

Winter 1-1-2008

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### Recommended Citation

J. Harvie Wilkinson III, *Lewis F. Powell, Jr.-A Personal View*, 65 Wash. & Lee L. Rev. 3 (2008), <https://scholarlycommons.law.wlu.edu/wlulr/vol65/iss1/2>

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# Lewis F. Powell, Jr.—A Personal View

J. Harvie Wilkinson III\*

It is a great pleasure to be at Washington and Lee today. I always welcome the chance to come to this beautiful campus and distinguished university. The law school is also among the nation's best. We in the Fourth Circuit are very proud of the law schools in our region, and Washington and Lee is the kind of institution that accounts for the quality of the attorneys that appear before our court.

It is also a personal privilege to be here. The new dean of the law school, Rod Smolla, is a longtime personal friend, and I am immensely proud of what he has meant to legal education in Virginia. Also, my law clerk Ann Massie has taught at the law school for many years. Those of you who had her in class can understand why I was so eager to have her as a clerk.

I have had many invitations over the years to speak about Justice Lewis Powell. Speaking about him after his death has been an emotional experience, and it makes me miss him more than ever. When an invitation came from students at W&L, it seemed to me something special. It is fitting that Washington and Lee should be the setting for this celebration of the centennial of his birth. This university could not have had a more engaged student or a more loyal alumnus.

So much discussion has been devoted to Justice Powell's jurisprudence that I thought some personal reflections might be in order. Some of my memories seem quite trivial and incidental, but then life's less consequential moments can be revelatory in their own way. At times, I find it difficult to believe that our lives—to my great good fortune—were so closely intertwined. Our relationship, however, was always characterized by a certain formality, which was not so much stiff but appropriate to our respective ages and stations and to the way we had been raised. For that reason, I will refer to Justice Powell as Justice throughout, even when speaking of his pre-court years. When I say that Justice Powell had a profound impact on my life, that doesn't wholly capture it. His influence actually began well before I was born. He and my father were best friends. They went to McGuire's School in Richmond together

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\* Circuit Judge, United States Court of Appeals for the Fourth Circuit. This text was delivered as the fifth lecture in the Lewis F. Powell, Jr. Distinguished Lecture Series at the Washington and Lee University School of Law in September 2007.

and shared a reverence for its headmaster, John Peyton McGuire. They won the Jack Gordon medal in successive years. That medal was awarded to the outstanding student at the school, and it forged a bond between the two of them for life. It was Justice Powell who introduced my mother and father to each other. He encouraged my father, who needed no encouragement, to marry my mother. He is, quite literally, the reason I am standing here today.

Justice Powell was not only like a second father to me, but he was also a constant school master in my childhood. Every Sunday night, he and Mrs. Powell would come over for dinner with my parents, and this practice continued without serious interruption for some ten or fifteen years. He and my father would gather in the family den for an hour or so before dinner, and the sense of hierarchy in that room was conveyed by the seating arrangements. I sat on a small stool at the foot of their chairs. My role was to be seen, but not heard, and to learn the value of listening.

The discussions on those Sunday evenings were wide-ranging. I remember the Justice talking about the terrible conditions in North Africa during World War II and how it took every sinew of American might to defeat the Nazi war machine. The Justice became alarmed at the launching of the Russian satellite Sputnik. He thought the great threat to America was its own complacency, and he fretted about the absence of rigorous science and economics instruction in the public schools.

It was also clear to me in his discussions of the law that Felix Frankfurter and John Harlan were the Justices he admired most in the 1950s and 1960s. He was deeply concerned during those years about violent tactics used in student protests and the anti-war movement, the extent of urban unrest, and the intransigent resistance in the South to the *Brown*<sup>1</sup> decision. Each of these things he thought was in itself a threat to the rule of law. And in combination, they threatened the very foundations of a stable society.

The Justice was a deeply pessimistic man in the 1960s. I remember my father asking him how he managed to devote so much time to organizations like the American Bar Association and the American College of Trial Lawyers on top of the demands of a busy law practice. The Justice replied that he thought the rule of law was literally on the verge of collapse and that professional organizations represented the best hope that it could still be preserved.

The grave concerns expressed in some of these conversations about the rule of law led Justice Powell to reject the position of the Nixon administration in two landmark cases. He had come to the conclusion that government had no more right to break the law than campus protesters or urban rioters did. In

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

*United States v. U.S. District Court*,<sup>2</sup> he voted to require the Executive Branch to get a warrant even for those wiretaps involving alleged domestic threats to the national security. And, of course, in *United States v. Nixon*,<sup>3</sup> he voted to reject claims of executive privilege and require the President to respond to the process of the courts. These decisions redeemed the rule of law in his own eyes and helped him, I think, to regain a sense of faith in legal institutions that grew stronger as the years went by.

Indeed, the last decade of his life found him a far more optimistic person than in those earlier years. Justice Powell felt that the country had survived the most serious external crises of World War II and the Cold War and the equally serious internal threats to the legitimacy of the legal order. It is fair to say that, at the end, he achieved greater serenity and peace of mind than in the storm-tossed middle decades of his professional life. In this sense, he was one of America's great patriots because his outlook depended on what was happening to the country and the profession that he so loved, even more so than on his own state of personal well being and health.

Justice Powell was a very kind man with very high standards—his children and his Hunton & Williams partners and associates will all attest to it. I knew of this first-hand. The Justice learned from my father precisely what my grades were each semester that I was in school. I had a bit of a sophomore slump at college with truly abominable marks in geology and astronomy, which I had to take to satisfy my physical sciences requirement. The first day of my summer vacation I received a call from Justice Powell. It was a chilling conversation and it focused on the fact that one had to do best those things which one liked the least. There was nothing like that stern, measured, precise, but caring voice at the other end of the telephone to jolt me into improvement.

Given his knowledge of my undergraduate science grades, I am still surprised that he chose me as his law clerk. Justice Powell went on the Supreme Court at the age of 64 and spent another eight years sitting with the Fourth Circuit during his 80s. On both courts, he turned in high energy performances. It was hard for any clerk to keep up with him. His work schedule at the Supreme Court was seven days a week. Seven days a week during the decade of his 70s. If we were gone on Sundays, there would be the products of his weekend efforts on our desks Monday morning.

What a happy time my clerkship was. Each morning and evening I drove with the Justice to and from the Supreme Court. The conversations in the car were slightly different from those in the family den. The weight of his office

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2. *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297 (1972).

3. *United States v. Nixon*, 418 U.S. 683 (1974).

made his words more measured. Judging never became quick or easy for him. He was astonished, I think, at the closeness of the cases before him and of their importance. When he cast a vote, he often said he could write a very strong opinion for the opposite side.

During all our trips together, he never once snapped at me or raised his voice, even when I said something silly or when much was on his mind. Still, we had our moments. The law clerks often played basketball on the fourth floor of the Supreme Court building toward the end of the day. I was in the habit of stuffing my sweaty clothes into a duffle bag, which I placed on the back seat of the car. One day Justice Powell decorously suggested that the bag go hereafter in the trunk.

The Justice and Mrs. Powell would sometimes ask me to dinner at their Harbor Square apartment, even at the end of a long court day. Occasionally after dinner, the Justice would close his eyes and Mrs. Powell would read a mystery or even certiorari petitions to him in the living room. This was his idea of relaxation. On other occasions, we would sit on the balcony of the apartment watching the distant airplanes glide over the Potomac and into National Airport.

The apartment next to his was occupied by Senator Hubert Humphrey and his wife, Muriel. Tragically, Senator Humphrey was in the advanced stages of cancer at that time, but that did not slow him down. His knock would come on the door around 8:00 p.m. "Oh, that's Hubert," the Justice would say, and Senator Humphrey would stride into the room in his long red bathrobe. Many times Senator Humphrey would stand and talk for a full hour without stopping. He did this in utter defiance of his wife and doctor's orders, but no one could slow him down. He talked a lot about his teaching experience after the 1968 presidential campaign, and what a professor he must have been—I doubt the students got out even when the bell rang.

In time, this unlikely pair of Justice Powell and Senator Humphrey became quite close friends. The Justice admired the Senator's magnanimity and benevolence, and the Senator found great support in the Justice's even demeanor and quiet assurances. For years after the Senator's death, the Justice could not pronounce the name Hubert without a little shake of the head and a smile.

At the age of 80, the Justice retired from the Supreme Court and came to sit with the Fourth Circuit. He sat with us regularly for some seven or eight years. The Fourth Circuit, as you know, has its special traditions with which Justice Powell felt quite at home. One of those is that the judges come down from the bench and shake the hands of counsel after every oral argument. I think the Fourth Circuit may also be the only court of appeals in the country

where all the judges do not address one another by their first name. At least I never, during my service with them, addressed Judge Haynsworth or Judge Russell as anything other than judge. That seemed entirely fitting because Judge Russell had been an Assistant Secretary of State before I was born. During the nearly 50 years I knew him, Justice Powell never once suggested that I call him by his first name. It is one of those small ironies in life that a few special relationships grow much closer, precisely because they are not on a first-name basis.

For some reason, Justice Powell never wished to be the presiding judge of our panels. Of course, he was given his choice of where to sit, and he always preferred the seat to the right of the presiding judge on our three-judge panels. This meant at conference that he would vote second. I never knew exactly why he preferred this arrangement; perhaps it was because it most closely paralleled his place on the seniority ladder at the Supreme Court.

In all events, he was a pleasure to sit with. Even the smallest and most fact-intensive case commanded his conscientious attention, and he was a model of considerateness to his colleagues and the Bar. He only asked questions to which he did not know the answer—always a refreshing quality in a judge. The Fourth Circuit judges meet frequently for dinner during court week, and the Justice and Mrs. Powell were our constant companions. One evening, I accidentally spilled a glass of water all over the Justice and his nice suit. He was too dignified to say anything about it at the time, but henceforth I noticed that he managed to sit at least a seat away from me.

The last years of Justice Powell's life were spent at his Rothesay Road home in Richmond, Virginia, where, as you might suspect, a constant stream of visitors came to see him. Those years were marked by the tragedy of Mrs. Powell's death in 1996, but also by the solace of life-long friends and the sweetness of reflection.

One story the Justice always loved to tell during those years involved the fabled romance of Colonel Henry Watkins Anderson, a founding partner of Hunton & Williams, and Ellen Glasgow, a celebrated novelist. The Justice had practiced briefly with Colonel Anderson, but this is not at all what he chose to recount. He was fascinated with Colonel Anderson's way with women and his adventurous life. During World War I, the Justice would say, Colonel Anderson left Ellen Glasgow the day after their engagement and went to Romania as Chairman of a Red Cross commission to aid in the war relief effort. During the winter of 1917–1918, Glasgow heard from Romania about Colonel Anderson's growing friendship with Queen Marie. Perhaps because of that relationship, Anderson and Glasgow never married, and Glasgow wrote several

novels in which the Colonel was treated none too kindly and in which his identity was scarcely concealed.

Why this story so fascinated Justice Powell always intrigued me. He was a splendid dancer and cosmopolitan traveler in his own right, but he was about as different from Colonel Anderson as two men could possibly have been. I am not sure that he ever unraveled the precise nature of the affections between the Colonel and his various companions, but he remained fascinated by it to the end.

The Justice's kindness was much in evidence during these last years. He was adored by his nurses, and he would occasionally dance in the hallway with them to the tune of "Mack the Knife." When I would get up to leave after a visit, the Justice would always rise, put on a floppy hat, accompany me to the front porch, and wave goodbye until my car had vanished from sight. He did this even in the most inclement weather.

I am happy to bring these recollections to you, but it is clear to me that the Justice has as much meaning for the future as he did in the past. It is important to have different kinds of judges on an appellate court. Some judges are catalytic thinkers whose expressiveness and creativity help drive the terms of a debate. I admire them greatly, but, when all is said and done, Justice Powell's qualities are the absolute best. He combined breadth of experience, firmness of conviction, and considerateness of manner to an extent that few other judges ever have or will.

And I suggest that America has never been more in need of its Lewis Powells. Our country is in the throes of bitter culture wars which always seem to end up in the courts. And while our multicultural future is cause for joy and celebration, it poses the danger of unprecedented tensions for our great land. During his long life, Justice Powell always sought to soothe feelings and to bridge differences. America needs believers in the possibilities of compromise.

I have mentioned that the Justice spent long periods of his life worried and concerned about America's future. So it might surprise even him to hear me say that he should endure as an example of promise and hope. That, clearly, is what he should be. As we ponder the present period of uncertain danger and a future where convulsive change may not be for the good, I ask that you remember Justice Powell. Here was a man who experienced the deprivation of the Depression, the challenges of World War II, the racial conflicts of the 1950s, the protests and divisions of the 1960s, the combustible issues that reached the Supreme Court during the 1970–1980s, and had seen his beloved country come through it all. And to understand and to know that his life ended on a note of optimism and hope is to refresh our faith in the possibilities of law—the profession that Lewis Powell believed was the greatest of them all.

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