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The One-Sided Media Coverage of Justice Stevens

By Lester Jackson | December 7, 2010

"Justice Stevens Renounces Capital Punishment"

--[Linda Greenhouse](#) ^[1], April 18, 2008

"TOTENBERG: *Indeed, his 1976 vote to uphold the death penalty is the one he regrets.*

"STEVENS: *I think there is one vote that I would change ... upholding the capital punishment statute.*"

-- [October 4, 2010](#) ^[2]

"Are you for or against the death penalty?"

Stevens: *"it's debatable."*

--[October 13, 2010](#) ^[3]

INTRODUCTION

Last April's retirement announcement by Justice John Paul Stevens occasioned an outpouring of [adulation](#) ^[4]: [Champion of the Powerless](#) ^[5], [The Greatest Justice](#) ^[6], etc. His absence from the new Supreme Court term renewed the [love fest](#) ^[7], evoking [honor](#) ^[8] and [award](#) ^[9] for his "[open mind](#) ^[10]." Liberal judicial activists depict him as an authoritative hero and saint (most recently: [60 Minutes](#) ^[11]' Scott Pelley and *The New York Times*' [Adam Liptak](#) ^[12]). (It is now [newsworthy](#) ^[13] and [praiseworthy](#) ^[14] when he [thrusts himself](#) ^[15] into the 9/11 mosque controversy while being [feted](#) ^[16]).

The other side of the story has barely been mentioned, leaving unreported critical facts and unrefuted misleading statements (recently, even by Stevens himself). This is of great significance. Media misrepresentation and outright concealment of shocking truths about the Supreme Court is an [essential requisite](#) ^[17] for enabling any five justices to usurp the democratic process and impose their own values upon the American people, against their wishes.

CAPITAL PUNISHMENT

With [rare exception](#) ^[18], critical media analysis of Stevens' death penalty views has been non-existent. Now, his own fresh specious assertions, reported unquestioned, require

renewed scrutiny.

Stevens "voted to reinstate capital punishment," Liptak flatly reports. Coverage has been so one-sided that even conservatives accept at face value his claim to have originally voted to uphold the death penalty in 1976.

Not in the cases where it counted!!

In disputing Nina Totenberg's [portrayal](#) ^[10] of Stevens as a moderate conservative, NewsBusters [stated](#) ^[19] that she "cited the death penalty Stevens voted in support of it, and then became horrified as conservatives made it easier for prosecutors." But NewsBusters failed to note that, in fact, five cases were decided on July 2, 1976. Two strong laws were declared unconstitutional by 5-4 votes, with **Stevens voting against capital punishment right from the start**. Three weak laws were upheld by 7-2 votes, with Stevens again in the majority. Hence, when his vote was necessary to overturn a death penalty statute, he could be counted on. On the other hand, why not vote to uphold what would be upheld anyway and appear to be "open-minded"?

Conspicuously absent from any Stevens interview: "Did you ever vote to uphold or proceed with a death sentence in a 5-4 decision (i.e., where your vote was decisive)? If so, how many cases and what percentage?"

A telling example of the Stevens technique ^[20] was provided by a 2008 [case](#) ^[20] upholding a lethal injection execution procedure. To [much acclaim](#) ^[21], he grandly announced his "own" conclusion that the death penalty was unconstitutional; nevertheless, he joined six other justices out of "respect [for] precedents that remain a part of our law." Of course, the precedent would not have remained part of the law if Stevens had four other votes. Only a prospective Brooklyn Bridge buyer would believe otherwise. In numerous cases, Stevens did not "respect" precedents when he had the votes to disrespect them. Examples include decisions saving premeditated murderers who claim to be retarded or who boast about torturing their victims but are only one day under 18.

Stevens was a master of having his cake and eating it too. He "respected" precedent when it made no difference but did not hesitate to reject it when his vote counted. He "upheld" capital punishment when it did not matter but effectively subverted it whenever he could.

Headlines have declared his having "renounced" the death penalty and his "regret" for supporting it. Yet, as recently as October 13, he characteristically [hedged](#) ^[3], saying "it's debatable" whether he is for or against the death penalty. Nothing could better illustrate his readiness to take any position to further his objectives. Sadly, the media treats as classified information his practice of working both sides of the street.

Unchallenged in news reports, Stevens [asserted](#) ^[10] two reasons for the "one vote that I would change." The court (1) "constantly expanded" death penalty eligibility and (2) made it easier for prosecutors. As Totenberg reported: "In 1976, ... Stevens ... voted to uphold the death penalty ... for a narrow category of offenders, using procedures that ... prevented loading the dice towards the prosecution. But...the universe of those eligible for the death penalty grew, and the court permitted more prosecution-friendly procedures in capital cases."

Totenberg and others in the media who, uncritically, gave wide currency to Stevens' claims, surely knew they were patently false.

First, far from eligibility being "constantly expanded," since 1976 it has been repeatedly narrowed. Just two years ago, in *Kennedy v. Louisiana*, a decision saving the lives of 300-

pound men who rape 8-year-old girls (requiring painful surgery), Stevens joined a 5-4 majority boasting of the tiny percent of first-degree murderers sentenced to death as “a result of” the Court’s rulings. (Forget actual executions.) With Stevens writing or joining decisions, often as an essential fifth vote, entire categories of barbarity and barbarians have been declared “death ineligible,” e.g.: “adult” rape, “child” rape; alleged retarded; murderers one day under age 18; recidivist murderers who commit new violence while under life sentence (effectively, a “constitutional” right to commit punishment-free violence bestowed on the most viciously depraved). And now, this month, Stevens himself [acknowledges](#) ^[22] decisions “eliminating categories of defendants ... and offenses ... from exposure to capital punishment nationwide.”

Second, it is also false that “procedures have been more prosecution friendly,” with the dice loaded against defendants **already convicted** of the most heinous acts. This is not the place for legal [details](#) ^[17]. Suffice it to say that, because the Supreme Court, with Stevens’ help, has tied the system in knots, murder cases, lacking any question of guilt, last decades. The media largely has concealed this, adding to the scandal that most people do not know there are cases **still** in progress involving murders committed in the mid-1970s. In [one such case](#) ^[23], the murderer sent a tape recording to his 18-year-old victim’s mother boasting: “it was beautiful. ... watching the blood gush from his eyes.” Isn’t there any interviewer with the courage and integrity to ask Stevens to account for this court-created fiasco if the system is so stacked against convicted murderers?

These multi-decade cases are caused by procedures called “Byzantine” by [Justice Thomas](#) ^[24], “bait and switch” by [Justice Scalia](#) ^[25] and “a dog’s breakfast of divided, conflicting, and ever-changing analyses” by [Chief Justice Roberts](#) ^[26]. This encourages myriad appeals by convicted murderers contesting sentences and execution methods rather than guilt.

What really disturbs Stevens is not that the dice are loaded **for** the prosecution but that they are not completely loaded **against** the prosecution. He has long complained about a feeble attempt to balance the scales of justice. After a Supreme Court fiat that capital convicts be allowed to present any and all evidence to “mitigate” barbarity (e.g., winning a dance prize, mother drank while pregnant), evidence to “humanize” victims was also permitted (having been deemed unconstitutional for four years). Stevens has vehemently protested this [because](#) ^[27] it is “troubling ... to rouse sympathy for the victims and increase jurors’ antipathy” for convicted murderers – who have Supreme Court-mandated license to submit any evidence to arouse sympathy for *them*. Also, the victims are already dead and any loss and grief suffered by their loved ones does not count because they aren’t victims at all but only mere “third parties” not worth thinking about.

In short, for Stevens, the dice are “loaded” when there is evidence about victims and their suffering. The dice are not loaded when there is sympathy only for convicted murderers, with victims out-of-sight-out-of-mind.

Reporters know this, but they are not going to tell anyone.

Relying solely on Stevens and his media acolytes, one might conclude that capital punishment has sharply escalated, due to “[rampant](#)” ^[28] misconduct by police and prosecutors. However, not only has he boasted of court-constricted death-eligible categories, his abolitionist allies repeatedly have [trumpeted](#) ^[29] a progressive [decrease](#) ^[30] in death sentences. As for procedures making it easier for prosecutors, University of Virginia Law Professor Stephen F. Smith, a strong death penalty opponent, has [lauded](#) ^[31] the Court’s “thunderbolt” ten years ago, a “more aggressive ... new approach” making it harder to impose the death penalty; opponents [celebrated](#) ^[32] “a marked decline in death sentences in the U.S. since 2000.”

Although death penalty supporters have [disputed](#) ^[33] that the death penalty is dying, one shocking statistic stands out: 723,000 murders and non-negligent manslaughters in 37 years (1972-2008) resulted in 1,188 executions (0.165%). Indeed, the number of really innocent people murdered by previously convicted murderers [far exceeds](#) ^[34] the number of lawful executions. Media reports on Stevens' claims have omitted these details. Is it mere inadvertence that Liptak mentions the execution number but not the massive slaughter of law-abiding victims who never had a trial, decades of appeals or the benefit of Stevens' "sympathy"?

Finally, Liptak uncritically quotes Stevens' charge that the death penalty has been made easier rather than more difficult to impose due to "regrettable judicial activism" with the court not upholding its prior decisions.

Talk about the pot calling the kettle black!! Liptak refuses or fails to observe what strident death penalty opponents long have acknowledged. According to [Hugo Bedau](#) ^[35], until 1961, few "gave any credence to the possibility of ending the death penalty by judicial interpretation of constitutional law." In 1968, he [complained](#) ^[36]: "not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be 'cruel and unusual punishment' under any state or federal constitution." Thirty years later, Carol and Jordan Steiker [noted](#) ^[36] that, for 175 years, "the Constitution was not construed to place any limits on ... capital punishment."

If not for judicial activism, how does Liptak think so many procedural and "eligibility" restrictions were imposed on the death penalty since 1972, when *Furman v Georgia* suddenly, with nine different opinions in a 5-4 fiat, declared the death penalty unconstitutional in all 42 states that had it? As for not upholding prior decisions, just one year earlier, *McGautha v. California*, 6-3, declared the death penalty constitutional. Does Stevens object to that? Countless death penalty decisions since 1972 provide as clear an example of judicial activism as can be found. As noted above, Stevens repeatedly voted to overturn precedent. In reality, he's a fan of precedents he likes and has no trouble overturning those he doesn't like. It's as simple as that.

FREE SPEECH

Just as Stevens says "it's debatable" whether he supports a death penalty he "renounces," the media has failed to report his heads-I-win-tails-you-lose positions on campaign finance restrictions. He would uphold them [because](#) ^[37] he rejects the Court's "determin[ation] that any regulation of the quantity of money spent on campaigns...ought to be viewed as a direct regulation of speech itself." Totenberg reported: "He doesn't think that money is speech," quoting Stevens: "Can you hear it talk or can you read it? It's simply not speech; it's one of the things that make speech possible." While this appears to be a rationale for his support of campaign finance restrictions favored by a media itself immune from government speech regulation, it is actually a classic example of Stevens having it both ways.

In fact, he does not support all restrictions. The media rarely if ever points out that Stevens took a starkly opposite position regarding the "Millionaire's Amendment," which lifted restrictions on contributions to a candidate whose opponent spent his own money over a limit, but not on the opponent. In *Davis v. FEC*, Stevens explicitly argued the amendment "does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard.... Enhancing the speech of the millionaire's opponent, far from contravening the First Amendment, actually advances its core principles."

In other words, because money is not what it enhances, campaign finance restrictions do not violate the First Amendment protection of free speech and thus must be upheld (*McConnell v. FEC* and *Citizens United v. FEC*); but because money helps make one's voice

heard, a law providing for increased contributions to some candidates but not others also must be upheld to advance the core principles of the First Amendment. When contributions are restricted, that is constitutional because money is not speech; but when money is not restricted, that is constitutional because spending actually assists speech in accord with the First Amendment.

Is that clear to everyone? Or is it inane hairsplitting and just plain double talk by a judicial emperor with no clothes?

“MODESTY”

Finally, while repeating the meme that Stevens was “moderate” and “modest,” recent reports failed to ask or explain how this squares with his [assertion](#) ^[38] that he “always thought I had the right answer”; or with Scott Pelley’s recent [report](#) ^[39] that “Stevens, at an early age, saw how a judge could change the world.” Pelley did not question that this is a judge’s function.

This is no surprise to those familiar with Stevens’ averring that his “[own experience](#)” ^[20] should determine the constitutionality of the death penalty and also that the “judgment” of any five justices, including himself of course, as to the “[acceptability](#)” ^[40] of a criminal penalty is superior to and trumps that of the American people.

In his Totenberg interview, Stevens criticized Justice Scalia’s position that the Constitution should be read to mean what it originally meant: “To suggest that the law is static is quite wrong ... the whole purpose was to form a more perfect union, not something that’s perfect when we started. We designed a system of government that would contemplate a change and progress.” Of course, it is one thing to say the law is not static and that the system contemplates “change and progress.” It is quite another thing to assert that it is up to Stevens and any other four justices to make the changes. Stevens (and complicit reporters) wholly disregard the painfully obvious point that the Constitution does provide for change and perfecting – by democratically elected executives and legislators, as well as by amending the document itself. Stevens and the media ignore the wisdom and true humility of Justice Black’s rejecting “that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas[;] I have never believed that lifetime judges ...have any such legislative power.” From Black’s perspective, the “modest” Stevens has seized legislative power for himself and four other unelected justices.

(Unsurprisingly, Stevens not only denies “the law is static,” he also says it is. When writing for the Court, he [insisted](#) ^[41] it does not “devise” or “create” new rules of law, but only “articulates” what “pre-exists” in the *original* Constitution. But his dissents accused the Court of indeed “[newly mint](#)” ^[42][ing]” and “[inventing](#)” ^[43] rules “out of whole cloth.” When opposing “change,” he argued (a) the Court does create new rules despite (b) the law being static.)

CONCLUSION

For those who rely on the mainstream media, there is only one conclusion. Justice Stevens was a great justice, and a brilliant but humble lawyer who decided cases solely in accordance with the law and the Constitution.

It is entirely appropriate to present this view. What is utterly inappropriate is the almost complete absence of any challenge to it. While occasionally conceding that he was a liberal, the media has refused or failed to even raise the possibility that, notwithstanding his repeatedly accusing others of his own practice, Justice Stevens was a quintessential judicial activist who, however soft his voice and however seemingly “polite,” arrogantly believed his

office bestowed upon him the right to impose his own values on everyone else; and he did this by advancing wholly contradictory arguments from case to case and often by misstating the law, the constitution and the facts.

This article barely scratches the surface.

The media reports only one side, not out of ignorance or incompetence, but because it is largely populated by those who know that their unpopular values cannot be achieved in open democratic debates and elections, but must be imposed in the dark by unelected and unaccountable judicial activists.

Lester Jackson has [written](#) ^[44] [articles](#) ^[45] showing how the media has enabled the Supreme Court to undermine the death penalty. He views mainstream media misrepresentation and [suppression](#) ^[17] of the truth as essential to harmful judicial activism. A former teacher at Rutgers and New York University, Jackson holds a Ph.D. in Political Science.

Guest columns do not necessarily reflect the views of Accuracy in Media or its staff.

URLs in this post:

[1] Linda Greenhouse: <http://www.nytimes.com/2008/04/18/washington/18memo.html>

[2] October 4, 2010:

<http://www.npr.org/templates/transcript/transcript.php?storyId=130198344>

[3] October 13, 2010:

http://webcache.googleusercontent.com/search?q=cache:nYMfVOUmBDgJ:mobile.suntimes.com/suntimes/db_9684/contentdetail.htm%3Bjsessionid%3D692381F4D34E724A89B7C547119D5E6A%3Fcontentguid%3DE6T0wftU%26pn%3D0%26full%3Dtrue+/search%3Fhl%3Den%26q%3D%2Bsite:suntime

[4] adulation: <http://www.scotusblog.com/?cat=99>

[5] Champion of the Powerless: <http://www.scotusblog.com/2010/07/justice-stevens-champion-of-the-powerless/>

[6] The Greatest Justice: <http://www.scotusblog.com/2010/06/the-greatest-justice/>

[7] love fest: <http://explore.georgetown.edu/news/?ID=52941>

[8] honor:

<http://cspan.org/Watch/Media/2010/10/08/SCourt/A/39149/Georgetown+Law+Symposium+on+Justice+John+Paul+Stevens.aspx>

[9] award: <http://www.bettergov.org/2010-bga-annual-award-luncheon/>

[10] open mind: <http://www.npr.org/templates/story/story.php?storyId=130198344>

[11] 60 Minutes:

<http://www.cbsnews.com/stories/2010/11/23/60minutes/main7082572.shtml?tag=currentVideoInfo;segmentTitle>

[12] Adam Liptak: <http://www.nytimes.com/2010/11/28/us/28memo.html>

[13] newsworthy: http://www.msnbc.msn.com/id/40015366/ns/politics-more_politics/

[14] praiseworthy: <http://www.nytimes.com/2010/11/10/opinion/10wed4.html>

[15] thrusts himself: <http://blogs.abcnews.com/thenote/2010/11/justice-stevens-defends-mosque-near-wtc.html>

[16] feted:

http://njamf.com/10th%20anniversary%20gala%20luncheon%20release_8%2011%2010_final.pdf

[17] essential requisite: <http://ssrn.com/abstract=1346142>

[18] rare exception: <http://homicidesurvivors.com/2010/05/15/the-moderate-republican->

death-penalty-values-of-justice-stevens/print.aspx

[19] stated: http://www.newsbusters.org/blogs/tim-graham/2010/10/10/nprs-totenberg-insists-retiring-liberal-justice-stevens-open-minded-mode?quicktabs_1=2

[20] case: <http://www.law.cornell.edu/supct/pdf/07-5439P.ZC1>

[21] much acclaim: <http://www.nytimes.com/2008/04/18/world/americas/18iht-18memo.12124092.html>

[22] acknowledges: <http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false&printpage=true>

[23] one such case: http://www.ideasinactiontv.com/tcs_daily/2009/09/the-new-york-times-again-cries-wolf---part-2.html

[24] Justice Thomas: <http://www.law.cornell.edu/supct/pdf/98-9741P.ZA>

[25] Justice Scalia:

http://en.wikisource.org/wiki/McKoy_v._North_Carolina/Dissent_Scalia

[26] Chief Justice Roberts: <http://www.law.cornell.edu/supct/pdf/5-11284P.ZD>

[27] because: <http://www.supremecourt.gov/opinions/08pdf/07-11073Stevens.pdf>

[28] rampant:

http://www.nytimes.com/2010/11/30/opinion/30herbert.html?_r=1&ref=opinion&page_wanted=print

[29] trumpeted: http://articles.cnn.com/2009-12-18/justice/death.penalty.use_1_romell-broom-executed-lethal-injection?_s=PM:CRIME

[30] decrease: <http://www.deathpenaltyinfo.org/documents/2009YrEndReportPress.pdf>

[31] lauded: <http://www.virginialawreview.org/content/pdfs/94/283.pdf>

[32] celebrated: <http://www.deathpenaltyinfo.org/dpic-resources-death-sentences-capita-basis-state-and-executions-proportion-death-sentences-state>

[33] disputed: <http://www.crimeandconsequences.com/crimblog/2010/04/its-dying----except-when-its-n.html>

[34] far exceeds: http://www.ideasinactiontv.com/tcs_daily/2010/02/the-sinister-secret-of-abolitionists---part-1.html

[35] Hugo Bedau: <http://www.law.cornell.edu/supct/pdf/07-5439P.ZC2>

[36] complained:

<http://www.law.duke.edu/shell/cite.pl?61+Law+&+Contemp.+Probs.+89+%28Autumn+1998%29>

[37] because: <http://www.law.cornell.edu/supct/pdf/07-320P.ZX>

[38] assertion: http://www.usatoday.com/news/washington/2010-10-03-justice-stevens_N.htm

[39] report:

http://www.cbsnews.com/stories/2010/11/23/60minutes/main7082572_page2.shtml?tag=contentMain;contentBody

[40] acceptability: <http://www.law.cornell.edu/supct/pdf/07-343P.ZA1>

[41] insisted: <http://www.law.cornell.edu/supct/pdf/06-8273P.ZO>

[42] newly mint: <http://www.law.cornell.edu/supct/pdf/08-205P.ZX>

[43] inventing: <http://www.law.cornell.edu/supct/pdf/06-278P.ZD>

[44] written: <http://homicidesurvivors.com/categories/Lester%20Jackson%20PhD.aspx>

[45] articles: http://www.ideasinactiontv.com/tcs_daily/lester-jackson/