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Citizen Lewis Powell¹

David Westin

Spending a year clerking for Justice Powell changed how I viewed the world, not least because I was a Yankee. You might think that more than a century after the surrender at Appomattox that wouldn't have made much difference. But it did.

The very first opinion I got to work on with the Justice was in a Voting Rights Act case. Justice Powell had a problem with these cases. Don't get me wrong. He was for everyone having an equal right to vote. But he thought that the southern states had been unfairly singled out to go hat in hand to the Justice Department in Washington whenever they wanted to change any law or regulation that affected voting. From where he sat, if Justice Department pre-review was so important, then it should apply to all of the states—not just those who had lost a war back in 1865.

In this particular case, *Dougherty County, Georgia, Board of Education vs. White*,² Powell found even more to take exception with: The Department of Justice had blocked a local rule that didn't have anything to do with voting, at least directly. It was a Georgia school district's employment policy that made any employee running for public office take a leave of absence.³ The problem was that the district had adopted this rule only after a

1. This speech was given at the 2015 Lewis F. Powell Lecture on April 1, 2015 in the Millhiser Moot Court Room at Washington and Lee University. For more information on the lecture series, see *The Lewis F. Powell, Jr. Distinguished Lecture Series*, WASH. & LEE UNIV. SCHOOL OF LAW, <http://law2.wlu.edu/powelllecture> (last visited May 31, 2015) (describing the history of the lecture series and providing a brief biography on Justice Powell) (on file with the Washington and Lee Law Review).

2. 439 U.S. 32 (1978).

3. See *id.* at 34 (citing the Georgia rule that stated, “Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence . . .”).

black employee decided to run for the board of education.⁴ And the Justice Department took exception.

Right after the case was argued, Justice Powell voted in Conference to dissent and undertook to write. He asked me to help him with the first draft.

After talking through with him how he would like the opinion to be written, I closeted myself in an upstairs office where we used to get serious work done and started in. I read all the opinions Justice Powell had written in Voting Rights Act cases. I read through the voluminous legislative history of the Act. And I painstakingly prepared a first draft for the Justice to review, revise, and dictate his “riders” for.⁵

A few days later, I proudly presented this, my first draft opinion to the Justice, and a short time after that I was invited to go over the draft line by line. As I sat across the desk from him, he began with a problem he had found in my draft. “David,” he said, “you refer in the draft to the ‘Civil War.’” I looked at him perplexed. Where I’d grown up in Michigan, this major event of history had only one name: “The Civil War.” How could this be a problem?

Sensing my puzzlement, Justice Powell explained that, “Where I went to school, we did not refer to it as the ‘Civil War.’ It was the ‘War Between the States.’”

For an anxious moment I struggled to understand what he was saying. What possible difference could it make whether we called it a “civil war” or a “war between the states”? But then, my mind racing, it occurred to me. “Oh,” I said. “You mean that, because the states had already seceded from the union, it couldn’t be a ‘civil war.’ It could only be a ‘war between’ the individual states.” “Exactly,” the Justice replied.

And then we went ahead to take apart the draft.

I realize now the dissenting opinion Justice Powell actually published didn’t include any reference to the war that consumed

4. *See id.* (laying out the background facts of the case).

5. “Riders” in the Powell chambers were long segments of opinions that he provided to replace much of what we clerks wrote, always making the opinions unquestionably his own.

the Nation from 1861 to 1865, whatever one might call it.⁶ And, in truth, Justice Powell did refer to it as the “Civil War” in other opinions.⁷ So I suspect that he may have been having a bit of fun at the expense of his very green and very Yankee law clerk.

But Justice Powell was also teaching me—teaching me about himself, about the law, about judging, and ultimately about life. For a young man fresh out of Michigan, this was a wake-up call for how differently people could look at the world.

I learned from the very beginning that it was important that he surround himself with those from different backgrounds and those who held different views. He was deeply rooted in the South, in its traditions, and in its history. But every day that I worked for him, he let us know in one way or another that he wanted to hear what we had to say, that he wanted us to debate and discuss, that he relied on me and my fellow clerks to make sure that he had heard all the arguments—not just those he was inclined to agree with.

He also began in that first experience to model the exquisite care and thoughtfulness that he brought to every question about the various institutions of our government—carefully defining their roles and how they would interact with one another.

And by this I don’t mean only clashes between different branches of the federal government or the sometimes uneasy relationship between the federal government and the various state governments. Powell took the same care in thinking about the role of all our civic institutions—such as our school boards and churches and news organizations and charities and clubs.

Powell worked hard to make sure that the federal government—and particularly the federal courts—did not do anything to undermine the crucial role of these building blocks of civil society. He knew from experience that these organizations help us as individual citizens join together and shape our communities, develop the policies that affect our lives, and,

6. See *Dougherty Cnty., Ga., Bd. of Educ. vs. White*, 439 U.S. 32, 47–59 (1978) (refraining from referencing to the Civil War).

7. See, e.g., *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 386 (1982) (“The Civil War had ended in April 1865.”).

ultimately, help us decide who should lead us and in what direction.

* * * * *

Most of us today think of Justice Powell first and foremost as a judge, which he was on the United States Supreme Court for over 15 years.⁸

A story circulated around Washington in the middle part of Powell's tenure that a group of lawyers from the Solicitor General's office who regularly appeared before the Supreme Court were talking one day about whom they would choose to decide an important case if they could have only one Justice. The strong consensus, so the story goes, was that Justice Powell is the one they would trust most.

Why was it that these lawyers, who in some ways knew all nine Justices best, held Powell in such high regard?

To start with the obvious, he was a careful and disciplined lawyer. He'd been a star of the Richmond bar for many years, starting as a trial lawyer and moving on to handle the most important clients with the most difficult problems, whether in litigation or in corporate board rooms. He'd run his Richmond firm of Hunton, Williams, Gay, Powell & Gibson, helping to build it into the national and international powerhouse that it is today.

No one took more care with the cases that came before him. He personally read and considered everything. He methodically reviewed all the arguments and the authorities. He showed respect to the advocates before him, as well as to his fellow judges.

He had a deep understanding of and reverence for the discipline of the law.

Powell built on the foundation of his craftsmanship by bringing two things to every case that almost no one else had or even has to this day: A rich life experience and the ability to draw

8. See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S. (Apr. 22, 2015), <http://www.supremecourt.gov/about/members.aspx> (last visited May 21, 2015) (listing the length of terms for each Supreme Court Justice) (on file with the Washington and Lee Law Review).

upon that experience to make his decision-making not only fair, but wise.

Lewis Powell was, of course much more than a successful lawyer in Richmond. From the beginning of his career he sought out opportunities to participate in civil society that took him well outside the walls of Hunton & Williams and well beyond the borders of his city. He served on a commission that restructured the entire government of Richmond back in the early 1950s and then accepted appointment to the Richmond School Board, quickly moving up to become its Chairman. He took a leadership role in the American Bar Association, ultimately becoming its President and undertaking major reforms in the areas of criminal justice, legal assistance to the poor, and legal ethics. He helped create and played a major leadership role in Colonial Williamsburg. He served on President Johnson's commission on law enforcement and the Administration of Justice in the mid-1960s. And in the late 1960s, he served on President Nixon's commission reviewing the U.S. military, which took him to the demilitarized zone in Vietnam.

For others, all this might have served only to build a formidable resume. But Justice Powell took away from each of his experiences life lessons that he applied to all of the decisions he rendered.

Two examples come from my time working with Justice Powell. The first has been reported in other places, but I learned about it early in my time with the Justice. In September of 1978 after he had returned from his summer in Richmond, Justice Powell invited his four new clerks to lunch in what was then called the "Ladies' Dining Room" at the Court.⁹

During this first, get-acquainted lunch, Justice Powell volunteered why, to the surprise of some, he had voted with the majority in *Roe v. Wade*¹⁰ five years earlier.

9. The Ladies Dining Room was an elegant, small room on the lower level where Justices could entertain guests, as only the Justices themselves were allowed to dine in the upstairs dining room. I understood that it was named the "Ladies Dining Room" because Justices would sometimes ask their wives to join them for lunch. This was back in the days before Sandra Day O'Connor broke the gender barrier at the Court. It is now called the "Spouse's Dining Room."

10. 410 U.S. 113 (1973).

As the Justice recounted it, he had been in his Richmond law office one morning when his long-time assistant, Sally Smith, buzzed in to say that one of the young messengers at the firm needed to see Powell urgently. When he asked why, Sally said that there was a warrant out for the young man's arrest on manslaughter charges. Flabbergasted, Powell asked Sally to send the messenger in.

As the story unfolded, the man—who was himself still a teenager—had a teenage girlfriend who had become pregnant. At the time, abortion was a crime in the Commonwealth of Virginia, and they certainly could not afford to travel to one of the states where abortions were then legal. So, the couple went to someone who performed abortions illegally for a modest fee. The operation was botched, and the young mother hemorrhaged and died. The police, investigating the circumstances, identified the boyfriend as being behind the abortion and charged him in her death.

As Justice Powell put it, “I don't want to live in a country where a young man and a young woman like that are forced to go to a back-alley butcher.”

As with every case that came before the Court, there was more to it than that. *Roe v. Wade*¹¹ had already been briefed and argued before Powell got to the Court, and a preliminary vote had been taken. There were no voices at that point among the nine Justices who saw abortion as the looming moral issue that some Justices do today.

But the fact remains that Justice Powell's personal experience helped to inform his decision-making in this pivotal case. Even in the running of his law firm, Powell had been collecting experiences about what life was like for people far different from him—experiences that he would draw upon when called to sit in judgment on cases one might have thought he would know nothing about.

A second example has not been reported before. One of the cases I worked on with Justice Powell was *Rakas v. Illinois*,¹² in which the police had stopped a vehicle one night because it

11. *Id.*

12. 439 U.S. 128 (1978)

matched the description of a car used in an armed robbery.¹³ When they searched the car without a warrant, the police officers found a sawed-off rifle under the front seat and rifle shells in the locked glove compartment.¹⁴ The passengers were charged with armed robbery, and they sought to exclude the gun and ammunition from evidence, claiming the search had been unreasonable under the Fourth Amendment.¹⁵

Justice Powell agreed with the majority that the evidence should not be suppressed, but he wrote a separate concurring opinion to explain why a general rule of reasonableness should apply and the search in this case had not been unreasonable.¹⁶

In working with the Justice on his opinion, he remarked about how difficult it was for police patrolling city streets at night, constantly vigilant about possible threats to the citizens and to themselves. I asked him how he could possibly know about this. He then recounted that, during his time on the Richmond School Board, he decided it was important for him to understand the role of the police in his community. So, he spent several nights riding in the back of patrol cars so he could learn for himself just what the police were facing.

Most important from my observation—more important than his legal craftsmanship or even his applying his personal life experience—the thing that made Justice Powell a great judge was a commitment to keeping his mind open as late into the process as possible. He always considered all arguments up to the very moment of decision, including those against any preliminary conclusion that he'd reached.

Today, when someone is nominated for the Court, it seems that it's all about ideology and politics and very little about judicial temperament or life experience. The media and the political parties largely assume that nominees come with fixed opinions, their votes already predestined in cases they haven't yet heard. Much of the selection and confirmation process seems directed toward ferreting out these predictable votes.

13. *See id.* at 130 (laying out the facts of the case).

14. *See id.* (describing what the police found in the car).

15. *See id.* (explaining the passengers' argument).

16. *See id.* at 150–56 (arguing that the search was not unreasonable).

This was not the Powell approach. He always kept an open mind, listened carefully to all the arguments, considered the precedent, listened to the views of other Justices, and then made a decision only after the process was complete. All this may sound almost quaint today.

Justice Powell's commitment to hearing different and conflicting views went well beyond having a Yankee in his chambers refer to the "Civil War." I remember one case when Justice Powell was not writing an opinion but had voted in Conference to join the majority. Another Justice circulated a draft majority opinion that I thought had some problems. So I sat down and wrote out a five-page memo critiquing the draft majority opinion and took it into Justice Powell's office.

As I entered the room, he told me that he had already sent his "join" note to the opinion's author.¹⁷ Given that he'd already signed on to the opinion, I told the Justice that he didn't need to read what I had written about it. But Justice Powell would have none of that. He insisted on reading my memorandum carefully, open to the possibility that he might withdraw his join or at least suggest changes in the majority opinion.

* * * * *

Lewis Powell's tenure on the Supreme Court by itself would have secured his place in history.

But there was a broader role that Powell played on the national scene, a role that pre-dated his time on the bench and continued until the day that he died. This was a role that I suspect Justice Powell himself might consider more important even than his judging.

Justice Powell was above all a citizen of our country. He loved the United States of America, in its perfect aspirations and in its far-from-perfect attempts to realize those aspirations. For Powell, being a citizen was more than a passive status—it was an active role that required us all to step up and do our part.

17. These join notes were small pieces of paper that said merely "join" with the Justices' initials and were the official record of who was joining which opinion.

Perhaps there was no more important example of this—certainly not more important to the Justice himself—than his military service during World War II.

Lewis Powell volunteered for service in 1942, soon after the United States entered the war. He was already thirty-four, with a wife and two young daughters, and so was not eligible to be drafted. His first attempt to volunteer failed, when the Navy decided his eyesight was not good enough. So, he tried again, this time with the Army Air Forces, where he was commissioned a Second Lieutenant and assigned to intelligence, attached to a bombing group in England. His group followed the invading troops into North Africa in November 1942, where he served until the Germans were driven out. During these months, he planned countless bombing missions, and his group suffered severe losses, something that was particularly hard on him.

In early 1944, Justice Powell was one of an elite group of U.S. officers attached to the Ultra Project in Bletchley Park outside of London—this is the Bletchley Park featured recently in the movie *Imitation Game* about the breaking of the German codes. By the end of the war, Powell was a Colonel and had received the Bronze Star and the Legion of Honor. I remember that we rarely saw him as pleased or proud as when a piece of mail would come into the Chambers addressed to “Colonel Powell,” rather than “Justice Powell.”

Lewis Powell was part of the “Greatest Generation”¹⁸ that saved the United States and the western world from the tyranny of fascism. He never bragged about his service, but on the rare occasions it came up, there was no doubting how important it was to him. When his country needed him, he stepped forward and gave his very best at a time when he could have been home in Richmond building his law practice and taking care of his family.

I can’t presume to speak for the citizen Lewis Powell about where we are as a Republic today. But what I can do is try to apply some of what I learned from him about our country and

18. See generally TOM BROKAW, *THE GREATEST GENERATION* (2001) (explaining why Americans who came of age during the Great Depression and World War II comprised the “greatest generation”).

how it works best—and why we may be falling short of the ideal that Justice Powell pursued all his life.

Our democracy today is not working the way any of us would want. Last fall, 37% of the eligible voters actually voted in our national elections. That means that roughly two-thirds of us let the other one-third decide who should govern us.

If that one-third were broadly representative of the nation as a whole, this would be an unfortunate lack of commitment to a basic act of citizenship—but no worse. The disturbing truth, however, is that the minority who turn up at the polls don't reflect what the rest of us are thinking.

Over the last twenty years, our nation has become increasingly polarized. Consider just one remarkable fact: twenty years ago, roughly one-third of active Republicans were more liberal than the average Democrat and one-third of active Democrats were more conservative than the average Republican. Today 98% of each party is to the right or left of the other.¹⁹ There is virtually no overlap left in the center of our country—at least among those who are most politically active and engaged.

There are many causes for the polarization of our active electorate, including things such as our reliance on primaries and re-districting. And, yes, I suspect that the weakening of many of those civic institutions that Justice Powell cared so much about means that we don't work together as citizens nearly as much as we once did, whether it's in our churches or charities or service organizations.

But it causes me particular pain to say that part of the problem lies with the media where I have worked for the last twenty-five years. In the time I've been in television, how and where we get our news—even what we consider to be “news”—all of these have changed profoundly. And those changes have contributed to both the polarization of those engaged in the political process and the dis-engagement of many others.

19. See *Political Polarization in the American Public*, PEW RESEARCH CTR. (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> (last visited June 19, 2015) (listing information on the polarization of political parties) (on file with the Washington and Lee Law Review).

Back in the early 1990s when I left practicing law to work at Capital Cities/ABC, the broadcast networks had already lost their dominance of the television market, but they still held powerful sway. On any given night in 1994, over forty million Americans watched one of the evening news programs.²⁰

In that same year of 1994, half of all Americans still regularly read newspapers.²¹

Today, only twenty-four million people watch the evening news, and only a quarter of our citizens read newspapers regularly.²² What has come along to inform and engage the millions of people who are no longer watching the evening news or reading newspapers?

Cable news is only a small part of the answer. Taken altogether, the cable news channels reach only about three million Americans a night—compared with the sixteen million people who no longer get their news from broadcast.²³ And, as cable news has become more and more partisan, it increasingly appeals to those whose minds are already made up.

Nor have the Internet and mobile technology stepped into the breach. As popular as they have become, even the largest digital providers of news still reach only a fraction of the (even reduced) broadcast news audience.

What's more, some of the news websites that have become popular are themselves even more polarizing than Fox or MSNBC. For example, Glenn Beck in creating "The Blaze" outdid his former employer, Fox News, in appealing to a very clearly

20. See *Network TV: Evening News Ratings Over Time*, PEW RESEARCH CTR., <http://www.journalism.org/media-indicators/network-evening-news-ratings-over-time/> (last visited June 2, 2015) [hereinafter *Network TV*] (providing information on news viewership over time) (on file with the Washington and Lee Law Review).

21. See *Where Americans Go For News*, PEW RESEARCH CTR. (June 8, 2004), <http://www.people-press.org/2004/06/08/i-where-americans-go-for-news/> (last visited June 2, 2015) (noting the 58% of Americans regularly read newspapers in 1994) (on file with the Washington and Lee Law Review).

22. See *Network TV*, *supra* note 20 (providing data on news viewership).

23. See *How Americans Get Their News*, PEW RESEARCH CTR. (Mar. 17, 2014), <http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/> (last visited June 2, 2015) (providing information on how Americans get their news) (on file with the Washington and Lee Law Review).

defined subset of the audience that believes deeply in him and in what he stands for.

It appears, then, that millions of our fellow citizens simply are not getting the regular dose of general interest, non-partisan news that they did twenty years ago. Political scientists have studied how this drop-off in mainstream news consumption may have affected our political system.²⁴

It turns out that when there were less media for us to choose from, many of us found ourselves watching general interest news programming simply because there was nothing else on.²⁵

This is important because the citizens who prefer non-news content come with a particular political profile. They are the ones whose minds are more open to all sides of the argument; indeed, many of them may not yet have even heard the arguments.²⁶ They are the ones who, when they vote, are most likely to switch back and forth between Democratic and Republican candidates. They are the ones whom Justice Powell would have valued for the very reason that they have not made up their minds before the question is even asked.

They are also the ones least committed to participating in the political process. For those who would just as soon be watching sitcoms or dramas or sports or cat videos, they now have plenty of alternatives to the news. And, spending their time elsewhere, when Election Day comes around, they are the most likely to stay home.

On the other hand, there's another, somewhat smaller, group who want to watch news no matter what else is on. And, for the most part, they are the most polarized.

24. See generally, e.g., Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in US House Elections*, 77 J. POLITICS 447 (2015) (discussing the effects of decreasing news viewership on the American political system).

25. See MARKUS PRIOR, POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS 16 (2007) ("When cable began to offer them plentiful entertainment options at the same time that networks only offered news, these less intrinsically interested people reduced their news consumption.").

26. See *id.* at 18 (describing the profile of people who prefer non-news entertainment).

This group is also the most likely to be active participants in politics—whether through volunteering or contributing or just plain voting. They now have at their fingertips on their televisions and their tablets and their smartphones a wealth of information and programming that confirms their pre-existing ideas twenty-four hours a day, making them even more energized to do all they can to back their candidates. Not surprisingly, the more they are exposed to the news, the more likely it is that they will vote when the time comes.

What is to be done? I know something about television news, and we are not going back to a world of three channels. Nor should we. The Internet and mobile technology have opened up a world of information and opportunity for each of us and for our country that no one, least of all Justice Powell, would sacrifice.

At the same time, I do know that Justice Powell believed deeply in the importance of the press as a means to inform and engage our citizens. His son, Lewis, tells me that, when he went to college at Washington and Lee University, Justice Powell urged his son to make a daily habit of watching the evening news, at least skimming two or more newspapers, and regularly reading the op-ed pages—taking care, in Lewis' words, to read "both sides."

I remember one time when I was working with him on his concurring opinion in a case where a reporter claimed a First Amendment right to cover a closed pre-trial criminal proceeding. He volunteered that he personally could never have been a journalist; it didn't fit with his sensibilities to be probing into private matters that others wanted kept secret. But he also told me how deeply he believed that our democracy could not work without a vigorous press.

It is sad that much of the press that Justice Powell knew and valued is not what it once was. Competition from digital news sources and—even more—from all the non-news sources has led news organizations to cut back on their news reporting and provide more information about celebrities and scandals and human interest stories.

There's nothing wrong with any of these stories in themselves. But they become part of the problem when they displace reporting that would help us all understand better what

is going on in our country and the world—and cause us to become more engaged as citizens.

Powell would expect more and better from some of our news organizations than what we are getting today.

We also need to look in the mirror and consider what we're doing—and not doing—as citizens to ensure that we are informed and engaged. In the end, we get the news media that we all deserve. If we seek out information about the important issues of our day, then the news business will respond. If, on the other hand, we spend our time and attention on less substantive subjects, then the media will cover them instead.

Lewis Powell valued the role of the press, but he would be the first to say that it is only one of the many institutions critical to our democracy. We need to take a hard look at all of those institutions and consider what we can do to restore what we've lost.

We need to search out new ways to encourage those who are not participating in the political process the way they once did to re-join the debate and discussion. We should be looking for ways to use our powerful new digital tools to enhance participation by all citizens in our civil society, encouraging all to vote and all to be informed.

We also need to work harder to suspend our judgment until we've heard from all sides in the debates consuming so much of our media today. Surely there are ways in the new digital world for us to have ready access to a range of viewpoints whenever we go to a website or an app that presents only one way of looking at things.

Justice Powell would want us all—whether on the right, the left, or the center—to learn the lesson that he taught that young, Yankee law clerk about how different our viewpoints can be. And how much value there is in considering all of these viewpoints so that we can make better decisions for our communities and our country together.

* * * * *

All of this no doubt sounds idealistic, even unrealistic. But the Justice Powell I knew was both grounded in the reality of

what we are and always reached for the ideal of what we, collectively, could become.

We can pay no greater honor to Justice Powell today than by doing all we can, together, to follow the powerful example he set.