Remembering Lewis F. Powell

Dennis J. Hutchinson

If reading your own obituary is the ultimate conceit, one assumes that Lewis F. Powell would have reacted with pleasure and perhaps relief at the notices following his death last summer at age 90. Newspapers uniformly applauded his 15-year career on the Supreme Court of the United States. The *Washington Post* was typical and declared that Powell "represented a set of values on the Supreme Court that make for bad theater and good law. Respect for precedent, civility, moderation and the ability to cobble together majorities out of different ideological frameworks may not capture headlines or inspire affection or hatred from any sizable portion of the public. They are, however, the stuff of well-reasoned legal opinions that command respect for the law."

Powell worried when he was appointed that he was too old to make a substantial contribution to the Court or to establish a distinctive place in the institution's history. At 64, he was the oldest man to join the Court in this century. President Nixon publicly blunted the anxiety in both Powell and skeptics of the appointment by proclaiming that he would rather have a decade of Powell than two decades of a lesser man. Powell's first term on the Court prompted an admiring and optimistic portrait by the dean of constitutional scholars, Gerald Gunther, who found in Powell "Judicial Quality on a Changing Court."[1]

Yet both at retirement and death, Powell was recalled more for the tenor of his positions than for his doctrinal achievements. His most memorable opinion was a doctrinal failure. The controlling opinion for the Court in the *Bakke* affirmative action case,[2] as Justice Potter Stewart later remarked, convinced only Powell himself: no one else joined it. The heart of the opinion rests on a distinction – between goals and quotas – that even his

Dennis J. Hutchinson is Professor and Senior Lecturer in Law, The University of Chicago.

1 Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972).

2 *California Board of Regents v. Bakke*, 438 U.S. 265 (1978).

admiring biographer concedes is "pure sophistry."[3]

Elsewhere, the foundation of Powell's analysis could sometimes be murky. *Stone v. Powell*,[4] which stripped federal habeas corpus courts of the power to award relief to state prisoners for Fourth Amendment violations, rested on either the Constitution or the federal habeas statute – the basis of the decision is not crystal clear. In many cases, Powell utilized such a fact-laden "balancing test" that the resulting constitutional line was very difficult to apply in subsequent cases.[5] On rare occasions when he tried to establish bright doctrinal lines, his creations had brief half-lives. A few examples: Following the lead of Justice Harry Blackmun,[6] Powell tried to develop the commercial speech doctrine[7] – which for him seemed paired with what might be called a "corporate speech doctrine."[8] Both came under withering criticism, even from otherwise friendly critics,[9] and failed to achieve the scope of their initial promise. He created the "market participant doctrine," which held that states acting as producers or consumers in an interstate market were exempt from the normal strictures of the so-called dormant Commerce Clause, but the underlying theory – an amalgam of state sovereignty and history – was intellectually barren, sharply criticized, and within a decade substantially circumscribed.[10] Late in his career, although frustrated by the doctrinal bureaucratization of the death penalty, Powell wrote for the Court that evidence from relatives of victims during capital sentencing was unconstitutional because of potential inflammatory effects.[11] The decision was overruled four years later.[12] To be fair, no doctrine is immune from development, reconsideration or even repudiation, but Justice Powell's doctrinal brainchildren suffered at an unusual rate. Only the final innovation, the "victim impact statement doctrine," was scuppered due to a change in Court personnel and the consequent vulnerability of a recent and unstable precedent.

To some extent, it is unfair to consider Justice Powell's career by weighing his doctrinal legacy. No justice is ever in control of his intellectual offspring, nor did Powell necessarily measure himself by his theoretical achievements. He knew when he came to the Court so late in his own legal career that close intellectual analysis was no longer his forte (he was a rainmaker and a supervisor), and he worried that he had no sophisticated feel for constitutional law. Although he worked with enormous industry to bring himself up to speed, he did not expect to match the intellectual legacy of the predecessor in his seat, Hugo Black. In-

3 John Jeffries, Justice Lewis F. Powell: A Biography 484 (New York: Charles Scribner's Sons, 1994).

4 428 U.S. 465 (1976).

5 *See* Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 Mich. L. Rev. 1854, 1874 (1995); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L.J. 1 (1987).

6 *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

7 *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980).

8 *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

9 *See, e.g.*, Tom Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979).

10 *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). The critics are collected by Gerald Gunther and Kathleen Sullivan in Constitutional Law 323 (Westbuy, NY: Foundation Press, 13th ed., 1997).

11 *Booth v. Maryland*, 482 U.S. 496 (1987).

12 *Payne v. Tennessee*, 501 U.S. 808 (1991).

stead, Powell seemed to acquiesce in his public image, which developed near the mid-point of his career and which was commonplace when he retired, as an intellectual balance wheel of the Court, mediating the philosophical extremes and brokering consensus.

Between his retirement and death, both of these images went under the scholarly microscope and the findings cast doubt on the conventional wisdom. Mark Tushnet's exhaustive survey of the papers of William J. Brennan and Thurgood Marshall for his biography of Marshall revealed Powell as less a broker than as a hard-line negotiator: in one important case under the Equal Protection Clause, for example, Powell "held his position and watched Brennan [writing for the majority] move toward it."[13] A careful analysis of Powell's voting record found no support "for the interpretation that Powell controlled the swing vote in civil liberties cases."[14] Powell the moderate was, after all, the author of opinions declining to invalidate state-funding mechanisms that appeared to disserve minority school children[15] and upholding state practices that disproportionately imposed capital punishment on non-whites,[16] and cast the deciding vote to uphold state statutes criminalizing consensual and private homosexual conduct.[17]

By most journalistic standards, all three decisions constitute conservative refusals to push out the constitutional boat. Justice Marshall, who dissented in all three cases, was lionized when he died for his refusal to capitulate to such moderation. Why, then, is Justice Powell so fondly remembered? Part of the reason, I think, is simply his manners. He was soft-spoken and unfailingly courteous, a soothing antidote to colleagues who were aloof, brusque, or ostentatiously pompous. His politeness was often mistaken for modesty, although he admitted to being highly ambitious for his entire career. He was also a friend to journalists, although none would probably admit publicly that they were more likely to look warmly on a justice who returns his phone calls and actually discusses issues – off the record, of course – than on those who do not. (Powell was one of the behind-the-scenes sources for *The Brethren*,[18] the controversial 1979 *exposé* of the Court that had been thought to be a *trahison des clercs* until one of its authors revealed that Justice Stewart had been a principal source;[19] Powell's role was revealed in his authorized biography.[20]) More importantly, Powell recanted two of the most controversial votes I mentioned – on the death penalty and on gay rights. His conversion after he retired – after he had arrived and pitched camp at Damascus, as it were – was read by many as a sign of growth or humility, rare virtues, at least in public, for retired members of the Supreme Court of the United States.

Powell's *mea culpæ* merit more attention than they have received in the press, in part for what they suggest about how the Justice viewed his career – not simply his judicial career but his entire career at the bar, which

13 Tushnet, *supra*, at 1873. The case was *Plyler v. Doe*, 457 U.S. 202 (1982).

14 Janet L. Blasecki, *Swing Voter or Staunch Conservative?*, 52 J. Politics 503 (1990). Compare Paul H. Edleman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 So. Cal. L. Rev. 63, 76-80 (1996).

15 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

16 *McCleskey v. Kemp*, 481 U.S. 279 (1987).

17 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

18 Bob Woodward & Scott Armstrong, The Brethren: Inside The Supreme Court (New York: Simon & Schuster, 1979).

19 *See* Adrian Havill, Deep Truth: The Lives of Bob Woodward and Carl Bernstein 128-135 (New York: Birch Lane, 1993).

20 Jeffries, *supra*, at 390.

included lengthy service on the boards of education of Richmond, Virginia, and the state of Virginia. Powell chaired the Richmond school board in the years immediately following *Brown v. Board of Education*[21] – the Supreme Court's condemnation of state laws segregating public schools by race. Powell, entering the prime of his legal career, feared that *Brown* would destroy neighborhood schools or that Virginia's "massive resistance" to *Brown* would destroy public schools altogether. In the eye of a political storm, Powell publicly kept silent. He privately debated supporters of massive resistance, but he concluded that public opposition was futile, and probably suicidal politically. The cost of inaction was high: during Powell's eight years on the board, only two of the city's 23,000 black children ever attended public school with white children. John Jeffries, Powell's biographer, views Powell's "disengage[ment]"[22] in the desegregation wars as sinful, but "sins of omission."[23]

Jeffries may be right, although others during the period made different calculations, and some nobly lost jobs and offices as a result.[24] In the long run, history tends to favor sacrifice over prudence, and Powell's caution came back to haunt him a decade and a year after he left the board when he was nominated to the Supreme Court. John Conyers, head of the Congressional Black Caucus, attacked Powell as a racist and focused on the school board period. Powell did not directly defend himself but instead supplied Congress a series of endorsements, including a detailed letter from Jean Camper Cahn, who praised Powell's work with the National Bar Association and in shepherding the Legal Service Program to an endorsement from a reluctant American Bar Association. In the end, Powell's nomination was confirmed with only one nay vote in the Senate.

The confirmation experience taught Powell a number of lessons, not the least of which is that history is constantly rewritten by the winners. Does that begin to explain his remarkable public recantations of his votes on the death penalty and homosexuality and the Constitution? In 1991, Jeffries asked Powell if he would change his vote in any case, and he said, "Yes, *McCleskey v. Kemp*," and added that he thought "that capital punishment should be abolished."[25] A year before, responding to a student at New York University who asked how he could reconcile *Bowers v. Hardwick* – the gay rights case – with *Roe v. Wade*,[26] Powell replied, "I think I probably made a mistake on that one."[27] That revelation earned an admir-

21 347 U.S. 483 (1954).

22 Jeffries, *supra*, at 177.

23 *Id*. at 172.

24 The most thoroughly documented record of one southern community's response to *Brown* covers Little Rock, Arkansas, which included memoirs by the superintendent of schools, who lost his job for developing even a deliberate integration plan (Virgil T. Blossom, It *Has* Happened Here, New York: Harper, 1959), the local eight-term Congressman, who was defeated for re-election by a write-in campaign by those who viewed him as a collaborator with integration (Brooks Hays, A Southern Moderate Speaks, Chapel Hill: UNC Press, 1959), and the local NAACP leader, who was vilified for supporting the students who integrated Little Rock Central High (Daisy Bates, The Long Shadow of Little Rock, New York: McKay, 1962). Secondary memoirs include Harry S. Ashmore, An Epitaph for Dixie (New York: Norton, 1957) (newspaper editor), and Elizabeth Huckaby, Crisis at Central High: Little Rock, 1957-58 (Baton Rouge: LSU Press, 1980) (assistant principal).

25 Jeffries, *supra*, at 451.

26 410 U.S. 113 (1973).

27 Jeffries, *supra*, at 530.

ing letter from Professor Lawrence Tribe, who had argued unsuccessfully for Michael Hardwick: "All of us make mistakes, and not all of us are willing to admit them."[28]

Both of Powell's statements are highly unusual for a Supreme Court justice, active or retired. Their effect is problematic: incumbents on the Court are faced with the fact that the decisive votes in two controversial cases have been renounced, which makes the decisions unsettled as a matter of public perception if not as a matter of law. And Powell's conversions, as I have written elsewhere, are "cold comfort"[29] for Hardwick and for the relatives of McCleskey (McCleskey was executed in 1991, a few weeks after Powell's revelation to Jeffries).

Mark Tushnet has suggested that Powell's behavior can be explained by his desire, throughout his career, to have his actions well-regarded by "those whose judgments he valued":

> When he actually had authority to make decisions – as an important figure in Richmond's public life and as a Justice – he could reasonably expect that the social groups with which he was affiliated would see his decisions as sensible. Afterwards, however, he had to worry about the verdict of history. By repudiating actions that either had not stood the test of time, for example his behavior in Richmond, or that might not do so, for example his votes in *Bowers* and death penalty cases, Powell could at least hope that historians would see him in a better light than they would if all they had to go on was what he had actually done.[30]

Tushnet sees Powell as a prisoner of his social class, with the limitations of vision and resolve associated with those "affiliations."[31] That may be true, but "concern for historical reputation"[32] is not confined to leaders of the corporate bar, or veterans of World War II, or other categories into which Lewis Powell rightly falls. His predecessor in what is conventionally designated as seat number two on the Court, Hugo Black, suffered a similar "wish to be buried at home with honors," as one southern federal judge put it to me many years ago in reflecting on Black's turn away from the unrelieved pro-civil liberties votes he had cast until the end of his career. Black and Powell came from the same region but from entirely different backgrounds, and they pursued different ambitions throughout their careers. Both lived through the political revolution and social convulsion that *Brown v. Board of Education* and later civil rights legislation ignited. And both, I think, wished in the end to be understood and appreciated by those they served on both sides of the divide.

Lewis Powell need not have worried. At the church service prior to interment, the Chief Justice recalled him as a "patriot, in the old-fashioned sense of that term," Justice Sandra Day O'Connor called him a "model of human kindness," and he was fondly remembered as a devoted and meticulously attentive father by a young lawyer bearing his name. Almost a thousand mourners attended, including every member of the present Court, retired Justice Byron R. White, the Solicitor General and several deputies, governors and former governors of Virginia and other prominent citizens. Burial was at Hollywood Cemetery, which also has the graves of Presidents James Monroe and John Tyler, and Jefferson Davis, President of the Confederate States of America. GB

28 *Ibid*.

29 Dennis J. Hutchinson, *Commentary: Judicial Biography: Amicus Curiae*, 70 NYU L. Rev. 723, 726 (1995).

30 Tushnet, *supra*, at 1881.

31 *Ibid*.

32 *Ibid*.