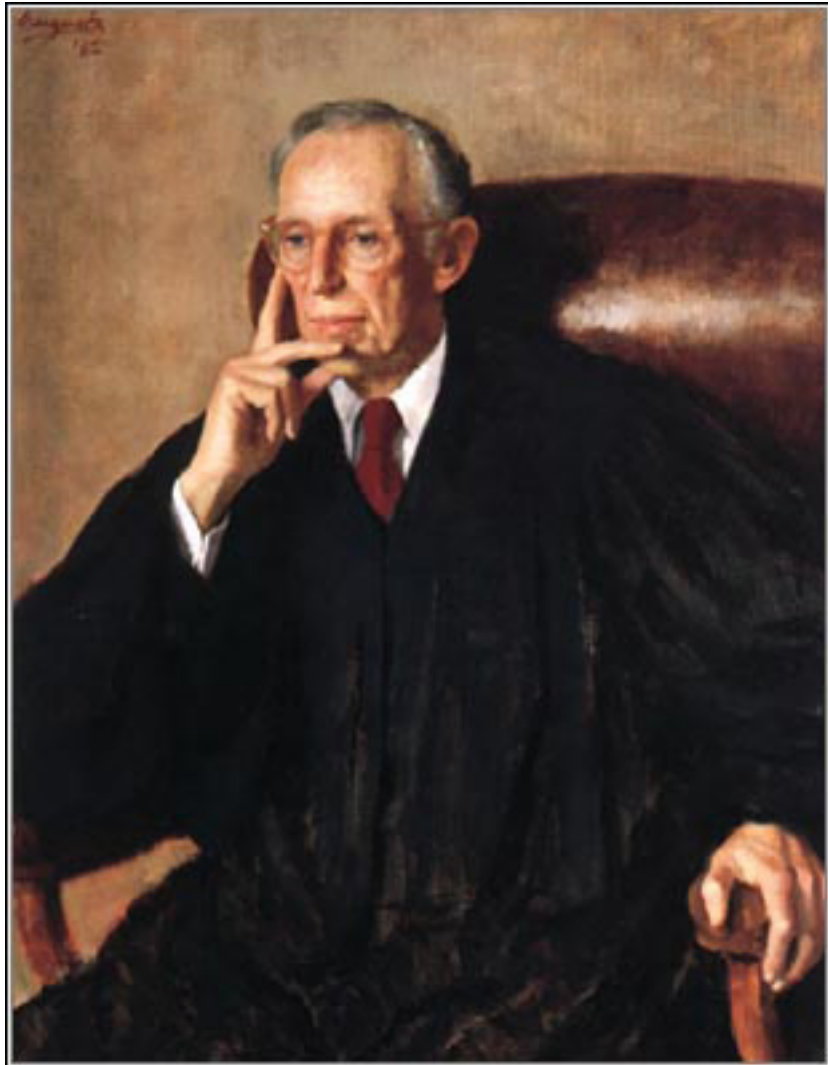


# AMERICAN COLLEGE OF TRIAL LAWYERS



LEWIS F. POWELL, JR.  
LECTURE SERIES

## AMERICAN COLLEGE OF TRIAL LAWYERS

**T**he American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.



***“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”***

—Hon. Emil Gumpert,  
Chancellor-Founder, ACTL

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The enclosed is a series of lectures from distinguished speakers who presented at previous meetings of the American College of Trial Lawyers in honor of Lewis F. Powell, Jr. the twentieth President of the College and the ninety-ninth Justice to sit on the Supreme Court of the United States. These lectures are as they were given at the College meetings and have not been edited for this publication.



A BRIEF REVIEW OF THE HISTORY  
OF THE ACTL AND ITS ACCOMPLISHMENTS

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
September 21, 1993

Honorable Lewis F. Powell, Jr.  
Associate Justice (Retired)  
Supreme Court of the United States



The subject of my remarks this morning is the history and accomplishments of this College. In light of the College's many worthy attributes, not to mention the individual accomplishments of our distinguished Fellows, you may be concerned that I will still be talking by lunchtime.

I promise not to talk quite that long.

As you know, the College is the brainchild of the Honorable Emil Gumpert, now deceased. It began in a rather unusual way. More than forty years ago (on April 3, 1950), Emil Gumpert and Leslie Cleary were sharing a compartment on the Lark, the overnight train from San Francisco to Los Angeles. They were on their way to a meeting of the California State Bar Committee on Criminal Law and Procedure.

Emil<sup>1</sup> was suffering from a bit of insomnia. At about 2:30 a.m., he awakened Les Cleary and asked: "Les, have you ever heard of the American College of Trial Lawyers?" The response was about what one would have expected: "Hell no, and even if I had, I wouldn't want to be awakened in the middle of the night to talk about it." Emil, not quite subdued, responded:

Forgive me for disturbing you Les. But I am sure you have heard of the American College of Surgeons. Why shouldn't we have a comparable organization in the legal profession?

The next day, at the cocktail hour following the committee meeting, Emil reopened and pressed the proposal. Enthusiasm for the idea developed, perhaps not discouraged by the assumption of each committee member that he was a trial lawyer of some distinction.

It was agreed that Emil would reserve the name with the Secretary of State, and arrange a subsequent meeting.

When the group met again, later in May 1950, Emil arrived with attractive membership certificates on parchment-like paper for each of the nine Founders.<sup>2</sup>

Although there was still no constitution, no bylaws, and little more than the idea and the membership certificates, Emil was chosen President and Les Cleary Chairman of the Board. The newly designated officers signed the membership certificates.

Thus, from Emil Gumpert's midnight idea, the College of American Trial Lawyers was born. Al Mundt, the first Secretary-Treasurer of the College, prepared a constitution and bylaws, modeled after those of the American College of Surgeons.

The infant organization thereafter moved with deliberate speed. From the outset, it put aside the temptation to measure progress by sheer numbers. Selectively, based on professional competency, was its hallmark.

Archie Mull, Jr., then President of the State Bar of California, was the first lawyer invited to join the founding group. A bouquet of red roses accompanied his formal invitation to membership, and whether persuaded by the roses or intrigued by the concept of the College, President Mull accepted.

The first out-of-state member, as well as further impetus and prestige, resulted from a chance meeting with Cody Fowler, then President of the American Bar Association, and in Los Angeles for a speaking commitment. The Founders of the College managed to corral Cody, and bring him to a duck dinner being hosted by Ray Robinson of Merced, California.

Cody did not have his usual crate of Florida oranges, but he was duly warmed up by California hospitality. When someone inquired if he was a trial lawyer, Cody-in his modest and inimitable way-responded:

Hell, I am the best damn trial lawyer in this bunch.

The group was so impressed by this self estimate that Cody was immediately inducted into fellowship. I pause here to note that the formalities of admission 25 years ago did not require the meticulous screening that one must survive today. I hasten to add that Cody would have been admitted under any regime.

In any event, he became a self-appointed roving ambassador for the College, proclaiming its merits but insisting higher than a self-proclamation of eligibility.

Cody was later to serve the College as President for two terms, an honor shared by no other Fellow.

In the early years, expenses of the College were financed by its then small band of Fellows who simply “chipped in”, with Emil tossing in the largest chip.<sup>3</sup> Through the dedication and inspiration of Emil, with help from the ever hard-working Louise Genter, the College was firmly established by the late fifties. In 1960, after ten years of existence, it was organized and represented in every state, with a total membership of about 1,200.

The College numbers about 5,000 lawyers and judges from both the United States and Canada. But numbers reveal inversely the success of the College. Unique among the many organizations of the legal profession the College is prestigious because of its smallness and selectively based on merit.

Membership was limited to not more than one percent of the bar of each state and admission standards required at least 15 years of trial practice. The emphasis was on proven ability and fidelity to professional ethics. Fellowship in the College became a distinction coveted by most trial lawyers.

Yet, it is one which eludes those who affirmatively seek it, by any means other than demonstrated skill at the bar.

In a country which recognized in no official way the historical English distinction between barristers and solicitors, there was a public need for an organization that stimulated and recognized high competency in courtroom advocacy. Progress towards this end has been an achievement of the College. This was the concept which so excited Emil Gumpert 40 years ago that he awakened Les Cleary at 2:30 in the morning to share it with him.

Today, the College's awards and programs continue to advance Emil's dream. In particular, the annual award for excellence in teaching trial advocacy, which bears Emil's name, has recognized and supported the programs of a number of law schools. The College awards excellence wherever it is found, regardless of size or national prominence. Past recipients have ranged from the Harvard Law School in Cambridge, Massachusetts, to the Campbell University School of Law in Buies Creek, North Carolina. I note that, in all likelihood, the \$25,000 prize has inspired the programs at other schools as well.

The College's sponsorship of the National Moot Court Competition and the National Trial Competition further encourages the professional training of future advocates. These competitions allow law students to test their newly developed skills before some of the best jurists in the country.

In addition, the College's support for continuing education, through such programs as the National College of District Attorneys, promotes the goal of improving the justice system by improving the quality of the advocacy. And, through the Samuel E. Gates Litigation award the College honors those who strive to better the system of justice. The award for Courageous Advocacy, so rarely given and therefore so high an honor, serves to recognize those advocates who have dared to take on unpopular causes to see that justice prevails.

The College also affects the administration of justice through work by its committees. Several committees and many dedicated Fellows of the College strive to improve the justice system by making recommendations regarding the various federal rules, the appointment of judges, and the ethical codes of conduct for the legal profession.

I know, too, that Fellows volunteer their time in other ways to influence more directly the provision of justice in their respective states. I have read about the program started several years ago by Fellows of the College in Massachusetts.<sup>4</sup> Over 50 Fellows volunteered as mediators in both the Quincy District Court and the Middlesex

Superior Court. Using their experience as trial lawyers, these Fellows were able to help settle a remarkable percentage of the cases on which they worked, helping clear the backlog that existed on those courts.

Through these and other activities, the College strives to achieve the goal set for it by Emil Gumpert: to be a professional organization designed not to promote the self-glorification of its members, but to serve the cause of justice.

Those of us who were inducted into Fellowship by Emil all remember – indeed who could forget – the deep emotional experience of standing before the podium, with fellow inductees, as Emil addressed us.

I doubt that the literature of our profession contains any more eloquent statement of the roll and duty of a trial lawyer than Emil Gumpert's induction address.

In closing, I remind you of Emil's words:

"You, whose names are freshly inscribed upon our rolls, have, by your mastery of the art of advocacy, by your high degree of personal integrity, your maturity in practice and your signal triumphs at the bar of justice, earned the honor about to be conferred upon you.

By you ability, learning and character you have added lustre to the legal and judicial annals of your state and nation, and have helped to strengthen and preserve the mighty fabric of our law.

We are confident that in the days to come, the lofty objects and purposes of this organization will be further advanced by the application of those rare qualities and virtues which nature, fortune and laborious days have bestowed upon you."

As did Emil, I commend all not only for your success as trial lawyers, but for your commitment to Emil's high ambition: conspicuous service to the cause of justice under law.

I'd like to conclude by thanking you for naming a lecture series in my honor. I shall always be proud of my association with the College. And, at the personal level, I shall always cherish my friendship with the lawyers and judges of this fellowship.

- 
1. In this informal talk to lawyers, I think it appropriate to refer to Emil Gumpert simply by his first name. I am sure he would want it this way.
  2. Members of the committee were Grant B. Cooper, Glen M. DeVore, Norman H. Elkington, John T. Holt, Hale McCowen, Albert H. Mundt, Evelle J. Younger, Leslie A. Cleary, and, of course, Emil Gumpert.
  3. Although records are not available to me, I understand that other dedicated early members who contributed to the financial solvency of the College included Al Mundt, Ed Bronson, Grant Cooper, and Jesse Nichols.
  4. See Robert J. Ambrogi, Trial Lawyers To Help Ease Case Backlog, Massachusetts Lawyers Weekly, January 14, 1991, at 1.



THE ART OF JUDICIAL SELECTION

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
September 23, 1995

Professor John C. Jeffries, Jr.  
Dean  
University of Virginia School of Law  
Charlottesville, Virginia

Good morning. I am delighted to be at the American College of Trial Lawyers meeting and delighted to be speaking at the Lewis F. Powell, Jr. Lecture.

The reason I am here, of course, is that I wrote a book about Justice Powell. So, I thought I might start off by telling you how that happened. In 1987, Justice Powell retired after sixteen years on the Supreme Court. He was approached by a niece, of whom he was very fond, whose husband teaches at Carlston College in Minnesota. A historian at Carlston College had a proposal to write a biography on the Justice, and his niece asked whether he would cooperate in that effort. He thought about it and said no, on the grounds that he was a lawyer and he believed that only another lawyer could understand him fully. So, in the course of making that decision, he thought the issue out and a year later he was approached by Scribner's Sons and asked whether he would cooperate in a biography, and he said, "Well, no; I think that should wait until after my death, unless you can get X or Y to do it for you." Well, X said "no" and I am Y.

It is, of course, a wonderful opportunity for an academic to have a complete set of Supreme Court papers to work with and that is what Powell ended up providing, but that wasn't clearly the deal from the beginning. We had conversations for some months about whether this project would go forward and on what terms. Finally, I thought it was necessary to bring this matter to closure, so I wrote Justice Powell a letter, and I said "Justice Powell, if we are going to do this biography thing, we really need to make the ground rules clear, and here are the rules I propose: I get everything, you get nothing. I get all of the papers, I get introduction to your family, I get your letters of introduction to the other Justices if I need that, I get access to all of your papers, personal, professional, financial, whatever, and you get to read the book after it's published like everyone else." I, frankly, thought he would say, "Well, now that I thought about it this biography business doesn't sound like such a good idea," and I was surprised when I got back a letter that has a couple of paragraphs of personal matter in it and then the third paragraph said, "I have your letter That's fine, when do we get started?"

So, by that act of courage or fool-heartiness, he started the enterprise which brings me to you today.

The focus of my attention, of course, was on Justice Powell as a member of the Supreme Court, but he had a life before the Supreme Court. How much of a life began to be clear to me when I had cocktails with him one night in his apartment, and I remarked on some unusual, fancy, delicate looking, long stemmed champagne glasses. He said, "Well, yes, they belonged to Adolph Hitler." That was a name I recognized. It turns out Justice Powell was one of a handful of people, twenty-eight people, almost all of whom were lawyers and several of whom were members of this organization, recruited to be American Ultra representatives. This was the name given to those officers who were charged with the use and the protection of Ultra secret intelligence (which is material that the Brits had learned to decipher from the highest level of German military communications). Powell ended up as the Ultra representative to the Army Air Corps Bomber Command in Europe, and in that role he played a responsible role in World War II.

At the end of the war when Germany had collapsed, Powell and two other officers flew off to Bertsgarten. Their mission was to recruit Germans who knew a lot about the Soviet Air

force. Looking down the road it seemed like that might be a good thing for us to prepare for. They went to Bertesgarten, which had been bombed out, and there in the lower level, where the damage is minimal, he found and liberated the champagne glasses and gave them a new home in Richmond, Virginia.

In working on Justice Powell's biography, I tried to identify issues that I thought were the most important issues of his sixteen years on the Supreme Court. Let me name them for you and make a few comments about them. I would like to use them as the basis for making a few brief remarks about the art of judicial selection.

First, the issues: busing, abortion, the Nixon tapes case, the death penalty, affirmative action and, late in his career, the issue of homosexual sodomy. Just a couple of words about these issues and the role that Justice Powell played in them.

First, Busing. The Supreme Court had ordered the busing of school children to achieve racial balance before Powell came to the Court, case name Swann v. Charlotte-Mecklenburg County Board of Education, as you remember. Busing worked very well in Charlotte-Mecklenburg because of fortuity. Years before, for reasons having nothing to do with desegregation, the City of Charlotte and the County of Mecklenburg had consolidated their school districts. So they had one very large school district with a substantial white majority, and in that configuration busing did not produce white flight. First of all, there wasn't any place to go and, second, the white children remained in the majority in all schools. That is an aberration. In most American cities the city is one school district – the suburbs are separate. The city school district is increasingly minority – the suburbs overwhelmingly white.

At some point busing school children within a city becomes pointless, as you simply run out of the raw materials of racial balance. You run out of white children in the city public schools. So the issue quickly became, and it is an issue of enormous importance in the way this race issue has developed in the last twenty years, whether there would be inter-district busing, that is the busing of city children to the suburbs and suburban children to the cities – the exchange of black for white children. And, the case went to the Supreme Court. Justice Powell, who had always been opposed to busing in any form – always a fan of the neighborhood school, always committed to the community involvement that neighborhood schools produced – voted against inter-district busing. The result is a schizophrenic constitutional command, bus the cities, but not the suburbs. And in the twenty years since the Charlotte-Mecklenburg case was decided, busing has become progressively less important.

Abortion: Powell was in the majority in Roe v. Wade in 1973 and in every other abortion case decided during his tenure, a total of nineteen cases, the only Justice of whom that can be said. Basically, Powell supported the right to abortion against many kinds of legislative limitations, but he stopped short of saying that the government had to pay for it.

The Nixon Tapes Case: The Nixon tapes case was unanimous, but within the Supreme Court there was a substantial dispute about how that issue should be resolved; not about who should win, but about the terms of the opinion. Justice Powell worked very hard, indeed, to try



and protect the future of the presidency; that is, to make sure that the Nixon Tapes Case would not become a future vehicle for congressional committees armed with subpoena power to run over executive privilege. I think in that respect he succeeded completely. The Nixon Tapes Case has not been a major ingredient in congressional-executive relations in the years since. As Louis Henkin said in a law review article after that decision was announced, and this is the title: “Mr. Nixon Loses But The Presidency Largely Prevails.”

The Death Penalty: During his sixteen years on the Supreme Court, Powell was the Justice most often in the majority in death penalty cases. He dissented in a case called Furman

v. Georgia in 1972 that struck down the death penalty statutes then in force. In 1976 he joined with Justices Stewart and Stevens to revive the death penalty, but with certain limitations. Justice Powell’s reasoning went like this: capital punishment could not be imposed for certain crimes; capital punishment cannot be imposed on certain offenders, juveniles below a certain age, persons of limited capacity; capital punishment cannot be imposed without certain specially elaborated procedural protections – but, basically, capital punishment was constitutional and that is still the law today.

Affirmative Action: The case most often associated with this is, of course, Bakke, in which the Supreme Court split 4-1-4. Four Justices saying affirmative action is virtually always okay, four Justices saying affirmative action is virtually always not okay, and Justice Powell in between splitting the difference. His position can be sloganized as “goals, but not quotas.” His essential idea was to accept racial preferences as necessary, but not as desirable. To accept them as something that should be done, perhaps for a generation, but not forever. To accept them as something that should be tolerated, but not applauded. And, here again, Powell’s voice was decisive not only in Bakke, but in the affirmative action cases after that case. He was in the majority in every affirmative action case during his tenure on the court.

Lastly, Homosexual Sodomy: In Bowers v. Hardwick, as you know, Powell originally voted with the dissenters to strike down the Georgia statute, and then he switched to the other side before the opinion became public so that the majority opinion upheld the Georgia statute. Truth is Powell was equally uncomfortable with both sides. On the one hand, he was unwilling to say homosexual sodomy was a fundamental right. As the dissenters believed, he was too worried about a constitutional claim of homosexual marriage, or about constitutional claim of homosexual adoption, et cetera. On the other hand, Powell thought it barbaric to suggest that homosexual relations between consenting adults could be punished by imprisonment, as the majority believed. He tried to split the difference and to say that there is no fundamental right to consensual sodomy, but there was some kind of protection against excessive criminal punishment. It think it is fair to say that he did not come up with a satisfactory explanation of those views, but that was his instinct.

So, those are the issues that dominated constitutional law during his tenure: busing, abortion, executive privilege, death penalty, affirmative action and homosexual sodomy. Not one of these issues played any role in Powell’s confirmation hearings, not one of them were subject to any sustained inquiry or debate in the United States Senate. Not one of them was the



announced basis of any Senator's vote for or against confirmation. If you read, as I have, the voluminous testimony by Powell, by various people on his behalf, by various people opposed to his nomination, and if you read all the questions asked by the Senators and all the answers, these six issues are missing from these discussions. Let me go through them again in a very quick way to explain why it might be true.

First, we have to put the Nixon tapes case to one side. Of course, nobody foresaw that and even today those facts seem slightly fantastical. So, it is not a surprise that no one was particularly worried about an issue that no one expected to occur.

I guess we also have to put busing to one side as a special case. Everybody in the United States Senate knew that busing was a major constitutional question, but nobody wanted to talk about it. And the reason for that, I think, is that busing was never politically popular. Even among African Americans, busing enjoyed a bare majority, sometimes – in some polls – a little less than the majority support, and among white Americans busing was always overwhelming unpopular. So there was no political incentive to make a stand on that issue, and no one did.

No one asked about homosexual sodomy in 1971; it would have been astonishing if they had. Even in the academic community, which is – if not out in front, at least off in some direction, the thought that there was a constitutional right to engage in homosexual sodomy in 1971 was, I think, barely thought of. If the question had gone to the Supreme Court in that year, or indeed in the heyday of the Warren Court, I tell you confidently that it would have lost ... zip.

No one asked Powell about the death penalty. Capital punishment had been enforced since the beginning of the Republic. It had been used with more-or-less frequency. It's constitutionality seemed clear. Indeed, only five months before Powell was nominated to the Supreme Court, that Court had upheld the constitutionality of capital punishment, so no one thought it was an issue, and no one asked Powell anything about it.

And, no one asked Powell a single question about affirmative action. Racial preferences in favor of minorities began in universities in the late 1960s, but the issue had not reached national prominence. Indeed, in 1971 the race issue was to make sure there was an end to official discrimination amongst minorities, particularly, in the South. Everyone was worried about discrimination against blacks, not racial preferences in their favor. No Senator saw affirmative action as a relevant inquiry.

Finally, abortion. Abortion did surface in Powell's confirmation hearings, but just barely. A few right-to-life organizations (at that time right-to-life organizations were not protestant and evangelical, they were closely associated with the Catholic Church), a few right-to-life organizations sent witnesses who were worried about legislative liberalization of abortion laws. No one paid them any attention whatever and no one asked Powell anything about it. Indeed, it is hard twenty years later to recollect what a low-profile issue abortion was before Roe v. Wade. My favorite is the 1972 presidential campaign – there is a U. S. News and World Report article on off-beat issues, – that is what they call them off-beat issues – in the 1972 presidential election, and abortion was listed as an off-beat issue, along with the legalization of marijuana,

public funding for the Olympics and a ban on hunting doves. Roe v. Wade not only created the constitutional right to abortion, it also (to a remarkable extent) created the political issue of abortion, which has loomed so large in political life from that time to this. Again, no Senator asked Powell any questions.

Now, the reason I go through that history is to support a couple of, I think rather obvious, observations that some of us (I wish Senator Hatch were here) seem to have lost sight of. There is and has been in the last couple of years, or maybe more, a lot of talk about judicial nominations to the Supreme Court, focused on what are called litmus tests: will this person guarantee the supposed right of abortion without any qualifications, ifs, ands or buts; will this person guarantee to strike it down at every opportunity without any compromise, et cetera? Is this person unambiguously for or against the death penalty, will he take a stand in favor of racial quotas, or take a stand against them in all contexts, et cetera, et cetera? And, one sees the confirmation process focusing more and more on a few high profile issues and on the understandable, if not exactly commendable, desire of politically active people to make sure that this nominee agrees with them if at all possible. Now what the experience of Lewis Powell tells me is that you cannot foresee the future. In 1971, those Senators never touched on the crucial issues of his tenure. The reason? They didn't have any more of a crystal ball than we do. And, when you put someone on the Supreme Court of the United States, not for the next year or even for the next presidential cycle, but for fifteen or twenty or thirty years, the issues that will in fact be important are issues that we, today, cannot clearly foresee. In other words, when you set up a litmus test for Supreme Court nominees, you're looking in a rearview mirror. You're talking about the issues that were crucial last year, the year before that presidential election. And the question, of course, is the question of the future.

One other observation, which is perhaps a little less obvious, not only could the Senators not foresee the issues that would in fact be important, but if they had asked Lewis Powell about those issues, he would not have known what to say. He would honestly not have known how he would have responded to most of these issues. He opposed busing, that turned out to be true. If you asked him in 1971 he also would have said, I believe, that he supported the death penalty, as constitutionally permissible, not necessarily as a live policy, but as a constitutionally permissible option, and that turned out to be partly true. But for most of these issues, abortion, affirmative action, constitutional protection of homosexual sodomy, he had no view at all and a perfectly honest and forthcoming answer by him would have been completely uninformative.

Well, if it's not possible, and my view is that it's not possible – not just that it's not desirable – but that it's not possible to focus successfully on a litmus test, what do you look for? I think that the career of Lewis Powell suggests the importance of character.

Let me name for you, many of you know him well, and I believe you will be able to confirm for me, this brief summary of his failures and characteristics.

First and foremost: hard work. It is the most consistent theme of Justice Powell's life; he believed in a doctrine of salvation by effort. He believed that he owed his success to the ability to work harder and longer than anyone else, and that translated directly into certain characteristics

as a judge. As a Judge, Powell took the time and trouble to try to understand each case, to understand that case fully and deeply, to go into the record if something seemed incomplete. He often went back and re-read precedents that had been relied on if he didn't have them very clearly in mind. He often searched out matters in the record and searched out other sources from the Library of Congress, for example, if the parties failed to give a clear view of what was at stake. I think he avoided sloganeering and he avoided knee-jerk reactions as much as is humanly possible. The knee-jerk reaction is a form of laziness. It results, more than anything else, from the desire to put everything into a pre-existing category. It results from the desire not to work to understand what this issue is really about, but simply to treat it as a familiar pigeonhole. Of this kind of political consistency, Powell cannot fairly be accused.

The second characteristic that he displayed throughout his life: he was always a good listener. When I talk to people about him, and I talked to a couple of hundred people, some of you probably, about Justice Powell, the most common comment I have is that he was a real gentleman, that he was deeply courteous, and when I probed people about what they meant when they said he was a real gentleman, they meant, I think, most of all that he was a good listener. Not just in the sense of having good manners, though he certainly did, but in the sense of having a genuine respect for others, their hopes, their aspirations, their opinions, their beliefs – a genuine interest in what they had to say. And I think that characteristic showed up directly on his work on the Supreme Court. He was, to the extent that it is possible to be, open-minded. He paid a lot of attention to arguments and briefs. He tried to follow arguments that he did not initially feel comfortable with. He tried to investigate precedents that he didn't really agree with and tried, to the extent it was possible, to open his mind to positions he had not previously endorsed. He was willing to re-think preconceptions. He was a Judge from the bottom up, rather than a Judge from the top down.

Now, I personally think that is a desirable characteristic in a Judge, but there are two points of view about that. If you want someone on the Supreme Court to provide ideological leadership, if you want someone to provide a consistent ideological edge, then being a good listener is a bad idea because the most firm ideological leaders are talkers, not listeners. They are people whose minds are made up, which is what gives them that certainty and consistency of political perspective. Of that virtue, Powell cannot fairly be accused.

Finally, pragmatism. I think Lewis Powell, all of his life, showed a distrust of ideological imperatives. He preferred experience over abstraction. His sense of right and wrong was situated, it was contextual, it sometimes changed over time. I don't suppose one could ask for a better illustration of that perspective than the Bakke decision, with the highly nuanced idea that affirmative action is permissible, but only to the extent that it be flexible rather than rigid, goals rather than quotas, etcetera.

In other words, if you wanted to try to predict what kind of judge Lewis Powell turned out to be, you would have done better to pay attention to what kind of a man he had proved himself to be, than to his political opinions as of the time of his nomination. Not only is that approach perhaps more desirable, in some theoretical sense, but in a purely practical way. If you had wanted to foresee his contribution to American constitutional law, you could see that

contribution more clearly in himself, as a man, as a person, than in his political beliefs. And, it is my belief, that I offer it to you as a suggestion, that character and personal commitment through one's life, habits of mind, attitudes, are truer predictors of judicial performance than litmus tests issued.

I want to close on a personal note, as a biographer of Justice Powell. I have tried very hard, some of you will have to tell me whether I have succeeded, to be objective, to catalog his weaknesses as well as his strengths, to examine his performances critically, and to give sustained attention to the aspects or events of his career that he might not be proud of, as well as those more humorous events of which he is justly proud. That is my role as a biographer. But, as an individual I am enormously fond of him. He has become sort of a second father to me, and I feel entitled to tell you about my personal belief in his standing as a Justice.

I want to quote my friend J. Harvie Wilkinson, a former law clerk and an old friend of mine who is now a Judge in the Fourth Circuit in Charlottesville, Virginia. This is what my friend Jay Wilkinson had to say about Lewis Powell – I think it is exactly right:

“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.”

It is a view I share. I wish I had been able to express it so well.

Justice Powell would be delighted to attend this event, as he was always proud of his association with you. I am delighted to attend it and speak, as it were, in his name. On his behalf and mine, I thank you very much indeed.



HIS CONTRIBUTIONS TO OUR NATIONAL SECURITY

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
March 12, 1999

Honorable William H. Webster  
Judge, United States Court of Appeals  
for the Eighth Circuit (Retired)  
Former FBI and CIA Director  
Millbank, Tweed, Hadley and McCloy

When President Nixon announced his intention to nominate Lewis Powell to the Supreme Court on October 21, 1971 he said this:

“Everything that Lewis Powell has undertaken he has accomplished with distinction and honor, both as a lawyer and as a citizen.”

This was a powerful and true statement and it remained true throughout his distinguished career on the Court. I have been invited to discuss, in this lecture, his contributions as a citizen in a less well-known aspect of his career – his role and abiding interest in the national security and intelligence gathering capabilities of our country.

Many of you in this room have known Lewis Powell longer and better than I. He was, after all, President of the College and a distinguished President of the American Bar Association. Some of you were his partners. I am not exactly sure when my own acquaintance with him expanded into an enduring friendship. I came to know him better during my eight years on the federal bench. In my last year there, I was also Chairman of the Business Law Section of the ABA – then the largest section, and I was looking for an appropriate place to hold the Spring Meeting. It was through Justice Powell’s personal intervention that we were able to hold our meeting at Williamsburg where he served so many years with the Colonial Williamsburg Foundation. As he did in all things in which he was involved, he took a very active interest in the success of that meeting.

On another occasion, when I told him I had successfully put forward the nomination of his former partner, George Freeman, to be a member of the Council of the American Law Institute, he called George to congratulate him. In the course of that conversation, he asked George to promise him that if he accepted the invitation he would attend every meeting of the Council fully prepared and give his best to the endeavor. And George always has.

One last story. While at the FBI I received a call from Justice Powell around 1981. He said that he wanted to come and see me. I said, “You want to see me? I’ll be right up there.” He responded “No, I want to come and see you there” and we set the time. When he arrived he said “I’m very excited. I proposed you for membership in the Alibi Club, and you are the first person I have proposed who has ever been elected.” I was highly complimented. The Alibi Club is a small group of 50 men who meet once a week for lunch in a little old federal-style building over 100 years old, and have a good time together. It included in the past Justice Potter Stewart and Chief Justice Burger and still includes Chief Justice Rehnquist. It also included a number of CIA-types such as George Bush and Dick Helms. It was and has been for me a wonderful experience and I shall be forever grateful to Lewis Powell for thinking I was worthy of membership.

But in all those earlier years I did not know of his background as a military intelligence officer and I suspect that most of the members did not know either. It was not until I visited the Air Force’s museum at Wright Patterson Air Force Base outside Dayton a decade later and saw a copy of the German enigma encryption machine and then a copy of an interview with Justice Powell by Dr. Diane Putney, the Air Force Historian, that I realized he had had an important involvement in intelligence during World War II. He was happy to talk about it but never

volunteered. Part of it had to do with the intense secrecy of the famous “Ultra Project” and part of it was his own reticence about puffing. (I’m told he didn’t discuss “Ultra” with his wife Jo for over 30 years.)

In any event, it was because of this that I asked Justice Powell to administer the oath of office when I moved to the CIA in May, 1987. Both President Reagan and then Vice President Bush were in attendance and I thought it was the perfect opportunity to let the intelligence community and those from outside in attendance know of his unpublicized significant contributions to our country. I prize the photograph of that occasion hanging on the wall behind me in my office with my daughter holding the Bible and my hand on the passage from psalms “He shall cover thy with his feathers and under his wings shall thou trust. His truth shall be thy shield and buckler.” Most of all I prize his inscription “To my friend of many years. \*\*\*\* With admiration and affection.” (And that’s how I felt about him.)

Those of us who have been privileged to be in what Tom Brokaw calls in his new book **“The Greatest Generation”** can properly measure the impact of World War II upon our lives, our careers, our aspirations and our accomplishments. Lewis Powell was 34 when Pearl Harbor was bombed. Born in 1907, he had attended and graduated in 1929 from Washington & Lee, magna cum laude, graduated from its Law School in 1931 first in his class, and went on to obtain a master of law degree the next year at Harvard University. After three years with Christian & Barton in Richmond, he joined the Hunton & Williams law firm in 1935 and married the lovely Jo Ruckert in 1936. Five years later he confronted the war and, with it, the impact upon his life and career. Historians say he was of two minds about the war before we entered it, but after Pearl Harbor his one desire was to engage fully in one of history’s great epochs. He was beyond draft age. Younger members of his generation who left college to enter military service and later left law firms to serve in the Korean War can understand those feelings.

Lewis Powell’s first preference was the Navy. It seemed more in keeping with this education and his way of doing things. (In my own case, when my time came in 1942, I reached the same conclusions about sheets over mud and cannons over knives.) Unfortunately, his eyesight precluded his service in the Navy.

He found that the Army Air Force was much less particular in selecting people for non-flyers. The Air Force recognized a good thing when they saw it and on April 29, 1942 ordered him to Miami Beach, Florida for training on two days’ notice. Lewis Powell turned over his files and was on his way. He was assigned to the 319<sup>th</sup> Bombardment Group which, by August, had been ordered to Europe, not yet fully trained. In September he traveled with 1,500 of his group to England aboard the Queen Mary, without escort.

During the next six weeks the 319<sup>th</sup> Bombardment Group tried to pull itself together. It was short on planes and flight crews. The Marauders of the 319<sup>th</sup> were two engine B-26 bombers designed for low-level bombing and fast getaways but in fact were not fast enough to out-distance the anti-aircraft fire at low altitudes. This limited their utility in Europe and to no surprise of Lewis Powell they were assigned to the North African campaign. In late October he boarded a converted passenger ship under escort and traveled south passing the Straits of



Gibraltar 10 days later and ultimately lay off-shore near the port of Oran in western Algeria. This was the beginning of Operation Torch. Three days after the initial landings east of Oran the men of the 319<sup>th</sup> went in; they marched seven miles to the Air Force staging area and spent the night in open foxholes in the rain. Powell's biographer and former clerk, Professor John C. Jeffries, Jr., records that within a few days Lewis Powell found himself "a well-appointed bedroom overlooking the Mediterranean from a house with modern plumbing." This did not last. His planes were moved in groups to different locations to avoid attacks by Axis aircraft from Sardinia. Thus he was introduced to real combat conditions.

U.S. air forces concentrated on Tunisian air fields from which the Luftwaft were providing cover for General Rommel's retreat westward from Alamein. Targets also included infrastructure such as bridges, harbors and shipping and railroads. Powell interrogated the returning flight crews. Jeffries observed that his painstaking preparation compared with the work of a litigator.

On November 27, 1942, with a new commander on board, the 319<sup>th</sup> flew its first combat mission against the harbor at Sfax, Tunisia. The mission was successful but four planes were lost in the following week including that of the new commander who was captured. Casualties were high as the planes flew lower and lower in an effort to evade the anti-aircraft gunners. The 319<sup>th</sup> experimented with skip-bombing tactics - launching 500 pound bombs like skipping stones. It was very effective except where the targets were well defended and in those circumstances the costs to U.S. forces were very high. In February, 1943 General Doolittle pulled the bombing group from combat after a particularly unsuccessful and costly attack on the air base at El Auoina during Rommel's advance to the Kasserine Pass. On the same day Powell was invited to join the headquarters staff in Algiers. The new unit in which Powell had been invited to serve had been constituted as the Northwest African Air Forces command by Major General Carl "Tooey" Spaatz. It included within the command men like Jimmy Doolittle, Air Vice Marshall Sir Arthur Coningham and Col. Elliott Roosevelt. On May 13 Powell was selected as a special courier to carry top secret assessments to Eisenhower at field headquarters. That was the day General Giovanni Meese, successor to the ailing General Rommel, surrendered his forces. We were in possession of North Africa.

After that came Sicily. Spaatz moved an advance command post to a resort off the coast of Tunis, taking Powell and several of the bright, young intelligence staff with him.

### SPECIAL BRANCH

Powell's responsibility was to follow the disposition and the capabilities of the German Air Force, a subject in which he developed a recognized expertise. By August 17, with Patton and Montgomery in Messina and the allies in possession of Sicily, and with Spaatz' air campaign against Italy underway, Lewis Powell was ordered back to the War Department under very mysterious circumstances and reported for duty August 26. He had been overseas for almost one year. He was promoted to major. He was assigned to the Air Force training school at Harrisburg, Pennsylvania to teach about his counterintelligence experiences. On February 2, 1944 he was relieved of his teaching assignments at Harrisburg and assigned to Military Intelligence Service,



War Department under the direct authority of the Secretary of War in what Jeffries described as “the most elite and unusual of all military intelligence services - the so-called “Special Branch”.

Now Pearl Harbor had been a military intelligence disaster. It was not so much a failure to have the information – we had broken the Japanese code – it was the failure of the services to recognize and respond to intelligence information about the threat of attack that was available at the time. In a reorganization of military intelligence, all radio and television was brought under G-2 at the Special Branch. They were looking for exceptionally bright officers – Powell was one of 28 selected – smart like all the others, less “ivy league” but mature and with combat intelligence experience. He was selected to return to General Spaatz, now back in England and Commander of the U.S. Strategic Air Forces, as the Ultra Secret Representative. He was sent to the now famed Bletchley Park for training along with three other Americans, Major James Fellows of Oklahoma, later known to many of you as President of the American Bar Association, who was assigned to General Pete Quesada; Major “Rosey” Rosengarten, a Philadelphia lawyer assigned to General Omar Bradley; and Captain Alfred Friendly, who was later to become Managing Editor of the Washington Post.

## ULTRA

Ultra was one of the best kept secrets of World War II. The story really starts two weeks before Hitler’s invasion of Poland in 1939. At the invitation of the Chief of Polish Intelligence, British and French intelligence agents met with their Polish counterparts in Warsaw. They were made aware of the work the Polish service had done in deciphering German messages encoded on a machine called “Enigma”. It has been available commercially in Berlin as early as the 1920s. (I first saw an Enigma machine in the Air Force Museum at Wright Patterson Field in Dayton. My somewhat faded recollection of it was a machine that looked very much like the old Edison dictating machine invented by Thomas Edison connected to a typewriter keyboard.) Its technical name was “Glow-Lamp Ciphering and Deciphering Machine”. The German military had developed a far more complicated version which was not generally known. The Poles had reconstructed its version of the German military model. They could use it to encrypt and decrypt their own messages but had not figured out how to read someone else’s. Nevertheless they had developed a methodology for penetrating over time the German enigma ciphers but had lost this capability in December 1938 when the Germans modified their machine shortly before their military actions. The Poles were willing to share two such machines with the British and the French and they were hand-carried to England and France just prior to the invasion.

Intelligence devices are often measured by their ability to defeat penetration for periods of time. The longer it takes to decipher, the less likely the information will be of value when finally captured. Secure telephone systems between state and local law enforcement, for example, need not be as secure or as costly as devices which carry far more sensitive and critical information. The ultimate device is one which will defy decryption. Ultra was a project to achieve decryption of what the Germans thought to be decryption-proof. It took place in an ugly Victorian mansion known as Bletchley Park northwest of London.

Because the Germans were using the enigma to encode and decode the most sensitive and vital information, it was extremely important to the allies that knowledge of their new found ability to decode enigma be confined to the fewest possible individuals and surrounded and wrapped in secrecy and cover. Information derived from decryption of these messages was not to be identified as Ultra product except to a very few at the highest level. Churchill received what he referred to as his “eggs” in a locked box sent to him daily by the chief of MI6. Special liaison units or SLUs were attached to the headquarters of Ultra recipients but not under their command. These officers and a small team were to receive the information (the transmissions of which were monitored by British cryptographers to assure strict cipher security) and transmit the information to the commanders and recover them afterwards and destroy them. Very much like the President’s daily brief which the CIA prepares each day, the few officials of the National Security Council who are also allowed to receive these briefs must read them in the presence of the briefer who collects and returns them to CIA.

There was more to this process. It was important that there be some kind of cover or explanation for why the allies acted in respect to any particular information provided from this source, which would not give Ultra away. Considerable effort went into providing rational explanations for why the allies knew what they did when they pounced on tankers or took other actions based on Ultra information. Attributing it to leaks from their allies, the Italians, for instance seemed very plausible to the Germans. Sometimes the information had to be withheld at some cost to those who could have used it to protect themselves. (It has been widely assumed that Coventry was sacrificed to protect Ultra, but I can find no evidence to support this legend. But there were others.)

Into this clandestine world on February 28, 1944 marched Lewis F. Powell, Jr. uniquely qualified by intellect, experience, integrity and context to serve as an Ultra secret representative. He received three weeks of training at Bletchley Park and was sent in April to Algiers where he delivered sealed documents and explained his mission. Then on to Italy for an inspection of our operations, interviews with British SLU personnel and meetings and briefings with American intelligence officers. He made a number of recommendations including a strong one that Ultra representatives should be given more training in other sources of intelligence. He recommended more general combat intelligence training during their training period. While he saw the advantage of specialization he realized that competence and intelligence is not enhanced by too narrow a focus. This is a lesson we preach today in what is called “all source intelligence”. All this helped to increase Powell’s value to Spaatz and he received more and more responsibility, including representing the Strategic Air Force at Shaef, Eisenhower’s Supreme Headquarters for the Allied Expeditionary Forces.

Powell became very active in selection of bombing targets. He was a staunch advocate of precision rather than blanket bombing. In the course of this work he had to defend those situations when bad weather or inadequate preparation had caused the precision bombing to go wide of its mark. Of all the targets, it appears that the decision to bomb Dresden was the most controversial and one which he felt called upon to explain or at least assign blame elsewhere. No one appears to accept the full responsibility for that decision, which dropped more than 2,500 tons of bombs on that renaissance city in one night in February 1945. There were a number

of reasons to justify this assault based largely on Dresden as a communications center, but historians seem to feel that it somehow happened because the Soviets wanted it to happen and no one was prepared to refuse. Powell's later years of correspondence reflect his efforts to keep the record straight.

As the war in Europe ended, Powell had been promoted to full Colonel and was ready to come home. Before returning he toured Germany to view the results of the bombing in cities and areas that he had been instrumental in targeting. Years later he would continue his efforts to keep the strategic bombing efforts in Europe separate and distinct from the later controversial bombings in Vietnam. In 18 months abroad he had performed his work with competence and with a quiet pride that never wavered in the years ahead.

Lewis Powell ended his wartime service in February, 1946 and was awarded the Legion of Merit, the Bronze Star and the French Croix de Guerre with Palm.

### LAW AND NATIONAL SECURITY

In the years following World War II Justice Powell's ardent but well-reasoned support for national security did not weaken or waiver. Even during the tough years of the McCarthy era he continued to voice through his membership on President Nixon's Blue Ribbon Defense Panel and other means of communication the importance of preserving and enhancing the Rule of Law by maintaining a strong national defense to withstand the totalitarian excesses of the Soviet Union and international communism. His was not the voice of hysteria; it was the voice of reason.

In 1962 he along with four other distinguished Americans, Chicago attorney Morris I. Leibman, Rear Admiral William C. Mott, Professor Frank Barnett and R. Daniel McMichael of U.S. Steel formed the American Bar Association's Standing Committee on Law and National Security. These were all men who had served their country well and deeply believed in it. Morris Leibman, for example, to whom I later awarded a medal on behalf of the Intelligence Community, served for many years as counsel to two brothers who provided extremely important information on the efforts of the Soviet Union to finance and control the Communist Party U.S.A. in violation of our laws. This was operation "Solo".

The initial goal of the Standing Committee was to contrast the American system of government under the Rule of Law with the alternative vision being offered by international communism. As our national security needs grew in sophistication and degree, the Standing Committee offered through its members and its expertise a continuing source of information and support to the Intelligence Community and the Defense Community. For over a decade I have served as one of its counselors. It has attracted some of our most distinguished leaders to its breakfast meetings, and its National Security Law Report, periodic conferences and other publications are widely followed. From 1962 forward Lewis Powell stood quietly in the shadows checking on our work to be sure that we were measuring up to the goals and traditions of the cofounders, all but one of whom have left our scene. Elizabeth Rindskopf, the current Chair of the Standing Committee and a former General Counsel of the CIA when I was the Director of Central Intelligence and former deputy at the State Department and General Counsel at the

National Security Agency, likes to tell how Justice Powell came to visit at NSA and told her “You have the job that I have always wanted.” (He told me the same thing.)

In addressing the Standing Committee on November 12, 1998, Justice O’Connor said of him “He knew and understood well the need for accurate intelligence in maintaining our security in a world at war.” That we are not now in a world war does not detract from the need for accurate intelligence in a more complicated and in many respect a more dangerous world today. Justice Powell understood this.

## CONCLUSION

Our nation has been blessed with leaders in high responsibility who through personal service to country have understood the need for a strong defense and for adequate means of gathering information against threats to our nation and world peace, and for the need to carry out this mission consistent with our Constitution and our most cherished values. It was said that Justice Oliver Wendell Holmes, thrice wounded in the Civil War, throughout his career on the bench sat figuratively on one of the bullets that struck him, able always to balance the individual rights he cherished with the national security he knew we needed. Similarly Justice Robert Jackson, who presided at the Nuremberg trials reminded us that the Constitution is not a suicide pact. This task of reconciliation was carried out for over 20 years with distinction both off and on the bench by Lewis Powell, whose overarching love of country – not personal bias – brought a rational approach to the security under law he was sworn to uphold.

Others will tell his story as a lawyer, jurist and outstanding citizen of Richmond. My story today is of a patriot who loved his country. Like so many of us of that generation whose careers were altered, modified and for some of us enhanced by the call to duty, he performed with honor, with competence and a profound love of the country that had done so much for him, and he for it.

On August 31, 1998 several blocks of Monument Avenue, Richmond, Virginia were blocked off to permit the large gathering throng to attend his funeral services at Grace Covenant Presbyterian Church, a large church which was filled to over-flowing more than an hour before the service began. The hymns selected by his family (and knowing his attention to detail I suspect by him) reflect a strong faith in God and country: A mighty Fortress Is Our God, Almighty Father Strong To Save (the Navy Hymn), Onward Christian Soldiers, Oh God Our Help In Ages Past, and God of Our Fathers Whose Almighty Hand (the National Hymn). I close my story with the penultimate stanza of the National Hymn, which for me speaks to the life and faith and hope of Lewis Powell, Jr.:

“From war’s alarms from deadly pestilence  
Be thy strong arm our ever-sure defense;  
Thy true religion in our hearts increase,  
Thy bounteous goodness nourish us in peace”

This was a true patriot, in war and in peace.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 27, 2000

Honorable J. Harvie Wilkinson III  
Chief Judge  
United States Court of Appeals  
for the Fourth Circuit

Thank you, Harvey, for that kind introduction.

It is a great pleasure for me to speak before an organization whose membership displays such a breadth of interest and whose stature in our profession is so well recognized. As Harvey mentioned, Justice Powell was President of this organization from 1969 to 1970, very shortly before he went on the Supreme Court. His work with the American College of Trial Lawyers was always a great source of pride and satisfaction for him, and he often expressed his abiding affection for this organization in his later years.

My friend Harvey Chappell, another distinguished Past-President, has used his gentle charm and persistence with respect to this invitation. When he first mentioned it to me, I demurred because of the closeness of my relationship to Justice Powell. Speaking about him after his death has been an emotional experience, and I told Harvey frankly that I needed a period of respite. This was especially the case for a talk which Harvey suggested be filled with personal recollections. After reflection on the matter, however, I decided that this talk was something that Justice Powell would have wanted me to give because he loved this organization so much.

Justice Powell was not only like a second father to me, but he was also a constant school master in my childhood. Every Sunday night, he and Mrs. Powell would come over for dinner with my parents, and this practice continued without serious interruption for some ten or fifteen years. He and Dad would gather in the family den for an hour or so before dinner, and the sense of hierarchy in that room was conveyed by the seating arrangements. I sat on a small stool at the foot of their chairs. My role was to be seen, but not heard, and to learn the value of simply listening.

The discussions of those Sunday evening were wide ranging. I remember the Justice talking about the terrible conditions in North Africa during World War II and about the absence of rigorous science and economics instruction in the public schools. It was also clear to me in his discussions of the law that John Harlan and Felix Frankfurter were the Justices he admired most in the 1950s and '60s. He was deeply concerned during those years about the tactics of the anti-war movement, the extent of urban unrest, and the intransigent resistance in the South to the Brown decision. Each of these things he thought was in itself a threat to the rule of law. And in combination, they threatened the very foundations of a stable society. The Justice was a deeply pessimistic man in the 1960s. I remember Dad asking him how he managed to devote so much time to organizations like the American Bar Association and the American College of Trial Lawyers on top of the demands of a busy law practice. The Justice replied that he thought the rule of law was literally on the verge of collapse and that organizations such as this one represented the best hope that it could still be preserved.

The grave concerns expressed in some of these conversations about the rule of law led Justice Powell to reject the position of the Nixon administration in two landmark cases. In US v. U.S. District Court, he voted to require the Executive Branch to get a warrant even for those wiretaps involving alleged threats to the national security. And, of course, in United States v. Nixon, he voted to reject claims of executive privilege and require the President to respond to the



process of the courts. These decisions redeemed the rule of law in his own eyes and helped him, I think, to regain a sense of faith in legal institutions that grew stronger as the years went by.

Indeed, the last decade of his life found him a far more optimistic person than in those earlier years. Justice Powell felt that the country had survived the most serious external crises of World War II and the cold war, and the equally serious internal threats to the legitimacy of the legal order. It is fair to say that at the end, he achieved great serenity and peace of mind after the storm-tossed middle decades of his professional life. In this sense, he was one of America's great patriots because his outlook depended on what was happening to the country and the profession the he so loved, even more so than on his own state of personal well being and health.

I should tell you that Justice Powell was a stern task master. He knew from my father precisely what my grades were each semester that I was in school. I had a bit of a sophomore slump at college with truly abominable grades in geology and astronomy, which I had to take to satisfy my physical sciences requirement. The first day of my summer vacation I received a call from Justice Powell. It was a chilling conversation and it focused on the fact that one had to do best those necessary duties which one liked the least. There was simply nothing like that stern, measured, precise, but caring voice at the other end of the telephone to jolt me into improvement.

Given his knowledge of my undergraduate science grades, I am still surprised that he chose me as his law clerk. Justice Powell went on the Supreme Court at the age of 64, and spent another eight years sitting with the Fourth Circuit during his 80s. On both courts, he turned in high energy performances. His work schedule at the Supreme Court was seven days a week. Seven days a week during the decade of his seventies. I could not keep up with him.

What happy years they were. Each morning and evening I drove with the Justice to and from the Supreme Court. The conversations in the car were slightly different from those in the family den. The weight of his office made his words more measured. He was astonished, I think, at the closeness of the cases before him and of their importance. During all our trip he never once snapped at me or raised his voice, even when much was on his mind. Still, we had our moments. The law clerks often played basketball on the fourth floor of the Supreme Court building toward the end of the day. I was in the habit of stuffing my sweaty clothes into a duffle bag, which I placed on the back seat of the car. One day Justice Powell decorously suggested that the bag go hereafter in the trunk.

The Justice and Mrs. Powell would sometimes ask me to dinner at their Harbor Square apartment, even at the end of a long court day. Occasionally after dinner, the Justice would close his eyes and Mrs. Powell would read certiorari petitions aloud to him in the living room. This was his idea of relaxation. On other occasions, we would sit on the balcony of the apartment watching the distant airplanes glide over the Potomac and into National Airport. The apartment next to his was occupied by Senator Hubert Humphrey and his wife Muriel. Tragically, Senator Humphrey was in the advanced stages of cancer at that time, but that did not slow him down. His knock would come on the door around 8:00 p.m., "Oh, that's Hubert," the Justice would say, and Senator Humphrey would stride into the room in his long red bathrobe. Many times Senator Humphrey would talk for an hour or an hour and a half without stopping. He did this

in utter defiance of his wife and doctor's orders, but no one could slow him down. He talked a lot about his teaching experience after the 1968 presidential campaign, and what a professor he must have been – I doubt the students got out even when the bell rang. In all events, this unlikely pair of Justice Powell and Senator Humphrey became quite close friends. The Justice admired the Senator's magnanimity and benevolence, and the Senator found great support in the Justice's even demeanor and quiet assurances. For years after the Senator's death, the Justice could not pronounce the name Hubert without a little shake of the head and a smile.

At the age of 80, the Justice retired from the Supreme Court and came to sit with the Fourth Circuit. He sat with us regularly for some seven or eight years. The Fourth Circuit, as you know, has its special traditions with which Justice Powell felt quite at home. One of those is that the judges come down from the bench and shake the hands of counsel after every oral argument. I think the Fourth Circuit may also be the only court of appeals in the country where all the judges do not address one another by their first name. At least I never, during my service with them, addressed Judge Haynsworth, or Judge Russell, as anything other than judge. That seemed entirely fitting because Judge Russell had been an Assistant Secretary of State before I was born. During the 50 years I knew him, Justice Powell never once suggested that I call him by his first name. It is one of those small ironies in life that a few special relationships grow even closer, precisely because they are not on a first-name basis.

For some reason, Justice Powell never wished to be the presiding judge of our panels. Of course, he was given his choice of where to sit, and he always preferred the seat to the right of the presiding judge on our three-judge panels. This meant at conference that he would vote second. I never knew exactly why he preferred this arrangement; perhaps it was because it most closely paralleled his place on the seniority ladder at the Supreme Court. In all events, he was a pleasure to sit with. Even the smallest and most fact-intensive case commanded his considerateness attention, and he was a model of considerations to his colleagues and the Bar. He only asked questions to which he did not know the answer - always a refreshing quality in a judge. The Fourth Circuit judges meet frequently for dinner during court week, and the Justice and Mrs. Powell were our constant companions. One evening I accidentally spilled a glass of water all over the Justice and his nice suit. He was too dignified to say anything about it at the time, but henceforth I noticed that he managed to sit at least a seat away from me.

The last years of Justice Powell's life were spent at his Rothesay Road home in Richmond, Virginia, where, as you might suspect, a constant stream of visitors came to see him. Those years were marked by the tragedy of Mrs. Powell's death in 1996, but also by the solace of life-long friends and the sweetness of reflection. One story the Justice always loved to tell me during those years involved the fabled romance of Colonel Henry Watkins Anderson, a founding partner of Hunton & Williams, and Ellen Glasgow, a celebrated novelist. The Justice had practiced briefly with Colonel Anderson, but this is not at all what he chose to recount. He was fascinated with Colonel Anderson's way with women and his adventurous life. During WWI, the Justice would say, Colonel Anderson left Ellen Glasgow the day after their engagement and went to Romania as Chairman of a Red Cross commission to aid in the war relief effort. During the winter of 1917-1918, Glasgow heard from Romania about Colonel Anderson's growing friendship with Queen Marie. Perhaps because of that relationship, Anderson and Glasgow never



married, and Glasgow wrote several novels in which the Colonel was treated none too kindly and in which his identity was scarcely concealed.

Why this story so fascinated Judge Powell always intrigued me. He was a splendid dancer and cosmopolitan traveler in his own right, but he was about as different from Colonel Anderson as two men could possibly have been. I am not sure that he ever unraveled the precise nature of the affections between the Colonel and his various companions, but he remained fascinated by it to the end.

The Justice's kindness was much in evidence during these last years. He was adored by his nurses, and he would occasionally dance in the hallway with them to the tune of "Mack the Knife." When I would get up to leave after a visit, the Justice would always rise, put on a floppy hat, accompany me to the front porch, and wave goodbye until my car had vanished from sight. He did this even in the most inclement weather.

My friend Harvey Chappell has asked me to bring these recollections to you, but it is clear to me that the Justice has as much meaning for the future as he did in the past. It is important to have different kinds of judges on an appellate court. Some judges are catalytic thinkers whose expressiveness and creativity help drive the terms of a debate. I admire them greatly, but, when all is said and done, Lewis Powell's qualities are the absolute best. He combined breadth of experience firmness of conviction, and considerateness of manner to an extent that few other judges ever have or will. And I suggest that America has never been more in need of its Lewis Powells. Our country is in the throws of bitter culture wars which always seem to end up in the courts. And while our multicuture future is cause for joy and celebration, it poses the danger of unprecedented racial and ethnic tension for our great land. During his long life, Lewis Powell always sought to soothe feelings and to bridge differences. America needs believers in the possibilities of compromise. But here was also a man who experienced the deprivation of the Depression, the challenges of World War II, the racial conflicts of the 1950s, the protests and divisions of the 1960s, the combustible issues that reached the Supreme Court during the 1970-80s, and had seen his beloved country come through it all. And to understand and to know that his life ended on a note of optimism and hope is to refresh our faith in the possibilities of law - the profession that Lewis Powell believed was the greatest of them all.



MR. JUSTICE POWELL  
AND THE DOCTRINE OF PRECEDENT

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 20, 2001

Honorable Richard S. Arnold  
Judge, United States Court of Appeals  
for the Eighth Circuit

Well, good morning, Judge Bell, President Silbert. Earl Silbert and I are classmates, and I am delighted to see him here. The fact that he is president gives me additional assurance of what a fine organization this is. Let me, before I go further, note the presence of my dear wife, Kay Kelly Arnold, who is a member of the Bar. I think that she is here, and if she wouldn't mind standing up, I would appreciate it.

Well, there are some things that Judge Bell left out of the introduction, and some things that should have been left out and that I do not want you to know, but there are a couple things that were left out that involved a story of how I got to be on the Court in the first place. And, of course, you know that every judge's favorite story is the story of how he or she became a judge, because those stories prove the efficacy of our system.

Now, Judge Bell knows some of this and probably knows some of it that I don't know, but one day in June of 1978, as I was sitting in my little cubicle in Senator Dale Bumpers's office in the Dirksen Office Building, the Senator called me in and said, "Richard, a United States District Judge in Arkansas has died, and I want you to fix up a letter to President Carter, recommending you to be United States District Judge," and I wrote him a hell of a letter.

It was the finest, most fulsome and most eloquent letter of recommendation ever sent by a U.S. Senator for a judgeship, and in due course of time, the Department of Justice called me, and I was asked to come over and be interviewed by Mike Eagan, who was working for Judge Bell. So, I am sure many of you know him. I thought when I got there I would be given the litmus test. They would want to know my constitutional philosophy. I didn't have one. I don't know that I have ever developed one. But, to my vast relief, Mr. Eagan asked me only two questions, was I breathing and did I come from the Senator, and because I was able to answer "yes" to both of those questions, I was nominated by President Carter in due course.

Now, those were kinder and gentler times, and you know that the confirmation process has become somewhat more complicated, but even then, one had to be confirmed by the United States Senate, and the person in charge of that was none other than Chairman James Eastland of the Judiciary Committee, Senior Senator from Mississippi. And, it happened that one day after I had been nominated I got on the elevator in the Dirksen Building with Dale, and Senator Eastland was on the elevator. Dale looked at him and he said, "Jim" now, I don't know if anybody ever called Senator Eastland "Jim," probably Judge Bell did, but most people, I'm sure, did not presume. But Dale said to him, "Jim, the President has nominated Richard here," and he jerked his thumb in my direction as if at some insignificant object, which I was. He said, "The President nominated Richard here to be United States District Judge, and I want you to confirm him." And Senator Eastland looked at Senator Bumpers, and he said,

"Whatever you say, Dale." So, we got down to the ground floor of wherever we were going and the great majestic elevator doors opened up, and it is time to get off, and Senator Eastland looks at me, and he said, "After you, Judge." So, you see, I got confirmed in the elevator. It's much preferable to the present practice.

Well, I want to thank the American College for your hospitality and your friendship, not only on this occasion but on a number of others. I have many friends here, many of whom I wouldn't have time to name.

I see Peggy and Frank Gundlach from St. Louis, and I want to tell you how grateful I am for some of the past experiences that I have received as a beneficiary of your hospitality. In 1987 I was fortunate enough to be part of the first Canadian-American Legal Exchange. A number of prominent members, including Ralph Lancaster, who I see, were on that trip, and that experience produced in me a life-long admiration for Canada and for its judicial system. Later, in 1994, I was part of a similar group that went to India. We visited the Supreme Court of India and the High Courts of Bombay and Madras, and I was allowed in Madras to sit on the bench and hear a portion of an argument. Members of the American College organized and participated in this trip, and I remember especially Joan Hall and Ed Brodsky and Charlie Renfrew, and I've had the pleasure of addressing your meeting once before on the topic of the federal budget, which was dear to my heart for years.

The fact that the invitation, though, to make this talk came from Judge Griffin Bell would have made it impossible for me to refuse in any case, because as you know from the story I've recounted, he was Attorney General when I went on the District Court and he was also Attorney General at the time I was chosen for the Court of Appeals. So, I hope he feels that his trust in me has not been disappointing. In any case, I have always thought of him as an excellent judge picker.

I do want, also, to say a personal word about Justice Powell, surely one of the most admired lawyers and judges of the twentieth century. I did not know him before he was appointed to the Supreme Court but I did become pretty well acquainted with him in later years, and one incident I would like to recall, if you will forgive me.

At a reception at the Supreme Court, during one of the meetings of the Judicial Conference of the United States, it happened that I was introduced to Justice Powell, and I had met him before but did not think that he would remember me. He simply looked at me and said, "Oh, yes, Judge Arnold. You write good opinions." Of course, I remember the exact words! One doesn't hear those words often from anybody, let alone a Supreme Court Justice. So, you will understand why I think Justice Powell was a man of great, good judgment.

My subject is the extent to which judges are bound by precedent, sometimes grandly referred to as the "Doctrine of Stare Decisis." And let me say, before I go any further, that I know there are people in the room who are not lawyers, and this is for you: the courts belong to the public, not just to the lawyers, and the public has a strong interest in consistency and stability of judicial decision making. So, please don't think, although I may be somewhat technical at times, please don't think that this is a subject only for technicians.

In recent years academic political scientists have tried to quantify the records of Supreme Court Justices with respect to how willing they are to overrule previous cases. Precedent and its binding nature have become synonymous with judicial restraint. The term “activism” is often a pejorative charge when a Court departs in some way from a previously decided case.

My purpose here is not to recount the long history of the debate about this value associated with the judicial function, but I want to make some observations about the role of precedent today and whether one can draw conclusions or, indeed, make predictions about what is likely to become of this doctrine, and the context of these observations is the record of Justice Powell.

Now, let me give you a working definition, first, of the doctrine of precedent. It is quite similar: A Court, once having decided a case according to a certain type of reasoning, should adhere to that reasoning when similar cases come before it, unless it has a darned good reason not to and says that reason out loud. Now, you won’t find that in the law books, but that’s what it boils down to. These were subjects on which Justice Powell wrote extensively while he was a member of the Supreme Court and following his retirement. He had very specific ideas about the appropriate boundaries of respect for precedent, and he spoke and wrote about them often.

Some of the most stirring language about the role of precedent was originally written by Justice Powell. Perhaps, because he so frequently made known his views about this matter, law professors and political scientists have scrutinized his record meticulously on the Court. In particular, political scientists are interested in numbers. A recent book claims that Justice Powell, of all the modern Justices, had the greatest degree of respect for precedent. The authors conclude that Justice Powell followed precedent in the so-called big cases 34.8 percent of the time that he served on the Supreme Court. When faced with a decision, he probably would have decided differently but for the constraints of a previously decided case.

Now, you may be interested in who the least respectful among the Justices of precedent may have been. According to, and I will not name any current members, but according to this author, Justices David Brewer, Horace Gray, Rufus Peckham and William O. Douglas are among that group. Now, that doesn’t mean they were making wrong decisions, but it meant that they felt unrestrained by the past, and sometimes that’s a good thing.

We know that Justice Powell thought a lot about the values of stare decisis because of his prolific speaking and writing on the subject. He might be uncomfortable with an effort to quantify his record, but I think he would be gratified that the Supreme Court and a number of lower federal courts have frequently cited, with approval, an article he wrote in 1991 in the Journal of Supreme Court History, entitled “Stare Decisis and Judicial Restraint.” Furthermore, lawyers before the United States Supreme Court are often citing Justice Powell’s articles on this subject. In a lecture before the Bar Association of the City of New York in 1989, he cautioned that abandoning the doctrine of precedent would undermine the rule of law. He went on to say that the elimination of stare decisis in constitutional cases would represent an endorsement of the idea that the Constitution is nothing more than what five judges say it is.

One of the most often quoted portions of his writings on the subject is the following:

“Perhaps the most important and familiar argument for the doctrine is one of public legitimacy. The respect given the Court by the public and by other branches of government rests, in large part, on the knowledge that the Court is not composed of nonelected judges free to write their policy views into law. Rather, the Court is a body vested with a duty to exercise the judicial power prescribed by the Constitution, and an important aspect of this is the respect that the Court shows for its own previous opinions.”

Now, there are three of his opinions in particular that if I have time I want to mention that I think illustrate this. One of them is a case called City of Akron v. Akron Center for Reproductive Health, and that is a case decided in 1983 in which the Court was asked to consider an argument that it had been mistaken when it had decided earlier, Roe v. Wade, and Justice Powell said this:

“The doctrine of precedent, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today and reaffirm Roe v. Wade.”

Another opinion in which this theme appears is Mitchell v. W. T. Grant Co., and this is from a concurring opinion of his:

“To be sure, stare decisis promotes the important consideration of consistency in judicial decisions and represents a wise and appropriate policy in most instances, but that doctrine has never been taught to stand as an absolute bar to reconsideration of a prior decision. When the Court errs in its construction of a statute, correction may always be accomplished by Congress. Revision of a constitutional interpretation, on the other hand, is often impossible, as a practical matter. It is, thus, not only our prerogative, but also our duty to re-examine a precedent where its reasoning as to the constitution is fairly called into question.”

So, it is not a rigid proposition that he is offering us, but a flexible one, a presumption, if you will, that previous opinions ought to stand but a recognition that there are instances in which they should not.

Some Court observers have discounted Justice Powell’s statements by pointing out the occasions on which he voted to overturn a prior precedent. In fact, in an opinion released only two weeks after the City of Akron abortion case that I have referred to, Chief Justice Burger, in dissent, charged that an opinion written by Justice Powell had, “blindly discarded any concept of stare decisis.” Have you ever noticed that no one ever said anything other than “blindly”?

A biographer of Justice Powell, John Jeffries, Jr., and by the way, this is a great book, has noted several reasons why many would have expected President Nixon’s appointment of Justice Powell to the Supreme Court to tilt the balance in favor of overruling a number of Warren

Court precedents, especially those on the rights of criminal defendant. For one thing, before his appointment to the Supreme Court, Lewis Powell wrote an article severely criticizing the Warren Court's criminal procedure decisions, especially the Miranda case. Yet, he did not vote to overturn any of the Warren Court's major decisions having to do with criminal procedure and, in fact, was a pivotal voice in the Burger Court's reaffirmation of these decisions.

Others have characterized Justice Powell as a restrained legal pragmatist because he valued precedent, but as I've said, he did not believe the doctrine was absolute. Justice O'Connor, on the occasion of Justice Powell's retirement in 1987, said this:

“At times, he may have been willing to sacrifice a little consistency in legal theory in order to reach for justice in a particular case.”

And, you want that, don't you? Especially if it is your particular case and you think that it is justice for which the Judge is reaching.

If we would turn the numbers in an attempt to quantify a particular Justice's work, we encounter assessments of Justice Powell that have concluded he was probably the most powerful Judge of his time. During fifteen terms, from 1971 to 1985, he ranked at the top of the scale for a majority participation, usually around ninety percent. He ranked at the bottom of the scale for dissenting votes. He was far more often in the majority than in the role of dissent, compared with the other members of the Court, but when he did dissent, he often criticized the majority for disregarding prior precedent.

Notably, one of his most impassioned dissents came in a case called Garcia v. San Antonio Metropolitan Transit Authority. It is about wages and the Tenth Amendment, in which he lamented the precipitous overruling of multiple precedents. In only a nine-year period, precedent was created, exceptions carved and, finally, an original holding was overruled. By contrast, it took more than fifty years before Plessy v. Ferguson was overruled in principle by Brown v. Board of Education. In retrospect, adherence to Plessy seems to have been wrong, but the non-adherence in the cases about wages and the Tenth Amendment doesn't seem to have been so bad.

Justice Powell did not think that courts were generally lax about precedent. He said that when the totality of cases is considered, the general rule of stare decisis remains a fundamental component of our judicial system. He claimed that as a rough average, the Burger Court, during the time of his membership, overruled fewer than four cases per term. Well, that sounds like a lot to me. As he said, the vast majority involved nothing more than application of previously decided cases. So he seemed to agree, in general, with the view that the courts of last resort in this country recognize at least a rebuttable presumption against overruling their own past decisions.

He wrote about other problems with the court system, too, among them overload of the courts. Now, this was written in 1978. He identified overload of the courts as the most serious problem facing the federal judiciary, serious enough that he believed it threatened the capacity of the federal courts to function as they should. “This overload,” he wrote, “creates intolerable



delays and affects seriously the quality of justice.” It is interesting that the subject of volume, especially the ever-increasing volume of cases in the Federal Courts of Appeals and of adherence to precedent turn out to be related in a curious way.

Now, from here on out, this is mainly me you are hearing from, not Justice Powell. To put the matter bluntly, many courts cope with volume by abandoning the doctrine of precedent. They are saying, “Our caseload is so high, we don’t have time to do a good job on many appeals.” Accordingly, decisions in those appeals, which the courts mark in advance as “unpublished,” will not be considered precedential. I think I saw Mike Cooper laughing. His son has written two very good articles on this subject.

Some courts will tell you that you can’t even cite those cases and will threaten you with sanctions if you do. It may be true that a panel of this court, or perhaps even this very panel before which you now appear, decided the very question you are presenting in a way favorable to you just yesterday. “Even so, because we chose to designate our opinion as ‘unpublished,’ we don’t have to follow it, and what’s more, you cannot even tell us about it.” The language is more direct at certain locations that courts are accustomed to use, but the message is exactly as I have put it. Some of you will have heard of an opinion I wrote called Anastasoff v United States. The opinion holds that conduct of this kind is unjudicial and unconstitutional.

When the framers used the phrase “judicial power” in Article 111, the opinion argues, they had in mind a system of reasoned decision in which courts had to and, in fact, would usually adhere to their previously announced views. Whether a court decides at the time it issues a given decision to send its opinion to legal publishers or not, what the Court has done and the reasons given are still declarations of law and freely available to the public, often on the Internet. For a court to disregard such decisions without giving a reason and even to forbid lawyers to refer to them at all is to assert a power wholly arbitrary.

Now, legislatures can do this. This is what legislatures do. They decide what they think is good policy and repealing existing law requires no more than changing their minds. Until recently, at least, we have expected more than that from courts. Courts are supposed to be voices of reason. What was reasonable yesterday normally continues to be reasonable today. I say “normally” because, as I have noted, sometimes cases are overruled, and sometimes they should be, but even when that occurs, something is happening beyond a mere exercise of will, or at least we hope so.

Why are some courts asserting such a power? Court rules concerning the precedential value of unpublished opinions have come into being only in the last several decades, no earlier than the mid-sixties. In response to dramatically rising caseloads, many of these rules specify that unpublished opinions are not precedent. In the Federal Courts of Appeals - if this doesn’t shock you, I’ll be shocked - in the Federal Courts of Appeals approximately eighty percent of all appellate decisions in 1999 were designated “not for publication,” That means they don’t count. Less than a quarter of all judicial work in the Federal Circuits in that year became precedent for future cases, and in some state courts, well over half of the decisions fall into this category



So, most of what the appellate courts are doing now is kind of a non-law, or “shadow law,” good for one time and place only. One justification for these rules has been convenience. Many cases are routine and, thus, no lengthy opinion is necessary. These cases do not alter precedent; they merely affirm it. But, if an opinion merely reaffirms existing law, what harm is caused by allowing it to be cited?

Another justification one hears is accessibility. The opinions are available only to large institutional litigants or large law firms. This is becoming less and less true because the so-called unpublished opinions are widely available on electronic databases. Now, I have to acknowledge that many judges, all people of good will and great learning, strongly disagree with the view that I am expressing.

Judge Kozinski, speaking for a panel of the Ninth Circuit, recently filed a very scholarly opinion, arguing, among other things, that in the time of the framers, the doctrine of precedent was not nearly so well developed as it has become since. This is a case called Hart v. Massanari, and listen to what happened to the lawyer in that case. He cited an-unpublished opinion because he thought it would help his client. An order was entered requiring him to show cause why he should not be disciplined for citing this unpublished opinion in violation of the Rules of the Ninth Circuit. Ultimately, the so-called order was discharged, roughly on the theory that the lawyer had been misled by the Eighth Circuit. But one gathers that counsel who cite unpublished opinions in the Ninth Circuit will not be treated so kindly in the future.

Consider, also, the position taken by the Fifth Circuit in a recent case. The issue was whether the Dallas Area Rapid Transit Authority was an arm of the State of Texas. Well, why does that matter? Because if you are an arm of the State of Texas, you are immune from suit under the Eleventh Amendment. And in one opinion, the Court of Appeals had said, yes, the Dallas Area Rapid Transit Authority is a state agency, and you can’t sue that authority in a federal court because of the Eleventh Amendment. This was affirmed by the Court of Appeals in an opinion that says, “Affirmed.” Later, the issue arose again, and this time a panel of the same court came out with the opposite conclusion and put it in a published opinion. So, the second plaintiff, identically situated to the first one, won his case, at least as far as getting over the immunity defense was concerned, but the first one did not.

Now, if you are the first plaintiff, what is the Court saying to you? It sounds something like this: “You have to understand that we have a lot of cases here. We don’t have time to think about all of them as much as we would like. We didn’t think your case was especially important and, therefore, we didn’t spend much time on it. Now that we have had time to think about the question, we’ve decided that the position you took was correct after all, but that won’t help you. Your case has already been decided. You lose. But the plaintiff in the second case wins, even though the only difference between the two of you is that we did not send the opinion in your case to private companies that publish court opinions.”

Is this justice? Of course not. We expect courts to treat everybody alike, and we expect them, generally, to keep the law stable, neither of which can be accomplished if courts create large bodies of law which they explicitly disavow. We expect courts to have a beginning working

point to ensure stability and relative equality of treatment of persons. That beginning point, at least in our system, is precedent, the record of how courts have decided issues in the past. They look first to how they have decided cases in the past, not only to save time in the reasoning process, but also to ensure that litigants close in time receive roughly the same kind of justice. Non-citation rules that permit judges to decide cases one way one year and another the next without explaining the difference have no part in a system that claims to operate within, as Justice Powell might have said, the rule of law.

In August of this year, the American Bar Association's Section on Litigation recommended to the House of Delegates its views on the use and effect of unpublished opinions in the federal courts of appeals. A resolution proposed that the practice of various federal courts of appeals in issuing unpublished opinions, which by court rule may not be cited, is contrary to the best interests of the public and the legal profession. Now, I am happy to report what most of you no doubt already know, that the Board of Governors of the American Bar Association recommended adoption of this resolution and that the House of Delegates did, in fact, adopt it, and I congratulate the American Bar Association on its willingness to stand up and be counted.

Now, it would be presumptuous of me to attempt to co-opt Justice Powell as a partisan in this dispute, but I think at least this much can be said. He left us many of his thoughts about institutional constraints on judges and the delicate balance necessary to determine when a prior case should be overruled. He said this, and the words are important, "The Court is a body vested with the duty to exercise the judicial power prescribed by this Constitution. An important aspect of this is the respect that the Court shows for its own previous opinions."

Thank you for listening to me.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 23, 2004

Honorable Sandra Day O'Connor  
Associate Justice  
Supreme Court of the United States

I am pleased indeed to be asked to give the Lewis F. Powell, Jr. lecture at the meeting of the American College of Trial Lawyers.

Lewis F. Powell, Jr. was the ninety-ninth Justice to serve on the United States Supreme Court. Perhaps he was the most reluctant. It is reported that on the day in January 1972 when Lewis F. Powell was sworn in, together with William H. Rehnquist, that Nan Rehnquist asked Justice Powell's wife, Jo, if it wasn't the most exciting day of her life. Jo reportedly said, "no, it is the worst day of my life. I am about to cry." Lewis F. Powell had turned down an appointment to the Court in 1969, and was prepared to do so again in 1972. Luckily for the Court and the Nation, Lewis F. Powell reluctantly agreed to accept the nomination when President Nixon convinced him it was his duty to his country to do so.

He served on the Court from 1972 to June 1987. He wrote more than 500 opinions. Many were very significant ones. It was a great privilege to serve on the Court with him for six years. No one did more than Lewis Powell to help me get settled as a new Justice. He found us a place to live, and a chamber's secretary. Most important he was someone willing to talk about cases and the issues. His door was always open. I miss these visits and discussions still today.

He was very hard working. He went over every detail. He brought to the Court a lifetime of experience as a lawyer and as a leader. He was enormously kind and thoughtful. But he would hold his ground when he decided on a course of action. For those who seek a model of human kindness, decency, exemplary behavior and integrity and there will never be a better man.

As our nation approaches another Presidential election I thought perhaps a few remarks about the intersection of the chief executive and the judicial branch might be in order. And as I considered the thoughts I wanted to share with you, I couldn't help but think of one particular historic figure of note, William Howard Taft. A story is told that Mr. Taft once found himself stranded at a small country railroad station. Informed that the express train would stop only for a large group of passengers, Taft wired the conductor: "Stop at Hicksville. Large party waiting to catch train." When the train stopped, Taft boarded alone. He then turned to the confused conductor. "You can go on ahead," he declared. "I am the large party."

We laugh at that story because we remember that Mr. Taft, at his heaviest, tipped the scales at over 300 pounds. But as the 27<sup>th</sup> President of the United States and the 10<sup>th</sup> Chief Justice of the United States, he also was the only person ever to have tipped the scales by holding both of those incredibly "large" offices – experiencing firsthand the large responsibility of heading two of the most significant institutions in the free world. His time in these two roles put him on two different sides of the same constitutional coin. Indeed, our remarkable Constitution recognizes the individual "largeness" of these governmental bodies while acknowledging that their relative strengths will at times coexist, at times collide, and nearly always manage to carry out the will of the majority while safeguarding the rights of the minority. There have been some moments in history in which these two large institutions, with large constitutional obligations, have intersected, overlapped, and even clashed. A look at the dynamic between the two speaks volumes about the genius of our Constitution.

## JEFFERSON AND MARSHALL

To find an example of the judiciary and the presidency surviving the collision of two larger-than-life personalities, we need not travel very far into the early days of our Republic. Second cousins John Marshall and Thomas Jefferson were anything but the kissing kind; indeed, their relationship was privately nasty and publicly only slightly better. Their exchanges – well-documented, but not well mannered – planted the seeds for an all-out war on the proper role of the judiciary vis-à-vis the other branches of government, and set the trajectory of constitutional law as we know it today.

Jefferson almost was not our third president, coming to the post only after the House of Representatives broke an electoral tie vote in his race with Aaron Burr. Marshall almost was not our fourth Chief Justice, receiving the nomination from John Adams only after first choice John Jay declined reappointment. But once fate brought them to their respective positions of authority, Jefferson and Marshall came to blows in ways that put even today's climate of political acrimony to shame. Early in his administration, Jefferson attempted to have Marshall impeached. He accused him of "irregular and censurable" behavior. "In Marshall's hands," Jefferson said, "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice." He spoke vehemently of his bitter disappointment in his own appointees to the Supreme Court, calling the "lazy" and weak for not standing up against the "crafty chief judge." Marshall, in turn, labeled Jefferson "totally unfit" for the presidency. Jefferson called the Chief Justice a man "of lax lounging manners...and a profound hypocrisy."

History teaches us that it was Marshall's decision in Marbury v. Madison – a case that many say might as well have been captioned Marshall v. Jefferson – that permanently legitimated and strengthened the Supreme Court and that gave the Chief Justice his least obvious but perhaps greatest victory over the President. In the watershed 1800 election, Marshall's Federalist party lost control of the executive and the legislative branches to Jefferson's Republicans, and in an effort to retain some presence in government, decided to pack the judiciary on their way out the door. President Adams appointed Marshall, then the Secretary of State, as Chief Justice, and Congress passed a number of pieces of legislation to restructure the court system and provide the lame-duck Senate and outgoing President Adams with many new positions to fill. Adams filled them – or thought he did – through a series of midnight appointments. But Jefferson fought back; when he took office, he refused to deliver the commissions of some of the appointees. When Mr. Marbury, an appointed judge who didn't get his commission, sought a court order compelling the administration to deliver it, the case made its way to the Supreme Court.

Chief Justice Marshall, to the surprise of many, denied the order that would have forced his nemesis to issue the judicial commissions. But the "victory" that he handed to Jefferson came with a silver lining for himself. The order was denied on the grounds that the part of the Judiciary Act that had given the Supreme Court the power to issue such orders was contrary to the Constitution. Writing for a unanimous court, Marshall declared "that courts as well as other departments, are bound by [the Constitution] and, more importantly, that it is "emphatically the province and duty of the judicial department" to say what the Constitution means. In one fell swoop, Marshall gave up a small power that Congress had conferred upon the Court and took

in exchange an even larger, overarching power – to examine the ultimate constitutionality of all Acts of Congress challenged in Court. Despite the vehement disagreement of his cousin Thomas Jefferson, this bold assertion by John Marshall has survived as the final and official answer to this day.

The lessons to be learned from the story of Jefferson and Marshall are too many to be recounted here. It is the story of a government that develops and grows and changes over time. It is the story of large institutions competing and accommodating in ways that both amaze and alarm us. Perhaps even more significantly, it is a story that begins a distinctively human thread that we have seen woven since: The judiciary and the presidency are inhabited by real people, with real emotions, real foibles, and a very real – if sometimes conflicting – commitment to doing what is right.

### LINCOLN AND TANEY

A second historic moment of interaction between the presidency and the judiciary stars President Abraham Lincoln and Chief Justice Roger Taney. To my knowledge, it represents the only time a sitting president has deliberately defied a direct court order.

In the early days of the Civil War, the fragile American nation faced serious threats from within. The Southern states had broken away, and European powers were poised to intervene, to divide the young nation permanently into Union and Confederacy. The war posed another sort of danger – a danger less obvious, perhaps, than columns of soldiers marching through the countryside but far more insidious to a nation “conceived in Liberty.” It was the danger that a government at war might use its extraordinary powers to stamp out political opposition. In April 1861, a trainload of Union soldiers passed through Baltimore en route to Washington, summoned to man the defensive fortifications around the capital. They were greeted by an angry mob of Southern sympathizers and had to fight their way across Baltimore to another station, where their train to Washington waited. Later that night, local authorities who favored the South burned bridges and cut telegraph lines between Baltimore and Washington, claiming that Union soldiers might come back, looking for revenge after the riot.

Congress was out of sessions, and President Lincoln found himself in a capital city with a rebel army to its south and a secession-minded mob to its north. Invoking his power as commander in chief, he authorized local military leaders to suspend habeas corpus along the railroad line from Washington, to Philadelphia. Essentially, this meant that the army could arrest civilians without getting a warrant from a court or without probable cause to believe a crime had been committed by the person arrested, and without providing the speedy jury trial that the Constitution guarantees. Mr. John Merryman, a member of the Maryland legislature who had been recruiting Rebel soldiers, was arrested by a Union general under this scheme, and hauled off to Fort McHenry in Baltimore Harbor.

This was when Supreme Court Justices still rode the circuit, hopping onto their horses to serve as federal circuit judges around the country. When Merryman filed his request with his local circuit judge, he went to none other than Chief Justice Taney. Taney was no friend

of the Republican administration, and when he received Merryman's petition, he ordered the commander of Fort McHenry to bring Merryman to his court in Baltimore. Instead of complying, the commander sent back an aide bearing the message that the President had authorized the colonel to suspend the writ of habeas corpus. This, as you can imagine, incensed the Chief Justice. He wrote a fiery opinion arguing that only Congress had the power to suspend habeas corpus. The President's job, he said, was merely to see that the laws be, as the Constitution says, "faithfully executed."

Lincoln did not publicly respond to Taney's opinion until Congress met a month later, on July 4<sup>th</sup>. Taking aim at Taney's assertion, he noted that in the Confederacy, the Constitution itself was being ignored, and that had he not acted when he did, Washington would have fallen into Southern hands and there would have been no Congress to act in response to the rebellion. He famously asked "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Merryman stayed in jail, and scholars still debate whether Lincoln had the authority to invoke the constitutional provision suspending habeas corpus during the early days of the war. This is not the place for me to wade into the muddy waters of that debate. It suffices for our purposes here to note that in March 1863, Congress gave Lincoln express legislative authority to suspend the writ, removing any constitutional obstacle to his detention of enemy Southerners. To his immense credit, Lincoln did not use this authority to trample on the civil liberties that the writ of habeas corpus was meant to protect. Recent historical studies have made clear that he never tried to suppress political dissent, and always understood that a democracy grows stronger by allowing the people to voice their opposition to government, even in the midst of war. In his words, "what constitutes the bulwark of our own liberty and independence" is "not our frowning battlements, our bristling sea coasts, the guns or our war steamers, or the strength of our gallant and disciplined army," but rather "the love of liberty" and "the preservation of the spirit which prizes liberty as the heritage of men, in all lands, everywhere."

In this way, what might otherwise be remembered as a clash between these the "large" historic figures can be seen as a moment of large respect for the rule of law by both the President and the Chief Justice. Their sincere, even if conflicting, examples of dedication to principle – and to the people of a struggling nation – loom large to this day.

### FDR'S COURT-PACKING PLAN

A third, well-known account of the intersection between the large scopes of influence of the judiciary and the presidency is found in the story of President Franklin D. Roosevelt's Court-expansion plan. The current head count of Justices on the Court is engraved neither in stone nor in the Constitution.

Citing the heavy workload and declining age of many of the Supreme Court's then-sitting justices, President Roosevelt suggested an increase in ranks from nine to fifteen. However, historians have long focused on what is widely believed to be the real reason for his plan: According to accepted wisdom, he was more than a little annoyed that the Justices were giving a thumbs-down to so much of his New Deal legislation. And he wasn't just imaging things. For in



the 140 years between 1790 and 1930, the Court had overruled only 60 acts of Congress – barely half an act a year. But during Roosevelt’s first term, the Court overruled 12 acts-and some of those were the President’s favorites!

His clever proposal was to get Congress to pass a bill that would let him appoint a new Justice every time a Justice turned 70 years old. Coincidentally, six members of the Court were over 70 at the time.

Chief Justice Hughes addressed the arguments proffered by the President and his supporters. He explained how the Court was fully abreast of its work and was not rejecting important cases to keep its dockets clean. His last argument was the clincher: “An increase in the number of the Justices of the Supreme Court,” he said, “would not promote the efficiency of the Court. It is believed it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of Justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.” President Roosevelt’s Court-packing plan was defeated. And so the Court survived what many viewed as one of the greatest crises of its history. It emerged larger in influence-if not in numbers-and more keenly aware of its sometimes tenuous, but always interesting, relationship with the presidency.

#### TRUMAN AND THE STEEL SEIZURE CASE

The last story I will mention on this subject-at least in terms of the legal precedent with which is provided us-is one that occurred most recently. It takes place in April 1952, during the Korean War, and features President Harry S. Truman, a Steelworkers Union, and Justice Robert Jackson-who, you might be interested to know, had as a law clerk at the time a bright young lawyer by the name of William H. Rehnquist.

At this critical time in the war effort, the steel industry and the union had reached an impasse in their negotiations. A looming strike by more than 600,000 workers threatened to cripple the production of weapons and, in Truman’s eyes, endanger American troops serving in Korea. Ever sympathetic to the steelworkers, President Truman had worked for months to keep the strike at bay, and he turned to his advisors for counsel. The recommendation? To seize the steel mills, forcing the companies and labor to return to the bargaining table and management to retract what Truman viewed as “outrageous” demands for regulatory approval of significant price-per-ton increases. The President took the advice, and just hours before the scheduled strike, in an important press conference, he stared into the camera and announced on national television that he would order his Secretary of Commerce, Charles Sawyer, to take over the mills and keep them running.

To the surprise of the administration-and even the steel companies’ own lawyers-the President’s act was challenged in Court. The District Judge declared the seizure unconstitutional, saying there was “utter and complete lack of authoritative support” for a President’s seizure of private businesses. The Circuit Court entered a stay and the Supreme Court heard expedited

arguments. In its decision in Youngstown Sheet & Tube v. Sawyer, it echoed the district court's rebuke of the President: He had, indeed, exceeded his powers under the Constitution. Writing for the majority, Justice Hugo Black rejected the Administration's argument that in a time of war, the President could exercise his emergency powers in so broad a fashion as to be almost boundless. But the most enduring opinion in the case was the concurrence penned by Justice Jackson-an insightful exegesis of the issue of Presidential powers that became the true legacy of the Youngstown Sheet & Tube case.

According to recent writings on this historic case, Justice Black invited President Truman and all the other Justices to a dinner at Justice Black's home, as a sort of peace offering to the beleaguered President. The President had been prepared to complain that "The Supreme Court substituted its judgment for that of the President as to the seriousness of the cessation of production of steel at this time," Whether Truman ever actually delivered that message remains unclear. It was reported, however, that at the conclusion of the dinner, he turned to Justice Black and quipped, "I don't like your law, but this is mighty good bourbon."

When the Founders crafted the masterful Constitution that survives to this day, could they have imagined the drama of the stories I've just told? Could they have anticipated the human dynamics and battles of will that would pepper the centuries to come and change the course of history in such fascinating ways? Perhaps. Certainly, at a minimum, they foresaw that there would be times of crisis-real and perceived, international and domestic, personal and political-and that these times would inevitable put the President in the boundary-pushing role of defining his own powers and the courts in the precarious role of reviewing the President's acts. They knew, because common sense dictates as much, that institutions that are large in power and large in their impact inevitably have run-ins that are large in scale and large in their ultimate consequences. But they also trusted that, in times of trial, their balanced system of government would provide an even larger perspective. They knew that the people of their fledgling nation could be counted on to respect the roles set forth for them. As we face the trials of today, we can find great hope in the dignity with which the presidency and the judiciary have emerged from even the rockiest episodes of the past. No doubt, when this same speech is given 100 years from now, it will be remembered that the tasks before us were large. But I'm confident that it will also be remembered that we, like our forebears, were strong enough to meet them..



LECTURE ON  
JUSTICE LEWIS F. POWELL, JR.

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
April 7, 2006

Griffin B. Bell, FACTL  
Past President, ACTL  
King & Spalding LLP  
Atlanta, Georgia

It is an honor to deliver another in a series of Lewis Powell lectures. He was an early President of the College and, because of his towering accomplishments as a citizen, a lawyer and jurist, the College has chosen to honor him with a series of lectures.

Other lecturers have covered his career generally. One lecturer, Dean John Jeffries of the University of Virginia law school, served as one of his Clerks on the Supreme Court and is his principal biographer. Another was Chief Judge Harvey Wilkinson, Jr. of the Fourth Circuit Court of Appeals, his first Supreme Court Clerk. Honorable William H. Webster, formerly a District and Federal Court Judge and later head of the FBI and the CIA, lectured on Justice Powell's service during World War II as an intelligence officer associated with the code-breaking project, which we came to know as "ULTRA." Judge Richard Arnold, now deceased, a distinguished federal circuit judge and former Chief Judge of the Eighth Circuit Court of Appeals, lectured on Justice Powell's philosophy as it related to *stare decisis*. Justice O'Connor lectured on serving with Lewis Powell on the Supreme Court. And Justice Powell himself gave a lecture on the history of the College.

My lecture, really a story, will focus primarily on two cases, each of which involved the national interest of our country. Justice Powell's unique experiences as a lawyer equipped him for his role in these cases, and our country is the better for those decisions, which I will describe in a moment.

I met Justice Powell shortly after World War II concluded. My deceased wife, Mary, was a native of Richmond and was a friend of Justice Powell. It was through her that I met him. We would visit Richmond from time to time, and a few years later, I had a long trial in Richmond involving a warehouse explosion. In the course of almost two years in preparing for the trial and during the trial itself, I made 29 trips from Atlanta to Richmond, where I saw him quite often. I also knew him from the American Bar Association, where, as you know, he rose through the ranks to be President.

I saw him frequently while I was serving as Attorney General, which was during some of the years while he was on the Supreme Court, and we had dinner together from time to time. He was very interested in the justice system generally and particularly in improving the administration of justice. All of these things one would expect from a past President of this College.

Justice Powell also had a great interest in education, having served for many years on the Richmond, Virginia School Board and then on the Virginia State School Board during the years when the Southern region was accommodating its school systems to the Brown vs. Board of Education and subsequent Supreme Court decisions.

In every sense, Justice Powell was a model of what Virginians think of as a citizen soldier. For example, it is the mission of the Virginia Military Institute to train citizen soldiers. In the case of Justice Powell, he was not only a citizen soldier but a citizen lawyer and a citizen jurist in the highest tradition of his State.

I knew Justice Powell in another way. Almost immediately after I met him, he found out that I was a native of Americus, Georgia and asked if I had known Harry Bowers, also of Americus. It happened that Harry, a lawyer, and I had been close friends since childhood and I knew of his death during the War.

As you know, Justice Powell began his service in the Army Air Force shortly after the beginning of World War II as an intelligence officer assigned to the 319th Bombardment Group. The Bombardment Group was part of the Northwest African Army Air Force. While visiting Powell's Group in North Africa, Major Harry Bowers invited Captain Powell to transfer to the U.S. Twelfth Air Force, a part of the NWAAF, as an intelligence officer under Major General Carl "Tooey" Spaatz. Powell agreed, and he and Major Bowers served together until Powell was recalled to Washington and assigned to the Special Branch of the Military Intelligence Department, which led to his ULTRA assignment, as Judge Webster described in his lecture on Justice Powell. Major Bowers was killed in a plane crash in England and Powell wrote to Bowers' mother about the crash and to report where he was buried.<sup>1</sup>

This story was told to me by Lewis shortly after I met him in the first year after the War. He had only recently returned from Americus, a long trip by train, to visit with Harry's mother. This tells us much about Lewis Powell, the man.

Now to the two cases I have selected to discuss.

The first of these cases, Snepp v. United States,<sup>2</sup> presented the issue whether an agent of the CIA is bound by his agreement not to publish a book based on his experiences in the CIA without getting clearance from the CIA. The other is the Bakke<sup>3</sup> decision. I had a personal involvement in each of these cases.

Snepp, a former employee of the CIA, breached his agreement not to disclose classified information without authorization and not to publish any information relating to the Agency without pre-publication clearance. He published a book about certain Agency activities in Vietnam without submitting his manuscript for pre-publication review. The Director of the CIA asked the Justice Department to bring a suit against Mr. Snepp for the breach. Mr. Snepp had signed the agreement when he accepted employment with the CIA and again as part of his termination upon leaving the Agency.

Specifically, we in the Justice Department sought a declaration that Snepp had breached the contract and an injunction requiring him to submit future writings for pre-publication review, and also sought an order imposing a constructive trust for the government's benefit on all the profits that Snepp might earn or had already earned from publishing the book. The district court

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<sup>1</sup> Jeffries, *Justice Lewis Powell, Jr.*, 1994, pp. 71, 73. *ULTRA and the Army Air Forces in World War II*, Interview with Justice Powell, Air Force History, 1987, p. 13.

<sup>2</sup> Snepp v. United States, 444 U.S. 507 (1980).

<sup>3</sup> Regents v. University of California v. Bakke, 438 U.S. 265, 317 (1978).

found that Snepp had “willfully, deliberately and surreptitiously breached his position of trust with the CIA and the termination secrecy agreement by publishing a book without submitting it to pre-publication review.”<sup>4</sup> The Court also imposed a constructive trust on Snepp’s profits.

The Court of Appeals for the Fourth Circuit upheld the injunction against future violations of the pre-publication obligation.<sup>5</sup> The Court, however, concluded that the record did not support the imposition of a constructive trust on Snepp’s profits given the government’s concession for the purposes of the particular case that Snepp’s books divulged no classified intelligence. The Court concluded that Snepp’s fiduciary obligation extended only to preserving the confidentiality of classified material. Judge Hoffmann, a district judge from the Eastern District of Virginia, sitting by designation, dissented from the refusal to find the constructive trust. He wrote that “this was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA.” Pre-publication was part of Snepp’s undertaking to protect confidences associated with his trust. Snepp filed a petition for certiorari and the government filed a cross petition. In a most unusual procedure, the Supreme Court granted certiorari on both petitions “in order to correct the judgment from which both parties sought relief.” The Supreme Court reinstated the judgment of the District Court in total. This was done in a per curiam opinion which represented the views of six justices, including Justice Powell and was done summarily, which meant without oral argument. Three justices dissented on the grounds that the constructive trust should not have been imposed since no classified information was divulged. The dissenters read the contractual obligation as being no more than an agreement not to disclose classified information, something which was opposite the view of the majority who read the obligation as depriving the CIA of the right to make its own judgment as to whether what was being published was harmful.

The Supreme Court stated that it agreed with the Court of Appeals that the Snepp agreement was “an entirely appropriate” exercise of the CIA Director’s statutory mandate to “protect intelligence sources and methods from unauthorized disclosure.” citing 50 USC § 403(d)(3). The Court said that the government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our Foreign Intelligence Service. The Court further stated that “a former intelligence agent’s publication of unreviewed material relating to intelligence activities can be detrimental to vital national interest even if the published information is unclassified. The Court said that when a former Agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA -- with its broader understanding of what may expose classified information and confidential sources -- could have identified as harmful. In addition to receiving intelligence on domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends on the CIA’s ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents”.

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<sup>4</sup> United States v. Snepp, 456 F.Supp. 176 (EDVA - 1978).

<sup>5</sup> Snepp v. United States, 595 F.2d 926 (CA4 - 1979)



The British distrusted the American security of foreign intelligence and would not allow Americans to participate in ULTRA until May 1943, although they made its product available to American commanders on a careful basis. This distrust was caused in part by a leak from the American Embassy in Cairo by virtue of the Germans deciphering the code used by a military attaché at the Embassy outlining the British operations against the Germans during 1941-42. The British learned of this breach of security and warned the Americans, who then changed the cipher system in June 1942. *The Chicago Tribune*, the *New York Daily News* and the *Washington Times-Herald* published stories about the Battle of Midway, which disclosed that the U.S. had precise information about the composition of the Japanese Strike Force in the Pacific, thereby tipping the enemy that the U.S. had broken the Japanese code, as it had. The Japanese shortly thereafter changed their code and the U.S. lost this advantage for a few months until they could break the new code. This reluctance on the part of the British was a morale factor for the U.S. armed forces, which was partly alleviated when, in 1943, the British relented to the point of training the Powell Group of officers to relay ULTRA information to American commanders.<sup>6</sup>

The Court pointed out that the Court of Appeals' reversal of the constructive trust remedy which had been imposed by the District Court was not proper since trial on remand for punitive damages, as was suggested by the Court of Appeals, would require proof of tortious conduct necessary to sustain an award of punitive damages on retrial, and that might force the government to disclose some of the very confidences that Snepp promised to protect. This trial of a suit before a jury if a defendant so elects, the Court said, might subject the CIA and its officials to probing discovery into the Agency's highly confidential affairs and rarely would the government run this risk. Given such problems in the trial, according to a former CIA Director who testified, the potential damage to the national security would preclude such a prosecution. When the government cannot secure its remedy without unacceptable risk, it has no remedy at all, and the Court went on to hold that a constructive trust with disgorgement of any benefits was the proper remedy. Possibly the reason for the use of the summary disposition in the Snepp case is reflected in this language of protecting foreign intelligence sources and methods from the usual litigation strictures.

The per curiam opinion would mirror the views of someone like Justice Powell, who had long experience with the foreign intelligence, tracing back almost to the beginning when General Donovan convinced President Franklin Roosevelt that we needed a foreign intelligence capacity of our own if we were to enter into World War II. This was the beginning of the OSS, which later became the CIA. As I have stated, Justice Powell was placed in the Special Branch, a select group in the Military Intelligence Department (a forerunner of NSA) of some 30 officers, using and protecting the methods and secrets of ULTRA.

In organizing the Special Branch, Secretary of War Stimson and Assistant Secretary John J. McCloy, both lawyers, decided to assemble lawyers and others who had experience in collecting and analyzing complex factual situations and drawing conclusions from facts. Twenty-eight persons of experience were selected, including lawyers, journalists, an architect and a geologist, among others.

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<sup>6</sup> See *ULTRA and the Army Air Forces in WWII*, Powell Interview, *supra*, pp. 84-85.



Powell continued his interest in foreign intelligence through his work with the national security project of the American Bar Association, in which he was one of the founders and a leader.

In his biography of Justice Powell, John Jeffries does not mention the Snepp case, but I bring it to your attention because I think it speaks well of the maturity and the practical understanding that is required by our Courts in dealing with compelling national interests such as foreign intelligence secrets and the need for the appearance of confidentiality. The majority opinion, considering the implication of First Amendment rights, points out that even in the absence of an agreement, the CIA could have acted to protect substantial government interests by imposing restrictions on employee activity that in other contexts might be protected by the First Amendment.

The role of Justice Powell in the Snepp case also demonstrates the wisdom of placing Justices on the Supreme Court who have worldly experience that leads to an understanding of the practical workings of the law and the government, whether based on the constitution or statutes.

The other decision to be considered is the University of California Regents v. Bakke case, an appeal from a judgment of the Supreme Court of California holding unconstitutional a special admissions or quota system for blacks, Chicanos, Asians and Native Americans to the medical school at UC Davis. The California Court also ordered the admission of Bakke, a white student who brought the suit challenging the special admissions program.

The California Supreme Court applied a strict scrutiny standard to the use of the set-aside and concluded that it was not the least intrusive means of achieving the goal of satisfying the compelling state interest in integrating the medical profession.

I was Attorney General at the time of the Bakke appeal in the U.S. Supreme Court and was a first-hand witness to the great pressures that were visited upon the Justice Department and the Solicitor General's Office seeking to support the set-aside program in an amicus brief. In his biography, Dean Jeffries outlines the pressures in great detail.<sup>7</sup> Many civil rights groups, major universities and the American Bar Association, among others, were supporting the set-aside plan. The Justice Department, after receiving the views of all concerned, concluded that the set-aside program needed to be reconsidered, but did not favor admitting Bakke until that could be done. In other words, the position was to avoid a final decision.

The Supreme Court made short shrift of this position in its final Order. I use "Order" advisedly since there were several opinions, but no opinion of the Court. The opinion of Justice Powell prevailed upon each point for decision since he made the fifth vote in two 5 4 rulings.

I was attending a Foreign Intelligence meeting in the Situation Room at the White House when the President called me about 10:30 a.m. to say that the Supreme Court had just decided the Bakke case, and he wanted me to hold a press conference at the White House for the White

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<sup>7</sup> Jeffries, *supra*, pp. 462-63.

House Press Corps at 1:00 p.m. to explain the decision. I moved with haste to obtain a copy of the decision of the Court. It developed that the several opinions covered 156 pages in the Supreme Court Reports. The opinions, whether for or against the set-aside plan or the admission of Bakke, were controlled by the opinion of Justice Powell, who made the fifth vote on each question.

The Order invalidating the special admissions or “set-aside” program was modified insofar as it prohibited the medical school from taking race into account as a factor in its future admissions decisions. Four of the Justices would have reversed the California Supreme Court’s decision so as to uphold the set-aside program, and four would have affirmed simply on the ground that Title VI of the Civil Rights Act of 1964 was violated. Justice Powell’s opinion, in which four Justices joined, restricts Title VI to those racial classifications that would violate the equal protection clause of the 14th Amendment and thus decided the case on constitutional grounds. His position was ingenious and rests on the idea that race can be considered in an admissions policy if it is one among other considerations in assessing whether to admit a particular student. He referred to the Harvard admissions plan as being a proper use of race. It avoided the use of quota or set-asides and was included as an appendix to the Powell opinion.

The great controversy over affirmative action had been reduced generally by the public to the idea that quotas, as the set-aside was termed, were invalid, but goals were permissible. The solution was to use goals which were the least restrictive needed to provide diversity in the student body. It is sufficient to say that Justice Powell alone fashioned a position that is somewhere in between no affirmative action and quotas, thereby finding a practical solution to one of the substantial governmental problems of his time. So our country owes a great debt to a single Justice on the Supreme Court who fashioned a way out of the quandary which had become quite divisive. I was able to say at the Bakke press conference that “I think the whole country ought to be pleased [with the Powell position and the result],” as quoted in the Jeffries biography, p. 497.

In his biography of Powell, Dean Jeffries states that Justice Powell, after his retirement, said that Bakke was his most important opinion. I agree. Some proof of this is to be found in the progeny of Bakke in the Supreme Court. Two cases involving affirmative action at the University of Michigan, were decided in 2003.

One, Grutter v. Bollinger, upheld a law school admissions program at the Michigan law school. The other, Gratz v. Bollinger, invalidated an admissions program giving 20 points out of 100 automatically to minorities.

In her opinion in Grutter, Justice O’Connor wrote:

We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. . . . The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld

the program against all attack on the ground that the government can use race to “remedy disadvantages cast on minorities by past racial prejudice. . . . Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds [and affirmed the admission of Bakke] . . . . Justice Powell provided a fifth vote not only for invalidating the set-aside program [and admitting Bakke], but also for reversing the state court’s injunction against any use of race whatsoever.

Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies . . . in many universities and colleges in the review of their admissions procedures . . . .”

Justice Powell approved the university’s use of race to further only one interest: “the attainment of a diverse student body. . . .” With the important proviso that “constitutional limitations protecting individual rights may not be disregarded,” Justice Powell grounded his analysis in the academic freedom that “long has been viewed as a special concern of the First Amendment. . . . Justice Powell emphasized that nothing less than the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples. . . . In seeking the “right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university seeks “to achieve a goal that is of paramount importance in the fulfillment of its mission.”. . . Both “tradition and experience lend support to the view that the contribution of diversity is substantial.”

We do not find it necessary to decide whether Justice Powell’s opinion is binding. . . . More importantly, for the reasons set out below, today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”

The test then is whether the admissions policy is sufficiently narrow in scope in meeting the objectives of diversity.

The law school admissions plan was approved. The affirmative action plan for the undergraduate school invalidated in Gratz also followed the Powell opinion.

And so it happened that an opinion by one Justice became, after 25 years, the test used by the entire Supreme Court in such cases.

In conclusion, let me say that there is some parallel between the two Virginians, John Marshall and Lewis Powell. As you know, John Marshall was an officer under General Washington during the Revolution. He was wounded during the Battle of Brandywine while serving with Morgans Raiders. He idolized General Washington and became his leading biographer after our government was formed. He later served as Secretary of State under

President Adams and began to first define the role of the Executive in foreign policy and foreign intelligence.<sup>8</sup> As Chief Justice, he wrote decisions that brought an understanding of and a solution to the tensions over power between the executive and Congress, between Congress and the Supreme Court, between the federal government and the state government, between the executive and the Supreme Court and between the federal government and the governed -- the people.

What Justice Powell was able to do in constitutional law was to build on these great principles. His approach fits well into what Justice Cardoza told us in his book, The Nature of the Judicial Process, that the courts fill the interstices left in statutes by the Congress. Justice Powell filled the interstices in the Constitution, as new and developing problems were presented to the Court.

Justice Powell's career as a lawyer and jurist demonstrates a life devoted to citizenship and patriotism and one that reflects great credit on this College, on the legal profession and on our country. We can only hope that we will see his like again.

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<sup>8</sup> See, e.g., United States v. Curtiss-Wright Export Corporation, 299 U.S. 304 (1936).



POWELL LECTURER GIVES HIS VIEWS ON  
“INTELLIGENCE PAST” AND “INTELLIGENCE PRESENT”

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
March 10, 2007

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Let me plunge into “Inman’s view of intelligence past and intelligence present.”

First, the period of 1946 to 1958: That was a period for forming the intelligence agencies which have performed during these sixty years, creation of the Central Intelligence Agency [and] ultimately the National Security Agency.

The task given them by those who had governed during the World War was: to build encyclopedic knowledge on the entire outside world, every country, every continent, never knowing where the next crisis might come: from the human intelligence side, to focus, to the *clandestine* side, on the best, the most effective efforts of entreating people to spy for the United States for information that could not be obtained by overt observation and a very large and largely effective *overt* human intelligence capability, mostly within the Foreign Service of the United States, people with language ability, understanding the cultures of the countries where they were assigned, to observe, engage, interact, and report what they saw happening in the outside world, and to push the frontiers of *technology*, from the early days of taking photographs from balloons in the Civil War to the modern era of the U2, high-altitude aircraft, the SR71, and then pushing on to lay the groundwork for satellite technology.

But most important, in that era, the early days of the Cold War, some of the brightest people in this country felt the urge to do public service in the intelligence agencies, to ensure that we were not again blind to the dangers that were underlined by Pearl Harbor.

We reached the plateau about 1958. We had created a very large organization, a series of organizations, and encyclopedic knowledge on much of the world. That plateau was maintained for about six years. Then in 1964, as we had moved overtly into the Vietnam conflict, the decision was made that we needed much more daily tactical intelligence to support the conflict. It was not achieved by adding additional resources, but, rather, [by] beginning to give up the base for maintaining the encyclopedias.

First went all in-depth coverage of Latin America in ‘65, Africa in ‘66, Western Europe in ‘67. Added to that was a decision President Johnson took on advice from Treasury that balance of payments was a critical problem we had to do something about it. So he sent a letter to every ambassador saying their most important role was to reduce the official American presence in their country.

Every president repeated that letter until President Reagan, and between 1967 and 1981, we removed forty percent of those overt human observers, political, economic, cultural affairs, commercial attaches, military attaches, and the cover billets for the clandestine services.

We did in that period make some major technology gains: the first satellites to collect imagery and have it returned. It had in this day and age a Rube Goldberg aspect. Satellites would be launched, circle in lower orbit, take pictures, and then, when the first so-called “bucket” had been completed out over the North Pacific, it would be expelled from the satellite, and an aircraft flying would attempt to grapple the parachute as it floated down. The bottom of the North Pacific is still littered with buckets that were not caught, so we’re not sure of what all we missed in that time frame.

Later in the '70s, technology enabled direct relay, relay satellites, electro-optical coverage, so we had the ability always in fair weather and daylight, and then eventually sometimes in poor weather and nighttime, to get images of what was going on around the face of the globe, but the loss of talent from '65 to '81 was extraordinarily difficult to overcome.

President Reagan arrived with some understanding of this and with the instruction to rebuild. I got the challenge of putting together a five-year program for going about rebuilding and found that the support structure, the infrastructure had been drawn down so much that there were limits of how many people you could train even if you could recruit talent.

But there was a different challenge. This is the era that follows Watergate and the Church and Pike Committees [Congressional committees that investigated alleged misuse of domestic intelligence gathering]. The same level of talent that had flowed in the '50s and '60s simply wasn't interested in coming to do public service in the military, or particularly in the intelligence agencies, and I think from hindsight that a lot of people came on board who were, with the best motivation, civil servants without the cutting edge that we critically needed.

That only lasted, that rebuilding, for four years. The intelligence budget has always been hidden within the Department of Defense, and as the defense budget goes up, there's breathing room, and when it comes down, the intelligence budget is cramped along with the rest. Many people don't realize the actual peak of rebuilding in the Reagan years was 1985, and then it started down, accelerated by the end of the Cold War.

The period from 1993 to 2001 is marked by an accelerating period of reduction of resources, but also one very significant change. Up to that time frame we had still maintained the view that the intelligence world should be focused on what was going on twenty-four hours a day, seven days a week. A different standard was created. The Cold War was over. "We don't need to do that. Eight hours a day, five days a week is fine."

My favorite story from that era comes late in the period. Bright, young photo interpreter at the National Geospatial Agency had gone camping over the weekend, came back late Sunday night, got a few hours sleep, went in early Monday morning, looked at the imagery that had been relayed down from satellites over the weekend and said, "Oh, India's getting ready to do a nuclear test."—which they had done Sunday afternoon. You get what you pay for.

World Trade Center: First bombing occurred in 1993. Some resources were reshuffled to worry about terrorism, but I can find no evidence, either from the Executive Branch or Congress, of any significant addition of resources. A greater problem became the leaking of secrets in ways that reveal how the information was collected. One of the most damaging occurred in 1998. Cruise missiles had been fired into Afghanistan and Sudan after the attacks on the U.S. embassies in Nairobi and Dar es Salaam. When asked by the media, a very senior member of the Administration responded when asked, "Well, how do we know Al-Qaeda was involved?" His response, broadcast around the world by the reporters, was that we knew because we were listening to their communications, and within a week, all those communications had disappeared.



In December, December the 10th, 2001, there was palpable excitement in Washington. Bin Laden had been cornered at Tora Bora and would be bagged that night. A journalist asked, and I still don't know who he asked, "How do we know he's there?" And the response, again broadcast around the world, was, "Well, we heard his voice." His voice has never been heard again in communications.

9/11, Afghanistan, Iraq, North Korea, and Iran, all of these have prompted a major surge of investment in the intelligence community, but on a base of an infrastructure that had again been drawn down dramatically. The good news is that the flow of applications from extraordinarily bright youngsters who want to be part of this is very reminiscent of the 1950s. My worry as I talk to some bright youngsters who I know, who I have encouraged to go that path, is they're very excited by the work, but as they encounter that upper middle management bureaucracy, they get discouraged. So they still have a challenge.

The answer was "reorganize." I'm on record. I testified before the Brown Commission in January 1996, my former old boss, Secretary of Defense Harold Brown, and I proposed radical surgery:

- Create a Director of National Intelligence;
- Dismember CIA as it existed;
- Create an Intelligence Operations Agency to compose all the clandestine human intelligence collection and non-lethal covert operations; anything paramilitary, moved to Special Forces in the Department of Defense;
- To put together all the analytical elements in one organization with a focus on geographic breadth and quality, and to separate them from collectors, so that they are not under pressure to make the collectors look good in reaching their judgments;
- On the counter-intelligence side, to separate the FBI into the element comparable to Scotland Yard, which would support the criminal judicial system, a critical part of our judicial system and on the counter-intelligence side to mirror MI-5. I simply believe the British are far more effective in dealing with the problems with the manpower applied.

As you can see, I offended just about everybody with my proposals. Dr. Brown figuratively patted me on the head and said, "Those are interesting ideas, but we're going to do evolution, not revolution." Well, in 2003, they moved to revolution, but with limits, created the Director of National Intelligence, did not alter the agencies, did not bring together the clandestine collection activities.

But most importantly, the one I left out: I had argued in 1996 the need to rebuild the Foreign Service, the need to dramatically increase the overt human observers. That was our greatest failing, not clandestine human intelligence, but the overt side. When 2001 occurred, I wrote an Op-Ed about that, and I'll come back to it later. It remains the great shortfall that we have not yet moved to rebuild our overt human intelligence capabilities.

Will this new process work? I apply the same rule here as I also think about the Department of Homeland Security, and that's why I look back at history: Department of Defense was created in 1947, National Security Act, separate Air Force. Even with the relative

coherence of the Army and the Navy and the Marine Corps, when the Korean War came in June of 1950, the Department of Defense was absolutely unprepared to deal with it. And it continued to stumble until President Truman persuaded General Marshall, who had already served as Secretary of State, to go take over the Defense Department. Finally by 1952 it was working effectively—five years.

Let me turn last—and I realize I'm running overtime—to intelligence and the rule of law. I have lived as a young Director of Naval Intelligence through the Church and Pike period of investigation, and, as I found myself about to assume the duties as the Director of National Security Agency on the 5th of July 1977, one of the major challenges was to try to restore confidence both within NSA and with the public about its mission. Indeed, as I went around the country, what I found an inevitable question was, “Is NSA spying on us?”—the concern that the government was using these great assets to spy on its citizens.

So I concluded, while I had enjoyed enormously the absence of any publicity for my public service to that time, that it was necessary to speak out. I was encouraged in doing that by four very important people who had served during World War II in this field: Justice Powell, Justice John Paul Stevens, who had been in the Naval Security Group, Lloyd Cutler, who had served, was then serving, as Counsel to President Carter, and by the Journalist Joe Kraft, who had served as an eighteen year-old in the Army Security Agency. And they all four generously over time gave me advice and encouragement to try to find a way to help the public understand the criticality of these missions but that we were not spying on U.S. citizens.

And this brought me to a critical problem that came very early: Presidential warrants for collection of foreign intelligence within the United States. I had been the Director only a few days when a stack of papers arrived on my desk for me to sign, going down for President Ford, I'm sorry, for President Carter to sign the new warrants; ones last signed by President Ford were about to expire. It was explained that the telecommunications agencies required these to cooperate with the government. They wanted to make sure they were covered, so I sent them forward.

And the instant reaction from the White House staff was this was an effort to trap President Carter, to have something to blackmail him with, like Mr. Hoover allegedly had done with past Presidents. I was infuriated, recalled them, and said, “When the warrants expire drop the coverage.” And six weeks went by. And we did indeed do that, and suddenly I began to get calls: “Where's the coverage on X country? That's very important stuff.” And my response was, “No warrant, no coverage.” And I was encouraged, “Well get them down there quickly and they'll be signed and you can resume coverage.”

But I concluded there had to be a better way, so I went to see Senators Joe Biden and Warren Rudman and went to my wise counselors in the judicial system, and out of those dialogues came the Foreign Intelligence Surveillance Act and the FISA Court. I was persuaded, and I remain persuaded, that it's possible for the intelligence agencies to do what needs to be done for the national security of this country within the law, but you have to work to make sure the laws are up to date and provide you the coverage you need.

There was a big debate when that came up about whether this was going to unnecessarily impact on the inherent powers of the President as Commander in Chief. And here, notwithstanding a push from the White House, Judge [Griffin] Bell [the then Attorney General] gave strong support, and the bill was enacted.

I have looked at the period after 9/11, when President Bush immediately directed the National Security Agency to see, “Are there any other potential hijackers here?” and when, on the precedent of the previous thirty years, he gave the warrant authorizing that activity. I have no quarrel with that action as a proper response to crisis, because in constructing the FISA Court, I didn't have the imagination to think of a world where people would hijack aircraft in this country after weeks, months, of planning, training, traveling, and use them as missiles to fly into buildings. There was no provision for crises.

But I have a lot of problems with not moving to modify the FISA Laws to be able to deal with crisis situations with the experience of 9/11. The Vice-President has a very strongly different view. He believes that the Court was an unnecessary distraction from the inherent powers of the presidency. I don't want to get into the debate about the powers of the President. I'm not a lawyer, but I remain persuaded that when the intelligence agencies have clear laws and the process for either congressional or judicial review, they perform better and the interests of the country are well-served.

Finally, in closing, why am I doing this important lecture extemporaneously instead of from a text? In October 2001, I wrote an Op-Ed about the failings shown by 9/11 in our human intelligence capabilities, and I recommended a major effort to rebuild the overt human intelligence capabilities in the Foreign Service.

I got two responses: From the Secretary of State, through one of his senior officials, that that was much too big a challenge. They couldn't possibly undertake it.

And I got a letter from the General Counsel of the Central Intelligence Agency telling me that because I had once served there, I should have submitted my editorial to CIA for prior review. I refused to do that as a matter of conscience, and that's why today you get an extemporaneous Lewis Powell speech.

Thank you.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
March 8, 2008

Honorable William J. Haynes II  
General Counsel  
Department of Defense  
Washington, District of Columbia

If you will allow me to reminisce just a bit, in September of 2005, I was sitting in a window seat on a commercial flight from Madrid to Philadelphia. It was mid-afternoon on a Tuesday. The plane was high above the clouds in the sunshine, halfway across the Atlantic. I was returning from a long trip to Europe. It was typically frenetic: six countries in five days, visit after visit with politicians and businessmen, diplomats and soldiers. I was tired, but marveling at what a great job I had. It is like being chief legal officer of a medium-size country. Any conceivable legal issue conjured up by the Department's more than 10,000 military and civilian lawyers could end up in my lap.

I remember my head buzzing with those responsibilities as I began to doze, and then it hit me with a jolt: I knew this flight. It was the same flight that we had tracked four years earlier on September 11th, 2001, another Tuesday. You know the story: Nineteen hijackers on four planes murdered almost 3,000 innocent people in an atrocity unlike any in American history. What you may not remember as well is that on that day our department tracked two international flights, one over the Pacific and this one over the Atlantic, suspecting that they too were hijacked and heading toward an American skyline. And we steeled and readied ourselves to shoot them down.

All of us remember where we were on that day. I was in my office on the phone with my wife, telling her to turn on the TV, when I saw the second plane hit the second tower. I raced down to one of the Pentagon command centers with some others to help set up a crisis action cell. And as the American Airlines plane hit our building on the other side, I felt only a shudder pulse of the monstrous concrete building, and then it was like I was in a movie playing in fast-forward: smoke and confusion, multiple conversations between the President and the Secretary, sending my own deputy off with the Deputy Secretary of Defense to a survival site in the event that another plane came at our side of the building, hearing situation reports about dead and wounded in the Pentagon courtyard.

I spent nineteen hours in the Pentagon that day, mostly at the elbow of then Secretary of Defense Don Rumsfeld and then Joint Chief General Dick Myers. Most of the time I was in two of the Pentagon command centers, reacting and contemplating possibilities I had never expected to face. These scenarios had nothing to do with corporate transactions, environmental clean-ups, government contracts, class action litigation or any of the other issues that had been on my mind when I first took the job nearly four months earlier.

That day, we considered whether to shoot civilian airliners from the sky, and we wondered what would come next. Were there more terrorists on the ground in American cities? Did they have suitcases nukes? After New York and D.C., were Chicago, Atlanta or Los Angeles next? The legal questions were legion: What were the rules of engagement? How do the 4th and 5th Amendments apply to a decision to shoot down an American airliner en route to a U.S. city? Should any enemies that we might capture be treated as criminal suspects or enemy combatants?

Smoke lingered in the Pentagon for days. We could not totally extinguish the fires for a while, because the water itself threatened to shut down the electrical information systems of the building.

But as the smoke dissipated, some things soon became clearer. We were attacked by a non-state organization known as Al Qaeda, and the President decided that we would fight this enemy with all national power, including our armed forces. We were at war. At the time, this was widely accepted. In those weeks following 9/11, both the United Nations and NATO concluded that we had suffered an armed attack, thereby invoking the UN Charter and the NATO Charter provisions for collective military action.

The Congress on September 18th, 2001, passed a breathtakingly broad authorization for use of military force. The decision to go to war also followed recent precedent. President Clinton had ordered cruise missile strikes against Al Qaeda in response to the 1998 bombings of U.S. Embassies in Kenya and Tanzania, also by Al Qaeda. But going to war had many legal consequences. It meant we could attack Al Qaeda with deadly force. It meant we could detain captured fighters for the duration of hostilities. It meant we could ask questions without reading *Miranda* warnings. It meant we could seek to intercept their communications to learn their intentions and foil their future plots. It meant we could use military commissions to try them for war crimes.

I was invited and tempted to give a detailed defense of these matters here today. Bob Fiske told me this group has heard many speakers over the past years criticizing the government's legal practices and that you would give me a fair hearing in rebuttal. I'm confident that that's true. But there are so many questions and there are so many better expositions, that in the time we have, I don't think that was a good course to take.

On Monday, I am leaving my job after almost seven years, so rather than justify, or attempt to justify, the actions that we have come up with, I would like to invite you to look with me to the future, as this national and global dialogue continues.

As you all are incredibly important opinion leaders, and as our democracy considers these new legal policies, I ask you to consider three questions, important to all Americans, and maybe especially important to those of us in the legal profession. One: With the law as it is developing, can we fight and win wars? Number two: Can we preserve the systems that we hold most dear? And number three: When the next big attack comes, will we be able to live within the law in responding to it?

The first: How does the law affect how we fight and win wars? An obvious approach to this question is to think about the rules we place on government. In the aftermath of 9/11, we have seen reforms in this mode. We have removed the so-called wall between law enforcement and intelligence. We created a Department of Homeland Security. We created the office of the Director of National Intelligence. These legal reforms have been aimed at restructuring government to be more effective.

I encourage you, however, to consider the law's impact on national security from other perspectives beyond just the rules that we place on government. Think about how the law sets incentives and disincentives for others besides the government. What incentives does the law set for our enemies? In a way, the threat that Al Qaeda poses makes the application of the Law

of War to this conflict unprecedented. On the other hand, the bedrock documents underlying the Law of War, the Geneva Conventions, had this kind of conflict squarely in mind in some sense. They were consciously written with the purpose encouraging combatants to follow certain basic rules, to place bounds on inherently violent and barbaric conduct, war.

The heart of this effort is to separate fighters from civilians. If the two are separated, civilian populations will be spared killing and destruction. So the Law of War requires combatants to distinguish themselves from civilians and distinguish those whom they target, usually by wearing a uniform and carrying their arms openly. So the Law of War attempts to encourage everyone to follow these rules through incentives. People who follow the rules receive a privileged status. Lawful fighters get combatant immunity. Although they may kill and be killed on the battlefield, once removed from the fight, they may not be prosecuted for lawfully fighting.

Lawful fighters if captured also get a special status called “prisoner of war.” This status comes with many privileges: access to athletic uniforms, musical instruments, access to a canteen where one can purchase tobacco and sundries, the right to whatever justice system the enemy uses to try its own troops. Now, Al Qaeda’s reason for being, its method of operation, strikes at the core of the Law of War. Al Qaeda does not want to be distinguished from civilians that surround them. The September 11th hijackers did not wear uniforms or carry their arms openly. They posed as businessmen and students. They did not distinguish their victims. They attacked civilian aircraft and used those aircraft to attack civilian targets.

Should we afford prisoner of war status to Al Qaeda fighters, notwithstanding their conduct? Amplifying that, should they get more procedural rights than even prisoners of war? Here I invite you to think about the incentives going forward. If one gives more protections and privileges to these unlawful combatants, then we may be stripping away any legal incentives for people to fight according to the rules. Countries and groups will have strategic incentives to enjoy the benefits of clandestine warfare without bearing any of the consequences for doing so. We encourage countries and groups to develop whole corps of unlawful fighters and ultimately perhaps increase the savagery of future conflicts.

Now, this new series of rights affects the incentives of those on the front line, combating terrorist organizations too. In fighting, our military personnel may be buying a long series of civilian judicial proceedings, trials and accusations, and the prospect that our opponents will be released before the end of the war. These were never prospects that military personnel faced in prior conflicts. One must ask what will the effect of this new web of legal requirements have on battlefield decision-making in the future?

And consider this, we have hundreds of *habeas corpus* cases for persons the United States holds at Guantanamo Bay, Cuba, and I’m concerned about the impact these cases might have on the incentives provided by the Law of War. During World War II, the United States detained more than 400,000 German and Italian prisoners of war in camps sprinkled around the United States. Many of them were American citizens. Zero had successful *habeas corpus* prosecutions. There are literally less than a handful of reported decisions. Now, today, we have



fewer than 300 people that we consider to be unlawful enemy combatants outside the United States in Cuba, two hundred forty six *habeas corpus* cases go with them. These cases are in addition to the administrative processes that the Executive Branch has developed on its own to review the detention of them, and those administrative processes have been endorsed by the Congress.

The legal process afforded to these detainees far exceeds anything that German or Italian soldiers enjoyed at any time in their captivity within our borders, and more than any prisoner of war is entitled to in a conventional war.

But consider the state beyond Cuba. Coalition forces hold tens of thousands of detainees in Iraq and over a thousand in Afghanistan. If the detainees in Cuba receive these rights, should those detainees in Iraq and Afghanistan also receive them? Instead of hundreds, why not tens of thousands of cases in our courts about those detained in combat with the United States?

I would say that this is an incentive to violate the Law of War. As some have said, what's in it for any foe of the United States to abide by those rules if one gets better treatment upon capture by violating them?

We go to another example where it's important to consider the incentives that the law creates for national security, and that's FISA, the Foreign Surveillance Intelligence Act. The statute, as you all know, was written in 1978, and it has got to be updated to accommodate the remarkable advances of communication technology since then. That is one challenge before the Congress now.

But another issue of FISA reform is whether private companies can be sued for cooperating with government request for information on suspected Al Qaeda operatives. When it comes to private corporations, even the prospect of liability, the very existence of litigation, may be enough to cause them to turn the government down. Allowing private lawsuits to go forward is a consequence of the political branches' not making tough policy decisions. They deprive our political process of a real chance to consider what surveillance of enemies should be permitted and what should be the balance with the liberties that we all treasure so highly.

The prospect of litigation against individuals, our troops and government officials, also affects the decisions that we make. When it comes to foreign lawsuits, the prospect of an adverse reaction, not by our executive branch, by our Congress or by our courts, but by a foreign tribunal, is affecting the decisions of military personnel and civilian leaders. For example, in April of 2003 in Baghdad, a U.S. tank under enemy fire, in active combat, returned fire and killed a Spanish cameraman covering the event. More than four years later and thousands of miles away, a Spanish judge indicted three U.S. soldiers for violating a Spanish law.

Another case, March 2005: soldiers at a U.S. checkpoint in Iraq killed an Italian intelligence agent after his speeding vehicle ignored multiple warnings and tried to run the checkpoint. Almost two years later, an Italian judge indicted a U.S. soldier on homicide charges. In Great Britain, U.S. Air Force pilots involved in tragic friendly fire incidents, and by that I

mean accidental deaths of Allied soldiers in combat, are the subject of multiple county coroner inquests that have accused our pilots of negligent homicide.

In each one of these cases, each one of them, the criminal investigative elements of the Defense Department, and in some cases, the British Defense Establishment investigated the events and concluded that no administrative or judicial action was warranted. So litigation and changing laws are dramatically affecting the conduct of warfare.

I express no value judgment about that at this point. I'm leaving this job. But it is something I invite you all as opinion leaders and as leaders of the legal profession to consider as the country wrestles with these difficult questions going forward.

Now, the second question I posed is: Can we preserve the American legal system? We have a remarkable criminal justice system. It's adversarial. It seeks to restrain government power and to preserve space for individual freedoms, and it's the most solicitous of individual rights of any in the world. Our criminal law system is remarkable in many ways, but one of them is because of how much it is not focused on putting criminals behind bars. It is a system where it's more important that innocents be found innocent, than that the guilty be punished. Therefore, the standard of proof is very high: beyond a reasonable doubt.

As Blackstone formulated, "Better that ten guilty persons escape than that one innocent suffer." It is a system where it is more important to keep the government playing by the rules than to punish the guilty. We have the exclusionary rule where, as Judge Cardozo put it, "the criminal is to go free because the constable has blundered."

Now, how would we adapt this gold standard of criminal law to deal with Al Qaeda and its likes? Is it better that ten Al Qaeda operatives escape than that one be wrongly detained? Should Al Qaeda members go free if the government blunders? And even if the government doesn't blunder, if the elements of proof are different in a combat situation, should that result in freedom for the Al Qaeda? Many might answer "yes." And there are good reasons to do so. Frankly, I think that any criminal process has got to have that set of procedural protections, because that's what we Americans prize most.

But I invite you to remember what only nineteen people were able to do nearly seven years ago. Some believe that doctrinaire logic of this type, applied without reflection, may be unwise in the future. It could, as Justice Robert Jackson once warned, convert the constitutional Bill of Rights into a suicide pact. Indeed, nearly all who have seriously considered the question view prosecution in the U.S. federal courts under rules currently in place as a viable option for only a handful of the Al Qaeda members that we have detained.

Now, adapting our criminal justice system to a 9/11-type terrorist threat could entail a compromise between our long tradition of individual rights and the new public need for thwarting mass murder and destruction. Academics and pundits have proposed such compromises. Special terrorism courts, for example, might detain individuals for long periods of time in spite of reasonable doubts. They might overlook blunders by constables, if those

blunders found credible evidence. And they might consider secret evidence. But I ask, do we want to introduce those qualifications into our gold standard criminal justice system?

Consider Justice Jackson's dissent in the World War II case of *Korematsu v. United States*. There he argued that the Court should abstain from judging the military's claim that it was necessary to exclude Korematsu from the West Coast on the basis of his race. Justice Jackson thought that judges should not review claims of military necessity because doing so would import unwarranted doctrines into our jurisprudence. Once a practice of racial discrimination is imported and validated by a judge, then it, as Justice Jackson said, "[L]ies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes." Justice Jackson went on to contrast the ephemeral nature of military orders with the enduring works of the court. He said, "A military commander may overstep bounds of constitutionality and it is an incident, but if we review and approve, that passing incident becomes a doctrine of the Constitution. There, it has generative power of its own, and all that it creates will be in its own image."

Now, I mention these things not to justify either *Korematsu* or any adverse modification of our criminal justice system. I pose the question merely: Should we be so fast to merge the two systems, the Law of War and the criminal justice system of the United States? If we choose to do that, we must take care that we do not endanger our long-held principles and values. Once we add special relaxed procedures in the criminal justice system, can we keep those procedures confined to the hardest cases? How will we prevent those who follow from using those as convenient ways to bypass the rigors of the system at large?

The third question I pose is: Can we preserve our adherence to the Rule of Law? Today the threat of terrorism seems distant to many Americans. Polls show that people are more concerned with the economy and health care than with terrorism. And for many of the military and civilian personnel in government, this is our proudest achievement. By preventing attacks, the government has returned to the people a sense of safety. But as we continue to refine the laws, we should not just assume today's sense of security and safety. We should also ask ourselves how people will think, feel and act when the next attack comes. And it will come. We can be sure that when the next attack comes, the American people will rally to the government and demand that it take action to protect the nation.

Now, writing the laws today, how do we write them so that the government has enough flexibility to deal with tomorrow's crises? And what if we err? What if a future government is put in the position where he or she must choose between following the law and doing what he or she believes is necessary to protect the nation? This is an awful choice. The Founding Fathers recognized this when drafting the Constitution. I quote from Madison in *Federalist* 41, "It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain, because it plants in the Constitution itself unnecessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions." We must be careful that the country can act lawfully in self-defense.

Now, in closing, I've shared with you some of my perspectives on law and national security. In a word, my perspective is conservative. I mean that literally. There's so much in our country worth preserving, worth conserving, worth protecting: the lives of our citizens, the liberties we enjoy, our legal traditions, our belief in government under law. As enemies threaten us, as the world changes, how do we best preserve all of that?

My first job out of law school was as a law clerk to Judge James B. McMillan in the Western District of North Carolina. I learned a lot from Judge McMillan, including some favorite phrases: "Never attribute to malice that which can be attributed to stupidity," being one. Another, "Your job as my law clerk is to keep me from making unintended error." But important for this talk today, he said, "Government has no rights, only responsibilities." And I have always carried this lesson with me whenever I have been in government. The awesome powers of the government exist only to fulfill its responsibilities to the people. Throughout my time as General Counsel to the Department, I have viewed the actions, not so much as exercises of lawful executive power or governmental rights, but as an appropriate discharge of the difficult executive responsibility.

The Constitution confers upon the President the ultimate responsibility of ensuring that the American people are safe and secure, especially in wartime, and the Constitution gives the President the power to fulfill that responsibility. Exercising this responsibility is discharging the most basic of all presidential duties.

Now, of course, other branches have constitutional duties as well, and we have seen the dialogue between the Congress and the courts and the President on these national security issues. This dialogue is how our Constitution is supposed to work.

Without presuming to speak for anyone other than myself, let me speculate a bit in closing. I think and hope that history will be kinder to the decisions this administration has made than many current accounts might indicate. This country has not, and I knock on wood as I say this, suffered another devastating domestic attack from Al Qaeda since 9/11. And most of the stories told thus far have been by outside critics, people who do not know the whole story. I am reminded of the late 1940s and early '50s. It took all of those years transitioning from World War II to a steady state, including a change in presidencies and parties, before the country as a whole adopted the containment strategy that ultimately forty years later toppled the Soviet Union.

Quite consciously, the Administration, I can say in particular [Secretary of Defense] Bob Gates, has been working in a similar vein over the last year and in this year to work to bridge the gap between the executive and the legislature, between the parties, to suck some of the poison out of the discussions, to establish common approaches to a threat that is a long-term threat. And I hope we have seen some of the fruits of that labor in recent times and hopefully over the next few years. I believe our challenge as citizens now is to find ways to deal with this deadly and likely enduring threat, that we can agree to sustain, over time and across party lines, ways that protect the ability of our country to win wars, to protect our systems and to abide by the law.

How we manage to live in a long period under threat, even when we are fighting people somewhere between criminals and combatants, when we are in a state somewhere between war and peace, what will be the balance between security and liberty? Again, Justice Jackson, speaking in 1951 at the beginning of the Cold War, offered his thoughts on wartime security and liberty under law. After discussing our constitutional history, including arguments between President Lincoln and Chief Justice Taney, Justice Jackson concluded with the following, “The problem of liberty and authority ahead are slight in comparison with those of the 1770s and 1860s. We shall blunder and dispute and decide and overrule decisions, and the common sense of the American people will preserve us from all extremes which would destroy our heritage.”

At first, this seems almost cliché. Common sense? Surely the great expositor of the *Steel Seizure* case had something more satisfying to say. But I think what Justice Jackson meant was this: The logic of liberty and the logic of security, if blindly followed without the other, each leads to the impracticable regimes. Carried to its extreme, the logic of liberty is a suicide pact. Carried to the other extreme, the logic of security is a government which can bend every law with a claim of urgent necessity, a government by fiat, not by law. Between those two extremes, we must chart a middle course, since ideology and dogmatic logic lead us to crash at either end, and I suppose we must rely on common sense to point the way.

As I leave government, as you all take up these challenges, may it guide you as well.

Thanks very much.



JUSTICE STEVENS RECALLS COURT DECISIONS AND  
MEMORIES OF FRIEND AND COLLEAGUE, LEWIS F. POWELL, JR.

LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 21, 2011

Justice John Paul Stevens (ret.)  
Supreme Court of the United States  
Washington, D.C.

Thank you very much. Justice Kagan, President-Elect Tongue, President Joseph. I have very brief remarks about my former colleague, whom we all honor this morning. Lewis Powell was a great admirer of Byron White. Byron White's heroism aboard a Navy carrier during World War II. It was Lewis who first told me how Byron had saved the lives of two sailors during a Japanese kamikaze attack on an aircraft carrier, because Byron seldom talked about his own exploits, either during the war or during his athletic career.

After he became a Justice, Byron was the man who most frequently commented on the fact that every new appointment to the Court creates a new Court with different dynamics from its predecessor. Instead of discussing the distinguished career of Justice Powell in depth this morning, I shall just compare three of his opinions with three court opinions announced shortly after his resignation to illustrate the points that Byron so often made.

In his 1986 partial dissent from the Court's 5-4 decision in *Dow Chemical against the United States*, Justice Powell argued that taking aerial photographs of the company's industrial complex in Midland, Michigan, from an altitude of 12,000 feet was an unconstitutional search.

I did not agree with Justice Powell in that case, but I'm sure he would have joined the dissent, as I did, in the 1989 5-4 decision in *Florida against Riley*, when the majority of the newly constituted court, including Justice Powell's successor, decided that the surveillance of a residential backyard from a helicopter at an altitude of 400 feet was not unconstitutional.

In 1987, Justice Powell wrote the majority opinion in *Booth against Maryland*, holding that victim-impact evidence is inadmissible in a capital sentencing proceeding because it has no relevance to a defendant's personal responsibility or moral guilt. The opinion represented a straightforward application of the reasoning in the joint opinion that Justice Powell, Justice Stewart, and I had authored a decade earlier, in which we concluded that the death penalty was constitutional as long as capital sentencing procedures avoided the risk that it would be imposed arbitrarily or capriciously – akin to the risk of being struck by lightning. After Justice Powell resigned, the Court overruled *Booth and Payne against Tennessee* by allowing emotionally fraught testimony concerning only the victim, not the defendant or his guilt, to influence the jury's death-sentencing decision. The *Payne* majority opinion essentially rejected the basic concern of our earlier joint opinion that the penalty must not be imposed on the basis of emotion or caprice.

In *Solem against Helm* in 1983, Justice Powell wrote the majority opinion holding that a life sentence without the possibility of parole was cruel and unusual punishment for the crime of uttering a no-account check for \$100 committed by an offender who was previously convicted of six nonviolent felonies, all of which, according to the Court of Appeals, had occurred while he was under the influence of alcohol. Based on his *Solem* opinion, I feel quite sure that Justice Powell would have disagreed with his successor's opinion in *Harman against Michigan*. Harman, a first-time offender, was convicted of possession of over 650 grams of a mixture containing cocaine. As a cloistered appellate judge, I have never seen cocaine myself, but I understand that the quantity actually possessed by Harman, 672 grams, or a little more than a pound and a half, could have been carried in a brown paper bag or concealed in a glove



compartment. Pursuant to Michigan law, he received a mandatory sentence of life imprisonment without the possibility of parole. Under the statute, the same sentence would have been imposed regardless of whether he was a kingpin in a major drug cartel or merely a part-time messenger hired to make a delivery. The question presented to the Court was whether that sentence constituted cruel and unusual punishment within the meaning of the Federal Constitution. The Court held that it did not. Had Justice Powell participated in that case, I believe he would have concluded otherwise.

Lewis Powell was a wise man, my neighbor on the bench during our joint service and a good friend. It is an honor to participate in an event that reminds us of his career as a great lawyer.

Thank you.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 19, 2012

Robert F. Mueller, III, FACTL  
Director of the  
Federal Bureau of Investigation  
Washington, District of Columbia.

Justice Powell took a keen interest in the FBI and in law enforcement in general. Before his appointment to the court, he often wrote and spoke publicly about the rising crime rates in this country. We in the FBI were most fortunate that he seemed to approve of our efforts to address crime. And when Justice Powell died in 1998, our nation lost a devoted advocate for the rule of law.

Today I would like to take a few moments to talk about the FBI's transformation in the years since September 11 and what we are doing to propel the FBI into its next era. But I would like to discuss all of this within the context of the rule of law, for every facet of our mission, the FBI's mission, must be viewed through this prism.

For Justice Powell, preserving the rule of law was paramount to his decision-making. Powell's thoughts are embodied by language he proposed in an early draft of the Court's landmark 1974 decision in *United States v. Nixon*. Powell wrote,

*We are a nation governed by the rule of law. Nowhere is our commitment to this principle more profound than in the enforcement of the criminal law, the twofold aim of which is that guilt shall not escape or innocence suffer.*

While his words ultimately were not included in the final opinion, their importance cannot be overstated. We are indeed a nation governed by rule of law. It is a hallmark of our democracy, and our commitment to this ideal must never, ever waver.

We in the FBI face significant and evolving terrorist and criminal threats. Regardless of the threats we face or the changes we make, we must act within the confines of the Constitution and the rule of the law -- every day and in every one of our investigations.

Bob [Robert B. Fiske, Jr., Past President, in his introduction of Director Mueller] alluded to some of the changes in the Bureau since September 11. When I took office in September of 2001, I expected to focus on areas familiar to me as a prosecutor - drug cases, white-collar criminal cases, violent crimes, homicides. But days later, the attacks of September 11 changed the course of the Bureau. National security—that is, preventing terrorist attacks—became our top priority. We shifted 2,000 of the then-5,000 agents in our criminal programs to national security. We dramatically increased the number of Joint Terrorist Task Forces with state, local, and other federal agencies. We increased them dramatically across the country.

We also understood that we had to focus on long-term strategic change as well, enhancing our intelligence capabilities and updating our technology. We had to build upon strong partnerships and forge new friendships both here at home and abroad. And at the same time, we had to maintain our efforts against traditional criminal threats, which we have done. We had to do all of this while respecting the rule of law and the safeguards guaranteed by the Constitution.

Today, the FBI is a threat-focused, intelligence-driven organization. Of course there have been challenges along the way. Looking back on the past decade, I recognize that I have learned

some hard lessons on how to lead an organization at a time of transition. One such lesson relates to the need to delegate.

I was a Marine, and I went to Officer Candidate School where they evaluate you. Initially they evaluate you physically, your ability to do ten-mile runs and pushups and the like, as well as academically, and I did okay in those areas.

But there was another category on that evaluation form that they called “delegation,” in which I got an F. I complained to the training sergeant. I said, “What is this delegation business and why are you evaluating me on it?” And I quickly learned the answer to that. It was absolutely an essential component of being an officer, and it is an essential component of running any organization. To whom you delegate and how you delegate is as important as anything else. I have learned some lessons better than others. Some people will tell you I’m still not very good at delegating, and they are the individuals who are currently being micromanaged by me.

The management books write that as the head of an organization, you should focus on the vision. You should be on the balcony and not on the dance floor. While this generally may be true, for me there were and are today those areas where one needs to be substantially and personally involved.

First, there was the terrorist threat and the need to know and understand that threat to its roots; and second, there is the need to ensure and shepherd the transformation of the Bureau’s technology. And unfortunately, the management books offered no “how-to” in either of these categories, despite the fact that you receive a fair amount of on-the-job education.

Another hard lesson to learn, particularly difficult in Washington, is the need to understand your place and the need for humility. Several years ago I had a rather salty chief of staff, an old friend by the name of Lee Rawls, who has since passed away, who was a naturally humble individual. He knew how to cut through nonsense and get to the heart of the matter better than anyone I knew. He also knew how to put me in my place. He became my chief of staff. And more than once, when I began to micromanage a situation, he would politely push me to the side, and say, “Don’t listen to him. He thinks he’s the Director of the FBI, but we can take care of this.”

I recall one particularly heated meeting where everyone was frustrated, most of them were frustrated with me, and if I were fair, I would tell you that I was a wee bit ill-tempered. Lee sat silently by and then said out of the blue, “What is the difference between the Director of the FBI and a four-year-old child?” The room grew hushed, everybody awaiting the answer. And finally, he said, “Height.” You need a Lee Rawls all the time.

Despite these leadership challenges and a few more substantive obstacles along the way, we have made strides over the past ten years. Together, with our state and local partners, we have thwarted dozens of terrorist attacks since September 11, and we have updated the technology we use to collect, analyze and share intelligence. We have put into place a long-term strategy to ensure that we are doing what is necessary to meet our priorities. And we have new metrics for success based on terrorist attacks prevented, and the long-term impact of our criminal

programs at the neighborhood level— not just the number of arrests and convictions, but on the consequent decreases in street crimes and homicides as a result of our collective efforts.

We have changed the way we do business over the past decade, principally to address terrorism. But the question remains: Where does the FBI need to be down the road?

National security remains our top priority. Terrorists remain committed to striking us here at home and abroad, as we saw just this week in New York with the attempted attack on the Federal Reserve, and as evidenced by the death of Ambassador Chris Stevens and three other Americans in Libya several weeks ago.

At the same time, spies seek our state secrets and our trade secrets for military and competitive advantages. And most particularly, cyber criminals now sit silently on our networks, stealing information for sale to the highest bidder. Computer intrusions and network attacks are becoming more commonplace, more dangerous and more sophisticated. That is why we are strengthening our cyber capabilities in the same way we increased our intelligence and national security capabilities in the wake of the September 11 attacks.

We are enhancing our Cyber Division's investigative capacity. We are hiring more computer scientists, and because even traditional crime is now facilitated through the use of computers, we are building the cyber capabilities of all FBI agents. We are converting computer intrusion squads in our fifty-six field offices into Cyber Task Forces that include state and local law enforcement, as well as other federal agencies. And we are increasing the size and the scope of the National Cyber Investigative Joint Task Force, a task force that brings together eighteen separate agencies to coordinate and share cyber threat information.

We are also working closely with our international partners, sharing information and coordinating investigations. We have agents embedded in police departments in Romania, Estonia, Ukraine and the Netherlands, just to mention a few. Yet at the same time, we face a wide range of criminal threats from white-collar crime and public corruption, to transnational criminal syndicates, migrating gangs and child predators. These threats are pervasive, and they will continue to evolve, largely as a result of globalization. *The New York Times* columnist Tom Friedman has argued, rather successfully, I might add, that the world is flat. Advances in technology, travel, commerce and communications have broken down barriers between nations and individuals.

And with the price of smart phones falling lower and lower and with the rise of social media like Facebook, YouTube and Twitter, our world is now hyper-connected. This hyper-connectivity is empowering and engaging individuals around the world. While Friedman describes the impact of globalization in the context of commerce and finance, globalization has affected law enforcement and the criminal justice system just as profoundly. For the FBI, this means that the work we do will almost always now have a global nexus, which presents a number of challenges. Technology has all but erased the borders that once confined crime and terrorism, and yet the traditional nation-state's jurisdictional boundaries remain the same, as do the individual criminal justice systems in these diverse nations. Given these constraints, we are often at a disadvantage in addressing global threats.

How do we prosecute a case where the crime has migrated from one country to the next, with victims around the world? How do we overcome jurisdictional hurdles and distinctions in the law from country to country?

As a prosecutor for the Department of Justice, I happened to work on the Pan Am [Flight] 103 bombing back in 1988, a time at which international terrorism was brought home to Americans in a profound way, and we were able to build bridges between the various investigative agencies here and Scotland and around the world. Partnerships like those forged in that investigation have never been more important. We have come to understand that working side by side is not the best option. It is the only option.

Let me turn for a second to an understanding not just of the threats that we face, because they will continue, and the potential damage that is exponential. To successfully address these threats, we must develop new strategies and a legal framework to support these strategies. We must always strike a balance between thwarting crime and terrorism on the one hand and ensuring that we adhere to the Constitution and the rule of law on the other hand.

The FBI has always adapted to meet new threats, and we must continue to evolve to prevent terrorist and criminal attacks, because terrorists and criminals certainly will evolve themselves. But our values, the Bureau's values, can never change.

In 1972, Justice Powell wrote the majority opinion in *United States v. U.S. District Court*, an opinion that established the warrant requirement for domestic electronic surveillance. And the crux of the case was, as Powell put it, the "duty of government to protect the domestic security and the potential danger posed by unreasonable surveillance to individual privacy and free expression." Justice Powell recognized that the rule of law is the only protection we have against the specter of oppression and undue influence at every level of government. We in the FBI recognize that principle as well. Strict adherence to the rule of law is at the heart of everything we do. In a practice started by my predecessor, Louis Freeh, all new agents visit the Holocaust Museum in Washington to better understand what happens when law enforcement becomes a tool of oppression, or worse, rather than an organization guided by the rule of law.

Every FBI employee takes an oath promising to uphold the rule of law and the United States Constitution. It is the very same oath that each of you have taken. For us, as for you, these are not mere words. They set the expectations for our behavior and the standard for the work that we do.

In my remarks to new agents upon their graduation from the FBI Academy, I try to impress upon each one the importance of the rule of law. I tell them it is not enough to catch the criminal; we must do so while upholding their civil rights. It is not enough to stop the terrorists; we must do so while maintaining his civil liberties. It is not enough to prevent foreign countries from stealing our secrets; we must do so while upholding the rule of law. It is not a question of conflict; it is a question of balance. The rule of law, civil liberties, civil rights. These are not our burdens. These are what make all of us safer and stronger.

In a 1976 meeting of the American Bar Association, Justice Powell said, “*Equal Justice Under Law* is not merely a caption on the facade of the Supreme Court. It is perhaps the most inspiring ideal of our society. It is one of the ends under which our entire legal system exists.”

Justice Powell made the rule of law his life’s work, and our system of jurisprudence is stronger because of his unwavering commitment. As citizens, we are more secure because of his longstanding dedication to this ideal.





LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
September 13, 2014

The Right Honourable  
The Lord Harry Woolf  
Former Lord Chief Justice of  
England and Wales  
London, England

I'm delighted and honored to have this opportunity to speak to my fellow Fellows of the College of Trial Lawyers in London. My pleasure is greater having been introduced by Charlie Renfrew, who I'm proud to say is a treasured friend. Note I do not say "old friend" I know Charlie well enough to know that you can never use the word "old" in relation to him. The years pass and he gets greater and different responsibilities but he retains the same elegance and style that he had when we first met. And that style was amply displayed when he tried to justify the honor that was being done to me in allowing me to give a lecture under the title of Lewis Powell.

Lewis Powell was an extremely distinguished jurist. He's credited as saying – I quote from his lawyer's handbook – 'the basic concept of freedom under law, which underlies our entire structure of government, can only be sustained by a strong and independent bar. It is plainly in the public interest that the economic health of the legal profession be safeguarded. One of the means towards this end is to improve the efficiency and productivity of lawyers.'

Those are sentiments which I strongly endorse and, indeed, they are central to what I'm about to say. We all know, of course, the aphorism of George Bernard Shaw that the U.S. and UK are two nations divided by a common language. There are also significant differences between our legal systems. However, despite this, I'm confident that the members of the legal profession in each country are firmly linked by the same commitment to the principles inherent from the rules of law and the values of the common law which distinguished predecessors have been discussing so ably under the mantle of Magna Carta.

This consensus is not in the least surprising having regard to the extent to which our different jurisdictions have a common historical source. Certainly, I am confident that Justice Powell's comments are as applicable in this country as they are to Canada and the States.

Against this background, I would like to start by warmly acknowledging the contribution made by the College and its Fellows to the commitments we share.

In advance of our meeting today I re-read the College's mission statement. It is a magnificent call for action by the eminent leading figures of the legal professions that make up the fellowship of the College.

My legal career commenced, as you just heard, in about 1956. It was followed by a practice extending over 20 years as a common law barrister.

During this period it was only a barrister who could properly describe himself in this jurisdiction as a trial lawyer. After all, it was only after legislation in 1990 that the other half of the profession, the solicitors, was able to obtain a certificate that gives them the right of audience in the senior courts. Even today the bar remains the primary training ground of the majority of British trial lawyers. Consequently -- and this is important -- it also remains the recruiting ground of the major members of the senior judiciary.

During my period at the bar, the greatest majority of barristers only had a single specialty and that was how to conduct litigation. The professional and ethical standards were those which

were laid down and under the control of the bar's institutions, the Inns of Court and the Circuit. When I joined it was a tiny profession indeed. There were about 1,000 members, but they played a huge part in the administration of justice. They also had to be members of chambers, but they weren't, and still aren't, allowed to be partners and your success depends entirely on your own efforts. It also explains, what I've just said, the independence of our bar, which is so important.

You know your contemporaries very well and you're continuously under scrutiny. If you adopt other than the highest standards, your reputation suffers and your prospects are, at the bar, dim indeed.

If I may, I will try to give you a flavor of life at the bar at that time because I'm afraid it is receding into history. I was on the Oxford Circuit and one of our circuit towns was Abingdon. Abingdon had a court in a beautiful medieval town hall. It was a beautiful building, but it had a particular shortcoming that you had to learn to adjust to, whether you was there as a defendant, as someone accused, or if you were there as a recorder. Its roof was held up by two pillars which were strategically placed; it seems, to try to prevent the judge from seeing the prisoner and the prisoner from seeing the judge. But that did not interfere with the way matters preceded in those days.

And I can remember conducting before the recorder, who was a part-time judge, a case for a very salacious young man who was constantly in trouble. And on this occasion, he was more in trouble than usual. He hadn't been sent to prison before, but I knew, first of all, that despite anything I could do he was going to be convicted; and, secondly, that he was going to have a severe sentence imposed. But that proved true except there was a rather exceptional statement by the recorder in passing sentence. He said to this young man, 'I hope you learn from your experience before this court and I hope that I will never see you again.' And then he realized that was a bit hard so he added, 'except socially of course.'

Since those days the position of the bar has been transformed. It is now, particularly in its most successful parts, a highly specialized body. Part of its success depends on the fact that for any part of our law or, indeed, many overseas countries' laws, there will be a barrister who knows the subject intimately, knows it in a way where no firm of lawyers, no matter how big, could provide a specialist providing that range of expertise. And that has been of great value to it in the days when its restrictions against competition have been swept away. To change from being a solicitor to a barrister and vice versa is the simplest of processes. A public Crown Prosecution Service and a defender service with wide rights of audience have been established, both services providing competition for the independent lawyer.

However, a substantial proportion of litigation and, therefore, income of the bar depends on legal aid. One of the areas in which I was particularly proud when I was growing up as a lawyer in this jurisdiction was that the Legal Aid Act 1949 introduced what was described by one of the great pillars of post-war welfare state namely our Legal Aid Act. It was based on a simple formula: subject to a litigant's means not exceeding the limits, if a lawyer certified you had a reasonable prospect of success in litigation you would normally obtain legal aid. The drawback of the scheme, as far as the government was concerned was that it was demand led without a cap

on the funding costs. It is therefore not surprising it was not popular with recent governments. They attempted to limit the scope of the circumstances in which legal aid is available.

Its restrictions on legal aid for criminal and family cases that is most worrying. Of late, the income of lawyers doing this work has generally, at best, been frozen. There's been a particularly acute dispute over fees between the government and the bar as to the fees payable in very long and complex, high-cost criminal cases. This resulted, for a time, in the senior barristers needed for trial of these cases withdrawing their services. Fortunately, eventually, a compromise solution was found but long-term damage, in my view, has been done by creating a most unfortunate precedent. This action on behalf of the bar is quite out of accord with the ethics of the bar and I, for one, having been privileged to see some of the documents passing between the bar and the government, feel that the bar's actions were understandable.

The problems which were more acute in relation to criminal and family cases also apply to civil cases. At the same time as I was implementing my civil justice reforms, which Charlie has just referred, the same government that invited me to make that report and, in fact, accepted my recommendations, introduced in an effort to control legal aid, conditional fees. Conditional fees were designed, it was hoped, to avoid some of the excesses that we felt could be seen in contingency fees which you long had in the States. Instead of giving lawyers the right to share in the damages recovered by a litigant, a lawyer was entitled to recover uplift on his fees if he won in return for no fee if he lost.

To make the scheme viable, it proved necessary in stages to enable a claimant who was successful in litigation to receive repayment of an insurance premium as well as the uplift which he had to pay to the lawyer if he won. This proved to be very unfair to defendants. It made the conditional fee arrangements heavily weighted in favor of the claimant. So this scheme was re-gearred to make it more evenly balanced.

In addition, there has been an increased emphasis on mediation, of which I am a strong advocate, which does again reduce the income of the bar. The government claims that the changes it has made are in the interests of economy and efficiency. The profession is not happy about some of the measures. There are merits on both sides and this is not the occasion for attributing blame.

However, an undoubted and, therefore, contributing cause is the unprecedented financial crisis from which this country and most Western governments are just beginning to emerge. In the States and Canada, there are no doubt similar issues. We had what I regarded as a Rolls Royce system which, in the contemporary world, provided financial assistance for publicly funded work on a scale which it was said we can no longer afford. Even in private work it has been said throughout my career by those within and outside the profession, the independent bar's days are numbered.

My response was its future depends on whether the bar provides a service for which there is a market. Judged by that test the bar has proved itself. Instead of withering, it has flourished, at least in the commercial and specialist sides of civil litigation. This is a huge tribute to the

profession's expertise and ingenuity. It has developed a massive export service achieved because of its hard-earned reputation for excellence.

However, that leaves open whether the government has taken the right action to make economies. I believe it is unlikely that the private sector of the bar and the whole of our justice system can avoid being contaminated by the unintended consequences of the demise of legal aid. There has been a lack of appreciation of the importance of not undermining the independence of the bar and, consequently the independence of the judiciary. We need to have the ability to attract recruits of the highest caliber who will, in due course, produce judges who share independence of mind and the undoubted incorruptibility of the present judiciary. These qualities explain why judges, such as myself, when we retire have no difficulty in supplementing our pensions. This is often by working abroad where our justice system is still much admired.

I've already pointed out the contribution made by commercial barristers and judges; but it is my belief they cannot preserve the reputation of our legal profession by themselves. I fear that in time the whole system will succumb to the consequences of the publicly funded part of our justice system being on its knees and restricted as to the service it can provide for the proper conduct of criminal and family work.

If my fears are justified, this is unfortunate indeed, because it is not only this jurisdiction that will suffer but it is those jurisdictions that look to this country for an example as to the standards they should apply in their country. Some of them, as you've heard, like Romania, who are doing their best to do so, but with great difficulty.

It is unfortunate that the state of our economy has required economies on an unprecedented scale at the same time as the recent constitutional changes of our justice system occurred. It has made us ill-equipped to the changes involved. The changes are those which refer to the role of the Lord Chancellor who, until a decade ago, was the peak of our justice system. Until the changes, the Lord Chancellor combined, quite contrary to separation of powers, the role of being a senior member of the government, speaker of the House of Lords and political head of the United Kingdom judiciary. He was always a senior lawyer who was a member of the bar. As a member of the Lords, he had no prospect or interest in further political preferment. Although of the government, he could adopt, at the same time, a position which was above the political fray. From that position he could have brought home to the government as a whole the danger of making some of the changes that have occurred and that are still proposed, but there's no evidence our current new style, non-lawyer chancellor has attempted to do this.

Instead, he has focused on the primacy of the fees of the profession which should be reduced but not reduced to such an extent that it damages the independent structure of those professions.

In case you think I am crying wolf without a sufficient justification, may I draw your attention to what two commentators recently said in *The Times* newspaper. They fit in again with the discussion we've heard about Magna Carta.

The first was on *The Times* of 24 July 2014 by Professor Slapper, Director of the New York University's campus in this country. He reminded us clause 40 of Magna Carta provides "to no one will we deny justice." Yet from 1950 to today we've gone from a position where, in the 1950s, eighty percent of the population was eligible for legal aid. The situation today is less than thirty percent are eligible. He refers to a case in which I was an advocate appearing for the government in 1970, a case, I may say, which I lost, in which Lord Denning cited the aphorism of Dr. Fuller, "be you never so high the law is above you." Today's changes made by Parliament last year may mean -- and I quote the professor "huge areas of civil legal provision have been removed so, in practice, there's no access to justice." He concludes, "If a monarch were to seal a new Magna Carta in 2050, its central inalienable and most cherished principle would be no one is below the law."

The other article was by Francis Gibb, leader of *The Times*, as recently as September 8, 2014. In it she draws attention to the concern expressed by my current successor of the job of Lord Chief Justice, Lord Thomas, as to the increase in unrepresented litigants over the last twelve months.

And the Chief Justice has announced that he has to allocate judges to take on the job of being specially trained to handle cases where the litigant should be represented but are not. Why I think changes of this sort are misconceived is because anyone who has practical experience of how courts work, as the trial lawyers here today will no doubt be able to corroborate, knows that if a judge does not have the assistance - especially in our judiciary where there's not the support of your American law clerks to the extent as you have in the States - it is more expensive and less efficient to try the case than if somebody is represented, because the lawyers help the administration of justice.

If Justice Powell was alive today I feel he would share my concerns. In view of the quotation I gave you from him I would believe he would agree that there were better ways in which we could have improved the productivity and efficiency of our lawyers than decimating the availability of legal representation for the less worthy members of the community.

That was what I was really going to say. But I can't resist, in view of the mention by one of our speakers of what happened on an occasion when they were required to speak. I'm referring to Tom McNally who I'm bound to say did magnificent work, bearing in mind that he wasn't a lawyer, to protect the position of the legal system in this country when he was in the House of Lords.

What I am going to tell you was about a lecture which a fellow judge was going to give in Manchester. It was late judge Alan King Hamilton, who was going up to Manchester in the winter. The weather was appalling and he got a phone call from the Chairman of the lecture, playing the part of Charlie for me today, who said to him, "Judge, you don't want to come up to Manchester on a night like tonight, on such a day. It really isn't worth your while. I'll explain to your audience and you won't need to worry about not being there."

But Alan was made of stern stuff and he travelled to Manchester. What he didn't know was that on that night Manchester City were having a replay with Manchester United in a vital

cup match. When he was in the car travelling to the venue the chairman said, “I’m sorry, Alan, I have a very important appointment which I have to attend so I won’t be able to accompany you, but I am taking you to the hall and I am sure you will find things are all to your liking.”

Well, Alan went into the hall he found one other person there. So he gave his talk and when he finished he started to step down from the platform. And the one member of the audience said to him, “Judge, would you mind staying a few minutes?” And Alan said, “Why?” He said, “I’m the other speaker.”





LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 12, 2015

Chancellor William H. McRaven  
University of Texas System  
Austin, Texas

Thank you very much. I have spent much of my year working with great officers of the Federal Bureau of Investigation. There are no finer men and women in this United States and they do an incredible job in protecting us. And I again would like to recognize Jim Comey and his terrific folks for the great job they do. So thank you, Jim.

And thank you very much, David, for the gracious and kind introduction. It is great to be here with America's finest trial lawyers.

You know, several years ago, the father of an American terrorist Anwar al-Awlaki sued me after Awlaki was mysteriously killed in Yemen. And then after the death of bin Laden, his son threatened to sue me.

But I thought after I left the military and stopped chasing bad guys that the need for a good trial lawyer would go away; however, now that I'm the chancellor of the University of Texas and embroiled in Texas politics, I find I still need a good trial lawyer.

So I have got a bowl up here. If you can leave your business cards in that bowl, I would appreciate it. Having said that, I do know where to find one of the finest trial lawyers in the nation and he just happens to be one of my regents.

In the few short months since his arrival on the board, David Beck has already made a huge difference in the temperament, the thoughtfulness and decisiveness of the board. David, it has been a real pleasure to work with you, and I look forward to the next several years together.

While I have never had any formal legal training, many years ago I was asked to make a case for one of the more complex legal arguments of our time. On 9/11, I was in a hospital bed in my home in California recuperating from a serious parachuting accident.

Soon after the events of that day, the President set up what was the Office of United Terrorism on the National Security Council staff. By October 1, I was limping my way into the old executive office as a brand-new member of the White House staff.

One week on the job, I received a call from a man inside the President's inner circle and he said, "Are you Captain McRaven?" I said, "Yes, sir, I am." He said, "You are a Navy SEAL, right?" I said, "Yes, sir." He said, "Good. I need you to do something for the President."

I thought here it is. This is what I've been waiting for. On the job a week and the President is already asking for my military advice. Maybe what he wants to know is how to deploy naval forces into the raging Gulf. Or maybe he wants my advice on overthrowing the Taliban in Kabul or maybe he wants to send me on a secret mission to get this guy bin Laden. Then the voice on the other end of the phone says, "The Papal Nuncio is arriving next week and the President needs you to draft a letter to the Pope explaining why war in Afghanistan would be a just war."

A just war? Good. Nothing too difficult, just something scholars and philosophers have been struggling with for centuries. And then the guy says, “And keep it short, about two pages.”

Of course. I mean, how much effort do you have to put in to explaining just war to the Pontiff? By the way, I was a Methodist from Texas. This really wasn’t my field of study, not in my wheelhouse. Nevertheless, I reached out to several staff members. I called Cardinals and Bishops. Within a few days, I had my first staff assignment complete. The Papal Nuncio arrived the next week. The letter was delivered to the Pope and off we went to war.

I don’t think that the two things had anything to do with one another, but you never know. But over the course of the next ten years and two wars in Iraq and Afghanistan, I had the opportunity to be involved in some of the more special operations of our time. Some of those missions came to light. Most did not.

As serious and as intense as they may look from the outside, invariably there is a humorous backstory that accompanies most of these missions. In December of 2003, we captured Saddam Hussein. The Special Forces soldiers brought him from Tikrit, which was a little bit north of Baghdad, where he had been captured down to my secret headquarters in Baghdad. We had a small holding area where we intended to keep Saddam for about thirty days. The entire world was waiting to see that we had captured the most wanted man in Iraq. My Chief of Staff came in and informed me that Saddam was in the holding pen. But then over the past six months in his hiding, he had grown this huge beard. The Navy captain thought that photos of Saddam might not look like the former president.

So I directed my Chief of Staff to have Saddam’s beard shaved off and return him to his original look. A little while later, after I had finished making calls to my bosses and letting them know we had gotten Saddam, a three-star general shows up at my headquarters and he wants to see this “Butcher of Baghdad.” So we walked over to the holding area and there, much to my surprise, was Saddam Hussein with a pair of scissors in his hand cutting off his own beard.

I carefully removed the scissors, had a few choice words with my staff, and then directed the soldiers to finish the job. But as we moved Saddam to a nearby safe house, the three-star general was quite taken aback. And he said to me, “Do we have the authority to shave Saddam?” I said, “Sir, I had the authority to kill him. I think I have the authority to shave his beard.”

The next day, a clean Saddam Hussein made the front page of every paper in the world, and not a word about who shaved him was in the article. Over the Easter weekend of 2009, we received word that Captain Richard Phillips of the tanker Maersk Alabama had been captured by pirates and was being held hostage off the coast of Somalia. I sent the SEALs in to assess the situation and see what our options were.

Now, there were four pirates and one hostage in a very small life boat. I knew that what we would have to do is let the situation play out and stand by for any opening that might present itself.

The problem was the White House wanted a deliberate response plan. I tried to explain to my military chain of command that we don't do a standard assault; it was a very small life boat. We couldn't bring SEALs in or helicopters. It was very small life boat.

Nonetheless, a plan was needed. So at 2 o'clock in the morning, I called up Admiral Michael Miller, who is the superintendent of the Naval Academy, and I asked him to give me the smartest professor he had on the life boat. Several hours later, we picked up this mild-mannered civilian in the middle of the night and brought him to a secret location in the United States. We worked all night long crunching the numbers to determine if we can ram the life boat with one of our cigarette hold vessels and not inadvertently sink the life boat.

The next day I had my answer. I briefed the Chairman of the Joint Chiefs of Staff that we have a plan. We would ram the life boat with one of our crafts, send everybody ass over teakettle, jump into the middle of the compartment, kill the bad guys and rescue the good guys.

And the Chairman across the video teleconference says, "Bill, that's your plan? That's your deliberate plan?" "Yes, sir, that's my plan."

A few days later the opportunity presented itself. And the SEAL snipers eliminated the hostages and rescued Captain Phillips.

That night we returned the wide-eyed professor to the Naval Academy with a tale of midnight intrigue he would never forget. Two years later, on May 2 of 2011, was an evening we got bin Laden and I was on a video teleconference with the President. He asked me if I was certain we had the right man.

I informed the President that I needed to go do a visual check before I confirmed the demise. I drove a short distance where the SEALs were bringing in the Marines. We pulled the heavy body bag from the vehicle, unzipped the rubber container and I began to inspect the body.

I looked at the facial features, which after two rounds in the head, didn't look great. However, knowing that bin Laden was about 6'4", I turned to a tall, young SEAL who was standing nearby and I said, "Son, how tall are you?" He said, "Sir, I'm about 6 foot 2." I said, "Good, I need you to lie down next to the remains here." He said, "I'm sorry, sir, you want me to do what?" I said, "I want you to lie down next to the remains." So he lay down next to the remains. And, of course, the remains were a few inches taller.

I returned to my makeshift headquarters and I informed the President that while without the DNA, I couldn't be positive; I told him, "I did have a SEAL lie next to the body and the remains were clearly taller." So there was a pause on the other end of the video screen. The President, who was now in a pretty good mood, responded, "So, Bill, let me get this straight. We had \$60 million for a helicopter, which we had lost on the mission, and you couldn't afford a tape measure?"

Two days later I returned to the States and the President invited me to Oval Office where he presented me a plaque with a tape measure on it.

A lot has happened since that first day I arrived at the White House and I think back on the letter I drafted to the Pope. I don't know whether my thinking was consistent with the just war theory.

But what I know today, after years of fighting this war, is this may be the most righteous fight we have had in the past thousand years. It is a fight between the civilized world and the barbarians who seek to destroy it, the extremists, the al-Qaeda core and their franchises in North Africa, Yemen and Iraq.

From Boko Haram in Nigeria to Al Shabaab in Somalia, from Abu Sayyaf in the Philippines to the Taliban in Afghanistan, from ISIS to Al Misra, they bring nothing, nothing but destruction, tyranny, savagery and slavery.

There are no redeeming qualities about their extremist views and so-called justice they exercise over their subjects. In Afghanistan, I saw Taliban al-Qaeda fighters force their way into rural villages. The first thing they did was kill the elders who failed to comply with their orders.

If they had a particular elder that they needed in order to garner village support, they would bring him in with the elder's family there and kill them in front of the elder. Young girls were not allowed to go to school. Young men were forced into servitude and schooled only in small groups where nothing, nothing enlightening was ever taught.

Wherever there was resistance, there was death. They practiced a perverted form of law where any violation could lead to mutilation, torture, execution. Western values frightened them more than anything. Liberal thinking, scholarly work, the power of the individual, the role of women, and any practice of law and religion that were not Islamic was worthy of a painful death.

In the Kandahar province in southern Afghanistan, the Americans started a small girls' school. It had about fifty girls that were members of the school. It was a small two-room building in a reasonably secure area of the Kandahar district.

Every day dozens of young girls would put on their uniforms and make their way to the schoolhouse. To the Taliban, it became a symbol of all that was wrong about the West—educating women. Clearly the devil's work.

One night Taliban soldiers slipped into the village and placed mines around the schoolhouse. Fortunately, we had been watching the village through our unmanned aerial vehicles, our drones, and the next day we went in and we defused the mines.

The following night, the Taliban came in again. Once again, we cleared the mines and let the girls go to school. The third time the Taliban came in, we were waiting and we never had that problem again.

But think how committed those fighters had to be in order to risk and, eventually, lose their lives just to keep young girls from going to school. Who and what thinks like that? Afghanistan, however, seems tame to some of the atrocities I saw in Iraq.

There was a special evil reserved for al-Qaeda in Iraq or AQI, as we called them. In 2004, AQI took over the town of Fallujah. It was a sprawling rundown city of about 300,000 people. AQI systematically murdered the town leadership. They lined up young men who didn't support them and summarily executed them, laughing throughout the execution.

They had torture houses where unmentionable horrors occurred. I watched through our surveillance as they dragged men out of their houses and shot them in front of their families. Finally, in late 2004, the Marines, the Army and Special Operations Forces went in and cleared out Fallujah.

In 2005, Sunni tribal leaders began to come together in what was called the Sunni Awakening to stand up against al-Qaeda. By 2009, we had begun to turn the tide in Iraq. One of my proudest accomplishments was we helped to establish Iraqi courthouses so that the Iraqis themselves could bring al-Qaeda to justice. We had Navy SEALs, Army Rangers and Green Berets setting up courthouses, helping with the dockets, protecting the judges and the prosecutors, allowing justice, real justice, not a kangaroo court, but true civilized justice to play out in Iraq.

I watched incredibly brave Iraqi trial lawyers risk their lives every day to exercise the law. Some days they didn't return, not because they didn't want to but because they had been discovered and killed by al-Qaeda. It was inspiring to see the power of the law in the hands of men who believed in them. But that was the exception.

In North Africa, al-Qaeda and the alliance of the Islamic Maghreb, or AQIM, were led by a former cigarette smoker Mokhtar Belmokhtar, who routinely kidnapped Westerners and ransomed them to fill his coiffeurs. When ransom wasn't paid, he returned and then executed his hostage. It was MBM [Belmokhtar] who took over the BP oil refinery in January of 2013. Thirty-seven hostages were killed. AQIM has been emboldened by the fall of Gaddafi and has been reinforced with sophisticated weapons left over after the Libyan Army fell. Now they control a large swath of land ranging from southern Algeria across Mali and into Libya. Just to the south of the Maghreb is northern Nigeria, home to Boko Haram.

Boko Haram, whose name means western education is bad. That's what the name means. These are the savages who kidnapped and sexually abused the 270 school girls from Chibok in northern Nigeria.

And then, when their acts of violence went unchecked by the Nigerian forces or any Western army, they raided another town and another and another, killing, raping and torturing those who didn't support them. It doesn't require any deep social theory to understand that any act of barbarism that goes unchecked only encourages more of the same behavior.

There are those in the U.S. government who hope that the bad behavior will stop. There are those who believe that kindness will prevail or that miracles will be forthcoming and all will be okay. It will not.

Then there is Al-Shabaab in Somalia. It was Al-Shabaab who, without any conscience, attacked the Westgate mall in Nairobi in 2014 killing sixty-three innocent shoppers. The Westgate mall is not some Third World rundown shanty strip mall. It's a high-end, Western-style outdoor mall with all the amenities that you would expect.

I spent many hours wandering around the mall. It would be no different than if a group walked into the Woodfield Mall here in Chicago and began shooting. Watch the video sometime, and you will see the killers' complete lack of compassion for the men, women and children that they executed.

In Yemen, there is al-Qaeda in the Arabian Peninsula. As mentioned earlier, AQAP was once run by an Anwar al-Awlaki until his very fortunate demise. It was Awlaki and his bomb maker Ayman al-Zawahiri who sent Umar Farouk Abdulmutallab, the underwear bomber, and the cartridge bomb, both intended to blow up civilian airliners, U.S. civilian airliners and sink the aviation business.

Now, Yemen is a failed state of the highest order. The Houthi rebels came down from the north and control most of the capital. Al-Qaeda owns most portions of the central portion of the country. The southern secessionists own the south.

And then, of course, there is ISIS. ISIS is an outgrowth of al-Qaeda in Iraq. Abu Bakr al-Baghdadi, their leader, is a former al-Qaeda fighter, who is a brutal, unrelenting megalomaniac. He attracts fighters to his cause by allowing them to carry out every perverted fantasy they might have and cloak their actions in Islam.

They have swept across the eastern desert of Syria and entered the key cities of Iraq. They move like locusts, destroying everything in their path and leaving nothing good behind.

They routinely destroy world heritage sites in an effort to erase the past. They use fear and torture as a tool to enslave the people they override: Beheadings, crucifixion and systematic raping of non-Muslim women.

Fighting these barbarians has been my life for the past decade. I believe we are in an existential fight. But the slow movement of this battle will not change our lives dramatically in the next year or five years or maybe even ten years. But it is, nonetheless, one of the most important fights of this generation.

You already see the impact of the fighting in Syria and how that impact is affecting Europe. Thousands upon thousands of refugees are moving west or they are fleeing North Africa and crossing the Mediterranean. Those that can't afford to make it to Europe are hunkering down in Lebanon and Jordan, creating pressures on those nations. If we were to lose King



Abdullah of Jordan, one of our closest allies, and if Lebanon were to fall back in the hands of the Hezbollah, the entire region could collapse.

We have been playing defense for several years now, allowing the extremists to gain ground in hopes that we can hold them in the red zone. While they are marching down the field, Syria, Iraq, Yemen, North Africa, Nigeria, their gains will affect the economies of Europe, Africa and the Middle East. If you think the problems in the Middle East don't impact your world, think again.

There is no such thing as a local problem. Everything in the world is connected. The oceans that used to connect us are no longer buffers against extremist ideologies, economic warfare and threats from the air and the sea.

Now, add to those problems the intervention of Russia and Iran and you have the making of a world crisis, the likes of which we have not seen in seventy years.

So what are we to do? What are we to do? We must fight them and we must fight them with everything we have. We must see this conflict for what it is, an assault on everything we hold dear; not some small regional dust up that will quietly recede into the history book. We must accept the fact that more young men and women will pay the ultimate price to achieve victory. We must accept the fact it will cost us billions or trillions more in dollars to fund if we continue to approach this war with a detached sense commitment, then we will surely lose.

Many people say that this is not our fight and that we should let the Arabs handle an Arab problem. We can't be the world's policemen. I hear it over and over again. Oh, yes, we can and we must. Our strong European partners will likely join us because they see the inevitable outcome if we don't drastically change our approach.

All of us who have spent time in the region know that the Arabs don't have the resources, the leadership or the skill to take this fight to the enemy. The Somalis, the Nigerians, the Algerians, the Egyptians and the Libyans, none of them, none of them can do this alone. And whether we like it or not, this is our fight.

But if we do not aggressively attack this problem, it will only get worse. First, we must push ISIS out of Iraq. That means putting U.S. soldiers on the front lines with our Iraqi counterparts. We must reengage, fully interact, providing the troops with the air, artillery and logistic support they need to turn the tide.

We must pursue ISIS in Syria. Once again, we will need U.S. boots on the ground, partnered with our European allies and those Syrians who are prepared to stand with us. We must be prepared to inflict casualties and take casualties. We must be prepped to endure the wrath of world opinion.

War is dirty, brutal and costly. There is no way to achieve victory without considerable pain and endings; and to think otherwise is just naive. We must also take the fight to those terrorist safe havens in Yemen, Somalia, North Africa, Nigeria and others.

We must not be nuanced in our delivery of justice. We must be firm and we must be fully committed. Anything less would be a disservice to the men and women who do the fighting. We must engage with the moderates in these geographic areas. But they will not come forward unless they know that we have their backs. So far we have not shown the staying power necessary to prevent the rebirth of some of these extremist organizations.

We must mobilize the international community with the same vigor that we engage the American people. Every effort must be made to cut off the flow of money, manpower and supplies to the terrorists. If we contain them, isolate their activities and then systematically destroy their leadership and their message through military, law enforcement, economic and diplomatic efforts, we can achieve success. But it will not be easy and it will not be quick.

If all of this sounds rather alarmist, it should. We are in perilous times. But it is easy to see these atrocities as someone else's pain, someone else's misfortune, someone else's country.

And I love the final courtroom scene in Matthew McConaughey's movie *A Time to Kill*. If you have seen it, you know it's set in rural Mississippi. McConaughey plays a young street-wise lawyer, who against everyone's advice, takes a case to defend a black man responsible for killing two white supremacists who raped the man's young daughter and tossed her over a bridge.

In the pivotal scene, McConaughey is making his closing arguments to the all-white jury. He talks them through the events of that night. The two older men, drunk on Whisky kidnap the young girl, brutally rape her, toss her in the back of their pickup and then, like she was a piece of trash, they throw her off a bridge.

McConaughey paints a vivid picture of the horror that night that the barbaric treatment of this young black girl. In the movie you see the jury, their eyes are downcast struggling to visualize the scene. And then McConaughey says "Now picture the little girl as white. Now picture the little girl as white."

Watch the news today and picture the families escaping from Syria as yours. Picture the border full of refugees as our borders. Cast yourself in the real life movie and then ask: "Are we doing enough?"

In the midst all this chaos, we have the ultimate weapon. We have the key to success. We have the American soldier. There are men and women, rich and poor, black and white, Christian and Muslim, gay and straight. They come from every corner of the United States, from small towns and big cities. They are the Millennials and the Gen Xers. They have tattoos and earrings. They listen to music that is incomprehensible to anyone over thirty. They play video games and they are wildly independent. And they may very well be the greatest generation of all. They volunteered. They volunteered when the nation called. They didn't just do four years. They have been at it for fourteen years.

They have seen all of their friends wrapped in the stars and stripes returning to the States in the back of a C-17, and yet they keep coming back, knowing that someday it could be them, but accepting those terms as part of their service.

They are stronger than any group of young Americans I have ever seen in the past forty years. They are unabashedly patriotic. They believe that the words duty, honor and country mean something, something important, something worth fighting for and something worth dying for. And they will not stop fighting until we are safe.

And as bad as things look sometimes, I remain incredibly optimistic because I have been honored to serve with such fine, fine Americans. When a soldier dies in combat, we have a ramp ceremony before placing the remains on the airplane to take them home. After saying a brief prayer, the clergy will always quote Isaiah 6:8, ‘And I heard the voice of the Lord saying, “Who shall I send and who will go for me.’ And I said, “Here am I. Send me.”’ They keep raising their hands and they keep saying, ‘Send me, all I ask from you is your kindness, your understanding, your support and your prayers.’

The world can look pretty bad at times. But if we are decisive, if we are not afraid of action and if we know that the sacrifice will be required, and if we rely on the greatness of Americans who are this centuries’ greatest generation, then everything will be fine.

Thank you all very, very much



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
September 16, 2016

General Michael V. Hayden  
Principal, The Chertoff Group  
Former Director, National Security  
Agency, Central Intelligence Agency  
Washington, District of Columbia

Thank you all for the opportunity to be with you here today. While I was listening to the other presentations I had the thought that by the time I get up here, most of you might be remembering or even humming that old Sesame Street song, ‘One of these things is not like the other, one of these things just doesn’t belong’ because you’ve had distinguished jurists and legal scholars. Now you’ve got the former director of the CIA and NSA up here to talk to you about some things.

I did choose a topic and I do think it’s perfect because it’s a place where I’ve spent most of my life in and now it overlaps with the world in which you currently exist. As Robert said, ‘It’s law, power, and a changing world.’

I would begin with the premise that the rules-based order on which certainly government depends on, and frankly even espionage depends on, a rules-based world which you nurture and spend a great deal of time not just studying but developing, that rules-based order domestically and globally is a bit under assault. That’s really what I want to talk about here today. What that assault looks like and what we might want to do something about it.

To begin, I was up in Baltimore, it’s a smaller group than we have here. It was all the Republican members of Congress. They were having their annual off-site in February and the leadership, Mitch McConnell and Paul Ryan were trying to get the Republican team together, at least on the same page with regard to a variety of issues. The agenda was filled with panels. They had a panel on the economy, and a panel on social issues, and I’m on the security panel. It was a very good panel.

I was delighted to be there. I was there with Mike Chertoff, the former Secretary of Homeland Security; Ray Odierno, just leaving the job of U.S. Army Chief of Staff, Ryan Crocker who we had sent to be our ambassador on just about every ugly spot on earth. He had done Pakistan, he had done Iraq. There was me; and then there was Robert Kagan, middle of the road, powerful writer, geopolitics from the Brookings Institute. You’re a very polite audience. You’re kind of listening to people up here and so on. The Republicans were not polite.

They had stuff to say. We’re paneling up there, we have individual skirmishes starting to take place up there, and questions are coming back and forth. Finally Kagan, the Brookings scholar, said, ‘All right, stop! Look, what’s going on is this. We are seeing the melting down of the post-World War II American Liberal, IMF, World Bank, Bretton Woods world order. Get it?’

That’s how fundamental the change that Bob thought was going on. I thought that was really good. I thought about it some more afterwards and said as right as Bob as he may have lowballed the tectonic shifts that are taking place because I think we’re not just seeing the melting down of the post-World War II American Liberal order. I’m willing to sign up that we’re seeing the melting down of the post- World War I Versailles order as well.

If you look at the maps, people here are kind of similar in age, the maps we grew up with, there are big gaps in those maps now, the places that used to be that don’t exist anymore. Czechoslovakia, which was divided in what was called a Velvet Divorce. Yugoslavia, which

divided, nothing velvety about it, a quarter million people dead. A country created not by Versailles but at the same time as Versailles. The Soviet Union is also gone. If you kind of shift your gaze out to the east a little bit and look at the Eastern Mediterranean and look at the patches of land formerly identified as Iraq, Syria, Lebanon and Libya. Let me just tell you something based on my professional judgment. They're gone too. They're never coming back.

That's a very nutty situation in Syria and Iraq. When you look at the public discourse, it looks like they know there's a polynomial equation for geopoliticians and they know the constants and they're working with the variables. See, the constants in Syria, the constants in Iraq, the variable is Bashar Al Assad. The variable is Abu al-Baghdadi. It's all for the variable. Get them out of there. I think what I'm trying to suggest to you is we've got that wrong.

The things in that equation we thought were constants, the continued existence of Iraq, the continued existence of Syria, Lebanon, Libya, they're not constants. Those states are gone and they're not coming back in anything like their current form. My point is the tectonic shifts going on now are so dramatic, the things that we use to solve equations, the constants, are no longer constant. If there's a breakdown in the post-World War II order in a melting of Versailles, let me suggest to you that there's a bit of a thawing around the edges of the Treaty of Westphalia too.

Do you remember Westphalia? The 17th century, 1648, Thirty Years' War, the last great war of religion in Christendom, where we in Christendom decided we had a sufficiently long list of things on which we could rely for legitimacy to kill one another that we didn't need religion any longer on that long list. We consciously, we do this imperfectly, but consciously said, 'Okay, secular stuff over here, sacred stuff over here. Coercive power of the state stays here. Questions of theology on.' I know we've applied it imperfectly but we did export it to the planet.

That is the theory of government, in addition to the lines we drew. That is the theory of government we exported around the world. I'm just here to tell you that that theory of government, not just the lines, that theory of government is now being challenged by another great monotheism who isn't quite yet willing to accept Christianity's resolution of fundamental issues of faith and reason, of secular and sacred. It would be the height of arrogance on our part for us to assume that that great monotheism isn't going to come up with the same solution that our monotheism did. In any event, I want to draw a point here that we're really talking about fundamental issues that really effect how we have structured ourselves to maintain some semblance of order on the planet. It goes further.

I was on Bush 41's NSC staff. If you recall back then, the National Security Advisor was Brent Scowcroft. Brent is still one of the great strategic minds this country has ever cranked out and still cranking out very powerful views. Brent was National Security Advisor, not once but twice, for Bush 41 and for Ford. What Brent points out in a recent piece about four years ago now, Brent says, 'You know, when I was doing my thing, the things on the board I worried about, they were all nation states. The way I moved the nation state on that board was through what you and I have now taken to call hard power.'

If you're not familiar with the term, masses of men and metal, at the right place at the right time. Brent points out in this article about four years or so back that neither of those sentences, 'All you care about are nation states and hard power is your favorite tool,' neither of those sentences are as applicable as they were when he was doing his thing, which he admits was at the height of Ford, on the back end of Bush 41, of what Lady Arden described for us had begun in Liverpool, the Industrial Age.

If you just think of the dynamics of what Lady Arden pointed out to us, the Industrial Age trended to strengthen the center. You couldn't be an industrial power without a strengthened center. You needed the tools of a powerful state to create the infrastructure on which industrialization would depend. I could do it in my country with the Republican Party controlling power in the last half of the 19th century to build the infrastructure that created the opportunity for the explosion of America as an industrial power in the 20th century.

I can go to the Soviet Union and simply say communism is a bad theory of history and the worst theory of government. It's not bad if what it is you want to do is to rapidly industrialize a backdoor agrarian near feudal society because it aggregates power to the center. What Brent then goes to point out is we're no longer in that era. We're in the Post-Industrial era and as things of the Industrial era strengthen the center, the Post-Industrial era pulls power away from the center, pulls power away from centralized institutions.

I do this on college campuses and it only half works, but it will work with this group. I'm old enough to remember when making a phone call was such a challenging undertaking, you and I would entrust it only to a government or a government-controlled monopoly. Remember? I'm old enough to remember I used to have to put a shirt on and get in the car, and drive the car, park the car, get out of the car, and go into a building and talk to a human being to get my money.

By the way, the college campus response to that is money? We have been tremendously empowered. How many of you used Zillow the last time you looked for a house? One or two clicks you can get everything you used to have to go to a professionalized institution in order to get that. In my line of work I'm old enough to remember only two countries would take pictures from space and only one of them did it really well. Now, you can go home and use Zillow Earth to look at North Korea and with sufficient resolution tell me whether or not the fun-loving Kim family is stacking a taepodong missile or not.

This is a world in which power has pushed out; it is a world that is far more interconnected than the one that we have left. For the most part that's made your life and my life just great. I really do like the empowerment. But that empowerment just does not go to people who are virtuous. That empowerment goes to people who would will us harm. One more I'm old. I'm old enough to remember I never lost any sleep over a religious fanatic living in a cave in the Hindu Kush, but it's something we all have now near the front of our consciousness.

Then the major muscle movement in addition to the kind of gnawing of the structures at the international level, the major muscle movement at the technological level is that the evil things you and I formerly associated only with the power of a malevolent nation state, those



kinds of things are now within reach of groups, gangs and even individuals. That is one real tectonic shift.

One real challenge to how it is we are going to decide to keep our citizens safe within our traditional value system. If you look up here at me for just a minute, the American security structure was hardwired in 1947 with the passage of the National Security Act of 1947, it created the CIA, National Security Council, Department of Defense, Joint Chiefs of Staff, and America's Air Force. We are hardwired to defend you from a malevolent state power. It's coming at you this way.

What I want to suggest to you is that most of the things that can actually go bump tonight and hurt you, terrorism, cybercrime transnational crime, the really practical, close in, urgent problems, they ain't coming this way. They're coming this way. The adjustments that I lived through and recorded somewhat in the book, we're still arguing with ourselves about, is how do you take a national security structure designed to go this way and make it go that way.

Let me be very concrete. I'm a career GI. I've had two presidents and both 43 and 44 said, 'Hayden we are at war with those guys.' War, armed conflict. And so you tell somebody like me armed conflict, war, okay. Close width and destroy the enemy, kill them. Normandy, Chateau Theory, Iwojima. Inchon, got it? What's it look like here? It looks like targeted killings outside of internationally-agreed theatres of conflict from unmanned aerial vehicles. I do this on a college campus and as a response I can mimic the audience reaction, 'Whoa, whoa whoa, slow down Hayden, not sure I'm real comfortable with that. What else do you got in your kit? Okay. I get the discomfort with the killing thing.

We can capture the enemy. We've done that in every war. There were literally hundreds of thousands Axis prisoners here in the United States during World War II. There's a graveyard at Ford Mead, my headquarters where the NSA was, with German soldiers, German soldiers who died of natural causes in American prisoner of war camps during the Second World War. Oh, yeah, OK Hayden, let's do that. Let's capture them.

What's that look like? It looks like a small naval base on the South Eastern tip of Cuba. It looks like Guantanamo. Slow down here big guy. You're making me nervous. I tell you what, what else have you got? Well, I could do the espionage thing. You know, I could divine enemy intentions. I could work really hard to figure out their plans. I could intercept their communications. You all saw the movie, Bletchley Park, Imitation Game, Touring. We're really good at intercepting communications. Yeah, Hayden do that.

What's that look like? That looks like everything Edward Snowden has told you about for the last two and a half years. Do you see the issues? Because the nature of the world, the melting down of international structures, the tectonic shifts put into play by technological and cultural changes, we are in the midst of trying to adapt our traditional tools to nontraditional tasks, and it's very hard. We have honest arguments, underline that word, honest arguments with one another about how we do it. This is a wicked problem.

Let me just stay with terrorism here to finish this out. This is a non-state actor; it's not even a country. Now, how does that effect what's fair and not fair? This is a non-state actor that rejects the heart of Geneva. The heart of Geneva is that there is a distinction between combatants and noncombatants. This enemy's basic faith, not just erodes but destroys that distinction, not just for you, their victims, it destroys that distinction for themselves since they believe that all true believers are part of the global jihad.

U.S. law, pre-9/11, U.S. law in order to try to balance our liberty and our security, and this is not a new problem, we've been doing this for, you know, over two centuries. But the broad formula I worked under on the morning of September 11th before the attacks was that we generally pushed questions of foreign stuff over here and questions of domestic stuff over here. In fact institutionally we had institutions that focused on foreign stuff and institutions that focused on domestic stuff.

We put intelligence over here and we put law enforcement over here. Against the traditional, state-based enemy that's pretty good. We stayed free and safe for the most part. On September 11th, 19 hijackers drove through that gap I just created for you with my metaphor. I was given the direction, close the gap.

So now we've begun a much more difficult conversation. For those of you who follow this, and I know a lot of you do, it's called the wall. It was much easier when you had the wall and that's that and that's this and we don't play together. It's much more difficult if you know you're going to have to blend this in ways we have not blended it before but be careful. Make sure you catch them, but for God's sake don't impose anything on legitimate constitutional rights.

That's just the great struggle that we're having now. By the way, immediately after 9/11, I got flogged left and right for the gap. The wall seemed to be some sort of fundamental affront to human decency. That's eroded. I'm going to be at Georgetown Law School as part of a panel for a new book written by a professor of law at Georgetown that talks about the future of foreign intelligence. The premise of her book is got to have the wall, got to have the wall, bring the wall back, got to have the wall.

We've come full circle as to how do we make these compromises. By the way, I had to live through some issues because of the erosion of the wall. Let me be very candid with you. When that wall became permeable as opposed to being non-existent, when the wall became permeable, a lot of very noble concepts that existed over here in the law enforcement bubble began to float across into the make war laws of armed conflict bubble. We over here were being severely criticized because our conduct, in the we are at war enterprise, didn't always reflect the standards of this is a legal procedure.

Criminal law enterprise, two very specific ones. I get beat up routinely. How in God's name can you keep all these people in Guantanamo without a trial? Easy. Laws of armed conflict, enemy combatant, duration of the conflict, or while they pose a danger, whichever comes first. I hear in my old NSA days, particularly after Snowden, 'Oh, my god, NSA does

suspicionless surveillance of millions of people abroad.’ I have to tell you suspicion is not a word that enters our vocabulary. We don’t give a damn about suspicion.

We’re after interesting. We will intercept foreign communications that contain information that would help keep America free or safe indifferent to the moral characteristics of who’s on either end of the conversation. This isn’t about bad people. It’s certainly not always about bad people. It’s about good information, intelligence. It’s not a moral or a legal judgment.

But we have these very powerful arguments, suspicionless surveillance for foreigners. By the way, just so you don’t think I’m too much of a renegade up here, there isn’t another foreign intelligence service on earth who would not have given the speech I just gave you. That’s how it works.

I was invited to go to CPAC, the Conservative Political Action Committee at Washington Harbor last year. A former director of the NSA going into a room full of 18,000 very young Tea Party activists is considered an away game by people in my profession.

I’m there and I’m actually going to debate Andy Napolitano, the judge on Fox news. He’s actually a pretty good friend. So Judge Napolitano goes up there, and I mean he just tosses out red meat about libertarian values, and I’m a libertarian, and he’s just going on and on. He does that for about five minutes and now it’s my turn. I walk up to the microphone and go, ‘My good friend Judge Napolitano is an unrelenting civil libertarian.’ Hah! The crowd goes crazy. I pause, let the applause die down, ‘And so am I.’ Boo. No you’re not.

I let the crowd die down. I said, ‘Yes I am, but I’ve lived most of my adult life having responsibility for another part of the document, the part that says ‘and provide for the common defense.’ The thought I would leave with you is that I don’t view this argument we’re having with ourselves as a struggle between the forces of light and the forces of darkness. We too quickly, unfortunately, divert to that kind of labeling on both sides.

This is an argument we’ve been having with ourselves since about forever. George the III was far too overbearing, we got to do it ourselves. Articles of Confederation, oh, my god, we can’t do anything with that government. Okay. Let’s come here to Philadelphia, write something else down, create the Constitution. Whoa, I’m a little scared, that’s a pretty powerful government. Let’s go home and write another ten paragraphs. So you see that’s just the life of the nation.

We’re still on that journey. We’re tacking based upon the realities of the concrete circumstances in which we find ourselves at the time. I’m happy to share with you that people like me share the nature of this problem with you. Our life experiences may give us different things to bring to the conversation but it shouldn’t put us on different sides. Thanks so much for the opportunity.



THE SUMMER OF 1787:  
WRITING THE CONSTITUTION  
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This is a humbling experience in many ways, in part because I started in law as a law clerk to Justice Lewis Powell, which was a remarkable experience and a privilege to work with him for a year. It's humbling to be on this stage. I have no clarinet and you should be very glad of that. I have no bust. I certainly don't have the history of effective activism of Mr. Gray, but I do have a PowerPoint. I'm here to talk about the writing of the American Constitution. I hope this resonates slightly with you because I was working on a case, a constitutional law case, where it became necessary to read the debates of the Constitution, the notes that James Madison took, and I was humiliated by that as well because I had never read them. I'm an experienced lawyer in my 40s doing constitutional law. I should have known this, but they were remarkable.

The debates were remarkable. You had the best political horseflesh of the continent there arguing hard questions, taking them seriously, struggling with slavery, which was something I didn't know. I thought I would really like to write a book about that. Then several years later when my children got out of college I was able to do that. Today I have a chance to talk about a very small sliver of the book and the story, and maybe give you a picture and an appetite to know more if you haven't studied that the way I hadn't. First, why was there a Constitutional Convention in 1787 that wrote the Constitution in a four-month period? What was it that caused it to happen? The other is to talk about a few of the people who were there. It's always an argument what's more important in history, the great tectonic movements of the world or the people who are in the room, or as we've learned from the musical *Hamilton*, the room where it happens. I think both are important, but the people in the room are a lot more interesting and I think it mattered then.

The setting in the 1780s is that times were actually pretty bad. We were operating under the Articles of Confederation, we only lived under them for seven years, but it did not establish a real national government. We had a Congress, we had no Executive Branch, we had no courts. That's disturbing to this audience. Congress often did not have a quorum, so it couldn't do anything for months on end. It also had no power to impose taxes. That might sound good initially, but it's not good if you want to have a Navy or Army, or if you want to have courts. They had to beg states for funds. They would just pass the hat. Ask for them. Most states sent something. I think Pennsylvania was at the top, was sending 60%. Georgia never sent anything. If you're from Georgia, you can't complain about federal taxes, you still owe us.

There was a reason it was such a weak national government. The colonists who formed the country knew strong central government. That was the British Empire and they didn't like it, so they created the least possible government they could imagine, and that's what they got, and the result was unhappy. They ended up with a currency that was valueless. We had continental dollars that had been issued during the Revolutionary War that have inflated away to almost nothing. They use foreign money mostly. Most embarrassing, they ended up using British pound sterling most often. That didn't feel exactly like independence. They also used Portuguese moidores, Spanish dólares, Portuguese johannes.

When I wrote my Madison book, I discovered that Madison was paid by the state of Virginia when he was in Congress and they paid him in Portuguese johannes. That's an odd sort of sovereignty that we were enjoying. Many states issued their own currency also of dubious

value. You read accounts of people traveling at the time and every stop at an inn was a currency negotiation. I have Pennsylvania pound sterling. We don't take those. I have Portuguese moidores. We'll give you a one-third discount on those. It made trade and economic activity dry up. The economy became extremely weak. The states, also with no actual federal government, fought each other. The states with good ports taxed goods going to states without good ports. My favorite example of this was that Massachusetts imposed taxes on goods that it was receiving from Connecticut. Import taxes that were higher than the taxes on goods coming from Britain, which we just fought a war with.

New York and New Hampshire fought over who owned Vermont. Vermont was sure nobody did, but it got a little nasty. Connecticut and Pennsylvania fought over who owned the Wyoming Valley. This is a part of northeastern Pennsylvania that had been settled by a group of people from Connecticut who were sentimental about Connecticut so they kept paying Connecticut taxes, and they actually elected someone to the Connecticut legislature. Pennsylvania was not amused and they sent in the troops, and this was another triumph for early American law. There was an arbitration which resolved that the Wyoming Valley in Pennsylvania belonged to Pennsylvania, but to compensate Connecticut they gave to Connecticut a strip of land below Lake Erie, which was called the Western Reserve. If you know, Case Western Reserve University, it's named for that area, that strip of land in northern Ohio was part of Connecticut until 1801.

Seven states claimed parts of the lands over the Appalachian Mountains. That was called the West then. This was awkward, they usually did this out of their colonial charters. This was awkward for Massachusetts and Connecticut because they claimed that the charter gave them land all the way to the west except there was New York state in between so they said their claim jumped over. This was good lawyering. New York did not have that provision in their charter so what they claimed was that since they control the Iroquois, and the Iroquois claimed to control the Ohio River Indians, therefore, by some transitive principal they owned the Ohio River. Virginia was very straightforward as the largest state in the union. They just claimed it. Foreign nations took little notice of the United States. This was very difficult for western interests. Farmers, anybody trying to get products to market, wanted to send them down the Mississippi to this city.

Spain closed port to all American goods. The British did not allow American ships to call in their West Indies ports or in Britain. The Barbary pirates in the Mediterranean and Atlantic who cruised always looked for American ships. If they took a British ship they would have the Royal Navy on their case and nobody wanted that. If you took an American ship, there was no penalty, no consequence. This came to a head in an event we remember as Shays' Rebellion, named for a man nobody actually has an image of or can tell you much about, Daniel Shays. It was a tax revolt. It turns out that's mostly what Americans get upset about, and a lot of the poor people in the western part of the state were feeling crushed by taxes. After a bunch of different political activism events they ended up, and we don't know enough about it, but 3,000 of them were gathering in Springfield, Massachusetts, where there was an arsenal of weapons from the war and they wanted to take the weapons. Then they were going to march on Boston and attack the rich people or something like that.



The state troops were recruited from the rebels' neighbors and they faced off in front of the arsenal. They fired a volley over the rebels and then the rebels didn't leave. They fired a volley directly into the rebels, killing four, wounding many others. The rebels ran. They hadn't expected actually to fight. These were Americans. Americans were killing each other because they couldn't run their own country. This is just three years after we signed the treaty with Britain, and this alarmed people. There were open expectations spoken of in Congress in 1786 and 1787 that the United States would become three countries. New England, the Middle Atlantic States, and the South, maybe even a fourth country in the West on the other side of the Appalachians. George Washington said, 'Weak at home, and disregarded abroad is our present condition, and contemptible enough it is.' The convention was called by means I don't have time to talk about. We had 74 delegates who were appointed. Rhode Island never sent any. I like to call out the states that didn't really pull their weight.

Of the 74 only 55 actually made it. It was a big deal to go to Philadelphia for a couple of months. Leave your business, leave your family. Of those 55, only about 30 were really there the whole summer. They met at Independence Hall and there were about a dozen, I would say, who had significant impact. I want to just talk about six of them who left an indelible mark on the constitution. I'm going to start where everything starts, which is with George Washington. He was famously called by one historian, James Flexner, the indispensable man and there is no better description. He had led the army through the war. He was not a spectacular general. I'm working on a book on Washington now. He had bad days, but he was a remarkable man. He had a gift of inspiring trust, which is a gift. It helped that he was the biggest guy in the room, but he also had a way of listening to people, of affability yet aloofness, of obvious intelligence, but not showy intelligence and he was the man.

Everybody in that room knew that he would be the first president. They also knew that if he hadn't come, there probably wouldn't have been a convention. There certainly wouldn't have been a final constitution. He's always sort of a sober guy, and one thing I'm struggling with is how do you humanize him? There is a story about him at the convention I'm going to tell, even though it's probably not true, but I've been doing this for years and if you say it's probably not true, then it's okay, right? There was an actual proposal on the floor of the convention by Elbridge Gerry of Massachusetts to put a cap on the size of the Army at 3,000 men. There was a doctrine at the time that said standing armies were a terrible thing, that they were invited adventures abroad and oppression at home, and that was what was wrong with Europe and we didn't want standing armies.

Washington, of course, would think this was ridiculous. That's certainly true, but he is supposed to have said this not during the formal debates but in conversation. 'That would be fine as long as we have a parallel provision that no invading army can be more than 3,000 men.' He wasn't a real jokey guy, so I tend to doubt that he said. The remarkable thing Washington did at the convention in addition to being there was to be quiet. He presided, he ruled on motions, but he did not engage in debates. He didn't like to mostly, but given his influence, given his stature, he could have gotten the constitution any way he wanted. In fact, I looked for that in the casual remarks of the other delegates that, 'the General really wanted this so we did it.' I never found anything like that.



As an illustration of what he could have done, on the next to last day of the convention, he finally steps down from where he was presiding and said, 'There was something that came up the other day about shrinking the size of congressional districts.' This was a proposal Madison and Hamilton had made to make them smaller and more responsive to the people. It had lost. They voted by state at the time and lost something like two to seven. Washington said, 'I think that's a good idea. I think we ought to do that.' Everyone said great and they all adopted it by acclamation. They didn't even take a vote. Whatever Washington said they were going to do. I think that's because until then he had done a remarkable thing, which is he had remained silent through the summer and he had basically said to all of those people in the room, whatever you do, I will make the best of it. I trust you. I know I will have to run this government and I will do the best I can with the tools you give me. Please do your best job. It is an incredibly powerful force and example to say that to people.

The second person I wanted to talk about is Ben Franklin. He was the oldest man in the room. He was 81 at the time, which I think was older then than it is now. He was not entirely well. He was old enough to be Washington's father, old enough to be Madison's grandfather, and he was often a wonderful force for conciliation. He cracked jokes. All the delegates tended to write home, 'Oh, Dr. Franklin told the funniest joke the other day.' He was a central glue, but he wasn't just the lounge entertainment. There's a key moment in the convention when it almost fell apart over representation. Would voting in Congress be by states, which is what it had always been under the Articles of Confederation, or would there be representation? Madison and some others were desperate for it only to be by representation and the small states were desperate that that would be terrible. They would be submerged by the big states and this is resolved by something that's often called the Connecticut Compromise. I don't understand why it's called that.

When I looked and actually read the records, the first person to propose this was John Dickinson, a delegate from Delaware. It was ignored and a committee was appointed to try to resolve this terrible confrontation on this issue. They debated all day, and at the end of the day Ben Franklin, with his timing being perfect, said, 'What about this idea that we heard the other day? That we have one house be chosen by the states and one house chosen by the people?' Everybody was hot, sweaty, exhausted, and angry. They all said, 'Fine, good enough,' and that's what we got. We now have the Senate and the House. I'm not here to argue whether it's good or bad, but they needed to get past it.

The third man is the one often called the Father of the Constitution, James Madison. He outlined the initial Virginia Plan, which began the event. He certainly was the key to forming the convention, to having it called. I don't consider him the Father of the Constitution. I get in trouble for this. The final Constitution was not much like what he wanted. He was terribly upset about per state voting. He also thought there should be a veto that Congress would have over state laws because state legislatures were the instruments of the devil. They were doing terrible things and somebody had to stop them. He also didn't sit on the key committees during the course of the summer. Many times, as with what I just described with Franklin, the key events happened in the committees and Madison was not on the important ones.

When he spoke and he spoke wonderfully, he was taking the notes of his own speeches so he got those down very well. His remarks didn't seem to change the argument. Although he's a terribly important figure, I think it's not good to elevate him above the others, although his notes are in fact indispensable to people like me who want to know what happened in that room.

The people like me, who want to know what happened in that room. My candidate for arguably the Father of the Constitution is equally controversial, is a fellow I suspect few will identify, named John Rutledge from South Carolina. He had been governor of this state, and you'll get a sense of his personality that he was known as the dictator. Someone called him the most imperious man in America. He drove hard and successfully to protect southern interests, including slavery, and that's very unattractive.

But he was a powerful force. When he spoke, and it's striking in the debates, when he speaks, he speaks in modern cadences. They spoke in very flowery, highly rhetorical ways. He spoke the way we do today. Madison had an ear for catching how people spoke. He spoke for a short time. Something I need to emulate. When he sat down, he changed the debate. He didn't always win. Nobody always won. But people responded to what he said. They answered him, or they agreed with him, or they modified something he said.

I think you then see his influence, in that he was appointed to more committees than any other delegate. He served on five committees. He chaired more committees than any other delegate. He chaired three committees. Madison chaired none. He chaired the most important committee, which is the committee that produced the first draft of the constitution. As we all know, whoever produces the first draft controls a lot. Let's work from my draft. It's a good way to start the meeting. I think it's important not to forget John Rutledge.

Then there's an equally prickly character, James Wilson of Pennsylvania. He was an immigrant from Scotland. Came over in his twenties, was a prominent lawyer. He was a strong force for a more democratic government. Debating with Wilson one said was like being occupied by a foreign army. He and Rutledge worked together to build an alliance between the large states and the small states, trying to preserve representative government in Congress. Wilson was a very creative thinker, and he came up with some very creative compromises. They have become controversial in history.

One is the three fifths compromise, which allowed southern states to claim that their slave population counted towards representation in Congress and in our electoral system for three fifths of their number. Three fifths of a human being was the phrase I used as the head of that chapter. There's something disgusting about that, which Madison acknowledged. But they found it necessary in order to get agreement, to have everybody in the room agree.

He's also the guy who came up with the electoral system. It doesn't work at all the way they had in mind. But they had a terrible time figuring out how to choose the president. Nobody really thought popular vote was a very sensible thing to do. George Mason of Virginia said, 'That makes as much sense as asking a blind man to choose colors.' But they did expect to have Congress choose the president, but they kept worrying that Congress could be bribed, and that bothered them.

They tried to create this electoral system, which was such a terrible idea it had to be rescued by the 12th amendment in 1803, and it still produces minority presidents. Something not great for the country. But again, it was a compromise that got them through. My final character is Gouverneur Morris. He's a lot of fun. He was a rake and a raconteur. He had a wooden leg. It was from a carriage accident, and a lot of people wanted to say that it was while in flight from a jealous husband, although that doesn't appear to be the case.

A Frenchman described Morris once as, 'Possessing the most spirit and nerve amongst those I met at Philadelphia.' But then added, 'His superiority, which he takes no pains to conceal, will prevent his ever occupying an important place.' Mostly that turned out to be true. He spoke more than anybody else at the convention. If he was there, he was talking. He actually achieved that distinction although he wasn't even there for two weeks. He had to go away on business.

He did two remarkable things that we ought to remember about him. One was when that first draft of the Constitution came back from the committee that Rutledge chaired, it had a variety of additional pro-slavery, pro-southern provisions. It guaranteed the slave trade forever. It would not allow the revision of navigation laws, which would control slavery and the slave trade, without a two thirds vote of Congress. Morris was the only who stood up and said, in what has been called the first abolitionist speech in American history, that 'Slavery is the curse of God that will curse this nation forever.'

He called for a vote on it. There was one other vote supporting him, the youngest delegate, Jonathan Dayton of New Jersey. But then in the next few days, the other northern delegates found their courage and started standing up and objecting to some of these provisions. They were changed, Morris, I think, made a testament of conscience we should honor. The other thing he did was he wrote the Constitution. They got to the end of the summer and they had this mess. They had the first draft. They had a lot of amendments and resolutions, and somebody had to put it together.

They appointed a committee, and the committee appointed Morris. He spent two days on it. He shrank it by two thirds, which we're all very grateful for. He produced something that makes sense mostly. It was hard intellectual work. You had to be sure that the different parts of the Constitution were integrated with each other, they didn't contradict each other, and that they followed what these different resolutions had tried to achieve. I think it's so sad we don't recognize this.

We exalt Thomas Jefferson for the Declaration of Independence, and it's a good piece of work, but it's a rant. It's basically saying we're angry and we're not going to take it anymore. What Morris did was hard. I'm still agitating for a statue to Gouverneur Morris. The Constitution was completed with all its faults, in Franklin's memorable phrase, and was finally ratified. Although North Carolina took two years to do it, and Rhode Island took three. There is a point I want to stress, which is none of the signers really liked it very much.

Madison continued to sputter over the lack of a veto of state laws for Congress. James Wilson hated having states cast a single vote, or equal vote in the legislature. He thought

that was far too aristocratic. Alexander Hamilton thought the Constitution was nowhere near aristocratic enough. He thought senators and presidents should serve for life, rather like kings and nobles. Franklin thought there should be a one house legislature, that public officials should not be paid, it only encourages them, and that there should be a three person executive, that way none of them would have any power.

Rutledge and the other southerners dreaded having to give up to Congress the power to make trade laws by a simple majority, and not a two thirds rule. Gouverneur Morris was outraged that the slave trade was allowed to proceed unabated for 20 years. It was not a perfect document. There was no Bill of Rights. There are other things that weren't perfect.

But the greatest legacy of the convention was not the document itself, but the political culture that created it, and that they left to us to do with it as best we can. We can only form a nation and be a nation by a compromise of vital interests. Nobody gets everything. Even ugly compromises, like those that were made over slavery, sometimes need to be made for a nation to be forged. We forget that at our peril. Thank you very much.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
September 24, 2020

William Cohen  
Former U.S. Secretary of Defense  
Chairman and CEO of The Cohen Group  
Washington, D.C.

*Secretary William Cohen*

Thank you for the very generous introduction and I also might say that I knew Justice Powell personally and have had dinner with him – or had him and his wife for dinner at our home one or two times – so it’s a thrill for me to be on this program, especially with all the luminaries mentioned in the lead up to my introduction.

I think it’s becoming very difficult to return to the days of strict bipartisanship – not strict, but at least, a governing center. I think what’s happened since the time that I was in office is that the extremes have become more fixed in that cement. So, I think the first thing that has to be done is that leadership always comes from the top and when you have a leader at the top who’s promoting bipartisanship, bringing people in – and I would go back to Bill Clinton, for example, him asking me was really an effort to build bipartisanship for the defense and security issues by bringing a republican into a democratic administration. He said, “I trust you. Look at your record; I know you want to work together with democrats, as well as your republican colleagues.” That was a major step on his part to say, let’s see if we can’t work to the center because he started out pretty far to the left for his first term and he saw that it’s much better to get back to the center, if you can, and develop a broad consensus in order to make things happen. I think it started with Bill Clinton and I saw that and how it worked, and I was able to work both sides of the aisle; my own republican friends in the senate and also the democrats who supported Bill Clinton ended up supporting me. So, it comes from the top and when you have the top that says, “No, I want to really divide the country along political lines,” then it becomes that much harder. So, it starts at the top. And then beyond that, if you really want to start getting back to how you build bipartisanship, you’ve got to stop the money chase. What was happening during my time toward the end of my senate career is that the people were spending more time on the road raising money than they were with each other and they’re usually very difficult. Early in my career, we would sit down, our families would have dinner together, we’d have social events, and that started to drop off pretty dramatically when the money chase became the most important thing: Get out there on the road, hustle for money, because money is really – it became expensive television. And that was actually just before social media came online and so now with social media and with the cost of the campaigns, you’re finding people spending less and less time in the senate with their colleagues. And plus, as a result of social media, your colleagues are being portrayed as political enemies rather than political competitors and philosophical competitors. So, it takes – it really takes leadership from the top to say how do we make things happen again? Because if we just plant our flags in the end zones, neither party is going to win and the country’s going to suffer. Plus, it really gives more and more power to the executive branch. When you find, the American people find, that nothing is happening at the legislative center, then the president is always eager to take that power as being given up and take it for himself or herself so we’re going to see a continuation of the concentration of executive power if congress doesn’t recognize that you need to compromise on the big issues, whatever those issues are. Whether it’s the climate change, whether it’s developing vaccines and making sure the people get vaccinated for the various flues that are here and those that are coming. On the big issues, you say, there’s no republican or democratic side on this issue; we’ve got to work together. So, a lot of challenges coming in the future. We’re seeing the spread of Coronavirus now but others will be coming. We’re seeing the continuation of terrorism around the world; that’s something else we’ll have to

cooperate with our allies and potentially with our adversaries, as well. I've always lived by the notion that if a democrat has a great idea, I'm willing to join with it. If republicans have one, I want the democrats to join them. I think we have to have people who want to adhere to that and when I was in the senate, we had lots of republicans who were working with democrats. I ended up writing a novel with Gary Hart. I ended up writing a book about Iran-Contra with George Mitchell. I tried to reach across the aisle. I voted against many of Bill Clinton's initiatives and yet, he welcomed me into his cabinet. So, I think it starts with people at the top of the senate, the house, but certainly, with the President of the United States.

*Robert B. Fiske, Jr.*

Well, I just wish we had more people in the senate that think the way you do and hopefully, we'll be able to turn this around at some point.

My second area that I wanted to ask you about, of course, is foreign policy. I guess a simple question would be looking ahead in the next year or so, whatever the next administration is and whatever the politics of that are, what do you see as the biggest foreign policy issue facing the country and how would you deal with it?

*Secretary William Cohen*

The biggest geopolitical challenge we'll face is how we reconcile our interests with those of China. Right now, we are seeing something of trade friction – I won't call it a war at this point – but it could develop into a trade war. The President has negotiated a quote, "phase one" deal with the Chinese. It really doesn't change very much in the structural side but at least it's an agreement to move forward. And I think as long as we understand that China is a very big country, it's going to be an economic powerhouse, it already is, it's going to develop a first-class military, certainly regionally, and I would expect they'll try to be a global power as well on the military side. So, we have to understand what their objective is and then how do we deal with that without turning them or them turning us into an enemy and which, under those circumstances, a miscalculation, something that takes place out of the blue, suddenly you're involved in a military conflict. That would not be good for them or us or for the world economy. What we have to do is find a *modus vivendi* for living with the Chinese. Understanding that they're going to try to compete with us at the very highest levels of the economy, certainly the military, and even diplomacy. We had one choice – you can say we're going to try to contain them, which I don't think you can do, and when someone is running after you gaining ground, you can either try to stop them or you have to run faster and I think that's what we have to do. We have to keep ahead of those competitors; we have to invest more in research and science and technology to make sure we're always a step ahead of those who want to compete with us. So that's what I think we have to do. I think it's a mistake when we start calling names and turning them into an enemy. They're certainly a competitor; we could turn them into an enemy. It'd be very tough to undo that if we should ever take that step. I've traveled to China a lot; I've been going there since 1978. I was one of the first senators to go into the country and I've been going



there ever since. And I find I'm in a position to talk with the Chinese at the highest levels and sit behind closed doors and say, "Here are the problems with what you're doing and this has got to change. And we understand you have problems with us. We'll sit down and let's negotiate our way as best we can, understanding what your interests are and what ours are." I think that's the way we should go forward. I would hope whoever is elected will follow that path going forward. There'll be some disengagement, there'll be some trying to pull back some of the critical things that we need in our country – medicines, by way of example – to try to make them here at home. But other countries will do the same. India will say, "Make in India." China will say, "Make in China." So, we've got to make sure that we still have an international trading system that allows all the countries to try to prosper in a way that still promotes stability.

*Robert B. Fiske, Jr.*

Thank you. Time for one other foreign policy question and I guess I would ask you what do you think of the current talks that are going on between Afghanistan and the Taliban and what do you think is going to come out of that or should come out of that?

*Secretary William Cohen*

Well, on this, Bob, I tend to be more skeptical. I think when you're dealing with a country like Afghanistan, you either have to make a long-term commitment on a multilateral basis – Afghanistan is still in a different century and in order to change that century and to bring it in the 21st, means massive investment, it means really curbing the Taliban, getting together with Al-Qaeda or other groups. It means educating the population. It means providing investment into the kind of agriculture that's not poppy-oriented and so trying to cut down all the drug trade, try to build an infrastructure so they can get groceries, vegetables and fruits to market before they rot. So, taking and building a country over a long period of time. And I think we've had – I think we're pretty tired of being there; that's the sentiment of this country. But I think it would be a big mistake if we pull all of our troops out. I think we have to have at least enough troops there, so-called counterterror capability, as opposed to counterinsurgency. And so we're not nation-building any longer or trying to do that because you need other countries in the region, throughout the world, to really invest over a very long period of time to ultimately change the culture of the country, to change the educational system, to introduce them into forms of capitalism that they would adopt. So that's not going to be done in the 19 years that we've been there. It may take, you know, 30, 40, 50 more, but I don't think the world has that interest and I know that the people of the United States don't have that interest right now, but that's what it's going to take to turn that country into one that doesn't invite Al-Qaeda back in or allow the Taliban to start plotting for ways in which they can either disrupt or destroy other countries.

*Robert B. Fiske, Jr.*

Thank you. You know, we can go on for an hour, two hours, and it would be fascinating

for our audience. Unfortunately, the powers that be in the College have only allotted us a limited amount of time and I didn't want to run out of time before I gave you an opportunity for the benefit of all of us to read one of your favorite poems.

*Secretary William Cohen*

Okay, now you're going to embarrass me. Let me tell you a very quick story. I went to Bowdoin College and while there, I was a big man on a very tiny campus. I think we had, at that point, maybe 700 students and so, I was co-captain of the basketball team and that was my self-image. I am a basketball player. And an English professor assigned the writing of a sonnet. He said everyone here will write a sonnet. Well, I had never read a sonnet, not to mention write one, and I panicked. I went to him; I said, "Professor Greason, please, you know I'm the co-captain of the basketball team and you know I'll be traveling throughout for the next two weeks for the team." And he stopped me cold. He said, "Mr. Cohen, you will write a sonnet or you will fail this course." So that sent me into all kinds of depression. I waited almost two weeks, three weeks; I didn't know how to go about writing a sonnet.

And finally, one night I was at the library and I was flipping through a magazine and that magazine was a science magazine and it talked about the relationship between the seasons and the lovemaking of animals. I said, I wonder if that applies to humans and so I wrote my first sonnet. And it goes, if I can remember: "Winter freezes, summer bled to ice, and it chills the passions that await the spring. The lovers suffer season's sacrifice and alters bleak with crystal covering. Now what heart can hold a love in winter's time when even nature slacks her passion pace? When minor creatures flea the upper pond for warmer realms of burrowed space. But spring has courage to oppose the cold and passes on to those who love the same. The sound of life and laughter take hold of human years that closed in winter's name. Ah, but is it fair to impassion reason to say that love depends upon a season?"

It opened my mind to say I'm more than a basketball player; there's much more life out there. There's more learning for me and it certainly opened my eyes to literature, from Latin and Greek, to the poets of the generations. And as a result of that, I eventually became a note editor on the editorial board of the law school. I wrote briefs for many other lawyers in the state of Maine and it certainly helped me when I got to Washington. So one person, I guess the lesson is, one person can have an impact upon your life that will change your life, hopefully, for the better. In my case, it was for the better.

*Robert B. Fiske, Jr.*

Well, Secretary Cohen, I want to thank you for an absolutely fascinating discussion and you have indeed showed us why you are a true renaissance man.

*Secretary William Cohen*

Bob, thank you. Thanks for all you've done in being a great prosecutor, an investigator. I will always remember your activities and how you conducted them during Whitewater and beyond. A pleasure for me to be with you.

*Robert B. Fiske, Jr.*

Thank you.



LEWIS F. POWELL, JR. LECTURES  
AMERICAN COLLEGE OF TRIAL LAWYERS  
October 1, 2021

James A. Baker, III  
Former U.S. Secretary of State  
Houston, TX

Thank you, ladies and gentlemen; thank you, all. Thank you, David, for a very, very generous introduction. And thank you, as well, for the honor of being named the Lewis Powell Lecturer today.

Ladies and gentlemen, Justice Powell was a titan of American jurisprudence; one who had great command of the law and its influence on all Americans. But his contributions to the nation really went far beyond his role as a great legal mind. Justice Powell's personal characteristics, the ones his colleague Sandra Day O'Connor said were, "A model of human kindness, decency, exemplary behavior, and integrity," are really sorely needed today in this zero-sum society of ours. I was fortunate to have become friends with Justice Powell during my time in Washington. And I can say firsthand to you that he preferred modest and restrained discussion over the brand of hollering that passes for debate these days in our country. His approach to the world around him would serve all of us well during this time of our national anger.

Now, I want to discuss with you today some of the challenges that I think face our nation, starting with a few comments about Afghanistan. Last month, the United States withdrew its last troops from that nation, concluding our 20-year military involvement there. Like many Americans, I was really dismayed by the sheer chaos of our departure. Images of fleeing Afghans falling from U.S. transport planes and thousands of others clamoring for evacuation will, I'm afraid, become part of our collective American memory. But I was also very proud of the courage and the compassion of our American servicemen and women during some very tough times. Not least, I felt - and I still feel - a profound sympathy for the Afghan people, especially the women and girls who now must live under a fanatical rule.

The story of our ill-fated involvement in Afghanistan, as we all know, is a long one. There's plenty of blame to go around; it is bi-partisan blame. I don't want to relitigate the policies undertaken by the four American administrations involved there; I will leave that argument where it belongs: with the historians. However, I do believe President Biden made the absolutely correct decision to leave Afghanistan, as difficult as it was. We cannot be the peacekeeper of the world even though a lot of countries would like us to be and twenty-plus years is a long time. What started as a mission to capture Osama Bin Laden and stem the flow of terror from that country was transformed when Bin Laden and most of his Al Qaeda people escaped into Pakistan. And in its place was a new American mission; a difficult one intended to provide stability in a country where similar efforts to do so led to humiliating defeats for both the British and the Soviet Empire.

Now, twenty years later, I would like to offer you a few suggestions about how I think the United States can avoid similar costly ventures in the future.

First of all, we need to establish a clear objective and we need to stick to it. The initial U.S. goal in Afghanistan was a necessary one in my opinion: The destruction of Al Qaeda's safe haven. But over the years, our involvement gradually shifted to an exercise in nation building; a very clear example of mission creep. Now we have engaged in nation building in the past, of course, with various degrees of success. Japan and Germany, after World War II, are cases in point. But in neither of those instances did we have to confront a substantial domestic insurgency

like the one we did in Afghanistan and like the one, frankly, that we did in Iraq, as well, after 2003.

The second lesson I would argue for is that we must define victory; define victory in terms that people understand. Devise a clear strategy to achieve it and then have an exit strategy once we have won. Otherwise, we risk drifting into an endless conflict driven by inertia among our policymakers. The truth of the matter is military and civilian bureaucracies will simply continue doing what they have in the past if given a chance. In other words, if you don't know how you're going to get out, don't get in.

That brings me to a third lesson: We must know our limits. While the United States may be the most powerful country in the world, our power is not boundless. We simply cannot transform countries like Afghanistan in our own image. As the Bible reminds us, pride goeth before destruction and a haughty spirit before a fall. I think this is advice that all American foreign policymakers should remember.

And fourth, and finally, we should be very, very wary of setting public deadlines when we're talking about military operations. Such deadlines encourage our adversaries to bide their time, gather their strength, and strike when we withdraw, and this is precisely what unfolded in Afghanistan.

Perhaps, the best advice I could give our current policymakers is the example that President George H. W. Bush set during Desert Storm; the successful U.S. military mission that ejected Iraq's troops from Kuwait in 1991. First, President Bush told the world what he intended to do. Then he went out and got U.N. Security Council resolution authorizing it; in other words, he then went out and got international support for the mission. And then he went to Congress, even though it was dominated, both houses, by members of the opposite party, and got domestic support for the effort. Finally, he did exactly what he said he would and no more. He then brought our sons and daughters home and after all of that, he got other countries to pay for almost all the cost of the war. The only war America's ever fought that was not paid for largely by our taxpayers.

Now, I'm biased, of course, but I would argue to you that this conflict represents a textbook example of the way to conduct a war: Diplomatically, politically, and militarily. Leaving Afghanistan, of course, was never going to be pretty. Losing a war is never pretty. But the manner of our departure - which was hurried, ill prepared, and marked by dangerous, willful thinking - reflected badly, I think, on the Biden Administration and, indeed, on the United States of America. Admittedly, the speed of the final Taliban advance was shocking, but we should have known it would be swift and the Biden Administration's lack of urgency surely contributed to the fiasco. The July evacuation of Bagram airbase, our largest in Afghanistan, was an early sign, I think, of the mistakes that would follow. We slipped away in the middle of the night without even informing the new Afghan commander or our allies.

The United States airlift of Americans and some of our allies, Afghan allies, was really a remarkable logistical feat. But when you think about it, ladies and gentlemen, it was weeks

too late. And with respect to those Afghans who had helped us, it was far too limited. Our commitment to these Afghan partners, especially the translators, is more than a matter of honor. It sends a clear signal around the world that the United States of America remembers its friends.

Now, in concert with other countries meanwhile, we must move quickly to address a massive refugee flow from Afghanistan. When the Vietnam War ended in 1975, President Ford acknowledged the serious human rights issues facing many South Vietnamese residents and he began what became the relocation of hundreds of thousands of refugees to the United States.

Now, I'm not sure there is political support today for such a massive program, but we must accept our fair share of refugees and provide humanitarian support for those that may be stranded elsewhere. I think we must also accept the possibility that Afghanistan will again become a base for terrorism against the United States or our allies. This, after all, is the reason we intervened in Afghanistan in the first place.

And more importantly than all of that, the Administration, I think, needs to move quite quickly to mend the damage to U.S. credibility caused by the manner of our withdrawal. Our partners around the world are clearly rattled by the shocking way in which our involvement ended. They doubt our commitment and they doubt our competence. That withdrawal will embolden our adversaries; the way it was conducted.

This could be the case, of course, with the Chinese threat to Taiwan. We, I think, must spend the upcoming weeks and months assuring our partners about our reliability and we should back up those assurances with measures including enhanced deployments in places like the South China Sea to signal that we really mean business.

Now, some have suggested that our defeat in Afghanistan marks the end of America's preeminent role in world events. My friends, nothing could be more wrongheaded. I've learned that betting against Uncle Sam is a fool's wager. We remain in economic, diplomatic, political, and military terms, by far the greatest nation on earth. And that power is multiplied by our long-term alliances in Europe and East Asia. As China continues to emerge on the world stage, it's going to be critical for the United States to remain fully engaged in global affairs.

Our way forward in Afghanistan is only one of many other serious challenges facing the United States today. The biggest of which, in my opinion, is a ticking fiscal debt bomb that threatens the financial strength of our country. Debt scholars, like me, seem to be a vanishing breed, these days; you used to hear this from both sides of the aisle. But I really hope it isn't true that all of this has passed because America's position as the world's preeminent power rests on three foundations. First of all, our military power. Secondly, our network of alliances with other nations. And third, our economic strength. And absent a strong economic position, we cannot maintain our military power or our political alliances.

Alarming, in my view, we have been spending money for the past few decades like drunken sailors and that's true, ladies and gentlemen, about both democrats and republicans. Everybody seems to want a free ride paid for by their grandchildren. The numbers today are



staggering. In March of this year, our total national debt stood at \$28 trillion. That represents about 108% of our gross national product and it's almost double what it was just two decades ago when the debt to GDP ratio was 55%. Ladies and gentlemen, that is just unsustainable. And if those who control the White House and House of Representatives today get their way, of course, there's a lot more to come. Left uncorrected, our national debt will be twice the size - get this - twice the size of our whole economy in thirty years, according to the Congressional Budget Office.

Now, some economists will argue that the size of our national debt doesn't really matter because interest rates needed to borrow the money to pay to service the debt are near historic lows and they see no indication that they will dramatically rise any time soon, if ever again. But ladies and gentlemen, as a former treasury secretary, I have to tell you, I don't believe that's a good bet because inflation is starting to rise, although it's not clear yet if this is merely a short-term jump caused by kickstarting our economy after more than fifteen months of a pandemic-related sluggishness. Inevitably, however, I would submit to you that the chickens will come home to roost and interest rates will spike. And when that happens - not if, but when - repaying the debt will require more and more of our tax dollars that I think would be better spent on things that keep our nation strong rather than paying debt service. I'm afraid that because of our political will to do what we need to do in our fiscal policy, the only way we're going to correct this problem is by ultimately inflating our way out of it. We can do that, of course, because we have the backdoor reserve currency of the world in the dollar. But inflating our way out of this debt is a terrible option; probably the worst. And particularly, for the poorest Americans who are most hurt by inflation.

Another serious challenge facing our nation is global climate change. I don't know whether it is the existential crisis that some claim it to be or not; I don't happen to be an expert on climate science. But it is a very serious problem and one that's going to continue to get worse unless there is a global commitment to the reduction of carbon emissions. Four years ago, the late secretary of state, George Shultz and I, came forward with a proposal to resolve the political conundrum between democrats and republicans in our domestic battle over what to do about climate change. Our plan called for a fee on all carbon emissions in the United States; an approach that most economists and most democrats believe is the most efficient and effective way to reduce such emissions. But rather than giving that money to the federal government, all of the revenues from that fee would be returned to Americans in the form of a quarterly dividend that would provide the vast majority of households with more money than they would pay in higher energy costs because of the carbon fee. As a result, this fee would not grow the government, and therefore, in my view at least, should not be considered a tax; something that is opposed, as you all know, by most all republicans.

Of course, the only way this proposal would work politically is to return all of the revenues to Americans via quarterly dividends. If Washington were to divert all or some of the revenues from such a carbon tax for other purposes, then it's not going to work politically. And first and foremost, this issue is a political issue and we need to find a way to bridge the gap between the parties. If the effort is successful to divert some of the proceeds to other purposes, we will probably lose any opportunity for a long-term solution to carbon emissions because we'll lose the opportunity to bridge that conundrum between democrats and republicans; that political problem.

A critical component of this plan of ours is a cross-border adjustment or tariff. The plan would rebate to U.S. manufacturers any fees applicable to products exported to any nation that doesn't have a similar carbon program. And importantly, it would apply the fee to imports from any non-complying nations.

If any country refused to go along, it would have to pay a tariff to send its good into the United States; the world's largest market. This would obviously put pressure on China and others to reduce their own emissions or pay a surcharge to sell their goods in the United States. Now, getting something through Congress, getting anything through Congress these days, is very difficult, of course. Because of the political dysfunction that infects Washington, anything you submit to the Congress today is going to be a real hard roll uphill.

And so that, ladies and gentlemen, brings me to the final challenge that I would like to discuss with you briefly. During my 91-plus years, I have seen few issues that are as vexing and potentially damaging as the one now posed by the incivility that poisons our society. The crassness of our national debate and the political dysfunction that accompanies it too often bring our governors to a standstill. Yes, politics ain't beanbag. People are always saying, "You know, politics ain't beanbag." That's right; politics ain't beanbag. I know that firsthand and I have the bruises to show for it. But as our national anger has grown, so too, ladies and gentlemen, has our distrust. Distrust of our politicians, distrust to our institutions, and distrust of each other.

I'm not sure how to resolve this problem because you can't legislate civility. But I do know that we need to start getting along better if the United States is going to remain the country we have been for most of our history. In Washington, that's going to take substantial leadership from both parties. Republicans and democrats must relearn how to compromise if they want to get things done. Doing that will require a commitment, in my view, to cooling some of the incendiary rhetoric that we see these days.

And meanwhile, I think all of us, as Americans, all Americans, must shoulder some responsibility for the state of our discourse today. We really cannot allow our popular culture to become angrier and uglier and more vulgar. Each of us, I think - each one of us - should recognize that in a democracy, no one side gets to make all of the rules. Our country has survived and it has thrived in large part because we have worked together in the past on important issues. And in a democracy, absent the art of compromise, chaos can ensue.

And above all, ladies and gentlemen, we need to start listening to one another; not just yelling at one another. When somebody makes a point, listen to it, regardless of how incorrect it may seem to you. Don't discount people just because you don't agree with them. Listening is an important part of learning about one another and from one another that sends a clear signal of respect. And in this country, my friends, I think we need to do more listening and less shouting because I think that - I really fear - that the things that have always bound us together as Americans, today are getting lost in the noise.

Thank you all for having me today.

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