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Professor Tribe: Thank you very much Mr. Justice Dickson. We now have the rare opportunity that lawyers, I am sure, throughout both Canada and the United States would wait a lifetime to experience and that is rather than having the Justices ask you questions, you are now invited to ask them questions.

Kenneth Davidson: I would like to ask each of the distinguished Justices in thinking back over their Supreme Court experience is there a case that stands out in your mind as one that was especially difficult to resolve in your deliberations or if that is not possible to say, do you have a favorite dissenting opinion that you feel good about in retrospect.

Justice Stewart: There is no particular case that seems to me the hardest. They are all hard for me and by definition with our certiorari jurisdiction an easy case does not belong in our Court. The cases in our Court are all hard and close because they are on the very frontier of the law or they are cases in which courts of appeal have reached conflicting conclusions on the same issue, which is certainly a clear indication that reasonable men and reasonable judges can differ and do differ.

So they are all hard and I think it is important for a judge to remember that each case is the most important case in the world to the litigant in that case even though it may not seem cosmic to anybody else. To the litigant in that case it is the most important case that ever occurred anywhere and it is important for a judge I think to keep that in mind and to consider every case, not only as a difficult case, but as an important case.

So far as dissenting opinions I rather enjoyed all of them. Number one I think was the case of *Ginsberg v. United States* involving what I thought was a very outrageous violation of the First Amendment and I took delight in saying so, but I would have taken more delight if I would have been able to persuade the Court.

Justice Dickson: I agree entirely with Justice Stewart, all cases are hard and I think they are getting harder. No one case stands out in particular as far as dissents are concerned. I have a lot of favorites. Most of them were discussed by Professor Schmeiser.

In our Court there were three of us who from time to time saw fit to dissent, Chief Justice Laskin, Chief Justice Spence, now retired and myself. The press rather irreverently referred to us as LSD, but I think there is a great deal of satisfaction in writing a dissent. You hope it will in due course be accepted by the majority and you push it a little bit each time the point comes up or something akin to it. You respect the position of the majority but you hope that the minority position of today will be the majority position a year from now or five years from now or even ten years from now.

In any event it does represent another line of thought which should be useful to other judges or scholars.

John Dean: Law students in Canada have recently begun to see the desirability of clerking with the Supreme Court. I wonder if the Justices could indicate how they use law clerks.

Justice Stewart: Professor Tribe is probably best qualified of the three of us to respond. As far as I am concerned law clerks are absolutely indispensable and have been during the period of time I have served in the Supreme Court. With that great volume of certiorari petitions I would be lost without the help of the law clerks, particularly in that branch of work. They also serve a useful purpose in providing companionship, friendship and contributing to my continuing legal education, if you will.

Having said that I think it is important to emphasize that as indispensable as are the services of the law clerks who serve our Court and the Justices of our Court, it is important to remember that the members of the Court for better or for worse are the ones who are appointed to be Justices of the Supreme Court. I think it is important, therefore, not to overemphasize the influence although I could not overemphasize their helpfulness.

Professor Philip Slayton: Both Justices described the cases that come before their respective courts as hard cases. That suggests to me, and I certainly agree, that those cases cannot be solved or decisions cannot be reached solely within the confines of the law or legal rules. The Courts must somehow reach beyond the legal rules and beyond the law to solve problems. If that is so, it must become very relevant to look closely at the kind of people who are appointed to the court, their political beliefs, and their social background.

I would like to direct my question in particular to Justice Dickson. Do you think this kind of close look at the kind of people and the sorts of beliefs they have is appropriate when they are appointed and if it is appropriate how might that be done?

Justice Dickson: This is a difficult question and it is really in the political sphere rather than the judicial. The reason I suppose that we have not had a more complicated system is that up to date I think the people appointed have been reasonably satisfactory to all concerned. There has been no real complaint or no particular incidents which anybody could point to as exemplifying an error which was made in the appointment process.

There have been various suggestions for a new Constitution, including some inquiry, perhaps by the Senate, prior to the appointment of Justices. The Court, I think, would have little to say on that because it is a political decision. The fear that I would express is that we, by an inquiry process, might discourage people who might otherwise be prepared to accept judicial appointments.

If I were a leading counsel in the City of Montreal or the City of Toronto and earning a large income in six figures I might not be too enamoured of having to go before some political body and to have to answer and be questioned about my background and my beliefs. Therefore I think there is a possibility of discouraging good people.

Before I came to the Supreme Court of Canada I was trial judge and then later judge in the Court of Appeal of a province. If someone had said, would you like to be appointed to the Supreme Court of Canada but you will have to undergo an inquiry process I think I would have hesi-

tated quite a while. If you lose in the process and you are rejected then I can not believe that your career is not very seriously damaged.

Justice Stewart: In the United States, contrary to the implication in the question or maybe contrary to the general understanding, while it is a political process, the very best politics from the point of view of the appointing authority of the President of the United States is to make an appointment of a wholly nonpolitical person. That is illustrated by the appointment of the most recent member of our court, Mr. Justice John Paul Stevens who was appointed by President Ford within ten months of the next presidential election. Frankly, there were people in the Senate Judiciary Committee who were just ready to hop all over the Ford nomination if they could have found any basis to do it upon. That led President Ford to appoint a nominee that they could not lay a finger on despite having all their investigators out there in Chicago as they did. All they found was that he was a completely competent professional. In terms of morals and character, he is a wholly nonpolitical person. That happened to be the very best politics at that time and that is not a unique situation.

My predecessor on the Supreme Court of the United States was Mr. Justice Burton, a Republican Senator from Ohio who was named to the Court by President Truman, a Democrat. Similarly, Mr. Justice Brennan was named to the Supreme Court by President Eisenhower, a Republican, so this is not a crass political process.

I would finally like to say that I think it is the first duty of any judge at every level to remove from his judicial work all of his political, moral or religious prejudices. Each human being has them, but I think it is the judge's first duty to eliminate all that from his judicial work. Thus I would not accept a major premise of your question that a judge's own political, moral or religious beliefs are highly relevant. The important thing is that he be a good judge and capable of divorcing those things from his judicial work.

Paula Rose: I was reading an article which I thought was interesting about juvenile juries in Denver, Colorado. Junior and senior high school students who are first offenders are tried and sentenced by their peers with nonconventional sentences. Out of fifty-five first offenders who were judged by their peers they have had only one repeat offender. I know this will never reach the level of the Supreme Court but I wonder what your views are on something like this and do you have this in Canada. If not, do you think it is a good thing to have?

Justice Dickson: I think it is a good idea and I'll tell you why, because the sentencing judge in our country has very few options open to him. Sentencing somebody to community service or perhaps the judgment of their peers is an innovation which I think could be very useful in the rehabilitative process.

Under the Russian system as I understand it, in the lower courts the judge sits with two assessors and the question is not so much guilt but rehabilitation. They put the responsibility for that rehabilitation on the members of the commune or the particular union with which this of-

fender is associated. It becomes a societal problem more than under our system.

Jane Picker: I am very curious about one thing that I have never seen anything published about, and that is the practice of the Supreme Court Justices concerning self-disqualification. I am also curious about the practice in Canada. I wondered if any enlightenment can be given us with respect to various reasons that disqualification occurs.

Justice Stewart: It is our custom generally not to give reasons. In our Court there are competing considerations. There is first of all the very obvious feeling that no judge should sit on any case in which he is incapable of being completely objective. Second, a Justice must appear and have the image of being completely objective. It is now a matter of statutory law that if you are the owner of any material property interest in any institutional corporate litigant directly or indirectly, no matter how much or how little, you disqualify yourself.

But the other competing consideration is the right of litigants in particular, and the public in general, to have a full Court hear each case. The Congress of the United States has legislated that the Supreme Court of the United States shall consist of nine people, not six or seven people. There is the pressure to sit as a full Court and it is the practice in our Court to basically leave disqualification as a personal decision.

It is also quite frequently the practice for a member of our Court to tell his colleagues at the conference table, "Look, I have thought about this, I do not know if I ought to sit in this case because I was the President of the School Board ten years ago in my city and while this does not involve that school board, it does involve a school board from another city," and then ask the advice of his colleagues. But the ultimate decision is his. It is basically a personal decision except there are some obvious cases where everybody would agree that a person should disqualify himself or herself as a judge. Some of them are so obvious that there are statutes enacted by Congress, but our practice is never to give reasons.

There was an exception to that practice four or five years ago. A Justice wrote a fairly long opinion discoursing on this problem in *Laird v. Tatum* when a motion was made asking him to disqualify himself. He declined to do so and he explained in a 15 or 20-page printed opinion why he did not. It was a very interesting discourse but an exception.

Justice Dickson: Our practice is exactly the same. We do not give reasons. If I have shares in a company which is party to litigation my practice is to go to the Chief Justice and tell him that I prefer not to sit on the case and then I do not sit. On a borderline case there is the consideration that Justice Stewart has just mentioned and that is that you are denying the litigants a full Court. In fact you are denying them two judges normally because we like to sit on an odd-numbered basis. If I go off, then somebody else goes off in order to get to the seventh number, it is a fair penalty that the litigants are paying and if it is a minor matter you have to give it some thought to determine whether that is a wise decision.

William Harwood: Justice Mosk said earlier that the first task of men

of an institution is to assure the survival of that institution. I am curious if you gentlemen think his comments do not apply to you.

Justice Dickson: What he was talking about was that a nation has the right to protect itself against sedition and the first duty is to his State.

Mr. Harwood: I am curious if you take that into consideration and to what extent you do consider those factors when you are rendering an opinion, the preservation of the institution?

Justice Dickson: Sedition is a rare bird in our country. I have never had the experience of having to consider that problem.

A Student: Justice Mosk suggested that there is a rise in the fundamental rights guaranteed by state constitutions. I would like to ask you, do you consider the Supreme Court of the United States as the final arbiter of fundamental constitutional rights or can there exist a state of variance between different states as to constitutional fundamental rights?

Justice Stewart: There can and does, and our Court has absolutely no power or jurisdiction or business of any kind in construing the law of California or any of the other forty-nine states, whether it be constitutional law or common or statutory law, civil or criminal.

Carl German: This question is primarily directed to Justice Stewart. To the extent that petitions for certiorari submitted to the court affect conditions in society, what impact do you see in the exercise of discretion in cases?

Justice Stewart: I have spoken about the rule of four. Beyond that one could give a long speech on the various ingredients that go into whether or not the court can grant certiorari on any particular case. The rule is that if four Justices vote to grant certiorari it is granted. There might be wholly different reasons among the four Justices and there might be wholly different reasons why the Court as a Court denies certiorari. I might deny it because I think it is an outrageously wrong decision and I am afraid if our Court takes it, the Court is going to affirm it and create a national precedent. Somebody else might deny it because he thinks it is egregiously correct and does not want to disturb it. Thus there is seldom one reason why certiorari is denied and there is just as seldom one reason why certiorari is granted. It is granted if four people vote to grant it. I can not answer your question beyond that.

Joe Moore: Justice Dickson mentioned the Canadian Supreme Court has looked to the decisions of the American Supreme Court. Do you foresee a change in the coming years in looking for jurisdiction precedents, ways to solve proper legal problems?

Justice Stewart: Our Court deals with specific federal statutes and with specific provisions of a specific and unique Constitution. Certain members of our Court in the past used to cite a good deal of foreign law. Justice Douglas seldom wrote an opinion without citing the Constitution of India. Certainly I think there is much more awareness of learning from others and I hope every member of our Court does, but so often a case involves a specific statute with a specific legislative history or a specific provision of the Constitution with its specific legislative history. No great purpose would be served by citing a decision of the court of another juris-

diction involving a different statute or a different constitutional provision even though it might be the same social problem. However, I would not be at all surprised to see more and more of that practice in our Court as communications become better and the world does become smaller.

Joe Baylis: I was wondering if the respective Justices could comment on the use of and acceptance of arguments based on considerations of public policy in their respective Courts. It seems to me as a Canadian student that the American Court is much more willing to write an opinion or consider an argument based on public policy than the Canadian Court.

Justice Dickson: I would answer that our courts have always taken public policy into consideration. I think that is the heart of common law. They will not perhaps indicate the values they are balancing but in the result it is quite obvious that balancing played a part. I think more and more in our Court we were doing as the Supreme Court of the United States does, that is not only taking into account competing values but articulating the reasons for which we either adopt or reject one of those values. So, public policy does indeed play a part in that broad sense.

Justice Stewart: I think it clearly does in our Court too, particularly in areas of statutory construction. However, it plays less of a role in some areas of constitutional adjudication because those public policy decisions were made by the framers of the Constitution.

Many of the provisions of our Constitution seem curiously dated now. I do not know of anybody in the United States of America who is really very concerned about soldiers being quartered in his house, but that is one of the constitutional protections of the Bill of Rights and that decision was made on the basis of public policy. Therefore, public policy plays more of a role in matters of statutory construction and in that sort of litigation than in constitutional adjudication when the basic decisions were made in the eighteenth century.

Diane Haskett: Mr. Justice Dickson you suggested that the differences in the functions of the Supreme Court of Canada and the United States are to some extent attributable to the differences in constitutional imperatives. Mr. Justice Stewart has alluded to the doctrine of separation of powers which has been characterized in the United States as a constitutional imperative, I would like to ask you, Mr. Justice Dickson, the extent to which notions of separation of powers play a part in decisions in the Supreme Court of Canada, notwithstanding the absence of any doctrinal directives or Constitutional imperatives in respect to separation of power.

Justice Dickson: We do not have a separation of power concept in Canada. There are not three separate distinct power bases. Under our system of parliamentary supremacy we must obey the dictates of Parliament. We may only interpret what the rules are and that is one of the reasons the Court is frequently criticized for lack of activism.

I think there are several responses to that criticism. One, our Court has been the top Court of the land for only about thirty years. Second, our Constitution does not possess a bill of rights and I think that is vital to the understanding of the differences between our Court and the Supreme Court of the United States.

The Bill of Rights, as we know it, is a federal statute. It is not constitutional. The Chief Justice has referred to it as a quasi-constitutional enactment and that raised a lot of eyebrows. It is not constitutional and therefore there is a great deal of uncertainty as to the degree to which we can use it in order to strike down legislation which Parliament has enacted and believes to be valid.

This concept of placing the judiciary above the power of Parliament is a very, very serious one. It is completely foreign to the British unitary system. In the United States it is part and parcel of the whole judicial system. Until such time as there is an embedded bill of rights, I do not think you are going to see a great deal of activism in the sense that some people would have us be active.

Bill McCormick: Following up what you were speaking about earlier, Justice Stewart concerning some of the provisions in the Constitution being rather outdated, do you feel there would be any purpose served in the reconvening of the Constitutional convention?

Justice Stewart: We have now amended the Constitution twenty-six times I think. The first ten were in the first two years and that is our Bill of Rights. Beyond that we have amended the Constitution by separate Constitutional amendments.

As we said earlier, an amendment needs to be proposed by two-thirds of both houses of Congress and adopted by three-quarters of the separate states. The Constitution itself provides two alternative forms. The way which we have always followed is amendment. The second alternative is to call a Constitutional convention which would take us back to 1787.

I agree it might be a good idea to take out of the Constitution certain things because they no longer reflect any contemporary concern such as a guarantee against soldiers being quartered in the house. I would not if I were writing a Constitution today put some of the things in it that are in it. I might put other things into it that are not now in it.

It is an eighteenth century document and there is nothing in it about economics, education, or other matters. There are more modern constitutions. Nonetheless, I think we all have a good deal of reverence for the fifty-five men who were there in Philadelphia in 1787 and who drafted the Constitution we have.

So no, a purpose would be served certainly by a Constitutional Congress but I am afraid it is not a purpose to which I could enthusiastically or confidently subscribe.

Brent English: Chief Justice Burger has been reported in the last several years as being very dissatisfied with the quality of the American Bar. Do you share that opinion?

Justice Stewart: I sat on the Court of Appeals for the Sixth Circuit Court for four and a half years and twenty-two years in the Supreme Court of the United States. I practiced law in Cincinnati, Hamilton County, Ohio before that. My own observation and experience has been that the quality of lawyers in the United States is pretty good. Like everything else in the world, it is a wide spectrum. There are some very good

and some very bad and most of them are in between. You can say that about anything or anybody. You can say that nothing or nobody is as good as it ought to be, but having said that you have not said very much.

I recognize that there is a wide spectrum of advocates in the Court where I have observed them and I suppose advocates everywhere. While there is a wide spectrum of other kinds of lawyers, office lawyers, counselor advisors, I do not have a strong feeling that the quality of lawyers in the United States is very bad. I think we are all human beings and I do not share, in other words, in that opinion.

Professor Tribe: Mr. Justice Dickson, Mr. Justice Stewart, I want to thank both of you I suspect not only for myself, but on behalf of everyone here. I want to thank all of you for being so attentive and helping to make this what I think was really quite an extraordinary day. Thank you.