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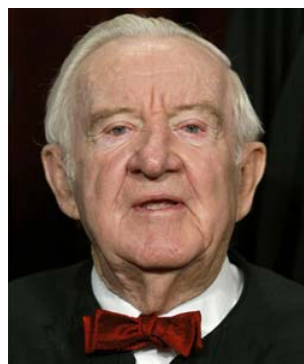
Unplugged

When do Supreme Court justices need to just sit down and be quiet?

By Dahlia Lithwick and Sonja West



Retired Justice John Paul Stevens

During his 35-year career on the Supreme Court, Justice John Paul Stevens gained a reputation as the mild-mannered jurist who sought permission before asking questions of oral advocates. Over his decades on the bench, Stevens gave few interviews, rarely made controversial remarks in his speeches, and wrote no books.

Then he retired.

Now, mere months after hanging up his robe, Stevens has been traveling the country, letting us know what he *really* thinks on everything from his views on the opposition to the "**Ground Zero Mosque**" ("American Muslims should enjoy the freedom to build their places of worship wherever permitted by local zoning law") to **capital punishment** (a system infected with racism, political exploitation, and "regrettable judicial activism") to the merits of ***Bush v. Gore*** ("it had obviously no merit to it").

And he is not alone. The two *other* retired justices have been dishing as well. Earlier this year, the formerly mild-mannered Justice David Souter let loose about **the messy realities of constitutional interpretation**, and Justice Sandra Day O'Connor **came to the defense** of the three Iowa Supreme Court justices who were facing retention elections because of their votes in favor of same-sex marriage.

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Other justices don't even bother to wait until they are off the bench to speak out. Justice Stephen Breyer told Fox News this weekend that the Founders **were in favor of gun regulation** and that his colleagues got their history wrong. Justice Ruth Bader Ginsburg was equally blunt about **her desire for more women on the court**. Justice Clarence Thomas **responded to criticism** of the court's campaign finance ruling, as did Justice Samuel Alito (**albeit less directly** and more in the manner of someone cheating at charades). And then there is Justice Antonin Scalia, upon whom we have depended for decades for enlightenment (sometimes with corresponding and **arguably obscene hand gestures**) on controversial issues ranging from **abortion** to **civil liberties for homosexuals** and **women's equality** (or lack of it).

One can only imagine what he'll say when he teaches **the upcoming class on the Constitution** to members of Congress that's being organized by Rep. Michele Bachmann.

Occasionally, the justices slip their personal views into their judicial opinions. A notable example was Justice Harry Blackmun's plea in his concurrence in the 1992 abortion case *Planned Parenthood v. Casey*. After pointing out that the constitutional right to abortion hung by a one-vote thread, Blackmun candidly laid the judicial and political realities on the line: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made." Stevens offered an equally pointed extrajudicial observation in a dissent in a Seattle schools voluntary desegregation case in 2007, when he observed, "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."

There has been growing debate about the ethics and proper parameters of **judicial recusals**, where the concern that a justice's extracurricular activities, investments, or relationships suggest that he or she has prejudged a case. Last week, for instance, questions were raised about **Judge Stephen Reinhardt's fitness** to evaluate the appeal over California's Prop 8 because of his wife's involvement in the case. Today the Internet is buzzing with accusations that Virginia's **Judge Henry Hudson had a financial connection** to a group that worked to oppose the Obama health reform law. These are hard questions that go to basic matters of judicial behavior: Who can they marry? Where can they invest? With **whom can they go to shoot some waterfowl**?

But if we put aside these difficult issues related to extrajudicial entanglements, there lies a more basic matter that the justices must also begin to address. What about the judicial gut-spilling?

Above and beyond the ethical rules that require a justice to recuse herself if she has evinced bias in a specific case, should the justices be held to a different standard when it comes to what they say and how they say it? Should these standards be different for sitting and retired justices? As justices speak more and more frequently off the bench, should they come to some agreement about when their words undermine the institution as a whole?

One viewpoint—let's call it the old school—holds that justices should say nothing that isn't contained within the four corners of a written opinion. When justices pontificate off the bench, it sows confusion and controversy and undermines the impression that jurists all float above the fray. The other side holds that transparency is always better than mystification and that so long as there is no real threat to the court's impartiality in a particular case, there is great value in lifting the veil of secrecy around the workings of the court and revealing the men and women hiding out behind the red velvet curtain.

The old-school view might be summarized like this: Dissenting in the 1962 case of *Baker v. Carr*, Justice Felix Frankfurter warned his brethren, whom he believed were incorrectly interpreting the Constitution, that the "Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction." Frankfurter's rephrasing of **Alexander Hamilton's symbolic description** of how the judiciary comes up with the short end of the balance-of-powers stick remains pertinent—so much so that Justice Breyer invokes it regularly. Congress can always back up its decisions through its power over spending, and the president gets to call out the military if folks get out of line. The court, however, has nothing but its words on the page and a faith that the public will heed those words.

Compared with the other branches of government, then, the court has significantly more reason to worry about its prestige. Part of that prestige is bought with illusion: costumes and curtains and a supporting cast that glides about the courtroom on silent feet. But is all this mystery and magic threatened when the justices open their mouths on *60 Minutes*, sound off to a group of high-school students, or pen a blistering book review? When Stevens observed in the Seattle schools decision that the composition of the court, and not the Constitution, dictated the holding, he was surely speaking the truth. But was it a truth America could afford to hear? Sometimes the perception of perfectly neutral justice is as important as justice itself.

Conversely, why shouldn't justices be allowed to speak up, especially if they are discussing judicial matters? Surely the justices have a right to speak their minds, up to and including, criticizing the president or berating their colleagues. If the president, the media, and members of Congress are free to opine on the courts, shouldn't justices be allowed to weigh in, too? Depending on your own ideology, there are likely justices whose off-the-bench truths you feel are desperately needed while others should be sent to their quiet places. That fact alone suggests that this is a problem that transcends partisanship.

How can we balance a justice's desire to get things off his chest against the need to protect our collective faith in the institution that cannot exist when that faith is annihilated? And how can we do so without permanently sacrificing the valuable insights we stand to gain by listening to those select few whose vantage point is unparalleled?

To be sure, sitting justices are free to do and say what they wish. They decide for themselves what is and is not appropriate and what need or need not be said. That makes answers to these questions purely academic. But for sitting justices, it seems the balance must tip toward restraint the closer the issue appears to the core work of the court. Moreover, we'd add that judicial editorializing never belongs in the text of an opinion, even in a concurrence or dissent. Supreme Court opinions, after all, are not blog posts. They're official judicial decisions meant to be a sophisticated analysis of legal documents and precedent.

Even outside the courthouse, however, sitting justices should exercise serious caution before going off-script. The more the commentary involves matters that have been, are, or may be before the court, the more suspect it becomes. Caution lights should flash over any remarks that cast doubt on the validity of a decision, a colleague, or the judicial process. Whether it's an interview, book, or speech, these nine jurists represent the court, regardless of where they are and to whom they are speaking. They should also consider that they represent that court whether or not the proceedings are recorded, televised, or just tweeted by someone in the audience. We mere mortals might get to blab about what the court should or shouldn't do, but we have no real power—the justices do. And as Spider-Man continues to remind us, with great power comes great responsibility, and sometimes that responsibility is to hold your Article III tongue, even when you'd rather not. To this we'd also add the rather obvious observation that if the justices want to be seen talking and thinking about important matters of law and policy, there is an easy solution that wouldn't damage the prestige of the court at all: Allow oral argument to be televised.

At the same time, we'd suggest that taking an oath of office should not come with a lifetime gag order. Once the black robe has been permanently sent to the cleaners, we think the balance tips in favor of disclosure. Retired justices are different from their former colleagues and serve a different role in the institution. They are still a little like "them" because they've sat in those chairs and seen the inside workings of the law machine, yet they're also a little like "us" in that they no longer have any power over cases, parties, or the future meanderings of the law. This calculus changes, of course, if they frequently sit on the lower courts by designation or **give an encore performance at the high court itself**. But when retired justices who are basically done with the job of judging want to tell us that they regret a vote, how we can improve the system, or that the robes are kind of itchy, then bring it on. They've earned their right to speak out, and we've earned the right to hear what they have to say.

Disclosure: Sonja West clerked for John Paul Stevens.

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