

Powell and Corporate Power

by James Allison

In the annals of corporate power, who was he? Lewis F. Powell, Jr., was a true Virginia gentleman: private and public schools; Washington and Lee University; Harvard Law; partner in a powerful Richmond law firm; full colonel in World War II, with impressive decorations for his work in intelligence. After the war, he had a distinguished career in corporate law: mergers and acquisitions; railway litigation; for big tobacco, much legal work and service on boards of directors. Esteemed by peers, he presided over the American Bar Association, the American College of Trial Lawyers, and the American Law Foundation.

When Hugo Black departed in 1971, he left a Supreme Court vacancy customarily filled by a southerner. Although Powell was a lifelong Democrat, Republican President Nixon offered, and Powell accepted, the job he had refused two years before.

The early 1970s were a good time for progressives. The public had turned against the Vietnam war. Federal government had embraced environmental protection, banned cigarette ads on the airwaves, cancelled the Supersonic Transport, bolstered product safety, and founded OSHA and EPA. It was an age of citizen action, of Common Cause and the Center for Law and Social Policy. In the field of auto safety, Ralph Nader had routed GM.

Nixon's offer to join the Court came about two months after Powell's confidential memo to the US Chamber of Commerce, a strategy for the defense of corporate America. From that now famous memo can we draw a line, via the Court that Powell sat upon, to the subsequent rise of corporate power, and its lofty perch in our government?

Lewis Powell saw corporations on the run, with scant public respect and little influence in government. Deeply worried, he wrote his memo: We must burnish the corporate image everywhere, from the mass media to the universities. But he also called special attention to the courts, "American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."

Forty years later, when Powell seems to have had his way, we may never quantify that influence. But his memo surely mattered. For example, the official historian of the Heritage Foundation reportedly said of an interview with Joseph Coors that Coors was so stirred up by the memo that he

invested the first \$250,000 in what became the Heritage Foundation—the granddaddy of right-wing DC think tanks.

What of Powell's direct judicial influence? My favorite specimen is *First National Bank of Boston v. Bellotti* (1978), a 5-4 vote with Powell writing for the majority. A Massachusetts law prohibited the use of corporate funds to influence voters. The Court ruled that corporations had a First Amendment right to try to influence political processes. The Constitution protected corporate speech, and the law infringed on that speech, as the law served no compelling state interest. What makes it my favorite specimen is the disdainful dissent by conservative Justice William Rehnquist. "This Court decided [sic; it was the Court Reporter who decided] at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific RR. Co.*, (1886)."

He said further: "The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court."

So much for "... this Court." And what about our present Court, of Roberts and company?

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Lewis F. Powell, Supreme Court Justice and corporate lawyer, who encouraged the US Chamber of Commerce and its members to promote corporate power.

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