*John Paul Stevens**

This year the first Monday in October fell on October 7th. The same phenomenon occurred precisely fifty years ago when the Court held its first public session in the magnificent building it now occupies. The anniversary was recognized in a brief ceremony in which the Chief Justice mentioned certain changes that have occurred at the Court in the past half century. Two of those changes are the consequence of the increase in the volume of the Court's work. Whereas in 1935 each side was allowed a full hour for oral argument, today the arguments are only half as long. In 1935 the Court session on the first Monday in October included nothing more significant than an announcement that the new Term had opened and the admission of new members of the Supreme Court Bar. On the first Monday in October of 1935, the Court was not prepared to act on the certiorari petitions that had been filed during the summer, or to hear oral argument in the cases that it had previously decided to decide on the merits. In 1985, however, we heard oral argument in four cases and we entered well over 1,000 orders disposing of cert petitions, jurisdictional statements, and motions and applications of various kinds.

Appropriately, the news media took no special note of the fiftieth birthday of our courthouse. On that date, however, at least one television network commentator made a point of noting that the members of the Supreme Court had returned to Washington "after completing their three months vacation." This comment reminded me of the somewhat unfriendly but not entirely isolated suggestion that the obvious answer to the Court's alleged workload problem is a shorter vacation for the Justices. Because I am not exactly a disinterested observer, I shall not attempt to make a complete analysis of the advantages and disadvantages of such a change. Instead, I shall merely express an opinion about that possible solution to the workload problem and then tell you about a few of the things that a Supreme Court Justice does during his or her

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* Associate Justice, United States Supreme Court. Mr. Justice Stevens delivered this address in Chicago before the Federal Bar Association on October 23, 1985. The *U.C. Davis Law Review* publishes this address with the special permission of the Federal Bar Association. *The Review* does not hold exclusive rights to this address.

vacation.

Before deciding on the best solution to any problem, it is prudent to identify the problem that needs to be solved. The annual workload of the Supreme Court includes two basic components: processing several thousand applications for review, principally cert petitions, and deciding about 150 cases on the merits. Although the summer recess does delay for a few weeks the entry of a large number of orders denying cert, no one suggests that the Court's capacity to process this component of its docket is adversely affected by the recess. It is, however, at least arguable that more cases could be decided on the merits if the Court heard oral arguments during the summer months. Whether that is a wise solution to the Court's problems depends, in part, on whether the Court is now deciding too few, or too many, cases on the merits.

My own view is that the Court is deciding too many cases and that the workload problem that is the most pressing is how to do a better job of rejecting cases that do not need to be decided by a tribunal with nationwide jurisdiction. As support for my view, I shall merely refer you to the exceptionally thoughtful and lucid discussion of various aspects of the work of the Federal Courts in Judge Posner's recently published book.[1] If one holds the contrary view—that the Court is not deciding enough cases—then, of course, there are only two possible solutions to the problem. Either increase the decision-making capacity of the Supreme Court or create a second court with nationwide jurisdiction. Whether either, or perhaps both, of these solutions should be adopted, depends largely on a judgment concerning the number of cases that should be decided by a national court each year. If the number of such cases is in the range of 300 or 400, the case for creating a junior Supreme Court is indeed a strong one. On the other hand, if there are only about 100, or perhaps 150 or even 200 such cases, every possible means of expanding the decision-making capacity of the existing Court should be studied before making a major structural change in the federal judicial system. Such a study should certainly consider the possible advantages and disadvantages of increasing the number of argument sessions, as well as scheduling some sessions during the summer. It is my firm opinion, however, that such a change should not be made without first carefully evaluating its possible impact on the quality of the Court's work—a subject that is already a matter of concern to some students of our work such as Judge Posner.

What do Supreme Court Justices do during the period between the

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[1] R. POSNER, THE FEDERAL COURTS (1985). For Posner's most pertinent commentary, see *id.* at 162-66.

day in July when the last opinion is announced and the first Monday in October? Just as there is no single answer to a similar question about practicing lawyers, United States Senators, or law professors, I am sure that each of the nine Justices would answer the question in a different way. Nevertheless there would be more similarity in the nine answers than many of you may assume.

Let me first frankly state that the absence of the deadlines that are imposed by the need to prepare for oral arguments on scheduled dates, to prepare for conference at regular intervals, and to circulate draft opinions with reasonable promptness, does make it possible to enjoy a period of genuine rest and rehabilitation after the Court recesses in July. Indeed, this is one important difference between my present assignment and my experience on the Court of Appeals where my work on opinions on cases argued in June invariably extended into the period of preparation for cases to be argued in September. It is largely for this reason that, even though I believe the average Supreme Court Justice works more hours per day than the average Circuit Judge during the ten months between the first of September and the end of June, on an annual basis I believe the two offices are equally demanding.

Apart from pure vacation time, what else do we do? Some tasks are quite routine but may be of interest to you. Usually a backlog of unanswered mail requires attention. I need two or three days to interview the prospective law clerks whose applications seem most promising. I spend some time reviewing the recommendations made by the Reporter of Decisions for style changes in the opinions I have authored. Usually, of course, I accept Mr. Lind's perceptive and meticulously accurate suggestions, but occasionally I stubbornly adhere to a bit of grammatical heresy that better conveys my intended message. And there are times when something more than style is at stake. Let me tell you about the change of one word in the Court opinion in *Wallace* v. *Jaffree*, the case involving the constitutionality of the Alabama statute authorizing a period of silence in the public schools "for meditation or voluntary prayer."

Both the majority opinion and Justice Rehnquist's dissenting opinion quoted a passage from Joseph Story's treatise that supported the proposition that the original intent of the Framers of the Establishment Clause of the First Amendment was concerned with protecting Christians from the official preference of one Christian sect over another and that adherents of non-Christian faiths were not members of the protected class. When the Court opinion was announced it contained these two sentences:

> At one time it was thought that this right merely proscribed the preference

> of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

In August I received the following letter from the Executive Director of the American-Arab-Anti-Discrimination Committee:

> Dear Judge Stevens:
>
> Several members who read your cogently written opinion in the *Wallace v. Jaffree* case were surprised to note that you referred to the Islamic faith as "Mohammedism".
>
> We thought you would appreciate knowing that scholars now consider "Mohammedism" an inappropriate synonym for Islam. Muslims find the term offensive because they believe "Mohammedism" implies that they worship the Prophet Mohammed, or consider him to have divine attributes like Christ. Since neither is the case, religious scholars have been encouraging use of the more accurate term, "Islam," for the past twenty years.
>
> If you should have occasion to refer to the Islam faith in the future, your sensitivity in the use of terms would be appreciated by hundreds and thousands of American Muslims.

After sharing that letter with my colleagues, we decided to substitute the word "Islam" for the word "Mohammedism" in the text of the opinion.

During the summer months most Members of the Court attend at least one Judicial Conference or Bar Association function, and usually make at least one or two public addresses. Typically these talks rehash material that has either been included in previous addresses or has been stated with greater gusto in a dissenting opinion. Nevertheless, I still find it remarkable that a statement critical of the Court will usually be ignored by the news media when it is included in a written dissent but may be treated as a dramatic news story when it is repeated several weeks later in a talk to a small audience of federal judges at a Judicial Conference.

I also find time during the summer to read some of the criticism of our work product. Since I have already adverted to the *Jaffree* case I shall mention one of the many adverse comments on that six-to-three decision. In his speech to the American Bar Association on July 9th, Attorney General Meese not only endorsed the rationale of Justice Rehnquist's dissenting opinion—that the Establishment Clause was originally designed to guarantee strict neutrality among Christian sects but did not contemplate strict neutrality between religion and non-reli-

gion—he also expressed an even more basic disagreement with the Court's decision. In advocating what he described as a constitutional "Jurisprudence of Original Intention," Attorney General Meese placed great emphasis on the fact that "the Bill of Rights, as debated, created and ratified was designed to apply *only* to the national government."

I have emphasized the word "only" because it is underscored on page twelve of the written text of his speech and because the point is so forcefully made in the following quotation from pages thirteen and fourteen:

> Though the first ten amendments that were ultimately ratified fell far short of what the Anti-Federalists desired, both Federalists and Anti-Federalists agreed that the amendments were a curb on national power.
>
> When this view was questioned before the Supreme Court in *Barron* v. *Baltimore* (1833), Chief Justice Marshall wholeheartedly agreed. The Constitution said what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states—and, he said, that was that.
>
> Until 1925, that is.
>
> Since then a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests. And nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation.

Of course, the Attorney General has correctly stated the holding in *Barron* v. *Baltimore* in 1833, and he was quite correct in identifying the year 1925 as the time when the Supreme Court first held that the State of New York as well as the Congress of the United States must obey the dictates of the First Amendment. The development of his argument is somewhat incomplete, however, because its concentration on the original intention of the Framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law. In particular, it overlooks the profound importance of the Civil War and the post-war amendments on the structure of our government, and particularly upon the relationship between the Federal Government and the separate States. Moreover, the Attorney General fails to mention the fact that no Justice who has sat on the Supreme Court during the past sixty years has questioned the proposition that the prohibitions against state action that are incorporated in the Fourteenth Amendment include the prohibitions against federal action that are found in the First Amendment.

The importance of evaluating subsequent developments in the law, as well as the original intent of the Framers, is well illustrated by

James Madison's views about the constitutionality of a federally chartered national bank. As a Congressman he opposed the first National Bank in part because he did not believe Congress had the constitutional power to authorize it, but as President twenty years later he not only signed the bill authorizing the second bank, but also accepted the interpretation of the Constitution that had been adopted by the Supreme Court in the interim. In a letter written in 1819 he explained: "It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."[2]

It is possible that I have misconstrued the speech given by Attorney General Meese last July and that he did not actually intend his recommended "Jurisprudence of Original Intention" as a rejection of the proposition that the Fourteenth Amendment has made the First Amendment applicable to the States. But if there is ambiguity in the message that was conveyed by an articulate contemporary lawyer last July, is it not possible that some uncertainty may attend an effort to identify the precise messages that equally articulate lawyers were attempting to convey almost two hundred years ago? We must, of course, try to read their words in the context of the beliefs that were widely held in the late Eighteenth Century. Relying on that background, the Attorney General forcefully asserted that "to have argued, as is popular today, that the amendment demands a strict neutrality between religion and irreligion would have struck the founding generation as bizarre."

The term "founding generation" describes a rather broad and diverse class. It included apostles of intolerance as well as tolerance, advocates of differing points of view in religion as well as politics, and great minds in Virginia and Pennsylvania as well as Massachusetts. I am not at all sure that men like James Madison, Thomas Jefferson, Benjamin Franklin or the pamphleteer, Thomas Paine, would have regarded strict neutrality on the part of government between religion and irreligion as "bizarre." Consider for example this passage that was penned by Thomas Paine in 1794:

> I believe in one God, and no more; and I hope for happiness beyond this life.
>
> I believe in the equality of man, and I believe that religious duties consist in doing justice, loving mercy, and endeavoring to make our fellow-

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[2] Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 939-41 (1985).

> creatures happy.
>
> But, lest it should be supposed that I believe many other things in addition to these, I shall, in the progress of this work, declare the things I do not believe, and my reasons for not believing them.
>
> I do not believe in the creed professed by the Jewish church, by the Roman church, by the Greek church, by the Turkish church, by the Protestant church, nor by any church that I know of. My own mind is my own church.
>
> All national institutions of churches—whether Jewish, Christian, or Turkish—appear to me no other than human inventions set up to terrify and enslave mankind and monopolize power and profit.
>
> I do not mean by this declaration to condemn those who believe otherwise. They have the same right to their belief as I have to mine. But it is necessary to the happiness of man, that he be mentally faithful to himself. Infidelity does not consist in believing, or in disbelieving; it consists in professing to believe what he does not believe.[3]

In planning to speak to you today it was my original intention merely to give you some notion what a Supreme Court Justice does during the summer but I have used up my allotted time without fairly conveying my intended message. I have failed, for example, to tell you how my law clerks and I screened over 1,000 cert petitions, jurisdictional statements, and motions, how I prepared for the discussion of the 230 cases that were on the Court's so-called "discuss list" for its conferences in September, or how I studied the briefs on the merits for the two-week argument session that commenced on October 7th and included approximately one-seventh of the cases that the Court will decide during this Term. But that sort of work, though performed in the summer months, is no different from similar work performed during the winter and therefore does not really merit discussion today.

Thank you.

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[3] T. PAINE, THE AGE OF REASON 231-32 (1928).