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The Right-Wing Legacy Of Justice Lewis Powell And What It Means For The Supreme Court Today

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Chances are if you were asked to name the most influential conservative Supreme Court justice of the last 60 years, you'd nominate the late Antonin Scalia. And you'd have any number of compelling reasons to do so.

Whether you liked him or loathed him, Scalia was a jurisprudential giant, pioneer of the “originalist” theory of constitutional interpretation, consistent backer of business interests, and the author of the 2008 landmark majority decision in **District of Columbia v. Heller**, which recognized an individual right to bear arms under the Second Amendment. His death in February left a vacancy that has become a hot-button issue in the runup to the November election.

But for all of Scalia's impact—and notwithstanding the political shivers and convulsions his demise has sparked—I have another contender, or at least a close runner-up, in mind: the late Lewis F. Powell Jr.

“Lewis F. Powell Jr.?” you might ask, with just a trace of skepticism. “Wasn't he the one-time corporate lawyer whom New York Times columnist Linda Greenhouse eulogized in her 1998 obituary as a ‘voice of moderation and civility’ during his 15-year tenure on the court?”

Yes, that guy. But while Powell has been widely commemorated by Greenhouse and others as both a centrist, a lifelong Democrat and a judicial workhorse, writing more than 500 opinions, his most significant contribution to American legal history was made in secret, some five months before his January 1972 elevation to the bench, and it was anything but moderate.

On Aug. 23, 1971, Powell penned a confidential 6,400-word memorandum and sent it off to his friend and Richmond, Va., neighbor, Eugene Sydnor Jr., then-chairman of the U.S. Chamber of Commerce education committee and head of the now-defunct Southern Department Stores chain.

The memo, titled “Attack on American Free Enterprise System,” was breathtaking in its scope and ambition, and far more right-wing than anything Scalia ever wrote. It was, as writer Steven Higgs noted in a 2012 article published by CounterPunch, “A Call to Arms for Class War: From the Top Down.”

Back in 1971, when the memo was prepared, Powell was a well-connected partner in the Richmond-based law firm of Hutton, Williams, Gay, Powell and Gibson and sat on the boards of 11 major corporations, including the tobacco giant Philip Morris. He also had served as chairman of the Richmond School Board from 1952 to '61 and as president of the American Bar Association from 1964 to '65. In 1969, he declined a nomination to the Supreme Court offered by President Nixon, preferring to remain in legal practice, through which he reportedly had amassed a personal fortune.

Powell and other business leaders of the era were convinced that American capitalism was in the throes of an existential crisis. A liberal Congress had forced Nixon to create the Environmental Protection Agency and the Occupational and Health Administration. At the same time, consumers were making headway against corporate abuse, both in the courts and legislatively. And the anti-war and the black and brown civil rights movements were all gathering steam and scaring the bejesus out of the corporate oligarchy.

“No thoughtful person can question that the American economic system is under broad attack,” Powell began his analysis. “There always have been some who opposed the American system, and preferred socialism or some form of statism (communism or fascism).”

“But now what concerns us,” he continued, “is quite new in the history of America. We are not dealing with sporadic or isolated attacks from a relatively few extremists or even from the minority socialist cadre. Rather, the assault on the enterprise system is broadly based and consistently pursued. It is gaining momentum and converts.”

In particular, Powell identified college campuses as hotbeds of dangerous zealotry, fueled by charismatic Marxist professors such as Herbert Marcuse of the University of California, San Diego, along with inspiring New Left lawyers like William Kunstler and Ralph Nader. Together, these “spokesmen” (the male noun being used throughout) were succeeding not only in “radicalizing thousands of the young,” but in Powell’s view also winning over “respectable liberals and social reformers. It is the sum total of their views and influence which could indeed fatally weaken or destroy the system.”

Sounding like an inverted caricature of Vladimir Lenin, who in his seminal pamphlet “What is to be Done?” pondered how the Russian Bolsheviks might seize power, Powell asked directly in the memo, “What specifically should be done?” to awaken the business community from its torpor, spur it to counter the New Left and reassert its political and legal hegemony.

The first step, he reasoned, was “for businessmen to confront this problem [the threat to the system] as a primary responsibility of corporate management.” In addition, resources and unity would be required.

“Strength,” Powell wrote, “lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and the political power available only through united action and national organizations.”

Deepening his call to action, Powell urged the Chamber of Commerce and other business entities to redouble their lobbying efforts and to “recruit” lawyers of “the greatest skill” to represent business interests before the Supreme Court, which under the stewardship of Chief Justice Earl Warren had moved steadily leftward. Powell wrote: “Under our constitutional system ... the judiciary may be the most important instrument for social, economic and political change.”

Apparently stirred by the urgency of the hour, Powell accepted Nixon’s second invitation to join the Supreme Court, tendered in October 1971. He was confirmed by the full Senate two months later by a vote of 89-1, with the sole “nay” ballot cast by Democrat Fred Harris of Oklahoma, a maverick populist, who asserted that Powell was an “elitist” who lacked compassion for “little people.” Powell took his seat the next January.

Powell’s memo, although circulated and discussed within the Chamber and in wider business consortia, never came to light during his confirmation hearings, despite supposedly thorough vetting by the FBI. In fact, it came to public notice only in September 1972, when it was leaked to syndicated columnist Jack Anderson, who devoted two pieces that month to the memo, describing it as “a blueprint for an assault by big business on its critics.” Powell’s views, Anderson argued, “were so militant that [the memo] raises a question about his fitness to decide any case involving business interests.”

Anderson’s warnings fell largely on deaf ears. During his Supreme Court career (1972-1987)—a time when the panel was in transition from its liberal Warren epoch to its conservative reorientation under the leadership of Chief Justice William Rehnquist—Powell provided a reliable vote for corporate causes.

He was especially instrumental in helping to orchestrate the court’s pro-corporate reconstruction of the First Amendment in the area of campaign finance law, which culminated years later in the 2010 **Citizens United** decision. He joined the court’s seminal 1976 ruling in **Buckley v. Valeo**, which equated money, in the form of campaign expenditures, with political speech. And he was the author of the 1978 majority opinion in **First National Bank of Boston v. Bellotti**, which held that corporations have a First Amendment right to support state ballot initiatives.

But it is the secret memo that has proved to be Powell’s most important and lasting legacy. Although he was not the only corporate leader to sound the counterrevolutionary alarm in the early ‘70s, his admonition for concerted action bore fruit almost immediately with the formation in 1972 of the Business Roundtable, the highly influential lobbying organization that within five years expanded its exclusive membership to include 113 of the top Fortune 200 corporations. Combined, those companies accounted for nearly half the output of the American economy.

The Roundtable was followed by a succession of new political think tanks and right-wing public interest law firms. These included the Heritage, Charles Koch, Castle Rock, Scaife, Lynde and Harry Bradley, and Olin foundations, among many others, as well as the Pacific Legal Foundation, the Cato Institute, the Federalist Society and, above all, the Chamber of Commerce National Litigation Center.

Established in 1977, the Chamber's Litigation Center has grown into the most formidable advocacy group regularly appearing before the Supreme Court. According to the Center for Constitutional Accountability, the Chamber has notched a gaudy 69-percent winning record since John Roberts' installation as chief justice in 2006. Together with its sister organizations, the Chamber has helped make the Roberts Court the most pro-business high tribunal since the 1930s..

Now, however, with Scalia departed and three sitting justices (Ruth Bader Ginsburg, Anthony Kennedy and Stephen Breyer) at least 80 years old and nearing inevitable retirement, the transformation of American law wrought by the institutions that Powell envisioned more than five decades ago is potentially at risk.

The next president—whether Hillary Clinton or Donald Trump—will have a historic opportunity to remake the nation's most powerful legal body. And while it may be safe to assume that any of the right-wing federal and state judges Trump thus far has floated to replace Scalia and fill any other vacancies would only further Powell's designs for a corporate court, it cannot be assumed that Clinton, with her longstanding ties to Wall Street, would appoint progressives just because she's a Democrat.

In all likelihood, if elected, Clinton would try to fill Scalia's spot with President Obama's current Supreme Court pick—District of Columbia Circuit Court Judge Merrick Garland. Like Powell in his time, Garland is considered by most legal observers to be a moderate, with a reputation for collegiality.

Now, I am not suggesting that Garland has a skeleton in his closet on the order of Powell's secret memo, or that he wouldn't move the court incrementally to the left if he were to succeed Scalia. What I am saying is that neither he nor anyone else who might be tabbed by Clinton would merit a free pass simply on the basis of party affiliation or status in legal circles.

And that's precisely the point of revisiting the Powell memo and calling attention to its meaning for the Supreme Court today. No matter who is selected to sit on the Supreme Court or by whom, the public deserves a full accounting of any nominee's views and affiliations, along with exacting standards of accountability and transparency.

There should be no more nonsense like the blind spots that accompanied Powell, or the ham-fisted inanity offered by John Roberts at his 2005 Senate confirmation hearing, in which he compared justices to baseball umpires calling balls and strikes. Nor should there be any more refusals, a la Justice Samuel Alito at his 2006 hearing, in which he declined to articulate his actual positions on critical constitutional questions.

The time for such evasions and legalistic parsing is over. There's simply too much at stake.