Potter Stewart*

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Much has already been said and written and more will be written about Potter Stewart's work and career. Whether it was his initial study in law school or in undergraduate school or his studies in England that gave him a keen interest and appreciation of the history of English Common Law, I am not certain.

Discussions in Conference and over the lunch table showed that Potter Stewart was intimately familiar with the genesis and history of the Fourth Amendment, and indeed all of the Bill of Rights. He knew that at times, in our early colonial history, soldiers and police and customs officers were often very high-handed in their enforcement of the law. He shared an 18th Century Englishman's concern for the protection of the privacy of the person and the home of every individual.

It would be difficult to single out any Justice in any period and say he or she came to oral arguments and to conferences better prepared than others. Potter Stewart's careful preparation in advance of oral argument manifested itself in many ways. The intensity and vigor of his presentation was usually tempered by a touch of humor. All of us who served with him have heard him say that "this fellow across the table," meaning one of the Justices, "maybe is dead wrong on that first case this morning but he is right on the second and third case," and so relations must be conducted accordingly.

On at least an equal level, Potter Stewart was concerned about the First Amendment, particularly free speech and freedom of the press. I suspect that it was Potter Stewart's early experience in journalism, followed by his being the editor of his college publication, that gave him a special insight into the subject of press freedom. But he was in no sense an absolutist with respect to the freedom of speech and press.

The subject of capital punishment disturbed Potter Stewart greatly, as it disturbs all judges, and his positions in this field in no sense meant that he was an advocate of capital punishment as the appropriate response of society to crime. As a legislator, he might not have supported capital punishment, but as a *judge*, he felt bound to enforce and apply the Constitution of the United States, which clearly authorizes legislative bodies to

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* This eulogy, reprinted in substantially complete form, was delivered by Chief Justice Burger at the funeral service for Justice Stewart in Washington.

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prescribe capital punishment. Potter Stewart contributed much in charting a new course with respect to this sensitive, difficult, and painful subject.

When I first same to the Court in 1969, I urged the American Bar Association to reexamine the Canons of Judicial Ethics, and I was requested to designate a member of the Court to serve on the Bar Commission dealing with this subject. Potter Stewart accepted his assignment, and his balanced view of the responsibilities of a judge combined with his proper concern for the appearance of justice made him a most valuable member of that body. It was appropriate that a Justice with his roots in Ohio should have a major voice in reexamining and restating those standards, for it was Chief Justice Taft, an early predecessor of Potter Stewart on the Court of Appeals for the Sixth Circuit, who had authored the Canons of Judicial Ethics.

In common with others in the legal profession, Potter Stewart had grave reservations about making sweeping revisions of criminal procedure on a case-by-case basis. I think he would have preferred to rely on the rule-making process where the generality of experience could be taken into account, rather than make new rules on the basis of one difficult case.

Potter Stewart's dissents on some of these may well be influential in the future. I know I speak for all of the Justices in saying we missed him on his retirement and will sorely miss his friendship in the years ahead.