Louisiana Law Review

Volume 59 | Number 2
Winter 1999

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Justice Lewis F. Powell, Jr. died in his Richmond, Virginia home early Tuesday morning, August 25, 1998. That same day I talked about Justice Powell to my seminar students. This seemed a good way to pay our respects. I played a tape recording of his swearing-in, a treasured piece of human voice unearthed years earlier on the seminar's field trip to the Court and to the National Archives. The day he died, Lewis F. Powell, Jr.'s soft Southern voice was heard in our classes at LSU Law.

He botched his oath of office, our students know. I suppose the excitement of the moment caught him up. "And that I will faithfully and impartially discharge and perform"—this was Chief Justice Burger's cue—but somehow Lewis F. Powell, Jr., his right hand raised, recited only: "And that I will faithfully . . . discharge and perform." He plum missed "impartially." Chief Justice Burger let it pass and said nothing about it.[1]

Tested by his service, Mr. Justice Powell was a paragon of impartiality. His *Bakke*[2] opinion comes to mind: Color consciousness may guide university admissions, but the Equal Protection Clause forbids exclusive focus on race.[3] That is judicial balance, as Mr. Justice Powell weighed competing interests.[4] I remember sending him a letter about his fence-straddling opinion in *Bakke*. In Justice Powell's soft voice of judicial balance, I sensed the Richmond, Virginia

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* George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Editor, The Bill of Rights and Judicial Balance: A Tribute to Lewis F. Powell, Jr., Readings for the Inaugural Meeting of the Bill of Rights Section of the Louisiana State Bar Association, May 6, 1989, New Orleans, Louisiana (LSBA 1989). Sec./Treas. Bill of Rights Section, LSBA.

1. The Court's official report, Appointment of Mr. Justice Powell, 404 U.S. xi-xiii, 92 S. Ct. 12-15 (Friday, January 7, 1972), recites the oath in its entirety without the slip.

2. University of California Regents v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978) (Opinion of Powell, J.).

3. The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. . . .

   In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive considerations of race and ethnic origin.

438 U.S. at 320, 98 S. Ct. at 2763 (Opinion of Powell, J.) (citation omitted).

4. "Again and again, explicitly and implicitly, Justice Powell has sought a more measured justice by attending to the complexities, the nuances and gradations, of a controversy." Paul A. Freund, *Foreword: Justice Powell—The Meaning of Moderation*, 68 Vir. L. Rev. 169, 172 (1982).

echo of Chief Justice Marshall. This is high praise, but Justice Powell deserves it. Ever modest, he wrote back doubting the comparison and saying his place in judicial history "will only be a footnote."

As modesty is the mark of a great man, Lewis F. Powell, Jr. hit the mark. His are vital chapters in the Book of the Constitution. "Thank God for Lewis F. Powell, Jr.'s opinion in Mrs. Moore's case,"[5] I tell my seminarians. I mention others.[6]

Of late, the Fifth Circuit has said that Mr. Justice Powell's *Bakke* balance is dead.[7] I doubt it.[8] The life of the Court and of the Constitution will ever require Justice Powell's soft style of judicial balance. Of this I am sure.

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5. Rescuing Mrs. Inez Moore from East Cleveland's "single family" zoning ordinance that prohibited her from living with her own son and grandsons in her own home, *viz.*:

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. . . . But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Moore v. East Cleveland, 431 U.S. 494, 502, 97 S. Ct. 1932, 1937 (1977) (Opinion of Powell, J.).

6. United States v. United States District Court, 407 U.S. 297, 92 S. Ct. 2125 (1972), holding that a President, including President Nixon who had appointed him, has no authority to dispense with Fourth Amendment warrant procedure for electronic surveillance in domestic security cases:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

Id. at 320, 92 S. Ct. at 2138. Rankin v. McPherson, 483 U.S. 378, 392, 107 S. Ct. 2891, 2901 (1987) (Powell, J., concurring), rescuing Ardith McPherson from being fired by Constable Rankin for her remark, after hearing of an attempt on the life of President Reagan, "If they go for him again, I hope they get him." Said Justice Powell:

> There is no dispute that McPherson's comment was made during a private conversation with a co-worker who happened also to be her boyfriend. She had no intention or expectation that it would be overheard or acted on by others. . . . If a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful.

Id. at 393, 107 S. Ct. at 2901.

7. Hopwood v. State of Texas, 78 F.3d 932 (5th Cir.), *rehearing en banc denied*, 84 F.3d 720, *cert. denied*, 518 U.S. 1033, 116 S. Ct. 2581 (1996).

8. Chief Judge Politz's dissent from denial of rehearing en banc in *Hopwood* is strong judicial medicine:

> Justice Powell's opinion in *Bakke* made the Supreme Court's disposition precedential. We unequivocally reject the proposition that it does not mandate our disposition. The syllogisms tacked together and proffered by the majority opinion as proof that Justice

Justice Powell once described his being appointed to the Court "as very much like being struck by lightning. No one ever fully recovers from the shock, and yet one's reverence for the Court remains undimmed. The Court is the final guardian of the liberties of the people, guardian of the liberties guaranteed by the Bill of Rights. Every justice is ever conscious of that responsibility."[9]

This from Mr. Justice Powell himself, another piece of precious sight and sound for the classroom. During my year as a Judicial Fellow working inside the Supreme Court, I was called upon to script "Supreme Court," an A.B.A. film that brings the Court and its justices to class. Mr. Justice Powell has added life to our learning at LSU Law.

My Harvard Law School dean, Erwin N. Griswold, joined Justice Powell, Judge Elbert Tuttle, Judge John Minor Wisdom, and Judge James L. Dennis at what was the inaugural meeting of the Bill of Rights Section of the Louisiana State Bar Association, in New Orleans, May 6, 1989. We called the roundtable "The Bill of Rights and Judicial Balance: A Tribute to Lewis F. Powell, Jr." I was grateful to Justice Powell, who was accompanied by his wife Josephine ("Jo" he called her), for agreeing to come to New Orleans to help us kick off the Bill of Rights Section. I remember Dean Griswold telling me of his role in the nomination of Lewis Powell to the Supreme Court. Two of President Nixon's choices were rejected by the Senate. Dean Griswold, who was then Solicitor General, called Attorney General Mitchell and recommended Lewis Powell. "He doesn't want it," Mitchell replied. This was not good enough for Erwin N. Griswold. "How do you know?" he asked. "We have our sources." Ever painstaking, Dean Griswold pushed ahead: "You will never know unless the President calls Lewis Powell personally and offers him the nomination." That is exactly what happened. After talking it over with his family, Lewis F. Powell, Jr., of Virginia accepted the nomination.

"I regard that as my finest public service," Dean Griswold said of his behind-the-scenes role. This is very high praise, from Harvard Law School's stalwart Dean, Erwin N. Griswold.

As for me, I hold to what I said in the introduction to our Bill of Rights Readings: "Justice Powell is one of my judicial heroes. Elizabeth Black thought him a fine Southerner to take Hugo Black's place on the Court. Justice Powell's

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> Powell's diversity conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of *Bakke*.

Hopwood v. State of Texas, 84 F.3d 720, 723-24 (5th Cir. 1996) (Politz, C.J., dissenting from denial of rehearing en banc). And, in the moderate manner of Mr. Justice Powell himself, Justice Ginsburg, joined by Justice Souter, spoke to save the issue for another day: "Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. . . . [W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition." Texas v. Hopwood, 518 U.S. 1033-34, 116 S. Ct. 2581 (1996) (Opinion of Justice Ginsburg, with whom Justice Souter joins, respecting the denial of certiorari).

9. The quotation is from the opening part of "Supreme Court," a film by Ernest Skinner (Young Lawyers Sections, A.B.A., Virginia Bar Ass'n, 1976).

votes and the sampling of his opinions collected here[10] prove Elizabeth Black right. Justice Powell exemplifies judicial balance in the reading of our Bill of Rights. That is a quality that endears him to any discerning student of the Court."[11]

Tuesday morning, cutting across the LSU Lakes, I heard the radio announcement of Justice Powell's death. He was 90; he had lived in every decade of the Twentieth Century. He was frail at the end. A former seminar student, John McClindon, heard the same announcement on his way to work. "I know that man. It hit home with me. I called home to tell my wife that Lewis Powell had died."[12] I am sure other of our students have their own remembrances. "You sure look like a Chief Justice," Lewis F. Powell, Jr. remarked to Danny Knowles on another LSU field trip to the Court. In the seminar, students reach a high plateau of their legal education: they become justices of Supreme Court of the United States and hear a case currently pending argued by two other members of the seminar, who use the actual briefs submitted by the lawyers in the case. The justices meet in conference, vote the case, and write opinions. Sometimes a student's physiognomy claims the role of Chief Justice. It did in Danny Knowles case. Chief Justice Knowles, looking like William Howard Taft, "marshalled" his Court to hold against Exxon and six other big oil companies in their dispute with the Maryland legislature.[13] Later when the seminar visited the Court in Washington, the group met with Justice Powell for an hour's class. "In my opinion, the tour of the Supreme Court which you gave us added more to my legal education that anything else I have experienced. Mr. Justice Powell would, by his position, have been a thrill to meet had he not said a word. I

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10. First Amendment and Public Employee Free Speech, Rankin v. McPherson, 483 U.S. 378, 392, 107 S. Ct. 2891, 2901 (1987) (Powell, J., concurring); Fourth Amendment, Warrantless Electronic Surveillance and Domestic Security, United States v. United States District Court, 407 U.S. 297, 92 S. Ct. 2125 (1972); Eighth Amendment and the Proportionality Principle, Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001 (1983); Liberty and the Sanctity of the Family, Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977); Equal Protection and Affirmative Action, University of California Regents v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978); Equal Protection, Education, and Illegal Alien Children, Plyler v. Doe, 457 U.S. 202, 236, 102 S. Ct. 2382, 2405 (1982) (Powell, J., concurring).

11. *Introduction* to The Bill of Rights and Judicial Balance: A Tribute to Lewis F. Powell, Jr. i, ii (P. R. Baier ed., LSBA 1989).

12. *Ex rel.* John S. McLindon, August 31, 1998. Mr. McLindon was a student in my Constitutional Law Seminar, Fall Term, 1988. He met personally with Justice Powell during the Bill of Rights Section program. "I write to emphasize that I appreciate a great deal your essay on me, written for Professor Paul Baier. I am making a copy of your article available to Professor John Jeffries of the University of Virginia who is commencing work on a biography. I am confident you will have a fine career in our profession, and send best wishes." Lewis F. Powell, Jr. to John S. McLindon, May 12, 1989 (copy on file, Louisiana Law Review).

13. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S. Ct. 2207 (1978) (7-1 for Maryland; 5-3 the same way in the seminar).

can honestly say that his comment to me, 'You sure look like a Chief Justice,' will never be forgotten."[14]

I gave Justice Powell a copy of the tape of his botched swearing-in. Mrs. Powell wanted it for their children and grandchildren. I treasure the little note and the inscribed photograph the Justice sent to me. LSU Law is lucky to have crossed his soft path.

> You were thoughtful to bring the tape of my misspoken oath. Jo and I enjoyed hearing it on our first night back in Washington. I often look back on the program you planned and implemented at the time the Bill of Rights Section of the Louisiana Bar was created. You prepared for that occasion in the same way that a superb trial lawyer prepares for a major trial. I hardly need say that the focus on my career and honoring me are "remembrances" I always will cherish.[15]

14. Letter from Daniel E. Knowles, III to Paul R. Baier, June 6, 1978 (copy on file, Chancellor's Office, Paul M. Hebert Law Center, Louisiana State University).

15. Lewis F. Powell, Jr. to Paul R. Baier, October 30, 1989 (copy on file, Louisiana Law Review).