

PROCEEDINGS IN THE SUPREME COURT OF THE
UNITED STATES IN MEMORY OF
JUSTICE POWELL*

TUESDAY, MAY 18, 1999

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS,
JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY,
JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, Justice Lewis F. Powell, Jr. The Court recognizes the Solicitor General.

The Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice Powell were unanimously adopted. With the Court's leave, I shall summarize the Resolutions and ask that they be set forth in their entirety in the records of the Court.

RESOLUTION

Lewis Franklin Powell, Jr., served on the Supreme Court from January 7, 1972, until June 26, 1987. Born on September 19, 1907, in Suffolk, Virginia, Powell lived most of his life

*Justice Powell, who retired from the Court effective June 26, 1987 (483 U. S. vii), died in Richmond, Virginia, on August 25, 1998 (525 U. S. v).

in Richmond. His father was a successful businessman, with sufficient resources to send his son to a private boys' school in Richmond, then to six years at Washington and Lee University, where Lewis, Jr., earned both undergraduate and law degrees, and finally to one year at Harvard Law School. At Washington and Lee, he was the proverbial "big man on campus." He was elected president of the student body, tapped for a succession of exclusive clubs, and chosen to represent the school at the National Student Federation.

In 1931, Powell graduated first in his law school class at Washington and Lee, then went to Harvard. There the competition was entirely different. Powell took a seminar in Administrative Law taught by Felix Frankfurter, who would later succeed Benjamin Cardozo on the Supreme Court. Seated around the seminar table with the two future Justices were Harold Stephens, who would later serve on the D. C. Circuit Court of Appeals; Louis Jaffe, who had a brilliant career on the Harvard law faculty as a specialist in administrative law; and Paul Freund, who became a celebrated teacher of constitutional law and twice was seriously considered by President Kennedy for appointment to the Supreme Court. In this company, the graduate student from Virginia did not stand out. He sat at the far end of the table from the voluble professor, took copious notes, and said as little as possible.

Lewis Powell left Harvard at the depth of the Great Depression. He turned down an offer from John W. Davis to work at Davis, Polk, and Wardwell for the munificent salary of \$150 per month and took a job in Richmond for one-third that rate. He was to practice law in Richmond for nearly 40 years, eventually becoming the city's leading lawyer and one of its foremost citizens. Much of that time Powell spent building a corporate practice at the great law firm that would one day bear his name (Hunton, Williams, Gay, Powell & Gibson), but to an astonishing degree he also devoted himself to public service. In the history of private practice, there is no better example of the lawyer as public citizen than Lewis Powell.

In the early years, Powell's public role was strictly local. He volunteered at the Legal Aid Society of Richmond, involved himself in a host of other civic activities, and became active in the local bar. For Powell, as for so many members of his generation, service on a broader scale began in the aftermath of Pearl Harbor. Too old to be drafted, Powell had good reasons not to volunteer. In 1936, he had married Josephine Pierce Rucker, a woman of striking beauty, vivacious temperament, and an immense capacity for supporting her husband. By 1941, they had two daughters. Powell's law partners urged him to stay home, saying that he might leave a wife and two small children with no means of livelihood, but, as Lewis told Jo, "I could never have looked my children in the face if I had ducked this responsibility."

It was not in Lewis Powell's nature to duck any responsibility. In 1942, he joined the intelligence branch of the Army Air Forces and in September of that year, found himself one of 16 officers crammed into a double berth on the *Queen Mary*, as the fast ship sped to Europe with a precious cargo of 17,000 American servicemen. Powell's unit spent six weeks in England, then shipped to North Africa. The air campaign was hard on the 319th Bombardment Group, and losses of men and airplanes mounted. When the unit was pulled from combat in February 1943 for rest and refitting, Powell transferred to the intelligence staff at the North African headquarters for Anglo-American air forces, where he helped plan the bombing campaign for the invasion of Sicily.

In August 1943, Powell was beginning to work on the planned invasion of the Italian mainland, when suddenly and mysteriously he was ordered back to the States. At first, it seemed that he had been brought home only to update Army manuals, but it soon became clear that he was in fact being interviewed for the most elite and unusual of all military intelligence services—the so-called Special Branch. The Special Branch was the organizational home of 28 American officers recruited to advise senior Allied commanders on the use of "Ultra" intelligence. That name referred to radio

intercepts encoded on the German enciphering machine “Enigma” and deciphered by the British through painstaking analysis at a secret installation outside London. Since the Germans used the Enigma machine for high-level radio traffic, the ability to decrypt Enigma intercepts gave the British access to the most secret of Germany’s wartime communications. The challenge was to put this information to good use without revealing its source, for once the Germans suspected that the Enigma encoding mechanism had been broken, the intelligence would end.

Powell’s job, and that of the other 27 Ultra representatives, was to receive Ultra decrypts, interpret them in light of other intelligence, present the findings to senior commanders, and make sure that no action taken on the basis of this information would reveal its source. For this purpose, Powell was assigned to the United States Strategic Air Force, where he eventually became head of the Operational Intelligence Division, comprising about 40 officers and as many enlisted personnel. In that capacity, Powell often represented his superiors at General Eisenhower’s daily briefing, held originally in London and subsequently in the Petit Trianon at Versailles. Operational intelligence rewarded a lawyer’s skills. Powell analyzed evidence, organized it coherently, and presented it to his superiors, all the while balancing loyalty to their aims and objectives with the independence of judgment necessary to a good counselor. From this experience, Powell gained a firm sense of his own competence and fitness to command.

At the end of the war, Powell returned home with the rank of full colonel, a chest full of decorations, and a set of long-stemmed champagne glasses that he had “liberated” from the basement of Hitler’s retreat at Berchtesgaden. Powell also came home a patriot. Although his love of country was not of the sloganeering, flag-waving variety, Powell never doubted the broad alignment of national self-interest with world peace and freedom. For Powell, American mistakes were aberrational, not symptomatic. He had an ardent faith in his country’s essential rightness, a faith powerfully rein-

forced by his service in World War II. In a long life of distinguished achievement, there was no part of his career of which Powell was more proud.

Back in Richmond, Powell renewed the process of building a law practice. Somehow, he also found time to do pro bono work for a variety of local organizations, including the Red Cross, the Virginia Home for Incurables, the Retreat for the Sick Hospital, the Family Service Society of Richmond, and even the Garden Club of Virginia. He became known as the leading “free” lawyer in Richmond, a reputation, he later said, that was “not given the highest rating by partners concerned with cash flow.”

By far the most important—and the most controversial—of Powell’s local activities was his stewardship of the Richmond public schools during the early years of desegregation. Powell was appointed to the Richmond School Board in 1950 and elected its chairman two years later. In 1954, the Supreme Court announced the beginning of the end of the Old South in *Brown v. Board of Education*, 347 U. S. 483 (1954), and one year later ordered desegregation to begin “with all deliberate speed.” *Brown v. Board of Education*, 349 U. S. 294, 301 (1955). Today, *Brown* is universally admired as both right and necessary. Indeed, no other decision in this century is so secure in moral standing or public esteem. It therefore requires an act of imagination to reconstruct the South’s original response. In 1956, Senator Harry Flood Byrd, acknowledged leader of Virginia politics, called for “massive resistance” to the Supreme Court order. The Byrd organization’s successful candidate for governor echoed that call: “Let there be no misunderstanding, no weasel words, on this point: We dedicate our every capacity to preserve segregation in the schools.” To back up that bluster, the state prepared to shut down public schools altogether rather than allow black and white to sit together. This policy was shameful in origin, unlawful in operation, and disastrous in consequence. Public schools were closed in several Virginia cities and later in Prince Edward County, and for nearly a decade Virginia fought desegregation to a standstill.

It was Lewis Powell's fate to confront the hysteria of massive resistance in the capital of the old Confederacy. Publicly, he said nothing. Even when the Richmond City Council, which appointed School Board members, demanded to know Powell's position on desegregation, he refused to elaborate on a press release of deliberate vagueness. For the eight years in which Powell was chairman of the Richmond School Board, neither he nor that body took any public position on "massive resistance." Behind the scenes, however, Powell fought hard against it. He made a futile effort to dissuade Senator Byrd from this perilous course and staunchly supported Virginia moderates. In particular, Powell did battle with "interposition," the purported theoretical justification for massive resistance. Interposition advocates claimed for each state the right to defy and disregard Supreme Court decisions that they believed to have departed from the Constitution. In a letter to the governor, in a memorable debate before an influential group of the state's leading lawyers and businessmen, and in innumerable private conversations, Powell assailed this pernicious doctrine. It was, he argued, "no less than a proposal of insurrection" against the national government, reflecting an "attitude of lawlessness" which would not be tolerated in an individual and which would bring discredit on the state. Eventually, interposition and massive resistance ran their course. When Powell stepped down from the Richmond School Board, integration had begun, albeit just barely. Critics could and did complain about the pace of progress, but the schools had been kept open.

In 1964, Powell moved onto the national scene as President of the American Bar Association. In his inaugural speech in August of that year, Powell outlined three initiatives. First, he called for comprehensive reform of legal ethics. This project, which began under Powell's leadership, replaced the 1908 canons of ethics with a new Code of Professional Responsibility, adopted by the ABA in 1969. Second, Powell announced a massive project on standards for the administration of criminal justice. Chief Judge Edward J.

Lumbard of the Second Circuit chaired this effort. Participants included academics, lawyers, and judges, including four future Justices of the Supreme Court—Powell himself; Warren Burger, who eventually succeeded Lumbard as overall head of the project; Abe Fortas, who served on a committee on the conflict between free press and fair trial; and Harry Blackmun, who sat on a committee on the role of the trial judge. Third, Powell called for a dramatic expansion of legal services for the poor. This proposal led to Powell's most notable accomplishment as President of the ABA—the birth of the Legal Services Program.

The Family Service Society of Richmond, where Powell had worked, was representative of traditional legal aid societies. Led by establishment lawyers, staffed largely by volunteers, and allied with the local bar, their goal was not to attack poverty as such but to provide adequate legal representation for those who happened to be poor. Lyndon Johnson's "War on Poverty" spawned a radically different approach. In November 1964, Sargent Shriver, director of a newly created federal agency called the Office of Economic Opportunity, called for a federal program of legal aid for the poor. His proposal raised fears that lawyers' traditional freedom to represent their clients as they thought best would be subordinated to the dictates of bureaucrats and social workers. Moreover, Shriver spoke of training lay persons to act as "legal advocates for the poor," handling tasks that historically had required lawyers. Private practitioners foresaw publicly funded competition for the struggling neighborhood lawyer. Complaints poured into ABA headquarters, demanding that the organization mobilize against the federal proposal, but Powell refused. Instead, he placed his personal prestige on the line to forge an alliance between the federal anti-poverty activists and the establishment lawyers of the ABA. Through delicate negotiations and personal leadership, Powell worked out a compromise. The ABA agreed to support the federal program, and the OEO agreed to allow existing legal aid societies to participate in federal funding. The federal program

was redesigned to protect the traditional independence of lawyers and to make certain other concessions, and the energies committed to existing legal aid societies were now harnessed in the federal program. To everyone's astonishment, Powell secured *unanimous* ABA endorsement of this arrangement and staged a "symbolic handshake" in which Shriver announced a National Advisory Committee on which Powell and other ABA leaders agreed to serve.

Years later, when Powell's nomination to the Supreme Court came before the Senate Committee on the Judiciary, Jean Camper Cahn, who had originally proposed the Legal Services Program to Sargent Shriver, wrote an extraordinary 18-page letter recounting Powell's role in these tortuous negotiations. She recounted how he had worked closely with the all-black National Bar Association and how he had invited her to become the first African-American lawyer, male or female, to address a plenary session of the ABA, and predicted that Powell would "go down in history as one of the great statesmen of our profession."

In the late 1960's, Powell became increasingly prominent as a conservative voice on crime. He used the ABA presidency as a bully pulpit, insisting on the rule of law, criticizing civil disobedience on both the left and the right, and reminding everyone that the first duty of government is "to protect citizens in their persons and property from criminal conduct—whatever its source or cause." In 1965, Lyndon Johnson named Powell to the President's Commission on Law Enforcement and the Administration of Justice. When its final report, *The Challenge of Crime in a Free Society*, was published in 1967, Powell issued a "Supplemental Statement" (he was careful not to call it a dissent), asking whether *Miranda v. Arizona*, 384 U. S. 436 (1966), had gone too far and suggesting the possibility of a constitutional amendment. Powell's speeches and his participation on the crime commission established him as a critic of the Warren Court—a responsible and respectful, but unmistakably conservative, critic of the Warren Court's work in criminal procedure.

It was this reputation, coupled with Powell's long list of accomplishments and distinctions, that attracted the attention of President Richard Nixon. In 1969, when the Senate rejected the nomination of Clement Haynsworth of South Carolina, Powell made the "short list" for appointment to the Supreme Court but withdrew from consideration. At 62, he thought himself too old and, as he wrote the Attorney General, feared "that the nomination of another southern lawyer with a business-oriented background would invite—if not assure—organized and perhaps prolonged opposition." After the disastrous nomination of G. Harrold Carswell, the President turned to Harry A. Blackmun of Minnesota, who was confirmed without controversy in June 1970.

Barely a year later, the retirements of Justices Hugo Black and John Marshall Harlan created two new vacancies, and again attention turned to Powell. Twice the Attorney General urged Powell to take the job, and twice Powell declined. Finally, the President himself called, spoke of Powell's responsibility to the country, and insisted that it was Powell's *duty* to accept appointment to the Supreme Court. When this approach proved successful, President Nixon announced the nominations of Lewis F. Powell, Jr., of Virginia and William H. Rehnquist of Arizona to the Supreme Court. On January 7, 1972, they took their seats as the 99th and 100th Justices of the Supreme Court.

Justice Powell served from that date until he retired, a few months short of his 80th birthday, in 1987. In those years, neither liberals nor conservatives dominated the Supreme Court. With left and right in ideological balance, the Court embarked on a pragmatic search for justice, order, and decency in a changing world. Surprisingly, Justice Powell, whose pronouncements on criminal procedure had made him seem reliably conservative, found himself at the political center of a divided Court. Often, his was the decisive voice. The record he compiled is not that of a dependable champion of left or right but that of a thoughtful moderate, steadfast in firm convictions but respectful of compromise, a judge mindful of context and distrustful of sweeping generaliza-

tion, and committed above all to the institution and the country that he served.

Consideration of three areas will reveal Justice Powell's exceptional impact on the development of American constitutional law. Abortion, affirmative action, and capital punishment were—and are—intensely controversial. In each of these areas, Justice Powell confronted explosive constitutional questions which he had had little occasion to consider before coming to the Court. In each of these areas, he sought to bring his understanding of constitutional principles and precedents to bear on deeply difficult questions that continue to divide both the Court and the country. In each area, his decisions reveal both this constancy in support of strong convictions and his instinct for a middle course. In each area, his views had an uncommon impact on the course of constitutional law.

Justice Powell was in the majority in *Roe v. Wade*, 410 U. S. 113 (1973), and in every other abortion decision during his tenure. On the one hand, he steadfastly supported *Roe* against challenges and limitations, including attempts to require a parent or husband's consent. See *Bellotti v. Baird*, 443 U. S. 622 (1979) (parental consent); *Planned Parenthood v. Danforth*, 428 U. S. 52 (1976) (spousal consent). On the other hand, he upheld laws directing an unmarried minor to notify her parents before having an abortion (but not giving them the power to veto her decision), *H. L. v. Matheson*, 450 U. S. 398 (1981), and he consistently refused to require public funding for abortion. See, e. g., *Beal v. Doe*, 432 U. S. 438 (1977); *Harris v. McRae*, 448 U. S. 297 (1980). More than those of any other member of the Court, Justice Powell's votes determined the content and scope of the constitutional right to abortion.

So it was also with affirmative action. In the famous *Bakke* decision, Justice Powell made a "majority of one" to tolerate racial preferences in higher education, but only as a temporary and contested deviation from the ideal of color-blindness. *Regents of the University of California v. Bakke*, 438 U. S. 265 (1978). Four Justices were prepared to

allow minority preferences more or less without limitation, and four others interpreted a federal statute to disallow minority preferences more or less without exception. Justice Powell cast the deciding vote in both directions. On the one hand, he thought it necessary that affirmative steps be permitted to overcome America's long history of racial oppression. On the other hand, he feared the entrenchment of a racial and ethnic spoils system that would prove permanently durable and socially divisive. Faced with these conflicting concerns, Justice Powell characteristically sought a middle course. He tried to permit racial preferences without conceding their future, to authorize such preferences while preserving the grounds of objection to them. In short, Justice Powell sought both to allow and to curtail racial preferences.

The middle ground that Justice Powell staked out in *Bakke* was filled in by thirteen additional affirmative action decisions during his tenure. In all of them, Justice Powell was in the majority. In all of them, he struck a delicate balance between the necessity, as he saw it, of allowing some racial preferences and the fear that racial quotas, once allowed, would become entrenched and permanent. Given the nearly even division of opinion elsewhere, Justice Powell's approach proved decisive. Perhaps in no other area of constitutional law have the individual views of a single Justice left such a large mark. His legacy lies not in a resolute commitment to either position but in the enduring ambivalence of the law's reaction to racial preferences. Under the regime of Justice Powell's views, affirmative action has been widespread, familiar, and significantly successful. It has also been contested, resented, and increasingly curtailed. Both sides owe something to the lonely wisdom of Lewis Powell.

One question on which Justice Powell did have a clear view on coming to the Court was the constitutionality of capital punishment. The question was argued only ten days after Justice Powell took his seat. He quickly concluded that the Constitution's repeated references to capital punishment, its long history of acceptance in this country, and the absence of

contrary precedent dictated that the death penalty be upheld. He said so, forcefully and at length, in his dissent from *Furman v. Georgia*, 408 U. S. 238, 414 (1972). That a majority of the Justices nevertheless determined to strike down all existing laws might have been expected to end capital punishment, but public opinion turned the other way. Thirty-five states promptly enacted new laws, and seventeen of them (in an effort to answer *Furman's* concern with arbitrariness of administration) made death the mandatory penalty for certain broad classes of homicide. The Justices now faced a vast expansion of capital punishment for which they themselves were directly responsible.

In 1976, the Court heard five companion cases dealing with a representative sample of the new statutes. Four Justices voted to uphold all the statutes; two others voted to strike them all. The balance of power rested with Justices Stewart, Powell, and Stevens, who issued a joint opinion approving the statutes that attempted to structure and guide sentencing discretion in capital cases but invalidating those that made the death penalty mandatory. *Gregg v. Georgia*, 428 U. S. 153 (1976); *Proffitt v. Florida*, 428 U. S. 242 (1976); *Jurek v. Texas*, 428 U. S. 262 (1976); *Woodson v. North Carolina*, 428 U. S. 280 (1976); *Roberts v. Louisiana*, 428 U. S. 325 (1976). These decisions inaugurated the constitutional regime that has continued until today. Under this approach, the Court respects the widespread legislative endorsement of capital punishment but insists on case-by-case scrutiny of the fairness of its administration. Here too Justice Powell's views proved durably influential.

Abortion, affirmative action, and capital punishment remain deeply divisive and controversial. Perhaps there will be few who unreservedly endorse Justice Powell's position on all three questions, yet we are united in our respect and admiration for the man who produced them. In these and other areas of constitutional adjudication, Lewis Powell showed himself a careful, caring, and supremely thoughtful jurist. In the words of his former clerk, J. Harvie Wilkinson, III, now Chief Judge of the United States Court of Ap-

peals for the Fourth Circuit, Justice Powell will have his critics: "Some of his votes are not easy to reconcile. Some of his theory is not seamlessly consistent. . . . For those who seek a comprehensive vision of constitutional law, Justice Powell will not have provided it." But, Wilkinson added, "For those who seek a perspective grounded in realism and leavened by decency, conscientious in detail and magnanimous in spirit, solicitous of personal dignity and protective of the public trust, there will never be a better Justice." Wilkinson, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 Harv. L. Rev. 417, 420 (1987).

Wherefore, it is accordingly

RESOLVED that we, as representative members of the Bar of the Supreme Court of the United States, express our admiration and respect for Justice Lewis F. Powell, Jr., our sadness at his death, and our condolences to his family; and it is further

RESOLVED that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

THE CHIEF JUSTICE said:

The Court recognizes the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:
MR. CHIEF JUSTICE, and may it please the Court:

Although his courtly manners and quiet confidence would lead others to think of him as a patrician, Lewis Powell was not born to wealth. His father worked hard as a manager in a series of businesses when he was a child, and provided opportunities to Lewis, Jr., that he himself had not had. As

a schoolboy, Lewis Powell received an award for personal integrity, an honor that would repeatedly be re-won in respect others had for him throughout his life.

The Solicitor General has already described portions of the Bar Resolution that detail Lewis Powell's splendid reputation at the Bar and his tireless efforts in public service of all kinds—including his chairmanship of the Richmond School Board during a time of unparalled challenge; his lasting initiatives as President of the American Bar Association; and his exceptional service to this country in World War II. Each of these voluntary efforts would be reason enough for the country to extol the memory of Lewis Powell.

It is also fitting, I think, to mention that he also held the highest offices of the American Bar Association and the American College of Trial Lawyers. He served, as the Solicitor General has noted, as a member of President Johnson's Commission on Law Enforcement and the Administration of Justice, President Nixon's Blue Ribbon Defense Panel, the National Advisory Committee on Legal Services to the Poor, the Virginia Constitutional Revision Commission, the Board of Trustees of Washington and Lee University, and the Colonial Williamsburg Foundation.

It is fair to say that Lewis Powell, the Supreme Court Justice drew deeply from the experience of Lewis Powell, the attorney. He brought a cautious and highly sophisticated pragmatism to the Court, and a distrust of doctrinaire prescriptions for complex problems. He characteristically focused on the facts of the case before the Court, striving to do justice *in that case* as well as fashion rules of general applicability to govern other, similar circumstances. When occasionally the effort to achieve a just result on the given facts implied creation of a new rule of uncertain consequences, Justice Powell strove to do justice in the case while endeavoring to limit the breadth of the Court's decision. The informed 'balancing' of competing interests became his hallmark as a Justice. Particularly on the great issues that tended to divide the country, Justice Powell's capacity to find

important elements of truth and justice on each side of the controversy became a powerful source of reconciliation and healing.

From the time he joined the Court in January of 1972 until his retirement in June 1987, Justice Powell wrote more than 600 opinions, approximately half of them for the Court. Within a short time after his appointment, Justice Powell was writing some of the Court's most important opinions. In his very first Term, he wrote the Court's opinion in *Kastigar v. United States*, which established the ground rules for the modern application of the Fifth Amendment privilege against self-incrimination in the context of immunized testimony.

Also within months of his appointment, Justice Powell demonstrated his independence from the President who had appointed him by writing for the Court in *United States v. United States District Court*. In that case the Court rejected the government's assertion of an executive power to wiretap persons without judicial supervision in cases involving national security. But as his opinion for the Court in *Dalia v. United States* would later demonstrate, the use of a warrantless entry to install eavesdropping equipment would not in and of itself give rise to a Fourth Amendment violation so long as the officers had received the approval of a judge for the wiretapping itself.

Another decision from his early years on the Court, *Almeida-Sanchez v. United States* would later develop into a series of Fourth Amendment decisions prescribing carefully nuanced rules to govern searches and seizures at the Nation's borders. Those decisions included *United States v. Brignoni-Ponce*, *United States v. Ortiz*, and *United States v. Martinez-Fuerte*. A similarly balanced approach can be found in Justice Powell's opinions in a series of cases dealing with the scope of the exclusionary rule.

Justice Powell was an especially authoritative voice in cases involving public education. In his second Term, he wrote the Court's decision in *San Antonio Independent*

School District v. Rodriguez, holding that a publicly-funded education is not a fundamental right triggering strict scrutiny of the financial disparities that may exist between rich and poor school districts. Yet the deference in *Rodriguez* to local control of public education was counterbalanced a decade later by the Court's holding that a state law prohibiting the children of undocumented aliens from attending public school violated the Constitution. Justice Powell wrote in his concurring opinion in *Plyler v. Doe*, 'The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children, thus, have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.'

Similarly, in a series of opinions under the Equal Protection Clause involving gender discrimination, Justice Powell applied mid-level scrutiny with telling effect—resulting in the Court's invalidation of gender-based discrimination in the military, the ability of pregnant teachers to work, the dissemination of social security benefits, the sale of 3.2 beer, and the rules requiring consent for adoption by an unwed mother but not an unwed father.

Justice Powell will, of course, long be remembered for his eloquent opinion in the *Bakke* case, which struck down racial quotas but upheld the use of race as a factor in determining who will be admitted to a state professional school. His opinion, although not joined in its entirety by any other Justice, controlled the outcome of the case and serves to this day as a beacon for all who would seek to find constructive common ground on issues of profound divisiveness.

In many other areas of the law, Justice Powell's opinions for the Court have left an enduring legacy. He was a leading voice in the Court's modern antitrust jurisprudence. His opinion in *Batson v. Kentucky* struck down the use of

peremptory challenges to jurors on the basis of race. His opinion in *Mathews v. Eldridge* established the essential rules of procedural due process that continue to determine the constitutionality of governmental restrictions on a person's rights to liberty or property. His opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* made clear that while discriminatory impact alone is insufficient to establish a constitutional violation, an intent to discriminate is susceptible of proof in practical ways. And in *Central Hudson Gas & Electric Company v. Public Service Commission*, Justice Powell's opinion articulated the essential criteria for evaluating the validity of governmental restrictions on commercial speech.

There are many other areas in which Justice Powell's views helped to shape this Court's jurisprudence. For example, in 44 cases involving the Religion Clauses of the First Amendment, Justice Powell was in the majority 93 percent of the time—by far the highest percentage of any Justice with whom he served. As the Solicitor General has noted, in the abortion cases decided during his tenure, he was in the majority 100 percent of the time, from *Roe v. Wade* through *Thornburgh v. American College of Obstetricians and Gynecologists*, even as the contentious issues of consent, public funding, and state restrictions commanded different majorities on the Court.

Lewis Powell recognized, in his many areas of endeavor, that individuals can make a significant difference in this world. The attributes that marked his life journey are ones everyone can admire: his determination in finding solutions to human problems, his unfailing courtesy to others, and his dedication to achieving results that helped diverse factions find common ground.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and particularly the Bar of this Court, I respectfully request that the Resolutions presented to you be accepted by this Court, and that they, together with the chronicle of

these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, thank you General Waxman for your presentation today in memory of our late friend and colleague, Lewis Powell.

We also extend to Chairman John Jeffries and the members of the Committee on Resolutions, Chairman William Kelly and the members of the Arrangements Committee, and Assistant Attorney General Joel Klein, Chairman of today's meeting of the Supreme Court Bar, our appreciation for the Resolutions you have provided today. Your motion that they be made part of the permanent record of the Court is hereby granted.

Lewis Powell was nominated to be an Associate Justice of this Court at age 64 in October 1971. It is fair to say he did not seek office—public office sought him. As the Bar Resolutions and the Attorney General have noted, Lewis Powell had a firmly established reputation as a leader of the Bar of his native Richmond, of his native State of Virginia, and of the United States.

Of 16 Justices, with whom I have served in more than 27 years on the Court, I think that only 2 would be long remembered in the annals of legal history had they not been appointed to the Supreme Court. Thurgood Marshall was one, and Lewis Powell was the other. Thurgood Marshall would have been remembered for the prominent up-front role he played in litigating landmark civil rights cases in the 1940's and 1950's. Lewis Powell would have been remembered for his building of Hunton & Williams into a national firm in a city the size of Richmond, Virginia, as president of the American Bar Association, president of the American College of Trial Lawyers, and a member of several blue-ribbon commissions. Byron White would have been remembered for his athletic accomplishments, but as for the rest of us; had we

not been appointed to the Supreme Court, we would have been perhaps more affluent, but certainly less well known.

Lewis Powell was a bear for work. During his 15 year tenure, he wrote over 600 opinions. The Bar Resolutions, the Solicitor General, and the Attorney General have pointed out the major contributions that Justice Powell made to the body of decisional law during his 15 year tenure on this Court. Virtually all of the opinions thus mentioned decide questions of constitutional law, and it is understandable that this should be so. I want to point out one opinion which Lewis Powell wrote that did not involve a constitutional question, but which is probably the most frequently cited opinion in briefs today of any opinion from the Court.

That case is *Harlow v. Fitzgerald*, which was decided in 1982. There we held in an opinion by Justice Powell that high ranking officials of the Executive Branch—and that holding has since been extended to most public officials exercising discretionary authority—are entitled to qualified immunity against suits for damages. More importantly, the qualified immunity is to be based on the objective reasonableness of the actions of the officials. Before *Harlow*, there was a subjective element involved which as a practical matter prevented summary judgment before discovery in just about every case.

As the Bar Resolutions have pointed out, but I none the less would like to emphasize, the Supreme Court appointment was not the first call to duty heeded by Lewis Powell. In 1941, at the time of the attack on Pearl Harbor, he was 34 years old, 7 years out of law school, and a partner at Hunton and Williams. He had two children at the time, and would have been excluded from the draft, but he nonetheless volunteered and was commissioned a First Lieutenant in the U. S. Army Air Force. He rose in rank to Colonel, he won the Legion of Merit and the Bronze Star, serving overseas with distinction as an Intelligence Officer in the Air Force for four years during World War II and its aftermath.

He served here at the Court with equal distinction. He brought a rare combination of ability, fair-mindedness, and

grace to the Court. He had the consummate judicial temperament. His capacity and willingness to see both sides of an issue, and his manner in persuading others to his own views resulted in his extraordinary influence during his tenure here.

Those of us who served with him during his 15 years on the Court cherished his intellect and gentlemanly charm. He managed to present his views in Conference forcefully without departing from his naturally gracious manner, particularly towards colleagues who expressed opposing views. Those of us who served with him continue to miss him. Our Nation is the better for his having served it in the many ways that he did.