

PROCEEDINGS IN THE SUPREME COURT OF
THE UNITED STATES IN MEMORY OF
MR. JUSTICE WHITTAKER*

WEDNESDAY, FEBRUARY 19, 1975

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon, to receive the Resolutions of the Bar of the Supreme Court in tribute to Mr. Justice Whittaker.

Mr. Solicitor General Bork addressed the Court as follows:

Mr. Chief Justice and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court just concluded, resolutions expressing profound sorrow at the death of Mr. Justice Charles Evans Whittaker were offered by a committee, of which Mr. Samuel Molby was Chairman. Addresses were offered by Mr. Carl Enggas of the Missouri Bar, Judge Bruce Forrester of the United States Tax Court, and by Senator Roman Hruska of Nebraska.

*Mr. Justice Whittaker, who retired from active service on the Court effective April 1, 1962 (369 U. S. iv, vii), and resigned effective September 30, 1965 (382 U. S. iv, xvii), died in Kansas City, Mo., on November 26, 1973. Services were held at the Central United Methodist Church, Kansas City, Mo., prior to his interment in Calvary Cemetery, Kansas City, Mo., on November 28, 1973.

The resolutions unanimously adopted are as follows:

We meet to record our respect and regard for Charles Evans Whittaker, Associate Justice of the Supreme Court of the United States from 1957 to 1962. His death on November 26, 1973, has saddened the members of the legal profession, his family, his friends, and those everywhere who admired and respected him.

Charles Evans Whittaker was born February 22, 1901, near Troy, Kansas. He spent his early years on his father's farm. In later life, in addition to recalling the hard work of farming, he also recounted that he ran a trapline on his way to school. He recalled that his most frequent quarry was skunks and that while their pelts brought three dollars each, he also recalled that his popularity at school was not enhanced, particularly in the winter when cold weather required the windows to be kept closed.

His formal education was interrupted after completion of the ninth grade, and he returned to farming and trapping. The interruption was only temporary, however, because as soon as he had accumulated \$750, he set out for Kansas City to enroll in the University of Kansas City Law School.

A high school diploma was a requirement of admission, but Mr. Justice Whittaker convinced the Admissions Committee to accept him on condition that he complete his high school course simultaneously with his law studies, which he did.

Mr. Justice Whittaker once told an interviewer that he had loved the law since his earliest recollection, and he approached his law school studies in that spirit.

He was graduated from the University of Kansas City Law School in 1923 and was admitted to practice before the courts of Missouri in that year. He immediately joined the Kansas City firm of Watson, Ess & Gage, for whom he had worked as a messenger while in law school.

In 1928, he married Winifred Pugh. It was a long and

happy marriage, and they were to have three sons, Keith, Kent, and Gary, each of whom now resides in Kansas City.

He fashioned a successful career at the bar, becoming a partner of his firm in 1930, and he rose to become a leading trial lawyer in Kansas City, involved primarily in litigation on behalf of corporate clients. But he believed, with Mr. Justice Brandeis, that every man owes something to his profession and he was therefore active in the organized bar, serving as president of the Missouri Bar Association from 1953 to 1954.

In that year, 1954, he was appointed to the United States District Court for the Western District of Missouri, and served in that capacity until June 22, 1956, when he was appointed a judge of the United States Court of Appeals for the Eighth Circuit.

As a district judge, he continued the hard work and long hours that had been hallmarks of his practice of law, and he confessed that he was, from time to time, sorely tempted to descend from the bench and join in the fray.

Upon leaving the bar and taking his place as a district judge, he said:

"I now say farewell to the practice of law I have loved so well. It is a step that one does not contemplate lightly. Yet I do this willingly, and I hope that there will be no change in me. If you have liked me as a lawyer, then you should like me as a judge, for I shall not change. The law has been my life. I wish every man who devotes his life to it could love it as I do."

Mr. Justice Whittaker served on the Court of Appeals for only one year, until March 2, 1957, when he was nominated as an Associate Justice of this Court by President Eisenhower. His nomination was hailed by the public and the profession alike, and he was quickly confirmed by the Senate.

He served as an Associate Justice for five years, from 1957 through 1962. During his service on this Court, he

wrote 42 majority opinions and 50 concurring or dissenting opinions.

By training and inclination, his primary interest lay in the field of commercial law, as is shown by his opinions involving complex tax issues, such as *Turnbow v. Commissioner*, 368 U. S. 337 (1961), and *Allied Stores of Ohio v. Bowers*, 358 U. S. 522 (1959); and in difficult patent cases, such as *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U. S. 336 (1961).

His work was not, of course, limited to issues of commercial law or taxation, and his opinions concerning matters of constitutional law are found in such decisions as *Staub v. City of Baxley*, 355 U. S. 313 (1958), which held a local ordinance regulating permits for solicitation of membership in organizations violative of the First Amendment; and *Payne v. Arkansas*, 356 U. S. 560 (1958), which dealt with coerced confessions in criminal cases; and *McNeal v. Culver*, 365 U. S. 109 (1961), concerning the right to counsel.

Early in 1962, Mr. Justice Whittaker was advised by his physician that his health would be endangered if he continued to serve on this Court. Bowing to that advice, he submitted his retirement on March 29, 1962, which was acknowledged by the Chief Justice and his Associate Justices with deep regret.

After his retirement from the Court, he returned to Kansas City. And in the two years following his retirement, he worked actively for the American Bar Association and also served as a member of the American Medical Association's commission for the in-depth study of postgraduate medical education. He contributed his time and his efforts to several civic and charitable enterprises in the Kansas City area, including the Kansas City Hospital.

In 1965, he became an arbitrator on behalf of the General Motors Corporation and was engaged in deciding controversies between that firm and its dealers.

To the end of his life, Mr. Justice Whittaker continued a deep interest in the law and in the contribution that courts and lawyers can make to the resolution of social conflict by litigation or arbitration.

He frequently expressed his concern about what he perceived to be an increasing tendency in our society to resort to political or economic pressures, rather than to the methods of dispute settlements established by the legal system.

Wherefore, it is resolved that we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Mr. Justice Charles Evans Whittaker, and our grateful appreciation for his long years of service in the judicial branch of his National Government, and in civil life, culminating with his work as an Associate Justice of the Supreme Court.

And it is further resolved that the Solicitor General be asked to present these resolutions to the Court with the prayer that they be embodied in its permanent records and that copies of these resolutions be forwarded to the widow and to the children of Mr. Justice Whittaker.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, your motion will be granted. I recognize the Attorney General of the United States.

Mr. Attorney General Levi addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of Charles Evans Whittaker, Associate Justice of the Supreme Court from 1957 to 1962.

Mr. Justice Whittaker's appointment to this Court on March 2, 1957, was the culmination of a distinguished professional career. He came to this Court with not

only an outstanding reputation at the bar gained as a leading trial lawyer in Kansas City, but also with prior judicial experience from his service both as a federal district judge in the Western District of Missouri and as a judge of the United States Court of Appeals for the Eighth Circuit. Indeed, he was one of the few members of this Court to have served at every level of the federal judiciary.

Although his opinions covered the full range of the subject-matter jurisdiction of this Court, Mr. Justice Whittaker's primary interest, due no doubt to his experience at the practicing bar, was in the area of commercial law. During his tenure as an Associate Justice, he authored many of this Court's decisions involving federal and state taxation. In *Youngstown Sheet & Tube Co. v. Bowers*, 358 U. S. 534 (1959), for example, he dealt with the subtleties and intricacies of state power of taxation, measured against the Import-Export Clause, reconciling their competing demands in an opinion for the Court that remains the leading exposition of that complex subject.

Mr. Justice Whittaker drew on his experience as a trial lawyer and as a district judge in dealing with several important questions of federal jurisdiction. In *Florida Lime & Avocado Growers v. Jacobsen*, 362 U. S. 73 (1960), he thoroughly canvassed the legislative history of statutory provisions and judicial precedent regarding three-judge courts, and in *Hoffman v. Blaski*, 363 U. S. 335 (1960), he provided authoritative guidance for federal trial judges concerning the transfer-of-venue provisions of 28 U. S. C. § 1404. His most significant opinion in this area, and perhaps his most significant opinion as a member of this Court, was *Leedom v. Kyne*, 358 U. S. 184 (1958), in which he carefully analyzed the relevant provisions of the National Labor Relations Act in Title 29 of the United States Code, in sustaining the jurisdiction of federal district courts to entertain suits

challenging *ultra vires* actions of the National Labor Relations Board.

He brought similar penetration, rigor, and respect for the rule of law to bear in his opinions involving the constitutional safeguards of liberties to challenged governmental action. In one of his most memorable opinions for the Court, *Staub v. City of Baxley*, 355 U. S. 313 (1958), he found constitutionally invalid a city ordinance requiring a permit for soliciting membership in any organization requiring fees or dues from its members, that gave the mayor and city council uncontrolled discretion to grant or deny such a permit. He wrote for the Court that in thus making "the enjoyment of speech contingent upon the will of the mayor and council of the city, such an ordinance imposes an unconstitutional prior restraint on the enjoyment of First Amendment freedoms."

Whatever the issue involved, Mr. Justice Whittaker's opinions were marked by a degree of care and precision that reflected his view that the law was a calling to hard work, and he once observed that justice cannot be produced through any system of procedures alone; in the main, it must always be the product of long hours of hard, diligent, painstaking labor by highly competent, experienced, careful and practical lawyers.

Throughout his career, as both a lawyer and a judge, Mr. Justice Whittaker adhered to those principles and combined them with a spirit of cooperation and good will. While always showing esteem for his Brethren on the Court, and sincere respect for their work, he did not hesitate to take telling issue on occasion with what he regarded as analytical shortcomings in the Court's opinions. Examples of this are his dissenting opinion in *James v. United States*, 366 U. S. 213, 248 (1961), analyzing powerfully and lucidly the tax consequences of embezzlement, illuminating the basic concept of taxable income, and his concurring opinion in *Gomillion v. Light-*

foot, 364 U. S. 339 (1960), dealing succinctly with the relationship between the Fourteenth and Fifteenth Amendment claims in that case.

On the occasion of his retirement from this Court, compelled by his physician's advice, his Brethren on this Court, in acknowledging his departure with regret, wrote to him:

"Our five years of association with you have been in the finest traditions of the Court. No Justice could have worked harder or in more complete harmony with his Brethren."

As a personal matter, I hope it is appropriate for me to note that over a two-year period I served with Mr. Justice Whittaker on a citizens' commission which explored in considerable depth the problems of graduate medical education. This was a matter of considerable interest to Mr. Justice Whittaker, and he brought to the work of the commission his extraordinary powers of analysis and his determination to think through the very difficult issues of policy. Working with Mr. Justice Whittaker during this period was a rare experience, which I greatly value.

I will close with the tribute paid to Mr. Justice Whittaker in the letter from Phineas Rosenberg of the Kansas City Bar to the Solicitor General. Mr. Rosenberg wrote:

"My close friendship with Mr. Justice Whittaker began in the early days of our respective lives and continued for years until his death. Thus, you can know and understand that my heart is full of fondest memories of him, which I shall always cherish, of a great love and admiration of him as a great lawyer, an outstanding jurist, and a man having the highest concept of honor and integrity, whose aim in life was to do justice fairly and impartially, and of respect for his high standards of patriotism. No man had a greater or more unrestrained love for his country."

May it please this honorable Court, in the name of the lawyers of this Nation and particularly for the Bar

of this Court, I respectfully request that the resolutions presented to you in memory of the late Mr. Justice Charles Evans Whittaker be accepted by you and that they, together with a chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General, and we thank you for these statements and tributes of the Supreme Court Bar to our late Brother, Charles Evans Whittaker.

The presentations made here today in his memory will be made a part of the permanent records of this Court, and we ask you to convey to the Chairman and the other members of the Committee on Resolutions our appreciation for their presentation today.

We accept these memorial tributes to Mr. Justice Whittaker made by you, Mr. Attorney General, and you, Mr. Solicitor General, on behalf of the Memorial Committee.

You have appropriately paid tribute to Mr. Justice Whittaker as a self-made lawyer who became one of the foremost advocates of his bar and whose talents were sought by many clients during his years of private practice.

His high standing as a lawyer was acknowledged by his peers, as you have already noted, by his election to various offices in the organized bar.

Of the 100 men who have come to this Court, including the nine who now hold office, Mr. Justice Whittaker was unique in the sense that his professional career covered the entire spectrum of the practice of law and, in addition, he sat as a judge in all three tiers of the federal bench.

Those who sat with him could understand readily why he achieved great success at the bar. He was a perfec-

tionist, with a passion for the facts of the case, both when he was an advocate and when he was a judge. And he was never content after he became a judge, until he had mastered the facts of the case and, in his appellate work, until he had mastered the record.

He drove himself unsparingly in his dedication to achieve that mastery, beginning with the petition or the jurisdictional statement and continuing on through to the consideration of the case on the merits.

Those who sat with him agree that he had few peers in terms of profound and conscientious application to his daily work. Indeed, he carried this to a point that was a source of concern to his friends and to his family, as the work of the Court mounted after he came here.

His cheerful aspect in the private exchanges with his colleagues and with members of the bar marked him as a man with a zest for life, and particularly for the day-to-day interchange and discussion of points of law.

His colleagues on each of the courts where he served held him in the highest regard. One of the Eighth Circuit judges said of him, "Charles Whittaker was a *good* man," and he used this in the sense of the innate decency and the firm adherence to high ideals both in his private life and in his public duties.

Few men ever worked more diligently to search out every phase of the questions which were brought to the Court, and his opinions on this Court reflect scrupulous attention to detail and comprehensive treatment of all the relevant authorities. He had a firm belief that the Court should not only reach a correct result, but that it had an obligation to demonstrate how that result was reached.

His colleagues at the bar, his colleagues on the United States District Court, his colleagues on the United States Court of Appeals, and the Justices of this Court, and of course his family and his close associates can appropriately take great pride in his splendid career as a lawyer and as a jurist.