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ARTICLES

POTTER STEWART: JUST A LAWYER

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I. INTRODUCTION

Retired Supreme Court Justice Potter Stewart died on December 7, 1985. Stewart was a member of the United States Supreme Court from 1958 to 1981. The purpose of this article is to review Stewart's illustrious career and his contributions during more than two decades of Supreme Court history.

II. POTTER STEWART, CINCINNATI REPUBLICAN (1915-58)

Potter Stewart was born January 23, 1915 into a family which lived in Cincinnati, Ohio. His father was a Republican politician, who served as Mayor of Cincinnati and Justice of the Ohio Supreme Court. Stewart received an impressive education at University School in Cincinnati at Hotchkiss School, and at Yale University, where he was class orator and received numerous honors; University of Cambridge; and Yale Law School, where he achieved an "outstanding record."[1]

After graduating from Yale, Stewart practiced law in New York City (1941-42, 1945-47) with time out for service in the Navy during World War II. He then returned to Cincinnati, where he practiced law from 1947 to 1954. During this period, he was elected Cincinnati City Councilman and also served as Vice-Mayor. At the age of thirty-nine, Stewart was appointed by President Eisenhower

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1. 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES 2922 (1969). Coincidentally, one of Stewart's brethren on the Supreme Court, Byron R. White, was a student at Yale Law School at the same time Stewart was, and another, John P. Stevens, was the nominee of one of Stewart's Yale classmates, Gerald Ford.

to a seat on the United States Court of Appeals for the Sixth Circuit, which he held for four years (1954-58).

III. POTTER STEWART, ASSOCIATE JUSTICE (1958-81)

Stewart's career on the Supreme Court may be divided into three periods. From 1958 to 1961, he was a swing vote on a closely divided Court. From 1962 to 1969, he was the Court's second most conservative member and a frequent dissenter protesting the dominant liberal activism of the 1960's. From 1970 to 1981, he was a "centrist" on the conservative Burger Court, once again holding a key swing vote.

A. *As Stewart Goes, So Goes the Court (1958-61)*

In 1958, President Eisenhower elevated Stewart from the Sixth Circuit to the United States Supreme Court to take the seat formerly held by Harold Burton, a Truman appointee.[2] At the time of his appointment, Stewart was only forty-three, the second youngest Justice appointed since the Civil War.[3]

When Stewart arrived in 1958, the Court was split into two warring factions. On the left were Warren, Black, Douglas, and Brennan, whom Frankfurter dubbed "the Four." On the right were Frankfurter, Harlan, and Whittaker. Clark was in the center between the two wings.[4]

In short, the balance of power on the Court depended on the behavior of Stewart. He could provide the winning vote for either the liberal wing or the conservative-moderate coalition. "Accordingly, there was considerable speculation in 1958 as to whether Stewart's replacement of Burton would alter the majority position of

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2. Burton submitted his resignation at age 70 due to his losing bout with Parkinson's disease. At the time of Burton's retirement, "Eisenhower complained about Brennan's decisions, as well as Warren's" and told Attorney General William P. Rogers to be "most careful" in choosing Burton's successor. "He [Eisenhower] was most interested in ensuring 'a conservative attitude' in the new Justice." H. SCHWARTZ, SUPER CHIEF 205, 320 (1983).

3. The youngest was William O. Douglas, a Franklin Roosevelt appointee, who was 41 when he was seated in 1939.

4. In the October 1957 Term, just prior to Stewart's arrival, polarization between the wings had reached extravagant levels. Eleven pairs of Justices had disagreement rates above 50%, and several pairs posted rates of nearly 60% (Black-Harlan, 57.8%; Douglas-Harlan, 57.7%; Douglas-Frankfurter, 56.7%). The October 1957 Term cases which split the Court 5-4 along liberal-conservative lines included Crooker v. California, 357 U.S. 433 (1958) (police interrogation); Lerner v. Casey, 357 U.S. 468 (1958) (subversion); Beilan v. Board of Educ., 357 U.S. 399 (1958) (subversion); Gore v. United States, 357 U.S. 386 (1958) (criminal procedure); and Rogers v. Quan, 357 U.S. 193 (1958) (deportation).

those Justices favoring a generally passivist viewpoint . . . . Stewart was popularly characterized as the 'swing man' on an otherwise evenly balanced Court. Newspaper reports commonly suggest[ed] that, 'as Stewart goes, so goes the Court.' "[5] By Stewart's own account, he was neither a judicial liberal nor a judicial conservative, but rather "just a lawyer," who took the cases one at a time and tried to decide them on the merits.[6]

Voting data for the ensuing terms show that Stewart joined forces much more frequently with the conservatives than with the liberals.[7] In his first term, for example, he disagreed with the liberals nearly three times as frequently as with the conservatives.[8]

Overall, Stewart's voting record was more conservative than Clark's during the October 1958 and 1959 Terms. Thus, Clark was more often the key swing vote than Stewart, and the traditional adage should perhaps have been "As Clark goes, so goes the Court." Despite his initial close alignment with the conservative wing, Stewart was ultimately less conservative than Whittaker, Harlan, and Frankfurter, so it is probably most accurate to classify him with Clark as a moderate-conservative on the 1958-61 Court. The refusal of Stewart and Clark to side with the liberal activists was a primary cause of the Court's relatively conservative interlude in the late 1950's.[9]

B. *Harlan and Stewart, Dissenting (1962-69)*

The year 1962 was, according to Stewart, a turning point in the history of the United States Supreme Court.[10] In April of that year, Felix Frankfurter, star of the Court's "restrained" wing suffered a severe stroke. Frankfurter resigned in August. In October, Arthur Goldberg took over Frankfurter's seat. Goldberg was a liberal and an activist, and his accession gave the liberal-activist wing five votes,

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5. 4 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES 2925 (1969). *See also* B. SCHWARTZ & LESHER, INSIDE THE WARREN COURT 165 (1983): "With the Court evenly divided on most cases between two camps—Warren, Black, Douglas, and Brennan being the activists and Frankfurter, Harlan, Clark, and Whittaker generally favoring restraint—Stewart became the 'swing man,' sometimes voting with one camp, sometimes with the other."

6. Interview with Potter Stewart, Washington D.C., June 17, 1985 [hereinafter cited as Stewart Interview].

7. *See* Galloway, *The Second Period of the Warren Court: The Liberal Trend Abates (1957-1961)*, 19 SANTA CLARA L. REV. 947 (1979).

8. *Id.* at 960.

9. *Id.* at 976.

10. Stewart Interview, *supra* note 6.

an absolute majority.

Whittaker also left the Court in 1962, further weakening the conservative wing. He was replaced by Byron R. White, who had attended Yale Law School at the same time as Stewart and was, according to Stewart, " 'never' a liberal."[11] White became Stewart's second closest colleague on the Court.[12]

The new liberal-activist majority that took over in October 1962 promptly began writing their views into the law of the land, making the October 1962 Term one of the most liberal-activist in the history of the Court. Although Earl Warren often receives credit for the Court's liberal activism, it was Hugo Black who was, in Stewart's opinion, the true leader of the Warren Court.[13] In response to the Court's dominant liberal activism, Stewart moved into close alignment with Harlan and became a member of the loyal opposition. From Goldberg's arrival in 1962 until the departures of Warren and Fortas in 1969, the phrase that best describes Stewart's role on the Court is "Harlan and Stewart, dissenting."

During this period, the liberal activists, bolstered by the arrival of Abe Fortas in 1965 and Thurgood Marshall in 1967, ruled the roost. In response, Stewart's dissent rate shot up from 12.2% in the October 1958 Term to 29.7% in the October 1962 Term, 33.0% in the October 1966 Term, and 33.3% in the October 1968 Term.[14] Stewart suspected that the liberals caucused before the conferences, because they normally had their position solidified by voting time.[15] Stewart and Harlan planned their counter-strategies while walking together to the Court in the mornings.[16]

During the 1962-69 period, Stewart was most closely aligned with Harlan and White. Stewart dissented in many of the famous landmark cases of the 1960's, including *Miranda v. Arizona,*[17] *NAACP v. Button,*[18] *Fay v. Noia,*[19] and *Engel v. Vitale.*[20] He later

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11. *Id.*

12. *Id.* Stewart's closest friend on the Court was Harlan, "an excellent judge . . . [and] a 'courtly' man." *Id.*

13. *Id.* Stewart described Warren as not an exceptionally strong legal scholar, but as an excellent conference leader. William Brennan was described by Stewart as the "play-maker" and "bridge-builder" of the Warren Court. *Id.*

14. Stewart's dissent rate was the highest on the Court in the 1968 Term.

15. Stewart Interview, *supra* note 6.

16. *Id.*

17. 384 U.S. 436 (1966) (police interrogation).

18. 371 U.S. U.S. 415 (1963) (freedom of association).

19. 372 U.S. 391 (1963) (habeas corpus).

20. 370 U.S. 421 (1962) (school prayer).

identified *Miranda* and *Reynolds v. Sims*,[21] the one-person, one-vote case, as especially "bad" Warren Court decisions and said that he never accepted the doctrine of "selective incorporation" of the Bill of Rights into the due process clause of the fourteenth amendment.[22] Of course, Stewart also joined the liberals in many cases during the 1960's and even wrote the majority opinions in some liberal landmarks including *Katz v. United States*,[23] and *Jones v. Alfred H. Mayer Co.*[24] Perhaps his most famous opinion during this period was his concurrence in *Jacobellis v. Ohio*,[25] in which he refused to attempt a definition of obscenity, stating instead, "I know it when I see it."[26]

C. *Swinging Once Again 1969-81*

The third, and final phase of Stewart's career as Associate Justice began when the dominance of the liberal-activist wing was broken by the departure of Warren and Fortas in 1969 and the arrival of the four Nixonians: Burger, Blackmun, Powell, and Rehnquist, in the 1969-72 period. Nixon's appointees were chosen for their conservative views, and they were, indeed, more conservative than either Harlan or Stewart. Consequently, Stewart found himself, once again, in the middle of the Court between two opposing groups of Justices, just as he had been in the late 1950's. This time the conservatives had four votes and the liberals three, and this time Stewart was joined by White rather than Clark in the center. But, as in the late 1950's, Stewart held a key swing vote and, in many cases, the reality was "as Stewart goes, so goes the Court." White was closer to the Nixonians during the early 1970's than Stewart was, but Stewart also leaned to the right, securing the conservative dominance characteristic of that period.[27]

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21. 377 U.S. 533 (1964) (legislative reapportionment).
22. Stewart Interview, *supra* note 6.
23. 389 U.S. 347 (1967) (electronic surveillance).
24. 392 U.S. 409 (1968) (racial discrimination).
25. 378 U.S. 184 (1964) (obscenity).
26. *Id.* at 197.
27. *See* Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981). Despite the shift in ideologies from the Warren Court's liberal activism to the Burger Court's conservatism, Stewart believed that there existed more continuity between the Warren and Burger Courts than many commentators recognized. Stewart based his belief on the premise that conservative Justices tend to be strongly committed to the principle of *stare decisis*. He acknowledged, however, that dominance passed from the left wing in the 1960's to the right wing in the 1970's. Stewart Interview, *supra* note 6.

In the late 1970's, the line-up on the Court was altered by two events. First, Douglas retired in 1975, leaving Brennan and Marshall alone on the left. Douglas' successor, John P. Stevens, joined Stewart and White in the Court's center. Second, in the October 1977 Term, Blackmun and, to a lesser extent, Powell, moved out of their close alignment with Rehnquist and Burger, creating a five-vote group which commentators tagged "the floating center." From 1975 to his retirement in 1981, Stewart was a member of the Court's controlling group of moderate conservatives. In his final term, Stewart was most closely aligned with the conservative wing, capping a long, illustrious tenure as a moderate conservative.

Although Stewart leaned more toward the Rehnquist-Burger pole than the Brennan-Marshall pole during the Burger era, he exercised an important moderating influence on the Burger Court's conservatives, especially in first and fourth amendment cases.[28] Stewart's decision to retire in 1981 at the relatively young age of 66 proved to be a major loss for the liberal wing; the arrival of his successor, Sandra Day O'Connor, pushed the Court to the right, initiating what has become a more conservative era of Supreme Court history.

IV. CONCLUSION

Stewart said that the Court in his time was more like nine separate law firms than nine partners in a single firm.[29] Although only one vote in nine, Cincinnati Republican Potter Stewart was a moderating, stabilizing force on a Court that shifted sharply from liberal dominance in the 1960's to conservative dominance in the 1970's. The second most conservative Justice of the 1962-69 period, Stewart became an important defender of first and fourth amendment values in the conservative 1970's. His voice will be missed.

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28. *E.g.*, Payton v. New York, 445 U.S. 573 (1980) (home searches); Ybarra v. Illinois, 444 U.S. 85 (1979) (dragnet searches); Dunaway v. New York, 442 U.S. 200 (1979) (probable cause); FCC v. Pacifica Foundation, 438 U.S. 726 (1970) (disfavored speech); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (newspaper searches); United States v. Chadwick, 433 U.S. 1 (1977) (searches of luggage); Young v. American Mini Theatres, 427 U.S. 50 (1976) (disfavored speech); United States v. Giordano, 416 U.S. 505 (1974) (electronic surveillance); Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (automobile searches); Cohen v. California, 403 U.S. 518 (1971) (profanity).

29. Stewart Interview, *supra* note 6.