



May 11, 2011

Retired Justice John Paul Stevens  
U.S. Supreme Court Building  
1 First Street, NE  
Washington, DC 20543

Dear Justice Stevens:

On March 12<sup>th</sup>, we celebrated “Harlan Bible Day”<sup>1</sup> – marking a tradition to which you are personally linked – and I noted that occasion by beginning a letter to you. Shortly after you were installed as a Justice, you signed your name alongside many predecessors upon the flyleaf of John Marshall Harlan’s Bible.<sup>2</sup>

For over 100 years now, that Bible has been carefully – if quietly – maintained in the Office of the Curator of the United States Supreme Court. Your colleague, David Souter, remarked that signing the Harlan Bible was “the most humbling thing that [he had] ever done in [his] entire life.”<sup>3</sup> It must signify how important God’s Word is to you that you are also a Signer. I know it does to those judges we meet all over America who are now replicating that venerable tradition through American Judicial Alliance.

Justice Stevens, your service defending Old Glory against Japanese aggression during World War II is worthy of respect and admiration. As the “Greatest Generation” passes into twilight, it reminds me of the challenges we face in the 21<sup>st</sup> century. As the “Baby Boomers” become the “elders” in our society, I believe British writer C.S. Lewis (1898-1963) well summarized the most pressing issue we now face when he wrote regarding moral relativism:

We continue to clamor for those very qualities we are rendering impossible.... In a sort of ghastly simplicity, we remove the organ and demand the function. We make men without chests and demand of them virtue and enterprise. We laugh at honor and are shocked when we find traitors in our midst. We castrate and bid the geldings be fruitful.<sup>4</sup>

Shortly before he died, Yale Law School Professor Arthur Leff (1935-1981) added this:

I want to believe – and so do you – in a complete, transcendent, and immanent set of propositions about right and wrong, findable rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe – and so do you – in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought

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1. <http://retiredjudges.org/archives/56>

2. An article featuring the “Harlan Bible” story is available at [http://retiredjudges.org/docs/brbar\\_harlan.pdf](http://retiredjudges.org/docs/brbar_harlan.pdf)

3 “Souter returns to N.H., talks of awe at role.” Boston Globe - Saturday, February 2, 1991.

4. Clive Staples Lewis, *The Abolition of Man*, (Harper Collins) 1943, page 475.

to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and good and to create it. ... Only if ethics were something unspeakable by us could law be unnatural, and therefore unchallengeable.<sup>5</sup>

And my friend Retired Judge Bob Downing breaks it down to simplistic terms: It is foolhardy to expect people to be “good for nothing.”<sup>6</sup>

Justice Stevens, why should people be “good...for nothing?” I think you would agree that what America needs is men and women ready to stand up and fight for our country, as you did—and for good reason. It may seem that we already do. After all, are we not winning the “War on Terror?” Yet, events over the last thirty years and especially what I describe below continue to give me pause...and you sir, I believe, are uniquely positioned to do something about it.

I recently volunteered alongside Baton Rouge Bar Association officials at an inner city school in Baton Rouge. The students were led in a role-playing game to emphasize the point that for any group of individuals to interact successfully, rules are necessary.

By abruptly changing those rules without advance notice, our Bar Association president well illustrated the point that, if rules are applied in an *arbitrary* manner, disruptive confusion results. Justice Stevens, we exhorted those students to respect law and obey the rules established for their well-being. And, these impressionable pre-teens seemed to enthusiastically and gratefully accept our counsel.

But my years of experience as an attorney, trial judge, father and grandfather left me uneasy over the challenges these youngsters would soon face as they grew older, because the children were not permitted to view the Source of Law<sup>7</sup> on their school wall. In my mind’s eye, it was as though these youngsters were being forced to exit their school bus onto a busy six-lane highway and then asked to navigate their way as vulnerable pedestrians. Small wonder so many follow paths of irresponsibility, lawlessness and underachievement.

If we are to break this pattern, our youth need more guidance than many today are receiving. Watching these school children learn about law caused me to remember my frustration – and not for the first time<sup>8</sup> – over an *arbitrary* Supreme Court decision that lies at the core of restricting America’s students from viewing God’s Ten Commandments – the very words whose moral reflection of the past 3000 years form the basis of our collective respect for Creator-endowed

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5. Leff, Arthur Allen, “Unspeakable Ethics, Unnatural Law” 1979 Duke Law Journal No. 6, pp. 1229, 1249 (1979).

6. Retired Louisiana Appellate Judge Robert Downing is actively involved in prison ministry and assists American Judicial Alliance in giving Bibles to courts following the tradition of Justice John Marshall Harlan (1833-1911). See <http://retiredjudges.org/quotable/letters> (Password = “letters”).

7. “It is a fallacy to suppose that by omitting the subject, you teach nothing about it. On the contrary, you teach that it is to be omitted, and that it is, therefore, a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby, insinuate it silently, insidiously, and all but irresistibly.” Sir Walter Moberly “The Crisis in the University” (S.C.M. Press) 1949.

8. See <http://retiredjudges.org/ddw>

gifts of life, family, property, and truth. To expect these attributes to be deeply ingrained in succeeding generations of Americans, we would do well to heed the words of President Washington:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.<sup>9</sup>

And so, Justice Stevens, I write you because I believe you are the only living jurist directly responsible for a decision which, in effect, became a major cause of America's deteriorating moral fitness. And, as I shall respectfully suggest, you are the most influential American who can set our great Nation on a different course.

Thirty years ago last November – while many Americans were more worried about “who shot J.R.” on that climactic last episode of “Dallas,” you, as one of five justices, issued a “per curiam” opinion in *Stone v. Graham*,<sup>10</sup> signaling to America that a state law calling for postings of the Ten Commandments in public schools was constitutionally infirm. You are the only one of that five-justice majority still living.

In that per curiam, you agreed that,

If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the school-children to read, meditate upon, perhaps to venerate and obey the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the establishment clause.<sup>11</sup>

With respect, I observe that a visage of the Ten Commandments adorn the very room from which *Stone* was issued, and rightly so. The Founders frequently wrote of the importance of the Decalogue in framing the moral and legal bases of this Grand Experiment, these United States.

Justice Stevens, I understand that per curia opinions typically adjudicate the mundane. But with a 5 to 4 vote, *Stone v. Graham* was anything but a non-controversial ruling. You once wrote that “traditions in the law are as likely to codify the preferences of those in power as they are to reflect necessity or proven wisdom.”<sup>12</sup> Even if you had disagreed with the dissent of Justice Potter Stewart that the Kentucky courts had “applied wholly correct constitutional criteria in reaching their decisions” in upholding the law,<sup>13</sup> you might, at least, have joined the dissents of Chief Justice Warren Burger and Justice Harry Blackmun as they called for a full plenary hearing on an issue of such momentous national significance.

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9. George Washington, “Farewell Address” (1796).

10. *Stone v. Graham*, 449 U.S. 39 (1980).

11. *Ibid.* p. 42.

12. John Paul Stevens to Harry Blackmun, Private Memorandum (1992); [http://www.nytimes.com/2010/04/10/us/politics/10judge.html?pagewanted=2&\\_r=1&ref=magazine](http://www.nytimes.com/2010/04/10/us/politics/10judge.html?pagewanted=2&_r=1&ref=magazine)

13. *Stone*, 449 U.S. at p. 43.

Instead, not unlike General Yamamoto during his December 7, 1941 raid, the five of you camouflaged your identity behind the “per curiam” label and joined in a pre-emptive strike that operated vengeance against God’s Decalogue. Your code-breaking led to Yamamoto’s death in 1943, and I salute you for that service, as it definitely dealt a blow to the morale in Japan. But today, some would accuse your ruling in *Stone v. Graham* of diminishing America’s moral fiber, thus sending our Republic into a tailspin.

For centuries, Western civilization has had recourse to the Ten Commandments as a central and authoritative statement of morality. If the Decalogue has no place in American jurisprudence, why would Justice Joseph Story write this?

I verily believe Christianity necessary to the support of civil society. One of the beautiful boasts of our municipal jurisprudence is that Christianity is a part of the Common Law....  
**There never has been a period in which the Common Law did not recognize Christianity as lying at its foundations.**<sup>14</sup>

And why would Justice David Brewer opine for a unanimous Court that “this is a Christian nation,” if it were not so?<sup>15</sup>

Your *Stone v. Graham* opinion boasted neither of Christianity’s link to America’s system of justice, nor of resolution of the issue at hand by reference to the clear text of the First Amendment. Instead, the “municipal jurisprudence” to which you appealed was former Justice Hugo Black’s *arbitrary* “wall of separation” rationale erected in *Everson v. Board of Education*<sup>16</sup> and its progeny. We now have it on good authority that Justice Black’s legal research was less than thorough.<sup>17</sup> In *Stone*, you wrote:

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the ‘official support of the State...Government’ that the Establishment Clause prohibits.<sup>18</sup>

At the risk of sounding like the child in “The Emperor’s New Clothes,” I respectfully point out that the First Amendment’s non-establishment clause prohibits only “Congress” from establishing a national denomination, and no *arbitrary* “crucible of litigation” jurisprudential metaphor can magically alter constitutional language or historical facts. *Lemon Test* or not, every school child at the time of the Framers knew what an “established” religion was.<sup>19</sup> Why doesn’t the Supreme Court?

14. Commentaries on the Constitution of the United States, Joseph Story (1833), p. 593 [Emphasis added].

15. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

16. *Everson v. Board of Education* 330 U.S. 1 (1947).

17. “Hugo Black’s biographer reported that the justice did not peruse the proceedings of the First Congress, which debated the provision now known as the First Amendment, until ‘[a]fter Everson was decided.’” Thomas Jefferson and the Wall of Separation Between Church and State, by Daniel Dreisbach, New York University Press (2002) at p. 124.

18. *Stone*, 449 U.S. at p. 42.

19. See Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 William and Mary Law Review 2105 (2003).

Justice Stevens, I often dwell on the irony that just five years before *Stone v. Graham*, you signed Justice Harlan's Bible. Respectfully, sir, I no doubt speak for many perplexed Americans when I question under whose official "auspices" that venerable tradition is being perpetuated. Does not the "mere" presence of that Book on public property, maintained at the taxpayers' expense and bearing your hand-written approbation, manifest the "official support" of a government agency? Justice Louis Brandeis well noted that government officials should observe the same standards as citizens:

At the foundation of our civil liberties lies the principle that denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen.<sup>20</sup>

Correct me if I am wrong, but I understand that a publicly-compensated marshal brought the Bible to you and then returned it to the Curator's office after you permanently affixed your "John Paul Stevens" upon the Harlan Bible's flyleaf just below "William H. Rehnquist."

In Justice Rehnquist's dissent in *Stone*, he characterized your actions as "cavalier." I have also read that your contemporary, Justice William Brennan, was fond of pointing out that, "with five votes you can do anything" at the Supreme Court.<sup>21</sup> While that "Law of Five" per curiam shielding maneuver may have spared you and Justice Brennan the glare of a public spotlight back in 1980, have you considered the bigger spotlight that continues to shine upon you?

Justice Stevens, I have an audio recording of your December 1975 Judicial Oath and have listened to it many times. You swore "solemnly" to support our Constitution, and ended your Oath – as you were required to do pursuant to law tracing back to The Judiciary Act of 1789, with the unequivocal supplication, "So Help Me, God."

That "So-Help-Me" God before whom you solemnly swore your Judicial Oath was watching and continues to keep score. By federal and state law, we trial judges are obliged to administer oaths calculated to "awaken the consciences" of witnesses before they are allowed to testify. I am certainly no threat to you, but as your judicial colleague, I respectfully ask you to consider how the God before Whom you swore your Judicial Oath will regard *Stone v. Graham* when one day you find yourself appearing before His *non-arbitrary* judgment.

An oath-taker of your learning and expertise surely understands that such a covenantal utterance imprecates the vengeance of a Holy God for contumacious violation of His Commandments.<sup>22</sup> Respectfully, Justice Stevens, if the Bible is true, another crucible surely awaits sworn public officers who *arbitrarily* twist our Constitution's text to suit their preferences instead of supporting the plain meaning of the English language. No repetition of error will placate the God who is the same yesterday, today, and forever.

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20 *Burdeau v. McDowell*, 256 U.S. 465 at p. 477 Justice Brandeis, dissenting (1921).

21. Jeffrey Toobin, *The Nine*, (New York: Doubleday, 2007), pp. 84-85.

22. Oath – "a solemn affirmation or declaration, made with an appeal to God for the truth of what is affirmed. The appeal to God in an oath implies that the person imprecates his [God's] vengeance and renounces his favor if the declaration is false, or if the declaration is a promise, the person invokes the vengeance of God if he should fail to fulfill it." N. Webster, *An American Dictionary of the English Language* (New Haven 1828).

Don't you agree that had that popular Kentucky law's constitutionality been upheld, surely the idea of simply acknowledging the source of America's liberties would have continued in other states—such as Colorado? It is a sad remembrance that your own birthday will henceforth be memorialized as the anniversary of America's tragic Columbine High School rampage in Littleton, CO. Raised in a post-*Stone v. Graham* America, murderer Eric Harris (1981-1999) chose to wear a t-shirt inscribed "NATURAL SELECTION" as he and Dylan Klebold (1981-1999) stole the gift of life from a dozen of their fellow students and a teacher on your 79<sup>th</sup> birthday.

The stamps imprinted on the minds of those once-impressionable young men were not "thou shall not murder, or thou shall not steal," but rather a raw "survival-of-the-fittest" worldview – one consistent with your secularist ruling. Brian Rohrbough, father of a student murdered at Columbine High School, told CBS News, "This country is in a moral free-fall. For over two generations, the public school system has taught in a moral vacuum, expelling God from the school and from the government, replacing him with evolution, where the strong kill the weak, without moral consequences and life has no inherent value."<sup>23</sup>

One of my senior friends – who join me in regular prayer for you and other judges – likes to joke that he has underwear older than I am. Still, in my forty years as a licensed attorney, I have watched America change, such that we now seem burdened with the lamentable prophesy of Founder Dr. Benjamin Rush (1746-1813) who warned that neglect of God's Word in education would produce a society that spends more time and money punishing crime than preventing it!<sup>24</sup>

John Marshall Harlan (I), whose Bible you signed, hailed from Kentucky, the state whose Ten Commandments law you summarily nullified. In the same year he dedicated his Bible to the Court, Harlan declared: "I believe that the Bible is the inspired Word of God. Nothing which it commands can be safely or properly disregarded. Nothing it condemns can be justified. No civilization is worth preserving which is not based on the doctrines or teachings of the Bible."<sup>25</sup> And, in his dissent in the unprecedented case of *Lochner v. New York*, Justice Harlan issued an admonishment that speaks to us today:

No evils arising from such [state] legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true - indeed, the public interests imperatively demand - that legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.<sup>26</sup>

23 <http://www.cbsnews.com/stories/2006/10/02/freespeech/main2057062.shtml>

24. Benjamin Rush, *Essays, Literary, Moral and Philosophical* (Philadelphia: Thomas and William Bradford, 1806), pp. 93-113, "A Defence of the Use of the Bible as a School Book."

25. <http://www.nyapc.org/history/?name=Justice%20Harlan> Quoted in 1906.

26 198 U.S. 45, 74 (1905) dissenting.

## So what can you, as a retired justice, do now, and why am I writing to you?

Respectfully, Justice Stevens, as the president of American Judicial Alliance and Retired Judges of America, I ask you to issue a public statement acknowledging that you made a mistake in *Stone v. Graham*. As a model I would cite Justice John Marshall Harlan who explained, when reversing positions over an issue of keen importance in his day, “let it be said that I am right rather than consistent.”<sup>27</sup>

At this point, what have you got to lose by distancing yourself from this *arbitrary* and unpopular decision? After all, Gallup reports that 76% of Americans want the Ten Commandments posted in government locations and 74% want them displayed in public schools.<sup>28</sup> By that 5 to 4 vote, your *Stone v. Graham* majority opinion has contributed toward transforming America’s public schools into the secularist seminaries about which Justice Goldberg warned.<sup>29</sup> Moral relativism now reigns supreme notwithstanding America’s Organic Laws that declare otherwise. As a direct result, for over thirty years now, conscientious parents, educators, and civic leaders have felt restricted from even displaying the Ten Commandments.

Imagine how your reprobation of *Stone v. Graham* might spark a fresh re-awakening in America, such that school children may once again view in their classrooms what the Supreme Lawgiver has to say about *non-arbitrary* rules binding on us all. Such bold action on your part would inevitably enhance respect for the rule of law and our judicial system by Constitution-loving Americans everywhere, not to mention preserve reverence for America’s flag.<sup>30</sup> Justice Stevens, you may even become a folk hero!

Justice Stevens, you have led a life of great distinction. It was another distinguished Midwesterner, Lewis Cass (1782-1866), the Democrat Party’s candidate for president in 1848, who laid down this warning to posterity:

Independent of its connection with human destiny hereafter, the fate of republican government is indissolubly bound up with the fate of the Christian religion, and a people

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27 [http://wiki.answers.com/Q/Which\\_Supreme\\_Court\\_justice\\_stated\\_that\\_the\\_Constitution\\_should\\_be\\_color-blind](http://wiki.answers.com/Q/Which_Supreme_Court_justice_stated_that_the_Constitution_should_be_color-blind)

28 <http://www.gallup.com/poll/15817/americans-thou-shalt-remove-ten-commandments.aspx>

29 "Untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," a result "not only not compelled by the Constitution, but ... prohibited by it." Justice Arthur J. Goldberg, concurring in *School District of Abington Township, Pennsylvania v. Schempp* 374 U.S. 203, 306.(1963)

30 As noted by one of Justice John Marshall Harlan’s friends: “The Stars and Stripes – the old flag – will float...over all these States.... If the time ever comes when we shall go to pieces, it will...be...from inward corruption – from the disregard of right principles...from losing sight of the fact that “Righteousness exalteth a nation, but that sin is a reproach to any people.” [Proverbs 14:34] ... [T]he secession of the Southern States in 1860 was a small matter compared with the secession of the Union itself from the great principles enunciated in the Declaration of Independence, in the Golden Rule, in the Ten Commandments, in the Sermon on the Mount. Unless we hold, and hold firmly to these great fundamental principles of righteousness...our Union...will be “only a covenant with death and an agreement with hell.” If it continues to exist, it will be a curse and not a blessing.” -- Francis J. Grimke, from "Equality of Right for All Citizens, Black and White, Alike," March 7, 1909, published in *Masterpieces of Negro Eloquence*, Alice Moore Dunbar, editor (New York: Dover Publications, Inc., 2000), pp. 246-247.

who reject its holy faith will find themselves the slaves of their own evil passions and of *arbitrary* power.<sup>31</sup> (emphasis added)

I close this respectful appeal with this – I pray – sobering reminder from Edmund Burke (1729-1797), whose words on the outcome of conflicts ring true today:

Judges are guided and governed by the eternal laws of justice, to which we are all subject. We may bite our chains, if we will; but we shall be made to know ourselves, and be taught that man is born to be governed by law; and he that will substitute will in the place of it is an enemy to God.<sup>32</sup>

Justice Stevens, your life seems characterized by extraordinary timing. From your presence at that famous 1932 World Series where Babe Ruth “called his shot,” your December 6, 1941 enlistment in the Navy and participation in “Operation Vengeance,” your courageous leadership in prosecuting corruption in the Illinois judiciary, your availability when President Gerald Ford needed a qualified Republican successor on the Supreme Court, and even to your wisdom in retiring while still healthy and in control of your destiny. Imagine the national impact of how your disavowal of *Stone v. Graham* would be received by Constitution-loving Americans at this point in America’s history.

To borrow a phrase from one of your opinions, “in a fundamental respect...it is the future of the student...that is at stake.”<sup>33</sup> The fact that our children are drowning in cultural sewage cannot be lost on you. If you were to confront the Supreme error that our children cannot be expected to be “good for nothing,” your legacy (like John Marshall Harlan’s) will be secure. I take no pleasure in suggesting that otherwise, you may miss this “timely opportunity” and be better remembered by critical-thinking Americans as one more of those *arbitrary*, oath-breaking federal judges, rather than the code-breaking WWII hero you are. Will you come to their rescue?

Dutifully,



Retired Judge Darrell D. White  
American Judicial Alliance  
and Retired Judges of America

cc: Rev. Billy Graham

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31 Tryon Edwards, D.D., *The New Dictionary of Thoughts-A Cyclopedia of Quotations* (Garden City, NY: Hanover House, 1852; revised and enlarged by C.H. Catrevas, Ralph Emerson Browns and Jonathan Edwards [descendent, along with Tryon, of Jonathan Edwards (1703-1758), president of Princeton], 1891; The Standard Book Company, 1955, 1963), p. 90.

32 Edmund Burke at the trial of Warren Hastings, 1788.

33. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 at Note 7 (2004).



Justice Stevens,

Consistent with the above letter, I am humbly and respectfully requesting that you issue a press release substantially as follows.

Judge Darrell White (Retired)  
President and Founder Retired Judges of America and American Judicial Alliance  
5656 College Drive  
Baton Rouge, LA 70806  
225 603-2544  
ajatoday.com  
[dwhite@retiredjudges.org](mailto:dwhite@retiredjudges.org)

## DRAFT PRESS STATEMENT

Retired Justice John Paul Stevens today expressed regret over his participation in the 1980 per curiam *Stone v. Graham* decision that nullified a Kentucky law calling for the posting of the Ten Commandments in Kentucky Schools at private expense:

“Upon reconsideration and reflection, I believe that the state of Kentucky in the *Stone v. Graham* case should have received a plenary hearing over the issues involved. To the extent that I joined in the per curiam opinion that summarily disposed of that case without oral argument, briefs and a full examination of the law and facts, I now view this action as arbitrary and a mistake.”

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May 11, 2011

Rev. Billy Graham  
P.O. Box 37  
Montreat, NC 28757

Dear Rev. Graham:

Today I am dispatching the enclosed letter to Retired Justice John Paul Stevens. I told Justice Stevens that I have copied you.

I hope and pray that God will invoke repentance within the heart of Justice Stevens and I ask you to pray with me: His Will Be Done.

You will find in the letter that John Paul Stevens is the only living justice responsible for removing the Ten Commandments from our nation's classrooms. We at American Judicial Alliance are asking him to publicly repent of this position and restore his honor before he goes before the Ultimate Judge.

I have read that you counseled Gen. Eisenhower regarding his faith and trust in Christ and, as you could be John Paul Stevens "big brother," I hope you will read and pray in that regard.

You once said that "every generation is strategic. We are not responsible for the past generation, and we cannot bear full responsibility for the next one: but we do have our generation. God will hold us responsible as to how well we fulfill our responsibilities to this age and take advantage of our opportunities." It is in that light that I write this letter to Justice Stevens.

Finally, I heard that you recently battled with pneumonia. Know that our organization's prayers for your continued good health are going up to the Throne on your behalf!

God bless the Graham family,

Darrell D. White  
Retired Judge  
President,  
American Judicial Alliance