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MR. JUSTICE POWELL AND THE EMERGING NIXON MAJORITY

*A. E. Dick Howard**

IN recent years, we have come to expect the debate over Supreme Court nominations to reflect ideological passions in the Government and the country at large; the Fortas, Haynsworth, and Carswell cases remain fresh in memory. In the hearings on the nominations of Lewis F. Powell, Jr., and William H. Rehnquist to the Court, Senate Democratic liberals made clear their intention to probe not only the nominees' integrity and legal qualifications, but also their judicial philosophies. It was ironic, therefore, to watch as liberal members of the Judiciary Committee, through their questions and comments at the confirmation hearings, made Powell, the conservative appointee of a Republican President, look even larger than life.¹

Powell's credentials, of course, were remarkable to begin with; they included the presidency of the American Bar Association and of the American College of Trial Lawyers, as well as other signal honors. But he was also the beneficiary of being paired with another nominee who, as events would have it, became the prime object of the liberals' attack. It was never likely that either nominee would be defeated, but liberal hopes burned more brightly in seeking to block Rehnquist, whose political activism presented readier targets, than the more prudent and circumspect Powell. Indeed, the close observer of the Senate's consideration of the two nominees would have to conclude that from the beginning not only was there no particular interest in an effort to "get" Powell, but also that Senate liberals set out to highlight the contrasts between Rehnquist and Powell. As a result, the public record, as made out during the Senate Judiciary Committee hearings, is largely one of encomiums for Lewis Powell. That record, therefore, does not yield much analysis of Powell's likely behavior on the bench.

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1. See, e.g., Senator Bayh's introduction into the record of the highly favorable letter from Jean Camper Cahn referred to in note 82 *infra*, and Senator Tunney's conclusion that at the hearings Powell had shown himself to be "a man of brilliance, compassion, and imagination." *Hearings on Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., at 280, 287 (1971) [hereinafter *Hearings*]. See also the favorable views of Senators Bayh, Hart, Kennedy, and Tunney in their statements of individual views. SENATE COMM. ON THE JUDICIARY, NOMINATION OF LEWIS F. POWELL, JR., EXEC. REP. NO. 92-17, 92d Cong., 1st Sess. (1971).

What may we expect of Mr. Justice Powell? Judges are regularly admonished—frequently by their own colleagues—to lay aside their social and economic views when interpreting the Constitution. Just as regularly, nominees to the Court say that they will strive to do just that.² But we are too much the children of twentieth-century insights into psychology and behavior to escape the implications of Judge Jerome Frank's comment, "When I woke up one morning a federal court judge, I found myself about the same person who had gone to bed the night before an S.E.C. Commissioner."³

It is natural, then, though far from the whole story, to ask something of what Powell has been—his law practice, his social and economic status, his whole life style—in pondering the kind of Justice he may be. John Schmidhauser, in an exhaustive "collective portrait" of the Supreme Court, described the typical Justice as "white, generally Protestant with a penchant for a high social status denomination, usually of ethnic stock originating in the British Isles, and born in comfortable circumstances in an urban or small town environment."⁴ To these characteristics are added other factors such as educational and social opportunities.⁵

Powell has had the economic and social advantages to which Schmidhauser refers, but such factors are so generalized as to be of little value in describing a man's philosophy. Arguably more relevant would be the new Justice's professional career, a more focused experience. Senator Harris, the only Senator to vote against Powell's confirmation, thought it significant that Powell was an eminently successful corporate lawyer among whose clients were numbered some of the wealthier and more influential corporations in the country. In Harris' view a man who had moved among "the rich, the comfortable, the approved" could not be expected to understand the plight of the common man in deciding Supreme Court cases.⁶

We should be wary of supposing that one who has been a corporate lawyer will behave in any particular way on the bench. As Paul Freund has noted, the Court's history cautions against the generali-

2. See, e.g., the colloquy between Rehnquist and Senator McClellan in *Hearings*, *supra* note 1, at 18-19.

3. Quoted in A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN 192* (1958).

4. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 *MIDWEST J. POL. SCI.* 1, 45 (1959).

5. *Id.*

6. *Richmond Times-Dispatch*, Dec. 7, 1971, at 1, col. 1. The history to 1954 of Powell's law firm is documented in 1 T. GAY, *THE HUNTON WILLIAMS FIRM AND ITS PREDECESSORS 1877-1954* (1971). The book's chapter headings—e.g., "Public Service Corporations," "Railroad and Corporate Reorganizations," "The Petroleum Industry"—are strongly suggestive of the nature of the firm's practice.

zation that "the lawyer is father to the judge."⁷ One might recall, for example, the libertarian opinions of Charles Evans Hughes as a rejoinder to predictions grounded in economic determinism.⁸ Lewis Powell, like any other appointee, will bring with him to the Court the fruits of his professional career, but like others before him he will be subject to moulding forces that he would not have encountered in practice—notably the traditions of the Court⁹ and the interactions among the Justices themselves.¹⁰

Prediction, then, is risky business. But most men who have attained the eminence of the Supreme Court have, along the way, left ample evidence of their attitudes and philosophy—evidence that may be suggestive of future judicial tendencies. Powell is no exception. For insights, there are several sources to which we may turn: Powell's own speeches and writings, which have been fairly ample; his career of public service, which has reached into a number of areas; and what others have said about Powell. To this record, one should add the perspective of President Nixon's expectations of his nominees—the articulated premises on which the appointment was made.

In announcing the Powell and Rehnquist nominations, Mr. Nixon saw himself as redeeming a campaign pledge to put "judicial conservatives" on the Court.¹¹ The President, in his statement, sought to distinguish between "judicial" and "political" philosophy, but, as Alan Dershowitz has pointed out,¹² his definitions seem not to have been the traditional ones. While no clean line can be drawn between "judicial" and "political" philosophy—both, after all, require the making of value judgments about political institutions—a judi-

7. P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 116 (1961). As support for such a conclusion, note the findings of John Schmidhauser that, contrary to a commonly held assumption, Supreme Court Justices who have been corporation lawyers are no more likely than Justices of other backgrounds to adhere to *stare decisis*. Schmidhauser, *Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 194, 204 (1961).

8. See Hendel, *Charles Evans Hughes*, in 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, 1893, 1904-05* (L. Friedman & F. Israel ed. 1969) [hereinafter Friedman & Israel]. After an overdose of behaviorism and economic determinism, both legal and historic studies have, in recent years, seen a renewed interest in the study of ideas in their own right. See, e.g., Greene, *The Flight from Determinism: A Review of Recent Literature on the Coming of the American Revolution*, 61 *SOUTH ATLANTIC Q.* 235, 257 (1962); Wood, *Rhetoric and Reality in the American Revolution*, 23 *WM. & MARY Q.*, Jan. 1966, at 3.

9. Even those who, before becoming Justices, have served on some other bench find that the Supreme Court is, as Frankfurter once put it, "a very special kind of court." F. FRANKFURTER, *OF LAW AND LIFE & OTHER THINGS THAT MATTER* 83 (1965).

10. See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); Murphy, *Courts as Small Groups*, 79 *HARV. L. REV.* 1565 (1966).

11. *N.Y. Times*, Oct. 22, 1971, at 24, col. 1.

12. *N.Y. Times*, Oct. 24, 1971, § 4, at 1, col. 5.

ciary philosophy deals more specifically with the Court's processes (*e.g.*, the weight to be given precedent) rather than with larger questions of public policy.

That Lewis Powell is a political conservative is clear. To put that conservatism in perspective, one should note the two conspicuous traditions in Southern politics. One is populism, calling to mind such colorful, sometimes circuslike figures as Huey Long and his cry of "Every Man a King" or Gene Talmadge and his red galluses. The other is Bourbonism, the genteel world in which so many Virginia political leaders, notably the late Senator Harry F. Byrd, have moved.¹³ One of the hallmarks of Southern Bourbonism is legalism, in particular, the instinct for responding to unwelcome political or social trends within a state or on the national scene by fashioning a constitutional framework for the Southern point of view. One may recall as instances the Southern turn-of-the-century state constitutions and the constitutional theorizing (including the short-lived revival of the doctrine of interposition) following *Brown v. Board of Education*.¹⁴

Lewis Powell, as Fred Harris knew, is no populist. Rather, he may be identified with the Virginia of the Byrds; indeed, Powell served as a member of a five-man steering committee for the younger Byrd's campaign for re-election to the United States Senate in 1970. Powell, however, is the kind of conservative whose political philosophy is visibly tempered by an acute sensitivity to public needs such as those in education; Powell, as a member of the commission that laid the groundwork for the adoption of Virginia's new Constitution, is well known to have been the father of the provisions which broke with the "pay-as-you-go" fiscal policy so closely associated with Byrd senior.¹⁵ But wherever he may stand on specific political issues, Powell is deeply imbued with the legalistic tradition of Southern thought.

A commitment to the modes of legalism is in fact an *idée fixe* in the ideas and writings of Lewis Powell.¹⁶ The theme emerges in his strongly stated views on civil disobedience and his commitment to

13. For a vivid picture of Virginia politics *à la* Byrd, see J. WILKINSON, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1954-1966 (1968).

14. 347 U.S. 483 (1954).

15. For the Commission's proposals, see THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 293-94, 307-19 (1969). For Powell's subsequent advocacy of the Commission's fiscal proposals, see Richmond Times-Dispatch, Feb. 25, 1969.

16. I make no attempt here to attach any precise meaning to the term "legalism." I use the term to suggest an attitude; I do not use it to imply an ideology.

the use of legal avenues to redress grievances.¹⁷ It appears in his distaste for judicial doctrines that seem to fetter law enforcement and crime detection.¹⁸ It is reflected in the fact that he chose to aspire to the presidency of that citadel of legalism, the American Bar Association—and by the fact that his fellow lawyers bestowed that honor upon him.

An English lawyer once remarked, "A man who has had a legal training is never quite the same again . . . [He] is never able to look at institutions or administrative practices or even social or political policies, free from his legal habits of belief."¹⁹ This is not to say that legalism always takes the form of ideology; there are, after all, lawyers who are liberals or radicals, and those who are conservatives or reactionaries. But, as has often been remarked, legalism tends to conservatism in the sense that law is a conserving force, one that looks to rules and accepted modes.²⁰ No man has spent his life more squarely in this legalistic tradition than Lewis Powell, who comes to the Court, at age 64, with habits and attitudes that cannot fail but be shaped by conspicuous success and recognition at working within these accepted legal modes.²¹

Powell does not, however, come to the Court with a fully worked-out judicial philosophy. Indeed, in the Senate Judiciary Committee hearings on his nomination, Powell observed that until recently he had not actually thought about a "judicial philosophy."²² This is not to say that Powell is without experience in and exposure to constitutional questions. He served with notable distinction as the chairman of the study commission that wrote Richmond's city charter²³—an exercise in constitution-making—and more recently was a member of the Virginia constitutional revision commission.²⁴ And, as noted below, Powell has served on study groups, such as the

17. See text accompanying notes 53-55 *infra*.

18. See text accompanying notes 46-59 *infra*.

19. Griffith, *The Law of Property (Land)*, in *LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* 118 (M. Ginsberg ed. 1959).

20. See J. SHKLAR, *LEGALISM* 10 (1964).

21. Powell's legalism corresponds rather well to Schmidhauser's description of the Supreme Court, in its role as keeper of the American conscience over the years, as reflecting "essentially the conscience of the American upper middle-class sharpened by the imperative of individual social responsibility and political activism, and conditioned by the conservative impact of legal training and professional legal attitudes and associations." Schmidhauser, *supra* note 4, at 49.

22. *Hearings*, *supra* note 1, at 219.

23. The Commission's report is a textbook model of lucidity. See *RICHMOND CHARTER COMMISSION REPORT* (1947).

24. See text accompanying note 15 *supra*.

President's Crime Commission, in the course of which he has had occasion to formulate positions on specific topics such as the *Miranda* warnings.²⁵ But it seems fair to say that Powell does not mount the bench with the kind of fully worked-out judicial philosophy which Felix Frankfurter so clearly brought with him to the bench²⁶ and which it seems that William Rehnquist already carries with him.

Powell and Rehnquist are both political conservatives; both may prove to be judicial conservatives. But there are notable differences in their style that may give rise to differences in judicial behavior. If Rehnquist's ideology is the more systematic and his thinking tends to the deductive, Powell leans to a pragmatic, problem-oriented style, a more inductive method of reasoning. Typically, his views on a subject have evolved from having had to think through that subject in the fashion of a lawyer dealing with a case. Powell's views on wire-tapping, for example, derive not from abstract views of the matter, but rather from viewing evidence accumulated during an ABA project and the work of the National Crime Commission.

Powell is by nature not one who volunteers his views on a subject—a trait which would naturally incline him to genuine judicial conservatism (for example, avoiding constitutional questions when a nonconstitutional ground of decision is available). Although Powell has written and spoken on many occasions, it is in character for him that these speeches and articles either arose out of his office, *e.g.*, as ABA president, or had been solicited, *e.g.*, the much-debated article on wiretapping which Powell was asked to write for the *Richmond Times-Dispatch* as a rebuttal to an earlier article in that newspaper.²⁷ Powell has the lawyer's trait of waiting for the client, case, or issue to come to him—perhaps a reflection of lawyerly sensitivity about solicitation, advertising, and self-publicity.²⁸ Powell's caution about forming judgments is reflected by his characteristic, and totally candid, answer to some questions put during the Senate Judiciary

25. *Miranda v. Arizona*, 384 U.S. 436 (1966).

26. See Sacks, *Felix Frankfurter*, in 3 Friedman & Israel, *supra* note 8, at 2401, 2406.

27. See text accompanying note 61 *infra*.

28. Rehnquist, by contrast, is a volunteer. When the Phoenix City Council was considering a public accommodations ordinance, Rehnquist appeared in person before the Council to oppose the measure. The text of the statement, made June 15, 1964, appears in *Hearings*, *supra* note 1, at 305. When the ordinance was adopted he wrote a strong letter to the *Arizona Republic* voicing continued opposition. The text of the letter appears in *id.* at 307. See also Rehnquist's 1967 letter to the *Republic* opposing proposals to break down de facto segregation in Phoenix schools. *Id.* at 309. In these acts, Rehnquist made it clear that he was simply representing his personal views. A man whose instincts call out so loudly for him to be vocal and activist on the political scene may carry those instincts with him to the Court. The differences are perhaps trivial, but it is hard to imagine Lewis Powell writing a letter to the editor.

Committee hearings: "I have never studied that"²⁹ or ". . . I have never considered this area."³⁰

At the Judiciary Committee hearings, Powell did bring with him one prepared statement—his views on the "role of the Court." In his statement, he touched six points. They include (1) a belief in the separation of powers, that courts should not encroach on the prerogatives of the legislative and executive branches; (2) a belief in the federal system; (3) an attitude of judicial restraint; (4) a respect for precedent, springing from a belief in the importance of continuity and predictability in the law; (5) the need to decide cases on the basis of law and fact before the Court; and (6) the responsibility of the Court to uphold the rule of law and to protect the liberties guaranteed by the Bill of Rights and the fourteenth amendment.³¹

It is revealing that Powell's statement shows more concern with process than with results; all save the last of Powell's six points go to the Court's process, rather than to substantive issues. Moreover, in his statement Powell developed the first five points rather carefully, sometimes giving specific examples, whereas his treatment of the sixth point is summary. One may infer that Powell, like the judicial conservatives, has a special sensitivity to the integrity of the process, to certain canons and precepts that he would apply independently of their impact on substantive issues at stake in a case.

The resemblance of Powell's stated views on the judicial process to the views of Felix Frankfurter and those of the second Justice Harlan is obvious. It was with an obvious touch of pride that, in outlining his views to the Judiciary Committee, Powell attributed his belief in the importance of judicial restraint to his having studied under Frankfurter at Harvard Law School.³² And to reinforce Powell's kinship with Harlan, it is interesting that Powell's first selection of a law clerk was a Virginia law student who has written admiringly of Justice Harlan and the values of federalism.³³

It is not given to many American Presidents to have the opportunity that events have thrust into the hands of Richard Nixon to remake the face of the Supreme Court.³⁴ And no President has laid

29. *Hearings, supra* note 1, at 207.

30. *Id.* at 218.

31. *Id.* at 219.

32. *Id.*

33. J. Harvie Wilkinson III. See Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

34. President Taft, in a little over two years, was able to put five men, Lurton, Hughes, Van Devanter, Joseph R. Lamar, and Pitney, on the Court, as well as name Edward Douglas White as Chief Justice. Warren Harding, in his two years and five months in

down in more explicit terms the philosophical assumptions on which he has chosen his nominees.³⁵ Some observers have suggested that, while the President speaks of judicial conservatism, the likely result will be a Court of judicial activists—conservative, to be sure, but activist all the same.

In recent decades, judicial activism has come in waves. Sometimes it has pursued conservative objectives, sometimes liberal. The Court's activism in the years before 1936 was conservative, overturning state and federal social welfare legislation. The activism of the late 1950's and the 1960's, the years of the Warren Court, was liberal; it was concerned with the protection of the weak and the unpopular, such as criminal defendants, the disfranchised, and racial minorities. If the emerging Nixon majority on the Court does prove to be activist, the question then becomes, What form will that activism take?

One possibility is put forth in the President's statement announcing the Powell and Rehnquist appointments: redressing the balance between the "peace forces" in society and the "criminal forces." The obvious area in which to readjust that balance is in the criminal cases that come before the Court, especially those which raise questions under the fourth, fifth, and sixth amendments. And it is in just these areas that the impact of the first two Nixon appointments, of Chief Justice Burger and of Justice Blackmun, has already been most apparent.

Criminal Law. The fourth amendment decisions are suggestive. The Chief Justice and Justice Blackmun have both indicated their disapproval of the exclusionary rule³⁶—Burger lamenting the "monstrous price" we pay for that rule.³⁷ Both Justices have joined in a course likely to lead to the undercutting or overruling of the *Aguilar*³⁸ and *Spinelli*³⁹ cases regarding the sufficiency of an informer's tip as the basis for a search warrant.⁴⁰ Burger and Blackmun

office, was able to put four men on the Court: Taft (as Chief Justice), Sutherland, Butler, and Sanford.

35. Of course, selection of men thought to be committed to a President's values has been a recurring consideration in making Supreme Court nominations. See Schmidhauser, *supra* note 4, at 35.

36. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Burger, J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 492, 510 (1971) (Burger, J., dissenting in part and concurring in part; Blackmun, J., joining parts of the opinion of Justice Black).

37. *Coolidge v. New Hampshire*, 403 U.S. 443, 493 (1971).

38. *Aguilar v. Texas*, 378 U.S. 108 (1964).

39. *Spinelli v. United States*, 393 U.S. 410 (1969).

40. *United States v. Harris*, 403 U.S. 573 (1971).

made possible the majority holding that the fourth amendment is not violated by the use at trial of a recording made by an informer who records a conversation with the accused.⁴¹

Equally suggestive of a marked change in the Court's course are recent decisions involving the fifth and sixth amendments. The much-debated *Miranda* decision has been a particular object of attack by critics of the Warren Court; Burger and Blackmun were part of the five-four majority in *Harris v. New York*,⁴² which narrowed *Miranda* by holding that a statement which, under the *Miranda* standards, would be inadmissible as part of the prosecution's case-in-chief may nevertheless be used to impeach the credibility of the defendant's testimony. In another case, Blackmun, in an opinion joined by Burger, wrote for the Court in holding that trial by jury is not required in juvenile proceedings.⁴³

In more than one case the Chief Justice has registered his objection to the Court's imposing uniform requirements on the states.⁴⁴ And he has thrown out hints about the limits of his willingness to abide decisions of the Warren Court when he has said that he "categorically" rejects the thesis "that what the Court said lately controls over the Constitution."⁴⁵

Lewis Powell has, on several occasions, voiced doubts about the extent to which the Supreme Court has gone in interpreting the rights of the accused in criminal cases. For example, he was one of four members of the National Crime Commission who, in an additional statement to the Commission's 1967 Report, were critical of the *Escobedo*⁴⁶ and *Miranda* decisions.⁴⁷ On other occasions Powell

41. *United States v. White*, 401 U.S. 745 (1971). See also Black's dissent (in which Burger joined) and Blackmun's dissent from the 6-3 holding in *Whitely v. Warden*, 401 U.S. 560, 570, 575 (1971), that there were insufficient facts supporting the complaint on which an arrest had been made, and their dissents from the Court's holding in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411, 430 (1971), that damages may be inferred from a fourth amendment violation. Burger and Blackmun (the latter writing for the Court) made up part of the 6-3 majority in *Wyman v. James*, 400 U.S. 309 (1971), upholding against fourth amendment claims home visitation as part of New York's Aid to Families with Dependent Children program.

42. 401 U.S. 222 (1971). For an example of an apparent willingness to get on with the job of reassessing the bounds of *Miranda*, see *United States v. Dimas Campos-Serrano*, 40 U.S.L.W. 4084, 4086 & n.1 (U.S. Dec. 20, 1971) (Blackmun, Burger, and White, JJ., dissenting).

43. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

44. *California v. Green*, 399 U.S. 149, 171-72 (1970) (concurring opinion); *Baldwin v. New York*, 399 U.S. 66, 76-77 (1970) (dissenting opinion).

45. *Coleman v. Alabama*, 399 U.S. 1, 21, 22 (1970) (dissenting opinion).

46. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

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has aired his concern that "[t]he pendulum may indeed have swung too far" in the effort to assure a fair trial for the accused.⁴⁸ On each of these occasions, however, Powell has taken care to put his concern into a larger, and carefully balanced, perspective. The object, he has urged, is the "striking of a just and reasonable balance" in which "there must be no lessening of this concern for the constitutional rights of persons accused of a crime."⁴⁹ And he has underscored the selectivity of his criticisms of particular cases by observing, "Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary or oppressive government."⁵⁰

There is no reason to think that Powell's views in the area of criminal justice are rigid. As a lawyer he had no criminal trial experience; the occasion for him to focus on this area came in the mid-1960's, with his ABA presidency and his service on the National Crime Commission. At the Senate Judiciary Committee hearings, Powell noted that he had not had recent occasion to restudy his 1966 views on cases such as *Miranda* and *Escobedo*;⁵¹ indeed, he showed his awareness of studies undercutting the fears he had expressed about the impact of those decisions on law enforcement.⁵²

It seems likely that Powell will be especially sensitive in cases involving access to the courts, *e.g.*, right-to-counsel cases. This sensitivity is a logical corollary of Powell's devotion to the principle of respect for law and his deep-seated concern about civil disobedience and civil disorder—a theme which he developed in the strongest terms in a number of speeches and articles before mounting the bench.⁵³ One who urges, as Powell has often done, that disputes be channeled into legal avenues ought to consider the extent to which those legal forums are freely available to all, regardless of race or economic status. It is instructive, therefore, to recall Powell's efforts

CHALLENGE OF CRIME IN A FREE SOCIETY 303-08 (1967) (additional views of Messrs. Jaworski, Malone, Powell, and Storey).

48. Powell, *An Urgent Need: More Effective Criminal Justice*, 51 A.B.A.J. 437, 439 (1965). See also Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 827 (1965); Powell, *Civil Liberties Repression: Fact or Fiction? —"Law-Abiding Citizens Have Nothing To Fear,"* Richmond Times-Dispatch, Aug. 1, 1971, in *Hearings*, *supra* note 1, at 213.

49. Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 827 (1965).

50. Powell, *An Urgent Need: More Effective Criminal Justice*, 51 A.B.A.J. 437, 439 (1965).

51. *Hearings*, *supra* note 1, at 237.

52. *Id.* at 232.

53. See authorities cited in notes 78-79 *infra*.

as ABA president to make legal services more generally available. On the occasion of his nomination, lavish praise was heaped on Powell for the role he played in nurturing OEO's legal services program at a critical time in its early life.⁵⁴ The symmetry of Powell's concern about civil disobedience and his quest for freer access to the courts bears an interesting resemblance to the views of Justice Black, whose opinions voiced such deep distress about civil unrest and who, at the same time, was such a champion of unfettered access to courts of justice.⁵⁵ There is reason to expect a like symmetry in Powell's opinions.

Powell has not given signs of wanting to embark on an across-the-board cutback in recent case law applying Bill of Rights guarantees to the state criminal process.⁵⁶ However, the Court has already given unmistakable signs of reassessment of much existing doctrine, and from the Court's recent decisions and from Powell's statements one may glean important areas of likely agreement where pruning may be predicted. As recently as April 1971, in a speech to the Richmond Bar Association, Powell said that one way to fight organized crime would be to "relax some of the artificial rules engrafted upon the fourth, fifth and sixth amendments by divided votes of the Court in cases like *Miranda* and *Escobedo*."⁵⁷ And at the Judiciary Committee hearings, Powell said that he knew of "no reasons why at this time" he should have views different from those he expressed as a member of the National Crime Commission (though he noted that he had not studied some of the issues since that time).⁵⁸

Powell's votes in criminal cases will also be influenced by his views about federalism. He will be no more sympathetic than was Justice Harlan to the expansive use of habeas corpus to give collateral federal review of state criminal convictions.⁵⁹ But, all in all, Powell's statements in the area of criminal procedure are not notably doctrinaire.

54. See, e.g., *Hearings, supra* note 1, at 125 (former Senator Joseph D. Tydings) 127 (Orison S. Marden), 130 (Bernard G. Segal), 281 (Jean Camper Cahn).

55. See Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030 (1967).

56. See, e.g., Powell's intimation that *Griffin v. California*, 380 U.S. 609 (1965) (forbidding comment on the failure of an accused to take the stand), which he had criticized as a member of the President's Crime Commission, might now be a precedent that he would leave undisturbed. *Hearings, supra* note 1, at 227.

57. In *id.* at 246 n.2. Powell observed that the English courts "have few such rigid, artificial rules." *Id.*

58. *Id.* at 237.

59. Powell has indicated that, while postconviction review by federal habeas corpus may have been necessary at a time when state criminal procedure "had not really caught up with" existing constitutional requirements, a "better system" must now be devised. *Id.* at 286. Harlan's views on the subject are, of course, well known. See, e.g., his dissent in *Henry v. Mississippi*, 379 U.S. 443, 457 (1965).

As a judge he is likely to be influenced by reasoned argument and to weigh closely the competing interests before deciding cases.

Wiretapping. Liberals concerned about the Nixon nominees to the Court have voiced special doubts about their views on wiretapping.⁶⁰ Powell's wiretapping views were the subject of close scrutiny during the Judiciary Committee's hearings, especially because of an article that Powell had written for the *Richmond Times-Dispatch*, in which he dismissed the outcry over wiretapping as a "tempest in a teapot." Citing figures on the number of wiretaps annually, Powell concluded, "Law-abiding citizens have nothing to fear."⁶¹

Pending before the Court is the question of the President's power to authorize wiretaps without judicial supervision in cases involving internal security.⁶² If Powell's *Times-Dispatch* article be taken as a gauge of his thinking, he is obviously disposed to the view that the President should have that power. It is not so clear, however, that that article represents his full and considered judgment. The article, a journalistic piece, was solicited as a rebuttal to an article expressing the opposite point of view.⁶³ Powell's *Times-Dispatch* article ought to be compared with the views in a speech he gave to the Richmond Bar Association.⁶⁴ There he took a much more guarded and tentative position on taps in internal security cases. Given the inherent difference between journalism (especially by one who is not a journalist) and legal writing, the bar speech, made to a legal audience, may well be the better measure of the manner in which Powell, as a Justice, will approach wiretapping cases. It is one thing to write an article for a newspaper, quite another, after briefs and arguments, to make law.

All in all, however, it would be surprising if Powell were moved to shift markedly from his stated views on wiretaps in domestic security cases. The distinction between "external" and "internal" threats to national security—which he labeled "largely meaningless" in his *Times-Dispatch* article⁶⁵—Powell in the Richmond Bar speech still called "far less meaningful now that radical organizations openly

60. See, e.g., Lewin, *Lewis Powell's Confusion: Facts About Wiretapping*, THE NEW REPUBLIC, Nov. 20, 1971, at 16.

61. Powell, *Civil Liberties Repression: Fact or Fiction?*, in *Hearings*, *supra* note 1, at 213, 215.

62. *United States v. United States Dist. Ct. for Eastern Dist. of Mich.*, 444 F.2d 651 (6th Cir.), *cert. granted*, 403 U.S. 930 (1971).

63. Gavzer, *Is Individual Freedom Threatened by Growth of Government Probes?*, *Richmond Times-Dispatch*, June 6, 1971, § F, at 1, col. 1.

64. Address of April 15, 1971, in *Hearings*, *supra* note 1, at 244.

65. *Id.* at 214.

advocate violence."⁶⁶ In the Judiciary Committee hearings, while noting that he had no "fixed views," Powell continued to refer to the "hazy" area of national security and internal security.⁶⁷ Even if he decides that the issue of the President's inherent power to wiretap in "internal security" (as opposed to "national security") cases must be resolved against the President, Powell's notion of "national security" could still be a sweeping one, including not merely domestic subversives working actively with foreign powers but also those "sympathetic" to such powers.⁶⁸

In general, while making clear his opposition to "indiscriminate" use of wiretapping, Powell summed up his views rather succinctly in his testimony:

I remember very well Mr. Justice Holmes' shorthand way of disposing of it. He said: "Wiretapping is dirty business." Of course, it is dirty business. The public interest, on the other hand, is to try to protect the innocent people from business that is equally dirty and in many instances dirtier.⁶⁹

Race and civil rights. The turnaround of the post-Warren Court in criminal cases is not paralleled in civil rights decisions.⁷⁰ For proof one need only point to the decision of Chief Justice Burger, who wrote for a unanimous Court in upholding a district court's use of busing, racial quotas, and other devices to achieve a racially unitary school system,⁷¹ as well as to the companion case (invalidating North Carolina's antibusing law) holding that race *must* be considered in fashioning judicial remedies to end racial discrimination in public schools.⁷² The Burger Court has likewise been generous in its construction of Title VII of the Civil Rights Act of 1964⁷³ and of Congress' power under the thirteenth amendment to reach private conspiracies.⁷⁴

Lewis Powell's record on race and civil rights was called into question at his confirmation hearings during the testimony of Representative Conyers of Michigan, speaking for the Black Congressional

66. *Id.* at 247.

67. *Id.* at 212.

68. *Id.*

69. *Id.* at 275.

70. Vernon Jordan, the executive director of the Urban League, sees things differently. He has said that blacks cannot take comfort in the chant of the 1960's, "Ain't gonna let nobody turn us round," because "when they see the new Supreme Court, they'll know we've been turned around." *Washington Post*, Jan. 6, 1972, at A16, col. 5.

71. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

72. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971).

73. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

74. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

Caucus, and of a Richmond attorney, representing the black Old Dominion Bar Association. These witnesses submitted that Powell, as chairman of the Richmond School Board, had frustrated desegregation of that city's schools, and that the record showed other instances in Powell's public, professional, and private life of his hostility or indifference to black aspirations.⁷⁵ Other witnesses, including the leading NAACP attorney in Virginia in the 1950's and the first black member of Richmond's school board, have painted a different picture.⁷⁶

Powell's statements and actions furnish a clue to how he may behave when racial cases come before the Court. There is little doubt how he feels about sit-ins, demonstrations, and other acts of civil disobedience. When the civil rights movement of the 1960's was at its height, Powell criticized the "heresy" of civil disobedience⁷⁷ and condemned it as one of the "contributing causes" to the trend "toward organized lawlessness and even rebellion."⁷⁸ At the same time Powell made equally clear how he feels about legislatures and public officials who attempt to disobey or evade court-ordered integration.⁷⁹ To Powell the "rule of law" binds white officialdom as it does black civil rights activists. And Powell has shown his awareness of the abuses of the legal process, double standards of justice, and other forms of discrimination and intimidation which so often gave the black ample reason not to respect the law.⁸⁰

Powell's role as Richmond School Board Chairman following *Brown v. Board of Education* is especially revealing. In the face of the public hostility to integration that had resulted in the closing of public schools in several Virginia communities, Powell pursued one

75. *Hearings*, *supra* note 1, at 361-95.

76. Oliver W. Hill, the NAACP attorney (and also the first black member of the Richmond City Council under the 1948 Charter), submitted to the Senate Judiciary Committee a statement calling Powell "a progressive moderate on racial questions" and praising Powell's contributions to the progressive features of the new Virginia Constitution. Manuscript statement, Nov. 4, 1971. (By apparent inadvertence Hill's statement does not appear in the printed record of the Committee's hearings.) Booker T. Bradshaw, a black school board member during the time of Powell's chairmanship, has recalled the "vital part [Powell] played in opposing 'massive resistance,' keeping the Richmond Public Schools open and ultimately bringing about the integration of the schools." Letter to Senator William B. Spong, Jr., Nov. 12, 1971. *See also* note 82 *infra* and accompanying text.

77. Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205 (1966).

78. Powell, *Civil Disobedience: Prelude to Revolution?*, 40 N.Y. ST. B.J. 172 (1968).

79. *See* Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 210 (1966); Powell, *Respect for Law and Due Process—The Foundation of a Free Society*, 18 U. FLA. L. REV. 1, 4 (1965); Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 827 (1965).

80. Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 206 (1966).

overriding goal: keeping the Richmond schools open while the clash between court decrees and state law resolved itself. Speaking for the Richmond board, Powell visualized the "catastrophic effect" of closing schools, including the "warping and corrosive" effect on individual children. Private schools, he argued, were no alternative because only the well-to-do could afford them and the burden of closed schools would fall on those less fortunate.⁸¹

Perhaps the most compelling portrait of Lewis Powell's attitudes to the needs and aspirations of the black in America has been painted by Jean Camper Cahn, a black woman who dealt with Powell when OEO's legal services program was getting underway. Candid about the "misgivings" which she felt in working with "a white lawyer from the ranks of Southern aristocracy leading the then lily-white ABA,"⁸² Mrs. Cahn described to the Judiciary Committee Powell's "capacity to empathize, to respond to the plight of a single human being to a degree that transcends ideologies or fixed positions"—a quality of humanity which Mrs. Cahn thought essential in the Court of last resort "to which I and my people so frequently must turn as the sole forum" for redress of grievances.⁸³

First amendment. The lines drawn by the Supreme Court in first amendment cases have always been wavering and uncertain ones, and it is no easier to say where the emerging Nixon majority is headed in this respect than to sum up where the Court stood at any earlier juncture. On the one hand, the first two Nixon appointees to

81. Richmond Times-Dispatch, May 7, 1959. The difficult climate of opinion in which Powell had to work is suggested by the 1956 call of a Richmond City councilman, an ardent opponent of desegregation, for Powell to disclose his own personal views on desegregation before Council acted to reappoint Powell to the School Board; the councilman obviously doubted Powell's willingness to man the barricades in support of segregation. Richmond Times-Dispatch, May 12, 1956. The difficulty of second-guessing, years after the fact, Powell's efforts to maintain a moderate course through troubled waters was evident to Senator Hart, of Michigan, who, with obvious reference to his own constituents' unrest over busing to achieve school desegregation, told the Senate:

I understand more clearly now than I might have had a year ago just how intense the pressure is when a community is required to correct a school system found to be segregated as a result of public policy, or de jure.

Mr. Lewis Powell stood up to that pressure. He took the right course—comply with the requirement of the Constitution and law; he rejected the popular course—close the schools. He has my respect and vote.

117 CONG. REC. S. 20589 (daily ed. Dec. 4, 1971).

With respect to the more recent issue of school busing and neighborhood schools, it might be noted that Powell signed the Commonwealth of Virginia's amicus brief in *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971). See 402 U.S. at 4.

82. Letter from Jean Camper Cahn, Director of Urban Law Institute of Antioch College, to Senator James O. Eastland, Nov. 3, 1971, in *Hearings, supra* note 1, at 281. Mrs. Cahn's letter, which should be read in full, is one of the most eloquent documents ever submitted in testimony on a Supreme Court nominee.

83. *Id.* at 285.

the Court have joined in further expanding in several libel cases the application of the *New York Times Co. v. Sullivan* rule,⁸⁴ and the Chief Justice, joined by Justice Blackmun, wrote the Court's opinion striking down salary supplements and other forms of state aid to sectarian schools.⁸⁵ On the other hand, the two Justices have consistently rejected first amendment attacks on state bar admission requirements,⁸⁶ they have been readier than some of their colleagues to uphold antiobscenity statutes,⁸⁷ and they have dissented from holdings invalidating a city ordinance regarding assembling on sidewalks⁸⁸ and overturning a state conviction for the public display of a four-letter word.⁸⁹ In the *Pentagon Papers* case, both Burger and Blackmun, in the Frankfurterian tradition, took pains to reject an "absolute" view of the first amendment, and both Justices (with Harlan) indicated the broad deference they would give the executive branch in deciding when disclosure of secret information would adversely affect national security.⁹⁰

Lewis Powell has not taken many occasions to express himself directly on rights of freedom of expression. He has taken a close look at the question of fair trial and free press, and his accommodation of those rights reflects a sensitivity to what he calls the "privileged position" of freedom of speech and press in the United States. He

84. 376 U.S. 254 (1964). See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971). See also *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

85. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But see *Tilton v. Richardson*, 403 U.S. 672 (1971), upholding federal construction grants to both religious and nonsectarian colleges.

86. *Baird v. State Bar*, 401 U.S. 1, 11 (1971) (Blackmun, Burger, Harlan, and White, JJ., dissenting); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *In re Stolar*, 401 U.S. 23, 31 (1971) (Blackmun, Burger, Harlan, and White, JJ., dissenting).

87. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States v. Reidel*, 402 U.S. 351 (1971). But see *Blount v. Rizzi*, 400 U.S. 410 (1971), which both Burger and Blackmun joined, holding that the administrative censorship scheme created by 39 U.S.C. §§ 4006-07 (1970), failed to meet the standards laid down by *Freedman v. Maryland*, 380 U.S. 51 (1965), and therefore violated the first amendment.

88. *Coates v. City of Cincinnati*, 402 U.S. 611, 617 (1971) (Blackmun, Burger, and White, JJ., dissenting).

89. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Black, Blackmun, and Burger, JJ., dissenting).

90. *New York Times Co. v. United States*, 403 U.S. 713, 748, 749 (Burger, J., dissenting), 752, 756-58 (Harlan, J., dissenting), 759, 761 (Blackmun, J., dissenting) (1971). See also the Court's decisions markedly limiting the bounds of its 1965 ruling in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which had carried the potential of broad federal court intervention in state criminal proceedings in which a state law was challenged on first amendment grounds. *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971) (per curiam); *Bryne v. Karalexis*, 401 U.S. 216 (1971) (per curiam).

rejects the British approach of reaching the media through the use of the contempt power; instead he emphasizes the duty of the bar to police itself and to reach at the source information that might prejudice a trial.⁹¹ Powell's oft-stated concern about civil disobedience suggests that as a judge he would draw a rather sharp line between speech, which is protected by the first amendment, and conduct, which is not. His views on direct action bear a marked resemblance to those of Justice Black in the sit-in and demonstration cases of the 1960's.⁹² Indeed, Powell has often quoted from those Black opinions.⁹³ It is apparent that Powell, like Black, would reject first amendment arguments such as those of Justice Fortas in *Brown v. Louisiana*⁹⁴ and that Powell would not likely be a hearty advocate of Harry Kalven's concept of the "public forum," which emphasizes the speech component of mixed speech and conduct in public places.⁹⁵ Powell, like Black, has returned again and again to the theme of the rule of law and the settlement of disputes through orderly legal processes. The debt to Black is obvious in such statements of Powell as:

And here, as a lawyer, may I emphasize that the right of dissent is surely a vital part of our American heritage. So also are the rights to assembly, to petition and to test the validity of challenged laws or regulations. But our constitution and tradition contemplate the orderly assertion of these rights. There is no place in our system for vigilantism or the lawless instrument of the mob.⁹⁶

In first amendment cases Lewis Powell is likely to be a "balancer" in the classic Frankfurterian tradition—though, of course, every "balancer" brings to the calculus his own appraisal of the various interests at stake. Nothing is more characteristic of Powell's approach

91. Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534, 535-36 (1965); Powell, *The President's Page*, 51 A.B.A.J. 199 (1965). See also Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 825 (1965). For further evidence of Powell's concern about the contempt power, see Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 8-10 (1966).

92. See, e.g., Black's opinions in *Bell v. Maryland*, 378 U.S. 226, 318 (1964) (dissenting opinion); *Cox v. Louisiana*, 379 U.S. 536, 575 (1965) (dissenting opinion); *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (dissenting opinion); *Adderley v. Florida*, 385 U.S. 39 (1966). For an analysis of Black's views in those cases, see Howard, *supra* note 55.

93. See Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 827-28 (1965); Powell, *Respect for Law and Due Process—The Foundation of a Free Society*, 18 U. FLA. L. REV. 1, 7-8 n.18 (1965); Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 226-27, 231 (1966); Powell, *Civil Disobedience: Prelude to Revolution?*, 40 N.Y. ST. B.J. 172, 173 (1968).

94. 383 U.S. 131 (1966).

95. Kalven, *The Concept of the Public Form: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

96. Powell, *Respect for Law and Due Process—The Foundation of a Free Society*, 18 U. FLA. L. REV. 1, 7 (1965).

to a problem (first amendment or otherwise) than to talk of "the striking of a just and reasonable balance" between rights or interests,⁹⁷ or to seek the fullest accommodation of competing interests rather than to see them as antagonistic.⁹⁸ Powell's whole temperament is that of the moderate man who prefers reason and reflection to emotion and impulse. He is a prudent and thoughtful man for whom the uses of "balancing" as understood in Supreme Court cases will hold a natural appeal.

If Powell does "balance" in first amendment cases, it remains to be seen how that balance may be affected by his view of the separation of powers, of federalism, and of judicial self-restraint. After a visit to the Soviet Union in 1958, Powell spoke on many occasions of the need to educate Americans to the menace of Communism,⁹⁹ and he spearheaded efforts in the ABA and in Virginia to have the study of Communism—"the overriding problem of our age"¹⁰⁰—included in school curricula.¹⁰¹ Given such views, Powell might, when a case before the Court involved Communist or other subversion, be inclined to pay the kind of judicial deference to legislative judgment which characterized Justice Frankfurter's opinions in such cases as *Dennis v. United States*¹⁰² and *Communist Party v. Subversive Activities Control Board*.¹⁰³ How far such deference, if any, might carry over to the Government's attitude toward internal security is

97. Powell, *The President's Annual Address: The State of the Legal Profession*, 51 A.B.A.J. 821, 827 (1965) (rights of the accused versus protection of the citizen from crime).

98. E.g., Powell, *The Right to a Fair Trial*, 51 A.B.A.J. 534, 535 (1965) (fair trial and free press).

99. See, e.g., Richmond Times-Dispatch, Aug. 24, 1958; *id.*, Nov. 13, 1958.

100. Richmond News Leader, Sept. 21, 1960.

101. Powell proposed that the ABA back the study of Communism in schools to contrast "the merits of freedom of Western democracy and 20th century capitalism and the brutal and repressive characteristics of 'dictatorship of the proletariat.'" Richmond News Leader, Aug. 30, 1960. See also Richmond News Leader, Sept. 21, 1960 (pilot course in Communism in Richmond schools); Richmond Times-Dispatch, Jan. 4, 1961 (proposal for Virginia schools); Richmond News Leader, Feb. 2, 1962 (distribution of ABA handbook for instruction on Communism). In April 1961, Powell urged the United States to give "whatever aid and assistance may be necessary" to overthrow the Castro regime in Cuba. Richmond Times-Dispatch, April 20, 1961. See also the views of the Communist menace expressed in the Supplemental Statement (Sept. 30, 1970), which Powell signed, to the REPORT OF THE PRESIDENT'S BLUE RIBBON DEFENSE PANEL (1970).

102. Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

341 U.S. 494, 517, 539-40 (1951) (Frankfurter, J., concurring).

103. 367 U.S. 1 (1961).

a relevant question in light of Powell's hesitation, in the case of wiretapping, to draw a line between national defense and espionage by a foreign power on the one hand, and internal security by domestic radicals on the other.¹⁰⁴

At the same time, in deciding where the "balance" is to be struck in first amendment cases, Powell's judgment is likely also to be affected by his perception of the relation of freedom of expression to the use of orderly processes to achieve social and political change.¹⁰⁵ Powell might share the concern of Justice Douglas (perhaps among the few things the Justices will have in common) that actions of the state not result in alienation of individuals from the state, a concern that naturally would lead to a full reading of the first amendment as a prerequisite of an open society.¹⁰⁶ And one should recall the first amendment opinions of the conservative Justice Harlan,¹⁰⁷ whom Powell resembles in so many other respects.

Other areas. Even at this early date one perceives some of the directions in which the emerging Nixon majority is embarking. In addition to what has been said above about criminal cases, the first amendment, and civil rights, a few other indicators may be mentioned. The Nixon appointees to the Court will be less likely than some of their colleagues to experiment with the "new" uses of the equal protection clause,¹⁰⁸ although it is interesting, in light of the general trend of the Court's decisions in criminal cases, to note several decisions in which the Court has used the equal protection clause to overturn additional jail sentences imposed on prisoners unable to pay fines¹⁰⁹ and to require a state to make available to indigent prisoners additional legal research materials.¹¹⁰ Surely, how-

104. See text accompanying notes 65-68 *supra*.

105. Cf. Chief Justice Hughes' statement in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937):

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means.

106. On alienation as a central theme in the opinions of Douglas, see Way, *The Study of Judicial Attitudes: The Case of Mr. Justice Douglas*, 24 WESTERN POL. Q. 12, 20 (1971). On a like theme running through the jurisprudence of Justice Black, see Howard, *supra* note 55.

107. *E.g.*, *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (concurring opinion); *NAACP v. Alabama*, 357 U.S. 499 (1958) (landmark right-of-association case).

108. See *Labine v. Vincent*, 401 U.S. 532, 535-36 (1971), *distinguishing* *Levy v. Louisiana*, 391 U.S. 68 (1968).

109. *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

110. *Younger v. Gilmore*, 40 U.S.L.W. 4003 (U.S. Nov. 8, 1971). See also *Meyer v. City of Chicago*, 40 U.S.L.W. 4055 (U.S. Dec. 13, 1971), in which a unanimous Court

ever, in future equal protection opinions we shall see more talk of "rational basis" and less of "inherently suspect" classification.¹¹¹ It is true that Chief Justice Burger, writing for a unanimous Court, ruled that a state statute giving preference to men over women in appointment as administrator of a decedent's estate violated the equal protection clause,¹¹² but it is noteworthy that the decision rests squarely on the traditional "rational basis" test and does not intimate that sex, like race, might be an "inherently suspect" classification. Like the Court's conservatives of earlier years, the emerging majority may be more willing to put the due process clause to work¹¹³ than to experiment with equal protection, but one should not expect innovations on the order of *Griswold*¹¹⁴ and its "penumbra" to come out of the Court.¹¹⁵

In the area of representation and the franchise, the new majority is not likely to seek the overturn of such landmarks as *Reynolds v. Sims*,¹¹⁶ but Burger and Blackmun so far have shown much more readiness to allow deviations from strict majoritarianism than have some of the holdovers from the Warren Court. Both Justices joined the opinion allowing a population deviation of 11.9% in a county government apportionment plan,¹¹⁷ both agreed that multimember legislative districts are not per se invalid,¹¹⁸ the Chief Justice wrote for the Court (in an opinion joined by Blackmun) in upholding a state requirement of an extraordinary majority in certain bond referenda,¹¹⁹ and Burger dissented (Blackmun taking no part) from the Court's ruling that a state may not restrict the vote to real property taxpayers in elections to approve the issuance of general

held that a state, in complying with the rule that it must provide an indigent appellant with a record of sufficient completeness to permit proper consideration of his claims, may not distinguish between felony and nonfelony convictions.

111. See *Richardson v. Belcher*, 40 U.S.L.W. 4015 (U.S. Nov. 22, 1971) (reduction in social security benefits); *Dandridge v. Williams*, 397 U.S. 471 (1970) (state's dollar limit on welfare benefits to any one family). Marshall dissented in both cases, arguing that a "rational basis" test has no place in cases involving fundamental services or basic human needs. 40 U.S.L.W. at 4018, 4019; 397 U.S. at 508, 519-22.

112. *Reed v. Reed*, 40 U.S.L.W. 4013 (U.S. Nov. 22, 1971).

113. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971), holding that a state denies due process of law when it refuses access to a divorce court to an indigent unable to pay court fees and costs.

114. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

115. See *United States v. Vuitch*, 402 U.S. 62 (1971), upholding a District of Columbia abortion statute against vagueness attacks; the Court passed up the invitation to reach arguments based on *Griswold*.

116. 377 U.S. 533 (1964).

117. *Abate v. Mundt*, 403 U.S. 182 (1971).

118. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

119. *Gordon v. Lance*, 403 U.S. 1 (1971).

obligation bonds.¹²⁰ Burger and Blackmun were among the four Justices who, in reviewing the Voting Rights Act Amendments of 1970, would have ruled that Congress lacked the constitutional power to extend the vote to eighteen-year olds even in federal elections.¹²¹

From the overt record, we know less of what Lewis Powell thinks of such matters as franchise and representation, of the "vague contours" of the due process clause, and of the "new" uses of equal protection, than we know of his views in such areas as the rights of an accused in a criminal case. But we do know something of his attitude to the role of the Court as a part of the federal system and as one of the three coordinate branches of government. And we know something of his belief in judicial self-restraint. Without attempting to predict his decision in specific cases, it seems reasonable to suppose that he will be much of a mind with the late Justice Harlan in being wary of an activist judicial role in imposing majoritarian philosophy upon the states or the federal government, or in discovering new "fundamental" rights entitled to a higher than normal insulation from legislative judgments.

Powell, attuned to traditional legal analysis, is likely to be the judicial antithesis of a Justice Douglas in dealing with the social contours of due process and equal protection problems. The style of the two men's writing is suggestive. A Douglas opinion cites sources, legal and nonlegal, which are as far-ranging as the travels of the man himself.¹²² By contrast, one searches the typical Powell article or speech in vain for the use of nonlegal authorities to support a legal argument. A Powell opinion is not apt to have sociological footnotes like that which occasioned so much comment after *Brown v. Board of Education*.¹²³

It may be true, as some liberals insist, that the emerging Nixon majority on the Court will be activist.¹²⁴ Conservatives might argue

120. *Phoenix v. Kolodziejewski*, 399 U.S. 204, 215 (1970) (dissenting opinion).

121. *Oregon v. Mitchell*, 400 U.S. 112, 281 (1970) (concurring in part and dissenting in part).

122. *See, e.g.*, Douglas's opinion arguing that the racial composition of New York's 17th and 18th congressional districts was comparable to the Electoral Register System in British India and the Constitution of Cyprus. *Wright v. Rockefeller*, 376 U.S. 52, 59, 63 n.5, 65 n.10 (1964) (dissenting opinion).

123. 347 U.S. 483, 494 n.11 (1954). That footnote, relying on the findings of Gunnar Myrdal and other social scientists, gave rise to a countermovement: the effort to invoke science and social science in defense of racial segregation. *See* I. NEWBY, *CHALLENGE TO THE COURT* (1967).

124. Soon after William Rehnquist's nomination, Fred P. Graham gave his opinion that Rehnquist "is far from a strict constructionist. Instead, he is that type of judicial activist that Justice Warren was—except that Mr. Rehnquist believes that it is time to read conservative rather than liberal meanings into the Constitution." *N.Y. Times*, Nov. 3, 1971, at 27, col. 1.

that, rather than being "activist," what the Court will be doing is to withdraw from some areas, such as *Miranda*, into which the Warren Court moved, and to resist expanding the Court's scope of review in areas which the Court in the 1960's might have seemed readier to enter, such as the "new" equal protection. By such an argument, "activism" consists in the Court's striking down measures (liberal or conservative) of which the Court disapproves, whereas staying out of an area, or withdrawing from an area previously entered by the Court, would be judicial conservatism.

Give its direction what label you will—"activist" or "strict constructionist" or otherwise—the emerging Nixon majority is already striking out on paths divergent from those of the Warren years. Summing up the 1970 Term of the Court, Harry Kalven was more impressed by the continuities between the Warren and Burger Courts than by the discontinuities.¹²⁵ But if one looks, not to the results reached by the entire Court, but specifically at the votes and views of the first two Nixon appointees (as I have done only summarily and illustratively in this Comment), the discontinuities become more evident. Add to the equation two more Nixon appointees—and assume the four at least tending to vote together¹²⁶—and the evidence mounts that on a range of fronts there will be palpable breaks with the direc-

125. Kalven, *The Supreme Court 1970 Term; Foreword: Even When a Nation Is at War*—, 85 HARV. L. REV. 3, 4-5 (1971). After the departure of Justices Harlan and Black from the Court, Kalven added a note at the outset of his article: "Rereading it now with hindsight, I would qualify its note of cautious optimism." *Id.* at 3 n.

After the present Comment had been written, the 1971 SUPREME COURT REVIEW appeared carrying Philip B. Kurland's assessment of the Court's 1970 Term:

The 1970 Term of the Supreme Court revealed that a new day has dawned in constitutional jurisprudence. The aftermath of the 1970 Term—the departures of Justices Black and Harlan and the appointments of their successors—now assures the change. The light of that new day, however, was not yet strong enough to illuminate the contours of the emerging doctrines—if any—that will guide the newly constituted tribunal. It is sufficiently clear, however, that many of the Warren Court's prevailing attitudes are no longer dominant. . . . Nor has the change as yet been as pervasive as some mourners for the immediate past would have it.

Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CR. REV. 265.

126. If Powell and Rehnquist do, from the very outset, vote regularly with Burger and Blackmun, this course of events will run counter to the tendency, reported in a 1958 study, of newly appointed Justices to join the subgroup holding the balance of power on the Court, and later to gravitate to the right or left. See Snyder, *The Supreme Court as a Small Group*, 36 SOCIAL FORCES 232, 237 (1958). In the 1970 Term, the pivotal subgroup consisted of Harlan, Stewart, and White, not Burger and Blackmun. See Kalven, *supra* note 125, at 9.

As if to underscore the hazards of the Supreme Court-watcher, Powell, in his first recorded dissent, joined, not the other Nixon appointees, but rather Douglas, Brennan, and White. See *Lippitt v. Cipollone*, 40 U.S.L.W. 3334, 3335 (U.S. Jan. 18, 1972). This is another caveat to those who are too quick to assume they can predict judicial behavior.

tions of the Warren Court.¹²⁷ Even Powell, for all his dedication to precedent, has been just as ready as Rehnquist to concede that the presumption attaching to precedent is weaker with more recent cases decided by a closely divided Court.¹²⁸ Many important decisions of the Warren Court fall in this category.

Such breaks with the past are bound to occasion great outcries from those who liked what the Warren Court was doing—just as the new ground broken by the Warren Court provoked protests from other quarters.¹²⁹ Such shifts, whether by the Warren Court or by the Burger Court, further undermine the Court's mystique and increase the tensions to which the Court as an institution is subject. It becomes, therefore, all the more important that the new results be articulated in the most reasoned fashion.¹³⁰

It is in supplying such reasoned opinions that Lewis Powell may provide his best service to the Court. It will be no surprise if he joins his vote with those of the other three Nixon nominees in shaping a new course for the Court. But if he writes the lucid, well-drafted opinions which many expect of him, then the thought reflected in those opinions should tend to mute legal and popular criticism—just as Powell was spared any substantial antagonism during his confirmation hearings, even from those who pointedly disagreed with the philosophy that led the President to nominate him.

There are those who, with the ebb and flow of judicial decision,

127. A conservative columnist, James Jackson Kilpatrick, surveyed twenty constitutional cases decided by a 5-4 vote in the 1970 Term; casting his analysis in straight-cut conservative-liberal terms, Kilpatrick produced a scorecard showing that the "Court conservatives won thirteen, lost six, and emerged from *U.S. v. Arizona* with a tie." Kilpatrick, *The High Court—Where Now?*, 23 NATIONAL REVIEW 1287, 1288 (1971).

128. See *Hearings*, *supra* note 1, at 19 (Rehnquist), 220 (Powell).

129. For a criticism of what the authors see as cloudy logic and lack of judicial restraint by the Burger Court, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). The authors conclude that *Harris* reflects an impulse to reverse many of the Warren Court's holdings "with something more than deliberate speed." *Id.* at 1227.

130. Philip B. Kurland is not very optimistic. Noting the departure of Justices Black and Harlan, Kurland observes:

No matter who the replacements, the Supreme Court is likely to be a sadly debilitated institution for some time to come. For history has made it clear that great Justices are made not born; that experience on the Supreme Court itself is a necessary though not a sufficient condition for judicial eminence; that it takes time for any new appointee, however vast his prior judicial experience, to meet the extraordinary challenges that inhere in the job.

The Court, then, would seem to be moving into a condition unfortunately similar to that which resulted when the Roosevelt Court under Stone was transmuted into the Truman Court under Vinson. Indeed, conditions are worse. For during the Truman period the Court had the strengths of Hugo Black, and Felix Frankfurter, and Robert Jackson. There is none left behind on the Court after the departure of Black and Harlan to carry out the same traditions of greatness. Kurland, *supra* note 125, at 320-21.

call, in the words of Herbert Wechsler, for "genuinely principled" decision-making, "reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."¹³¹ Lewis Powell's legalism should make that Wechslerian ideal attractive to him as a judge.

One of the most principled of Justices, John Marshall Harlan, wrote on the occasion of Felix Frankfurter's retirement from the Court that Frankfurter

brought to bear on his judgments a deep understanding of the nature and values of our federalism; a scrupulous observance of the boundaries between the executive, legislative, and judicial branches of the government; a dispassionate approach to the conflicting forces always present in a dynamic economy, and a sensitive regard for the balance that must ever be achieved in a free society between individual rights and governmental power.¹³²

Lewis Powell has yet to write the opinions by which his place among the Justices of the Supreme Court will be measured. But one can imagine his taking Harlan's judgment of Frankfurter as a worthy goal for himself.

On the personal side, Powell's work habits and temperament—conscientiousness, thoroughness, craftsmanship, and sheer capacity for hard work—are strikingly like Harlan's.¹³³ As to philosophy, we may see time bearing out the resemblances that Powell's legalism bears to the qualities which were honored in Frankfurter and Harlan. If Powell joins a new majority in developing distinctive avenues of jurisprudence, he brings with him to the Court the tools by which to give reasoned and lucid voice to those avenues.

131. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

132. Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 76 HARV. L. REV. 1, 2 (1962).

133. Many of the biographical similarities between Harlan and Powell are striking. Harlan drank deeply of the English legal tradition while a Rhodes Scholar at Oxford; Powell is a devout Anglophile. Harlan practiced with a law firm that did not discourage public service; lawyers in Powell's law firm (especially Powell himself) have been notably active in Virginia's public life (though not in elective office). Both Harlan and Powell had a practice of unusual range and complexity. Both served with distinction in World War II. Each man had particular occasion to engage himself in the problem of organized crime, Harlan as chief counsel for the New York State Crime Commission, Powell as a member of the subcommittee on organized crime of the President's Crime Commission. Both Harlan and Powell attained a number of bar association offices. For a biographical sketch of Harlan, see Dorsen, *John Marshall Harlan*, in 4 Friedman & Israel, *supra* note 8, at 2803. On Harlan's judicial views, see *THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN* (D. Shapiro ed. 1969).