

A Tribute to Justice Lewis F. Powell Jr.

by Clarence M. Dunnville Jr.

In this, the 50th anniversary of the Civil Rights Act and the 60th year after the landmark United States Supreme Court's *Brown v. Board of Education*¹ decision that struck down the requirement of segregation in public schools based upon race and caused the political leaders of Virginia to propose the closing public schools and "a 20th century revival of nullification,"² it is important to pay tribute to Justice Lewis F. Powell Jr., the champion of racial fairness.

Powell, who was the chairman of the Richmond School Board at the time of the *Brown* decision in 1954, prevented the closing of Richmond schools and worked to secure compliance with the ruling. This was in spite of members of his own law firm representing the other side as attorneys for Virginia and as counsel to the state and local governments in related cases.

Two and a half decades later, as a member of the United States Supreme Court, Powell cast the deciding vote in the "greatest civil rights case since *Brown*."³ Were it not for his decision in the divided court, the significant progress made by people of color towards equality in the United States over the past thirty-five years would be unlikely.⁴

The Powell family has been rooted in Virginia since 1635. One of his ancestors served as acting governor during the colonial era. The family patriarch was a Confederate soldier wounded at Fredericksburg.

Lewis Powell was born in 1907, a decade after the Court decided *Plessy v. Ferguson*, the so-called separate but equal doctrine.⁵ That case held that racial apartheid in the United States was constitutional. More than half a century of segregated public toilets, water fountains, neighborhoods,



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schools, hospitals, and all other public facilities, followed *Plessy*.

Non-white people were limited to menial, servile, and unskilled employment. They were excluded from grand juries and petit juries, and restricted in voting. In the criminal justice field, where most often there was no justice, black defendants were unable to obtain legal counsel in some cases. In 1933, a black man charged with the murder of a white woman in Loudoun County was unable to obtain counsel. There were no black lawyers admitted to practice locally, and no white lawyer would accept the case. Finally, a team of lawyers from Howard University Law School undertook the defense. The trial judge denied all motions against the many procedural irregularities, and also the motion opposing the exclusion of blacks from the jury. The out-of-state defense team was threatened and faced great danger. The defendant was convicted in an atmosphere of great hostility.⁶ This was the climate faced by people of color in Virginia as young Lewis F. Powell

Jr. began his law practice in Richmond, with one of Virginia's most prestigious law firms, representing major corporations and financial interests.

Oliver W. Hill, also born in 1907, graduated from Howard Law School in 1933, and began his practice in Virginia.⁷ Powell was a very conservative white Virginia gentleman, a member of the country club set, a rising power in the Virginia establishment who was surrounded by servants in his home. Hill was a man of color from the Negro side of town. He began his practice barely eking out a living representing the downtrodden, while pursuing the rights of black people.

Hill studied law for the express purpose of challenging Virginia's segregation laws. His goal was to have *Plessy v. Ferguson* declared unconstitutional.⁸

A small band of lawyers consisting of Charles Hamilton Houston, dean of Howard Law School during Hill's attendance, Hill, Thurgood Marshall, Spottswood Robinson and several others from Howard began in the 1930s to plan the attack to end racial segregation. In planning a strategy to bring down discrimination, they had to establish a body of law to support their position. This took more than twenty years; the first case was launched while Hill was still in law school.⁹

Over the years, Hill and his associates, while building the case law necessary to bring down *Plessy*, handled a number of civil rights cases involving voters' rights, equal rights in employment, criminal justice, and other areas, but always with the objective of overturning *Plessy*. An example of this work during this early period was the case involving the denial of blacks to vote in primary elections.

Powell believed in education and the law, and he had a strong sense of public duty.

For more than thirty years, Senator Harry F. Byrd dominated the Democratic Party to the extent that winning the party's nomination in a primary election was tantamount to winning the election. Often blacks were excluded from voting in the Democratic primary. In 1939, Hill successfully obtained relief against the County Election Board of Greenville County, remedying the board's practice of denying blacks the right to vote in the Democratic primary.

Powell believed in education and the law, and he had a strong sense of public duty. His charity work and public service were exemplary. He became involved in legal services for the poor and served on numerous charity and public service boards. These activities earned him the reputation of being the leading free lawyer in Richmond.¹⁰

During the 1940s, the Richmond Citizens Association, the most prominent political organization in Richmond, organized a task force headed by Powell to seek a change in the form of city government. The Citizens Association advocated changing the form of government from a strong mayor with a weak city council to a strong city council with a ceremonial mayor selected by the council, and a city manager appointed by the council to perform the administrative functions of the city.¹¹ Powell's group worked with Hill, and the new government system was adopted by a large majority in November 1943. Hill at the same time ran for city council with the backing of the association. He became the first black elected to the Richmond city council.¹² Hill has stated that from that time forward, he considered Powell a friend.

Hill continued for many years to pursue overturning *Plessy*. He and his law partner, Spottswood Robinson, were the trial attorneys in *Davis v. County School Board of Prince Edward County*, which was the Virginia case consolidated in *Brown v. Board of Education*. Robinson and Thurgood Marshall argued the case before the Supreme Court. The result, overturning *Plessy*, was the fulfillment of Hill's goal.

Powell accepted the Court's ruling and tried very hard, working behind the scenes, to secure compliance with the Court's edict.

At that time, Powell could not have dreamed he would someday be sitting on the Court, and would render the deciding vote, and write the controlling opinion, in a case equally important to *Brown* from the perspective of racial fairness.

Powell did not seek appointment to the Supreme Court and he actually wrote to the U.S. attorney general that he was unavailable. But he reluctantly agreed to accept the appointment after President Nixon's first two choices failed to receive confirmation. Powell was opposed by many civil rights activists because of his membership in the all-white Country Club of Virginia, and other organizations, and because his law firm then hired no black attorneys. It was also alleged that he had

actually subverted the law and obstructed the Supreme Court decision in *Brown*.

Powell's friend, Hill, stepped forward to his defense. Hill privately told Marshall that Powell was "all right," and testified on his behalf at the confirmation hearing. Powell was confirmed.

While *Brown v. Board of Education* held that racial segregation was unconstitutional, it did nothing to bring black people into the mainstream, to make the nation a fully integrated society. A quarter of a century after *Brown*, people of color had virtually no positions of influence, affluence, prestige, or power in America.

Universities had begun after *Brown* to attempt to alleviate the situation. They actively recruited black students and established special programs, including quotas for blacks. Without education, it was impossible to achieve any measure of success. Education was the point of entry to an integrated society. Universities, recognizing that racial preferences were necessary to obtain a diverse population of students, admitted some black students over white students with equal academic qualifications. There were great outcries of reverse discrimination. Alan Bakke, seeking admission, brought suit against the University of California asserting that the quotas established for black students were unconstitutional. In late 1977, the case reached the Supreme Court.

The court was evenly divided, with justices Burger, Stewart, Rehnquist, and Stevens, firmly opposing racial preferences, and Brennan, Marshall, White, and Blackmun favoring the university's quota plan. Powell stood alone, with the power to decide. He conceived of the principle of affirmative action, holding that racial quotas were unconstitutional, but that race could be considered in admissions policies to obtain diversity. His decisive vote framing his limited form of racial preferences, coupled with the determinations of Brennan, Marshall, White, and Blackmun, ushered in the national policy of affirmative action and the beginning of the period during which a substantial number of people of color could gain the educational background needed to aspire to positions of influence, affluence, prestige, and power. Affirmative action is more favorable than quotas, in that quotas are limited to a specific number, whereas there is no limitation on the number of students accepted under the principles of affirmative action. The affirmative action policy further allows great flexibility to the university. Over time, Powell's plan resulted in far more blacks becoming qualified for high levels in government, corporate positions, and the professions.

Powell and his friend Oliver Hill were from opposite poles of society, but they had the common goal of always doing the right thing. Both men made a tremendous contribution to the progress of black people in America. Both had a sense of decency and fairness, and the belief in the law as a vehicle for change. Both were fearless and willing to stand up and fight for the principles they believed in, irrespective of the personal risk. Powell's character put him on the side of the struggle of people of color because it was fair, right, and just.

At the 60th anniversary of *Brown* and the 50th anniversary of the Civil Rights Act, it is important to pay tribute Justice Lewis F. Powell Jr. for his role in the struggle for racial fairness in the nation.

Endnotes:

- 1 *Brown v. Board of Education of Topeka Kansas* 347 U.S. 483 (1954).
- 2 Jeffries, John C. Jr., Justice Lewis F. Powell, Jr., Charles Scribner's Sons, 1994, p. 163 US 527 1896
- 3 Id, p. 488.
- 4 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
- 5 *Plessy v. Ferguson*
- 6 Smith, J. Clay, Emancipation, the Making of the Black Lawyer, 1844-1914, University of Pennsylvania Press, 1993, p. 234.
- 7 There were no law schools in Virginia that admitted non-white students.
- 8 See Hill, Oliver W., the Big Bang, *Brown v. Board of Education* and Beyond, Four G Publishers, Inc., 2000, p76, 154.
- 9 Hill, Id. p. 152.
- 10 Jeffries, Jr., Id. p. 123.
- 11 Hill, Id., p. 225.
- 12 Jeffries, Jr. Id., p. 124.



Clarence M. Dunnville Jr. of Richmond has worked in civil rights matters throughout his career, most recently was a member of the Virginia State Bar Diversity Task Force and head of the foundation that preserves the boyhood home of Oliver W. Hill Sr. in Roanoke. He is the recipient of the 2009 Lewis F. Powell Jr. Pro Bono Award from the VSB Special Committee on Access to Legal Services and was the first recipient of the VSB Diversity Conference's Achievement Award, which was then named in his honor.