

RETIRED JUSTICE CHANGES STAND ON DEATH PENALTY

By **David Von Drehle** June 10, 1994

Retired Supreme Court Justice Lewis F. Powell Jr., a prime architect of America's modern death penalty system, decided after he left the high court that he should have voted against capital punishment, according to a new biography.

"I have come to think that capital punishment should be abolished," Powell is quoted as saying. The vast majority of death sentences are never carried out due to complex appeals; as a result, the death penalty "brings discredit on the whole legal system," Powell said. The book describes the decision more as a pragmatic conclusion than a moral choice.

Powell was a reliable vote in favor of the death penalty throughout his term on the court, and in a 1986 case his vote saved the death penalty from a potentially devastating attack.

That case was *McCleskey v. Kemp*. Opponents of capital punishment argued that statistics showed a pattern of racial bias in sentencing and, therefore, the death penalty was unconstitutional. Powell cast the deciding vote against this argument.

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John C. Jeffries Jr., author of "Justice Lewis F. Powell Jr.: A Biography," writes that he asked during a 1991 interview if Powell would change any of his votes if he could.

"Yes," Powell answered, "McCleskey v. Kemp." A provision that would essentially reverse the McCleskey decision is part of the crime bill passed earlier this year by the House of Representatives. But senators have promised to filibuster if the provision is part of the final legislation.

The report of Powell's change of heart comes less than four months after Powell's longtime colleague, retiring Justice Harry A. Blackmun, pronounced the death penalty a failed "experiment." Like Powell, Blackmun was appointed to the court by Republican President Richard M. Nixon. Both men were steady votes to uphold capital punishment during the court's see-saw battles over the issue in the 1970s.

Stephen Bright, the J. Skelly Wright Fellow at Yale Law School and an ardent anti-death penalty lawyer, said he was not surprised by Powell's conversion. "I think that those closest to the system are increasingly coming to the point of view that the death penalty is a great sound bite but bad public policy.

"I hear all the time from judges and even prosecutors that the capital punishment system doesn't work. But because of the politics they can't say it," Bright said. "I guess when you have people who aren't running for anything, they can say it."

But author Jeffries, a law professor at the University of Virginia and a former Powell clerk, said he was very surprised when Powell announced his change of heart.

"I was quite certain I had misunderstood him," Jeffries said in a telephone interview yesterday. "But I quizzed him and he meant what he said. I was very surprised, because here was a man who had spent so much of his career and so much energy trying to craft a compromise" to maintain the death penalty.

Powell yesterday declined to add anything to his comments in the book.

Appointed to the court in 1971, Powell grappled with the death penalty in one of his first major cases. A fractured 5 to 4 majority in *Furman v. Georgia* struck down in 1972 all existing death penalties, a decision Powell resisted with a careful statement of judicial restraint. Four years later, Powell was one of three centrist justices who used their swing votes to reinstate capital punishment.

The three justices approved a complicated process that survives to this day wherever the death penalty is on the books: After a prisoner is convicted of murder, a second hearing must be held at which reasons for and against execution are weighed. Then each death sentence must be reviewed by state appeals courts.

During Powell's term, which ended in 1987, the number of prisoners on death rows in America grew from zero to about 2,000. (The number is now approaching 3,000.) Fewer than 100 were executed while Powell was on the court.

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According to Jeffries, this evidence convinced Powell that the death penalty system he had helped to devise could not be made to work.

When a blue-ribbon commission headed by Powell in the late 1980s failed to reform the process and speed things up, his sense of the system's failure deepened.

"I don't think he changed his mind on the philosophical issue. I think he was worn out by the cost of administering the process, and the feeling that the system lacked confidence to make the death penalty work," the author said in an interview.

Jeffries contrasted Powell's style with Blackmun's: Powell was a circumspect justice while Blackmun was emotional. Powell resisted broad statements while Blackmun reveled in them. Blackmun wound up the most liberal justice while Powell never drifted from the center-right.

"And yet, on this issue," Jeffries said, "they wound up in exactly the same place."

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David Von Drehle writes a twice-weekly column for The Post. He was previously an editor-at-large for Time Magazine, and is the author of four books, including "Rise to Greatness: Abraham Lincoln and America's Most Perilous Year" and "Triangle: The Fire That Changed America."  Follow @DavidVonDrehle