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## A LAWYER'S LAWYER, A JUDGE'S JUDGE: JUSTICE POTTER STEWART AND THE FOURTH AMENDMENT

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### I. INTRODUCTION

On July 3, 1981, Potter Stewart retired as Associate Justice of the Supreme Court of the United States after twenty-three years of service.<sup>1</sup> Only eighteen of 101 other Justices served longer.<sup>2</sup> Stewart was

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The authors acknowledge with appreciation the cooperation of Justice Potter Stewart, who submitted to several interviews with Helaine Meresman Barnett, but who is not responsible for the conclusions of the authors.

1. Potter Stewart was appointed in 1958 at the age of forty-three by President Eisenhower to fill the vacancy created by the retirement of Justice Harold H. Burton. Born in Jackson, Michigan on January 23, 1915, he was raised in Cincinnati, Ohio, where his father served as mayor for nine years and then became a judge of the Supreme Court of Ohio. Potter Stewart graduated from Yale College and the Yale Law School where he was first in his class. After wartime service in the Navy, he returned to Cincinnati to practice law and entered local Republican politics. He was elected to the City Council and served as Vice Mayor before being appointed in 1954 by President Eisenhower to the United States Court of Appeals for the Sixth Circuit. The youngest federal judge in the country, he served four years.

Earl Warren was Chief Justice when Stewart was appointed to the Court, and Hugo Black, Felix Frankfurter, William O. Douglas, Tom Clark, John Marshall Harlan, William J. Brennan, Jr. and Charles E. Whittaker were his colleagues. Warren E. Burger was Chief Justice when Justice Stewart retired. The Associate Justices were, in addition to Justice Brennan (the only Justice to serve throughout Stewart's tenure) Byron White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell, Jr., William H. Rehnquist and John Paul Stevens. Two other Justices served with Potter Stewart: Arthur Goldberg (1962-1965) and Abe Fortas (1965-1969). Justice Stewart sat with eight different groupings of Justices.

2. William O. Douglas (36 years); Stephen J. Field (34); John Marshall (34); John Marshall

often a pivotal figure during two decades in which the Court was asked to resolve an extraordinary number of emotionally charged and politically significant issues.<sup>3</sup> When Stewart arrived in 1958, the Court often divided between Justices Frankfurter, Harlan, Clark and Whittaker on the one hand, and Chief Justice Warren, Justices Black, Douglas and Brennan on the other.<sup>4</sup> Thus, virtually immediately, Justice Stewart was called upon to render the deciding vote in a number of significant cases.<sup>5</sup>

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Harlan (33); Joseph Story (33); James Moore Wayne (32); John McLean (31); William Johnson (30); Bushrod Washington (30); Oliver Wendell Holmes (29); Roger Brooke Taney (28); John Catron (28); Samuel Nelson (27); Edward Douglass White (26); Willis Van Devanter (26); James Clark McReynolds (26); Joseph McKenna (26); Felix Frankfurter (23); Nathan Clifford (23); Robert C. Grier (23); Gabriel Duval (23). Justice Brennan has already served over 25 years.

3. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United States v. Nixon*, 418 U.S. 683 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Baker v. Carr*, 369 U.S. 186 (1962).

Justice Stewart declined to offer his opinion as to which were the most important cases decided during his tenure, stating that it is a judge's duty to give his individual energies and attention to each and every case. Justice Stewart indicated that certain cases have a greater impact on a particular segment of society than others. Some of the cases decided in his time were important to the political history of our country but less important to its jurisprudence, such as those involving the Pentagon Papers, the Nixon tapes and the Iranian hostages. Some cases triggered passions, such as those involving capital punishment and abortion. The first amendment in all its aspects is emotionally charged and evokes strongly held views on both sides. In an interview, Justice Stewart, however, did refer specifically to *National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Jones v. Mayer*, 392 U.S. 409 (1968). Interview by Helaine Meresman Barnett with Justice Potter Stewart, in Washington, D.C. (Sept. 23, 1981) [hereinafter referred to as *Personal Interview* (xxxx)].

4. At his retirement press conference, in response to a question as to whether he was a "swing man on the Court," Justice Stewart answered, "I have never thought of myself as a swing Justice—I have thought of myself as deciding every case correctly! And I've never thought in terms of putting a label on myself except to try to be a good lawyer. . . ." Transcript of the Press Conference on the Retirement of Justice Potter Stewart 16 (June 19, 1981) (available in Public Information Office, United States Supreme Court) [hereinafter referred to as *Retirement Transcript*].

Neither the authors nor Justice Stewart are attracted by the idea of attaching labels to the jurisprudential views of the justices. When, at the time of his appointment, Justice Stewart was asked if he was a judicial conservative or liberal, he replied, "I like to be thought of as a lawyer." *N.Y. Times*, Oct. 8, 1958, at 1, col. 1.

5. *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Frank v. Maryland*, 359 U.S. 360 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

See Schultz & Howard, *The Myth of Swing Voting—An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. Rev. 798 (1975). There the author found that "Justice Stewart's swings are interesting not for their capriciousness or ambivalence, but for their consistency." *Id.* at 844.

The replacement of Justice Frankfurter by Justice Goldberg in 1962 led to a period during which Stewart dissented on many important issues.<sup>6</sup> With President Nixon's appointment of Chief Justice Burger in 1969, Stewart returned to the role of the Court's "balance wheel." His experience and temperament became important as the Court struggled with the loss of Justices Black, Harlan and Douglas, who among them had served eighty-seven years, and with the problem of "digesting" four new Justices in less than three years.<sup>7</sup> More and more cases were decided by pluralities. In many cases there were five or more separate opinions; in some cases, nine or ten.<sup>8</sup> To some extent the fragmentation resulted from the hesitancy of the new members to subscribe fully to one position or another. Undoubtedly, the greater complexity of the issues facing the Court was a factor as well as the lack of time to consult fully with each other. But Justice Stewart also believes that four appointments in three years was too quick a turnover for the Court as an institution and for the individual appointees.<sup>9</sup>

This fragmentation must have proven frustrating to Justice Stewart. While many of his colleagues saw nothing amiss with writing separate statements of their own views, Justice Stewart considered it a primary duty of the Supreme Court to produce a Court opinion that would

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6. *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968); *Miranda v. Arizona*, 384 U.S. 436, 504 (1966); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 744 (1964).

7. Chief Justice Burger was appointed in 1969. Justice Blackmun took his seat June 9, 1970, and both Justices Powell and Rehnquist joined the Court on June 7, 1972.

8. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

9. For justices in their early years to find their work overwhelming is not unusual. See, e.g., *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573 (1977); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975). Six Justices, including all those appointed after 1968, have expressed the need for changes so that the Court can keep up with its workload.

Justices Douglas, Brennan, Marshall and Stewart opposed proposals for a National Court of Appeals. Stewart indicated that he was not convinced of the need for a new National Court of Appeals at that time, although he thought it likely that the day would come when a new court would be needed. *Id.* at 172-88.

Justice Stewart expressed gratitude for having been able to remain the "Junior Justice" for well over four years, permitting him time to learn the workings of the Court from colleagues who had been serving for many years in a stable atmosphere without the Court undergoing changes in composition. But Stewart considers it equally unfortunate for the Court to continue too long without new appointments. The Court requires both continuity and change, and to have too much of either is not good. Stewart has indicated that it would be ideal to have one new Justice every two years, which historically is the average elapsed time between appointments. *Personal Interview* (Jan. 9, 1973), *supra* note 3. The period between Justice Douglas's retirement on November 12, 1975, and Stewart's retirement on July 3, 1981, was the fourth longest in the history of the Court. The periods 1811-1823, 1882-1888 and 1930-1937 were longer.

guide other courts, lawyers and the American people.<sup>10</sup> Justice Stewart believes that a court opinion should represent an accommodation of all the views of the majority.<sup>11</sup> While accepting the right, and sometimes the duty, of each Justice to write his or her own opinion, Stewart believes that this should be the exception, not the rule.<sup>12</sup>

Justice Stewart also was disturbed by what he saw as the Court's willingness in the 1970's to reverse recent precedents. Dissenting angrily in a case decided by a four to three vote, Stewart wrote:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.<sup>13</sup>

Stewart was almost always consistent in his impassioned dissents from what he deemed improper overruling of precedents, regardless of how he had voted in the earlier decision.<sup>14</sup>

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10. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

11. According to Stewart, accommodation does not require that a Justice give up his own beliefs. It can mean, however, that the emphasis in the opinion is not exactly as he would have liked it, or that something was left out that he would have put in, or vice versa. *Personal Interview* (Feb. 19, 1982), *supra* note 3.

12. Justice Stewart admits that he feels more strongly about the wisdom and duty of producing a Court opinion than his former colleagues did. He indicated dismay that some law review articles do not seem to recognize that the Court's opinion is a collegial effort. It is frustrating, he says, to read that "[t]he Court did not even discuss . . .," when the author of the opinion had indeed thought the issue or point of law important and devoted two or three pages of discussion to it in an early draft, but his colleagues insisted that he take it out. *Id.*

13. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974). In *Grant*, a majority composed of the four Nixon appointees and Justice White reversed *Fuentes v. Shevin*, 407 U.S. 67 (1972), a case in which Justices Powell and Rehnquist had not participated. See *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975) (where Justice Stewart, paraphrasing Mark Twain, in his concurring opinion wrote that "it is gratifying to note that my report of the demise of *Fuentes* . . . seems to have been greatly exaggerated.").

14. See *Cardwell v. Lewis*, 417 U.S. 583, 596 (1974) (discussed *infra* note 87 and accompanying text); *United States v. Edwards*, 415 U.S. 800, 809 (1974) (a five to four decision in which Stewart was joined by Justices Douglas, Brennan and Marshall).

See also *Milton v. Wainwright*, 407 U.S. 371 (1972) (admission of a post-indictment, pre-trial confession obtained by a police officer who posed as a fellow prisoner in the defendant's cell was held to be harmless error by a majority consisting of Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist). Justice Stewart, joined in dissent by Justices Douglas, Marshall and Brennan, began by stating, "[u]nder the guise of finding 'harmless error' the Court today turns its back on a landmark constitutional precedent established 40 years ago. That precedent, which clearly controls this case, is *Powell v. Alabama*, 287 U.S. 45." 407 U.S. at 378 (Stewart, J., dissenting).

See *United States v. Kras*, 409 U.S. 434, 451 (1973) (a five to four decision in which the majority upheld the statutory requirement of payment of a filing fee as a condition precedent to

To Justice Stewart, respect for precedent is fundamental in the law.<sup>15</sup> Overruling previous court opinions should never be done easily or irresponsibly. Overruling may be justified if there has been a change in the facts or in the perception of the facts,<sup>16</sup> or a change in technology, or if the previous precedent was never really accepted or was an aberration. For Stewart, to overrule is less dishonest than to distinguish a precedent away.<sup>17</sup>

Along with his belief in accommodation and his commitment to precedent, Stewart also believes that a Justice must neither seek favor nor yield to personal prejudices. Indeed, a Justice's duty is not to "count constituents" but to "interpret a fundamental charter of government, regardless of his own moral, philosophical, or religious or political views."<sup>18</sup> Judges are not free to decide cases according to "personal predilections."<sup>19</sup>

the discharge of one's debts in bankruptcy). Stewart's dissent in *Kras*, joined by Justices Brennan, Marshall and Douglas, began with one of his most quotable lines: "The Court today holds that Congress may say that some of the poor are too poor even to go bankrupt. I cannot agree." *Id.* at 457 (Stewart, J., dissenting).

15. *Personal Interview* (Jan. 5, 1982), *supra* note 3. At the time of his confirmation hearings, Justice Stewart stated: "Certainly stare decisis is to me as important a principle as there is in the judicial function." *Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. 110 (1959).

16. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483 (1954).

17. *Personal Interview* (Jan. 5, 1982), *supra* note 3. *See, e.g., Chandler v. Florida*, 449 U.S. 560 (1981) (where the Court, in an opinion written by the Chief Justice for himself and five others, held that the states could permit the televising of court proceedings). Justice Stewart concurred in the result stating:

Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*. . . .

I believe now, as I believed in dissent then, that *Estes* announced a *per se* rule that the Fourteenth Amendment "prohibits all television cameras from a state courtroom whenever a criminal trial is in progress." . . . Accordingly, rather than join what seems to me a wholly unsuccessful effort to distinguish that decision, I would now flatly overrule it.

. . . .

The Court in *Estes* found the admittedly unobtrusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of Due Process of Law. Today the Court reaches precisely the opposite conclusion. I have no great trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

*Id.* at 583-86 (Stewart, J., concurring).

18. Address by Justice Stewart, Cincinnati Bar Association, Cincinnati, Ohio, at 14 (Sept. 14, 1979) [hereinafter referred to as *Cin. Bar Address*].

19. *Id.* at 11. Stewart also has stated that it is important for a judge "not to think of himself . . . as some great, big philosopher-king—to justify his own ideology. . . . Your boss is only the

What goes for the Justices also must go for the Supreme Court. To Stewart it is a court of law, not a court of justice. It is not a representative institution.<sup>20</sup> Although the issues presented to the Court may involve important social, political, economic and even philosophical problems, he does not believe that the Court is charged with making those decisions. As he stated:

[T]he Court is not a council of platonic guardians whose job it is to decide difficult and delicate questions according to the Justices' own notions of what is just or wise or politic. To the extent that this function is a governmental function at all, it is for the people's elected representatives, the legislative and executive branches. The judicial branch is charged with deciding controversies according to the Constitution and the law. And because the issues arise in the framework of concrete litigation, they must be decided on particularized facts embalmed in a record made in a trial court or an administrative agency.<sup>21</sup>

Justice Stewart has lived up to such statements far more than most judges, and those statements offer a reliable guide to his work.

The authors will take advantage of Justice Stewart's retirement to scrutinize a judicial record that has received too little attention.<sup>22</sup> During his tenure, Justice Stewart managed to maintain a low profile. Little known to the general public, he has not been the subject of much scholarly attention, perhaps because he appeared difficult to "pigeon hole," lacking an apparent commitment to any stated ideol-

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Constitution and the law. But they can be—and should be—very, very strict bosses." *Retirement Transcript*, *supra* note 4, at 16.

20. *Retirement Transcript*, *supra* note 4, at 3. Nonetheless, according to Justice Stewart, representation of differing opinions and points of view is healthy and proper. The Court would not be such a strong institution if all nine justices had been Harvard professors, like Justice Frankfurter, or Wall Street lawyers, like Justice Harlan. *Personal Interview* (Sept. 23, 1981), *supra* note 3.

21. *Cin. Bar Address*, *supra* note 18, at 11-12.

22. Although unexpected, Justice Stewart's decision to retire in good health and, at sixty-six, junior to five colleagues, should not be viewed as uncharacteristic. Stewart did not follow the pattern of remaining on the Court until his health deteriorated. (Of his colleagues who retired, Justices Frankfurter, Black, Harlan and Douglas all did so for reasons of poor health.) Instead, he was acting in conformity with his view of the necessity of change on the Court, and announced his decision with his distinctive ability to create a pithy phrase, stating, "[i]t's better to go too soon than to stay too long." *Retirement Transcript*, *supra* note 4, at 1. Justice Stewart explained that while he became eligible for retirement on his sixty-fifth birthday in January, 1980, he did not want to create a vacancy during an election year and thereby draw the Court inevitably into a presidential political campaign. *Id.* at 6.

ogy.<sup>23</sup> Only his first amendment views,<sup>24</sup> including his quotable phrase about obscenity,<sup>25</sup> were well-known.<sup>26</sup>

It is not Justice Stewart's judicial philosophy that is unusual. What is unusual, however, is that he consistently adhered to it in practice. The authors have chosen to examine his opinions dealing with the fourth amendment because his contribution in this area has been substantial and valuable. Those opinions offer a fair illustration of how Stewart lived up to the overall tenets of his judicial philosophy. While during the years Stewart served on the Supreme Court the judicially created exclusionary rule generated impassioned debate among judges, politicians and those concerned with law enforcement, Stewart refused to give way to strong passions or result-oriented jurisprudence. He marked his way with understated emotion, attempting to establish clear guidelines for the courts, police and ordinary citizens. He honored precedent and demonstrated marked craft in deal-

23. Relatively few articles have focused upon Justice Stewart. See, e.g., Friedman, *Potter Stewart*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 291-305 (L. Friedman & J. Israel eds. 1978); Israel, *Potter Stewart*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 2921 (L. Friedman & J. Israel eds. 1969); Barnett & Levine, *Mr. Justice Potter Stewart*, 40 N.Y.U. L. REV. 526 (1965); Lewis, *Justice Stewart and the Fourth Amendment Probable Cause: "Swing Voter" or Participant in a "New Majority"?*, 22 LOY. L. REV. 713 (1976).

24. See, e.g., Address by Potter Stewart, Or of the Press, Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), reprinted in 26 HASTINGS L.J. 631 (1976). See *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring); *Zurcher v. Stanford Daily*, 436 U.S. 547, 570 (1978) (Stewart, J., dissenting); *Pell v. Procunier*, 417 U.S. 817 (1974) (Stewart, J., majority opinion); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (Stewart, J., dissenting); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Stewart, J., concurring); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (Stewart, J., majority opinion). Compare *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (Stewart, J., majority opinion) with *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 (1980) (Stewart, J., concurring).

See also *Engel v. Vitale*, 370 U.S. 421, 444 (1962) (Stewart, J., dissenting). In *Engel*, the Court struck down mandatory school prayers. Stewart indicated at his retirement that this dissent attracted the greatest amount of mail of any of his opinions. *Retirement Transcript*, supra note 4, at 4-5.

25. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart has indicated that although he has labored thousands of hours over many of his opinions, it is "not lacking in irony" that the phrase which is most often quoted is his definition of obscenity, "I know it when I see it," which he wrote offhandedly. *Personal Interview* (Sept. 23, 1981), supra note 3. See also *Retirement Transcript*, supra note 4, at 4.

26. Having as a matter of choice spent his career not seeking the limelight, Justice Stewart received kudos on his retirement. See, e.g., Cutler, *Mr. Justice Stewart: A Personal Reminiscence*, 95 HARV. L. REV. 11 (1981); Powell, *Justice Stewart*, 95 HARV. L. REV. 1 (1981); Sandalow, *Potter Stewart*, 95 HARV. L. REV. 6 (1981); Kronstein & Wexler, *Justice Stewart's Craft*, 186 N.Y.L.J. 2 (1981); Unim, *Another Stewart Please*, N.Y. Times, June 24, 1981, at A23, col. 1; Greenhouse, *Stewart: A Lawyer, Not a Philosopher*, N.Y. Times, June 19, 1981, at A14, col. 3; *Knowing Justice When You See It*, N.Y. Times, June 19, 1981, at A26, col. 1.



ing with one of the most opaque areas of constitutional law. This is not to suggest that Stewart always lived up to his principles. But he came close. And this may well be the area where his presence on the Court will be most sorely missed.<sup>27</sup>

## II. JUSTICE STEWART AND THE FOURTH AMENDMENT: AN OVERVIEW

Justice Stewart had an obvious interest in the fourth amendment. He authored more than fifty opinions in this area, thirty-four for the Court, ten dissents and eight concurrences.<sup>28</sup> Significantly, these include the last two opinions he wrote as a Justice.<sup>29</sup> In his opinions, Stewart reveals himself to be a fourth amendment strict constructionist.<sup>30</sup> A study of his opinions reveals a consistent and persuasive view

27. One news story at the time of his retirement reported that "Justice Stewart's successor could also make a difference to the Fourth Amendment. . . . At least four Justices, not including Justice Stewart, have expressed a distaste for continuing to apply this exclusionary rule, which is also under attack in Congress. . . ." Taylor, *Addition of Conservative to Court Could Tip Balance*, N.Y. Times, June 29, 1981, at B6, col. 1.

Sandra Day O'Connor, appointed to the United States Supreme Court by President Reagan, gave an indication of her views on the fourth amendment in her confirmation hearing before the Senate. In her testimony, she stated that the exclusionary rule has caused general public discontent and indicated that she might be receptive to a "good faith" exception; because it is a judge-made rule, the Supreme Court probably could alter it without doing violence to a constitutional provision or principle. *Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 142-43, 195 (1981). See also *infra* note 157. For confirmation of her position on the exclusionary rule, see *Taylor v. Alabama*, 102 S. Ct. 2664, 2669 (1982) (O'Connor, J., dissenting).

28. Of course different people might count cases differently. The authors have reviewed every opinion involving the fourth amendment authored by Justice Stewart during his twenty-three years on the Court and have referred to all significant majority, dissenting and concurring opinions in the text or footnotes. The authors have not discussed Stewart opinions that contained fourth amendment issues but were decided on other grounds. See, e.g., *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting); *Massiah v. United States*, 377 U.S. 201 (1964).

29. *New York v. Belton*, 453 U.S. 454 (1981); *Robbins v. California*, 453 U.S. 420 (1981). See *infra* notes 101-09 and accompanying text for discussion.

30. The fourth amendment to the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

Stewart did not join the majority in *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)). In *Wolf*, the Court refused to impose the exclusionary rule of evidence, applicable in federal prosecutions since 1914, to the states. See *Weeks v. United States*, 232 U.S. 383 (1914). Justice Clark's opinion in *Mapp* for five members of the Court was joined by Chief Justice Warren and Justice Brennan; Justice Douglas and Justice Black each separately concurred. Justice Harlan, joined by Justices Frankfurter and Whittaker, dissented. Justice Stewart filed a one paragraph memorandum, agreeing with part of Justice Harlan's dissenting opinion that *Mapp* was not an appropriate case to overrule *Weeks* because the statute involved

that the words of the fourth amendment are clear as written and that any exceptions must be drawn narrowly. While other Justices have been particularly concerned with the overall evidence of the defendant's guilt,<sup>31</sup> his expectation of privacy<sup>32</sup> or the governmental interest involved,<sup>33</sup> Justice Stewart remained steadfast in his literal reading of the amendment.

Justice Stewart read the two clauses of the fourth amendment together. The first requirement of the Constitution in this area is that a warrant must be obtained from a neutral magistrate<sup>34</sup> and must be specific as to people,<sup>35</sup> places<sup>36</sup> and things.<sup>37</sup> The necessity of a warrant is fundamental. As Stewart wrote in *Katz v. United States*, the basic modern rule<sup>38</sup> is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions."<sup>39</sup> According to Justice Stewart, warrantless searches will withstand constitutional scrutiny only if they are incident to a lawful arrest,<sup>40</sup> pursuant to exigent circumstances,<sup>41</sup> or when the evidence found was in plain view.<sup>42</sup>

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violated the first amendment, but adding, "I express no view as to the merits of the constitutional issue which the Court today decides." 367 U.S. at 672.

Stewart wrote the opinion for the Court in *Elkins v. United States*, 364 U.S. 204 (1960), which discarded the "silver platter" doctrine of *Weeks*. In *Elkins*, the Court held that evidence seized in an illegal search by state police officers must be excluded from a federal criminal trial. Stewart argued that the exclusionary rule was "calculated to prevent, not to repair . . . to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217. See also *United States v. Janis*, 428 U.S. 433, 460 (1976) (Stewart, J., dissenting) (reaffirming the *Elkins* rationale); *Rios v. United States*, 364 U.S. 253 (1960) (companion case to *Elkins*).

31. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 502 (1971) (Black, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 560 (1968) (Black, J., dissenting).

32. See *Robbins v. California*, 453 U.S. 420, 429 (1981) (Powell, J., concurring); *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

33. See *Robbins v. California*, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting); *Ybarra v. Illinois*, 444 U.S. 85, 96 (1979) (Burger, C.J., dissenting).

34. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

35. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

36. *Id.*

37. *Stanford v. Texas*, 379 U.S. 476 (1965).

38. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

39. 389 U.S. 347, 357 (1967) (footnotes omitted).

40. To be constitutional, a search incident to a lawful arrest must be limited in time and space. See, e.g., *Vale v. Louisiana*, 399 U.S. 30 (1970) (discussed *infra* notes 79-81 and accompanying text); *Chimel v. California*, 395 U.S. 752 (1969).

41. Exigent circumstances include the danger of immediate destruction of evidence, the involvement of a moving automobile or the police in hot pursuit.

42. Here the initial intrusion that brings police within inadvertent plain view must be supported by one of the recognized exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

While some members of the Court have preferred to treat the two clauses of the fourth amendment separately, judging searches and seizures without a warrant by a standard of reasonableness,<sup>43</sup> Justice Stewart would not expand upon narrowly delineated exceptions to the warrant requirement. Even where the government urged that a vital interest in the prompt investigation of a brutal murder presented an emergency situation requiring an immediate search of a homicide scene without a warrant, Stewart rejected that argument, stating "[i]f the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary?"<sup>44</sup> For Stewart, the need for more efficient law enforcement could not by itself justify a disregard of the fourth amendment.<sup>45</sup> Recognizing that criminal investigations always would be simplified if warrants were unnecessary, Stewart insisted that "the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home or property may not be totally sacrificed" for the sake of simplicity in law enforcement.<sup>46</sup> Stewart therefore rejected the creation of a "murder scene exception," and reaffirmed that the fourth amendment requires a neutral, objective magistrate, not a police officer, to assess the reasonableness and scope of a proposed search.

### III. SCOPE OF PROTECTION

Justice Stewart's fourth amendment opinions reveal his very broad view of the scope of the fourth amendment. To him, an individual may be protected from unreasonable searches and seizures whether he is in his home, office, hotel room, automobile or even a telephone booth.<sup>47</sup> While he reaffirmed that "at the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,"<sup>48</sup> he indicated that the Court has been "far from niggardly" in construing the physical scope of the fourth amendment protection.<sup>49</sup>

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43. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 510 (1971) (White, J., concurring in part and dissenting in part).

44. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

45. *Id.*

46. *Id.*

47. *Lanza v. New York*, 370 U.S. 139, 143 (1962).

48. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

49. *Lanza v. New York*, 370 U.S. 139, 143 (1962). Nonetheless, Stewart concluded that a jail shares none of the attributes of privacy found in a home, an automobile, an office, or a hotel room and rejected the argument that the visitor's room of a public jail is a constitutionally protected area. *Id.*

In 1967, Justice Stewart authored the landmark decision that exploded all previous notions regarding what is seizable and from where—*Katz v. United States*.<sup>50</sup> The government had overheard Katz's telephone conversations by using an electronic listening device attached to the outside of a public telephone booth. No warrant had been obtained. The Court held that the conversations could not be introduced into evidence. Justice Stewart, expressing the views of seven members of the Court,<sup>51</sup> began by rejecting any talismanic definition of constitutionally protected areas, declaring that "the Fourth Amendment protects people, not places."<sup>52</sup> When the petitioner entered the booth, he sought to exclude not the "intruding eye" but the "uninvited ear."<sup>53</sup> Although the absence of physical entry at one time was thought to foreclose inquiry under the fourth amendment, this trespass theory had been discredited and no longer was followed. The two leading cases on the trespass theory, *Olmstead v. United States*<sup>54</sup> and *Goldman v. United States*,<sup>55</sup> specifically were overruled.<sup>56</sup> Thus the Court held that the conversations were seized even though no physical intrusion occurred. Stewart flatly rejected the government's attempt to expand the few specifically established and well-delineated exceptions to permit surveillance of a telephone booth without advance authorization by a magistrate.<sup>57</sup> Warrantless searches were per se unreasonable.<sup>58</sup> *Katz* remains one of Justice

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Two years later Stewart wrote on behalf of all but one member of the Court, holding that a warrantless search of a hotel room could not be rendered lawful by the permission of the night clerk. The petitioner's constitutional right was involved, not the night clerk's or the hotel's. *Stoner v. California*, 376 U.S. 483, 489 (1964) (Stewart, J., majority opinion).

50. 389 U.S. 347 (1967).

51. Only Justice Black dissented. Justice Marshall took no part in the decision.

52. 389 U.S. at 351.

53. *Id.* at 352.

54. 277 U.S. 438 (1928).

55. 316 U.S. 129 (1942).

56. 389 U.S. at 353.

57. Justice Harlan, in a separate concurring opinion in *Katz*, argued that the case ought to turn on the defendant's "constitutionally protected reasonable expectation of privacy." *Id.* at 360. Stewart specifically rejected this ground in the Court opinion, stating that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Id.* at 350.

Speaking about *Katz* some fourteen years later, Justice Stewart referred with respect to Justice Harlan's point of view but emphasized that he accepted the approach of Warren and Brandeis in their seminal article—Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)—that the right to privacy is not a general constitutional right but a matter of state law. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

58. Justice Stewart authored the opinion for a five to three Court in *Desist v. United States*, 394 U.S. 244 (1969) (holding *Katz* prospective in application). Recognizing that *Katz* was "a clear break with the past," *id.* at 248, Stewart applied the threefold test developed in *Linkletter v. Walker*, 381 U.S. 618 (1965), to determine that *Katz* also should be applied prospectively. *See*

Stewart's most significant opinions and states the cardinal principle the Court continues to apply to fourth amendment jurisprudence.<sup>59</sup>

#### IV. WARRANT REQUIREMENT

Stewart holds paramount the requirement that the government obtain a warrant issued by a neutral magistrate specifying the persons, places and things to be seized. In *Stanford v. Texas*, Justice Stewart, writing for a unanimous Court, reviewed the warrant requirement in depth.<sup>60</sup> Stewart found the language of the warrant clause precise and clear. After considering the history of governmental intrusion suffered by the colonists at the hand of the Crown, he found that a general warrant, like the one issued by the state magistrate in this case, was exactly the kind of warrant that the fourth amendment was designed to forbid.<sup>61</sup> It was not particularized sufficiently.<sup>62</sup>

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also *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966). Accordingly, on the same day that it decided *Desist*, the Court in *Kaiser v. New York*, 394 U.S. 280 (1969) (Stewart, J., majority opinion), held that recordings made prior to *Katz* were admissible.

59. See *United States v. Ross*, 102 S. Ct. 2157 (1982). Justice Stewart reaffirmed and refined the *Katz* doctrine throughout his tenure on the Court. However, with a change in Court membership, he was forced to dissent strongly from the majority holding in *Smith v. Maryland*, 442 U.S. 735 (1979), that insertion of a pen register, which records the numbers dialed but not actual conversations, does not violate the fourth amendment. Stewart reasoned that the numbers dialed from a private telephone were just as much within the constitutional protection recognized in *Katz* as the conversation that occurred during that call. Such numbers were not without content as they could reveal intimate details of a person's life, such as the identities of persons and places called. *Id.* at 747-48 (Stewart, J., dissenting). Because no warrant was obtained prior to its installation, the pen register was per se unreasonable, according to Stewart. *Cf.* *United States v. New York Tel. Co.*, 434 U.S. 159 (1977) (Stewart, J., concurring) (where Justice Stewart agreed with the majority opinion which held that a district court had authority to issue an order authorizing installation of pen registers because the order had been approved by an independent magistrate and because only the number of calls was to be monitored, not the actual phone numbers dialed).

Justice Stewart's involvement in the law governing wiretapping is worthy of greater attention than the authors are able to offer here. See, e.g., *United States v. Kahn*, 415 U.S. 143 (1974) (post-*Katz*); *Lee v. Florida*, 392 U.S. 378 (1968) (same); *Berger v. New York*, 388 U.S. 41, 68 (1967) (Stewart, J., concurring) (pre-*Katz*); *Osborn v. United States*, 385 U.S. 323 (1966) (same); *Silverman v. United States*, 365 U.S. 505 (1961) (same); *Elkins v. United States*, 364 U.S. 204 (1960) (same). In *Lee*, Stewart wrote for the Court and held that evidence obtained from wiretaps illegal under federal law could not be admitted in state criminal prosecutions. In *Kahn*, Stewart, again writing for the Court, held that Title III of the Omnibus Crime Control and Safe Streets Act requires that a person be named in the application or interception order only when law enforcement authorities have probable cause to believe that that individual is committing the offense for which the wiretap is sought.

60. 379 U.S. 476 (1965) (Stewart J., majority opinion).

61. *Id.* at 486.

62. With regard to the warrant in *Stanford*, Stewart stated, "[t]he indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history." *Id.*

Not only must a warrant be particular, but also its terms must be followed by law enforcement officers. In *Stanley v. Georgia*, federal and state agents under authority of a search warrant entered the defendant's home seeking evidence of alleged bookmaking.<sup>63</sup> Instead they found and seized films from a desk drawer which they viewed and deemed obscene. The Supreme Court held that mere private possession of obscene material constitutionally could not be considered a crime. Justice Stewart, joined by Justices Brennan and White, concurred only in the result on the ground that seizure of the films violated the fourth amendment.<sup>64</sup> Although the warrant had been issued by a neutral magistrate apprised of probable cause and had described the place to be searched and the things to be seized with particularity, the officers searching pursuant to the warrant overstepped its limits by seizing films not specified in the warrant.

Besides specifying the items to be seized, a warrant must be issued by a magistrate possessing sufficient neutrality. In *Coolidge v. New Hampshire*, a case involving the commission of a particularly savage murder, the Court through Justice Stewart struck down a warrant issued by a state official who was also the chief investigator in the case.<sup>65</sup> He concluded that prosecutors and policemen could not be expected to maintain sufficient neutrality with regard to their own investigation.<sup>66</sup> A warrant issued without the requisite neutrality should be treated as a nullity. Faithful to his scrupulously literal reading of the fourth amendment despite the drumroll of criticism directed at the Court's decisions involving criminal procedure, Stewart wrote with a rare open expression of emotion and with eloquence:

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or extravagant to some. But the values were those of the authors of our fundamental constitutional concepts. In times not

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63. 394 U.S. 557 (1969).

64. *Id.* at 569. Stewart used concurring opinions in fourth amendment cases to limit or restrict the breadth of the Court's decision to a specific fact pattern or narrow issue, or to clarify the extent of the Court's holding. See *United States v. Cortez*, 449 U.S. 411, 422 (1981) (Stewart, J., concurring); *United States v. Watson*, 423 U.S. 411, 433 (1976) (Stewart, J., concurring); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (Stewart, J., concurring); *Chambers v. Maroney*, 399 U.S. 42, 54 (1970) (Stewart, J., concurring); *Giordano v. United States*, 394 U.S. 310 (1969) (Stewart, J., concurring); *Berger v. New York*, 388 U.S. 41, 68 (1967) (Stewart, J., concurring). But see *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (Stewart, J., concurring) (suggesting an alternative analysis).

65. 403 U.S. 443 (1971) (Stewart, J., majority opinion).

66. *Id.* at 450.

altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.<sup>67</sup>

The final requirement to satisfy the warrant clause is specificity as to the persons to be searched. *Ybarra v. Illinois* involved a state statute that permitted the search of any persons found on premises being searched pursuant to a warrant.<sup>68</sup> The warrant in this case specified that a tavern and its bartender be searched for suspected illegal drugs. Ybarra was a patron in the bar at the time the search was conducted. Striking down the search of Ybarra, Justice Stewart wrote that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."<sup>69</sup>

#### V. LIMITED EXCEPTIONS

According to Justice Stewart, any searches conducted without satisfying the warrant requirements should be treated as warrantless and per se unreasonable unless one of the "specially established," "nar-

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67. *Id.* at 455. *Coolidge* is further noteworthy because Justice Stewart atypically devoted a ten page detailed and particularized response to arguments raised by Justice White in his dissent, concluding:

Of course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent. But it is no less nonsense to suggest, as does Mr. Justice White, . . . that we cease today "to strive for clarity and consistency of analysis," or that we have "abandoned any attempt" to find reasoned distinctions in this area. The time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework. We need accept neither the "clarity and certainty" of a Fourth Amendment without a warrant requirement nor the facile consistency obtained by wholesale overruling of recently decided cases.

*Id.* at 483.

68. 444 U.S. 85 (1979).

69. *Id.* at 91. Characteristically, Justice Stewart limited this holding by stating that the Court "need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs." *Id.* at 92 n.4. See also *Hoffa v. United States*, 385 U.S. 293, 302 n.6 (1966); *Stanford v. Texas*, 379 U.S. 476, 485 n.16 (1965); *Silverman v. United States*, 365 U.S. 505, 509 (1960); *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960).

rowly delineated" or "jealously and carefully drawn" exceptions apply.<sup>70</sup>

The first exception involves searches incident to a constitutionally valid arrest. Constitutionality depends in part upon whether the officers had probable cause to make the arrest. In *Beck v. Ohio*, an early Stewart fourth amendment opinion, the Court struck down a warrantless arrest made on information from a vague source that the petitioner was involved in illegal gambling.<sup>71</sup> Stewart, speaking for six members of the Court, set forth basic principles to which he adhered throughout his tenure. His concern with a warrantless arrest was that it "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."<sup>72</sup> While assuming that the police officers had acted in good faith in making the arrest, Stewart nonetheless held that subjective good faith alone was not enough to preserve the protections of the fourth amendment.<sup>73</sup>

A warrantless search incident to a lawful arrest may be constitutional where probable cause for the search exists, but only if limited in time (substantially contemporaneous with the arrest) and place (immediate vicinity of the arrest).<sup>74</sup> Justice Stewart sought to confine this exception to these limiting principles. In *Chimel v. California*, Justice Stewart clarified the law concerning the permissible scope of searches incident to an arrest,<sup>75</sup> which had been marked throughout the twentieth century by decisions difficult to reconcile.<sup>76</sup> In *Chimel*, police officers arrived at defendant's home with an arrest warrant for burglary of a coin shop. They were admitted to the house by defendant's

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70. *Coolidge*, 403 U.S. at 455.

71. 379 U.S. 89 (1964) (Stewart, J., majority opinion).

72. *Id.* at 96.

73. *Id.* at 97. In *McCray v. Illinois*, 386 U.S. 300, 304 (1966), Stewart distinguished *Beck* and upheld a warrantless arrest supported by probable cause where the informant had been reliable in the past and where his information in this case was specific and credible.

74. *Chimel v. California*, 395 U.S. 752 (1969).

75. *Id.* at 752.

76. See *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Trupiano v. United States*, 334 U.S. 699 (1948); *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Marron v. United States*, 275 U.S. 192 (1927); *Agnello v. United States*, 269 U.S. 20 (1925); *Carroll v. United States*, 267 U.S. 132 (1925); *Weeks v. United States*, 232 U.S. 383 (1914). The *Rabinowitz* proposition that a warrantless search incident to a lawful arrest generally extends to the area considered to be in the "possession" or "within the control" of the persons arrested was overruled, as was *Harris*. *Chimel*, 395 U.S. at 768.



wife with whom they waited until the defendant returned. Upon his return, the officers searched the entire house, including the attic, garage and workshop. In the master bedroom the officers directed the wife to open drawers and remove their contents. The Court, although recognizing that a police officer reasonably may expect the arrestee to use any weapons he may have and to attempt to destroy incriminating evidence in his possession or within his grab, held that searches made incident to a lawful arrest may extend only as far as the area within the arrestee's immediate control.<sup>77</sup> There is no justification for the warrantless search of rooms other than the one in which the arrest occurred, or even searching closed or concealed areas within that room.

In unequivocally rejecting the argument that a search of a person's house is reasonable when he is arrested in it, Justice Stewart contended that the argument was based on a subjective view of acceptable police conduct, and not on fourth amendment considerations. Fourth amendment protection would approach the evaporation point under such an unconfined analysis. Stewart found it difficult "to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest."<sup>78</sup>

A year later Stewart authored the opinion in *Vale v. Louisiana* for six members of the Court, holding unconstitutional a search of defendant's home by police officers who had a warrant for defendant's arrest.<sup>79</sup> After arresting the defendant on the front steps of his house, the officers brought him into the house and searched the entire dwelling, finding narcotics in the bedroom. Justice Stewart specifically held that for a warrantless search of a house to be justified as incident to arrest, the arrest must take place inside the house.<sup>80</sup> The police officers had sufficient time to obtain a warrant, and there was no special exception from the warrant requirement because, even though narcotics are easily removed, hidden or destroyed, the defendant was not destroying or removing them.<sup>81</sup>

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77. *Chimel*, 395 U.S. at 763.

78. *Id.* at 764-65 (footnotes omitted).

79. 399 U.S. 30 (1970) (Stewart, J., majority opinion).

80. In *Payton v. New York*, 445 U.S. 573 (1980), the Court held that the police may not enter a private residence to make a routine felony arrest without first obtaining a warrant. Stewart voted with the majority. In *Steagald v. United States*, 451 U.S. 204 (1981), Stewart again voted with the majority, holding that the search of a defendant's home pursuant to an arrest warrant for another individual violated the fourth amendment.

81. 399 U.S. at 33-34.

A change in membership resulted in the Court's beginning to retreat from the principles enunciated in *Chimel*. In two cases, Stewart, joined by three of the other four justices who sat in *Chimel*, vigorously dissented. In *United States v. Edwards*, the search of the defendant began late at night when he was taken to the police station incident to his arrest.<sup>82</sup> The search was abandoned due to the lateness of the hour and resumed the following morning. Ten hours later a seizure of clothing was made. In an opinion by Justice White,<sup>83</sup> the Court upheld the seizure, stating that the administrative mechanics of arrest had not been completed and the officers had probable cause to believe that the articles of clothing worn by the defendant were themselves material evidence of the crime.

Stewart, joined by Justices Douglas, Brennan and Marshall, sharply disagreed with what he viewed as an about-face.<sup>84</sup> In this case, he stated, there had been ample time for the police to obtain a warrant since the search occurred ten hours after the arrest. Thus there was no justification for dispensing with the warrant requirement. Disturbed that the Court was looking to the "reasonableness" of the search, rather than applying the *Chimel* test, Stewart argued that "the mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographical or temporal scope."<sup>85</sup> Although the intrusion in this case "was hardly a shocking one" and the police were not acting in bad faith, the fourth amendment "was not designed to apply only to situations where the intrusion is massive and the violation of privacy shockingly flagrant."<sup>86</sup>

The Court in *Cardwell v. Lewis*, a plurality opinion, also upheld as incident to arrest the seizure of paint scrapings taken from an automobile in a public parking lot and a later search of its exterior in a police impoundment area.<sup>87</sup> Justice Stewart, joined again in dissent by Justices Douglas, Brennan and Marshall, would have held the police strictly to the *Chimel* standard. Since the automobile was neither

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82. 415 U.S. 800 (1974).

83. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined in the majority opinion.

84. Justice Stewart asserted, "[t]he Court says that the question before us 'is whether the Fourth Amendment should be extended' to prohibit the warrantless seizure of Edwards' clothing. I think, on the contrary, that the real question is whether the Fourth Amendment is to be ignored." 415 U.S. at 809 (Stewart, J., dissenting).

85. *Id.* at 810.

86. *Id.* at 812.

87. 417 U.S. 583 (1974). *See also* *South Dakota v. Opperman*, 428 U.S. 364, 384 (1976) (where Stewart joined a four-man dissent—the majority upheld the routine police inventory search of a closed glove compartment of a locked car impounded for a traffic violation).

moving nor removable from the police impoundment area, there was no real danger that the evidence would be destroyed. Thus there was no constitutional reason to grant an exception to the warrant requirement.

A second exception to the warrant requirement is that of "exigent circumstances," exemplified by a moving automobile,<sup>88</sup> the police in hot pursuit, or evanescent evidence, where a warrantless search and seizure is constitutionally permitted. Stewart construed this exception narrowly. In *Michigan v. Tyler*, for example, he reviewed the applicability of the fourth amendment to acts of fire investigators who enter fire-damaged premises.<sup>89</sup> He recognized that innocent fire victims retain the protection of the fourth amendment and that a person's reasonable expectation of privacy does not diminish simply because a fireman rather than a policeman conducts the search.<sup>90</sup> The emergency situation clearly permits firefighters to enter burning premises without a warrant, to remain there for a reasonable time to investigate the cause of a blaze and to make warrantless seizures of evidence pursuant to this purpose. However, once the emergency subsides, the warrant requirement reappears and any subsequent warrantless entries and searches would be deemed per se unreasonable.

In *Cupp v. Murphy*, Justice Stewart again reviewed facts indicating exigent circumstances that would permit a warrantless search.<sup>91</sup> He found the limited warrantless search and seizure of material under defendant's fingernails constitutionally acceptable. The samples, taken by the police under protest and without a warrant, contained

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88. See *Coolidge v. New Hampshire*, 403 U.S. 443, 461-63 (1971). The automobile exception first was enunciated in *Carroll v. United States*, 267 U.S. 132 (1925), long before Justice Stewart ascended to the bench. It permitted warrantless searches of automobiles stopped on the highway provided that the officer had probable cause to believe contraband goods were being transported illegally. Such searches had been authorized specifically by Congress under the National Prohibition Act. The underlying rationale of *Carroll* was reaffirmed in *Chambers v. Maroney*, 399 U.S. 42 (1970), where the Court emphasized that the car's contents might never be found again if a warrant had to be obtained first. Justice Stewart specifically concurred in *Chambers*, joining the opinion on fourth amendment grounds although he personally felt that the admission at trial of evidence acquired in alleged violation of fourth amendment standards was not of itself a sufficient ground for collateral attack upon an otherwise valid conviction. *Id.* at 54 (Stewart, J., concurring).

89. 436 U.S. 499 (1978) (Stewart, J., opinion of the Court).

90. *Id.* at 506. Justice Stewart went on to state that "[s]earches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment." *Id.* For Justice Stewart's own view of administrative searches, see *infra* notes 145-53 and accompanying text. Because this decision came down after *Barlow's*, he obviously applied its holding with full force and effect.

91. 412 U.S. 291 (1973) (Stewart, J., majority opinion).

skin and blood cells from the defendant's murdered wife and were introduced against him at a subsequent trial. As there had been probable cause to link defendant to the murder, and he was well aware that he was considered a suspect, such knowledge, as reviewed by Justice Stewart, was enough to "motivate him to attempt to destroy [the evidence] . . . ." <sup>92</sup> The police in these circumstances were justified therefore "in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." <sup>93</sup>

Justice Stewart's narrowing of the possible exceptions to the blanket prohibition against warrantless searches extends to the "plain view" exception. To invoke this exception, according to Justice Stewart, the officer seizing evidence in plain view must have had a prior justification for the intrusion. Having made a legitimate intrusion, if he inadvertently discovers a piece of evidence lying in plain view that incriminates the accused, he may seize it. But plain view alone is never enough to justify the warrantless seizure of evidence. <sup>94</sup>

In *Davis v. Mississippi*, the Court held that fingerprints taken during an arrest for which there was neither probable cause nor a warrant were inadmissible. <sup>95</sup> Justice Stewart's dissent presaged what would become the Court's view of this type of evidence which is, in fact, in plain view: "Fingerprints are not 'evidence' in the conventional sense . . . . Like the color of a man's eyes, his height or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingertips can be exactly and endlessly reproduced." <sup>96</sup>

In *United States v. Dionisio* <sup>97</sup> and its companion case *United States v. Mara*, <sup>98</sup> Justice Stewart, writing for the Court, expanded on his dissent in *Davis*. "The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear." <sup>99</sup> Thus the Court upheld the right of the grand jury to compel production of voice prints. <sup>100</sup>

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92. *Id.* at 296.

93. *Id.*

94. See *Coolidge*, 403 U.S. at 468.

95. 394 U.S. 721 (1969).

96. *Id.* at 730 (Stewart, J., dissenting).

97. 410 U.S. 1 (1973) (Stewart, J., majority opinion).

98. 410 U.S. 19 (1973) (Stewart, J., majority opinion).

99. 410 U.S. at 14.

100. *Dionisio* also may be seen as a demonstration of Stewart's respect for the grand jury. For Stewart, every person is obliged to appear and give evidence before a grand jury. See, e.g.,

The last two opinions penned by Justice Stewart prior to his retirement appear at first to be inconsistent. But according to Stewart, they are reconcilable. In *Robbins v. California*, Stewart wrote the plurality opinion for the Court.<sup>101</sup> In that case, the police approached defendant's car because of his erratic driving. When defendant opened his car to get his registration, an officer smelled marijuana. The police then searched the car and found a sealed plastic bag in the luggage compartment. The police opened the container and found marijuana bricks. Although the case was argued in terms of defendant's expectation of privacy, Justice Stewart based his exclusion of this evidence on his already articulated, almost literal reading of the fourth amendment that warrantless searches are per se unreasonable unless they fall within one of the narrowly circumscribed exceptions. Here there was no arrest prior to seizure so the incident to arrest exception was inapplicable. There was no testimony regarding exigent circumstances such as the possibility of flight or destruction of evidence. Justice Stewart specifically found that the automobile exception did not apply because "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."<sup>102</sup> The marijuana, placed in a sealed opaque container in the covered portion of the trunk area of the car, was clearly not in plain view. Further, there was ample opportunity to obtain a warrant before opening the package. Thus the warrantless search violated the Constitution, and the seized evidence was inadmissible.

In *New York v. Belton*, decided on the same day as *Robbins*, Justice Stewart wrote the opinion for a Court divided six to three.<sup>103</sup> In that case the police overtook a speeding vehicle, smelled marijuana and

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*Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Stewart, J., dissenting). "[A] subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Dionisio*, 410 U.S. at 9. See also *United States v. Calandra*, 414 U.S. 338 (1974) (where Stewart joined a majority holding that a grand jury may base questions upon information obtained from an illegal search and seizure); *United States v. Mara*, 410 U.S. 19 (1973). Cf. *Gelbard v. United States*, 408 U.S. 41 (1972) (where Stewart joined a five to four majority holding that under Title III of the Omnibus Crime Control Act, a witness before a federal grand jury may refuse to testify on the ground that the interrogation will be predicated upon illegal wiretapping and electronic surveillance).

101. 453 U.S. 420 (1981). Although the opinion was joined by Justices Brennan, White and Marshall, Chief Justice Burger only concurred in the judgment without opinion. Justice Powell concurred in the judgment based on defendant's reasonable expectation of privacy—a ground Justice Stewart rejected in *Katz v. United States*, 389 U.S. 347 (1967), decided before Justice Powell joined the Court. See *supra* note 57. Justices Blackmun, Rehnquist and Stevens dissented.

102. 453 U.S. at 425.

103. 453 U.S. 454 (1981).

saw an envelope on the floor marked "Supergold," a term associated with marijuana. The occupants of the car were ordered out of the car and placed under arrest for unlawful possession of marijuana. A search of the passenger compartment followed, and in a zipped pocket of a jacket lying on the back seat the police found cocaine. Justice Stewart found the introduction of the cocaine permissible because it was seized in a search incident to a lawful custodial arrest. A search incident to a lawful arrest based on probable cause is a reasonable intrusion under the fourth amendment when it immediately follows the arrest and is limited in space to the area within the arrestee's immediate control. Concerned with the courts' difficulty in applying *Chimel* and seeking to establish a workable rule, Stewart held that as a contemporaneous incident of a lawful arrest of an occupant in an automobile, the police may search the passenger compartment, including any open or closed containers found within it. Justice Stewart explained that articles inside the passenger compartment of a car are "within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'"<sup>104</sup> Thus the evidence found during this contemporaneous search of the passenger compartment was admissible.

While *Belton* could be viewed as a retreat from *Chimel*, Justice Stewart explains that the Court would be engulfed by factual variations if it did not set down a workable rule that everything within a car's passenger compartment is within the arrestee's immediate control, and therefore is subject to a warrantless search incident to a lawful arrest.<sup>105</sup> According to Stewart, the cases can be reconciled with each other and with the fourth amendment.

Justice Stewart's last two opinions were the subject of vigorous criticism.<sup>106</sup> They hardly can be viewed as successful, even on Justice Stewart's own terms. Stewart was not able to command a majority of the Court in *Robbins* so as to produce a Court opinion.<sup>107</sup> Nor was he

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104. *Id.* at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). See Justice Brennan's dissent, joined by Justice Marshall, in spite of Justice Stewart's specific statement that "[o]ur holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460 n.3.

105. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

106. See, e.g., J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS & DEVELOPMENTS* 69-119 (1982); Comment, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U.L. REV. 291 (1982); *The Supreme Court—1980 Term*, 95 HARV. L. REV. 91, 251-61 (1981); Kamisar, *4th Amendment Hatchback*, Wash. Post, Oct. 15, 1981, at A29, col 3.

107. There were five separate opinions written in *Robbins* and Chief Justice Burger concurred only in the judgment.

able to provide the desired guidance for lower courts, as evidenced by the action taken in *Belton* on remand by the Court of Appeals of New York.<sup>108</sup> And the Court's decision in *Robbins* did not survive even one year.<sup>109</sup>

## VI. MINIMAL INTRUSIONS

One category of seizures that technically are covered by the fourth amendment involve such minimal limited intrusions that they can be justified on facts less than probable cause to arrest. During Justice Stewart's tenure, Court opinions identified two such situations: (1) street crime—a "stop and frisk" patdown conducted by police acting in self-defense upon the belief that the person was armed and dangerous; and (2) border crossings—brief stops by the border patrol for questioning about citizenship or immigration status, based upon specific objective facts that create a reasonable suspicion of criminal activity. Justice Stewart joined in the opinions of the court, recognizing that in these two areas realities dictate the need for a limited stop for questioning upon suspicion less than probable cause. Not surprisingly, he sought to keep those two exceptions narrowly circumscribed.<sup>110</sup>

Stewart joined Chief Justice Warren's opinion for the Court in *Terry v. Ohio* where the Court held that the police may "stop and frisk" a person for weapons and to prevent destruction of evidence upon the belief that the person was armed and dangerous.<sup>111</sup> In

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108. While the Supreme Court upheld the search as proper because it was incident to a lawful custodial arrest, the Court of Appeals of New York subsequently held the search justified by the automobile exception to the warrant requirement. *People v. Belton*, 55 N.Y.2d 49, 432 N.E.2d 745, 447 N.Y.S.2d 873 (1982). The concurring opinion of Judge Gabrielli specifically found this course of action questionable. "[O]n remand, the majority expressly rejects the rationale articulated by the Supreme Court . . . and upholds the search . . . upon an independent rationale not addressed or mentioned by the majority on the previous appeal in this court." *Id.* at 56, 432 N.E.2d at 748-49, 447 N.Y.S.2d at 876-77 (Gabrielli, J., concurring).

109. In *United States v. Ross*, 102 S. Ct. 2157 (1982), Justice Stevens for a six to three Court held that police pursuant to the automobile exception may search without a warrant every part of a vehicle being searched including closed containers, and rejected the precise holding in *Robbins*. But the Court specifically reaffirmed the basic rule of fourth amendment jurisprudence stated by Justice Stewart in *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz*, 389 U.S. 347, 357 (1967)). Justices White, Marshall and Brennan dissented. In reporting this decision, the *New York Law Journal* stated, "[t]he Court's sharp reversal was due in part to the addition of its newest justice, Sandra Day O'Connor, whose vote helped swing the pendulum to give police broader authority in search-and-seizure situations." 187 N.Y.L.J. 1 (1982).

110. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968).

111. 392 U.S. 1 (1968). See also *Sibron v. New York*, 392 U.S. 40 (1968) (companion case to *Terry*) (the same standard applied to different facts yielded a contrary result). Justice Stewart also joined the majority opinion in *Adams v. Williams*, 407 U.S. 143 (1972), in which the Court

*Ybarra v. Illinois*, the police searched a tavern pursuant to a valid warrant and detained and frisked a customer in that tavern.<sup>112</sup> After rejecting probable cause as a basis for Ybarra's search simply because Ybarra happened to be in the tavern, Justice Stewart concluded that the initial patdown did not constitute a reasonable frisk for weapons under *Terry* because the search was not supported by a reasonable belief that the customer was armed and dangerous.<sup>113</sup> Justice Stewart further explained that

[t]he *Terry* case created an exception to the requirement of probable cause, an exception whose "narrow scope" this court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted . . . . The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.<sup>114</sup>

Thus despite the important governmental interest in controlling drug traffic, Justice Stewart rejected the argument that the fourth amendment should permit searches of persons who are found on compact premises and who the police have reason to believe are connected with the drug traffic. He reaffirmed the longstanding principle that probable cause remains the best method for accommodating individual safeguards to law enforcement efforts.<sup>115</sup>

The most troubling decision by Justice Stewart in this area is his opinion for the Court in *United States v. Mendenhall*.<sup>116</sup> In *Mendenhall*, the record showed that federal agents initially approached the defendant, who fit the "drug courier profile," in an airport, identified themselves truthfully and then asked to see her ticket and identification without a warrant or probable cause to believe she was

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held that police officers responding to an informant's tip could provide probable cause for a stop and frisk based on information supplied by the informant who was known to the officers personally and had supplied past information to them. Justices Douglas, Brennan and Marshall dissented.

112. 392 U.S. 1 (1968). See *supra* notes 68-69 and accompanying text.

113. 444 U.S. 85, 92-93 (1979) (Stewart, J., majority opinion).

114. *Id.* at 93-94.

115. In his dissent, Chief Justice Burger, joined by Justices Blackmun and Rehnquist, accused the Court of unjustifiably narrowing the *Terry* rule, of overlooking the practicalities, and of placing "a further hindrance on the already difficult effort to police the narcotics traffic . . . ." *Id.* at 96-97 (Burger, C.J., dissenting).

116. 446 U.S. 544 (1980) (Stewart, J., opinion of the Court).



carrying narcotics. While the defendant's driver's license was issued in her name, her airline ticket was not. After returning the license and ticket, the agents asked her to accompany them to their airport office for further questioning. Finding that defendant possessed a constitutional right of personal security as she walked through the airport, Justice Stewart nevertheless distinguished an intrusion that amounted to a "seizure" of a person from an encounter that did not intrude upon a constitutionally protected interest.<sup>117</sup> He stated that as long as the person questioned remains free to disregard the questions and walk away, neither his liberty nor his privacy has been intruded upon so as to require constitutional justification.<sup>118</sup> Stewart concluded that a person is seized within the meaning of the fourth amendment only if, in light of the surrounding circumstances, "a reasonable person would have believed that he was not free to leave."<sup>119</sup> According to Justice Stewart, the facts in this case did not support a holding that a seizure had occurred.<sup>120</sup>

In *Reid v. Georgia*, a per curiam decision rendered in the same year as *Mendenhall*, Justice Stewart was one of five justices who joined in holding that the stop of a passenger in an airport by federal agents, solely because the passenger met the drug courier profile, did not meet the requirement of a reasonable suspicion of criminal activity and therefore violated the fourth amendment.<sup>121</sup> Thus despite his opinion in *Mendenhall*, Justice Stewart did not take a rigid position on whether simply fitting the drug courier profile amounts to reasonable

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117. *Id.* at 552.

118. *Id.* at 554.

119. *Id.* A seizure might occur where the person did not attempt to leave due to "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

120. Justice Stewart was joined only by Justice Rehnquist in that part of the opinion holding that there had been no violation of the fourth amendment. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the part of the decision involving consent and concurred in the judgment. They did not reach the question of whether the respondent was "seized," because in their opinion, there was reasonable suspicion that the respondent was engaged in criminal activity. Thus, the agents did not violate the fourth amendment by stopping her for questioning, according to the concurrence.

Justices Brennan, Marshall and Stevens joined in Justice White's dissent. *Id.* at 566 (White, J., dissenting). White criticized Stewart for departing from the usual rule of refusing to review judgments on grounds not raised at the trial below. *Id.* at 568-71. Stewart addressed a fact-bound question that was best left in the first instance to the trial court. *Id.* at 569.

121. 448 U.S. 438 (1980) (per curiam). Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred, finding the case similar to *Mendenhall* and stating that "on the basis of facts remarkably similar to those in the present case, Mr. Justice Stewart and Mr. Justice Rehnquist decided that no seizure had occurred." *Id.* at 443 (Powell, J., concurring).

suspicion of criminal activity. Rather, he believes that resort to a case-by-case determination is appropriate.<sup>122</sup>

With respect to the border patrol, Justice Stewart limited them to "stops" and not searches. In *Almeida-Sanchez v. United States*, a roving United States Border Patrol stopped a car at least twenty-five miles from the Mexican border without probable cause and without consent.<sup>123</sup> Writing for the five to four Court, Justice Stewart found that neither the Court's automobile search decisions nor its administrative inspection decisions applied. Nor was this search the functional equivalent of a routine border search, justifying the upholding of this particular warrantless stop and search. Stewart's opinion "counsels a resolute loyalty" to the requirements of the fourth amendment in the face of a serious governmental problem of great magnitude, that of controlling illegal entries into the country.<sup>124</sup> Stewart was unwilling to consider relevant those factors that Justice Powell in his concurring opinion found to be the equivalent of probable cause—consistent lower court judicial approval, absence of alternatives for the solution of a serious problem and only a modest intrusion into a car.<sup>125</sup>

In *United States v. Brignoni-Ponce*, also a border patrol case, Justice Stewart joined in Justice Powell's opinion for the Court which indicated that the border patrol could stop a car near the Mexican border for questioning about immigration status on less than probable cause for an arrest, but only if specific facts, along with the rational inferences from those facts, created a reasonable suspicion that the car contained illegal aliens.<sup>126</sup> Justice Stewart concurred in the result

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122. Justice Stewart has stated that the drug courier profile alone cannot be substituted for the standards of the fourth amendment. *Personal Interview* (Feb. 19, 1982), *supra* note 3. In November 1981, the Supreme Court granted certiorari to reexamine the *Mendenhall* decision. See *Florida v. Royer*, 102 S. Ct. 631 (1981).

123. 413 U.S. 266 (1973) (Stewart, J., majority opinion).

124. *Id.* at 273.

125. In *United States v. Peltier*, 422 U.S. 531 (1975), a Court changed in membership refused by a vote of five to four to apply *Almeida-Sanchez* retroactively. Justices Douglas, Brennan, Marshall and Stewart dissented, Stewart joining in the first part of Brennan's dissent. *Id.* at 543 (Brennan, J., dissenting). Brennan concluded that *Almeida-Sanchez* had not represented a sharp break from existing law and therefore ought to have been retroactive.

The Court once again held in a five to four decision that *Almeida-Sanchez* was not retroactive. Stewart dissented without opinion. *Bowen v. United States*, 422 U.S. 916, 921 (1975) (Stewart, J., dissenting).

126. 422 U.S. 873, 884 (1975). The only factor justifying the stop was the occupant's apparent Mexican ancestry, which was not sufficient for the search to be upheld. *Id.* at 885-86.

See also *United States v. Ortiz*, 422 U.S. 891 (1975) (decided the same term; Justice Stewart joined the majority opinion in finding a warrantless search of cars by the border patrol at traffic check points invalid because there was no consent or probable cause). The border patrol in *Ortiz* advanced no specific reason for believing that defendants' cars contained aliens. *Cf. United*

reached by the Court in *United States v. Cortez*.<sup>127</sup> After detailing all the information the border patrol knew or routinely had deduced in that case, Stewart emphasized that the border patrol officers had uncovered an abundance of specific facts which, along with the rational inferences from those facts, warranted a suspicion that the vehicle contained illegal aliens.<sup>128</sup> Therefore, the stop of the car for questioning was permissible.

During his last term, in a case in which the Court sought to expand upon permissible seizures on less than probable cause, Justice Stewart dissented. In *Michigan v. Summers*, the Court held that where the police obtained a warrant to search a house for contraband, the warrant carried with it the limited authority to detain the occupants of the premises while the search was being conducted.<sup>129</sup> Stewart faulted the Court for creating a new exception to the requirement of probable cause for police detention. He rejected the reasonableness test that the majority had applied to determine the permissibility of this seizure. For Justice Stewart, "stop and frisk" patdowns and border patrol stops are the only two specific and isolated exceptions justifying a limited seizure based on less than probable cause. For each of those exceptions, the government has demonstrated an important purpose beyond the normal goals of criminal investigations, i.e., self-defense and prevention of illegal entry of aliens.<sup>130</sup> The ordinary police interest in discovering evidence of crime and apprehending wrongdoers is not enough. In this case, not only did Stewart find no compelling governmental interest to justify detention, but also Stewart questioned whether such a detention, where the police make a person a prisoner in his own home for a potentially long period of time, could be considered a minor intrusion of only a brief duration.<sup>131</sup> The Court had not articulated any principles for circumscribing the scope of the intrusion. Thus Stewart, who recognizes only two limited and isolated exceptions to the minimal intrusion rule, rejected any effort to expand them and demanded clearly articulated criteria to prevent any diminution of the meaning of the fourth amendment.

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*States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (where Justice Stewart joined Justice Powell's opinion permitting stops for brief questioning limited to permanent immigration check points, and Justices Brennan and Marshall dissented).

127. 449 U.S. 411, 422 (1981) (Stewart, J., concurring).

128. *Id.* (quoting *Brignoni-Ponce*, 442 U.S. at 884).

129. 452 U.S. 692, 705 (1981).

130. *Id.* at 706-12.

131. *Id.* at 711.

## VII. CONSENT

When a party voluntarily consents to a search and seizure, the fourth amendment is not involved. Differences of opinion have arisen among the justices as to whether, under the circumstances of a particular case, consent is voluntarily and knowingly given or whether it is the result of coercion. *Bumper v. North Carolina* provides an example of coercion.<sup>132</sup> In that case involving a vicious crime, Justice Stewart looked closely at the facts to determine whether consent to the search was clearly voluntary. Four white policemen announced that they had a warrant to search the home of the defendant's black grandmother, who consented. According to Stewart, these facts constituted coercion, "albeit colorably lawful coercion," and thus there was no consent.<sup>133</sup>

Justice Stewart's work in the consent area has been characterized by his literal reading of the facts. This sometimes has resulted in his being overly generous to the claims of law enforcement officers. Thus his approach, while consistent in theory, has not always been in concert with the rest of his fourth amendment jurisprudence. Two of the most controversial opinions rendered by the Court in this area were authored by Justice Stewart. *Schneckloth v. Bustamonte*, a six to three decision, involved police on routine patrol who stopped a car with a burned out headlight.<sup>134</sup> The driver was unable to produce a license. After two more officers arrived, they asked the occupants if they could search the car. The men responded, "Sure, go ahead."<sup>135</sup> Further, some of them aided the search by opening the trunk and glove compartment.

Once again, Justice Stewart began his opinion by limiting the inquiry<sup>136</sup> and narrowly stating the question presented—what must the prosecution prove for a voluntary consent.<sup>137</sup> His analysis of extensive judicial exposition upon the meaning of voluntarism in cases involving a defendant's confession yielded no "talismanic definition."<sup>138</sup> Justice Stewart found it significant that none of the cases depended upon a single factor, but that each reflected a careful scrutiny of the surrounding circumstances.<sup>139</sup> He therefore concluded that a demon-

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132. 391 U.S. 543 (1968) (Stewart, J., opinion of the Court).

133. *Id.* at 550.

134. 412 U.S. 218 (1973) (Stewart, J., majority opinion).

135. *Id.* at 220.

136. *See supra* note 69.

137. 412 U.S. at 223.

138. *Id.* at 224-26.

139. *Id.* at 226.

strated knowledge of the right to refuse was but one factor to be taken into account in determining whether consent in fact was given voluntarily and not as the result of duress or coercion.<sup>140</sup> Rejecting the necessity of finding an explicit waiver to ascertain whether the consent was voluntary, Justice Stewart distinguished the requirements for an effective waiver when fifth and sixth amendment rights are involved from cases in which the fourth amendment is involved. Unlike the fifth and sixth amendment guarantees, those of the fourth amendment have nothing to do with the ascertainment of truth at a criminal trial.<sup>141</sup> Justice Stewart concluded by reemphasizing the limits of the Court's holding, stating that the prosecution is not required to demonstrate as a prerequisite to establishing a voluntary consent that the subject knew he had the right to refuse.<sup>142</sup>

In *Mendenhall*, the defendant was asked if she would allow a search of her person and her handbag and was told that she had the right to decline.<sup>143</sup> After she responded, "Go ahead," a female police officer arrived and asked the defendant if she consented to the search. Upon the totality of the facts and circumstances, Stewart held that the defendant had consented to the detention by the drug enforcement agents and to the strip search which was conducted.<sup>144</sup>

Justice Stewart reached his conclusions as to whether consent to a search was voluntary upon a close literal reading of the particular facts of each case. He did not always appear willing to take adequately into consideration the view that acquiescence simply may be due to submission to authority. Thus, while his insistence upon narrow exceptions to the warrant requirement enhances fourth amendment protections, his approach to consent risks it becoming one broad exception to the fourth amendment.

### VIII. ADMINISTRATIVE SEARCHES

While the Supreme Court's opinions dealing with the question of whether administrative searches are subject to the fourth amendment

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140. *Id.* at 248.

141. *Id.* at 242.

142. *Id.* at 247-48.

143. 446 U.S. 544 (1980). See *supra* notes 116-20 and accompanying text for discussion of *Mendenhall*.

144. Such consent, according to dissenters White, Brennan, Marshall and Stevens, was unsupported by the record. Justice White wrote that "the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority." 446 U.S. at 577. If the government does not have to prove that the defendant knew of her right to refuse to accompany the officers to establish consent, "it cannot rely solely on acquiescence to the officers' wishes to establish the requisite consent." *Id.*

have vacillated back and forth depending upon the membership of the Court, Justice Stewart remained true to his personal view that searches and seizures made pursuant to an administrative regulation simply are not covered by the fourth amendment, yet he remained equally committed to stare decisis. He was in the majority in *Frank v. Maryland*, a five to four decision in his first term on the Court that upheld a warrantless public health inspection of a home for rodent infestation.<sup>145</sup> Writing for the majority, Justice Frankfurter reviewed the history of the constitutional protection against official invasion of a citizen's home. Frankfurter concluded that the right embodied in the fourth amendment was the right to be secure from searches for evidence to be used in a criminal prosecution. Since the search in *Frank* was adjunct to a regulatory scheme designed not as a means of enforcing the criminal law but for the welfare of the community, fourth amendment rights were not implicated.

Eight years later the Court pro tanto overruled *Frank v. Maryland* by a six to three vote in *Camara v. Municipal Court*.<sup>146</sup> In the intervening years, Justices Whittaker and Frankfurter left the Court; the four dissenters in *Frank* joined the newest Justices, White and Fortas, to hold that housing inspectors had to obtain a warrant to search a private dwelling. Justices Stewart and Harlan joined Justice Clark's dissent, reiterating their view that warrantless health and safety inspections are not designed for criminal prosecution and therefore do not run afoul of the fourth amendment.

Following *Camara*, however, Stewart joined the opinion of the Court in *Marshall v. Barlow's, Inc.*, which invalidated the warrantless safety inspection program authorized by the Occupational Safety and Health Administration.<sup>147</sup> The Court refused to construe this type of search of commercial premises without a warrant as falling within the two previously established exceptions for the liquor business<sup>148</sup> and licensed gun dealers,<sup>149</sup> both industries with a history of pervasive and close governmental regulation.

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145. 359 U.S. 360 (1959). Justice Stewart stated that he regrets that he did not write a separate concurring opinion in *Frank*, and that that was not the first nor the last time he regretted not writing a separate opinion. For example, in retrospect, he would have preferred writing a separate opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966), where he joined two other dissenting opinions. *Personal Interview* (Jan. 5, 1982), *supra* note 3. He would, in effect, write his separate opinion for *Frank* in *Donovan v. Dewey*, 452 U.S. 594, 609 (1981) (Stewart, J., dissenting).

146. 387 U.S. 523 (1967).

147. 436 U.S. 307 (1978).

148. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (where Justice Stewart joined the dissents of Chief Justice Burger and Justice Black).

149. *United States v. Biswell*, 406 U.S. 311 (1972) (where Justice Stewart joined in the majority opinion).

In *Donovan v. Dewey*, decided during Stewart's last term, eight members of the Court upheld the warrantless search of mines pursuant to the Federal Mine and Safety Act, finding it analogous to earlier exceptions.<sup>150</sup> Justice Stewart, alone in dissent, reaffirmed his own view that warrantless health and safety inspections do not require the same safeguards as searches for evidence of criminal acts. He acknowledged, however, that "I must, nonetheless, accept the law as it is, and the law is now established that administrative inspections are searches within the meaning of the Fourth Amendment."<sup>151</sup> He then faulted the Court for equating the warrantless searches in this case with the exceptions enunciated by the Court in *Barlow's*, and reiterated that those exceptions involved implied consent to warrantless searches because both the gun and liquor businesses were pervasively and traditionally regulated. Justice Stewart concluded with a foreboding prediction:

Under the peculiar logic of today's opinion, the scope of the Fourth Amendment diminishes as the power of governmental regulation increases. Yet I would have supposed that the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands.

. . . .  
As I read today's opinion, Congress is left free to avoid the Fourth Amendment industry by industry even though the Court held in *Barlow's* that Congress could not avoid that amendment all at once. Congress after today can define any industry as dangerous, regulate it substantially, and provide for warrantless inspections of its members. But, because I do not believe that Congress can, by legislative fiat, rob the members of any industry of their constitutional protection, I dissent . . . .<sup>152</sup>

Thus, in his last term on the Court, Stewart's private views on administrative searches remained precisely where they were twenty-two years before. In practice, however, his commitment to stare decisis was so great that he insisted upon holding the Court to its own precedents even though he disagreed with them.<sup>153</sup> In addition, his approach to administrative searches, like his approach to minimal intrusions and to the warrant requirement, was to confine narrow exceptions to the limited facts of the case.

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150. 452 U.S. 594 (1981).

151. *Id.* at 609 (Stewart, J., dissenting). See also *Michigan v. Tyler*, 436 U.S. 499 (1978) (Stewart, J., opinion of the Court).

152. 452 U.S. at 612, 613-14 (footnotes omitted).

153. See *supra* note 15.

## IX. CONCLUSION

A modest man who thought it proper to accommodate his work to that of his colleagues, Justice Potter Stewart sought to be a major spokesman for the Court and attempted to clarify the law where the fourth amendment was involved.<sup>154</sup> Many of the landmark decisions dealing with search and seizure bear his name.<sup>155</sup> If Stewart was less successful than he had hoped to be in mustering majorities for clear expositions of the law, and was not always successful at keeping the Court in line with such decisions, this in some measure is because the fourth amendment brings out passions that lead to rigidity and limit the potential for accommodation.<sup>156</sup>

Because fourth amendment questions will continue to occupy attention,<sup>157</sup> to ponder just what Potter Stewart brought to their resolution is appropriate. He was truly a champion of the fourth amendment. To be sure, he did not join in the *Mapp* decision,<sup>158</sup> taking no position there as to the incorporation of the exclusionary rule against state law enforcement officials and even questioning the original hypothesis.<sup>159</sup> But once the Court had so held, Stewart took the position that the fourth amendment had been incorporated with all its ramifications, and that its enforcement was up to the Court.<sup>160</sup>

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154. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

155. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967).

156. *See, e.g.*, *Coolidge*, 403 U.S. at 483 (where Stewart states that no trick of logic will make the decisions of the Court all perfectly consistent). For discussion of *Coolidge*, see *supra* notes 65-67 and accompanying text.

157. Calls for differing resolutions persist, ranging from the elimination or abolition of the exclusionary rule to the creation of a good faith exception. *See* N.Y. Times, Feb. 28, 1982, at E20, col. 1. *See also* *United States v. Ross*, 102 S. Ct. 2157 (1982) (case decided during the first term after Stewart's retirement); *Washington v. Chrisman*, 102 S. Ct. 812 (1982) (same). On November 29, 1982, the Supreme Court directed reargument on the question of whether the exclusionary rule should be modified. *Illinois v. Gates*, 103 S. Ct. 436 (1982).

158. 367 U.S. 643 (1961).

159. Justice Stewart pointed out that one can question whether *Mapp* was in fact a court opinion. Justice Clark's opinion for the Court was joined by Justice Brennan, and Chief Justice Warren and Justice Douglas joined the Court opinion but wrote a separate concurrence. However, Justice Black, whose vote was necessary for a five-man majority, wrote a separate concurring opinion using a totally different rationale to join the Court's judgment and opinion. *Personal Interview* (Jan. 5, 1982), *supra* note 3. *See* 367 U.S. at 661-62. *See also* *Interview with Justice Potter Stewart*, 14 THIRD BRANCH 1 (1982). Moreover, Justice Stewart also has indicated that he reasonably can foresee that incorporation of the fourth amendment into the fourteenth could ultimately lead to the weakening of the fourth amendment. He explained that the fourth amendment was originally applicable only to the federal government, and that the only federal law enforcement searches and seizures were conducted by customs officials for tax violations. It was never designed to meet the needs or realities of a big city police force. Therefore, by expanding the fourth amendment to the states, the fourth amendment protections may be weakened as courts become more tolerant of and more responsive to big city police forces and their problems. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

160. *Personal Interview* (Jan. 5, 1982), *supra* note 3.



Stewart always has been aware that the fourth amendment lacked a powerful constituency.<sup>161</sup> Cases involving the amendment, almost by definition, deal with persons who are guilty. Damaging evidence—guns, narcotics and the like—has been found in the defendant's possession. But a judge's opinion as to guilt should be irrelevant to consideration of fourth amendment issues. The process by which the evidence has been found is the central issue. This Justice Stewart never forgot. Thus, Stewart viewed the amendment as an important constitutional protection rather than as a technicality impeding efficient law enforcement.<sup>162</sup>

Indeed, Stewart sees no viable alternative to the amendment.<sup>163</sup> For Stewart, the Constitution does not allow room for a post hoc subjective evaluation of the reasonableness of a warrantless search, where an inquiry can end simply with, "They found it, didn't they?"<sup>164</sup> Accordingly, in the overwhelming majority of fourth amendment cases, once Stewart found that an individual had standing to raise a fourth amendment claim,<sup>165</sup> Stewart's strict construction of the fourth

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161. Justice Stewart specifically referred in this connection to Justice Frankfurter's sensitivity to the fourth amendment. *Personal Interview* (Sept. 23, 1981), *supra* note 3. See *Harris v. New York*, 331 U.S. 145, 156 (1947) (Frankfurter, J., dissenting). Justice Frankfurter therein stated:

But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.

*Id.* at 156.

162. *Personal Interview* (Jan. 5, 1982), *supra* note 3. See also *Elkins v. United States*, 364 U.S. 206, 216-17 (1960) (Stewart, J., majority opinion).

163. *Personal Interview* (Jan. 5, 1982), *supra* note 3. See also *Interview with Justice Potter Stewart*, 14 *THIRD BRANCH* 1, 3-4 (1982).

164. Stewart indicated in an interview in January, 1982, that with too much of that reasoning the fourth amendment disappears. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

165. Stewart has been reluctant to expand upon the traditional view as to who has standing to raise fourth amendment claims. See, e.g., *United States v. Miller*, 425 U.S. 435 (1976) (bank depositor had no protectible fourth amendment interest in bank records); *Couch v. United States*, 409 U.S. 322 (1973) (taxpayer cannot assert fourth amendment or fifth amendment claims where IRS summons an accountant). Cf. *Alderman v. United States*, 394 U.S. 165 (1969) (where the Court held that, while fourth amendment rights are personal rights which cannot be asserted vicariously, an absent homeowner is protected against the use of third party conversations overheard on his premises). Stewart joined in that part of Justice Harlan's concurring opinion in *Alderman*, in which he argued that the right to conversational privacy is a personal right, not a property right. *Id.* at 194.

Stewart's sensitivity to the requirements of federalism also has narrowed the reach of his fourth amendment jurisprudence. In *Harris v. Nelson*, 394 U.S. 286 (1969), the Court held that where state prisoners alleged that they were confined as a result of fourth amendment violations, in a habeas corpus action the federal court must provide appropriate procedures and facilities for the prisoner to develop his case. In dissent, Stewart emphasized that in dealing with habeas applications, federal judges should not be inhibited by inflexibly formalized rules. *Id.* at 307. Stewart

amendment and his penchant for confining and limiting both the exceptions to the warrant requirement and the exceptions involving minimal intrusions greatly enhanced fourth amendment protections.

Stewart's opinions were those of a principled pragmatist, the opinions of a judge who wanted to reach sensible decisions that would be easily understood and readily followed. His was an approach that was consistent without being rigid.<sup>166</sup> While the work of many of his colleagues in this area is wrought with moral certainty, Stewart's opinions are relatively free of passion.<sup>167</sup> He marked his way with understated emotion, deciding each case according to a deft analysis of precedent, the individual fact pattern and the purpose of the fourth amendment. He picked his way through a mine field, blending fact consciousness,<sup>168</sup> concern for treating cases before him individually,<sup>169</sup> the belief that holdings should be limited<sup>170</sup> and his view that each justice must accommodate himself to the majority so that the Court can reach an opinion, with a high level of consistency to a faithful, if

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demonstrated his concern with decisions opening the gates to collateral attack by joining in Justice Harlan's dissent in *Kaufman v. United States*, 394 U.S. 217, 242 (1969), handed down the same day. Such sentiments are also reflected by his vote with the majority in *Stone v. Powell*, 428 U.S. 465 (1976), which held that where a defendant had been afforded a full opportunity to litigate his fourth amendment claim in a state court, the exclusionary rule could not be employed in a subsequent habeas corpus action in federal court. *See also* *Allen v. McCurry*, 449 U.S. 90 (1980) (Stewart, J., majority opinion) (six to three decision which held that where a state court had given full and fair opportunity to litigate federal claims, the doctrine of collateral estoppel denied a litigant the opportunity to raise these claims in a federal civil rights action); *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) (Stewart, J., majority opinion) (when a state rule permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding).

166. Stewart does not believe that he has evolved any different philosophy or become a different judge than he was twenty-seven years ago when he began on the court of appeals. *Retirement Transcript*, *supra* note 4, at 9. He also has indicated in an interview after his retirement that with the years of experience, he gained more self-confidence and perhaps a certain inflexibility in his point of view. *Personal Interview* (Feb. 19, 1982), *supra* note 3.

167. *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (Stewart, J., majority opinion); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Stewart, J., majority opinion); *Stanford v. Texas*, 379 U.S. 476 (1965) (Stewart, J., opinion of the Court). This is not to suggest that he did not struggle personally with the decision-making process. He movingly described the process as "not without . . . quite agonizing tensions at times," and one that "can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge. A Justice does not forget how much may depend on his decision. He knows that it may affect the course of important social, economic and political currents in our national life." *Cin. Bar Address*, *supra* note 18, at 8.

168. *See* *Cupp v. Murphy*, 412 U.S. 291 (1973) (Stewart, J., majority opinion).

169. *See* *New York v. Belton*, 453 U.S. 454 (1981) (Stewart, J., majority opinion).

170. *See, e.g.*, *Ybarra v. Illinois*, 444 U.S. 85 (1979) (Stewart, J., majority opinion).

literal, reading of the fourth amendment.<sup>171</sup> Stewart's opinions were often direct appeals for sensible results which he argued were mandated by the Constitution. Sometimes, to be sure, this caused problems, as in *Belton* where he may have sought too bright line a test;<sup>172</sup> sometimes, as with *Mendenhall*, he relied too literally on the facts;<sup>173</sup> and occasionally, as with the area of consent to search, he was less sensitive to realities than what we had come to expect.<sup>174</sup>

Justice Stewart also left his individual mark as a conscientious and diligent justice<sup>175</sup> who never missed an argument day in twenty-three years<sup>176</sup> and who added a special dimension to the Court's consideration of a case during oral argument.<sup>177</sup> While always polite to litigants, his crisp and incisive questions forced the attorneys to deal with the hard issues. His written opinions convey a literary style and flair that reflects his overall judicial approach. They are clear, concise and very readable. He will be remembered for his steady, lawyer-like tone which was blended occasionally with a droll sense of humor, a gift for poignant analogy, and a pithy choice of language. Search and seizure law, like many other aspects of constitutional law, yielded to Stewart's special ability to enhance his opinions by selecting a memorable phrase that captured the essence of a particular holding.<sup>178</sup>

Potter Stewart had great respect for Robert H. Jackson as a jurist,<sup>179</sup> but he admired no one more than his colleague, John Marshall

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171. See *Reid v. Georgia*, 448 U.S. 438 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980).

172. *New York v. Belton*, 453 U.S. 454 (1981).

173. *United States v. Mendenhall*, 446 U.S. 544 (1980).

174. See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (Stewart, J., majority opinion).

175. He admitted to reading all of the briefs, including amici briefs, before each argument and never using bench memoranda. *Personal Interview* (Feb. 19, 1982), *supra* note 3.

176. After mentioning this fact at his retirement press conference, he quickly added with his characteristic humility that he had not bragged about that very much "remembering . . . the person in class in school who won the attendance prize was about the dullest student in the class!" *Retirement Transcript*, *supra* note 4, at 11.

177. Justice Stewart stated that oral argument could be decisive, explaining that often he did not have a judgment formed before oral argument; or if the case involved an area with which he was not completely familiar, he viewed it as an opportunity to learn. *Personal Interview* (Jan. 9, 1973), *supra* note 3. See also Cutler, *supra* note 26, at 13-15; Powell, *supra* note 26, at 2. For additional insights regarding this area, see Stewart, *Reflections on the Supreme Court*, 8 A.B.A. SEC. LIT. L. REP. 8 (1982).

178. See, e.g., *Robbins v. California*, 453 U.S. 420, 426 (1981) ("Once placed within . . . a [closed opaque] container, a diary and a dishpan are equally protected by the Fourth Amendment."); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

179. Justice Stewart stated that although he never knew Justice Jackson, he greatly admired him from his writings which he felt were objective, perceptive and well expressed. *Personal Interview* (Jan. 9, 1973), *supra* note 3. He has referred to him "as an engaging teacher," with a

Harlan.<sup>180</sup> Much of Stewart's work on the bench is reminiscent of both men. As with Jackson, Stewart's literary talents facilitated his work as a judge. And whether Stewart deliberately attempted to emulate Harlan, he is much like him in character and diligence. While he by no means agreed with all the jurisprudential views of either Jackson or Harlan, he clearly felt an affinity for their views on the fourth amendment.<sup>181</sup>

Stewart also shares both Jackson's and Harlan's attitudes as to the appropriate role both for the Justices and for the Court itself. Like both his predecessors, Stewart views the Court as an arbiter of the given facts of each particular case as measured by the Constitution and by the law rather than as a vehicle for social action. Also, Stewart sees the mark of a good judge as one whose opinions leave one with "no idea whether the judge was a man or a woman, a Republican or a Democrat, a Christian or a Jew, or if a Christian, Protestant or Catholic."<sup>182</sup>

All judges pay lip service to precedent. But, as with Jackson and Harlan, Stewart's commitment to stare decisis<sup>183</sup> has been greater than most.<sup>184</sup> This was demonstrated again most vividly at the end of his career on the Supreme Court. Despite his own firm view that

"direct and pungent style" and "singular clarity and force" of expression. Stewart has spoken of Jackson's opinions as being scholarly while containing "characteristically practical insights." Stewart, *Robert H. Jackson's Influence on Federal State Relationships*, 23 REC. A.B. CITY N.Y. 7, 12, 19-20 (1968).

Many of Stewart's assessments of Justice Jackson's work and person are equally applicable to Stewart's: the years did not play havoc with Jackson's philosophy. *Id.* at 15. He maintained a compelling sensitivity to his constitutional duty and was a man possessed of resolute self-discipline. *Id.* at 26. He was not result-oriented and therefore, remained a puzzle to Court observers to the end. *Id.* at 26-27. On the similarity of Stewart's views to Jackson's on aspects of fourth amendment jurisprudence, see *infra* note 181.

180. Justice Stewart stated that he admired no one more than Justice Harlan, who epitomized for him all the qualities that were best in an American lawyer: honorable, very conscientious right to the end when he was almost blind, very principled, an old-fashioned gentleman and a fine person. *Personal Interview* (Jan. 5, 1982), *supra* note 3.

181. *Id.* In a personal interview, September, 1981, Stewart indicated that he was particularly moved by Justice Jackson's impression of the importance of the fourth amendment after Jackson's return from the Nuremberg Trials, as seen in *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (quoted by Stewart in *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973)). See also Stewart, *supra* note 179, at 5. Justice Stewart quoted Justice Jackson's views on a number of other occasions. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *Chimel v. California*, 395 U.S. 752, 766 n.11 (1969); *Elkins v. United States*, 364 U.S. 204, 217-18 (1960). Stewart, of course, was aware that the fourth amendment was applicable only to federal enforcement agents in Jackson's day, and did not know how Jackson would have felt after *Mapp*.

182. *Retirement Transcript*, *supra* note 4, at 3.

183. See *supra* note 15.

184. See *Katz v. United States*, 389 U.S. 347 (1967) (Stewart, J., opinion of the Court).

administrative searches have no place within the fourth amendment, Justice Stewart dissented alone in *Donovan*.<sup>185</sup> In that dissent he reminded the Court of its decision fifteen years earlier.<sup>186</sup> He dissented from that decision, but now, unlike his colleagues, he considered himself bound by precedent. The membership of the Court might change, but for Stewart the institution's decisions must be honored.

Through his fourth amendment jurisprudence, Stewart demonstrated fidelity to precedent, technical craft and consistency. Potter Stewart contributed much to the tradition of Jackson and Harlan. At the press conference on the occasion of his retirement, when asked how he wished to be remembered, Stewart replied, "As a good lawyer who did his best."<sup>187</sup> That he surely was, but he was, indeed, much more. No greater tribute could be paid him than that tendered by his colleague, Justice Lewis Powell, who concluded that Potter Stewart was the "quintessential judge."<sup>188</sup>

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185. See *supra* notes 150-52 and accompanying text. Justice Stewart was also the sole dissenter in such other cases as *Minnesota State Senate v. Beens*, 406 U.S. 187 (1972); *Powell v. McCormick*, 395 U.S. 486 (1969); *In re Gault*, 387 U.S. 1 (1967); *Engel v. Vitale*, 370 U.S. 421 (1962).

186. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

187. *Retirement Transcript*, *supra* note 4, at 22.

188. Powell, *supra* note 26, at 5.