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Ex-Justice Criticizes Death Penalty

By ADAM LIPTAK

WASHINGTON — In 1976, just six months after he joined the Supreme Court, Justice John Paul Stevens voted to reinstate capital punishment after a four-year moratorium. With the right procedures, he wrote, it is possible to ensure "evenhanded, rational and consistent imposition of death sentences under law."

In 2008, two years before he announced his retirement, Justice Stevens reversed course and in a concurrence said that he now believed the death penalty to be unconstitutional.

But the reason for that change of heart, after more than three decades on the court and some 1,100 executions, has in many ways remained a mystery, and now Justice Stevens has provided an explanation.

In a detailed, candid and critical essay to be published this week in The New York Review of Books, he wrote that personnel changes on the court, coupled with "regrettable judicial activism," had created a system of capital punishment that is shot through with racism, skewed toward conviction, infected with politics and tinged with hysteria.

The essay is remarkable in itself. But it is also a sign that at 90, Justice Stevens is intent on speaking his mind on issues that may have been off limits while he was on the court.

In the process, he is forging a new model of what to expect from Supreme Court justices after they leave the bench, one that includes high-profile interviews and provocative speeches.

He will be on "60 Minutes" on Sunday night.

Earlier this month, he weighed in on the controversy over the proposed Islamic center near ground zero in a speech to the National Japanese American Memorial Foundation.

During World War II, Justice Stevens served as a Navy cryptographer at Pearl Harbor for more than two years. On returning to Hawaii in 1994, he said he had an emotional reaction to seeing Japanese tourists at a memorial there. "We shouldn't allow them to celebrate their attack on Pearl Harbor," he remembered thinking.

He added that he understood why some New Yorkers would have a similar reaction to the proposed Islamic center near ground zero.

“But then, after a period of reflection, some of those New Yorkers may have second thoughts, just as I did,” he went on. “The Japanese tourists were not responsible for what some of their countrymen did decades ago; the Muslims planning to build the mosque are not responsible for what an entirely different group of Muslims did on 9/11.”

The two other retired justices have been active, too, but they have largely limited their public comments to more traditional matters like judicial independence and constitutional interpretation. Justice Sandra Day O’Connor, who is 80, speaks frequently on what she says are the problems inherent in electing state court judges.

Justice David H. Souter, 71, in a commencement address in May at Harvard, gave a detailed critique of the mode of constitutional interpretation associated with Justices Antonin Scalia and Clarence Thomas, who rely on the text and original meaning of the Constitution.

Justice Souter said those tools are inadequate given the “open-ended language” in the Constitution, which, moreover, “contains values that may well exist in tension with each other.”

But that sort of abstract discussion is nothing like the blow-by-blow critique in Justice Stevens’s death penalty essay, which will be published in The New York Review’s Dec. 23 issue and will be available on its Web site on Sunday evening.

The essay is actually a review of the book “Peculiar Institution: America’s Death Penalty in an Age of Abolition,” by David Garland, a professor of law and sociology at New York University. The book compares American and European approaches to the death penalty, and Justice Stevens appears to accept its major conclusions.

Professor Garland attributes American enthusiasm for capital punishment to politics and a cultural fascination with violence and death.

In discussing the book, Justice Stevens defended the promise of the Supreme Court’s 1976 decisions reinstating the death penalty even as he detailed the ways in which he said that promise had been betrayed.

With the right procedural safeguards, Justice Stevens wrote, it would be possible to isolate the extremely serious crimes for which death is warranted. But he said the Supreme Court had instead systematically dismantled those safeguards.

Justice Stevens said the court took wrong turns in deciding how juries in death penalty cases are chosen and what evidence they may hear, in not looking closely enough at racial disparities in the capital justice system, and in failing to police the role politics can play in decisions to seek and impose the death penalty.

In Payne v. Tennessee in 1991, for instance, the court overruled a 1987 decision, Booth v. Maryland, that had banned statements from victims at sentencing because of their tendency to inflame juries.

"I have no doubt that Justice Lewis Powell, who wrote the Booth opinion, and Justice William Brennan, who joined it, would have adhered to its reasoning in 1991 had they remained on the court," Justice Stevens wrote. "That the justices who replaced them did not do so was regrettable judicial activism and a disappointing departure from the ideal that the court, notwithstanding changes in membership, upholds its prior decisions."

Justice Stevens did not name those new justices. One was Justice Anthony M. Kennedy, lately the court's swing justice, who replaced Justice Powell.

The other was Justice Souter, who replaced Justice Brennan and in other cases generally voted with Justice Stevens and the rest of the court's more liberal wing.

Justice Stevens also had harsh words for the 5-to-4 decision in 1987 in McCleskey v. Kemp, which ruled that even solid statistical evidence of racial disparities in the administration of the death penalty did not violate the Constitution. He said the decision effectively allowed "race-based prosecutorial decisions."

"That the murder of black victims is treated as less culpable than the murder of white victims provides a haunting reminder of once-prevalent Southern lynchings," Justice Stevens wrote.

Here, too, Justice Stevens wrote, the decision turned on changes in the court's membership. Justice Potter Stewart "surely would have voted with the four dissenters," Justice Stevens said. Justice Stewart was replaced by Justice O'Connor, who voted with the majority.

The problems with the administration of capital punishment extend beyond the courthouse and into the voting booth, Justice Stevens said.

"Local elections affect decisions of state prosecutors to seek the death penalty and of state judges to impose it," he wrote.

He was also critical of decisions allowing prosecutors to exclude jurors with qualms about the death penalty, tilting the legal playing field toward conviction. The better approach, he said, is

one in which “a jury composed of 12 local citizens selected with less regard to their death penalty views than occurs today — in that respect, a truer cross-section of the community — would determine individual defendants’ fates.”

Robert B. Silvers, the editor of The New York Review of Books, said the idea of asking Justice Stevens to contribute occurred to him after he read passages from the justice’s dissent in Citizens United, the January decision that lifted restrictions on campaign spending.

“It was clear that he was a very strong writer,” Mr. Silvers said. “We simply sent him the book, and we got back a letter saying he’d be delighted to review it.”