THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

John Paul Stevens

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PREFACE

The following oral history is the result of a recorded interview with John Paul Stevens conducted by Mary Marshall Clark and Myron Farber on August 29 and November 7, 2012. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD | Session One

Interviewee: John Paul Stevens | Location: Washington, D.C.

Interviewers: Mary Marshall Clark (Q1), Myron Farber (Q2) | Date: August 29, 2012

Q1: So, good morning. If you could just say a few words.

Q2: Just a few words for the machine. It could be any words.

Stevens: Well, I'm happy to welcome you to the court.

Q1: Thank you.

Stevens: I hope we get along well in the next thirty or forty minutes, and that most of what we say makes sense.

Q1: Perfect. Everybody's recording. So, again, I want to thank you. I give you our deepest thanks from Columbia for giving us this honor.

As you saw, maybe, in the outline, I'm interested in the evolution of your judicial philosophy—how you would explain it—and I'm interested in going all the way back to [Wiley B.] Rutledge [Jr.], and what it was like to work with him, and to work on *Ahrens* [*v. Clark*, 1948]. So anywhere you'd like to start.

Stevens: Well, again, I'm not sure how to start because, to go back to the beginning, I guess the first person who got me interested in the law was an older brother, my brother, Jim [Stevens], who really persuaded me to go to law school, and persuaded me that one can get much more satisfaction and pleasure out of doing things for other people in the profession than you expect. So I got involved in the law at his urging, and went to Northwestern when the school was a little different from some of the other law schools like Michigan and Harvard, because the school concentrated more on different fact patterns and different procedures, rather than broad rules of law. One of the basic principles I learned was to beware of glittering generalities, and try to work on specific problems. So I think I did have a different kind of legal education than many people had.

Q2: Were Nathaniel [L.] Nathanson or Leon Green of any influence there?

Stevens: They were tremendously influential to me. Both of them. Nat Nathanson is the one who most frequently cautioned against overly broad generalities and the like. Leon Green was a very inspiring torts teacher. He required his students to stand up when they recited in class. He was merciless in his questioning and interrogation of students. If you've talked to other Northwestern graduates—or Texas graduates, because he also taught at Texas—everybody remembers Leon Green as a very inspiring and merciless instructor.

Q2: Did you anticipate or seek a Supreme Court clerkship when you were graduating?

Stevens: Well, at the time of my graduation, yes, because I had already been hired at the time, but I didn't when I went to school. It developed later, during my second year at law school. Congress authorized the Supreme Court justices to have a second law clerk, and Justice Rutledge took advantage of that and decided to hire a second law clerk. He did his recruiting through two members of the Northwestern faculty, with whom he was very close. One was [W.] Willard Wirtz, who later became secretary of labor. The other was Willard [H.] Pedrick, who was a dean at a law school that was founded in the west a few years later. They're the ones who got Art Seder and me in, to consider two available vacancies. To make a long story short, Art and I flipped a coin to see which one would get to go with Rutledge and which would go, a year later, with Fred [Frederick M.] Vinson, and I won the flip.

Q2: Were you anxious to go, rather than to wait another year?

Stevens: Oh, yes. Definitely.

Q1: And what was he like to work with? How would you describe him?

Stevens: Justice Rutledge?

Q1: Yes.

Stevens: Well, he was a very interesting person. Both Stan [Stanley L.] Temko and I had recently been in the military, so we had a military approach to certain things. We had an office—the two

of us were in one office, and the secretary's office and the justice's was on the other side. When he would come into our office, we would, of course, stand up to greet him. That sort of embarrassed him a little bit [laughs], and he had to make us understand that we could just go ahead and relax and sit there. But you might say he was a very democratic person, and he was very, very likable, extremely conscientious and a very hardworking justice. You couldn't help but really like him. He was a very lovable man.

Q2: Did you know anything about his jurisprudence at the time you came?

Stevens: No, I really didn't. I knew he had written the dissent in the [Tomoyuki] Yamashita case, which was particularly important, but I didn't really know much about his special jurisprudence.

Q2: Among the cases that came up, one could say it might be relevant to Guantánamo and to your decisions later on, was the *Ahrens* case. Do you recall that case?

Stevens: I recall it very well, and I remember he was very disturbed about the holding in the case, and I remember feeling very strongly that the case was incorrectly decided. The holding was that, under the habeas corpus statute, both the custodian and the prisoner had to be in the same district—the district in which the habeas corpus proceeding was filed. It seemed to us that that was not, even though the words within their respective jurisdiction appear in the statute, it did not seem to either of us that that was the intent—to limit jurisdiction that way. We thought it could produce all sorts of unfortunate results.

Q1: But I understood that you had drafted some part of that dissent for his approval, and that you may have gone a little further than you might have, according to some of the people I've read.

Stevens: Well, the opinion was his opinion. There's no doubt about it. But parts of my draft did show up in the final draft too. That's correct.

Q1: Could you tell us just a little bit about why that became important later? Why it stood, so many years later, as an important—?

Stevens: Well, what happened later that was really important was that the case was overruled. It wasn't recognized as a terribly important overruling at the time, although it clearly was overruled, in a case whose name I can't recall at the moment.

Q2: The Kentucky case.

Stevens: Yes. That's right. Kentucky against somebody. The fact that it had been overruled removed it as precedential support for a decision that Justice [Robert H.] Jackson wrote a few years later, involving the availability of statutory habeas corpus to some—I guess they were German. They were people who had been tried in China, and I can't remember—

Q1: German prisoners of war—yes.

Q2: [*Johnson v.*] *Eisentrager* [1950].

Stevens: Yes, that's right. That's right. So the overruling of the case sort of undermined the basis for the precedent that Justice Jackson had written, and provided—part of the reasoning in the opinion that I wrote involving—I forget which—*Hamdi* [*v. Rumsfeld*, 2004] or *Hamdan* [*v. Rumsfeld*, 2006]—I never remember case names well—but basically the holding that habeas corpus, the statutory habeas corpus, was available to the internees at Guantánamo.

Q1: I think that was *Rasul v. Bush* [2004]. Maybe.

Stevens: Yes. The *Rasul* case. *Rasul v. Bush*. That's the one. Yes.

Q2: There were actually three cases that came down at that same time, in 2004. *Rasul*, as Mary Marshall points out, held as it did, and there was [*Rumsfeld v.*] *Padilla* and *Hamdi*. And *Padilla* and *Hamdi* involved United States citizens.

Stevens: Yes. *Padilla*—that was the one—there was the question of the government moving the defendant from place to place to prevent him from filing for habeas corpus relief in the right forum. I think that was right. And *Hamdi* was an American citizen. I didn't write in that case. I think I joined Justice [Antonin G.] Scalia's opinion—

Q2: You did.

Stevens: —if I'm not mistaken. We both thought that the writ of habeas corpus definitely was available, and had not been suspended by another president's decree. The interesting thing about that case was that, I think, the outcome was eight to one. I think only Justice [Clarence] Thomas dissented in that case; even Chief Justice [William H.] Rehnquist, who was a strong supporter of the executive in case after case, joined Justice [Sandra Day] O'Connor, if I'm not mistaken.

Q1: We've brought you a lot of years, already, from Rutledge to post-9/11, but is there anything else you'd like to say about working with Rutledge, and how he influenced you overall, and how your own philosophy developed?

Stevens: Well, he definitely had a huge influence on my approach to the law. Among other things, he wrote his own opinions. When he would write an opinion, he wrote it out in longhand on yellow pads, and sometimes there would be a note at the bottom: "J.P.S. get cites," and I would have to find footnote material and that sort of stuff. But the opinions he wrote were his own opinions, although he did have a practice of asking his clerks—there were two of us. Each of us was permitted to write the first draft of a majority opinion, and the opinion he assigned to me was a case called *Mandeville Island Farms* [*v. American Crystal Sugar*, 1948], which involved the applicability of the Sherman Act to an alleged conspiracy among refiners of sugar, all of whom were located in California. Arguably, they were just involved in intrastate activity, but the commerce clause had been broadly construed in cases that I learned about in law school. I thought that this was a pretty easy case. There were two questions—whether the Sherman Act applied to a conspiracy among purchasers, and also whether it applied to a conspiracy among the defendants, all of whom were located in California. I wrote an opinion, it was about five or six

pages long, and I was quite proud of it. It was sort of like a law school note, where, you know, I had everything worked out in succinct form. I turned it in to the justice, and he didn't talk to me about it for a while. Maybe a week or so later I got back his draft, and his draft must have been about thirty pages long. It sort of started from the beginning and explained why the commerce clause *did* apply. It's a very important opinion, and he basically overruled a case called [*United States v.*] *E.C. Knight Co* [1895], which is a case that said mere manufacture, or mere production within a state, is not interstate commerce. He wrote an eloquent, articulate explanation of why the law should be as he described it in that opinion. In what I wrote there were about two pages, not even two pages—right in the middle of his very distinctive style of writing. But in the midst of the opinion there is a paragraph, in the law review style, that doesn't fit [laughter]—

Q2: —and that's you?

Stevens: —and that's mine. [Laughter] There's one paragraph. If you look carefully, you'll find it.

But I remember that case particularly because years later—I appreciated the wonderful scholarship that Justice Rutledge exhibited in his writing, but I thought we didn't need that. The law is perfectly clear. Why be so careful? Well, years later, when I was on the court here, we had a case involving the constitutionality of the gun-free school zone statute, which basically made it a federal crime to possess pistols in or near public schools. The court, to my amazement, held the statute unconstitutional. Not only did they hold it unconstitutional, but Justice Thomas wrote a separate opinion in which he said that the *E.C. Knight* case should be the guiding principle here, on which we should overrule *Mandeville Island Farms*. So my good friend, Clarence, wanted to

overrule the one case that I had something to do with on writing the majority. His views on the commerce clause are a good deal narrower than Justice Rutledge's or mine.

Q2: Right. You are, by the way, the third longest serving justice in American history?

Stevens: I learned that around the time I retired. I also learned that the second longest justice, Justice [Stephen Johnson] Field, probably was too sick during the last year of his service to do any work, so, really, I ought to be in second place. [Laughter]

Q2: By 1995, when Harry [Harold A.] Blackmun retired and you became senior associate justice—or, as they often say, "second among equals"—would you say you had a fairly closely developed judicial philosophy?

Stevens: Well, I don't know. I've never really thought about what exactly my judicial philosophy was. I've always taken the cases one at a time, as they come along, so I don't really know the answer to that. I've always felt that it's a continuous process of learning on the job, because you always learn something new in new cases. I'm really not sure how to answer that question.

Q2: Well, some have characterized your position as being one of deciding as little as possible.

Stevens: Yes. That's definitely true.

Q2: But why?

Stevens: Well, because your job is to decide cases; it's not to announce rules of law. If you try to decide the case before you and do the best job you can in that case, you've done your job. And to the extent that you're trying to make rules for the future, you may not anticipate all the aspects of the problem that really are there.

Q2: Well, can't you just send a message to the framers and say, "What did you mean?"
[Laughter]

Stevens: Well, yes. But you're not sure you're going to get an answer.

Q2: Originalism depends upon an interpretation of what the framers meant. Is that correct?

Stevens: Well, there are two views of that. One is, what did the framers mean? Another view is, what did the people who ratified the convention think they meant? So there are two different ways of looking at that issue. It's quite interesting that some of the people who are the most earnest advocates of original intent don't believe in looking at the intent of grassroots legislation. They think that legislative history should not play a very important role in analysis statutes. On the other hand, when you get to the constitutional provision, they want to make that almost as important as the text, if not more important.

Q1: Since we're in 1995, and moving to one of the darker times of American history—9/11—you're a veteran. You're a very distinguished veteran. What was your reaction? Where were you,

and what did you experience the days after? What did you think about when the government started making its provisions?

Stevens: Well, are you talking about the attack itself?

Q1: Yes.

Q2: And the aftermath.

Q1: And the aftermath.

Stevens: Well, I certainly was not happy with the attack. That certainly is true. I shared the same reaction, actually, with my granddaughter the morning of the attack. I remember absolute amazement at what they had succeeded in doing—blowing up the airliners over Manhattan. It was, I guess, a matter of not really comprehending what was developing. I don't know exactly what to say about that.

Q2: Well, as the Guantánamo Bay detention camp was opened, and as the pictures of people being brought there, and as President [George W.] Bush announced that there were going to be military commissions, did you foresee, even then, that something was going to come before you and the court?

Stevens: Probably, but to tell you the truth I don't remember particularly anticipating what our role might develop to be, at the time. Again, as I say, in the court you react to cases that arise and come to you, and you address them when they're there. I don't remember any period of anticipation in which I said, "Well, we've got to get ready for a series of cases that are going to come down the pike," or anything like that. They just rose, as they did, one after another.

Q2: Just before 9/11, you wrote the majority opinion, I think, called *INS* [Immigration and Naturalization Service] *v. St. Cyr* [2001].

Stevens: Yes. Well, that had to do with a statutory amendment that made it easier to deport aliens who were noncitizens, and we construed the statute making it not quite as easy as the Department of Justice felt that Congress intended.

Q2: Well, it was a habeas case, was it not?

Stevens: I'm not sure, to tell you the truth.

Q2: Still, is there some way to compress—?

Stevens: But I can say, going to back to *St. Cyr* for a minute—in my own thinking back about that case, the Guantánamo case—I don't recall that case having any particular impact on my thinking in the later Guantánamo cases.

Q2: Okay. But one of the commentators says that, "As he later did in *Hamdan*, Justice Stevens closely parsed the restrictive statute in *St. Cyr*, and found the habeas jurisdiction remained available."

Stevens: Okay.

Q2: I just mention it because habeas becomes such a central issue to the cases that would come about.

Stevens: That's true, but—and this goes back to my years with Rutledge—I have to say that habeas played an important role in post-conviction review of criminal convictions in state courts. That was a fairly significant part of my work as a law clerk—was involved in trying to understand the common law writs—error coram nobis, the common law writ of error in habeas corpus—so it's that background, in just full conviction review of state convictions by federal judges, that gave me more of a background than the *St. Cyr* case did.

Q2: When *Rasul* arose, was Ted [Theodore B.] Olson the solicitor general?

Stevens: I think he was.

Q2: And the question before the court was framed in such a way as to make Cuba a foreign territory. The question before the oral argument had been rewritten to make it more neutral. Do you know how that would come about?

Stevens: I don't remember that. Did we order an argument on a different question? Or did the government, in its brief, just reframe the question?

Q2: I think you ordered a different question.

Stevens: It's funny. I don't have any recollection of that. That's interesting.

Q2: Do you remember, at all, a colloquy with Mr. Olson, Solicitor General Olson, in which you drew out the point that the war was really irrelevant to the matter of habeas at *Rasul*?

Stevens: I really don't remember the colloquy, but I remember the point. He said, "That's correct." The availability of habeas corpus did not depend on whether or not we were at war, or whether or not they were prisoners of war, if they were in a particular place, subject to the jurisdiction of the federal government.

Q1: I know it's hard to remember that time—everything happened so fast—but in 2003, 2004, just looking at the historic context, was there any kind of real information available about what was happening at Guantánamo in terms of the torture? The systematic torture?

Stevens: I would say no. I think it may be that in one of the cases, I guess it was *Boumediene* [*v. Bush*, 2008], that Tony [Anthony M.] Kennedy and I originally voted to deny cert, and a petition for rehearing called our attention to facts that affected our thinking on the case. I don't remember

the details exactly, but we both had originally thought that we should not be reviewing the procedures that Congress had created until they'd been tried out—wait until the inmates had had a chance to take advantage of the proceedings. But there was some development to which our attention was called in the rehearing petition that made us feel very seriously that the procedures were more defective than we might otherwise have thought, and also, that it would be important to have a more prompt review than we originally thought.

Q2: That was a declaration by retired Lieutenant Colonel Stephen Abraham.

Stevens: That sounds right.

Q2: That's right—who had served on the Combatant Status Review Tribunal.

Stevens: That was brought out in the rehearing petition.

Q2: That's right. Exactly. And he said, "They simply don't work."

Stevens: That's right. It turned that we were persuaded, when we heard the case on the merits. That's the case where Tony wrote the majority opinion, if I remember correctly.

Q2: Yes, he did. In fact, as senior associate justice, it was your prerogative to assign cases when you were in the majority. Isn't that correct?

Stevens: Technically, that's true. The assignment is made by the senior justice in the majority. But very often it's a collective decision, and I remember on that one I thought Tony was very well prepared on the issue and so forth. I don't remember, in effect, assigning it to him or really talking to him—"Maybe you ought to write this one." I just don't remember.

Q2: As an old Chicagoan, you didn't engage in any politics here? "Maybe I should give this opinion to this justice or something, to hold him in?"

Stevens: No, I don't think so on that. Tony—there was no question about his conviction on the outcome. I would not attach any significance to the assignment other than the fact that I was satisfied he would do a really good job, and I think he did.

Q2: Justice Stevens, can you comment on the traditional position of the Supreme Court with regard to executive power, especially in wartime? And is it a question of deference?

Q1: Let's go back. You can go back as far as you want to, to answer that question.

Stevens: Well, the deference is not just in wartime. There's deference to the executive and the executive's responsibility for military matters. It's true in peacetime as well as wartime. But, again, it depends on just what the issue is, and of course—talking about ends—one thing I might say that runs through my mind as we talk about this is that we disagreed with the executive on several issues during that period. I have to say that President Bush was totally respectful to the court on every one of those issues. He never questioned the court—that is, I have no recollection

of his ever suggesting that the court was going beyond its proper responsibility as a court. It was not trespassing across the line in the separation of powers, and I think the president respected us in our decision.

Q2: Was it traditionally the role of the court to not mess into executive prerogatives?

Stevens: Well, it's a question of exactly what terms you use. The court respects the executive's function, particularly in military matters and foreign policy, generally. There's more respect for the executive than in other areas.

Q2: Is Chevron a good example of that?

Stevens: Well, I’m not sure I've ever thought of Chevron just exactly in those terms. I've thought of Chevron as showing more respect to Congress. But you're right. It's respect to both Congress and—in Chevron, the decision was that Congress had decided that the agency should be making close calls on important questions, and we were respecting the Congress's decision that the agency should be making the decision—that, in effect, you gave the executive more authority, but it's a mixture of respecting a congressional decision as well.

Q2: But when *Rasul* came up, the first of the Guantánamo cases, really, was it a surprise to you that the Bush administration would take the position that this military naval base in Cuba was on foreign territory, and was a legal black hole as far as the United States courts were concerned?

Stevens: Well, I don't remember being surprised at the position that the executive made. They were party to litigation, and they had set up a program that they thought was constitutional, and the arguments they made to defend it were legitimate arguments.

No, I won't say that I was that surprised.

Q1: Can I just ask you—I'm not a lawyer, so I apologize for that. But just as a lay person—in the *Rasul* case, there was not a distinction made between a foreign national, as far as I could tell, and an American citizen. What was your thinking when you decided it that way, or read it that way?

Stevens: Well, the law, generally, doesn't draw distinctions between citizens and aliens when the right of the person is what is at stake. The Fifth Amendment and the Fourteenth Amendment talk about rights of persons; they're not rights of citizens, so the distinction between an alien and a citizen really is not particularly relevant to the question of whether the writ was available. Now I know that later on, in the case in which Justice Scalia wrote about the suspension, in his view the citizenship does make a great difference. But I don't share his view on that particular issue.

Q1: So, in terms of your views, where do you go back in history to understand those, to the common law principles or—?

Stevens: Yes.

Q1: Could you talk a little bit about that? Because I noticed in your opinions you draw a lot upon different historical precedents.

Stevens: Right. And, of course, habeas corpus is—was—a common law writ, and it was a writ that preceded the adoption of the Constitution. It was there, and the Constitution itself says that "The writ shall not be suspended, except in certain circumstances." So you necessarily look back to the common law to help understand what the writ does. And the common law I don't think drew distinctions between aliens and citizens and noncitizens.

Q2: Yet, in both the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, the Bush administration tried to strip this court and other federal courts of habeas review.

Stevens: Well, that's why—

Q2: Are they reading a different Constitution?

Stevens: Well, the common law writ has both the common law and, therefore, constitutional source. It also has a statutory source, and they tended to—I forget just which statute we're talking about, but you have to keep in mind that different sources may make a difference in particular cases. Now in *Boumediene*, if I remember correctly, Congress had tried to take away the statutory remedy, but Justice Kennedy correctly wrote that the common law writ remained available, and, therefore, it did survive.

Q1: There was more information out, really, beginning, I guess, in 2006, about the systematic nature of the torture in Guantánamo. I realize that this would never influence the court in terms of its logistical work, but were you surprised? What was your reaction to that, and did you all talk about it as justices?

Stevens: Well, I can't remember whether we talked about it. But, of course, that raised a whole separate set of issues—the question of the kind of treatment that a person in confinement must receive, that involves Eighth Amendment protections, not just the question of whether or not some remedy is available. But those proceedings challenging the conditions of confinement really raise a separate category of issues. I don't think we dealt with any of those in the cases that I worked on.

Q2: That's right. But do you recall that when you were actually deciding *Rasul*, there were these pictures about Abu Ghraib and the release of the so-called "Torture Memo" that had been written in the administration in 2002? Does that kind of thing have any impact on the justices' thinking?

Stevens: Well, you're human beings. You must react to these things, but I don't really recall that aspect of the detention as affecting the legal analysis in any of the cases. It may have. I'm not aware of it. It seems to me that *Rasul* could have been any inmate and the case would have been decided the same way.

Q2: But in *Hamdan*, when you wrote the majority opinion, you reached out to the failures of the government in providing for coverage under the Geneva Conventions, for example. That certainly relates to treatment in some respect.

Stevens: Well, I'm not sure we reached out. I think the issue had been raised by the parties, and I think that particular basis for decision—there were two bases for decision in the case, if I remember correctly. There was both that basis, in which Justice Kennedy joined and we had a court, but I also felt very strongly that the charge did not allege a violation of the laws of war, because it was a conspiracy charge. And I've always been very disappointed that there was not a full court to join that part of my opinion in that case.

Q1: You got four votes on that, though.

Stevens: I got four votes, but Justice Kennedy—but we did not get a court.

Q2: Does four votes equal no cigar?

Stevens: I guess so. [Laughter]

Q1: Of all these amazing opinions you wrote or signed, what are you proudest of during this period? What do you think will stand the longest?

Stevens: Gee, I really don't know. I don't really look at this period as sort of a separate chapter of my work on the court. I think of the *Ahrens* case in connection with this case, in connection with the *Rasul*, I guess it is, too. But I don't really know how to answer that.

Q2: Let's rephrase that question a little bit. Do you recall any cases in which you were in the majority, that have given you, over the course of your career, a special reward, that you've been most proud of?

Stevens: Majority cases? Oh, I spent a little more time thinking about dissents that I made [laughs] that I'm more proud of.

Q1: Let's talk about your dissents that you're proud of.

Stevens: One that keeps coming back to mind now, to tell you the truth, is a case called *Printz v. United States* [1997], which was one in a series of cases that is among the one I talked about—the statute involving guns in school zones. Well, *Printz* raised the question whether, in the Brady Act, Congress can require a county sheriff to do a background check on a gun purchaser during the short period of time before the federal government could set up its own background check program. The court—in an opinion I still think is one of the most unfortunate in the history of the court—said that the Congress cannot commandeer a county officer to perform that kind of a test. I think about that case every time I go into an airport where the federal inspection of people getting on airplanes ask the local police to come and lend a hand on doing the inspection, because there were not enough feds around to do the job effectively. To me, the notion that the

federal government, by an act of Congress, does not have the power to commandeer a local official is so inconsistent with the whole theory of the Constitution that it troubles me repeatedly.

Q2: That was a 1997 case.

Stevens: I don't know. Whenever the Brady Act was passed [February 28, 1994].

Q2: Right. Is there some correlation in any sense between that and the *D.C. v. Heller* [2008] case?

Stevens: Well, perhaps, although they are incorrect decisions for quite different reasons. I think you can't look at the *Heller* case independently of the following-up case where they construed substantive due process, not only created a right to bear arms—an individual right to bear arms—but also that cannot be regulated by state or federal government, because the Second Amendment case applied to the District of Columbia and federal regulation. I thought it was quite wrong to think that the Second Amendment—which, in its preamble is directed to protect the force of the state militias—could be construed to apply to non-militia related gun possession. But even beyond that, when you put the two cases together and you have a constitutional provision designed to protect state prerogatives in the militia area from federal supervision, you end up with a rule that says, "No, the final answer has to be given by federal judges who will decide whether the state regulation is—." It seems to me that that is really a quite ironic twist on what the framers really tried to accomplish.

Q1: What are some other dissents that you're proud of?

Stevens: Well, of course, I'm very proud of *Citizens United* [*v. Federal Election Commission*, 2010].

Q1: Yes. That's a huge case.

Q2: You thought the court was going to turn around, maybe, with the *Montana* case [*Western Tradition Partnership, Inc. v. Attorney General of Montana*, 2011] on *Citizens United*.

Stevens: No, I didn't predict that.

Q2: I thought you gave a talk down in Arkansas, saying that there were signs that maybe they were going to rethink *Citizens United*.

Stevens: Well, they have to rethink the aspect—no, the talk I gave down there I had written before I was aware of the *Montana* decision at all. That had nothing to do with the *Montana* decision. I did not expect that decision to cause the members of the majority to rethink their position. The point I made down there, very simply, if I remember correctly—maybe I'll have to stop a second to—

[See speech transcript attached]

Q1: We can fill in the name later. We can add some of this later. You can add to it in writing.

Stevens: Okay. Oh, I know the point. It was a follow-up on the State of the Union message, in which President [Barack H.] Obama had pointed out, in effect, that the reasoning in the majority opinion would apply to money spent by non-Americans in elections, and if you applied the reasoning, he was dead right. But what the court had done in the interval—and I mentioned this piece in the Arkansas talk—had basically said no, "The statute which prohibits foreign contributions to elections is valid; therefore, our reasoning does not apply to that situation." But, in fact, the basic reasoning was that the First Amendment does not tolerate discrimination based on the identity of the speaker. That was the principle of the proposition on which the majority relied in *Citizens United*. But this holding, and this procuring on the case that I mentioned in the Arkansas talk, squarely rejected that. So what I was saying was that the court is going to have to come up with a different explanation for their holding. Basically, they're going to have to rely on the explanation that speech by corporations is really like speech by a group of individuals; that group speech is entitled to the same kind of protection as individual speech—which is an entirely different rationale than was in Justice Kennedy's majority opinion, and, rather, was the rationale that Justice Scalia adopted in a separate writing. Which way they go is—I was talking about what kind of justification the court would rely on in the future. But I wasn't suggesting that they were going to reverse the holding itself.

Q2: Does that remain a lamentable decision?

Stevens: I think it's a quite incorrect decision. I think the more you listen to television commercials currently, the more you have to agree with that. [Laughs]

Q2: You must hear a lot of them in Florida.

Stevens: Yes, you sure do. And you hear a lot of them in Virginia, too.

Q2: Right. Are there cases, looking back, that you wish you had gone the other way?

Stevens: Actually, there are probably a fair number that I could be persuaded the other way. But the case I suppose you probably have in mind is the case requiring photo ID in the voting case. I wrote the majority in the Indiana case [*Crawford v. Marion County Election Board*, 2008]. I can't say I wish I'd gone the other way. I do think that the case could have been better argued and prepared at the time, but I do think I correctly analyzed the law in the case. It's a case that may have given rise to some legislation that had a partisan motivation rather than a public motivation.

Q2: Justice Stevens, is it easy to carry the weight of being one of the nine at the end of the road here? Does it give you pause at any time?

Stevens: You know, it's a funny thing. You're just doing your job, and everybody on the court is doing the same job. I don't think that that aspect of it is something that affects your thinking in particular cases.

Q1: I understood also, from doing some background reading, that you also, like Rutledge, write your own opinions, for the most part.

Stevens: Yes, but not as thoroughly. I follow the practice, and it's been true from the time I was on the court of appeals. I always want to write a first draft. I do think it's better for the judge to write the first draft. Because if you've done writing, then you can verify this out of your own experience. During the process of writing you learn what you're writing about, and you sometimes learn that the arguments you're making are not as strong as you thought you were, and the fact that the result is wrong. On more than one occasion I've written opinions and decided I was wrong, then ended up writing the other way. Usually, I manage to persuade the members of the court to go that way, too.

Q2: Let me come back, if I can for a moment, to the rule of law cases involving Guantánamo Bay. What is the best way to understand the court's position with regard to whether detainees held abroad, clearly in a place over which the United States does not have sovereignty, have habeas rights?

Stevens: Well, that's still an open question, I think.

Q2: It's an open question, but aren't you included to think that they do have?

Stevens: Well, I don't think what I'm inclined to do or not inclined to do is something that I should be speculating about. Because if it's an open question, it's a question that has to be decided based on the history and the arguments that fit it, and so forth.

Q1: What are the other questions you see as remaining—the open questions? There have been some restrictions put on—

Stevens: In Guantánamo?

Q1: Yes.

Stevens: Well, there's a question where they should be tried for alleged criminal offenses. It seems to me there's no reason why they shouldn't be tried in normal, federal courts. But there is a place for military commissions too. I'm really not fully up-to-date on everything that's happened since then, and I think I shouldn't try to—

Q1: It's happening so fast.

Q2: Do you have a position on whether Guantánamo simply should be shut down?

Stevens: Well, I would have shut it down. I think it has adversely affected the position of the United States in the eyes of foreign countries, and I think the benefits of it don't outweigh it. On

the other hand, we spent a lot of money down there building facilities, and I can understand why they want to maintain them.

Q2: But all in all, with regard to *Rasul*, *Hamdan*, *Boumediene*, *Padilla*, *Hamdi*—you're satisfied that the right course was taken by the Supreme Court, and there isn't anything that worries you about the decisions.

Stevens: Well, the only one that worries me a little bit—it's unfortunate that we didn't get a majority on the question of whether conspiracy is a violation of the laws of war. Because I do think that, going back to the Yamashita case, I do really think that a lot of the criticism in that case was based on the fact that the trial was not fair. There were a lot of things about the trial that were not fair, particularly the admission of unrestricted rules of evidence. But the central problem in that case was the charge itself, which was fundamentally wrong—that a man can be held responsible for things he didn't even know about, and be put to death. Again, I think it's really unfortunate that we did not establish a precedent that narrowed the scope of potential violations of the law of war, because who knows what the next conspiracy charge might be?

Q2: Well, there have been conspiracy charges in military commissions at Guantánamo—

Stevens: Well, there was—

Q2: —before and after, I believe—before your opinion—

Stevens: Well, I guess they actually tried him for conspiracy, and they decided that the conspiracy was so serious that he should not receive any additional punishment but—

Q2: Justice, do you know that there are some detainees still at Guantánamo—maybe forty, fifty, in that area—for whom the government has no plans to try? For one reason or another they can't be tried, the government says. Does that make sense?

Stevens: Well, again, this depends on your concept of what the status of the situation is now. If there is an ongoing war between Al-Qaeda and the United States, and if there are people who are detained, who would, if released, join the enemy army, there is an argument that justifies continued detention. But the detention isn't based on punishing them for things they've done in the past; rather, the detention, I suppose, to be justified, has to be preventing them from engaging in future military activities. Now I have no idea about whether that justification would be valid or not, but, certainly, if there is a man there who says, "As soon as I get out of here I'm going to blow up Times Square," there would be justification for retaining him.

Q2: Right.

Q1: This is an obvious question, but in 2006 the UN [United Nations] Commission on Human Rights came out against what was happening—the systematic torture, which we now know. I've interviewed some psychologists and others who explain in great detail what that torture is. What would be the occasion upon which those cases would come before the court? Would they have to be tried in order for that to actually be before the court?

Stevens: I would assume. Again, I don't know the facts, exactly. But if those people were tortured—obviously, without justification—they should have a remedy under the Eighth Amendment, to sue for damages. Whether that would—

Q1: But how would that come to the court if they can't be tried?

Stevens: Well, they would have to initiate their own proceeding. They would have to do it. But there is a distinction between that kind of proceeding and a proceeding that would result in their release.

Q1: I understand.

Q2: Right. Are you familiar with the case, the cert [certiorari] sought by a Yemeni by the name of [Adnan] Latif this past year? This year?

Stevens: I'm not.

Q2: Okay. May I read you something here that says that—this is by David [D.] Cole, a professor of law at Georgetown—

Stevens: Right.

Q2: —written this year. "The fact that Chief Justice [John G.] Roberts [Jr.] has sided with the court's four liberal justices a grand total of once, in the more than one hundred five-to-four cases since he's joined that court—and that Justices Antonin Scalia and Clarence Thomas have done so only twice and Samuel [A.] Alito [Jr.] never—makes one think." Are those striking to you? They're striking to me, as an outsider. Are they striking figures to you?

Stevens: I'm not sure they're one hundred percent accurate. Of course, you have to be—again, I don't like to generalize with statistics and the work of the members of the court.

Q1: Well, we're aware that we don't want to take too much more of your time—

Stevens: Okay.

Q1: —but I wanted to congratulate you on winning the Presidential Medal of Freedom.

Stevens: Well, thank you.

Q1: What was it like? Were you surprised? Or what was it like to be there?

Stevens: Well, of course, I'd been advised a few days in advance, and I was very much surprised when I was advised. Of course, I regard it as a great honor. I was pleased to be with the other recipients who also received it. I'm very happy about that.

Q1: Thank you so much for your time.

Stevens: Well, thank you.

[INTERRUPTION]

Q1: This always happens when I turn it off. The great stories come up.

Stevens: Well, I met Amelia [M.] Earhart at the opening banquet of the Stevens Hotel, which my father was responsible for building. After the event—and I can't remember the details, of course—but I do remember my dad taking me up to meet her, and her saying, in substance, "You're out pretty late on a school night." Something to that effect. I always thought I was in third grade, but it must be—

Q2: Well, you were seven years old.

Stevens: I couldn't have been in third grade, I guess.

Q2: I don't know. You did law school in two years. But can you see her image in your mind?

Stevens: Not really. I think I can. But I do remember [Charles A.] Lindbergh much more specifically, because he stopped at the hotel on his triumphal tour of the United States after he made the flight to Paris. My dad took me up to his suite, and the suite was just filled with gifts

from just everywhere. He had both a bedroom and a living room. I remember him, he and my dad and I— he was saying, pointing at everything and saying, "What am I going to do with all this stuff?" in effect. I don't know how he did it, but then he brought over this cage with a dove in it—with a bird that we later called Lindy—and said, "Would you like to have this?" I said, "Sure." I do remember him as a very likable, friendly sort of guy. So, anyway, we said yes, and he gave us this cage with the dove in it, which we took home and eventually took up to Michigan to our summer home. Somehow or other I let the bird out of the cage and it escaped [laughter]. Lindy didn't last as long as I wanted him to.

Q2: Justice, since the clock has been turned back on—one question. Were you surprised by Justice Roberts' vote in the Affordable Care Act the other day?

Stevens: Actually, I predicted it when I talked to my—not Eduardo [Bruera] but Dina [Mishra]. I came down the morning the cases were announced—because I had thought the court would have adjourned the day before, and I was arranging for the law clerk interviews for a year from now. And Dina who was going to join me—she was my clerk last year—we talked about the case and I said, "We might as well go in," since the court has not adjourned. "Let's go in and listen to the opinion. My guess is that the court will uphold the statute and that the chief will make the deciding vote." And that's what happened.

Now I've been a very poor predictor, generally, but I did predict that. I didn't know what the ground would be, but I actually had confidence that the chief justice would vote the way he thought the law commanded, and that's what happened. I’m quite sure he was not, as a matter of

policy—I don't think he's a person who favored the adoption of the act—but I also firmly believed that he would do what he thought the law required. I remember saying that to Dina that morning, and she'll verify. I don't know if she'll talk to you about it or not. And it turned out that way. So I was not surprised.

Q1: That's a beautiful note to end on. Thank you.

[END OF SESSION]

VJD | Session Two

Interviewee: Justice John Paul Stevens | Location: Washington, D.C.

Interviewers: Mary Marshall Clark (Q1), Myron Farber (Q2) | Date: November 7, 2012

Q1: Myron, you were capturing a wonderful story, so why don't you ask that question again?

Q2: As I pointed out a moment ago, as we start, there was a letter to the editor of the *New York Times* the other day from a woman in Poulsbo, Washington, and I was struggling in my mind to figure out why did I recognize that name? I have never been there, never heard of it before except in one instance, and that was connected to Justice Stevens—who, apparently, has a distinguished connection to Poulsbo, Washington. Isn't that right, Justice?

Stevens: It is. They awarded me the "Small Town Lawyer of the Year" award some years ago, although I don't remember just when it was. When they told me I had won that award, I questioned my eligibility because I had practiced law in Chicago—which is not exactly a small town—and I was then located in Washington, which is not a small town, and I wanted to be sure that I was eligible, so I wrote them a letter. They sent me back a copy of a resolution adopted by the local bar association, explaining that eligibility for the "Small Town Lawyer of the Year" requires the lawyer to have practiced in a community of less than so-many hundred or thousand—I don't remember—people, and not more than so-many lawyers, and so forth. They had four or five things on it. Then, at the end, it said, "Or, be a justice of the United States Supreme Court." [Laughter] So they assured me that I was eligible for the award. Maryan

[Stevens] and I went out there, and we enjoyed ourselves very much. There was a fascinating program, very interesting, which we enjoyed, and we stayed at a motel that had good food in it.

Q2: Well, I looked it up the other day. It's on Bainbridge Island, I think. It's in a beautiful part of the islands off Seattle, isn't it?

Stevens: Yes, it is. It is just a little ways—it's across the bay from Seattle, and I guess it's on Bainbridge. I'm not sure. Bainbridge is one of the places where the Navy had an intercept station during World War II, where they intercepted Japanese messages that were then sent to Washington for analysis.

Q2: In the same way that messages were intercepted at Pearl Harbor by people like yourself?

Stevens: I didn't do the intercepting, but I analyzed the traffic at Pearl Harbor, yes. It was similar. It was the intercept station that fed the messages to Washington for analysis, whereas at Pearl Harbor, we intercepted at Wahiawa, in Hawaii, and delivered to us regularly.

Q2: You signed up for the Navy the day before Pearl Harbor?

Stevens: Yes. To be precise, I had actually signed up earlier to take a correspondence course in cryptanalysis. It was a confidential course. The dean of students at the University of Chicago was kind of a secret recruiting agent, and he arranged to have me take the course. I had progressed to a point where they wanted me to apply for a commission the first few days in December, and I

went up to Great Lakes Naval Station on December 6 and took my physical exam and worked out the paper work. The next day the war started.

Q2: No correlation there.

Stevens: Oh, yes. There had to be. They knew they were in trouble if they didn't respond. [Laughter]

Q2: But did you ship out directly out to Pearl Harbor?

Stevens: No, I came to Washington and I served in Washington for a few months, and then I went to Pearl Harbor.

Q2: Which was, I take it, still visibly damaged.

Stevens: Oh, yes. The damage was still visible, to a certain extent. Of course, they still had a blackout in the evening and so forth.

Q2: You were there three or four years, at Pearl Harbor?

Stevens: About two and a half. I was there until shortly before the end of the war, and fortunately I transferred back to the States in the summer of 1945. While I was on leave, before reporting to duty in Washington, they dropped the atomic bomb. The war ended promptly thereafter, and I

was just fortunate that I was back in the States and was able to get started in law school almost immediately.

Q2: Right. Have you ever read or seen the film version of *From Here to Eternity*?

Stevens: I think I've seen the film version. I don't remember it very well.

Q2: During that time you were at Pearl Harbor, analyzing these intercepts, Admiral [Isoroku] Yamamoto was shot down by the Americans, was he not?

Stevens: That's correct.

Q2: Was he the leader of the Pearl Harbor attack?

Stevens: Yes. He was the commander-in-chief of the Japanese navy at the time of the Pearl Harbor attack, and for a considerable period—well, until he was shot down—he was the commander-in-chief.

Q2: But there was something that troubled you about that.

Stevens: Yes, there was. We had intercepted messages that enabled us to know exactly where his planes were going to be flying, and they sent up Air Force pilots. Really a very difficult mission. They were in the air for many hours. But they did intercept him and shoot him down, and he was

the individual target of a military mission that was very successful. I happened to be on duty in Pearl the day—or, I guess, it was the evening—when they actually shot him down, and I remember a message coming across my desk saying that we had been successful in—I forget the exact language—“getting two sparrows and one eagle.” Yamamoto was the eagle, and the two sparrows, apparently, were other fighter planes. I'm not sure.

But I do remember thinking that it was an unusual military operation because it targeted a particular individual. It seemed to be almost like he'd been sentenced for a crime or something like that. I do remember feeling that it was a very unusual episode, to have an individual the target of a military mission.

Q2: Is that analogous to, say, the mission against [Osama] bin Laden?

Stevens: Yes, I guess it is. But the difference was, in bin Laden's case, he was a wrong-doer. He had definitely violated both international rules of law and laws in effect in New York. He was definitely someone who deserved to be punished for what he had done, whereas Yamamoto, at least arguably, was just carrying out his responsibilities as an enemy commander. Of course, there's debate about whether his part in the Pearl Harbor attack made him eligible for retribution, but that was somewhat different. It's not necessarily a war crime in the same sense as what bin Laden had done.

Q1: So thank you again for the last session. I just wanted to ask you a couple of follow-up questions. We're still in the Guantánamo piece of the Rule of Law part.

The last time you spoke you said you were disappointed in the *Hamdan* case, that the full court did not join you in the opinion, and there was kind of a narrow joining in of your opinion. And you spoke about the focus on the conspiracy trial.

Stevens: Oh, yes. I think that was the case in which there were multiple grounds for interfering with the military prosecution, and one was concerns about the procedures, which the court did join. But I also thought that the charge of conspiracy did not allege a violation of the laws of war. I thought that the court should have held on that ground, as well. But Justice Kennedy thought it was not necessary to decide that in that case, so he did not join that part of my opinion.

Q1: What are some of the dangers, in terms of precedent, of a narrow joining like that?

Stevens: Well, it did not become a precedent. But, of course, if the issue arises again, it at least would be the expression of four justices, which might have an impact when it's necessary to decide that question.

Q2: Well, it already is. Just the other day, on October 15, the D.C. Circuit Court of Appeals, down the street, ruled, once again, in the case of this *Hamdan*—the same man—that the charge of which he was convicted, material support of terrorism, was not an international crime at the time he was convicted, and, therefore, had to be thrown out. This was the D.C. Circuit Court, just the other day.

Stevens: Right. I know. I remember reading about that.

Q2: We were wondering whether there isn't some parallel here between what you were saying about conspiracy and the fact that they had to throw out this material support charge.

Stevens: There well may be, and I have to confess I have not read their opinion. But I did read the newspaper story about it, and I think you're dead right. There may be a parallel there, because I thought that the conspiracy charge was not grounded in established rules of the law of war.

Q2: As they have concluded, with a three judge panel, at least two of whom—among the most judicially conservative judges in the country, I dare say—ruled, supported your thinking, only with respect to material support.

Stevens: I don't know whether they cited my opinion or not.

Q2: Well, yes, there is some reference to the plurality opinion in what they call “Hamdan I.” Certainly, the commentators have been talking about whether, now, this extends to conspiracy.

But I would like to, if I could, expand that for a second. The D.C. Circuit of all places has been very critical of the Supreme Court's opinion in *Boumediene*, which you assigned to Justice Kennedy but supported, of course, in 2008. In fact, Judge [A. Raymond] Randolph of that court compared the justices to Tom and Daisy Buchannan in *The Great Gatsby*, as "careless people who throw things around and create a mess that other people have to clean up." Judge Janice

Rogers Brown of the same court referred to the court's "airy suppositions" in *Boumediene*. Judge [Laurence H.] Silberman described *Boumediene* as the Supreme Court's "defiant, if only theoretical, assertion of judicial supremacy." What's going on here, Justice Stevens?

Q1: Don't worry. We're interviewing them, too. [Laughter]

Q2: Is that striking, that they should be commenting on the Supreme Court's manner instead of just doing what the Supreme Court said to do?

Stevens: They're certainly entitled to express their own views on these issues. I wouldn't criticize them for that. I haven't really read all the subject of their opinions, so I really shouldn't try to comment. They're all good judges.

Q2: They haven't been exactly supportive of the *Boumediene*, as I understand *Boumediene*. No detainee has triumphed in the D.C. Circuit, even with federal district judges granting habeas and concluding that the detainees should be released. None of them have been released. All of that has been overturned by the D.C. Circuit.

Stevens: Well, I'm not really in a position to comment on the developments subsequent to the opinions I've written, but none of what has happened has given me any doubt about the soundness in my own analysis.

Q1: Not too many cases seem to be coming before the court these days. After you stepped down, there are not as many cases on Guantánamo. Do you think that's partly as an effect of the good rulings that were made, or is it just that the court may not be interested anymore? Do you have any analysis of that?

Stevens: I really shouldn't try to speculate on what motivates the present court because I'm really not a party to their deliberations, and I really couldn't contribute anything significant to that discussion, I don't think.

Q1: Okay. Is there anything else you want to talk about in relation to the Guantánamo rulings? Anything on your mind, as you rethink them?

Stevens: Well, I can remember, at the end—I didn't think this all through before coming here this morning, but I remember being disappointed that they did not review the status of the Chinese people who could not go back—they refused to release them in the United States—

Q2: The Uighurs.

Stevens: Yes. That's their name. It seemed to me that there were powerful arguments that would have supported their release into this country because there are other people from their area of the world who might have given them support. I think they had a good claim for release.

Q2: Justice, Joseph [T.] Thai—am I saying that right?

Stevens: Yes. Thai. Joe Thai.

Q2: Was he a clerk of yours?

Stevens: Actually, he was a clerk who was hired by Justice [Byron R.] White during a period when Justice White let me use—he was retired and therefore didn't need the full services of a clerk, just as I now have a clerk who only works about half-time and is now working for Justice [Sonia M.] Sotomayor, and last year worked for Justice Kennedy. But Joe Thai was White's clerk, who worked for me, and we became very good friends, and he did a very fine job in participating in a lot of work. He has written some stuff about one or two of the opinions that I've written, and he's quite reliable.

Q2: Is he reliable when he says that *Rasul* and *Hamdan* are, "arguably the two most important opinions" of your career? Would you agree with that?

Stevens: No, I don't think I would. [Laughter] They were important opinions, but I think I've written several opinions that have the same magnitude of importance.

Q2: For example, does something come to mind that, naturally, everybody has to associate with you, and is an important opinion? Important even if not so well known?

Stevens: Well, yes. Just to take one example, there's a case called *Printz v. United States* in which the court held that the states cannot commandeer the services of state officials. In that case, the Brady Act required the local sheriffs to perform background checks on gun purchases before the purchase could be effective, and the court held that that was an over-reaching by the federal government to impose that duty on local law enforcement officers. There is nothing in the text of the Constitution—nor, in my judgment, in history—that supported that decision, which limits the power of the federal government in a significant way. I think if one followed that case, literally and explicitly, you would have trouble with things like the recent hurricane in the Northeast [Hurricane Sandy], in which FEMA [Federal Emergency Management Agency] has played a major role in controlling the damage—in which, I think, it is certainly consistent with the Constitution for them to supervise state offices and agents in the work that they had to do. There are many situations in which the federal government has to make use of local personnel to carry out their mission—locating missing children, crime detection. The very issue in the *Printz* case is one that they should have been able to take care of. That is an example of an opinion, a dissent that I wrote, that I feel very strongly was a correct interpretation of the law, and would even justify an amendment to Article 6 to make it perfectly clear. I said so when I talked to the Chicago Bar Association a month or two ago.

Q2: Right. You have actually been called "the dissenter" on the court in the years that you were there. Indeed, you wrote more dissents, probably, in your career than any other justice ever has. What occasions that?

Stevens: Well, there are two reasons for that. One, I've been on the court longer than most justices. I've had more opportunity to do that. Secondly, before I went on the court, I had this experience investigating the Illinois Supreme Court, in which two justices did not publish their dissents. They were dissents from a very important case that I think the public would have benefited from knowledge that they had dissented. I made up my mind when I first went on the court, on the court of appeals, with that background in mind, that I thought I had a duty to explain my disagreement with the court if, in fact, I did disagree.

So, unlike the tradition that prevailed for many, many years for many great justices, who had graveyard dissents, they did not always publish them. But I thought the more correct position for an appellate justice would be to explain your own views if they differed from the majority. So I had that practice, and that has made me express my dissents more frequently than, sometimes, other justices have.

Q2: Right. Actually, John Marshall Harlan II was quite a dissenter in the [Earl] Warren Court, was he not?

People sometimes associate you with justices like [Lewis F.] Powell [Jr.], Blackmun, and O'Connor, and as a moderate, Republican, common law thinking, “let's go slow, let's not try to create some ground rule where it's not necessary” justice. As the court has changed, as you've seen it, are you the last of those people? Will there ever be another group of those kinds of moderate Republicans on the court, do you think?

Stevens: I have no way of knowing what may happen, but it is correct that some other people have compared my views as being closer to Justice Harlan's than to the other justices you mentioned. I really think that's right, because I did, on many occasions, disagree with Lewis Powell, and with Sandra O'Connor, and with Harry Blackmun, from time to time. Of course, I've disagreed with some things that Justice Harlan has written.

Let's see. Where am I in the answer to your question?

Q2: You wrote in *Five Chiefs* that every time a justice comes on the court, the court dynamic changes.

Stevens: Absolutely. That's right.

Q2: Is that true regardless of what kind of vision the justice might have?

Stevens: I think that is true, and that's something that Justice White said on more than one occasion—that it is a different dynamic within the court. When you change any one person in a nine-person decision-making body, the process becomes different.

Q2: Speaking of Justice White, Justice Potter Stewart is someone you seem to have had a great regard for.

Stevens: Absolutely.

Q2: Could you tell me why—tell us why—and what makes a good and effective justice?

Stevens: Well, there are several qualities. Potter was a brilliant lawyer. He was extremely articulate. He was a very good writer. He expressed himself very lucidly and wrote a number of very fine opinions. And he was totally independent. He analyzed things, he came to his conclusion, and I think pretty much he generally wrote out his dissent when he didn't agree with the majority. I thought, particularly from going back to my early years on the court, I thought his views in the capital punishment area were particularly persuasive and reliable. I was disappointed by subsequent decisions of the court basically expanding the area in which the death penalty became permissible and tolerating procedures that I thought were not acceptable. I think he would have had the same reaction to those changes in the law that I did over the years because he regarded the death penalty as a punishment that should be very rarely imposed, and only on the basis of correct reasoning, rather than an emotional reaction to the particular crime.

For example, I was particularly distressed at the court's approval of victim impact evidence, which is only relevant as a way of increasing the likelihood that the death penalty will be imposed. Lewis Powell had written the first opinion excluding that kind of evidence, and I'm sure Potter would have joined that too. A few years later, when the personnel on the court changed, they overruled that opinion, which I think was quite an incorrect decision.

But that's an example of a change in jurisprudence that, I think, Justice Stewart, as I have, would have disagreed with. Because I think he had a narrower view of what was permissible in capital punishment jurisprudence than the present majority does.

Q1: Can we follow up—that actually is an area we wanted to talk to you about, in relation to our Rule of Law project. Are changes in your thinking, maybe, due to changes in context about the death penalty from the time of your appointment?

Stevens: It's interesting. I'm sure I've had some change in my own views, but I really think my present views are a reaction to changes in the law that have taken place since I first joined the court. As I said, I think Justice Stewart would have shared the same reaction. Now whether he would have come to the same conclusion that I did, after the *Baze* [*v. Rees,* 2008] case—that the whole project should be considered cruel and unusual punishment—I can't, of course, speak to that. I think I've already mentioned to you my change in thinking after the *Baze* case.

Q1: No, we haven't discussed it.

Stevens: In that particular case, it was after reading Chief Justice Roberts' very fine opinion upholding the use of lethal injection as a method of execution, he pointed out how the court had developed rules that, in effect, guaranteed the defendant a painless execution, protecting him from any unnecessary pain in the administration of the death penalty—which, of course, I think is correct. But that made it clear that the original, strongest argument in favor of the death penalty—namely, retribution—really was kind of a false justification for the penalty because you

are preventing the state from administering what people generally think ought to be imposed on a person who's injured a citizen in a very outrageous way, saying, "We'll get even with them." The law has developed to the point where it forbids getting even with them. It forbids the kind of retribution that was the original justification for much of the death penalty jurisprudence. And when you cannot justify it on the grounds that the main reason why the public generally supports it, there's something wrong about the whole procedure.

Q2: It was kind of scary, actually—in one of Justice Thomas's opinions, he almost seemed to be approving of the litany of terrible tortures that were imposed upon people.

Stevens: That's right. But I think he correctly described what was the real justification for the penalty, and a justification that is no longer permitted under the Constitution, under Chief Justice Roberts' reasoning, in the *Baze* case. Justice Thomas has a very, let me say, originalist view about the punishment that's permissible under the Eighth Amendment—and I think he's quite wrong. I think the jurisprudence has correctly developed in response to a changing in the public's attitude and what is considered unusual and cruel. But I think he's consistent with himself.

Q2: It's probably worth noting that when you came on the court in 1975, *Furman* [*v. Georgia*] had already been decided three years earlier. But in 1976, when you were only getting your feet wet here, there was *Gregg* [*v. Georgia*]. Now you supported the *Gregg* decision. Do you regret that at all?

Stevens: No, I don't.

Q2: Looking back, was that the time to have said, "No more death penalty"?

Stevens: I really don't think so, because I think that was a correct interpretation of the law that had developed to that time. I was not persuaded by the very persuasive writing by Justice [William J.] Brennan [Jr.] and Justice [Thurgood] Marshall that it should be totally abolished at that time. I was not convinced because there was so much societal acceptance of it, and in response to *Furman*, as you know, an increasing number of legislatures had endorsed the death penalty. But I think, over time, its administration has become even more unacceptable—had become more unacceptable—than it was at the time.

Q2: But you come out of the death-penalty thinking—if I understand your position correctly—feeling that it simply cannot be imposed constitutionally.

Stevens: That's right. Because I think the original justification is no longer acceptable.

Q2: But couldn't you have figured that one out in 1976?

Stevens: I suppose it's possible. I don't know. But I did not feel that way at the time. I think I was incorrect in my vote in the [*Jurek v.*] *Texas* case [1976]. I think I've said that on more than one occasion. Because I was persuaded largely by Potter Stewart's writing that the mandatory death penalty was unacceptable. It should be, as we held later in Justice [Warren E.] Burger's plurality opinion in the [*Lockett v.*] *Ohio* [1978] case, that you should always consider the mitigating

circumstances that would tend to reject the death penalty. But the law has changed in the other direction, in that area.

Q2: The *Texas* case you're referring to is the *Jurek* case.

Stevens: Yes. I think *Jurek* was incorrectly decided, and I regret my vote on that.

Q2: Speaking of Justice Thomas, you wrote in *Five Chiefs* that Justice Thomas—let me find the—

Stevens: The substance of what I said was that the replacement of Justice Marshall with Justice Thomas had a profound impact on the court. I think Clarence would agree with that.

Q2: Could you spell that out for us?

Stevens: Well, I think the *Printz* case is an example that I mentioned earlier. I think there are a very large number of five-four decisions in which Justice Thomas was one of the five, in which Justice Marshall, had he been on the court, would have voted the other way. So I think that he is really responsible for a number of cases that moved the court in a direction that is different from the direction it would have taken, had Justice Marshall remained on the court.

Q2: You said before that the court inevitably changes its dynamic when any justice joins. It changed it doubly with Justice Thomas?

Stevens: I think yes, that's probably true.

Q2: As we talked about the evolution of your thinking on the death penalty, can you just give us an idea of the evolution of your thinking with regard to affirmative action, which is a subject that's coming up to the court again this term?

Stevens: Well, I don't know that it's so much a change in my own thinking. There are a lot of aspects of affirmative action that require careful thought. All affirmative action cases are not fungible. They raise issues in an educational context, in public contracting—building roads, for example. The case favoring opening up employment opportunities in the pavement, in the highway construction industry, is much different from the interest in diversity in the educational context. Diversity in the educational context makes a positive contribution for the future, whereas you could arguably make the same argument in the general labor market, but it's not nearly as strong and the costs are different. It seems to me that if you impose requirements on hiring people that require exclusion of people who already have jobs and who are eligible for jobs, the balance is quite different than it is in the educational context. At least I think it is.

Q2: And is the word "future benefit for everyone"—is that key to your thinking?

Stevens: Yes, it really is, and I think I made that argument for the first time in the Michigan case, *Wygant v. Jackson* [*Board of Education,* 1986], Michigan, I think it was, in which there was a program that had been negotiated between the teachers' union and the school board that gave

African American teachers a better tenure than other teachers—which seemed to me a perfectly reasonable thing to do, because there is an interest in having a diverse faculty so students can experience an association with people of different races. Whereas, if you apply a rigid rule that can't be a factor in the analysis, it seems to me you come to the wrong conclusion. But that's exactly right, and I think that's the case in which I first articulated it—although I think I had also written an earlier opinion—I think it was not a court opinion—in which I was confronted with the example of having an African American participate in certain law enforcement activities where they were infiltrating drug groups and the like, where it made sense to have a law enforcement officer of the same ethnic background as the people they were going to have to learn to work with. It seemed to me that obviously future benefits were there. That was not a matter of making up for past wrongdoing; it was just a sensible way to enforce the law. The same is true, I think, in the law enforcement of a community, generally. If you have African American police officers in African American neighborhoods, you're going to have a much better opportunity for the citizens to respect the police than if you have a segregated force that operates. There are future benefits there that are not as obvious in some other areas.

Q2: Do you know enough about the *Fisher* case now before the court—I think it's *Fisher v.* [*University of*]*Texas*—to say whether that falls into this framework?

Stevens: Yes. Well, I'm not sure I do. There are some aspects of that case that are different from any precedents because the ten-percent rule that Texas has in effect—where they automatically admit to the University of Texas any student who is in the upper ten percent of the class. Of

course, that has the effect, in high schools that are segregated, of distorting the admissions class in Texas. I haven't thought through that particular aspect of the case.

Q2: Is it possible that, as in *Citizens United*, the court could take a narrow view of what the issue was and then deal with it narrowly? Or they could take a grand view that would overturn *Grutter v. Bollinger* [2003] and, as *Citizens United* went far beyond what the court could have ruled on.

Stevens: Well, there's that risk. But I think you really have to wait until the case is decided. Of course, the thing that puzzles me about that—there was no real need to grant cert in the case, because I'm not aware of any conflicts that required resolution in the case. But the fact that there were four members who thought that the case should be reviewed suggests that there may be some change in the law that will come out as a result of that.

Q2: Do you recall what's called the Stolen Valor case?

Stevens: Yes, I do. Very well. That's a recent decision that Justice Alito dissented in, if I remember correctly. I thought he wrote a powerful dissent, to be honest.

Q2: He actually dissented in the Westboro Church [*Snyder v. Phelps*, 2012] case, where a group from the church was picketing—

Stevens: And I thought he was right in that case, too.

Q2: Yes. Yes, you would have joined him, I think you said, on that case, even though he was alone.

Q1: Could you explain your reasons?

Stevens: Yes. In the First Amendment law involving defamation, the court has granted a distinction between defamation that impairs the reputation of a public figure, and public figures are better able to defend themselves, and there's more importance for wide discussion about public figures than there is of private figures. So the same kind of defamation of a private figure would not have First Amendment protection as a distinction between public figures and private figures. I think the same distinction should apply in the intentional infliction of emotional distress—which was the tort involved in that case. It's one thing to pick on somebody like Jerry [L.] Falwell [Sr.], who is a public figure and can defend himself; it's another thing, it seems to me, to target a family who has had a funeral, who were involved in targeting the deceased member of the family—who was not a public figure. He served in the war, but that doesn't make him a public figure. It seems to me the same distinction should have applied there, and they should have respected the interest in privacy of the people who suffered real emotional distress as a result of the activity. I don't think the interest in getting their message in the public domain justified the particular tactics that they used in that case. So I feel that Justice Alito was on the right side of that discussion, because I think the majority failed to recognize the parallel between the constitutional protection of defamation and the constitutional protection for the intention of infliction of emotional distress.

Q2: Speaking of Justice Alito—you don't attend the president's State of the Union messages anymore, do you?

Stevens: I'm usually in Florida when they take place.

Q2: Were you there in 2010?

Stevens: Yes.

Q2: In January of 2010. That's when President Obama, in his State of the Union address—referring to *Citizens United*—said that the Supreme Court "reversed a century of law to open the floodgates for special interests, including foreign corporations, to spend without limit in our elections," at which point Justice Alito mouthed, "Not true," causing weeks of comment in the press, and generally speaking. Did you have any reaction to that, or was it talked about at the court here, what he had done?

Stevens: Actually, I talked about that subject in a talk I gave in Little Rock, Arkansas. I don't know if you've read that talk or not.

Q1: I didn't see that one, no.

Stevens: I talk about it at some length. I pointed out in that talk that President Obama—who is a former professor of constitutional law, by the way—had read the analysis of the opinion quite

correctly, because the majority's rationale, which says basically said that the First Amendment does not allow regulation of speech based on the identity of the speaker, would apply to a foreign speaker as well as a domestic speaker. The president basically was saying under the reasoning of the majority in *Citizens United* that protection would extend to the foreign speaker. But Justice Alito, in his remarks, suggested he didn't agree with that. Therefore, that may well mean that in future cases the court would draw a distinction that President Obama did not draw. As a matter of fact, they did, in a per curiam case arising in the D.C. Circuit—they affirmed, without writing an opinion, a holding of a three judge district court, which had upheld a federal statute that prohibited a Canadian and an Israeli citizen from contributing to campaigns in New York. So they decided, without explaining why, that there is a distinction between foreign speakers and domestic speakers, in terms of campaign contributions.

So both Justice Alito and the president were right, on the basis of what they did. Because the president was not privy to any thinking about what might happen in a case like this, but he correctly pointed out that the reasoning of the court would apply to foreign speakers, and the court, although they had a footnote or a paragraph responding to something I said in my dissent—that their reasoning would protect Tokyo Rose's propaganda broadcasts during World War II, and it would. But they, in response to my comment on Tokyo Rose, said, "Well, we don't have to decide this in this case." But they didn't explain why. Actually, in Justice Scalia's concurring opinion, he made the argument that a corporation is really just like a bunch of individuals. Of course, if that were true, you wouldn't need corporations at all, anyway. Although he signed onto the opinion, he wrote a separate opinion that relied not on the fact that speech cannot be regulated on the basis of the identity of the speaker, which they later did decide, but,

rather, the speech of corporations should be subject to as broad a protection as the speech of a group of individuals—which is contrary to the whole reason why corporations are formed, to protect individuals from individual liability.

Q1: The Huffington Post, when you announced your retirement, listed your ten most important decisions. And, of course, that decision—in this case, dissent on *Citizens United*—could you talk to us a little bit about *Citizens United* and your dissent?

Stevens: Well, [laughs] I think if you've watched television during the last six months you can see one of the consequences of *Citizens United* that I think I foresaw and I've regretted. It seems to me that the wealth of money that is spent on campaign advertising could be devoted to more useful causes. Let's put it that way.

Q2: Well, we've come to an end now. Would you like to comment on—we're the first in the door—to ask you to comment on the election yesterday.

Stevens: Well, my comment is gratitude that the advertising campaign has come to an end, and a tremendous victory.

Q2: You don't want to go beyond that? It has consequences for the court, doesn't it?

Stevens: It potentially does, yes, because now there's a likelihood that if either Justice Scalia or Justice [Ruth J. Bader] Ginsburg retires in the next four years, that the replacement will be more

in line with the prior appointments that President Obama has already made—someone more like Justice Ginsburg than like Justice Scalia.

Q2: Right.

Stevens: The election has a significant likely impact on the makeup of the court at the end of this presidential term.

Q2: I just wanted to finish off, if I can—you don't have any problem, or do you have any problem, with the president, in the State of the Union, referring to Supreme Court decisions with a viewpoint?

Stevens: No. I don't see why that's any different from any other public speaker who wants to disagree with another decision-maker in society.

Q2: The reaction to Justice Alito mouthing "Not true"—again, was that seen as appropriate here? Or would anybody care?

Stevens: I don't know. I would think it's somewhat unusual, a response on the floor of the Senate, or the House, I guess it was. But he's certainly entitled to express his views too. For me, it was enlightening to have a member of the court basically make a public indication that the reasoning of the *Citizens United* case would not stand the test of time.

Q2: Okay. Life on the court—is it a truly, monkish life?

Stevens: No.

Q2: Do you get about town, so to speak? Do you want to get about town? Is there a social side of the existence of a justice?

Stevens: Well, there are two views on that. Justice Powell thought there was, and I guess some members of the court have. It never really affected my day to day activities at all. I played bridge, publicly, in public. I played tennis. I played golf. It didn't affect any of my daily activities. And I was never recognized, basically, in public.

Q1: There's a great story about that, right? Where a tourist came up and asked you to step aside from the Supreme Court so she could take a picture? [Cross talk]

Q1: Could you tell us that story?

Stevens: Oh, yes. I was out in front, they were taking pictures, and I was—

Q2: In front of the court?

Stevens: In front of the court. I think I was walking over to the Capitol to see the attending physician, to see the doctor there, and I walked down the steps and I got in the way of the person

taking a picture of his family. And he basically [gestures that he waved him away]. I obliged, politely. [Laughter] I didn't think it appropriate to say, "Perhaps the picture you'd like to have is of a Supreme Court Justice."

But I, frankly, am almost never recognized when I'm in public or traveling. Occasionally, on a flight to Fort Lauderdale, when we went down there, there would be a lawyer on the plane who would recognize me and say hello to me, and that sort of thing. But not to the extent that it affected anything that I did.

Q2: He wouldn't hand you a petition, though. [Laughter]

One of the things that has always fascinated me is whether oral arguments make a difference at the court.

Stevens: Oh, yes. They definitely do. Because very often the colloquy between the justices and the lawyers sheds new light on an issue and will cause you to change your thinking on the relevance of a particular arguments. It very often will affect the outcome, sometimes, actually, the bottom line, and other times just the analysis that's used in the opinions. It's definitely an important part.

Q2: Do you recall anyone who appeared before the court—apart from yourself—who made one appearance, I think, as a lawyer before the Supreme Court of the United States—something I hope you happily remember? Did you win?

Stevens: No. No, I didn't. Justice Harlan agreed with me, though. [Laughter]

Q2: Do you recall any people who have been really great presenters of cases?

Stevens: Bob [Robert H.] Bork is my favorite. He was an excellent advocate. He had wonderful rapport with the court, and is a very fine lawyer. He's my first. In more recent years—that name escapes me right now—but he's argued case after case in the last few years.

Q2: Paul [D.] Clement?

Stevens: Paul Clement, yes. He's a very fine lawyer. I'm an admirer of his. Carter [G.] Phillips is a very fine lawyer who argues a lot of cases. Some advocates are better than others.

Q1: You served also—and your book shows this—with some really great justices. I wanted to ask you for some commentary on Thurgood Marshall—what he was like to serve with, and if he had an influence on your thinking in areas like affirmative action.

Stevens: Yes. One of the many things that one admires about Justice Marshall—his word was one hundred percent good, and that goes back to an incident when I was a lawyer in the Seventh Circuit and he was the Circuit Justice at the time. At some function, he was asked whether the relationship among the justices was cordial or not and he said yes, it was, they got along beautifully, as a matter of social relations and working together. I remember thinking to myself,

"Well, that's the party line." Because when I was a law clerk, that was really not true. There were some strong feelings—and one of the justices, Justice [Felix] Frankfurter, and Justice [William O.] Douglas, for example—did not get along. There was a recent book that I can't remember the name of, by Rosen—is that the name of it?—about that court, pointing out that there were personal differences within the court. [Jeffrey Rosen, *The Supreme Court: The Personalities and Rivalries that Defined America,* 2007] I was conscious of that as a law clerk without witnessing anything myself.

So I thought maybe Justice Marshall was adhering to the public clime. So I was curious, when I got down here, as to what the situation would be. It turned out he was dead right. No matter how strongly they expressed their disagreements about legal issues, they actually got along as a personal matter very well. That was true of the entire period of my service. I think about it in connection with Thurgood because he was telling the truth when I suspected otherwise. He also had an influence on us in an informal way because he always contributed to the discussions—not always, but often—by relating some of his own personal experiences as a practicing lawyer. They were moving experiences because I think he had a greater impact on the improvement in the law as a trial lawyer than he even did as an appellate lawyer because he went through many, many experiences in a hostile environment in trial courts where it took real courage and real dedication to the profession to do the things he did. Many of his experiences he described in a way that would not necessarily be recorded. He also was an excellent raconteur. He had a wonderful field of jokes and stories. He had a wonderful sense of humor. As I've mentioned on more than one occasion, he never told the same story twice. [Laughter] Most people who are good storytellers repeat their favorite stories over and over again. Not Thurgood.

Q2: But Thurgood retired when there was a Republican president. Did he ever talk to you about hanging on until there was a Democratic president? Do justices think along those lines?

Stevens: I never heard any justice say that to me, that they would want to hang on because the political persuasion of the person who would appoint their successor would have an impact on the timing of their decision to retire. It may well have, but I don't remember any discussion with any of my colleagues about that.

Q2: It was ill health that took him.

Stevens: Yes.

Q2: He didn't die while a member of the court, did he?

Stevens: No, he retired before, for health reasons.

Q2: Right. And he was, of course, replaced by Justice Thomas, as we pointed out before.

Stevens: Well, of course, so did Justice Brennan retire and was replaced by a nominee of President Bush.

Q2: Right. But now Justice Elena Kagan, back in 1995, wrote a book review in the University of Chicago Law Review in which she said that the confirmation process of the justices had become—I've forgotten her exact words—something like vacuous—excuse me—a "vapid and hollow charade" were her words. Now this was post-Bork, Robert Bork, whom you mentioned before. What about the confirmation? Do you believe that's what the confirmation process amounts to today? Maybe there shouldn't even be one?

Stevens: Well, there has to be one. [Laughter]

Q2: I was tying that to a string. [Laughter]

Stevens: Well, I don't know. It has become more adversarial since the Bork proceeding. As you may know, I thought Bork should have been confirmed, and I said that publicly, because I had high regard for his ability as a lawyer, and I've often thought that maybe he would have been a much more acceptable justice than people generally say, because he became more—I won't say necessarily conservative—but I think his views became more rigid after he was not confirmed than they were before. I think he might well have been a much more acceptable justice than people regard, generally. I think both parties are responsible for the very partisan nature of that particular confirmation process.

Q2: It was during Justice Kagan's confirmation that Thurgood Marshall's name came up—even more than her own name, I think—

Stevens: Well, she was a law clerk for him.

Q2: —and she was royally rapped by the Republicans for sharing his "judicial activist views." I'd like to ask you, does this have any meaning? "He's a judicial activist. She's a judicial conservative." How is the public supposed to read that? After you wrote the *Kelo* [*v. City of New London,* 2005] decision, for example, you were roundly rapped on the knuckles by the right for being an activist. But you didn't see that decision that way, did you?

Stevens: That's partisan criticism by a particular segment of the public that has a particular point of view that they're advancing. The *Kelo* decision was a very conservative decision. It applied established law that I think is well settled now. I recently wrote a piece in the *Alabama Law Review*, and I gave a lecture at the University of Alabama that discussed the case as a clear example of applying well settled law. Ironically, the case that is often cited—and I made the same mistake in my own opinion in *Kelo* for the proposition that the Fifth Amendment—the Takings Clause—was incorporated in it by the Fourteenth Amendment, and is now applied to the state. In fact, the case it cited for that proposition was in Chicago—a railroad case that arose in Illinois—actually didn't hold that at all. It didn't even cite the Fifth Amendment. What it held was that the due process clause of the Fourteenth Amendment protects substantive rights as well as procedural rights, and the right to due compensation in exchange for appropriation is one of the substantive rights protected by the Fourteenth Amendment. The Fifth Amendment isn't any part of the analysis at all. The people who are critical of *Kelo* are unaware of that very fundamental, elementary rule.

Q2: Yes, but they were singling you out.

Stevens: Well, sure.

Q2: They were saying, "This Justice Stevens, he's just a terrible activist over there."

Stevens: But they were wrong.

Q2: Do those terms mean anything? Should they mean anything to the public?

Stevens: Well, for example, I think the decision in *Printz* that I mentioned earlier was an activist decision. It changed the law, I think, in an unfortunate way. It deprived the federal government of power that I think the federal government should have, and really had had until that decision.

Q2: In other words, it doesn't mean good or bad. Active, conservative—isn't equated with good and bad?

Stevens: No. It's the extent to which the law is changed by a judicial decision. Some changes in the law are properly called activism, and they can be made by politically conservative justices, but I doubt that they were made by judicially conservative justices.

Q1: I'd like to ask you a couple of questions about how you see the court in terms of educating the public about the law. John Marshall, whom you praised, talked about wanting to teach the public what the law is.

Stevens: Well, of course, Justice [Louis D.] Brandeis is famous for writing that the court is a very important teacher about the law. I thought of that when I read Justice Alito's dissent and the majority opinions in the case that you mentioned earlier about the Stolen Valor Act. I think it's really unfortunate for the Supreme Court, in effect—for a Supreme Court opinion—the court, as a whole, doesn't hold this. But in Justice Kennedy's opinion for the plurality, he basically would have held that there is a constitutional right to lie—which I think is not correct. I think that kind of decision has a teaching effect, and it would have been much better to write an opinion in which he did not say that it was a constitutional right to lie, but you merely said what Justice [Stephen G.] Breyer said—that the particular statute was unconstitutional because it made illegal a broader category of speech than it should have. And I do think, actually, that Justice Alito wrote a more persuasive opinion, that there was a justification for prohibiting the narrow category of speech, telling falsehoods about your own military career—not that unfortunate.

But I do think the teaching effect of opinions is something that justices should keep in mind. I believe in the teaching effect of George Washington's legend that "I cannot tell a lie" when he was chopping down the cherry tree. It's not a true story, but the fact that somebody told that lie might well have been protected. [Laughter] But there was no justification whatsoever for telling a lie about your own background, as winning the Congressional Medal of Honor.

Q2: If I can get just briefly, before we get completely off cases—you mentioned *Jurek* and that you were disappointed in your own vote in *Jurek*. But recently, the court, in a Louisiana case—*Connick v. Thompson* [2011], I think—where the prosecutor withheld exculpatory evidence—[John] Thompson served eighteen years in prison, fourteen on death row. Do you remember that case?

Stevens: I certainly do, and I've given a speech about it in New York a little over a year ago.

Q2: We're going to have to follow you around!

Stevens: The big problem in that case is that the court, earlier, had held that the doctrine of *respondeat superior* does not apply to public agencies. The error in that particular case is traceable to the court's opinion holding that *respondeat superior* doesn't apply. That case, unfortunately, was written by Justice Brennan. It's not one of his best. In fact, he was dead wrong in the case. If you simply applied *respondeat superior* to prosecutors, you wouldn't have to worry about individual liability, and you wouldn't have to worry about trying to prove defects in the training in the office, which is what the issue was in the Louisiana case. You would simply say that if there was a violation of the constitutional rights of the defendant, the prosecutor's office should be held responsible. You shouldn't try to impose a responsibility on the individual for not doing as good a job at training as you. It's sort of like having a postal driver have an accident. In order to recover against the government, should you have to prove that they didn't train him well in his driving? Or just hold them responsible for the negligence of the agent? That's what should have been the answer in that case. You shouldn't have had to go into all the

details. The problem in the case is that there's a doctrine out there that does not belong there, and should be corrected by statutory amendment.

Q2: Right. Okay.

Q1: My son really wants you to talk about *Citizens United*. He said, "Ask the justice if corporations are people, how are we ever going to put them on trial and put them in jail?"

Stevens: Well, corporations can be on trial. There are criminal provisions that apply to corporations. The anti-trust laws have applied to corporations for a long, long time, and they are persons, for certain purposes, under the constitution. Yes.

Q2: Justice Stevens, should there be an age limit on justices? And another tender subject—why not?—should there be television at hearings in the oral proceedings?

Stevens: That's a close question. I have to confess to having changed my mind in both directions on that. [Laughter] Part of it is the concern about the impact that television often has on any institution that's unintended and unexpected. I think that televising certain activities in Congress has had an adverse effect on the deliberations, and there's a potential adverse effect on a process that is basically working well. On the other hand, it would be an educational benefit, because the public generally, I don't think, has as much respect for the intelligence and the preparedness of the justices that you would find when you witness an argument. So there are pros and cons, there

are arguments on both sides, but I think the justices themselves are sufficiently concerned about the possibility of an adverse effect. It's very unlikely that they would go along with it.

Q2: And the question of whether there should be an age limit. It comes up sometimes in discussions about even whether there is something sacrosanct about nine justices; whether maybe it should be expanded in some fashion, or even narrowed in some fashion. Is there something magical about nine? And should they be able to stay on forever, and ever, and ever—and I'm bearing in mind that you left the court at the age of ninety, was it not?

Stevens: I guess so. Two years ago. I'm now ninety-two.

Q2: Maybe you have a prejudiced view of it. [Laughs]

Stevens: Yes. Well, I have always believed in life tenure, and I do think that in the case of the court it has not produced a problem. I think the justices have been able to handle themselves, either by individually recognizing when the time has arrived, or, there have been two or three occasions when a member of the court has suggested to a colleague that the time may well have come. I think that has always been respected.

Q2: May I ask why you chose the time that you did to retire?

Stevens: I chose retirement—I think maybe I said this publicly, but when I announced my oral opinion in the *Citizens United* case, I stumbled in making the announcement. I had trouble

getting it out, which was very surprising to me, because I really had not had trouble speaking in the past at all, and I did have trouble. The announcement was garbled to some extent. So after that happened, I decided that I probably should be aware that nature was having an impact on my work and that maybe I should retire at the end of the term.

Q2: Well, on the other hand, you've gone on a writing spree, and a speaking spree, since that time. You may even yet be playing golf or tennis.

Stevens: Yes. It's true. But my physical capacity has declined. There's no doubt about it. I think I was correct to recognize—I'm not disappointed in any of my work in the remainder of that term. It did strike me as a sign that I should pay attention to, and I think I was right. I think my ability to work is not as strong today as it was two years ago.

Q2: I don't have a lot of faith in polls. I don't know how you feel about them, but in June of this year, the *New York Times* had a story, "Approval Rating for Justices Hits Just 44% in New Poll." That was followed, after the Affordable Care Act decision—it showed an even further decline, to forty-one percent of Americans saying that they approved of the job the court is doing. Do justices care about this kind of polling? I know you've always been proud—at least some of the justices certainly have seemed to be vocally proud of the former high estimation of Americans for the court.

Stevens: I don't remember being influenced one way or another by polls about the court. I don't know that newspaper readers' immediate reaction to decisions should necessarily be given much

weight. As you know, I've written on many different occasions, judges are not in the business of being popular. It's important that they not be concerned about popularity. They do their best to be impartial and do what they think the law requires. I do think in the particular case you mentioned, I think the chief justice is entitled to a great amount of credit for calling them as he saw it in those cases. Because I'm sure that his own political views were not in accord with the views he expressed in the opinion. But I think he did what the law requires a judge to do— to follow what he thought the law required. I do think he's entitled—and should be given credit for doing that—and not criticized by people who were opponents of the statute.

Q2: This is way out of order here. Did I understand you to write, in *Five Chiefs,* that there were only three women in the Northwestern School of Law, in your class, or in the law school, at the time you were there, in the mid-forties?

Stevens: I think it was the law school, because during World War II the size of the classes was diminished. I think we just had one in my class, but only two or three. Very, very few.

Q2: Today, on the court, you've got three women justices of the court. Two of them were appellate justices—appellate judges of the courts of appeal, were they not?

Stevens: Elena was a solicitor general at the time.

Q2: But you had spoken about the value of diversity of the court. But almost all of them are former courts of appeal judges. Isn't that correct? Is that diversity?

Stevens: No, actually. I think it would be healthier, in the long run, to have greater diversity on the court. But, having said that, there is no one member of the court that I could suggest isn't entirely well-qualified. Unfortunately, there are very few seats available, and it is true that one criterion is former judicial service, which tends to indicate one's qualifications. So it's kind of a dilemma, but I think that, looking back, Lewis Powell, and Byron White, Bill Rehnquist were eminently well qualified to serve even though they had no prior judicial service.

Q2: Actually, do you have to be a lawyer to be a justice?

Stevens: No, you don't have to be a lawyer.

Q1: There have been many nominated who are not lawyers.

Stevens: Have they? But I know it's not a qualification. No.

Q2: Where do we sign up?

Q1: Tell me what you enjoy most about your time now. Are you enjoying going around and giving speeches and writing?

Stevens: Yes, and I enjoy the freedom from deadlines and the work load. I do enjoy that, and I do enjoy the freedom—that I'm able to go to bed early at night when I don't feel like working.

Q1: Stephen [T.] Colbert did quite an interview with you. Do you recall that interview?

Stevens: I certainly do. He's a very nice guy. [Laughter]

Q2: It was during that interview that Colbert made the mistake—fatally—of asking you whether you regretted any decisions, and your immediate reply was, "Other than this one?" [Laughter]

Stevens: Well, he was very kind to me.

Q2: I hope you don't feel that way about our having interviewed you.

Stevens: No, I certainly don't. I certainly don't. He's a very interesting and likable person.

Q1: He is. Yes, indeed.

Q2: And influential, I think.

Stevens: I think so, too. And he's very intelligent, too. He's a very decent person.

Q1: We don't know how much time you have. We don't want to take more—

Stevens: I'm basically running out pretty quickly.

Q1: Well, I can't thank you enough. We'll send you these transcripts, and we'll hope when you come back, you'll tolerate a few more sessions with us.

Stevens: I will. Okay. I leave for Florida tomorrow.

Q1: Congratulations.

Q2: The historian Jacques [M.] Barzun passed away recently, and it was noted—

Stevens: Who passed away?

Q2: Jacques Barzun.

Q1: He's a historian at Columbia—

Q2: —for many, many years. The *Times* noted that he wrote dozens of books, across many decades, demonstrating that old age did not necessarily mean intellectual decline. He published his most ambitious and encyclopedic book at the age of ninety-two. So I rest my case.

Q1: So we're looking forward to that book.

Stevens: I'll read the book. I think I did read—what was that book about?

Q2: That book was *From Dawn to Decadence*.

Q1: The decline of the West, basically.

Q2: *From Dawn to Decadence*. It's 877 pages.

Q1: It's his book predicting the decline of the West, the Western world—

Q2: Which is still here.

Stevens: Oh, I see.

Q1: Okay, we're going to let you stop.

Stevens: Right.

[END OF INTERVIEW]