1999

In Memoriam: Lewis F. Powell, Jr.

Christina B. Whitman
University of Michigan Law School, cwhitman@umich.edu

*Christina B. Whitman**

At the time of his resignation, Justice Lewis F. Powell, Jr. was justly praised as a moderate, flexible jurist — open-minded, suspicious of ideology, most often found at the center of a divided Supreme Court. Yet Justice Powell was a man of deeply conservative instincts. Suspicious of invitations to expand the scope of individual constitutional rights, he was a participant and even a leader in the Court's reassertion of a federalism that emphasized deference to states and in its reinvigoration of restrictions on access to federal courts. His jurisprudence was all of a piece. Justice Powell's reluctance to expand federal court protection of constitutional rights coexisted with an unusually personal sensitivity to the situations of individual litigants. He sought, by counseling federal judicial restraint, to acknowledge with respect and encourage the vitality of state and local communities, where he thought people could most richly flourish.

Justice Powell's non-ideological conservatism reflected his own innate courtesy and grace. It was tempered by, indeed based upon, habits of empathy and compassion that were immensely appealing. These humane and deeply personal values, rooted in the Justice's own personal and professional experiences over the six decades before he joined the Court, both facilitated and blunted the Court's turn to the right.

Had he never accepted appointment to the Supreme Court, it would still be fair to say that Justice Powell had a spectacularly successful personal and professional life. With the exception of a period of service during World War II, most of it was spent in Richmond, Virginia. All of it — college, law school, military service, and lawyer's work — taught him the importance of close personal bonds, community involvement, taking responsibility, a sense of belonging to a place. He had a vivid sense of the personal rewards, as well as the costs, of public service, and he thought it absolutely critical that institutions that afforded the opportunity for service be nurtured and preserved.

For most of Justice Powell's legal career he was a partner in a prominent Richmond law firm, but he was seldom simply in private practice. His life was filled with commitments to the governing institutions of civic and professional life. He was, for example, president of the American Bar Association, the American College of Trial Lawyers, and the American Bar Foundation; chairman of the Richmond Public School Board during a particularly tumultuous period; a member of the Virginia State Board of Education; vice-president of the National

* Associate Dean for Academic Affairs and Professor of Law and Women's Studies, The University of Michigan Law School.

Legal Aid and Defender Society; and a member of both a National Advisory Committee on Legal Services to the Poor and a President's Commission on Law Enforcement and Administration of Justice. Justice Powell was extraordinarily conscientious in these offices. He sought to leave each position having made a difference and, above all, tried to use his influence to create more inclusive and enduring institutions. He emerged from these experiences with a deep understanding of the conflicting pressures on people who hold positions of authority and a confidence that they would, as he did, struggle to do their best. He also found public service to be enormously satisfying, basic to his sense of personal as well as professional identity.

His experience of public service, his personal success, and his involvement in World War II created in Justice Powell a solid faith in American institutions. He was not oblivious to social problems, but believed that solutions lay in the involvement of individuals working together through vital public institutions. The law, and in particular the Constitution, created the structure that made self-government possible by nourishing communities in which individuals could flourish. Justice Powell had an unusually personal vision of the constitutive role of the Constitution in a way of American life that he thought worth preserving. He believed that state and local governments and the more democratic branches of government were accessible to those willing to compromise and negotiate. He was suspicious of those who sought national solutions, for he saw them as shirking this difficult, community-building work.

Justice Powell's beliefs led him to two characteristic, and superficially inconsistent, approaches to his role on the Supreme Court: as a Justice, he continued to feel obligated by his belief that those in authority should be attentive and responsive to the people who would be personally affected by their actions, yet he was eager to give a clear message that those seeking social change should not look to the federal courts for solutions. When substantive issues of law were reached, he tried to write with particularity and sensitivity about the consequences for all the litigants, but in decisions based on issues of jurisdiction and justiciability, he often reached for broad rules that would lead to clear, door-closing results.

The felt need to consider, and articulate, the various interests affected by a judgment is responsible for the balancing approach for which Justice Powell has been both praised and criticized. Balancing appealed to him for several reasons: it allowed him to articulate the full range of views and interests implicated in a case, it expressed judicial modesty by deferring broader decisions, and it held out hope for losing litigants who might prevail in future cases. Most importantly, balancing left those most familiar with particular problems free to draw upon the full range of their local knowledge in devising solutions. It gave constitutional space to local decisionmakers while modeling the

inclusive process that the Justice hoped they would use. When Justice Powell could see the human face behind an argument, he invariably responded. If he thought that a majority opinion had failed adequately to consider a particular perspective, it was his habit to write separately — sometimes to qualify his vote, but often to give the excluded a voice. In his opinion in *Keyes v. School District No. 1*,[1] for example, he spoke for the families of children, black and white, whose lives might be disrupted by busing. In *Franks v. Bowman Transportation Co.*,[2] he sympathized with the white workers whose seniority expectations were displaced by the class relief approved by the majority.[3] In *Regents of the University of California v. Bakke*,[4] his respect for both sides of the affirmative action debate led him to a middle ground and a decision, joined by no other Justice but speaking for the Court, in which "individualized consideration" of applicants was held to be critical to the constitutionality of educational affirmative action programs.[5]

Justice Powell preferred judgments rooted in the specific facts of a case. To give guidance primarily in terms of the various factors to be considered held out hope of future success and cautioned lower court judges to look closely. His opinions in cases involving the First and Fourteenth Amendments best illustrate this quality. An obvious, and influential, example is his opinion in *Mathews v. Eldridge*,[6] which set forth a three-part test for evaluating procedural due process claims. In *Ingraham v. Wright*,[7] he rejected a procedural due process challenge to corporal punishment in secondary schools but left room for claims challenging particularly severe beatings on either common law or substantive due process grounds. *Gertz v. Welch, Inc.*,[8] a defamation case, offered some protection for media defendants who acted in good faith and some vindication for injured plaintiffs.

When Justice Powell found constitutional support for an individual right, he took care that the right was defined very narrowly. It was on these terms that he joined the majority in *Roe v. Wade*.[9] More often, he thought the best solution was not to support individuals in pressing

---

1 413 U.S. 189, 217 (1973) (Powell, J., concurring in part and dissenting in part).

2 424 U.S. 747 (1976).

3 *See id.* at 781 (Powell, J., concurring in part and dissenting in part); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269 (1986).

4 438 U.S. 265 (1978).

5 *Id.* at 318 n.52.

6 424 U.S. 319 (1976).

7 430 U.S. 651 (1977).

8 418 U.S. 323 (1974).

9 410 U.S. 113 (1973). Justice Powell's opinion for the Court in *Maher v. Roe*, 432 U.S. 464 (1977), rejected an expansive interpretation of *Roe*. Yet he repeatedly voted to preserve the essential practical freedoms that made the core *Roe* right to choose abortion a reality. *See, e.g.*, City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

claims against government officials, but to encourage both sides to see their interests as ultimately congruent. Repeatedly, he spoke sympathetically of those responsible for governing community institutions. In a well-functioning school, teachers were the benevolent protectors of students.[10] In prisons, he felt, wardens struggled to do the best they could, with inadequate resources, to provide a rehabilitative environment for prisoners.[11] The law should be used to promote affiliation rather than conflict. The supplicant's interest could be best protected by supporting the official in his obligation to be responsive.

Justice Powell's opinion in *San Antonio Independent School District v. Rodriguez*,[12] which flatly rejected the argument that school financing systems should be subject to heightened scrutiny under the Equal Protection Clause, incorporated both his balancing approach, in its articulation of the constitutional tests, and his deference to local institutions. It also illustrated the connection between Justice Powell's sympathy for local decisionmakers and his willingness to send a clear message that federal courts will not be available to decide certain questions. He sounded that theme again in cases that interpreted Article III standing requirements very narrowly[13] and those that expanded the personal immunities of local officials from constitutional litigation.[14]

Justice Powell's conservative impulses were a product of a faith in the basic institutions of American life that he not only accepted but exemplified. His own character and sense of civic obligation justified his confidence in the responsiveness of those who possessed authority and power. He made it easier for the Supreme Court to turn away from its earlier activism by reassuring individuals that their voices would still be heard and their interests respected.

---

[10] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 670 (1977); Goss v. Lopez, 419 U.S. 565, 594 (1975) (Powell, J., dissenting).

[11] *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 351 & n.16 (1981); Procunier v. Martinez, 416 U.S. 396, 404 (1974).

[12] 411 U.S. 1 (1973).

[13] *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

[14] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).