



# Justice Powell

## 1973-75

by David Kirby

On December 5, 1975, Richmond's morning newspaper, *The Times-Dispatch*, published an editorial that it probably considered a defense of Supreme Court Associate Justice Lewis F. Powell, Jr., concluding that he is not a "doctrinaire conservative" but, instead, "a strict constructionist of the Constitution, without being unduly influenced by sociological or other non-legal factors." This editorial was published as an answer to several comments concerning the pending appointment of Associate Justice John Paul Stevens to Associate Justice William J. Douglas's seat on the Court. The newspaper quoted one syndicated columnist as saying that "even if a strongly conservative new justice were appointed, it would not necessarily give the court an impregnable conservative majority, since on all but some criminal justice issues Mr. Justice Powell... usually joins Mr. Justice Stewart and White in the moderate center."

Not so, stated the newspaper. "Mr. Powell's stand with the liberal bloc on one or two much-publicized issues has led casual observers of the court to jump to the conclusion that he 'swings' from the conservative to liberal side, and vice versa, as frequently as do the true 'swing' justices, Stewart and White. . . . But on nearly all the major controversial issues . . . Justice Powell has been on the conservative side in opposition to the liberal bloc (Douglas, Brennan and Marshall) and more often than not in opposition to one or both of the middle-of-the-roads (Stewart and White)."

A study of the 1973 and 1974 Court terms, and of some few major cases before those terms, backs up this contention. Justice Powell has voted with the conservative justices in almost every case, with the exception of only one broad category of cases. In fact, of more than 300 cases during this period, in only six percent of these cases did Powell break with the conservatives on the Court and vote, in either 5:4 or 6:3 decisions, with the more liberal members of the Court. In less than one percent of the cases would Powell's vote with his more conservative brethren have changed the outcome of the case.

The terms "liberal" and "conservative" are awkward when dealing with the total thrust of a judicial philosophy. Perhaps better is the phrase offered by the *Times-Dispatch*'s editorial: Powell is certainly a "strict constructionist" of the Constitution. There is no better way to show this than by looking at his stands in the area of judicial restraint and activism.

Powell believes in a separation of powers. Courts are not to legislate through their decisions but are only to interpret actions in light of current law and the Constitution. Over and over again, in both majority and concurring or dissenting opinions, Powell makes this point. He has said, for example, that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case." *Elliott v. Corliss & Jacquelin*, 417 U.S. 136, 176 (1974). He seems to take exceptional effort to read the law exactly and only as it was written by the legislators. His majority opinion in *Shen v. Violpando*, 416 U.S. 251 (1974), and his dissenting opinion in *Sea-Land Service, Inc. v. Gaudet*, 414 U.S. 573, 595 (1974), also show this.

Courts, even when they interpret a law, do not have to work alone, Powell feels. Courts "may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267, 274-75 (1974).

The Supreme Court, he believes, is not always the absolute arbitrator of disputes. Sometimes it does not have the facts necessary to decide a question. Sometimes it does not have the jurisdiction. Sometimes a change in law has made a question moot before it has reached the court. Powell consistently votes with those who prefer to see a case decided at a lower level of the federal or state judiciary, or who feel that proper jurisdiction does not exist. See *MTM, Inc. v. Barker*, 420 U.S. 769 (1975); *Foley v. Blair and Co., Inc.*, 414 U.S. 212 (1973); *Chicago Mercantile Exchange v. Decker*, 414 U.S. 113 (1973).

Even the court system taken as a whole cannot always grant relief for some complaints. In the case

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that decided whether the Mayor of Philadelphia had appointed too few minority members to a group that recommended members for the school board. Powell states in the majority opinion that executives "are often vested with discretionary appointment powers. . . . [T]he city charter holds the Mayor accountable only at the polls." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 614 (1974). And although he objects to part of the decision, he says, along with a majority of the Court, that national political parties should have the right to seat delegates at their conventions as they see fit. Courts, in most cases, should not enter into this purely political arena. *Cousins v. Wigoda*, 419 U.S. 477 (1975).

Powell would not completely tie the hands of the courts, however. They do have the authority to make interpretations and to change those interpretations from time to time in light of present day considerations. *Stare decisis* "has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627 (1974) (Powell, J., concurring). Particularly when dealing with questions of either actual or symbolic speech, Powell prefers to look at modern trends. In a case that deals with a contempt citation, Powell states that perhaps, "in view of contemporary standards as to the use of vulgar and even profane language . . . this particular petitioner had no reason to believe that this expletive would be offensive." *Eaton v. City of Tulsa*, 415 U.S. 687, 700 (1974) (Powell, J., concurring). And in holding a Massachusetts flag disrespect statute vague, Powell says that "because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw." *Smith v. Goguen*, 415 U.S. 566, 581 (1974).

In the area of equal protection, Richmond Mayor Henry Marsh said in an interview in the spring of 1975 that the Supreme Court had been surprisingly liberal in its interpretation of minority and women's rights for cases his law firm had taken to the Court. If this is true of Powell, it is no more true of him than of the rest of the Court. Powell has taken the side of expanding minority and women's rights in several cases. See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975); *Morton v. Mancari*, 417 U.S. 535 (1974); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 601, 682-84 (1974) (Rehnquist, J., concurring); *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973). However, in some very important decisions Powell has joined the majority in voting against what might be construed as the best interests of minorities or women. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), gives private clubs the right to refuse to serve minorities. *Milliken v. Bradley*, 418 U.S. 717 (1974), stops multi-district school desegregation plans. *Schlesinger v. Ballard*, 419 U.S. 498 (1975), allows armed forces to distinguish between the sexes for purposes of promotion and mandatory retirement, although in this case the decision favored women.

Powell would grant prisoners more rights in certain areas. In the majority opinion in *Procunier v. Martinez*, 416 U.S. 396 (1974), he writes that Court members "reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners." *Id.* at 409. If mail censorship in prison is to be permitted, he states that it "must be accompanied by minimum procedural safeguards." *Id.* at 417.

Perhaps this expansion of prisoner's rights is a good thing, because Powell has voted with those who would back off the broad interpretation given the *Miranda* rights. In both this area and in others

dealing with arrest and conviction, Powell has consistently favored more limitations on the rights of the accused and a broadening of police and court powers. For example, he states that evidence found during a valid "probable cause" arrest for another offense can be used for a conviction, *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); that grand jury witnesses can be forced to testify on evidence seized during an unlawful search, *United States v. Calandra*, 414 U.S. 338 (1974); that a wife can be arrested on information received from a legal wiretap of her husband, *United States v. Kohn*, 415 U.S. 143 (1974); that false statements made before a grand jury are permissible evidence in a trial, *United States v. Kohn*, 415 U.S. 143 (1974); and that due process is not denied when a jury is informed of a co-defendant's guilty plea and receives instructions to disregard this knowledge. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). All of these cases are ones with a 6:3 decision, with the liberals, all holdovers from the Warren Court, voting in the minority. Powell has favored a backtracking from the rights granted to the accused by the previous Court.

This is evidenced in his concurring opinion for *Robinson*. "If the arrest is lawful, the privacy interest guarded by the fourth amendment is subordinated to a legitimate and overriding governmental concern. . . . [A] valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. . . ." *Id.* at 237. There is certainly a voice here that favors the government in an arrest, possibly at the expense of the person being arrested.

In an important earlier case, the Court has held that nine of twelve jurors can convict a person without denying him due process or equal

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protection. Powell voted with the majority in this 5:4 decision and, in a concurring opinion, stated, "I do not agree that Louisiana's less-than-unanimous verdict rule undercuts the applicable standard of proof in criminal prosecution in that state." *Johnson v. Louisiana*, 406 U.S. 356, 368 (1972). This, again, is taking a hard line against those who have been accused of a crime.

Powell and the Burger Court have not completely ignored the pleas of those who might possibly have committed crimes and been unjustly handled in their convictions, however. In two 8:0 decisions, the Court has sharply limited the authority of the border patrol near Mexico to stop vehicles that might contain illegal aliens. *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Powell said in *Brignoni-Ponce* that if the only clue to a person's being an illegal alien is his apparent Mexican ancestry, that person cannot be stopped. *Id.* at 886-87. If there are valid reasons for the border patrol to believe that a vehicle contains illegal aliens, that vehicle can be stopped only briefly and its occupants cannot be detained without probable cause. *Id.* at 881.

There is, however, one broad area of law in which Powell often has broken with his conservative brethren to vote with the liberal bloc. This is the area

of first amendment protections. Of those first amendment cases in which the decision was 5:4 or 6:3, Powell voted with the more liberal bloc six times and with the conservative bloc four times, a more liberal tendency than might be expected from his votes on other issues.

Acting as a circuit court judge in *Times-Picayune Publishing Corp. v. Schillingkamp*, 419 U.S. 1301 (1974), Powell stopped press coverage of two trials and said that there were three things he considered in taking this action. There must be reasonable likelihood that four justices would vote to hear the case at all; "there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if the decision is not stayed." *Id.* at 1306.

In one of the "much-publicized" cases the *Times-Dispatch* editorial referred to, Powell wrote the majority decision banning a Jacksonville, Fla., ordinance that barred movies with nude scenes from being shown at drive-ins that can be seen from highways. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In this case, as in many others, Powell seems to take the line that the intent of the ordinance is not itself the evil; rather, it was its overbreadth that is wrong. "Clearly all nudity cannot be deemed obscene even as to minors." *Id.* at 213. Powell notes that the Jacksonville ordinance does not attempt to protect citizens from all movies that might offend them, but, instead, "it singles out films containing nudity." *Id.* at 208.

It is the vagueness of the law that seems to worry Powell more than the law itself. In another first amendment case, Powell stated that a vague ordinance "tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person." *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Powell, Jr., concurring).

In other first amendment cases, Powell voted with the minority to allow newsmen to choose which inmates they want to interview. *Pell v. Procunier*, 417 U.S. 817, 836 (1974) (Powell, Jr., concurring in part and dissenting in part); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (Powell, Jr., dissenting); voted in favor of the press' having the right to use a rape victim's name in reporting a trial if that name has been previously published in public records. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 496, 497 (1975) (Powell, J., concurring); and stated that "commercial speech," i.e., advertising, is not stripped of all first amendment protections. *Bigelow v. Virginia*, 421 U.S. 809 (1975). He also went with a unanimous majority that held that newspapers do not have to give access to their pages to those political candidates they have assailed. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Powell has not favored the press in all cases, however. He limited the news coverage of two trials as a circuit court judge. *Times-Picayune Publishing Corp. v. Schillingkamp*, 419 U.S. 1301 (1974). Also, he voted with a majority of the Court when it said that there is no testimonial privilege between a newsmen and his sources and that newsmen could be compelled to testify before both state and federal grand juries. *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972).

In short, the *Times-Dispatch* editorial was correct in labeling Justice Powell a conservative. With the exception of several first amendment cases, and with the tendency of the Court—in some areas, anyway—to expand minority and, especially, women's rights, Powell has taken conservative stands since he joined the Court. The view he has expressed are not out of line with those generally given by the Burger Court, but they would have probably been in the minority on most of the best-known decisions handed down during the 1960's by the Warren Court.