Justice Stewart: A Tale of Two Portraits

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The portrait of Justice Potter Stewart that hangs in my office is your typical law clerk's memento: an official, black and white Supreme Court photograph that the Justice autographed and gave to me at the end of my clerkship with him in the 1967 Term. The figure in that official photograph, as you might expect, looks every inch like your "typical" Supreme Court Justice: black robe, penetrating gaze, serious demeanor—a study in earnest reflection and solemn, if not quite stern, reserve. That picture of Justice Stewart always brings to my mind these words from Milton:

> A pillar of the state; deep on his front engraven
> Deliberation sat and public care[1]

And well might deliberation sit upon his features, for deliberation, which constitutes much of the business of a Supreme Court Justice, was always Potter Stewart's forte.

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 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.

Yet for Potter Stewart the real labor of deciding a case came when the Justices deliberated at their weekly conference. For him the great joy of the Court's work was this collegial colloquy, the interplay of advocacy at the hands of nine master craftsmen of that art. The Justice was not one for "lobbying" other members of the Court before the conference; such maneuvers were not his way. Indeed, if he sensed that a majority of the Court had come to the conference as a united front, not to engage in spir-

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1. J. MILTON, PARADISE LOST, bk. II, lines 302-03, at 36 (S. Elledge ed. 1975).

ited exchange but to impose a pre-engineered *fait accompli*, he felt cheated of that opportunity for collective deliberation which was for him the soul of the Court's work.

This is not to say that Justice Stewart never struggled against an apparent consensus of his Brethren. When the Court considered *Witherspoon v. Illinois*, the Justice for some time found himself utterly alone in arguing that the death sentence in that case had to be reversed. But he gamely endured in his advocacy until, in the end, all but three members of the Court agreed that: "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution."[2]

When the Court considered *Jones v. Alfred H. Mayer Co.*,[3] Justice Stewart's confidence in his own convictions proved positively infectious. I initially wrote for the Justice a rather timid memorandum suggesting that, amidst the racial strife of the mid-60's, it seemed unlikely that the civil rights statute before the Court would bring forth much fruit, since it had been barren and unattended for a full century. The Justice strode into chambers the next morning and with almost innocent exasperation asked why I found it so hard to grasp that Congress had, in what to him seemed plain language, guaranteed the black man's "freedom to buy whatever a white man can buy," and his "right to live wherever a white man can live."[4] The Justice seemed disappointed that even a brash young clerk fresh from law school could be willing to capitulate to a century of unexamined, pussy-footing, prudential concerns, and so reluctant to seize upon unambiguous statutory language that simply cried out for a recognition that Congress meant what it had said. Armed with the courage of Justice Stewart's conviction, I sequestered myself in the Supreme Court library and emerged two months later with ample historical evidence to support the Justice's insight into the statute's text. Needless to say, I was convinced—and so was the Court, for all but two of the Brethren joined his opinion.

As well as it captures Justice Stewart's serious, deliberative frame of mind, that *de rigueur*, black and white glossy photograph—mass-produced for public dissemination—misses nuances of the Justice's personality best revealed in the painting that those who had served as his law clerks commissioned in 1983—a painting which now hangs in the Supreme Court building. The face that looks out from that portrait is less somber: a warm smile plays about the lips; a wry spirit dances in the eyes. The Justice's reserve, after all, was born not of disdain, but of innate

2. 391 U.S. 510, 523 (1968).
3. 392 U.S. 409 (1968).
4. 392 U.S. at 443.

shyness—and of an appreciation of the demands of his position. The exuberant prankster who once talked his kid brother into putting a dead frog in the salad bowl had of necessity been tamed by his profession and by his judicial responsibilities. Yet underneath that lugubrious judge's robe lurked a man who relished wit and retained a sense of whimsy. Potter Stewart took the law, the Court, and his role as a Justice very seriously indeed, but he always resisted the impulse to take himself too seriously.

For all his deep and abiding faith in the Court's deliberative process, Justice Stewart could not help being amused at some of the turns it could take. Framed on the wall of my study is a note that the Justice scribbled to me during one of the Court's conferences:

> Larry,
> The indication is that A.F. [Justice Abe Fortas] will join our *Katz* [opinion]. With such prompt and enthusiastic support from such an unexpected quarter, maybe we better *re-read* the memo carefully to see what we say (and what we don't) . . . .

More often, Justice Stewart mocked himself. He once lamented in dissent that the Court had effectively overruled an important opinion he had only recently written. When a subsequent decision confirmed that his mourning had in fact been premature, the Justice smiled at his own error, and filed a short concurring opinion—with a "*cf.*" to Mark Twain—stating that it was "gratifying to note that my report of the demise of *Fuentes v. Shevin* seems to have been greatly exaggerated."[5]

Although he never took himself too seriously, Justice Stewart did not presume to lecture his Brethren in this respect. I remember an afternoon when he told me that I must excise from a draft opinion a citation to a prior case in which Justice Black had dissented. Justice Stewart chuckled as he explained that, if we wanted Justice Black to join "our" opinion, we would have to remember that Hugo Black would never sign onto an opinion which displayed the bad judgment to rely, even in passing, upon an earlier decision that had obviously been in error.

But when the integrity of the Court itself, and not merely the eccentricities of its Members, was at stake, Justice Stewart's smile faded and his resolve hardened. In 1967, the Justice dissented from the Court's denial of certiorari in a case testing the legality of the undeclared war in Vietnam, *Mora v. McNamara*.[6] The Justice knew that a judicial declaration that American involvement in the Vietnam War was unlawful would be political dynamite; he recognized that the constitutionality of the draft, and of

5. North Georgia Finishing, Inc. v. Di-Chem, 417 U.S. 601, 608 (1975).
6. 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

the war itself, might well prove to be nonjusticiable questions, committed by the Constitution to the political branches. But the Justice fervently believed that, even if he and his Brethren were ultimately to determine that the courts should play no role in resolving these explosive issues, the Court nevertheless owed the American people a forthright explanation of *why* that was so. As it turns out, Justice Stewart had clear evidence that the draft dissent he had circulated among his Brethren had been taken to the White House by Justice Fortas. And Justice Fortas had left little doubt that President Johnson would not take kindly to even the smallest judicial hint that his favorite "police action" was beyond the constitutional pale. But Potter Stewart stared down Abe Fortas's veiled—and plainly improper—threats of retaliation and filed his dissent anyway.

Justice Stewart believed that the Supreme Court's refusal to grapple with the constitutional implications of the Vietnam conflict constituted that Court's greatest single failure during his tenure as a Justice. Yet even the gravity of that choice, and the tension of the confrontation with Justice Fortas, could not completely suppress Justice Stewart's humor. In a wry moment, the Justice conjured for me an image of Supreme Court Marshal T. Perry Lippitt, a prim and spindly character straight out of Dickens, slogging through the rice paddies in his swallow-tailed coat to deliver a copy of the Court's opinion to General Westmoreland, along with a writ ordering the army out of Vietnam.

Justice Stewart's firm conviction that the republic deserves an explanation of where its Supreme Court Justices stand on an issue—and why—manifested itself in his policy of reading his dissents from the bench, even after that practice had begun to fall into desuetude under Chief Justice Burger. That conviction went hand-in-glove with his belief that the explanation should be plainly put. Impatient with turgid prose, the Justice always had a flair for potent metaphor and a deft turn of phrase: a conviction obtained through a hasty nocturnal trial could not stand because "swift justice demands more than just swiftness;"[7] warrantless electronic eavesdropping of a public phone booth constituted an invasion of privacy and an unlawful search because "the Fourth Amendment protects people, not places;"[8] and arbitrary imposition of the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[9]

But Justice Stewart's rhetorical powers were by no means limited to a knack for aphorisms. When dissenting from the Court's decision to throw the aegis of absolute judicial immunity over a state court judge who had

7. Henderson v. Bannan, 256 F.2d 363, 390 (6th Cir. 1958) (Stewart, J., dissenting).
8. Katz v. United States, 389 U.S. 347, 351 (1967) (Stewart, J., concurring).
9. Furman v. Georgia, 408 U.S. 238, 309 (1972).

granted an *ex parte* petition to sterilize a 15-year-old girl without her knowledge, the Justice declared from the bench that such lawless conduct could never constitute a "judicial act": "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."[10] The Justice filed an even more powerful dissent from the Court's decision to jail a pedestrian porno peddler while exonerating an established publishing house that had also been charged with obscenity. Justice Stewart reminded his Brethren that, in "enforcing the Bill of Rights, this Court has no power to pick or to choose. When we lose sight of that fixed star of constitutional adjudication, we lose our way. For then we forsake a government of law and are left with government by Big Brother."[11]

Although he could express disagreement with great vigor, Justice Stewart's dissents did not partake of rancor or invective, nor did he treat differences of opinion as grounds for personal affront. When subsequent doctrinal developments would bear out a position he had earlier taken in dissent, the Justice believed that it was really the law, and not his personal views, that had been vindicated.

Justice Stewart was equally eloquent when expressing the opinion of the Court. He penned these words in a unanimous 1975 decision that ordered the release of a man who had been imprisoned without cause as a "mental patient" for 15 years:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.[12]

The heartfelt, if characteristically quiet, satisfaction which service on the Supreme Court brought to Potter Stewart led him to opine, in a 1979 interview with Fred Graham, embargoed until the Justice' death, that appointment to that tribunal was "like dying and going to heaven." Yet it would seem that heaven itself was not enough, for Justice Stewart retired from the Court just two years later at the youthful age of 66. The incisive intellect that had livened oral arguments was then devoted to deciding cases in the federal courts of appeals, or to clarifying legal issues on public

10. Stump v. Sparkman, 435 U.S. 349, 367 (1978) (Stewart, J., dissenting) (footnote omitted).
11. Ginsburg v. United States, 383 U.S. 463, 501 (1966) (Stewart, J., dissenting).
12. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

television. And the sonorous voice that once filled the Court's marble chamber was put to work recording legal texts for the blind.

But the Justice left no doubt that his primary reason for retiring was to spend more time with his family. He had begun his service on the Supreme Court at the remarkably early age of forty-three, and when he left the Court twenty-three years later he did so with no regrets. For the Justice was also an ordinary citizen, a husband and a father who savored his private life as much as his public service. Although his unexpected and untimely death cut short his retirement, there is every reason to believe that Potter Stewart brought to the final years of his private life the same quiet, unpretentious vigor that animated his years on the Supreme Court. And I suspect that, surrounded by his grandchildren and relieved of the serious responsibilities of the Court, he had a chance to indulge some of the childlike whimsy that attracted him to the verses of Robert Louis Stevenson—verses that the Justice, according to his brother, Zeph Stewart, scribbled down many years ago and carried in his wallet for the rest of his days:

> Must we to bed indeed? Well then
> Let us arise and go like men,
> And face with an undaunted tread
> The long black passage up to bed.
>
> Farewell, O brother, sister, sire!
> O pleasant party round the fire!
> The songs you sing, the tales you tell,
> Till far tomorrow, fare ye well!

As I stood in Arlington Cemetery last December, I thought of those lines and my eyes were drawn to the small figure of one of Justice Stewart's grandchildren. The boy, a lad of at most five or six, did not, as would befit his age, fidget in distraction during the funeral of a dimly perceived grandparent. The child understood that someone who had come to make a difference in his life was gone for good. As the cannon salute echoed over the Virginia hills, the boy wept; for him, too, the loss of Potter Stewart was immediate and all too real.