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Russell W. Galloway Jr.

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ARTICLE

JUSTICE LEWIS F. POWELL, JR.

Russell W. Galloway, Jr.*

United States Supreme Court Justice Lewis F. Powell, Jr. resigned on June 26, 1987, the last day of the October 1986 Term. This article gives a brief overview of Powell's career with primary emphasis on his role on the Court.

I. POWELL'S PRE-COURT YEARS

Lewis F. Powell, Jr. was born on September 19, 1907, in Suffolk, Virginia. In 1929, he graduated *magna cum laude* from Washington and Lee University, where he was president of the student body and Phi Beta Kappa. Graduating first in his class, Powell obtained an LL.B. degree in 1931 from Washington and Lee Law School. He also received an LL.M. from Harvard Law School in 1932. He served in the United States Air Force during World War II. Powell is married and has four children.

From 1932 to 1971, Powell practiced law with Hunton & Williams in Richmond, Virginia.¹ During this period, he held many notable offices. He was chairman of the Richmond School Board from 1952 to 1961, a period of transition from segregated to integrated schools.² He was Vice President of the National Legal Aid and De-

* 1988 by Russell W. Galloway, Jr.

* Professor of Law, Santa Clara University School of Law; J.D., 1965, Columbia University School of Law; Ph.D., 1970, Graduate Theological Union; Director, Supreme Court History Project; member of the California Bar. Supreme Court History Project, Publication No. 11.

1. Powell's law practice was sufficiently lucrative to make him the wealthiest Justice during his years on the Court.

2. "Despite Powell's moderation on the racial issue, however, he cannot be classed as a leader in bringing racial equality to the South." L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT* 65 (1978).

fender Society, President of the American Bar Association (1964-65), President of the American College of Trial Lawyers (1969-70), and President of the American Bar Foundation (1969-71). He was also a member of the boards of directors of eleven major companies.

In sum, Powell was a classic "corporate lawyer" and a "pillar of the American legal establishment" before coming to the Court.³

II. JUSTICE POWELL

A. *Powell's Voting Pattern*

Powell was one of President Nixon's four conservative appointees who pushed the Court far to the right in the early 1970's.⁴ Nixon had run on an anti-Warren Court platform in 1968, and he promised to pack the Court with conservatives committed to law and order and judicial restraint. During the two and one-half year period from the summer of 1969 to January 1972, Nixon carried out this promise by appointing Warren E. Burger, Harry A. Blackmun, William H. Rehnquist, and Powell to the Court.

When Powell and Rehnquist were seated in January 1972, the Court had already swung from liberal to conservative dominance.⁵ Powell helped solidify this shift. He joined the conservative wing and soon became one of its outstanding spokesmen. During most terms, he lined up third from the right after Rehnquist and Burger. He was statistically closest to Burger during fourteen of the fifteen terms in which both were on the Court.⁶

During the period from 1972 to 1976, the Court was dominated by the "Four Nixonians," Burger, Blackmun, Powell, and Rehnquist.⁷ The dissent rates of the liberals, William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall, shot up to record

3. *Id.* at 64.

4. The terms "conservative" and "liberal" are used in this article despite their vagueness and historical variability. The current Court's conservatives tend to favor the "haves" (including big business) over the "have-nots" in economic cases, the government over the individual in civil liberties cases, judicial restraint over judicial activism (although this often depends on whose ox is being gored), and the states over the federal government. The liberals tend to take the opposite views on these issues.

5. Galloway, *The Burger Court (1969-1986)*, 27 SANTA CLARA L. REV. 31, 32-37 (1987).

6. This statement is based on analysis of the Justices' disagreement rates during each term. For each pair of Justices, the disagreement rate is calculated by dividing the number of cases in which both Justices participated into the number of cases in which the two disagreed. See, e.g., Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891, 942-51 (1981).

7. Galloway, *supra* note 5, at 37-44.

levels as they protested the dismantling of the Warren legacy.⁸ Conservative dominance was secured by the moderate conservatives, Potter Stewart, Byron R. White, and John P. Stevens, who replaced Douglas in 1975. Powell's dissent rates were among the lowest on the Court during this period, suggesting he was generally content with the Court's drift toward conservatism.

During 1977, Powell and Blackmun shifted away from their close alignment with Burger and Rehnquist and set the stage for a somewhat more moderate interlude from 1977 to 1982.⁹ Unlike Blackmun, whose shift to the left became permanent, Powell moved back to the right soon after 1977 and resumed his close alignment with Burger.

During the period of conservative dominance, which began shortly after the replacement of Potter Stewart in 1981 by the more conservative Sandra Day O'Connor,¹⁰ Powell was a solid member of the conservative "Four Horsepersons" bloc, a group that included Rehnquist, Burger, and O'Connor. Powell's overall voting record during this period places him squarely in the conservative wing rather than in the Court's statistical center.¹¹

In short, Justice Powell was a conservative.¹² He was substantially right of center in fifteen of his sixteen terms on the Court. He was, in general, more closely aligned with conservatives such as Burger, O'Connor, and Rehnquist than with liberals such as Douglas, Brennan, and Marshall. Powell was closest to Burger and farthest from Douglas, as the following table shows.

8. For example, William O. Douglas dissented in seventy-one of the 140 cases decided in the October 1972 Term. Douglas' 50.7 percent dissent rate was the highest in nearly 200 years.

9. Galloway, *supra* note 5, at 44-52.

10. See Galloway, *supra* note 5, at 52-58.

11. See Table 1.

12. As Powell himself put it, "I think of myself as a conservative. . . ." Diamond, *Justice Lewis Powell: A View from the Top*, CAL. LAW., Nov. 1982, at 77.

TABLE 1
 JUSTICE POWELL'S DISAGREEMENT RATES
 (1972-87)

JUSTICE	DISAGREEMENT RATE WITH POWELL
CONSERVATIVES	
Rehnquist	20.6%
Burger	15.0%
O'Connor	16.0%
LIBERALS	
Douglas	52.5%
Brennan	40.2%
Marshall	39.8%

While undoubtedly a conservative, Powell was the most moderate member of the Court's conservative wing in the 1980's and a key swing vote in close cases. In recent terms, he provided the fifth vote that enabled the liberal wing to maintain control in several of the Court's most important lines of cases.

B. *Powell's Opinions*

Justice Powell was one of the Court's most skilled legal craftsmen. He advocated the thoughtful balancing of interests associated with Justice John Marshall Harlan, the conservative conscience of the Warren Court. Powell's hallmark was detailed articulation and careful accommodation of the competing interests involved in specific cases.

To understand Powell's role on the Court, one must keep in mind that although he was an intellectual leader of the Court's conservative wing, he was more moderate than other Justices and represented a key swing vote in many close cases. The ensuing sections will discuss some instances in which Powell played a conservative role and then several other fields where he voted with the liberals.

1. *Door-Closer Par Excellence*

Powell was a leader in the movement to "close the courthouse doors," which is widely recognized as one of the foremost hallmarks of the Burger era. In response to the vast expansion of federal jurisdiction created by the Warren Court's liberal activists, the Burger Court carried out a jurisdictional counter-revolution, significantly re-

stricting access to federal judicial remedies. Powell was one of the most aggressive of the Burger Court's "door-closers."¹³

Of Powell's many important opinions in this area, the landmark case of *Warth v. Seldin*¹⁴ is perhaps the most famous and illustrative of Powell's conservative influence. *Warth* involved a challenge to a zoning ordinance that excluded low-income persons from residing in Penfield, New York. Plaintiffs included low-income persons seeking housing, contractors seeking to build low-income housing, taxpayers from nearby Rochester, and several associations of interested parties. Powell employed threshold barriers such as standing, mootness, and ripeness to eliminate every claim, and the Court was precluded from reaching the merits of the case. In the process, Powell converted the standing doctrine into a formidable constitutional barrier that still bars the courthouse doors to many public interest cases that certainly would have received hearings in the Warren era.

Douglas, Brennan, Marshall, and White, in their dissent to Powell's majority opinion, argued that the decision made it virtually impossible for plaintiffs to challenge similar ordinances. But that was precisely the result Powell and his conservative colleagues desired. Powell was a powerful leader in the movement to reduce the role of the federal judiciary in American life.¹⁵

2. *Law and Order Justice*

Perhaps the most famous of the Burger Court's counter-revolutions against the Warren era's liberal activism occurred in the area of criminal procedure. As mentioned above, Nixon was determined to pack the Court with Justices who would reverse the Warren Court's tendency to favor criminal defendants. Powell, although not as reactionary as Rehnquist and Burger, played a central role in strengthening the hand of the police and prosecutors.

The death penalty issue, in which the public has shown a great interest, provides an excellent illustration of Powell's "law and order" tendencies. While he occasionally provided the fifth vote needed

13. Powell took "an extreme position in denying plaintiffs access to a Federal court. . . ." L. FRIEDMAN & F. ISRAEL, *supra* note 2, at 78.

14. 422 U.S. 490 (1975).

15. Many other examples could be given of Powell's pivotal role in restricting access to federal courts. Worth noting, Powell provided the crucial fifth vote in the line of eleventh amendment cases holding that citizens may not sue their states in federal courts. *E.g.*, *Welch v. State Dept. of Highways & Pub. Transp.*, 107 S. Ct. 2941 (1987); *Papasan v. Allain*, 478 U.S. 265 (1986).

for narrow liberal victories in capital punishment cases,¹⁶ Powell sided with the conservative wing in landmark cases that resurrected the death penalty from the desuetude into which it had fallen in the Warren era. In 1987, for example, he provided the controlling vote in three 5-4 cases favoring the death penalty, including *McCleskey v. Kemp*.¹⁷ There, Powell's majority opinion rejected a constitutional challenge based on the fact that killers of white victims, in Georgia, are eleven times more likely to receive a death sentence than killers of black victims.¹⁸

Powell sided with the Court's law-and-order wing in dozens of narrowly-decided criminal cases. For instance in *United States v. Leon*,¹⁹ Powell joined the majority in holding the exclusionary rule inapplicable when officers conducting a search reasonably rely on a search warrant. This decision significantly restricted the Warren Court's landmark decision in *Mapp v. Ohio*.²⁰ Just last term, Powell provided the controlling vote in both *United States v. Salerno*,²¹ a 5-4 decision upholding preventive detention, and *Turner v. Safley*,²² a 5-4 decision holding infringements of prisoners' constitutional rights permissible where reasonably related to legitimate penological interest.

3. *In Bed With Business*

Powell also was a member of the Court's conservative wing in cases involving property rights, especially cases involving the regulation of business. As one commentator noted, "When Justice Powell woke up in his sixty-fourth year a Justice of the Supreme Court, he remained very much the lawyer who for thirty-five years had gone to bed defending the interests of many of America's largest corpora-

16. *E.g.*, *Booth v. Maryland*, 107 S. Ct. 2529 (1987)(ban on "victim impact statements"); *Gray v. Mississippi*, 107 S. Ct. 2045 (1987) (conviction subject to automatic reversal because of improper exclusion of juror).

17. 107 S. Ct. 1756 (1987).

18. The other two 1987 cases are *Tison v. Arizona*, 107 S. Ct. 1676 (1987)(death penalty upheld for accomplice who neither killed nor intended to kill); *California v. Brown*, 107 S. Ct. 837 (1987) (instruction that jurors "must not be swayed by . . . sympathy" in deciding on death penalty upheld).

19. 468 U.S. 897 (1984).

20. 367 U.S. 643 (1961).

21. 107 S. Ct. 2095 (1987).

22. 107 S. Ct. 2254 (1987).

tions."²³ *Nollan v. California Coastal Commission*²⁴ provides a recent example of Powell's tendency to protect property owners against government regulation. Last term's landmark 5-4 decision requires the government to compensate owners of ocean-front property when it requires them to grant public access to the beach. Once again, Powell's vote provided the margin of victory for the conservative wing.

4. *Man in the Middle on Affirmative Action*

In contrast, Powell provided the fifth vote that enabled the liberal wing to prevail in several 5-4 affirmative action cases. Powell's most famous opinion occurred in *Regents of the University of California v. Bakke*,²⁵ where he wrote that the University of California at Davis Medical School may take race into account in its admissions decisions but may not use a rigid racial quota. The Court split 5-4 on both points, and Powell's vote was decisive on each.

In general, Powell agreed with the conservative wing that government affirmative action programs using "benign" racial classifications are subject to strict scrutiny by the Court. However, he sided with the liberal wing in finding the strict scrutiny test satisfied in several important cases. For example, Powell's vote in *United States v. Paradise*²⁶ was decisive in upholding a racial quota that required the Alabama Highway Patrol to promote one black officer for each white promoted. If Rehnquist, Scalia, O'Connor, and White pick up a conservative vote from Powell's successor, the Court will likely curtail affirmative action dramatically.

5. *The Key Fifth Vote on Abortion*

Powell also provided the crucial fifth vote needed in recent years to preserve the constitutional right of pregnant women to have an abortion. In *Thornburgh v. American College of Obstetricians & Gynecologists*,²⁷ for example, Chief Justice Burger joined Justices

23. L. FRIEDMAN & F. ISRAEL, *supra* note 2, at 79. The author continues: "In a series of decisions, Justice Powell has consistently voted to shield the capital markets from increasing governmental and public scrutiny. . . . Justice Powell's anti-trust opinions have been equally favorable to big business. . . . [Justice Powell has a] strong propensity to vote against organized labor. . . . Similar decisions by Justice Powell exist favoring big business in the environmental and consumer protection area." *Id.* at 79-81.

24. 107 S. Ct. 3141 (1987).

25. 438 U.S. 265 (1978).

26. 107 S. Ct. 1053 (1987).

27. 476 U.S. 747 (1986).

Rehnquist and White for the first time in calling for the overruling of *Roe v. Wade*.²⁸ Justice O'Connor also argued for major restrictions on *Roe*. Powell, however, cast his vote with Blackmun, Brennan, Marshall, and Stevens, allowing a narrow one-vote majority to reaffirm *Roe*.²⁹

It now appears that Rehnquist, Scalia, O'Connor, and White favor restricting *Roe v. Wade* and the constitutional right to terminate a pregnancy. If Anthony Kennedy, Powell's successor, joins the conservatives, the constitutional right to abortion will be seriously threatened.

6. *Swing Vote on Separation of Church and State*

Similarly, Powell cast the decisive vote in cases involving separation of church and state, frequently supporting the liberal wing's effort to keep intact the wall of separation between church and state. In 1985, for example, Powell provided the controlling vote in two 5-4 cases holding that the establishment clause prohibits the government from paying the salaries of persons teaching classes in parochial schools.³⁰

Rehnquist, White, and O'Connor have recently called for major revisions in establishment clause law, and Scalia is likely to join them in seeking greater latitude for government aid to religious institutions. If Powell's successor joins the conservative wing, one can expect the Court to accept Rehnquist's call to demolish Jefferson's wall between church and state.³¹

C. *Powell, the Person*

Lewis F. Powell, Jr. occupied a special position on the Supreme Court not only because of his role as swing vote in many key areas and his highly developed judicial craftsmanship, but also because of his personality. The consummate southern gentleman, Powell was a beloved member of the Court known for his tranquil, considerate

28. 410 U.S. 113 (1973) (holding that women have a fundamental constitutional right to terminate pregnancies).

29. In contrast, Powell provided the margin of victory for the conservative wing in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the landmark 5-4 decision holding that the constitutional right of privacy does not protect consensual sodomy by gay adults.

30. *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

31. As Rehnquist put it in *Wallace v. Jaffree*: "The 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned." 472 U.S. 38, 107 (1985).

disposition. Powell's was a moderating voice, emotionally as well as doctrinally. He was a buffer between sharply split wings on the Court, a healing force on a severely divided Court. He will be missed.

