all that important. Although when you read the opinion, you can see the dramatic
01:07:14	change in style, right in the middle. About four or five pages read like a law review with a few propositions.

[56] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[57] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

Timecode	Quote
	And the rest of it is in much more polished English. But that's the case, I mentioned this before, that Justice Thomas would overrule.[58] And I always accused him of trying to destroy my one contribution to the law that I made as a law clerk.
01:07:41	MR. MCKENZIE: Justice, you mentioned that Rutledge would request a bench memo on a small handful of cases.
	JUSTICE STEVENS: Right.
	MR. MCKENZIE: Did he ever indicate why he would pick out certain cases and ask for a bench memo?
	JUSTICE STEVENS: Well, I think there were two considerations. One, if it was a big record case,
01:08:01	he'd generally ask us to save him time of going through the whole record, because he was pretty careful and pretty thorough. And other than

[58] United States v. Lopez, 514 U.S. 549, 598 (1995) (Thomas, J., concurring) (writing that Framers had not intended for the Commerce Clause to give Congress power to regulate manufacturing, and writing approvingly of Supreme Court's decision in ***E.C. Knight***).

Timecode	Quote
	that, and also there were cases of
01:08:14	importance, we had the Paramount Pictures antitrust case decided that year. I think I probably wrote a memo on that case. And the cement case was a big important case.[59] And I can't remember the others, but I think they were cases on which the bench memo would shorten the amount of time he'd have to spend on the case.
01:08:36	MR. MCKENZIE: Justice, you famously did not join the cert pool as a justice. Did your experiences as a law clerk --
	JUSTICE STEVENS: Yes.
	MR. MCKENZIE: -- affect your decision not to join the cert pool?
	JUSTICE STEVENS: Yes, that made the difference, having had the experience as a law clerk. I really
01:08:54	felt that I could get through the,

[59] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948).

Timecode	Quote
	make the decision whether or not to grant cert very quickly without a lot of writing involved, by just looking at the papers. And so I developed
01:09:10	the practice of not writing memos in every case. But I did ask my clerks as I think you remember, I think you would go through the certs and write memos if you thought the case really was important and so to be sure I wouldn't miss it. So you performed a kind of second safety valve that I wouldn't miss things that I should understand.
01:09:41	MS. LEE: Now, this is turning to the rather amorphous topic of judicial style, or opinion-writing style of judicial approach. First an open-ended question, and then I can get more specific. Do you think that Justice Rutledge's approach to deciding cases, including his focus on the record and on the facts, influenced you when you became a
01:10:13	judge, and then later a justice?

Timecode Quote

JUSTICE STEVENS: Yes. Yes, it did, Carol, but actually it wasn't just Justice Rutledge on that. My experience on the Court of Appeals

01:10:23 had a big impact on that, and I particularly remember talking to John Hastings, who was a senior judge on the Court of Appeals who also wrote all his own opinions.[60] And he said that, I remember him saying, if you do a careful job with the statement of fact, the rest of the opinion will write itself. And he, as well as the example of Justice Rutledge, did lead

01:10:51 me to conclude for myself that I would do a better job if I tried to, if I wrote out the first draft myself.

MS. LEE: Now as to the style of opinion writing, you said a minute or two ago that in the Mandeville Island

[60] John S. Hastings (1898-1977) of Indiana was in private practice in Washington, Indiana, from 1924 to 1957. He joined the Seventh Circuit in 1957 and served as chief judge from 1959 to 1968. He assumed senior status in 1969, the year before Stevens joined the court, and served until his death in 1977.

Timecode	Quote
	Farms opinion, the text that was written by Justice Rutledge rather obviously differed from the text that was written by clerk John Paul
01:11:17	Stevens. So your writing style is somewhat different from Justice Rutledge. What did you think of his writing style? And if you compare them, why did your style in writing
01:11:33	opinions differ from his? JUSTICE STEVENS: Well, I thought at the time, and I still think that his style, he tended to write longer opinions than I thought necessary. And sometimes the length of the opinion was fully justified because of the issue. His dissent in the Yamashita case, for example, is a very important document that he wrote
01:11:57	100% himself.[61] It was the year ahead of my clerkship, but we did have different-- I do tend to try to be as

[61] In re Yamashita, 327 U.S. 1, 41-81 (1946) (Rutledge, J., dissenting). ***See*** John Paul Stevens, ***Mr. Justice Rutledge***, ***in*** MR. JUSTICE 194-198 (Allison Dunham & Philip B. Kurland eds. 1956).

Timecode	Quote
	concise as possible in writing, and his approach was different. I think I wrote one opinion I think when Teresa was clerking for me,[62] in which the footnotes were longer than the text. I've always been a believer in footnotes anyway, unlike
01:12:28	a lot of my colleagues. I think footnotes play an important role as optional reading. You don't have to read footnotes to understand the opinion, but I do think that they
01:12:40	perform a useful function.
	MS. LEE: Now Justice Rutledge also wrote separate opinions from time to time.
	JUSTICE STEVENS: Yes, he did.
	MS. LEE: How did, what was his view on when was the appropriate time to write a separate opinion, and did that affect your own thoughts on
01:12:57	writing separate opinions?

[62] Teresa Wynn Roseborough was a law clerk for Justice Stevens in the 1987 Term.

Timecode	Quote
	JUSTICE STEVENS: I'm sure it did. I'm not sure I can give you examples, but I think he sometimes, he would disagree with the reasoning in the majority opinion and would set out his own reasoning. In the Screws case, I guess. No, the Screws case is a case in which he voted differently. But he thought it important to
01:13:22	set forth how he had analyzed the case.[63] And that did stick with me too.
	MS. LEE: What were Justice Rutledge's views on what
01:13:35	circumstances would justify overruling a precedent of the Supreme Court?
	JUSTICE STEVENS: That's a good question, and I'm not sure I know the

[63] Screws v. United States, 325 U.S. 91 (1945). Justice Rutledge wrote a concurring opinion, id. at 113-34, explaining that he believed that the judgment below should be affirmed. He disagreed with the four justices in the plurality, who wished to remand the case for further proceedings, but disagreed even more with the justices joining the principal dissent, who wished to reverse the judgment below. Therefore he concurred in the judgment so that the Court could dispose of the case.

Timecode Quote

answer. I don't know that they did any overruling during my term. I just don’t remember.

MS. LEE: Wasn't EC Knight at least--

JUSTICE STEVENS: Well, I

01:14:01 thought the EC Knight case had already been overruled--

MS. LEE: Oh.

JUSTICE STEVENS: By intervening decisions. And I guess it had never squarely been overruled.[64] But his opinion in the Mandeville Island Farms I guess did put the final nails in the coffin. And I thought final nails until Justice

01:14:20 Thomas came along.

MS. LEE: This is a bit of a tangent, but you mentioned that you had drafted the first, put a piece of the final opinion in Mandeville Island

01:14:35 Farms and that you did bench memos on a cement case and on Paramount

[64] See ***Mandeville Island Farms***, 334 U.S. at 229-35 (Justice Rutledge’s discussion of intervening decisions, including ***Standard Oil*** and ***American Tobacco***, that applied the Sherman Act to manufacturing companies).

Timecode	Quote
	Pictures. And antitrust seems to feature in all of these cases. Did that have any effect on your interest in practicing antitrust law later on?
	JUSTICE STEVENS: Well, I think the interest in antitrust came first.
	MS. LEE: I see.
01:14:56	JUSTICE STEVENS: I think I wrote a note or a comment when I was on the law review on the Paramount Pictures case.[65] And I believe, and also I may have written some on Alcoa.[66] The big antitrust precedents that were kind of controversial when I was in law school were Paramount, the movie cases, and the Alcoa case by Judge Learned Hand. And I had
01:15:23	written a comment on Paramount, the movie cases, which I think led to my following development in the antitrust law, more particularly than

[65] Comment, ***Price Fixing in the Motion Picture Industry***, 41 ILL. L. REV. 630 (1947) (discussing United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), and 70 F. Supp. 53 (S.D.N.Y. 1947)).

[66] United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945).

Timecode	Quote
	other branches of law.
01:15:38	MS. LEE: What was it about antitrust law that interested you?
	What was it about antitrust law that interested you? Was it the complexity or the room for development by judges, or --
	JUSTICE STEVENS: Well, I think at the time it was a fairly controversial area of the law in that there was a fear that the wildly liberal Supreme Court might destroy
01:16:09	American business. And I think that it was more controversial than it is today, I think.
	MS. LEE: So turning back to judging and judicial approach, what were Justice Rutledge's views on reaching or trying not to reach, that is avoiding the decision of constitutional questions?
	JUSTICE STEVENS: Well, he
01:16:38	did not think the Court should decide constitutional issues unless they were absolutely necessary to do so.

Timecode	Quote
	He wrote some opinions that went to great lengths to avoid this
01:16:54	specific issue. There's one, I have one in mind, but I can't think of its name now.[67] But he definitely did not go out of his way to reach constitutional issues.
	MS. LEE: One thing that came to mind as I prepared for this oral history was that Professor Nathaniel Nathanson and Justice Wiley Rutledge had certain elements of their
01:17:22	approach to the law in common, and one of them was a focus on the facts and the specific circumstances of the case. Another one was the importance of judgment by judges, not black letter law. And yet another was avoiding constitutional decision-making --
	JUSTICE STEVENS: That's exactly right.

[67] Justice Stevens may have been referring to Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 459 (1947), a case decided the term before his clerkship. Justice Rutledge wrote the opinion of the Court dismissing the appeal.

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01:17:43 MS. LEE: When necessary. At the time, when you were clerking for Justice Rutledge, did it occur to you that some of the things that Justice Rutledge believed in addressing these

01:17:55 sorts of issues were similar to what you had learned at Northwestern?

JUSTICE STEVENS: That's interesting. They probably were similar, but I don't recall associating the two. But Rutledge did write some fairly elaborate opinions on going out of his way to avoid. You know, there's an interesting parallel here that just comes to

01:18:21 mind. The legislative veto case was a very important case where the Court, I forget the name.

MR. MCKENZIE: Chadha.[68]

JUSTICE STEVENS: Pardon me? Chadha, yeah. And Ed Levi was also someone who had an influence on me, even back there, as a scholar, and of course

[68] INS v. Chadha, 462 U.S. 919 (1983).

Timecode	Quote
	well before I went on the Court of Appeals. I taught, I
01:18:47	filled in for him for a year, or two years, at the University of Chicago Law School.[69] But he, like Nathanson, thought there was a virtue to postponing constitutional
01:19:02	adjudication, first because you might be more apt to get it right the longer time you take. But also that sometimes there's a virtue in ambiguity in the law. And the Chadha case was an example that I think he cited, or maybe Nat did, as the law might be better off leaving the question undecided --
	MS. LEE: [Interposing] Mmm hmm.
01:19:28	JUSTICE STEVENS: -- because the threat of the legislative veto might be better than having Congress actually make the decisions. And sometimes the uncertainty in the law

[69] Edward H. Levi was professor of law at the University of Chicago from 1945 to 1950, dean of the University of Chicago Law School from 1950 to 1962, president of the University of Chicago from 1968 to 1975, and attorney general of the United States from 1975 to 1976.

Timecode	Quote
	will perform a useful function in government.[70] And I remember their thinking that was an example that maybe it would be better off just leave the issue undecided.
01:19:52	MS. LEE: Okay. Why don't we turn to you next?
	MR. MCKENZIE: So Justice, I wanted to ask you a little bit about judicial philosophy or viewpoint of
01:20:03	Justice Rutledge, and whether or not it had any effect on your view of the role of judges. Justice Rutledge has often been described or sometimes been described as a judge who thought about the law in the way in terms of how it affected people. Do you think it's fair to say that he was a justice who thought his job was doing

[70] Professor Nathanson and former Attorney General Levi had each written that judicial resolution of the constitutionality of the legislative veto might be undesirable, although the two men expressed different opinions on the merits of the constitutional issue. ***See*** John Paul Stevens, ***Judicial Restraint***, 22 SAN DIEGO L. REV. 437, 442 & n. 12 (1985), citing Nathaniel Nathanson, ***Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the 'Independent' Agencies***, 75 NW. U. L. REV. 1064, 1110 (1981), and Edward H. Levi, ***Some Aspects of Separation of Powers***, 76 COLUM. L. REV. 371, 387 (1976).

Timecode	Quote
	justice in particular cases rather
01:20:28	than developing a body of, a philosophy of the law?
	JUSTICE STEVENS: Oh yes, I think that's really accurate. I think that's true. I don't know exactly how to add to that. And he took, each case was separate. Just to run an example, I remember we had a case involving whether or not it was appropriate to forbid the
01:20:56	circulation of some book. It had some sexual issues of some kind.[71] And he didn't just read the briefs. He took the book home and read through the book to find out whether, and I
01:21:09	remember him coming in one morning, "It's not that big a deal, this book," or something. But it obviously, he tried to understand as much as he could about the actual

[71] Justice Stevens may have been referring to Winters v. New York, 333 U.S. 507 (1948) (book dealer's appeal of conviction for possessing certain magazines alleged to violate state indecency law).

Timecode	Quote
	issue. And he thought there was a tempest in a teapot in that particular book.
	MR. MCKENZIE: One criticism of a judicial style that focuses closely on facts and circumstances of a case
01:21:35	is that it has the risk of being results-oriented, unpredictable. Do you think that would be a fair criticism of Rutledge's way of deciding cases?
	JUSTICE STEVENS: No, I don't. And I don't know exactly why I say that, but I really don't think that's right, 'cause I think he did, he deeply believed in
01:22:01	having valid rules of law governing procedures, for example. And I really don't think that is a valid criticism of his approach.
	MS. LEE: Speaking of procedures,
01:22:17	Justice, our next question is about Justice Rutledge's strong commitment to procedural fairness, to applying time-tested procedures, and applying

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them even in national security issues where there might be some temptation to take shortcuts. And the Yamashita case comes to mind. That wasn't in your term. It was the term before --

01:22:48 JUSTICE STEVENS: Term ahead, right.

MS. LEE: --but I'm sure you were familiar with it. Do you think that Justice Rutledge's views on proper process had an effect on you when you were later a judge?

JUSTICE STEVENS: Oh, I'm sure they did. But that was characteristic of his requirement that we look at all the in formas,

01:23:08 for example. He wanted to be sure the procedures were fair.

MS. LEE: That is, when you say all in formas, you're referring to the in forma pauperis cases?[72]

01:23:19 JUSTICE STEVENS: I'm sorry?

MS. LEE: In formas, you said all in formas.

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[72] ***See supra*** note 51.

Timecode	Quote
	JUSTICE STEVENS: Yeah, right.
	MS. LEE: You're referring to the in forma pauperis cert petitions that were before the Court. Did Justice Rutledge have views on the role of the courts in limiting and reining in
01:23:38	potential abuses by the political branches, have an effect on your thinking?
	JUSTICE STEVENS: I just don't remember any particular instance right now. I should mention that his strength was not merely in procedure. On the Commerce Clause, for example, he had a very profound belief that the national government
01:24:07	had an important role to play, and the Commerce Clause was the justification for that. And in his book, ***Declaration of Legal Faith***, he is all about the Commerce Clause and
01:24:20	how the attempt to get rid of the Balkanized economic problems with different separate states was what really got the country formed.

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MS. LEE: I remember that vividly because I was your clerk during the term when you wrote a concurrence in a case called EEOC versus Wyoming, which was about age discrimination--

01:24:43 JUSTICE STEVENS: Right, right.

MS. LEE: And mandatory retirement age for fish and game wardens.[73]

JUSTICE STEVENS: We cited the book. Didn't we cite Rutledge in that?

MS. LEE: Yes, not only that. You quoted a block, a long block quotation from ***Declaration of Faith***

01:24:56 on the Commerce Clause being the central reason for the creation of the new Constitution. And that in itself was striking. But at the end, when you put in the citation to

01:25:09 ***Declaration of Legal Faith***, you also say that you had cited it at length in a Seventh Circuit opinion called

[73] EEOC v. Wyoming, 460 U.S. 226, 244-51 (1983) (Stevens, J., concurring).

Timecode	Quote
	Staszcuk, S-T-A-S-Z-C-U-K.[74]
	JUSTICE STEVENS: Oh, that's right. I had forgotten.
	MS. LEE: So that passage clearly had a very strong influence on--
	JUSTICE STEVENS: It did.
	MS. LEE: --the way you think about the
01:25:26	Commerce Clause.
	JUSTICE STEVENS: It did. You're right. In the Staszcuk case, it was an en banc case in which I wrote the Seventh Circuit opinion, yeah. It involved whether the Commerce Clause justified the-- either indictment or some kind of discipline against I think a real estate broker or something like that. And we gave
01:25:50	a very generous interpretation of federal power in the case.
	MS. LEE: So that ***Declaration of Faith*** clearly had an important

[74] 260 U.S. at 244-45, citing United States v. Staszcuk, 517 F.2d 53, 58 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975). The correct spelling is S-T-A-S-Z-C-U-K.

Timecode	Quote
	influence on you.
	JUSTICE STEVENS: That's right.
	MS. LEE: Do you remember
01:26:07	what it was about Justice Rutledge's views on the Commerce Clause that was, that you found so compelling?
	JUSTICE STEVENS: Well, I just thought he got it right. And I do remember in studying American history, George Washington was concerned about the federal power to pay the troops. And I really think that's an important part of our whole
01:26:30	governmental structure, that I think it really is important to understand that the framers felt the same way too.
	MS. LEE: But unfortunately from your perspective, a number of the current justices on the Supreme Court don't find that view of the Commerce Clause as compelling.
	JUSTICE STEVENS: That's
01:26:50	right. And I frankly think Justice Ginsburg really wrote a magnificent

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separate opinion in the case to which we're referring.[75] And it differed dramatically with the position of the

01:27:03 Chief Justice. And I think Ruth got it right.

MR. MCKENZIE: So Justice, we have a few more minutes, but I wanted to ask you about some of the cases that were before the Court during your term as a law clerk. One of them was the Sipuel case.

JUSTICE STEVENS: Oh yes, right.

01:27:25 MR. MCKENZIE: Race discrimination case. Sipuel against Board of Regents.[76]

JUSTICE STEVENS: Of Oklahoma.

MR. MCKENZIE: Of Oklahoma. And you wrote a memo to Justice Rutledge in that case that questioned the

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[75] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Chief Justice Roberts and four other Justices wrote that the individual mandate in the Affordable Care Act was not authorized by the Commerce Clause, although they did not join in a single opinion on this issue. Justice Ginsburg and three other Justices dissented from this conclusion.

[76] Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948).

Timecode	Quote
	validity of the separate but equal doctrine. And of course this was
01:27:39	some years before Brown against Board. Did Rutledge's views influence what was expressed in the memo, or was that your own independent view that you were
01:27:48	expressing in that memo to the Justice?
	JUSTICE STEVENS: Well, I don't know because we both had the same view. I don't know which is the cause, but it just, it was not just my views. The law clerks as a group at the time felt very strongly that the separate but equal doctrine was a lot of nonsense. And I don't think I was
01:28:13	out of the thinking of the clerks who were on the Court at that time. They all thought this was an easy case. An interesting aside to the Sipuel case that I might toss in there is that when she went to Oklahoma Law School, she was the only black student in the class. And many years

Timecode	Quote
	later, I played golf on a fairly regular basis with a graduate of that
01:28:46	law school, who recalled when she joined the class. And he said she was entirely welcome to the students, but she upset the faculty. And the interesting thing was that the
01:29:02	faculty rule was not popular with the students at the time. They welcomed her. And he was very genuine about that. But I found that quite interesting as sort of background of the case itself, that the administration was perpetuating the discriminatory practice, but not necessarily what the students would've done.
01:29:29	MR. MCKENZIE: Interesting. Another important case involving race was Shelley against Kraemer, involving the enforcement of racially discriminatory covenants.[77] Justice Rutledge did not sit on that case,

[77] Shelley v. Kraemer, 334 U.S. 1 (1948).

Timecode	Quote
	and neither did Justices Reed or Jackson. Did you agree with the Justice's decision to recuse in that case?
01:29:55	JUSTICE STEVENS: Well, it wasn't a matter of agreement. My first assignment when I got down there, maybe not the first, but one of the first things that Rutledge
01:30:05	asked Stan and me to do was to go down and study the property records of the District of Columbia to determine whether there was not some common law basis for concluding that his covenant wasn't binding on him. MR. MCKENZIE: Oh, he wanted to sit. JUSTICE STEVENS: He wanted to sit. He definitely wanted to sit. And he wanted Stan and me to figure
01:30:26	out some theory on which he could properly sit. But he was also very sensitive to the ethics restraints on judicial participating in cases. And he thought he could not sit on the case.

Timecode	Quote
	In fact, he was so strict that I admire him for it, but I thought it went a little too far. The law publishers regularly send copies of new books to chambers of justices.
01:31:02	And he insisted that any copy, any book sent by any publisher to the chambers be immediately delivered to the library, so he would not even accept free books from law publishers, which I
01:31:17	think practically every judge in the country has certain books that are sent to them and they think nothing of it. But he was a very, very strict enforcer of ethics rules as they applied to himself.
	MR. MCKENZIE: Another important case before the Court was the Everson establishment clause case--
	JUSTICE STEVENS:
01:31:38	[Interposing] Correct.
	MR. MCKENZIE: --Everson against Board of Education, in which Justice

Timecode	Quote
	Rutledge dissented.[78] Do you think that Justice Rutledge's views on the Establishment Clause affected your own views in that area?
	JUSTICE STEVENS: They probably did. They probably did. He felt very strongly, and I think that was
01:31:54	probably, I think he got it right.
	MR. MCKENZIE: Everson turned out to be quite an important case in establishment clause jurisprudence. Was it, did it seem like a big case
01:32:06	at the time? Did it feel divisive on the Court, or significant in other ways?
	JUSTICE STEVENS: I think it was; I think it was. Did Black write the majority?
	MR. MCKENZIE: I think he did, actually. I think that's right, yes.
	JUSTICE STEVENS: Yeah, I think he did. You know, that was a really
01:32:28	important case.

[78] Everson v. Board of Education, 330 U.S. 1 (1947). Justice Black wrote the opinion of the Court.

Timecode	Quote
	MR. MCKENZIE: So I think in the few minutes we have remaining, Justice, some of the questions we wanted to ask are a little bit more tangential, but they are just about what it was like to be in Washington and to work at the Court during that time. I wanted to ask a few questions about the solicitor general's office. Do you
01:32:51	remember whether the office was as well-respected then as it is now? Do you remember the argument style?
	JUSTICE STEVENS: I do. Philip Perlman was the solicitor
01:33:02	general at the time.[79] I did not think he was a good advocate. I thought that in response to questioning, he would sometimes give the same answer over and over, but the volume of his voice would go up. But the content of his answer

[79] Philip B. Perlman (1890-1960), a Maryland lawyer and political leader, was named Solicitor General by President Truman in 1947 and served until 1952.

Timecode	Quote
	wouldn't change. I guess people generally think he was a pretty good advocate, but I never regarded him as a particularly good
01:33:26	advocate. But they had a number of very fine advocates in the office. And the office was very well respected at that time. They wrote good briefs, and they were very persuasive. So that the answer is, my answer is a little bit mixed.
	MS. LEE: Turning to the justices on the Court at the time that you clerked, what kind of relationships
01:33:52	were there among the justices? Did some of them get along or not get along with each other, and were you aware of that as clerks?
	JUSTICE STEVENS: Well, it
01:34:02	was generally assumed that Justice Jackson and Justice Black were not the best of friends. But to tell you the truth, we didn't notice it in anything that went on within the Court. But I was aware of the fact

Timecode Quote

that Justice Frankfurter did not really respect the views of Justices Black and Douglas. And there was kind of a mutual mistrust of one

01:34:35 another. And so I did not think that they were as cordial as they appeared to be on the surface, although I guess it was publicly known that Jackson was disappointed at not being made chief justice, and that was public knowledge. So there was some public knowledge of the friction within the Court.

MR. MCKENZIE: And blamed Black for

01:35:02 the--

JUSTICE STEVENS: Yeah.

MR. MCKENZIE: --for the failure to be appointed chief.

JUSTICE STEVENS: I'm not

01:35:06 sure that was right.

MS. LEE: How did it become a matter of public knowledge?

JUSTICE STEVENS: Pardon me?

MS. LEE: How did it become a matter of public knowledge?

Timecode	Quote
	Was it through, were
01:35:16	justices talking to professors or the public, or lawyers that came in?
	JUSTICE STEVENS: Not as far as I know. Not as far as I know. I just don't know the answer to that.
	MS. LEE: So with the relationship among the justices when you were a law clerk, how would you compare that to the relationship among justices when years later you became a
01:35:39	justice?
	JUSTICE STEVENS: Well, I've told this story more than once, I'm sure, but when I was a lawyer practicing in Illinois, Thurgood
01:35:48	Marshall was our circuit justice. And I remember him on one or more occasions mentioning the fact that everybody was good friends on the Court. And I remember thinking well, that's probably what they say in public but it may not be the actual fact, 'cause I had this recollection

Timecode	Quote
	of dissension, some kind of dissension in the Court when I was a
01:36:10	clerk. But then when I got there, I found out Thurgood was telling it as it really was. And the relationships, the personal relationships among members of the Court is excellent. And I think, my impression is it still is.
	MS. LEE: What about the relationship among law clerks across different chambers? Did you get to know them
01:36:35	well? Did you share ideas? Did you try to persuade each other? Could you talk a little bit about that?
	JUSTICE STEVENS: Yes, they were a smaller group of law clerks when I
01:36:45	was a clerk. There were about 14 or 15; I can't remember. But we were all friends. And we occasionally had social events where we all attended with our wives and so forth. So it was a congenial group among the clerks. And that has varied over the years. There's a period, I can't

Timecode	Quote
	tell you the exact time when the clerks really divided more or less
01:37:14	socially, as did the ideological views of their bosses.[80] But when the members of the Court found that out, they put an end to it. And they now, as I understand it, they now get along very well socially and can help one another. They talk to one another about business as well as political and social events.
	MS. LEE: When you were a clerk, did
01:37:41	you and your co-clerk ever feel that you would try to promote your Justice's views by persuading the law clerks of other justices about the merits of those views?
01:37:53	JUSTICE STEVENS: I didn't, but I think Stan from time to time, he was a pretty good friend of Justice Reed's clerks, and I think he would sometimes try to influence his clerk to say, to prevent Reed from doing

[80] *See* EDWARD LAZARUS, CLOSED CHAMBERS (1998). The author served as a law clerk to Justice Blackmun in 1988-89.

Timecode Quote

something that he shouldn't have done or something.

MR. MCKENZIE: Well, Justice, we've come to the end of this session.

01:38:17 Once again, we'd like to thank you very much for your time and for answering our questions.

JUSTICE STEVENS: Well, I've enjoyed it.

MS. LEE: Well, we've enjoyed it too. Thank you very much.

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MR. MCKENZIE: Justice, when we last spoke, we left with your, the end of your clerkship. And I wanted to

01:38:40 start up there and ask you about your decision to enter private practice. Did you consider going into the legal academy instead of private practice?

JUSTICE STEVENS: Well,

01:38:49 there's one brief episode, that Justice Rutledge asked the people at Yale to come up to Yale and pay a visit. And I did visit them, but I really was not particularly

Timecode	Quote
	interested in teaching. I wanted to get into practice.
	MR. MCKENZIE: And why not?
	JUSTICE STEVENS: Well,
01:39:11	actually I had the feeling that even if I were to go into teaching, a little experience in practice would be a good preparation for it. So I really didn't seriously consider teaching at the outset.
	MR. MCKENZIE: Today many law clerks who leave the Court end up going to appellate practices where they specialize in appellate work. You
01:39:37	didn’t do that. You quickly turned your focus to more trial litigation. Was that a conscious choice on your part when you left clerking?
	JUSTICE STEVENS: Not
01:39:48	really. I just took whatever was available, I was interested in doing. I first went to work with what's now the Jenner & Block firm, for Edward R. Johnston, who was a leading antitrust lawyer, I think really in

Timecode	Quote
	the country. He was the first chairman of the ABA section on antitrust law.[81] And an awfully nice guy too. So I was very fortunate to
01:40:14	be able to work with him for the first year or two of my practice. MR. MCKENZIE: And did you think about doing mostly transactional work instead of litigation at some point? JUSTICE STEVENS: Well, yes. Actually there are two stages to my, well, there'll be three stages to my early years. One, working for the big firm. And then I came down to
01:40:38	Congress and worked as associate counsel for the Celler Committee for about almost two years.[82] And then I went back, and three of us formed our

[81] Edward R. Johnston emerged as a nationally known trial attorney as early as the 1920s. He won a landmark Supreme Court case in 1925 on behalf of a trade association client, helping to attract numerous trade associations to the firm. He was perhaps the country's most prominent antitrust lawyer at the time. Jenner & Block, History by the Decades, https://jenner.com/about/history/

[82] Subcommittee on the Study of Monopoly Power of the House Judiciary Committee, chaired by Rep. Emanuel Celler of New York.

Timecode	Quote
	own law firm.[83] And when you form your
01:40:50	own law firm, you pretty much do what's available. And it happened that I did, I did a fair amount of transactional work actually and also litigation and whatever came along.
	MS. LEE: So Justice, delving into your experience as a trial lawyer, which was one of the significant parts of your practice, as a former practicing litigator, what is your
01:41:17	view of the adversary system as a method for resolving disputes? What are its strengths and weaknesses?
	JUSTICE STEVENS: Well, I've always been a believer in the adversary system. I think it's the best method of ascertaining the truth. But I haven't really thought so much about the burdens of the system now that some of the big cases

[83] In July 1952, Stevens, Edward Rothschild, and Norman Barry left the Poppenhusen, Johnston firm and started their own law practice, which was called Rothschild, Stevens, and Barry. BARNHART & SCHLICKMAN, *supra* note 2, at 93; STEVENS, FIVE CHIEFS, *supra* note 26, at 86.

Timecode	Quote
01:41:37	with the great volume of discovery may be beyond anything I had in my own experience, although discovery was fairly burdensome even when I was in practice.
01:41:51	MS. LEE: So that is one of the ways in which you see litigation as changing since you were yourself in practice?
	JUSTICE STEVENS: I guess it has. I guess it's a matter of degree rather than anything else. It's somewhat more burdensome. But it was always potentially pretty burdensome.
01:42:11	MS. LEE: What was your most memorable experience as a litigator?
	JUSTICE STEVENS: Well, I've thought. I knew that question was coming up. I suppose a case involving a fire in a printing plant in Kokomo, Indiana, back there several years ago had a lot of interesting aspects to it that I particularly remember.
01:42:41	MS. LEE: Did you try that case to a jury?

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	JUSTICE STEVENS: Yes, I did. And the jury came in on our side of it. But it was interesting
01:42:52	because I represented the Cuneo Press, which owned the printing plant. And they were sued by the Hearst Corporation, which had a large volume of paper in the plant. And it was a negligence case where a former employee had poured a lot of hot stuff on the roof. They were replacing the roof and started a fire which set off the sprinkler system, which drowned the
01:43:21	paper in a flood of water and caused a huge amount of damage to Hearst's paper. And I still remember when the former employee came in, got on the witness stand. They asked him his name, and he stood up and saluted. He said, "Dewey Pace [phonetic], sir." And he sort of made out the point that he was not a particularly competent employee to be trusted with
01:43:50	repairing the roof.

Timecode	Quote
	And they had experts from the roofing company testify as to how a well-trained roofer would avoid the risk of fire. And whereas Dewey Pace
01:44:04	testified that his instructions were to get the tar good and hot, that was the only instruction he got. And so they concocted a case of negligence against our employees. But I remember particularly that what won the case for us was the former fire chief of Kokomo, Indiana, who Mr. Cuneo had hired to supervise fire prevention. And he was a wonderful
01:44:34	witness. And what I learned in that, one of the many things I learned during that trial, is that witnesses win trials, not lawyers.
	MR. SAMUEL ESTREICHER: Do you have a favorable impression of the jury system?
	JUSTICE STEVENS: Pardon me?
	MR. ESTREICHER: Do you have a
01:44:50	favorable impression of our jury system?

Timecode	Quote
	JUSTICE STEVENS: Yes, I do. I think juries generally get it right. And sometimes of course it
01:44:57	misfires, but nothing is really perfect.
	MS. LEE: How many cases did you try before a jury in your career?
	JUSTICE STEVENS: How many? Not very many. In fact, I think there's a misconception about the amount of jury work that even very busy trial lawyers do, 'cause most cases settle. And I don't know. I
01:45:22	just tried maybe 10 or 12 cases, is all.
	MS. LEE: How valuable do you think that experience as a trial lawyer is to the work of an appellate judge?
	JUSTICE STEVENS: I think it's extremely valuable. I think you learn a lot during trials that you don't learn in any other forum. It's extremely important, I think. And I
01:45:49	know you ask about whether I think it's unfortunate that there are not

Timecode	Quote
	more trial lawyers on the Court now, and I do. I think that's an omission that is unfortunate. But it's partly the
01:46:04	problem with getting people confirmed and so forth.
	MS. LEE: One final question about your trial lawyer experience, and a recent case that the Supreme Court decided, the Twombly case about particularity of pleading.[84]
	JUSTICE STEVENS: Yes.
	MS. LEE: Did you conceive that case from the perspective of your own
01:46:28	experience as an advocate, a trial advocate, and what did you think about the case?
	JUSTICE STEVENS: Oh, I thought it was a most unfortunate case. I really did. I can't really remember precisely what the issue was in that case now.

[84] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (holding that, to survive a motion to dismiss, the complaint must allege sufficient facts to establish a plausible entitlement to relief). Justice Stevens dissented. ***Id.*** at 570.

Timecode	Quote
	MR. MCKENZIE: It was an antitrust Sherman Act, I think, case.
01:46:51	JUSTICE STEVENS: Oh yeah, and they did not allow the plaintiff, I forget the details of the case.
	MS. LEE: It was a plausibility requirement that would be a threshold
01:47:00	that was decided by the judge.
	JUSTICE STEVENS: Oh, yeah. In order to even go forward with discovery.
	MS. LEE: Yes, yes.
	JUSTICE STEVENS: You know, I think that's quite wrong. Quite wrong.
	MS. LEE: Okay.
	MR. MCKENZIE: Justice, you mentioned
01:47:13	your work with the, on Capitol Hill a few minutes ago. What was your job on the staff?
	JUSTICE STEVENS: Well, a little background to that. The Celler Committee was engaged in a series of hearings raising the question whether merely being a big company could violate section two of the Sherman

Timecode	Quote
	Act,[85] was sort of the underlying
01:47:39	concern. And the Republicans were concerned that Celler was too aggressive and moving too far to the left and might come up with some unfortunate legislation. So I was
01:47:55	working for Edward R. Johnston, who I've already identified as the first head of the antitrust section of the American Bar Association. And the American Bar engineered an effort to get a Republican appointed as associate counsel to watch out for the dangers that Manny Celler was threatening to our economy.[86] And so I was recommended by Johnston to go
to 01:48:25	that job. And I came down here more or less as a defense counsel defending big business.

[85] Section 2 of the Sherman Act prohibits monopolization, attempt to monopolize, or conspiracy to monopolize any part of the trade or commerce among the States or with foreign nations. 15 U.S.C. § 2.

[86] Emanuel Celler (1888-1981), a Democrat from New York, served in the U.S. House of Representatives from 1923 to 1973. He was chairman of the House Judiciary Committee from 1949 to 1973, except for 1953 to 1955, when the Republicans were in the majority. In 1950, Rep. Celler was the lead House sponsor of legislation that strengthened the Clayton Antitrust Act by giving the federal government power to prevent anticompetitive mergers by means of asset acquisition.

Timecode Quote

But when I got here, I found out that the committee really was much more non-partisan than I had expected. And as it turned out, we worked on a very non-partisan basis, working with one another on the investigations. And I just fit in

01:48:53 with the staff very well, and I grew to admire Celler. And he had an assistant who was in charge of the Judiciary Committee named Bess Dick, who was a very good

01:49:08 lawyer and sort of helped a lot with the work on the committee.[87] And we ended up, we finished up an investigation of, I think it was, of the steel industry.

But then we got the idea that we should investigate organized baseball. And organized baseball, the big issue then was whether the

[87] Bess E. Dick was legislative assistant, House Judiciary Committee, in 1945, when the Democrats were in the minority in the House of Representatives, and staff director from 1955 to 1972, when the Democrats were in the majority. Because the Democrats were in the majority in 1951-52, when John Paul Stevens was on the staff of the Cellar Committee, Bess E. Dick was probably staff director.

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01:49:34 reserve clause violated the antitrust laws. And so we had experts in antitrust and baseball such as Ty Cobb and Branch Rickey and Mickey Mantle*and other, Ford Frick, people come and testify. And that occupied a very large part of our time, those hearings. And they were really very interesting, and I think fairly significant hearings. And it was

01:49:59 interesting to see and learn about the economics of the baseball industry at that time, which is vastly different from the economics of sports franchises today.

01:50:10 MR. ESTREICHER: Did your experience on this committee affect how you view the reliability of legislative history? Did your experience affect how you view legislative history?

JUSTICE STEVENS: Yes, that's an experience that influenced my thinking about legislative history, because I remember one particular instance we did get a bill through

*Although Mickey Mantle did testify on antitrust and monopoly issues before a Senate Subcommittee, he did so not in 1951 but at a later hearing in 1958.

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01:50:34 enacting a federal statute of limitations on treble damage actions. And it's rather complicated because the tolling of the statute is postponed during the pendency of a government action, because a government victory in particular is prima facie evidence of guilt in the subsequent treble damage action.[88] So we'd have a problem of when the

01:51:02 statute was tolled, when it began to run again. And I remember discussing that issue with one member of the committee and explaining to him some of the complication. And he ended

01:51:17 our conversation by saying, well, I think we can let the judges work that one out. But I think there was a lot of wisdom in the legislature recognizing that you can't figure out everything of every application of a statute. There does have to be some coordination between enforcement by

[88] 15 U.S.C. § 16(i).

Timecode	Quote
	the executive branch and by the judges and what the legislators
01:51:41	intend. And if they attempt to figure out every possible wrinkle in a statute. . .
	MR. ESTREICHER: They'll make a lot of mistakes.
	JUSTICE STEVENS: It'll take a lot of time, too.
	MR. ESTREICHER: And take a lot of time.
	JUSTICE STEVENS: Yeah.
01:51:54	MR. MCKENZIE: How did your work with the Celler Committee affect your subsequent practicing career?
	JUSTICE STEVENS: Well, one way it helped, oddly enough, is it's probably
01:52:06	responsible for my representation of Charlie Finley, because I did get to know a little bit about baseball at that time. And when he wanted to move from Kansas City to another location, he had first consulted a lawyer named Nizer, a New York

Timecode	Quote
	lawyer, who was kind of pretty adversary sort of --
	MR. ESTREICHER: Louis Nizer, Louis.
	JUSTICE STEVENS: -- person.[89]
01:52:35	And the people who testified in the hearings somehow or other suggested to him that he ought to hire me. And he did, and that led to a lot of interesting legal work.
	MS. LEE: Now, turning to antitrust, did you represent both plaintiffs and defendants--
	JUSTICE STEVENS: Yes.
	MS. LEE: As an antitrust lawyer?
01:53:00	JUSTICE STEVENS: We did. I did, and I think about 50/50, which was fairly unusual at the time because most of the big firms did defense work only. And there were a
01:53:14	few specialists on the plaintiff side. There was a lawyer named Tom McConnell in Chicago, who was very

[89] Louis Nizer, a senior partner of the New York law firm Phillips, Nizer, Benjamin, Krim, and Ballon, was a noted trial lawyer who represented parties in high-profile trials. He published a best-selling memoir, My Life in Court, in 1962.

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successful. He brought the case involving the Jackson Park Theatre in Chicago. Bigelow I think is the name of the case.[90] And it really made it possible to compute a fair measure of damage and so forth. It was a very influential case, developing private

01:53:41 treble damage. And he was a very effective lawyer.

MS. LEE: How did it happen that both plaintiffs and defendants came to your firm to do antitrust representation?

JUSTICE STEVENS: Well, I was already representing Charlie Finley[91] when we got in the, it's kind of interesting. Charlie hired me

01:54:08 really to get him out of Kansas City and into a new location without

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[90] Bigelow v. Loew's, Inc., 201 F.2d 25 (7th Cir. 1952). Thomas C. McConnell of Chicago represented the plaintiff.

[91] Charles O. Finley (1918-1996), after making a fortune in the insurance business, purchased the Kansas City Athletics baseball team in 1960 and moved the franchise to Oakland in 1968. Finley was a master showman, an innovator, and one of baseball's most flamboyant owners. He often clashed with players, other baseball owners, and the commissioner of baseball.

Timecode	Quote
	getting involved in litigation, or try to make the move as peaceful as we could. And we ended up going to
01:54:20	Oakland, California. And the day we arrived, the Sportservice concessionaire filed a lawsuit against him requiring, seeking to be named the concessionaire. And Oakland Coliseum had its own concessionaire. So there was a conflict between a rock and a hard place because there are two binding contracts that created a problem.
01:54:52	And Sportservice sued Charlie, or tried to enforce the contract.[92] The contract that Charlie had inherited when he owned the team had been negotiated by Connie Mack maybe 20 or 30 years earlier, at a time when the Athletics were in need of money.[93] And one source of financing

[92] Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 365 F. Supp. 235 (N.D. Cal.), rev'd 512 F.2d 1264 (9th Cir. 1975).

[93] Cornelius "Connie Mack" McGillicuddy (1862-1956) was a professional baseball player, manager, and team owner. He

Timecode	Quote
	in baseball at that time was having the concessionaire advance money to
01:55:18	the team in exchange for a long-term contract. And he had a contract that not only extended for many, many years, but required that Sportservice have the concession business if the
01:5535	team moved to another location. And not only was Sportservice entitled to the concession, but they were entitled to do the concession work for every person who became a tenant of the facility. So if their view prevailed, they not only did the baseball concessions, but the football and anything else. So that really presented a situation
01:55:59	that was ripe for litigation. And the case went on, and the first part of the trial was handled by Tom Clark sitting as a trial judge out in San Francisco, and that's the first time

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managed the Philadelphia Athletics from 1901 to 1950, and was an owner of the team from 1901 to 1954. The team moved to Kansas City in 1954 under new ownership.

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I had a chance to meet Justice Clark, for whom I became a real admirer of the work he did.[94] But that case went on from the time I got there 'til after I was on the Court of Appeals.

01:56:31 And I think the case was still pending when I came to the Supreme Court.[95]

MS. LEE: Do you think that it was an advantage for your clients that the lawyers they hired did represent both

01:56:43 sides?

JUSTICE STEVENS: Well, I think probably. I don't know if they thought of it in that term. See, in that case, Charlie was really a plaintiff 'cause in the counterclaim we challenged the validity of these long-term contracts and ultimately prevailed. But I'm not sure it's

01:57:10 that organized.

MR. ESTREICHER: Were you involved at

[94] After retiring from the Supreme Court in 1967, Tom Clark sat by designation on the lower federal courts around the country.

[95] Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291 (9th Cir. 1982).

Timecode	Quote
	all as a counsel for class actions on
	. . .
	JUSTICE STEVENS: Did I ever do. . .
	MR. ESTREICHER: Yes, as a lawyer.
	JUSTICE STEVENS: I did some defense work. I represented
01:57:25	some directors in corporate litigation.
	MS. LEE: You mentioned Edward Johnston, and you mentioned Tom McConnell. Were there any other
01:57:36	memorable lawyers in the antitrust bar in Chicago when you were practicing?
	JUSTICE STEVENS: Yes, there were several. John Chadwell was particularly effective. He was really a great lawyer at the time.[96] I almost went to work for him before I got the clerkship with Justice Rutledge. But he didn't have an
01:57:57	opening when I came back, so I went

[96] John T. Chadwell was a name partner in a firm that was described as the preeminent antitrust firm in Chicago, which received referral business from New York firms. He became well known after litigating several large antitrust cases. CYNTHIA GRANT BOWMAN, DAWN CLARK NETSCH: A POLITICAL LIFE 79 (2010).

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elsewhere. But generally speaking the best litigators in general were also the best antitrust lawyers.

MS. LEE: Apart from specific issues of antitrust law, do you think that your work in that area had any broader impact on your approach to the law generally or to your approach

01:58:26 to other areas of law that might be analogous to antitrust?

JUSTICE STEVENS: Well, yes, I do, antitrust is just one kind of big

01:58:45 lawsuit, and I got involved in other fairly substantial litigation that was not necessarily antitrust. Although a lot of the biggest antitrust litigation that took place during my private practice was the electrical equipment cases, in which Westinghouse and General Electric and other suppliers were sued by the utility companies.[97] And

[97] *See* Myron R. Watkins, ***Electrical Equipment Antitrust Cases: Their Implications for Government and Business***, 29 U. CHI. L. REV. 97-110 (1961).

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01:59:22 that was a time when it became acceptable for the big firms and the conservative firms to become plaintiffs because they were representing substantial companies who were suing the suppliers. And so that's the time when it became a rather dramatic change in the makeup of the antitrust bar.

MS. LEE: Did you spend time doing

01:59:50 economic analysis of antitrust law, and did that affect the ways in which you thought about the law more generally?

JUSTICE STEVENS: Yes, and

01:59:58 as I think I've mentioned, I taught the subject both at Northwestern and the University of Chicago. And particularly at Chicago, the course was called, Competition and Monopoly was the name of the course. And it was taught by an economist and a lawyer. And the economist was Aaron Director, who was a very fine economist but didn't write much

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02:00:27 stuff, but he was really a very influential economist.[98] And I learned a great deal from him when I was co-teaching the course. And so that had an impact on my thinking, and of course that had other consequences too.[99]

MS. LEE: Turning more generally to your law practice, please tell us about the decision that you and your

02:00:51 colleagues made to leave the Jenner firm and to establish your own practice.

JUSTICE STEVENS: Why we did it?

02:00:57 MS. LEE: Yeah, why you did it.

JUSTICE STEVENS: Well, the actual decision was probably made shortly after we joined the firm. When in order to get admitted to the bar, we

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[98] Aaron Director, a professor of law at the University of Chicago from 1946 to 1965, profoundly influenced antitrust law through the application of economic analysis. More generally, he was a central figure in the Chicago school of economics.

[99] Stevens was invited to teach the Competition and Monopoly course by Edward Levi, dean of the law school at the University of Chicago, who had previously taught the course. Years later, when he was Attorney General, Levi played an instrumental role in President Ford's decision to nominate Stevens to the Supreme Court.

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all took the bar and were admitted. Well, they were a year behind me in law school. I was admitted after I served my clerkship with Justice Rutledge. But after we

02:01:25 had been hired at what was then Johnston, Thompson, Raymond & Mayer-- no, it was really Poppenhusen, Johnston, Thompson, Raymond & Mayer, we had to take a day off to go down to Springfield to be admitted to the bar. And we did that, and we all learned at our next paycheck we were docked for that day. We didn't do any productive work, and

02:01:52 three of us shared the same office. Mr. Poppenhusen's office was a great big, lovely office. But he was in ill health at the time we started. And so we

02:02:05 shared, and we became good friends. And I think after that experience, we decided that sooner or later we would be working for somebody else.

MS. LEE: How large did the law firm,

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your law firm become, say at the time that you left to go to become a judge? How many partners, how many associates were there?

JUSTICE STEVENS: Well,

02:02:32 when I went to work for what is now Jenner and Block, I think there were 24 lawyers, and the firm jumped to 28 at the time, which was a big firm. Now you'd call it a boutique, I think ...

MS. LEE: Yeah.

JUSTICE STEVENS: But when we left, three of us left together.[100]

MS. LEE: Yeah.

JUSTICE STEVENS: We met

02:02:49 one another when we were all hired at the same time at Jenner. And we left in 1952, after I had served as associate counsel for the Celler Committee. I came back to Chicago.

02:03:03 I went back with the Poppenhusen firm for a short time, and then the three

[100] John Paul Stevens, Edward Rothschild, and Norman Barry.

Timecode	Quote
	of us left.
	MS. LEE: Did you grow very much in terms of numbers of lawyers over the years?
	JUSTICE STEVENS: Well, not compared to the growth of today's bar, but I think I practiced probably for, I guess in that firm for about
02:03:24	18 years. And I think we had about ten lawyers when I left. I'm not sure the exact number.
	MR. MCKENZIE: Justice, are there lessons that you can relate from your time in practice, and in particular, things that you may have learned from representing clients?
	JUSTICE STEVENS: Yes, there sure are. I certainly couldn't in a
02:03:55	few minutes recount all the lessons, but I think I mentioned in connection with the fire case that I learned that witnesses win lawsuits. Lawyers don't. You need to have the facts
02:04:10	explained in an intelligible way, and in a way that makes a jury

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sympathetic to your position. And I don't know. Everything you do, you learn something. It's amazing. I'm still learning today.

MR. MCKENZIE: For a trial judge, I can see a direct connection between having represented clients in practice and being a trial judge. Do

02:04:36 you think it matters as much for an appellate judge?

JUSTICE STEVENS: Well, I do, but of course it varies from case to case. Every case is different, and every problem is different. But just as a general matter, I had learned things along the way that were helpful to me in thinking through

02:05:00 particular problems. And I have to say I think that that's true of Tony Kennedy, because he had experience in trial work, and I think he has insights that other members of the

02:05:11 Court don't share. And so he's a particularly, he's a particularly fine judge because of his ability to

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size up different situations.

MS. LEE: Again on the topic of clients, you mentioned Charlie Finley, who was evidently a very memorable client. Were there any other memorable clients who you'd like to tell us about?

02:05:40 JUSTICE STEVENS: Oh, I had a lot of memorable clients. I think I may have mentioned in ***Five Chiefs***, for some reason I did a fair amount of work for distributors rather than manufacturers or retailers. I did some work for different kind, and one in particular I'd mention is Norm Niemi, who was a distributor of calculating equipment.[101] At that time,

02:06:11 it was an English machine called, I think it was the plus machine. It was comparable to a comptometer, which is fairly primitive compared to

[101] Norman Niemi, Felt and Tarrant Manufacturing Co., Merchandise Mart, Chicago.

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the stuff that's available now. But

02:06:22 he was a particularly good client, and he took me to England with him on one occasion to renegotiate his arrangement. Another client was Sam Zeoli in the washing machine business, coin-operated washing machines.[102] And I remember one thing that he often bragged about, he was a very fine man, was that he had grown up in a tough neighborhood in New

02:06:54 York. None of his boys had ever spent a day in jail. That was evidence of the kind of person he was.

MS. LEE: One client whom you have spoken about is a prisoner named Arthur La Frana, whom you represented as a pro bono matter in habeas.[103] Could you please tell us a little bit about that case?

02:07:16 JUSTICE STEVENS: Yes, I can. That

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[102] See Laundry Equipment Sales Cor. v. Borg-Warner Corp., 334 F.2d 788 (7th Cir. 1964).

[103] People v. La Frana, 4 Ill. 2d 261 (1954).

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was a case where La Frana had filed a pro se petition alleging that he had been brutally beaten by the police, and he had confessed as a

02:07:30 result of the torture. And it turned out his story was true. I remember my first visit with La Frana, who was a likeable guy, and who had got into trouble, one kind or another. But I remember asking him about, he had alleged that he had been handcuffed, his arms behind his back and that a rope had been attached to the handcuffs and he been strung with his

02:08:06 feet off the floor, so the weight was on the rope and the handcuffs. And I had thought that it would be terribly painful to his wrists, with the handcuffs. I remember asking him how it felt to be put in that position. And he said the pain was absolutely excruciating, particularly through his shoulders. And it surprised me when he said that, and I thought my

02:08:40 golly, he wouldn't be saying that if

Timecode	Quote
	it weren't true.
	And I formed the opinion that he was telling me the truth, and that he had in fact been beaten up. And so
02:08:51	anyway, I was appointed to represent him on the trial. I should back up. When he filed his pleading, the Illinois court had dismissed, thrown it out on the ground he hadn't exhausted his state remedies. And he was one of several, his petition one of several that the Supreme Court ordered hearings in. And he had been represented by Nat Nathanson, my
02:09:18	former con law professor, in his petition for review in the Supreme Court.[104] And when the case was sent back for an evidentiary hearing, Nat asked me if I'd be willing to take over the case 'cause he didn't have much experience in trying cases. And

[104] La Frana v. People of the State of Illinois, 342 U.S. 805 (1951) (appointment of Nathaniel Nathanson as counsel for petitioner); Jennings v. State of Illinois, 342 U.S. 104 (1951) (remand of three cases, including La Frana's case, to Supreme Court of Illinois to determine if the Illinois statute provided an appropriate remedy for petitioners to assert that their constitutional rights had been infringed).

Timecode	Quote
	I was happy to do it, and the judge appointed me as the counsel to represent him. And then I went down
02:09:46	for my first interview with him. And because of the fact that I was convinced he was telling me the truth, I think I may have spent a little more time on the case and been
02:09:58	a little more diligent than I otherwise would have, although I like to think I would have done a thorough job anyway. I don't know. But I made a pretty thorough investigation of the case. And we found in the records, there were records, medical records that confirmed the marks on his arms to show that they'd been held. And we found a picture of him
02:10:21	in a newspaper story that had been taken after he had confessed. He was beaten for several days as it turned out. And the picture showed he had bruises that were evident to the observer. And there was some other piece of evidence we found too that

Timecode	Quote
	confirmed it. In any event, he was telling the truth. And we were able to establish that fact. And that of
02:10:53	course made me realize that there was such a thing as police brutality that affected a fair number of arrestees, and it influenced me to take cases of that kind more seriously.
02:11:11	Eventually we got, we did not persuade the trial judge. It's also interesting that the trial judge in the case was Judge Kluczynski, who later became a member of the Illinois Supreme Court.[105] And although he conducted a very fair hearing and let us get in all our evidence, he eventually ruled against us. And the reason he did is he didn't want to be in the position of
02:11:36	reversing a fellow trial judge. And so he accepted it, but then we

[105] Thomas Kluczynski, a judge in Cook County, presided over Family Court and became chief justice of the Criminal Court and later of the Circuit Court. He served on the Illinois Supreme Court from 1966 to 1976 and from 1978 to 1980. *Veteran Justice Thomas E. Kluczynski*, CHI. TRI., May 18, 1994.

Timecode	Quote
	appealed to the Illinois Supreme Court, and the court unanimously reversed on the facts that the evidence definitely established his allegations.[106]
	MS. LEE: Did that quite vivid experience affect the ways in which you later viewed police brutality
02:11:58	allegations or generally the availability of post-conviction remedies?
	JUSTICE STEVENS: Yes, it did because, and that plus my
02:12:07	experience with Justice Rutledge, I think we discussed--
	MS. LEE: [Interposing] Yes.
	JUSTICE STEVENS: --before, that you can't be sure, there's sort of a presumption that most of these cases probably have no merit. But you do learn when you get involved in one or more that some of them do have merit. And you have to look at them

[106] People v. La Frana, 4 Ill. 2d 261 (1954).

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02:12:28 pretty closely to find out what the facts are.

MS. LEE: Thank you.

MR. MCKENZIE: Justice, as a lawyer in private practice, you argued a case in the Supreme Court, United States against Borden Company.[107] Could you describe that experience and what that was like?

JUSTICE STEVENS: Well, that was a Robinson-Patman Act case,[108] in which I 02:12:52 represented one of the defendants, Bowman Dairy, and Borden was represented by Stuart Ball of what had formerly been a big retailer company. But in any event, we lost

02:13:11 the case, and I thought that we should've won it. But the most memorable experience is getting up at the lectern and finding out that the members of the Court seemed to be close enough to reach out and touch

[107] U.S. v. Borden Co., 370 U.S. 460 (1962).
[108] Enacted in 1936 as an amendment to the Clayton Antitrust Act, the Robinson-Patman Act prohibited price discrimination in an effort to protect small retail shops against competition from chain stores.

Timecode	Quote
	'em. And I think it's an experience that many others have shared. I remember talking to both John Roberts and Ruth Ginsburg, who argued a fair number of
02:13:37	cases. And they also remembered their first experience in the Court was one that you're just right in, almost within touching distance of the people you're addressing.
	MR. MCKENZIE: Did that experience affect the way you treated lawyers once you became a member of the Court?
	JUSTICE STEVENS: I don't,
02:13:55	I'm not sure it did. I don't really think it did.
	MR. MCKENZIE: Have you heard your argument? You can actually get online an audio of your argument in
02:14:07	the Borden case.[109]
	JUSTICE STEVENS: No, I haven't. Have you heard it?

[109] The Oyez Project, IIT Chicago-Kent School of Law, Cases, 1962, www.oyez.org.

Timecode Quote

MR. MCKENZIE: I have; I have. You sound the same.

JUSTICE STEVENS: That's interesting.

MR. MCKENZIE: Very persuasive, actually.

JUSTICE STEVENS: I didn’t

02:14:18 really persuade. I think John Harlan was the only one who was persuaded to our position. And I think we were really right in that case. It's interesting. But anyway, that's one thing that you learn also when you take on cases. You sometimes are doubtful about the merits of your client's position. But the more you work for the client, the more you

02:14:46 become convinced that justice is really on your side. Which is one lesson that affected my work on the Supreme Court, by the way, that sometimes when you have the

02:15:00 responsibility for assigning opinions, if you have someone who is not all that sure of the outcome, if you assign that person the opinion,

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that person is going to be totally convinced by the time he's written it, whereas if you assign it to somebody else, that person is apt to maybe rethink the case. It's an interesting phenomenon.

02:15:24 MS. LEE: Justice, switching to Chicago, and Illinois politics, or Illinois generally, do you think that coming from Chicago, as opposed to coming from somewhere else in the rest of the country, had an impact on your life?

JUSTICE STEVENS: Yes, oh sure did, for a lot of reasons. But one thing that that question reminds

02:15:50 me of. Bill Rehnquist came from Milwaukee. And Milwaukee was kind of a law and order city. And Chicago was kind of an everything goes city. And I remember thinking that crossing

02:16:06 the middle of the block in the Loop,[110] that's no problem. You have

[110] The Loop is the central business district of Chicago.

Timecode Quote

a constitutional right to jaywalk in Chicago. But in Milwaukee, you're apt to spend a couple of days in jail if you're going to do the same thing. And the two of us often compared our experiences, and we agreed there was a difference in Chicago and Wisconsin. And I think that

02:16:30 difference may have contributed to our differences of appraising the importance of giving a presumption of regularity to local government decisions. He gave a strong presumption, and I thought sometimes it was appropriate to take a second look.[111]

MR. ESTREICHER: You had a different experience with local government.

02:16:49 JUSTICE STEVENS: Pardon me?

MR. ESTREICHER: You had a different experience with local government, in

[111] *See* Oklahoma City v. Tuttle, 471 U.S. 808, 839-44 (1985). Justice Rehnquist, writing for a plurality, stated that a municipality should not be liable for the wrongful acts of a single city employee not authorized to make policy. Justice Stevens dissented, urging that a municipality should be liable for the actions of its employees under the theory of *respondeat superior*.

Timecode	Quote
	Chicago.
02:16:53	JUSTICE STEVENS: That's exactly right. That's exactly right.
	MS. LEE: During your time in Chicago, you saw your share of Chicago politics and irregularities, to your use your word. Did that background have any effect on your views about corruption or money and politics?
	JUSTICE STEVENS: I think
02:17:13	it did. I think ,just as I mentioned with Bill Rehnquist, I thought it was more of a real problem than people who came from areas where similar activity didn't occur as frequently.
	MS. LEE: And since you retired, all of the justices on the Supreme Court were living and working either on the East Coast or in California, at the point when they were named to the
02:17:47	Court. And there's been a certain amount of discussion about that unusual lack of geographic diversity. Do you think that it makes any

Timecode	Quote
	difference?
02:17:57	JUSTICE STEVENS: I do, and maybe it hasn't affected the decision of particular cases. I'm not sure. But I do think that-- and I don't know how one achieves that goal. But I think the Court would be stronger with more diversity, and the public would have more respect for it. But because the Court that I joined really was very diverse, both in
02:18:21	terms of particular backgrounds, geographic area, and the work, and of course there's no former member of the military is a member of the Court either, which I think is unfortunate. But it's a problem. There are only nine seats, so you can't be too representative. But I think also, the confirmation process has become more along the line of trying to find
02:18:54	somebody who's not only qualified but doesn't have any handicaps in his or her background. So it is a problem. MS. LEE: Do you think that the Court

Timecode	Quote
	would benefit from having a member or
02:19:10	members who have had experience in elective politics?
	JUSTICE STEVENS: Yes, I do. I do, and that of course was true for years. Elected politics has provided an appropriate background. Hugo Black was of course a senator, and Sandra Day O'Connor was active in the legislature. And I think that does provide a valuable perspective.
02:19:42	Of course, Steve Breyer has had the experience as general counsel to the Senate Judiciary Committee.
	MR. MCKENZIE: Justice, you were very active in the bar, in Chicago. Did you make an affirmative decision to become involved in the Chicago Bar Association, or did it slowly develop over time?
	JUSTICE STEVENS: Well, I
02:20:06	think I made an affirmative decision. My older brother Jim, who I've always admired, was active in the bar. And I think he found it useful in getting

Timecode	Quote
	to know other lawyers in a setting
02:20:23	that's not adversary. And also, when you're involved in bar work, it's one activity where you can think for yourself rather than merely representing a client. And the more time you spend in activities of that kind, I think the better perspective you have generally. And I really learned a great deal in bar association work, and I think it's
02:20:50	very important for young lawyers to get involved in it.
	MR. MCKENZIE: And what roles did you play in the bar association?
	JUSTICE STEVENS: Well, several. I was on different committees, committee on the development of law, the antitrust committee, committee on judicial candidates where we interviewed judicial candidates and
02:21:12	made recommendations for them. And I was on the Board of Managers for a while. I did spend a lot of time in bar association work.

Timecode	Quote
	MR. MCKENZIE: And how did that
02:21:25	involvement affect your perspective on, for example, the selection of judges?
	JUSTICE STEVENS: Well, I've always, it perhaps solidified feelings I had all along, but I thought that Alexander Hamilton and his colleagues got it right in deciding that appointment is a better way to get qualified candidates. But it's kind of hard to
02:21:57	just treat it as two black and white divisions, because really in a lot of jurisdictions where judges are elected, they really are pretty much appointed by political leaders who have the ability to determine who will get on the ballot.
	And one thing I'll say for Mayor Richard Daley, the senior Daley, when I was on the committee on candidates of
02:22:27	the bar association, we had, he made a commitment to us that he would not approve putting

Timecode	Quote
	anyone on the ballot who was not found to be qualified by the bar association's
02:22:43	review. This was just an informal arrangement. But partly he wanted to get good judges. And having the committee decide that somebody was not qualified gave him an acceptable reason for turning down a person who had the political credentials that might have warranted being rewarded with a judicial post. So that by working with the Democratic
02:23:10	organization, which was really in control in Chicago, and Mayor Daley, we had better judges than we would otherwise have had.
	MR. ESTREICHER: Can I just comment on that? You were a Republican, at least nominally. Was that because of your experience in Chicago politics?
	JUSTICE STEVENS: Well, I grew up as a Republican. My parents were both
02:23:37	Republicans. And I don't know that my brother Jim was. But the family

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was Republican. And then when I got the appointment at the Celler Committee, it was thanks to Mr.

02:23:51 Johnston, who was also a Republican, and Chauncey Reed, who was a Republican representative from West Chicago, Illinois.[112] And he was, that was a very Republican area. And he was one of the very few Congressmen, Republican Congressmen, who stayed through the Roosevelt era where something like 90% of the Congress was Democratic. But that sort of

02:24:22 matter just developed.

MR. MCKENZIE: Justice, did your involvement in the bar affect your views on lawyer advertising, which at the time was very minimal and very strictly limited, but today, in part because of the Supreme Court's First Amendment jurisprudence, is much more

[112] Chauncey W. Reed was a member of the U.S. House of Representatives from Illinois from January 1935 to February 1956. He was a member of the Judiciary Committee.

Timecode	Quote
	widely accepted.
	JUSTICE STEVENS: I don't
02:24:45	think it did. I just don’t have any recollection of any connection between the two. But the rules have certainly been relaxed, and I think probably the net result is for the
02:25:02	good rather than otherwise.
	MR. ESTREICHER: Was there any interaction with Illinois state judges?
	JUSTICE STEVENS: Pardon me?
	MR. ESTREICHER: Did you have any interaction with Illinois state judges?
	JUSTICE STEVENS: Not a
02:25:14	great deal, but to a certain extent I did. But most of the work that I did was in federal court, although there was one pro bono assignment I did where I argued the constitutionality of an Illinois statute that imposed a cooling off period in domestic litigation, that imposed a delay between the time of filing and

Timecode	Quote
	permissible granting of a divorce
02:25:49	decree.[113] And I can remember working particularly with Judge Miner in that case.[114] He was sure the statute as drafted was constitutional and just wanted a test case. I remember
02:26:08	explaining that if I took on the assignment, I'd do my best to get the statute held unconstitutional. And he said well, I know there's no problem about that. Bert Jenner[115] has already looked at it and told me it's okay. But anyway, we went through the litigation process. We held the statute unconstitutional. I persuaded, and my colleagues
02:26:33	persuaded, the Illinois Supreme Court that the statute was

[113] People ex rel. Christiansen v. Connell, 2 Ill. 2d 332 (1954) (holding statute unconstitutional).

[114] Julius Howard Miner served as a judge on the Circuit Court of Cook County from 1940 to 1958, when he became a judge on the U.S. District Court for the Northern District of Illinois. He served as a federal district judge until his death in 1963.

[115] Albert E. Jenner, Jr. (1907-1988), a prominent Chicago attorney, became a partner at the Poppenhusen, Johnston firm in 1939 and a name partner in 1955. In 1947, he became president of the Illinois State Bar Association. The firm is now known as Jenner & Block.

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unconstitutional. And I learned there that if you're going to take an assignment of that kind, you got to do the best you can as an adversary.

MR. MCKENZIE: Justice, I wanted to ask about your involvement with the Illinois Supreme Court investigation. You were counsel to an

02:26:58 investigating committee that was tasked with determining whether allegations of corruption against two members of the Illinois Supreme Court had any merit.[116] And apparently many

02:27:12 members of the Chicago bar had been reluctant to take on that role.

JUSTICE STEVENS: I noticed that. I don't think that's true, Troy. I don't know that anybody was asked and turned it down. There was one other person, Milt Shadur, who later became a federal judge,[117] who was seriously

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[116] *See generally* KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS (2001).

[117] Milton Irving Shadur (born 1924) received his law degree from the University of Chicago in 1949. He practiced law in Chicago from 1949 until 1980, initially at the law firm co-

Timecode	Quote
	considered for the position, but he
02:27:35	was vetoed by a member of the commission. There were five lawyers: president of the state bar, president of the Chicago bar, and three other leading lawyers, one not from Chicago. And they asked Milt Shadur if he wanted to take the job. Or they considered Milt Shadur. And one of the members of the commission was a member of the law firm that
02:28:04	represented the Chicago Cubs. And Milt Shadur had been a lawyer in a class action case against the Wrigley family seeking to have lights installed in Wrigley Field.[118] And that
02:28:18	was considered, you just don't challenge the Wrigleys. No way. And a member of that firm basically said he did not want him to be the counsel

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founded by Arthur Goldberg, who later served on the U.S. Supreme Court. Shadur served as a U.S. District Judge for the Northern District of Illinois from 1980 until his retirement in 2017.

[118] Schlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968).

Timecode	Quote
	to the committee. And then they checked, and I was the second choice. And then Frank Green called me up and asked me if I was maybe willing to do it. But I don't think anybody had been approached and turned down.
02:28:41	MR. MCKENZIE: Why did you agree to do it?
	JUSTICE STEVENS: Well, I thought it was a job that really had to be done. And I must say we didn't know at the time whether or not there was merit to the charges that were made by a man named Sherman Skolnick, who accused the court of-- it's kind of a complicated story. It grew out
02:29:08	of the case against Ted Isaacs, the revenue director under Governor Kerner, who was indicted for steering printing business to a firm that he controlled. I think that's the
02:29:22	background. And the trial judge had dismissed the indictment, and the Illinois Supreme Court had affirmed the dismissal. And it was alleged by

Timecode	Quote
	Sherman Skolnick, the self-styled reviewer of the integrity of judicial behavior generally, that some of the judges had discussed the Isaacs case with Isaacs, and that he in fact had given them an opportunity to purchase stock
02:30:01	in the Civic Center Bank at a favorable price. And anyway, that's that happened. They did buy it, but they didn't actually get a lower price than anybody else. But they were on a list of people who were enabled to buy the stock when the general public was not entitled. Anyway, so purchase of stock in a company that had been formed by a litigant that
02:30:34	led to their ultimate resignation. MR. MCKENZIE: What did you learn from your involvement in that investigation, if any lessons came out of it?
02:30:44	JUSTICE STEVENS: Well, again the same lesson, the fact that your

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prospective litigant is making what seem on their face to be improbable charges may not be the fact, because

when we got into it, we found that the charges were true. And I learned the value of discovery, and I also learned the value of telephone records when you're

02:31:12 investigating suspicious behavior. And sometimes those records are the best evidence that you can find. That's one of the things that we had to subpoena the telephone company to get some records, to get some phone calls that led us to discover a particular trust that Judge Solfisburg had set up.[119]

MR. MCKENZIE: So Justice, I wanted

02:31:37 to pick up with your appointment to the Seventh Circuit. How did you come to be nominated to the Court of Appeals?

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[119] Roy J. Solfisburg, Jr. was elected by popular vote to the Illinois Supreme Court in 1960. He was Chief Justice from 1962-63 and for a three-year term starting in 1967.

Timecode	Quote
	JUSTICE STEVENS: Well,
02:31:48	I've heard different stories about that. One of them is that as a result of the hearings, on the integrity of the judgement in the Isaacs case, that turned out to be a successful hearing. And when it started, everybody was very suspicious that the lawyers in Chicago would whitewash the Illinois Supreme Court.
02:32:18	And so the favorable impression that those hearings gave apparently planted the seed in Chuck Percy's mind[120] . . .
	MR. MCKENZIE: Who's the senator from Illinois.
	JUSTICE STEVENS: The senator, Senator Percy was. And Senator Percy actually is entitled to a great deal of credit for making a

[120] Charles H. Percy (1919-2011), a classmate of John Paul Stevens at the University of Chicago, became president of Bell & Howell, a Chicago-based manufacturer of motion picture equipment. A liberal Republican, he was elected U.S. Senator from Illinois in 1966 and served until the end of his third term in January 1985.

Timecode	Quote
02:32:40	sincere effort to get better judges in the Northern District of Illinois, and federal judges generally. And he did. The people that he sponsored, some of whom were Democrats, turned
02:32:54	out to be for the most part very, very good judges. Well, somewhere along the line, his office called me up and asked me if I would meet him at a hotel in Chicago when he was back there. And I was glad to say yes, 'cause I had known Chuck, we were friends in college, not the same fraternity, but we had a number of things that we did together.
02:33:24	And I met with him, and he said he wanted to talk to me about some appointments. He had I think two or three vacancies on the District Court, and a vacancy on the Court of Appeals that he wanted to fill. And he asked me if I had any suggestions for filling those vacancies. And we had a nice chat. And then at the end of the chat, he said well, how about

Timecode	Quote
02:33:46	you? Will you consider, and it came as a total surprise to me, the first thought that anybody did. And anyway, he asked me if I'd like to be appointed to the Court of Appeals.
02:33:59	And at that time, my practice was just really beginning to become profitable and more substantial. And I was dubious about whether I should get involved in judicial work, even though I knew I would enjoy it. But anyway, after thinking it over, I decided that I would go forward with it. And he did submit my name. And I can tell you that being a
02:34:28	prospective federal judge is not good for generating law business. People are not going to hire you to do something you may not be able to fulfill if you go onto the bench. But anyway, that's the way it started.
	MR. MCKENZIE: Had you been considered for a judicial appointment before that time?

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02:34:48 JUSTICE STEVENS: Not to my knowledge.

MR. MCKENZIE: Was there any controversy about your nomination when it went to the Senate?

02:34:55 JUSTICE STEVENS: Yes. Yes, people like President Ford's wife were not in favor of a male appointee. And of course the National Organization for Women were vigorously opposed to my appointment.

MR. MCKENZIE: I meant to the Seventh Circuit, when you were. . .

JUSTICE STEVENS: Oh, I'm sorry, to the Seventh Circuit.

02:35:12 MR. MCKENZIE: To the Seventh Circuit.

JUSTICE STEVENS: You're right. I don't remember any dispute at the time, no.

MS. LEE: Now, turning to the Seventh Circuit, perhaps we can start with the other judges whom you joined on the Seventh Circuit and tell us about them. Particularly, were any of them

Timecode	Quote
02:35:37	you admired especially, or were close to?
	JUSTICE STEVENS: Well, that was a strong court. The judges, I think they were all well qualified at
02:35:52	the time. Luther Swygert was the chief judge.[121] Tom Fairchild was from Wisconsin, was a fine judge, had been formerly chief judge on the state supreme court.[122] Wilbur Pell was just ahead of me. He was a Republican appointee.[123] Walter Cummings was on the court, a former partner of the Sidley firm.[124] Roger

[121] Luther Swygert (1905-1988) of Indiana was a state and federal prosecutor and then was appointed in 1943 to the U.S. District Court for the Northern District of Indiana. He served as chief judge from 1954 to 1961. In 1961, he was appointed to the Seventh Circuit. He was chief judge from 1970 to 1975 and took senior status in 1981.

[122] Thomas Fairchild (1912-2007) of Wisconsin was Attorney General of Wisconsin, U.S. Attorney for the Western District of Wisconsin, and a lawyer in private practice in Milwaukee. He served on the Wisconsin Supreme Court from 1956 to 1966, when he became a judge on the Seventh Circuit. He was chief judge from 1975 to 1981, and held senior status from 1981 until his death.

[123] Wilbur F. Pell, Jr. (1915-2000) of Indiana practiced law in his home town, Shelbyville, and was deputy attorney general of Indiana from 1952 to 1955. He became a judge on the Seventh Circuit in 1980, assumed senior status in 1984, and served in that capacity until he died.

[124] Walter J. Cummings, Jr. (1916-1999) of Illinois was a partner at the Chicago law firm now known as Sidley Austin.

Timecode	Quote
	Kiley, a former Democratic machine
02:36:24	politician, you might say, but was a fine judge.[125] He was a really decent man. I think I've named, and then after I got appointed, Bob Sprecher was put on the court, who was really a brilliant judge, and one of the best judges I think the system had.[126] So it was a strong court.
	MR. ESTREICHER: Was it a collegial court?
02:36:44	JUSTICE STEVENS: Pardon me?
	MR. ESTREICHER: Was it a collegial court?
	JUSTICE STEVENS: Yes, it
02:36:48	was a collegial court. Oh, and I

He took a leave of absence to be Solicitor General of the United States for several months in late 1952 and early 1953. He joined the Seventh Circuit in 1966, was chief judge from 1981 to 1986, and served on the court until his death.

[125] Roger J. Kiley (1900-1974) of Illinois practiced law in Chicago and was a member of the Chicago Board of Aldermen before serving as a judge on the Superior Court of Cook County, Illinois, in 1940 and a judge on the Appellate Court, First District, from 1941 to 1961. He became a judge on the Seventh Circuit in 1961 and took senior status in 1974, the year he died.

[126] Robert A. Sprecher (1917-1982) of Illinois engaged in the private practice of law in Chicago from 1941 to 1971, practicing corporate law and trial and appellate litigation. In 1971, he was named to the Seventh Circuit. He served until his death in 1982.

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should've named John Hastings, was a senior judge on the court.[127] And John was particularly important to me 'cause like Wiley Rutledge, he wrote out his own first drafts of opinions, and we talked about that on more than one occasion. I can remember him saying that, if you write a careful statement of the facts in any case, the

02:37:13 rest of the opinion will write itself. And he did. He wrote his own opinions. And he was a good judge. Very conservative man, but he was a very good judge.

MS. LEE: It has sometimes been said that the Seventh Circuit that you joined was known as a champion of civil rights and civil liberties. Do

02:37:36 you agree with that perception, and did it affect you, if you perceived it that way?

JUSTICE STEVENS: I don't know

[127] See *supra* note 60.

Timecode Quote

whether, maybe it was. I'm just

02:37:44 not sure. But there were other fairly liberal courts around the country. I think we also were known as the best patent court in the circuit. And I remember when the question of a separate court--have the federal circuit do all the patent work was debated, we were one part of the judiciary that was not in favor of that change. And I still think

02:38:12 it's an incorrect--

MR. ESTREICHER: [Interposing] Diane Wood is still opposed to it.

JUSTICE STEVENS: Pardon me?

MR. ESTREICHER: Diane Wood of the Seventh Circuit.[128]

JUSTICE STEVENS: Is she still opposed?

MR. ESTREICHER: Still opposed to the

02:38:18 federal circuit.

JUSTICE STEVENS: Yeah, well, I think

[128] Diane P. Wood, previously a professor at the University of Chicago Law School, became a judge on the Seventh Circuit in 1995. She became chief judge in October 2013.

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it's an incorrect area for specialization because trial judges can't be specialized. But I'm

02:38:31 sure there were on some issues that the court perhaps deserved the reputation as a liberal court.

MS. LEE: You wrote, according to the statistics, when you were on the Seventh Circuit, you wrote a larger number of concurrences and dissents than practically all of your colleagues, practically every year.[129] Were you aware of that at the time,

02:39:01 and were other judges on the Seventh Circuit aware of it at the time?

JUSTICE STEVENS: Well, I'm not sure, but that's one chapter that I might comment on NYU's seminar for newly appointed appellate judges.[130] One of

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[129] Stefanie A. Lindquist, ***Supreme Court Prequel: Justice Stevens on the Seventh Circuit***, 106 NW. U. L. REV. 15, 721-23 (2012).

[130] When he was a judge on the Seventh Circuit, John Paul Stevens participated in the annual New Appellate Judges Seminar, an intensive summer program on practical matters and substantive law for new federal and state appellate judges. The seminar has been sponsored since 1960 by the Institute of Judicial Administration at NYU School of Law.

Timecode	Quote
	the things that was suggested to new judges at the time was, don't write too many dissents because you might generate friction within a
02:39:29	court that's unnecessary. And if you can possibly go along, you're better off just swallowing your opposing views. I didn't agree with that at the time. And the reason I didn't
02:39:41	agree with it I think was a product of our investigation of the Isaacs case, because in our review of the facts, we found that there were two judges on the Illinois Supreme Court who had written dissents from the disposition of the case which excused Ted Isaacs from responding to criminal charges. But they hadn't been published.
02:40:12	And I thought at the time the public is entitled to know what these two judges said, because they might have different impressions of the case if they had a chance to read it. And the two judges who had written

Timecode	Quote
	dissents, one of them was Wally Schaefer, a former member of the faculty at Northwestern Law School and very close to Adlai Stevenson.[131]
02:40:37	And the other was a judge, his name escapes me, but he was also a Downstate judge.[132] But that particular experience made a real impression on me. It seemed to me that if a judge
02:40:55	disagrees with the majority of his or her colleagues, the public ought to know that. And that's why, when I went on the bench, I did the exact opposite of what the NYU seminar recommended. I thought--
	MR. ESTREICHER: [Interposing] So we had an impact on you.
	JUSTICE STEVENS: You did. You had

[131] Walter V. Schaefer (1904-1986) became a professor of law at Northwestern University in 1940. He took a leave of absence in 1949 to serve as administrative assistant for Governor Adlai Stevenson of Illinois, who appointed him to the Commission to Study State Government. He served on the Illinois Supreme Court from 1951 until his retirement in 1976.

[132] The other dissenting judge was Robert C. Underwood. MANASTER, *supra* note 116, at 45-46. Judge Underwood, who came from McLean county, Illinois, served on the Illinois Supreme Court from 1962 to 1984 and was chief justice from 1969 to 1975.

Timecode	Quote
	an impact. And I found that
02:41:19	it doesn't necessarily generate discord. I may have missed it, but I never felt that a dissent I had written caused me to lose my ability to get along with my colleagues as a friend or a colleague. And I really think that's right. Now, it's not a question that you write. It's the kind of dissent that you write. If you treat your colleagues with
02:41:46	respect in your dissent, they recognize your right to your own views, and it's something that does not impair the work of a collegial court.
02:41:58	MR. ESTREICHER: Have there been times when you've held back on a dissent because you were able to shape the majority opinion, having it narrowed or more to your liking? There's an issue of political capital when you write a dissent, and sometimes you can have more influence by joining or concurring.

Timecode	Quote
	JUSTICE STEVENS: Well, I
02:42:18	never even considered joining an opinion I didn't agree with. It just seemed to me that that's not part of the job. So I never used the possibility of a dissent as a bargaining wedge or anything of that kind. And I don't think other judges do either. You do your own job, and that's sort of the end of it.
	MR. MCKENZIE: Justice, while you
02:42:48	were a member of the Seventh Circuit, another member, Otto Kerner, who had been an Illinois governor, was tried and convicted on corruption charges,[133] and the court was therefore short-
02:43:03	staffed during that period of time. What do you remember about that experience?

[133] Otto Kerner, Jr. (1908-1976) was governor of Illinois from 1961 to 1968. He resigned as governor in 1968 to become a judge on the Seventh Circuit. After taking the bench, Kerner was charged with having received a bribe in the form of stock options, while he was governor, from a racetrack manager. He was tried in 1973, convicted of mail fraud, conspiracy, perjury, and related charges, and sentenced to three years in federal prison.He resigned from the Seventh Circuit in 1974.

Timecode	Quote
	JUSTICE STEVENS: Well, I remember it very well, of course because Otto Kerner was a very likeable, I think a very decent human being. And I know he was totally convinced of his innocence. And he made what apparently was a trial
02:43:26	lawyer's mistake in thinking he could convince the jury and the prosecutor if he got on the stand that what he did was permissible and within the realm of appropriate conduct. But he was wrong. And he did violate the law. I think the judgment was correct. But he didn’t think he was wrong. It's an interesting, it was an interesting case. But as a result
02:43:56	of his trial, he stopped sitting. First, he stopped sitting on any government cases. And then I think we persuaded him he should not sit while his trial was still pending.
02:44:12	So that removed one judge from those actively participating in the work of

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the court. And at about the same time, the Conspiracy Seven case was tried by Judge Hoffman in Chicago.[134] And that generated a huge record and required an awful lot of appellate work to resolve correctly. And the court had decided, I think before I got there, I don't remember

02:44:40 participating in the decision, but that Walter Cummings, Wilbur Pell, and Tom Fairchild should not sit on any other cases until they disposed of that case.

MR. MCKENZIE: So they were only doing the Chicago Seven case.

JUSTICE STEVENS: That's right. They were just doing the Chicago Seven case, and then of

02:44:57 course Otto was out for another

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[134] The "Chicago Seven" were charged with conspiracy, inciting to riot, and other charges relating to protests that had taken place in Chicago during the 1968 Democratic National Convention. Judge Julius J. Hoffman of the Northern District of Illinois presided over the trial, which lasted from April 1969 to February 1970. Five of the defendants were convicted after a jury trial of crossing state lines with the intent to incite a riot.The Seventh Circuit overturned all of the convictions. U.S. v. Dellinger, 472 F.2d 340 (7th Cir. 1972). The opinion of the court was 61 pages, with 97 footnotes.

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reason. So that reduced our number of working judges to four, I think it was. Bob Sprecher and myself, Roger Kiley, and Luther Swygert were still

02:45:11 sitting. And we had the full docket to contend with, so we got in the habit of asking more judges from other circuits to sit with us. And that affected our work both because we had more work to do and also because we got to know judges from around the country. And the judge who was most productive and helpful to us was Tom Clark, who was in

02:45:36 Washington.[135] And he came and sat almost as a regular judge for that period. And I had known Clark because of the Finley litigation before, which had gone on a matter of a year or two before. So he and I became quite good friends while he

[135] Tom C. Clark (1899-1977) was Attorney General of the United States from 1945 to 1949, and Associate Justice of the Supreme Court from 1949 to 1967. He retired from the Supreme Court in 1967 to avoid a conflict of interest when President Lyndon Johnson appointed his son Ramsey Clark as Attorney General. After his retirement, Clark served as a visiting judge on several U.S. Courts of Appeals.

Timecode	Quote
	was sitting with us. And so one of the benefits of this period of time of hard work was the friendship with
02:45:05	Tom Clark.
	MR. MCKENZIE: Justice, I wanted to go back to your experiences at the New Appellate Judges Seminar at NYU.[136] What did you learn about appellate
02:46:17	judging from that session?
	JUSTICE STEVENS: Well, the thing I can remember from that session is that there were a lot of nice guys who were appellate judges. And it was a good series of sessions. And I can't name the people, although I know I made some friendships with them and kept in touch with some of the people later on. But it was more learning
02:46:44	to respect judges in other jurisdictions, through the meeting and through our common discussions,

[136] *See supra* note 130.

Timecode	Quote
	is what I remember most.
	MR. MCKENZIE: Did you rethink any of your practices as a result of those seminars?
	JUSTICE STEVENS: I'm not sure I did, except the one about whether to . . .
02:47:06	MR. ESTREICHER: You took the lesson in reverse. You took the lesson in reverse.
	JUSTICE STEVENS: That's right.
02:47:15	MS. LEE: You have said, Justice Stevens, that part of being a judge is learning on the job. And that we thought we might be particularly applicable to the very beginning, when you had been a practicing lawyer and then you were putting on robes and sitting on the other side of the bench. What do you recall about the process of learning on the job when
02:47:39	you became a judge on the Seventh Circuit?
	JUSTICE STEVENS: Well, just that if, sitting on cases is an educational experience 'cause you learn all the

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relevant facts about the particular case, and you learn about the issue. And you also tend to form your own thinking about issues as you go along.

02:48:08 MR. ESTREICHER: Did you change your mind on any substantive areas? Having a certain view coming into the job?

JUSTICE STEVENS: Well, the

02:48:19 most dramatic case that I can remember is the patronage case.

MR. ESTREICHER: Right.

JUSTICE STEVENS: Illinois Employees Union against, what's the name, Lewis? Or whatever, I forget the name of the former secretary of state.[137] When I first looked at that case, I thought it was basically frivolous. And there's a long story involved in

02:48:44 the case, but I ended up voting and writing an opinion holding that

[137] Illinois State Employees' Union v. Lewis, 473 F.2d 561 (1972), cert. denied, 410 U.S. 928 (1973).

Timecode	Quote
	patronage hiring and dismissals didn't fit the American system. And I think probably that's one of the most influential opinions that I have written, because I think that as a result of that line of cases, which I think started with our Seventh Circuit case, I think patronage is
02:49:12	now considered improper use of political power. And it seemed to me the same should be true of gerrymandering but it didn't --
	MR. ESTREICHER: Not yet.
02:49:24	JUSTICE STEVENS: Haven't persuaded many people yet.
	MS. LEE: Did the other judges on the Seventh Circuit, did any of them in particular give you guidance or have an influence on you as a new judge?
	JUSTICE STEVENS: Well, I mentioned John Hastings writing his own opinions, and Walter Cummings made an impact on me by how efficient
02:49:49	he was in getting his work done. He turned out his work with amazing

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speed. He was kind of like Justice Douglas on the Supreme Court.[138] He got his work done so well. And Tom Fairchild was a very thoughtful person. I think sometimes he got behind in his work 'cause he was maybe too thoughtful and too careful with his work. And there were

02:50:17 occasions when we had to take over some of the work that he hadn't finished as promptly as he should. But he was a superb judge and a superb person. They were a very fine group of

02:50:32 people.

MS. LEE: One thought that occurs to me here is also law clerks. How did you decide, how did you find the law clerks whom you selected on the Seventh Circuit? And how did you develop your habits of using law

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[138] William O. Douglas (1898-1980) was an Associate Justice of the Supreme Court from 1939 to 1975. He was known for the speed with which he produced his opinions. *See* WILLIAM DOMNARSKI, THE GREAT JUSTICES, 1941-54: BLACK, DOUGLAS, FRANKFURTER, AND JACKSON 143-44 (2006). Justice Stevens was appointed to fill the seat vacated by Justice Douglas in 1975.

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clerks?

JUSTICE STEVENS: Well, my first law clerk was Gary Senner, who

02:51:01 had been out of school for two or three years. He had joined our firm,

had been hired by our firm. And I persuaded him to leave the firm and come as my first law clerk. My second law clerk was Sam Clapper from Chicago, who practices in Pennsylvania now. And Sam worked with me on the patronage case. In fact, I remember when he left, our

02:51:32 opinion wasn't actually released until after he'd gone, and I remember him asking Florence, my secretary,[139] to send him the newspaper clippings

describing

02:51:43 the case. And time went by, and we

never got, nothing was said about the case in the press at all. We never had occasion to send them to him. It's funny how, and it was really an

[139] Florence Lundquist served as secretary to John Paul Stevens when he was a judge on the Seventh Circuit.

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important case. And the press just totally missed it.

02:52:08 MR. ESTREICHER: Did you develop closer ties with Northwestern and Chicago while you were on the bench?

JUSTICE STEVENS: Gary was from Northwestern, and Sam was from Chicago. But I had a clerk from Michigan. His name escapes me right now, who died last year. Steve

02:52:30 Goldman who was from Michigan, he had gone to Duke college and Michigan Law School. But then he spent a year in Oxford studying with Dworkin, who later...

MR. ESTREICHER: Came to NYU.[140]

02:52:49 JUSTICE STEVENS: He did - - he studied with him, and it was very helpful. And I had a clerk from

[140] Ronald M. Dworkin (1931-2013) was Professor of Jurisprudence at the University of Oxford and subsequently became a professor of law and philosophy at New York University. Dworkin wrote influential works on the philosophy of law and political philosophy, including Taking Rights Seriously and Law's Empire.

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Stanford, who was a son of Paul Kitch in Wichita.[141] Did I mention him earlier? MS. LEE: Did you pattern the way that you used your law clerks on the

02:53:17 way that Justice Rutledge had used his law clerks when you were a Supreme Court clerk?

JUSTICE STEVENS: Well, yes and no. I mean, I think we had an understanding, totally frank with one another and explain their disagreements with me. And that was the same with Rutledge. You were supposed to tell him exactly

02:53:46 how you felt about a case. And I remember one case that we disagreed with, and we had a long, heated discussion about it. But he won the discussion obviously. But I suppose

02:54:01 there was an overlap, yeah.

MR. ESTREICHER: Were you involved in judicial conference activities while

[141] James C. Kitch clerked for Justice Stevens in the 1972 Term.

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on the Seventh Circuit?

JUSTICE STEVENS: Well, not at the national level. The chief judge would come to the judicial conference meetings. But of course at the business of the Seventh Circuit, all the members of the court

02:54:27 participated.

MR. ESTREICHER: One reason I ask the question is Harold Leventhal,[142] for whom I clerked, was absolutely delighted you were appointed by President Ford...

JUSTICE STEVENS: I had not known you were a Leventhal clerk.

MR. ESTREICHER: Excuse me? Yes.

JUSTICE STEVENS: Were you,

02:54:43 but you were, had to be with him after Buckley against Valeo.[143]

MR. ESTREICHER: Sort of like, Carol

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[142] Harold Leventhal (1915-1979) was a judge on the D.C. Circuit from 1965 until his death in 1979.

[143] In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court ruled on constitutional challenges to numerous provisions of the Federal Election Campaign Act of 1974. Justice Stevens did not participate in the decision of the case, which was argued before he joined the Court.

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is the expert on this 'cause she just wrote an article about it,[144] but it was

02:54:53 an overlap. It was an overlap period.

JUSTICE STEVENS: I'm sorry; I didn't hear.

MR. ESTREICHER: It was an overlap period, but I think I was there part of that year.

JUSTICE STEVENS: Oh, you were?

MR. ESTREICHER: When David Martin

02:55:01 was there as well. But he was delighted. I had just started the clerkship, something like July. And he was so delighted that you were nominated.[145] I'm wondering how you two knew each other.

JUSTICE STEVENS: Well, that's nice to hear. It really is, because I'm

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[144] Carol F. Lee, ***Judge J. Skelly Wright: Politics, Money, and Equality***, 61 LOY. L. REV. 1129-40 (2015).

[145] Samuel Estreicher clerked for Judge Leventhal on the D.C. Circuit from summer 1975 to summer 1976. David Martin was a law clerk for Judge J. Skelly Wright on the D.C. Circuit during the same period. President Gerald Ford announced his nomination of John Paul Stevens to the Supreme Court on November 28, 1975.

Timecode	Quote
	an admirer of his.
	MR. ESTREICHER: Super delighted.
02:55:17	JUSTICE STEVENS: And I remember having a conversation with him about some issue of criminal law in which he was very complimentary about an opinion I had written. And I
02:55:30	don't remember exactly what it was right now. They have a lecture series in his name...
	MR. ESTREICHER: Yes.
	JUSTICE STEVENS: Here in Washington.
	MR. ESTREICHER: Yes, I know.
	JUSTICE STEVENS: And I gave a Leventhal lecture just a couple of weeks ago.[146]
02:55:45	MR. ESTREICHER: I'd love to have a copy of the text. That'd be great.
	JUSTICE STEVENS: I'm sorry?
	MR. ESTREICHER: I'd love to get a copy of that text.

[146] John Paul Stevens, 2014 Harold Leventhal Lecture, Administrative Law Section of the D.C. Bar, Washington, D.C., September 12, 2014, posted on the website of the United States Supreme Court, www.supremecourt.gov.

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	JUSTICE STEVENS: Go tell Janice[147] and you've got a copy.
02:55:51	MR. ESTREICHERR: Yes, that'd be great.
	MR. MCKENZIE: Justice, I wanted to ask you about the lifetime appointments of federal judges. You
02:56:00	mention that you thought that Hamilton and his colleagues had gotten it right with respect to the appointment process. But judges in our federal system under Article III serve during good behavior. Do you think that was a beneficial thing for you when you joined the Seventh Circuit? Do you think that it affected the way you worked? Do you
02:56:24	think that it made you more independent than you might otherwise be?
	JUSTICE STEVENS: Yes.
	MR. MCKENZIE: Had been?
	JUSTICE STEVENS: Yes. I do. I'm a

[147] Janice Harley, Justice Stevens's secretary at the Supreme Court.

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	very firm believer in the federal system of appointing judges, and in the life tenure provision too because I do think that many states
02:56:44	have imposed mandatory retirement, and that the conference is --[sound of buzzer]
	MR. MCKENZIE: Conference.
	JUSTICE STEVENS: --just ending--at an earlier age than they
02:56:56	should. I would have been off the bench. About 20 years of my career would not have been available under a lot of state systems. And I do think most judges, there are always exception, are conscious of the importance of getting off the job when you're not able to do it. And I think the federal experience in this court has demonstrated that it's an
02:57:26	appropriate way to do it.
	MS. LEE: Justice, before becoming a judge or for that matter, while you were a judge, did you read some of the classic works on judging, such as

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	Cardozo or Jerome Frank or others? And if you did, did they have any influence on you?
	JUSTICE STEVENS: Well, I remember reading some of
02:57:53	Cardozo's writing.[148] I did not read Frank's. I did not do a great deal of reading. I had not read Frankfurter's book on statutory construction.[149] But the answer is, I
02:58:14	did some reading, but not as thorough as I should've been.
	MS. LEE: Do you read judicial biographies?
	JUSTICE STEVENS: Yes.
	MS. LEE: If so, which ones, and how do you pick them, and why do you read them?
	JUSTICE STEVENS: Well, if I find them interesting, I really do.
02:58:32	Biographies generally are interesting, I think.

[148] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); JEROME N. FRANK, LAW AND THE MODERN MIND (1930).

[149] Felix Frankfurter, ***Some Reflections on the Reading of Statutes***, 47 COLUM. L. REV. 527 (1947).

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MR. ESTREICHER: Did you like ***Salt of the Earth?***

JUSTICE STEVENS: Pardon me?

MR. ESTREICHER: Did you like ***Salt of the Earth?***

MR. MCKENZIE: It's the biography of Justice Rutledge.[150]

02:58:43 MR. ESTREICHER: The biography of Rutledge.

JUSTICE STEVENS: Oh, oh. Yes, I thought he did a good job. That's.

02:58:50 MR. ESTREICHER: John Ferren.

JUSTICE STEVENS: Yeah, yeah, I thought that was an excellent job. There's a lot to be learned there about changing in the profession during his career, too.

MS. LEE: One thing that I noticed is that a number of times over the course of your time as a justice, you included cites to John, the biography

[150] JOHN M. FERREN, SALT OF THE EARTH: CONSCIENCE OF THE COURT: THE STORY OF WILEY RUTLEDGE (2004). The author, John Ferren, was a senior judge of the District of Columbia Court of Appeals at the time the book was published.

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02:59:12 of John Marshall, by Beveridge.[151]

JUSTICE STEVENS: Well, Marshall is a very interesting person; there's no doubt about that. I don't remember particularly, I mean I've read more than one biography--

MS. LEE: [Interposing] Yeah.

JUSTICE STEVENS: --of Marshall certainly. And there's an interesting comment on Marbury

02:59:34 against Madison in Burt Neuborne's new book, which really has quite a devastating description of that case.[152]

MS. LEE: And another topic that you

02:59:47 touch upon from time to time in your, more in your extrajudicial writings, is episodes from English legal history. And as somebody married to a historian of English law, I found that somewhat noteworthy. Do you

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[151] ALFRED J. BEVERIDGE, THE LIFE OF JOHN MARSHALL, published in four volumes from 1916 to 1919.

[152] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 150-173 (2013). Professor Neuborne calls Marbury v. Madison "a farce in three acts."

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read about English legal history, or is it simply something you come across from time to time and store away interesting episodes?

03:00:07 JUSTICE STEVENS: I guess it's really more just from time to time. I can't really claim to be a scholar well-versed in that writing.

MR. MCKENZIE: Justice, I wanted to turn to some of the cases you decided, or sat upon, when you were a judge on the Seventh Circuit. One of them that's most notable is the case of Fitzgerald against Porter Memorial

03:00:33 Hospital, which presented the question whether a father has a right to be present in the delivery room.[153] And the case raised questions of substantive due process and the right

03:00:47 to privacy. And you had a description of the right to privacy in that opinion that seems to have

[153] Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976).

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been influential, because you drew on it later when you were on the Court, where you really said that the right to privacy is a bit of a misnomer. It's more about a liberty interest.[154]

JUSTICE STEVENS: Right.

MR. MCKENZIE: Did that case cause

03:01:07 you to really think about those questions, or had you formed views before you got to that case?

JUSTICE STEVENS: No, that case made me give a lot of thought to it because of, for two or three reasons. My law clerk at the time had a wife who was pregnant. And one of the issues during this pregnancy was whether he'd be able to be in the

03:01:27 delivery room. So that was a subject we discussed at some length. And I thought he really was persuaded he should've been allowed to go there. And I came out the other way. And my

[154] *See* McDonald v. City of Chicago, 561 U.S. 742, 864 (2010) (Stevens, J., dissenting) (citing Fitzgerald v. Porter Memorial Hospital).

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03:01:39 very respected colleague Bob Sprecher dissented in the case and wrote a very persuasive opinion that way.[155] And I thought it was a very close case, but it did seem to me that we should defer to, not just dissent, you always defer to decision makers who are better qualified than judges to make decisions in their area. And I really thought that even though

03:02:08 it was kind of hard to know what the pros and cons were, that we should defer to the decision makers in the hospital and on their staffs as to whether there was a potential for some kind of harm to be involved. And so I thought, this was kind of a predecessor of the Chevron case.[156]

MR. ESTREICHER: I was thinking Chevron when you said that.

03:02:27 JUSTICE STEVENS: We should be

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[155] Fitzgerald v. Porter Memorial Hospital, 523 F.2d. 716, 722 (7th Cir. 1975) (Sprecher, J., dissenting).

[156] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a leading case on judicial deference to statutory interpretations by government agencies. Justice Stevens wrote the opinion of the Court.

Timecode	Quote
	deferring to people who know much more about childbirth and the hazards than we do. And so that's the way I thought about it. But I also was
03:02:39	convinced that the decision really was an important decision for the family members who were there, both for the mother who would be getting the comfort from her husband, and for the husband being there at the same time. So that was a tough case. And it seemed to me it rather dramatically emphasized the fact that constitutional protection for
03:03:02	personal decision involved pretty important decisions. And of course that did seem to qualify. It was a tough case. It's a tough case.
	MR. MCKENZIE: Do you remember other cases involving a claim of a constitutionally protected liberty interest that you sat on, on the circuit?
	JUSTICE STEVENS: Yes, I
03:03:26	can't remember exactly what it was,

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	but there was a case involving a teacher who didn't want to wear a tie to a class, I think it was, and whether there was a constitutional issue
03:03:39	raised by, sort of like the cases involving the right to shave, or right to grow a beard, or the right to have long hair,[157] the kids' cases that a lot of people, like Justice Black, I think put an end to the long hair cases.[158] But the one thing I do remember discussing at some length with Steve Goldman, whom I just mentioned,[159] and I

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[157] ***See*** Miller v. School District No. 167, 495 F.2d 658 (7th Cir. 1974) (opinion by Judge Stevens for the court upheld termination of an untenured mathematics teacher, allegedly because he wore a beard and sideburns); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972) (court held that provision of school dress code regulating the length and style of hair of male students was unconstitutional; Judge Stevens dissented).

[158] Justice Stevens may have been referring to Karr v. Schmidt, 401 U.S. 1201 (1971) (Black, J., in chambers), in which Justice Black, as Circuit Justice, denied a motion to vacate the Fifth Circuit's stay of the district court's injunction barring enforcement of a public school's restrictions on male students' hair length. Justice Black wrote that he refused to predict that the Supreme Court would hold that federal courts have authority to prohibit public schools from regulating the length of students' hair.

[159] Steve Goldman was the law clerk to Judge Stevens on the Seventh Circuit in 1973-74.

Timecode	Quote
03:04:06	did come up with a conclusion that any rule had to have some neutral reason to support it. That doesn't necessarily have to be the wisest rule, but it can't be totally a partisan rule or a particular personal gain. There has to be some public justification for any governmental rule. And that's affected a lot of my thinking.
03:04:32	In the gerrymandering example, a gerrymandered district should not be permitted to survive if there's no justification for it other than partisan advantage for the people in
03:04:46	the state legislature. That can't be a sufficient ground, although apparently it is in many examples. And that's a principle that was involved in the patronage case. There can't be simply patronage; it can't be a sufficient reason for preferring one person over another. And that answers an awful lot of questions, if you just try to focus

Timecode	Quote
	on whether
03:05:11	there is a rational basis.
	MR. ESTREICHER: So it's like rational basis with teeth. Rational basis with teeth.
	JUSTICE STEVENS: That's exactly right. And as long as you're taking a rational basis, but one that does require a neutral, valid justification for a law or decision or whatever it is, it helps you
03:05:32	think the problem through.
	MR. MCKENZIE: And did that follow through on some of the cases you heard as a justice including the physician-assisted suicide case,
03:05:44	Glucksberg[160]...
	JUSTICE STEVENS: Yes. Yeah, yeah.
	MR. MCKENZIE: Bowers against Hardwick and so forth.[161]

[160] Washington v. Glucksberg, 521 U.S. 702 (1977). The Court upheld Washington state's ban on physician-assisted suicide on the ground that it was rationally related to legitimate government interests. Justice Stevens wrote an opinion concurring in the judgment. *Id.* at 738.

[161] In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court rejected a constitutional challenge to Georgia's sodomy

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JUSTICE STEVENS: Yeah, it definitely does. And I really think it has to be a non-religious reason has to be involved. And that issue of course

03:06:10 is going to become more important as time goes on, on the assisted suicide problem.

MS. LEE: Justice, following up on what you had mentioned on gerrymandering, you have written that the same standards ought to apply for racial and political gerrymandering. And your view is that the reason that racial gerrymandering is done is

03:06:38 because of an expectation as to how people of that particular group will vote, so that it's really an aspect of political gerrymandering.[162] Is that view, that the standards for racially

03:06:52 based discrimination and politically based discrimination unique to the

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statute. Justice Stevens wrote a dissenting opinion. ***Id.*** at 214.

[162] Cousins v. City Council of Chicago, 466 F.2d 830, 848-53 (7th Cir. 1973) (Stevens, J., concurring).

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districting context? Or is it something that you would apply more generally as you look at equal protection cases?

JUSTICE STEVENS: Well, that's interesting, one clarifying thought I should express is that in the racial gerrymandering cases, it

03:07:16 always seemed to me incorrect to prohibit racial gerrymandering that was designed to enhance the political power of the minority, because it seemed to me that the constitutional provision is intended to impose equality. And gerrymandering that is intended to impose equality should be judged differently than gerrymandering that is just designed

03:07:43 to entrench the power of the people in power in the political area.[163] So although they now apply the rule both for and against racial

[163] Shaw v. Reno, 509 U.S. 630, 676 (1993) (Stevens, J., dissenting) (duty to govern impartially is not violated when the majority acts to facilitate the election of a member of an underrepresented group).

Timecode	Quote
	gerrymandering, I accept that as part
03:08:02	of the law now. But having accepted that, there's no basis for treating racial gerrymandering differently than political gerrymandering.
	MR. ESTREICHER: Can we talk a little bit about tiers of review? It seems to fit, I mean the Court, the Supreme Court, over the years, something you were covering, they assert they've got this sort of three tiers
03:08:23	of review, rational basis, intermediate scrutiny, strict scrutiny. And the lawyers spend a great deal of time arguing whether or not their case fits into one of those tiers, is that a good description of how you approach an equal protection case?
	JUSTICE STEVENS: I think there's only one equal protection
03:08:45	clause. I think that's a manufactured decision-making tool that doesn't really advance the inquiry properly, because I remember

Timecode	Quote
	in the case involving the right of
03:09:05	children of non-citizens to get an education in Texas, I think that's when they really manufactured the intermediate scrutiny notion.[164] And they could've just decided whether it makes a lot of sense or not.
	MR. ESTREICHER: Could be two tiers, maybe.
	JUSTICE STEVENS: Yeah.
	MR. ESTREICHER: Rational basis with
03:09:23	teeth, and then cases where we are very suspicious of the government.
	JUSTICE STEVENS: Well, I think even the cases where you apply strict scrutiny, there really is no need for strict scrutiny because there's really no rational basis for giving someone a job because he's white or black. The rational basis test will

[164] Plyler v. Doe, 457 U.S. 202 (1982). The opinion of the Court by Justice Brennan stated that, although education was not a fundamental constitutional right and undocumented aliens were not a suspect class, the state had not shown that it was rational to bar undocumented aliens from public schools because it failed to show that this discrimination furthered "some substantial goal of the state." *Id.* at 224.

Timecode	Quote
	take care...
03:09:44	MR. ESTREICHER: Will do it all.
	JUSTICE STEVENS: . . . of the cases that they developed strict scrutiny to answer.
	MS. LEE: One remaining question on
03:09:55	political gerrymandering. You never quite got there. You didn't quite get to the point where a majority of the Court agreed with you, although briefly the majority of the Court said that it might be justiciable.[165] Why do you think that this view which you have held for so long and felt was so persuasive didn't persuade enough of the other members of the Court?
03:10:17	JUSTICE STEVENS: I just don't understand it. I don't know.
	MR. ESTREICHER: That was a slow pitch down the middle of the plate.

[165] Davis v. Bandemer, 478 U.S. 109 (1986). Six Justices rejected the defendant's argument that the gerrymandering claims were not justiciable, but seven Justices agreed with the defendants that the plaintiffs had failed to prove invidious discrimination. *See* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 44-47 (2014).

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JUSTICE STEVENS: Yeah. It really is distressing to me that I've been so unpersuasive on such an important subject.

MS. LEE: Do you think that there is a concern that if judges were

03:10:36 deciding these cases, they would be seen as being themselves political actors?

JUSTICE STEVENS: That could be it. That certainly could be

03:10:46 it, but I don't know why it's any more so when they're describing unequal populations. But it seems the two are very similar.

MR. MCKENZIE: Justice, I also wanted to ask you about an area in which you expressed a view on the Court of Appeals, and you seem to have been consistent in that view after you joined the Supreme Court. When you

03:11:13 were a circuit judge, you were part of a three-judge, special three-judge district court, in Hartke against Roudebush, which was a recount

Timecode	Quote
	dispute. And the district court enjoined a recount of an Indiana...
	JUSTICE STEVENS: Correct.
	MR. MCKENZIE: . . . US Senate race. You dissented vigorously. And the Supreme Court ultimately reversed,
03:11:36	and you were vindicated.[166] I wanted you to talk about that case and whether it shaped your views on the role of federal courts in contested elections such as Bush against Gore.[167]
03:11:47	JUSTICE STEVENS: It had a profound impact on me. In fact, when Bush against Gore came up, I thought, well, I've already thought this one through. And the very simple issue was whether a recount is apt to be more accurate than the first count. And it seemed to me the Court in Roudebush against Hartke decided that

[166] Hartke v. Roudebush, 321 F. Supp. 1370 (S.D. Ind.), rev'd, 405 U.S. 15 (1972).
[167] Bush v. Gore, 531 U.S. 98 (2000) (Court reversed decision of Florida Supreme Court requiring a recount of contested results in presidential election in Florida).

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the recount is a more reliable event
03:12:20 than the first count. There can be mistakes made. And it seemed to me that Bush against Gore was really a replay of that case.

MS. LEE: Another case that falls in the political category was, on the Seventh Circuit, was Hoellen versus Annunzio, in which you wrote the majority opinion. It was about Congressional franking.[168]

03:12:47 JUSTICE STEVENS: Yes.

MS. LEE: And you expressed some keen awareness of the possibility that incumbents would use government resources to entrench themselves. Do
03:12:59 you recall that case?

JUSTICE STEVENS: Yes, I do. It's a case in which my good friend Phil Tone had been the trial judge.[169] And

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[168] Hoellen v. Annunzio, 468 F.2d 522 (7th Cir. 1972), cert. denied, 412 U.S. 953 (1973). Judge Stevens wrote the opinion of the court, joined by Judge Sprecher. Judge Swygert dissented.

[169] Philip W. Tone (1923-2001), succeeded John Paul Stevens as law clerk to Justice Wiley Rutledge. Stevens helped recruit Tone to join him at the law firm later known as Jenner &

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Phil had enjoined the Congressman from sending this circular questionnaire, whatever, to all the voters in the district in which he was about to compete.[170] A larger number were in the

03:13:26 new district than in his own district. And the only justification for sending them to the new district was to advance his election hopes in that district. And it did seem to me that that was a perfect example of using governmental power for a non-governmental reason, for a partisan reason. It's exactly the same reasoning that should condemn

03:13:53 gerrymandering. There was not a neutral, independent reason justifying what he did. But a good judge dissented in that case. I think Judge Swygert decided, voted

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Block. Tone was a partner at Jenner & Block when he became a federal district judge, Northern District of Illinois, in 1972. Two years later, he became a judge on the Seventh Circuit, where he served until 1980. He left the bench to return to private practice at Jenner & Block.

[170] Hoellen v. Annunzio, 348 F. Supp. 305 (N.D. Ill. 1972).

Timecode	Quote
03:14:08	the other way in that case. Bob Sprecher was my partner.
	MS. LEE: You had already also briefly mentioned that in the political patronage cases, that you changed your mind. Can you elaborate on --
	JUSTICE STEVENS: The political patronage cases?
	MS. LEE: The political patronage
03:14:25	cases --that your original view was this is the way it's always been done. And you came to think that it was a violation of the Constitution.[171]
	[Crosstalk]
	MS. LEE: So what was your thought process?
	JUSTICE STEVENS: Between the time--
	MS. LEE: [Interposing] Yeah.
03:14:37	JUSTICE STEVENS: I read the briefs--
	MS. LEE: Yes, yes.
	JUSTICE STEVENS: And I had to vote,

[171] Illinois State Employees' Union v. Lewis, 473 F.2d 561 (1972), cert. denied, 410 U.S. 928 (1973).

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	during the case itself?
03:14:41	MS. LEE: Yes.
	JUSTICE STEVENS: Yeah, when I first looked at the issue, it did seem to me if it's something that's as well-established as patronage, it's probably something you've got to accept as part of our political life. But the more I thought about it, that didn't seem to me a correct view. It's very similar to the gerrymandering--
03:15:04	MR. ESTREICHER: [Interposing] Feel the same way about patronage hiring as well as dismissal?
	JUSTICE STEVENS: Yes. Both hiring and dismissal, and. . .
	MR. ESTREICHER: Presumably within a category of officers, you do pick your political…
	JUSTICE STEVENS: A
03:15:17	category?
	MR. STREICHER: Well, a category of executives or people that are going to be your confidential aides, the

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	policy heads.
	JUSTICE STEVENS: Oh, in the
03:15:25	patronage area, then the affiliation of the employee is not the sole reason for making the decision. There's a category of employees that develop certain skills in their work that can, the skills can be linked to their political affiliation. And for them, the rule doesn't apply. And I think that was correct.
03:15:58	MS. LEE: Was it the briefs that, in the case that persuaded you? Do you remember who wrote them?
	JUSTICE STEVENS: No, I think it was just reading the cases in that area of the law that I thought it through. I don't know, it's hard to know...
	MS. LEE: Yeah.
	JUSTICE STEVENS: . . . right now
03:16:19	what made the difference.
	MR. MCKENZIE: Justice, I wanted to ask about a few other things from your time on the Seventh Circuit. You dissented in a case involving a

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03:16:31 man named Father Groppi who had protested on the floor of I think the Illinois legislature, and he was summarily held for contempt.[172] And what were your thoughts about that case, and. . .

JUSTICE STEVENS: Well, that's a case in which the legislature imposed a punishment without giving him any hearing

03:16:54 whatsoever. And it seemed to me pretty clear that that's not due process however you decide it. But that was a period during our history when Nixon was the president, and when the law and order side of the most debates was the popular side.

And I thought it was an easy case on the merits, but I also thought that it would be an unpopular case. And I

03:17:25 do remember thinking, and in fact I can remember talking to John Hastings

[172] Groppi v. Leslie, 436 F.2d 326 (7th Cir. 1970); 436 F.2d 331 (7th Cir. 1971) (en banc); ***id.*** at 332 (Stevens, J., dissenting); rev'd, 404 U.S. 496 (1972) (contempt citation without hearing by Wisconsin legislature for protest on the floor of the legislature).

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about the case, whom I've described. And he had sat on the panel decision, which had upheld the judgment

03:17:41 against Groppi, the judgment of the Wisconsin legislature.

And I remember him telling me, this is when we were just getting acquainted, that he had assigned the opinion to Wilbur Pell because he thought it was the kind of high-visibility case that might increase his eligibility for consideration of a vacancy on the Supreme Court. And

03:18:07 I thought well, I guess that's right. That would, in today's climate, his vote would push him in the right direction. So, I thought the merits were quite clearly the other way around. So when I remember writing my dissent, I thought to myself, well, I can kiss goodbye to any notion of ever being on the Supreme Court, writing this position,

03:18:30 which was a healthy thing to happen to you because I did totally-- I mean

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	I can't say I thought I'd be appointed to the Court in any event, except that Chuck Percy, when I was debating whether or not to
03:18:46	accept his invitation to go on the Court of Appeals, he suggested that I ought to get on the Court of Appeals if I ever want to be on the Supreme Court.[173] So I had that possibility as part of my consideration of judicial work. And I remember thinking that, with the Groppi case, well, I can forget about that particularly. But as you know, when it reached the United
03:19:11	States Supreme Court, they reversed unanimously, which I thought was quite clearly correct.
	MR. MCKENZIE: There are also quite a few, in going back over the cases on which you sat as a Seventh Circuit judge, there seem to have been an unusual number of cases involving

[173] Senator Charles Percy of Illinois. *See supra* note 120.

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prisoners, prison conditions, prisoner due process.[174] Did you think

03:19:36 before that point about due process rights of prisoners? Did those cases change your views about due process rights of prisoners?

JUSTICE STEVENS: Well, I

03:19:44 think they did. I don't think I had thought about due process rights of prisoners at all before I had been on the Court of Appeals. And some of the rules that were accepted as part of the basic law in that area were really pretty old-fashioned, let me put it that way. And I was impressed by the need for a fresh look at some of that stuff.

03:20:08 MR. MCKENZIE: And some of the prison reform litigation of that era required federal courts to take a very active role in superintending

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[174] ***See, e.g.,*** Harris v. Pate, 440 F.2d 315 (7th Cir. 1971); United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied 414 U.S. 1146 (1974).

Timecode	Quote
	what was happening in state prison systems, or sometimes local jail systems. Did you form a view about the appropriate role of a federal court under those circumstances in what you could call structural reform
03:20:32	litigation?
	JUSTICE STEVENS: I'm not sure, Troy, whether I did or not. I think that my concern about the structural reform cases probably was
03:20:42	after I got on the Supreme Court. I'm not 100% sure, but the issues that I do remember confronting on the Seventh Circuit related to the fairness or unfairness of particular decisions involving prisoners and revocation of parole and things like that, rather than structural reform.
	MS. LEE: You said that the rules that were in place needed rethinking.
03:21:11	Had they just grown up over time without a focus on the idea that prisoners are really people who have due process rights at all?

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JUSTICE STEVENS: Well, the basic, the underlying proposition in those cases was that the prisoner was a slave. That he was treated, in terms of his rights, he had no more rights than a slave. And that was

03:21:33 the analogy that was used in a number of the early cases. And I think the case that really broke the ground there was Warren Burger's opinion in Morrissey against Brewer, I think

03:21:50 it was, involving the right to a hearing before your parole is revoked.[175] That was a tremendously important case that he wrote. And I think that may have been partly been inspired by some of his reading or examination of prison practices in the Scandinavian countries. I'm not sure. But that was a very important case.

03:22:22 MR. MCKENZIE: Justice, we have a few minutes remaining. I just wanted to

[175] Morrissey v. Brewer, 408 U.S. 71 (1972).

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	ask if there were other memorable cases or events from your time on the Seventh Circuit that you thought were particularly influential for when you later got on the Supreme Court in shaping your views about the law.
	JUSTICE STEVENS: Well, there probably were. The one that
03:22:45	comes most to mind I guess is the Cousins case, which we talked about already, gerrymandering in the city of Chicago, and the patronage case was very important.
	But I think also I
03:23:03	learned a lot from Tom Fairchild, for example, about judging. I remember that affected me later when I got on the Supreme Court. I had written a couple of opinions in which I in substance said that I'm not too happy with the rule, but it's the law of the circuit, so I'm going to go along with it or something like that.
	And I remember Tom suggesting that
03:23:33	there's no point in doing that. It

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doesn't help the court particularly. If you're accepting the law, you ought to just go ahead and accept it. It affected my thinking about whether a judge should use the word "we" in an opinion when the "we" is really prior judges, not the judge involved. And Tom persuaded me it's appropriate to say "we" when you're talking about your

03:24:02 court, even though you may not agree with it. And I remember discussing that very issue with Warren Burger later on when he thought it was inappropriate for me to use the word

03:24:14 "we" when I was describing something that the Court had decided before, and I, relying on Tom Fairchild's approach. But I am part of the "we" once I'm on the Court. And that, so that was a little incident.

MR. ESTREICHER: Did the Seventh Circuit sit en banc during your period?

JUSTICE STEVENS: We had

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03:24:33 probably five or six en banc cases. And one of them was the Groppi case that Clay has mentioned.[176] And there were two or three others, but not very many.

MR. ESTREICHER: That would suggest a high level of collegiality, in terms of panel doing a good job of anticipating where the court is.

JUSTICE STEVENS: I think

03:24:55 that's right, yeah. Everybody on the Second Circuit respected one another.[177] And there was a fair range of views within the court.

MR. MCKENZIE: Well, Justice, once

03:25:10 again, thank you for your time.

MR. ESTREICHER: Thank you very much.

JUSTICE STEVENS: Well, I enjoy it.

MS. LEE: Thank you very much.

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MR. ESTREICHER: Mr. Justice, this is the third installment of our oral

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[176] Justice Stevens was referring to interviewer Troy McKenzie.

[177] In context, Justice Stevens was referring to the Seventh Circuit.

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	history project on great American judges, and we're so pleased that you've taken the time to be part of
03:25:35	this with us. This is a project of the Institute of Judicial Administration, at which you had been a summer attendee one year, and we're just pleased to have that continued link with you.
	JUSTICE STEVENS: Well, thank you. I am enjoying it, so I look forward to what we do today.
	MR. MCKENZIE: Justice, I wanted to
03:25:53	ask you about your transition from the Court of Appeals to the Supreme Court, and frankly how you learned to be a justice, learning on the job. What influence did other justices
03:26:07	have on your early approach to being a justice on the Court?
	JUSTICE STEVENS: Well, I really think the judge that had the most influence on my transition was Judge Tom Fairchild of the Seventh Circuit, who came from a family of judges, and

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	he, I admired him as a fine judge. And he gave me some advice that I followed as I came
03:26:37	here.
	MR. MCKENZIE: What was that advice?
	JUSTICE STEVENS: Well, one thing that when I started out on the Seventh Circuit, when I wrote opinions, I often differentiated between saying what I thought the law was in opinion and what the court had decided. And he convinced me that it would be in the better interest of
03:27:00	the institution just to use the word "we" because when you join the court, you accept its prior decisions. And that's part of learning on the job. You are not an individual actor in a
03:27:16	multi-judge court. You're part of that court. And that actually provoked some disagreement between me and Chief Justice Burger later on when he suggested that it was inappropriate for a brand new justice to use the word "we" on speaking on

Timecode	Quote
	the Court. And I responded that I thought Tom Fairchild had the right view of the matter.
03:27:38	MR. MCKENZIE: Were any of your colleagues here at the Court, your new colleagues, particularly helpful? Did any of them offer guidance to you?
	JUSTICE STEVENS: Well, they were all very helpful. It was interesting to me that I did learn that it was a collegial group, and I really got along well with everybody
03:27:58	on the Court. They were all helpful to me. I remember one particular visit from Potter Stewart, who came down and visited me in these chambers 'cause I'm in the retired chief justice’s
03:28:11	chambers. And he confessed some inability to locate it, because his work was entirely on the west half of the building. He seemed to have difficulty finding out where this was. But he was very, he had a

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	number of observations about the work at the Court, and he was very friendly all the time.
	MR. MCKENZIE: Do you remember some
03:28:35	of those observations?
	JUSTICE STEVENS: Yes, but I'm not sure I should repeat a couple of them.
	MR. MCKENZIE: Okay.
	JUSTICE STEVENS: He did comment on some of his colleagues as who would, whose votes would be most likely to be the same at conference at the end and after the opinions
03:28:54	came around, and he did identify some whose votes tended to be less reliable. Some were more apt to reflect about cases and change their minds before the decisions were
03:29:06	handed down. And so he suggested you always have to write with the possibility that your opinion may not end up as an opinion of the Court when you're assigned, which of course I always did. And I lost a certain

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	amount of, some cases to dissents when I started.
	MR. MCKENZIE: Did you try to model yourself on any particular justice,
03:29:28	either one of your contemporaries or a justice from the past?
	JUSTICE STEVENS: I don't really feel that I did. I think I've said to you I learned a lot from Justice Rutledge, and I followed some of his practices, I'm sure. But I didn't have a single person that I tried to emulate.
	MR. MCKENZIE: And did you look
03:29:49	outside to writings on the Court, books, articles, when you were trying to get yourself up to speed?
	JUSTICE STEVENS: No, I really don’t recall doing that.
03:30:01	MS. LEE: Justice, this is the question of comparisons between being a judge on the Court of Appeals and a justice of the Supreme Court. Did you find that there was a difference in how you approached deciding cases

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because you were now on a court with nine decision makers compared with a court of three?

JUSTICE STEVENS: No, I

03:30:27 don't recall that. Of course, there was always the problem you had to persuade more people to join the opinion than when you're on a three-judge court. But the work was essentially the same, I think.

MS. LEE: Oral argument, do you find a contrast between oral argument at the Court and the Seventh Circuit?

JUSTICE STEVENS: Well,

03:30:48 again as I'm sure you know, it varies from case to case. I think there were probably more arguments in the Supreme Court in which the arguments were better than on the Court of

03:31:00 Appeals, but by no means uniform. We had a fair number of very excellent arguments on the Court of Appeals. And we had a fair number of dismal arguments up here. So that it's a question of how much rather than a

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simple answer.

MR. ESTREICHER: On the arguments up here, do you recall any arguments that changed your mind from your

03:31:24 initial take on the case?

JUSTICE STEVENS: I can't identify any as I sit here, but I'm sure there were some. And I think I have said this in other contexts. Bob Bork was the solicitor general when I came here. And I still regard him as the best solicitor general during my period on the Court. And I'm sure he persuaded me on some cases, or maybe

03:31:51 some of the others did too. But even if you may not have changed your bottom line, you often get new insights into the arguments that are persuasive or not persuasive, and

03:32:03 either belong in or don't belong in an opinion.

MS. LEE: And the final question about contrasts between the Court of Appeals and the Supreme Court is, whether there was any difference in

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	your judicial method. One obvious difference is that the Supreme Court is the final decision maker, not subject to appeal. Do you think that
03:32:27	that affected in any way the way that you approached any given question?
	JUSTICE STEVENS: Yes, I suppose it did, although I don't have any examples in mind. But of course when you're on the Court of Appeals, part of your audience is the Supreme Court 'cause if it's a case of an important issue, it's apt to be reviewed. And so part of your
03:32:57	drafting of opinion is to make your position clear on review, which is not a problem when you're writing up here. But essentially the work is much more similar than different.
03:33:12	MS. LEE: Thank you.
	MR. ESTREICHER: Mr. Justice, we're going to turn to questions on judicial method in general. The first question is on judicial philosophy. Some commentators

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	believe that a justice on the Supreme Court has developed over time a philosophy on how to tackle various categories of cases. Do you think that's a good
03:33:33	description of the way justices proceed in doing their work?
	JUSTICE STEVENS: Well, it's not a description of how I proceeded. I took the cases one at a time, and I just figured I'd probably decide them according to the same basic principles. But there are other justices I know who have tried to have a consistent judicial
03:33:56	philosophy. And sometimes it seems to me they'd be more concerned about whether their vote in a particular case fits into their past philosophy, rather than whether it just fits
03:34:07	into the law in general. And I never asked my clerks to do a study of what I voted in the past because I didn’t think that should be as important to me as what I thought the law

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required. So I know I've been criticized for not espousing a particular judicial philosophy, but that really was more or less deliberate on my part. I think I

03:34:32 took the cases one at a time, and I followed a number of guidelines, such as not trying to decide more than one had to. But at times you have to make a very categorical decision, but different rules guiding judges apply in different fashion in different cases.

MR. ESTREICHER: Taking my last point, some academics have

03:34:53 characterized your work on the Court, or your influence on the Court as being the common lawyer, the common law lawyer on the Court. Would you think that's an apt description of

03:35:03 your approach?

JUSTICE STEVENS: Well, I never have thought of it that way. But in response to the question, I guess it is relatively accurate because common

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	law judges made law. And of course, during my confirmation hearings and other times, I was asked whether judges make law or not. And the answer of course is,
03:35:25	combine the one fact that legislatures are the primary source of law, but there always questions that are left open for judges to decide, and they then continue to make law. So the law, the federal law that we have, is a mixture of statutory law and judge-made law. But judges do play a role in fleshing out unanswered questions and
03:35:52	necessarily must be recognized as lawmakers and therefore continuing the common law tradition.
	MS. LEE: Justice, in our previous interviews, we discussed your
03:36:08	distrust of glittering generalities, a term that was used by Professor Nathanson.
	JUSTICE STEVENS: Right.
	MS. LEE: Your opinions, in contrast,

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reflect a preference for multi-factor balancing tests rather than bright line rules. Could you talk to us a little bit more about what you see as the advantages and disadvantages of

03:36:26 the two approaches?

JUSTICE STEVENS: Well, actually again, it's sometimes one approach is appropriate in one type of case, and other times it isn't. I think in every case you have to carefully understand the facts as best you can and avoid deciding much more than necessary, avoid unnecessary glittering generalities.

03:36:47 But there are also times when it's necessary to announce more or less a general, a very broad rule. In that case, you have to be more general than specific. So it's not a question of which approach you

03:37:04 apply across the board as much as it is which approach is appropriate in particular cases.

MS. LEE: So that in itself is an

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avoidance of having a bright line rule on whether or not you should have a bright line rule.

JUSTICE STEVENS: I think that's right; that's right. But certainly you should be careful

03:37:22 whenever you announce a bright line rule. And sometimes bright line rules are the consequence of a very narrow decision. One that comes to mind, we talked a little bit about same sex marriage on an earlier occasion. The first year I was on the Court, we had an appeal from a decision from Virginia upholding Virginia's sodomy statute. And the

03:37:51 court voted six to three to affirm without considering the argument.[178] Well, that established a bright line rule. It did. It covered, and I think the rule was later proven to be

03:38:11 incorrect. I was one of the three,

[178] Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge district court), aff'd, 425 U.S. 901 (1976). Justices Brennan, Marshall, and Stevens wrote that they would note probable jurisdiction and set the case for oral argument.

Timecode	Quote
	by the way, who voted to note probable jurisdiction.
	MS. LEE: Thank you.
	MR. MCKENZIE: Justice, I wanted to ask you some questions about constitutional interpretation, and in particular about the role of original meaning or original intent, because during your time on the Court, originalism as a theory of
03:38:34	constitutional interpretation has become much more significant, certainly in the legal academy, but also on the Court. And you did speak a little bit about this in prior sessions, but what are your views on the role that a search for the original meaning of the Constitution should play?
	JUSTICE STEVENS: Well, I
03:38:55	really think the Constitution, like a statute or any other, or even a common law rule, is assisted by studying, learning the best you can what the authors of that rule had in

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03:39:11 mind. That includes the original intent of the framers and the original intent of statutory draftsmen. You always want to know as much about the intent as you can. But that role is primarily designed, as I've thought about it more recently, to find out the minimum coverage of the statute rather than the ceiling. You often know that

03:39:36 they want to accomplish certain things. But it doesn't mean they wanted to forbid other things that they didn't mention explicitly, or that were inevitably covered in the law.

MR. MCKENZIE: In one of your opinions on the Court, the Granholm case, which involved a test of the meaning of the 21st Amendment--

03:40:02 JUSTICE STEVENS: [Interposing] Right.

MR. MCKENZIE: --which had repealed Prohibition, you wrote in dissent, "The views of judges who lived

Timecode	Quote
03:40:08	through debates that led to the ratification of those amendments," meaning the 21st and the 18th Amendments, "are entitled to special deference." And you then went on to discuss Justice Brandeis's views on those amendments in a contemporary case.[179] Did you consider your Granholm dissent to be an originalist opinion?
	JUSTICE STEVENS: I've
03:40:29	never classified my opinions as originalist or not. It sounds like it must've been in a sense because I did think it quite relevant and quite important to figure out what the people who worked on that particular provision had in mind, and the contemporary situation did seem to me quite relevant. And of course it was particularly so because of the appeal of
03:40:54	Justice Brandeis.

[179] Granholm v. Heald, 544 U.S. 460, 495 (2005) (Stevens, J., dissenting).

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MS. LEE: Justice, one area that you have been quite interested in over the years, as have I, is state sovereign immunity. That is an area

03:41:09 where you seem to have decided that the original purpose of the amendment was perhaps the most important factor in interpreting what it ought to be now. And in some ways, you could say that your view of the 11th Amendment suggests that you thought that they did not intend to expand it beyond what was mentioned.[180] Could you comment on why you thought that the

03:41:41 original intent was really important, was perhaps the dispositive factor for the 11th Amendment?

JUSTICE STEVENS: Well, as I think I've said earlier, it's always important to look at the original

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[180] See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 76, 81-83 (1996) (Stevens, J., dissenting) (Congress should have power to abrogate state sovereign immunity when it legislates pursuant to its Article I powers); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 126, 151-52 (1984) (Stevens, J., dissenting) (Eleventh Amendment should not prohibit federal courts from ordering state officials to conform their conduct to state law).

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intent, whether of a statute or constitutional provision. But there of course the original intent goes back behind the 11th Amendment, to

03:42:03 Chisholm against Georgia.[181]

MS. LEE: Yeah.

JUSTICE STEVENS: And I really think that the most important element of a discussion of that

03:42:10 particular part of our law should keep in mind that four of the five justices who decided that case were intimately involved in the adoption of the Constitution.[182] And if they didn't think that the framers just wanted to bring sovereign immunity as

[181] In Chisholm v. Georgia, 2 U.S. 419 (1793), the Supreme Court rejected the state of Georgia's claim that sovereign immunity protected it from suit in federal court by a South Carolina creditor to collect a debt. The Eleventh Amendment, ratified in 1795, overturned the Chisholm decision.

[182] James Wilson of Pennsylvania played a leading role at the Constitutional Convention and then at the Pennsylvania ratifying convention. John Blair of Virginia was a delegate to the Constitutional Convention. John Jay of New York did not attend the Constitutional Convention, but he contributed five essays to the Federalist Papers and was an influential supporter of the Constitution at the New York ratifying convention. William Cushing of Massachusetts was vice president of the Massachusetts ratifying convention. (James Iredell of North Carolina was a supporter of the Constitution and unsuccessfully urged its ratification at the first North Carolina ratifying convention.)

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a common law defense to the United States, it seems to me that we should never forget that. And the fact that

03:42:37 the states did enact a limited bar on sovereign immunity should not go farther than what the framers of the 11th Amendment intended, which was pretty well-analyzed by John Marshall in later opinions and so forth, basically wanting to protect them from having to pay their debts.[183] And it never really envisioned the exceptional expansion of the whole

03:43:08 doctrine that this Court is responsible for.

MR. ESTREICHER: We're going to turn, still on the theme of original intent, we're going to turn to the

03:43:17 Second Amendment cases, the right to carry and bear arms in Heller and McDonald.[184] Do you believe that the,

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[183] *See* Cohens v. Virginia, 19 U.S. 264 (1821) (opinion for the Court by Chief Justice Marshall).

[184] District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual's right to keep and bear arms unconnected with service in the militia,

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do you think that the Court adopted an original intent approach in those cases or a--what some would call--a living constitution approach in those cases?

JUSTICE STEVENS: Well, sort of in between, because there are

03:43:42 two versions of the original intent approach. There's what I understand Attorney General Meese's approach was to try and figure out what the draftsmen of the constitutional provision had in mind, whereas the more modern version of original intent looks primarily at what audiences look at, what the ordinary reader reads into the intent. And in

03:44:09 the debate in the Heller case, Justice Scalia relied very heavily on contemporary commentary on the, rather than the views of Madison and

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and striking down certain D.C. restrictions on firearms as unconstitutional); McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Fourteenth Amendment incorporates the right to keep and bear arms, and striking down Chicago gun control ordinance).

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the people who submitted drafts to

03:44:23 Madison to adopt as part of the Second Amendment.[185] And I thought it more important to look at what Madison had in mind and look at the original version of the original intent.

MR. ESTREICHER: The drafters versus the audience.

JUSTICE STEVENS: The drafters versus the audience. And I think on that score, although others

03:44:43 obviously disagree, there are all sorts of points of view, I really think I had by far the better of the argument. It was quite clear that the expansive interpretation of the amendment was not what, certainly not what Madison primarily had in mind. He wanted to protect the states from the federal government.

03:45:05 MR. ESTREICHER: So on that point, would there have been an original

[185] 554 U.S. 570, 581-95 (2008).

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intent argument for not incorporating the Second Amendment against the states?

03:45:15 JUSTICE STEVENS: Oh, certainly. That to me, you're talking about the McDonald case now rather than the Heller case.

MR. ESTREICHER: Yes.

JUSTICE STEVENS: It seems to me that that really is a fascinating case because from Attorney General Meese's position, he basically opposed the incorporation

03:45:32 doctrine entirely.[186] He thought one of the worst decisions the Court made was incorporating provisions of the Bill of Rights and making them applicable to the states. And under that approach, there would be no

[186] Under the incorporation doctrine, certain provisions of the Bill of Rights, which were originally adopted to restrain the U.S. Congress, also apply against the states through the Fourteenth Amendment. Attorney General Edwin Meese declared in 1985, "nothing can be done to shore up the intellectually shaky foundation on which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation." Attorney General Edwin Meese III, Address before the American Bar Association, Washington, D.C. (July 9, 1985).

Timecode	Quote
	justification for treating the due process clause as a basis for incorporation. And so it's really quite interesting that in the majority in the City of Chicago
03:45:59	case. . .
	MR. ESTREICHERR: McDonald, yes.
	JUSTICE STEVENS: Relied on substantive due process --
	MR. ESTREICHER: Unbelievable.
03:46:05	JUSTICE STEVENS: Rather than the privileges and immunities clause,
	except for Justice Thomas.[187]
	MR. ESTREICHER: And rather than the original intent of the framers, which was a fear of a federal standing army.
	JUSTICE STEVENS: I'm sorry?
	MR. ESTREICHER: Rather than the
03:46:15	original intent of the framers as well.
	JUSTICE STEVENS: Yes.

[187] 561 U.S. 742, 805 (2010) (Thomas, J., concurring) (right to keep and bear arms is a privilege of American citizenship that applies to the states through the Fourteenth Amendment's Privileges and Immunities Clause).

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MR. ESTREICHER: Which was premised on a fear of a federal standing army.

JUSTICE STEVENS: Right, that's exactly right.

MR. ESTREICHER: With a militia by the states an important check.

JUSTICE STEVENS: The

03:46:29 McDonald case is a very, very interesting case because the people who joined that opinion[188] are more likely to be in the camp that thinks that prohibition, that the substantive due

03:46:45 process clause is not a justification for incorporating a protection to abortion and the like. And having endorsed substantive due process as a way of incorporating the Second Amendment, it seems to me that really forecloses them from arguing that it should not enforce any other provisions of the Bill of Rights.

MR. ESTREICHER: Interesting.

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[188] Justice Alito, Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas.

Timecode	Quote
03:47:09	Turning, still on original intent, but turning to the religion clauses of the First Amendment, are those cases where focus on the framers' intent is appropriate, useful? JUSTICE STEVENS: It depends on what you, if you look at the original intent as a floor or as a ceiling. Looking at it as a floor, the original intent certainly
03:47:36	supports a liberal interpretation of the, well, I don't know how to put it this way. But in fact, the draftsmen of the religion clauses did not think it extended protection
03:47:51	to non-Christian faiths. It did not, and there's writing to that effect by some of the early justices.[189] And so

[189] Justice Joseph Story wrote that the religion clauses did not mean "to countenance, much less to advance Mahometanism, or Judaism, or infidelity . . . but to exclude all rivalry among Christian sects." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833). Chief Justice John Marshall wrote, in a letter to Jasper Adams on May 9, 1833, that the American population "is entirely Christian, and with us Christianity and Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity." RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPER ADAMS AND THE CHURCH-STATE DEBATE 113 (Daniel L. Driesbach ed. 2015).

Timecode	Quote
	it clearly did not establish the ceiling of the principle that there should be freedom to choose one's faith. But what is really important to me is not so much what the draftsmen of the First Amendment thought, but of the
03:48:22	whole history of our country. What brought people from England to this country is to escape religious persecution. And it justifies a broader interpretation of the protection, that you want to protect them from the kind of harm that drove them to leave Europe and come here. So it's a mixture, how you describe original intent. But certainly the
03:48:48	fact that draftsmen of the provision thought it had a ceiling, applied only in a limited area, certainly cannot determine our interpretation of the provision.
03:49:01	MR. ESTREICHER: Especially when they did not express that ceiling in the text of the First Amendment.

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JUSTICE STEVENS: It doesn't express it in the text, and nothing about the real reasons for it that justify that -- so again it's important to look at whether it's the floor or the ceiling that you're talking about.

03:49:21 MR. ESTREICHER: We're going to turn a little bit away from original intent issues to constitutional interpretation in general. And one question we want to ask you is about Justice Brandeis and the principle of attempting to avoid constitutional questions when there is another way of reading the statute, a reasonable way of reading the statute available. Do

03:49:46 you regard yourself as a follower of Justice Brandeis in this regard?

JUSTICE STEVENS: Very definitely, yes. I think I've cited his opinion several times.[190] I think

[190] Justice Stevens is referring to Justice Brandeis's opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

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03:49:54 it's dead right. Sometimes when you're compelled to address the issue, you have to address it broadly. But if you can avoid it, you certainly should. And that certainly was the view I expressed in Citizens United.[191]

MR. MCKENZIE: Justice, do you think that it is legitimate for a justice on this court to weigh potential

03:50:18 practical consequences of a decision for one side or the other? For example, serious economic consequences or consequences to the judicial system.

JUSTICE STEVENS: Yes, I do. I think you think about a problem. You think about all of its dimensions. Consequences of doing one thing

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[191] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), struck down the federal statute prohibiting independent expenditures by corporations and labor unions in support of or in opposition to political candidates. As Justice Stevens wrote in his dissent, the Court could have avoided the constitutional issue by deciding the case on statutory grounds. ***Id.*** at 393, 395, 405-09 (Stevens, J., dissenting, citing Justice Brandeis's Ashwander concurrence and discussing narrower grounds for decision).

Timecode	Quote
	rather than another have to
03:50:41	be part of what you're trying to accomplish. And this is a view that Justice Breyer I think has expressed more often --
	MR. MCKENZIE: Yes.
03:50:50	JUSTICE STEVENS: --than any of the rest of us.[192] But I certainly, in general I agree with him.
	MR. MCKENZIE: And is that the kind of thing that a justice would then be duty-bound to state clearly in an opinion? I've weighed the following consequences and that has formed my decision in the case?
	JUSTICE STEVENS: I don't
03:51:08	know that I've ever done that. I just can't remember it, but certainly whenever you're making a decision,

[192] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005) ("Since law is connected to life, judges, in applying a text in light of its purpose, should look to ***consequences***, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'"); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 81 (2010) (observing that "when faced with open-ended language and a difficult interpretive question, [judges] rely heavily on purposes and related consequences").

Timecode	Quote
	you have to think about what might happen with one decision rather than another. But it certainly should not be controlling. For example, in the snail darter case,[193] the fact that that might have had a serious consequence to the federal budget might have prevented
03:51:34	the completion of the dam--that's something the law requires, and you have to acknowledge it.
	MR. ESTREICHER: If I can return to Ashwander and Justice Brandeis[194] for a
03:51:43	moment . . .
	JUSTICE STEVENS: Sure.
	MR. ESTREICHER: I think you said that in general, you're a follower of the avoidance principle. If there is a reasonable statutory interpretation available, it enables you to avoid

[193] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). Justice Stevens joined the opinion of the Court, which held that the Endangered Species Act prohibited the completion of a dam.

[194] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

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deciding a constitutional question, that's the way to go. Are there exceptions to that approach? Are

03:52:01 there circumstances where you would reach the constitutional ground?

JUSTICE STEVENS: I suppose there are. Any rule must have its exceptions, I'm sure. That sometime the issue is, the exceptions are pretty slim and pretty rare. . .

MR. ESTREICHER: Rare.

JUSTICE STEVENS: I would think. But they may well be--

03:52:28 [Crosstalk]

MR. ESTREICHER: And of course there has to be a reasonable statutory interpretation available as well.

JUSTICE STEVENS: That's

03:52:34 right. And there has to be a permissible statutory interpretation available.

MS. LEE: Justice, turning now to a very interesting concept that you have referred to from time to time over the course of your time on the

Timecode	Quote
	bench, which sometimes you've referred to as "due process of lawmaking," it seems to be the idea
03:52:59	that in considering an action based on a legislative rule, it is appropriate to look at the process by which the legislature came to that rule. And if it was sloppy or unreasoned or didn't take proper account of the factors, the merits of the rule, it seemed that you sometimes thought that the rule should be given less deference,
03:53:29	should be given less respect.[195] Most recently, you mentioned this in Baze versus Rees, even though you didn't use the term due process of lawmaking. You said that the
03:53:39	decision to retain the death penalty may be the product of habit and

[195] Bowsher v. Synar, 478 U.S. 714, 757 n.23 (1986) (Stevens, J., concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 549 & n. 24 (1980) (Stevens. J., dissenting); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 189-90 (1979) (Stevens, J., concurring in part and concurring in the judgment); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 98 (1977) (Stevens, J., dissenting).

Timecode	Quote
	inattention, rather than an acceptable deliberative process that weighs the costs and risks of administering the penalty against its identifiable benefits.[196] And you mentioned a similar concept in Fullilove versus Klutznick, and in an Indian case way back at the beginning
03:53:59	when you were a justice.[197] Could you please tell us a little bit more about this very interesting idea that does not seem to have been taken up by many other members of the Court? JUSTICE STEVENS: It's really not relevant too often, you're dead right. But I think it was the product of some of Hans Linde's writing, the Justice of the Washington Supreme Court

[196] Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring in the judgment).

[197] Fullilove v. Klutznick, 448 U.S. 448, 549 & n. 24 (1980) (Stevens. J., dissenting); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 98 (1977) (Stevens, J., dissenting).

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03:54:24 or Oregon Supreme Court?[198]

[Crosstalk]

MS. LEE: Oregon.

JUSTICE STEVENS: Oregon?

MR. ESTREICHER: Oregon.

03:54:29 JUSTICE STEVENS: Yeah, he wrote about it, and I found in the Indian case you described, looking at the legislative history of the statute, you would sense that it's clear as a bell that they had made a mistake in excluding a certain category of beneficiaries or including, I don't remember the details now. And I thought the deficiency in attention

03:54:53 to the issues by the legislative body really should be given some consideration. And yes, I also had the same reaction to the, in the Fullilove case because it seemed to me there was a profoundly difficult and controversial question that should have preceded the decision of

[198] Hans Linde, ***Due Process of Lawmaking***, 55 NEB. L. REV. 197 (1976).

Timecode	Quote
	Congress on
03:55:27	whether to grant the preference that the statute granted. And I thought again there was a wide divergence between what they should have done and what they did do
03:55:36	during their actual deliberations. And that did have an impact on my interpretation in the case. And that again came back to mind when I wrote Baze. I think again, and the states of course, the rules are in place a long, long time. And I think that's why they're there. They've been there so long right now. There was a reconsideration of the validity of
03:55:08	the death penalty shortly after I came on the Court, during the period when most states took the time to study the question and reenacted the provision.[199] So there was a fresh

[199] See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). In these cases, the Court upheld the constitutionality of death penalty statutes enacted after predecessor statutes had been struck down in Furman v. Georgia, 408 U.S. 238 (1972).

Timecode	Quote
	study then.
	But there wasn't over the succeeding years. And I think it's something that should've been thought about more carefully by individual
03:56:31	legislatures to see whether or not their systems made sense, or whether you're giving too much discretion to individual prosecutors in individual counties, things like that. And
03:56:42	whether they should have rules that enable the prosecutor to have express latitude in challenging jurors that might have reservations about the death penalty and so forth. I think it would have been better if there had been more constant attention to the problem than there was.
	MS. LEE: So is there a way that you could articulate in general terms
03:57:06	what you expect of a legislature in standing up to your scrutiny? What are the standards that you think legislatures should meet, or does it all depend on the circumstances and

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	the context?
	JUSTICE STEVENS: You should have a feeling they've really thought about the problem and enacted, and based on reasons rather
03:57:29	than just a particular political climate at the time that made decision.
	MR. ESTREICHER: Wouldn't it be hard for judges to evaluate that sort of a record? Or it could be manufactured
03:57:43	to satisfy the judges?
	JUSTICE STEVENS: No, I think that's true. And I certainly don't mean to suggest that’s a standard part of your looking at cases, but sometimes when it does just jump out at you that there's been no particular consideration of the merits of an issue, it seems to me there's less deference due to the
03:58:05	decision that you're looking at.
	MS. LEE: Thank you very much. Now the next topic, another general theme that appears from time to time in

Timecode	Quote
	your opinions on constitutional issues, is that you state what you think the law requires, the Constitution requires. And then you state, I don't think this is a good idea as a policy matter. And I
03:58:37	remember that from EEOC versus Wyoming during my term, when you said that you thought that as a policy matter, mandatory retirement age was probably a good idea.[200] And you've
03:58:49	said something similar in Kelo and in Gonzales versus Raich, the medical marijuana case.[201] Can you tell us what considerations led you to decide when you would express a personal view about the policy substance in a

[200] Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 250 (1983) (Stevens, J., concurring) ("I also believe, contrary to the popular view, that the burdens imposed on the national economy by legislative prohibitions against mandatory retirement on account of age exceed the potential benefits. My personal views on such matters are, however, totally irrelevant to the judicial task I am obligated to perform.")

[201] Kelo v. City of New London, Connecticut, 545 U.S. 469, 489-90 (2005); Gonzales v. Raich, 545 U.S. 1, 9 (2005) ("The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally.")

Timecode	Quote
	case, in an opinion?
	JUSTICE STEVENS: Well, I think that they’re especially in opinions we thought were probably going to be the target
03:59:14	of very serious criticism. And the purpose of putting it in my opinion was to say, well, we're not arguing about whether it's a good idea. There's a narrower issue. And if you want to criticize the opinion, you should criticize its discussion of the law, rather than the particular merits of the policy decision that may or may not be upheld.
03:59:41	MS. LEE: So thank you very much for that. And onto Troy.
	MR. MCKENZIE: And Justice, another question on constitutional interpretation. We've discussed this
03:59:54	a little bit in earlier sessions. You famously said that there is only one equal protection clause. Your colleagues on the Court, however, tended to prefer tiers of scrutiny

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and subdividing the equal protection clause. Do you think the course of the law would have been different if a majority of your colleagues had adopted your view of the equal

04:00:17 protection clause? And if so, how do you think the law in this area would have changed?

JUSTICE STEVENS: Well, I'm not sure how to answer that. I think I was explaining what I understood to be the actual process of decision, that you put it in the tier of scrutiny after you've decided how the case is set. And that was just my impression of

04:00:40 what they were really doing. And I think that that struck me most forcefully in an intermediate scrutiny case, well, the one there was whether same access to alcoholic

04:00:55 beverages by females and males of the same age.[202] And that seemed to me

[202] Craig v. Boren, 429 U.S. 190 (1976).

Timecode	Quote
	not really what was going on. And there was another case involving a right of the children of immigrants to access to education. And I think they put that in intermediate scrutiny.[203] And it seems to me what they're really basically doing is whether they thought the benefits outweighed the
04:01:19	costs.
	MR. ESTREICHER: We're going to turn to another area, reading statutes.
	JUSTICE STEVENS: Reading statutes.
	MR. ESTREICHER: Reading statutes. There is at least one member of this Court who's made himself very prominent in academic circles for taking the view that the text of the
04:01:35	statute is pretty much the only thing that counts, with an occasional resort to a dictionary or some other

[203] Plyler v. Doe, 457 U.S. 202 (1982).

Timecode	Quote
	source like that.[204] Is that your view? Are you a textualist of that sort?
04:01:48	JUSTICE STEVENS: Well, we wouldn't be here if I were.[Laughter.] No, I'm certainly not. And it's a principled position that Nino takes, but I really think it's quite incorrect. As I've said in some of my other answers, I really think a judge should look for as much help as he can find in other sources to decide what's involved. And I just think
04:02:16	it's unwise and incorrect to place an arbitrary limit on the materials that you look at in trying to figure out what the legislature meant. Of course, he doesn't think it's important to know what the legislature meant. He thinks it's only important to know what the

[204] Justice Antonin Scalia ("Nino"). ***See*** Antonin Scalia, ***Common-Law Courts in a Civil-Law System, in*** A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Guttmann ed. 1997); ***See generally*** ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

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statute means. And I think that is, as I've expressed in the book reviews we talked about earlier,

04:02:41 I think that may be influenced by his very strict approach to the issues of delegations of legislative power. He thinks that only Congress makes the law, and Congress has no right to

04:02:56 delegate any legislative power to any other branch, rather than as I would view it, whether the delegation was adequately limited by . . .

MR. ESTREICHER: - - limited, right.

JUSTICE STEVENS: Provisions in the statute.

MS. LEE: I might add for purposes of the record that the book review you were referring to was a book review

04:03:15 published in October of 2014 of Judge Robert Katzmann's book on reading statutes.[205]

JUSTICE STEVENS: That's right; that's exactly right.

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[205] John Paul Stevens, ***Law Without History?***, N.Y. REV. OF BOOKS, Oct. 23, 2014 (review of JUDGING STATUTES by Robert A. Katzmann).

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MR. MCKENZIE: Published in *The New York Review of Books.*

JUSTICE STEVENS: Pardon me?

MR. MCKENZIE: Published in *The New*

04:03:26 *York Review of Books.*

JUSTICE STEVENS: Yes.

MR. ESTREICHER: We're giving you credit for that book review, which was a very fine book review. We were

04:03:32 speaking about it off record. Now Judge Katzmann believes it's very important to take into account the views of committees and the sponsors of bills, because the other legislators that will vote on the ultimate bill are paying special respect and deference to those folk.[206] Is that your view as well?

JUSTICE STEVENS: Very

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[206] ROBERT A. KATZMANN, JUDGING STATUTES 19-22 (2014). Before attending Yale Law School, Robert Katzmann received a Ph.D. in Government from Harvard University. He was a scholar at the Brookings Institution from 1981 to 1999. He also taught government, law and public policy at Georgetown. One of the topics of his research and writing was the relationship between the courts and Congress. He became a judge on the U.S. Court of Appeals for the Second Circuit in 1999 and chief judge in 2013.

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04:03:53 definitely, and I must say, and it's an interesting sidelight, my views are influenced by my work in the subcommittee of the House Judiciary Committee, where I got a feel for the legislative process firsthand. And it's not only the views of other members of the legislature that are affected by the history, but it's also the views of the agencies that

04:04:22 are affected. . .

MR. ESTREICHER: Absolutely.

JUSTICE STEVENS: . . . by the legislation. And Bob Katzmann makes a very important point that no matter

04:04:30 whether you follow Scalia's views or not, legislative history has a very significant impact on the law as it's administered by the agencies who are involved in the legislation.[207] And we are under a duty under Chevron to

[207] ***Id.*** at 23-28.

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pay deference to what they do.[208] So there really is no way you can completely exclude examinations of--

[Crosstalk]

04:04:55 JUSTICE STEVENS: --legislative history from your understanding of what a statute should, how a statute should be read.

MR. ESTREICHER: I'll turn to Chevron for one moment, which has been a very influential opinion of yours.

JUSTICE STEVENS: Pardon me?

MR. ESTREICHER: We're going to turn

04:05:03 to Chevron in one moment.

JUSTICE STEVENS: Yes.

MR. ESTREICHER: Which has been a very influential opinion of yours. Are there cases where it's

04:05:10 inappropriate to use legislative history? Are there situations where we're giving undue weight to minority views in the legislature when we do that?

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[208] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

Timecode	Quote
	JUSTICE STEVENS: I suppose there might be, but I don't quite see the connection between Chevron. . .
	MR. ESTREICHER: No. This was just a follow-up to an earlier question. It
04:05:32	was not related to Chevron.
	MS. LEE: I think to follow up, clarify the last question, are there pieces of, types of legislative history that you consider unreliable enough that you wouldn't rely on
04:05:46	them?
	JUSTICE STEVENS: Oh, sure. I mean Chief Justice Roberts put it well. All legislative history is not equal. Committee reports and
04:05:55	conference reports are clearly more important than isolated comment.[209] And I think to rely on legislative

[209] Statement by Judge John G. Roberts at his confirmation hearing, quoted in KATZMANN, *supra* note 206, at 54 ("All legislative history is not created equal. There's a difference between the weight that you give a conference report and the weight you give a statement of one legislator on the floor. You have to, I think, have some degree of sensitivity in understanding exactly what you're looking at . . . .")

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history, you have to assume that judges can sort it out and look at what's important, unimportant, and I think the risk that they will adopt some statement that was inspired by a lobbyist trying to sell a certain point of view is really very

04:06:21 minimal. We have intelligent people looking at this. They can evaluate what the significance is of the different kinds of legislative history.

MR. ESTREICHER: We're going to turn

04:06:33 to Chevron, which has been a very influential opinion of yours. It is the common feature of administrative law casebooks, legislation casebooks throughout the country. How broad is

04:06:47 the principle of deference to agencies in your view, in the area of statutory interpretation? When is it appropriate for a, when is it required for a judge to defer to an agency's statutory interpretation?

JUSTICE STEVENS: Well, there's a

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preliminary question that I have to-- what do you mean by defer? You always defer in the sense that

04:07:11 you take into consideration what the agency's done. But that does not necessarily mean you always reach the same conclusion.

MR. ESTREICHER: Right.

JUSTICE STEVENS: The agency's view is required to be followed if it's a reasonable interpretation. I think that's in Chevron itself.

MR. ESTREICHER: Right.

JUSTICE STEVENS:

So it's not a

04:07:31 totally black and white distinction.

MR. ESTREICHER: Absolutely. So there's always respect for the agency's view--

JUSTICE STEVENS:

04:07:38 [Interposing] Right.

MR. ESTREICHER: Especially if it's being considered.

JUSTICE STEVENS: And in some cases, much higher respect than others. If

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the kind of issue is a very complicated one, requires knowledge of engineering questions the judges may not have much knowledge about, or things like that,

04:07:56 but it varies. And there are some areas where there's really not much point of giving any extra deference to what the agency does.

MR. ESTREICHER: There are some invocations of Chevron in which the deference is a much stronger respect for the agency's view. And in fact, if Chevron step two, as they say, applies, you must defer, you must

04:08:18 accept the agency's view if it's reasonable.

JUSTICE STEVENS: Right.

MR. ESTREICHER: And when are we in that step two? When do we know

04:08:28 whether a statute is sufficiently ambiguous that we have to, that the Court has to strongly defer to the agency's view?

JUSTICE STEVENS: Well, I think the

Timecode	Quote
	test is when we think it's reasonable. But you don't always defer, but you certainly, there's a strong presumption that you should defer, if you think the agency is
04:08:46	better informed about the issue than we are. And they usually are.
	MR. ESTREICHER: A couple, Mr. Justice, a couple of questions following up on Chevron, which as I said is a very important decision in American public law. Getting back to the Chevron case itself, what was your process of decision-making in that case? At what point did you
04:09:11	come to the view that the statute was sufficiently ambiguous, that deference to the agency was required?
	JUSTICE STEVENS: Of course, the memory that goes along goes back a
04:09:22	number of years, but I do have my draft of--my original draft of the opinion. And it impresses me how detailed I was in discussing the facts. And I remember in reviewing

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the facts, I did see that there was a legitimate argument for both views of the statute. Is it applied to a plant-wide test or a particular equipment applied test? And I

04:09:51 thought that it is ambiguous in the sense that you cannot find in the legislative history that Congress had chosen one meaning over another. And that qualified for a question on which we should defer.

MR. ESTREICHER: Thank you.

MR. MCKENZIE: Justice, I wanted to ask you a question about sources of authority that a judge or justice on

04:10:20 this court should look to. Did you rely much on academic writing? Did you make a practice of keeping up with the law reviews, with academic books on a regular basis? And did

04:10:34 you think to turn to academic authors as sources of authorities in your opinions?

JUSTICE STEVENS: Well, again, it varies from case to case, as I'm sure

Timecode	Quote
	you know. And the thing that really impressed me the most on sources of authority is that how often cases depended on an interpretation of a prior Supreme
04:10:57	Court case, just one or two cases might require a really detailed study to figure out what would be the right next step. And so as a general matter, I don't think I did look at too much extrajudicial writing. And I always asked my law clerks to do that sort of survey and call my attention to anything they thought was particularly relevant. So as a
04:11:24	general matter, I look mainly at our prior precedents. And I think most cases, only two or three precedents really matter. But on the other hand, I always felt it entirely
04:11:39	permissible to look at anything that would shed light on the issue. I would look at law review articles. I would look at opinions of Canadian judges or Australian judges or any

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other source that might shed light on how you should think about the problem. So again, as you suggested, it depends on the case.

MS. LEE: That, Justice, almost

04:12:04 steals my lines for the next question that I'm about to ask, which is about citing foreign sources. And we know that you did occasionally cite foreign sources such as the views of the European Union in your opinion for the Court in Atkins versus Virginia,[210] and you quoted Chief Justice Aharon Barak of the Supreme Court of Israel in a dissent in

04:12:27 Circuit City Stores versus Adams.[211] There is actually some debate about whether or not it is appropriate for a Supreme Court opinion to cite a

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[210] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (opinion of the Court by Stevens J.) (citing Brief of European Union as Amicus Curiae to support statement that world community overwhelmingly disapproves of execution of mentally retarded offenders).

[211] Circuit City Stores v. Adams, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) (citing Justice Barak of the Supreme Court of Israel on methods of statutory interpretation).

Timecode	Quote
	foreign source. And the topic was
04:12:41	the subject of great interest at recent confirmation hearings of justices, Chief Justice Roberts and Justice Alito. There have been occasional outliers who suggested that if a justice cites a foreign court opinion, that justice should be impeached.[212]
	[Laughter] Could you comment a little bit more on the pros and cons of this debate?
04:13:10	JUSTICE STEVENS: Yes, it seems to me that there are two different questions. One is, are you citing the foreign authority as authoritative or merely as shedding light on the issue? And it seems to me that foreign opinions, like law review articles or briefs or anything else that shed light on the issue, are appropriate materials to refer to.

[212] David J. Seipp, ***Our Law, Their Law, History, and the Citation of Foreign Law***, 86 B.U. L. REV. 1417, 1424 (2006).

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04:13:36 But if you cite it on as having decided the issue, and that it's binding on an American judge, of course that's quite wrong. But I don't think any American judge does

04:13:48 that 'cause it's so obviously improper. And I think that the debate is based on a misunderstanding by people who criticize the process, who apparently assume that the judge writing an opinion in our court or in a federal court is following the foreign courts as though it were authoritative law, which of course is very seldom the case. But why one

04:14:16 should not consider some intelligent statement that's relevant to an issue because its author was not a United States citizen doesn't seem to me to make any sense.

MS. LEE: I recall that the Chief Justice, when he was sitting before the Judiciary Committee, said that citing foreign law was like picking your friends out of a crowd, that

Timecode	Quote
04:14:41	you're inevitably being selective, and that you're trying to stack the deck.[213] And others have said that if you cite foreign law, even if you're not claiming that it's dispositive,
04:14:52	you wouldn't be citing it unless you thought that it would tip the scales in some way, that it would have some weight perhaps in a closely divided case.[214]
	JUSTICE STEVENS: Well, what has weight is the reason given in the document you cite. If your thinking makes sense, it seems to me it's appropriate to cite it and to
04:15:12	indicate it has influenced your thinking. I don't see anything wrong with being influenced by a thinking

[213] Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States before the Senate Committee on the Judiciary, 109th Congress 200, 200-01 (2005).

[214] ***See*** Sanford Levinson, ***Looking Abroad When Interpreting the U.S. Constitution: Some Reflections***, 39 TEX. INT'L L.J. 353, 360-61 (2003-2004) (discussing possible grounds for Justice Scalia's objections to U.S. courts' references to foreign law when interpreting the U.S. Constitution); Lawrence v. Texas, 539 U.S. 554, 598 (2003) (Scalia, J., dissenting) (stating that Court's discussion of foreign views is "meaningless dicta" and "dangerous dicta," since the Court "'should not impose foreign moods, fads, or fashions on Americans'" (citation omitted)).

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of people who were not born in the United States. And so I just, I thought part of John's testimony there was, I wouldn't entirely agree with. I didn’t -- that's I think one of the very few things in his congressional hearing that I wouldn't have

04:15:38 subscribed to 100%.

MR. ESTREICHER: There have been a few cases where you have expressed the view that even in the interpretation of federal statutes,

04:15:48 the Supreme Court should give special respect to the uniform views of the lower courts.

JUSTICE STEVENS: Oh, that's definitely true. And particularly that's true in statutory cases. I have the view, it was relevant in a fair number of cases when I first came on the Court, that if the law has been settled by courts

04:16:09 of appeals decisions in which there have been no conflicts for a period

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of time, that the bar and the commercial segments of our society rely on that rule as a rule of law. And I think that fact should be given consideration when an issue is reached by this court that had been previously decided in a very uniform way in the courts of appeals. So I

04:16:34 really think that a general consensus in the circuits should be given stare decisis effect on statutory issues.[215] Now on constitutional questions, I have a different view. I think the

04:16:51 Court has the obligation to address it as a de novo proposition when it first gets here.

MR. ESTREICHER: Turning to amicus briefs, there's been quite an industry in the production of amicus briefs in the last 20, 30 years at the Supreme Court. Are there particular cases where the filing of an amicus brief has been especially

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[215] ***See, e.g.***, Morrison v. National Australia Bank, 561 U.S. 247, 274 (2010) (Stevens, J., concurring in the judgment).

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04:17:13 helpful to the Court?

JUSTICE STEVENS: Well, there are cases, I suppose. My practice with amicus briefs had been that I would generally read an amicus brief filed by the solicitor general because he often would have insights about federal law that I should be taking into consideration. But I would ask my law clerks to read all

04:17:36 the other amicus briefs and call my attention to anything they found in them they thought merited my attention. So it depends on the case. And that was true regardless

04:17:48 of how many amicus briefs were filed. And I think you're correct, that there seem to be more now than there were.

MR. ESTREICHER: It's a cottage industry.

JUSTICE STEVENS: It is a cottage industry.

MR. ESTREICHER: If I can turn your attention to the University of

Timecode	Quote
04:18:00	Michigan case, where there was an amicus brief, and this is something you discuss in your book Six Chiefs.
	JUSTICE STEVENS: Six Amendments.
	MR. ESTREICHER: Five cases.
	JUSTICE STEVENS: ***Five Chiefs.***
	MS. LEE: ***Five Chiefs.***
	MR. MCKENZIE: ***Five Chiefs***.
04:18:11	MR. ESTREICHER: ***Five Chiefs,*** sorry. I apologize. ***Five Chiefs.*** The amicus brief written on behalf of military, retired and active military--
04:18:21	JUSTICE STEVENS: [Interposing] Right.
	MR. ESTREICHER: --officials, in support of affirmative action,[216] I believe you said that was an especially influential brief.[217]
	JUSTICE STEVENS: It was. In fact, I talked about that brief just a week or so ago in Michigan at an affair

[216] Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., Grutter v. Bollinger, Nos. 02-041, 02-516, Feb. 21, 2003.

[217] STEVENS, FIVE CHIEFS, ***supra*** note 26, at 240-43.

Timecode	Quote
	for President Ford.[218] And that
04:18:43	was a particularly important brief for several reasons. One, it made an awful lot of sense. But in determining whether affirmative action is in the public interest in an educational institution, it was important to realize that the Military Academy and the Naval Academy had engaged in affirmative action in order to cure the problems
04:19:08	that resulted from a largely African-American enlisted corps and an all-white, or virtually all-white, officer corps. And the experience of very well-respected military leaders showed
04:19:22	what a benefit that could provide the country looking to the future. And it was an interesting contrast, and I had mentioned an opinion I was particularly happy with, Wygant

[218] John Paul Stevens, Michigan and the Supreme Court, Address to The Economic Club of Southwestern Michigan (Sept. 23, 2014) (transcript available on the website of the Supreme Court of the United States, www.supremecourt.gov).

Timecode	Quote
	against the city of Jackson, Michigan,[219] in which the city had tried to increase the number of minority teachers up to an appropriate level. And the issues seemed to boil down to
04:19:56	whether or not it was an appropriate remedy for past discrimination, which had been the primary test of whether affirmative action was permissible or not. And I wrote in a separate opinion that nobody joined, that it's far more important to look at the future benefits from any program than it is to just decide whether or not it's an appropriate remedy for past
04:20:19	sins, and whether the number of black teachers would provide better education in the future for the children of Jackson.
	And I really think that's right, and
04:20:30	I think that in the brief, although they didn't cite my opinion, which

[219] Wygant v. Jackson Board of Education, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

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would not be good advocacy to be citing a dissenting opinion, they in effect argued that same position, that this would be good for the country. And that's the tact that Justice O'Connor took in her opinion for the Court, which I thought was particularly good. She relied

04:20:54 heavily on that amicus brief.[220] And it was an unusual amicus brief because it was such a good one, and supported by such distinguished personnel.

MR. ESTREICHER: If I can just stay on the issue of affirmative action for a moment, how have your views evolved with respect to that issue over the years?

04:21:17 JUSTICE STEVENS: Well, I think that case had an important part on it. It's quite interesting. I may have mentioned this someplace else, but during the week before that case

[220] Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

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04:21:27 was argued, Justice Powell and I had a meeting on some other--

MR. ESTREICHER: [Interposing] Referring to Wygant now.

JUSTICE STEVENS: Pardon me?

MR. ESTREICHER: You're referring to Wygant now.

JUSTICE STEVENS: I'm referring to Wygant.

04:21:35 MR. ESTREICHER: Yes.

JUSTICE STEVENS: And I remember saying to him as I left his office, "Oh at least we have an easy affirmative action case on the docket for next week." And he said, "That's right." And we left both thinking we had an easy case, but we had different views about how it should be decided.

[Laughter] And I really thought that

04:21:55 was a particularly easy case 'cause it really dramatically drew the distinction between trying to correct the past and what's good for the future.

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04:22:10 MR. MCKENZIE: Justice, I wanted to ask you a couple questions about writing separately as a justice. And as we discussed earlier, your view as a judge on the Seventh Circuit was that it was important to write separately if you wanted to express disagreement or a different view of a case from the majority. When you came here, did you feel more or less

04:22:36 able to express disagreement?

JUSTICE STEVENS: Same view.

MR. MCKENZIE: Same view.

JUSTICE STEVENS: Yeah. I think it's the correct view.

MR. MCKENZIE: As you became more senior on the Court, you were also able to take on the responsibility of assigning majority or dissenting

04:22:54 opinions. Did that role cause you to pull back a little bit from writing separately?

JUSTICE STEVENS: No.

MR. MCKENZIE: Why not?

04:23:05 JUSTICE STEVENS: Why should it? I

Timecode	Quote
	mean the same reasons applied. If I didn't agree with the views of the majority, I had the same obligation to make those views known.
	MR. MCKENZIE: One of the interesting features of being a justice for the length of tenure that you were on the Court, is that you were able to see a number of your dissenting or separate
04:23:32	opinions eventually become the views embraced by the entire Court. And I'm thinking of cases such as Ring against Arizona, which overruled the Walton case,[221] Lawrence against Texas, which overruled Bowers,[222] Arizona against Gant, which limited New York against Belton,[223] and Garcia against San Antonio, which overruled National League of Cities against

[221] Ring v. Arizona, 536 U.S. 584 (2002); Walton v. Arizona, 497 U.S. 639 (1990).

[222] Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986).

[223] Arizona v. Gant, 556 U.S. 332 (2009); New York v. Belton, 453 U.S. 454 (1981).

Timecode	Quote
	Usery.[224] When
04:23:59	you were writing the dissents in those earlier cases, was it your hope that the Court would one day adopt your views? Were you writing to the future, or were you thinking, this is
04:24:11	the kind of thing where I'm trying to formulate a coherent view that will one day become the law?
	JUSTICE STEVENS: Well, I suppose whenever you write a dissent, you hope that someone will agree with it, including future lawmakers. So I was always writing both for the present and for the future.
	MR. MCKENZIE: And when is it, in
04:24:37	your view, when is it appropriate for a dissenting justice to stop dissenting? If you've dissented in a case, and later a subsequent case raising a similar issue or the next step of the same issue comes along,

[224] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); National League of Cities v. Usery, 426 U.S. 833 (1976).

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when is it time for a justice who dissented in the earlier case to accept the prior decision as stare decisis and move on? And when is it

04:25:02 on the other hand important for that justice to stand his ground?

JUSTICE STEVENS: That's a very interesting question. I'm not sure I know the answer. I think on

04:25:16 constitutional questions, you pretty much have an obligation to-- Well, that's a very interesting question. And I think I decided on a case-by-case basis, but there are not too many constitutional issues that the same issue comes back over and over again. So it's one I can't really say I focused specifically on. But I do know I have reacted unfavorably to

04:25:54 some of my colleagues' adherence year after year after year to positions that were both wrong and firmly rejected by the Court repeatedly. I think of, for example, in Harmelin against Michigan, Justice Scalia

Timecode	Quote
	advanced the view that the Eighth Amendment doesn't have any proportionality requirements,[225] that black and white thing. And scholars
04:26:18	have discredited that view. Case law has discredited it. It's been firmly rejected over and over again. But both he and Justice Thomas still rely on it. And I must say I react
04:26:33	somewhat adversely to their stubborn adherence to an incorrect view of the law, but maybe that's just motivated by my reaction to the particular law. And I should also say that in that very case, even the plurality written by Justice Kennedy got it wrong terribly.[226] They held that a particular transmission of drugs by a courier justified a
04:27:07	sentence of life without the possibility of parole was permissible under the Eighth Amendment. I think

[225] Harmelin v. Michigan, 501 U.S. 957 (1991).
[226] ***Id.*** at 996 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy was joined by Justices O'Connor and Souter.

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today, I can't believe they would still follow that view today. It seems so outrageously wrong. And so how does that tie into your question? I'm not sure, except that some positions should be reexamined more readily than others, I guess.

04:27:35 MS. LEE: Justice, following up on a point that we were talking about earlier, which is the 11th Amendment, it seemed that you and three other justices never gave up on your view

04:27:49 of this, the 11th Amendment, and of why Hans versus Louisiana[227] was not proper constitutional law. And it might be that each successive case had a slight wrinkle, and it was copyright this time, and it was some other context next time. But the underlying basis for the dissent of all of those five-fours throughout the eighties and the nineties was

04:28:12 that the 11th Amendment didn't mean

[227] Hans v. Louisiana, 134 U.S. 1 (1890).

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what five members of the Court said it meant. How would you explain that decision to not give up, and not to accept that as stare decisis?

JUSTICE STEVENS: Well, I think in the profession generally, it's accepted that the 11th Amendment jurisprudence of the Court is absolutely indefensible. Even the

04:28:40 most recent writing doesn't even rely on the 11th Amendment any more. They now rely on the original intent as expressed in the Tenth Amendment. And they've abandoned the tissue of

04:28:54 decisions that never really made any sense. I have to confess though, I think there was one opinion early in the sequence in which I criticized one of my colleagues in the four for not accepting stare decisis and moving on.[228] And that's, whatever I

[228] Florida Dept. of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 151 (1981) (Stevens, J., concurring) (stare decisis required that Edelman v. Jordan, 415 U.S. 651 (1974), be followed, although he believed that it had been incorrectly decided; declined to join Justices Brennan, Marshall, and Blackmun in dissenting from summary reversal). In Atascadero

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said in that opinion, I disavow.

[Laughter]

MR. ESTREICHER: Turning to a general matter of changes at the Court, the

04:29:23 Court you departed in 2010 I assume is very different from the Court that you entered in 1975. What are some of the most important differences?

JUSTICE STEVENS: Well, the most important difference, I don't want you to misunderstand this, my good friend Clarence Thomas, and he is a good friend, I'm very fond of him, but the most important

04:29:44 difference in terms of jurisprudence was replacement of Thurgood Marshall by Clarence Thomas, because they had vastly different approaches to constitutional law. Both are

04:29:55 principled approaches, but they're different.

MR. ESTREICHER: Has there been a

State Hospital v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting), Justice Stevens disavowed his opinion in Florida Dept. of Health and wrote that he was now persuaded that he should no longer be constrained by the doctrine of stare decisis with regard to the Eleventh Amendment).

Timecode	Quote
	change in the collegiality of the Court during that period of time?
	JUSTICE STEVENS: I don't think so. I really don't. They're a fine bunch of people. I like all of them, and I respect all of them.
	MR. ESTREICHER: Have your views
04:30:14	changed in any particular areas in significant ways during that time?
	JUSTICE STEVENS: I'm sure they have. I can't just tell you which, but. . .
	MR. ESTREICHER: Too many to list.
	JUSTICE STEVENS: Pardon me?
	MR. ESTREICHER: I said too numerous to list.
04:30:24	JUSTICE STEVENS: Too numerous to list, probably.
	MR. ESTREICHER: Thank you.
	MR. MCKENZIE: One other area of change at the Court during your time,
04:30:32	Justice, was the rapidly shrinking docket. . .
	JUSTICE STEVENS: Yes.
	MR. MCKENZIE: . . . of the Supreme Court. At one time in the late

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seventies through the early eighties, the Court was resolving 150, 160 cases per term after argument on the merits. And now the Court is barely able to decide 70 cases after argument on the

04:30:56 merits. Is there an optimal number of cases the Court should take? Do you think it's a problem? You said before you thought it was a problem when the Court was taking too many cases.[229] Do you think it's a problem when the Court takes too few?

JUSTICE STEVENS: I do. I think the right number is around 100, maybe 90 to 100. I think they could

04:31:14 take more. I really do, and I think they should. But they took too many before. And there are explanations for it, but times have changed a little bit.

04:31:26 MR. MCKENZIE: And what's the reason for thinking that more than the

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[229] John Paul Stevens, ***The Life Span of a Judge-Made Rule***, 58 NYU L. REV. 1, 16-21 (1983).

Timecode	Quote
	current level is better?
	JUSTICE STEVENS: Well, I just base it on my experience during my last few years on the Court. During the first few years, I was a "deny" person. I thought we took many cases, and I was very often the only justice who voted to deny. On my
04:31:48	last years on the Court, I was very often the only justice who voted to grant. And I know that during my term I thought the Court should be granting more cases than it did. And I attributed part of the refusal to do so as to the negative impact of the cert pool.[230] I think the cert pool has a depressant effect on the number of cases. It's a good effect in the
04:32:12	avoidance of 130 [cases], but it also I think causes the Court to refuse to

[230] STEVENS, FIVE CHIEFS, *supra* note 26, at 139-40 (discussing cert pool). Almost all of the justices now participate in the cert pool, in which each cert petition is assigned for review to a law clerk to a participating justice. That law clerk drafts a memorandum on the petition that will be relied upon by all the justices in the cert pool.

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take some cases that it should.

MS. LEE: A follow up on that

04:32:22 question, the cert pool didn't exist to the eight against one extent that it does now. But there was a cert pool back in my time when the Court took 160 cases.

JUSTICE STEVENS: Right.

MS. LEE: Do you think that the incremental difference between having not only yourself but Justice Brennan not being in the cert pool made that

04:32:44 big a difference in the suppressing effect of the cert pool?

JUSTICE STEVENS: No, I'm not sure that it did. And because, and of course there are exceptions to everything I say. For example, Justice White was a "grant" person all along. He thought we didn't take enough cases, and he was also a member, an organizer to the cert pool. He was

04:33:06 one of those who helped organize it. So it's pretty hard to generalize

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everything. But I'm sure I've lost a thread of your question.

MS. LEE: The question was you said

04:33:14 the cert pool had a suppressing effect now on the Court taking so few cases. But there was a cert pool that had I think seven justices in it even when they were taking 160. Do you think that there is a change in the way the cert pool operated between 30 years ago and the time when you left the Court?

JUSTICE STEVENS: I'm

04:33:33 really not sure, 'cause I think it always would've had some depressant effect. It took more time for it to get the institutional power that it since acquired.

MR. MCKENZIE: Justice, I wanted to ask you another question about change at the Court with respect to oral argument. During your time at the Court, oral argument became somewhat

04:33:59 more. . .

MR. ESTREICHER: Active.

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	MR. MCKENZIE: Active, that's the right word, or energetic. The bench became hotter, I think most observers
04:34:07	would say. Do you think oral argument today at the Court is better than it was when you joined the Court? Do you think it better contributes to the decisional process of the justices?
	JUSTICE STEVENS: I really don't know, 'cause I think you're right that it does seem to be more active, but there are justices whom I
04:34:27	admire on both sides of the participation that are responsible for it. I mean Justice Scalia has always been an active questioner. But Justice Sotomayor I think may be outpacing him now. She's active too. And I think I'd say to both of them, I think there are times when their questions have prevented, have interfered with the ability of the
04:34:51	advocate to get their points out. But they’re certainly better judges

Timecode	Quote
	of what will work right now than I am.
	MR. ESTREICHER: Justice Scalia, any,
04:35:02	Justice Scalia, I apologize. I was thinking of Justice Scalia.
	JUSTICE STEVENS: Don't apologize.
	MR. ESTREICHER: Justice Stevens, are there procedures you think the Court should change that might improve decision making? Does anything come to mind?
	JUSTICE STEVENS: Well, the
04:35:18	one that I mentioned, I think in one my books is that they shouldn't have moved the conference table. [Laughter] I think, 'cause I'm conscious now my hearing is not what it used to be, that there are times when you're sitting at the end of the table from the Chief Justice that you may not hear everybody else as well as you should. I don't know if that's still a
04:35:41	problem or not. But I have a hunch it still may be.

Timecode	Quote
	MR. ESTREICHER: Given the recent news about Justice Ginsburg's changing a mistake in her opinion, I
04:35:50	don't know if you saw that, she had made some assertion about the consequences of a case, and then she's had to retract it,[231] would it make sense for the opinions of the Court in most cases to be released on a provisional basis, to sort of elicit commentary and then two or three weeks later they would be final, if they were not changed?
04:36:15	JUSTICE STEVENS: I don't really think that's necessary. Maybe there's an occasional glitch that has to be corrected, but I think the present practice is probably okay.
	MR. ESTREICHER: Should we reduce the number of clerks allotted to justices or increase the number?
	JUSTICE STEVENS: Well, they're better judges of that than

[231] Adam Liptak, ***A Rare Admission About a Correction***, N.Y. TIMES, Oct 23, 2014, at A21.

Timecode	Quote
04:36:31	I am. I, as you know, I started out with less than the full complement, but by the time I retired. . .
	MR. ESTREICHER: Went back to four.
	JUSTICE STEVENS: I had the
04:36:40	full number. And I can't say that either system is better than the other. The reason I think I particularly like just having two clerks was that you do have, two clerks are more thoroughly involved in everything that goes in in the chambers than when they're four.
	MR. ESTREICHER: During your time on the Court, were you the only justice
04:37:02	who wrote his own first drafts?
	JUSTICE STEVENS: I don't know, and I'm not sure there's a blanket rule. I assume that sometimes other justices have written a number of first drafts.
	MR. MCKENZIE: Justice, I wanted to ask a follow-up question on clerks. This is a purely parochial and personal question. I was among the

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first group of four clerks that you hired in one cohort. Earlier you had been hiring three clerks of your own and then borrowing a clerk from a retired justice. And what made you

04:37:59 decide to finally go to four clerks as a, on a standing basis?

JUSTICE STEVENS: I'm sure it must've been there was such an outstanding candidate available that I couldn't turn him down.

MR. MCKENZIE: Perfect answer. Perfect answer.

MR. ESTREICHER: That's what he was looking for.

04:38:14 JUSTICE STEVENS: And he by the way was the only clerk who ever won the trivia contest in the clerks' annual party at the end of the year. So you're unique in many respects.

04:38:27 MR. MCKENZIE: Thank you.

MR. ESTREICHER: Were there justices you've been closer to than others? I mean who are the-- let me rephrase that. Who were the justices during

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the period you were on the Court that you were most close to?

JUSTICE STEVENS: When I was a law clerk myself?

MR. ESTREICHER: No, when you were a

04:38:40 justice.

JUSTICE STEVENS: I'm not sure I understand.

MR. ESTREICHER: Of your colleagues on the Court, were there some that stand out as colleagues that you were most close to, or most influenced by?

JUSTICE STEVENS: You're not talking about clerks; you're talking about colleagues.

04:38:58 MR. MCKENZIE: Colleagues.

MR. ESTREICHER: Colleagues, yes.

JUSTICE STEVENS: Well, I listened to all of them, to tell you the truth, and I really

04:39:15 don't think so.

MR. MCKENZIE: Justice, I wanted to ask you some retrospective questions, to look back over your time on the Court. And the first one was about

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areas of the law in which you think you have had particular influence. Do you think there is any particular area of the law that you would stake out as one in which you've had the

04:39:38 greatest influence, or a great deal of influence as a member of the Court?

JUSTICE STEVENS: Well, I knew that question was coming, and I've given it some thought. And I don't really have a very good answer, but I do think there are several areas of the Court that I can be proud of my contribution. And two of

04:39:59 them actually go back to my service on the Seventh Circuit. I think that probably the most significant was in the area of patronage. I wrote an opinion in the Seventh Circuit

04:40:13 holding unconstitutional a large patronage discharge in the state of

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Illinois.[232] And that was the subject of debate for many years in the Court. And I really, the Court has generally come to agree with the position I took then.[233]

A second area was the difference between political factors that affect elections and racial factors. And in

04:40:43 a case called Cousins on the Seventh Circuit, I thought that racial decisions in drawing district lines and the like should be judged the same standards as political decisions.[234] And I still feel that way. And I really think that is the basis for the change that's got to come sooner or later, where they get rid of gerrymandering, because if they

04:41:07 can do it in racial gerrymandering,

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[232] Illinois State Employees' Union v. Lewis, 473 F.2d 561 (1972), cert. denied, 410 U.S. 928 (1973).

[233] Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980).

[234] Cousins v. City Council of Chicago, 466 F.2d 830, 848-53 (7th Cir. 1973) (Stevens, J., concurring).

Timecode	Quote
	it's simply absurd to say they couldn't do it with regard to political gerrymandering. And that goes way back to my thinking on the
04:41:18	Seventh Circuit. And I think I've had some influence on a number of patent decisions too, and I think I've been constructive, although I was very disappointed on the last decision day in my tenure on the Court that they didn't categorically hold that business patents were not patentable subject matter, but I do--
	MR. MCKENZIE: [Interposing] Business
04:41:42	method patents, you mean?[235]
	JUSTICE STEVENS: Pardon me?
	MR. MCKENZIE: Business method.
	JUSTICE STEVENS: That, right, they didn't exclude business patents. But in any event, I think the law is moving in the

[235] Bilski v. Kappos, 561 U.S. 593 (2010). Justice Stevens wrote an opinion concurring in the judgment. ***Id.*** at 613.

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04:41:56 correct direction there with later decisions. And I also, I can't claim credit, you mentioned the overruling in Bowers against Hardwick. But that also goes back to my first year

04:42:13 on the Court, we refused to, we affirmed summarily a sodomy case which clearly was a sufficient issue that should've justified review back there.[236] And I think I've had some favorable impact on the law in my opinion in Bowers.[237] I really, and I mentioned in affirmative action, I mentioned the Wygant opinion. I really think that was a quite

04:42:40 significant opinion.[238]

And the other area that I think I've had more impact than may have been understood is in sentencing. I

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[236] Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976). Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and set the case for argument.

[237] Bowers v. Hardwick, 478 U.S. 186, 214 (1986) (Stevens, J., dissenting).

[238] Wygant v. Jackson Board of Education, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting).

Timecode	Quote
	couldn’t remember the name of the case this morning, and Travis got it for me,[239] but there was a dissent I wrote, let's see -- back in
04:43:17	1997, in a per curiam case called United States against Watts, in which the Court held that it was permissible for a judge to rely on acquitted. . .
04:43:29	MR. MCKENZIE: Acquitted conduct. JUSTICE STEVENS: . . . conduct in sentencing. I thought that was quite wrong. And I dissented from the per curiam opinion of upholding the practice.[240] And at an occasion at Georgetown Law School shortly after I retired, there was a panel discussion of some of my work. And Clement, who had been a solicitor general during--
04:43:58	MR. MCKENZIE: [Interposing] Paul

[239] Travis Crum, law clerk to Justice Stevens in the 2014 Term.

[240] United States v. Watts, 519 U.S. 148 (1997) (Stevens, J., dissenting).

Timecode	Quote
	Clement[241].
	JUSTICE STEVENS: Yeah, Paul, identified that as a case that he thought may well have led to the decisions invalidating the sentencing
04:44:12	guidelines.[242] And I do think that some of my writing in the sentencing area has had a positive effect on the law that I'm really proud of, although I still think that sentences are more
04:44:24	harsh than they need to be as a general matter.
	MR. MCKENZIE: So you would include Apprendi?
	JUSTICE STEVENS: That's right. So that goes to Apprendi, in which, it's

[241] Paul D. Clement, Esq. served as the 43rd Solicitor General of the United States from June 2003 to June 2008. Earlier in his career, Clement clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the U.S. Supreme Court.
[242] The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens, Georgetown Law Center, October 8, 2010. The remarks of Paul Clement were not published in the symposium issue of the Georgetown Law Journal, but a video of the panel in which he participated, The Legacy of John Paul Stevens, is posted on the C-SPAN website, http://www.c-span.org/video/?295896-2/legacy-justice-john-paul-stevens.

Timecode	Quote
	quite controversial. And I think Apprendi was clearly correct.[243] And the Court more recently has finally buried Pennsylvania against
04:44:47	McMillan, which Chief Justice Rehnquist wrote, and I dissented in that case, where the case held that a sentencing factor could mandate an increase in a sentence by a judge who didn't think it should.[244] And the other thing I wanted to mention was, I don’t know where I've got it now. Oh, I think the cases involving Guantanamo detainees are not
04:45:30	currently particular subjects of discussion, but I do think they were

[243] Apprendi v. New Jersey, 530 U.S. 466 (2000). Justice Stevens wrote the opinion of the Court, holding that, apart from the fact of a prior conviction, any fact that increased the penalty for a crime beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt.

[244] Alleyne v. United States, 133 S. Ct. 2151 (2013); McMillan v. Pennsylvania, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting). Justice Rehnquist, then an associate justice, wrote the opinion of the Court in McMillan.

Timecode	Quote
	constructive cases.[245] And even though the outcome of everything down there had not gone the way I thought it
04:45:44	should, I do think those were important cases. And the case in my last term on the Court on the rights of, adequate representation for immigrants who are on trial for cases that can have the consequence of making a deportation necessary, I think that was a significant opinion.[246]
04:46:21	But as I reflect on it, there are probably others I should mention, but I think the most important opinion I wrote was my dissent in Bush against Gore.[247] And I think that I have often thought that I made a mistake

[245] Justice Stevens wrote the opinions for the Court in Rasul v. Bush, 542 U.S. 466 (2004), and Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[246] Padilla v. Kentucky, 559 U.S. 356 (2010). Justice Stevens wrote the opinion of the Court.

[247] Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting). The majority of the Court stopped the state of Florida's recount of presidential election ballots, resulting in the election of George W. Bush.

Timecode	Quote
	in that case in not explaining why the distinction between what kind of chads they have--hanging chads and dimpled chads--it was an absolutely frivolous basis for an equal
04:46:54	protection argument, that I should've discussed that in the opinion, because there's limited time to do it.
	But on reflection, I think I was
04:47:04	correct to concentrate on the one really terrible error that the Court committed, in making a decision on the stay application that really did impact on the respect that the public has for the work of judges. And I think that case created very serious damage to the rule of law. I think our present cynicism about the judicial process may actually go back
04:47:44	to that particular case, because it was such a dramatic contrast between the performance of the Court in a political area, and the magnificent decision in Nixon against the United

Timecode	Quote
	States, in which four justices appointed by the president joined in opinion that led to his impeachment, a magnificent chapter in our history.[248]
	MR. MCKENZIE: Thank you, Justice.
04:48:14	JUSTICE STEVENS: And Bush against Gore just destroyed so much of that.
	MS. LEE: Justice, one follow up on your previous answer. One area that
04:48:24	you didn't mention as an area in which you had influence was antitrust. I wonder whether you've deliberately excluded it, whether you had any thoughts on the effect that you might have had on the Court's jurisprudence in an area as to which you are an expert.
	JUSTICE STEVENS: Well, it's interesting. I did write some
04:48:47	opinions shortly after I came on the Court. There's one called Fortner

[248] United States v. Nixon, 418 U.S. 683 (1974) (holding that President Nixon must produce tape recordings and documents in responses to a grand jury subpoena).

Timecode	Quote
	against the steel company, in which we reexamined the basis for the prohibition on tying clause, and which basically reversed, it didn't do it in so many words, but took an entirely different approach to antitrust jurisprudence that had been taken in the very same
04:49:14	case several years earlier. And I thought that was a very constructive opinion in antitrust law.[249] But in later years, the Court took some steps that I thought went in the
04:49:28	other direction, and I ended up along with Justice Breyer in dissent, for example, in the case involving whether resale price maintenance, I forget the name of the case now, should be overruled.[250]

[249] United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

[250] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 908 (2007) (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg).

Timecode	Quote
	MR. MCKENZIE: Dr. Miles.[251]
	JUSTICE STEVENS: Dr. Miles. And so I can't claim that I was a great victor, but although for a
04:49:53	time my views did seem to have some impact.
	MR. ESTREICHER: You left off employment law, labor law. Any opinions in those areas that you are fond of?
	JUSTICE STEVENS: Well, again, for me that was sort of a subcategory of Chevron, that pretty much I felt we pretty much should do
04:50:15	what the agency commanded. But there is one that folds into arbitration.
	MR. ESTREICHER: Yes.
	JUSTICE STEVENS: I do think the Court got arbitration quite
04:50:31	wrong in interpreting what Congress really intended with the Federal Arbitration Act, and that arbitration

[251] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

Timecode	Quote
	kind of has grown like Topsy[252] in ways that I don't think the statute was intended, and which I don't think that has served the public very well.[253] I mean when they find that the fine language on a ticket can have the decisive effect on the passengers
04:50:57	that it does, it seems to me that something has gone wrong.[254]
	MS. LEE: A couple of other, looking back questions, which you may or may not have responses to. One is, do you have any opinions you would

[252] Topsy is the name of a young slave girl in the book ***Uncle Tom's Cabin*** by Harriet Beecher Stowe. The word 'Topsy' is used allusively to refer to something that seems to have grown of itself without anyone's intention or direction. OXFORD ENGLISH DICTIONARY ONLINE 2017 http://www.oed.com/view/Entry/203471?redirectedFrom=Topsy&

[253] ***See*** Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 76 (2010) (Stevens, J., dissenting). Justice Stevens dissented from the Court's holding that the Federal Arbitration Act permitted delegation to an arbitrator of exclusive authority to resolve any dispute relating to the enforceability of an employment agreement.

[254] See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 604 (1991) (Stevens, J., dissenting) (attaching a copy of the cruise ship passenger's ticket containing in fine print a forum selection clause unfavorable to the passenger); Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) (upholding damages limitation in Warsaw Convention even though it was disclosed only in 8-point type).

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consider your favorites? And if you do, why?

JUSTICE STEVENS: Well, Carol, I still like Karcher against Daggett.[255]

04:51:25 MS. LEE: Uh-huh. So do I.

JUSTICE STEVENS: I thought you might . . .

MS. LEE: To remind. . .

MR. ESTREICHER: A case you worked on.

04:51:29

MS. LEE: For the record, that was a case in which the Justice wrote a concurrence in a challenge to the constitutionality of the congressional redistricting map for New Jersey.

JUSTICE STEVENS: Correct.

MS. LEE: Which was put in place in a strictly party line vote behind closed doors in the New Jersey state legislature.

04:51:47

JUSTICE STEVENS: That's right, and

[255] Karcher v. Daggett, 462 U.S. 725, 744 (1983) (Stevens, J., concurring) (asserting that New Jersey congressional district lines drawn on a partisan basis should be subject to challenge as political gerrymandering in violation of the Equal Protection Clause).

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which has had a significant, and which as you know I include the map there to indicate that I do think you can tell gerrymandering when you see it. This is some of the wisdom of Potter Stewart.

[Laughter] Applies to gerrymandering.

MR. MCKENZIE: It's the Jacobellis

04:52:07 rule. You know it when you see it.[256]

JUSTICE STEVENS: You know it when you see it; that's true. And of course that reflects the fact that the issues today are not the same as

04:52:19 they were back then. For years, obscenity was a major issue in deciding what was obscene and what wasn't. And that's kind of not part of the law any more, or not debated very often.

MS. LEE: And finally, on this category of questions, looking back, are there any votes or any opinions

[256] Jacobellis v. State of Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

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	that you regret?
04:52:47	JUSTICE STEVENS: Well, there are different things. I mean, regretting a decision doesn't necessarily mean you were incorrect in your vote. For example, I've cited the Texas death penalty statute. I think I was incorrect in my vote.[257] I've thought about it. But there are other cases that I regret more or less as though, because I
04:53:11	felt I was compelled by the law to go along with the decision. And I guess the one that's of most current interest is the question on voter ID business, where I wrote the opinion upholding
04:53:25	the Indiana statute which required voters to have photo IDs to vote.[258] And I'm still persuaded that the factual record developed at great

[257] Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens).

[258] Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

Timecode	Quote
	length by Judge Barker in the district court and reviewed carefully by Judge Posner and another judge in the Seventh Circuit, although there was a very persuasive dissent in the Seventh Circuit,[259] did lead to the
04:53:50	conclusion that the statute was a permissible statute, even though it had partisan effects that were not, that were intended but not necessarily invalidating. I was under the impression at the time that free photo IDs would be available to the voters, which I think was true in Indiana, although the number of places where they could
04:54:24	be obtained was much smaller than the number of voting booths, and so that as times developed, they apparently were not as generally available as the record indicated they would be.
04:54:38	But in any event, I think that that's

[259] Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007); 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

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a decision I can say I regretted, but I don't think at the time I made it that it was an incorrect interpretation of the record. And there were three different opinions in the case, and different views. Justice Souter wrote a really magnificent dissent.[260] I've always admired it. But I

04:55:01 thought at the time, and I still do, that some of the material in the dissent was based not on testimony in the record, but rather he took judicial notice of a lot of material on the Internet and elsewhere that I didn't think could be a proper part of the analysis. I'm not criticizing him for it because he did write a beautiful dissent.

MS. LEE: You mentioned, you put

04:55:25 quite a bit of emphasis on the record and the findings of the trial court in that case. And as I understand

[260] Crawford v. Marion County Election Board, 553 U.S. 181, 209 (2008) (Souter, J., dissenting).

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	it, at the time that that decision was issued, people who were looking
04:55:37	to challenge voter ID laws in other states took some comfort that your opinion emphasized the record and set out to build better records for the challengers' case in those other states. What happened was that, the circuit in Georgia is the one I'm thinking of in particular, did, or the trial judge and then the appeal, is to totally ignore the fact that the
04:56:04	Indiana case depended a lot on the record and just looked at the bottom line and said the Supreme Court has ruled that voter ID laws are permissible.[261] So there was a great deal of disappointment that the record-bound aspect of what undoubtedly you intended was not paid attention to. Do you think there's any way that you could've written the

[261] Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009).

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04:56:23 opinion differently that would have made it more clear that this was a case that depended on the facts?

JUSTICE STEVENS: Well, I think I made it--

04:56:32 MS. LEE: [Interposing] Yes.

JUSTICE STEVENS: --pretty clear in the opinion itself. Actually you should bear in mind too that Justice Scalia did not join the opinion. He wrote a separate opinion.[262] And my opinion was announced the judgement of the court, but it was just a plurality. And I think more attention should be paid

04:56:51 to the fact that Justice Scalia's view of the law was rejected by the Chief Justice and Justice Kennedy and me.

MS. LEE: Thank you.

MR. MCKENZIE: Justice, we've come to the end of our questions. But we

7195 wanted to give you the opportunity to

[262] Crawford v. Marion County Election Board, 553 U.S. 181, 204 (2008) (Scalia, J., concurring in the judgment).

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make any other comments, if there's something that we haven't covered

04:57:12 that you think is pertinent and important, we wanted to give you a chance to speak on it.

JUSTICE STEVENS: Well, that's very nice. I did a little

04:57:24 thinking as I've indicated on your answer to your question about whether I made any contributions to the law. But I haven't really thought about a final address. I think perhaps I should repeat the wisdom that the president expressed when he said that his speech would be little known nor long remembered. And it's been pretty well known and pretty well

04:57:56 remembered.[263] And I know there are many, many things that I should've thought about, but I've just kind of done my best on a kind of a casual basis. But I still have great confidence in the Court as a very

[263] Justice Stevens was referring to Lincoln's Gettysburg Address.

Timecode	Quote
	important institution in our society and have great confidence it will be in the future too.
	MR. MCKENZIE: Justice Stevens, thank
04:58:25	you very much.
	MR. ESTREICHER: Thank you very much.
	MS. LEE: Thank you.
	JUSTICE STEVENS: Thank you.
0:4:58:42	[END RECORDING]