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In Memoriam: Justice Lewis F. Powell, Jr. - A Tribute

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IN MEMORIAM

JUSTICE LEWIS F. POWELL, JR.—A TRIBUTE

*The Honorable Kenneth F. Ripple**

In remembering Justice Powell, my memory invariably recalls three distinct images from the years I spent at the Supreme Court. Two of these memories are from my own work with him. The other is from my observation of him on the bench. In the days since his death this past autumn, all three have sparked a great deal of reflection about his enduring contribution to our jurisprudence and to our profession.

During my first year at the Court, I presented matters that came before him in his capacity as Circuit Justice for the Fifth Circuit. Busy Justices rarely find applications for interlocutory relief to be a welcome interruption from their regular fare. Circuit work usually comes to the Court on little or no record and the Justices are asked, on short notice, to intervene, sometimes in very definitive ways, in cases about which they have only a modicum of information. This situation is a very uncomfortable one for a Justice habituated to the rhythm of appellate decisionmaking in the rarified atmosphere of the Supreme Court. Although he obviously had a great deal of other work to do, Justice Powell always approached his circuit work in a calm unruffled manner. On the occasions when he requested an oral briefing, his attention was riveted totally on what I had to say; his eyes would never show the slightest hint of distraction as, rocking gently in his desk chair, he listened intently. I cannot recall his ever having interrupted my initial presentation, but as his questions and discussion afterward invariably would evidence, his mind had not only grasped but sifted the facts and the law in search of the essence of the case as I spoke. His decisionmaking was methodical, low key, dispassionate. His grasp of complex factual situations and even more complex regulatory schemes was quick and surefooted. He demonstrated particular care in ensuring that both sides of the matter were fully aired. When he

* Judge, United States Court of Appeals for the Seventh Circuit.

had made his decision, I could count on precise instructions as to the disposition. His demeanor in the privacy of his chambers was not at all dissimilar from that one observed when he was on the bench. In the courtroom, he rarely interrupted counsel, but the intensity of his attention evinced an intellect hard at work. His questions usually came at the end of the argument. Posed in the most polite manner possible, they nevertheless were aimed invariably at the heart of the case.

The second vivid image that inevitably comes to mind whenever I think of the Justice is based on a single encounter one Saturday evening. Having worked all day in my office on the Court's second floor, I set out for home around the dinner hour. The elevator stopped on the first floor, where the Justices had their chambers, and Justice Powell stepped on. He looked tired, very tired. His tie was loosened and he was carrying two large brief cases. Here was one of America's most accomplished lawyers, then in his late sixties, going home for the weekend at six o'clock on a Saturday night after what had obviously been a very full day at the office.

Lastly, I remember him on the bench. During my years at the Court, he sat next to Justice Marshall and the two would do a good deal of low-key talking throughout the oral argument session: two Justices whose paths to the Court had been so different sharing the ultimate responsibility of interpreting the Constitution.

When Justice Powell left us several months ago, the commentators and "talking heads" of the electronic media gave us their "sound-bite" assessment of his career as a Justice. He was described as "scholarly," "courtly," and a "Southern gentleman." In some quarters, it was suggested that he was a person of an earlier and quainter time; others suggested that his jurisprudential contribution might not endure because he had not been the leader of an ideological bloc. For me, the memories contained in the three images I have just recounted suggest another and far more positive perspective.

Whether based on a meeting in the privacy of his chambers or in the formal setting of the courtroom, a lawyer left an encounter with Justice Powell with the same dominant impression: the morality of his mind. In every professional situation, great or small, the classical characteristics of the thoughtful judge dominated the process of decision: the precise dissection of the facts, the structured discussion of the law, the care in ensuring that no stone, factual or legal, was left unturned, the deliberate suspension of judgment until the entire case

had been evaluated.¹ The Justice was not easy to categorize ideologically, a characteristic that confounded the sound-bite crowd but, I suspect, delighted the Justice. At home with the common law, his work manifested a robust confidence in the ancient methodology. He had long accepted the observation in *Estin v. Estin*, that “there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree.”² He accepted the inevitability of the judicial role in reconciling the shades of grey. Extraordinarily sensitive to the limited role that judges ought to play in a democratic polity, he nevertheless accepted the inevitable responsibility of having to make unguided choices in delicate and controversial areas of constitutional jurisprudence.

Coming to the work of the Supreme Court relatively late in life, Justice Powell was a quick study in familiarizing himself with areas of law that had not been a part of his practice. But far more impressive was the alacrity with which he acclimated to the ways of a judge.³ From the beginning, his work evinced the qualities of mind and spirit that our judicial tradition always has regarded as marks of judicial greatness.

The Justice loved the practice of law and the fellowship of other lawyers. Rather than allowing the discipline and grind of everyday lawyering—and judging—to dull the mind and spirit, he transformed them into a positive element in the esprit de corps of his chambers.⁴ As Professor Christina Brooks Whitman described it, “Decades of practice had led him to think of law as a high calling and to view the legal profession as composed, at its best, of people of goodwill who were trained to facilitate mutual understanding and to devise practical solutions to difficult problems.”⁵ No chambers radiated more enthusiasm and more energy. Even in the hallowed halls of the Supreme Court, where politeness and decorum enjoy a tenure far longer than that of any Justice and permeate every aspect of everyday life, Justice Powell set a new standard. On the bench, he was uniformly civil to the advo-

1 For another description of Justice Powell’s analytical abilities, see Dallin H. Oaks, *Tribute to Lewis F. Powell, Jr.*, 68 VA. L. REV. 161, 162 (1982).

2 *Estin v. Estin*, 334 U.S. 541, 545 (1948).

3 For an assessment of Justice Powell’s acclimation to the bench, see Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

4 See Richard H. Fallon, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 400 (1987).

5 Christina Brooks Whitman, *The Reluctant Justice*, 84 A.B.A. J. 100 (1998).

cates who appeared before the Court. His questions, often coming at the end of the lawyer's presentation, invariably went to the heart of the case, but never gave a hint of egocentricity. Within the Court, the civility of his discourse with Justices and staff members never failed. A litigator by background, he never exhibited the more raw characteristics often included, fairly or not, in caricatures of practitioners of that branch of the profession. His style was uncomplicated: reasonable discourse, plainly and simply stated.

Judicial collegiality in America's courts suffers from two virulent cancers: ideology and ego. Lewis Powell suffered from neither affliction. To the dismay of many, the first, ideology, was foreign to his concept of judging. Not without his viewpoints, he also had seen enough of life to be concerned genuinely about oversimplification of the judicial task by the application of bright-line rules which, although allowing for efficiency of governance, often worked injustice upon those governed. For him, the judicial task required a special sort of intellectual humility. He believed that others in the governmental process had a great deal to contribute to the dialogue of the judicial process. Appellate judges ought to listen, carefully, to the trial court. The judicial branch ought to be attentive to the views of the political branches. The federal government ought to listen to the states. He believed that a judge ought to take care of today's problem today and be circumspect in avoiding premature resolution of tomorrow's situation when a better record might be made and, through the contributions of others involved in governing, a better solution proffered. Justice Powell relied a great deal on history to tell him about the values embodied in our Constitution. But his style of judging also counseled that history must be viewed not as static but as ongoing. He was content to play his part and leave for another day, and for other players, the resolution of questions not yet ripe for judicial resolution.⁶

Lewis Powell not only avoided the two cancers of collegiality, he contributed affirmatively to the Court's collegiality by his high regard for the capacities and the contributions of his colleagues.⁷ Unlike some of his predecessors, he always manifested a genuine appreciation of the gifts of character and intellect which each Justice brought to the Court's work. Realizing that the problems before the Court for resolution were larger than the capacity of any one individual to re-

6 See generally Robert D. Comfort, *He Understood the Need for Subtlety*, NAT'L L.J., Sept. 7, 1998, at A21.

7 But cf. H.N. HIRSCH, *THE ENIGMA OF FELIX FRANFURTER* (1981) (arguing that Justice Frankfurter's inability to appreciate the contributions of other Justices led to his own ineffectiveness).

solve, he regarded the Court's diversity of talent as a great institutional attribute, one that was vital to the Court's institutional capacity to resolve the problems before it. Watching Lewis Powell, the patrician Virginia lawyer, and Thurgood Marshall, the African-American civil rights advocate, conversing on the bench of the Supreme Court of the United States gave one a special kind of hope that the country's capacity for jurisprudential problem-solving would not, in the long-run, be ravaged by transient and trendy ideological warfare, but rather be characterized by the careful melding of the wisdom of the many strains of legal thought and culture that have enriched our jurisprudential growth as a nation.

The sound-bite commentators pegged Justice Powell as a Justice of a kinder, gentler era in American judicial life. But was his tenure on the high bench, and indeed his earlier life as a lawyer, that of a person of the past? Or, to borrow a phrase from Professor Archibald Cox, was he rather "the voice of the spirit, reminding us of our better selves?"⁸ Indeed, perhaps his enduring message is a reminder to the judges of this land to cherish and nurture the qualities of mind and spirit that our common law tradition has identified as cornerstone qualities of the judicial vocation. He never forgot that cases are about real people with real problems. He saw cases "in terms of the particular individuals involved in day-to-day human problems rather than as opportunities for applying or announcing ideological concepts or abstract legal principles."⁹ As Justice O'Connor has put it, he brought to the Court a "humanizing influence."¹⁰ His great respect for history ought to remind judges that they are indeed part of that history and that every decision rendered is another stitch in the ongoing tapestry of our country's jurisprudential life. His appreciation for the contributions of other officers of federal and state government ought to remind the judges and the lawyers of today that our judicial system works best, and our jurisprudence flourishes and prospers, when it unfolds in an atmosphere of civil discourse rather than of partisan or ideological rancor. He reminds us that judges work best when they focus on a principled solution to the problem before them and leave to another day the definitive resolution of that which can only be seen indistinctly. Judicial institutions grow stronger, not weaker, when they

8 ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 117 (1976).

9 George Clemons Freeman Jr., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 404, 404 (1987).

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

exercise restraint and manifest respect for the workings of democratic institutions.

Notably, Justice Powell's views on judicial restraint never led him to denigrate the importance of the office which he held or the dignity of the institution on which he served. He was quite well aware of the importance of the Court's role in American political life and certainly showed no inclination to minimize the importance of that role. Indeed, as Chief Judge Wilkinson of the Fourth Circuit expressed, the Justice believed that "judges play an important role—albeit, in the final analysis, a limited one—in contributing to the consensus both within our body politic and our legal culture."¹¹ A Justice who believed that the Court's primary work was to heal and not divide the nation cannot be relegated to status of historical artifact. He is more than a warm memory of a simpler time. He lights the path for those who don the black robe and take responsibility for the judicial institutions that will govern our grandchildren.

11 J. Harvie Wilkinson III, *The Powellian Virtues in a Polarized Age*, 49 WASH. & LEE L. REV. 271, 272 (1992).