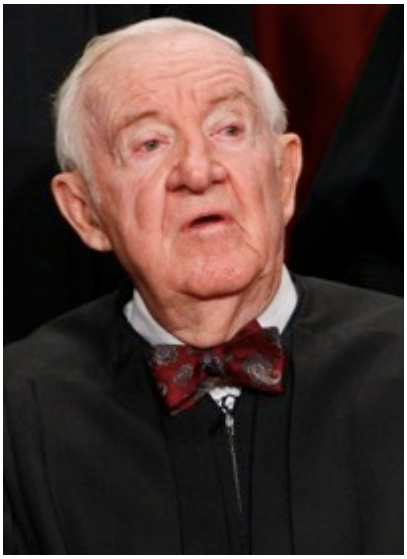
Written by **Jack Kenny** on April 10, 2010

"Surprise Liberal" Stevens Leaving Court



A Republican who became the leader of the liberal wing of the U.S. Supreme Court, 90-year-old Justice John Paul Stevens, has announced he will retire at the end of the current term, after more than 34 years on the nation's highest tribunal. Nominated by Republican President Gerald Ford, who said he wanted "the finest legal mind I could find," Stevens was quickly confirmed by a Senate vote of 98-0, and was sworn in as Associate Justice on December 19, 1975.

He succeeded Justice William O. Douglas, whom Ford as a Congressman tried to impeach for writing for a pornographic magazine (*Playboy*) and promoting what Ford described as "hippie-yippie-style revolution" in Douglas' 1970 book, *Points of Rebellion*. Yet the Stevens appointment and Senate hearings on his confirmation were free of the ideological controversy that has characterized Supreme Court nominations in recent years. Calling his retirement the "end of an era," the *New York Times* noted that Stevens was the last nominee to the high court whose confirmation hearings were not broadcast live on television. And though the still-controversial *Roe v. Wade* decision was nearly three-years-old at the time, Stevens was not asked about the judicial determination that the freedom to abort an unborn infant is a right guaranteed by the Constitution of the United States.

Considered moderately conservative as federal circuit court judge, Justice Stevens maintained that reputation in his early years on the Supreme Court. He voted to reinstate the death sentence, suspended under a previous high court ruling, and opposed the an admissions program favoring racial minorities in the highly publicized *Regents of the University of California v. Bakke* case. But as the court turned more conservative, Stevens appeared to move to the left, joining the liberal bloc on so-called abortion rights and "gay" rights issues and supporting affirmative action.

He invoked a highly liberal interpretation of the First Amendment's establishment clause, writing for the court's majority in *Wallace v. Jaffree* that an Alabama statute requiring a minute of silence in public schools "for meditation or silent prayer" violated the Constitution. "Just as the right to speak and the

right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed of the majority," he wrote in that opinion. A moment of silence may seem a far cry from the imposition of a creed, but Stevens somehow fit it into the establishment clause. He also wrote a dissenting opinion when the court ruled that a display of the Ten Commandment on the Capitol grounds in Texas did not violate the establishment clause. The clause regarding an "establishment of religion" has, Stevens wrote, "created a strong presumption against the display of religious symbols on public property." Yet the Supreme Court building itself contains a depiction of Moses with the stone tablets, representing the Ten Commandments.

On free speech issues, his course has been erratic. He was initially opposed to the idea of constitutional protection for obscenity, rejecting in 1976 a challenge to a Detroit zoning ordinance that banned so-called adult theaters in designated areas. While holding that "the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value," Stevens insisted that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." That principle is one he apparently abandoned in this year's *Citizens United v. Federal Elections Commission* ruling, in which Stevens, writing in dissent, supported a 2008 ruling by the FEC banning the televising of negative movie about presidential candidate Hillary Clinton. In 2002, Stevens joined the court's majority in striking down a federal law regulating obscene content "harmful to minors."

Stevens has at least refrained from declaring his evolving views on the death penalty to be constitutional law. Two years ago he voted with the majority in upholding Kentucky's method of lethal injection because he felt bound by court precedent. Yet he wrote in his concurring opinion that "state-sanctioned killing is … becoming more and more anachronistic." It was an interesting opinion from a justice who has consistently held that a state-protected right to kill an infant in the womb is required by the Constitution.

In the highly controversial decision in *Kelo v. New London* (2005), Stevens was part of a court majority that upheld the power of a state agency to take residential property for private commercial use. In *D.C. v. Heller* (2008), he supported a District of Columbia law banning possession of handguns by private citizens. On Fourth Amendment issues, his record is also a mixed bag. He authored a ruling that allows unwarranted searches of closed containers when police are searching a vehicle. But he is also the author of a dissent in *Kyllo v. United States* holding that a search by thermal imaging requires a warrant.

"While a friend of liberty in certain limited circumstances, he ultimately hangs his hat on supporting government action over the rights of individuals," wrote Ilya Shapiro of the Cato Institute, a libertarian think tank.

Stevens "may be the last justice from a time when ability and independence, rather than perceived ideology, were viewed as the crucial qualifications for a seat on the court," said the *New York Times*. Perhaps the *Times* <end is inclined to see only conservative jurisprudence as exercises in "ideology," while liberal or "progressive" rulings are signs of "ability and independence." Judges who move in a liberal direction are often said to have "grown" on the court. Such was the case with chief Justice Earl Warren, an Eisenhower appointee who presided over the most liberal era in Supreme Court history. So it was with William Brennan, another Eisenhower pick, and David Souter, appointed by President George H.W. Bush. John Paul Stevens was not the first "surprise liberal" to rule the nation from a seat

on the high court. It seems safe to predict he won't be the last.

Photo of John Paul Stevens: AP Images