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The Honorable William H. Rehnquist*

Lewis Powell's career was characterized by a willingness to serve his country, his state, and his city. He was by no means an eager seeker after public office – public office sought him. At the age of sixty-four – already occupying a secure place among the leaders of the American bar – he reluctantly accepted appointment to the Supreme Court of the United States.

The Supreme Court enforces a unique form of equality upon its members – the vote of each member counts exactly the same as that of every other member regardless of one's background or experience before coming to the Court. The views of each member are judged only by the persuasiveness with which they are expressed – not by any previous pedigree that the Justice brings to the job.

The Supreme Court also imposes a rigid seniority system at its conferences. The discussion of each case proceeds from the Chief Justice to the most junior – again with no regard for pedigree. When Lewis Powell took office in 1972, he was eighth in seniority, and he expressed his views at conference the last but one. Because I came to the Court at the same time he did, he was spared the indignity of being the very last – he never had to answer knocks on the conference room door.

Other widely known and distinguished lawyers had been appointed to the Court in the past, but many of them did not thrive under this regime. Lewis Powell did. He combined a fair-minded willingness to see both sides of a question with an impressive ability to persuade others to his own views. As

* Chief Justice of the United States. Chief Justice Rehnquist delivered this eulogy for Lewis F. Powell, Jr. at Grace Covenant Presbyterian Church, Richmond, Virginia, on August 31, 1998.

a result, he was an extraordinarily influential member of the Court. He often wrote the opinion of the Court in important cases. Whether writing for the Court or in dissent in controversial cases where feelings ran deep, his opinions forcefully presented their point of view, but they never took any "cheap shots" at those expressing opposing views. His remarkable influence resulted from a combination of ability, fair-mindedness, and personal grace.

The Supreme Court appointment was not the first call to duty heeded by Lewis Powell. Seven years out of law school, he had become the tenth partner in the Hunton & Williams firm, and by the time of the Japanese attack on Pearl Harbor, he was well on his way to a successful and lucrative law practice here in Richmond. He was thirty-three years old and married with two children – he was in no danger of being drafted. Yet he volunteered for service in the Army Airforce, rising in rank from First Lieutenant to a full Colonel, and winning the Legion of Merit and the Bronze Star.

It seems to me that both his decision to accept the Supreme Court appointment, and his decision to volunteer in World War II, are cut from the same cloth. Lewis Powell was a patriot in the old-fashioned meaning of that term, responding when his country needed him. This deep-seated devotion to duty – not some legally enforceable duty, but a moral duty – in combination with his fair-mindedness and graciousness, were largely responsible for his success as a lawyer and as a judge. Every bit as importantly, they endeared him to all of us who worked with him.

The Honorable Sandra Day O'Connor*

We are gathered here today to remember and to celebrate the life of Lewis F. Powell, Jr. Last week Lewis left us and went home to God and to rejoin his beloved wife, Jo. I was at the Supreme Court in January 1972 to witness the investiture of Lewis Powell and William Rehnquist. I met the Powells at the reception following, but little did I dream then that I would know Lewis Powell as a colleague on the Supreme Court nine years later.

Justice Powell was the ninety-ninth Justice to serve on the Supreme Court and perhaps the most reluctant. It is reported that, on the day in January 1972 when Lewis was sworn in, Nan Rehnquist asked Justice Powell's wife, Jo, if it wasn't the most exciting day of her life. Jo reportedly said, "No, it is

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* Associate Justice, Supreme Court of the United States. Justice O'Connor delivered these remarks at the funeral services for Lewis F. Powell, Jr. in Richmond, Virginia on August 31, 1998.

the worst day of my life. I am about to cry." Lewis Powell had turned down an appointment to the Court in 1969 and was prepared to do so again in 1972. Luckily for the Court and the Nation, he finally agreed to accept the nomination when President Nixon convinced him it was his duty to his country to do so.

His family dates back to Thomas Powell who came to the James River area of Virginia from England in 1635. Lewis was born in Suffolk, Virginia, but lived most of his life in Richmond. He was an able student and a good athlete – playing basketball and baseball. He learned how to shoot and enjoyed hunting. He also learned as a youngster the demanding nature of life on a farm – his father bought a milk cow named Mollie. Lewis was directed to feed her, take care of her, and milk her. Anyone who has done that knows there is never a day off. Lewis said one of his happiest days was some years later when he went out to the barn and "found the damn cow dead."

He attended college and law school at Washington and Lee University in Lexington, Virginia. He quickly demonstrated his leadership qualities – president of his fraternity, managing editor of the student newspaper, student body president. He graduated first in his class from law school, then did a postgraduate year at Harvard.

Lewis returned to Richmond to practice law and after a couple of years joined the law firm of Hunton & Williams, at the handsome salary of fifty dollars per month. Soon after, he married Jo Rucker – a beautiful and talented graduate of Sweet Briar. It was a marriage made in heaven, as they say. One that remained joyous and loving for over sixty years. They had four wonderful children – Jody, Penny, Lewis, III, and Molly. Nine grandchildren, and one great grandchild.

He volunteered in the Army Air Force in 1941. He served in North Africa, Sicily, and England. Eventually he was assigned to military intelligence and served as a representative in the most sensitive and top secret intelligence group known as *ULTRA*. In the military service, he made a very important contribution to the victory of the allies, and it was a significant part of his life.

After the War, he returned to Hunton & Williams. He represented some important clients, including Colonial Williamsburg.

Qualities of leadership emerged again at once – within his law firm, the House of Delegates of the American Bar Association, and as chairman of the Richmond School Board. In that capacity, he served on the board during the years immediately following the Supreme Court's decision in *Brown v. Board of Education*, keeping the public schools open. Later he served on the Virginia State Board of Education. He supported reform of the curriculum, and he strongly opposed those who were proposing massive resistance to the desegregation of the public schools.

He became president of the Colonial Williamsburg Foundation and, in 1964, president of the American Bar Association.

He served on the Supreme Court of the United States from 1972 to June 1987. He wrote more than 500 opinions, many very significant. It was a great privilege to serve on the Court with him for six full years. No one did more than Lewis Powell to help me get settled as a new Justice. He found us a place to live. He allowed me to hire one of his two secretaries as my chamber's secretary. Most important – he was willing to talk about cases and the issues. His door was always open. I miss those visits and discussions still today.

He was very hard working. He went over every detail. He was concerned in every case about the equity at the bottom line – about reaching a fair and just result. He brought a lifetime of experience as a lawyer and as a leader. He was enormously kind and thoughtful. But underneath that kind and gentlemanly exterior was a firmness and resolve. He would hold his ground when he decided on a course of action.

Despite the hard work, Lewis and Jo would occasionally attend social functions with their friends. Lewis was an excellent dancer and I had the privilege of dancing with him several times. Lewis once asked me to speak at a meeting of the Richmond Bar Association. He introduced me and I still remember when he said, "Now on my tombstone it will say 'here lies the first Supreme Court Justice to dance with another Justice.'"

Many of you may have read his wonderful biography by a former clerk, John Jeffries. As I read it I was struck by how Lewis Powell has followed General Robert E. Lee's precept:

> Do your duty in all things. You cannot do more. You should never do less.

As another observer of Lewis Powell said:

> For those who seek a perspective grounded in realism and leavened by decency, conscientious in detail and magnanimous in spirit, solicitous of personal dignity and protective of the public trust, there will never be a better Justice.

I would add:

> For those who seek a model of human kindness, decency, exemplary behaviour and integrity, there will never be a better man.

The Honorable Harry L. Carrico*

One incident that stands out in my memory of Lewis Powell is his last appearance as a lawyer before the Supreme Court of Virginia prior to his appointment to the Supreme Court of the United States. I have long since forgotten what the case was about or how it ended. I could look all that up, of course, but it is about Lewis Powell's performance I want to comment, and I need no memory-jogging on that score.

He knew his case thoroughly, he did not waste a single word in presenting his argument, he sat down before he had used his allotted time, and his manner reflected a warm and pleasing personality. All in all, his was a model of appellate performance. I only wish someone had made a videotape of it for use in seminars on appellate advocacy.

I got to know Lewis Powell on a personal basis much better after he became a member of the Supreme Court of the United States. We used to have lunch together on occasion during the summers he spent in Richmond, and they were pleasant and stimulating experiences for me. He was an excellent conversationalist, always steering the discussion more toward what I was doing than toward himself. And, more than once, he expressed his admiration for the Supreme Court of Virginia, which, naturally, filled me with pride.

My most memorable experience with Lewis Powell came after my court entered an order that required each attorney admitted to the state bar on or after July 1, 1988 to attend a course on professionalism within twelve months of admission. As a result, the Virginia State Bar Mandatory Course on Professionalism was established. It is estimated that more than half the lawyers actively practicing in Virginia have taken the course by now. Virginia's effort in this respect has become a model that has been followed in a number of other states.

The State Bar asked Lewis Powell and me to make a videotape for use in the course, and we agreed. Moderated by Professor John C. Jeffries, Jr., Professor of Law at the University of Virginia and former law clerk to Justice Powell, the taping session was held in an office in the old City Hall Building in Richmond. We talked for about two hours, and, after editing, a tape twenty-two minutes in length resulted.

The tape was shown at the beginning of the first session of the mandatory course on December 18, 1988 at a Crystal City hotel in Arlington. I was scheduled to make a luncheon speech at that session. Justice Powell had been invited to come over from Washington, and he had accepted. He was asked

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* Chief Justice, Supreme Court of Virginia.

to make some remarks, but he declined, indicating he did not want to detract from my presentation.

He was introduced, however, and received a tremendous ovation. He said afterwards he was surprised at the warmth of his reception. I told him he just did not realize how much those young people admired him, and he was surprised at that as well. He was, indeed, a modest person.

The tape is still shown at the beginning of each of the six sessions of the mandatory course held each year. I will always remember the great time we had making the tape, and I will ever be proud of my appearance on the tape with Justice Powell.

Finally, I had the pleasure of presenting Justice Powell with the Virginia State Bar's first Lewis F. Powell, Jr. Pro Bono Award on the evening of May 3, 1991. Here again, Justice Powell seemed humbled by the praise that came his way that night.

The Pro Bono Award was named for and was presented to Lewis Powell because of the magnificent effort he made while President of the American Bar Association in 1964-65 to further the cause of providing legal services to the poor. Knowing full well that he was putting his credibility on the line, he asked the ABA to endorse a controversial legal aid program proposed by the United States Office of Economic Opportunity. According to an observer, Lewis Powell was "flanked on one side by the so-called 'old line' legal aid agencies that demanded monopoly control of any government funds for legal aid, and on the other side by lawyers fundamentally distrustful of any governmental involvement."

Little did the observer know of Lewis Powell's persuasive powers. The endorsement President Powell wanted came in the form of a unanimous vote of the ABA's Board of Directors and a similarly solid vote of its House of Delegates.

Lewis Powell then became a member of the National Advisory Committee on Legal Services to the Poor, established pursuant to the Economic Opportunity Act of 1964 and designed to guarantee the independence of the OEO legal services program. One of his associates on the Committee supported his nomination to the Supreme Court in a letter to the Senate Judiciary Committee. She wrote:

> My support [of Lewis Powell] is based upon the fact that I am drawn inescapably to the sense that [he] is, above all, humane; that he has a capacity to empathize, to respond with humanity to the plight of a single human being to a degree that transcends ideologies or fixed positions. And it is that ultimate capacity to respond to individualized instances of injustice and hurt that is the best and only guarantee I would take that his conscience and his very soul will wrestle with every case until he can live in peace with a decision that embodies a sense of decency and fair play and common sense.

This was a splendid tribute to a truly great man who, in a lifetime filled with accomplishment, never forgot that it is the duty of a lawyer to render service to others.

Justice Powell and General Lee's College

Lewis F. Powell III*

Dad would probably be a little embarrassed by the dedication of this issue of the *Law Review* in his honor. However, he dearly loved Washington and Lee, and was always very proud to claim it as his alma mater. He was especially proud of the school's ascension to the ranks of America's elite academic institutions.

When the *Law Review* asked me to contribute to this commemorative issue, at first I was reluctant to do so. Hardly an objective observer, I was uncertain what I could write that would be of any interest. It finally occurred to me, however, that I might write a few paragraphs about the origins of Dad's relationship with Washington & Lee, and the editors generously agreed to publish the result.

Syndicated columnist Charles McDowell recalls growing up in the late 1920s on the campus of Washington and Lee, where his father was on the faculty. McDowell particularly remembers becoming acquainted with a student from Richmond named Lewis Powell. Most vivid in McDowell's memory, however, is not anything particular about this slender and intense young man. Instead, McDowell recalls that Powell lived in the home of Miss Annie Jo White, and that hanging in her parlor was a photograph of Miss White as a child, sitting in the lap of Robert E. Lee, who sat astride Traveller.

When he would tell this story, McDowell often would add, with a twinkle in his eye, that he had known Justice Powell longer than just about anyone still living. McDowell's point was not so much to claim familiarity with the Justice (in fact, they enjoyed a long friendship). Instead, McDowell would keep coming back to his childhood memory of knowing a lady who had known Robert E. Lee, who himself was only a single generation removed from

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* Mr. Powell is a partner in the Richmond office of Hunton & Williams. A 1974 graduate of Washington and Lee, Mr. Powell received his law degree from the University of Virginia School of Law in 1978, where he was an Executive Editor of the *Virginia Law Review*. He joined Hunton & Williams in 1979 after clerking for the Honorable Robert R. Merhige, Jr. of the United States District Court for the Eastern District of Virginia.

the American Revolution. For McDowell, these relationships illustrate the youth of our nation, and how far we have come in such a short time. For me, they provide context for my family's close ties with Washington and Lee, which Dad usually called "General Lee's College."

Among Dad's favorite books and now one of my most cherished possessions is *Lee – The Last Years*, Charles Bracelen Flood's account of the wonders wrought by Robert E. Lee in the few years left to him following the Civil War. Expecting to fade away quietly into obscurity, Lee found himself instead at the helm of tiny Washington College in Lexington, which in the wake of the war was teetering on the brink of collapse. Lee saved the school, and in so doing helped save the South. Dad gave this book to me in 1982. It bears this inscription:

> Lewis, as you share my unbounded admiration for Robert E. Lee, I think you will enjoy – and be moved by – this intimate description of "The Last Years."

Dad graduated from the college in 1929 and the law school in 1931 (when it was still possible to get both degrees in six years). Later, he was a long-term member of the Board of Trustees. His younger brother Angus and Angus's two sons also attended the college, as did I. And I recall Dad often remarking that my older sister Molly, a 1969 graduate of Hollins College, should have been awarded an honorary degree from W & L on account of the countless time she spent in Lexington.

On the threshold of a new millennium, it is easy to forget that a generation ago young men came of age at a time when the South remained enthralled by the Civil War. Born only forty-two years after the end of the war, Dad grew up knowing Americans who had fought other Americans in our country's bloodiest conflict. And growing up in the capital of the Confederacy, Dad was surrounded by the images and romance of the Lost Cause.

Thus, it was only natural that Lee was among Dad's heroes. So, too, was the man he called "Uncle Ned." Edward Gwathmey was Dad's maternal great uncle and, after Dad's mother, the next most influential adult of his formative years. Uncle Ned owned the Gwathmey family farm north of Richmond, called Bear Island. Dad's mother grew up at Bear Island in Uncle Ned's care, because her parents died when she was a child. Thus, Uncle Ned was a father figure to her, and the only "grandfather" Dad ever knew. Uncle Ned was a veteran of the Civil War.

Dad's choice of Washington and Lee was not warmly embraced by his father, who had been obliged to leave school at age fourteen to help support his family and expected Dad to attend *the* University. Dad's decision to attend college in Lexington rather than Charlottesville reflects Uncle Ned's

influence. For although Uncle Ned had been enrolled at Virginia, he did not graduate. Instead, he left school in 1861 to join the Army of Northern Virginia, with which he fought until Appomattox.

While no one in our family ever claimed that Uncle Ned actually knew Robert E. Lee, it is altogether clear that Uncle Ned worshipped his former commander. Indeed, somewhat like Lee, but with far less enduring consequences, after the war Uncle Ned established and ran for fifty years a school for young boys at Bear Island.

In retrospect, therefore, it seems wholly unsurprising that a young man who grew up hearing his beloved Uncle Ned reminisce about the Civil War, and his reverence for General Lee, would himself want to attend the college that came to bear Lee's name. Nor is it surprising that, like his childhood heroes, Dad would devote much of his considerable energy and talent to education – which he often described as the country's greatest equalizer.

He always considered it a privilege to have such a long and deep association with General Lee's College. If he were still with us, he would especially enjoy the current celebration of the school's 250th anniversary, and be gratified to see that Lee's legacy has endured and prospered.

The Benign Mentor

George Clemon Freeman, Jr.*

Lewis Powell left his mark on America, not only through his public service on the Court, in the community and in the bar, but also through his impact on the lives of several hundred individuals in his natural and "extended" family. They include not only his four children and his many grandchildren, but also lawyers who worked with him at his old law firm, Hunton & Williams, persons on his staff there and at the Court, his law clerks, and special friends outside these circles.

Powell's influence was not only indirect through example, but he was also pointedly direct through his monitoring, questioning, suggesting, and cajoling each of us over the years of our association with him. Very little that we did, or that we ought to have done, or that we ought to do, escaped his attention. It seemed as if he had a special plan for each of us. He felt a responsibility to help us see and do what was best for our country, our com-

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munity, our families, and ourselves. I am certain that those of us who were fortunate to be on his list recall many examples of his continuing surveillance and his intervention in our lives.

His four children received the lion's share of his advice. I believe that at times in their earlier years they may have felt it a bit heavy. Powell usually gave considerable thought to his suggestions and they were not only lovingly, but also strongly intended. Younger lawyers at Hunton & Williams had mixed reactions to Powell's expressions of his personal concern. Powell's manner of speaking was usually calm, quiet, deliberate, and precise. His silence in response to excuses could be chilling. One of our contemporaries in the law firm referred to him as the "ice man." He came across as a powerful, serious, no-nonsense person. Powell's direct focus made some understandably nervous, despite his good intentions. But as Powell grew older his warm sense of humor began to show through the "Woodrow Wilson" mask. Indeed, after a few years on the Court all traces of the austere Senior Partner vanished before the quiet benevolence of the wise and caring Justice. This side of Powell's personality that he had earlier shown only to his close contemporaries now became apparent to all.

Justice Powell's mentoring was thorough and systematic. Like Justice Frankfurter, whom Powell had admired since his year at Harvard Law School following his law degree from Washington and Lee, Powell kept checks on everyone on his list. Whenever something of special interest, good or bad, happened to any of them, he or she got a call or a note from Justice Powell.

Powell also used those of us on his list as sources of information for others on the list. Let me give an example. After Justice Powell went on the bench in 1972, my law practice required me to be in Washington often throughout his tenure. I made it a practice, with encouragement from him, to drop by the Court every two or three weeks to see him and Sally Smith, his secretary. On those occasions, Powell questioned me about what I was doing, what my family was doing, what was going on at "the law firm," what was happening at the American Bar Association and the American Law Institute, what was going on in Congress, in foreign affairs, etc., etc. He would ask if I knew something new about our mutual friends that he should know. He would also make suggestions on things I should do or consider. Occasionally, he would suggest a way in which I might help someone we both knew. Usually, these suggestions were reinforced by a brief note, probably dictated soon after I left. Powell had great organizational skills. Once he thought there was something he should do, he did it then and there. There was never any justification for procrastination in his or our affairs.

Powell, like Frankfurter, also intervened quietly behind the scenes to help promote the advancement of those on his list. I was one of the many bene-

ficiaries of his efforts. One example was in the American Law Institute. Early in my career, several years after I became a partner, Powell suggested I join the American Law Institute. He orchestrated the necessary letters of endorsement to help me get in. I, of course, did. Years later in 1980 when I had just turned fifty-one, I got a call from Judge William Webster, as the Chairman of its Nominating Committee. Bill asked if I would serve on the ALI Council if elected. I told him I would check with the firm's Executive Committee and call him back. Several minutes later, Justice Powell called: "George, Bill Webster tells me that he has just asked if you will serve on the ALI Council. I recommended you to him. I hope that you will accept, but only if you promise that you will go to all its meetings and that you will do your homework."

This kind of benign intervention happened time and time again. The present prominence of many of Powell's clerks and others on his list did not come about solely from their own abilities or good luck. I believe all on his list share the same sense of gratitude for his attention and help. There is also a lesson here that we should remember as we go through life with our own lists. I am certain Powell wanted us to remember it.

Robert E.R. Huntley*

I had a chance to see up close one aspect of the life and career of this multifaceted man. I came to know Lewis Powell during his seventeen years as a trustee of Washington and Lee. During much of that time I was president of the school.

He was, of course, a graduate of the college and law schools at Washington and Lee. He confirmed to me the story I first heard elsewhere that he came to Washington and Lee mainly because he was vigorously recruited by the college's legendary baseball coach, Cap'n Dick Smith, for his skills at that game. His record indicates that he did a bit more than play baseball. He was president of the student body, finished his undergraduate career with high academic honors, Phi Beta Kappa, and graduated first in his law class. The faculty voted to honor him as one whom it expected to "excel in high ideals of living, in spiritual qualities, and in generous and disinterested service to others." Their expectations were more than fulfilled by a unique record of service to community, state and nation, to American jurisprudence – and to his University.

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* President, Washington and Lee University, 1968-82.

During all the years of professionally and nationally acclaimed achievement, he found the time and the concern to bring to his alma mater a full measure of true devotion. His was not merely the nostalgic devotion of an alumnus, but rather an intelligent, well-informed concern. He was there with sound advice when advice was useful, but never proffered it gratuitously or officiously. He was there with leadership when leadership was needed, but never arrogated to himself a role that might usurp the proper leadership of another.

In routine matters as well as in matters of critical dimension, no one could have performed more effectively. He led the Board of Trustees in decisions to reorganize itself, including term membership in place of the then more traditional life tenure of trustees. In the Board's deliberations about planning for the future, he kept its vision on significant matters of policy, helping to guide it to sharpened appreciation of its proper role. He understood clearly the distinctive place of the board as the governing entity responsible for strategy and vision, for the selection of the administration, and for overall financial health – never as a meddler in the operational activity of the institution. In the 1960s, he was among those on the Board who led affirmation of the faculty's role in academic matters, in the admission of qualified students of all races, and in permitting and encouraging the presentation of diverse viewpoints. When from time to time the honor system was attacked as unforgiving, outdated, or excessively "judgmental," he and the Board unswervingly supported the student body responsibility for it, including the exclusion of students for lying, cheating, or stealing.

I remember May of 1970. Most who were on college campuses then remember May of 1970. Washington and Lee, like many other colleges, was gripped by a tension that seemed to some to pose an immediate threat to its stability and integrity as a center of learning. At the peak of this excitement and concern, it was Lewis to whom I turned for advice – not only because he was a Trustee, but because I knew of his capacity to bring calm wisdom to an emotionally charged problem, objectively, and with lucid insight.

Without hesitation, he advised me to act with complete confidence that the faculty and ultimately the student leaders would rise to the performance of the duty and responsibility which the school has traditionally reposed in them. The reader may be able to recall enough about those times to remember that such advice to college presidents would not have been the usual. Whether the right advice for others I do not know, but it was the right advice for us. Lewis's quick understanding, intuitive empathy, and his seasoned confidence in the integrity of the college's institutions provided a perspective which allowed Washington and Lee to come through those days with little bitterness and perhaps even with new strength.

We were blessed with a Board of strong and effective persons, among whom he served as a voice of reason, optimism, and vision – and, perhaps above all, of courage. The institution's financial situation in the first decade of his service as Trustee was not robust, and some of the needs were pressing and immediate. The Board approved expenditures to begin to meet these needs long before the funds were in sight to cover them – a bold act of courage and faith that in time was proven justified.

After his appointment to the Supreme Court, he resigned from nearly all the boards on which he served. But when he called me to tell me of his decision to accept appointment to the Court, he said he expected to receive the concurrence of the Chief Justice to continue as a trustee of Washington and Lee. He served an additional seven years until he encountered the age retirement provision that he himself had helped put in place. During those years, as before, he was always available to me by phone or if need be in person, a privilege that I hope I did not abuse but which I often used. And of course, as before, he attended and participated in the Board's meetings.

One concluding anecdote: as all who knew him could attest, Lewis Powell was the personification of dignity, courtesy, and gentlemanly demeanor. So it may surprise some to know that he was a consummate and inveterate jitterbugger, 1940s style. So is my wife, who ever since she married a man with two left feet had been watchful for opportunities to cut a rug to the likes of *In the Mood* with someone who really knew how to move. She found him in Lewis Powell, and at Board social evenings Jo Powell and I accustomed ourselves to watching Lewis and Evelyn clear the floor till the band was exhausted.

Robert R. Merhige, Jr.*

The late Justice Powell was noted for his gentle manner, his legal acumen, his great service to the legal profession, and his contribution to all Americans for his service as a soldier and a Justice of the Supreme Court of the United States. All of that, of course, makes those of us who had the privilege of knowing him in more than a casual manner, aware that though his responsibilities were serious and all-encompassing, that never changed the fact that he was a man who participated in more mundane activities, and always remained the same Lewis Powell that he was prior to his appointment

* Special Counsel, Hunton & Williams, Richmond, Virginia. United States District Judge, Eastern District of Virginia, 1967-98.

to the Court. Despite his admonishments to me to the effect that I was to address him by his first name as I had been accustomed, I simply couldn't do that. From the moment of his appointment, he was "Mr. Justice Powell."

His sense of humor was something that all of us who knew him took joy in. While he had achieved many firsts in his life, one of those in which he took special pride was his recitation of the fact that he believed he was the first Justice of the Supreme Court to have danced with another Justice of the Supreme Court. He took obvious pleasure in recounting that experience, and always with a wide smile. His dancing companion on that occasion, as is now well known, was Justice Sandra Day O'Connor.

On a more personal note, I felt that the Justice added greatly to the folklore of the court over which I presided, by virtue of his appearance before the court while a Justice to be heard on a motion. The motion, which was for the admission of two young lawyers to the bar of the court, was made in a typical Justice Powell manner, introducing himself as a member of the bar of the court. It was so typical of the way the Justice always conducted himself. I frequently reminded him subsequently that the very fact that it was an occasion reserved for lawyers added greatly to the folklore of the Eastern District of Virginia, whose first judge was appointed by President George Washington in 1789.

Justice Powell was, indeed, a special man. His gentleness, his conduct as a lawyer, his devotion to his family, friends, and his profession were attributes which served, and will continue to serve, as encouragement to each of us to endeavor to emulate them. To me he will never be forgotten. I truly feel blessed to have had the opportunity to be his friend.

Barry Sullivan*

I had occasion to meet Lewis F. Powell, Jr. for the first time in the fall of 1974. I was a recent law school graduate, he had been a Justice of the nation's highest court for a little more than two years, and Watergate was very much in the air. I would later have the privilege of arguing several cases before the Court while Justice Powell was in active service, and, later still, I would come to know him better through our respective connections to Washington and Lee. As I made the trip to Richmond for his funeral, however, I did not think of the cases I had argued, or of our conversations and correspondence since

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his retirement. My thought turned repeatedly to my first meeting with Justice Powell almost a quarter century ago.

The occasion is not important, and I am sure that I have forgotten much of what we talked about, but the part that I recall is vivid indeed. I remember Justice Powell's graciousness and courtesy, as well as the very real and sincere interest he showed in me. That graciousness and courtesy and genuine interest in others was his trademark. It was an attitude, and a way of being, that permeated his relations with others. In my case, Justice Powell was interested in hearing whatever ideas I might have had about how I thought my professional life would unfold. What would my first steps be? What were my ultimate goals? Was I attracted to teaching and scholarship? Would I practice law in the public sector or in a private firm? Finally, and most important, what did I value, and how would my choices relate to that?

I have long ago suppressed any recollection of the inadequate answers I must have given to the serious questions that Justice Powell put to me. What I do recall are his questions, the excitement he demonstrated in posing them, and, most important, the intensity and passion with which he spoke about the possibilities of doing good and useful work as a lawyer. It would be difficult to forget the enthusiasm with which Justice Powell talked about lawyers and lawyering, let alone the gentle persistence with which he expressed the view that lawyering involves a great deal more than the pursuit of personal financial gain. Justice Powell truly believed, in the words of the Preamble to the ABA Model Rules, that a lawyer is "a public citizen having special responsibility for the quality of justice."[1] He knew, too, that technical skills and knowledge are critical to good lawyering, but no more so than the habits of heart and mind and soul that nurture the fundamental values of our profession.

Justice Powell's enthusiasm would have been noteworthy at any time, but it was particularly extraordinary at the time of our first meeting, when Watergate had brought the nation and the profession to the low water mark. Then, as always, Justice Powell's belief in the importance of lawyers, and in the importance to society of the work that we are capable of doing, was unequivocal. As a lawyer, Justice Powell reminded me, one would have many opportunities for good and useful service. Those were true words that young lawyers needed to hear then, as now, and the exemplary life of Justice Powell gives them special weight.

In reflecting on the professional career of Justice Powell, one is understandably tempted to focus on his accomplishments as a member of the Court. Certainly, the voice that he brought to the Court was a distinctive one, as were the style and attitude with which he approached his work as a Justice. Many

1. MODEL RULES OF PROFESSIONAL CONDUCT preamble ¶ 1 (1983).

of Justice Powell's opinions reflect an enduring wisdom that will affect the course of the law for years to come. As Justice O'Connor has written, Justice Powell's judicial work also is remarkable for its "deep sensitivity to the real people whose hardships or injuries sometimes recede from view in appellate litigation."[2]

Justice Powell was deeply mindful that questions presented for judicial decision are not simply intellectual puzzles to be solved, but issues affecting both the well-being of society and the lives and liberties of individuals. It is the right of individuals in a free society, as Justice Powell understood, to have their problems taken seriously, and to have them decided fairly, by those who hold judicial office. Not surprisingly, another part of Justice Powell's judicial legacy rests in his personal influence on those with whom he came in contact while doing the business of the Court, and in the standard he set in that regard: "The humanizing influence of Justice Powell's courtesy and kindness is not an easy thing to measure, but for those of us who felt it, it will be impossible to forget."[3] Not by loud exhortation, but by quiet and effective example, he challenged all of us to be better than we are. To have contact with Justice Powell in even the most cursory way was to be impressed by the power of character: civility and integrity, humility and hard work.

Justice Powell's excellence as a judge should not make us unmindful of his career as a lawyer. After all, Justice Powell came to the Court in his sixty-fifth year, a time of life when many lawyers think of retirement. At that time, he already had met the challenge of Justice Holmes's dictum that it is possible "to live greatly in the law."[4] Senior partner in one of the nation's leading law firms, he was widely recognized for his expertise in transactional as well as trial work. His record of civic and professional leadership was substantial. Soldier with a distinguished record of wartime service, president of the American Bar Association, president of the American Bar Foundation, president of the American College of Trial Lawyers, chairman of the Richmond School Board during a singularly important time in its history, member of the Virginia Commission on Constitutional Revision, member of several national commissions and task forces, and board member of numerous business corporations and educational and charitable foundations – the record of accomplishment that Justice Powell presented at the time of his Senate confirmation

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2. Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396 (1987).

3. *Id.* at 395.

4. Oliver Wendell Holmes, *The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University* (Feb. 17, 1886), *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES 471, 472 (Sheldon M. Novick ed., 1995).

truly was extraordinary.[5] Indeed, Justice Powell's record as a lawyer might profitably be compared to the words of the Model Rules:

> As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession.... [A] lawyer should cultivate knowledge of the law beyond its use for clients . . . [and] employ that knowledge in reform of the law.... A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor... cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.[6]

The words Justice Powell spoke to me, concerning the possibilities of doing good and useful work as a lawyer, were deeply felt and the product of substantial personal experience.

In attempting to assay the character of Lewis Powell, I can do no better than the words spoken by Justice Sandra Day O'Connor at his funeral: "I was struck by how Lewis Powell has followed General Robert E. Lee's precept: 'Do your duty in all things. You cannot do more. You should never do less.'" We were fortunate to know him. We were fortunate to have his deep and abiding interest in the progress and ideals of our University, which he personified to an extent that few others have done. Above all, we were fortunate to have him do our public business.

Robert M. Couch*

In April of 1996, former law clerks of Justice Lewis F. Powell, Jr. received a memorandum from the Justice's son, Lewis III, entitled "Mother and Dad." The memorandum was prompted by the approach of the customary date for the annual law clerks' reunion. Several clerks were concerned because they had not received the usual notices of pending events. Lewis's memo

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5. *See, e.g.*, Oliver Hill, *A Tribute to Lewis F. Powell, Jr.*, 49 WASH. & LEE L. REV. 11 (1992).

6. MODEL RULES OF PROFESSIONAL CONDUCT preamble ¶ 5.

* B.S. Washington and Lee University, 1978; J.D. Washington and Lee University, 1982. President, New South Federal Savings Bank. The author clerked for Justice Powell during the 1983-84 term. The author wishes to thank two of his fellow Powell clerks, Cammie Hauptfuhrer and Joe Neuhaus, and Matt Lembke, who clerked for Justice Anthony Kennedy, for their comments on an earlier draft of this tribute.

stated, in part, that Justice Powell recently had experienced problems with his health that had led to a medical evaluation. Without providing a definitive diagnosis, Lewis offered, "when people ask, I simply say that his short term memory is shot, that he has postponed his tryout with the Orioles, but that he continues to delight in the company of his family."[1]

The memo went on to deliver additional grim news about Justice Powell's wife, Jo:

> Mother's doctors have now confirmed that she has lymphoma. She commenced a mild regime of chemotherapy this week. The goal is not to cure the disease, which the doctors say is out of reach, but to lengthen her life a bit and restore her energy, without subjecting her to the ravages of aggressive chemotherapy.[2]

Many of the law clerks, including myself, received both doses of news with foreboding. Although the clerk grapevine had indicated that all was not right in Richmond, few of us had any idea of the gravity of the situation.

Most of the Justice's law clerks consider themselves to be a part of his extended family – a notion that the Justice and his "blood kin" have done little to dispel. As a member of the "family," it was easy to see many implications of the news that Lewis III, with customary good humor and aplomb, had delivered. First, I awoke to the realization that the Justice was mortal. This conclusion would not be noteworthy to a casual reader given that the Justice was approaching his eighty-ninth birthday and had suffered a series of medical setbacks in recent years, but it was a startling revelation to many of us who had worked closely with him over the years. For as long as I had known him, the Justice's frail appearance had masked his acute intellect and inexhaustible drive to produce results. I found it difficult to imagine Justice Powell being forced into full retirement. The consequences of prolonged idleness to the Justice's quality of life potentially could have been an unfortunate epilogue to an illustrious career.

More importantly, I realized that the source of much of the Justice's strength was in grave jeopardy. Justice Powell always had been devoted to Mrs. Powell and had relied on her cheerful countenance and unwavering support in all the tough spots before. She had always been there for him. Now, she was the one in need of support.

Finally, Lewis's memo underscored what we had understood for so long, that the pleasures that the Justice had always enjoyed the most were the simpler ones: "I am pleased to tell you that both Mother and Dad are cheerful, and under the circumstances, optimistic. They are physically comfortable, and at least for the time being, they are in the home they love. Their children and

1. Memorandum from Lewis F. Powell III (dated Apr. 19, 1996).
2. *Id.*

grandchildren . . . have flocked to them."[3] Despite this optimism, Mrs. Powell passed away in July of 1996 and the Justice lived in relative comfort until August 25, 1998, just a month shy of his ninety-first birthday. Although we had had over two years of warning, the news of Justice Powell's death still came as somewhat of a shock to many of us. He was, indeed, mortal. But he was also a great man, possessing the characteristics of leadership that withstand the passage of time. My purpose here is to give my personal reflection on the guiding principles in the Justice's life and why they contributed to his greatness.

Duty

It would be difficult to become acquainted with Justice Powell or his career without being struck by the role that his perceived duty to serve his community and society at large played in his thought processes. Whether in his own decision making or the advice he gave to others, the obligation to serve others was a recurring theme. As aptly put by the Justice's biographer: "If there was one constant in Powell's life, it was his sense of duty."[4]

There is no way to pinpoint the source of the Justice's sense of obligation, but it surfaced as early as his college days. No doubt, his six years of study at Washington and Lee[5] with its institutional adoption of General Lee's concepts of duty played a part. While at Washington and Lee, Powell managed to excel in his school work while also engaging in numerous extracurricular activities and service projects.[6] As a result, he received one of the highest honors awarded by the school, the Algernon Sidney Sullivan Medallion. This medal is awarded annually to the student who best exhibits "generous and disinterested service to others."[7] He was also elected president of the student

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3. *Id.*

4. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 6 (1994).

5. Justice Powell combined the undergraduate and law curricula to earn both college and law degrees in six years, graduating first in his law school class. Following completion of the program at Washington and Lee, he spent another year at Harvard Law School, earning his masters degree in law in 1932.

6. The Justice's service to Washington and Lee University did not end when he graduated. From 1961 to 1971, he served on the Board of Trustees. Following his retirement from the Court, he surprised many by donating his personal and professional papers to Washington and Lee, where they are now housed in the Lewis F. Powell, Jr. Archives, adjacent to the School of Law.

7. Lest my description of the Justice's college days make him appear to be dull, it is worth noting that he also excelled at the social aspects of college. He was elected president of his fraternity. Although he did not imbibe, he was inducted into the Sigma Society, a campus drinking and socializing club. Many years later, he would reminisce about leading the opening procession at the Fancy Dress Ball his senior year. Clearly, he included some time for play in his busy schedule.

body and, as such, had responsibility for administering the school's Honor Code.[8] Whether or not these experiences served as the breeding ground for Justice Powell's sense of duty or merely demonstrate a predisposition to the service of the larger community is immaterial. The Justice's life was replete with examples of his accepting the call to fulfill his duty as he perceived it. I will cite only a few of the more prominent examples.

Justice Powell returned to Richmond following law school to find the Depression in full swing. He found employment as a lawyer with no small degree of difficulty. With enormous dedication, during the next decade, he built a reputation as an able young lawyer.[9] He also courted and married the beautiful Josephine Rucker. By all accounts, the Justice had everything going for him. Then, World War II intervened. In 1941, he chose to put a promising legal career on hold to join the Army Air Corps and the war effort – this despite having a beloved wife and two young children at home. His reasoning? "I could never have looked my children in the face if I had ducked this responsibility."[10]

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8. The Honor Code, which continues to govern student conduct at Washington and Lee, traces its origins to the period of Robert E. Lee's tenure as president of the university. It is based on Lee's admonition that it is the duty of every student to conduct himself as a gentleman. 4 DOUGLAS SOUTHALL FREEMAN, R.E. LEE 278 (1935). Justice Powell was a great admirer of General Lee. Duty to Lee was a paramount consideration in all decisions. Interestingly, in much the same way that duty caused Justice Powell to decline consideration for a Supreme Court seat in 1969, it was duty that caused General Lee to decline Lincoln's offer of the command of the Union Army in 1861. 1 DOUGLAS SOUTHALL FREEMAN, R.E. LEE 436-37 (1934). In her eulogy to Justice Powell delivered at his funeral, Justice Sandra Day O'Connor noted a similar parallel: "As I read [Justice Powell's biography,] I was struck by how Lewis Powell has followed General Robert E. Lee's precept: 'Do your duty in all things. You cannot do more. You should never do less.'"

9. The Justice felt that a law degree provided an unusually useful tool for fulfilling one's duty to serve one's community. During my clerkship year, one of my co-clerks approached the Justice for advice about choosing between several competing job offers. One of the offers was from a prestigious law firm in Washington, D.C. The Justice encouraged the young man not to stay in Washington to practice law. The Justice's reasoning was very pragmatic: A person with a law degree is looked up to by others in the community. In every committee meeting where an important question is at issue, everyone in the room will seek the advice of the lawyer. In Washington, there are so many lawyers that your natural advantage to being a leader in your community will be watered down.

In essence, the Justice was saying "Take your law degree and go somewhere where you can use it to be of more service to your community." He offered me similar advice. In a letter he wrote me just after I wrapped up my year working for him, he gave the following unsolicited counsel: "While establishing yourself as a lawyer is first priority, you know my view that a lawyer . . . should take part in the affairs of your community and state."

10. JEFFRIES, *supra* note 4, at 61.

It must have been this same sense of responsibility that caused him to accept reappointment as the chair of the Richmond School Board during the period of implementation of the *Brown v. Board of Education*[11] decision. Justice Powell must have known the risks that such a role would carry, both to his personal reputation and the reputation of the law firm that bore his name. But the Justice must also have appreciated what was at stake in a speedy and appropriate resolution of the issues presented by the call to integrate the Richmond schools. The relative ease of the transition in Richmond when compared to other large cities in the South suggests that Justice Powell and the other members of the Richmond School Board performed their duties well. The Justice always referred to his service for the Richmond schools with a good deal of self-satisfaction and pride.

In a perverse way, it was a sense of duty that caused then-lawyer Powell in 1969 to decline President Nixon's invitation to fill Justice Fortas's seat on the Supreme Court. In his letter to Attorney General John Mitchell, Powell stated: "I am deeply grateful . . . for the consideration . . . [b]ut I wanted you to know of my considered judgment that the nomination of a younger man less subject to controversy would best serve the public interest."[12] Duty to Justice Powell meant not only providing service, but refraining from action that would cause disservice.

President Nixon was able to turn that sense of duty to his advantage some two years later when he approached Lewis Powell again; this time with the hope of filling one of the vacancies left by the retirements of Justices Black and Harlan. Powell twice dismissed Attorney General Mitchell's entreaties. Only when the President spoke to him personally and reminded him of his "responsibility to the South, to the Supreme Court, and to the country" did Powell acquiesce, ultimately allowing his name to be considered for nomination.[13]

Ironically, Justice Powell's sense of duty once again played a pivotal role when he was faced with the decision of retirement. The Justice had expressed on many occasions that he wanted to make sure that he did not fall prey to a common malady of powerful people as they grow older – the inability to recognize the effects of age on one's abilities. In the Justice's view, William O. Douglas had done the country a disservice by hanging on as long as he did. As he advanced in years, Justice Powell sought the advice of others – physicians, family, and former clerks – to make sure he did not "overstay his welcome." When he announced his retirement in 1987, he listed as one of his

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11. 349 U.S. 294 (1955).
12. Letter from Lewis F. Powell, Jr. to John Mitchell, Dec. 12, 1969.
13. JEFFRIES, *supra* note 4, at 6-7.

reasons his desire not to "handicap the Court in the event of reoccurrences of serious health problems."[14] Stated another way, it was his duty to step aside and pass the job to someone of surer health. As Justice Powell's biographer, John Jeffries, put it: "Powell had gone onto the Supreme Court when he did not want to, because of a sense of duty, and he stepped down from the Supreme Court when he did not want to for the same reason."[15] Justice Powell's heartfelt obligation to serve permeated his career and infected his decision-making.

Dedication

In reflecting on Justice Powell's career, I find it incumbent to note the tremendous dedication that he brought to any endeavor. Just after I started my clerkship with the Justice in 1983, I went into his office for my inaugural meeting with him. He used this meeting to set some of the ground rules for the upcoming year. Among other matters, we covered his expectations regarding the hours that I should plan to put into the job. He assured me that he was not like some of the other justices who expected their clerks to work around the clock. He, in contrast, didn't care how many hours I worked as long as I got the job done. This comment was very reassuring because I had heard the horror stories about the life of a Supreme Court clerk. The Justice added, however, that he would like for me to be around his chambers whenever he was. That request seemed quite reasonable. After all, how demanding could the work schedule of a seventy-five year old jurist be? Soon enough I learned two facts the hard way. First, the horror stories about the workload were true. And, secondly, this seventy-five year old had an amazing work ethic.

The Justice arrived at the office every day but Sunday around 8:30 a.m. He would leave the office, briefcase brimming, at 6:00 p.m. each weekday. Saturdays, he would generally cut short, leaving the Court in the mid-to-late afternoon. On Sundays, he rarely came to the Court, but somehow drafts of opinions that had been virgin on Saturday when he left were amply edited in the Justice's handwriting by Monday's start of business.

Never, however, did the Justice's routine take on the elements of a workaholic's. There was no make-work. There was very little idle chit-chat. His opinions were never excessive in length; if anything, the Justice appreciated economy in writing style and encouraged it in his clerks at every turn.

If the Justice had an opportunity to manage his time more wisely, it would have been in the ways that he responded to others. He regularly acted

14. Lewis F. Powell, Jr., Retirement Statement, June 26, 1987, at 2.

15. JEFFRIES, *supra* note 4, at 546.

as a sounding board to other Justices. He routinely answered all legitimate correspondence promptly and personally.[16] He would always take time to counsel a former clerk, no matter how busy the season. He made a point of paying attention to the staff of the Court, whether joking with one of the security guards, visiting with the elevator operators, or talking politics with the Court barber. He could have gotten home earlier, but only at the expense of the respect he paid to others.

The dedication that he brought to his job did not start when he was appointed to the Supreme Court. John Jeffries reports that when Justice Powell was beginning his legal career as a young associate in the Richmond firm of Christian, Barton & Parker, "[h]e resolved to be the first to arrive every morning and the last to leave every night."[17] Later, as a partner in the firm that bore his name, Hunton, Williams, Gay, Moore & Powell, his reputation as a hard, but fair, taskmaster among young associates was secure.

For Justice Powell, the dedication that he brought to a task was the natural by-product of the choice he had made, whether the choice was to accept an assignment as a practicing lawyer or to allow one's name to be put forward for a seat on the Supreme Court. Duty required that he accept the challenges, and hard work was the price of fulfilling his obligation. Once during my clerkship, I asked the Justice for a weekend off in order to play golf with my father who was visiting the area on vacation. Justice Powell encouraged me to take time off to be with my family and then asked me if I were aware that soon I would have to give up golf. He went on to reason that golf is much too time-consuming a distraction for an ambitious young lawyer. Although disbelieving at the time, I later found the Justice's insight to be sound.

Justice Powell's incredible drive had a self-fulfilling quality: his hard work lead to success, success lead to more opportunities requiring his attention. He confessed to me once that one of the by-products of his success was a lack of hobbies. According to Professor Jeffries, one of the Justice's major concerns each time he considered retirement was the absence of any diversions other than work. What would he do with his time if he retired? He derived immense satisfaction from his tremendously demanding workload, and the workload prevented other competitors for his time from creeping in. Even after "chronic fatigue" forced him to retire at the age of seventy-nine, the

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16. In a recent conversation, one of Justice Kennedy's former clerks ratified my comment that Justice Powell was fastidious in answering mail he had received from others. My friend recalled an occasion on which he had written Justice Powell to express appreciation for some kindness the Justice had shown. Shortly thereafter, my friend received a note from the Justice acknowledging the first note.

17. JEFFRIES, *supra* note 4, at 45.

schedule of speaking engagements, courts of appeals sittings, and teaching assignments that he maintained would have exhausted most anyone. For the Justice, even "retirement" required an immense amount of dedication.

Diplomacy

Only infrequently do observers of the Supreme Court refer to the period of Justice Powell's judicial tenure as the "Burger Court," despite the fact that Warren Burger was the Chief Justice during all but one of the terms during which Justice Powell served. The Chief, as he liked to be called, did not manage to build consensus and set clear direction the way his predecessor had.[18] Into this leadership vacuum, Justice Powell stepped in 1971. Justice Powell's quiet voice and understated manner permitted him to build consensus when others on the Court could not.

The Justice's modus operandi was to work behind the scenes, gently nudging rather than openly criticizing. As a clerk, I recall being told by the Justice in a case in which we were trying to turn a four-to-five dissent into a majority opinion to work quietly with the clerks in other chambers to craft language that would be acceptable, rather than circulating a blistering attack on the draft opinion of the majority. On another occasion, I recall the Justice responding to a report that another Justice had granted an interview in which that Justice had criticized other members of the Court with whom he disagreed. Justice Powell's response: "You should never foul your own nest." These anecdotes are just two illustrations of the approach that the Justice took to his duties on the Court, but they are consistent with a career full of successes achieved by little noticed maneuvering and quiet diplomacy.[19] These skills served him well as he cultivated respect and admiration from the other members of the Court. Upon his retirement, the expressions of regret from his colleagues on the Court went well beyond perfunctory professional courtesy. Other Justices conveyed heartfelt fondness for Justice Powell and sadness that he would no longer be working with them.[20]

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18. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 256 (1979).

19. See *id.* at 363-65 for other examples of the Justice's brand of diplomacy. Another earlier case in point was Justice Powell's efforts as President of the American Bar Association to secure the ABA's backing of a national legal services program. *See* JEFFRIES, *supra* note 4, at 197-201, 220.

20. JEFFRIES, *supra* note 4, at 545; *see* Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987); Byron R. White, *Lewis F. Powell, Jr.*, 39 BAYLOR L. REV. v (1987). Justice O'Connor reiterated in her eulogy at Justice Powell's funeral her reliance on his counsel:

> No one did more than Lewis Powell to help me get settled as a new Justice. He found us a place to live. He allowed me to hire one of his two secretaries as my

The result of the Justice's respect for the Court as an institution and the other Justices as individuals was that he played an unusually valuable role as a majority-maker on an unusually discordant Court. The 1984-85 Term provides perhaps the starkest illustration of this point. During that Term, an operation to remove prostate cancer caused the Justice to be absent from the bench for eleven weeks. Shortly after his return, Time magazine bemoaned the fact that the Court had been unable to craft majority opinions in an inordinately high number of cases while he was gone.

> When the U.S. Supreme Court handed down a pair of eagerly awaited rulings last week, the results – two 4-4 deadlocks – were disappointing for all concerned. . . . The difference between a decision and no decision in both cases was the absence of Lewis Powell, who has just returned to the bench after missing five weeks of oral arguments . . . . Three other tie votes were also announced last week, and three additional cases were not decided when the high court took the unprecedented step of ordering new oral arguments in the same term on the same issues, apparently solely for Powell's benefit.[21]

Two years later and some two months before he announced his retirement, the New York Times extended the logic of the Time article:

> He is slender, almost frail at 79 years of age, a soft-spoken Virgina [sic] gentleman whose friends worry about his health. His is not a household name. Yet Justice Lewis F. Powell Jr. has had as powerful an influence as anyone alive today in setting the law of the land on a stunning array of social issues – more than Chief Justice William H. Rehnquist, more than Chief Justice Rehnquist's predecessor, Warren E. Burger, more, in a sense, than even Ronald Reagan.[22]

The New York Times and some of the Justice's critics have attributed his role as perennial swing vote to a lack of philosophical moorings. To the contrary, Justice Powell consistently applied core values of fairness and decency to every case that came before him. He believed adamantly in the principle of stare decisis. History, I believe, will label him generally a "conservative," even though it was the voices of prominent "liberals" who decried his retirement most vociferously.[23]

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chamber's secretary. Most important – he was willing to talk about cases and the issues. His door was always open. I miss those visits and discussions still today.

21. Michael S. Serrill, *An Illness Ties up the Justices – The Second Oldest Court Shows the First Signs of Age*, TIME, Apr. 8, 1985, at 59.

22. Stuart Taylor, Jr., *Justice Powell Shaping Law as Swing Man on High Court*, N.Y. TIMES, Apr. 26, 1987, at 1.

23. JEFFRIES, *supra* note 4, at 550.

But the truth is, cases that reach the Supreme Court – at least those that involve the refinement of important legal doctrines – involve issues upon which reasonable minds can differ. More importantly, Justice Powell's tenure spanned a period in American history that contained significant shifts in public mores.[24] The fact that the issues of capital punishment, abortion rights, affirmative action, and homosexuals' right to privacy[25] all commanded the Court's attention during Justice Powell's tenure speaks to the intractability of the positions the Court had to consider. The increased politicization of the nomination process for new Justices during the past three decades reflects the divisiveness that these and other thorny issues have engendered. If, as Justice Cardozo maintained, jurisprudence should reflect on an indirect and lagging basis the values of the greater society,[26] it is little wonder that the Justice, as a moderate in his beliefs, often would find himself in a position to cast a deciding vote or to define a centrist position.[27] This position of power was only enhanced by the Justice's deliberate style and insistence on considering each case on its own facts.

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24. *See* L.A. Powe, Jr., *The Court Between Hegemonies*, 49 WASH. & LEE L. REV. 31 (1992).

25. It is indeed unfortunate that the articles that appeared in the popular press following Justice Powell's death should focus on his swing vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See, e.g.*, Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, at D19; Tony Mauro, *Powell Was Most Comfortable Taking Middle Ground*, USA TODAY, Aug. 26, 1998, at 3A; *Newmakers – Transition – Died: Lewis Powell*, NEWSWEEK, Sept. 7, 1998, at 73. The case has commanded attention because it combined the sensationalism of homosexual rights and the rarity of a public admission by a national figure. The Court's 1986 opinion in *Bowers*, in which Justice Powell changed his vote late in the process to join four other justices in the majority, stands for the proposition that there is no constitutional right of privacy covering homosexual conduct. In 1990, Justice Powell, responding to a question from a student at New York University Law School, said that he had made a mistake in voting with the majority. Although this decision, and Justice Powell's second thoughts four years later, seem to have captured the public's imagination, they run the risk of distracting an observer from the enormous role the Justice played in defining the center of the Court during his tenure. If anything, *Bowers* illustrates the soul searching approach that the Justice took in any case involving individual rights. *See generally* Christina B. Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303 (1982). Justice Powell's reconsideration of the outcome in *Bowers* is evidence of his thoughtful nature, his core intellectual honesty, and his concern for fundamental human decency.

26. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 104-05 (1921).

27. Justice Powell established his place in the political center soon after his appointment to the Court. He provided the swing vote in several important cases during his first term. *See* WOODWARD & ARMSTRONG, *supra* note 19, at 222-24. Perhaps the best example of the pivotal role he played on the Court was his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the Justice joined one four-justice bloc to rule that quotas were unlawful and another bloc to allow colleges to take race into consideration in their admissions decisions.

While his open-mindedness and sense of justice may have placed him in the center with unusual frequency, it was the Justice's diplomatic skills that placed him in the majority so often. The Supreme Court is a collegial institution. When the Court holds its conference to decide cases, only the nine justices are in the room. There are no reporters, no court reporters, no clerks. No one has to worry about getting reelected or the need to posture for political gain. Going around the table in a preset order, each justice gets to explain his or her position and gets to cast his or her vote. In many ways, the process resembles a corporate boardroom more than it does the typical judicial forum. It is in just such a setting that the art of diplomacy as played so skillfully by Lewis Powell becomes most effective. Perhaps Justice Powell's service as a director on numerous corporate boards before coming to the Court prepared him well for his position as Supreme Court mediator, but I would argue his skills predated both roles. The same inherent skills of gentle persuasion and habits of building trusting relationships that served him well as a nationally known corporate lawyer and as President of the American Bar Association, were called upon to exercise enormous influence as an Associate Justice of the Supreme Court of the United States. While Justice Powell may not have been the most powerful man in America, as proclaimed by a former legal director of the American Civil Liberties Union,[28] he undoubtedly left an indelible mark on American jurisprudence that was enlarged through his able use of the art of diplomacy.

Devotion

While Justice Powell's work ethic prevented him from acquiring any lasting hobbies, it did not preempt him from devoting time to the arena from which he derived the most pride and satisfaction, his family. In the eulogy delivered at the Justice's funeral, Lewis III remarked:

> He was always there for us, and I do mean always. Indeed, his level of involvement in our lives made current concepts of "micro management" seem, by comparison, like profound disinterest. Our yearnings for occasional indifference went wholly unnoticed.... But, almost without exception then, and with perfect clarity now, we understand that he was motivated solely by his profound love for us, his supreme confidence that he

28. Al Kaman, *Justice Powell Resigns*, WASH. POST, June 27, 1987, at A1. The New York Times also cited a lawyer for the American Civil Liberties Union as proclaiming: "This mild-mannered Virginia man has incredible power. His vote makes a bigger difference than maybe anybody else's in the whole country, whether it's minors' rights or the First Amendment or privacy." Taylor, *supra* note 23, at 28. The same article quoted the executive director of the Leadership Conference on Civil Rights as saying: "In many civil rights cases, Justice Powell has been the pivotal vote, and the general rule is that if Justice Powell is on our side, we win." *Id.*

was right (and, mostly, he was), and his congenital inability to leave anything to chance.[29]

One did not have to be around the Justice for long before noticing his devotion to his wife and four children and the immense amount of pride he took in his family. Clearly, to state that the Justice's dedication to his work kept him from having diversions overlooks the constant joy he derived from his dealings with his children and grandchildren.

Conclusion

Those of us who were privileged to get to know Justice Powell on a personal level will miss him terribly. On a grander scale, the nation will miss him even more. The qualities that he championed either patently in his public utterings or tacitly in the way he conducted his life are ones that seem to have less and less application to our nations's current leaders. If only more public officials today felt similar calls to service for the sake of service alone. Fortunately, his example is there for anyone searching for a model for greatness.

29. Eulogy delivered by Lewis F. Powell III.

ARTICLES