which so many other school systems in Virginia and elsewhere were torn apart by disagreement and racial distrust.

As a senior member of his firm in Richmond, Mr. Powell has participated either directly or indirectly in an almost boundless variety of legal matters touching both the public and private sectors, in which his judgment, devotion to reason, and sense of fairness have been consistently applied. He has served so many public and private groups both in Virginia and elsewhere, in fact, that he will be sorely missed when his responsibilities on the Court make it no longer possible for him to continue to share his wisdom, intelligence, and integrity with those who have relied so heavily upon him in the past.

I know that I speak for many thousands of Virginians and Americans when I say that the appointment of Lewis F. Powell, Jr., as a Justice of the Supreme Court of the United States is in the finest and highest traditions of public service in this country.

STATEMENT OF A. E. DICK HOWARD

I am A. E. Dick Howard, professor of constitutional law at the University of Virginia. I appear today to support the nomination of Lewis F. Powell, Jr., to be Associate Justice of the Supreme Court of the United States.

For two years, from 1962 to 1964, I served as law clerk to Mr. Justice Hugo Black of the Supreme Court. I came away from that experience with a deepened appreciation for the Court as an institution and for the richness of the judicial process. I also came away with some appreciation of the qualities which one would hope to find in a Justice of the Supreme Court.

The affection I had for Justice Black and the respect I have for the Court are among the reasons I am here today. But a further reason is that I believe I have had an unusual perspective on Lewis Powell—a perspective from which I can draw some observations about his fitness for the position for which he has been nominated.

Lewis Powell's record of public service is already well known to you. I prefer to speak instead of qualities in Mr. Powell which I have seen at firsthand through a close working relationship—qualities which will make Lewis Powell a superb Justice of the U.S. Supreme Court.

I worked with Lewis Powell in a context not unlike that of the Court itself. In 1968–69 I was Executive Director of Virginia's Commission on Constitutional Revision, on which Mr. Powell served as a member. That commission produced the recommendations which, as revised by the General Assembly and approved by the people, became Virginia's new Constitution, effective July 1 of this year.

This revision was the first complete overhaul of Virginia's Constitution since the turn of the century. It produced a document which will help Virginia respond to the needs of education, state finance, the environment, and other areas in the closing decades of the twentieth century. Lewis Powell was a key figure in this revision.

I worked with the Commission continuously for a year. The commissioners met at frequent intervals, sometimes for two or three days at a time, to debate basic problems of constitutional government as reflected in a state constitution—the powers of government, limits on those powers, the liberties of the people. In many ways the deliberations of that Commission were as close an approximation as one could imagine to a conference of the Supreme Court.

This was no ordinary study commission. It included two former Governors of Virginia, a law dean who is now a judge of the World Court at the Hague, two men who now sit on the federal bench, three who sit on the Supreme Court of Virginia, and others of like calibre.

It is no disrespect to the other members of the Commission to say that Lewis Powell brought exceptional talents and qualities of mind to the work of the Commission. It is those talents and qualities which, with Lewis Powell's record as a lawyer and a public servant, make him so eminently qualified to take a seat on the nation's highest court.

INTEGRITY

To begin with, Lewis Powell is endowed with an unusual sense of integrity and values—a sense which has been reflected throughout his career. In the deliberations of the Commission, he sought always to appreciate the philosophical foundations and the social and ethical implications of any proposal. No man could have made a more honest and assiduous attempt to free himself of personal, business, or other considerations extrinsic to the merits of a question before the Commission.

CONSCIENTIOUSNESS AND HARD WORK

All the members of the Commission were busy men, but none more so than Lewis Powell. Yet every time he spoke to a question, the thoroughness of his research and preparation was evident. Lewis Powell is something of a legend as regards his capacity for hard work. He couples that capacity with an unwillingness to do anything but the most conscientious job of understanding a question, its alternatives, its likely consequences.

CRAFTSMANSHIP

The Commission divided itself into five subcommittees, each proposing drafts to revise various parts of the Constitution. Lewis Powell's drafts were prepared with a meticulousness and craftsmanship which any lawyer would envy. He has a keen sense of the uses of legal analysis and a marked flair for the articulation of an idea. The draftsmanship of his opinions as a Supreme Court Justice are likely to be in the admirable tradition of Mr. Justice Harlan.

JUDICIOUS TEMPERAMENT

Qualities of integrity, conscientiousness, and craftsmanship are all important to a judge. But there is one more quality which peculiarly characterizes the judicial process: the quality of judiciousness—the ability to hear and decide cases with a sense of proportion and balance, the ability to be detached and even-tempered which is so essential to the Anglo-American tradition of justice.

Lewis Powell has that judicious temperament. Time after time I have seen him able to state with clear logic a legal or constitutional question, to sum up and evaluate competing interests or factors, and to propose a moderate and judicious solution. He prefers reason to emotion, reflection to impulse, and moderation to extreme. In a tribunal beset by so many sensitive and thorny questions, Lewis Powell would be a joy for his fellow Justices to work with.

To make my generalizations more concrete, I could readily give specific examples drawn from the Commission's deliberations. However, the attorney-client relation which I had with the Commission precludes my speaking to specific questions which were resolved within the Commission. For illustrations of Lewis Powell's approach to legal problems, I turn therefore to examples drawn from matters of public record.

I believe that my own impressions—drawn from a close working relationship—are borne out by Lewis Powell's public record. I believe, moreover, that his articles and speeches, which are many, reflect the qualities which I have described.

In preparing to testify before this Committee, I have read Mr. Powell's articles and speeches. In the pages that follow, I have touched on several areas which he has developed in speeches or articles, including the administration of criminal justice, respect for law and for due process of law, availability of legal services, race and civil rights, speech and press, wiretapping, and the Supreme Court itself.

These areas are developed here, not so much to analyze Mr. Powell's views on specific issues, but more to show the manner in which he goes about addressing himself to legal and constitutional questions. What he has said in the totality of his articles and speeches tends, in my judgment, to bear out my personal impressions of him and to suggest those qualities of mind which will serve him well on the Supreme Court.

In short, I believe Lewis Powell to be superbly qualified to sit on the Supreme Court of the United States. The man readily measures up to the most exacting standards which we might ask of a judicial nominee. I hope it will be the pleasure of the Senate to confirm Mr. Powell's appointment.

Criminal justice. Mr. Powell has on several occasions voiced a doubt about the extent to which the Supreme Court has gone in interpreting the constitutional rights of the accused in criminal cases. For example, he was one of four members of the National Crime Commission who, in an additional statement to the Commission's 1967 Report, were critical of the Court's decisions in the *Escobedo* [1] and *Miranda* [2] cases. Voicing concern about the "adverse impact" of the decisions on law enforcement, those who signed the additional statement made several pro-

[1] Escobedo v. Illinois, 378 U.S. 478 (1964).
[2] Miranda v. Arizona, 384 U.S. 436 (1966).

posals, including the judging of confessions on the ground whether they are genuinely voluntary.[3]

At the same time, Mr. Powell and the other signers took care to say that decisions such as *Miranda* and *Escobedo* must be respected and enforced as the "law of the land" unless and until changed by processes available under our form of government. Likewise, the signers lamented the "unfair—and even destructive—criticism of the Court itself" and urged that those who would criticize particular decisions of the Court must recognize "the duty to support and defend the judiciary, and particularly the Supreme Court, as an institution essential to freedom." [4]

Finally, in seeking to redress what was seen as an imbalance between the rights of the accused and the interests of society in being protected against crime, Mr. Powell and the other signers concluded that

> . . . concern with crime and apprehension for the safety of their persons and property, as understandable as these are today, must be weighed carefully against the necessity—as demonstrated by history—of retaining appropriate and effective safeguards against oppressive governmental action against the individual, whether guilty or innocent of crime.[5]

On several occasions, Powell has voiced a concern that "the pedulum may have swung too far" in the effort to assure a fair trial for the accused.[6] He has reiterated his view that "the right of society in general and of each individual in particular must never be subordinated to other rights." [7]

On each of these occasions, Powell has invariably taken care to put his concern into a larger, and carefully balanced, perspective. In seeking a judicial approach which will help protect society from crime, Powell has urged that "there must be no lessening of this concern for the consitutional rights of persons accused of crime"; our object must be "the striking of a just and reasonable balance" between the rights of the accused and the protection of the citizen from crime.[8] In fact, he has recognized that some of the very decisions under criticism may come to be viewed as "milestones" in the defense of civil liberties: [9]

The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary or oppressive government.

Further, Powell has been acutely conscious of the Court's difficult role in deciding such cases and the need, even while disagreeing with a decision of the Court, to lend one's full support to the Court as an institution:[10]

While there is room for considerable difference of opinion with respect to some of these decisions—and lawyers differ widely as do members of the Court on occasions—it is both unproductive and even destructive to criticize the Court itself. It must be remembered that in all of these cases, the Court was confronted with the difficult question of protecting the constitutional rights of the individual against alleged unlawful acts of government. While lawyers must feel free to express disagreement with its exercise in particular cases, few Americans would wish to undermine or limit this historic function of the judiciary.

As president of the American Bar Association in 1964–65, Powell gave concrete expression to his interest in the administration of criminal justice. On assuming the presidency in August 1964, he suggested three top priorities for the ensuing year, one of them being the launching and financing of a project to formulate minimum standards for the administration of criminal justice.[11] The Association's House of Delegates authorized such a project, and a number of studies, under a budget of $750,000, got underway. Fifteen separate studies have been published;

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[3] President's Comm'n on Law Enforcement and Admin of Justice, *A Report: The Challenge of Crime in a Free Society* (1967), pp 303-08 (Additional views of Messrs. Jaworski, Malone, Powell, and Storey) There were, of course, dissents on the Court itself, both to the decision in *Escobedo*, 378 U.S. 478, 492–99 (Harlan, Stewart, White, Clark dissenting), and in *Miranda*, 384 U.S. 436, 499–545 (Clark dissenting and concurring; Harlan, Stewart, White dissenting)

[4] *Report*, pp. 308, 304.

[5] *Id*., p. 308.

[6] "An Urgent Need More Effective Criminal Justice," 51 *A.B.A.J.* 437, 439 (1965)

[7] *Ibid.* See also "The President's Annual Address The State of the Legal Profession," 51 *A.B.A.J.* 821 827 (1965) "Civil Liberties Repression Fact or Fiction?" *FBI Law Enforcement Bulletin*, Oct 1971, p 12.

[8] "The President's Annual Address The State of the Legal Profession," 51 *A.B.A.J.* 821, 827 (1965)

[9] "An Urgent Need More Effective Criminal Justice," 51 *A.B.A.J.* 437, 439 (1965)

[10] *Ibid.*

[11] See "The President's Page," 50 *A.B.A.J.* 803 (1964)

many of them have already had considerable impact on standards of criminal justice in this country.[12]

It is especially revealing of Powell's reasoned reaction to developments in criminal law that, despite his being critical of the *Escobedo* decision, he gave as ABA president his vigorous backing to the Association's search for means to assure that counsel be provided for indigents accused of crime. Noting that the timeliness of this effort had become more evident as a result of such decisions as *Gideon* v. *Wainwright* [13] and *Escobedo*, Powell called the Association's program "essential to the realization of equal justice under law. It merits the full and active support of the entire profession." [14]

Powell has also expressed himself thoughtfully on other aspects of criminal justice, including fair trial and free press, and trial by jury. Powell's careful effort to seek means of avoiding publicity prejudicial to the rights of an accused while at the same time not impinging on rights of a free press I have discussed below under the heading "Speech and press." Powell has also spoken eloquently in defense of the right to jury trial in criminal cases. The jury he sees as a popular check on government, as a safeguard against political trials, and as a means to help maintain public respect for the legal system.[15]

RESPECT FOR LAW AND DUE PROCESS

Powell has devoted several speeches and articles to voicing his concern about civil disobedience, civil disorder and unrest, and lack of respect for the law and its orderly processes. It is obviously a subject which has engaged his particular attention. Most of these articles and speeches were written in the mid-1960's at a time that many sit-ins and other demonstrations were taking place as part of the civil rights movement. Powell has been markedly critical of the doctrine of civil disobedience, which he has called "a heresy which could weaken the foundations of our system of government, and make impossible the existence of the human freedoms it strives to protect." [16] Powell has pronounced civil disobedience to be one of the "contributing causes" to "the disquieting trend—so evident in our country—toward organized lawlessness and even rebellion." [17] He has documented in some detail what he believes to be the "escalation and proliferation" of civil disobedience so that civil disorder and even mob violence is committed in its name.[18]

Powell's strong distaste for civil disobedience is evident in his writings. But it is important to see his remarks in their larger setting. His central concern is about disrespect for law, whatever form it takes and whoever practices it. And his object is to reassert the intrinsic relation between respect for law and a free society in which individual liberties are safeguarded.

Powell's writings make this abundantly clear. He has been as quick to criticize white Southern officials as he has civil rights leaders who he believes have prompted disrespect for the processes of the law. He points out, for example, that the "first example of disobedience relating to civil rights may have been set by the Southern legislatures and officials who attempted to disobey or evade court-decreed integration of schools"—conduct which "was—as it should have been—struck down by the courts." [19]

Powell's writings reflect an abiding faith in the "rule of law"—one which binds judges, elected officials, and citizens alike. It is, as he sees it, a standard which is the same regardless of one's race or cause. An address which he gave in Florida in 1965 is especially revealing, for he lists a number of segments of society whom he holds equally to blame for a rising spirit of disrespect for law. These include law enforcement officers who by illegal conduct violate their duty to uphold the law, businessmen who flagrantly violate the anti-trust laws, lawyers who fail to

[12] Most of the reports of the Project on Standards for Criminal Justice have been approved by the ABA's House of Delegates, making them official ABA policy; others are in the process of approval. Reports have been prepared on (1) fair trial and free press, (2) post-conviction remedies, (3) pleas of guilty, (4) appellate review of sentences, (5) speedy trial, (6) providing defense services, (7) joinder and severance, (8) sentencing alternatives and procedures, (9) pretrial release, (10) trial by jury, (11) electronic surveillance, (12) criminal appeals, (13) discovery and procedure before trial, (14) probation, and (15) the prosecution function and the defense function.

[13] 372 U.S. 335 (1963).

[14] "The President's Page," 50 *A.B.A.J.* 1103, 116 (1964).

[15] "Jury Trial of Crimes," 23 *Wash. & Lee L. Rev.* 1 (1966).

[16] "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205 (1966).

[17] "Civil Disobedience Prelude to Revolution?" 40 *N.Y. St. B.J.* 172 (1968).

[18] "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205, 216–28 (1966).

[19] *Id.*, p. 210. For like criticisms of defiance of the courts as part of "massive resistance," see "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 4 (1965); "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821, 827 (1965)

defend the Supreme Court against unfair attacks, those who promoted massive resistance to *Brown v. Board of Education*, those who counsel civil disobedience and others.[20]

Nor, in his criticisms of civil disobedience, is Powell insensitive to the fact that civil unrest minifests deeper social problems the root causes of which ought to be attacked as such. "The central causes of unrest in ruban areas involve complex and deep-seated social and economic problems." [21] Similarly, in another talk on civil disobedience, Powell concluded his remarks with a "caveat" to his plea for civil order: [22]

> Now, a final caveat. I have spoken as a lawyer, deeply conscious that the rule of law in America is under unprecedented attack. There are, of course, other grave problems and other areas calling for determined and even generous action. The gap between the prosperous middle classes and the genuinely underprivileged—both white and black—must be narrowed. . . .
>
> We must come to grips realistically with the gravest domestic problem of this century. America has the resources, and our people have the compassion and the desire, to provide equal justice, adequate education, and job opportunities for all. This, we surely must do.

Asking respect for the law of those who have no genuine access to the courts or other judicial machinery is, of course, a one-sided and unfair proposition. Hence it is noteworthy that, as will be discussed below, Powell, as president of the American Bar Association, actively promoted bar efforts to make legal services more readily available to the poor and to the middle classes and was sensitive to such questions as the right and duty of lawyers to represent unpopular clients.

In many respects, Lewis Powell's uneasiness about the threat which he sees civil unrest to pose to the rule of law and to individual liberties resembles the views stated so forcefully by Mr. Justice Black in a number of Supreme Court opinions in the sit-in and demonstration cases of the 1960's.[23] Indeed, it is interesting that Powell has so often quoted from Justice Black's opinions in those cases.[24] The debt to Justice Black is obvious in such statements of Lewis Powell as: [25]

> And here, as a lawyer, may I emphasize that the right to dissent is surely a vital part of our American heritage. So also are the rights to assembly to petition and to test the validity of challenged laws or regulations. But our constitution and tradition contemplate the orderly assertion of these rights. There is no place in our system for vigilantism or the lawless instrument of the mob.

AVAILABILITY OF LEGAL SERVICES

One who urges that disputes be channeled into legal avenues ought properly to ask whether those legal forums are freely available to all regardless of race or economic status. Lewis Powell has taken a special interest in seeking ways of overcoming economic and other barriers to obtaining legal services and counsel.

Referring to a survey undertaken in Missouri in 1960, Powell found it especially disquieting that 74 percent of the lawyers surveyed "believed that wealth, social position, and race may affect standards of justice." [26] At a law and Poverty Conference held in June 1965 under the sponsorship of the Department of Justice and the Office of Economic Opportunity, Powell dwelled on the failure of the American legal system to live up to the ideal of equal justice under law: [27]

> Equal justice for every man is one of the great ideals of our society. This is the end for which our entire legal system exists. It is central to that system that justice should not be withheld or denied because of an individual's race, his religion, his beliefs, or his station in society. We also accept as fundamental that the law should be the same for the rich and for the poor.

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[20] "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 2-5 (1965).
[21] "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205, 228 (1966).
[22] "Civil Disobedience: Prelude to Revolution?" 40 *N.Y. St. B.J.* 172, 181 (1968).
[23] See, e.g., Black's opinions in Bell v. Maryland, 378 U.S. 226, 318 (1964) (dissent); Cox v. Louisiana, 379 U.S. 536, 575 (1965) (dissent); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissent); Addelley v. Florida, 385 U.S. 39 (1966). For an analysis of Black's views in these cases, see A. E. Dick Howard, "Mr. Justice Black: the Negro Protest Movement and the Rule of Law," 53 *Va. L. Rev.* 1030 (1967).
[24] See "The President's Annual Address. The State of the Legal Profession," 51 *A.B.A.J.* 821, 827-28 (1965); "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 7 n. 18 (1965); "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205, 226-27, 231 (1966); "Civil Disobedience: Prelude to Revolution?" 40 *N.Y. St. B.J.* 172, 173 (1968).
[25] "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 7 (1965).
[26] "The Challenge to the Profession," 51 *A.B.A.J.* 148, 149 (1965).
[27] "The Response of the Bar," 51 *A.B.A.J.* 751 (1965).

> But we have long known that the attainment of this ideal is not easy. It requires sensitivity, vigilance, and a willingness to experiment. Looking at contemporary America realistically, we must admit that despite all of our efforts—and these have not been insignificant—far too many persons are not able to obtain equal justice under law.

As president of the American Bar Association in 1964–65, Powell spurred steps to make legal services more generally available. On assuming the presidency in August 1964, Powell proposed three items of priority for his term of president, one of the three being an acceleration and broadening of efforts to assure the availability of legal services, in both civil and criminal cases, to all who need them.[28] In the president's annual address in August 1965, Powell was able to report on the steps which had been taken during the preceding year toward that goal.[29]

Powell's August 1965 address is interesting not only for the narrative of events but also for Powell's attitude to them. Speaking of the entry of OEO into the area of legal services for the poor, Powell candidly admitted his own preference for "local" rather than "federal" solutions to the problem. But he chose to lay aside his personal preferences in the face of the demonstrable need for federal involvement without which a sufficient program of legal aid was unlikely:[30]

> It is true that most lawyers would have preferred local rather than federal solutions. Certainly, this would have been my own choice. But the complexities and demands of modern society, with burdens beyond the will or capacity of states and localities to meet, have resulted in federal assistance in almost every area of social and economic life. There is no reason to think that legal services. Might be excluded from this fundamental trend of the mid-twentieth century Lawyers must be realistic as well as compassionate.

Turning his attention to the problems encountered by middle-income groups in obtaining legal services, Powell implied some reservations about the rise of new trends, such as the increasing reliance on group legal services—trends which might clash with "long-established standards of the legal profession."[31] But again he seemed to want to avoid a doctrinaire position; even as study of the problem of legal services was proceeding, he asked the bar to

> press ahead with every available means to improve existing methods—through greater emphasis on lawyer referral services and through wider experimentation with neighborhood law offices and legal clinics.[32]

Availability of legal services can also be a special problem in the case of unpopular causes or individuals. In his president's annual report to the ABA, Powell urged revision of the Canons of Legal Ethics so that the Canons might "with sufficient clarity and particularity express this duty of individual lawyers" [to represent unpopular defendants] as well as "the broader obligations of the Bar generally to discourage public condemnation of the lawyer who represents an unpopular defendant."[33]

RACE AND CIVIL RIGHTS

The sense of proportion and balance which is reflected in Powell's writings and speeches is equally present when he touches on questions of race. As already noted, in his condemnation of civil disobedience as it emerged in the civil rights movement, Powell has carefully and consistently laid a full measure of blame at the doorstep of Southerners who undertook massive resistance to court-ordered integration.[34] And, in speaking of civil disobedience, Powell has been sensitive to the fact that Negroes often had ample reason to distrust the processes of the law:[35]

> It is true that the Negro has had, until recent years, little reason to respect the law. The entire legal process, from the police and sheriff to the citizens who serve on juries, has too often applied a double standard of justice.

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[28] See "The President's Page," 50 *A.B.A.J* 891 (1964).
[29] "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821 (1965).
[30] *Id.*, p. 823.
[31] *Id.*, p. 824. On questions raised by Powell concerning the implications of Brotherhood of Railway Trainmen v. Virginia, 377 U.S. 1 (1964), see *id.*, p. 825; "The President's Page," 51 *A.B.A.J.* 3 (1965); "Extending Legal Services to Indigents and Low Income Groups," 13 *La. St. B.J.* 11–17 (1965).
[32] "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821, 824 (1965.) See also Powell's conclusion that the bar must "explore broadly, and with an open mind" a range of possible solutions. "The President's Page," 51 *A.B.A.J.* 3, 20 (1965).
[33] *Id.*, p. 825.
[34] "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 4 (1965); "A Lawyer Looks at Civil Disobedience," 23 *Wash. & Lee L. Rev.* 205, 210 (1966).
[35] *Id.*, p. 206.

> Even some of the courts at lower levels have failed to administer equal justice. Although by no means confined to the southern states, these conditions—because of the history, economic and social structure of that region, and its population mix—have been a way of life in some parts of the South. Many lawyers, conforming to the mores of their communities, have generally tolerated all of this, often with little consciousness of their duty as officers of the courts. And when lawyers have been needed to represent defendants in civil rights cases, far too few have responded.
>
> There were also the discriminatory state and local laws, the denial of voting rights, and the absence of economic and educational opportunity for the Negro. Finally, there was the small and depraved minority which resorted to physical violence and intimidation.
>
> These conditions, which have sullied our proud boast of equal justice under law, set the stage for the civil rights movement.

Accordingly, Powell has urged that the "full processes of our legal system must be used as effectively, and with as much determination" against those who would use "violence and intimidation to frustrate the legal rights of Negro citizens" as against any other form of lawlessness.[36] And Powell has lamented the "particularly acute" problem of racial prejudice frustrating fair trial and has urged steps to assure fair selection of jurors and impartial administration of justice.[37]

Powell has reason to know something of the South's passage through the troubled years following *Brown* v. *Board of Education*. He was chairman of the Richmond School Board from 1952 to 1961, during which time Richmond was able to take the initial steps toward desegregation of its schools without the closing of schools and like traumas through which some other Virginia localities went in the late 50's and early 60's. On the occasion of Powell's nomination to the Supreme Court, the national press, inquiring locally into Powell's role in the desegregation events in Richmond during his chairmanship of the school board, has reported its conclusion that his role was a moderating and constructive one which made possible eventual desegregation without closed schools or other crippling effect on the quality of public education.[38]

SPEECH AND PRESS

Powell has not taken many occasions to express himself directly on rights of freedom of expression. But in several contexts his views reflect a tendency, in suggesting solutions to whatever problems may be at hand, to be sensitive to the implications for First Amendment freedoms.

For example, in approaching the question of fair trial and free press, Powell is unwilling to see the matter as a "contest between two competing rights." Rather he sees the task as one of seeking an accommodation of both rights "in the limited area where unrestrained publicity can endanger fair trial."[39]

In response to the problem of release of information which tends to prejudice the accused, Powell has rejected the British approach of emphasizing control of the media itself, e.g. by subjecting the publisher to fine or imprisonment for contempt of court. Powell obviously shares the "uneasy distrust" which Americans seem to have shown for the contempt power.[40]

Moreover, he is not willing to use an approach inconsistent with the "privileged position" which this country affords freedom of speech and press. He prefers instead to emphasize the duty of the bar to police itself and to reach at the source (whether prosecution or defense) information which might prejudice a trial.[41] Even here, his solution is not to bar information permanently, rather to delay it until the jury can reach a verdict, untainted by prejudicial publicity.[42] Powell's search for a reasoned solution to the question of fair trial and free press is summed up in his statement:[43]

> It is important that the media and the Bar should not view this as a "controversy" or as an attack by one upon the other. We have here a common problem requiring thoughtful and reasoned solutions in the public interest.

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[36] "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821, 827 (1965).
[37] "Jury Trial of Crimes," 23 *Wash. & Lee L. Rev.* 1, 11 (1966).
[38] See, e.g., Washington Post, Oct. 24, 1971, p. A1, col. 1; New York Times, Oct. 22, 1971, p. 25, col. 5; New York Times, Oct. 16, 1971, p. 1, col. 6; Time Magazine, Nov. 1, 1971, p. 18; Newsweek, Nov. 1, 1971, p. 18.
[39] "The Right to a Fair Trial," 51 *A.B.A.J.* 534, 535 (1965).
[40] *Id.*, p. 536. For an instance of Powell's concern about the contempt power, see "Jury Trial of Crimes," 23 *Wash. & Lee L. Rev.* 1, 10 (1966).
[41] "The Right to a Fair Trial," 51 *A.B.A.J.* 534, 536 (1965). See also "The President's Annual Address: The State of the Legal Profession," 51 *A.B.A.J.* 821, 825 (1965).
[42] "The Right to a Fair Trial," 51 *A.B.A.J.* 534, 536 (1965).
[43] "The President's Page," 51 *A.B.A.J.* 199 (1965).

Powell's views on civil disobedience have already been noted. The intensity with which he holds those views about confining dissent to legitimate channels raises questions about the implications of Powell's arguments for First Amendment rights. Powell has recognized that problem and has said that his proposals should not be applied in such a way as to infringe on those First Amendment freedoms, although he does not conceive incitement to willful violation of draft laws, income tax laws, or court decrees to be encompassed as rights of free speech.[44]

WIRETAPPING

Powell's views on wiretapping have occasioned some notice. In an article written for the *Richmond Times-Dispatch* and reprinted in the *FBI Law Enforcement Bulletin*, he advanced reasons why requiring a court order for wiretapping in cases involving national security "would seriously handicap our counter-espionage and countersubversive operations." Powell recognized that there could be "legitimate concern" whether a President should have the power of wiretapping in internal security cases without court order and that "at least in theory" there was a potential for abuse. But, apparently resting content with the government's claim of its need for secrecy, Powell dismissed the outcry over wiretapping as a "tempest in a teapot." Citing figures showing that there are only a few hundred wiretaps annually, Powell concluded, "Law-abiding citizens have nothing to fear." [45]

The FBI article, a journalistic piece, was apparently solicited as a rebuttal to an article expressing the opposite point of view.[46] Powell's article has the ring of a rebuttal about it. It is in the nature of a rebuttal to assume that one side of an argument has been stated and accordingly to argue the other side. Powell's views on wiretapping are more fully and fairly stated in a speech he gave to the Richmond Bar Association on April 15, 1971.[47] There (as he did also in the FBI article) Powell noted that the more serious wiretapping question arises in internal security cases, as Title III of the Omnibus Crime Control Act of 1968 [48] requires a court order when electronic surveillance is sought to be used in cases not involving national defense or internal security. Believing that it is difficult to draw a distinction between external and internal threats to the country's security, Powell noted that the question whether the President has inherent power to order a wiretap in internal security cases is pending in the courts. He therefore looked to the courts to lay down guidelines in this "perplexing" area.

Taking the totality of Powell's views on wiretapping, it is clear that he recognizes and approves the place of prior court order, with carefully fashioned limitations and safeguards, when wiretaps are used against domestic crime. His position on wiretapping in internal security cases is less clear. His FBI article would suggest he has resolved that question in favor of the President's inherent power in such cases, but his Richmond bar speech would imply a more guarded and tentative position. The bar speech, the tone of which is far more characteristic of his other speeches and writings and which was made to a legal audience, would seem to be the more accurate indicator of Powell's approach to the constitutional aspects of wiretapping. It would suggest that as a Justice he would approach the question of wiretapping with an awareness of the various, arguably competing factors which bear on a judicial resolution of the question.[49]

SUPREME COURT

Like most lawyers, Powell has felt perfectly entitled to criticize decisions of the Supreme Court, for example, the *Escobedo* and *Miranda* decisions. But he has a lawyer's reverence for the Court as an institution. Repeatedly he has called upon lawyers to avoid destructive criticism of the Court and has rebuked them for their failure to defend the Court against such criticism.[50]

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[44] "Civil Disobedience: Preclude to Revolution?" 40 *N.Y.S.B.J.* 172, 180 (1968).

[45] "Civil Liberties Repression: Fact or Fiction?" *FBI Law Enforcement Bulletin*, Oct. 1971, pp. 9, 10-11.

[46] Bernard Gavzer, "Is Individual Freedom Threatened by Growth of Government Probes?" Richmond Times-Dispatch, June 6, 1971, p. Fl, col 1.

[47] Manuscript of text of speech.

[48] P L. 90-351, 90th Cong., H R. 5037, June 1968.

[49] The question of the President's power to authorize wiretaps without judicial supervision in cases involving internal security is now pending before the Supreme Court. See United States v. U.S.D C. for E.D. Mich., 444 F. 2d 651 (6th Cir.), *cert granted*, 403 U.S. 930 (1971).

[50] E.G., "Respect for Law and Due Process—The Foundation of a Free Society," 18 *U. Fla. L. Rev.* 1, 4 (1965); "An Urgent Need: More Effective Criminal Justice," 51 *A.B.A.J.* 437, 439 (1966); President's Comm'n on Law Enforcement and Admin. of Justice, *A Report: The Challenge of Crime in a Free Society* (1967), pp. 303, 304 (Additional views of Messrs. Jaworski, Malone, Powell, and Storey).

He shows a like sensitivity to ensuring that the Court's independence not be undermined because of criticism of unpopular decisions. In this vein, Powell expressed pointed disapproval of Congress' exclusion of the Justices of the Supreme Court from the general pay raise for other federal judges in 1965—an "unfortunate example" of the pressures which even in an enlightened system can be brought to bear on the judiciary.[51]

Powell's belief in an independent and unfettered judiciary is also reflected by criticism of the 1963 proposal to create a "Court of the Union" to review certain kinds of Supreme Court decisions—a proposal which Powell compared to the court-packing proposal of the 1930's. "These," said Powell, "were attacks on the funamental principles of our government involving the independence of the judiciary and the separation of powers doctrine."[52]

Summary. To repeat, the burden of the above discussion has not been to give a comprehensive issue-by-issue discussion of Lewis Powell's philosophy or to dissect the position which he has taken on every issue. Rather the purpose has been to take central themes which he has developed in his articles and speeches and to enquire what qualities of mind and temper they reflect. In my judgment, Lewis Powell's writings reflect the qualities which I have seen the man display at firsthand—a devotion to the uses of reason, a finely developed set of principles and values, a skilled craftsman's ability to analyze and articulate, an enduring dedication to the law and the judicial process, and a well-modulated and judicious temperament. Few men are so well qualified by temperament and training to sit on the bench as is Lewis Powell.

STATEMENT OF J. EDWARD LUMBARD, SENIOR JUDGE OF THE SECOND CIRCUIT

My name is J. Edward Lumbard. I am a senior circuit judge of the United States Court of Appeals for the Second Circuit. From December 9, 1959 to May 17, 1971, I was Chief Judge of this Court. I have been a circuit judge since July 18, 1955.

I have known Lewis Powell since December 1963 when the American Bar Association embarked on its project to formulate standards for the administration of criminal justice. I have been closely associated with Lewis Powell in that project during the past eight years. I believe he possesses in high degree all the qualities one would hope to find in a Justice of the Supreme Court. He has integrity, scholarship, an informed and independent mind, a keen sense of civic and professional responsibility, clarity of expression, a tolerance and understanding of the views of others and, above all, such wisdom and judgment as can come only from having played a leading role in the legal profession and in the public affairs of this country.

As President-Elect of the American Bar Association in 1963–1964, Lewis Powell was an active member of the committee which made preliminary studies to determine the range of the criminal justice project. In August 1964 the Board of Governors approved the project and at the same time Lewis Powell became President of the ABA.

I need hardly remind this Committee of the great public concern regarding criminal justice in 1963. By that time numerous court decisions, judicial standards and reports in the news media had made it all too clear that the administration of criminal justice throughout the country was becoming ineffective; it was also apparent that too little was being done to protect individual rights according to constitutional requirements of due process.

The purpose of the ABA project was to formulate and recommend standards which the states and the federal government could apply. In his speeches and writing Lewis Powell repeatedly emphasized the dual purpose of the project: to permit effective law enforcement and adequate protection of the public and simultaneously to safeguard and amplify the constitutional rights of those suspected of crime. Speaking to the New York Bar Association in January 1965, he noted: "the problem—complicated by our dual system of state and federal laws—is how to strengthen our criminal laws and render their enforcement more effective and at the same time accord to persons accused of crime the rights which are a proud part of our Western heritage."

An ABA President, Lewis Powell immediately went to work to recruit the necessary men and money for the criminal justice project. To finance three years

[51] "Jury Trial of Crimes," 23 *Wash. & Lee L. Rev.* 1, 9–10 (1966).
[52] "The President's Page," 51 *A.B.A.J.* 101 (1965).