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THE CASE OF JUSTICE STEVENS: HOW TO SELECT, NOMINATE AND CONFIRM A JUSTICE OF THE UNITED STATES SUPREME COURT

*Victor H. Kramer**

The nominees to the Supreme Court during the past thirty years have been, in order of nomination: White, Goldberg, Fortas, Marshall, Thornberry, Burger, Blackmun, Haynesworth, Carswell, Powell, Rehnquist, Stevens, O'Connor, Scalia, Bork, Ginsburg, and Kennedy.¹ Most students of the Court, including both scholars and practitioners, would rate Stevens as above average and perhaps near the top of these seventeen nominees. As Professor Abraham put it:²

Stevens's [opinions] are consistently . . . tightly reasoned, sometimes crochetlike; written with directness, and often blunt incisiveness; addressing statutory construction with literateness and literalness . . . [A] personal loner, legal maverick, he forever challenges his colleagues without, however, triggering or adopting the sort of acrimony characteristic of some of them.

* * *

Stevens . . . is . . . an unceasing stimulator of reflection, of innovation, of disciplined literateness. . . . And his gift for elegant, pungent memorable expression will always grace the Court's annals.

In the past twenty years we have seen how the appointments process can misfire. To understand the process fully, however, we also need to consider its successes. How did Stevens arrive on the Court?

I

The recent disclosure of President Ford's papers on the Stevens nomination revealed that he relied largely, if not totally, on his At-

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1. The nominations of five of these seventeen—Thornberry, Haynesworth, Carswell, Bork and Ginsburg were either withdrawn or the nominee was rejected by the Senate.

2. ABRAHAM, JUSTICES AND PRESIDENTS, 325, 327 (2d ed. 1985).

torney General's advice. Hence, the story of the Stevens appointment really begins with Ford's selection of Edward Levi to be his Attorney General.

In early December 1974, Edward Hirsch Levi, President of the University of Chicago, found himself on a plane to Washington. Donald Rumsfeld, then President Ford's chief of staff, had asked him to come and plan to spend about three hours at the White House.³ Levi knew Rumsfeld because both had served on the Productivity Commission which George Schultz had chaired. According to Levi, Rumsfeld did not mention to Levi the possibility that he might be asked to serve in the Ford Administration.

Upon arriving at the airport Levi was driven to the White House in a government limousine and commenced talking with Rumsfeld, who asked Levi what he thought should be the Ford Administration's goals in selecting an Attorney General.⁴ William Saxbe, then Attorney General, was resigning.⁵ Saxbe, a former senator who had been a small-town lawyer in Ohio, probably had been selected by President Nixon because senatorial courtesy assured his confirmation.⁶ Two of Nixon's previous Attorney Generals had or would be indicted and convicted of crimes, and the third, Elliot Richardson, had resigned upon being ordered by President Nixon to fire Archibald Cox (who had been Nixon's choice to investigate the Watergate scandal).⁷

Levi's answer stressed the importance of depoliticizing the Department of Justice.⁸ In response, Rumsfeld told Levi that the President would speak directly with him and started to take Levi into the Oval Office. Levi held back long enough to knock the ashes out of his pipe. Upon entering the office and greeting President Ford he noticed that the President was smoking his pipe, whereupon Levi ducked out of the office to regain his own.

The President and Levi had a long discussion ranging over many issues, including the problems facing the Department of Justice. During the course of that discussion Ford asked Levi what the "Department of Justice needs most."⁹ Ford in his autobiography

3. Author's first interview with Edward Levi (May 24, 1989).

4. *Id.*

5. On December 12, 1974, then Attorney General Saxbe wrote to President Ford submitting his resignation as Attorney General upon "my appointment as Ambassador [to India] or on the appointment of my successor whichever is earlier." Saxbe's letter is in the White House Central File, category FG 17A, Box 88 in the Gerald R. Ford Library. See also, G. FORD, *A TIME TO HEAL* 235-36 (1979).

6. See N.Y. Times, Dec. 18, 1973, P. 35, col. 4.

7. *Id.*

8. See *supra* note 3, and G. FORD, *supra* note 5, at 237.

9. See G. FORD, *supra* note 5, at 237.

reports that Levi replied, "A nonpolitical head." After further discussion, the president asked Levi to take the job of Attorney General and run the Department.¹⁰

Both Levi and Ford agree that Levi had not expected any such offer.¹¹ Levi held back, saying that he needed the job "like I need a hole in my head."¹² Less dramatically, he explained to the President that he had obligations to the University of Chicago which he was loath to shirk.¹³ Ford has written that at this point he

knew . . . that Levi was the man for the job, so I decided to put the pressure on. 'With the administration of justice in such difficulty,' I asked, 'How could you possibly turn your back on this opportunity?'¹⁴

Several days later Levi acceded to Ford's request.¹⁵

Levi was, indeed, a remarkable choice for the Attorney General. Son of Gerson Levi, a distinguished Chicago rabbi, grandson of Emil Gustav Hirsch, another distinguished rabbi,¹⁶ he was a brilliant legal scholar. After graduating from the University of Chicago Law School in 1935, Levi did graduate work as a Sterling Fellow at Yale, served on the staff of the House Judiciary Committee, and held high offices in the antitrust division under Thurman Arnold and his successor, Wendell Berge.¹⁷ In 1945 Levi returned to the University of Chicago where he was successively Professor of Law, Dean of the Law School, Provost and finally President.¹⁸

Ford's autobiography reports that Levi's cool performance as president of the university during the Vietnam protests "intrigued" him.¹⁹ Ford focused on the student sit-in at the University's administration building:²⁰

Levi didn't panic. He didn't call the police or provoke a confrontation. He simply told the students that he would be happy to talk to them about legitimate grievances, but *not* about amnesty for them, and when the sit-in ended some forty of its ringleaders were tossed out of school.

On December 12, 1974, it became public knowledge that Ford

10. *Id.*, and author's second interview with Edward Levi (Nov. 1, 1989).

11. *Id.*, and interview with Edward Levi, *supra* note 3.

12. Interview with Edward Levi, *supra* note 3.

13. *See supra* note 9.

14. *Id.*

15. *Id.*

16. Biography of Edward H. Levi in 45th ed., Vol. 2 at 1859 WHO'S WHO IN AMERICA 1988-89; Gerson Levi biography in Vol. 1, WHO WAS WHO IN AMERICA at 724; and Hirsch in *id.* Vol. 1 at 569. Gerson Levi listed himself as a Republican.

17. *See* G. FORD, *supra* note 5, at 236.

18. *Id.*

19. *Id.*

20. *Id.*

wanted Levi for his Attorney General.²¹ Senators Eastland and Hruska, respectively Chairman and ranking minority member of the Senate Judiciary Committee, “went through the roof.”²² They regarded Levi as a liberal, an “academician” out of touch with the “real world” and inexperienced in the courtroom.²³ Knowing that he would face strong opposition to Levi’s appointment, Ford prepared carefully for his private talk in the Oval Office with the two Senators.²⁴ He succeeded in convincing them to meet with Levi and see for themselves.²⁵ As Ford has said, the Senators’ face to face meetings with Levi “did it.”²⁶ The Levi nomination was sent to the Senate on January 14, 1975, and he was confirmed, taking office on February 7, 1975.²⁷

After Levi assumed office—and doubtless in anticipation of the death or resignation of Justice Douglas who had suffered a massive stroke²⁸—Ford asked Levi to give him a list of candidates for the Supreme Court that Levi “thought worthy of consideration,”²⁹ and to ignore all political considerations.³⁰ Levi’s list included no persons over sixty years of age.³¹ The following eighteen names were on the list (in alphabetical order):

Judge Arlin M. Adams
 Professor Philip Areeda
 Solicitor General Robert Bork
 Bennett Boskey, private practitioner
 Judge Alfred T. Goodwin
 Senator Robert P. Griffin

21. See N.Y. Times, Dec. 13, 1974, at 19, col. 1; and *id.*, Dec. 14, at 12, col. 1.

22. See G. FORD, *supra* note 5, at 237.

23. See *id.* and memo from Tom C. Korologos to Ford through William E. Timmons, December 12, 1974, in Box 14, Pres. Handwriting File in the Gerald R. Ford Library, regarding meeting with Senators Hruska and Eastland.

24. See *id.*

25. See Memo for the President from Phillip Areeda, January 6, 1975, in Box 14 in Pres. Handwriting File in the Gerald R. Ford Library. The memo reported that “a few days after Eastland and Hruska met with you, they lunched with Levi. We understand the meeting went well.”

26. See G. FORD, *supra* note 5, at 237.

27. See N.Y. Times, Jan. 15, 1975, at 14, col. 6; and *id.*, Feb. 8, 1975, at 15, col. 1.

28. See N.Y. Times, Jan. 2, 1975, at 31, col. 1.

29. See Memo for the President from Attorney General Levi, November 10, 1975, at 1 in Cheney Files, Box 11 in the Gerald R. Ford Library.

30. Interview with Edward Levi, *supra* note 3.

31. See Memo for President Ford, *supra* note 29, at 1-2. Curiously, one of the names included in the list was that of Bennett Boskey, born in 1916. Not included was Judge Gignoux about whom Levi wrote Ford as follows:

In my original conversation with you on this matter, I mentioned Edward Gignoux of Portland, Maine, U.S. District Judge for the District of Maine. Judge Gignoux is one of our most distinguished judges but he was born in 1916.

Id. at 2. Boskey, included in the list, was but about two months younger than Gignoux.

Professor Philip Kurland
 Vincent Lee McKusick, private practitioner
 President Dallin H. Oaks (Brigham Young University)
 Judge Paul H. Roney
 Assistant Attorney General Antonin Scalia
 Judge John Paul Stevens
 Judge Philip Tone
 Judge H. Clifford Wallace
 Judge William H. Webster
 Representative Charles E. Wiggins
 Judge Malcom R. Wilkey
 James H. Wilson, Jr., private practitioner

After Levi submitted this list, it became clear that Justice Douglas's illness rendered him unable to carry on his duties on the Supreme Court. On November 10, 1975, two days before Douglas's formal retirement, Levi wrote the President:³²

At your suggestion, I have now pared down the list, and I have provided short biographies for those remaining on the list.

. . . I have not included biographies of Senator Griffin or Congressman Wiggins, since they are well known to you. I should say I have a high regard for their legal ability. I have included biographies for Judge Roney and Judge Goodwin, but I do not believe they would be appointments up to the high standard you have suggested.

Levi then rated seven of the eleven names on his "pared down" list in three groups and in order within each group, as follows:³³

Dallin Oaks
 Judge Stevens
 Robert Bork

 Judge Adams
 Vincent McKusick

 Judge Webster
 Judge Wallace

Unrated: Judges Roney and Goodwin and Congressmen Griffin and Wiggins.

As mentioned in the memorandum, Levi provided "short biographies" of those on the list (except for the Congressmen "since they are well known to you.")³⁴ Some of the biographies are revealing. First of all, those for Judges Stevens and Adams were somewhat longer than any of the others. In the Stevens biography, Levi wrote:

32. See Memo for the President, *supra* note 29, at 3.

33. *Id.*

34. *Id.*

His opinions lack the verve and scope of Judge Adams' but are more to the point and reflect more discipline and self restraint.³⁵

Two days later, on November 12, Justice Douglas sent his formal letter of resignation to the President, and Ford met with Levi and White House Counsellor Philip Buchen to discuss a replacement.³⁶ Ford says he told Levi, "don't exclude women from your list."³⁷

On November 12—the same day he met with Ford and Buchen—Levi submitted the eleven names on his November 10 list to the Committee on the Judiciary of the American Bar Association.³⁸ Warren Christopher, then head of the ABA Committee on Judicial Appointments, in a personal visit with Levi, had urged him to submit names to the ABA Committee before the President made his final choice. Levi decided to follow Christopher's advice, although President Nixon had stopped submitting anything to the ABA, probably because he thought the committee members had leaked the names to the press.³⁹

Less than a week later Levi submitted a list containing additional names to the ABA Committee.⁴⁰ Included on the list were those of two women: Carla Hills, Secretary of Housing and Urban Development, and U.S. District Judge Cornelia Kennedy, of De-

35. *Id.* at 5. On Nov. 10, 1975—the same day that Levi submitted his shorter list—Chief Justice Burger wrote the President, stating that a Court vacancy "may occur" and that three "factors" especially "deserve consideration" as follows:

(a) It must be a nominee of such known and obvious professional quality, experience and integrity that valid opposition will not be possible.

(b) [a] nomination should be made swiftly . . . without delay.

(c) A nominee with substantial judicial experience would have several marked advantages . . . because of familiarity with the enormous amount of "new law" in recent decades; insulation from controversy and partisanship by reason of judicial service is also likely an advantage (as it was to Justice Blackmun and to me).

The letter from Chief Justice Burger is in Box 11, Richard Cheney Files in the Gerald R. Ford Library.

36. See G. FORD, *supra* note 5, at 334.

37. *Id.* at 335, in which President Ford wrote that Carla Hills, then Secretary of Housing and Urban Development, and U.S. District Judge Cornelia Kennedy in Detroit, were on the list.

38. See ABRAHAM, *supra* note 2, at 322; N.Y. Times, Nov. 17, 1975, at 18, col. 4; and Washington Post, Nov. 14, 1975, at A-2. The Post article contained this paragraph:

The names prompting the most discussion continued to be Carla A. Hills, . . . and Attorney General Edward H. Levi. There was also considerable speculation about Sen. Robert P. Griffin (R-Mich.) and Solicitor General Robert H. Bork.

A memo by Levi dated Nov. 13, 1975, giving the names of the 11 submitted to the ABA the previous day is in Box 62 in the Philip Buchen Files in the Gerald R. Ford Library.

39. See ABRAHAM, *supra* note 2, at 306 and 322; interview with Edward Levi, *supra* note 10.

40. See N.Y. Times, Nov. 20, 1975, at 16, col. 1.

troit.⁴¹ Betty Ford, wife of the President, had publicly urged that a woman be appointed to the Supreme Court.⁴² The *New York Times* reported on November 18 that the National Women's Political Caucus submitted to the White House a list of sixteen potential female candidates.⁴³ The names of at least thirty-three women were submitted by various individuals and groups,⁴⁴ including a then little-known Arizona judge, Sandra O'Connor.⁴⁵

On November 26, Levi wrote to Buchen as follows:

Late yesterday afternoon I was informed in a second call from Warren Christopher that the ABA Committee has moved to the second stage on Arlin Adams and has satisfied itself to place him in the first category.

At this point, then, there are three candidates in the first category; Adams, Tone and Stevens.⁴⁶

Levi's note to Buchen then addressed criticisms of Stevens. Levi noted that Stevens's opinions "do not substantiate" a "feeling" by some that "Stevens might be soft on crime." With respect to criticisms of Stevens's "dissent in the long hair case,"⁴⁷ Levi wrote, "I like the dissent, as I believe you will." Levi's comments clearly suggest he favored Stevens.

41. See G. FORD, *supra* note 5, at 335.

42. See Washington Post, Nov. 14, 1975, at A-2, col. 6; and N.Y. Times, Nov. 20, at 16, col. 1.

43. See N.Y. Times, Nov. 18, 1975, at 18, col. 6.

44. See undated Memorandum for President Ford through Richard B. Cheney from Douglas P. Bennett in the White House Central Collection, Box 137 in the Gerald R. Ford Library. The memo contains a list of "names of individuals who have been recommended for appointment to the Supreme Court." The list was divided into three categories as follows: judges, legal scholars and "attorneys in other activities." There were seventy-nine names on the list of which thirty-three had feminine first names. Curiously, Stevens's name was not on the list. Judge (now Senator) Heflin's name was misspelled. Dallin Oaks was incorrectly described as a U.S. District Judge and his first name was misspelled. Finally, the list did not include some of the names on Levi's list.

45. Memorandum from Pat Lindh, Special Assistant to the President for Women, to Douglas Bennett, Director of the President's Personnel Office, November 14, 1975 found in the White House Central Collection, Box 136, in the Gerald R. Ford Library, reads in its entirety as follows: "Another name has come to my attention and I feel it is important to pass it on to you. The person is Sandra O'Connor, Judge, Superior Court, Court [sic] of Maricopa, Arizona." At that time, O'Connor was a judge on the Maricopa County Superior Court.

46. The memo is in the Buchen Files, Box 62 in the Gerald R. Ford Library. Compare N.Y. Times, Nov. 26, 1975, at 16, col. 5, reporting as follows:

The four [under consideration for appointment to the Supreme Court] are Vincent L. McKusick, a lawyer in Portland, Me., and three judges on the United States Court of Appeals—Arlin Adams . . . and John Paul Stevens and Philip W. Tone . . .

Judge Tone was on Attorney General Levi's original list of eighteen persons but not on the pared down list of eleven given to the President on November 10, 1975. See Memorandum from Levi, *supra* note 29, at 2.

47. See *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972); cf. *Miller v. School District No. 167, Cook County, Ill.*, 495 F.2d 658, *rehg. denied*, 500 F.2d 711 (7th Cir. 1974).

Although on November 26, Levi wrote that the list of those "in the first category" was down to Adams, Tone and Stevens. Ford recalls the "final choice" was between Judges Adams and Stevens.⁴⁸ Remember that about two and a half weeks earlier Levi had written the President putting these two judges (and Solicitor General Bork) at the top of the list and favoring Stevens over Adams. Judge Tone was not included in this shorter list. This leaves unexplained the disappearance of Oaks and Bork and the inclusion of Tone on Levi's top list. Oaks, a Mormon, would have faced confirmation difficulties in view of the then prevailing racial attitude of the Church of Latter Day Saints. Of Bork, who had continued as Solicitor General after Nixon's resignation, Levi had written in his November 10 memorandum to the President:⁴⁹

Mr. Bork has the highest reputation . . . for ability and integrity. If . . . appointed to the Court, there would be little doubt of his intellectual capacity for the work. There would be equally little doubt that, on the Court, Mr. Bork would provide strong reinforcement to the Court's most conservative wing—particularly in the sense of a need to limit the extended role of the courts.

Bork probably was dropped because of these "most conservative" views. We don't know why Judge Tone (who appeared only on Levi's first list of eighteen) reemerged, at least according to Levi's November 26 memo, in the top three.

In explaining why he selected Stevens, Ford, who had been a student at Yale Law School when Justices Stewart and White were also there, has written that he "poured over" the judicial opinions of the two "final" candidates:⁵⁰

Stevens's opinions were concise, persuasive and legally sound. It was a close call, but after talking to Levi and Buchen, I selected Stevens in December [sic].⁵¹

The record makes it reasonably clear that Levi was largely responsible for Ford's selection of Stevens. Stevens was always one of Levi's three top choices and became first after Oaks was dropped. Ford didn't know Stevens and perhaps had never heard of him until Levi brought him to the President's attention.⁵² On the other hand, Stevens and Levi had known each other for many years. Like Levi, Stevens was a Chicagoan who received his bachelor's degree from the University of Chicago and graduated high in his class. Unlike Levi, he attended and graduated first in his class from Northwest-

48. See G. FORD, *supra* note 5, at 335.

49. See Memorandum from Levi, *supra* note 29, at 7.

50. See G. FORD, *supra* note 5, at 335.

51. President Ford advised the Senate of his nomination of Stevens on November 28. See N.Y. Times, Nov. 29, 1975, at 1, col. 8.

52. See ABRAHAM, *supra* note 2, at 324.

ern University Law School.⁵³ After clerking for Justice Rutledge, he entered private practice and specialized in antitrust.⁵⁴ In 1951, Stevens served on the staff of the Subcommittee on the Study of the Monopoly Power of the House Judiciary Committee.⁵⁵ Levi had been counsel for the same subcommittee until he resigned to become Dean of the Chicago Law School.⁵⁶ Stevens taught part time for several years at the University of Chicago Law School.⁵⁷ Stevens listed Levi as a reference on his resume submitted in connection with his consideration for appointment as a Seventh Circuit judge.⁵⁸

II

In presenting Judge Stevens to the Senate Committee on the Judiciary to act on his nomination, Attorney General Levi pulled out all the stops. He said:

I have known Judge Stevens for many years

Judge Stevens . . . is truly outstanding. His opinions . . . are gems of perfection. He is a craftsman of the highest order. He has a built-in direction system about how a judge should approach a problem fairly, squarely, succinctly. His opinions are a joy to read . . . other judges have a very high mark to come up to compare with his⁵⁹

Levi had classified Stevens in his November 10 memo to Ford as "a moderate conservative in his approach to judicial problems and in cases involving the attempted expansion of constitutional rights and remedies."⁶⁰ And Levi cited several of Stevens's opinions (one a dissent) in the Seventh Circuit in which Stevens had

53. See, *Hearings on Nomination of John Paul Stevens To Be A Justice of the Supreme Court*, Judiciary Committee, U.S. Senate, 94th Cong., 1st Sess. 3 (1975) [hereinafter *Hearings*].

54. *Id.*

55. *Id.*

56. See WHO'S WHO IN AMERICA 1988-89.

57. See, *Hearings*, *supra* note 53, at 3.

58. See, *Memo by Stevens*, 1970, Box 11, The Richard Cheney Files in the Gerald Ford Library (in connection with Stevens's appointment to a judgeship on the Seventh Circuit. The Stevens memo was found with a memo dated Nov. 25, 1975 from Philip Buchen, Counsel to the President, to Richard Cheney, Assistant to the President. The Buchen memo reports that the President wanted to know what Stevens's views were on environmental questions).

59. See, *Hearings*, *supra* note 53, at 3. Warren Christopher, on behalf of the American Bar Association, also testified in glowing terms in support of Stevens. The ABA found him "one of the best persons available for appointment to the Supreme Court." Christopher added that the "striking fact that comes through from a survey of the opinions [of Stevens on the Seventh Circuit] is their consistently high quality, regardless of the substantive area [of law] involved." *Id.* at 17-21.

60. See *Memo*, *supra* note 29, at 5.

rejected extensions of criminal defendants' assertions of "rights."⁶¹

Stevens testified before the Senate Judiciary Committee on December 8 and 9.⁶² Immediately following the conclusion of his testimony, Margaret Drachsler, representing the National Organization for Women, expressed "my grave concern regarding the nomination . . . and the manner in which it was accomplished."⁶³

Although the political party affiliation of neither Levi nor Stevens (if any) played a part in their nominations, the nominations were made by a Republican President. Presumably, Republican Senators had no interest in opposing or even delaying the Stevens nomination. Accordingly, it was the Democratic members of the committee who did the questioning, save for Senator Mathias, a liberal Republican who frequently voted with the Democrats.

During the hearings Senator Kennedy questioned Stevens on his views about sex discrimination. Stevens was prepared for the question and discussed his views at length. He made the following points:⁶⁴

1. He had re-examined his two opinions that womens' groups specifically criticized, and he remained convinced that they were correctly decided.
2. The proposed equal rights amendment to the Constitution "apart from its symbolic value" will not achieve anything that is not achievable under the equal protection clause of the fourteenth amendment.
3. He testified: "I think women should have exactly the same rights under the law as men. I think they should have the same economic opportunities. But I do not think they should win every case they file."
4. "I would be more concerned about the racial discrimination [than sex discrimination] because I think they [blacks] are a more disadvantaged group in the history of our country than the half the population that is female."

After Stevens politely but firmly declined to discuss the subject of capital punishment,⁶⁵ he said he thought Senator Kennedy was asking "a very fair question" when Kennedy asked what his standards would be to decide whether to excuse himself from sitting in cases.⁶⁶ But he failed to answer the question with any degree of precision, noting that he was "rethinking the problem" of recusal "as it might apply to the Supreme Court."⁶⁷

Next came the nominee's most revealing and significant answer

61. *Id.* at 5-6.

62. *See, Hearings, supra* note 53, at 6-78.

63. *Id.* at 78. Three other witnesses testified against Stevens; their testimony was inconsequential; *see id.* at 185, 209, 212.

64. *Id.* at 15-16.

65. *Id.* at 26.

66. *Id.* at 31.

67. *Id.* at 32.

to any Senatorial question. Kennedy asked him, "How would you label yourself . . . as an activist or a strict constructionist?" Stevens replied:⁶⁸

I would not label myself, Senator, and that is not a contrived position by any means. . . . It is almost a characteristic of my entire professional life. . . . [Law] firms [have] tended to become identified either as plaintiffs' firms or defendants' firms. That was not true of ours. We felt that the law was a profession and we could handle professional work in a professional way without trying to get involved in the policy judgments . . .

On the following day, Judge Stevens was questioned by Senators Byrd, Mathias and Tunney.

Senator Byrd asked him whether he would "feel bound by the precedents that the Supreme Court established on constitutional questions."⁶⁹ This was a question Judge Stevens felt comfortable in answering:⁷⁰

I certainly would weigh very carefully any decision that had already been reached by a prior Court and I would be most reluctant to depart from prior precedent without a clear showing that departure was warranted.

I would feel bound, but not absolutely 100-percent bound I think there are occasions, particularly in constitutional adjudication, where it is necessary to recognize that a prior decision may have been erroneous and should be reexamined.

Senator Byrd asked him whether he thought that the

Constitution has a fixed and definite meaning when it was adopted and that the same fixed and definite meaning prevails today but that it must be applied to changing circumstances and interpreted and construed in the light of those circumstances?⁷¹

Judge Stevens did not ask for a clarification of this perhaps intentionally confused question. Instead he deftly carried water on both shoulders, replying:

I think he has to be guided by history, by tradition, by his best understanding of what was intended by the framers, and yet he also must understand that he is living in a different age in which some of the considerations that happen today must inevitably affect what he does.⁷²

Stevens was forthright in answering Byrd's question whether a "Justice should interpret the Constitution in accordance with his own personal views on economic and political and sociological questions."⁷³ His answer was no: "a man is the product of his own

68. *Id.*

69. *Id.* at 40.

70. *Id.*

71. *Id.* at 41.

72. *Id.* at 42.

73. *Id.* at 44.

background and he may be somewhat influenced" by his own personal views "[b]ut I will do my very best to subordinate those considerations because I think that is the duty of any judge."⁷⁴

Judge Stevens, in answer to a question from Senator Mathias, said that he placed "the highest possible value on the interests protected by the First Amendment."⁷⁵

Following Senator Mathias, Senator Tunney inquired whether Stevens was "in sympathy" with a "trend" of the Court to avoid deciding cases on the basis of lack of standing and other "avoidance techniques."⁷⁶ At first the nominee ducked, saying "I really do not know how to answer that" but apparently thought better of his answer, because he then said:⁷⁷

I think I might mention one [decision] specifically.

I was surprised at the law school reverse discrimination case. I would have thought the court [sic] would have reached that issue on the basis of the facts.

When Senator Tunney asked him if he had any views on the exclusionary rule, Judge Stevens said that he was "not sure he should go beyond" recognizing that the public "sometimes has difficulty understanding" why the rule is necessary, and on the other hand there is "concern that, unless the exclusionary rule is enforced, there may not be an adequate deterrent to police conduct of which none of us would approve."⁷⁸

Stevens's testimony stretches over more than sixty printed pages but the above gives the range of questions he was asked and the flavor of his replies. In general, his testimony can be summarized as deft, judicious, cautious, and fairly forthcoming, although the nominee was reasonably careful not to express views on specific questions that might come before the Court. Only on the question of discrimination against women did Stevens seem to be on the defensive.

Stevens was unanimously confirmed as a Justice on December 17, 1975—less than eight days after the conclusion of his testimony.⁷⁹

III

This review of Justice Stevens's elevation to the Supreme Court might suggest the following prescription: Take a President deter-

74. *Id.*

75. *Id.* at 56.

76. *Id.* at 67.

77. *Id.*

78. *Id.* at 77.

79. See N.Y. Times, Dec. 18, 1975, at 1, col. 7.

mined to de-politicize the Department of Justice; have him appoint as Attorney General a distinguished lawyer-scholar-administrator without any interest or prior participation in politics, rely on his Attorney General's prompt recommendation for a non-partisan appointment to the Supreme Court, settle on the nominee quickly—and out will come an outstanding, noncontroversial appointment enthusiastically endorsed by an admiring and charmed Senate Judiciary Committee.

One difficulty with this prescription lurks in the words "politicization" and "non-partisan." We must not forget that it was President Nixon who took the step that made Stevens a leading candidate because it was Nixon who, acting in accordance with the long tradition of senatorial prerogatives, accepted the recommendation of Illinois Senator Percy, to appoint Stevens to the Seventh Circuit.⁸⁰ Yet the same Nixon appointed his campaign manager to be his Attorney General,⁸¹ and ruthlessly used law enforcement and the lack thereof to further his political career.⁸²

When it comes to a nominee to the Supreme Court, just what does "non-partisan" mean? If it means that the nominee is not a registered member of a political party, the term seems insignificant. Based on the careers of the seventeen persons nominated during the past thirty years, only a few could be called political partisans although most were members of the same political party as the president who nominated them. A few had campaigned for that president.⁸³ Only two of the seventeen had held political office (Thornberry⁸⁴ and O'Connor⁸⁵).

Perhaps the term "non-partisan" means that the nominee cannot be labeled as conservative or liberal (as Judge Stevens insisted was true of himself). That Stevens had been a highly competent

80. DORNETH & CROSS, FEDERAL JUDICIARY ALMANAC 6 (1987).

81. See N.Y. Times, Dec. 12, 1968, at 37, col. 7.

82. See *id.*, Aug. 9, 1974, at 13, col. 1.

83. Byron White and Arthur Goldberg, both nominated by President Kennedy, had been active in Kennedy's campaign for election to the presidency. See SCHLESINGER, A THOUSAND DAYS 28, 51, 75 (1965). Abe Fortas had been closely associated with Lyndon Johnson for many years prior to and during his vice-presidency and presidency, and gave him legal, political and policy advice. See MURPHY, FORTAS (1988). Chief Justice Burger had been Minnesota state Republican Chairman in 1952. Justice Rehnquist was actively involved in Barry Goldwater's 1964 campaign for the presidency. See ABRAHAM, *supra* note 2, at 298, 315.

84. Judge Thornberry, who was nominated in 1968 but never confirmed, had been active politically prior to his appointment to the federal bench. See his biography in WHO'S WHO IN AMERICAN LAW 790 (5th ed. 1987-88).

85. Sandra O'Connor had been active in Republican politics in Arizona. She served in the state Senate from 1969 to 1975 and was its majority leader in 1973-74. See her biography in *id.* at 585. She also served as a state co-chair of the committee to re-elect President Nixon. See N.Y. Times, July 8, 1981, at A13, col. 6.

lawyer and, as an appellate judge, had written superb, carefully crafted opinions, do not appear to be qualities associated only with judges who have not been politically active. For example, Justices Black and Brandeis, two of the most admired Justices ever to serve on the Court, had been quite "partisan." Black had served in the Senate and was a leader in guiding President Roosevelt's New Deal legislation through the Senate.⁸⁶ Brandeis had been active politically and a leader in crafting President Wilson's program to reform the antitrust laws and to enact new legislation to regulate business.⁸⁷ Apparently, such "partisan" backgrounds did not disqualify Brandeis or Black from judicial greatness.

While partisanship has become a suspect quality, experience as an appellate judge has become a major consideration in choosing Court appointees in recent years. Yet fifty years ago not a single Justice had served on an appellate court prior to appointment.⁸⁸ And a hundred years ago, only three of the Justices had had significant judicial experience.⁸⁹ Of the Justices now on the Court five came from the federal courts of appeal and two more had experience on state appellate courts.⁹⁰ Moreover, it may be more than coincidence that three of the nine Justices now on the Court had been law clerks to former Supreme Court Justices,⁹¹ and two of

86. See Frank, in FRIEDMAN & ISRAEL, *JUSTICES OF THE UNITED STATES SUPREME COURT*, VOL. III, 2326-29 (1969).

87. See MASON, *BRANDEIS—A FREE MAN'S LIFE* (1946), especially part IV, entitled *In National Politics* at 365-440.

88. See *DICTIONARY OF AMERICAN BIOGRAPHY* and *WHO WAS WHO IN AMERICA*. The Justices holding office at the opening of the October Term, 1939 were: Chief Justice Hughes and Justices McReynolds, Butler, Stone, Roberts, Black, Reed, Frankfurter, and Douglas. See 308 U.S. iii (1939). Hughes had served on the Supreme Court twice and hence, literally, he had prior appellate experience as a judge. Black had served but eighteen months on a local police court. See *supra* note 86, at 2324.

89. The Justices on the Court at the opening of the October Term 1889 were: Chief Justice Fuller and Justices Miller, Field, Bradley, Harlan, Gray, Blatchford, and Lamar. There was one vacancy. See 132 U.S. over flyleaf (1889). Justices Gray and Field had sat on the supreme courts of Massachusetts and California, respectively. Justice Blatchford had served as a judge in the Southern District of New York and on the U.S. Circuit Court in New York. Justice Harlan had served as a judge of a Kentucky county court for a year. Chief Justice Fuller and Justices Miller, Field, Bradley, and Harlan had been active in politics. Justice Lamar had been elected to both the U.S. House of Representatives and the U.S. Senate. The facts concerning the careers of these eight Justices were derived from their biographies in FRIEDMAN & ISRAEL, *JUSTICES OF THE UNITED STATES SUPREME COURT*, VOL. II, 1013, 1072, 1184, 1282, 1283, 1380, 1403, 1431-33, 1474 (1969).

90. Marshall (2d Circuit), Stevens (7th Circuit), Blackmun (8th Circuit), Scalia (D.C. Circuit), and Kennedy (9th Circuit). Justice Brennan had served on the appellate courts of New Jersey for about six years. See *WHO'S WHO IN AMERICA* 1988-89. Justice O'Connor had served on the Maricopa County Superior Court from 1975 to 1979, and on the Arizona Court of Appeals from 1979-81. See *WHO'S WHO IN AMERICA* 1988-89.

91. Justice White was a law clerk to Chief Justice Vinson; Justice Stevens was a law clerk to Justice Rutledge; and Chief Justice Rehnquist was a law clerk to Justice Jackson.

those three are the only current Justices who had not held prior judicial office. The experience gained as a Supreme Court law clerk may be useful training for a job on the Court today.

Granted, then, that judicial experience is considered a highly important credential for elevation to the Court, what are the considerations that should move a President to favor one experienced judge over another for a Court appointment? Attorney General Levi in his November 10 memorandum to President Ford mentioned "craftsmanship" in opinion writing,⁹² as well as "broad scope of interest, and energy" and "analytical skill."

But considerations of diligence, energy, analytical skill, persuasiveness and judicial experience are less important than a political question: what are the potential Justice's views on the important issues of public policy that will come before the Court and do those views mesh or clash with those of the president? If the bitter and divisive battle to confirm Judge Bork taught Americans anything, it should have taught them that many issues both of constitutional law and statutory interpretation are decided on the basis of the Justices' philosophies, experiences, and prejudices rather than upon a specialized kind of learning acquired through careful study.

Only in America among the world's democracies has such broad discretionary power to overrule the will of the elected representatives been permitted to so few. We continue to permit it because we think judicial review works. We increasingly recognize that it will continue to work only if the opinions of the Court do not stray too far, for too long a time, from the national consensus. But how can a President determine his nominee's views—or more accurately—his nominee's future views on important questions of public policy? It was easy for Attorney General Levi, in advising President Ford, to place Judge Bork's views far to the right of center.⁹³ Not so, however, in the case of Judge Stevens. Stevens warned us that he could not be labeled.⁹⁴ Yet Levi labeled Stevens when he wrote President Ford that Stevens "is generally a moderate conservative in his approach to judicial problems and in cases involving the attempted expansion of constitutional rights and remedies."⁹⁵ As it turned out, Justice Stevens has sided more often with the "lib-

Judge Ginsburg, whose nomination was withdrawn, had clerked for Justice Marshall. See *supra* note 80, at 4, 5 and 143.

92. We have it on good authority that some of the Justices do not draft their own opinions; their law clerks do. See R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102-19 (1985), especially 105-10. Pages 102 to 119 are subtitled *The Rise of the Law Clerk*.

93. See *Memorandum, supra* note 29, at 7.

94. See *Hearings, supra* note 53, at 32.

95. See *memorandum, supra* note 29, at 5.

eral" Justices Brennan and Marshall than with the other six.⁹⁶

Did Tony Lewis say all that can be said when he wrote less than two weeks prior to Stevens's appointment: "There is no formula for choosing Justices except to seek excellence?"⁹⁷ President Ford and the country surely got a kind of excellence when the President followed his Attorney General's advice and nominated John Paul Stevens. In substantial part, no doubt, Stevens's selection was determined by chance, but the record shows that a significant factor was the wisdom of Levi and the good judgment of the President in selecting Levi to be Attorney General.

96. See ABRAHAM, *supra* note 2, at 325.

97. See N.Y. Times, Nov. 17, 1975, at 31, col. 6.