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JUSTICE JOHN PAUL STEVENS (Ret.)

Arlington County Bar Association Luncheon
Arlington Courthouse

June 10, 2016

Because I have always regarded bar association membership as an indispensable part of the practice of law, I especially welcome your invitation to be with you today. I plan to make brief remarks about two recent news stories - the article in the Washington Post about the failure to fill vacancies on the federal bench more promptly, and press comments about Muhammed Ali's victory in the United States Supreme Court decision involving his draft status in 1971.

The Post story correctly describes the adverse effects of the failure to fill vacancies on the federal bench more promptly. The shortage of federal trial judges has a more serious impact on the administration of justice than the vacancy on the Supreme Court. This is a problem that has been with us since the days when I served on the Court of Appeals in Chicago. It goes without saying that I strongly favor more prompt action

by the Executive in making appointments and I am troubled by the delays in scheduling confirmation hearings in the Senate. The delays reflect that judicial appointments even at the trial-court level have become politicized to a disturbing degree, a state of affairs which can only serve to undermine public confidence in the judiciary and the federal government in general. Today, however, I just plan to identify a potentially beneficial side effect of such delay.

In the early 1970's the Republican Administration and the Indiana Senator were deadlocked over the federal district court vacancy in Hammond, Indiana for a period that may have lasted for two or three years. For reasons that I do not recall, I volunteered to serve briefly as a trial judge to help cut down on the increasing backlog of untried cases. I took over a docket that included about two dozen cases; I actually tried two to verdict, and the threat of more trials produced a fair number of settlements. While I have never thought that my career as a trial judge had a

sufficient impact on the backlog to be worth mentioning, that experience confirmed my view that advocates often have much less impact on the outcome of trials than witnesses. Even the best lawyer cannot change the facts. It also confirmed my confidence in the ability of jurors to resolve issues of credibility accurately. Perhaps one potential benefit of the present shortage of trial judges is that it will create an opportunity for an occasional appellate judge with limited trial experience to improve his or her professional qualifications.

The recent coverage of Muhamed Ali's death has reminded me of his unexpected triumph in the Supreme Court in the early 70's. On June 28, 1971 the Court finally decided, after some four years of litigation, that Cassius Clay - a/k/a Muhammed Ali - who had been indicted and convicted of wilfully refusing to submit to induction into the Armed Forces, was not guilty. The opinion supporting that result was a "*per curiam*" - not signed by any Member of the Court. Following that

per curiam is an opinion written by Justice Douglas that begins with this sentence: "I would reverse this judgment of conviction and set the petitioner free." But that is exactly what the majority opinion did. Moreover, that is exactly how Justice Douglas would have started his dissent if the majority had voted the other way. These two aspects of the case - using an unsigned opinion to announce the decision in an important argued case and having the opening sentence in the first signed opinion read as though it were a dissent - persuade me that the outcome of the case must have been changed at the last minute. In their book, *The Brethren*, Bob Woodward and Scott Armstrong say that the final vote changed as the result of a last-minute study of the case by Justice Harlan, who also wrote a separate opinion that reads as though it had been drafted as a dissent.

I have no knowledge about any of the facts in *The Brethren*'s story of the case, but I am sure that the

footnote on page 138 of the book must be inaccurate. That footnote reads:

> "Douglas's concurrence retained language making it obvious that it was originally a dissent. His clerk, who normally would have corrected it, refused to work further on the opinion after Douglas insisted on retaining an incorrect statement of the Black Muslim position on holy wars."

I did know Bill Douglas and I am confident that he did not have any law clerks who would refuse to do any work on a case because they did not agree with his views, and I am equally confident that they would not have continued to be clerks after such a refusal. Inadvertence provides a more credible explanation of the unchanged first sentence.

Now, if you have any questions, I will try to answer them.