

PROCEEDINGS IN THE SUPREME COURT OF THE
UNITED STATES IN MEMORY OF
JUSTICE STEWART*

MONDAY, OCTOBER 20, 1986

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN,
JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE POWELL,
JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

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 our former colleague and friend, the late Justice Stewart.

The Solicitor General is recognized at this time for the purpose of presenting those resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General Fried addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Court met this day and have adopted resolutions in honor of Justice Stewart. And I would ask leave of the Court to present those resolutions at this time.

We have convened today in this Temple of Justice where the late Associate Justice Potter Stewart served with the highest distinction to give formal expression to the esteem

*Justice Stewart, who retired from active service on the Court effective July 3, 1981 (453 U. S. III, IV), died in Hanover, N. H., on December 7, 1985 (474 U. S. III, VII). Services were held at the Washington Cathedral, Washington, D. C., prior to his interment in Arlington National Cemetery on December 11, 1985.

and affection in which we held this able and devoted lawyer and jurist.

He was born January 23, 1915 in Jackson, Michigan, the birthplace, also, of the political party with which he was affiliated before he began his judicial career; but he grew up in Ohio, the family home, where the Stewarts had for many years contributed signally to the development and governance of the Buckeye State. He was the son of Harriet Potter Stewart and James Garfield Stewart, a fabled orator who included among his achievements service for several terms as mayor of Cincinnati and later as Justice of the Supreme Court of Ohio. Potter Stewart attended Cincinnati's University School, Hotchkiss School, and Yale College, where he graduated *cum laude*, was elected to Phi Beta Kappa, and served as Chairman of the *Yale Daily News*. After a year at Cambridge on a Henry fellowship, he entered the Yale Law School. He received his J.D. degree from Yale in 1941 after a brilliant academic career that included an editorship of the *Yale Law Journal*. These were the days when the validity of much of the New Deal Legislation was challenged in the Court and Yale Law School was in the van of the legal realism movement. Professor Jerold Israel, who served as one of his law clerks, has speculated that these debates may have had a significant impact upon the development of Justice Stewart's legal philosophy.¹

His initial employment with a Wall Street law firm was interrupted in its first year when our Nation entered World War II. He served more than three years on active duty in the United States Naval Reserves as a deck officer on oil tankers in what he called the "dungaree navy." He concluded his naval service with three battle stars, and after a brief period with the Wall Street firm, returned to Cincinnati to join a leading firm in the general practice of law.

He and Mary Ann Bertles had married on April 24, 1943, and they both settled down to the challenging and rewarding

¹ Israel, *Justice Potter Stewart*, in IV *The Justices of the Supreme Court* (L. Friedman and F. Israel, eds., 1969).

life of a promising young lawyer in the Queen City. His ability was recognized in his service in many charitable and civic community organizations, and he was elected in 1950 to the Cincinnati City Council. He was reelected in 1952, and was serving as vice-mayor when President Dwight D. Eisenhower appointed him, although only thirty-nine years of age, to the United States Court of Appeals for the Sixth Circuit on June 1, 1954. This appointment afforded the young judge an excellent opportunity to acquire a wide range of judicial experience.

As Justice Stewart was to observe later, "The Sixth Federal Judicial Circuit is a cross section of the nation. Extending from the tip of Michigan's upper peninsula to the Mississippi border, it spans the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of our national life. To it for decision came admiralty cases from the Great Lakes, moonshine cases from Appalachia, labor cases from Cleveland, patent cases from Detroit, tax cases from Memphis—criminal cases and civil cases of every conceivable kind from almost everywhere within the Circuit's broad borders."²

In his four years as the junior judge of the Sixth Circuit Court of Appeals, Justice Stewart quickly earned the reputation of a careful, learned, and industrious judge. When Justice Harold Burton, a fellow Ohioan announced his retirement in the fall of 1958, it surprised no one that President Eisenhower turned to the talented and energetic young Cincinnati judge from the Sixth Circuit.

Professor Israel has written, ". . . on October 7, 1958, [when] President Eisenhower formally announced the appointment, [t]he selection of Stewart was highly praised by the bar, although there was some southern opposition to the appointment of a 'northern integrationist.' (One of Stew-

² Stewart, J., Preface, *The Sixth Circuit Review* 1968-69, 1970 U. Tol. L. Rev. 49.

art's few major constitutional decisions on the Court of Appeals had been a school segregation case in which the court ordered almost immediate integration, *Clemons v. Board of Education of Hillsboro*, 228 F. 2d 853 [6th Cir. 1956].) Only forty-three at the time of his appointment, Stewart became the second youngest Supreme Court Justice since the pre-Civil War period."³

Many observers of and commentators on the business of the Court frequently try to identify an ideological division between the justices and attempt to explain the decisions of the Court as reflecting the philosophical predispositions of their authors. When Stewart took his seat, the Court was popularly viewed as evenly divided between an activist or liberal group of four Justices and a passivist or conservative group of an equal number. Stewart was asked by a journalist how he classified himself. His response came as no surprise to those who knew him, "I like to be thought of as a lawyer."

Dean Terrance Sandalow, Justice Stewart's first law clerk on the Court, has written, "Justice Stewart never confused cases with causes or ideology. The responsibility of the judge, in his view, is to decide the former, not to promote the latter."⁴

Professor Laurence H. Tribe, another Stewart law clerk, also recognized this approach of the Justice to the decisional process, "He was less interested in pursuing a unified philosophical vision than in determining what the law, as he understood it, required in the case at hand. And his most consistent philosophy was his skepticism about the virtues of apparently consistent philosophies. Never an ideologue, Justice Stewart found himself at the Court's 'center' not out of political predilection, but because his habit of mind was to start from a position of equipoise, and from there to assess the competing arguments of the parties before him. What the particular parties in a case had to say mattered greatly to this Justice; he saw the Court's business as that of deciding

³ Israel, *supra*, note 1.

⁴ Sandalow, *Potter Stewart*, 95 Harv. L. Rev. 6 (1980).

cases, not of arbitrating causes. Thus he was ever the careful student of the briefs and, during oral argument, one of the most active Justices—which is to say, from the perspective of one who has argued before him, one of the most relentless and demanding.”⁵

His personal relationships with his judicial brethren and with the lawyers who came before the Court was one of un-failing courtesy and consideration, and he always manifested the greatest respect for the traditions of the legal profession and the Court. Once, an overzealous lawyer during a question period at a Sixth Circuit Conference asked Justice Stewart about an opinion of “Wiley Rutledge.” Justice Stewart looked at the lawyer quizzically and inquired, “Were you personally acquainted with Mr. Justice Rutledge?”

But Justice Stewart was not without passion. Manifest injustices could evoke from him the scathing denunciation of an Old Testament prophet. Shortly before he retired, with hands almost trembling as he suppressed his outrage, he read from the bench a dissenting opinion in which he refused to accord absolute judicial immunity to a state judge who had, *ex parte*, at the request of the parents of a fifteen year old girl, authorized her sterilization without her knowledge. “A Judge is not free like a loose cannon,” he said, “to inflict damage whenever he announces that he is acting in his judicial capacity.”⁶

Although the Court was its professional centerpiece, it was not all of Justice Stewart’s life, and at the end of the Term in 1981 he decided to retire at age 66 to permit him to spend more time with his beloved Andy, their children and grandchildren.

His retirement plans included making recordings for talking books for the blind and serving on public and private boards and commissions where he might share some of the rich experiences and wisdom that he had acquired in his eventful life. He achieved many of these goals when, in the fullness of his involvement with life, he left it on December 7, 1985.

⁵Tribe, *Tribute to Potter Stewart*, 95 Yale L. J. 1328 (1986).

⁶*Stump v. Sparkman*, 435 U. S. 349, 364 (1978).

He wrote a short concurring opinion in *Jacobellis v. Ohio*⁷ that was reconstructed by the press into an epigram that received such currency that he feared that it might become his epitaph. A rephrasing of that apothegm would make it read more appropriately, "He may not have been able to define justice, but he knew it when he dispensed it."

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our lasting and great appreciation for the exemplary service rendered by Potter Stewart during his long public career, as Cincinnati councilman, as Judge of the Court of Appeals, and then as a distinguished Associate Justice of this Court, and later as a retired Associate Justice; that we record with great affection and esteem for him, and our admiration for the qualities of wise judgment, of diligent and perceptive craftsmanship, and of personal generosity and gentlemanliness which enabled him to be so effective in contributing to the progress of the law and to the betterment of our Nation; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent record.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Meese addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

As you have heard from the Solicitor General, the Bar of this Court met today to honor the memory of Potter Stewart, Associate Justice of the Supreme Court from 1958 to

⁷ 378 U. S. 184, 197 (1964).

1981. It is my privilege on behalf of the Supreme Court Bar to present a few remarks about this distinguished jurist and to offer a motion before the Court.

Justice Stewart was only 43 years old when President Eisenhower appointed him to this Court. But while he came to the Court relatively young in age, Potter Stewart brought with him a highly developed sense of our system of governance and a finely tuned appreciation for the purposes and vision of the written Constitution that structures that system. As part of that appreciation, he had a particularly keen understanding of the role of a judge in our constitutional republic.

Justice Stewart began learning about our constitutional system of governance at an early age. His father was a mayor and, later, a judge on the Ohio Supreme Court. Justice Stewart learned about the legal system from his father and then followed his father's path in law, government, and the judiciary. He studied jurisprudence at Cambridge and Yale Universities, practiced law in New York and Cincinnati, served as a member of the city council and as a vice-mayor of Cincinnati, and sat as a federal judge on the Sixth Circuit Court of Appeals. Thus, by the time he came to this Court, Potter Stewart had the seasoning of firsthand experience with almost every aspect of the legal system and the institutions that function within it.

These experiences profoundly shaped Justice Stewart's view of the function of this Court in interpreting the Constitution and laws of our country. Having served in a war, in local elective office, and on the federal appellate bench, Justice Stewart had a particularly keen understanding of the role played by each of the different branches of government in our constitutional system. He appreciated, as did the Founding Fathers, the importance of a separation of powers, of federalism, and of an independent judiciary to the preservation of liberty. Justice Stewart realized that reposing unchecked authority in *any* branch of government is the antithesis of what our constitutional system is about.

It has been often noted that Justice Stewart avoided unnecessarily far-reaching pronouncements and paid unusually careful attention to the facts of the cases before him. At oral argument he always wanted advocates to be attentive to the facts that produced and shaped a particular dispute. He repeatedly stressed that the heart of a case could be found in its facts, and he was not satisfied to proceed on less than a full understanding of those facts. His opinions typically reflect the same focus: they carefully document the events that brought a particular controversy to the Court, examine the various arguments that the parties could make in advocating a particular result, and then, applying Occam's razor, answer the question presented—and no more. Justice Stewart's public performance thus exemplified his conviction that the Court is on the surest and most proper ground when it acts not as a philosophical or political body, but rather as a legal, institution.

Whether one agreed or disagreed with his opinions in particular cases, Justice Stewart's lawyerly approach, good judgment, and elegant prose always brought great credit to this Court. His jurisprudence shows a reverence for the basic tenets of our constitutional tradition—free speech, religious liberty, protection of civil rights, and reliance on the representative processes of government.

For example, in cases involving speech and religion, Justice Stewart urged the Court to champion "a society of free choice." [*Ginsberg v. New York*, 390 U. S. 629, 648 (1968) (Stewart, J., concurring).] He believed, as he said, that "those who wrote our First Amendment . . . put their faith, for better or worse, in the enlightened choice of the people, free from interference of a policeman's intrusive thumb or a judge's heavy hand." [*Ginzburg v. United States*, 383 U. S. 463, 498 (1966) (Stewart, J., dissenting).] Thus, he wrote for the Court in *Edwards v. South Carolina* that a State could not "make criminal the peaceful expression of unpopular views," [*Edwards v. South Carolina*, 372 U. S. 229, 237 (1963),] and he dissented when the Court allowed a State, in his view, to force an individual "to choose between his

religious faith and his economic survival." [*Braunfeld v. Brown*, 366 U. S. 599, 616 (1961) (Stewart, J., dissenting).] To Justice Stewart, the First Amendment was the "foundation" on which our constitutional system is built. [See *Bates v. Little Rock*, 361 U. S. 516, 522-523 (1960).]

Justice Stewart understood that our Constitution guarantees more than just orderly processes. He deeply believed, for example, that the Constitution—without exception—guarantees equal treatment for people of *all* races. He wrote that the Constitution does not allow "the criminality of an act [to] depend upon the race of the actor," [*McLaughlin v. Florida*, 379 U. S. 184, 198 (1964) (Stewart, J., concurring); see also *Loving v. Virginia*, 388 U. S. 1, 13 (1967),] and he dissented in a case involving a race-conscious program sponsored by the Federal Government, stating that the "equal protection standard of the Constitution had one clear and central meaning—it absolutely prohibits invidious discrimination by government." [See *Fullilove v. Klutznick*, 448 U. S. 448, 523 (1980).] Justice Stewart believed that our Constitution has promised equal opportunity to all, and all institutions of government are duty bound to enforce that promise.

Justice Stewart also believed that the Constitution preserved various powers for the states. For example, though he agreed that the Eighth Amendment's prohibition against capital punishment was substantial, he believed that the states were entitled to enact death penalty statutes with appropriate safeguards. [See *Gregg v. Georgia*, 428 U. S. 153 (1976).] Similarly, though he believed Congress had substantial power to regulate interstate commerce, he believed strongly that the regulation of "wholly local activities" was reserved to the states. [*Perez v. United States*, 402 U. S. 146, 157 (1971) (dissenting opinion).]

Justice Stewart viewed as a pervasive theme of our Constitution a deep faith that each individual in our society is capable of intelligent choice. This conviction in the ability of individuals rationally to choose underlay his pronouncement for the Court that the Sixth and Fourteenth Amendments give a criminal defendant the right "to proceed *without* coun-

sel when he voluntarily and intelligently elects to do so." [*Faretta v. California*, 422 U. S. 806, 807 (1975) (emphasis in original).] It similarly underlay his positions, albeit in dissent, that public school students should be allowed to engage in voluntary non-denominational prayer, [see *Engel v. Vitale*, 370 U. S. 421, 444-445 (1962) (Stewart, J., dissenting)]; and that criminal suspects should be allowed to respond to questions without first being warned of their privilege against self-incrimination and of the consequences of foregoing it, [see *Miranda v. Arizona*, 384 U. S. 436, 504-545 (1966) (dissenting opinion); see also *Orozco v. Texas*, 394 U. S. 324, 331 (1969) (Stewart, J., dissenting).]

Concomitantly, Justice Stewart appreciated that "the essence of judicial duty [required him] to subordinate [his] own personal views . . .," [*Griswold v. Connecticut*, 381 U. S. 479, 530-531 (1965) (Stewart, J., dissenting),] and that the Court should not normally substitute its judgment for that of elected legislative bodies. Thus, in an equal protection opinion, he forcefully articulated for the Court the proposition that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court," [*Dandridge v. Williams*, 397 U. S. 471, 487 (1970),] and he found especially troubling cases which called upon the Court to address claims not expressly governed by the text or the history of the Constitution itself. [See *Griswold v. Connecticut*, 381 U. S. at 530-531.] However, in cases where the Constitutional text and history is clear, Justice Stewart was properly forceful and vigilant in safeguarding fundamental civil rights. [As evidenced by his opinion for the Court in *Allied Structural Steel Co. v. Spannaus*, 438 U. S. 234 (1978).]

In remembering Justice Stewart's work and career, we should also remember his unusual personal qualities of character, integrity, and intelligence. Justice Stewart had a quick wit that cut through cant or hypocrisy and he learned early on not to take himself too seriously. While a student at Hotchkiss he was elected class wit with 43 votes. The next

closest wit got only 4. I personally learned of Potter Stewart's sense of humor and good fellowship when the two of us joined William Buckley and Walter Cronkite in a humorous skit on the stage of the Bohemian Grove.

Those of us who had the privilege to know him will always remember Justice Stewart's love for politics, the Cincinnati Reds, and most of all his family. For Justice Stewart was a husband, father, and grandfather who savored his private life as much as his public service. Many public men and women often find it difficult in the midst of attention and honors to keep their eye on what T. S. Eliot called "the permanent things." Justice Stewart knew his priorities. He always put his family first.

MR. CHIEF JUSTICE, in the name of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented in honor and celebration of the memory of the late Justice Potter Stewart be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you on behalf of the Bar for your presentations today in memory of our late colleague and friend, Justice Stewart.

We ask that you convey to Chairman McCree and the members of the Committee on Resolutions our profound appreciation for these very appropriate resolutions. Your motion that these resolutions be made a part of the permanent record of the Court is hereby granted.

Potter Stewart was many things besides a judge.

He was an avid fan of the Cincinnati Reds baseball team. Those of us who served with him at the time can still remember his intense interest in that great seven-game World Series of 1975 between the Cincinnati Reds and the Boston Red Sox, and his delight with the Reds' triumph in four games over the New York Yankees in the World Series of 1976.

He was a fisherman. In fact, he was one of the very few fishermen I have ever known who didn't like to get up early in the morning.

He was a patriot, not in the sense often attributed to Stephen Decatur—"my country, right or wrong,"—but in the sense that many of his contemporaries were, contemporaries who had served creditably and honorably in the Armed Forces in the Second World War and who still many years later got goose bumps when they saw the flag passing by on a ceremonial occasion.

He was also something of a mentor to me, although he may not have realized it. He was not the sort of a fellow to ostentatiously take a neophyte under his wing, and show him how the land lay. But a number of his very perceptive observations made to me—and doubtless made to others who had joined the Court after he had—gave me a feel for the way the institution worked.

I remember his telling me that he felt he would never know more about a case than when he left the bench after hearing the case orally argued. Over a period of time I tested out this bit of wisdom which he had imparted, and came to agree with him completely.

Justices of this Court rightly prize their complete independence, not only from authority in the other branches of government, but from their colleagues; no member of this Court is bound to surrender his opinion on a particular matter even though eight colleagues totally disagree with him. Potter Stewart cherished this independence in the same way that all of us do, but he was also constantly mindful that even on an Article III court such as ours, a judge is a member of an organization. The organization has no claim on the judgment of a Justice, but it does have a claim of a smaller order—that the judge manage his own work in such a way as to assist his eight colleagues in getting their work done. Potter Stewart managed as well as any colleague I have known to balance the demands of the collegiate institution against the need for full development and exposition of one's own opinions in cases before the Court.

He was a superb craftsman of the written opinion. His opinions were short, lucid, and to the point. His father, James Garfield Stewart, had been active in elective politics in the state of Ohio, and was in fact serving on the Supreme Court of Ohio when Potter Stewart was appointed to this Court. Potter retained a lively spectator's interest in electoral politics for all of his life, but like all good judges he refrained from mixing partisan politics with judging. When his opinions had finished dealing with the legal questions involved, they ended; he was content to be a judge, and did not aspire to be a robed statesman. His discussion of cases at the conferences of the Court followed the same model: lucid, analytical, and to the point.

During the time he served with Chief Justice Burger, Potter Stewart was on occasion referred to as one of the "swing" votes on the Court, which is an appellation apparently reserved for those who are somewhere in the middle of the ideological spectrum of the Court as constituted at a particular time. If this classification be thought to suggest that he had no established constitutional hierarchy of his own, it could not be more mistaken. During his period of service with Chief Justice Warren, he was often in dissent in some of the Warren Court's decisions about the constitutional rights of criminal defendants. During his service with Chief Justice Burger, he was more often with the majority in cases such as this. But it was not he who altered his views; it was the cases coming before the Court and the personae of the Court which had changed.

Many of the questions which perplexed the Court during the twenty-three years during which he served have not been finally resolved, nor will they be resolved in our time. They embody the issues on which judges of different philosophies can and do often disagree; the judicial quest is not to finally put at rest the claims of government against the claims of the individual, the need for order against the desire for liberty; that is too much to ask of any judges who are, after all, human. The quest is rather to draw the boundaries in each succeeding case, knowing that our efforts are apt to be as

transient as those of our predecessors, and very likely those of our successors.

But in this often baffling endeavor, those of us who knew Potter Stewart, and particularly those of us who served with him on this Court, know how fortunate it was that during these twenty-three years there sat upon this bench a judge of keen and penetrating intellect and unwavering devotion, not simply to the exposition of his own ideas, but to the work of the Court as a court. He devoted a large part of his life to that endeavor, and this Court, the Bar, and his country are the better for his efforts.