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COMMENTARIES

MR. JUSTICE STEVENS AND THE BURGER COURT'S UNCERTAIN TRUMPET

*Francis X. Beytagh, Jr.**

I. Introduction

Mr. Justice John Paul Stevens took his seat on the Supreme Court on December 19, 1975, after having served for some five years on the U.S. Court of Appeals for the Seventh Circuit in Chicago. The shoes he fills are those of one of the Court's legendary figures—the Honorable William O. Douglas. The processes of appointment and confirmation were, for Justice Stevens, both expeditious and unexceptional. Virtually all seemed to agree that Stevens was a competent and thoughtful person who was well qualified for service on the Court. He proceeded to join the Court in a quiet and unassuming fashion. Yet, despite the superficial calm, his appointment is likely to have some significant and lasting impact on the direction the Court takes in future years.

Who is Justice Stevens? Briefly, he is a Chicago lawyer turned federal judge who had a distinguished academic career and then gained considerable respect as an antitrust practitioner. His relatively short service on the court of appeals provides some basis for assessing what sort of justice he will make. There is, of course, a considerable hazard in such forecasting, as Stevens' predecessor forcefully reminded us in saying that new justices come with their bags packed but are less than sure what is inside them. So it is with Stevens. His opinions and testimony before the Senate Judiciary Committee indicate a pronounced streak of Frankfurterianism tempered by a willingness to apply the law vigorously in those areas—such as in first amendment cases—where the fundamental nature of the rights at stake outweigh considerations of judicial self-restraint, deference to other branches of government and federalism. It is simple, then, and perhaps accurate, to characterize Stevens as a moderate. But that tells us little about his likely role on the Court. Admitting the possible inaccuracies of such speculation, the matter is too important to lawyers and to the country generally to ignore.

II. Background and Assessment of Stevens as an Appellate Judge

A clear consensus appears to exist about Justice Stevens' competence and integrity. His opinions for the Seventh Circuit reflect a clarity of expression and a balanced and scholarly analysis that led Attorney General Levi, no mean critic, to characterize them as "gems of perfection" and "a joy to read."¹ Stevens' con-

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¹ Testimony of Edward Levi, Attorney General of the United States, *Hearings on the Nomination of John Paul Stevens to be a Justice of the Supreme Court Before the Senate Committee on the Judiciary*, 94th Cong., 1st Sess., at 3 (1975) [hereinafter cited as *Stevens Hearings*].

clusions, for the most part, indicate a considerable degree of caution and restraint that typifies his overall judicial philosophy. A refined craftsman, his overall approach is to apply the law as he finds it to the facts presented in a particular dispute. A constant theme of his testimony before the Senate committee involves the self-imposed restriction of courts' resolving concrete controversies that are presented to them. While not politically insensitive, Stevens seems apolitical in many ways. He appears to appreciate the awesome responsibilities imposed on a justice, but not to be awed by them. His penchant for dissents when not in agreement with the majority in a particular case reflects an individualism which seems to typify the man. And his reluctance to express his views on questions to which he felt he had not given sufficient thought appears to stem less from astuteness in dealing with Senate committee members than a deeply felt concern for giving thoughtful consideration to a matter before reacting to it.

Some data about Stevens' pre-Seventh Circuit days gives one a more complete picture of the man. A Phi Beta Kappa graduate of the University of Chicago, he was graduated first in his class at Northwestern University's School of Law in 1947. Following law school, Stevens served as a law clerk to Justice Wiley B. Rutledge. He thus becomes the third former Supreme Court law clerk to return as a justice, joining Justices White and Rehnquist in this respect. Most of Stevens' ensuing years were spent in private law practice in Chicago, specializing in antitrust work. In 1970 he was appointed by President Nixon to serve on the Seventh Circuit Court of Appeals. In a period of little more than five years he compiled an impressive record as an appellate judge, and was nominated by President Ford in November of 1975 to succeed the retiring Justice Douglas.

The most comprehensive and probably objective analysis of Justice Stevens' work on the Seventh Circuit was conducted by the American Bar Association's Standing Committee on the Federal Judiciary. The chairman of that committee, former Deputy Attorney General Warren Christopher, indicated that Stevens' approximately 215 court opinions had been closely scrutinized by practicing lawyers and legal academicians for the committee's benefit. According to Christopher, all "expressed admiration for the outstanding quality of Judge Stevens' opinions."² As an overall matter, the committee concluded, "Judge Stevens' opinions are well written, highly analytical, closely researched, and meticulously prepared," and as well "reflect very high degrees of scholarship, discipline, open-mindedness, and a studied effort to do justice to all parties within the framework of the law."³ Christopher stated that such "consistent excellence . . . in opinions ranging across a broad spectrum of federal law, gives high promise that Judge Stevens will be able to deal with the very complex issues that are before the Supreme Court at almost every argument session."⁴ The committee's assessment, Christopher indicated, was that "Judge Stevens meets high standards of professional competence, judicial temperament, and integrity"—a

2 Testimony of Warren Christopher, Chairman American Bar Association Standing Committee on the Federal Judiciary, *Stevens Hearings*, *supra* note 1, at 19.

3 *Id.* at 19.

4 *Id.* at 21.

unanimous conferral of the committee's highest evaluation.⁵

The number of times a court of appeals' judge is reversed by the Supreme Court may not provide a litmus test as to judicial competence. But it surely gives some indication about the quality of the particular judge's decisionmaking. In Stevens' case, rather remarkably, he was reversed but once, and there in a celebrated and controversial case—*Gertz v. Welch*⁶—where the law was unsettled and unclear, and where the Court rerouted itself rather dramatically. Despite his approach in *Gertz*, a landmark first amendment case dealing with defamation and privacy concerns, Stevens seems largely a centrist on freedom of expression and related issues. He refreshingly sought to inject some rationality into the overlapping and sometimes confusing overbreadth and vagueness doctrines.⁷ He is likely to be a balancer when free press/fair trial questions are presented, but seems to hold little sympathy for an approach of prior restraint, even where national security matters are involved.⁸ Little opportunity was afforded Stevens to express his views on obscenity or religious freedom issues while a court of appeals' judge; it would thus be pure speculation to suggest how he might approach such important and potentially divisive areas. His opinions do exhibit a rather rigid traditionalism about the "state action" concept which may well have some indirect effect in first amendment matters.⁹

The views of Justice Stevens in the criminal procedure area are difficult to predict from a study of his attitudes as a court of appeals' judge. He was generally responsive to fourth amendment contentions, largely because of an apparently deep respect for our established traditions of personal privacy.¹⁰ He is likely to take a middle-ground position on electronic surveillance questions, if his committee testimony is a fair indication of his thinking.¹¹ On the critical matter of the future of the exclusionary rule, Stevens is impossible to predict. As a court of appeals' judge he applied it; in testifying at his confirmation hearings he expressed at once concern about the rule's consequences but appreciation for the necessity for having some effective tool to give force to the fourth amendment.¹² Overall, his methodology in fourth amendment cases was to engage in a careful and focused analysis of the particular facts, and only then apply the law as developed in Supreme Court precedents.¹³ Similarly, in the fifth amendment area Stevens seems a strong supporter of the essential aspects of the privilege against self-incrimination and procedural due process,¹⁴ but less enamored of

5 *Id.* at 22.

6 *Gertz v. Welch*, 471 F.2d 801 (7th Cir. 1972), *rev'd* 418 U.S. 323 (1974).

7 Testimony of John Paul Stevens, *Stevens Hearings*, *supra* note 1, at 74.

8 *Stevens Hearings*, *supra* note 1, at 59.

9 *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973); *Sucas v. Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

10 *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974); *United States v. Pratter*, 465 F.2d 227 (7th Cir. 1972).

11 *Stevens Hearings*, *supra* note 1, at 46.

12 *Id.* at 77.

13 *See, e.g.*, *United States v. Rosselli*, 506 F.2d 627 (7th Cir. 1974), and *United States v. Dichiarante*, 445 F.2d 126 (7th Cir. 1971) for an understanding of his methodology in this area.

14 *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974) (dissenting opinion), *cert. denied*, 421 U.S. 964 (1975), *reh. denied*, 422 U.S. 1049 (1975).

what might be perceived as excessive extensions of those protections.¹⁵ As regards sentencing, Stevens has advocated openness and flexibility.¹⁶ Insofar as sixth amendment questions are concerned, Stevens indicated agreement with the Court's decision in *Argersinger v. Hamlin*¹⁷ in his committee testimony, but showed little enthusiasm for extending right to counsel contentions in cases where equal protection arguments were urged.¹⁸ He seems attuned with the Court's present majority in matters such as plea bargaining, line-ups, guilty pleas and speedy trial.¹⁹ Stevens understandably refused to respond to senatorial inquiries about his views on the constitutionality of capital punishment, since that crucial eighth amendment issue is presently before the Court.

In other areas Justice Stevens' views are hard to forecast. He seems quite positive about the virtues of jury trial, and wrote an extensive opinion premised on the Seventh Amendment, albeit in a case where civil rights activists argued against its application to a housing discrimination case.²⁰ In equal protection matters he appears vigilant about eradicating the remaining vestiges of racial discrimination, which may be of consequence in the Northern school desegregation cases the Court will predictably be facing.²¹ But he is considerably less enamored about application of a strict scrutiny test where other forms of alleged discrimination are involved. For example, he dissented in a significant sex discrimination case and was subjected to extensive questioning during his committee hearings about his views on that subject—without producing much illumination.²² He seems apprehensive about use of either equal protection or due process rationales to effectively protect substantive interests.²³

Insights into Justice Stevens' thinking on various matters that do not relate directly to his likely performance as a member of the Supreme Court can be extrapolated from his committee testimony. For example, on several occasions he stressed the need for more federal judges and for better compensation in order to attract the most qualified persons to those positions and in order for the courts to cope with rapidly increasing dockets.²⁴ A strong strain of federalism recurred throughout Stevens' testimony. When asked about the problems of crime and civil rights litigation, he stressed the central role that he thought states should play in regard to those matters, particularly in contrast to the federal judiciary.²⁵

15 *United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974).

16 *United States v. Rosciano*, 499 F.2d 173 (7th Cir. 1974) (dissenting opinion).

17 407 U.S. 25 (1972).

18 *Matthews v. United States*, 518 F.2d 1245 (7th Cir. 1975); *Ganz v. Bensinger*, 480 F.2d 88 (7th Cir. 1973).

19 See e.g., *United States v. Smith*, 440 F.2d 521 (7th Cir. 1971) (dissenting opinion) (plea bargaining); *United States ex rel. Dirby v. Sturges*, 510 F.2d 397 (7th Cir. 1975), cert. denied 421 U.S. 1016 (1975) (line ups and identification procedures); *Stevens Hearings*, supra note 1, at 25. (speedy trials).

20 *Rogers v. Loether*, 467 F.2d 1110 (7th Cir.), aff'd 415 U.S. 189 (1974).

21 *Cousins v. City of Council of Chicago*, 503 F.2d 912 (7th Cir. 1974), cert. denied 420 U.S. 992 (1975). 466 F.2d 830, 847 (7th Cir. 1972) (dissenting opinion) cert. denied 409 U.S. 893 (1972).

22 *Rosa v. Bridgeport*, 487 F.2d 804 (7th Cir. 1973) (dissenting opinion); *Sprogis v. United Airlines* 444 F.2d 1194 (7th Cir. 1973) (dissenting opinion), cert. denied 404 U.S. 991 (1971).

23 *Shirch v. Thomas*, 447 F.2d 1025 (7th Cir. 1971), vacated 408 U.S. 940 (1972).

24 *Stevens Hearings*, supra note 1, at 25, 47, 53.

25 *Id.* at 29.

On the important question of the extent he would regard himself bound by prior Supreme Court decisions, Stevens predictably equivocated. He did indicate, not insignificantly, that he perceived a considerable difference between his previous role as a lower court judge and his prospective position as a Supreme Court Justice.²⁶ Should an appropriate case require that a particular doctrine be rethought, he stated, "I suppose I would have the duty to think of it in terms that I have not yet been called upon to do."²⁷

In a broader sense, Justice Stevens' testimony before the Senate Judiciary Committee provides an interesting, although perhaps a bit misleading, picture of his overall judicial philosophy. One telling passage reads as follows:

I think it is the business of a judge to decide cases that come before him. From time to time, in the process of deciding cases, important decisions are made and the law takes a little different turn from time to time. But it has always been my philosophy to decide cases on the narrowest ground possible and not to reach out for constitutional questions. I think that is the tradition, that is in the finest tradition of the work of the Supreme Court and I think the Court is most effective when it does its own business the best.²⁸

Yet, Stevens made clear, he does not regard constitutional decisionmaking as a mechanical process. At a later point he stated:

The more fundamental the charter is, the more it must, necessarily, contain open areas that require construction and interpretation. And to the extent that open areas remain in our Constitution, and inevitably a large number do . . . , the judge, I think, has the duty, really, to do two things. One, to do his best to understand what was intended in this kind of situation, and yet to realize that our society does change and to try to decide the case in a context that was not completely understood or envisioned by those who drafted the particular set of rules.

[In so proceeding, the judge] has to be guided by history, by tradition, by his best understanding of what was intended by the framers, and yet he must also understand that he is living in a different age in which some of the considerations that happen today must inevitably affect what he does.²⁹

Legislatures make policy judgments in our system, Stevens said, not judges. Still, he continued, when a judge gets "into these open areas, that I have mentioned, no matter how hard one tries to subordinate his own philosophy sometimes it may not be completely possible."³⁰ He views the Supreme Court as neither a continuing constitutional convention nor as a legislative body. As a judge "[c]ertainly you do not have a charter of freedom to substitute your own views for the law."³¹ And yet, he concluded, "there are decisions which inevitably have a lawmaking character to them."³² Central to Stevens' philosophy, he made clear, is that

26 *Id.* at 39.

27 *Id.* at 77.

28 *Id.* at 36.

29 *Id.* at 42.

30 *Id.*

31 *Id.*

32 *Id.*

the business of the Supreme Court—as it is the business of other courts—is to decide cases, to decide specific controversies that the Court has jurisdiction to decide pursuant to Article III of the Constitution. In the process of adjudication certain law is made and changes develop but the changes really, I think, are initiated by the litigants putting forth new claims sometimes found to have merit and sometimes rejected. I do not think it is the function of the Court to search for issues or to regard itself as sort of [a] commission to reform the law or something like that. There is plenty to do in simply deciding the cases that the litigants bring before the Court and in that process the law does develop.³³

Asked about any relevance the burdensome nature of the constitutional amendment process might have to judicial decisionmaking, Stevens responded: “As I indicated, there are times when the course of decision necessarily changes somewhat, but I do not think one could say that because of the difficulty in amending the Constitution, that it would be a proper function of the Court to assume that it had authority to amend the document itself. I would think it clearly does not.”³⁴ At a later point he reiterated that “judges should impose on themselves the discipline of deciding no more than is really required to adjudicate controversies.”³⁵ Contrariwise, he recognized that “the developing body of [decisional] law” might “have somewhat of [the] effect” of amending the Constitution.³⁶ Interestingly, Stevens showed a refined perception of the difference between a “political question” and issues with political consequences.³⁷ Moreover, he expressed surprise that the Court had avoided resolving the “reverse discrimination” question presented by the *DeFunis*³⁸ case, on mootness grounds.³⁹ More generally, he endorsed going beyond “merely a colorblind remedy and requir[ing] in certain circumstances affirmative action to redress the past injustice,”⁴⁰ although stating that “the extent of affirmative action would always be a function of, and be related to, the kind of factual situation disclosed by the particular case.”⁴¹

What does all this signify about the new justice? Simply stated, that he will in all likelihood be a centrist, a moderate, a balancer. His notion of judicial self-restraint appears to depart from the Frankfurterian preoccupation with avoidance of constitutional decisions and focuses instead on deciding cases circumspectly, not on refusing to decide them at all. The openness of the judicial process to outside scrutiny that his affirmative attitude toward dissenting and concurring opinions manifests intimates a confidence in the courts as stable and respected institutions. While the appearance of unanimity might seem to foster greater acceptance of judicial decisions, the expression of divergent views lets litigants know that their arguments were heard and understood and lets the public know that the courts are strong enough to tolerate some internal divisions and differences.⁴²

33 *Id.* at 43-44.

34 *Id.* at 44-45.

35 *Id.* at 55.

36 *Id.* at 59.

37 *Id.* at 44, 68-69.

38 *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

39 *Id.* at 67.

40 *Id.* at 57-58.

41 *Id.*

42 *Id.* at 41.

Stevens is nonetheless not unconcerned about the law's stability. For him stability comes from the law's capacity to maintain a high degree of certainty and predictability. Thus, a healthy respect for the concept of *stare decisis* supplies whatever his skepticism about the value of unanimity might omit.⁴³ Deference to legislative judgment in regard to matters of social policy seems an integral part of Stevens' thinking. But the Court's unique constitutional role occupies an important place in our governmental scheme. Beyond a sketchy analysis of his basic attitudes toward some of our fundamental legal precepts and key constitutional provisions and a rather superficial survey of his judicial philosophy, there is little that can be safely predicted about how Justice Stevens will deal with the more controversial and difficult issues that he will be facing on the Court. His style is not to develop firmly fixed preconceptions about particular questions in advance of their presentation in the context of a concrete case that he is required to consider and decide. That sort of unpredictability is a commendable characteristic of a jurist in the classic sense. Nor should this be viewed as suggesting that Stevens' role on the Court is not likely to be a significant one. Timing and circumstance seem to indicate a pivotal position for Justice Stevens on the Court that will sit in the last quarter of this century.⁴⁴

III. The Court in the Late 20th Century

There are aspects of symbolism in Stevens' appointment and confirmation that are readily apparent. With his taking his seat, the Court no longer is comprised of a majority of justices who sat during the Warren years. Decision-making in the Court is never simply a matter of pigeonholing justices, yet the Court as now composed might more properly be called the "Burger Court" than previously. Moreover, the departure of Justice Douglas not only means the loss of his 36 years of experience on the Court. In a real sense, Douglas was the Court's last continuing tie to a now-distant past, for he was the last of the Roosevelt appointees and the last of the New Dealers. Justice Brennan, who recently celebrated the twentieth anniversary of his appointment, now is the senior Justice in time of service. The departure of Douglas has portents for the way the Court will decide a whole host of future cases as well. Justice Stevens is not only a relatively unknown quantity at present, he is likely to be unpredictable as regards approach and perspective, in contrast to the rather consistent predictability of Douglas on many issues.

Where is the newly composed Court likely to go? One can only guess, based on the past few years and a comparison of Stevens with Douglas. No Court is ever the same as the previous one, for the change of one member, while not necessarily critical in itself, produces a different body than before. Indeed, the Court in a sense renews and refreshes itself with the addition of new blood. Given what we know about Justice Stevens, and in view of the long incumbency of Justice Douglas, that is quite likely to occur with his appointment. Yet, style and

⁴³ *Id.*

⁴⁴ For another appraisal of Justice Stevens' work while he served on the Court of Appeals for the Seventh Circuit see 29 *VAND. L. REV.* 125 (1976).

approach are of considerably less consequence than substance, when it comes to prognostications about the Court. The place to start, quite naturally, is with the Court as it has been functioning in the past several years.

A few discernible trends typify the Court in recent years. First, there is an erratic character to the Court's decisionmaking that, while perhaps explicable, is confusing and undesirable. Basically, the Court seems to be struggling mightily to develop a new majority that can grapple consistently with the variety of complex questions that are pressed on it for decision. And it has yet to succeed, at least in any comprehensive way, in this effort. Thus, one sees a number of cases in which there is no majority opinion; one justice delivers an opinion announcing the Court's judgment in which several others join, a few other justices concur on separate grounds, and a few dissent. The precedential value of such decisions is, at best, difficult to assess. Another theme that is noticeable is the wavering of several of the justices—especially holdovers from the Warren years who were not a consistent part of the Warren Court majority, such as Justices Stewart and White. Sometimes they adhere to Warren Court precedents, even though they might have dissented at the time. More frequently, they join with the four Nixon appointees, or at least three of them, on a position that occasionally is squarely at odds with a Warren Court decision, but more often involves a refusal to extend the underlying rationale of such a case to related situations. One also finds more discussion of deference to legislative judgment and more extensive application of threshold procedural concepts, such as mootness, standing, and the like, as a way of avoiding decision of particular cases.⁴⁵ And one sees the Court talking more frequently about federalism concerns. There is an apparent disenchantment with equal protection litigation, as signified by cases such as *Rodriguez*.⁴⁶ The Court has distinguished *Miranda* in so many different respects that it becomes difficult to know where the basic holding applies, if at all.⁴⁷ The first amendment still occupies a preferred position, but the Court remains in a morass as regards obscenity, its religious freedom decisions are largely *ipse dixit* in character,⁴⁸ press freedom seems less favored than in the 1960's,⁴⁹ prior restraint is frowned upon but tolerated in certain situations,⁵⁰ and something called "substantial overbreadth" must now be shown in order to invalidate an overbroad law.⁵¹ Procedural due process remains viable, though there has been some backtracking

45 See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

46 *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); Reid, *Cast Aside by the Burger Court: Blacks in Quest of Justice and Education*, 49 NOTRE DAME LAWYER, 105 (1973); Comment, 9 NEW ENG. L. REV. 574 (1974).

47 Compare *Miranda v. Arizona*, 384 U.S. 436 (1966), with *Harris v. New York*, 401 U.S. 222 (1971), and *Michigan v. Tucker*, 417 U.S. 433 (1974). Cf. *Less Second-Guessing on Police Searches*, TIME, July 19, 1976, at 43, 44.

48 See Survey, *A Survey of Selected Contemporary Church-State Problems*, 51 NOTRE DAME LAWYER, 737, 768-69 (1976).

49 See Grace, *The Courts v. the News Media: Is the Conflict Necessary?*, 79 CASE AND COMMENT 3.

50 In *New York Times v. United States*, 403 U.S. 713 (1971), the Court held that the Government bears a "heavy burden" of justifying a prior restraint but did not say that prior restraint was *per se* prohibited. See generally, Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAWYER (1976).

51 *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Civil Service Comm. v. Letter Carriers*, 413 U.S. 548 (1973). These cases significantly limited the overbreadth doctrine as announced in earlier cases such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

from cases like *Goldberg v. Kelley*.⁵² Fourth and fifth amendment cases are so confusing that even thoughtful students of the criminal procedure area have despaired of rationalizing recent decisions.⁵³ And there are more fundamental changes in approach being suggested. Some seek to cut back on the Court's appellate jurisdiction in various ways, including the creation of a national court of appeals with the authority to decide cases in the Court's behalf.⁵⁴ Others urge abandonment of the exclusionary rule or limitation of the fourteenth amendment to cases involving racial discrimination—and included in these groups are members of the present Court.⁵⁵ Put mildly, the Burger Court's trumpet has been a decidedly uncertain one. Things will at least not be dull for Justice Stevens.

What seems critical to the Court's future are the 1976 and 1980 presidential elections. Should the person or persons elected follow the Nixon strategy of seeking to appoint judicial passivists, then it is likely that Justices Brennan and Marshall, the only remaining consistent adherents to a Warren Court philosophy, will be replaced during those years with persons with quite different views of the Court and the Constitution. The dismantling of the Warren Court's edifice of decisions will then begin in earnest, with Justices Stewart, White and perhaps Stevens dissenting on occasion. Much like in the Taney years and the late nineteenth century, the Court will be a relatively insignificant force in the country's affairs. And, should this come to pass, it will take some time to turn things around again, even if political sentiments swing in the opposite direction. All this should not be greatly disturbing to students of the Court, at least as a conceptual matter, for it is a political institution⁵⁶ and judicial review is a two-edged sword. The great danger, of course, is that the Court will cease to be an effective instrument for protecting those basic rights of minorities that the majoritarian-oriented political process is unlikely to concern itself with.⁵⁷ The distrust of government that seems endemic today will be intensified, for the last bastion of respect—the courts—will diminish in importance.

Should, however, Court appointments take a different tack, then a rather different scenario might be anticipated. If Justices Brennan and Marshall are replaced with persons who are similarly minded, then the rather delicate balance that has existed on the Court for the past few years will be maintained. And the

52 397 U.S. 254 (1970). See, e.g., *Arnett v. Kennedy*, 417 U.S. 977 (1974) (holding *post-dismissal* hearings sufficient to satisfy due process).

53 See, e.g., Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1192 (1971). Cf. *Less Second-Guessing*, *supra* note 47.

54 For a review of this controversy see Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 FORD L. REV. 63 (1973). See also A. BICKEL, *THE CASELOAD OF THE SUPREME COURT AND WHAT IF ANYTHING TO DO ABOUT IT* (1973). *Contra*, Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L. J. 883 (1974).

55 See *United States v. Calandra*, 414 U.S. 218 (1973); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

56 See Cole, *The Political Impact of Constitutional Courts: A Critique*, 49 NOTRE DAME LAWYER 1045 (1975); Murphy & Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME LAWYER, 1037 (1974); Wasby, *The United States Supreme Court's Impact: Broadening Our Focus*, 49 NOTRE DAME LAWYER 1023 (1974).

57 In a recent speech before the New Jersey State Bar Association Justice Brennan complained that recent Supreme Court decisions were increasingly limiting access to federal courts for "the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities." *A Shift to the Right*, TIME, July 12, 1976, at 37.

role of Justice Stevens then would become a crucial one, for he might well become the swing vote on a number of significant issues. How he will vote defies prediction, at least as regards any particular question. Justice Stevens of course has little control over *whether* he is likely to play such a significant role. But, should that come to pass, those qualities of openness and moderation indicated by his judicial record and committee testimony suggest that, while unpredictable, his approach will be principled, articulate and, based on what we know about him, will be a positive, constructive and uplifting force on the Court. An Illinois lawyer saved the country over a century ago. It may fall to another one to perform a like, albeit more modest, task as this experiment in self-government enters its third century.