

REMEMBERED JUSTICE: THE BACKGROUND, EARLY CAREER AND JUDICIAL APPOINTMENTS OF JUSTICE POTTER STEWART

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During Potter Stewart's 23 years on the Supreme Court he served with 17 other justices. All but four of the 17 have been the subject of at least one book-length biography, and the careers or decisions of the remaining four have been closely examined in scholarly monographs. Potter Stewart is the only one in his cohort of justices who has not had a book written about him or his work. If a person runs a search for "Stewart, Potter" in the Library of Congress on-line catalogue, the only hits that person will receive are for two collections of letters deposited by the heirs of other men.

Seven of the eight members of the Supreme Court who greeted newly-minted Justice Stewart in 1958 have received full biographical treatment, sometimes several times over: Hugo Black,¹ William J. Brennan,² William O. Douglas,³ Felix Frankfurter,⁴ John Marshall

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1. See, e.g., HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR (1996); HUGO L. BLACK, JR., MY FATHER: A REMEMBRANCE (1975); GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); VIRGINIA VAN DER VEER HAMILTON, HUGO BLACK: THE ALABAMA YEARS (1972); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

2. See, e.g., HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR (1995); KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993); ROGER GOLDMAN & DAVID GALLEN, JUSTICE WILLIAM J. BRENNAN, JR.: FREEDOM FIRST (1994).

3. See, e.g., JAMES C. DURAM, JUSTICE WILLIAM O. DOUGLAS (1981); EDWIN P. HOYT, WILLIAM O. DOUGLAS: A BIOGRAPHY (1979); JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (1980).

4. See, e.g., LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); LIVA BAKER, FELIX FRANKFURTER (1969); ROBERT BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988); H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES (1982).

Harlan, II,⁵ Earl Warren,⁶ and Charles Whittaker.⁷ The lone exception, Tom C. Clark, is the subject of a 139-page juvenile biography as well as a bio-bibliography published by the library of the University of Texas School of Law.⁸ In addition, Justices Black and Douglas and Chief Justice Warren all told their own stories in the form of memoirs or autobiographies.⁹

Nine more justices joined the Court during Justice Stewart's tenure. Five of them have already merited full-length biographies: Abe Fortas,¹⁰ Arthur J. Goldberg,¹¹ Thurgood Marshall,¹² Lewis Powell,¹³ and Byron White.¹⁴ While no full biographies have yet been written of Chief Justice Warren Burger and Chief Justice William Rehnquist, their terms in office have been analyzed in numerous books.¹⁵ Justice John Paul Stevens' style of constitutional decision-making is the subject of one

5. See TINSLEY E. YARBOROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992).

6. See, e.g., ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN (1997); LEO KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY (1967); JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA (1979); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND THE SUPREME COURT: A JUDICIAL BIOGRAPHY (1983); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1982).

7. See RICHARD LAWRENCE MILLER, WHITTAKER: STRUGGLES OF A SUPREME COURT JUSTICE (2001).

8. See DON LARRIMER, BIOBIBLIOGRAPHY OF JUSTICE TOM C. CLARK (1985); EVAN A. YOUNG, LONE STAR JUSTICE: A BIOGRAPHY OF JUSTICE TOM C. CLARK (1998).

9. See HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK (1986); WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1974); WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1980); EARL WARREN, THE MEMOIRS OF EARL WARREN (1977).

10. See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

11. See DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL (1996).

12. See, e.g., HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA (1998); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

13. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994).

14. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE (1998).

15. THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES (Charles M. Lamb & Stephen C. Halpern eds., 1991); THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983); EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986 (2000); BERNARD SCHWARTZ, ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990); THE REHNQUIST COURT: A RETROSPECTIVE (Martin H. Belsky ed., 2001); SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION (1989); STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000); DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1993); TINSLEY E. YARBOROUGH, THE REHNQUIST COURT AND THE CONSTITUTION (2000).

scholarly monograph,¹⁶ and a key episode of his early career is the subject of another.¹⁷ Justice Harry Blackmun's decision in *Roe v. Wade*¹⁸ has been examined in a veritable flood of books.¹⁹ Juvenile biographies have been written about Chief Justice Rehnquist and Justices Stevens and Blackmun.²⁰ However, there are no books about Potter Stewart or his work on the Court.

This article brings together some of my research for a book that examines one of Potter Stewart's better-known opinions.²¹ It is not intended to be a comprehensive portrait of Justice Stewart. It is drawn largely from public sources. It is my hope that publishing this article will encourage another researcher to undertake that long-overdue biography while many of Justice Stewart's contemporaries are still alive and available to be interviewed.

I. BIRTH AND FAMILY

Potter Stewart was the son of James Garfield Stewart, whose name honored the martyred Ohioan President, suggesting something of the family's engagement in Ohio Republican politics. Jim Stewart was a native Ohioan, from Springfield, a graduate of Kenyon College and the University of Cincinnati College of Law. He began his legal career in Cincinnati in 1908 at age 28.²² He was highly successful earning enough to build a house of grand proportions for his family, as revealed in a story his son told to illustrate the difference between his parents. When his parents decided to build the new house in 1927, Mrs. Stewart frequently met with the architects and pored over the plans. Mr. Stewart paid no attention, and when the family finally moved into the house he

16. See ROBERT JUDD SICKELS, *JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE* (1988).

17. See KENNETH A. MANASTER, *ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS* (2001).

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. See, e.g., MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* (2001); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994); N.E.H. HULL & PATER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* (2001).

20. BOB ITALIA, *CHIEF JUSTICE WILLIAM REHNQUIST* (Paul Deegan ed., 1992); BOB ITALIA, *HARRY BLACKMUN* (Paul Deegan ed., 1992); BOB ITALIA, *JOHN PAUL STEVENS* (Paul Deegan ed., 1992).

21. *JUDGING CRIMES: THE CHRISTIAN BURIAL MURDER CASE AND THE EXPANSION OF JUDICIAL POWER*, examines, among many other topics, Justice Stewart's opinion in *Brewer v. Williams*, 430 U.S. 387 (1977).

22. *HISTORICAL AND PHILOSOPHICAL SOCIETY OF OHIO, CINCINNATI'S MAYORS* (ca. 1960).

managed to get lost in it. But on a train trip to California with his 12-year-old son, “he must have told a dozen strangers we met on the train, ‘I have a house with a living room 46 feet long.’ That’s all he knew about the house.”²³ In that recollection of the 66-year-old man you can still hear the 12-year-old’s embarrassment.

Potter was born on January 23, 1915, in Jackson, Michigan, which is west of Ann Arbor and about forty miles north of the Ohio border. It was the hometown of his mother, whose birth name was Harriet Loomis Potter. According to Justice Stewart, “her father and grandfather had been president of the local bank, the oldest bank in the state. She’d been kind of a small-town rich girl.”²⁴ The bank, Jackson City Bank & Trust Company, is said to have been the oldest bank in Michigan to survive the Great Depression, suggesting competent and prudent management.²⁵ After the Stewarts became politically prominent, the family told the Cincinnati newspapers that Potter was born while the family was on vacation in Jackson,²⁶ although it seems odd that his mother should have taken a vacation while her pregnancy was so far advanced, particularly as she already had a young daughter to take care of. Possibly it seemed impolitic to admit that she preferred the care she could receive in her hometown to that available in Cincinnati.

Despite his Michigan birth, Potter grew up in Cincinnati, attending the private University School for the lower grades. As a teenager he boarded at Hotchkiss School in Lakeville, Connecticut, which was founded in 1891 with the mission of preparing students for Yale.²⁷

In 1933, when Potter was eighteen, his father was elected to the

23. Alvin P. Sanoff, *Famous Father, Famous Son*, CINCINNATI ENQUIRER, June 15, 1986, supp. at 12.

24. *Id.*

25. Letter from George E. Potter to Joel Jacobsen (Aug. 21, 2001) (on file with author); E-mail from Steve Shiley, to Joel Jacobsen (Aug. 15, 2001) (on file with author).

26. *Jubilant Well-Wishers Greet New U.S. Justice*, CINCINNATI POST, Oct. 8, 1958, at 1; Karen Heller, *Cincinnati’s “Swing Man” On The Court*, CINCINNATI ENQUIRER MAGAZINE, Dec. 9, 1973, at 8.

27. For Stewart’s schooling, see George Bush, *In Tribute to the Honorable Potter Stewart: Potter Stewart*, 95 YALE L.J. 1323, 1323 (1986); Leon Friedman, “Potter Stewart,” in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1548, 1548-49 (Leon Friedman & Fred L. Israel eds., 1997); Heller, *supra* note 26; Michael Maloney, *Lawyers Here Praise Stewart’s Appointment*, CINCINNATI ENQUIRER (Oct. 8, 1958), at 4B; Byron R. White, *Remembering Potter Stewart*, 21 no. 1 LITIGATION 3, 3 (1994). Professor Friedman states on the cited pages that Potter Stewart and George H. W. Bush were classmates at Hotchkiss, but Bush was nine years younger and graduated from Philips Andover. See the biography offered by the George Bush Presidential Library and Museum’s website, at <http://bushlibrary.tamu.edu>. For information concerning Hotchkiss’s original mission, see “About Hotchkiss,” at <http://www.hotchkiss.org>.

Cincinnati City Council, beginning a highly successful second career in politics at age 53. Cincinnati's unique hybrid form of government has both a mayor and a city manager. Under the city charter of the 1930's, the councilors were elected at-large, and they selected the mayor and vice-mayor from among their own ranks.²⁸ The elder Stewart served on the council four years before being selected mayor by his fellow councilors, a post he filled for the next nine years. The hometown papers used words like "colorful" and "ebullient" to describe Jim Stewart.²⁹ The *Cincinnati Enquirer* dubbed him "Jovial Jim" and said he was "one of Cincinnati's most beloved public figures."³⁰ Reminiscing in retirement, Potter Stewart said: "In Cincinnati, everybody thought they knew my father. You couldn't walk a block downtown without taking two hours because everybody stopped and talked to 'Jim' Stewart."³¹

The only people who had difficulty talking to Jovial Jim, it seems, were members of his family. In 1936, while Potter was an undergraduate at Yale, his mother filed for divorce, declaring that her husband, not yet mayor, "treated her with 'complete indifference.'"³² The phrase may have described their relationship, or may have been merely conventional in divorce proceedings of the era.³³ Jim Stewart's devotion to politics had led him to spend many evenings away from the house. The retired Justice Stewart, looking back from the perspective of a half-century, remembered that "[h]e often came home late at night. One night our dog even bit him; he was a stranger."³⁴ One need not be a marriage counselor to guess that Jim Stewart's time-consuming avocation was to some extent a response to stresses in the marriage. And, in a predictable vicious circle, a husband being gone night after night must have contributed mightily to the unhappiness in the house. Jim Stewart eventually moved into the Cincinnati Club downtown. When Potter came home for vacations he stayed with his mother. "My brother³⁵ and I would make a point of seeing him for a meal or two, but

28. League of Women Voters of the Cincinnati Area, *Cincinnati City Charter: A Brief Historical Perspective*, at <http://www.lwvcincinnati.org/historycity.htm>.

29. Glenn Thompson, *Stewart Endorsed by Bricker for Bench*, CINCINNATI ENQUIRER, Feb. 18, 1954, at 1; Heller, *supra* note 26.

30. Warren D. Wheat, *Former Cincinnati Mayors' Sons Paths Cross*, CINCINNATI ENQUIRER, May 24, 1976, at D2; Maloney, *supra* note 27.

31. Sanoff, *supra* note 23.

32. *Wife Files Divorce Suit Against Councilman*, CINCINNATI ENQUIRER, Nov. 19, 1936, at 7.

33. *Id.*

34. Sanoff, *supra* note 23.

35. Classicist Zeph Stewart, the Andrew W. Mellon Professor of the Humanities, Emeritus, Harvard University.

it always seemed forced.”³⁶

In 1944 Mayor Stewart was the Republican candidate for governor of Ohio but lost in a landslide to the Democratic mayor of Cleveland, Frank Lausche, their contest nicely embodying the traditional rivalry of Ohio’s poles. United States Senator Robert Taft, Mr. Republican himself, son of the former president and chief justice (and grandfather of Ohio’s current governor), came within 18,000 votes of losing his own seat, partly no doubt because the double-header of conservative Cincinnatians heading the Republican ticket alienated northern Ohioans. Senator Taft, whose least-attractive trait was his eagerness to blame others for his setbacks, privately opined that “[t]he closeness of my election was due principally to Stewart’s weakness.”³⁷ Many in the Taft circle blamed the 1944 near-defeat for Taft’s failure to secure the Republican nomination for President in 1948, believing the close shave encouraged wavering delegates at the national convention to doubt his voter appeal. After all, if he had trouble carrying his own state, how would he fare across the nation?³⁸ From Taft’s point of view, then, Jim Stewart was a big reason he did not become President in 1948.

Nonetheless, Jim Stewart survived politically. Because Cincinnati’s council elections are held in odd-numbered years while the governor is elected in even-numbered years, he was not obliged to relinquish the mayor’s seat in order to run for governor. And when Governor Lausche was defeated in his re-election campaign two years later – a temporary setback in his long career at the top of Ohio politics – Mayor Stewart received the thanks of a grateful Republican party. The new Republican governor appointed him to the Ohio Supreme Court, where he served from 1947 until his death in April, 1959, a half-year after his son’s elevation to the only court that was superior to his.

II. EARLY CAREER

A member of both Skull and Bones and Phi Beta Kappa, young Potter majored in English at Yale University and graduated *cum laude*.³⁹

36. Sanoff, *supra* note 23.

37. JAMES T. PATTERSON, MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT 279 (1972).

38. JEROME NASHORN, CHOOSING THE CANDIDATES 1952 2-3 (1988).

39. Earl F. Morris, *Mr. Justice Stewart*, 44 A.B.A. J. 1174, 1174 (1958); Friedman, *supra* note 27, at 1548-49. Professor Friedman erroneously states that Stewart and George H.W. Bush were classmates at Yale. In his eulogy at Stewart’s funeral, then-Vice President Bush said: “We were not, as Richard Nixon now and then insisted, roommates at Yale. Potter belongs to the famous Class of ‘37 . . .” Bush, *supra* note 27, at 1323. The first President Bush famously enlisted in the Navy on the day of his high school graduation in 1942.

He subsequently graduated *cum laude* from Yale Law School, where his classmates included Gerald Ford and Byron White.⁴⁰ “Jerry Ford and the rest of us all knew that he was going to return to Grand Rapids and practice law,” Stewart told an *American Heritage* interviewer. “And that’s what nearly happened.”⁴¹ In 1937-38, between undergraduate and law school, he spent a fellowship year at Cambridge University on a Henry Fellowship, beneficiary of an exclusive exchange program involving the closed circle of Harvard, Yale, Cambridge and Oxford.⁴²

After finishing Yale Law School, Stewart applied for a job with the FBI. J. Edgar Hoover himself killed the application with a memo that highlighted the findings of a Cincinnati field agent that Stewart’s mother belonged to the League of Women Voters and a Cincinnati group called the Peace League that was devoted to such causes as aiding European refugees. Such memberships raised, in Hoover’s mind, “the possibility that his family was involved in subversive activities.”⁴³ Many years later, a Cincinnati lawyer who knew Harriet Stewart laughed at the suggestion, describing her “as rock-ribbed Republican as you could find anywhere.”⁴⁴ On July 6, 1941, Stewart telegraphed Hoover to ask about the status of his application, and the following day Hoover telegraphed back that “no encouragement can be offered.”⁴⁵

Following the FBI’s rebuff, Stewart followed the more conventional career path for graduates of Yale Law, taking an associate’s job with a prestigious Wall Street law firm. His choice was Debevoise, Stevenson, Plimpton & Page. A high-gloss job at a high-gloss firm like Debevoise would have seemed a natural step in the life progression of an honors graduate of Yale Law School. Looking back in retirement, Potter said he was also prompted by a desire to get out of Cincinnati, to escape from the unhappiness of his family’s life. In addition, he naturally felt a degree of resentment at finding himself in his

40. White, *supra* note 27; Lloyd N. Cutler, *Mr. Justice Stewart: A Personal Reminiscence*, 95 HARV. L. REV. 11, 11 (1981); Samuel G. Freedman, *Ex-Justice Stewart Relives the Eli Life*, N.Y. TIMES, Apr. 30, 1982, at B1; *Jubilant Well-Wishers Greet New U.S. Justice*, *supra* note 26; Paul Welch, *Potter Stewart Keeps Fingers Crossed on Bid for Judgeship*, CINCINNATI POST, Mar. 5, 1954, at 5.

41. Robert Bendiner, *The Law and Potter Stewart: An Interview with Justice Potter Stewart*, AMERICAN HERITAGE, Dec. 1983, at 104.

42. Morris, *supra* note 39, at 1174; Maloney, *supra* note 27. For information about the Henry Fellowship, *see* <http://www.yale.edu/iefp/fellowships/individual/henry.html>; www.admin.cam.ac.uk/reporter/1999-2000/special/06/100.html.

43. Tony Mauro, *Hoover Kept a Careful Eye on Stewart*, CINCINNATI ENQUIRER, Apr. 19, 1997, at 1.

44. *Id.*

45. *Id.*

prominent father's shadow: "I wanted to be regarded as more than just my father's son."⁴⁶ Being "Jim Stewart's boy" – sometimes even called "Jimmy" by strangers who assumed he was named after his Dad,⁴⁷ when in fact he was named after his mother's family – would have been a cross to bear for a sensitive and ambitious young man starting out in his father's profession, and particularly for a young man who did not feel especially close to his father.

Potter Stewart threw himself into the public life of his new town, but his politics remained those of a Cincinnati Republican. According to a story in the *Cincinnati Post*, he made street corner speeches against Vito Marcantonio, the not-so-crypto-Communist Congressman from East Harlem whose intense local following was partly a reaction to the hostility he aroused in people such as Potter Stewart.⁴⁸ Street-corner politicking seems wildly out of character, but the *Post* apparently had the story from Stewart himself.

In the summer of 1941, as he was beginning his legal career, Stewart volunteered for the Navy's Reserve Officer Training Program, taking a two-week trigonometry cram course at the University of Cincinnati to qualify.⁴⁹ Just a few months later, the Japanese attacked Pearl Harbor. The following April he was called up to active duty, and after four months in officer training school he was commissioned an ensign. With a week's leave before his first assignment he returned to Cincinnati, making a point of visiting City Hall in his dress uniform – the dutiful son of a politician father – to pose for press photographers with his dad the mayor.⁵⁰

Ensign (later Lieutenant) Stewart spent three years on active duty as a navigator in the Atlantic Fleet, escorting convoys of oil tankers on the unglamorous, essential and intermittently dangerous crossings depicted in the book and movie *The Cruel Sea*. He received three battle stars, reflecting his participation in actual combat, which in his line of work meant U-boat attacks. He described his wartime experience as "floating around in a sea of 100-octane gas, bored to death 99% of the time and scared to death 1% of the time."⁵¹

46. Sanoff, *supra* note 23.

47. *Id.*

48. See Welch, *supra* note 40.

49. Morris, *supra* note 42, at 1174; *Jubilant Well-Wishers Greet New U.S. Justice*, *supra* note 26.

50. *Mayor Says Goodbye to Son*, CINCINNATI POST, Aug. 11, 1942, at 3; *Mayor's Son to Join Fleet*, CINCINNATI TIMES-STAR, Aug. 11, 1942, at 9.

51. *Lawyer by Heritage: Potter Stewart*, N.Y. TIMES, Oct. 8, 1958, at 26; *The Young Justice*, TIME, Oct. 20, 1958, at 24; Heller, *supra* note 26; E-mail from Potter Stewart, Jr., to Carla

While on leave during the war, he married Mary Ann Bertles, known as Andy, a researcher for *Life Magazine*.⁵² They had in common their upper-class Republican activism: while still a student at Bennington she campaigned for Wendell Wilkie in 1940.⁵³ After the war, Potter returned to his New York job, but in 1947 – the year his father stopped being mayor – they packed up and moved to Cincinnati, the obvious place to launch the political career he was evidently planning. He was already the father of a daughter, Harriet, with Potter, Jr. on the way. (A third child, David, followed a few years later.)

At the time of his elevation to the Supreme Court, *Time* wanted to know why he had quit Debevoise. “As a New York lawyer, he explains, ‘you work harder and harder to become more and more successful so that you can move farther and farther away from town and see less and less of your family.’”⁵⁴

His new position was with Cincinnati’s most prestigious law firm, Dinsmore, Shohl, Sawyer & Dinsmore. The repetition of “Dinsmore” in the name revealed that a second generation of that family had joined an already-established firm, demonstrating a dynastic continuity that was evidently important to Stewart, scion of a dynasty-to-be. (In 2001 there was still a member of the Dinsmore family at the firm, which remains a Cincinnati powerhouse.) The firm’s client list included Proctor & Gamble,⁵⁵ which counted for a lot in Cincinnati. It was blue chip all the way for the mayor’s son.

The younger Stewarts moved into a house across the street from the Cincinnati Country Club, in a turn-of-the-last-century neighborhood that advertised its exclusiveness by naming itself Hyde Park.⁵⁶ Adjusting to life in Ohio, Andy Stewart worked full-time for Taft in his 1948 presidential campaign, helping him win his primary battle against former Minnesota Governor Harold Stassen, who was then making his first and most serious run for the presidency.⁵⁷

Beauchamp (Jan. 13, 2000) (on file with author).

52. *The Young Justice*, supra note 51; *The Town Knows Potter Stewart*, CINCINNATI TIMES-STAR, Nov. 18, 1949, at 2.

53. *The Town Knows Potter Stewart*, supra note 52.

54. *The Young Justice*, supra note 51.

55. Anthony Lewis, *Ohioan Is Chosen for Burton’s Post on Supreme Court*, N.Y. TIMES, Oct. 8, 1958, at 1.

56. The house was at 7 Peasenhall Lane. Charles O’Neil, *Son of Ex-Mayor May Be Candidate For City Council*, CINCINNATI TIMES-STAR, Mar. 22, 1949, at 1. The Stewarts later moved to the legendarily exclusive suburb of Indian Hill, northeast of downtown Cincinnati. *Potter Stewart May Become U.S. Justice*, CINCINNATI POST & TIMES-STAR, Oct. 7, 1958, at 1.

57. *The Town Knows Potter Stewart*, supra note 52.

Potter supported Taft in 1948, too.⁵⁸ Supporting Taft was almost a given in Cincinnati Republican circles, and whatever tension existed between the families during the heat of the tough 1944 statewide race seems to have been forgotten. Taft lost the nomination to Thomas Dewey, but Potter Stewart was rewarded with a seat on the Hamilton County Republican executive committee.⁵⁹ The following year he made his own first run, receiving the official blessing of the Republican Nominating Commission (a kingmaking body he later chaired) for a seat on the City Council.⁶⁰

Despite what Potter said in later life about his alienation from his father, he largely owed his political career to him. The candidacy of the “Son of Ex-Mayor” got a front-page announcement in the Taft family’s *Cincinnati Times-Star*, which informed readers that “Stewart is considered an excellent candidate because of the popularity of his father, now an Ohio Supreme Court judge.”⁶¹ For eleven straight years, Jim Stewart had been grand marshal of an annual Fourth of July parade sponsored by the Corryville Playground Mother’s Club and in 1949 he shared his seat on the float with his son the council candidate.⁶² Andy threw herself full-tilt into the campaign, putting in long days without break until the day after the election, when she collapsed and had to be hospitalized with pneumonia.⁶³ Her husband won.

A councilor’s annual salary was \$5,000. That was a living wage in 1950, when the average worker’s yearly income was \$3,255 and the average public school teacher pulled down \$2,794.⁶⁴ In terms of purchasing power, Councilman Stewart’s salary was worth about \$36,825 in 2001 dollars.⁶⁵ Being a councilor was not a full-time job, but it was far from an honorary position. The councilors were expected to devote serious time to the running of the city, and Potter Stewart must have been exemplary in this respect as in so many others, because in his second term, beginning in 1951, his colleagues selected him vice-mayor.

58. Welch, *supra* note 40.

59. Welch, *supra* note 40.

60. O’Neil, *supra* note 56, at 1; A.M. Forkner, *Stewart Named As Head of Group To Select GOP Slate For May 4 Primary*, CINCINNATI ENQUIRER, Dec. 30, 1953, at 13.

61. O’Neil, *supra* note 56. The article also mentioned that Stewart “is regarded as the best speaker among the younger Republicans.” *Id.*

62. *Stewarts, Pere et Fils, To Head Holiday Parade*, CINCINNATI TIMES-STAR, June 27, 1949, at 7.

63. *The Town Knows Potter Stewart*, *supra* note 52.

64. THE VALUE OF A DOLLAR: PRICES AND INCOMES IN THE UNITED STATES, 1860-1989 352 (Scott Derks ed., 1994).

65. For the Bureau of Labor Statistic’s inflation calculator based on the Consumer Price Index, see <http://stats.bls.gov/cpihome.htm>.

He received the second-largest number of votes among all candidates for City Council, and was first among the Republicans.⁶⁶ At age 36, he was well on his way toward settling into his father's old chair in the mayor's office. Indeed, the *Cincinnati Post* reported on its front page that "Mr. Stewart seems certain to overtake his glad-handing father, James Garfield Stewart, in vote-getting ability."⁶⁷

Midway through his second term, the presidential nominating season rolled around again. Once again Taft was running, and once again only Stassen opposed him in the Ohio primary.⁶⁸ Taking nothing for granted, Taft ran hard in his home state and won a smashing victory, the Stewarts adding their mite to the effort.⁶⁹

Fortunately for Stewart's later career, the real struggle for the nomination took place far from Cincinnati. The choice between Taft and Eisenhower was stark. Taft was unswervingly partisan and conservative in domestic policy, while no one knew where Eisenhower stood on domestic issues. But everyone knew that Eisenhower, supreme commander of NATO, was committed to the defense of Europe and the reconstruction of its economies, while Taft said the United States could not afford the Marshall Plan. He was even "unwilling to admit that the loss of Europe would make this country unsafe."⁷⁰

From the point of view of Eisenhower's supporters, foreign policy was the defining issue of the campaign.⁷¹ For Taft's people, something else was at work. Although Taft prepped at a boarding school named after his family and weekendend at the White House as a Yale undergraduate before attending Harvard Law School, he saw himself as the representative of Main Street America. In his view, the Republican Party was undermined from within by big money, eastern-establishment

66. He was, however, only a handful of votes ahead of the once and future Republican mayor Carl Rich, whom he supported for the post. Charles O'Neil, *Rich To Be New Mayor on Dec. 1: Potter Stewart Not After Office; Supports Former Holder*, CINCINNATI TIMES-STAR, Nov. 13, 1951, at 1; Paul Welch, *GOP Council Appears Certain*, CINCINNATI POST, Nov. 8, 1957, at 1; *Council Standings*, CINCINNATI POST, Nov. 8, 1957, at 1.

67. *Rich Sure of Mayor, But Stewart High on List*, CINCINNATI POST, Nov. 8, 1951, at 1.

68. HERBERT BROWNELL & JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* 121, n.1 (1993).

69. Nashburn, *supra* note 38, at 276-77; *Ike Nominates Potter Stewart*, *supra* note 58; Kevin M. Costelloe, *Potter Stewart Learned Law at Father's Knee*, Associated Press Dispatch (June 18, 1981).

70. *Taft Says General Sidesteps Issues*, NEW YORK TIMES, June 6, 1952, at 8.

71. According to Milton Eisenhower, the President's brother, Ike was prepared to renounce any intention of seeking the Republican nomination in 1952 if Taft would commit himself to NATO and the policy of mutual security, but Taft refused. MILTON S. EISENHOWER, *THE PRESIDENT IS CALLING* 244-45 (1974).

figures like Wilkie and Dewey and Henry Cabot Lodge. They were Rockefeller Republicans before Nelson Rockefeller. Eisenhower was the candidate of the eastern elite, and for Taft and his resentful supporters (afterward convinced that the nomination was stolen from them at the convention) the primary campaign was a cultural war.⁷²

In 1952 the smoke-filled-room system of nominating presidential candidates had not quite vanished, and Ike could pick and choose which primaries to enter. He stayed out of Ohio, where he had no prayer of beating Taft, so Stewart was never required to choose between them. The Eisenhower people did not hold it against him that he supported Cincinnati's favorite son in the primary; in Ohio, working for Taft did not mean working against Eisenhower. Once the general's nomination was secured, Potter and Andy supported him wholeheartedly. In this way, while Taft and Eisenhower fought for convention delegates, arguing in occasionally bitter tones over the future direction of the party, Stewart could honestly say that he supported them both,⁷³ and so avoid taking sides in the GOP's *kulturkampf*.

By 1952 Potter Stewart was a veteran party activist and officeholder and a familiar name to readers of Cincinnati's newspapers. Yet his political profile remained curiously indistinct. In 1958, the *Cincinnati Post & Times-Star* called him "a liberal Republican" – the phrase was not an oxymoron yet – and quoted him as saying in a single breath that he was a "moderate" and a "life-long admirer" of the very conservative Bob Taft.⁷⁴ His Senate sponsor, John W. Bricker, declared him a "staunch conservative."⁷⁵

72. Taft himself made this explicit in a memo analyzing the 1952 campaign, which became public in 1959. *Taft Traces '52 Defeat to Eastern Big Business*, CINCINNATI ENQUIRER, Nov. 26, 1959, at 46. Illinois Senator and Taft backer Everett Dirksen famously tried to tie Eisenhower to Dewey at the 1952 Republican Convention, prompting the Republican Governor of Iowa to say a few days later that "after what Dirksen said the other night, the people of Iowa wouldn't use him to wipe their feet on." SHERMAN ADAMS, *FIRSTHAND REPORT: THE STORY OF THE EISENHOWER ADMINISTRATION* 35-36 (1961). For a thoughtful and still relevant journalistic discussion of the cultural split in the Republican Party during Taft's era and its persistence through the 1970s, see HENRY FAIRLIE, *THE PARTIES: REPUBLICANS AND DEMOCRATS IN THIS CENTURY* 67-86 ('1978). See also EUGENE H. ROSEBOOM, *A HISTORY OF PRESIDENTIAL ELECTIONS: FROM GEORGE WASHINGTON TO RICHARD M. NIXON* 508-13 (1970). The Fairlie book compares Taft to Goldwater, a comparison also found in MARY C. BRENNAN, *TURNING RIGHT IN THE SIXTIES: THE CONSERVATIVE CAPTURE OF THE GOP* 31-32 (1995).

73. Costelloe, *supra* note 69; *Ike Nominates Potter Stewart*, *supra* note 58; *Jubilant Well-Wishers Greet New U.S. Justice*, *supra* note 26.

74. *Jubilant Well-Wishers Greet New U.S. Justice*, *supra* note 26; *Potter Stewart May Become U.S. Justice*, *supra* note 56.

75. Mary Gallagher, *Potter Stewart Named to U.S. Supreme Court*, THE CINCINNATI ENQUIRER, Oct. 8, 1958, at 1.

There was evidence in the public record to support the senator's evaluation. While serving on the city council, Stewart received a great deal of publicity for a fire-breathing speech denouncing Democrats for tolerating Communist infiltration of the Planning Commission.⁷⁶ The speech echoed sensational charges of Communist infiltration of Cincinnati's Democratic Party and labor unions, initially made in the *Cincinnati Enquirer* and subsequently the subject of public hearings before the House Committee on Un-American Activities (HUAC).⁷⁷ Two years before joining the Sixth Circuit, Stewart was chairman of Gordon H. Scherer's successful campaign for Congress.⁷⁸ In his subsequent 10-year career in the House of Representatives, Scherer gained a kind of immortality as a leading light of HUAC, from which perch he led the charge against such as Pete Seeger.⁷⁹

Part of the indistinctness of Stewart's political profile had to do with the job of city councilor. Minding the details of municipal government was not a position that required, or permitted expression of, ideological commitment. As a Republican officeholder in the early 1950s, Stewart could not realistically avoid contact with the McCarthyite wing of the party, so his gestures to the right can be discounted as "going along to get along" in the party. But if we discount them, we are left with little concrete notion of his politics.

III. APPOINTMENT TO THE SIXTH CIRCUIT

On November 2, 1952, just days before Eisenhower's election, an 80-year-old federal appellate judge with the wonderful name of Xenophon Hicks died.⁸⁰ Judge Hicks had served on the Sixth Circuit Court of Appeals, which covers a heterogeneous slice of middle

76. The background of the affair is given in Daniel M. Berman, *Mr. Justice Stewart: A Preliminary Appraisal*, 28 U. CIN. L. REV. 401, 402-03 (1959).

77. The episode in the Spring of 1950, with much back-and-forth between Cincinnati's three daily newspapers, is chronicled in FRANK J. DONNER, *THE UN-AMERICANS* 157-60 (1961). Donner, a lawyer who represented many witnesses before House Un-American Activities Committee, himself took the fifth when subpoenaed by it. WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES* 387 n.8 (1969). Nonetheless, his description of the Cincinnati newspaper war is confirmed by a review of the papers themselves.

78. A.M. Forkner, *Vice Mayor Is Scherer Pick To Direct His Steps In Race For Congress*, *CINCINNATI ENQUIRER*, Mar. 2, 1952, at 1.

79. For a portrait (or perhaps caricature) of Scherer, see DAVID KING DUNAWAY, *HOW CAN I KEEP FROM SINGING: PETE SEEGER* 174-78 (1981). For a somewhat more balanced view, see Goodman, *supra* note 77, at 324, 363, 365, 368-69, 372 n.2, 392-93, 431-33. For Goodman's take on the Pete Seeger hearings, see *id.* at 377-79.

80. *Obituary*, "Xenophon Hicks", *N.Y. TIMES*, Nov. 3, 1952, at 27.

America: the industrial Great Lakes states of Michigan and Ohio and the upper South of Kentucky and Tennessee. Only three Ohioans served on the Sixth Circuit in its first sixty years of existence (the first was William Howard Taft), and so, even though Hicks hailed from Tennessee, it was agreed in the Senate that his replacement should come from Ohio. Under time-honored custom, the appointment was patronage controlled by the state's senators who were of the same party as the President, although the President had the final say.

The senior Republican Senator from Ohio was Taft, Eisenhower's convention opponent. The state's junior Republican Senator, Bricker, was Taft's colleague in thwarted ambition – he had been Dewey's running mate in 1944. Together, Taft and Bricker recommended the Cincinnati lawyer Bert H. Long, who was well thought-of in Cincinnati legal circles and endorsed by the Cincinnati Bar Association.⁸¹ The recommendation was made even before Eisenhower was sworn in as the nation's 34th President on January 20, 1953.⁸² But Eisenhower's judge-picker, Attorney General Herbert Brownell, declined to forward Long's name to the Senate, giving as his reason Long's age of 66 and the new President's policy of nominating no judge older than 65.⁸³ (Long subsequently served over a decade on the Ohio Court of Appeals.)

Following Long's rejection, Senators Taft and Bricker recommended a second Cincinnati Republican, Augustus Beall, Jr. – a name worthy of Xenophon Hicks's successor. But Brownell declined to forward Beall's name, as well, without rejecting him and without publicly giving a reason for his inaction. Beall was well-known in Cincinnati, but he was not universally liked. The Cincinnati Bar Association split on the question whether to endorse him for the seat.⁸⁴ Beall's granddaughter, Amy Miller, reported to this author that even Beall's step-brother doubted if he truly had the judicial temperament.⁸⁵ She told an anecdote about his unwillingness to change any position

81. *Cincinnati for Judgeship*, CINCINNATI POST, Jan. 17, 1953, at 6; *Excellent Material*, CINCINNATI ENQUIRER, Jan. 7, 1953, at 4.

82. STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 41 (1984).

83. *Long's Age Is Likely Block*, CINCINNATI ENQUIRER, May 14, 1953, at 2; *Long Loser For U.S. Bench?*, CINCINNATI ENQUIRER, June 20, 1953, at 28. Brownell wrote in his memoirs that the age limit for judges was 62. Brownell, *supra* note 68, at 177. However, this may have been a slip of memory; in the same passage he remembered Long as 62, four years younger than his actual age. *Id.* In his diaries, Eisenhower wrote that the age limit of 62 applied to Supreme Court nominees. DWIGHT D. EISENHOWER, *THE EISENHOWER DIARIES* 342 (Robert H. Ferrell ed., 1981).

84. Paul Welch, *Approval of Beall for U.S. Judge Splits Bar Association*, CINCINNATI POST, July 23, 1953, at 1.

85. E-mail from Amy Miller, to Joel Jacobsen (June 30, 2001) (on file with author). The step-brother was 92 years old in 2001, when he gave this opinion.

once assumed. Beall announced University of Cincinnati football games on the radio, and during his broadcast of a Thanksgiving weekend game against cross-state rival Miami of Ohio he questioned the officiating in particularly strident terms. Told that he had to apologize for his remarks or be removed as announcer, he refused to back down, and that was the end of his sportscasting career.⁸⁶ So perhaps there were valid reasons for Beall's colleagues in the bar to doubt whether he would have made an ideal judge.

Such doubts may have been enough to doom his nomination. However, it is hard to suppress a suspicion that politics also played a substantial role. Beall was a protégé of the Senator's brother Charles P. Taft, a former Hamilton County Prosecutor.⁸⁷ Attorney General Brownell had been Eisenhower's point man in the brutal credentials fight against the Taft forces at the 1952 Republican convention, where the nomination came down to which of two competing slates of delegates from Texas and Louisiana would cast their ballots. Brownell, seconded by the Louisiana Republican leader John Minor Wisdom, won the credentials fights for Eisenhower, but not without bruising many feelings.⁸⁸ 'It was not in Taft's nature to forgive and forget,⁸⁹ and so it seems probable that a certain tension existed between the Taft family and the Attorney General. In addition, Cincinnati papers reported that "Bricker disliked Brownell intensely."⁹⁰ While this last assertion needs to be taken with a grain of salt – Brownell denied it,⁹¹ and at any rate

86. *Id.* Beall's sportscasting career was mentioned in his obituary, but not the reason for its termination. *Heart Attack is Fatal to Attorney*, CINCINNATI POST, Nov. 5, 1962, at 11.

87. *Id.* Cincinnati is in Hamilton County. In one exceptionally high-profile case, Beall and Charles Taft unsuccessfully prosecuted the noted "gentleman bootlegger" George Remus, whose career is the subject of Craig Holden's novel *THE JAZZ BIRD* (Simon & Schuster 2002).

88. For Wisdom's role at the 1952 convention, see Brownell, *supra* note 68, at 111. For Wisdom's centrality in Louisiana Republican politics of the era, see PERRY H. HOWARD, *POLITICAL TENDENCIES IN LOUISIANA* (Baton Rouge: Louisiana State Press, 1971) (rev. ed.), at 321, 329-30; ALLAN P. SINDLER, *HUEY LONG'S LOUISIANA: STATE POLITICS 1920-1952* 244-45 (1956). For descriptions of the convention and the strong feelings it aroused, see Adams, *supra* note 72, at 14-36; Nashorn, *supra* note 38, at 149, 270-77, 326-32; Patterson, *supra* note 31, at 535-77; GEOFFREY PERRET, *EISENHOWER* 405-10 (1999); Roseboom, *supra* note 72, at 508-513; EDWARD L. SCHAPSMEIER & FREDERICK H. SCHAPSMEIER, *DIRKSEN OF ILLINOIS: SENATORIAL STATESMAN* 76-83 (1985).

89. See Patterson, *supra* note 37, at 571-72.

90. Robert Crater, *Potter Stewart Backed by Bricker*, CINCINNATI POST, Oct. 10, 1958, at 10. The source of the supposed dislike was Brownell's effective opposition to the "Bricker amendment", which would have amended the Constitution to circumscribe the President's treaty-making powers.

91. "As a fellow midwesterner, I had good rapport with Bricker and his staff, which was to last even during the fight in the Eisenhower years over his attempts to curb the president's treaty-making powers – the Bricker amendment." Brownell, *supra* note 68, at 51. Brownell reported that,

politicians as successful as Bricker and Brownell generally do not let personal feelings control their actions – it is not hard to believe that once Beall’s nomination became controversial among Republican circles in Beall’s own hometown, Brownell lost all interest in pushing it. Perhaps he would have been prepared to wage a confirmation battle on behalf of other Republican senators, but not on behalf of Taft and Bricker. After seven months in the limbo of political inattention, Beall withdrew his name.⁹²

In the interim, Senator Taft died, having succumbed with shocking rapidity to cancer. Taft’s death simplified the politics of the nomination. Ohio’s new junior Senator, appointed by Governor Lausche (once again presiding over the state capitol), was a Democrat. Bricker and Brownell found a candidate they could both agree on, the outgoing Cincinnati vice-mayor, a political up-and-comer who had backed Eisenhower in the general election and was not conspicuously beholden to any faction within the party.⁹³

On the occasion of Justice Stewart’s retirement, Lloyd Cutler, Stewart’s classmate at Yale Law School, told an amusing story about Stewart’s nomination to the Sixth Circuit, an anecdote that belongs in the dictionary under “tepid endorsement.” Cutler said that, “Taft had initially proposed an Ohio lawyer whom Attorney General Herbert Brownell ruled out on the ground of excessive age. His second choice was rejected by Brownell as wholly unsuited for the bench. Taft then sounded out Stewart. When Stewart gave a favorable response, Taft called Brownell and said: ‘I have finally found someone who is neither too old nor unqualified.’”⁹⁴ Brownell recalled the same incident somewhat differently. In his recollection, Bert Long was 62 – four years younger than his actual age – and Beall does not figure at all. After Long was turned down, Taft came to his office and told him, “I have a recommendation for that judgeship. He’s young enough to satisfy even you.”⁹⁵ That person was Stewart.⁹⁶

after their respective retirements from political life, he had lunch with Bricker whenever his law practice took him to Columbus. *Id.*

92. Glenn Thompson, *supra* note 29; *Potter Stewart Seems Sure of U.S. Judgeship*, CINCINNATI POST, Feb. 18, 1954, at 25.

93. *Potter Stewart Seems Sure of U.S. Judgeship*, *supra* note 92. Stewart did not run for re-election in 1953; his term as councilor and vice-mayor thus ended about six weeks before his selection as judge became public. Charles O’Neil, *Three GOP Councilmen Will Not Run in 1953*, CINCINNATI TIMES-STAR, Nov. 7, 1952, at 1.

94. Cutler, *supra* note 40, at 11-12.

95. Brownell, *supra* note 68, at 177.

96. *Id.*

Unfortunately, neither story is likely to be accurate. Taft's health began failing in April, 1953, and he died on July 31 of an extraordinarily malignant, metastasizing cancer. He spent many of his last days in a hospital, undergoing rounds of tests, radiation therapy and exploratory surgery. When he appeared in public, his illness was shockingly evident to all. Even though he was never fleshy, he lost weight. He was anemic, deathly pale, and even greenish. Toward the end, he relied on crutches.⁹⁷ It is likely that his meeting with Brownell occurred before his illness was far advanced, because Brownell did not mention his appearance and because it seems improbable that Taft would rise from his deathbed to pursue a patronage appointment. The existence of the age limit, and the probability that it would doom Long's nomination, became public knowledge in mid-May;⁹⁸ it presumably had been known to Taft and Bricker before then. Accordingly, it is reasonable to suppose that Taft's meeting with Brownell, at which Taft announced the location of a younger substitute candidate, occurred in May, or even earlier, when Taft's illness was not so far advanced.

But Bert Long had a meeting with Brownell at the Department of Justice as late as June 19, 1953,⁹⁹ and his recommendation was not officially rejected by the President until after that date. The controversy about Beall's nomination did not become public until mid-July, less than two weeks before Taft's death.¹⁰⁰ Beall did not officially withdraw his name from consideration for another half-year, when Stewart's name first began to be mentioned. When all of these various dates are considered, it seems certain that the meeting between Taft and Brownell concerned Beall, not Stewart.

Potter Stewart was just 39 when he first donned the black robe. Even more remarkably, he had practiced law full time for only six years. For other years he split his time between law and the city council. As he explained when announcing his decision not to seek re-election, his two positions together demanded more time than he could give because "You cannot do justice to both jobs."¹⁰¹ When Stewart's appointment to the Sixth Circuit was announced, he told a *Cincinnati Post* reporter that, "it's like the end of your life."¹⁰² The comment was unexpected and

97. Patterson, *supra* note 37, at 599-614.

98. Long's Age Is Likely Block, *supra* note 83.

99. Long Loser For U.S. Bench?, *supra* note 83 (report published June 20, 1953, describing meeting of the previous day).

100. Welch, *supra* note 84.

101. O'Neil, *supra* note 93.

102. Welch, *supra* note 40.

poignant. What he meant, one gathers, is that the position represented the fulfillment of his ambitions, or perhaps the abandonment of all other ambitions, because a sitting federal judge cannot run for governor or senator or president. Before him, at age 39, stretched a seemingly flat horizon.

Curiously enough, years later when describing his feelings upon being elevated to the Supreme Court, he once again compared the appointment to the end of life. He said that it was “like dying and going to heaven.”¹⁰³

IV. THE MARIE TORRE CASE

During his five years on the Sixth Circuit, Stewart’s most significant opinion had to do with Judy Garland’s weight and self-esteem. The *New York Herald Tribune*’s entertainment reporter, Marie Torre, later a television anchor in Pittsburgh and New York (her daughter Roma maintains the TV tradition in New York today), wrote an article about the trying times experienced by CBS executives trying to tape a Judy Garland special. Garland was, by that time, deep into her druggy descent. A CBS executive, speaking with the expectation of anonymity, told Torre that Garland had “a highly developed inferiority complex” and that she did not want to work because “something was bothering her.” When pressed to explain what was bothering her, the executive said, “I don’t know, but I wouldn’t be surprised if it’s because she thinks she’s terribly fat.”¹⁰⁴

Garland sued CBS for breach of contract and libel, seeking the peculiarly precise sum of \$1,393,333 in damages.¹⁰⁵ Her lawyer subpoenaed Torre for a pretrial deposition, demanding to know the name of her source. Torre kept mum, citing her implicit promise of confidentiality and the first amendment’s guarantee of a free press. Garland’s lawyer took the matter to the federal judge presiding over the proceedings, Sylvester J. Ryan, who ordered Torre to answer the question or be found in contempt of court. Through various rounds of skirmishing, Torre stuck to her guns and the judge stuck to his, eventually sentencing her to ten days in jail.¹⁰⁶

103. Lawrence H. Tribe, *Justice Stewart: A Tale of Two Portraits*, 95 YALE L.J. 1328, 1332 (1986) (quoting a 1979 interview of the justice by CBS correspondent Fred Graham).

104. RICHARD KLUGER, WITH THE ASSISTANCE OF PHYLLIS KLUGER, *THE PAPER: THE LIFE AND DEATH OF THE NEW YORK HERALD TRIBUNE* 536 (1986); MARIE TORRE, *DON’T QUOTE ME* 34 (1965); Edmond J. Barnett, *Columnist Loses in Contempt Case*, N.Y. TIMES, Oct. 1, 1958, at 30.

105. Torre, *supra* note 104, at 37.

106. *Id.* at 38-71; Kluger, *supra* note 104, at 536-37, 560-62.

Torre, backed to the hilt by the *Herald Tribune's* idealistic young editor and publisher Ogden Reid,¹⁰⁷ later a congressman from New York, appealed to the Second Circuit Court of Appeals. The case was assigned to Sixth Circuit Judge Potter Stewart, who happened to be sitting on the Second Circuit by designation. Given his connections to New York and New Haven, Stewart probably expected service on the Second Circuit to be something of a holiday, but the *Garland v. Torre* case turned out to be anything but routine.

Torre and the *Herald-Tribune* made two arguments, one practical, the other theoretical. The practical argument was that Garland's defamation claim was "'of problematical merit, with grave doubt of ever being brought to trial,' and that the information sought to be exacted will therefore probably prove of no actual use to the plaintiff."¹⁰⁸ The difficulty with this argument was that neither Torre nor the newspaper was a party to the suit, and so neither had standing to challenge the merits of the complaint directly, which forced them to frame their argument in terms of probabilities and forecasts. Judge Stewart emphasized that he was not "intimating the slightest view as to the merits of Judy Garland's claim against CBS of defamation", but after concluding it was not "patently frivolous" he ruled that it was within the trial court's discretion to order discovery of evidence relevant to it.¹⁰⁹

This threshold argument would likely meet a friendlier reception today, given that Garland was a public figure, both the defendant (CBS) and the target of the subpoena (the *Herald-Tribune*) were media concerns, and the statements in question were not "provable as false".¹¹⁰ But in those pre-*New York Times v. Sullivan*¹¹¹ days, most courts would have probably decided the issue as did Judge Stewart. Certainly the CBS executive's remarks tended to make Garland seem ridiculous and unprofessional, which made them libelous *per se* under New York common law.¹¹²

The issue on which the *Herald Tribune's* management wanted a decision was whether reporters possessed an absolute or conditional constitutional privilege against divulging the identity of confidential

107. Kluger, *supra* note 104, at 537, 561.

108. *Garland*, 259 F.2d at 550 (2d Cir. 1958).

109. *Id.* at 550-51.

110. *See Milkovich v. Lorain Journal*, 497 U.S. 1, 19-20 (1990).

111. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

112. *Dahl v. Columbia Pictures Corp.*, 166 N.Y.S.2d 708, 711 (N.Y. Sup. Ct. 1957) ("An article or picture tending to expose a person to public contempt, scorn, obloquy [and] ridicule . . . or to injure him in his profession, occupation or trade, is libelous and actionable."); *Dall v. Time, Inc.*, 300 N.Y.S. 680, 683-84 (N.Y. App. Div. 1937), *aff'd*, 16 N.E.2d 297 (N.Y. 1938).

sources. Stewart wrote that the problem presented by the case “does not seem difficult.”¹¹³ He saw two interests contending for supremacy: freedom of the press and “the judicial power.”¹¹⁴ In framing the contest, Stewart showed a rhetorical flair: “Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth.”¹¹⁵ That passage appeared no fewer than three times in *The New York Times*: once in a news story, once in an editorial, and again when the paper published Stewart’s opinion in full.¹¹⁶ Other sentences in the opinion were also quoted in the press, such as: “but freedom of the press, precious and vital though it is to a free society, is not an absolute”; . . .¹¹⁷ “The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.”¹¹⁸

These phrases, eloquent though they must have seemed to the newspaper readers who read them as isolated sound-bites in a news account, acquire meaning only by inference. Accepting the proposition that freedom of the press is not absolute brings us no closer to resolving the conflict unless the competing interest *is* absolute, or at least more nearly absolute. Stewart’s opinion never actually says that “the judicial power” is absolute, or more nearly so, but that is the underlying principle on which he decided the case.

Judge Stewart’s opinion for the Second Circuit was historically significant in that it recognized (or, more precisely, assumed) the existence of a qualified first amendment right for journalists to maintain confidentiality.¹¹⁹ The case is still cited by courts today for the proposition that the competing rights of the press and of litigants seeking

113. *Garland*, 259 F.2d at 548.

114. *Id.* at 549.

115. *Id.* at 548.

116. The news story and opinion appeared side by side in the October 1, 1958 New York Times. Edmond J. Barnett, *Columnist Loses in Contempt Case*, N.Y. TIMES, Oct. 1, 1958, at 30; *Text of Appeals Court Decision in Marie Torre Contempt Case*, N.Y. TIMES, Oct. 1, 1958, at 30. The editorial appeared the following day. *Justice vs. Freedom*, N.Y. TIMES, Oct. 2, 1958, at 36.

117. *Garland*, 259 F.2d at 548.

118. *Garland*, 259 F.2d at 548 (quoted in *The Girl Who Said No*, TIME, Oct. 13, 1958, at 70 and Edmond J. Barnett, *supra* note 116.).

119. See, e.g., Paul L. Glenschur, *Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection*, 33 HASTINGS L.J. 623, 640-48 (1982); Monica Langley & Lee Levin, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 15-16 (1988); Mary V. Mate, *Piercing the Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 MINN. L. REV. 1563, 1569 (1998).

testimony must be balanced on a case-by-case basis.¹²⁰ In the end, the opinion had a little something for everyone: for Judy Garland's fans, who got to see Dorothy pull back the curtain on yet another Wizard; for those who hated the press in general or the *Herald Tribune*, the voice of Republican liberalism, in particular; but also for the press itself, both in its bonanza of stirring quotes to include in news stories about the case and in its back-handed recognition of a constitutional right not to divulge the identity of confidential sources. Torre spent a bleak ten days in the Hudson County Jail,¹²¹ but her martyrdom proved to be a way station on the road to *New York Times v. Sullivan*, *Branzburg v. Hayes*¹²² and the judicial acknowledgment of First Amendment protections for newsgathering.¹²³

Garland v. Torre, with its irresistible mixture of high ideals, low gossip and constitutional interpretation, gave Judge Stewart national publicity for the first time in his career.¹²⁴ He was "pitched into national prominence" by the opinion, in the words of the *Cincinnati Post & Times-Star*.¹²⁵ It was issued six days before Supreme Court Justice Harold H. Burton, an Ohio Republican, announced his retirement.¹²⁶

V. APPOINTMENT TO THE SUPREME COURT

Justice Burton had just finished participating in an extraordinary summer session of the Court, which convened to deal with the crisis

120. See, e.g., *United States v. King*, 194 F.R.D. 569, 575 (E.D. Va. 2000); *Bauer v. Gannett Co.*, 557 N.W.2d 608, 610, 612 (Minn. App. 1997); 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5426, at 718 n.35 (1980). In their description of the case, Wright and Graham manage to get almost every fact wrong, beginning with a description of the reporter as a "gossip columnist."

121. Torre movingly describes the experience in her memoir, *supra* note 104, at 72-112. Late in life she told an interviewer, "I am the first person to have gone to jail for refusing to reveal a source." ELLIE WYMARD, *CONVERSATIONS WITH UNCOMMON WOMEN: INSIGHTS FROM WOMEN WHO'VE RISEN ABOVE LIFE'S CHALLENGES TO ACHIEVE EXTRAORDINARY SUCCESS* 152 (1999). *The New York Times'* obituary more grudgingly allowed only that she was "the first reporter to gain national attention for going to jail for refusing to identify a news source." Nick Ravo, *Marie Torre, 72, TV Columnist Jailed for Protecting News Source*, N.Y. TIMES, Jan. 5, 1997, at 24.

122. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

123. For an interesting discussion of the relationship of *Garland* to *Branzburg*, see Ethel S. White, *The Protection of the Individual and the Free Exchange of Ideas: Justice Potter Stewart's Role in First and Fourth Amendment Cases*, 54 UNIV. CINCINNATI L. REV. 87, 94-96 (1985).

124. *The Girl Who Said No*, *supra* note 117; Barnett, *supra* note 116.

125. *Potter Stewart May Become U.S. Justice*, *supra* note 56.

126. The opinion was issued September 30, 1958. Burton announced his retirement on Monday, October 6, 1958, which was also the first day of the Supreme Court's 1958-1959 term. *Potter Stewart May Become U.S. Justice*, *supra* note 56. Burton had informed the President of his planned retirement in a letter dated July 17, 1958, but the news was not made public for two and a half months." See 358 U.S. vii-xi (1958).

involving integration of the Little Rock schools.¹²⁷ On the first day of the regular October session, the 70-year-old Burton, a former Cleveland mayor and Ohio Senator who suffered from Parkinson's disease, announced his retirement, occasioned by his deteriorating health.¹²⁸ According to at least one subsequent press report, Eisenhower's first choice to replace Burton was former Attorney General Brownell, who had recently stepped down from the Justice Department.¹²⁹ However, Brownell had played a leading role in implementing the Supreme Court's decision in *Brown v. Board of Education* requiring desegregation of schools.¹³⁰ It was rumored that Eisenhower was convinced that forwarding Brownell's name to the Senate would be a red flag to the southern delegations which were exclusively composed of segregationists.¹³¹ Even before the Little Rock crisis, Brownell had been the subject of an extraordinary joint resolution of the Georgia Legislature, condemning him for countenancing the FBI's "unconstitutional" inquiries into the Georgia judicial system.¹³² Eisenhower's diaries and Brownell's memoirs confirm that the President sounded out Brownell about the possibility of a seat on the Supreme Court in 1957, but Brownell did not exhibit much interest.¹³³

Regardless of whether Brownell took himself out of the running or was taken out by political realities, Ike began a search for another candidate. During the same time period, the new Attorney General, William P. Rogers (subsequently President Nixon's first Secretary of State), attended a Yale Law School alumni function and found himself chatting with Judge Potter Stewart of the Sixth Circuit.¹³⁴ Rarely has the old-boy network worked with such efficiency. Stewart's appointment came while Congress was in recess, and the new justice was sworn in without Senate confirmation on October 14, 1958, just seven days after being nominated and eight days into the new term.¹³⁵ *The New York*

127. See *Aaron v. Cooper*, 357 U.S. 566 (1958); *Cooper v. Aaron*, 358 U.S. 1 (1958).

128. *Potter Stewart May Become U.S. Justice*, *supra* note 56.

129. Crater, *supra* note 90.

130. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

131. Crater, *supra* note 90.

132. Joint Resolution of the Georgia General Assembly No. 14 (Georgia House Resolution No. 51), Feb. 13, 1956. The joint resolution was made in connection with *Reece v. Georgia*, 350 U.S. 85 (1955).

133. Eisenhower, *supra* note 83, at 342; Brownell, *supra* note 68, at 181. In 1968 Eisenhower recommended Brownell for the Supreme Court in a memo to President-Elect Nixon. Ambrose, *supra* note 82, at 673. A decade after Little Rock, hostility of southern senators toward brownell remained intense. Richard Nixon, RN: The Memoirs of Richard Nixon. 419 (1978).

134. Cutler, *supra* note 40, at 12.

135. Lewis, *supra* note 55; Anthony Lewis, *Stewart Takes High Court Seat*, N.Y. TIMES, Oct.

Times ran a photograph of him with his beaming father.¹³⁶ Judge Jim Stewart died the following April, six months after his son took his seat on the Supreme Court but a month before his nomination was finally confirmed by the Senate.¹³⁷

In April, after six months' service on the Court, Justice Stewart faced hostile questioning from southern Democrats on the Senate Judiciary Committee, who wanted to know his views on *Brown v. Board of Education*. Mississippi's Senator James O. Eastland asked Stewart if he believed *Brown* was, in effect, an amendment to the Constitution. Stewart replied: "No, sir, I don't think it was. It was a decision made in a very sensitive and difficult area."¹³⁸ Stewart told Senator John L. McClellan of Arkansas that, "I would not like for you to vote for me on the assumption that I am dedicated to the cause of overturning that decision, because I'm not. I have no prejudgment against that decision."¹³⁹

Senator Eastland, joined by colleagues from Arkansas and South Carolina, filed a minority report objecting to the Judiciary Committee's recommendation of Stewart, writing, "We are further opposed to Justice Stewart, because it is evident from the hearings that Justice Stewart thinks the Supreme Court has the power to legislate and to amend the Constitution of the United States."¹⁴⁰ Of course, Stewart had said exactly the opposite, as New York's Senator Kenneth Keating pointed out during the floor debate.¹⁴¹ What the senators meant was elucidated by South Carolina's Strom Thurmond when he said, "If Mr. Stewart believes in that decision [meaning *Brown*], then he believes that the Constitution of the United States can be amended by the Supreme

15, 1958, at 28.

136. Lewis, *supra* note 135.

137. Sanoff, *supra* note 23.

138. Lowell K. Bridwell, *Senators Quiz Stewart On Policies*, CINCINNATI POST, April 9, 1959, at 1.

139. 105 CONG. REC. 7472 (1959). The first sentence was quoted in both Anthony Lewis, *Stewart Hearing Opens in a Clash*, N.Y. TIMES, Apr. 10, 1959, at 1 and *Justice Stewart*, CINCINNATI POST & TIMES-STAR, May 1, 1959, at 10. The wording given here is that found in the Congressional Record, as quoted in the remarks of Republican Senator Jacob Javits of New York. In *The New York Times*, the first sentence is given: "I would not like for you to vote for me on the assumption or the proposition that I am dedicated to the cause of overturning that decision, because I'm not." The latter wording is also found in Berman, *supra* note 76, at 411. Note that the first sentence acquires rather a different meaning when considered without the second.

140. *Two Senators Blast Naming Of Stewart*, CINCINNATI POST & TIMES-STAR, Apr. 30, 1959, at 4. Senator Eastland made a similar statement during the floor debate. 105 CONG. REC. 7465 (1959).

141. 105 CONG. REC. 7469-70 (1959). Stewart's response is also quoted in Lewis, *Stewart Hearing Opens*, *supra* note 139.

Court.”¹⁴² Thurmond explained his view that while Communism was “a satanic, brutal, wicked enemy,” “the decisions of the U.S. Supreme Court which have been handed down in recent years constitute a much greater danger than the threat of communism from without.”¹⁴³ Senator Eastland agreed that *Brown* “was based on Communist dogma.”¹⁴⁴ It sounds like a parody but, sadly, it was not.

At this hour of need, the old-boy network again came to Stewart’s aid. Senator Prescott Bush of Connecticut, father and grandfather to future presidents, spoke up in favor of the nominee, “whom I happen to know very well.”¹⁴⁵ All senators from eight Southern states – Virginia, North and South Carolina, Georgia, Alabama, Mississippi, Louisiana and Arkansas – voted as a bloc against Stewart.¹⁴⁶ The two senators from Florida split their votes, but the next day Senator George Smathers apologized for having voted “yea.”¹⁴⁷ With unanimous support from every other state in the Union, Stewart was easily confirmed.¹⁴⁸

Mr. Justice Stewart was 43 when he took the oath as a recess appointment, and 44 when finally confirmed by the Senate on May 15, 1959, becoming, at the time, the second youngest man to serve on the Supreme Court since the Civil War, and the sixth youngest overall.¹⁴⁹

142. 105 CONG. REC. 7471 (1959).

143. *Id.* Senator Thurmond added that another thing worse than Communism was “the big spending by the Congress”. *Id.*

144. *Id.* at 7452.

145. *Id.* at 7466. In his farewell press conference, Justice Stewart called then-Vice President Bush “a long-time friend.” Robert S. Marsel, *The Constitutional Jurisprudence of Potter Stewart: Reflections on a Life of Public Service*, 55 TENN. L. REV. 1, 29.

146. 105 CONG. REC. 7472. The nays included Senators Sam Ervin of North Carolina, William Fulbright of Arkansas, Russell Long of Louisiana and Adlai Stevenson’s 1952 running mate, John Sparkman of Alabama. *Id.*

147. *Id.*; Bendiner, *supra*, note 41, at 100.

148. Lowell K. Bridwell, *Stewart on Bench Today With 70-17 Senate Blessing*, CINCINNATI POST & TIMES-STAR, May 6, 1959, at 6.

149. Clarence Thomas subsequently nudged ahead of Potter Stewart on this list, being 43 years and 4 months old when confirmed in 1991. (Stewart was 43 years and 8 months old when he first took the oath.) William O. Douglas was 40 when he joined the Court in 1939. James Iredell, one of the original George Washington-appointed justices, was 38 when confirmed by the Senate. Bushrod Washington was 36 when he joined in 1799, William Johnson was 33 when he joined in 1804, and Joseph Story was 32 when he joined in 1812. The first Chief Justice, John Jay, was 43 years and 10 months old when confirmed. John McLean, John Marshall Harlan I and Byron White were all 44 when confirmed, but each was a few months older than Potter Stewart was in May, 1959. The exact birthdate of Justice James Morse Wayne is not definitely known; he was either 44 or 45 when he joined the Court in January, 1835.